

AL - FIQAH
(ISLAMIC JURISPRUDENCE)

VOLUME ONE

INTRODUCTION TO THE STUDY OF FIQAH

By

SYED ANWER ALI

Published By

Zia-ul-Quran Publications

Lahore, Karachi- Pakistan

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Preface

I intended to write myself a complete Code of "Fiqah" (Islamic Jurisprudence), according to the Sunni Hanafi School of thought, in the English language. But when I went through the English Translation of "Hidayah", by Charles Hamilton, I thought it to be an unnecessary exercise to write again the same thing which is already available and is taken to be authentic by the students, lawyers, and courts of law, in the sub-continent of Pakistan and India as well as other countries of the world, for the last over two centuries.

I, therefore, confined myself to writing a bit detailed "Introduction to the Study of Fiqah", and note down the principles of Islamic Shari'ah, according to the Hanafi School of thought, relating to "Taharat" (Purification), and " 'Ibaadaat," viz., "Salaat" (Prayer), "Zakaat" (Poor-rate), "Som" (Fasting), and "Hajj" (Pilgrimage to Mecca), which have been left over by Charles Hamilton ; and as regards the "Mu'aamlaat" (Affairs), to prepare an abridged edition of "Hidayah" from its English Translation by Charles Hamilton, eliminating from it the detailed discussions, so as to make it easy for the readers to have the bare principles of law with least expense of time and energy.

While preparing the abridged edition, however, I found that in its very first edition (published in 1730 A.D.), Charles Hamilton left over the "Kitab-ul-Heel" and the "Kitab-ul-Fara'iz". In the present work also I have not, for the time being, included the "Kitab-ul-Heel" ; and as regards the "Kitab-ul-Fara'iz", instead of myself translating it from the "Hidayah", I have adopted the "Hanafi Law of Inheritance" as given by Sir Dinshah Fardunji Mulla in his famous book "Principles of Mahomedan Law" (Chapter VII, Sections 61 to 86),* and put it as Book VI in Part I (Manakahaat) of Volume III.

* Mulla's work is based on a very prominent and authentic work, on the Hanafi Law of Inheritance, namely, "al-Sirajiyyah", by Shaikh Siraj Muhammad Sajawandi (d. 6th century A.H.), translated in English by Sir William Jones (Mr. Rumsey's edition), and its commentary "al-Sharifiiyyah", by Sayyad Shariff.

Further, when second edition of Charles Hamilton's work was published in 1870 A.D., by Standish Grove Grady, which is still extant, the following nine Books were expunged from it :

1. Book V – of Ittak or Manumission of Slaves
2. Book VIII – of Saraka or Larciney
3. Book IX – of Siyar or the Institutions
4. Book XII – of Ibbak or the Absconding of Slaves
5. Book XXXII – of Mukatibs
6. Book XXXVI – of Mazoons or Licensed Slaves
7. Book XLIX – of Janayat or Offences against the person
8. Book L – of Deeyat or Fines (Chapters I and IV to VI)
9. Book LI – of Mawakil or the Laying of Fines.

I, therefore, went in search of the first edition of Charles Hamilton, and ultimately succeeded in getting a copy of it from which I have restored in this work, in an abridged form, the expunged Books noted at Serial Numbers (2), (3) and (7) to (9), which deal with Saraka, Siyar, Janayat, Deeyat, and Mawakil, respectively. As regards the books noted at serial Numbers (1) and (4) to (6), they relate to slavery which has now been abolished from all over the world, and, therefore, for the time being, I have also not included these books in this Compilation.

On a thorough study of Charles Hamilton's work, I also discovered many errors in the transliteration of the names of jurists, Arabic words and phrases, e.g., Zufar is written as Ziffer, Shaafe'ee as Shafei, Auzaa'ee as Oozai, Khassaaf as Khasaf, Sarakhsi as Saruckshi, Karakhi as Koorookhee, Sha'bee as Shobbia, Umm-e-Walad as Am-Walid, 'Iddat as Edit, Salam Sale as Sillim Sale, Khayber as Kheebir, Shuf'ah as Shaffa, Zawaatul Qiyam as Zooatul Keem, Zawaatul Amsaal as Zooatul Imsal, Sunnah as Soona, Eidul Qurban as Yd Kirban, Umrah as Amrit, Nafaqah as Nifka, Hil as lawful (Halaal), Haram as unlawful (Haraam), and so on.

Charles Hamilton has also throughout written "K" for "Q", e.g., Kazeer for Qazi, and Kadooree for Qaduree ; and "i" for "a", e.g., Sirf sale for Sarf sale, Munaasif for Munassaf, and so on.

In Volume III, and subsequent Volumes, I have written all these, and such other names, words and phrases, after necessary corrections.

In this connection, it is also worth pointing out that Charles Hamilton has, throughout his work, written Abu Hanifah as Haneefa, although Haneefa was the daughter of Abu Hanifah. She was not a jurist and had nothing to do with the codification of Fiqah. This has also been corrected.

Lastly, I also noted that the arrangement of the Books in the Hidayah, and accordingly in the work of Charles Hamilton, is un-systematic, in that the Books relating to one and the same topic have been put at different places, e.g., the Books relating to Slavery, Punishments, Property, Business, and so on. In Volume III, and subsequent Volumes, therefore, I have given my own arrangement in which all Books relating to one and the same topic have been put together. For convenience of the reader, however, I have also, in the Foot Note, given the relevant Book Number of Charles Hamilton.

With the substance detailed above, this book is being presented in six volumes. Volume I consists of a bit detailed "Introduction to the Study of Fiqah", which, I hope, will be useful particularly to the students of Islamic Jurisprudence *vis-à-vis* the Roman and European Jurisprudence. Volume II deals with the Islamic Principles of Taharat, and performance of 'Ibaadat, viz., Salaat, Zakaat, Som, and Hajj. Volumes III to V give the Principles of Law relating to "Mu'aamlaat" (Affairs) of the individual and social life of a Muslim in this world. While noting down the principles, first the finally settled law, and then the differing views of the Imams, have been given.

In writing the "Introduction", I have taken help from many books including, particularly, the following :

1. Muhammadan Jurisprudence, by Abdur Rahim,
2. Dictionary of Islam, by T. P. Hughes,
3. Falsafah-e-Shari'at-e-Islam, by Moulvi Muhammad Rizvi – Urdu translation of "Falsafah-tush-Shari'at Fil Islam", by Dr. Subhi Mahmasani of Egypt,
4. Shorter Encyclopedia of Islam, by Gibb and Kramers
5. Taareekh Fiqah-e-Islami, by Abdus Salam Nadvi – Urdu translation of "Taareekh at-Tashree' al-Islami", by Mahmud al-Khizri of Egypt,
6. Fiqah-e-Islami Ka Tareekhi Pas Manzar, by Maulana Mohammad Taqi Amini,
7. Islami Dunya Main Fiqahi Mazahi-e-Arba'ah Ka Farogh, by Me'raj Muhammad Baariq – Urdu translation of "Nazrata Taareekh Fi Hudoos Al-Mazhabul Arba' Wa Intishaarohu 'Inda Jamhoorul Muslimeen", by 'Allama Ahmad Taimoor Pasha of Egypt ; and
8. Family Law Reform in the Muslim World, by Dr. Tahir Mahmood of India,

I owe a debt of gratitude to the learned authors of all these, and other, books which I have referred to in this work. They have indeed rendered very valuable service for the cause of Islam.

Professor Shaikh Haider Advocate ¹ has made available for this work some very important books from the library of S.M. Government Law College, Karachi. Some important references have also been supplied by Mr. Khalid M. Ishaq Advocate ² from his library, by Professor Dr. Muhammad Mas'ud Ahmad ³ and

1. Formerly the principal of S. M. Government Law College, Karachi, and also Deen of the Faculty of Law, University of Karachi.

2. Senior Advocate, Supreme Court of Pakistan, formerly Advocate General, West Pakistan, eminent scholar and writer of many books.

3. Prominent religious scholar and author of large number of books and articles. Formerly the Principal of Government College, Thatta (Sind), and also, for sometime, the Additional Secretary, Education, Government of Sind.

Mufti Muhammad Jan Na'eemi ¹ from the library of Darul Uloom Mujaddadiyah Na'eemiyah, Malir, Karachi, and by Syed Tanseem Hussain ² from the library of Jaame'atul Uloomul Islamiah, New Town, Karachi. I put on record my grateful thanks to all these friends and benefactors of mine for thus helping me in this work.

Finally, before concluding, I bow down, with utmost humility, before Allah the Almighty, and thank Him for His unbounded Grace, Mercy, Favour and Kindness, in giving me time, courage, strength, favourable circumstances, and above all the guidance ; and, inspite of my short comings, lack of knowledge, experience, and resources, enabling me to undertake and complete the work on Fiqah also, after completion of the Sixteen-Volume Commentary of Holy Qur'an, and Five- Volume Compilation of the Ahadees of the Holy Prophet Muhammad (peace be upon him), and thus having the privilege of working on all the three fundamental branches of Islamic Learning, viz., the Qur'an, the Hadees, and the Fiqah.

May Allah the Almighty, out of His extreme Benevelance and Mercy, reward all these three works with His Pleasure and Acceptance, and make them useful for me, as well as for those who read them, in this world as well as in the Hereafter.

Aameen.

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CHAPTER 1

USUL

DEFINITION

“*Usul*” literally means “roots,” and the “*Ilmul Usul*” or the “Science of Usul” is the name for the “Legal Science which concerns itself mostly with a discussion of the Sources of the (Islamic) Law and matters appertaining thereto.”¹ In other words, “*Usul*” or “*Ilmul Usul*” is the Science or Knowledge of those rules which directly or approximately lead to the Science or Knowledge of “*Fiqah*.”

SUBJECT-MATTER OF USUL

It discusses the Nature of the Sources or Authorities of Law, as well as the Nature of what is established by those Sources or Authorities, namely, the law and what appertains thereto.

The last one relates to the “*Haakim*” i.e. the “Law Giver,” the “*Hukm*” i.e. the “Law”, the “*Mahkoom Beh*” i.e. the “Objectives of Law” or the acts, rights and obligations, and the “*Mahkoom Elaih*” i.e. “the Subjects of Law” or those to whom “the Law” applies or, in other words, “the Persons”.²

The first and foremost, rather the real, “*Haakim*” or the “Law Giver” is Allah the Almighty, Who is the Creator, Cherisher and the Overall Administrator of the whole Universe, and, accordingly, the Primary, Basic and Fundamental “*Hukm*” or “the Law” is the Holy Qur’an ; and since the Holy Qur’an itself makes it obligatory for the Muslims to obey Allah and the Holy Prophet Muhammad (peace be upon him), the Holy Prophet is also the “*Haakim*” or the “Law Giver” and, therefore, his “*Sunnah*” is also the “*Hukm*” or “the Law”, and since both the Qur’an and the Sunnah define the acts, rights and obligations,

1. Muhammadan Jurisprudence, by Abdur Rahim, p. 33

2. Ibid, p. 48

and lay down the "*Hukm*" for them, therefore all acts, rights and obligations of man are the "*Mahkoom Beh*" or the "Objectives of Law", and should therefore be exactly under the "*Hukm*" as given by the "*Haakim*", and, therefore, the "*Mahkoom Elaih*" or the "Subjects of Law" i.e. the Muslims are bound to obey the "*Hukm*" given by the "*Haakim*" or the "Law Giver" i.e. Allah the Almighty and the Holy Prophet Muhammad (peace be upon him).

THE BASIC SOURCES

Thus Qur'an and Sunnah, being the basic Sources of Law, are the first and foremost subjects for the "*'Ilmul Usul*" to deal with. Then come the *Ijma* i.e. Consensus of opinion, and *Qayas* i.e. analogy for which the sanction is contained in the Sunnah of the Holy Prophet. Accordingly, to the Scholars of *Usul*, therefore along with Qur'an and Sunnah, *Ijma* and *Qayas* are also the Sources of *Fiqah*, but the later two are in any case to remain subordinate to the former two. In other words, resort should be had to them when nothing is available in the first two and, further, in no case the last two should go against the first two ; and the real sequence between all these four is that Sunnah will apply when nothing is available in Qur'an, and *Ijma* will apply when nothing is available even in Sunnah, and *Qayas* will apply when nothing is available in the first three.

In the development of "*Qayas*", Imam Abu Hanifah has also introduced "*Istehsaan*", and Imam Maalik has introduced "*Istislaah*" or "*Masalihul Mursalah*" and "*Istadlaal*", as the Sources of *Fiqah*, and accordingly these are also the subject matter for the "*'Ilmul Usul*" to discuss.

'Ilmul Usul deals with all these Sources of Law. It also deals with the nature and the kinds of "*Hukm*" i.e. whether it is "*Farz*", "*Wajib*", "*Sunnat*", "*Mustahab*", "*Nafal*", "*Mubah*", or "*Makrooh*". It also deals with the "*Sabab*", "*Shart*", "*Maa'ni*", "*Sehat*", "*Batlaan*", "*Rukhsat*", and "*'Azeemat*" of an act.

CLASSIFICATION OF LAWS

Laws are classified into (1) defining and declaratory, (2) perfect and imperfect, (3) religious and secular, (4) revealed and unrevealed, (5) certain and presumptive or discretionary, (6) strict and modified, (7) interpretive, (8) repealing and amending, (9) public and private, (10) of person, (11) of evidence (12) of procedure, (13) constitutional, and (14) international.

(1) Defining law is that which does not derive its character as such from the fact of one thing being connected with another. It may :

- (a) define the quality of an act of the obligee, that is, the person to whom the law is addressed, for example, the law which tells us that a certain act is obligatory or forbidden ; or
- (b) indicate its legal effect such as ownership, and that which is connected therewith, for example, right to conjugal society, right to usufruct, whether produce of property or services of man and the establishing of obligation to discharge a debt.¹

Declaratory law deals with the origination, transfer and extinction of rights and obligations. A declaratory law derives its character as such by reason of the connection existing between one fact and another. If the connection between the two be such that one is included in the other, the former is called "*Rukn*" or constituent of the latter. If one fact directly brings about another fact as its legal result, the former is regarded as the "*'Illat*" or effective cause of the latter. If one fact leads to another fact on the whole, that is to say, not directly and immediately but remotely, the one is called the "*Sabab*" or preparatory cause of the other. If the existence of one fact be dependant on the existence of another fact, the latter would be called the "*Shart*"

1. Muhammadan Jurisprudence, by Abdur Rahim, p. 193

or condition of the former. Until the fact which is the condition of a law happens, the “ *Illat* ” (effective cause) will not come into operation. When the existence of a fact is indicated by, but does not depend on, another fact, the latter is called the “ *’Alamat* ” or sign of the former. ¹

Defining law is known as “*Takleefi*” in the Arabic, because it defines or indicates the extent of man’s liberty of action and the restraint imposed upon it, or, in other words, his rights and obligations. It tells us whether an act is “*Farz*” (obligatory), or “*Haraam*” (forbidden) or “*Mandoob*” (commendable), or “*Mubah*” (permissible), or “*Makrooh*” (abominable).

Declaratory law is known as “*Waza’ee*” in the Arabic, and it indicates the component elements of a defining law, namely, whether they are the cause, the condition, or the constituent of a “*Hukm*” (command), as, for example, the rule that proposal and acceptance are the cause of transferring the ownership from seller to purchaser of a property ; or proposal and acceptance of marriage creates the relationship of husband and wife.

(2) the laws of Perfect and Imperfect obligations are divisible into :

- (a) those which concern men in their social and individual existence in this world, and whose enforcement is incumbent on the society, e.g. , the laws relating to contracts, transfer of property, succession, domestic relations, wrongs, crimes, etc ;
- (b) those which solely concern the spiritual life of an individual, whose enforcement is by Allah alone by means of spiritual rewards and punishments, i.e. the commendable acts, e.g., alms, optional prayers and optional fasting, prohibiting condemned acts, etc.;

1. Muhammadan Jurisprudence, by Abdur Rahim, p. 210

- (c) those which mainly concern the spiritual life of an individual but also affects the social life of a Muslim in its religious aspect, whose enforcement is left to the discretion of the State, i.e. the compulsory acts, e.g. , five times prayers, poor-rates, fasting during the month of Ramazaan, etc., which may be enforced by disciplinary measures.

(3) Spiritual laws solely relate to the Hereafter, and are known as the “ ’Ibadaat”. Secular laws appertain to this world, and are divided in “Mu’aamlaat” (dealings between men), “Manakihaat” (domestic relations), and “ ’Uqubaat ” (punishment for the crimes) ¹

(4) Laws contained in the Qur’an and authentic Ahadees of the Holy Prophet are Revealed laws, and the laws determined by the jurists by way of Ijma (consensus) or Qiyas (analogy) are Unrevealed laws.

(5) Laws are also Certain (Yaqeeni) and Presumptive or Discretionary (Zanni). Revealed laws and laws based on Ijma are of the class of Certain laws, and the laws based on deduction by individual jurists are of the class of Presumptive or Discretionary laws. A Muslim acting on even the latter class of laws incurs no spiritual liability even if they may be incorrect. A judge, while deciding a case, is bound to follow the laws based on Revelation or Ijma, and therefore if he goes wrong on a question covered by such laws, his decision must be set aside by himself or his success, when the error becomes known. But his decision based on analogical deduction may not be reversed, because with regard to it cannot be said with certainty that his view is wrong.

(6) Laws are also Strict (’Azeemat) or Modified (Rukhsat). The former consists of laws in strict adherence to the letter of the texts (i.e. Qur’an and Sunnah), and the latter consists

1. Talweeh, p. 693

Note : For details regarding the names of the books and their authors, see the Bibliography at the end of this volume

of rules modified or relaxed in their application to obviate hardship and inconveniences.

(7) Laws are also Interpretive, which interpret the texts of Qur'an and Hadees. But interpretation by laws devised by human reason is not so authentic as interpretation by Qur'anic or Traditionary text by another such text. The object of Interpretive text, however, may either be to explain the meaning, or to indicate the limit and the extent of the application of another text. But what is laid down by such interpretation is undoubtedly a binding law.

(8) Laws are also Repealing and Amending. There are some texts of the Qur'an and the Hadees which have either been totally repealed, or their application has been limited or modified by subsequent such texts. It may, however, be noted that only the Revealed law can be repealed or modified by another law of the same class. One juristic deduction cannot be said to be repealed or modified by another, because for neither of them can it be affirmed with certainty that it is correct.

(9) Laws are also Public and Private. The rights of Allah known as "*Huququllah*" corresponded to the rights of public, and the rights of men known as "*Huququl 'Ibaad*" correspond to the private rights. The former, though reside in Allah, but since they exist for the benefit of the men in general or the community, they are public rights, e.g., the right to levy the taxes, or punishment of crimes which are against the community, and accordingly the laws relating to these rights are called the public laws. On the other hand, the laws which relate to private rights, e.g., the recovery of rent of the house by his owner, or redress for the wrong done to an individual, are called the private laws.

(10) Law of Persons, according to the Muslim jurists, relates to the question of the application of law, having regard to the fitness (Ehliyat) of men for the inheritance and the exercise of rights and the discharge of obligations. Under this topic they discuss the legal capacity of infants, lunatics, infidels, slaves, sick persons, and the like.

(11) Law of Evidence, under the Islamic Jurisprudence, is partly substantive and partly adjective law. The right to give oral testimony is a question of capacity of the witness to create liability ; and the object of evidence (Shahadat) is to enable the court to ascertain the truth with a view to enforce the rights and obligations.

(12) Law of Procedure is dealt with under the Islamic Jurisprudence as law appertaining to "Aadaabul Qazi" or duties of the judge.

(13) Constitutional law under the Islamic Jurisprudence is generally dealt with in the text books in the chapter on Siyar or Jihad (war) and defines the duties and rights of the Executive Head of the community.

(14) International law under the Islamic Jurisprudence defines the relations of the Muslim State and of the Muslims towards the non-Muslim States and the non-Muslims. But the rules under this department of law bind only the Muslim State and the Muslims, and are not based on any international arrangement or comity. This law is also discussed under Siyar. ¹

ACTS, RIGHTS AND OBLIGATIONS

Acts, Rights and Obligations are Objectives of Law (Mehkoom Beh).

ACTS

Acts are classified as (1) Natural Acts (Hissi) and (2) Juristic Acts (Shara'ee).

Natural Acts include acts of the body or physical acts (Af'aalul Jawareh) as sell as acts of the mind (Af'aalul Qalb). Physical acts consist of the motion of any limb of the body, such as speaking, eating, drinking, striking, etc., and are perceptible to others also. Acts of mind, such as believing, acknowledging,

1. Muhammadan Jurisprudence, by Abdur Rahim, pp. 60-68

intending, thinking, wishing etc. are not perceptible to others. Acts of mind unless they are expressed in physical acts are not subject to incurring any liability.

Juristic act may be described as an aggregate of more than one natural act of one or more person which the law treats as one act, such as faith, prayer, contract, offence, etc. Juristic act must have existence in the outside world, and also separately in the contemplation of law while a natural act has no separate existence in law though the latter deals with it.

Physical acts are divisible into acts of utterances (Qaul) and acts of conduct (Fe'l). Acts of utterances consist of speeches, writings and gestures ; and acts of conduct consist of motions of the body, viz., walking, hunting, striking, default in fulfilling of obligations, etc.,

Physical acts are affected by the acts of mind and are accordingly either voluntary or involuntary. The former are called "Tasarrufaat", which means the expenditure of one's energy or will, and "Tasarrufaat-us-Shara" i.e. acts according to the Shara or juristic acts.

Juristic acts are divisible into originating acts (Insha'at), informations (Akhbaraat), and acts of Faith ('Etiqadaat).¹ Originating acts and informations are physical acts' and acts of faith are mental acts. Originating acts produce legal results, e.g. sale, marriage, etc., while information describes an event, e.g., testimony, narration of a Tradition, etc.

Juristic acts are also divided into Creative acts (Isbaataat), which create rights, e.g., sale, lease, gift etc., and acts extinguishing rights (Isqaataat), e.g., release, divorce, freeing of slave, etc.²

Originating acts are of two kinds, viz., revocable (Maa Yunfiskh), e.g., sale, lease, etc., and irrevocable (Maa Laa Yunfiskh), e.g. divorce (after third pronouncement), freeing of slave, etc.³

1. Tauzeeh, p. 450 ; Talweeh, p. 773

2. Tauzeeh, p. 774

3. Tauzeeh. pp. 450-453

Originating acts creating legal relations are called "Uqdaat", (contracts), and those cancelling or annulling contracts are called "Fusukhaat".

Acts, physical as well as juristic, are also classified into (a) acts in respect of which there is a pronouncement of law and which are also the cause of another command of the law, e.g., whoredom is a physical act and is pronounced as forbidden (Haraam), and it also gives rise to the sentence of Hadd ; or sale is a juristic act and is pronounced as permissible (Jaa'iz), and it also gives rise to transfer of ownership ; and (b) acts in respect of which there is a pronouncement of law, but which is not the cause of another command of the law, e.g., eating is physical act and pronounced sometimes as permissible and sometimes as forbidden, but it is not the cause of any legal injunctions ; or prayer (Salaat) is a juristic act and is pronounced as obligatory or optional, but it is not the cause of any other command.¹

Acts are also classified with reference to their Spiritual or Secular purpose.

Acts classified with reference to their spiritual purpose are "Farz" (Compulsory), or "Wajib" (Obligatory) for every individual or "Farz-e-Kifayah" which are obligatory on the Muslim community as a whole, or "Sunnat" (practice of the Holy Prophet), "Mandoob" (Mustahab or Nafal), which are commendable, or "Makrooh", which are abominable (further sub-divided into "Makrooh-e-Tehreemah" and "Makrooh-e-Tanziyah"), or "Mubah" which are permissible.

As regards secular purpose, a juristic act is said to exist if it possesses its essential elements (Arkaan), and conforms to the necessary conditions (Shara'it) insisted on by the law. If it possesses necessary legal qualifications, it is correct (Saheeh), otherwise it is faulty or vitiated (Faasid). But if it is wanting in any of the elements, it is void (Batil). A faulty or vitiated act is correct in its essence and is defective only as regards the

1. Tauzeeh, p. 410

qualities, while a void act is bad essentially. A correct act leads to the desired object, a void act altogether fails to attain such object, and a vitiated act leads to the object in so far as its constituent element and necessary conditions are concerned, but not its extraneous conditions. In other words, the correct and faulty or vitiated acts are legally valid and operative, but in the latter the parties are allowed to withdraw.

A juristic act of secular nature possessing its necessary elements is said to be "Mun'aqad" (constituted) ; and is said to be "Naafiz" (operative) if it has the desired legal effect, otherwise it is called inoperative ; and is said to be "Laazim" (binding) if the person entering into it cannot get rid of its legal effect.

Essential elements of a secular act are (1) legal fitness or capacity of the person to enter into it ; (2) fitness of the subject-matter ; and (3) consent of the parties.

Relating to essential elements, but exclusive of them, there are also some necessary conditions which vary according to the nature of transactions,

RIGHTS

Rights are classified into (1) rights of Allah (Huququllah), and (2) rights of men (Huququl 'Ibaad). The former involve benefit to the community at large and not merely to a particular individual. They correspond to public rights and since Islamic law regards the observance of obligatory devotional acts as being beneficial to the community there is no difficulty in describing all rights of Allah as public rights.¹ The difference between the public right and the private right is that enforcement of former is the duty of the State, while as regards the latter it is for a person to ask for or not for the enforcement of his right. But some times public rights also affect some particular individuals more than

1. Talweeh, p. 705

others, and therefore the rights are classified as follow :-

- (1) purely the rights of Allah or public rights involving benefit to men generally, as, for instance, the enforcement of Hadd ;
- (2) purely the rights of men or private rights, as, for instance, the enforcement of contracts ;
- (3) public rights and private rights combined but the former having preponderance, e.g., the right to punish the slanderer; and
- (4) public rights and private rights combined, but the latter having preponderance, e.g. the right to punish the murderer.

Classes (1) and (3) are again sub-divided into :

- (i) acts of devotion, i.e. Eiman (Faith) and 'Ibadaat (prayers) ;
- (ii) punishment ('Uqubaat) of a perfect nature (Kamilah) e.g., the Hadd ;
- (iii) punishment ('Uqubaat) of imperfect nature (Qaasirah), e.g. depriving the killer of his right of inheritance from the killed one ;
- (iv) matters partaking of the nature of both, e.g., atonement (Kaffarah) ;
- (v) acts of devotion involving an impost, e.g. Sadaqatul Fitr ;
- (vi) imposts having the sense of worship, e.g. Ushr or Tithe payable by a Muslim owner of land of certain description ;
- (vii) imposts which have the sense of punishment, e.g., Khiraj or land tax ;
- (viii) rights which exist by themselves (Haqqun Qaa'imun Be-Nafsehi), e.g., the right to one-fifth of the booty which is reserved for the poor while four-fifth is distributed among the warriors taking part in the war.

Rights are also divided into (1) independent rights, i.e. those that exist by themselves, also known as the "rights in rem," and (2) dependant rights, i.e. those that exist against a particular person who is under an obligation to discharge certain duties towards the possessor of the right, ¹ also known as the "rights in person."

1. Tauzeeh, p. 414

Rights are also divided into (1) original (Asl), and (2) substitutory (Khalf), e.g., the right of Allah to require performance of ablution before offering of the prayer is original, while the performance of "Tayammum" in exceptional cases is substitutory right ; or in case of sale, the right of purchaser to get the sold property is original right, while the right of damage in case of default by the seller is a substitutory right. They are also known as antecedent and remedial.

The classification of rights into independent and dependent, or original and substitutory, apply to the private as well as public rights.

Original private rights are : (1) right to safety of person (Nafs) ; (2) right to reputation (Hurmat) ; (3) right of ownership (Milk) ; (4) right of family [including (a) marital (Zaujiyat), (b) guardianship (Wilayat), (c) children and relatives, (d) succession (Wirasat)] ; (5) lawful acts (Tasarrufaat) , and (6) ex-contractu.

Substitutory private rights are treated by the jurists from the point of view of the person of incidence, that is, as part of the subject of obligations (Wujoob) imposed by an imperative command of the law and the performance of what has been so ordered (Al-Eitaan Bil Mamoor Beh).

OBLIGATIONS

With regard to their origination, obligations are classified as those arising :-

- (a) by the implication of law (i) towards Allah or the State, e.g., obligation to worship, or obligation to pay taxes, (ii) towards individuals, e.g., those arising out of family relations ;
- (b) out of man's own acts of utterance, e.g., rights ex-contractu, or by admission of another's claim ;
- (c) by reason of conduct infringing another's rights relating to (i) personal safety, (ii) doing of lawful acts, (iii) reputation, (iv) family rights, (v) ownership and possession.

Obligations relating to (a) and (b) relate to acts which are "Farz" (obligatory) and those of (c) relate to "Haraam" (forbidden) acts.

Most of the Hanafi jurists also distinguish between obligation *per se* (Nafsul Wajib) and obligation to certain acts (Wujubul Adaa). The former consists in the liberty of the obliged being restricted with reference to certain matters, and the latter is his obligation to release himself from such restrictions.¹

The discharge of an obligation may be (i) specific (Adaa) or non-specific also known as substitutory (Qazaa). In the former the very thing which is required has to be carried out, and in the latter when what has to be carried out is something similar to what is required. This classification applies to both the right of Allah and the right of men.

Further, the specific discharge of an obligation may be (a) perfect (Kaamil), e.g., the very thing sold is delivered to the purchaser ; or (b) defective (Qaasir), e.g., when a slave wrong-fully taken possession of has been restored to his owner but after he has incurred some liability ; or (c) resembling non-specific performance, e.g., the person wrongfully taking possession of another's slave hands over the slave to the latter and asks him to emancipate the slave and the latter emancipates the slave without knowing that he is his slave.

Non-specific discharge of an obligation may be by means of something which is intelligibly similar (Mislun Ma'qulun) to the subject-matter of the right both in appearance (Zaahir) and in essence (Baatin). If that is not possible, the law will be satisfied with something similar in essence though not in appearance, e.g., the payment of price of a misappropriated article.²

1. Tauzeeh, pp. 199-212

2. Muhammadan Jurisprudence, by 'Abdur Rahim pp. 193-209

LEGAL CAPACITY

Acts, rights and obligations, i.e. the objectives of law (Mehkoom Beh) relate to persons who are the subjects of law (Mahkoom 'Alaih) i.e. those to whom the law is addressed. The fitness (Ahliyat) of a person for the application of law to his actions is called the legal capacity (Zimmah).

“Zimmah” or legal capacity is defined as “the quality by which men become fit for what he is entitled to (Maa Lahu) and what he is subject to (Maa 'Alaih).¹

Legal capacity is divided into (1) capacity for the inherence of rights and obligations (Ahliyatul Wujoob), and (2) capacity for the exercise of rights and the discharge of obligations (Ahliyatul Adaa). The former is the “receptive” and the latter the “active” legal capacity. The receptive capacity begins while the child is in his mother’s womb, but the active capacity begins from the birth and after gradual development becomes perfect with the maturity of body and mind.

The legal capacity is adversely affected by (a) defects (’Awariz), such as infancy, idiocy, lunacy, weakness of intellect, and death ; or (b) entail its forfeiture either wholly or partially by reason of hostility to the law, such as apostacy, unbelief and slavery ; or (c) cause its suspension in order to safeguard the rights of others, such as death-illness and insolvency. A person with full legal capacity is, therefore, a living human being of mature age and understanding, free, Muslim, not seized with death-illness, and solvent.²

The circumstances which generally affect the legal capacity of a person, or interfere with the proper legal effect of a man’s actions in particular cases are grouped into (1) providential (Samaawi) i.e. those which are beyond the control of man, and (2) those created by man (Maksubah). Infancy, idiocy, lunacy, forgetfulness, sleep, fainting fit, illness, and death

1. Tauzeeh, p. 419.

2. Muhammadan Jurisprudence, by 'Abdur Rahim pp. 217-218

belong to group No. 1, while ignorance of the truth (religion) or of fact or of law, slavery, drunkenness, jest, folly, mistake, and duress, belong to group No. (2)

Legal capacity of a man is affected by the condition of his mind, in that by nature he has the right to choose (Ikhtiar) which is known as will or volition, and, after choosing, to intend (Qasd or Iradah) the doing of the chosen act, which may also have his consent (Raza), or be under duress (Ikraah) which vitiates (makes Fassid) the intention. The act may also be involuntary or without intention as in case of sleep or in a fainting fit or in a state of forgetfulness or drunkenness.

An act is generally directed towards an object (Mahal), but sometimes it so happens that involuntarily it is directed to an object not actually intended which may be by negligence, heedlessness or carelessness (Tarkut Tarwa) or by mistake (Khata) ¹

BOOKS ON USUL

Imam Abu Yusuf and Imam Muhammad, the two prominent disciples of Imam Abu Hanifah, were the first scholars to write books on "Usul" but their books are not available. The only basic and most fundamental book available on "Usul" is the "Risalah Fi Adalatul Ahkaamiah," generally known as the "Risalah" of Imam Shaafe'ee. In this "Risalah", Imam Shaafe'ee has dealt with Qur'an, Hadees, Naasikh and Mansookh, 'Ilal-e-Hadees, Khabar-e-Wahid, Ijma, Qayas, Ijtihad, Istehsaan, and Ikhtilaaf, all being the Sources of Law.

As regards Qur'an, Imam Shaafe'ee has discussed in detail the nature of Qur'anic narration, viz., whether it is by way of a "Nass", as for example the "Faraa'iz, or something to be laid down by the Holy Prophet, as fore example the number of "Rak'ats in a prayer ; or the extent of "Wasiyat", or something to be introduced by the Holy Prophet, as for example the details of

1. Muhammadan Jurisprudence, by 'Abdur Rahim pp. 219-221

performance of "Wuzu" or offering of "Salaat", or performance of the rites of Hajj, or manner of Sacrifice, and so on ; or some thing to be decided by the Muslim Scholars, through Ijthihad ; or that sometimes Qur'an speaks of a general principle and also means by it something particular, and sometimes it uses the words of which the obvious and real meanings are different ; and so on.

As regards Hadees, Imam Shaafe'ee has shown that Hadees is an authority for Fiqah, because Allah the Almighty has Himself made it obligatory for the Muslims to obey the Holy Prophet. He has also discussed that sometimes Ahadees are exactly in conformity with the Qur'an, sometimes they are in explanation of the Qur'an, and sometimes they are independent of Qur'an because there is no "Nuss" relating to them in Qur'an, but they are also revelations from Allah the Almighty, and there-fore in any case, all Ahadees are to be obeyed.

Imam Shaafa'ee has also dealt with "Naasikh and Mansookh", and has discussed that "Naskh" (abrogation) of Qur'an can be by Qur'an only. Qur'an cannot be abrogated by Hadees, although Qur'an can abrogate a Hadees, but this should also be proved by the Hadees itself. In other words there should be a Hadees to show that any Hadees has been abrogated by the Qur'an. Further, Hadees can also be abrogated by Hadees, but not by anything less than the Hadees of the Holy Prophet. In other words, a Hadees cannot be abrogated by a saying of any person or group of persons.

He has also discussed with the " 'Ilal-e-Hadees " and, in this connection, he has given in detail the nature and kinds of Hadees, and has laid down as to how and in what manner a "Mujtahid should reconcile them or distinguish them or prefer one over the other in the process of "Ijthihad" in respect of any problem. He has also discussed the "Khabar-e-Wahid" as an authority.

He has also dealt with "Ijma" and discussed those Ahadees by which the Holy Prophet has laid emphasis on the

following of the consensus of opinions of the majority of the Ummah. In this connection, he has also discussed the "Qayas" and "Ijtihad" and has held that both these are one and the same. According to him, difference of opinion in "Ijtihad" is also a matter of blessings, because the Holy Prophet has said that man who decides by "Ijtihad" something which is correct will get double reward, but if it is not correct, he will get one reward, meaning thereby that decision by "Ijtihad" in any case gets the reward.

He has rejected Istehsaan and has said that Istehsaan means to say something without Hadees or Qayas. He has also discussed as to who is entitled to do Qayas. According to him, Qayas is to declare that if something in its large quantity is "Haraam", it is also "Haraam" in its lesser quantity, and *vice versa*. Similarly, if Allah has declared as "Mubah" the greater part of anything, its lesser part will also be "Mubah."

He has also discussed Ikhtilaaf and has said that there is no Ikhtilaaf in those things which are proved by the "Nass" i.e. clear verses of Qur'an. It is only in those things which need "Taaweel" or interpretation or those which can be known through Qayas.

Besides these Sources of the Islamic Law, "Istislah" or "Masalehul Mursalah" and "Istadlaal", as introduced by Imam Maalik, are also the Scorches of Islamic Law and are accordingly the topics which are discussed under the Science of "Usul."

Apart from the books of "Usul" written by Imam Abu Yusuf, Imam Muhammad and Imam Shaafe'ee, there are also some other prominent books on "Usul" written by subsequent scholars which are as follows.¹

-1. "Falsafah-tush-Shari'at Fil Islam", by Dr. Subhi Mahmasani, Urdu translation "Falsafah-e-Shari'at-e-Islam", by Maulvi Muhammad Rizvi, pp. 146-148.

HANAFIAH

1. Kitabul Usul, also known as Usulul Buzdawi by Ali bin Muhammad Buzdawi (d. 482 A.H.). Nasafi has written a commentary on it in "Al-Manaar" and Ibne Maalik has written a commentary on "Al-Manaar" in "Manaarul Anwaar". Ibne Aini has also written a commentary on this commentary.
2. Tanqeeh-ul-Usul, by Sadrush Shar'iah Ubaidullah bin Mas'ud (d. 747 A.H).
3. Kitabut Tehreer, by Kamaluddin Muhammad bin Humaam (d. 861 A.H.)
4. Musallamus Suboot, by Muhibbullah bin Abdul Shakoor Bahaari (d. 1119 A.H.)

Note : The last two books are on Hanafi as well as Shaafe'ee Mazhab

MAALIKIAH

1. Muntahi-us-Sa'ool Wal Amal, by Jamaluddin Usman bin Hajib (d. 646 A.H.) – a summary of Al-Ehkaam Fi Usulil Ehkaam, by Saifuddin Aamidi (d. 631 A.H.)
2. Al-Muwafiwaat and Al-E'tisaam, by Abu Ishaq Ibrahim Shaatibi Gharnaati (d. 790 A.H).

SHAAFE'EEYAH

1. Mustasfi, by Abu Hamid Ghazali (d. 505 A.H.)
2. Al-Mehsool Fil Usul, by Abu 'Abdullah Muhammad bin 'Umar Fakhruddin Raazi (d. 606 A.H.).
3. Al-Ehkaam Fi Usulil Ehkaam, by Saifuddin Aamidi (d. 631 A.H.).
4. Minhaajul Usul Ila Ilmul Usul, by Qazi 'Abdullah 'Umar Baizawi (d. 685 A.H.)
5. Nihayatus Sa'ul Fi Sharhe Minhaajul Usul, by Jamaluddin Asnavi (d. 772 A.H.)
6. Jaame'ul Jawame', by Tajuddin 'Abdul Wahab Subki (d. 771 A.H.). He also completed the book "Al-Ibhaaj Sharhe Minhaaj" which was started by his father Taqiuddin Ali

Subki (d. 755 A.H.). it may be noted that Jalaluddin Mahalli wrote a commentary on "Jaame'ul Jawame'" and Banani wrote foot Notes on the Commentary.

HAMBALIAH

1. Risala Ma'arijul Usul, by Taqiuddin Ahmad bin Taimiyah (d. 728 A.H.)

QAWA'IDUL FIQAHIAH OR USULUL FIQAH

The Scholars of Usul have laid down some fundamental principles of universal application, known as "Qawa'idul Fiqahiah" or "Usulul Fiqah" which must be followed by the jurists of all ages while making juristic deduction on any problem before them.

In fact these principles are basic and fundamental because they are exactly according to the inherent requirement of the human society for the purpose of real justice and well being of the humanity at large. They are also universal because they do not change with the changes in the human society and apply with full force to all people of all times and of all places of the world, and they have been unanimously accepted as such by all religions, societies, and scholars, down the ages. The primitive people named these principles as "Lex Aeterna", "Jus Naturale", or "Jus Divinum", i.e. "Eternal Law", "Natural Law", or "Divine Law". The Greek Philosophers including Aristotle also dealt with these laws and after them the French, English and German scholars also wrote on them, and all scholars are of the view that these Laws are "Leges Legem", i.e. "Basic Principles" under-lying all laws, and are general as well as eternal and universal in their application. Accordingly, they are equally found in the laws of all primitive, modern, Roman, European as well as Islamic laws, because they relate to the "Adl" or "justice in reality", and "Cannons of Justice", therefore, are basically one and the same in all nations. ¹

1. Falsafah-e-Shari'at-e-Islam, ibid, pp. 331-333

The Muslim Scholars of Usul have written on these principles under the "Al-Ishbah Wann Nazaa'ir" of which the first document available is in the form of 'Umar's letter to Abu Musa Ash'ari, asking him to "Aa'raful Amsaal Wal Ishbaah Wa Qassul Umoor Be Nazee'ir-e-haa", i.e. consider the precedents and decide your matters on their analogy. Among the Muslim writers, Tajuddin Abdul Wahab Subki (d. 771 A.H.) was the most prominent writer on "Ishbaah Wann Nazaa'ir" or "Qawa'id-e-Kulliah". He was then followed by Jalaluddin Suyuti or Asyuti (d. 911 A.H) and, after him, by Zainul Aabidin bin Ibrahim bin Nujaim Hanafi known as Ibne Nujaim (d. 970 A.H.). The book of Suyuti "Al-Isbaah Wann Nazaa'ir" is very popular on this subject, and Ahmad bin Muhammad Hamavi has written a commentary "Ghamz Uyunul Basaa'ir" on it.¹ Later, Abu Sa'eed al-Khadimi has also mentioned many "Qawa'idul Fiqahiah" in the end of his book "Majame'ul Haqa'iq" (Al-Mukhtasar Fi Ulumul Usul) on which Mustafa Muhammad al-Kozul Hisaari has written a commentary in his book "Munaafi'ud Daqaa'iq."

Al-Mujallatul Ehkaamul 'Adliyah has given ninety nine "Qawa'idul Fiqahiah" which are as follows. In the English language these are known as "Legal Maxims".

1. Published in two volumes by "Matba' Daar-ut-Tibaa'atul Aamirah" in 1290 A.H. (Ibid, p. 336, F.N.)

QAWE'IDUL FIQAHIAH OR USULUL FIQAH *
(LEGAL MAXIMS)

1. The basis of every order is the intention thereof.¹
2. Contracts are to be under-stood in relation to their intention as substance, not by the words and phrases used.²
3. A belief amounting to conviction cannot be caused to disappear by doubt.
4. It is a principle that a thing remains as it is.
5. Let the ancient rest on its age.
6. A wrong is a wrong even though it be ancient.
7. The basic principle is that of freedom from obligation.³
8. As to incorporeal matters that do not prove them-selves, the basic principle (presumption) is that they do not exist.⁴

* The Arabic text is taken from "Al-Mujallatul Ehkaamul 'Adliah", and the English translation is by Justice A.R. Cornelius, a former Chief Justice of Pakistan, published in the All Pakistan Legal Decisions, 1966, Vol. 1, Journal Section, pp. 49-56.

1. A judgment based on an order should follow the intention and purpose of that order.

2. So a Bai-bil-Wafa will be held as mortgage.

3. So that if one destroys the property of another, and they differ as to the extent of the damage, the word of the person destroying may be taken, but the owner of the property may bring evidence to prove the excess.

4. So that if between the active partner and the financier, there be a dispute as to profit, the word of the active partner will be taken, and the financier may lead evidence to prove the actual profit.

9. Anything once proved remains proved, until the contrary is established. ¹
10. Every occurrence is presumed to be of recent date. ²
11. The presumption is that what is said is true.
12. No reliance is to be placed on inference, as against expression.
13. In the face of the text, studied construction is not permissible.
14. What is proved not to correspond to the (true) measure, cannot be a measure for other things.
15. One considered construction is not avoided by another.
16. To make easy that which is difficult to bear. ³
17. Relax that which is too strict. ⁴

1. So that if one is proved to have been the owner of anything, his ownership will be decreed unless something is found which has caused it to be removed.

2. So that if there be dispute as to time, an occurrence will be related to the nearest date, unless it be proved to be of earlier date.

3. That is to soften a hardship and to relax that which is too strict-this proposition is the basis of many rules of Fiqah in relation to debt, to transfer of obligations, to restraint on competency, etc., by which lessening of burdens in accordance with the Shari'ah (of Mu'aamilaat) has been brought about by the jurists.

4. i.e. anything that is difficult is to be softened and widened.

18. No wrong, no wrong-doing.
19. Wrong is to be undone.
20. Necessities justify that which may be unlawful.
21. The extent of necessities limits action thereunder.
22. What is lawful for a reason becomes invalid when such reason disappears.
23. When a bar is removed, the thing that was barred is revived.
24. A wrong is not avoided by another of the same kind.
25. To avoid public injury, a private injury may be suffered.¹
26. A greater injury may be avoided by a lesser injury.
27. In the face of two unlawful things, the lesser may be committed to avoid the greater.
28. The lesser of two evils is to be chosen.
29. Unlawful things are to be prevented, irrespective of benefit.

1. Hence the rule forbidding practice by ignorant doctors.

30. Injury is to be resisted to the extent possible.
31. A need 'whether public or private' assumes the character of necessity. ¹
32. Necessity does not destroy the rights of others. ²
33. What is *Haraam* to take is *Haraam* to give.
34. What is *Haraam* to do is *Haraam* to demand.
35. Custom is a source of judicial decisions. ³
36. A general practice of the people acquires legal force, and must be acted upon.
37. What is forbidden by custom is forbidden in truth.
38. Change of conditions, through passage of time, will not alter the decision.
39. Custom has force to make void a fact.
40. The custom which is most widely prevalent and operative is to be relied on.

1. This was why Bai-bil-Wafa was permitted in Bukhara, where the people's indebtedness had become excessive, and since then the rule has become general.

2. For example, one who is compelled to eat the food of another is still liable to pay the cost.

3. Custom, whether general or private, is to be taken as a judicial decision to establish a rule of law.

41. Credence is to be given to that which is publicly and generally operative, and not to what is rare (little seen).
42. What is a matter of common practice has the same effect as an express condition.
43. Matters of common practice among merchants have the same effect as express conditions between them.
44. Specification by common practice is equivalent to definition by text.
45. If there be conflict between a bar to certain action and the necessity for such action, the bar will prevail.¹
46. That which belongs goes with the thing to which it belongs.²
47. For purposes of decision, a thing which belongs cannot be dealt with separately from the thing to which it belongs³
48. The owner of the property owns also all rights necessary for enjoyment.⁴

1. For example, a mortgager may not sell the mortgaged property so long as it is in the mortgagee's possession.

2. For instance, the *foetus* in a pregnant animal, which is sold, goes with the animal

3. For instance, a *foetus* may not be sold separately from the mother.

4. For instance, he who buys a house acquires also the means of access thereto.

49. When the root ceases to exist, the branch also ceases to exist.
50. A right which has been lost does not return.¹
51. When a thing becomes void, everything encompassed with-in it also becomes void.
52. When the root becomes void, a substitute is to be sought.
53. You may remit in consequential or dependent actions what you may not remit in others²
54. In the final (decision) that may be excused which would be fatal (in law) if it had appeared at the commencement.³
55. The end is easier than the beginning.
56. A free and voluntary gift is not complete without transfer of possession.⁴

1. Just as that whose existence is annihilated does not return.

2. Thus, if a buyer gives authority to the seller to hold the thing sold, that is not permissible. But if the buyer asks the seller to measure the goods sold into a receptacle provided by the buyer, and this is done, possession would then be deemed of the buyer.

3. For instance, if a piece of land be gifted, and it is later discovered that there was a co-sharer in it (other than the donar) the gift is valid as to the remaining share (i.e. of the doner) even although it is a share in undivided property.

4. Thus, a gift is not complete unless possession of the thing gifted is made over to the donee.

57. Power in respect of the people's property must be exercised for the public benefit.
- 58 Special authority is stronger than general authority. ¹
- 59 Words are to be given effect to, rather than to be rejected, ²
- 60 If a factual meaning cannot be given, a figurative meaning may be applied.
- 61 When no meaning can be given to words, they are to be rejected. ³
- 62 Where a thing is not divisible, mention of it by part is equivalent to mention of the whole
- 63 What is absolute remains absolute unless limited by text or by proof.
- 64 Description of a thing which is visibly present is otiose, but the description of a thing not there is binding. ⁴

1. Thus, the authority of the Mutawalli of a Wakf has precedence over the authority of the Qazi.

2. So long as any meaning can be given to them.

3. That is, neither factual nor figurative meaning.

4. Thus, if A, when selling his horse which is on the spot, pointing to it describes it as black when it is in fact gray, and the buyer accepts it, the sale is valid, and the description is otiose, but if the horse sold be not there, and A says it is gray, whereas in fact it is black, the sale will not be valid.

- 65 A question is reflected in the answer thereto. ¹
- 66 Silence is not to be construed as speech. ²
- 67 In matters not visible an inference of a thing has validity. ³
68. Writing is equivalent to speaking.
69. Recognised dumb-signs are equivalent to speech by tongue.
70. The word of the translator is to be accepted implicitly.
71. No reliance on any supposition which is apparently defective.
72. A possibility which is based on mere inference has no force. ⁴

1. that is, the content of an honest question has the quality of an honest admission in reply

2. Except silence when there is occasion for speech, that is no statement can be attributed to a person who remains silent, but to keep silent where speech is called for amounts to a spoken admission.

3. That is you judge by the appearance where it is difficult to ascertain the facts.

4. For example, if a person admits a debt to one of his heirs, when in a state of Maraz-ul-Maut, the admission is of no effect, unless the remaining heirs support it, because the possibility that the man intended to deprive the other heirs is supported by the fact of his illness ; whereas such an admission is acceptable if made in a state of health, for any intention thereby to deprive the other heirs becomes a bare possibility, a sort of imagination, which has no force as against the admission.

73. No reliance on mere imagination.
74. A thing which is established by proof is equivalent to a thing actually seen.
75. Proof is on the claimant; oath on him who denies.
76. Proof to establish the contrary of appearances; oath to maintain the basis.
77. Proof has positive force; (by comparison) admission is deficient in force
78. Admission binds the person who makes it.
79. No force is left when two things contradict each other, but such contradiction will not avoid a judicial decision.¹
80. Although the base may not be established, something arising therefrom may be established.²

1. For example, if two eye-witnesses should resile from their statements, those statements will lose their legal force, but should a judge have made a judgment in accordance with their statements, that judgment will not be void; moreover, the two witnesses will be bound to satisfy the judgment.

2. For example, if a person should say "A owes B so much as a debt, and I am surety for it," and A denies the debt, whereupon B sues the surety, the latter is bound to make good the debt.

81. That whose existence is dependent on a condition is established when the condition is established.
82. A condition must be observed so far as possible.
83. A promise subject to a condition is binding.¹
84. Payment for user goes with user.²
85. Payment for the use of a thing cannot be combined with compensation for the thing itself.
86. Damage and benefit go together.³
87. The blessings of a thing are in proportion to the evils thereof, and *vice versa*.
88. The agent is responsible for his action, and not the person under whose orders he acts, unless there be compulsion.

1. For example, if A were to say to B, "sell this thing to C, and if C does not pay the price, I will pay it", then if C should fail to pay the price, A is bound to pay it in performance of his conditional promise.

2. That is, when the thing used is destroyed in the possession of the user thereof, compensation for use will be included in the compensation for its value; for example, if the buyer of an animal returns it because of a defect, after using it for a period, he is not liable to pay for the use of the animal, since if it had died before being so returned, it would have died as his property.

3. For example, he who derives benefit from a thing must also bear any damage from it.

89. As between a proximate agent and a remote agent, the decision will go against the proximate agent.¹
90. What is permissible in law cannot be a cause for liability.²
91. The proximate agent is responsible, even in the absence of premeditation.
92. The remote agent is not responsible ; unless there be premeditation on his part.
93. Injury by a dumb animal is not a crime.
94. An order by one person to dispose of the property of another is null and void.
95. No one may dispose of the property of another, without the latter's' permission.

1. For example, should a person dig a well in a public highway, and another person throw an animal not belonging to him into the well, the responsibility will be that of the person who threw the animal in, and not that of the person who dug the well.

2. For example, should a man dig a well in his own land, and an animal belonging to another falls in and dies, the person who dug the well is free of liability.

96. No one may take the property of another, except for a lawful reason.
97. A charge in the nature of proprietorship of a thing is equivalent to a change in the thing itself.
98. He who hastens an event in order to acquire a thing before its due time will be punished by being denied that thing.
99. The attempt of a person to undo what has been finalised by his own act will recoil on him.

CHAPTER 2

FIQAH

DEFINITION

As previously defined, “Usul” is the “Science of the Sources of Law” and “Fiqah” is the “Science of the Law itself.”

Fiqah has been variously defined by the scholars. The dictionary meaning of the word “Fiqah” is (“Al-Shaq Wal Fath”), i.e. “to break and open.” Zamakhshari has also defined it as such. According to him, “Faqeeh” (Jurist) is one who is

(“Al-Aalimullazi Bi Shiqqil Ehkaam Wa Yuftish Ann Haqaa’iquhu Wa Yuftah Maa Astaghlaq Minha”), i.e. the scholar who opens or makes manifest the commands of Shari’ah and enquires into their reality and defines the difficult and complicated matters therein.¹

Fiqah is also defined as “Understanding” or “Knowledge” on basis of the word “Yatafaqqahu” appearing in verse 122 of chapter 9 (Taubah) of the Holy Qur’an. But according to the terminology of Shari’ah, it is not understanding or knowledge in its general sense, but it is understanding or knowledge of the commands of Shari’ah in particular.

Abu Hanifah defines Fiqah in the following words :

i.e. the knowledge of what is for a man’s self, and what is against a man’s self.

Sadrush Shariah, while discussing this definition, has given three interpretations of it, viz.,

- (1) it means the “knowledge of spiritual rewards and punishments”, but this meaning, he says, fails to cover” the acts which are not spiritual, e.g. contract to sell , lease, etc.”

1. Haqiqatul Fiqah, Vol. I

- (2) it means the “knowledge of what is permissible for a man to do, and what he is under an obligation to do”, but this also, according to him, would leave from its purview “the doing of acts which have been forbidden, and the omission of what has been made obligatory.”
- (3) it means the “knowledge of things which are permissible for man to do and of things which are forbidden to him.”

The last meaning includes both acts of commission and omission and in this sense, Fiqah is the “Science which points out the extent and limits of a man’s liberty.”, or, in other words, it is the “Science of rights and obligations.”¹

The author of “Tauzeeh” defines Fiqah as

(“Al-Ilm Bil Ehkaamush Shari’ah Ann Adallatohal Tafseeliah”), i.e. “knowledge of the commands of Sharia’at with their detailed reasoning”, or, in other words, “the knowledge of the laws of Shari’ah which are intended to be acted upon, and which have been divulged to us by Revelation or determination by concurrent decisions of the learned, such knowledge being derived from the sources of the laws with the power of making correct deductions therefrom.”²

The Shaafe’ee scholars define Fiqah as “the knowledge of the laws of Shari’ah relating to man’s acts and derived from specific sources.” In this definition the words “derived from specific sources” are intended to exclude from the science “such knowled-ge or the sacred laws as the Holy Prophet possessed, and which he derived from inspiration.” Further, by the use of the word “Sh-ari’at” it is intended to exclude mere concepts of the reason or the senses, such as our knowledge that “the world is liable to changes” or that “the fire burns.” “Shari’at,” which may be translated as the “Islamic Code,” means “matters which would not have been known but for the communications made to us by the Law-giver.”³

1. Muhammadan Jurisprudence, by ‘Abdur Rahim, pp. 48-49

2. Tauzeeh, p. 14 (Calcutta Edition)

3. Muhammadan Jurisprudence, by ‘Abdur Rahim, p. 50

The Maaliki scholars define Fiqah as “the Science of the commands of the Shari’at in particular matters deduced by the application of a process of reasoning.”¹

The language of Abu Hanifah’s definition, however, shows that in his conception of the “Science of Fiqah”, which he called as “Fiqah-e-Akbar”, would include in its scope “pure questions of Faith” which, strictly speaking, are subject of the “Science of Divinity”, and also abstract questions of Ethics, and in the beginning era of Islam also the basic aim of Fiqah was to obtain knowledge of the affairs of the Hereafter and the trials and dangers which beset the human life in this world, and, therefore, as put by the author of “Musallamus Suboot”, Fiqah included the “Ilme Haqeeqat” (Knowledge of Divinity), “Ilme Tareeqat” (Knowledge of Spirituality) and “Ilme Shari’at (Knowledge of the Commands), and this state of affairs continued for long.

But with the expansion of the Islamic State, increasing contacts of the Muslims with other Nations of the world, introduction of their art and science, particularly the Greek Philosophy, questions about Faith became the subject matter of a separate branch of knowledge known as “Ilmul Kalaam”, and Fiqah was confined to “Ilm-e-Shari’at-e-Zaahirah”, or, in the words of Imam Ghazali, “the Science of the rules of law,”² or, as put by the author of “Musallamus Suboot”, “Knowledge of Shari’at which deals with Ehkaam (Commands), and not with Aqaa’id (beliefs).”

Imam Ghazali, therefore, criticised this state of affairs, saying that, “Fiqah is now the name of knowing some details (of the Law) and their ‘Asbaab-o-Ilal,” and the one who knows them is taken to be a greater scholar of Fiqah,”³ although, as he further said, “the purpose of Fiqah, as given by Qur’an, viz.,

(‘Le Yunziru Qaumahum’), i.e., so that they may

1. Muhammadan Jurisprudence, by ‘Abdur Rahim, p. 50

2. Kashshaaf Fi Istilahil Fanoon, Vol. I, p. 31 (Muhammadan Jurisprudence, by ‘Abdur Rahim, p. 50)

3. Ehya-ul-Uloom-ud-Deen, Vol. I

warn their people, ¹ can be achieved only when Fiqah is understood in the sense it was understood and practiced in the beginning era of Islam.” ²

Fiqah, after passing through its various stages, now, in its wider sense, “covers all aspects of religious, political and civil life. In addition to the laws regulating ritual and religious observances (i.e. Ibaadaat), as far as concerns performance and abstinence, it includes the whole field of family law, the law of inheritance, of property and of contract, in a word provisions for all the legal questions that arise in social life (i.e. Mu’aamlaat); it also includes criminal law and procedure, and finally constitutional law and laws regulating the administration of the State, and the conduct of war. Thus all aspects of public and private life and business are regulated by laws recognised by religion, and the Science of these laws is Fiqah.” ³

The fact, however, remains that while all affairs of the human life, private as well as public, come within the purview of Fiqah, questions relating to Faith (Aqeedah) are not the subject matter of Fiqah, obviously because Faith has been specifically and clearly laid down by the Holy Qur’an, and fully explained and emphasized by the Holy Prophet, and therefore nothing has been left regarding it to be discussed and decided by the scholars.

BASIS OF FIQAH

Fiqah has its basis in the Holy Qur’an itself. In verse 122 of Chapter 9 (Taubah) of the Holy Qur’an it is said :

i.e. and the believers should not go forth all together. Why, then, does not a company from every party from among them go forth that they may apply themselves to obtain understanding in religion, and that they may warn their people, when they come back, that they may be cautious.

1. Verse 122 of Chapter 9 (*Taubah*) 2. *Ehya-ul-Uloom-ud-Deen*, Vol. I
 3. *Shorter Encyclopaedia of Islam*, by Gibb and Kramers, p. 102.

In this verse the word “Yatafaqqahu” i.e. “obtain understanding” is very important. For obtaining the understanding in its true sense mere “intelligence” is not enough. It also requires “insight of the heart” which is known as “Baseert-e-Qalbi.” Regarding those who are deprived of the “insight of the heart”, Qur’an says : i.e. they have hearts wherewith they understand not (*Aaraaf*, 7:179), and by way of rebuking them asks: i.e. are there locks on their hearts (*Muhammad*, 47:24) ; and says : i.e. Allah has sealed their hearts (*Baqarah*, 2:7); and i.e. surely We have placed veils over their hearts, lest they may understand (*Kahf*, 18:57).

All these verses show that without “insight of the heart” there can be no understanding in its reality even though intelligence is already there. Not only this but even perception in its reality through the senses is not possible without “insight of the heart.” Qur’an says :

i.e. it is not the eyes that are blind but blind are the hearts which are in the breasts (*Hajj*, 22:46), and that is the reason that inspite of seeing the reality with their own eyes people do not accept the Truth underlying the universe.

When mind (intelligence) and heart (insight) both concur, the scholar is able to go into the depth of the problem before him, and arrive at the stage where he is granted the “Hikmat” (wisdom), and according to Qur’an :

i.e. whoever is granted “Hikmat” (wisdom), he indeed is given “Khairan Kaseeraa” (the Great Good) (*Baqarah*, 2:269).

“Hikmat” and “Fiqah” go side by side. The Holy Prophet Muhammad (peace be upon him) has said :

i.e. for whomsoever Allah intends “Khairan” (i.e. Good), He grants him “Tafaqqah Fid Deen”, i.e. understanding in religion (*Bukhari* and *Muslim*, vide *Mishkatul Masaabeeh*, *Kitab-ul-Ilm*).

The Holy Prophet therefore commanded his Companions :
i.e. from different places of the world the people will come to you so that they may have understanding in religion. When they meet you, admonish them the Good (*Tirmizi, vide Mishkatul Masaabeeh, Kitab-ul-Ilm*).

This was also necessary because as it is said in another Hadees :

i.e. many of the bearers of "Fiqah" are not (really) "Faqeeh", and though many are "Faqeeh", but those to whom they transmit (the Fiqah) are more Faqeeh than them (i.e. the transmitters) (*Abu Dawud and Ibne Majah, vide Mishkatul Masaabeeh, Kitab-ul-Ilm*).

"Hikmat," to quote Raaghib Asfahani is :

i.e. Hikmat is to arrive at the Haq (Truth) through 'ILM' (knowledge) and 'AQL' (intelligence) ¹

And according to Lisanul Arab :

i.e. Hikmat is to know the "Afzal" (Superior) and "Behtareen" (Best) through the best "Ilm" (knowledge). ²

But "Hikmat" is a gift from Allah. Imam Maalik says :

i.e. "Hikmat" (wisdom) and "Ilm" (knowledge) are "Noor" (Light) which Allah grants to whomsoever He wishes. ³

1. Mufraadaatul Qur'an, p. 126 2. Vol. V 3. Tarjumanus Sunnah, Vol. I.

He also says :

i.e. "Ilm" (knowledge) is not the name of knowing too much. It is a "Noor" (Light) which Allah puts in the heart of the son of Adam.¹

FAQEEH (JURIST)

From the above discussion it is clear that for a Faqeeh, not only intelligence but insight is also necessary, and insight is acquired through the 'Ilm-e-Tareeqat' i.e. Mysticism, the sole object of which is purity of the heart and soul.

In fact the three-fold purpose of the Holy Prophet's Mission, as Qur'an itself tells us, was :

i.e. reciting to them His Messages, and purifying them, and teaching them the Book and wisdom (*Aale Imran*, 3:164)

While the first and the third of these purposes are achieved by the knowledge and practices of "Shari'ah, the second one i.e. purification is achieved through the knowledge and practice of "Tareeqat" only and unless both these are available a scholar cannot become a Faqeeh in its real sense. It is for this reason that Imam Ghazali gives the qualification of a Faqeeh as follows :

Faqeeh is one (1) who has no attachment by heart with the world, and remains inclined towards the Hereafter ; (2) who has full insight in the religion ; (3) who is obedient ; (4) who does not bear injustice to the Muslims in any case ; (5) who is always mindful of the well-being of the Muslims as a whole and has no greed for the wealth ; (6) who knows intricacies of the psychological problems ; (7) who is acquainted with those things which invalidate the deeds ; (8) who knows the difficulties of the

1. *Fiqah-e-Islami Ka Taareekhi Pas Manzar*, by Maulana Muhammad Taqi Amini, p. 30, and *Tambeeh*, p. 188

Path of the Hereafter ; (9) who, besides treating the world as low, also has the power to have control over it ; and (10) who always fears Allah, whether he is at home or in journey.”¹

Hasan Basri also gives more or less the same qualification of Faqeeh.²

According to Aa'mash, while the “Muhaddis” (scholar of Hadees) is like the one who collects good medicines, the “Faqeeh” (scholar of Fiqah) is like the one who diagnoses the disease and prescribes the medicine for it. To quote his own words :

i.e. O assembly of Jurists, you are the physicians and we are the chemists.³

Faqeeh, in its original dictionary meaning, meant, “the one who possesses knowledge of , or understanding about, a thing.” But by the passage of time, it first became limited to “religious knowledge (i.e. Ilm-ud-Deen),” and then to the “religious law” (i.e. Shari’ah),” and finally to the “derivative details of the Shari’ah (i.e. Faro’).” Thus it passed from meaning an “intelligent, understanding person” to meaning a “theologian,” then a “Cannon Lawyer”, and finally a Casuist” (Lisanul Arab, Vol. XVII, p. 418).⁴

THE NEED OF FIQAH AND FAQEEH

Among the Muslims there are some people who are of the view that in view of the presence of Qur’an which contains the Commands revealed by Allah to be followed by the mankind, and the Ahadees (or Sunnah) which contain the explanations of the Commands of Allah by the Holy Prophet Muhammad (peace be upon him), there is no need for the Fiqah or the Faqeeh,

1. Ehya-ul-Uloom-ud-Deen, Vol. I

2. Fiqah-e-Islami Ka Taareekhi Pas Manzar, ibid, p. 25.

3. Haqiqatul Fiqah, Vol. I

4. Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 98

which, according to them, amounts to obeying, in matters of religion, persons like us, besides Allah and His Messenger, and it is according to them, a kind of “Shirk” (polytheism).

In this connection, it may be noted that, firstly, obedience of anybody, besides Allah and His Messenger, is not “Shirk” (polytheism). Qur’an itself says ;

i.e. O you who believe, obey Allah and obey the Messenger and those in authority from among you (*Nisa*, 4:59).

The “Oolul Amr”, who, within the meaning of this verse may be the Muslim Caliphs or the Ulama (scholars) of the Ummah, are neither holding the status of Allah nor of the Messenger of Allah, but still they are to be obeyed as commanded by Allah the Almighty Himself, and in so far as they command strictly according to the Commands of Allah and His Messenger, obedience to them is the obedience to Allah and His Messenger.

Secondly, it is also pertinent to note that the authority to lay down the law vests in Allah and His Messenger only. The Ulama or Fuqahaa are merely the interpretators of it. They are not the Law-givers, and they have actually never claimed to be so or acted as such. They have simply interpreted, explained and applied the Law laid down by Allah and His Messenger to facts and circumstances of particular individuals and societies, and that is actually the Fiqah.

Thirdly, since the interpretation, explanation and application of the Law is neither possible for, nor is it within the capacity of , everybody, Qur’an has, therefore, commanded the common people to :

i.e. ask the followers of the Reminder (the learned ones) if you know not (*Ambia*, 21:7).

All this clearly shows that the need of Fiqah and Fuqahaa cannot be dispensed with. Qur'an is a reservoir of basic and fundamental realities unfolding themselves more and more with the passage of time. Similarly, the Hadees – the word of the Jaame'–il–Kalam – the Holy Prophet Muhammad (peace be upon him) is full of such knowledge and wisdom which will become more and more explicit with the advancement of art and development of human civilization. Therefore, in order to deduce the principles from Qur'an and Hadees (or Sunnah) for application to changed circumstances we will always be in the need of Fiqah and the Fuqahaa, whose "Taqlaed", i.e. following or obedience, has been made obligatory for us by the Holy Qur'an itself.

BOOKS ON FIQAH

HANAFIAH

I. The books compiled by Imam Muhammad are :

- (a) Kutub-uz-Zaahirur–Riwayat , i.e. those narrated by authentic narrators from Imam Muhammad, also known as "Masaa'il–ul–Usool,"
- (b) Kutub or "Masaa'il–un–Nawadir, i.e. those not narrated by authentic narrators

(a) Kutub–Zaahirur–Riwayat are six in number, viz.,

- 1. Al–Mabsoot
- 2. Al–Jaame' –ul–Kabir
- 3. Al–Jaame' –us–Saghir
- 4. Kitab-us-Siyar-ul-Kabir
- 5. Kitab-us-Siyar-us-Saghir
- 6. Ziyadaat

These books have been compiled by Abul Fazl Maruzi known as Haakimush Shaheed (d. 344 A.H.) in his book

“Al-Kaafi.”¹ Muhammad bin Ahmad Sarkhasi (fifth century Hijri) wrote a commentary on it in his book “Al-Mabsoot.” The writers of “Mujallatul Ehkaamul ‘Adliyah” took most of the principles from the Kutub-uz-Zaahirur Riwayat.

(b) Kutub-un-Nawaadir, i.e. those written on dictations, are :

1. Kitab Amaali Muhammad in Fiqah or Kisaaniyat narrated by Shu’aib.
2. Kitab-ur-Raqiyat containing the problems which Imam Muhammad had to face when he was appointed Qazi of Raqah by Haroon Rashid.
3. Harooniyat
4. Jurjaniyat
5. Kitab-ul-Makharij Fil Heel
6. Ziadat-uz-Zadiyat
7. Kitab-un-Nawadir-e-Muhammad as narrated by Ibne Rustam

In this category are also included the books narrated by the scholars of this school, e.g.

1. Kitab-ul-Mujarrad, by Abu Hanifah, narrated by his pupil Hasan bin Zaid Lulu’oo
2. Kitab-ur-Radd Ala Ahlal Medinah and Kitab-ul-Aasaar, both by Muhammad bin Hasan²

II. Then there are books of Fatawa and Masaa’il in which the subsequent jurists, finding nothing in the books of their predecessors, decided the problems on their own “Ijtihaad”, e.g.,

1. Kitab-un-Nawazil,³ by Abul Lais Nasr Samarqandi (d. 373 A.H.)

1. Its manuscript is available in the Library of Egypt.

2. Published by Idara Ehya’ul Ma’arif Nu’maniah, Hyderabad Deccan (India)

3. Its manuscript (No. 565) is available in the Library of Egypt.

2. Kitab-ul-Heel and Kitab-ul-Waqf, by Ahmad bin Maheer also known as Khassaaf (d. 261 A.H.)
3. Al-Jaame'ul Kabir Fish Shuroot, by Abu Jafar Tahawi (d. 321 A.H.)

III. Then there are the books written by the "Muqalladeen" (followers), e.g.,

1. Khazanatul Akmal, by Abu 'Abdullah Jarjani (d. 398 A.H.)
2. Al-Mabsoot, by Muhamad bin Ahmed Sarkhasi (5th century Hijri)
3. Kitab-ul-Usool, also known as "Usulul Buzdawi", by Ali bin Muhammad Buzdawi (d. 482 A.H.)
4. Bada'us Sana'e Fi Tarteebush Shara'e, by Abu Bakr Kasani (d. 587 A.H.)
5. Hidayah¹ (full name ; Hidayah Fil Furu'), and Sharhe Bidayatul Muftadi, by Burhanuddin Ali Marghinani (d. 593 A.H.)
6. al-Sirajiyah, by Siraj Muhammad Sajawandi (6th century A.H.)²

1. Hidayah is in four volumes. It is the most prominent book of the Hanafi Fiqah. Many commentaries have been written on it, e.g. , "Al-Ghaaya", by Saroji ; "Kifayah", by Karlani ; "Waqayah", by Tajush Shari'ah ; "Naqayah—the precis of "Waqayah", by Sadrush Shari'ah ; "Nahayah", by Saghnaqi ; "Merajud Darayah", by Qiwanuddin Kaki ; "Enayah", by Babarti ; "Binayah", by Aini ; and "Fathul Qadeer", by Kamaluddin bin Humaam,

Hidayah has also been translated in Persian by Ghulam Yahya together with Mulla Tajuddin, Meer Muhammad Hussain, and Mulla Sharafatullah, and named as "Hidayah Faarsi"; and also in English by Charles Hamilton ; and in Urdu, with commentary, by Maulana Syed Ameer Ali, known as "Ainul Hidayah."

2. It is a book on the Islamic Law of Inheritance. It was translated in English by Sir William Jones, in 1792 A.D.

IV. Then came the age when Ijtihad was given up, and scholars wrote :

(a) Abridged editions of the books of Fiqah, and the commentaries, and explanatory notes, on them, e.g.

1. Kitab-ul-Mukhtasar, by Ahmad bin Muhammad Qaduri (d. 428 A.H.)
2. Waqayah Mukhtasarul Hidayah, by Tajush Sharai'at Mahmood Mahboobi
3. Mukhtar and its commentary Ikhtiar, by 'Abdullah Musali (d. 683 A.H.)
4. Majma'ul Bahrain, by Ibnus Saa'aati (d. 694 A.H.)
- (5) Kanz or Kanz-ud-Daqa'iq¹ by Hafizuddin Nasafi (d. 710 A.H.)

(b) Fatawaa and the Commentaries thereon , e.g.,

1. Fatawaa-e-Walwaaljiah, by 'Abdur Rashid Walwaalji, (d. 540 A.H.)
2. Fatawaa-e-Khaniah, by Qazi Khan Hasan bin Mansoor (d. 592 A.H.)
3. Fatawaa-e-Zahiriah, by Zahiruddin Muhammad Bukhari (d. 619 A.H.)
4. Fatawaa-e-Tarsusiah known as "Anfa'ul Wasa'il Ila Tehrirul Masa'il", by Ibrahim bin Ali Tartusi (d. 758 A.H.)
5. Fatawaa-e-Tataarkhaniah, by Ibne Alauddin (d. 800 A.H.)
6. Fatawaa-e-Bazaziah, by Hifzuddin Muhammad Urf Ibne Bazaz (d. 827 A.H.)
7. Fatawaa-e-Khairiah, by Khairuddin Muneef Faruqi Ramli (1081 A.H.)

1. This is the most famous book of abridged text of Fiqah, and many comment-arise have been written on it, e.g., "Tabayyanul Haqa'iq", by Zaila'ee; "Ramzul Haqa'iq", by Aini ; "Behrul Haqa'iq", by Zainul Abidin bin Nujaim ; "Takmilah Behrur Raa'iq", by Turi ; "Nehrul Fa'iq" by Umar bin Nujaim ; "Minhatul Khaliq", by Amin bin Abidin ; and "Kashful Haqa'iq," by Afghani.

8. Fatawaa Anqarwiah, by Muhammad Afandi Anqarwi (d. 1098 A.H.)
9. Fatawaa-e-Hindiah also known as Fatawaa-e-Aalamgiri ¹ by Shaikh Nizam Burhanpuri and other scholars.
10. Fatawaa-e-Hamidiah, by Hamid Afindi Ibne Ali Emadi, and its precis "Tanfi'ul Hamidiah", by Muhammad Amin bin Abidin (1252 A.H.)
11. Fatawaa-e-Mehdiah Fil Waqa-e-al-Misriah, by Shaikh Muhammad Abbasi Mehdi (compiled in 1304 A.H.)

(c) Some other famous books :

1. Jaame'ul Fasuleen, by Ibne Qazi Sahawah (d. 818 or 823 A.H.)
2. Durul Ehkaam Sharhe Ghararul Ehkaam, by Manla Khusro (d. 885 A.H.), and its explanatory notes "Ghaniah Zul Ehkaam", by Sharnablali (d. 1069 A.H.)
3. Multaqi'ul Abhar, by Halabi (d. 956 A.H.), and its commentary "Majma'ul Anhar", by Daamaad Aafindi (d. 1078 A.H.) and its second commentary "Al-Durrul Muntaqi", by Muhammad Alauddin Haskafi (d. 1088 A.H.)
4. Tanwirul Absaar, by Tamartaashi, and its commentary "Ad-Durrul Mukhtaar", by Haskafi

1. This was compiled on the command of Emperor Aurangzeb Aalamgir in Arabic, then translated in Persian by Maulana Chalpi Abdullah Rumi, and then also in Urdu by Maulana Syed Ameer Ali of Lucknow (see Fatawaa-e- Mazhari, p. 57, published by Medinah Publishing Company, Karachi, 1390 Hijri). Some of its chapters were also translated in English by N.B.E. Baillie in his "Digest of Moohummudan Law" (3rd Ed. 1957 A.D.)

5. Raddul Mukhtaar Alad Durrul Mukhtaar, by Muhammad Amin bin Abidin, and its "Takmilah" (Qurrah Uyunul Akhyaar) written by his son Muhammad Alauddin.
6. Mujallatul Ehkaamul 'Adliyah, compiled under the orders of the Usmaniah Regime of Turkey, in 1293 A.H. (1876 A.D.)

MAALIKIAH

1. Muwatta, by Imam Maalik (d. 179 A.H.)
2. Al-Qawaneen-ul-Fiqahiah Fi Talkhees Mazhabul Maalikaih, by Abul Qasim bin Juzzi (d. 741 A.H.)
3. Al-Mukhtasar, by Syed Khaleel (d. 767 A.H.)
4. Al-Mudawwenah, by Asad bin Furat al-Taunsi (d. 213 A.H.) compiled in "Asadiyah". It was again arranged by Abdus Salam al-Tanokhi Urf Sehnoon Qeerwani (d. 240 A.H.) and published in the name of "Mudawwenatul Kubra"

SHAAFE'EEYAH

1. Risalah, by Imam Shaafe'ee
2. Kitab-ul-Umm, by Imam Shaafe'ee
3. Kitab Ikhtilaaful Hadees, by Imam Shaafe'ee
4. Musnad Imam Shaafe'ee
5. Al-Mukhtasar, by Ismail Muzni (d. 264 A.H.)
6. Muhazzab, by Abu Ishaq Feerozabadi (d. 476 A.H.)
7. Al-Mustafaa, Al-Wajeez, and Ehya'ul Uloom-ud-Deen, by Ghazali (d. 505 A.H.)
8. Fathul Aziz Sharhe Al-Wajeez, by Abul Qasim Raafe'ee (d. 623 A.H.)
9. Qawa'idul Ehkaam Fi Masalehul Anaam, by Qazi Izzuddin bin Abdus Salam (d. 660 A.H.)
10. Al-Kitab-ul-Kabir, by Muhiuddin Nawawi (d. 676 A.H.)

11. Al-Majmoo, by Muhiuddin Nawawi (d. 676 A.H.)
12. Sharhe Muhazzab, by Muhiuddin Nawawi (d. 676 A.H.)
13. Sharhe Saheeh Muslim, by Muhiuddin Nawawi (d. 676 A.H.)
14. Minhaajut Taalibeen, by Muhiuddin Nawawi (d. 676 A.H.)
15. Takmilatul Majmoo Lil Nawawi, by Taqiuddin Ali Subki (d. 756 A.H.)
16. Sharhe Minhaajul Baizawi, by Taqiuddin Ali Subki (d. 756 A.H.)
17. Fatawaa-e-Subki, by Taqiuddin Ali Subki (d. 756 A.H.)
18. Jaame'ul Jawame, by Tajuddin Abdul Wahab Subki (d. 771 A.H.)
19. Tatimmah Sharhe Minhaajul Baizawi, by Tajuddin Abdul Wahab Subki (d. 771 A.H.)
20. Tabqaat-ush-Shaafe'eeyat-ul-Kubra, by Tajuddin Abdul Wahab Subki (d. 771 A.H.)

HAMBALIAH

1. Musnad-e-Ahmad, by Ahmad Bin Hambal
2. Al-Sunan Fil Fiqah, by Abu Bakr bin Hani Urf Asram
3. Al-Mukhtasar, by Abul Qasim Kharqi (d. 334 A.H.)
4. Al-Mughni, ¹ by Mufiquddin bin Qudamah (d. 620 A.H.)
5. Al-Sharhul Kabir Ala Matanul Maqna, by Shamsuddin Qudamah Maqdisi (d. 682 A.H.)
6. Fatawaa-e-Mashhoorah, by Taqiuddin Ahmad bin Taimiyah (d. 728 A.H.)
7. Majmoo'atur Rasaa'ilul Kubra, by Taqiuddin Ahmad bin Taimiyah (d. 728 A.H.)
8. Minhajus Sunnah, by Taqiuddin Ahmad bin Taimiyah (d. 728 A.H.)

9. Risalah Ma'arijul Usool, by Taqiuddin Ahmad bin Taimiyah (d. 728 A.H.)
10. E'laamul Muqe'een 'Ann Rabbil 'Aalameen, by Abu Abdullah bin Bikt Zar'ee Damishqi 'Urf Ibnul Qayyim al-Jauziah (d. 751 A.H.)
11. At-Turqul Hukmiayah Fi Siyasatush Shar'eeyah, by Abu Abdullah bin Bikt Zar'ee Damishqi 'Urf Ibnul Qayyim al-Jauziah (d. 751 A.H.)
12. Zaadul Ma'aad Fi Huda Khairul 'Ibaad, by Abu Abdullah bin Bikt Zar'ee Damishqi' Urf Ibnul Qayyim al-Jauziah (d. 751 A.H.)

1. One of the most prominent and best books on Fiqah.

CHAPTER 3

IJTIHAAD AND TAQLEED

IJTIHAAD

DEFINITION

Literally, Ijtihaad means, "exertion". It is, "logical deduction on a legal or theological question by a Mujtahid or learned and enlightened doctor, as distinguished from Ijma which is the collective opinion of a council of divines".¹ It means, "the exerting of one's self to the utmost degree to attain an object, and is used technically for so exerting one's self to form an opinion in a case or as to a rule of law. This is done by applying analogy (Qiyas) to Qur'an and Sunnah."² It literally means striving or exerting, and as a term of jurisprudence it means the application by a lawyer (Faqeeh) of all his faculties to the consideration of the authorities of the law (that is the Qur'an, the Traditions and the Ijma) with a view to find out what in all probability is the law (in a matter which is not covered by the express words of such texts and has not been determined by Ijma).³ In other words, "Ijtihaad is the capacity for making deductions in matters of law in cases to which no express text or a rule already determined by Ijma is applicable."⁴

SCOPE

Ijtihaad is neither in E'tiqadaat (Faith) nor in 'Ibadaat (Prayers). It is only in Mu'aamlaat (worldly affairs), and that too in those matters only in respect of which no obvious text of the Qur'an and Hadees is available.

As Allama Shaatibi puts it, the command for 'Ibadaat (Prayers) is different from the command for 'Aadaat (worldly affairs). In the latter where there is silence on the part of the

1. Dictionary of Islam, by T.P. Hughes, p. 197.

2. Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 158

3. Jaame'ul Jawame', Vol. IV, p. 262 ; Mukhtasar, Vol. II, p. 289

4. Muhammadan Jurisprudence, by 'Abdur Rahim, p. 169

Lawgiver, there is option for a man to act according to his own understanding, but as regards the former there is no such option, and nothing against the Shari'at can be introduced through juristic deduction, because as against the 'Aadaat, the 'Ibadaat are bound by clear commands, and the reason for this difference is that in case of 'Aadaat our intellect can find out a way for us, but as regards 'Ibadaat we cannot know through our intellect as to what is the way of nearness to Allah.¹

SANCTION FOR IJTIHAAD

Sanction for Ijtihad is contained in Qur'an, Sunnah, Ijma of the Sahabah (Companions of the Holy Prophet), and sayings of the four Imams of Fiqah.

Qur'an has made it obligatory to ponder over the commands of Shari'ah and in case of difference of opinion to refer to Allah and His Messenger. In verse 2 of Chapter 59 (*Hashr*) it is said, "so take a lesson, O you who have eyes"; and in verse 59 of Chapter 4 (*Nisa*) it is said, "if you dispute about anything, refer it to Allah, and the Messenger."

The Holy Prophet has said, "do the Ijtihad because for whatever work a man is created, Allah makes that work easy for him",² and, "when a Haakim does correct Ijtihad in giving a decision, there are two rewards for him, but if he commits a mistake in it, there is one reward for him."³ When the Holy Prophet deputed Mu'aaz bin Jabal⁴ as a Qazi to Yemen, he said : O Mu'aaz, by what rule will you act ? He said : by the Law of the Qur'an . But if you find no direction therein ? , asked the Holy Prophet. He said : then I will act according to the Sunnah of the Messenger of Allah. But what if that fails ? , asked the Holy Prophet. Then I will do the Ijtihad and act upon it, he said. The Holy Prophet said : praise be to Allah Who has so deposed the delegate of His Messenger so as to satisfy him.⁵

1. Al-'Etisaam, Vol. II , p. 115. 2. Al-Ehkaam, by Aamidi, Vol. III , p. 107

3. Bukhari and Muslim, 4. A Companion

5. Mishkatul Masabeeh, Kitab-ul-Hudood, Bab-ul-'Aamale Fil Qaza'e Wal Khaufe Minho, No. 3565/7.

As regards the Ijma of the Sahabah, Abu Bakr, while deciding the case of a Kalalah (i.e. the one leaving no legal heir), said, "I decide by my opinion. If my opinion is correct, it is from Allah; but if it is wrong, it is from me and from Satan, and Allah and His Messenger are free from it".¹ On one occasion Umar said, "Umar does not know that Umar has found out the Haq (right thing) but he did not fall short in his endeavour." When a woman disputed the validity of prohibition against fixing larger amount of dower, Umar said in the open public, "the opinion of the woman is correct and the opinion of Umar is wrong."²

As regards the sayings of the Four Imams of Fiqah, according to Ibne Qayyim, Abu Hanifah and Abu Yusuf said, "it is not Jaa'iz (lawful) for anybody to follow our view unless he knows on what basis we have expressed our view."³

As reported by Mo'een bin Isa, Imam Maalik said, "no doubt, I am a human being. I can give correct as well as wrong decision. Ponder ever my opinion. Whatever opinion is in accordance with Qur'an and Sunnah, accept it; and whatever opinion is against Qur'an and Sunnah, leave it."⁴

Imam Shaafe'ee said, "if the word of the Holy Prophet is against my word, the word of the Holy Prophet is to be followed, and do not follow me; and if any Hadees is against my view, follow the Hadees and know that it is my Mazhab."⁵

Imam Ahmad bin Hambal said, "neither follow me, nor Maalik nor Shaafe'ee nor Sauri, but keep before you the sources which were before them i.e. the Qur'an and Hadees."⁶

MUJTAHID COMMITTING AN ERROR

From all these it is clear, firstly, that blind following is not permissible for the one who is learned and is able to do

1. Minhajul Usul, al-Kitab-ar-Raabe, Fil Qiyas.

2. Al-Ehkaam, by Aamidi, Vol. III, p. 150; Ehya-e-Uloom-ud-deen, by Ghazali, Vol. I, p. 39.

3. Al-Qaulul Mufeed, pp. 15-27. The word "anybody" actually means the learned and the one who can himself do the Ijtihad, and not the common man (Author)

4. Ibid

5. Ibid

6. Ibid

Ijtihad ; and secondly, that even the opinion of a Mujtahid can be wrong. Further, this also shows that if the Mujtahid, at any time, comes to know that his decision was wrong, it is not binding for him to follow it in a subsequent case. This is also clear from a letter¹ which Umar had written to Abu Musa Ash'ari, saying, "whatever you decided today, then, resiling from it, you decided correctly, then you should not desist from giving up the former decision and reverting to what is right, because whatever is right is to remain and nothing can wipe it out, and to revert to the right is better than remaining for long on the wrong."

PROCESS OF IJTIHAAD

Ijtihad primarily consists in the application of Qur'an and Sunnah, to the problems at hand, in their obvious meanings ; and if that is not possible, then deducing the law from their hidden or latent meaning or the intent implied therein through Qiyas (analogy), Ijma (consensus of opinion), Istehsaan (equity), Masalehul Mursalah (public welfare), or Istadlaal. This has been the way of all jurists right from the day of the Sahabah (Companions of the Holy Prophet). For this purpose the first and foremost requirement is the correct interpretation of Qur'an and Sunnah.

"The function of interpretation," to quote 'Abdur Rahim, "is to discover the intention of a person, whether he be the lawgiver, or an expounder of law, or any other person, either from his words or his conduct. The object of interpretation of conduct, which is called "interpretation by necessity", is in case of the lawgiver and the exponents of law to ascertain their intention with regard to what has been left unexpressed as a matter of necessary inference from the surrounding circumstances as furnishing an index to their minds."²

The same definition of "interpretation" applies to the texts of Qur'an and Sunnah. While interpreting the Qur'an and

1. Al-Ehkaamus Sultaniah, by Maawardi, p. 68 ; E'laamul Muqe'een, Vol. I, p. 72 ; Muqaddamah, by Ibne Khuldoon, p. 192.

2. Muhammadan Jurisprudence, by 'Abdur Rahim, p. 78

Sunnah ¹ it may be kept in mind that the words used in the texts of Qur'an and Sunnah are divisible in four categories having regard to (1) their grammatical application ; (2) their actual use ; (3) their meaning being clear or ambiguous or doubtful ; and (4) the ways in which the meaning of the words have been indicated.

As regards Category No. 1 , a word may be homonym (Mushtarak) i.e. meaning different things, or Specific (Khaas) i.e. applying to particular thing or things, or General ('Aam) i.e. applying to many things in general.

If it is a noun, it may be derivative (Sifat), or Proper ('Alam) or Generic (Isme Ginse). It may be Absolute (Mutlaq) or Limited (Muqayyad). It may be Particular (Mahood) or determinate (Nakarah).

With regard to the Specific words it may also be noted that they establish absolute propositions, as for instance the phrase "as such" or the word "then" and "for".

As regards the General words, according to the Hanafiah, they cover, to the extent of certainty, everything to which they are applicable. The Shaafe'iyah on the other hand say that they cover everything to which they are applicable but not to the extent of certainty.

As regards the conflicting texts, when two speeches of general character conflict, one of them sanctioning a certain thing in general words and another prohibiting it, the prohibitive speech will prevail. ² If it is possible to reconcile the conflicting propositions, then they should be reconciled. ³

If a general and a specific proposition conflict, and it is not known which of them is later in date, then both should be presumed of the same date and attempt should be made to

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Also see Chapter 4 "Sources of Fiqah"

2. Tauzeeh , p. 33.

3. Ibid, p. 34

reconcile them. according to Shaafe'iyah, the general should be accepted with limitations imposed by the specific. According to the Hanafiah, if they cannot be reconciled, then if the general is of a later date, the specific should be treated as repealed. If the specific is of a later date, then if they are connected in point of time, then the general should be limited to cases not covered by the specific ; but if they are not so connected, then the specific should be taken to have repealed so much of the general which is inconsistent with the specific.¹

The general may be qualified by independent (Mustaqal) or dependant (Ghair Mustaqal) proposition. In the former case it is known specification (Takhsees), and in the latter it is an exception (Istisna) or a condition (Shart) or quality (Sifat) or indicating the extent (Ghayat) of the general proposition.

A word may also be plural, meaning at least three, or singular meaning only one, either of them may also be preceded by the word "the". It may also be intermediate which negatives all but the one for whom it is used. It may also be in the generic sense, e.g., the word "whoever"; or specific sense e.g., the word "he who" , or "that which", or "all of them", or "all".

As regards Category No. 2, i.e. actual use of the word, a word may be in its original or primary sense known as the proper word (Haqiqat), as "Bai", "Nikah" , or "Talaq". etc. ; or in its secondary meaning known as tropical(Majaaz), which may be its dictionary (Lughvi), legal (Shar'ee), customary (usual), conventional (Urfi) or technical (Istilahi) , meaning.

Further, if the application of a word be what is intended thereby, it is called its meaning (Ma'ni) ; if it be what is to be inferred therefrom, it is called its sense (Mafhoom) ; and if a noun be used to denote the thing for which it was intended, it is called its name (Musamma).²

Tauzeeh , p. 79.

2. Talweeh, p. 141

The use of a word may be tropical or secondary with reference to a particular point of time, and proper with reference to another, e.g., the command to make over the property of the orphan to him when he becomes major ; or it may be expressive of the potentiality of a thing, e.g., the word "Muskir" or intoxicant for "Khamr" ; or mental (Zehni) ; or of an outward (Khariji) character also known as figure of speech (Isti'arah), e.g. , the word "food" is used for the "rain", or the word "faith" is used for the "act of piety".

A legal expression is also used in the proper or secondary or tropical sense. It may also be used to denote the cause. Whether a word is used in its proper or tropical or secondary sense is to be ascertained from the context and surrounding circumstances.

A word may be plain (Sireeh) i.e. the one disclosing the intention of the speaker, or allusive (Kinayah) i.e. the one not disclosing the intention of the speaker. Here it may be noted that offences punishable by the Hadd cannot be established by allusive words even though they form the confession by the accused.

As regards writings, they may also be plain or illusive, as follows :-

- (1) Writings which are legible and in the usual form known as "Mustabinun Marsumun" are plain ;
- (2) Writings which are legible but not in the usual form known as "Mustabinun Ghaira Marsumun", may they be on paper, engravings on walls or leaves of tress, are illusive;
- (3) Delineations which are not inscriptions or writings in a perceptible and lasting form known as "Ghairo Mustabinun" such as on the water or air, are not to be taken into account at all.

Gestures or signs (Isharaat) of the dumb and deaf are treated on the same footing as an illusive speech , and according to the accepted opinion, it makes no difference whether such a person is able to write or not. ¹

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Fatawaa-e-Aalamgiri, Vol. I pp. 533-534 ; Hidayah ; Kifayah, Vol. IX , pp. 447-449 ; Muhammadan Jurisprudence, by Abdur Rahim, p. 98.

As regards Category No. 3 , i.e. their meaning being clear or ambiguous or doubtful, if a word is apparent or manifest of meaning, it is known as "Zahir", and if it is more clear by means of the context, it is called "Nass" ; if it is so clear that there is no room for exposition and does not admit of limitation, it is known as "Mufassar" (explained) ; if it is still more clear having no possibility of repeal, it is called "Mohkam"

If a word be concealed by reason of an extraneous circumstance, it is called "Khafi" (obscure) ; if it is obscure of meaning but is capable of understanding, it is known as "Mushkil" (difficult) ; if its meaning cannot be discovered with-out help of another text, it is known as "Mujmal" (vague) ; and if its meaning cannot be discovered at all, it is called "Mutashabeh" (unintelligible). Instance of "Khafi" is the word "Saraq", that of "Mujmal" is the word "Riba", and that of "Mutashabeh" are the "Huroof-e-Muqatte'aat.

As regards Category No. 4 , i.e. the ways in which the meaning of the words have been indicated, a word conveys its meaning either by denoting the thing to which it is originally applied known as "Mauzu Lahu", or some part of it known as "Juz", or that which it necessarily implies as a consequence of its application in the text known as "Laazimuhul Muta'akhkhar." Such expression of the meaning may be directly by the text ('Ibarat) or indirectly by way of connotation or suggestion (Isharat). A word may also indicate something which its application in the text necessarily implies as a condition precedent (Iqtaza), or sometimes from what is expressed in a text, it may appear that it supplies to some other matter which comes within its intendment by the implication of the language (Dalalat). The Hanafiah call these modes of interpretation as "Istidlal." ¹

The words also indicate the nature of the commands, that is, whether they are obligatory, forbidden, permissible, and so on, which may be expressed in an imperative manner or in the

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Muhammadan Jurisprudence, by Abdur Rahim, pp. 100-101.

form of information or narration (Akhbaar), which may also be good (Hasan) or bad (Qabeeh) or right or wrong.

When an act is prohibited as being bad *per se*, it is known as "Baatil." If it is prohibited by reason of something which is a quality of the act itself, or because of some concomitant circumstance, the act is regarded legally as "Saheeh" (correct) in its essence, and the prohibition is taken to apply to that quality or circumstance. When the prohibition refers to the quality of the act, the act is "Fasid" (vitiated or faulty); and if it refers to a concomitant circumstance, it is "Makrooh" (abominaule).¹

After understanding the nature of the words used in the text for the purpose of correct interpretation, it may also be noted that sometimes the interpretation of one text is by another, which is known as "explanatory text"; sometimes by repealing of one text by another which is known as "Nasikh-o-Mansookh", and sometimes by necessary implication of what is left unsaid from what has been said known as "Bayan-e-Zarurat."

With regard to the interpretation, understanding and accepting as authority any Hadees of the Holy Prophet, it may be noted that the jurist should ascertain its nature as to whether it is "Mutawatir" (continuous), or "Mash-hoor" (well-known), or "Ahaad" (isolated); and also the qualifications of the "Raavi" (narrator) as to whether he is a Muslim, major, sane, intelligent, and possessing the power of retention (Zabt), has righteous conduct ('Adalat), is "Ma'roof" (well-known) and not "Majhool" (obscure). Further, the chain of narrators should also be complete upto the Holy Prophet, and the mode of narration should also be clear as to whether it is by "Haddasinah" (somebody relating to him) or "Akhbarina" (somebody informing him), and whether the original words of the Holy Prophet have been transmitted or only their sense and substance has been expressed by the narrator in his own words. It is also to be ascertained as to whether the narration consists of any practice of the Holy Prophet, or

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Muhammadan Jurisprudence, by Abdur Rahim, pp. 105-108.

whether it carries any imperative or prohibitory command, or it is merely a narration of an event.

While interpreting Qur'an and Hadees, the duty of the Mujtahid is to find out the real intent of the Law-giver, i.e. Allah and the Messenger of Allah, underlying the text of Qur'an and Hadees, to ensure its correct application to the facts of a case before him.

If in any matter no direct command is available in the obvious text of Qur'an and Hadees, but a command is available in some other similar matter, then the 'Illat or effective cause of that command should be found out and on basis of it the same command should be applied to the matter at hand if the same 'Illat is also available in it. This is known as Qiyas or analogy.

If the command deduced by Qiyas or analogy conflicts with any other text or Ijma, or does not appear to be fit owing to its narrowness and inadaptability to the habit and usages of the people and is likely to cause hardship, in that event the Mujtahid should accept a rule which in his opinion is better to advance the welfare of men and the interests of justice. This is known as Istehsaan.

If necessary, and in the absence of any direct command in the obvious text of Qur'an and Hadees, or Ijma, the Mujtahid may deduce the law based on general considerations of the public good. This is known as Istislah or Masalihul Mursalah. But as explained by Shaatibi, it does not give a total free hand to a Mujtahid. It is bound by three conditions, viz., deduction must be strictly according to the intent of Shari'ah ; the general intelligence of the people should accept it as correct ; and it should be to fulfil some real need or to avoid some real difficulty. ¹

-----1.
Al-E'tisaam, Vol. II , pp. 110-114

DEGREES OF IJTIHAAD

There are three degrees of Ijtihad as follows :

- (1) Ijtihad Fish Shara' ;
- (2) Ijtihad Fil Mazhab ; and
- (3) Ijtihad Fil Masa'il.

The first is absolute and complete, the second relative, and the third special.

(1) Ijtihad Fish Shara' is absolute independent legislation, and, therefore, the Mujtahid Fish Shar'a is the one who is founder of any School of Fiqah, as the four Imams of the Sunni Fiqah, namely Abu Hanifah, Maalik, Shaafe'ee and Hambal ; or the three Imams of the other three Schools of Sunni Fiqah which became extinct, namely, Auzaa'ee, Dawud Zaahiri, and Ibne Jareer Tabari, ; or the two Imams of the Shiah Schools of Fiqah, namely Zaid and Jafar al-Sadiq.

Absolute independence in legislation is the gift of Allah. He to whom it is given when seeking to discover the meaning of Divine Law is not bound to follow any other teacher. He can use his own judgment. This gift was bestowed on the jurisconsults of the first, and to some of the second and third centuries. The Companions, however, who were closely connected with the Holy Prophet, having transmitted immediately to their posterity the treasures of legislation, are looked upon as Mujtahideen of much higher authority than those of the second and third centuries. Thus Abu Hanifah said, "that which comes to us from the Companions is on our heads and eyes (i.e. to be received with respect) ; but as to that which comes from the Taaba'een, they are men and we are men."

Since the time of the Taaba'een this degree of Ijtihad has only been conferred on the Imams mentioned above. Among them the first four also "formulated the theories and principles of general applicability relating to interpretation and deductions. It

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Dictionary of Islam, by T.P. Hughes , p. 198.

is by the authority of these jurists that Qiyas (analogy), Ijma (consensus of opinion), Istehsaan (juristic preference), Maslehu Mursaleh (public good), Urf (custom and usage), and Istidlaal have been established as sources of law.”¹

(2) Ijtihad Fil Mazhab is relative legislation, and Mujtahid Fil Mazhab is, therefore, the one who, being the follower of any of the Schools of Fiqah, is able to differ on basic or side issues from his Imam and substitute his differing views through his own Ijtihad, and decide about the legal problems according to the principles of Shari’ah, as did Imam Abu Yusuf and Imam Muhammad among the Hanafiah, and Imam Muzni among the Shaafe’eeyah.

In fact, this degree has been granted to the immediate disciples of the great Imams, who have elaborated the systems of their masters. They enjoyed the special consideration of the contemporary Ulama, and their respective Imams who in some cases allowed them to retain their own opinions. In this respect Imam Abu Yusuf and Imam Muhammad, the two disciples of Imam Abu Hanifah, have acquired a unique position in that as a rule it is laid down that a Mufti may follow their unanimous opinion even though it be against the opinion of Imam Abu Hanifah.² Other jurists of this degree were Zufar and Hasan bin Ziyad among the Hanafiah ; and Ibnus Salah and Suyuti among the Shaafe’eeyah ; and Ibne Abdul Barr and Abu Bakr Ibnul Arabi among the Maalikiah.

These Mujtahids followed the fundamental principles laid down by their respective masters, for instance, that a rule of law sanctioned by consensus of opinion is of absolutely binding authority or that a deduction by analogy cannot be contradictory to a text of the Qur’an or Hadees. They did not, however, consider themselves bound to follow the masters in the application of general principles or in the arguments in particular cases, and they often propounded views opposed to their masters.³

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Muhammadan Jurisprudence, by Abdur Rahim, pp. 182-183.

2. Dictionary of Islam, by T.P. Hughes, p. 199.

3. Muhammadan Jurisprudence, by Abdur Rahim, p. 183.

(3) Ijtihaad Fil Masa'il is special legislation, and Mujtahid Fil Masa'il is, therefore, the one who is competent to expound the law on particular questions, which had not been settled by jurists of the first and second degrees, and a *fortiori* is not competent to oppose them on any matter of principle. But on fresh points and in cases which had not been clearly dealt with by higher authority, a jurist of this degree is at liberty to lay down the law in conformity to the principles of his School.

Among the Hanafiah, Khassaaf, Tahawi, Sarkhasi, Karkhi, Baizawi, Halwani and Qazi Khan ; ¹ and among the Shaafe'eeyah, Ghazali, attained to this position.

MUJTAHIDUNUL MUQAYYID

These three classes of the jurists are admittedly the classes of the Mujtahids. After them come the four classes of jurists who are known as the Muqallids. They do not expound the law. They simply explain, or draw inference, or classify the dicta of the Mujtahids preceding them, and decide between them. They are also known as "Mujtahidunul Muqayyid" or Mujtahids with a limited sphere of exposition like those of the last two degrees though of inferior authority as distinguished from Mujtahids of the first degree i.e. the Mujtahidunil Mutlaq or Mujtahids with absolute powers. ² These are of four grades as follows :-

- (1) those who draw inferences and conclusions from the law laid down by higher authorities, and explain and illustrate what has been left doubtful or general. They are known as "As-haabut Takhreej". Abu Bakr Razi was of his rank.
- (2) those who discriminate between two conflicting views held by jurists of higher rank, and pronounce "what is better", or "more correct", or "preferable", and so on. They are known as "As-Haabut Tarjeeh." Qaduri and the author of Hidayah were of this rank.

-----1.
Muhammadan Jurisprudence, by Abdur Rahim, pp. 183.

2. Durrul Mukhtar Vol. I, p. 57

- (3) those who have authority to say whether a particular version of the law is strong or weak, namely, whether it is a manifest or rare version of the views of the Mujtahids of his School. They do not include in their books rejected or weak reports of the law. They are known as "As-haabut Tasheeh." Sadrush Shari'ah (known as Abu Hanifah the second), and the author of "Al-Mukhtaar" (not the Durrul Mukhtaar) are of this rank.
- (4) those who cannot even decide whether a particular rule of law is strong or weak in authority. They accept what jurists of the above mentioned ranks have laid down, and decide new matters coming to them on basis of analogy of what has already been laid down in similar matters, taking into account the changes, if any, in the customs and affairs of men, and adopting a rule which may be most suitable in the circumstances and in accordance with the usage. ¹

QUALIFICATIONS OF MUJTAHID

Sadrush Shari'ah, following Fakhru'l Islam, gives a short description of the qualifications of a Mujtahid. ² According to him, a Mujtahid (jurist) should have knowledge of Qur'an together with its meaning, dictionary and legal, and its various divisions, of Traditions including the texts and the authorities thereof, and of the rules relating to analogical deductions.

The author of *Jaame'ul Jawame'* ³ ; on the other hand, gives a much wider description of the qualifications of a Mujtahid, saying that he must be major, possessed of understanding and of sufficient intellectual acuteness to be able to grasp the drift of a speech ; must have average knowledge of the Arabic language, grammar and rhetorics, of the principles of jurisprudence and of the sources of law, that is, the Qur'an and the Traditions, must be well versed in the main principles of Shari'ah or the legal code so as to be able to ascertain the intention

-----1.
Ibid ; also see *Muhammadan Jurisprudence*, by Abdur Rahim, pp. 183-185.

2. These qualifications are of Mujtahid-e-Mutlaq, i.e. Mujahid of the First Degree.

3. Tajuddin Abdul Wahab Subki (d. 771 A.H.)

of the lawgiver ; must know the repealing and the repealed texts, the circumstances in which the texts of the Qur'an were revealed, and the rules relating to the continuous and the isolated Traditions, and be able to discriminate between authentic Traditions and Traditions of weak authority, and he must know the history of narrators of Traditions, but in this connection it would be sufficient for a jurist in our days to refer to the authority of one of the imam of Traditions such as Ahmad, Bukhari, and Muslim. ¹

He further says that there may be a jurist of a lower rank namely, "Mujtahidul Mazhab", that is, a jurist following a particular School of law. Such a jurist must be able to apply the principles laid down by the founder of his School to particular cases.

He further says that there are jurists of a still narrower sphere of exposition ; namely, "Mujtahidunul Futiya", that is, those who are competent to give Fatwaas or, in other words, to decide as to which of the conflicting views reported from the jurists of higher rank is correct. ²

TAQLEED

DEFINITION

Literally, the word "Taqleed" means "winding round". It also means (1) putting a wreath round an animal destined to be slaughtered at Mecca, (2) girding with a sword, as a sign of investiture of a high dignitary. It is also a law term in Muhammad Law for the following of a religious leader without due inquiry. ³

Taqleed means following the opinion of another person without knowledge of the authority for such opinion. ⁴ As a term

-----1.
Muhammadan Jurisprudence, by Abdur Rahim, pp. 169-170. Also see Dictionary of Islam, by T.P. Hughes , p. 199 ; and Falsafah-e-Shari'at-e-Islam, ibid, p. 216.

2. Muhammadan Jurisprudence, Ibid.

3. Dictionary of Islam, by T.P. Hughes , p. 628

4. Jaame'ul Jawame, Vol. IV, p. 276 ; Mukhtasar Vol. II , p. 307 ; Taqreer wat Tehbeer, Vol. III , p. 340 ; Al-Ehkaam by Aamidi, Vol. III p. 166. Muhammadan Jurisprudence, ibid, p. 171

of jurisprudence, it means following the opinion of a jurist in matters which have not been dealt with by an express Qur'anic or Traditional text or by Ijma, for in matters which have been so dealt with there is no room for juristic opinion and all persons, whether jurists or not, would be equally bound to accept such laws.¹

SANCTION FOR TAQLEED

Qur'an says : Fas'alu Ahlaz Zikre Inn Kuntum Laa Ta'lamoona, i.e. ask the followers of the Reminder, i.e. those who have knowledge, if you do not know (*Nahl*, 16:43 ; *Ambia*, 21:7)

APPLICATION

As it is clear from the definitions given above, Taqleed applies only in the case of those who do not possess the qualification of a jurist. If a jurist has formed an opinion of his own on a particular question, it is forbidden (Haraam) to him to follow in preference the opinion of another jurist to the contrary. And even if a man who does not possess the qualifications of a jurist but is learned in the law ('Aalim) holds a certain view on a particular question, he ought to act upon it though the contrary view may have been sanctioned by a jurist.²

As regards the layman, or a student who has not yet acquired the qualification or capacity to do Ijtihad, his duty is to follow the guidance provided by the jurists and the learned ones.

For him the only way is that of Taqleed. It is for such a man that it is said, "Fatwa is for an illiterate just as Ijtihad is for Mujtahid,"³ or, "the authority of the Fatwaas of the Mujtahids for the common men is like the authority of the 'Dala'il-e-Shara'iyah' for the Mujtahids."

⁴ According to Maalikiah and Shaafe'eyah, and some earlier Hanafi jurists, a common man is to follow the learned one whom he consults even if the latter belongs to a School other than his own.⁵

-----1.
Muhammadan Jurisprudence, by Abdur Rahim, p. 171

2. Jaame'ul Jawame', Vol. IV, p. 264

3. Al-Majame' and its commentary, p. 326 4. Al-Muwafiqat, Vol. IV, p.292

4. Mukhtasar, Vol. II, p. 309

In fact the occasion for Ijtihad is for the man who devotes himself wholeheartedly to the study of Fiqah and acquires knowledge in it and becomes qualified to do Ijtihad. But the people who are engaged in other affairs of life and have no knowledge of Fiqah and the capacity to do Ijtihad, for them it is obligatory to follow the Mujtahids. It is for them that Qur'an says, "ask the followers of the Reminder, that is, those who have knowledge, if you do not know" (*Nahl*, 16:43 ; *Ambia*, 21:7).

SOME QUESTIONS RELATING TO TAQLEED

While studying the Ijtihad we have noted that while Ijtihad in its first degree has ended on the four Imams of the Sunni Fiqah – the founders of the four Sunni Schools of Fiqah, Ijtihad in its second and third degrees – the last one further divided in four degrees of still lower ranks, has continued, and even today the jurists decide about new problems by their own Ijtihad keeping in view the basic principles laid down by the founders of their respective Schools of Fiqah. Still the Wahabiah¹ and the Salafiah² movements came in the field to upset the doctrine of Taqleed, and open once again the door of absolute Ijtihad. On account of these movements the following important questions arise with regard to Taqleed.

- (1) Must a Muslim of the present day adopt one of the current Schools of legal thought or is he entitled to say, "my law is the Qur'an and Sunnah, but in matters not expressly dealt with therein, I am free to make deductions therefrom according to the best of my lights, independently of what the others have said" ; or can he say,
- (2) I adhere to the tenets which are common to all the four Sunni Schools, and that on any question on which they differ, I am free to adopt the view of such one of them as may commend itself to my judgment" ; or
- (3) If he is a follower generally of one of the four Schools, is he at liberty on a given question to adopt the view of any other Sunni School ; or

-----1.

Founded by Shaikh Abdul Wahab (d. 1206 A.H.) of Najd (Arabia)

2. Founded by Syed Jamaluddin Afghani (d. 1897 A.D.) and his disciple Shaikh Muhammad Abdodu (d. 1905 A.D.)

- (4) Is it open to a Qazi or a judge to base his judgment in a question of juristic law on a view, which is opposed to that held by the jurists of the School to which he belongs, or of the School to which the litigants belong, if such view has the support of one or more of the other Sunni Schools and is, in his opinion, more in consonance with the requirements of justice than the other view.

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As regards question No. 1, it may be noted that there is nothing in the books of Usul and Fiqah which precludes the recognition of any jurists other than the ancient doctors,² but it is also a fact that the four Imams were the first and the last to lay down the theories and principles of Usul and Fiqah which have universally been followed for the over many centuries, and so for there has not come forward any to disprove the truth and importance of their theories and principles, or to propound a better theory or principle to govern the Islamic jurisprudence, and the theories and principles they propounded still hold good and are effective as they did twelve hundred years before. Not only this, but even the juristic deductions which they made on the problems, actual as well as imaginary, which the Muslims had or have to face in their individual as well as social lives, have proved to be perfectly correct, not only according to Qur'an and Sunnah but also on basis of rational understanding, so much so that even now unexpected problems arising in today's most ultra modern world are being easily solved by the jurists in the light of what the four Imams have laid down centuries before, and that is the reason that it has been rightly said that absolute legislation has ended on them, and therefore, now one has no option but to follow either of the four Imams.

Further, it is also a fact that the four Imams have laid the foundation of their theories, principles, and juristic deductions, on all matters relating to Fiqah, on Qur'an and Sunnah. Even the Ijma, Qiyas, Istehsaan, Maslehul Mursalah and Istidlaal, which they have introduced for the purpose of juristic deductions, are strictly to remain within the limits of Qur'an and Sunnah.

-----1.
 Muhammadan Jurisprudence, by Abdur Rahim, p. 172. 2. Ibid, p. 173

Therefore, there is nothing basically of their own to be disputed and differed with on personal reasons. There remains, therefore, no justification at all in rejecting their authority or upsetting the Fiqah which they have laid down, and which has also stood the test of the time down the ages.

In this connection it also worth noting that, even in the earliest ages, three jurists of high caliber, namely Auzaa'ee (d. 157 A.H.), Dawud Zaahiri (d. 270 A.H.), and Tabari (d. 310 A.H.) put forward their own independent absolute views, so much so that some people also accepted them and three more Schools of Fiqah came into existence, but they could not gain the field as against the four Imams and their Schools, and they sooner or later became extinct, and now there is no follower of them in the Muslim world. Similarly, if even now any jurist of extraordinary caliber comes forward and introduces his new and novel ideas, and some people also accept his views and start following him, it will be nothing more than creation of yet another School of Fiqah, but it will not in any way finish the truth of what the four Imams have laid down, and it is just possible that sooner or later it will also become extinct like the three mentioned before.

Here it may also be mentioned that the idea of getting rid of the well-settled Fiqah of the four Imams has been introduced by Shaikh Abdul Wahab (d. 1206 A.H.) of Najd (Arabia) whose followers are known as the Wahabiah or the Ahle Hadees (as they call themselves) who claim not to follow any Imam and therefore are also known as the Ghair Muqallids. But the Ummah as a whole did never subscribe to their views, and they are of a very negligible number. Other names in connection with such a movement are those of Syed Jamaluddin Afghani (d. 1897 A.H.) and his disciple Shaikh Muhammad Abdohu (d. 1905 A.D.) who are the founders of the "Salafiah" movement in Egypt whose slogan was, "revert to Qur'an and Sunnah, and fight against blind Talqeed and Bid'aat (innovations)."¹

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The movement to challenge the authority of the four Imams, and acquire the freedom of absolute legislation for everybody, is now being exploited by anti-Islam elements as well as their agents among the Muslims, whose main aim is to create confusion and rift between the Muslims and break their unity even as regards the Fiqah¹ on which they have remained united for the last over many centuries. Otherwise neither juristic deduction is the function of everybody nor is it at all necessary for everybody to decide for himself what to do in any matter relating to Fiqah. It is exclusively the function of the jurists and they have undoubtedly been performing it with utmost efficiency throughout the Islamic History and in this sense Ijtihad is still continuing and shall continue as such for all times to come. For the common men the only right way is that of Taqleed i.e. to follow the jurists and the Ulama in all matters relating to religion. That is the only safest way to act upon the Shari'ah, also necessary for solidarity of the Muslim Ummah.

In fact the ultimate aim of the exploiters of this movement is to make the Muslims give up the Islamic Shari'ah once for all and become free lancers like the Jews and Christians. In this connection, the first step is to give up the Fiqah laid down by the four Imams on the false pretext of adhering totally to Qur'an and Sunnah because they say that Fiqah has been made by human beings, and we ourselves being the human beings also have every right to understand Qur'an and Sunnah and follow them according to our own understanding, and are therefore not bound to follow any of the Imams who had been centuries before and had no occasion to face the problems which we have to face in today's ultra modern world. The second step will be to get rid of Sunnah on another false pretext that it is not authentic, and that the Holy Prophet and his first four Caliphs had discouraged, rather prohibited, the recording of the Ahadees, and that compilations of Ahadees were prepared two hundred years after the Holy Prophet from a mass of over seven lac Ahadees which shows that Ahadees were also forged on a large scale, and there-

-----1.
They have already succeeded in breaking the unity of the Muslims as regards politics, firstly in the days of Ali the fourth Caliph, then on the end of Abbaside rule and finally on the end of Usmania Caliphate.

fore even for the present compilations it cannot be definitely said that all Ahadees therein are authentic and binding, and that Qur'an is the only authentic and complete Book in the presence of which nothing more is required, as the Chakralvees, Perwezees or the so called Ahle Qur'an (in Pakistan) say and try to deviate the Muslims from the Path of Sunnah. Here it may be noted that news for such an absurd ideology was already given by the Holy Prophet in his Ahadees.¹ After making the Muslims agree with this view, God forbid, the final step will be giving up of the Qur'an itself, as being a Book revealed fourteen hundred years ago and accordingly not suitable for the today's ultra modern world. Such ideology has already started coming fourth from the modern scholars who have received education from the Jew and Christian teachers of Europe and America. They openly say that performance of regular prayers five times a day or fasting for complete one month of the Ramazaan are not possible for today's busy man who is all the time busy in Science and Technology, or journey throughout the world round the clock, or that sacrifice of animals on Eidul Azha is mere waste of money, or that privacy of the women, or the law of inheritance giving double share to men, or ignoring the children of pre-deceased sons, are against human rights, and so on.

Such absurd ideology or movement, however, cannot be successful, because the Muslim Ummah can never subscribe to it. The Holy Prophet has already said that, "my Ummah will never unite on error,"² and no doubt there can be no error for the Ummah worst than the giving up of Qur'an, Sunnah or the Fiqah. The only way, therefore, to save one's self as well as the Muslim Community from the evils of this movement is to adhere more strictly to the doctrine of Taqleed and follow with sincerity the Fiqah laid down by the four Imams which fully satisfies the requirements of the Muslim society of even today as it ever satisfied the same during the last over fourteen hundred years.

-----1.
Mishkatul Masabeeh, Kitab-ul-Eiman, Baab-ul-E'itisaam Bil Kitab Was Sunnah, Ahadees No. 155/24 and 156/25

2. Mishkatul Masabeeh, Ibid, Hadees No. 163/32

Still if anybody claims to be a jurist of the first degree, he has every right to do so, but firstly he will have to prove himself to be worthy of it, on basis of caliber, intelligence, knowledge, experience, and character, and secondly he will also have to satisfy the people, particularly the learned ones, that the theories, and Fiqah laid down by the four Imams, are incorrect, and that the views propounded by him are better and more correct on basis of Qur'an, Sunnah, and rational understanding. Otherwise his word will also be as absurd as that found in some of the so called modern legislations¹ made in some of the Muslim countries, particularly relating to polygamy, pronouncement of three Talaqs at one and the same time, inheritance by the children of a pre-deceased son, when other sons daughters are alive, and so on, which legislation has undoubtedly been done by modern westernised scholars under the influence of their non-Muslim teachers.

When all this has been said, it may also be put on record that jurists and Ulama are the need of all times to come to decide about the new problems. Therefore the better and more realistic course is to safeguard, and take fullest help from, the Fiqah laid down by the four Imams and their disciples and all the great jurists succeeding them in solving the new problems arising out of the fast scientific developments in the today's ultra modern world, rather than to give it up and involve the largest majority of the Muslim Ummah, i.e. the Sunnis – Hanafi, Shaafe'ee, Maaliki or Hambali, who are ninety percent of the total Muslim population of the world, in confusion and chaos, and break the unity which is existing between them for the last over fourteen hundred years.

As regards question No. 2, Ibne Salah has said that for a Muqallid, i.e. follower, the Taqleed of one of the four Imams is Jaa'iz (permissible), and not of anyone else, because the principles of all these four Schools have already been well – settled and fully established, and a common man is never aware of all possible circumstances relating to any problem. It is there-fore always safe to follow any one of these Schools.²

-----1.

See Chapter 9 "Modern Legislation"

2. Commentary of "Al-Mihaaj", by Asnawi, Vol. III, p. 191

Even otherwise, from the question it is clear that if a man follows the agreed views of the four Imams, and in case of disagreement between them, follows the view of either of them as may commend to himself, it is virtually the following of the Imam whose view he follows in case of disagreement between them. The better course for him, therefore, is that he should follow one Imam only.

As regards question No. 3, the general view is that the follower of one of the four Sunni Schools is at liberty on a given question to adopt the view of any other Sunni School, but when he acts upon a Fatwa of one School, he should not also act upon the Fatwa of another School on the same question.¹

As regards question No. 4, when a question depends upon juristic deduction, a Qazi belonging to one School of Sunni Law may decide it according to other School, if he prefers that view, or he may pass on the case to Qazi of the other School, if one is available, for decision.² This was also the view of the primitive jurists.

Ibne Humaam (d. 861 A.H.), however, laid down that a Qazi of the present day should not be allowed to decide cases contrary to the law of the School to which he belongs, as he might do so from improper motives. He justified his view on the ground that when the Sultan appoints a Qazi to administer a particular School of Law, he would be acting contrary to the order of his appointment if he administers any other law.³ Another argument in support of his view is that the Qazi in whose favour Abu Hanifah and his disciples conceded so much latitude was meant to be a Mujtahid in the sense of an independent expounder of law.⁴

-----1.

Al-Ehkaam, by Aamidi, Vol. III, p. 174.

2. Fatawaa-e-Qazi Khan, Vol. II, pp. 451-159; Fatawaa-e-Aalamgiri, Vol. III, pp. 439-441.

3. Fathul Qadeer, Vol. IV, p. 397

4. Muhammadan Jurisprudence, by Abdur Rahim, p. 181.

The view of Ibne Humaam continued till the Sultan of Turkey promulgated an order enjoining upon the Qazi not to follow "weak opinion", and thus the doctrine of Taqleed received its present elaborate and apparently rigid form, and it appears that one Allama Qasim was chiefly instrumental in giving it vogue. ¹

-----1.
Muhammadan Jurisprudence, by Abdur Rahim, p. 182.

CHAPTER 4

SOURCES OF FIQAH

DEFINITION

The word "Sources" stands for the Arabic word "Usul" which has been defined by the scholars as :

i.e. "Usul-e-Fiqah" or "Sources of Fiqah" is the science of such principles by the reasoning of which the laws are deduced. ¹

In other words, the sources from which, through rational understanding, laws for application to the problems arising in the individual as well as social life of man are deduced by the scholars, are known as the "Sources of Fiqah" or "Usul-e-Fiqah."

Sources of Fiqah are (1) "Suwari" as well as (2) "Maaddi". The former provides the "sanction", and the latter provides the "substance", for the promulgation of laws. ²

The basic sources of Fiqah are four, namely, Qur'an, Sunnah, Ijma and Qiyas. The scholars have, however, introduced eight other sources also, namely, Istehsaan, Istidlaal, Istaslah or Masaalehul Mursalah, opinions of men of authority, Ta'amul, Urf, previous Shari'ats, and law of the State. But these sources are actually covered by the basic four sources, and, therefore, have no independent status of their own. Thus, Istahsaan, Istidlaal, Istaslah or Masaalehul Mursalah come under Qiyas ; opinions of men of authority, if based on Qiyas, come under Qiyas, or, if based on Sama', come under Hadees ; Ta'amul and Urf come under Ijma ; Previous Shari'ats come under Qur'an and Sunnah ; and Law of the State comes under Ta'amul which itself comes under Ijma.

1. Sharhe Musallamus Suboot ; Fiqah-e-Islami Ka Taareekhi Pas Manzar, by Maulana Muhammad Taqi Amini, p. 57. 2. Usul-e-Qanoon, p. 189.

Thus the basic sources are only Qur'an, Sunnah, Ijma and Qiyas, and since the other eight come under either of these four, we will therefore, discuss them along with their relevant basic sources.

As regards the four basic sources also, it is to be noted that the first and the foremost source is Qur'an, and since Qur'an itself commands the Muslim to obey the Messenger of Allah,¹ and accept whatever the Messenger of Allah gives and abstain from whatever he forbids,² and declares that whoever obeys the Messenger of Allah, he indeed obeys Allah,³ therefore the second basis source is the Sunnah. Further, as regards Ijma and Qiyas, the sanction for them is contained in the Qur'an as well as Sunnah of the Holy Prophet.⁴ and hence they are the third and the fourth basic sources of Fiqah.

Further, since the first and the foremost source, as stated above, is Qur'an and sanction for the Sunnah is contained in the Holy Qur'an itself, therefore Sunnah always remains within the limits of Qur'an. In other words, Sunnah never issues any command contrary to Qur'an. The Holy Prophet has himself said that while Qur'an may supercede Sunnah, the Sunnah never supercedes Qur'an. Similarly, Ijma and Qiyas are always to remain within the limits of Qur'an and Sunnah. In other words, no law can be made on basis of Ijma and Qiyas contrary to Qur'an and Sunnah.

Section 1 . QUR'AN

REVELATION

Qur'an is the first and the foremost Source of Fiqah. It is the fourth and the final Heavenly Book which was revealed to the Holy Prophet Muhammad (peace be upon him) through the angel Gabriel⁵ Its revelation commenced in 610 A.D., when he was 41 years of age, while he was busy in meditation in the Cave

1. *Maa'idah*, 5:92

2. *Hashr*, 59:7

3. *Nisa*, 4:80

4. We will give the relevant verses of Qur'an, as well as Ahadees, under Ijma and Qiyas.

5. *Baqarah*, 2:97

of Hira in a mountain (known as Jabl-e-Noor) in the outskirts of Mecca, in the Lailatul Qadr ¹ (Night of Majesty) in the month of Ramazaan ² (9th month of Hijrah), with the revelation of the following five verses of *Suratul 'Alaq* (Chapter 96) :

i.e. read in the Name of your Lord, Who creates – creates man from a clot. Read and your Lord is Most Generous, Who taught by the pen, taught what he knew not (*Alaq*, 96:1-5).

The revelation of Qur'an was in parts, revealed from time to time, according to the need of the occasions arising in the individual as well as social life of the Muslims. The revelation continued till 632 A.D. for about 22 years, 2 months and 22 days, and completed in the 10th year of Hijrah, ³ when the Holy Prophet was 63 years of age, with the revelation of verse 3 of *Suratul Maa'idah* (Chapter 5) which reads :

i.e. this day have I perfected for you your religion and completed My Favour to you and chosen for you Islam as religion (*Maa'idah*, 5:3).

MANNER OF REVELATION

As regards the manner in which Qur'an was revealed, the following points are to be noted :

- (1) the verses relating to Fiqah were mostly revealed on occasions arising out of the problems which the Muslims, individually or collectively, had to face. They are known as the "Asbaab-un-Nuzool", and are of primary importance in understanding the real meaning of the relevant verses.

1. *Qadr*, 97:1

2. *Baqarah*, 2:185

3. On the 9th Zil Hijjah, during the Hajjatil Wadaa', in Arafat.

As for instance, verse No. 221 of Chapter 2 *Baqarah*, prohibiting marriage with polytheists, was revealed when Hazrat Marsad, a Companion of the Holy Prophet, sought permission to marry an idolatress.

- (2) the verses relating to Fiqah were also revealed in answer to questions put to the Holy Prophet, e.g., verse 217 of Chapter 2 (*Baqarah*) relating to fighting, or verse 219 of the same Chapter relating to intoxicants, or verse 220 of the same Chapter relating to the orphans, or verse 222 of the same Chapter relating to menstruation, and so on.
- (3) verses relating to Fiqah revealed without any occasion for its revelation or in answer to any question are very few in number.
- (4) revelation has been in piecemeal. Verses revealed on different occasions have been placed in their relevant Chapters according to the directions of the Holy Prophet.

PERIOD OF REVELATION

The period of revelation is divided in the Mecci and the Madani periods. The Mecci period is of 12 years, 5 months and 13 days starting from the commencement of the revelation in 610 A.D. when the Holy Prophet was 41 years of age, and ending in 622 A.D. on his migration to Medinah at the age of 54 years. The Madani period is of 9 years, 9 months and 9 days starting from his migration to Medinah in 622 A.D. at the age of 54 years and ending in 632 A.D. or 10th year of Hijrah when he was 63 years of age.

The qualification of Mecci or Madani is, however, not with reference to the place of revelation, but it is with reference to the Mecci or Madani life of the Holy Prophet, or, in other words, before or after migration of the Holy Prophet from Mecca to Medinah, and that is the reason that many verses revealed at Mina, Arafat, or during the Me'raaj, before the Migration are included in the Mecci Chapters though they were not revealed at Mecca proper. Similarly, there are many verses revealed after Migration, at Hudaibiah at the times of Treaty with the Non-believers, or even at Mecca at the time of victory over Mecca, or

in Arafaat during the Hajjatil Wadaa, are included in the Madani Chapters although they were not revealed at Madinah. Besides this, some chapters are completely Mecci and some completely Madani, and some Mecci chapters also contain verses revealed after migration e.g., Chapter 7 (*Aaraaf*) is Mecci but its verses 163 to 173 were revealed in the Madani period. Similarly, Chapter 22 (*Hajj*) is Madani but its verses 52 to 55 are Mecci.¹

ARRANGEMENT OF QUR'AN

The total number of verses revealed are more than six thousand in number which are divided in 114 Chapters, known as "Surats", 558 Sections known as "Ruku" , 7 Stages known as "Manazil" , and 30 Parts known as "Siparaas".

Out of the 114 chapters, 86 are Mecci and 28 Madani. The Mecci chapters are mostly short and deal with the Faith and the Day of Judgment, and address the mankind in general by the words "Yaa Ayyuhan Naas," and contain no commands relating to Fiqah. On the other hand, the Madani chapters are long and generally address the Muslims by the words "Yaa Ayyuhallazina Aamanoo, and contain the commands relating to Fiqah covering all affairs of the human life, individual as well as social.

The 86 Mecci chapters are : Faatiha, An'aam, Aa'raaf, Yunus, Hood, Yusuf, Ibrahim, Hijr, Nahl, Bani Israil, Kahf, Maryam, Taa Haa, Ambia, Mo'minoon, Furqan, Shu'araa, Naml, Qasas, Ankaboot, Rum, Luqman, Sajdah, Saba, Faatir, Yaa Seen, Saaffaat, Swaad, Zumar, Mo'min, Haa Meem, Shura, Zukhruf, Dukhaan, Jaasiah, Ahqaaf, Qaaf, Zaariyaat, Toor, Najm, Qamar, Waaqi'ah, Mulk, Qalam, Haaqqah, Ma'arij, Nooh, Jinn, Muzzammil, Muddassir, Qiyamah, Mursalaat, Naba, Naazi'aat, Abasa, Takweer, Infitaar, Tatfeef, Inshiqaaq, Burooj, Tariq, A'laa, Ghashiyah, Fajr. Balad, Shams, Lail, Duha, Inshirah, Teen, Alaq, Qadr, Aadiyaat, Qaari'ah, Takasur, Asr, Humazah, Feel, Quraish, Maa'oon, Kausar, Kaafiroon, Lahab, Ikhlaas, Falaq, Naas.

1. Manahilul Irfan, Vol. I, p. 192 ; Ma'ariful Qur'an, Vol. I, pp. 26-27.

The 28 Madani Chapters are : Baqarah, Aale Imran, Nisa, Maa'idah, Anfaal, Taubah, R'ad, Hajj, Noor, Ahzaab, Muhammad, Fatha, Hujuraat, Rahman, Hadeed, Mujadalah, Hashr, Mumtahirah, Saff, Jumu'ah, Munafiqoon, Taghabun, Talaaq, Tehreem, Dahr, Bayyinah, Zilzaal, Nasr.

The arrangement of the Holy Qur'an, as we have, is not according to the order of actual revelation. It is actually according to the instructions of the Holy Prophet under the Divine Guidance." ¹ Whenever the Holy Prophet received the revelation, he used to dictate it to his scribes and also direct them where to place it in the arrangement of its relevant Chapter.

THE SCRIBES OF QUR'AN

The scribes of Qur'an, according to some, were 26 in number ; but according to Halabi, ² they were 42 including the most prominent ones, namely, Abu Bakr, Umar, Ali, Aamir bin Faheerah, Abi bin Ka'b, Zaid bin Sabit, Mu'awiyah bin Abi Sufyan, Sabit bin Qais bin Shamaas, Yazeed, Mughirah bin Sho'bah, Zubair binul Awaam, Khalid bin Waleed, Ula binul Hazrami, Amr binul Aas, Abdullah binul Hazrami, Muhammad bin Muslimah, and Abdullah bin Abdullah bin Abi Ibne Salool. They used to write down the verses on stones, bones, leaves, leather, and also paper which were kept with the Holy Prophet, and also committed to memory by the Companions, particularly Mu'aaz bin Jabl, Abi bin Ka'b, Abdullah bin Mas'ud, Saalim bin Ma'qal, Zaid bin Sabit, Abu Zaid, and Abud Darda.

COMPILATION OF QUR'AN

The manuscripts of Qur'an thus preserved in writing as well as memory were first compiled in the form of a book by Zaid bin Sabit, under the orders of Abu Bakr at the instance of 'Umar. This compilation remained with Abu Bakr, then with 'Umar, and after him with Hazrat Hafsah – the daughter of 'Umar and wife

1. Qiyamah, 75:17.

2. Seeratul Iraqi (Tareekh at-Tashree' al-Islami", by Muhammad al-Khizri - Urdu translation "Taareekh Fiqah-e-Islami", by Abdul Salam Nadvi, p. 9)

of the Holy Prophet. When reports came to Usman, during his caliphate, that there were variations in the reading of Qur'an by different people, he called for the compilation of Qur'an from Hazrat Hafsa and commissioned Zaid bin Sabit, 'Abdullah bin Zubair, Sa'ad binul Aas, and 'Abdur Rahman ibne Haris ibne Hishaam, to prepare more copies from it, and sent the same to different regions of the Islamic State to be used as the official compilation of the Holy Qur'an. He then returned the original copy to Hazrat Hafsa, and also ordered for burning away the private copies, if any, kept by the individuals, to avoid any variation in the recitation.¹ The same is the copy of the Holy Qur'an handed down to us. It is complete, pure, and chaste, in its form as well as contents, in all respects, whatsoever.

INTERPRETATION OF QUR'AN

The first and the most authentic and exact interpretation of the Holy Qur'an came from the Holy Prophet himself. He not only read out the Qur'an to the people, particularly his Companions, but also explained it to them and put it in actual practice in the individual as well as social life. After the Holy Prophet, his worthy Companions, including particularly Abu Bakr, 'Umar, 'Usman, 'Ali, 'Abdullah bin Mas'ud, 'Abdullah bin 'Abbas, Abi bin Ka'b, Zaid bin Sabit, Abu Musa Ash'ari, and 'Abdullah bin Zubair were the chief interpreters of Qur'an.² The interpretation of Qur'an by 'Abdullah Ibne 'Abbas is also available in writing and is known as "Tafseer Ibne 'Abbas." It has also been translated in the Urdu language.

In the early period of the Abbaside rule, interpretation of Qur'an took the form of a separate science, and many important and prominent commentaries of the Holy Qur'an were written, viz., "Tafseerul Kabir", entitled as "Jaame'ul Bayan Fi Tafseerul Qur'an", by Ibne Jareer Tabari (d. 310 A.H.); "Tafseer-e-Kashshaaf", by Qasim Mahmood bin 'Umar Khawarazmi Zamakhshari (d. 538 A.H.); "Mafatihul Ghaib", known as "Tafseer - e - Kabeer", by Fakhruddin Razi (d. 606 A.H.);

1. Taareekhul Qur'an, by Abu 'Abdullah Zanjani, pp. 17-57 (Qairo, 1935);

2. Al-Itqaan Fi Uloomul Qur'an, by Jalaluddin Suyuti, Vol. II, p. 187

“Tafseer-e-Baizawi”, entitled as “Anwaarut Tanzeel wa Asraarut Taaweel”, by ‘Abdullah bin ‘Umar al-Baizawi (d. 685 or 691 A.D.); “Tafseer Jalalain”, by Jalaluddin Mahaali and Jalaluddin Suyuti (d. 911 A.H.); “Tafseer Al-Qurtabi” entitled as “Al-Jaame’ul Ehkaamul Qur’an”, by Abu ‘Abdullah Muhammad bin Ahmad bin Abi Bibr bin Farah Al-Qurtabi (d. 671 A.H.); “Tafseer Ibne Kaseer”, by Hafiz Emaduddin Abul Fida Ismail Bin Kaseer (d. 774 A.H.); “Tafseer Behrul Muheet”, by Allama Abu Hayyaan Ghamati Undlusi (d. 754 A.H.); “Ehkammul Qur’an Lil Jassaas”, by Abu Bakr Jassaas Razi (d. 370 A.H.); “Tafseer Ad-Durarul Mansoor,” by Jalaluddin Suyuti (d. 911 A.H.); Tafseer-e-Mazhari by Qazi Sanaullah, Panipati (d. 1225 A.H.); and “Roohul Ma’ani”, entitled as “Roohul Ma’ani Fil Tafseerul Qur’anal Azeem wa Sab’ul Masani”, by Allama Mahmood Aalusi (d. 1270 A.H.).¹

All these commentaries have been basis for subsequent commentaries written in Persian, Urdu and English languages.

Among the Urdu Commentaries, “Bayanul Qur’an”, by Maulana Ashraf ‘Ali Thanwai (d. 1362 A.H.); “Tafseer-e-Maajidi”, by Maulana Abdul Maajid Daryabi (d. 1396 A.H.); “Tafseer-e-Haqqani”, by Shaikh Abu Muhammad Abdul Haq al-Haqqani ; “Tafheemul Qur’an”,² by Syed Abul A’ala Maududi (d. 1399 A.H.); “Tafseer-e-Usmani”, by Allama Shabbir Ahmad Usmani, (d. 1369 A.H.) as Explanatory Notes on the Urdu Translation by Maulana Mahmudul Hasan (d. 1363 A.H.); Ma’ariful Qur’an, by Mufti Muhammad Shafie (d. 1396 A.H.) ; “Khaza’inul Irfan”, by Maulana Na’imuddin Murabadi (d. 1367 A.H.) as Explanatory Notes on the Urdu Translation “Kanzul Eimaan”,³ by Maulana Ahmad Raza Khan (d. 1340 A.H.); and Ziaul Qur’an by Peer Karam Shah Azhari are very prominent.

In the English language, the commentary written by ‘Abdullah Yusuf ‘Ali and Maulana Abdul Maajid Daryabadi are

1. Falsafah-e-Shari’at-e-Islam, *ibid*, pp. 157-158, and Ma’ariful Qur’an by Mufti Muhammad Shafi, Vol. I, pp. 55-58

2. Also translated in English.

3. Also translated in English, Dutch, Turkey and Pushto.

very prominent. The present writer has also compiled a commentary in sixteen volumes entitled as “Qur’an – the Fundamental Law of Human Life.”¹

TRANSLATIONS OF QUR’AN

The Holy Qur’an has also been translated in about 63 languages of the world,² including Latin, French, Swedish, Hebrew, German, Dutch, Russian, Argeni, Greek, Jawa, English, Chinese, Sawahili, Hindi, Bengali, Purtaguese, Roman, Persian, Punjabi, Sindhi, and Urdu.

Among the English translations, the translations by George Sale, Rodwel, Palmer, Arbery, Muhammad Ali, Marmaduke Pickthall and Abdullah Yusuf Ali ; and among the Urdu translations, the translations by Shah Abdul Qadir, Shah Rafi’uddin, Maulana Mahmudul Hasan, Fateh Muhammad Jalindhari, and Maulana Ahmad Raza Khan, are prominent.

CONTENTS OF QUR’AN

Qur’an substantially consists of the following :-

- (1) Verses relating to the Faith in Allah, His Angels, His Books, His Prophets, and the Hereafter. The “Ilmul Kalaam” and the “Ilm-e-Usul-ud-Deen” deal with it ;
- (2) Verses relating to the spiritual aspects of the human life. The “Ilmul Akhlaaq” deals with it ; and
- (3) Verses relating to the material aspect of the human life, or the physical activities of men, known as the “Awaamir” and “Nawaahi”, as well as the rights and obligations. The “Ilmul Fiqah” deals with it.

It may, however, be noted that Qur’an is a book of basic and fundamental principles of universal application, and though

1. Published by Hamdard Foundation, Karachi, Pakistan, in 1999.

2. “Al-Qur’an Fil Lisaan”, by Dr. Muhammad Hamidullah Khan (Paris) ; and “Urdu Main Qur’ani Tarajim Wa Tafaaseer”, by Dr. Muhammad Mas’ud Ahmad (unpublished)

sometimes it also gives details of any command, but they are precise and in respect of few commands only. To quote Allama Shatibi, Qur'an, inspite of being "Mukhtasar", i.e. precise, is "Jaame'" i.e. comprehensive, and "Jaame'", is one which contains the "Kulliyat" i.e. basic and fundamental principles of universal application, because with the revelation of Qur'an, the "Shari'at" has been completed, as Allah the Almighty Himself says : this day I have perfected for you your religion and completed My Favour to you and chosen for you Islam as a religion (Maa'idah, 5:3). This is also obvious (from the fact) that detailed commands relating to Salaat, Jihaad, etc., are not given in the Qur'an ; they are given in the Sunnah. Similar is the position as regards Nikah, Qisaas, Hudood, and other affairs" ¹ He also says, "in the Qur'an the commands of Shari'ah are mostly basic and fundamental. Wherever there are any details, they are under some basic and fundamental commands". ²

For a Faqeeh (Jurist), therefore, it is necessary to know :

- (1) the "Naasikh" (abrogating) as well as the "Mansookh" (abrogated) verses ;
- (2) the "Mujmal" (concise) and "Mufassar" (detailed) verses ;
- (3) the "Khaas" (particular) and the "'Aam" (general) verses ;
- (4) the "Mohkam" (established) and the "Mutashaabah" (allegorical) verses ³ ;
- (5) the "Ma'roof", whether they are Farz, Wajib, Sunnat, Mustahab, etc. ; and also the "Munkar", whether they are Haraam, Naa Jaa'iz, Makrooh, etc. ⁴

PURPOSE OF THE REVELATION OF QUR'AN

As regards particularly the commands relating to Fiqah, the purpose of revelation, as given by Qur'an itself, in verse 157 of Chapter 7 (*Aaraaf*), is :

- (1) , i.e. to enjoin them (i.e. the people) the Good and forbid the Evil ;

-1. Al-Muwafiqat-ul-Mas'alatul Khaamisah, Vol. III , p. 367 2. Ibid.

3. Ibid 4. Iqbul Jayyad, p. 6 , by Waliullah.

- (2) , i.e. to make lawful to them the good things and make unlawful for them the impure things ;
- (3) , i.e. to remove from them their burden and the shackles which were on them ;

(1) MA'ROOF AND MUNKAR

“Ma’roof (i.e. good) means “that which is known”, and “Munkar” means “that which is denied”. According to Jassaas, “Ma’roof” is that which is approved by Shari’at as well as ‘Aql (intelligence). He also says that “Ma’roof” is that the doing of which is liked by intelligence, and which according to the men of intelligence is not included in the “Munkar”¹

Accordingly, all good things found in the laws, customs, and practices of the nations of the world, so far as they are not against the Shari’ah and intelligence, will come within the definition of “Ma’roof.”

According to Imam Razi, the term “Mar’oof” covers all aspects of good things which are enjoined,² which means that all affairs for the well-being of the humanity at large are also included in the “Amr bil Ma’roof.”

The Holy Prophet has also said that, “Amr bil Ma’roof implies the respect for the Commands of Allah and kindness to the creatures of Allah.”³

(2) TAYYIBAAT AND KHABAA’IS

“Tayyibaat” include all those things which the rightful nature (of man) treats as good and pure. Similarly, “Khabaa’is” are all those things which the rightful nature (of man) treats as bad and impure.⁴

1. *Ehkammul Qur’an*, Vol. III, p. 38. 2. *Tafseer-e-Kabeer*, part IV, pp. 1 to 3

3. *Ibid*

4. *Tafseer-e-Kabeer*; also see *Tafseer-e-Baizaawi*, p. 257

(3) ISR AND IGHLAAL

“Isr” and “Ighlaal” include all those commands and practices which require hardship beyond the capacity of man. ¹ Ununderstandable beliefs, superstitions and blind following of self – styled and misguided religious leaders also come within its purview. ²

BASIC PRINCIPLES

In order to achieve the purpose of the revelation of the commands relating to Fiqah, as mentioned above, Qur’an has adopted the following basic principles :

- (1) “ ’Adam-e-Haraj ” (), i.e. removal of burden ;
- (2) “Qillat-e-Takleef” (), i.e. lessening of hardship;
- (3) “Tadreej” (), i.e. graduality ; and
- (4) “Naskh” (), i.e. abrogation

(1) ’ADAM-E-HARAJ

“Adam-e-Haraj” means removal of burden. Hazrat ’Aa’isha and Hazrat Ibne Abbas give the meaning of “Haraj” as “Zeeq”, ³ and accordingly “Adam-e-Haraj” means that, in issuing the commands, Qur’an has kept in view the principle that there should be no burden beyond the capacity of a man. In this connection the following verses may be noted.

- (a) i.e. and removes from them their burden and the shakles which were on them (*Aaraaf*, 7:157)
- (b) i.e. Allah desires ease for you, and He desires not hardship for you (*Baqarah*, 2:185)
- (c) i.e. (Allah) has not laid upon you any hardship in religion (*Hajj*, 22:78)

1. Noorul Anwaar, Mabhasul Ehkaamul Mashroo’ah

2. Tarjumanul Qur’an, by Maulana Abul Kalaam Azad.

3. Tafseer-e-Kashshaaf, p. 293 and Taseer-e-Kabeer, Vol. VI, p. 128

(d)

i.e. Allah desires not to place a burden upon you but He wishes to purify you (*Maa'idah, 5:6*)

(e)

i.e. Allah imposes not a duty on any soul beyond its capacity (*Baqarah, 2:286*);

Qur'an itself teaches us to pray :

(f)

i.e. Our Lord, do not lay on us a burden as You did lay on those before us. Our Lord, impose not on us (a burden) which we have not the strength to bear (*Baqarah, 2:286*)

While assigning official duties as governors to Abu Musa Ash'ari and Mu'aaz bin Jabl, the Holy Prophet directed them saying,

i.e. make easy and do not make difficult, create inclination and do not create disgust, develop cooperation and do not develop opposition.¹

The Holy Prophet has also said :

(a)

i.e. I have been sent with easy Hanafi religion.

(b)

i.e. desirable religion with Allah is Hanafiah which is easy.²

(c)

i.e. there is neither giving trouble nor bearing trouble in Islam.³

1. Bukhari and Muslim (Mishkatul Masabeeh, Baab Maa Alal Walayat Minat Taisar)

2. Bukhari, Baabud Deen-e-Yasr 3. Muwatta and Daara Qutni.

- (d) i.e. had I not feared that my Ummah will be in hardship, I would have ordered doing of Miswaak at every prayer. ¹

It was also the habit of the Holy Prophet that whenever he had any option to choose between two alternatives, he used to choose the easier one provided it involved no sin. ²

(2) QILLAT-E-TAKLEEF

“Qillat-e-Takleef” means lessening of hardship. This is the natural result of “’Adam-e-Haraj”, because overburdening in the commands increases the hardship. In this connection it is worth noting that the “Awaamir” and “Nawahi” i.e. commands relating to the doing or not doing of the acts are few in number ; they can be easily put to memory ; and can also be easily put into practice, and none can find any hardship in acting upon them.

The principle of “Qillat-e-Takleef” is very clear from the following verses of the Holy Qur’an :-

- (a) i.e. Allah imposes not on a soul a duty beyond its capacity (*Baqarah, 2:286*);
- (b) i.e. Allah desires to make light your burdens, and man is created weak (*Nisa, 4:28*)
- (c)

i.e. O you who believe, ask not about things which if made known to you would give you trouble, and if you ask about them when the Qur’an is being revealed, they will be made

1. Tirmizi and Abu Dawud

2. Tirmizi and Bukhari

known to you. Allah pardons this ; and Allah is Forgiving, Merciful. A people before you indeed asked such questions, then became disbelievers therein (*Maa'idah*, 5:101-102)

As regards the Ahadees supporting this principle, the following may be noted :-

(a) The Holy Prophet was asked about Hajj : i.e. is it "Farz" each year ? The Holy Prophet said :

i.e. had I said : yes, it would have become "Farz" each year. So far I leave you, you also leave me, because the people before you perished because of plenty of questions and opposition to their Prophets ; ¹

(b) The Holy Prophet has said :

i.e. , the greatest culprit among the Muslims is he who questioned about any thing which was not made "Haraam", but on account of his question it was made "Haraam". ²

(c) The Holy Prophet has said :-

i.e. Allah has fixed some as "Fara'iz", do not give them up ; fixed some "Hudood", do not go beyond them ; made some as "Haraam", do not violate them ; kept silence in respect of some as a favour on you but not because He forgot them, therefore do not question about them. ³

1. Muslim ; E'laamul Muqe'een, Vol. I.

2. Mishkat-ul-Masabeeh, Kitab-ul-Eiman, Baab-ul-E'tisaam Bil Kitab wal Sunnah No. 145/14.

3. Mishkat-ul-Masabeeh, Kitab-ul-Eiman, Baab-ul-E'tisaam Bil Kitab wal Sunnah No. 186/55.

(d) The Holy Prophet has said :-

i.e. religion is easy, but the one who exaggerates it, it over-powers him .¹

(3) TADREEJ

“Tadreej” means graduality. The commands contained in the Holy Qur’an have not been revealed all at one and the same time. They have been revealed gradually according to the need and circumstances. Thus, for instance, wine and gambling were not prohibited forthwith. Firstly, when people enquired about them, Quran said :-

i.e. they ask you about intoxicant and gambling. Say : in both of them is a greater sin and (some) advantage for men, and their sin is greater than their advantage (*Baqarah*, 2:219).

Then the believers were stopped from praying while intoxicated, saying:-

i.e. O you who believe, go not near prayer when you are intoxicated till you know what you say (*Nisa*, 4:43)

Then there was the clear prohibition, saying :-

i.e. O you believe, intoxicants and gambling and (sacrificing) on stones set up and (dividing) by arrows, are only an uncleanness, the Satan’s work ; so shun it so that you may succeed. The Satan

1. Mishkat-ul-Masabeeh, Baab Qasd-ul-’Amal.

desires only to create enmity and hatred among you by means of intoxicants and gambling, and to keep you back from the remembrance of Allah and from prayer. Will you then keep back. (*Maa'idah*, 5:10)

Further, as Hazrat 'Aa'isha has said, firstly the verses relating to Faith and the Hereafter were revealed ; and when the Believers became firm in Faith, commands relating to "Halaal" and Haraam" were revealed. ¹

Another aspect of graduality in the revelation of Qur'an was that initially the commands were revealed in their "Mujmal" (short but comprehensive) form, and then "Mufassal" (detailed) commands were issued. The former related to the Faith and institutional prayers and the latter related to the social affairs of human life.

(4) (NASKH)

According to the scholars of Fiqah, "Naskh" has a two-fold meaning, viz., any command is totally abrogated by a subsequent command, or any command is modified by a subsequent command.

As regards "Naskh" in the sense of modification, it is proved by the Holy Qur'an itself. It is either in the form of :

- (1) making an " 'Aam" (general) command as "Khaas" (specific), or
- (2) making a "Mutlaq" (absolute) command as "Muqayyad" (limited).

"Naskh" in the former sense is contained in the following verses :

- (a) For the "Iddat" (waiting period) of a divorced woman, Qur'an says :

1. Bukhari, Baab Taaleef-ul-Qur'an.

i.e. the divorced women should keep themselves in waiting for three courses (*Baqarah*, 2:228).

But in a subsequent verse it is said :

i.e. when you marry believing women, then divorce them before you touch them, you have in their case no term which you should reckon (*Ahzaab*, 33:49).

In these two verses the first one is “ ’Aam” (general) which applies to both the consummated as well as the unconsummated women, but the second one is “Khaas” (specific) which applies to the unconsummated women only, and to this extent the second one abrogates the first one.

(b) For not proving the charge of adultery, Qur’an Says :-

i.e. those who accuse free women and bring not four witnesses, flog them (with) eighty stripes (*Noor*, 24:4)

But in a subsequent verse, for the husband, it is specifically said :-

i.e. and those who accuse their wives and have no witnesses except themselves, let one of them testify four times, bearing Allah to witness, that he is of those who speak the truth (*Noor*, 24:6).

In these two verse the first one is “ ’Aam” (general) which applies to all men including the husbands, but the second one is “Khaas” (specific) which applies to the husbands only, and to this extent the second one abrogates the first one.

“Naskh” in the latter sense is contained in the following verses :

(a) For prohibition of eating the blood, Qur’an says :-

i.e. forbidden to you is that which dies of itself, and blood (*Maa’idah*, 5:3)

But in a subsequent verse it is said :

i.e. say : I find not in that which is revealed to me aught forbidden for an eater to eat thereof, except that it be what dies of itself, or blood poured forth (*An’aam*, 6:145).

In these two verses while the “blood” used in the first one is “Mutlaq” or absolute, in the second it is “Muqayyad” or limited in that the blood should be “flowing”, and to this extent the first verse is abrogated by the second one.

Such abrogation, as stated earlier, is only in the form of modification and not repealing once for all the former verse by the latter one. Both will apply to their relevant facts and circumstances and both will remain part of the Holy Qur’an for all times to come.

As regards “Naskh” in the sense of total abrogation (or repealing once for all) of any Command, the verse :

i.e. whatever Message We abrogate or cause to be forgotten, We bring one better than it or one like it (*Baqarah*, 2:106), according to the learned scholars, refers to abrogation of the previous “Shari’ats”. In this connection, Abu Bakr Jassaas says:-

i.e. in this verse there is reference to abrogation, but it means abrogation of the previous "Shari'ats".¹ Abu Muslim Asfahani (d. 322 A.H.) is also of the same view. Imam Fakhruddin Raazi has given this view in his commentary of the Holy Qur'an, and he himself is also of the same view.

As regards the "Naskh" or abrogation of one Hadees by another, we have instances of it in respect of commands relating to visiting the graves, keeping the meat of sacrificed animals, and drinking the "Nabeez". Previously these were prohibited, but subsequently the Holy Prophet permitted them, saying,

i.e. I had prohibited you from visiting the graves, but now you visit them ; and I had prohibited you from keeping the meat of the sacrificed animals for more than three days, but now you may keep it as long as you wish ; and I had prohibited you from drinking the "Nabeez" except in "Mashkeezah", but now you may drink it in all utensils, but do not drink intoxicants (Muslim) (Mishkatul Masabeeh, Baab Ziaratil Qutoor, No. 1670/1)

NATURE OF THE COMMANDS (EHKAAM)

Qur'anic Commands are basically of the nature of "Talab" (i.e. demanding the doing or not doing of an act) or of "Takhayyur" (i.e. giving the right to do or not to do an act), in respect of the "Awamir" as well as the "Nawaahi"

I. The acts of which the doing or not doing is demanded are mentioned in different manners, as follows.

Sometimes it is in the form of a clear "Amr" (command) e.g.,

(a)

1. Ehkaamul Qur'an, Baab Fee Naskh-e-Qur'an, Vol. I

i.e. surely Allah enjoins justice and the doing of good, and the giving to the kindred (*Nahl*, 16:90)

(b)

i.e. Surely Allah commands you to make over the trusts to those worthy of them, and that when you judge between people, you judge with justice (*Nisa*, 4:58)

(2) Sometimes it gives the news that this act is made “Farz” on the addressees, e.g.,

(a)

i.e. retaliation is prescribed for you in the matter of the slain (*Baqarah*, 2:178)

(b)

i.e. fasting is prescribed for you (*Baqarah*, 2:183)

(3) Sometimes it gives the news that the responsibility of this act is on all people or on any particular group of people, e.g.,

(a)

i.e. and pilgrimage to the House is a duty which men owe to Allah—whoever can find a way to it (*Aale Imran*, 3:97)

(b)

i.e. and their (i.e. of the mothers of the children to be suckled) maintenance and their clothing must be borne by the father according to usage (*Baqarah*, 2:233)

(c)

i.e. and similar duty (devolves) on the (father’s) heirs (*Baqarah*, 2:233)

(d)

i.e. and for the divorced women (provision) must be made in kindness. This is incumbent on those who have regard for duty (*Baqarah*, 2:241)

(4) Sometimes it lays down the responsibility of the demanded act upon those from whom the act is demanded, e.g.,

(a)

i.e. and the divorced women should keep themselves in waiting for three courses (*Baqarah*, 2:288)

(b)

i.e. and (as for) those of you who die and leave wives behind, such women should keep themselves in waiting for four months and ten days (*Baqarah*, 2:234)

(5) Sometimes such words are used by which stress is laid on the demanded act and sometimes such words are used by which it is proved that the demanded act is not "Farz", e.g.,

(a)

i.e. and mothers shall suck their children for two whole years, for him who desires to complete the time of suckling (*Baqarah*, 2:233)

(6) Sometimes it demands the act with "Amr" and "Muzar'e", e.g.,

(a)

i.e. guard the prayers and the middle prayer, and stand up truly obedient to Allah (*Baqarah*, 2:238)

(b)

i.e. then let them accomplish their needful acts of cleansing, and let them fulfil their vows and go round the Ancient House (*Hajj*, 22:29)

(7) Sometimes it uses the word "Farz" for it, e.g.,

(a)

i.e. we know that we have ordained for them concerning their wives and those whom their right hands possess (*Ahzaab*, 33:50)

(8) Sometimes it mentions the demanded act with a condition, e.g.,

(a)

i.e. but if you are prevented (from Hajj), send whatever offering is easy to obtain (*Baqarah*, 2:196)

(b)

i.e. then whoever of you is sick or has an ailment of the head, he (may effect) a compensation by fasting or alms or sacrifice (*Baqarah*, 2:196)

(c)

i.e. and if (the debtor) is in straitness, let there be postponement (of the recovery of debt) till (he is in) ease (*Baqarah*, 2:280)

(9) Sometimes it mentions the demanded act with the word “Khair”, e.g.,

i.e. and they ask you concerning the orphans. Say : to set right their (affair) is good (*Baqarah*, 2:220).

(10) Sometimes the demanded act is mentioned with a promise, e.g.,

i.e. who is that who will offer to Allah a goodly loan, so He will double it for him, and he will have a generous reward (*Hadeed*, 57:11)

(11) Sometimes it says that the demanded act is itself righteous-ness or the one which makes one achieve righteousness, e.g.,

(a)

i.e. but righteousness is of one who believes in Allah (*Baqarah*, 2:177)

(b)

i.e. you cannot attain to righteous unless you spend out of what you love (*Aale Imran*, 3:92)

Similarly, Qur'an has adopted different manners in respect of the acts prohibited, as follows.

(1) Sometimes it is in “Nahi” (prohibition), e.g.,

(a)

i.e. and He forbids decency and evil and rebellion (*Nahl*, 16:90)

(b)

i.e. Allah forbids you only respecting those who fight you for religion, and drive you forth from your homes and help (others) in your expulsion (*Mumtahanah*, 60:9)

(2) Sometimes it declares as “Haraam” the prohibited things, e.g.,

i.e. Say : my Lord forbids only indecencies, such of them as are apparent and such as are concealed, and sin and unjust rebellion, and that you associate with Allah that for which He has sent down no authority, and that you say of Allah what you know not (*Aaraaf*, 7:33)

(3) Sometimes it declares the prohibited things as “not Halaal”, e.g.,

(a)

i.e. and it is not lawful for you to take any part of what you have given them (i.e. the wives), unless both fear that they cannot keep within the limits of Allah (*Baqarah*, 2:229)

(b)

i.e. and it is not lawful for them to conceal that which Allah has created in their wombs (*Baqarah*, 2:228)

(4) Sometimes it uses the prohibiting words “Laa” or “Ain” or “Zarr” before the command, e.g.,

i.e. and approach not the property of the orphans except in the best manner (*An'aam*, 6:152)

(5) Sometimes it mentions denial of righteousness by a prohibited act, e.g.,

i.e. it is not righteousness that you turn your faces towards the East and the west (*Baqarah*, 2:177)

(6) Sometimes it mentions denial of the prohibited act, e.g.,

(a)

i.e. so whoever determines to perform the Hajj, therein shall be no immodest speech, nor abusing, nor altercation in the Hajj (*Baqarah*, 2:197)

(b)

i.e. neither a mother shall be made to suffer harm on account of her child, nor a father on account of his child (*Baqarah*, 2:233)

(7) Sometimes it mentions the prohibited act with the option of sin, e.g.,

i.e. then whoever changes it (i.e. the Will) after he has heard it, the sin is only upon those who change it (*Baqarah, 2:181*)

(8) Sometimes it mentions the prohibited act with the threat of punishment, e.g.,

i.e. those who swallow usury cannot arise except as he arises whom the Satan prostrates by (his) touch (*Baqarah, 2:275*)

(9) Sometimes it uses the word “Sharr” (evil) for the prohibited act, e.g.,

i.e. and let not those, who are niggardly in spending that which Allah has granted them out of His Grace, think it is good for them. Nay, it is evil for them (*Aale Imran, 3:180*)

II. The acts for which Qur’an gives the right for doing or not doing are also mentioned in different manners.

(1) Sometimes the “Hillat” (permissibility) is with reference to the thing permitted. e.g.,

(a)

i.e. they ask you as to what is allowed to them. Say : the good things are allowed to you, and what you have taught the beasts and birds of pray, training them to hunt (*Maa'idah, 5:4*)

(b)

i.e. this day (all) good things are made lawful for you. And the food of those who have been given the Book is lawful for you and your food is lawful for them (*Maa'idah*, 5:5)

(2) Sometimes there is immunity from sin on the doing of an act, e.g.,

(a)

i.e. then whoever is driven by necessity, not desiring, nor exceeding the limits, no sin is upon him (*Baqarah*, 2:173)

(b)

i.e. then whoever hastens off in two days, it is no sin for him ; and whoever stays behind, it is no sin for him (*Baqarah*, 2:203)

(c)

i.e. but if one fears a wrong or a sinful course on the part of the testator, and affects an agreement between the parties, there is no blame on him (*Baqarah*, 2:182)

(3) Sometimes there is immunity from sin by the use of the word "Junaah" on the doing of an act, e.g.,

(a)

i.e. on those who believe and do good there is no blame for what they eat, when they keep their duty and believe and do good deeds, then keep their duty and believe, then keep their duty and do good (to others) (*Maa'idah*, 5:93)

(b)

i.e. besides these it is no sin for you nor for them (*Noor*, 24:58)

(c)

i.e., the Safa and the Marwah are truly the Signs of Allah ; so whoever makes a pilgrimage to the House or pays a visit (to it), there is no blame on him if he goes round them (*Baqarah*, 2:158)

KINDS OF COMMANDS

The Commands given by the Holy Qur'an are of two kinds, viz.,

(1) Commands relating to the affairs between Allah and the human beings. These are known as the " 'Ibaadaat" and are four in number, viz., Salaat (prayer), Som (fast), Zakaat (poor-rate), and Hajj (pilgrimage to Mecca). All these "Ibaadaat" are spiritual, physical, financial or social.

(2) Commands relating to the affairs between man and man. These are :

- (a) the Commands relating to Jihaad which is for the safeguard of the Message of Islam ;
- (b) the Commands relating to the family life of a man, viz., Nikah, Talaq, Children, Wirasat, etc. ;
- (c) the Commands relating to contracts known as "Mu'aamlaat", and
- (d) the Commands relating to Ta'zeer" i.e. punishment of the offenders.

Section 2 SUNNAH

Sunnah is the second basic source of Fiqah.

DEFINITION

Literally, the word “Sunnah” means “a path or way or a manner of life”¹; or “custom, use and wont, statute”;² or “a way or rule or manner of acting or conduct or life or the like.”³

In this sense the word “Sunnah” also appears in the Holy Qur’an in connection with the “Sunnatul Awwaleen”, i.e. the way of those of old (vide *Anfaal*, 8:38 ; *Hijr*, 15:13 ; *Kahf*, 18:55; and *Faatir*, 35:43) ; and “Sunnat-Allah”, i.e. the Way of Allah (vide *Ahzaab*, 33:38 and 62 ; and *Faatir*, 35:43) ; and “Sunanun” (plural of Sunnah), i.e. the Ways of Allah (vide *Aale Imran*, 3:137).

According to the terminology of Fiqah, however, the “Sunnah” means and includes :-

i.e. the sayings and deeds of the Holy Prophet Muhammad (peace be upon him) as well as the sayings and deeds of his Companions spoken or done before him (or reported to him) on which he kept silence.⁴

In this sense the word “Sunnah” is also inclusive of the word “Hadees” which is otherwise used only for the “Sayings” of the Holy Prophet. But the scholars also use the word Hadees as synonymous with the word Sunnah, and in this sense it includes the whole body of the Traditions of the Holy Prophet, including his sayings as well as deeds, and the Science of it is known as the “’Ilmul Hadees”.⁵

1. Dictionary of Islam, by T.P. Hughes, p. 622

2. Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 552

3. Arabic-English Lexicon, by E.W. Lane

4. Noorul Anwaar

5. Shorter Encyclopaedia of Islam, ibid, p. 116

Thus Sunnah is either “Sunnatul Qaul (i.e. sayings) or “Sunnatul Fe’l” (i.e. deeds) or the Holy Prophet or “Sunnatul Taqreer” (i.e. approval or silence) of the Holy Prophet on what was said or done before him by his Companions. ¹

Further, those things which the Holy Prophet emphatically enjoined on his followers are called “Sunnatul Huda” (or Sunnah of Guidance), or “Sunnatul Mu’akkadah” ; and those which he did not emphatically enjoined are known as “Sunnatul Zaa’idah” (or Superogatory Sunnah). ²

QUR’ANIC SANCTION FOR SUNNAH

Sanction for the Sunnah is contained in the Holy Qur’an itself. In this connection it is to be noted that, firstly, Allah the Almighty deputed the Holy Prophet as His “Muballigh” i.e. missionary or preacher of His Messages. Qur’an says :

i.e. O Messenger, deliver that which has been revealed to you from your Lord (*Maa’idah*, 5:67) ;

secondly, he was also to explain the Messages of Allah. Qur’an says:

i.e. and We have revealed to you the Reminder that you make clear to men that which has been revealed to them, and that haply they may reflect (*Nahl*, 16:44)

thirdly, he was also to decide between the people according to the Message of Allah. Qur’an says :

1. Dictionary of Islam, by T.P. Hughes, p. 622 ; Falsafah-e-Shari’at-e-Islam, ibid, p. 164.

2. Dictionary of Islam, ibid, p. 622.

i.e. surely We have revealed the Book to you with Truth so that you judge between people by means of what Allah has taught you (*Nisa*, 4:105);

fourthly, Allah Himself commands the believers to obey the Holy Prophet. Qur'an says :

i.e. obey Allah and obey the Messenger and be cautious (*Maa'idah*, 5:92); and further,

i.e. and whatever the Messenger gives you, accept it, and whatever he forbids you, abstain (from it) (*Hashr*, 59:7); and declares :

i.e. whoever obeys the Messenger, he indeed obeys Allah (*Nisa*, 4:80); and also makes it clear that

i.e. your companion (i.e. the Holy Prophet) errs not, nor does he deviate, nor does he speak out of (his own) desire. It is not but revelation that is revealed (*Najm*, 53:2 to 4).

It was for this reason that obedience to the Holy Prophet is made the foundation of the Faith itself. Qur'an, says :

i.e. but no, by your Lord, they believe not until they make you a judge of what is in dispute between them, then find not any straitness in their hearts as to that which you decide, and submit with full submission (*Nisa*, 4:65)

Then, by way of reward for obedience to the Holy Prophet, Qur'an asked the Holy Prophet himself to say :

i.e. say : if you love Allah, follow me : Allah will love you, and grant you protection from your sins (*Aale Imran*, 3:30). Qur'an further says :

i.e. and whoever obeys Allah and the Messenger, they are with those upon whom Allah has bestowed favour from among the Prophets and the Truthful and the Faithful and Righteous, and a Goodly Company are they (*Nisa*, 4:69).

In view of the authority given to him by these verses, the Holy Prophet read out the Message of Allah (i.e. Qur'an) to the people, explained it to them by his word (known as Hadees) as well as his deed (known as Sunnah), and also by approval of, or silence over, what his Companions said or done before him. For the explanation of, and putting into practice, the commands contained in the Holy Qur'an, the Holy Prophet also laid down rules and regulations or, in other words, the bye laws, which provide the details of the manner in which the commands of Allah were and are to be acted upon. All these form the Sunnah and have binding authority at par with the Holy Qur'an itself. In this connection, as rightly stated by Shaatibi, it may also be always kept in view that :

i.e. there is nothing in Sunnah of which the base is not in the Qur'an. ¹ This is because ;

i.e. Sunnah is (basically) in explanation of the Commands of Qur'an. ²

SUNNAH IS BASED ON REVELATION

From verses 2 to 4 of chapter 53 (Najm), which we have already quoted, it is quite clear that Sunnah is also on account of "Wahi" or revelation from Allah the Almighty. The Holy Prophet has himself said :

i.e. verily, I have been given the Qur'an, and something like it, ³ which in fact means the Hadees or Sunnah.

In fact revelation has been of two kinds – manifest (Zaahir) and internal (Batin). Manifest revelation consisted of the communication which were made by the angel Gabriel, under the direction of Allah, to the Holy Prophet Muhammad (peace be upon him), in the very Words of Allah. This forms the Holy Qur'an. Internal revelation was by hints or by knowledge as occurred in the mind of the Holy Prophet through Inspiration (Ilhaam) from Allah and was expressed by the Holy Prophet in his own words or deeds. This forms the Hadees or Sunnah. ⁴

The Hadees or Sunnah of the Holy Prophet is, therefore, also known as the "Wahi Ghair Matlu", i.e. the un-read revelation, whereby the Holy Prophet was enabled to give authoritative declarations on religious questions, either moral, ceremonial, or doctrinal. The Traditions of the Holy Prophet are therefore supposed to be the "un-inspired record of inspired saying", ⁵ obviously because the inspiration in connection with

1. Al-Muwafiqat, Vol. IV, ibid

2. Ibid

3. Mishkat-ul-Masabeeh, Kitab-ul-Ilm, Baab-ul-E'tisaam Bil Kitab wal Sunnah, 155/24 .

4. Muhammadan Jurisprudence, by Abdur Rahim, p. 69.

5. Dictionary of Islam, by T.P. Hughes, p. 639

Hadees or Sunnah has been expressed by the Holy Prophet in his own words or deeds.

THE HOLY PROPHET'S VIEW ABOUT HIS OWN HADEES OR SUNNAH

As regards Hadees or Sunnah, the Holy Prophet has said :

i.e. verily the Best Word is the Word of Allah, and the Best Rule of Life is that delivered by Muhammad (Mishkat-ul-Masabeeh, 132/2)

i.e. that which the Messenger of Allah has made unlaw-ful is like that which Allah Himself has made unlawful (Mishkat-ul-Masabeeh, 155/24)

i.e. I have left among you two things, and you will not stray as long as you hold them fast. The one is the Book of Allah, and the other the Sunnah of His Prophet (Mishkat-ul-Masabeeh, 176/45)

i.e. my sayings do not abrogate the Word of Allah, but the Word of Allah can abrogate my saying (Mishkat-ul-Masabeeh, 184/53)

i.e. some of my sayings abrogate others (Mishkat-ul-Masabeeh, 185/54)

i.e. convey to other persons none of my words, except those you know of surity. Verily he who represents my words wrongly shall find a place for himself in the Fire. (Mishkat-ul-Masabeeh, 216/29)

(Mishkat-ul-Masabeeh, Kitab-ul-Eiman, Baab-ul-E'tisaam Bil Kitab Wal Sunnah)

THE VIEW OF COMPANIONS (SAHABAH) ABOUT HADEES OR SUNNAH

The practice of Abu Bakr Siddique was that whenever any problem came before him, he used to first consult the Holy Qur'an for its solution and decide according to it. If, however, he could not find anything in the Holy Qur'an, he used to search for it in the Ahadees. If he could not get anything,, he used to ask other Companions whether anybody of them knew Tradition of the Holy Prophet on that particular problem. If any of the Companions told him any such Tradition, he used to give decision according to it. ¹

Not only this, but on getting any Tradition of the Holy Prophet from any of the Companions, he used to say : praise be to Allah who has kept alive such people who know the Traditions of the Holy Prophet. ²

'Umar used to say : there will be such people who will dispute with you regarding the "Mutashabihaat" (allegorical verses of the Holy Qur'an). You should then argue with them on basis of Ahadees, because the knowers of Ahadees also know the Holy Qur'an better. ³

1. Al-Muwafiqaat, ibid, Vol. IV.

2. Hujjatillahil Baaligha, by Shah Wali'ullah, Vol. I

3. Kitab-ul-Meezaan Lil Sherani Fee Maa Waradani Zammur Ra'e 'Anush Shaar'e

As regards the duties of the Governors, 'Umar said : I appoint Governors so that they should teach you your religion and the Traditions (Sunnah) of the Holy Prophet. ¹ He also said : O people, the Traditions have been fixed for you ; Faraa'iz have been fixed for you ; thus you have been set on the clear path ; if you will look to the right or left on account of the people, you will go astray. ²

THE VIEW OF JURISTS (FUQAHAA) ABOUT HADEES OR SUNNAH

Imam Abu Hanifah said : none of us could understand the Qur'an without the Sunnah. ³ He also said : people will be in the good till they will seek knowledge through Hadees. When they will give up the Hadees, they will be in the evil. ⁴

Imam Shaafe'ee said : there is Ijma of the people of Islam on the point that if anyone gets a Hadees of the Holy Prophet, it is not permissible for him to give it up and act upon the word of anybody else. ⁵

Imam Maalik said : whatever is according to Qur'an and Sunnah, accept it ; and whatever is otherwise, leave it. ⁶

Imam Hambal said : whoever rejects the Hadees of the Holy Prophet, he reaches the brink of destruction. ⁷

THE WAYS IN WHICH SUNNAH EXPLAINS QUR'AN

Sunnah has explained the Holy Qur'an in three ways, viz.,

- (1) explanation of the "Mujmal" (concise) verses ;
- (2) making the "Mutlaq" (absolute) as "Muqayyad" (limited); and
- (3) explanation of the difficult verses ;

Commenting on the explanation of Qur'an by the Hadees, Allama Ibne Qayyim writes that (1) "Wahi" which itself was

1. E'lamul Muqe'een, Vol. I

2. Al-E'tisaam, Vol. I

3. Kitab-ul-Meezaan Lil Sherani, ibid.

4. Ibid

5. E'lamul Muqe'een, Vol. II

6. Jaame'Ehlul 'Ilm Le Abdullah

7. Kitab-ul-Manaqib Le Ibne Jozi

“Khafi” (hidden) became “Zaahir” (manifest) by the tongue of the Holy Prophet ; (2) many words and phrases used by the Qur’an, having different obvious meanings, were explained by the Holy Prophet with reference to their real hidden meaning, e.g., the word “Zulm” appearing in the verse

was explained by the word “Shirk” ; and the verse

was explained as referring to the reckoning of deeds before Allah the Almighty ; and the words “Khait-ul-Abyad” and “Khait-ul-Aswad” appearing in verse

were explained to be meaning the whiteness of the day and darkness of the night; and the word “Ra’aaho” appearing in verse

was explained to be referring to the seeing of Gabriel ; and the verse

was explained to be referring to the rising of the sun from the west ; and the word “Shajar” appearing in verse was explained to be the palm-tree ; and the verse

was explained to be referring to the questioning by the angels in the grave ; and the word “R’ad” appearing in the verse

was explained to be the angel of cloud, and the words “Ahbaar” and “Rohbaan” appearing in the verse

were explained to be the misguided religious leaders of the Bani Israil who used to declare things as Halaal or Haraam according to their own wishes ; and the word “Quwwatun” appearing in verse

was explained as shooting the arrows ; and the word “Yujza” appearing in verse was explained to mean

trouble or hardship ; and the word “Ziadah” appearing in verse

was explained to mean the Sight of Allah; and the word “Ad’oo” appearing in verse was explained to mean the

“Ibaadat” ; and the phrase was explained to mean the two Rak’ats of prayer before the Farz prayer of the Fajr ;

and the phrase was explained to mean the

two Rak'ats after the Farz prayer of the Maghrib ; (3) many things were explained by the Holy Prophet by his deeds, as for example the fives times of compulsory prayers were made known to the people by himself performing the prayers on all the five appointed times ; (4) many commands were revealed in answer to the question put to the Holy Prophet by the people and he explained them as such, e.g., the commands relating to "La'an" ; (5) many commands which were issued by the Holy Prophet in answer to the questions after receiving the "Wahi" for them but they do not form part of the Holy Qur'an, e.g., he ordered a man, who was wearing a cloak below the "Ehraam" and was also having the perfume, to put off the cloak and remove the perfume; (6) many commands were issued by the Holy Prophet without any question put to him, e.g. the prohibition in respect of the flash of an ass, Mut'a marriage, hunting within the precincts of Medinah, marriage with the paternal as well as maternal aunt of the existing wife ; (7) deeds which the Holy Prophet himself did, and did not prohibit the Ummah from doing them ; (8) deeds which the Holy Prophet did and also approved them for the Ummah or taught them to do ; (9) approval of the permissibility of any deed by silence ; (10) explanation of the conditions, difficulties or obstructions or limitations or timings or qualifications, etc., on which Qur'an was silent. In fact in such things Qur'an gave "Mujmal" commands and left their details for the Holy Prophet to explain, e.g. in the verse

the "Hillat" is "Mauqoof" when the conditions of Nikah are available, prohibitions are not there, time and occasion are proper, etc., all these details are not given in the Qur'an. These are known from the Ahadees of Holy Prophet. ¹

Allama Shaatibi says that Sunnah in its ultimate substance and meaning reverts to Qur'an. It is explanation of the "Mujmal" or "Mushkil" or "Mukhtasar" verses of Qur'an. As a whole, (1) Sunnah is a narration of Qur'an and, accordingly, in terms of the verse there is nothing in the Sunnah of which the "Ijmaali" or "Tafseeli" "dalaalat" is not present in Qur'an ; (2) all those things which prove that Qur'an

-----1.

is a book and a fountain head of the fundamentals of Shari'at also prove that Sunnah in its substance and meaning is revertible to Qur'an ; (3) Qur'an says and according to Hazrat 'Aa'isha, the conduct of the Holy Prophet is Qur'an, which shows that all his sayings, doings and approvals are revertible to Qur'an because all these form the conduct ; (4) Qur'an says which also proves that Sunnah is in the Quran ; (5) the verses and

refer to the revelation of Qur'an, and Sunnah is in fact a narration of it. Thus Sunnah is revertible to Qur'an, and if it be not so, then there is the need to hesitate in accepting the Sunnah. ¹

The fact that Sunnah is a narration of Qur'an is well-established among the learned scholars because, firstly, Qur'an has itself made compulsory the obedience to the Holy Prophet; ² secondly, all details laid down by the Holy Prophet relating to the performance of Salaat, Som, Hajj and payment of Zakaat are actually the explanation of Qur'an ; thirdly, the Holy Prophet decided about things which are between two obvious matters by Ijtihaad, and between those things which are between Usool and Fara' by Qiyas, e.g., Allah declared pure things as Halaal, and impure things as Haraam, but in between these two obvious things there are some doubtful things which the Holy Prophet decided by Ijtihaad, and declared that the beasts and birds having paws are also Haraam which means that by his Ijtihaad he included these things also among the Haraam things. Similarly, Allah declared all intoxicant drinks as Haraam and all non-intoxicant drinks as Halaal, but in between these two are things which though not intoxicants yet can become intoxicants under special circumstances and are therefore doubtful, e.g. the "Nabeez" prepared in "Daba", "Mazfat" and "Naqeer" (the utensils used for the preparation of "Nabeez") because it creates intoxication, and was therefore prohibited. Likewise, Allah has permitted the prey by a trained animal, and prohibited the prey

-----1.
Al-Muwafiqaat Lil Shaatibi, ibid, Vol. IV, Al-Mas'alatus Salasah. Also see Hujjatillahil-Baaligha, Baab Bayan Aqsaam Uloomun-Nabi, .

2. Qur'an, Maa'idah, 5:92.

by an untrained animal, but in between these two is the prey which has been partly eaten up by the trained animal. The Holy Prophet by his Ijtihaad decided that this is also prohibited because it is just possible that the trained animal might have preyed for itself and therefore it ate out of it. Another example of it is that while ordinarily a man is permitted to hunt, in the state of Ehraam he is prohibited from hunting and if he does so, he is to give an expiation for it, but in between these two is a man who kills an animal by mistake while he is still in the state of Ehraam. The Holy Prophet by his Ijtihaad made him also liable to pay the expiation for it.

As regards decision in respect of the things falling between Usool and Fara through Qayas, it may be noted that Allah the Almighty declared usury as Haraam,¹ but the Holy Prophet also declared the usury of Days of Jaahiliah as Haraam, saying : which also banned the excess with-out consideration in any goods or articles, and commanded that gold for the gold, silver for the silver, wheat for the wheat, barley for the barley, dates for the dates, salt for the salt should be sold equally and hand to hand ; any excess will be usury ; but if the things are different, e.g. dates for barley, excess is permissible but the deal should be hand to hand, otherwise it will also be usury. Another example of it is that Allah prohibited marriage with a woman and her mother or daughter, or two sisters, both at one and the same time, but the Holy Prophet also included in this prohibition the paternal as well as the maternal aunt of the existing wife, saying :

which shows that such prohibition was on basis of Qayas. Yet another example of it is that Allah laid down the "Deeyat" for life but not for the organs of the body. They Holy Prophet fixed it by own Qayas.

Lastly, it may also be noted that Sunnah, while giving any explanation or issuing any command, keeps in view the Qur'an as a whole.²

-----1.
Baqarah, 2:275.

2. *Tareekh Fiqah-e-Islami*, ibid, pp. 41-47

HADEES AND ITS COMPILATION

As also previously defined, "Hadees" actually means the saying and "Sunnah" actually means the deed of the Holy Prop-het, but the scholars have used both these words as synonymous to each other and thus Hadees, as also the Sunnah, in broad sense means and includes the sayings as well as the deeds of the Holy Prophet. It also means and includes the words and deeds spoken or done by the Sahabah (Companions) in presence of the Holy Prophet which he approved or on which he kept silence.

From the beginning no record in writing was kept of the Ahadees because the Holy Prophet had prohibited it.¹ Similarly, Umar had also prohibited it so that the people might not neglect the Qur'an. The Sahabah (Companions) therefore kept the Ahadees in their memory and orally transmitted them to others. But when there arose the tendency of forging and circulating forged Ahadees, Umar bin Abdul Aziz (d. 101 A.H.) ordered the search for, and compilation of, the correct Ahadees. This work was therefore undertaken with great zeal and enthusiasm during the rule of the Abbasides, and many collections of the Ahadees came into existence.

The first compilations of Ahadees were made by Abdul Malik ibne Juraij of Mecca who died in 150 A.H., and Imam Maalik of Medinah who died in 179 A.H., but the latter one is more prominent and is still extant and is known as "Muwatta."

Thereafter came into existence, firstly the compilations known as the "Masaaneed", and then the compilations known as the "Musannifaat". The "Masaaneed" are with reference to the "Isnaad" or names of their narrators in which Ahadees narrated by different narrators are collected under their names, as for example the Ahadees narrated by Abu Hurairah are placed under his name, the Ahadees narrated by Hazrat 'Aa'isha are placed under her name, and so on. The most prominent and still extant of such compilations is the one compiled by Imam Ahmad bin Hambal (d. 241 A.H.) and is known as the "Musnad-e-Ahmad."²

-----1.

Muslim

2. For other such "Masaaneed", see Chapter 6, "History of Fiqah and Fuqahaa"

The "Musannifaat" are with reference to the subject matter in which the Ahadees are placed under different topics. The first compilation of this type was the "Muwatta" of Imam Maalik which we have already mentioned. But the most prominent, and no doubt the most authentic, of such compilations are the "Saha Sitta" or the six compilations made by Bukhari (d. 256 A.H.), Muslim (d. 261 A.H.), Abu Dawud (d. 275 A.H.), Tirmizi (d. 279 A.H.), Nasa'ee (d. 302 A.H.), and Ibne Majah (d. 273 A.H.)

Of the "Saha Sitta", the first one i.e. Bukhari, is taken by all to be next to Qur'an in authenticity, thereafter come the Muslim, but both taken together are known as the "Sahiheen" and are held in high esteem. Both contain "Saheeh" or authentic Ahadees not only relating to "cannon law", and to the "permitted" and "prohibited", but also many historical, ethical and dogmatic traditions. The four others, however, deal almost exclusively with the Sunnah, i.e. use and wont, and as such they are all known as the "Sunan". Another compilation of Ahadees made in this century was "Sunan-e-Daarimi" made by Abdullah ad-Daarimi (d. 255 A.H.) but it could not get the status of "Saha Sitta".

Thereafter Abul Hasan Dara Qutni (d. 385 A.H.) made another compilation entitled as "Musannaf Dara Qutni" in which he also commented on the weakness of some Ahadees mentioned in the Bukhari and Muslim. Yet another compilation which is more prominent and is still extant was made by Abu Muhammad Baghawai (d. 510 A.H.) known as the "Masaabeeh al-Sunnah". It contains Ahadees taken from other earlier compilations including the "Saha Sitta" without the "Isnaad". This compilation was revised by Waliuddin Muhammad bin Abdullah al-Khaeeb al-Umri (d. 743 A.H.) and named as "Mishkat-ul-Masabeeh" which is now very popular among the teachers and the student of Hadees as well as the general public.

Among the prominent collections of Ahadees in the later period we have "Jaame'ul Jaame' " and "Jaame'us Sagheer" by Jalaluddin Suyuti (d. 911 A.H.) who attempted to give a comprehensive compilation of extant collections.

Besides the preparation of the compilations of Ahadees, the scholars also wrote commentaries on the compilations, particularly on Bukhari and Muslim. Among the most prominent of the commentaries we may mention the "Fathul Bari", by Ibne Hajr Asqalani Shaafe'ee (d. 852 A.H.), "Umdatul Qari", by Badruddin Mahmood Aini Hanafi (d. 855 A.H.), and the one written by Qastalaani (d. 932 A.H.) on the Shaheeh Bukhari ; and also the commentary on Saheeh Muslim by Nawawi Shaafe'ee (d. 676 A.H.).

The Shiah's have their own compilations of Ahadees based on the authority of Hazrat Ali and his adherents. Among them the five compilations which are very prominent are (1) "Al-Kaafi", by Muhammad bin Yaqub al-Kulini (d. 328 A.H.), (2) "Mann Laa Yastahziruhul Faqeeh", by Muhammad bin Ali bin Babuyah al-Kummi (d. 381 A.H.), (3) "Tehzeeb-ul-Ehkaam" and (4) "al-Istibsaar Fi Makhtalafa Fihil Akhbaar", both by Muhammad al-Tusi (d. 459 A.H.), and (5) "Nehjul Balagha", by Ali bin Tahir al-Shareef al-Murtaza (d. 436 A.H.) or his brother Raziuddin al-Baghdadi.¹

ILMUL HADEES

"Ilmul Hadees" consists of two closely connected branches of study, viz., "Ilme Darayat" and "Ilme Riwayat". The former deals with the reliability of the "Raawi" i.e. narrator of Hadees, and the latter with the authenticity of the "Riwayat" or narration or the Hadees itself.

RELIABILITY OF THE NARRATOR

According to the scholars, a Hadees can only be considered as authentic when its "Isnaad" i.e. the narrators offer

-----1.

Shorter Encyclopaedia of Islam, by Gibb and Krammers, p. 120.

an unbreakable chain of reliable authorities. The scholars endeavour not only to ascertain the names and circumstances of the authorities (the "Rijaal" or personalities who transmit the Ahadees) in order to know as to when and where they lived, and which of them had been personally acquainted with the other, but also to test their reliability, truthfulness and accuracy in transmitting the texts, to make certain which of them were reliable (Saqqaah). This way of investigation is known as the "Jirha Wa Ta'deel" (wounding and authentication) ¹, and this was thought to be so indispensable that all commentaries on the collections of Traditions contain more or less details concerning the authorities. Special works are also devoted to this subject which are called the "Tabaqaat", as for example the "Tabaqaat" of Ibne Sa'd (d. 230 A.H.) and "Tabaqaat" of al-Zahabi (d. 748 A.H.). The books "Kitab-uz-Zu'afa" of Nasa'ee (d. 302 A.H.), "Al-Isaba Fi Tamyeez al-Sahabah" of Ibne Hajar Asqalaani (d. 852 A.H.), and "Asadul Ghabah Fi Ma'rifat al-Sahabah" of Ibnul Aseer (d. 630 A.H.) also deal with this subject.

On basis of strict investigation, out of forty thousand persons who have been instrumental in handing down the Ahadees, Imam Bukhari acknowledged only two thousand as reliable authorities. ²

In order to test the reliability of the Narrator, scholars have been particular about ascertaining the following facts :

- (1) The name, nickname, title, parentage and occupation of the narrator ;
- (2) The narrator must not have spoken a lie in reporting any Hadees from the Holy Prophet ;
- (3) The narrator must not have been accused of any offence or known to have been a liar
- (4) The narrator must not have committed frequent mistakes and blunders ;
- (5) The narrator must not have been careless in narrating the Hadees

-----1.
Shorter Encyclopaedia of Islam, by Gibb and Krammers, p. 117.

2. Dictionary of Islam, by T.P. Hughes, p. 640.

- (6) The narrator must not have been wicked in words and deeds;
- (7) The narrator must not have spoken from mere imagination,
- (8) The narrator must not have spoken anything against reliable persons ;
- (9) The narrator must not have been illiterate and fool ;
- (10) The narrator must not have held any peculiar religious view of his own ;
- (11) The narrator must not have had bad memory ;
- (12) The narrator must have examined every report minutely as required by verse 6 of chapter 49 (Hujuraat) of the Holy Qur'an.

CLASSIFICATION OF THE HADEES

With reference to the authenticity of the Hadees the scholars have classified the Ahadees as follows :

- (a) with reference to the character of those who have handed down the Hadees :
 1. Saheeh, i.e. a genuine Hadees, is one which had been handed down by truly pious persons who have been distinguished for their integrity ;
 2. Hassan, i.e. a mediocre Hadees, is one the narrator of which do not approach in moral excellence to those of the Saheeh ;
 3. Za'eef, i.e. a weak Hadees, is one whose narrators are of questionable authority ;
- (b) with reference to the original narrators of the Hadees :
 1. Marfu', i.e. an exalted Hadees, is a saying or an act, said or done, by the Holy Prophet Himself ;
 2. Mauqoof, i.e. a restricted Hadees, is a saying or an act, said or done by a Sahabi (Companion) of the Holy Prophet ;
 3. Maqtu', i.e. an intersected Hadees, is a saying or an act, said or done by a Taaba'ee (the one who conversed with a Sahabi) ;

-----1.
Al-Hadis, Vol. I, pp. 22-23, by Al-Haj Fazlul Karim.

- (c) with reference to the links in the chain of the narrators of the Hadees ;
- (1) Muttasil, i.e. connected Hadees, is the one of which the chain of narrators is complete from the time of the first utterance of the saying or doing of the act upto the time it was noted down by the compiler ;
 - (2) Munqate', i.e. disconnected Hadees, is the one of which the chain of narrators is incomplete ;
- (d) with reference to the manner in which the Hadees has been narrated and transmitted down from the first
1. Mutawaatir, i.e. an undoubted Hadees, is the one which is handed down by very many distinct chains of narrators, and which has been always accepted as authentic and genuine, no doubt ever having been raised against it ;
 2. Mashhoor, i.e. a well – known Hadees, is the one which has been handed down by at least three distinct chains of narrators. It is also known as "Mustafeez" (diffused). It is also used for a Hadees which was at first recorded by one person, or by some persons, and afterwards became a popular Hadees ;
 3. Aziz, i.e. a rare Hadees, is the one which has been handed down by only two chains of narrators ;
 4. Ghareeb, i.e. a poor Hadees, is the one which has been handed down by only one chain of narrators ;
 5. Waahid, i.e. a single Hadees, is the one which has been narrated by one person and handed down by one chain of narrators ;
 6. Mursal, i.e. a let loose Hadees, is the one which any compiler of Hadees, such as Bukhari and others, records with the assertion "the Messenger of Allah said" ;
 7. Riwaayat, i.e. a Hadees which commences with the words "it is related" without the authority being given ;
 8. Mauzoo', i.e. an invented Hadees, is the one the falsehood of which is beyond doubt. ¹

-----1.
Dictionary of Islam, by T.P. Hughes, p. 640.

There are also some other kinds of Ahadees as follows :

- (1) Mu'addal, i.e. a problematic Hadees, is the one in which two successive narrators are missing ;
- (2) Matrook, i.e. abandoned Hadees, is the one of which the narrators are blamed for falsehood in matters other than in the narration of the Hadees ;
- (3) Munkar, i.e. unknown Hadees, is the one of which the narrator made mistake in narration or is negligent. It is opposed to "Ma'roof" ;
- (4) Shaaz, i.e. contradictory Hadees, is the one which is contradictory to trustworthy narration.¹

RULES APPLIED FOR ACCEPTENCE OF ANY HADEES AS AUTHENTIC

The learned scholars applied the following rules for accepting the Ahadees as authentic ;

- (1) the narration must be plain ;
- (2) the narrator must have himself heard or seen the Holy Prophet say or do any thing, or give complete chain of the narrators between him and the Holy Prophet ;
- (3) there should be no accusation against the Sahabah (Companions) or the Ahle Bait (household) of the Holy Prophet ;
- (4) the Hadees should not have a non-Arabic style and ignoble sense ;
- (5) it must be proved that the narrator actually met the person from whom he narrates ;
- (6) it must be proved that all narrators of a Hadees were of the age at which they fully understand what they heard or saw ;
- (7) the Hadees should not be inconsistent with established historical facts ;
- (8) the Hadees should not contain a severe punishment for slightest fault or high reward for a very small virtue ;
- (9) all narrators must have been known for piety, virtue and honesty ;

-----1.
See Al-Hadees, by Al-Haj Fazlul Karim, Vol. I, pp. 28-29,

- (10) each narrator must have been competent to correctly understand and transmit what he heard or saw ;
- (11) the Hadees which should have been known generally was known as such and the narrator was not alone in narrating it ;
- (12) the Hadees should not be contrary to reason or known principle of law ;
- (13) the Hadees should not be contrary to Qur'an ;
- (14) the Hadees should not be contrary to universally accepted sayings of the Holy Prophet ¹
- (15) the Hadees should not be containing superstitious belief ;
- (16) the Hadees should not be containing exaggeration in the praise of anybody ;
- (17) there should be no forecasts having exact dates, months or years ;
- (18) there should be nothing contrary to the high status of the Holy Prophet ;
- (19) the narration should not be such of which the explanation may not be possible.

FORGED AHADEES

In order to declare any Hadees as forged, the scholars have been particular to ascertain the following :

- (1) whether the Hadees was invented by the narrators ;
- (2) whether the Hadees was borrowed from other people ;
- (3) whether the Hadees is based on some other forged Hadees;
- (4) whether the Hadees is based on the narrator's own scepticism ;
- (5) whether the Hadees was due to the ignorance of a pious devote ;
- (6) whether the Hadees is due to religious bigotry ;
- (7) whether the Hadees was to please the aristocracy, or a king, or a caliph or any other official ;
- (8) whether the Hadees was only for the purpose of popularity. ²

-----1.
See Al-Hadees, *ibid*, pp. 21-22 2. See *ibid*, p. 23.

COMPANIONS OF THE HOLY PROPHET

The Companions of the Holy Prophet occupy very high rank among the Muslim Ummah. It is through them that the Hadees or Sunnah of the Holy Prophet has been handed down to us, and the authenticity of the Hadees or Sunnah actually depends upon the authenticity of the word and deed of the Companions obviously because they were the first to hear and see the words and deeds of the Holy Prophet, retain them safe in their memory, and transmit the same to the coming generations.

It was for them that the Holy Qur'an said :

i.e. and the foremost, the first of the Emigrants and the Helpers, and those who followed them in goodness—Allah is well-pleased with them and they are well-pleased with Him, and He has prepared for them Gardens wherein flow rivers, abiding therein for ever. That is the Mighty Achievement (*Taubah*, 9:100).

This verse speaks of two groups, viz., (1) first of the Emigrants and the Helpers, and (2) those who followed them in goodness. The first one was of those Companions who were the first to settle the status of Qur'an and Sunnah and deduce the law from them, and the second one was of those who followed them and accepted their authority in juristic deduction. According to this verse, Allah is well-pleased with them. This is the greatest testimony of the fact that the law laid down by the Companions of the Holy Prophet is also binding on the Muslim Ummah and that has been a well established principle of the Fiqah for the last over fourteen hundred years.

In this connection the following Ahadees of the Holy Prophet are also to be noted :

i.e. do not rebuke my Companions. If some one of you spends as much gold as the Uhud, he will not reach (the reward of) of one 'mud' of anyone of them nor half of it (Mishkat-ul-Masabeeh, Kitab-ul-Fitan, Baab Munaqibis Sahabah, 5752/1); and

i.e. honour my Companions, because they are the best among you, next those who will follow them (Mishkat-ul-Masabeeh, Kitab-ul-Fitan, Baab Munaqibis Sahabah, 5756/5); and

i.e. my Companions are like the stars, whoever of them you follow you will be on the guidance (Mishkat-ul-Masabeeh, Kitab-ul-Fitan, Baab Munaqibis Sahabah, 5762/11); and

i.e. my Ummah will be divided in seventy sects, and all will go to Hell except one. They asked : which is that one, O Messenger of Allah ? He said : that which is on that on which I and my Companions are (Mishkat-ul-Masabeeh, Kitab-ul-E'tisaam, Bil Kitab Wal Sunnah, 162/31).

The Fuqahaa (jurists) are also of the view :

i.e. that which is generally extant, and the Sahabah have kept silence over it and have accepted it, it is "wajib" (obligatory) to accept. But that which is in dispute between them, it is not "wajib" to accept it. ¹

-----1.
Tauzeeh wa Talweeh, Fasl Fi Taqleedus Sahabi

The reason for this, according to them is :

i.e. most of their sayings are those which they heard from the Holy Prophet. They directly observed the context of the "Nasoos". They have precedence in the religion. They got training direct from the Holy Prophet. Their period was "Khair-ul-Quroon" (the best of the periods). They knew the "Asbaab-o-Ahwaal" of Qur'an and the "Israar" of Shari'at, and they acquired the knowledge of the occasion of revelation. ¹

Section 3 IJMA'

Ijma is the third basic source of Fiqah

DEFINITION

Literally, "Ijma" means "collecting" or "assembling", ² or, to be more correct, "agreeing upon." ³ But in the domain of Fiqah, it means "the agreement of the "Mujtahids (i.e. those who have a right, in virtue of knowledge, to form a judgment of their own) after the death of the Holy Prophet Muhammad (peace be upon him), in any age, on any matter of the Faith." ⁴ In other words, it is "an agreement of the jurists among the followers of the Holy Prophet in a particular age on a question of law." ⁵

-----1.
Ibid, also see Noorul Anwaar.

2. Dictionary of Islam, by T.P. Hughes, p.197

3. Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 157. 4. See ibid

5. Tauzeeh, p. 498 ; Mukhtasar, Vol. II, p. 29 ; Jaame'ul Jawame', Vol. III, p. 288

Just like the Sunnah, Ijma is also either “Ittiffaaq-e-Qauli” i.e. unanimous consent expressed in declaration of opinion, or “Ittiffaaq-e-Fe’il i.e. expressed in unanimity of practice, or “Ittiffaaq-e-Sukuti i.e. when the majority of the Mujtahideen signified their tacit assent to the opinion of the minority by “silence” or “non - interference.”¹

AUTHORITY OF IJMA

Authority of Ijma as the third source of Fiqah is based on Qur’an, Sunnah as well as the Tradition of the Sahabah (Companions) of the Holy Prophet.

As regards Qur’an, the following verses may be noted :

i.e. O you who believe, obey Allah and obey the Messenger and those in authority from among you (*Nisa*, 4:59); and

i.e. and whoever acts hostilely to the Messenger (of Allah) after guidance has become manifest to him and follows other than the way of the believers, We turn him to that to which he (himself) turns and make him enter the Hell, and it is an evil resort (*Nisa*, 4:115); and

i.e. and thus we have made you an exalted nation that you may be the bearers of witness to the people (*Baqarah*, 2:143); and

i.e. ask the followers of the Reminder, i.e. those who have knowledge, if you do not know (*Nahl*, 16:43; *Ambia*, 21:7); and

-----1.
Dictionary of Islam, by T.P. Hughes, p.197

i.e. and consult them in matters. Then, when you have determined, put your trust in Allah (*Aale Imran*, 3:159); and

i.e. and whose affairs are (decided) by counsel among themselves (*Shura*, 42:38)

As regards Sunnah, the following Ahadees provide the sanction for Ijma :

i.e. Allah will never gather my Ummah upon what is wrong (*Mishkat-ul-Masabeeh*, *Kitab-ul-Eiman*, *Baab-ul-E'tisaam Bil Kitab wal Sunnah*, (163/32); and

i.e. follow the "Sawadal Azam" (numerous body) (*Mishkat-ul-Masabeeh*, *ibid* (164/33); and

i.e. the Hand of Allah is over the "Jama'at" (body); and whoever separates himself from the "Jama'at" will go to Hell (*Mishkat-ul-Masabeeh*, *ibid* (163/32); and

i.e. He who opposes the people to the extent of an span will die the death of men who died in the days of ignorance (*Mishkat-ul-Masabeeh*, *ibid* (175/44).

As regards tradition of the Sahabah (Companions of the Holy Prophet), the Sahabah used to decide matters by counsel among themselves keeping in view the Qur'an and Sunnah. All the four early Caliphs strictly adhered to this practice. Abu Bakr and 'Umar had for this purpose prohibited the senior Sahabah

from going abroad, because they were to be consulted on all matters arising out of new situations particularly due to vast expansion of the Islamic State in the days of 'Umar, and all that was decided by consultation was acted upon through out the Islamic State. In those days gathering of men of learning in the days of Hajj was also used for this purpose.

On account of this practice, the Ijma of the Sahabah was considered to be equal to "Hadees-e-Mutawatir" ; and that which was decided afterwards, but in accordance with the unanimous view of Sahabah, was treated as equal to "Hadees-e-Khabar-e-Mashhoor" ; and that upon which there was diversity of opinion among the Sahabah, but had since been decided by the later Mujtahideen was equal to "Hadees-e-Khabar-e-Waahid." ¹

NECESSITY OF IJMA

The four Sunni Imams hold Ijma as a valid source of Fiqah not merely on basis of Qur'an and Sunnah but also on the unanimity of opinion of the Sahabah. The Shaafe'ee and Maaliki Imams recognize the authority of Ijma not merely in matters of law and religion but also in matters relating to the army, war and administration of the State. ²

Ijma was acted upon by the Ummah immediately after the dath of the Holy Prophet when they elected Abu Bakr as a successor to the Holy Prophet, by a unanimous vote.

The argument of the Sunni Imams in support of the Ijma is that if any rule of law is not explicitly found in the Qur'an and Sunnah, it must be capable of being deduced from them, and since the learned are alone competent to make such deduction, their concurrent opinion on any question must be of valid authority and it must also be infallible, since truth is one according to Islam and all besides is error. ³

-----1.
Dictionary of Islam, by T.P. Hughes, p.197

2. Jaame'ul Jawame', Vol. III, pp. 288, 305,307 ; Mukhtasar, Vol. II p. 29 ; Muhammadan Jurisprudence, by Abdur Rahim, p. 116.

3. Tauzeeh on the margin of Talweeh, p. 510 ; Kashful Israar, Baizawi, Vol. III, p. 226-227 ; Muhammadan Jurisprudence, by Abdur Rahim, ibid.

COMPETENCY FOR IJMA

According to the agreed opinion of the scholars, Muslim Mujtahids and jurists alone are competent to take part in Ijma. Non-Muslims are totally debarred from making juristic deductions. They have no faith in the Law-Giver – i.e. Allah and His worthy Messenger, they cannot therefore be presumed to arrive at the truth in matters of law and religion. As regards minors and lunatics, they are debarred on account of their natural disabilities.

Further, among the Muslims also only the learned ones are fit for Ijma, i.e. those who are competent to make juristic deductions. As regards the masses, they are to follow Ijma of the learned ones. Qur'an has itself commanded them to "obey Allah and obey Messenger and those among you who are in authority" (*Nisa*, 4:59). The Words "those among you who are in authority" are construed to mean "the learned ones" ; they do not mean "the rulers" because all others, including the rulers, are asked in matters of Shari'at to act upon the advice of the learned ones by the verse, "ask the followers of the Reminder, i.e. those who have knowledge, if you do not know" (*Nahl*, 16:43 ; *Ambia*, 21:7).

In fact the masses are not at all competent to take part in the Ijma. According to the learned scholars, the opinion of the masses in respect of Ijma is of no value, neither in favour nor against, because in matters of Shari'ah they have no approach, nor are they acquainted with the "Hujjat" nor "Burhan" of Shari'ah. Accordingly, in matters of Fiqah only the Fuqahaa, in matters of Usul only the Usuli'een, and in matters of Nahev only the Nehiyoon will be competent. All others will be included among the masses.¹

Even otherwise, not only the masses are incompetent to take part in Ijma, but in fact such an Ijma is not even practically possible. To quote Shah Waliullah, "Ijma of the entire Ummah from which none remains away is impossible. Ijma has been of

-----1.
Husulul Mamool Min Ilm-ul-Usul, p. 40

the majority in the sense that from among the jurists of the city the competent ones have agreed on any particular point such as we find in the problems settled by 'Umar. Thereafter is the Ijma of the majority and silence of the rest, thereafter is the case of two different opinions rejecting a third one, thereafter is the agreement of "Ahle Haram" and the "Khulafa".¹ According to Imam Ghazali, if agreement of all the Muslims were essential, Ijma would become impossible.²

As regards the qualification of a man to take part in the Ijma, the scholars are of the view that he should know the Usul and Faru', the theoretical and the applied laws, he should be learned in Qur'an and Sunnah, and he should be conversant with the rules and methods of analogical deductions, besides being a true Muslim, strict follower of the Shari'at and a man of excellent character.³

IJMA NOT CONFINED TO ANY AGE OR COUNTRY

Maalikiah recognize the validity of the Ijma of the Sahabah and their successors residing in Medinah, without reference to the opinion of others.⁴ Maaliki view is based on the fact that Medinah was the first fountain head of Islamic learning and that it also had great sanctity. Against this was the view that learning spread throughout Arabia during the life time of the Holy Prophet and also after him and that even in those days Mecca was no less sacred than Medinah.⁵ Further, the Ahadees, viz., "Medinah throws out its dross as fire throws out the dross of metal,"⁶ and "Islam will return to Medinah as a serpent returns to its hole",⁷ which the Maaliks referred to in support of their view, were interpreted by other jurists as merely indicating the sacred character of the city of Medinah.

-----1.
Al-Tahmeed Le Ta'reef A'immatut Tatjeed (manuscript)

2. Tqreer, Vol. III, p. 82; Mukhtasar, Vol. II, p. 33

3. We have dealt with Qualifications of Mujtahid in chapter 3 "Ijtihad and Taqleed"

4. Mukhtasar, Vol. II, p. 35

5. Ibid, Vol. II, pp. 29,35; Taqreer, Vol. III, p. 100

6. Mishkat-ul-Masabeeh, Kitab-ul-Manasik, Babo Haramil Medinah, 2617/10

7. Mishkat-ul-Masabeeh, Kitab-ul-Eaiman, Baab-ul-E'tisaam Bil Kitab wal Sunnah, 152/21

Those who confine the Ijma to the Sahabah contend that most of the texts relied upon as authority, as for example, "you are the best of people,"¹ "Allah will never gather my Ummah upon error"² refer to the Sahabah only. But majority of the Jurists are of the view that these are of general application. Even among the Hanafis, Qazi Abu Khazim, during the reign of Mu'tadid Billah, held the concurrent decision of the first four Caliphs as the Ijma, and according to one report this was also the view of Imam Hambal.³ Some were also of the view that agreement of the first two Caliphs was sufficient to constitute Ijma.⁴

But now the accepted view of all the four Sunni Schools of Fiqah is that Ijma is not confined to any particular age or country.⁵

The Shiahs, particularly the Imamiyas and Zaidiahs, admit the Ijma of the descendants of the Holy Prophet alone. They rely upon Qur'anic verse "Allah wishes to cleanse the people of the household (of the Holy Prophet) of impurities,"⁶ and also on the Hadees "I am leaving among you two things. If you hold by them, you will not go astray, the Book and my descendants."⁷ According to the Sunnis, however, the verse refers to the wives, and not descendants, of the Holy Prophet; and as regards the Hadees itself, according to the scholars, its proof rests on isolated testimony and cannot therefore support a doctrine of absolute authority like Ijma; and that descendants alone are not mentioned in the Hadees as the source of guidance, the Qur'an is also there.⁸

In fact the Qur'anic text that "whoever acts hostilely to the Messenger after guidance has become manifest to him and follows other than the way of the believers, We turn him to that to which he (himself) turns and make him enter the Hell,"⁹ and

-----1.

Aale Imran, 3:110

2. *Mishkat-ul-Masabeeh*, *ibid*, 163/32

3. *Taqreer*, Vol. III, p. 98

4. *Mukhtasar*, Vol. II, p. 36

5. *Jaame'ul Jawame'*, Vol. III, p. 291; *Mukhtasar*, Vol. II, p. 35; *Taqreer*, Vol. III,

6. *Ahzaab*, 33:33

7. *Mishkat-ul-Masabeeh*, *Kitab-ul-Fitan*, Babo Manaqibe Ehle

Bait, 5890/18

8. In Hadees No. 176/45 (*Mishkat-ul-Masabeeh*), previously

noted, instead of "Itratee" there appears

"Sunnato Rasulohu",

9. *Nisa*, 4:115.

“thus We have made you an exalted nation that you may be the bearers of witness to the people”,¹ and the Hadees “Allah will never gather my Ummah on error”,² imply that, “there is in the thought and working of the (Muslim) people as a whole a power to create doctrine and law, and not simply to stamp with approval that which has otherwise been (already) reached.”³

The result is that Ijma is for every age and for every country, and the learned ones of every age and country have the authority to decide by agreement about new problems coming before them, and in this connection also make necessary modification in their views with the change in the circumstances, basically keeping in view the Qur'an and Sunnah as well as the Ijma of the Sahabah. In this connection, it may also be noted that the Ijma of any age or country is binding on all people of that one age or that country and none has the right to oppose it.⁴ Ijma of one age may however be reversed by a subsequent Ijma of the same age in which case the first one ceases to have operation. Similarly, Ijma of one age may be repealed by Ijma of a subsequent age with one exception,⁵ namely, that an Ijma arrived at by the Sahabah of the Holy Prophet is incapable of being repealed afterwards.⁶

NUMBER OF JURISTS REQUIRED FOR IJMA

According to the Hanafis and Maalikis, it is not necessary for the validity of Ijma that the number of jurists participating in the Ijma should be large. Their number, however, according to some, must not be less than three, or, according to others, less than two.⁷ One jurist, namely, Ibne Juraij, was, however, of the view that if in any particular age there happens to be only one jurist, his opinion should have the authority of Ijma.⁸

-----1.
Baqarah, 2:143.

2. *Mishkat-ul-Masabeeh*, *Kitab-ul-Eaiman*, *Baab-ul-E'tisaam Bil Kitab Wal Sunnah*, 163/32

3. *Shorter Encyclopaedia of Islam*, by Gibb and Kramers, p. 157

4. *Tauzeeh Talweeh*, *Al-Ijma* 5. *Kashful Israar*, Vol. III, p. 262

6. *Muhammadan Jurisprudence*, by Abdur Rahim, pp. 127-128

7. *Kashful Israar*, Vol. III, p. 229 8. *Jaame'-ul-Jawame'*, Vol. III, pp. 294, 305 ; *Mukhtasar*, Vol. II, pp. 36-37 ; *Taqreer*, Vol. III, p. 593.

BASIS OF IJMA

According to the agreed view of all the four Sunni Imams, Ijma may be based on Qur'an, or Sunnah, or Qayas. The Mo'tazilah and the Zaahiriah do not admit the validity of Ijma based on an isolated Hadees or Qayas. They say that since a concurrent decision is absolute in its legal effect, therefore the authority on which it is based must also be of a conclusive nature. This argument is, however, rebuttable on the reasoning that the authority of Ijma is derived from the agreement on which it is based and not from the nature of the reasons or text on basis of which it is found. Therefore if the authority on which it is based is already of a binding nature, then Ijma itself becomes unnecessary.¹

IJMA BECOMES ABSOLUTE

According to the Hanafiah, Ijma becomes absolute if it fulfils the following conditions :-

- (1) no opinion to the contrary should have been expressed on the question by any of the Sahabah (Companions), or by other Mujtahids before the formation of the Ijma ;
- (2) none of the Mujtahids taking part in the decision should have afterwards changed his opinion ;
- (3) the decision must be proved as being either universally known, or at least as being well known ;
- (4) it should be based on an express text of the Qur'an, or a Tradition of a continuous or well known character ; and
- (5) it must be regularly constituted.²

-----1.
Muhammadan Jurisprudence, by Abdur Rahim, pp. 133-134

2. Ibid p. 135

Section 4 QIYAS

Qiyas is the fourth basic source of Fiqah.

DEFINITION

The word "Qiyas" means "meaning", "accord", or "equality."¹ Literally, it also means "to compare."² As a source of law, the Hanafiah define it as, "an extension of law from the original text to which the process is applied to a particular case by means of a common "Illat" or effective cause, which cannot be ascertained merely by interpretation of the language of the text."³ According to the Maalikiah, it means, "the accord of a deduction with the original text in respect of the "Illat" or effective cause of its law."⁴ The Shaafe'eeyah are of the view that it is, "the accord of a known thing with a known thing by reason of the equality of the one with the other in respect of the "Illat" or effective cause of its law."⁵

In plain language, Qiyas is a process of deduction by which the law of a text is applied to cases which, though not covered by the language, are governed by the reason of the text.⁶ In other and more simple words, if the "Illat" or effective cause of two problems is the same, then to apply the command applicable to the former to the later one also is known as the Qiyas.⁷

QIYAS AND INTERPRETATION

Qiyas, however, is not the same as interpretation. While by means of interpretation a text is applied to the cases covered by its language, the function of Qiyas is to extend the law of the text to cases not falling within the purview of its language.

-----1.
Mukhtasar, Vol. II, p. 204. 2. Dictionary of Islam, by T. P. Hughes, p. 482

3. Tauzeeh, p. 302

4. Mukhtasar, Vol. II, p. 2040

5. Jaame'-ul-Jawame', Vol. IV, p. 1

6. Muhammadan Jurisprudence, by Abdur Rahim, p. 138

7. Noor-ul-Anwaar, p. 224 ; Husaami, p. 91

PURPOSE OF QIYAS

The purpose of Qiyas, according to the scholars, is not to establish a new rule of law. It merely helps to discover the law and not to lay down a new law. It may, however, widen generally the law embodied in a text, though there are some jurists who take a narrower view and say that Qiyas can be used only to extend the actual command contained in the text, and not the cause or condition of its operation.¹

AUTHORITY OF QIYAS

Rules of law deduced by Qiyas do not rank so high, in authority, as those laid down by Qur'an, Sunnah or Ijma. The reason is that Qiyas rests upon reason which is likely to err, and therefore, according to the Sunni jurists, a Qazi, in deciding a case before him, is not bound by any particular juristic deduction; he may follow his own view.

Among the Sunnis, the Zaahiriah,² and some of the Hambalis deny the authority of Qiyas as a valid source of Fiqah, except in matters relating to the rights of men, e.g., appraising the value of a property destroyed by a trespasser, which are ascertainable by our senses and reason. Among the Shiah, the Imamiyah also dispute the authority of Qiyas as a source of Fiqah.³

Those who oppose the Qiyas say that the Qur'an has left no room for Qiyas. They rely on the following verses :-
i.e. nor anything green or dry but (it is all mentioned) in a Clear Book (*An'aam*, 6:59); and

-----1.
Aayaatul Bayyinaat, Vol. IV, p. 6

2. Al-Ehkaam, by Ibne Hazm, Vol. VII, pp. 53-56

3. Hallal Uqool, p. 53

i.e. we have not neglected anything in the Book (*An'aam*, 6:38); and

i.e. We have revealed to you the Book explaining all things (*Nahl*, 16:89)

i.e. and in whatever you differ, the judgment thereof is with Allah (*Shura*, 42:10)

They also say that Qiyas cannot be relied upon because Qur'an says :-

i.e. and surely conjecture avails naught against Truth (*Najm*, 53:28).

They also rely upon the following Ahadees of the Holy Prophet :-

The Holy Prophet has said that, "the greatest "Fitnah" for my Ummah will be those who will decide about the problems by their views and Qiyas ; they will make the Halaal as Haraam and the Haraam as Halaal;"¹ and that,

i.e., "the affairs of Bani Isreal were in proper order, until those born of the slave-girls increased in numbers, and began to deduce, from what had been laid down things which had never been laid down, and thus they themselves went astray and led others astray" (Daarimi).

-----1.

In answer to it, the Sunni jurists say that there is no doubt that the law for the guidance of the Muslims in every matter is to be found in the Holy Qur'an, but they point out that the law on some questions only has been laid down in express terms, and as regards the rest, Qur'an merely affords indications from which inferences have to be drawn. As regards the Ahadees, they say that they contain warning for the misguided ones but do not apply to Muslim jurists as a body. By way of sanction for Qiyas the Sunni jurists rely upon the authorities given under the following heading.

SANCTION FOR QIYAS

Sanction for Qiyas, according to the Sunni jurists, is contained in Qur'an, Sunnah as well as the tradition of the Sahabah (Companions) of the Holy Prophet.

As regards Qur'an, the following verse may be noted :-

i.e. He it is Who caused those who disbelieved of the People of the Book to go forth from their homes at the first banishment. You deemed not that they would go forth, while they thought that their fortresses would save them against Allah. But Allah came to them from a place they expected not and cast terror into their hearts – they demolished their houses with their own hands and the hands of the believers. So take a lesson. O you who have eyes (*Hashr*, 59:2)

On basis of this verse it is contended that the Muslims are asked by Allah by this verse to infer by Qiyas or analogically from the example of the Bani Israil that disobedience to

to Allah through insolent pride would not escape punishment.

Further, the word "Fa'tabaru" derived from the word "E'tibaar" means "turning a thing to its like", meaning thereby that whatever command is applicable to a thing will also be applicable to its like.¹

Other verses relied upon are :-

i.e. and teaching them the Book and the Wisdom (*Aale Imran*, 3:164)
; and

i.e. so that they may devote themselves to obtain understanding in religion (*Taubah*, 9:122)

While the first verse makes it clear that the very Mission of the Holy Prophet Muhammad (peace be upon him) was the teaching of the Book and the Wisdom, the second verse makes it necessary for the Muslims that some of them must devote themselves to acquire understanding in religion. Both these imply the use of intellect in the understanding of Qur'an and its application to the day to day problems which arise in the life of this world, particularly in the changed circumstances, and this is a clear sanction for Qiyas.

As regards Sunnah, reliance is placed on a well – known Hadees that when the Holy Prophet sent Mu'aaz bin Jabl as a Qazi to Yemen, he asked him : how would you decide the cases? Mu'aaz said : by the Book of Allah. The Holy Prophet asked : and if do not find anything in the Qur'an to guide you ? Mu'aaz said : I will decide according to the Sunnah of the Messenger of Allah. The Holy Prophet asked : if you do not find anything in it also ? Mu'aaz said : I will decide by my own reason. The Holy

-----1.
Tauzeeh Wa Talweeh, Al-Qiyas

Prophet said : Praise be to Allah Who has so disposed the delegate of His Messenger so as to satisfy him. ¹

According to yet another Hadees, in answer to the question put to them by the Holy Prophet, both Mu'azz bin Jabl As'ari said : when we will not find any command in the Sunnah, we will decide one matter on the Qiyas or analogy of the other, and decide according to what will be nearer to the Truth. The Holy Prophet said : both of you are correct. ²

Both these Ahadees provide a clear sanction for Qiyas as a source of law. Further, it is also a fact that the Holy Prophet himself relied on Qiyas or analogy in determining questions of law. For instance, he was once asked by a man whose father, though a man of means, had died without performing the Hajj, whether it was necessary that Hajj should be performed on his behalf and whether it would be of benefit for his soul. The Holy Prophet asked : what would you do if your father died owing a debt ? Here, it is clear that the Holy Prophet used the analogy of an unpaid debt for an unperformed Hajj, and ordered accordingly that the legal heir should arrange for the performance of Hajj as he is to do in the case of an unpaid debt. ³

As regards the tradition of the Sahabah, it is well known that the Sahabah used to decide the matters firstly by the Holy Qur'an, than by the Sunnah of the Holy Prophet, than by the Ijma, and lastly by their own Qiyas.

When Abu Bakr was asked about Kalalah, ⁴ he said :-

i.e. I say this by my own opinion. If it is correct, it is from Allah, and if it is wrong, take it to be from me and from Satan. ⁵

-----1.
Tauzeeh, p. 307 ; Mishkat-ul-Masabeeh, Kitab-ul-Hudood ; Baab-ul-'Amale Fil Qaza'e Wal Khaufe Minho ; 3565/7

2. Minhaj-ul-Usul, Kitab-ar-Raabe', Fil Qiyas.

3. Aayaat-ul-Bayyinaat, Vol. IV, p. 7

4. The one leaving neither parents nor children as legal heirs

5. Minhaj-ul-Usul, Kitab-ar-Raabe', Fil Qiyas.

Similarly, 'Umar on one occasion, in respect of the "Jadd" (grandfather), said : i.e. I decide this by my opinion.¹

On one such occasion, Usman said to Umar :-

i.e. if you follow your own opinion, it is good ; and if you follow your predecessor, it is better.²

Ali, in respect of a problem said that, "previously my and 'Umar's opinion was the same, but now my opinion is different, and now I do not consider their "Bai" (sale) as proper."³

'Abdullah Ibne Mas'ud said in respect of the woman to whom he had given the right to take divorce that I give the decision by my own opinion. If it is correct, it is from Allah ; and if it is wrong, it is from me and from Satan ; Allah and His Messenger are free from it.⁴

Umar, when appointing Qazi Shuraih as Qazi of Kufah, said to him that when you do not get any command in the Qur'an and Sunnah, and you are in doubt, then decide by your own opinion.⁵

Similarly, while appointing Abu Musa Ash'ari as Governor of Basrah, Umar said :

i.e. acquire the knowledge of the precedences and do Qiyas by your opinion.⁶

1. Ibid. 2. Ibid. 3. Ibid. 4. Tareekh Fiqah-e-Islami 5. Ibid.
6. Ibid.

Here it may also be noted that those who oppose Qiyas refer to the following views of the Sahabah :

Abu Bakr said :

i.e. O people, save yourselves from “As-haab-ur-Raa’e”. They are enemies of the Sunnat, and are unable to safeguard the Ahadees, and therefore they decide by their opinion. ¹

Ali said :

i.e. if religion were to be deduced from Qiyas, “Masah” of the lower part of the socks would be better than of the upper part to it. ²

Abdullah bin ‘Abbas said :

i.e. your learned ones and righteous ones will depart, and people will make the illiterate ones as their chiefs who will decide by their opinions. ³

These views are, however, not against Qiyas as laid down by the learned jurists of Islam right from the days of Sahabah. These are actually against deciding cases by illiterate ones on basis of their own opinions keeping aside the Qur’an, Sunnah, Ijma as well as decisions by the predecessors. Qiyas as laid down by the learned Jurists is a definite and well – established Science based on very sound principles and is a valid source of law needed for all times to come in order to decide about the new and novel problems which the Muslim Ummah will have to face in the fast developing and swiftly changing circumstances of the human society.

-----1.
Ibid. 2. Minhaj-ul-Usul, Kitab-ar-Raabe’, Fil Qiyas 3. Ibid

NEED AND IMPORTANCE OF QIYAS

The passing away of the Holy Prophet Muhammad (peace be upon him) deprived the Muslim Ummah of the means of getting revelations and at the same time of its guide in all matters – religious, social, as well as political. At first the Muslims relied upon Qur'an and Sunnah of the Holy Prophet. But the expansion of the Islamic State, under the first four Caliphs, and the growing interest in the theological and judicial speculation, the whole new world, intellectual as well as material, raised questions which were previously unknown, the answer to which (in clear terms) could not be in the Qur'an nor in the Sunnah. The people therefore found themselves forced to take decisions or to regulate their own conduct by their own opinions, and this laid the foundation of Qiyas for which the sanction was already contained in the Qur'an and Sunnah. But from the very beginning the jurists were of the view, as also expressed in clear words by Imam Shaafe'ee, that Qiyas, "is used in the cases which are not dealt with by the Qur'an and Sunnah nor the Ijma." ¹ In other words, Qiyas applies only when nothing is found in Qur'an, Sunnah or Ijma to solve any problem, and further, Qiyas can in no case go against Qur'an, Sunnah or Ijma, otherwise it will be *ab initio void*.

QIYAS, IJTIHAAD AND RAA'E

According to Imam Shaafe'ee, "Qiyas and Ijtihaad are two terms for the same idea." ² Raa'e is also used as a synonym of Qiyas, but Raa'e in fact is "pure reasoning" while Qiyas has always a limited meaning in as much as it is applied to a "particular method of reasoning" which ought to be applied to the other sources of Fiqah also. ³ In fact Qiyas is always to remain within the limits of Qur'an, Sunnah and Ijma, because it has to extend the law laid down by any of these there and not to lay down any new law itself.

-----1.
Risalah, p. 65 ; Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 266

2. Risalah, p. 60.

3. Shorter Encyclopaedia of Islam, *ibid*

KINDS OF QIYAS

Qiyas is of two kinds, viz., Jali (evident) or Khafi (hidden)

An example of Qiyas-e-Jali is as follows : wine is forbidden in the Qur'an under the word "Khamr", which literally means anything intoxicating ; it is therefore evident that opium and all intoxicating things are forbidden.

Qiyas-e-Khafi is seen in the following example : In the Hadees it is enjoined that one goat in forty must be given by way of Zakaat. To some poor persons the money may be more acceptable ; therefore, the value of the goat may be given instead of the goat.¹

CONDITIONS OF QIYAS

Conditions of Qiyas relate to "Hukm", "Asl" and "Fara' ".

The conditions relating to "Hukm" are as follows :

(1) the precept or practice upon which it is based must be of "Aam" (Common) and not "Khaas" (special) application.

Thus the Hadees saying, "if Khuzimah testifies for any one, that is sufficient" has no general application, and therefore by Qiyas it cannot be applied to any other person.

(2) the "Illat" (Cause) of it must be known and understood.

Thus, since the reason of fixing a particular ratio of Zakaat, or shares in inheritance, or Hudood, is not ascertainable, these cannot be extended to similar cases by Qiyas ;

(3) it must be based upon either Qur'an or Sunnah or Ijma ;

(4) it must not be contrary to anything declared elsewhere in the

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Qur'an or Sunnah, or, in other words, it should not involve a change in the law embodied in the Qur'an or Sunnah ; and

(5) it should not be a case of exception, e.g. eating or drinking due to forgetfulness does not break the Fast. ¹

The conditions relating to "Asl" are as follows :

- (1) the argument of the "Hukm" of "Asl" should not also imply the "Hukm" of the "Fara' " otherwise the "Hukm" will be proved by the "Hukm" and there will remain no need of Qiyas ;
- (2) the "Hukm" of "Asl" should not be "Fara' " of some other "Asl" , but it should be an independent "Hukm" in itself. But if instead of the "Hukm" the "Asl" is itself the "Fara' " of some other "Asl", and the 'Illat is common to both the "Asl", then Qiyas will be permissible. ²

The conditions relating to "Fara' " are as follows :

- (1) 'Illat of "Fara' " and "Asl" should be the same, though there may be difference in the degree, strength or weakness ;
- (2) the "Hukm" of the "Asl" should not change in the "Fara' " ;
- (3) the "Hukm" of "Fara' " should not precede the "Hukm" of "Asl"

'ILLAT (EFFECTIVE CAUSE)

'Illat is defined as "Mu'arrif" i.e. same thing which makes known, or as " 'Alaamat" i.e. a sign, or as "Mu'assir" i.e. something which brings into existence.

Sadrush Shari'ah prefers first definition as by 'Illat the applicability of the law of a text to a case not covered by its language becomes known. According to him the second definition is included in the first one ; and as regards the third one, he

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Dictionary of Islam, *ibid* ; Muhammadan Jurisprudence, by Abdur Rahim, pp. 142-146 ; Kitab-ut-Tehqeeq, Qiyas ; Sharhe Musallamus Sabut, Qiyas.

2. Kitab-ut-Tehqeeq, Qiyas ; Sharhe Musallamus Suboot, Qiyas.

objects to it saying that it is the law – giver who brings the law into existence and not the 'Illat.

In other words, 'Illat may be defined as the fact, circumstance, or consideration which the law-giver has in regard in laying down the law in a text.¹

When the 'Illat or effective cause of a text has been determined, the jurist is in a position by "Ta'leel", or reasoning based on that 'Illat, to apply the law of the text in a case in which the same 'Illat is present.

According to the Sunni scholars, the law-giver has in view a certain "Hikmat" or "Maslehat" or policy, the purpose of which is to promote the welfare of men by securing an advantage or averting an injury, and so far as the 'Illat for a law advances that policy it is "Munaasib" or proper.

HIKMAT (POLICY)

The "Hikmat" or policy of the law is either religious or secular. The religious policy is the "Riyazun Nafs" i.e. discipline of the soul and "Tehzeeb-ul-Akhlaaq" i.e. improvement of the morals. The secular policy is to safeguard the life, property, generation, reputation, religion and knowledge. These are known as the "Zaroorat" or primary objects. Then there are the "Haajat" i.e. wants which are secondary objects. Lastly are the "Tehseen" i.e. objects relating to dignity of man.²

There are, however, grades in both the religious as well as the secular objects, and no hard and fast line can be drawn between the primary and secondary objects, and therefore the law in certain cases is promoted by the consideration of what is fit and proper in the given circumstances. In other words, the absolute necessity has precedence over all other considerations. Instances of it are contained in the so many exceptions allowed by the Shari'ah in the performance of Salaat, (prayer), Som (Fast) and Hajj.

1. Muhammadan Jurisprudence, by Abdur Rahim, p. 146.

2. Tauzeeh, p. 318 ; Aayaat-ul-Bayyanaat, p. 96; Mukhtasar, Vol. II , p. 240

'ILLAT, SABAB, SHART AND 'ALAAMAT

“ 'Illat ” is that “ 'Aariz ” (symptom) which creates “Taghayyur” (change) in the “Wasf” (quality) of “Mahl” (Object). Thus, disease is known as “ 'Aariz ” because it creates “Taghayyur” in the “Wasf” i.e. health of the “Mahl” i.e. man.

According to the jurists, when “Hukm” or law is provided in any “ 'Aariz ” when it is found, the “ 'Aariz ” is known as the “ 'Illat”.¹

“Sabab” means the way leading to the purpose. According to the jurists, the way by which one arrives at a “Hukm” or law is known as the “Sabab”.² But the “way” and “to walk on the way” are two different things. Thus, although the “way” leads to the purpose, but the purpose can be achieved only when one “walks on the way”, and therefore “to walk” on the “way” is the “ 'Illat ”. In other words, the “way” leading to a “Hukm” is the “Sabab” and the act “to walk” on the “way” to arrive at the “Hukm” is the “ 'Illat ”.³

“Shart” means the condition on which the existence of anything depends. According to the jurists, the thing on the existence of which depends the existence of the “Hukm” is known as the “Shart”.⁴

But the “existence” of “Hukm” and the “proof” of “Hukm” are two different things. The former relates to the “Shart” and the latter relates to the “ 'Illat ” of the “Hukm”.

According to the jurists, “Hukm” relates to its “Sabab”, is proved by its “ 'Illat ”, and exists on the existence of its “Shart”.⁵

“ 'Alaamat” means a sign. According to the jurists, the thing which serves as a sign for the existence of a “Hukm” is known as “ 'Alaamat”. It neither relates to the “existence” nor “proof” of the “Hukm”.⁶

1. Al-Taqrer Wal Tehbeer, Vol. III, p. 141.

2. Husaami, p. 129

3. Usulush Shashi, p. 96

4. Kitab-ut-Tehqeeq p. 274

5. Usulush Shashi, p. 96

6. Kitab-ut-Tehqeeq, p. 279

To put all the four together, “Sabab” is the way to reach the “Hukm”, “ ‘Alaamat ” is the sign of the existence of the “Hukm” , “Shart” is the one on which the existence of the “Hukm” depends, and “ ‘Illat ” is that on which is based the proof of the “Hukm”.

‘ILLAT AND SABAB

- (1) If ‘Illat and Sabab both are present, the “Hukm” will relate to the ‘Illat and not to the Sabab, unless it is difficult to relate the “Hukm” to ‘Illat.
- (2) When Sabab proves ‘Illat, it is in the sense of ‘Illat and is known as “ ‘Illat-ul-‘Illat ”.
- (3) Sabab can be in place of ‘Illat when it is difficult to know the ‘Illat.
- (4) Sometimes that which is not actually the Sabab is also said to be the Sabab, e.g., oath is generally said to be the Sabab of ransom although actually the breaking of the oath is the Sabab of ransom.¹

’ILLAT AND SHART

Shart is of five kinds, viz.,

- (1) “Sharte Mehz” as already explained above ;
- (2) Shart in the sense of ‘Illat – it is when the ‘Illat to which the “Hukm” can be related is not present ;
- (3) “Sharte Ismi” – when there are two conditions for a “Hukm” out of which the first one is not present,
- (4) Shart which is taken as the Sabab ;
- (5) Shart in the sense of ‘Alaamat.²

“ ‘ILLAT ” AND “ HIKMAT ”

“Hikmat” underlies all the “Ahkaam” or Commands issued by the Law – giver i.e. Allah the Almighty from the very beginning. It is, however, concealed or hidden, but the rules and regulations as well as the limitations lead to it and are also the means to achieve it.

1. Kitab-ut-Tehqeeq, Qiyas 2. ibid

“ ’Illat ” is deduced through reasoning from the “Hikmat” of the rules and regulations as well as the limitations. Thus it necessarily exists with the “Hikmat” and serves as the basis for the “Hukm” by rational understanding. But since “Hikmat” is something hidden, it cannot serve as a basis for “Qiyas”. The basis of “Qiyas” will always be the “ ’Illat ” which will also be the basis of “Hukm”.¹

“ ’Illat ” and not “Hikmat” is therefore the basis for the “Hukm”. If “Hikmat” is made the basis for the “Hukm”, there will arise difficulties in many commands of the Shari’ah as for example, the exceptions in Salaat and Som for a traveller are to remove the hardships which also come within the “Hikmat”, but the basis for these exceptions is actually not the “Hikmat” because hardships in Salaat and Som are also faced by those at home. The basis of these exceptions is actually the “ ’Illat ” i.e. the journey and therefore all those in journey can avail these exceptions. Those at home, inspite of facing the hardships, are not allowed to avail such exceptions.

“ ’ILLAT ” AND “ ’AQL ”

Since “ ’Illat ” forms the basis for “Hukm”, the basis for “ ’Illat ” must always be “ ’Aql ” or intellect, so that the “Hukm” deduced by it may be understandable in terms of reason. According to the scholars, therefore, “it is necessary that ’Illat of a Hukm must be such that it may be known by the people ; its reason must not be hidden ; and distinction between its existence and knowledge be possible.”²

WHAT THINGS FORM THE ’ILLAT

The following things form the ’Illat : (1) the links or the means ; (2) the ways or the manners ; (3) closeness with the ‘Hikmat’, ‘Maslehat’ or policy ; and (4) its necessity for it.

1. Hujjatullahil Baaligha, Baab al-Farq Bainul Masaleh Wal Shara’e.

2. Hujjatillahil Baaligha, Baab Israrul Hukm Wal ’Illat.

When more than one of these things are present, the one preferable on solid reasons will be made the 'Illat. As for example, hardships of summer and winter could also be the 'Illat for the exceptions in respect of Salaat and Som, but since determination of their limitations is not practically possible, they were not made the 'Illat for the exceptions allowed in respect of Salaat and Som for a traveller or a patient.

HOW 'ILLAT IS FORMED

'Illat is formed on basis of (1) the condition of man ; or (2) the condition of the thing upon which the man acts.

- (1) As regards man, the condition that forms the 'Illat is either (a) inherent ; or (b) accidental.

Thus, for instance, in Salaat, Som and Zakaat, the conditions of being major and sane are those which are inherent, and the conditions of time, month and minimum assets are those which are accidental.

- (2) As regards the thing also, the condition that forms the 'Illat is either (a) inherent ; or (b) accidental

Thus, for instance, in case of intoxicants the condition of intoxication is inherent ; and in case of theft the condition of stealing is accidental.

Sometimes more than one conditions of the thing are combined together, e.g. a married adulterer is to be stoned to death, and an unmarried adulterer is to be flogged.

Sometimes the conditions of man and thing both are combined together, e.g., gold and silk are prohibited for the men but not for the women of the Ummah.

HOW 'ILLAT IS ASCERTAINED

'Illat is ascertained from Qur'an and Sunnah, Ijma, as well as through Ijtihad.

I. 'ILLAT ASCERTAINED FROM QUR'AN AND SUNNAH

In the Qur'an and Sunnah, the 'Illat is given (a) "Sarahatan", i.e. in express terms, as well as (b) "Isharatan", i.e. by indication.

(a) As regards mention of the 'Illat in express terms, the position is as follows :

(1) Sometimes it is expressed in more than one words. e.g., in verse 58 of chapter 24 (*Noor*) of the Holy Qur'an, it is said, "O you who believe, let those whom your right hands possess and those of you who have not attained puberty ask permission of you three times : before the morning prayer, and when you put off you clothes for the heat of noon, and after the night prayer. These are three times of privacy for you ; besides these it is no sin for you nor for them – some of you go round about (waiting) upon others." In this verse, the 'Illat for not seeking permission besides the three times mentioned is expressed in the words "some of you go round about (waiting) upon others."

Similarly, in a Hadees the Holy Prophet declared the water from which a eat, drinks as pure and, by way of its 'Illat, said that "the cat frequently visits the houses."

(2) Sometimes it is expressed in one word, e.g., in verse 7 chapter 59 (*Hashr*) of the Holy Qur'an, viz.,

the 'Illat for distribution of the "Fai", i.e. property acquired without war, is given by the word "Kai" meaning "as that."

Or, in the Hadees :

the 'Illat is given by the word "Le Ajl", or, in another Hadees :
the 'Illat is given by the word "Izn".

(3) Sometimes it is expressed by a single letter, e.g., in verse 1 of chapter 14 (*Ibrahim*) of the Holy Qur'an, viz.,

the 'Illat is given by the letter "L".

Or, in the Hadees :

the 'Illat is given by the letter "F"

Here it may also be noted that the letter "F" comes in respect of "Wasf" (quality) as in the above mentioned Hadees, as well as in respect of "Hukm" (command) as in the verse :

i.e. and (as for) the men and the women addicted to theft, cut off their hands (*Maa'idah, 5:38*)

(4) Sometimes it is expressed by a composite word, like "La 'Allata", "Kaza", "Inna", etc., e.g., in verse 53 of chapter 12 (*Yusuf*) of the Holy Qur'an, viz.,

the 'Illat is expressed by the composite word "Inna."

(b) As regards the mention of the 'Illat by indication, there are many ways of it as follows :

(1) by the use of the letter "F", whether relating to "Hukm" or "Wasf" when both are mentioned, may it be in the words of the "Shaare" (Law – giver) or the "Raavi" (narrator)

Thus in the Hadees :

the indication by "F" is in respect of the "Wasf" in the words of "Shaare"; and in the statement : the indication by

“F” is in respect of “Wasf” in the words of “Raavi”.

Similarly, in the verse :

the indication by “F” is in respect of the “Hukm” in the Words of “Shaare”; and in the statement : the indication by “F” is in respect of the “Hukm” in the words of “Raavi”.

(2) If a “Wasf” of a person was known to the Holy Prophet , and on basis of it the Holy Prophet issued a command, the “Wasf” was the ‘Illat of the command by indication. As for instance, a man came to the Holy Prophet and stated that he cohabited with his wife during the Fast. The Holy Prophet commanded him : i.e. set free a slave. In this the ‘Illat of the command was the cohabitation with the wife during the Fast.

(3) If distinction is made between two commands on account of a “Wasf”, the “Wasf” will be the ‘Illat of the command by indication, e.g.,
i.e. two shares for the rider and one for the one on foot. In this the distinction is on account of the “Wasf” of riding, and it is therefore the ‘Illat of the command.

(4) If one out of the two commands or things is mentioned, the one not mentioned will be the ‘Illat by indication e.g., i.e. the murderer does not inherit. In this, murder, which is not mentioned, is the ‘Illat of depriving from inheritance.

(5) When two commands are distinguished by a word of exception, the word of exception will be the indication of the ‘Illat, e.g.

i.e. and if you divorce them before you have touched them and you have appointed for them a portion, (pay) half of what you have appointed unless they forego (*Baqarah*, 2:237)

In this “Ya’foona” i.e. forego is the ‘Illat of defeating the dower and it is indicated by the word “’Illa” which is the word of exception.

(6) The maximum limit of a command also indicates its ‘Illat, e.g.,

i.e. so keep aloof from women during menstrual discharge and go not near them until they are clean (*Baqarah, 2:222*)

In this the ‘Illat of the command “so keep aloof” is indicated by the impurity of “menstrual discharge”.

(7) The statement is made in the form of a condition by which the distinction is understood, e.g.,
i.e. the condition of equality is when the things are of the same “Jins” (kind). If the “Jinse” is different, sell as you like.

In this the ‘Illat of the permission to sell is indicated by the different nature of the “Jinse”.

(8) The word “Laakin” (but) is mentioned to indicate distinction, e.g.,

i.e. Allah will not call you to account for that which is vain in your oaths, but He will call you to account for the making of deliberate oaths (*Maa’idah, 5:89*).

In this the making of deliberate oaths indicates the ‘Illat for calling to account.

(9) Any “Wasf” of a thing which if not taken to be the ‘Illat, its mentioning becomes meaningless, e.g.,

i.e. (the Holy Prophet asked) does dates become less in weight on becoming dry? (People) said : Yes. (The Holy Prophet) said : then (in such condition) it is not permissible (to sell it).

In this the dryness of the dates indicates the 'Illat of the command.

(10) Sometimes the reason for the doubt also gives the indication towards the 'Illat e.g., once 'Umar asked the Holy Prophet : does Fast become defective by kissing ? The Holy Prophet said : will water taken in the mouth for rinsing and thrown out without letting it go inside the throat will break the Fast ? Will you be said to have drunk the water ?

In this the reason for the doubt is kissing. In the answer another instance of the reason for the doubt, i.e., taking water in the mouth for rinsing is referred to. The idea is that if taking of water in the mouth for rinsing which is otherwise also the act preceding drinking of the water does not break the Fast, the kissing which is the act preceding sexual intercourse also does not break the Fast.

(11) The "Wasf" which is mentioned with the Command indicates 'Illat of that Command, e.g.,
i.e. the Qazi should not give the decision while angry.

In this the anger indicates the 'Illat of prohibiting the giving of decision by the Qazi.

(12) 'Illat is also indicated by prohibiting anything coming in the way of obedience to any Command, e.g.,

i.e. hasten towards the remembrance of Allah and leave off business (*Jumu'ah*, 62:9)

In this the 'Illat is indicated by the business which comes in the way of the remembrance of Allah. Such an 'Illat is known as "Taqwiyat-e-Wajib."¹

1. Tauzeeh Talweeh, Sharhe Musallamus Suboot, Minhajul Usul, Kitab-ar-Raabe, Fil Qiyas ; Fiqah-e-Islami Ka Taareekhi Pas Manzar, ibi d, p. 152.

II. 'ILLAT ASCERTAINED FROM IJMA

'Illat is also ascertained from the Ijma. Thus, for instance, by Ijma it is settled that in the inheritance the real brother will have preference over the brother from the same father but different mother. Such 'Illat is known as "Imtizaj-un- Nasabain." Similarly, in the statement that the guardian of a minor is his or her father, the 'Illat is "Sighr Sini" or minority.

III. 'ILLAT ASCERTAINED FROM IJTIHAAD

According to the scholars,, 'Illat is ascertained from Ijtihad in the following ways :

(1) By "Munaasibat"

In this connection the following principles laid down by the jurists are to be kept in view :

- (a) all "Ausaaf" (qualifications) of a "Nass" do not affect the "Hukm" ;
- (b) all "Ausaaf" of a "Nass" do not form the 'Illat;
- (c) no "Wasf" can be made 'Illat without reason ;

(2) By "Tarad Wa 'Aks"

In this the "Hukm" goes with the "Wasf". If "Wasf" changes, the "Hukm" also changes, e.g., the extract of grapes is "Halaal" until intoxication does not appear in it. As soon as intoxication appears in it, it becomes "Haraam".

The system of "Tarad Wa Aks" is mostly extant with Imam Shaafe'ee and Imam Ghazali, but not so much with Imam Abu Hanifah.

(3) By "Shubha"

In this, "Wasf" has no obvious "Munaasibat" with the "Hukm". It is inferred from some other commands. For example, in order to remove the impurity Imam Shaafe'ee says :

i.e. this purity is one which is intended for Salaat, therefore except through water this purity is not permissible to be acquired through any other flowing thing.

But that water is the only thing for "Taharat" is not obvious from the command relating to "Taharat" for Salaat. It is actually inferred from the commands relating to the touching of the Holy Qur'an or "Tawaaf" round the Ka'bah in which water is mentioned for acquiring "Taharat".¹

(4) By "Qiyasul Ishbah"

In this, the new problem has similarity with two "Asl" – one as regards the "Hukm" and the other as regards the "Surat" (form). Imam Shaafe'ee prefers the "Mushabihat Fil Hukm" and Imam Ahmad and Imam Abu Hanifah (according to one view) prefer the "Mushabihat Fis Surat". Accordingly, for a slain slave Imam Shaafe'ee recommends the payment of his value which may be more than his blood – wit, while Imam Ahmad and Imam Abu Hanifah recommend the payment of his value only to the extent of the blood – wit.

(5) By "Taqseem Wa Sibr" (division and elimination)

In this, all those facts which can form the 'Illat are separately considered one by one, and while the one found to be fit is accepted as the 'Illat the others are eliminated. This, however, depends upon the discretion of the jurists as to which he accepts and which he eliminates. Thus, for instances, the 'Illat of guardianship in marriage, according to Imam Shaafe'ee is virginity, while according to Imam Abu Hanifah it is minority, all other things are eliminated.

1. Minhajul Usul ; Al-Taqrer Wal Tehbeer, p. 200.

(6) By "Tarad"

In this, the "Hukm" is ascertained from such a "Wasf" of which the "Munasibat" is not known from the "Hukm", nor is it in others except the one at hand, just like "Shubha". The scholars, however, do not treat this as authentic.

(7) By "Tanqeeh-e-Manaat"

In this, the thing which makes the distinction between the "Asl" i.e. previously existing command and the "Fara'" i.e. the new problem is rejected by argument, and then what is "Mushtarak" (i.e. common) on basis of it both are united in the command. As for instance, Imam Shaafe'ee does not give any weight to the fact whether a man is killed by a blunt weapon or a sharp weapon. According to him, the difference in the nature of weapon does not form the 'Illat. The murder itself is the 'Illat.

In this connection, the scholars use two more terms, viz., "Takhreej-e-Manaat" and "Tehqeeq-e-Manaat."

According to the former, the 'Illat of a command is ascertained through the ways given above, e.g., if the 'Illat of usury is to be ascertained it will be considered whether it is "Kail" (measurement), or "Zaa'iqah" (taste), or "Ghiza'iyat" (food); and according to latter, the 'Illat so ascertained is to be proved in the new problem, e.g., if the 'Illat of usury is ascertained as "Kail" (measurement), this to be seen in what other thing his 'Illat is found so that these things may also be included among the things which are hit by usury.

The scholars define "Takhreej-e-Manaat" as follows :

i.e. to ascertain the " 'Illat-e-Mo'ayyinah" or "Hukm" through "Munasibat" and other above mentioned ways, by rational understanding.¹

1. Minhaj-ul-Usul, Kitab -al-Taase', Tanqeeh-ul-Manaat

The scholars also define the “Tehqeeq-e-Manaat” as follows:

i.e. to prove the 'Illat ascertained by agreement from “Nass” or Ijma in the new problem in which the 'Illat is “Khafi” i.e. hidden.¹

CONDITIONS GOVERNING 'ILLAT

The scholars have fixed the following conditions for 'Illat :

- (1) It must have “Munaasibat”, meaning that it must imply the “Hikmat or “Maslihat” which the Law-giver had in mind while issuing the command ;
- (2) It must be “Mo'een” i.e. obvious. For this reason, “Hikmat” cannot be 'Illat because it is hidden and not obvious ;
- (3) For an existing “Hukm” the 'Illat should not be non – existing, although non-existing 'Illat can be for the non – existing “Hukm” ;
- (4) It should not be “Qaasirah”, which means that due to the “Wasf” of the “Asl” it should not be extendable to the “Fara' ”, e.g., the 'Illat of usury in gold and silver is “Samaniyat” (valuation in terms of money). Since excepting these two, inherently, “Samaniyat” is not in anything else, therefore this 'Illat does not exist in anything else ;

If such 'Illat is derived from Ijtihaad, there is difference of opinion. But if it is ascertained from the “Nass”, then all agree that it is permissible

- (5) 'Illat must go with the “Hukm”, unless there is something obstructing ;
- (6) If 'Illat does not exist, “Hukm” also does not exist. But according to the jurists, this is not important, because sometimes “Hukm” also contains more than one 'Illats ;
- (7) As against the 'Illat there should be no “Wasf” in the “Hukm” which can intervene as 'Illat. If there be so, both will be made the 'Illat, but in case both become permanent,

1. Husulul Mamool Min 'Ilmul Usul, p. 94 ; Fathul Mulhim, Muqaadimah, p. 89

- this condition will not apply and only one of them will be 'Illat ;
- (8) The argument of 'Illat should not be inclusive of "Fara' ", because in that case the "Hukm" for "Fara' " will be proved by the argument itself and 'Illat will become unnecessary. If, however, there be some doubt in the inclusiveness of "Fara' " in the generality of the argument, the 'Illat will prove the "Fara' ". The scholars, however, do not think this condition as necessary ;
- (9) The 'Illat must be acceptable to "Aql" i.e. intellect. ²

KINDS OF 'ILLAT

The scholars have given three kinds of 'Illat, viz., (1) "Ismi", (2) "Ma'navi", and (3) "Hukmi".

" 'Illat-e-Ismi" is that which is coined for the "Hukm" according to the Shari'ah or to which the "Hukm" directly relates ; " 'Illat-e-Ma'navi" is that which has its role in any manner in proving the "Hukm" ; and " 'Illat-e-Hukmi" is that by which the "Hukm" is so proved as though it is joined with it.

Sometimes all the three, sometimes two, and sometimes only one of them is present in the 'Illat. When all the three are present, the 'Illat is known as the " 'Illat-e-Taammah".

The instance of the presence of all the three is the "Bai" (sale); the instance of "Ismi" and "Ma'navi" is the "Bai Bil Khiyaar" ³ and the instance of "Ismi" and "Hukmi" is the "Safar" (journey) ; the instance of "Ma'navi" and "Hukmi" is the last portion of the composite 'Illat which is effective and with which the "Hukm" is joined, e.g. near relative slave on becoming owner becomes free ; the instance of "Ismi" only is "Eijaab-e-Mu'allaq" ; the instance of "Ma'navi" only is the first part of the composite 'Illat which also affects the "Hukm", and the instance of "Hukm" only is the condition on which the "Hukm" depends. ⁴

1. Sharhe Musallamus Suboot, Le Behrul Uloom,

2. Tauzeeh wa Talweeh, Al-Qiyas Fil 'Illat.

3. Sale with the option of return to the purchaser

4. Kitab-ut-Tehqeeq, p. 226 ; Sharhe Musallamus Suboot, ibid, p. 542

OBSTRUCTION FOR THE 'ILLAT

All those things which obstruct the formation of 'Illat are known as the obstructions for the 'Illat. They are as follows :

- (1) That which does not allow formation of 'Illat, e.g., "freedom" of a free man does not allow his sale ;
- (2) That which stops the effect and completion of 'Illat, e.g., the sale of the slave of anybody else cannot be complete without his permission ;
- (3) That which stops the beginning of the "Hukm", e.g. the right of putting a condition by the seller stops the right of ownership of the purchaser ;
- (4) That which stops the completion of the "Hukm", e.g. the condition of seeing before purchasing ;
- (5) That which stops the "Hukm" becoming obligatory, e.g. the right to reject the sale on finding out any defect in the goods. ¹

Section 5 OTHER SOURCES

So far we have dealt with the four basic sources of Fiqah, viz., Qur'an, Sunnah, Ijma and Qiyas. As we have already stated, the jurists have introduced eight other sources of Fiqah, viz., Istehsaan, Istidlaal, Istaslah or Masaalehul Mursalah, Opinions of men of authority, Ta'amul, Urf, Previous Shari'ats and law of the State, but since these sources are covered by the four basic sources, we will now deal with them in brief.

1. ISTEHSAN ()

Istehsaan comes under Qiyas.

1. Sharhe Musallamus Suboot, Fil Mawane' ; Fiqah-e-Islami Ka Tareekhi Pas Manzar, ibi d, p. 166.

DEFINITION

Literally, Istihsan means “approving.”¹ preferring, or considering a thing to be good,² Technically it is also known as “juristic preference” or “equity.”³

It implies rejection of Qiyas and admission of the law of expediency.⁴ It is a “Khafi” or concealed Qiyas, a divergence from “Jali” or externally obvious Qiyas to an inner and self – contained decision.⁵ It is the doctrine by which a jurist is enabled to get over a deduction of analogy, either because it is opposed to Qur’an, Sunnah or Ijma, or is such that his better judgment does not approve of it.⁶ It is to give up one Qiyas which is weak and accept another Qiyas which is stronger,⁷ or to give decision about any matter, ignoring the already existing rulings about it on basis of better and stronger reasons.⁸ It is to give up the obvious Qiyas and adopt that which is in the best interest of the people.⁹ It is to search for ease and act upon wider principle.¹⁰

INTRODUCTION

The doctrine of Istehsaan was introduced by the Hanafiah. It was also approved by the Maalikiah and Hamballah, but Imam Shaafe’ee opposed it fearing that in this way by going beyond the methodically secure and generally recognised principles of legal interpretation, a loophole would be made for arbitrary decision. He said, “Allah has not permitted any man since His Messenger to present views unless from knowledge that was complete before him.”¹¹

1. Dictionary of Islam, by T.P. Hughes, p. 221.

2. Muhammadan Jurisprudence, by Abdur Rahim, p. 164 3. Ibid

4. Dictionary of Islam, ibid

5. Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 184.

6. Muhammadan Jurisprudence, by Abdur Rahim, p. 164

7. Kitab-ut-Tehqeeq, Istehsaan.

8. Minhajul Usul, Istehsaan. 9. Al-Mabsoot, Fil Istehsaan 10. Ibid

11. Risalah, p. 70 ; Shorter Encyclopaedia, p. 185 ; Kitab-ul-Umm, Vol. VII, pp. 273-274

INSTANCE OF ISTEHSAAN

It is a well – established principle of Qiyas that sale of a thing not present at the time of sale is not permissible,¹ and that its profit also is not “Maal” or property in reality.² In the case of a contract also, since there is sale of a non-existing thing and its profit is also not “Maal” in reality, the decision on basis of Qiyas is that it is not permissible. But because contract is permissible by Qur’an, Sunnah as well as Ijma, and all these three are stronger than Qiyas, therefore the jurists ignore the Qiyas and permit the contract on basis of Istehsaan.

SANCTION FOR ISTEHSAAN

Sanction for Istehsaan is contained in the Qur’an, Sunnah as well as Tradition of the Sahabah (Companions of the Holy Prophet).

As regards Qur’an, the following verses are cited in support of Istehsaan :

i.e. Who listen to the Word, then follow the best of it (*Zumar*, 39:18) ; and

i.e. and enjoin your people to take hold of what is best thereof (*Aaraaf*, 7:145), and

i.e. He has chosen you and has not laid upon you any hardship in religion (*Hajj*, 22:78), and

1. Mujallat-ul-Ehkaam-ush-Shara’eeyah, Art. 205

2. Imam Shaafe’ee treats such profit as real “Maal” (Mabsoot, Vol. XI , p. 78

i.e. Allah desires ease for you, and He desires not hardship for you (*Baqarah*, 2:185), and

i.e. Allah imposes not on any soul a duty beyond its scope (*Baqarah*, 2:286)

As regards Sunnah, the Holy Prophet has said :

i.e. your good religion is easy. ¹

While deputing Ali and Mu'aaz to Yemen, the Holy Prophet admonished them saying :

i.e. make ease for the people and do not put them to hardship ; bring them near and do not make them to keep away. ²

As regards the tradition of the Sahabah, the following case proves Istehsaan. A woman died leaving her husband, mother, two real brothers and two uterine brothers ³ as legal heirs. According to the law of inheritance, real brothers are residuaries and consanguine brothers are sharers. Sharers are those who inherit first and that which is left goes to the residuaries. On basis of Qiyas, after the allocation of 1/2 to the husband, 1/6 to the mother and 1/3 to the consanguine brothers, there is left nothing for the real brothers. When this case came before Umar, he ignored the Qiyas and gave shares to the real brothers along with the consanguine brothers allotting them all the 1/3 . This was on account of Istehsaan.

1. Al-Mabsoot, Vol. X , Fil Istehsaan.

2. Mishkat-ul-Masabeeh, Baab Maa Alal Walayat Minat Tayassiar

3. brother from same mother but different father.

IGNORING QIYAS-E-ZAAHIR

In ignoring the Qiyas-e-Zaahir, Istehsaan proceeds on “Nass”, “Ijma”, “Zaroorat” or Qiyas-e-Khafi.

As regards “Nass”, according to Qiyas-e-Zaahir, the sale of a non-existing thing is not permissible, but since the Holy Prophet has said :

i.e. whoever of you wants to enter into the sale of a non-existing thing, let him fix the measurement of weight and time.

On basis of this, Qiyas is ignored and “Bai-e-Salam” is allowed by way of Istehsaan.

As regards “Ijma”, according to Qiyas-e-Zaahir, the transaction of paying the price for anything, say a pair of shoes, to be prepared and delivered at a later date is not permissible because at the time of transaction the thing is not in existing, but this is a common practice among the people and it is a sort of Ijma, therefore on basis of Istehsaan it is valid.

As regards “Zaroorat” (need), according to Qiyas-e-Zaahir, washing and squeezing of an impure article is necessary for its purification, but since a solid article, say a plate or a cup, can be washed but cannot be squeezed, therefore on basis of Istehsaan mere washing of it will serve the purpose.

As regards “Qiyas-e-Khafi”, according to Qiyas-e-Zaahir, anything from which the animal which is Haraam eats up is also Haraam, and since the animals having the paws are also Haraam, the thing from which they eat up should also be Haraam, but that is not so, and the argument is that the animals having the paws do not eat with their tongues. They eat with their beaks which is of bone and has no saliva, and therefore on basis of Istehsaan it is said that the things with the Haraam birds eat up and leave is permissible for eating for the men.

“ZAROORAT” AND “MASLEHAT”

In connection with “Zaroorat” (need) it may also be noted that it implies “Maslehat” (policy) in order to promote the good and eliminate the evil for the betterment and satisfaction of the human life, spiritually, morally as well as physically.

“Maslehat” is either (1) “Zarooriah” which relates to the safeguard of religion, self, intellect, generation, and property ; or (2) “Haajiah”, which relates to the welfare of life, viz., elimination of injury, getting rid of hardship, and overpowering of all dangerous ways ; or (3) “Tehsiniyah”, which relates to morals and high standards of life.

As regards number (1), for safeguard of religion, Jihaad ; for safeguard of life, Qisaas ; for safeguard of intellect, prohibition of intoxicants ; for safeguard of generation, marriage; and for safeguard of property, punishment for theft, have been provided.

As regards number (2), transactions of sale and purchase, contracts of partnership, hire and rent, etc. have been provided.

As regards number (3). Commands relating to enjoining the “Ma’roof” (permissible things) and avoiding the “Munkar” (prohibited) have been issued.

IMPORTANCE OF ISTEHSAAAN

Istehsaan is in reality a very important and most useful doctrine approved by three out of the four leading jurists of Islam in order to solve the problems arising in the day to day life of the ever growing human civilization, and its need is much more in today’s most ultra modern world rather than in any of the earlier periods of the Islamic History, and although Imam Shaafe’ee, as also previously stated, has opposed, rather force-fully rejected it, yet it is also a fact that the Shaafe’ee scholars have also used Istehsaan for the purpose of juristic deductions, and it appears that the opposition was only to the extent of giving it an independent status, and therefore the Shaafe’ee scholars

have said :

i.e. the truth is, as stated by Ibne Haajib and also pointed by Aamidi, that “Mukhtalif Feeh Istehsaan” does not exist.¹

But Istehsaan in fact is itself a Qiyas rather a better or preferable Qiyas, and therefore like Qiyas it has always to remain within the limits of Qur’an, Sunnah and Ijma, and in no case to go beyond or against them. It is not an independent source and perhaps that was the reason that Imam Shaafe’ee opposed it on the ground that it may give a free license to the jurist to by pass all the basic and well – established sources and give decision according to his own knowledge and understanding.

2. ISTISLAH OR MASAALAHUL MURSALAH

Istislah or Masaalehul Mursalah also comes under Qiyas.

DEFINITION

Juristic deduction merely on basis of “Zaroorat” (need) or “Maslehat” (policy) is known as Istislah or Masaalehul Mursalah, which are defined by the jurists as :

i.e. Masaalehul Mursalah are those which are neither proved nor disproved by the Shari’ah, but they are in accordance with the general “Masaleh,” i.e. considerations of public good, and are approved by the “Aql” i.e. intellect.²

1. Minhaj-ul-Usul, Istehsaan ; Fiqah-e-Islami Ka Tareekhi Pas Manzar, ibid, p. 191

2. Al-Muwafiqaat, Vol. I ; Minhaj-ul-Usul.

Imam Maalik was the pioneer of this doctrine, and Imamul Haramain also held a similar view.¹ According to Maalik, when Shari'at does not disclose the "Maslehat" or any command, deduction of law can be made on basis of public welfare. According to this, "Maslehat" is also a basis of Shari'at, and therefore when for the public welfare no "Nass" is available, it itself can be made the basis of juristic pronouncement, but it should be keeping in view the intent of Shari'at as well as general welfare.²

CONDITIONS FOR ISTISLAH OR MASAALAHUL MURSALAH

The conditions governing this doctrine are three, viz.,

- (1) the problem should not be relating to "Ibadaat" (prayers) but is should be relating to "Mu'aamlaat" (worldly affairs) which may be settled by "Maslehat" ;
- (2) the "Maslehat-e-'Aammah" (general welfare) should be according to the "Rooh" (spirit) of Shari'at and not against the "Dalaa'il-e-Shari'at, i.e. criterions laid down by the Shari'at ; and
- (3) the "Maslehat-e-'Aammah" (general welfare) should relate to the "Zarooriyaat-e-Zindagi" (basic needs of life) and not the "Haajiyaat" (general affairs) or "Kamaliyaat" (comforts) of life. The "Zarooriyaat" mean the safeguard of religion, life, intellect, generation and property ; the "Haajaat" mean the general affairs including financial requirements, etc., and "Kamaliyaat" mean the articles of comforts, pomp and show, etc.

INSTANCES OF ISTISLAH OR MASAALAHUL MURSALAH

The following are some instances of this doctrine :

- (1) to lay taxes on the wealthy persons for the purpose of defence and safety of the country ;

1. Jaame'ul-Jawame' ; Vol. IV , pp. 101-102 .

2. Al-E'tisaam, Vol. II , pp. 95-116 ; Al-Mustasfa, Vol. I , pp. 139-144 ; Tabsirat-ul-Ehkaam, Vol. II, p. 117.

- (2) to get back the property from the thief, may it be the same which was stolen or some other property ;
- (3) if the enemy uses the Muslim captives as a shield in the war, then to kill Muslim captives also, although killing of the Muslims is not generally permissible. But this should be resorted to when no other alternative is available ;
- (4) to use force on a person accused of theft to make him confess.

CRITICISM

The Hanafi jurists consider this doctrine to be too vague and general to be useful in making legal deduction. ¹ Imam Ghazali (Shaafe'ee) approves this doctrine but not as a source of Fiqah, and that too when its need is most necessary as well as sure. He thus approves the Killing of Muslim captives used by the enemy as a shield, but rejected the use of force on a person accused of theft on basis of the Hadees in which it is said that to forgive a culprit is better than to punish an innocent. ²

THE LIMIT

As it is also clear from the definition of this doctrine by Imam Maalik himself, it is to keep the spirit of Shari'at, which means that it should always remain within the limits of Qur'an, Sunnah and Ijma, and therefore even on basis of it no law can be made in violation of these basic sources of Fiqah ; and further, as put by Imam Ghazali, it should be adopted when there are cogent and unequivocally defined considerations affecting the whole community. Otherwise it is not allowed to use Istislah or Masaalehul Mursalah. ³

3. ISTIDLAAL ()

Istidlaal also comes under Qiyas.

1. Mukhtasar, Vol. II , pp. 281-289

2. AL-Mustasfa, ibid ; Jaama'ul Jawame', Vol. IV, p. 102. For the Hadees, see Tirmizi, Behaqi and Jaame'us Sagheer

3. Mustasfa, Vol. I , pp. 284-315 ; Shorter Encyclopaedia of Islam, ibid, p. 185

DEFINITION

The word "Istidlaal" in its ordinary significance means "the inferring from a thing another thing." The Hanafiah use this word more or less in this sense in connection with the rules of interpretation, but according to the Maalikiah and Shaafe'eeyah, "Istidlaal" is the name for a distinct method of juristic ratiocination, not falling within the scope of interpretation or analogy.¹

The word "Istidlaal" has been derived from the word "Istidal," which means, "he searched for the "Daleel" (reasoning) and found it out." According to the jurists, however, it signifies :

i.e. such "Daleel" or reasoning which is neither available in the "Nass", nor in the "Ijma", nor in the "Qiyas".²

KINDS OF ISTIDLAAL

The classification of "Istidlaal" is twofold, viz.,

- (1) "Istidlaal Bil Qiyasul Mantaqi", which means the acceptance of the resulting proposition from the acceptance of two propositions. As for example, it is accepted that sale is a contract, and that every contract depends upon mutual consent, therefore it is also to be accepted that sale depends upon mutual consent.
- (2) "Istidlaal Ba Istishaab-ul-Haal", which means the presumption that a state of things, which has not been proved to have ceased, still continues. The Shaafe'eeyah and the Hambaliyah as well as the Shiah Imamiah³ are mostly in favour of this "Istidlaal."

1. Muhammadan Jurisprudence, *ibid*, p. 166

2. Jaama'ul Jawame' with Commentary, Vol. II, p. 258 ; Al-Ehkaam La Aamidi, Vol. III , p. 119 ; Al-Mustasfa, Vol. I , p. 127 ; E'lamul Muqe'een, Vol. I, p. 294

3. Kitab-ul-'Anaween-ul-Usul, Vol. II , p. 48.

“Istishaab” actually means “the seeking for a link” to something which is known and certain. In other words, it means, “the endeavour to link up a later set of circumstances with an earlier, and is based on the assumption that the rules of Fiqah applicable to certain conditions remain valid so long as it is not certain that these conditions have altered.”¹

It is of many types as follows :

- (a) “Istishaab al-Bara’tul Asliyah”, which means that “in reality there is no obligation on anybody.” In other words, none is responsible for anything unless there is present a “Daleel-e-Shar’ee” to prove any obligation²
- (b) “Istishaab-ul-‘Umoom Ila Ann Yradda al-Takhsees”, which means that generality continues till any reason for making it specific is available. In other words, the command of a general “Nass” will remain general unless by another “Nass” it is applied to specific persons.
- (c) “Istishaab an-Nass Ila Ann Yradda an-Naskh”, which means that the command of “Nass” will continue till it is abrogated by another “Nass” ;
- (d) “Istishaab al-Wasf al-Saabit Shar’an Hatta Yusbito Khilaafah Au Istishaab-ul-Maazi Bil Hall”, which means that the condition which is proved according to Shari’at is to be taken as it is unless change of the condition is proved, or, in other words, to maintain the command of the past in the present also.³

As an example of this type of Istishaab is the case of a man who has disappeared, and whose whereabouts are not known. The Shaafe’ee would treat him as living for all purposes of the law until his death is proved, so that his estate will not be

1. Shorter Encyclopaedia of Islam, *ibid*, p. 187.

2. Kitab-ul-Ishbah Wan Nazaa’ir, by Suyuti, p. 39 ; Kitab-ul-Ishbab, by Ibne Nujaim, p. 23

3. Kitab-ul-Ishbah wan Nazaa’ir, by Suyuti, p. 37 ; Kitab-ul-Ishbah, wan Nazaa’ir, by Nujaim, p. 23 ; Al-Jaame’ and its commentary Al-Munaafe’, p. 33.

distributed among his heirs, and he will be allotted his share in the estate of a person from whom he is entitled to inherit, and who happens to die during his disappearance. The Hanafees say that the presumption that a particular state of things continues until the contrary is proved is valid only to the extent it serves to protect his existing rights, but not for establishing or creating new rights, which means that he will not be entitled to inherit from the man who has died during the period of his disappearance.¹

- (e) “Istishaab al-Maqlaab Au Istishaab-ul-Haal Fil Maazi”, which means to maintain the present as the past. In other words, any tradition found to be existing or not existing in the present will also be presumed to be existing or not existing in the past, unless the contrary is proved. But such Istishaab is not a preferable Istishaab.²

It may also be noted that Istidlaal as a method of juristic deduction includes all forms of ratiocination which do not fall within the scope of analogical deduction. Qazi Wadood himself says that the Hanafi doctrine of Istehsaan or juristic equity, as well as the Maaliki doctrine of public good are covered by Istidlaal.³

4. PREVIOUS SHARI'ATS ()

Previous Shari'ats come under Qur'an and Sunnah.

As regards the previous Shari'ats as a source of Fiqah, the jurists are of three different views.

According to one view, the laws revealed to the previous nations are binding on the Muslims, except such of them which have been abrogated by the Islamic Shari'at. They rely upon the following authorities :

1. Muhammadan Jurisprudence, *ibid*, pp. 167-168 ; Shorter Encyclopaedia of Islam, *ibid*, p. 187.

2. Al-Ibhaaj, commentary of Al-Minhaaj, by Subki, Vol. III, pp. 111-112.

3. Mukhtasar, Vol. II , p. 281 ; Muhammadan Jurisprudence, *ibid*, p. 168

(1) In the Holy Qur'an, after the mention of the Prophets and Shari'at, it is said :

i.e. these are they whom Allah guided, so follow their guidance
(*An'aam*, 6:90)

The word "Huda" used in this verse has been defined by the learned scholars to mean :

i.e. "Huda" includes "Eiman" as well as "Shara'e", because guidance relates to all, and therefore to follow their (i.e. of the Prophets) Shari'ats is "Wajib" (obligatory).¹

(2) In another verse it is said :

i.e. He has made plain to you the religion which He enjoined upon Noah, and which We have revealed to you, and which We enjoined on Abraham and Moses and Jesus – to establish religion and not to be divided therein (*Shura*, 42:13).

(3) In yet another verse it is said :

1. Al-Taqrer Wal-Tehbeer

i.e. then We revealed to you : Follow the Faith of Abraham, the Upright One, and he was not of the polytheists (*Nahl*, 16:123)

(4) As regards the Sunnah of the Holy Prophet, according to one report, when there was no command revealed in respect of any matter, the Holy Prophet liked to act upon the ways of the People of the Book.

Not only this, but according to Imam Ahmad bin Hambal :

i.e. in Islam the good things of the Days of Ignorance were being acted upon.¹

On account of this, the Muhaddassen said :

i.e. to act upon the previous Shari'ats is necessary unless it is prohibited by the revelation from Allah.²

The second view is that the previous Shari'ats have no longer any authority. In this connection, the following incidents are relied upon.

When 'Umar wanted to note down something from the Jews, the Holy Prophet said :

i.e. are you unsatisfied as the Jews being unsatisfied turned towards other side. I have brought to you clear and manifest Shari'at. Had Moses been alive, he would have no option except to follow me.³

1. Musnad Imam Ahmad bin Hambal, Vol. III,

2. Aini, Vol. II

3. Mishkat-ul-Masabeeh, Kitab-ul-Eiman, Baab E'tisaam Bil Kitab Wal Sunnah, No. 167/36

Similarly, when once 'Umar brought some pages of the Torah and started reading them, the face of the Holy Prophet turned red by anger. When 'Umar looked at the face of the Holy Prophet, he said :

i.e. I seek refuge in Allah from the wrath of Allah and His Messenger. We are pleased with Allah being our "Rabb", Islam being our "Deen", and Muhammad (peace be upon him) being our Prophet.¹

Then the Holy Prophet said :

i.e. by Him in Whose Hands is the Life of Muhammad, had Moses appeared and you leaving me followed him, you would have gone astray from the Straight Path, and had he been alive and reached the period of my Prophethood, he would have also followed me.²

The third view is that of the Hanafiah that only such laws of the previously revealed religions are binding which have been mentioned in the Qur'an without disapproval. This restriction, according to the jurists is necessary because the previous religions have not been correctly transmitted to us, and have undergone considerable corruption.³

1. *Mishkat-ul-Masabeeh*, *ibid*, No. 183/52

2. *Mishkat-ul-Masabeeh*, *ibid*,

3. *Muhammadan Jurisprudence*, *ibid*, p. 70

5. TA'AAMUL ()

Ta'aamul comes under Ijma

Ta'aamul means the usual or general agreed practice of the Sahabah (Companions) of the Holy Prophet. The jurists have included it in the Sunnah and used it as a source of Fiqah.

Ta'aamul has its sanction in Qur'an as well as Sunnah.

As regards Qur'an, it says :

i.e. and the foremost, the first of the Emigrants and the Helpers, and those who followed them in goodness—Allah is well-pleased with them and they are well-pleased with Him (*Taubah*, 9:100)

In this verse the phrase “Radiyahalloho 'Anhum Wa Radu 'Anho” is the greatest testimony of the fact that the usual or general agreed practice of the Sahabah has the Great Pleasure of Allah and therefore it is also an authentic source of Fiqah and jurists have rightly declared it as such.

As regards Sunnah, the Holy Prophet has said :

i.e. in the Ummats of all Prophets sent before me there were their Companions and Helpers who used to hold up their Sunnah and follow their commands.¹

1. Mishkat-ul-Masabeeh, ibid, No. 149/18

The Holy Prophet has also said :

i.e. you hold up my Sunnah and the Sunnah of my rightly guided Caliphs, strictly adhere to it, and seek guidance from it.¹

By another Hadees² the Holy Prophet indicated that the way on which he and his Sahabah are is the only right way, which also proves the authenticity of the “Ta’aamul” of Sahabah as a source of Fiqah.

In fact the Sahabah of the Holy Prophet were the best people of the Muslim Ummah. They were directly trained by the Holy Prophet in all affairs – spiritual as well as material – of the human life. They were the perfect knowers as well as followers of Qur’an and Sunnah. They were the first and the foremost torch – bearers of Islam. They were the fountain – heads of Islamic learning. Their lives were complete symbols of the Islamic faith and way of living. They acquired theoretical as well as practical knowledge of Islam from the Holy Prophet, maintained it and passed it on quite safe and sound to the coming generations. To quote ‘Abdullah ibne Mas’ud, “these are the Companions of Muhammad (peace be upon him) who, in piety of the heart, depth of knowledge, and frankness are the best of the people of this Ummah. They were chosen by Allah for company of His Prophet and to establish His religion. You should know their superiority, follow their footsteps and hold fast, as far as possible, to their pattern. These are the people who are on the straight path.”³

The view of the jurists as regards “Ta’aamul” is as follows :

1. Mishkat-ul-Masabeeh, ibid, No. 156/25.
 2. Mishkat-ul-Masabeeh, ibid, No. 162/31
 3. Mishkat-ul-Masabeeh, ibid, No. 182/51

i.e. that which was generally extant among the Sahabah or that which they had accepted, its following is “Wajib” (obligatory) ; and that wherein they differed its following is not “Wajib” (obligatory).¹

This is because the agreed view or practice of the Sahabah is Ijma superior to the Ijma of all other people and therefore it is binding on the Muslims. Even the agreed view of the two first Calips of the Holy Prophet, namely, Abu Bakr and 'Umar, is an authority of which the following is necessary. According to the jurists ;

i.e. everything on which the agreement of the “Shaikhain” (i.e. Abu Bakr and 'Umar) is proved (is binding and) its following is “Wajib” (Obligatory).²

6. OPINION OF MEN OF AUTHORITY

If based on Qiyas, it comes under Qiyas ; and if based on Sama', it comes under Hadees.

In this, the opinions, religious pronouncements, court or arbitration decisions, government directions, etc., all are included. But in order of merit come firstly the views of the Sahabah, and secondly the views of the Taba'een, and thereafter the views or directions of other ones.

As regards the Sahabah, the Holy Prophet has himself said :

i.e. my Companions are like the stars ; whoever of them you follow you will get the guidance.³

1. Tauzeeh Wa Talweeh Fee Taqleed-us-Sahabi

2. Ibid.

3. Mishkat-ul-Masabeeh, Kitab-ul-Fitan, Baab Mana'iqibis Sahabah, No. 5762/11

The jurists give the following reasoning for accepting the authority of the Sahabah in matters relating to Fiqah :

i.e. their views are mostly those which they heard from the Holy Prophet. Even if they have done Ijtihaad, their opinion is more correct because they have directly studied the context of the “Nasoos”. They have precedence in religion. They have the blessings of the company of the Holy Prophet. Their period was the “Khair-ul-Quroon ;”¹ and :

i.e. they have observed the revelation of the Holy Qur’an and the secrets of the Shari’at ; and

i.e. they know the occasion of the revelation (of Qur’an).²

As regards particularly the Fiqah, the jurists give more weight to the views of those Sahabah who were more concerned with it. According to them :

i.e. those Companions who passed their lives in the company (of the Holy Prophet) and adopted the pattern of his excellent character, as for example the rightly – guided Caliphs, the wives

1. Tauzeeh Wa Talweeh Fee Taqleed-us-Sahabi.

2. Noor-ul-Anwaar, Fee Taqleed-us-Sahabi

3. Husaami, p. 6

of the Holy Prophet, the devotees (i.e. Abdullah ibne Mas'ud, Abdullah ibne Umar, Abdullah ibne Zubair, and Abdullah ibne Abbas), Anas and Huzaifah and all those belonging to their group.¹

As regards the opinions of the Sahabah, the jurists are of the view :

i.e. the opinion of the Sahabah in which there is scope for Qiyas and "Raa'e" is of the nature of Sunnah for the one who is not a Sahabi.²

This means that as regards such of their views in which there is no scope for Qiyas, their following is "Wajib" (obligatory) ; and as regards the views in which Qiyas is possible, their following is not "Wajib" and under changed circumstances the jurists can form their own opinions. This is also the view of Imam Shaafe'ee.³

Next to Sahabah is the opinion of the Taaba'een. It is for them that the Holy Qur'an says :

i.e. and those who followed them in goodness (*Taubah*, 9:100) ; and the Holy Prophet had also said :

i.e. the best period of my Ummah is that of mine, then that of those after them, then those after them.⁴

1. Sharhe Muslim, p. 441.

2. Ibid, p. 471

3. Noor-ul-Anwaar, Fee Taqleed-us-Sahabi ; Tauzeeh Wa Talweeh, Fee Taqleed-us-Sahabi

4. Mishkat-ul-Masabeeh, Kitab-ul-Fitan, Baab Manaqibis Sahabah, No. 5755/4

On account of this high status of the Taaba'een, the jurists also give weight to their opinions, but in comparison to the opinions of the Sahabah, they sometimes prefer Qiyas as against their opinions.

7. 'URF ()

'Urf comes under Ijma.

'Urf (custom or usage) is a very old well-recognised source of law which Islam also permitted in matters not provided by Qur'an and Sunnah, or on which Qur'an and Sunnah were silent, provided they were not against the Islamic Faith.

DEFINITION

'Urf means "practice of the general public in word or deed." It is also known as "Ta'aamul" or "'Aadat." According to the scholars, "the general habit of the people in sale and purchase and other worldly affairs is known as Ta'aamul." As regards "'Aadat", they say that, "all those things which are liked by good nature (Tabee'at-e-Salimah), on being repeatedly done become the 'Aadat (habit)." ¹ Another word, viz., "Iste'maal" is also used in the same sense, and it is said :

i.e. the usage of the people is an authority on which acting is obligatory. ²

SANCTION FROM QUR'AN AND SUNNAH

The Holy Qur'an says :

i.e. take to forgiveness, and enjoin Good and turn away from the ignorant (*Aaraaf*, 7:199).

1. Al-Ishbah Wan Naza'ir, al-Qa'idatus Sadisaht-ul-Aaditah Mohkamata, by Nujaim, p. 37

2. Mujallah, Art. 37 ; Al-Munaafe', p. 308

The word “’Urf” in this verse, according to the scholars, mean and include all rational and good customs. ¹

The Holy Prophet has said :

i.e. you know well about your worldly affairs.

According to Abdullah ibne Mass’ud,

i.e. whatever is treated as good by the Muslims is good with Allah also ; and whatever they treat as bad is bad with Allah also. ²

THE JURISTS

According to the jurists

i.e. whatever is proved by ‘Urf is like the one proved by “Naas” ³ and

i.e. whatever is proved by ‘Urf will be taken as proved by “Daleel-e-Shar’ee” ⁴

The jurists are of the view that
decisive thing. They say that :

i.e. ‘Aadat is a

i.e. decision should be given according to the custom or usage of the time even though it be against the time of the primitive ones. ⁵

CONDITIONS

But custom or usage to have the force of law must be

1. Sharhe Sair-e-Kabir, Vol. I , p. 198

2. Al-Ishbah Wan Naza’ir, Al-Qa’datus Sadi saht-ul-Aaditah Mohkamatah.

3. Sharhe Sair-e-Kabir, Vol. I , p. 115.

4. Majmoo’ah Rasa’il Aabideen, p. 115 5. Radd-ul-Mukhtaar, Vol. III, p. 408

generally prevalent. According to the jurists :

i.e. when usage increases and gains the field, then it will be taken as authentic. ¹ In other words, the usage should become such a "Kulliah" in which there is no "Takhalluf", ² and which is followed in most of the circumstances and affairs. ³ It should be more often practised than not. ⁴

Thus practice of a few individuals or of a limited class of men will not be recognised as custom or usage for the purpose of law, nor will it be so recognised so long as it remains confined to a particular locality, such as a village or a town, and has not become extant in the country in which the question arises. ⁵ Further, it has authority only so long as it prevails, so that the custom of one age has no force in another age. ⁶

The custom which is prevailing since long and is also in vogue at the time when the question arises will be binding, but not the one introduced subsequent to the arising of the question. ⁷

If any of the parties to a transaction puts any condition which is against a custom, then the condition will prevail and not the custom, because custom is itself a "Zimmi" condition and it becomes ineffective against an specific condition. ⁸

Custom should not be against a clear command of the jurists, nor against a clear "Naas" of Shari'at unless the "Nass" is itself based on a custom. Thus the custom which is against a "Daleel-e-Shar'ee, or spirit of Shari'at, or its "Maslehat" (policy), or its clear command, will not be valid and binding. ⁹ It should not be against a clear text of Qur'an or Sunnah. ¹⁰

1. Al-Ishbah Wan Naza'ir, Al-Behsus Saani Innama Ta'tabar-ul-'Aadat, p. 59

2. Al-Urf Wal 'Aadat Fee Raa'e al-Fuqaha 3. Ibid

4. Radd-ul-Mukhtaar, Vol. III, p. 408 5. Fath-ul-Qadeer, Vol. VI, p. 65

6. Radd-ul-Mukhtaar, ibid.

7. Al-Ishbah Wan Naza'ir, by Suyuti, p. 68 ; and by Nujaim, p. 40

8. Falsafah-e-Shari'at-e-Islam, ibid, p. 304.

9. Ibid, p. 305.

10. Muhammadan Jurisprudence, ibid, p. 136

If custom fulfills all these conditions, there is agreement of the jurists that custom overrides Qiyas i.e. analogical deduction, and such a custom has played great part. Especially during the time of the Sahabah and their successors, in the growth of the Islamic law. The Hanafiah include such custom under the principle of Istehsaan or juristic preference.¹

Apart from religious conditions as mentioned above, custom should not be against reason or law of the parliament or the law generally extant. It should be the one taken by the people as obligatory or binding and should be prevalent since long.

8. LAW OF THE STATE ()

The first and the foremost Law-giver in Islam is Allah the Almighty Himself. He has laid down the basic and fundamental laws for the human life in the Holy Qur'an in which He has also made compulsory the obedience to His Messenger Muhammad (peace be upon him) as well as the "Oolil Amr" among the Muslim, saying :

i.e. obey Allah and obey the Messenger and those in authority among you (*Nisa*, 4:59); which means that the Messenger of Allah and, after him, his successors, as rulers among the Muslim Ummah, also have the authority to lay down the laws needed for running the affairs of the State as well the people in general.

With this authority the Messenger of Allah laid down, by his word (Hadees) and deed (Sunnah), various rules and regulations required for the explanation as well as enforcement of the Law of Qur'an and also for governing the public as well as the private life of the people in general. All these rules and regulation are known, in one word, as Sunnah of the Messenger of Allah.

1. Muhammadan Jurisprudence, *ibid*, p. 136

As the Holy Qur'an made compulsory the obedience to the "Oolil Amr", so also the Messenger of Allah declared it as such saying:

i.e. whoever has obeyed me has obeyed Allah ; and whoever has disobeyed me has disobeyed Allah ; and whoever has obeyed the Ameer has obeyed me, and whoever has disobeyed the Ameer has disobeyed me. Listen and obey even though a Negro slave is made a ruler over you whose head be black like Maqnaa. Whoever comes to know any evil in the Ameer should keep patience because whoever disobeys the Ameer even in the least and dies he dies the death of Jahiliah. Behold, on whomsoever an Ameer is appointed and he sees any disobedience to Allah in him he should think it bad in his heart but do not withdraw his hand form obedience to him. ¹

On basis of these sanctions, from Qur'an and Sunnah, there is Ijma of the jurists on the point that the man in authority has also the authority to lay down the laws for running the administration of the State as well as general affairs of the people. With this authority when the Caliphs and the rulers of the Islamic State, after the Messenger of Allah, did not find anything in the Qur'an and Sunnah to deal with the new problems coming before them concerning the State and the people, they themselves, with the concurrence of the leaned ones, framed and enforced the laws, relating particularly to the administration of

1. Mishkat-ul-Masabeeh, Kitab-ul-Amarat Wal Qaza, No. 3491/1.

the State, as for example the establishment of offices and departments, recovery of the taxes, police, jails and prisons, defence, promotion of health and education, punishment of the culprits by Ta'zeeraat, and all affairs governing the general welfare of the people including the establishment of courts and appointment of judges. In doing so they also took help from the laws of previous nations and communities which were extant and were not opposed to Qur'an and Sunnah. Thus the Sahabah in the countries they conquered, maintained their good laws in general dealings between their people. Not only this but for sometimes even the languages extant therein were also maintained, as for example in Iraq the Persian, in Syria the Roman, and in Egypt the Qubtian languages were continued till the rule of Abdul Malik when the Arabic language was adopted as the only official language. Even Hazrat 'Umar allowed the Roman, Greek and Iranian laws relating to the revenue to continue in Iraq, Syria and Egypt. The private laws of the non-Muslims were also kept intact and made applicable to them.¹ Similar was the condition in the Omayyid, Abbaside and Usmania rule over the Islamic regions.

Now in many Islamic countries there are duly elected Parliaments or Legislative Assemblies which frame the laws needed for their countries which are enforced by their respective governments.

It may, however, be noted that in framing or adopting any law it was fundamentally kept in view that it should not be against Qur'an and Sunnah, and therefore if any law to be adopted was found to be against Qur'an and Sunnah, it was properly modified and brought within the spirit of Qur'an and Sunnah, as for an instance the laws relating to marriage, sale and purchase, mortgage, rent or hire, wills, judiciary, etc.

It is, however, totally wrong to say that Fiqah is based on the Roman or Greek laws, as some orientalist say. Fiqah has its own separate and unique foundation depending primarily on

1. Kitab-ul-Amwaal, p. 101.

Qur'an and Sunnah and then on Ijma and Qiyas and other subsidiary sources which we have already discussed in detail – all remaining basically within the four corners of Qur'an and Sunnah ; and if any laws have been framed or adopted, they have been framed or adopted keeping in view the spirit of Qur'an and Sunnah for the greater benefit of the people. The adoption of laws in fact has been on basis of the saying of the Messenger of Allah that :

i.e. good word is the lost property of the Mo'min, therefore wherever it is found, he is more entitled to take it back. ¹

Allama Shaatibi says :

i.e. sources of Shari'at are of two kinds, viz., (1) those which relate to "Naql" and (2) those which relate to "Raa'e." The former depend upon Qur'an and Sunnah, and the latter depend upon Qiyas and Istidlaal. But the real sources are only Qur'an and Sunnah. Qiyas and Istidlaal are not sources merely because they are proved by "Aql", but because they are both proved from the former (i.e. Qur'an and Sunnah). This is the reason for relying upon them. ²

Thus basically the Holy Qur'an and Sunnah have been the law of the Muslims and the Islamic State right from the days of the Holy Prophet, and all those laws which have been framed by the Muslim rulers or adopted after necessary modifications

1. *Fiqah-e-Islami Ka Taareekhi Pas Manzar*, ibid, p. 235

2. *Al-Muwafiqat*, Vol. III, *Al-Mas'alat-ul-Khamisah*, p. 41.

from other nations for governing the worldly affairs have specifically been kept within the limits of Qur'an and Sunnah.

As an instance of adoption by modification the laws which were already extant, we may note that there were many ways of marriage that were extant in the days of ignorance. Out of these the Holy Prophet adopted the way of offer and acceptance as the only valid way of marriage. Similarly, there were different modes of transfer of ownership in the property e.g. sale, mortgage, gift, etc., which were adopted and continued. As regards sale of goods also the systems of Salam, Marabeha, Tauliah were extant, which were adopted by necessary modifications. The system of giving the agricultural lands to others on basis of the share in the produce, making of the wills, administration of justice, etc., were also adopted with necessary modifications.

Due to extensive conquests, the Sahabah came across many laws of other nations that were extant in different countries, e.g., the Roman law in Syria and Egypt, and Iranian law in Iraq, etc., which they maintained to the extent they were permissible according to the Islamic Shari'at in dealing with them, and permitting them to follow their own laws in their personal matters.

Similarly, the subsequent Omayyid, Abbaside and Usmani rulers framed new laws or adopted already existing laws with necessary modifications. But in doing so they always kept the following criteria before them :

(1) Instead of their personal views, they gave preference to the Commands of Shari'at and norms of justice and equity ;

(2) They themselves were bound to follow the Commands of Shari'at, because obedience to them (i.e. the rulers) was only in deeds of righteousness, as laid down in many Ahadees of the Holy Prophet, e.g.,

i.e. obedience (to the rulers) is only in good deeds ; ¹ and

i.e. listening to and obeying the ruler is obligatory for a Muslim, whether he likes it or not, in respect of that command which is not for sin ; when it is for sin, there is neither listening ² nor obedience to it ; and

i.e. there is no obedience for the servant of Allah in disobedience to Allah. ³

Here it may also be noted that for the Shiahs obedience to the Imam is "Farz" (compulsory) because according to them he is "Ma'soom" (sinless), ⁴ while for the Sunnis obedience to the Ameer is not "Farz" in acts of sin because he is not "Ma'soom". ⁵

(3) They were also bound to seek and act according to the advice of the learned ones, because Qur'an says :

i.e. and consult them in matters ; but when you have determined, put your trust in Allah (*Aale Imran*, 3:159) ; and

i.e. and whose affairs are (decided) by counsel among themselves (*Shura*, 42:38)

In this connection it may also be noted that the Holy Prophet himself used to seek advice of his Companions in many matters, and, after him, his successors, particular Hazrat 'Umar, ⁶ used to decide matters with the advice of other Companions. ⁷

1. Mishkat-ul-Masabeeh, Kitab-ul-Amarat Wal Qaza, No. 3495/5

2. Mishkat-ul-Masabeeh, ibid, No. 3494/4

3. Mishkat-ul-Masabeeh, ibid, No. 3525/35

4. Al-Milal Wan Nahl, by Sheristani, Vol. I, p. 151.

5. Al-Jaame' and its Sharhe Al-Munaafe', p. 330 6. E'lām-ul-Muq'e'en, Vol. I, p. 70

7. Sharhe 'Aini of Bukhari, Vol. XXV, p. 78 ; Muslim, Vol. V, p. 157.

CHAPTER 5

DEVELOPMENT OF FIQAH

PRE-ISLAMIC PERIOD

In the pre-Islamic period the Arabs had no Constitution and no settled form of government. The Arab population was divided in tribes and each tribe was governed by its own elected chief who was also assisted by a council of elders.

In Mecca city, however, the position was a bit different. Here there was developing a tendency towards the formation of a government. The tribes that were permanently settled here had the custody of the Ka'bah, which was the center not only of worship but also of social and political activities. The public offices were divided among the twelve principal tribes whose chiefs were responsible to fulfil the duties entrusted to them.

As regards decision of claims and disputes, first the plaintiff was asked to produce the evidence. If he had no witnesses, and the defendant denied the claim, he was asked to take the oath ; and if he took the oath, he was absolved from the liability. Oath was held in great reverence and in important matters it was administered at the 'Hateem' – a place adjacent to Ka'bah. The oath was generally of 'Habal' – their principal deity, or of their ancestors, and at the end a whip or sandals or a bow was thrown down indicating that a binding oath was taken. ¹

As regards punishment for all crimes, it was retaliation commutable to payment of the blood – wit or compensation for the injury. In case of murder of a member of higher family by a member of a lower family, the retaliation was of two men for one, or a man for a woman, or a freeman for a slave. ² In case of theft the right hand of the accused was cut off. For the offence of adultery, the Jews of Medinah used firstly to stone to death if the

1. Qustalani, (Calcutta Ed), Vol. VI , pp. 176, 182

2. Tafseer-e-Ahmadi, p. 57, by Mulla Jiwan

accused was a poor, but subsequently they used to blacken the face of the accused, rich or poor, after flogging him. ¹

As regards marital life and patronage, the different modes in vogue were (1) by offer and acceptance, (2) by a man asking his wife to send for a man and have sexual relation with him till conception to have a noble seed for his generation, (3) by the visit to a woman of men, not more than ten in number, and have sexual relation with her, and on conception and delivery the woman would declare the child to be belonging to any one of them, and (4) by the visit to a woman of any number of men and have sexual relation with her and after conception and delivery the physiognomists were to decide the patronage of the child.

The Arab also used to contract "Mut'a" or temporary marriage during journey when they had to stay at any place for sometime so that the woman could be a partner to him in bed and also look after her belonging. ²

In the regular form of marriage (vide No. 1 above), the fixing of 'Mehr' (dower) for the wife was also in vogue, which was sometimes also taken by the guardian of the wife, ³ unless the marriage was a 'Shighaar' marriage, i.e. a cross marriage. Unchastely on the part of the wife would disentitle her of the dower, and therefore sometimes the husband used to make false charge of adultery in order to get rid of his wife ⁴

In marriage the woman had no option at all. It was the right of her father, brother, cousin or any other male guardian to give her in marriage, even by force, irrespective of the fact whether she was old, young or minor, widow, divorcee or virgin. The widows were also inherited by, and divided among, the legal heirs of their husbands, except the real mother, like other goods. ⁵

There was no restriction on the number of wives, and a man could have as many wives as he could in addition to the slave – girls also. ⁶

1. Kasful Ghumma, Vol. II, pp. 105-106. 2. Fathul Qadeer, Vol. III, p. 151

3. Tafseer-e-Ahmadi, p. 226. 4. Ibid. p. 257 5. Ibid, p. 256

6. Kashful Ghumma, Vol. II p. 54

The prohibited degree in marriage was limited to closeness in consanguinity. An Arab could not marry his mother, grandmother, sister, daughter or grand-daughter and perhaps also his aunt and niece. But the Magian could marry even his own daughters and sisters. An Arab could take as his wife his step-mother, cousin, wife's sisters, and could combine in marriage two sisters or a woman and her niece. It is doubtful whether he could marry his mother-in-law or step – daughter.¹

The husband had absolute right of divorcing and taking back his wife as many times as he liked,² or give her a suspensary divorce.³ The systems of divorce by "Eilla", i.e. the husband swearing that he would have nothing to do with his wife,⁴ as well as by "Zihaar", i.e. the husband saying that his wife was like the back of his mother,⁵ were also extant among the Arabs.

The wife had no right to get the divorce, but her parents by returning or forgoing the dower could by a friendly arrangement get separation for her which was known as Khula'.

In case of divorce or death of the husband the woman was to observe a waiting period known as 'Iddat' before remarriage, which in case of the death of the husband was of one year.

As regards parentage of the child, in the three last mentioned ways of sexual relation the woman herself or the physiognomist, as already stated, was to fix it.

Adoption of the children was also in vogue among the Arabs by mutual contracts with the parents. The adopted son had the family name and all rights and disabilities of the adopting family like the natural son.⁶

Birth of a daughter was thought to be an insult and therefore infanticide was prevalent among the Arabs who used to bury her alive immediately after birth.

1. Kinship and Marriage in Early Arabia, by W.R. Smith. P. 164

2. Tafseer-e-Ahmadi, p. 130 3. Ibid, p. 121 4. Ibid, p. 122

5. Ibid, p. 160 6. Tafseer-e-Ahmadi, p. 610.

The generally owned property of an Arab was the cattle, camels, tents, houses, lands and slaves, and he had absolute right to alienate it by sale, gift, loan, pledge or lease. A woman, though not entitled to inherit, could also own property received through dower or gift or merchandise. But her person and property were not safe without protection of her parents or husband, and in case of dishonesty on the part of her guardian she had no remedy. Similar was the position of an infant.

As regards sale of goods, the following ways ¹ of it were extant among the Arabs :

- (1) Sale by exchange or barter known as "Muqayadah"
- (2) Sale for money known as "Bai"
- (3) Sale of money for money or money – changing known as "Sarf"
- (4) Sale by payment in advance and supply of goods later known as "Salam"
- (5) Sale with an option to revoke known as "Bai'-e-Khiyar"
- (6) Absolute or irrevocable sale ;
- (7) Sale of goods on credit in which the price was to be paid later
- (8) Sale on cost price with an stated profit known as "Murabaha"
- (9) Sale at the cost price known as "At-Tawaliah"
- (10) Sale at less than cost price known as "Wadi"
- (11) Sale by bargaining known as "Musawamah"
- (12) Sale by throwing a stone known as "Bai' Be Alqa'il Hajar"
- (13) Sale by touching of the goods by the buyer known as "Mulamassah"
- (14) Sale by throwing of the article by the seller towards the purchaser known as "Munabazah"
- (15) Sale of dates on a tree in consideration for plucked dates known as "Muzabanah"
- (16) Sale of wheat in the years or of a foetus in the womb known as "Muhqalah"

1. Vide Hidayah and Fathul Qadeer (Egyptian Ed), Vol. VI , pp. 49-55 ; Kashful Ghumma, Vol. II, pp. 6-7.

- (17) Sale against a debt on condition that the article will return on repayment of the debt known as "Bai'-ul-Wafa" or "Mu'aamilah" ; the article was not to be used by the buyer without permission of the seller ;
- (18) Sale with condition that the buyer would resale the article to the seller within a stated period, known as "two bargains in one";
- (19) Sale against earnest money with condition that if the buyer approves the article he will pay the balance, otherwise he will return it and the seller will forfeit the earnest money known as "Urboon"

As regards lease of land, it was usually for one year, and rarely for two or three years, but not on long terms. The rent was in terms of money, or part of produce. If the lessor supplied the seed, it was known as "Mukhabarah" ; but if the lessee supplied the seed, it was known as "Muzara'ah"

Sometime the condition was that the lessee would cultivate with the seed supplied by himself and the lessor would get the crops growing on the portion adjoining the stream or some other specified plot. The Arabs also used to farm out the fruit trees. ¹

As regards loans, the Arabs used to lend money on interest so also the Jews of Medinah, which was known as "Riba". Articles were also given for use known as "Aariyat."

The Arabs also had the absolute power to dispose off their properties in full or in party by way of will to anybody, whether an heir, relative or stranger, even to partial or total deprivation of their legal heirs.

As regards inheritance, the property of a deceased used to devolve on his male heirs capable of bearing arms, all minors and females being excluded. The heirship was determined by consanguinity, adoption or compact. The first one consisted of

1. Nawawi's Commentary of Saheeh Muslim, (Bulaq Ed.), Vol. VI , pp. 401, 405-406

sons, grandsons, father, grandfather, brothers, cousins, uncles and nephews. The second one consisted of the adopted sons who stood at par with the real sons. The third one arose out of contracts by which the parties used to agree that the surviving among them would get the entire or part of the inheritance or a fixed amount from the property left by the deceased. There was no fixed ratio in the inheritance. The chief of the tribe used to give shares according to the circumstances. The estate was, how-ever, considered liable to pay the widow's dower, and among some tribes also the maintenance to her. ¹

This is as regards the worldly life of the Arabs before the advent of Islam. Spiritually, the pagan Arabs were polytheists. They used to worship, and offer sacrifices at, many false deities including the "Laat", "Manaat" and "Habal" which were the prominent ones. Only in the Ka'bah there were placed 360 idols of different descriptions. Side by side, they also claimed them-selves to be the descendants of Prophets Abraham and Ishmael, do "Tawaaf" of the Ka'bah, and perform the Hajj.

The Jews and Christians claiming themselves to be the People of the Book had made changes in the Torah and Gospel, believed respectively in Uzair (Ezra) and Jesus Christ as the sons of God. The Christians also believed in the divinity of Mary the mother of Jesus Christ.

ADVENT OF ISLAM

In these circumstances the Holy Prophet Muhammad (peace be upon him) was born to 'Abdullah, (the youngest son of Abdul Muttalib), through his wife Aamna, in the progeny of Banu Hashim – a branch of the Quraish, at Mecca in 571 A.D. The Banu Hashim were the noblest tribe of the Quraish and were the direct descendants of Prophet Ishmael, who also held the high office of the Custodian of the Ka'bah.

1. The article "Pre-Islamic Period" is based on Muhammadan Jurisprudence, by Abdur Rahim, pp. 2-16

The Holy Prophet did not receive any education from anybody and remained totally un-lettered. But by nature he was extremely chaste, pious, truthful, intelligent, brave and trustworthy so much so that the people used to respect him, keep their trusts with him and call him Al-Ameen. He disliked polytheism as well as the inhuman and immoral activities of the people. Allah had created him and made him His Messenger for guidance of the entire mankind. On becoming major, he started passing his time mostly in meditation and devotion to Allah in the cave of Hira in a mountain called "Jabl-e-Noor" in the outskirts of Mecca. In 610 A.D. when he was forty years of age Allah the Almighty started revealing to him through Angel Gabriel the Holy Qur'an – the fourth and the final Divine Book, for guidance of the mankind. The first revelation commenced with the following verses :

i.e. Read in the Name of your Lord Who creates – creates man from a clot. Read and your Lord is Most Generous, Who taught by the Pen, taught man what he knew not (*Alaq*, 96:1-5).

After a year another revelation came to him, saying :

i.e. O you wrapped up in your mantle, arise and warn (*Muddassir*, 74:1-2)

He accordingly started propagation of Islam in secret, and the first converts were Khadijah – his wife, Abu Bakr – his close friend, Ali – his cousin, and Zaid – his freed slave and adopted son. Then followed Usman, Talha, Abdur Rahman, Bilal, S'ad bin Abi Waqqas, and Zubair binul Awaam.

Then came the third command :

i.e. therefore declare openly what you are commanded, and turn away from the polytheists (*Hijr*, 15:94); and

i.e. and warn your near relations (*Shu'ara*, 26:214).

He therefore summoned the people at the Hill of Safa, pleaded the "Tauheed" (Absolute Unity of Allah) before them, and warned them against "Shirk" (polytheism), with the result that people stood up in opposition to him and he and his followers had to suffer great hardships at their hands.

In the sixth year of his mission Umar and Hamzah embraced Islam and this gave some strength to his mission as well as courage to his followers. But due to his increasing influence his enemies also became more active and ultimately planned to kill him.

In the twelfth year of his mission, the Holy Prophet was taken to the Heavens which is known as the "Me'raaj", in which he and his Ummah were enjoined five times daily prayers.

In the thirteenth year of his mission, under the command of Allah, he left Mecca and migrated to Medinah, with his close friend Abu Bakr, where his mission had already started gaining the field without any serious opposition from anybody.

During these thirteen years, i.e. before migration to Medinah, 86 (out of 114) chapters of the Holy Qur'an were revealed which particularly dealt with the basic articles of Faith, viz., "Tauheed" (Absolute Unity of Allah), "Risaalat" (Rprophet-hood of the Holy Prophet), "Qiyamat" (Day of Judgment), Paradise and Hell, Angels and the Divine Books. There was also condemnation of "Kufr" (infidelity) and "Shirk" (polytheism), warning of the punishment of Hell and good news of the reward of Paradise.

DEVELOPMENT OF FIQAH

Section 1

FIRST THIRTEEN YEARS OF THE HOLY PROPHET'S MISSION (MECCI PERIOD)

The Islamic Shari'at consists of a complete Code of life dealing with :

- (1) 'Aqaa'id (beliefs) – Faith in Allah, Prophet Muhammad (peace be upon him) and other Prophets, Qur'an and other Heavenly Books, Angels, Day of Judgment, Paradise and Hell, etc.;
- (2) Ibaadaat (Prayers) – Salaat, Som, Zakaat, and Hajj ;
- (3) Akhlaqiyaat (morality)
- (4) Manakahaat (marriage) – family affairs
- (5) Mu'aamlaat (worldly affairs) – finance, business dealings, contracts, politics, war and peace, etc,
- (6) 'Uqubaat (punishments) – punishment of the criminals ;
- (7) Mukhasimaat – litigations and their decision through the judiciary

Originally all these formed the subject matter of Fiqah. Commenting on the words "Yatafaqqahu Fiddin", appearing in verse 122 of chapter 9 (*Taubah*) of the Holy Qur'an, Imam Ghazali included in the scope of Fiqah, among other things, (1) the intricacies of the happenings to the soul (*Aafaat-e-Nafsaani*), (2) those things which nullify the acts, (3) knowledge of the way leading to the Hereafter, (4) extreme inclination towards the virtues of the Hereafter, (5) thinking the world to be baser and the power to have control over it, (6) fear of Allah overwhelming the heart, etc.¹ Shah Waliullah also said that in the old days Fiqah included the Knowledge of "Haqiqat" (dealing with the Person and Attributes of Allah), Knowledge of

1. Ehyaul Uloom-ud-Deen, Vol. I.

“Tareeqat” (dealing with the acts leading to Salvation as well as those resulting in destruction), and Knowledge of “Shari’at” (dealing with commands in respect of material affairs).¹ According to Imam Abu Hanifah and other prominent jurists also, Fiqah is the name of religious insight by which commands of “Shari’at”, secrets of “Ma’rifat”, and problems of “Hikmat” are known ; and deduction of legal principles is made ; and the one who possesses this religious insight and the capacity of juristic deduction is known as the “Faqeeh” (jurist).² This was the reason that when Imam Abu Hanifah wrote a book on “Aqaa’id” (Faith), he named it as Fiqah-e-Akbar.³

When, however, under the increasing influence of the Greek Philosophy, sophisticated, abstruse and lengthy discussions relating to the Faith took the place of simple narrations about it, questions relating to “Aqaa’id” became the subject matter of a separate science, namely, “Ilmul Kalaam”, and “Aqaa’id” (Faith) were excluded from the scope of Fiqah, and Fiqah was accordingly restricted to “deductions of the laws.”⁴ This was, perhaps, also because “Aqaa’id” stood fully defined and settled by the Holy Qur’an and Sunnah of the Holy Prophet and did not require any settlement by discussions of the learned jurists.

Keeping in view that originally Fiqah also included within its scope the “Aqaa’id”, we may now refer to the very first revelation of the first five verses of Chapter 96 (*Alaq*) of the Holy Qur’an to the Holy Prophet, and can safely say that in these verses was laid down the foundation of the Fiqah.

The very first thing which the Holy Prophet had to face during his mission was the wrong faith of the people, viz., “Kufri” (infidelity) and “Shirk” (polytheism). The first and the foremost aim of his mission, therefore, was to uproot the faith in,

1. Hujjatullahil Baaligha, Baab Asbaab Ikhtilaaf al-Sahabah Wat Taaba’een Fil Faro’

2. Musallamus Suboot ; Tauzeeh Talweeh 3. Musallamus Suboot

4. Sharhe Musallamas Suboot, Al-Muqaddamah Behrul Uloom ; Noor-ul-Anwaar ; Tauzeeh Talweeh

and worship of, the false deities, and to establish the faith in, and exclusive worship of, the One, Real, and Absolute God i.e. Allah the Almighty. It is obvious that at that stage revelation of any command relating to the other affairs of the human life would be unnecessary.

True faith in the Absolute Unity of Allah is in fact the key to the success in the Hereafter which is better and ever-lasting¹ as against the life in this world which is short and temporary. This is the true religion pleaded by all Prophets of Allah right from Adam. But the infidels and the polytheists, under the Satanic persuasions, gave up this religion and formed their own baseless ideologies. The very first revelation of the Holy Qur'an, therefore, laid emphasis on the fact that, as against the illiteracy, superstition, mystery, and self-made ideology, the religion of Allah, i.e. Islam, has its foundation in reading and writing, i.e. 'Ilm or Knowledge which is taught by Allah the Almighty Himself Who is the Creator of man by a clot.

The fact of creation by a clot indicates that man, instead of being arrogant and indifferent, should think of his own origin. Allah has created him from a clot and guided his growth from a clot to the stage of babe in the womb of his mother, and then from infancy to manhood in the world. He therefore is the only Being Who knows how he i.e. man has to pass his life in this world and achieve the success in the Hereafter, and therefore it is a must for him, i.e. man, that he should follow the guidance provided to him by Allah through His Books and Prophets.

The mention of reading and writing further indicates that the Islamic faith is not based on superstition or mystery. It is based on rational understanding, which is also the real meaning of Fiqah in terms of verse 122 of Chapter 9 (*Taubah*) of the Holy Qur'an.

1. Verse 17 of Chapter 87 (*Aala*) of the Holy Qur'an.

Further, this rational understanding has nothing to do with the self-made ideologies of the people. It is based on the 'Ilm or Knowledge taught by Allah the Almighty Himself, and this 'Ilm is that which the people did not know.

When the Holy Prophet proclaimed his Mission, the infidels and polytheists of Mecca took it to be a serious threat to their self-made religious beliefs and practices as well as to their superiority over the people. They therefore came forward with an all-out opposition to the Holy Prophet, and this opposition continued for complete thirteen years of the Holy Prophet's Mission at Mecca, and also some years after his migration to Medinah.

In order to meet the opposition of the non-believers and to make them understand their absurdity in worshipping the false deities, and to persuade them to submit to the One, Absolute and Real God, i.e. Allah the Almighty, and worship Him alone, revelations continued to be coming to the Holy Prophet during all this period, from time to time, in terms of the need of the time and occasions at hand. All these revelations form 86 (out of 114) Chapters of the Holy Qur'an and contain emphasis on the "Tauheed" i.e. Absolute Unity of Allah, asking the people to give up infidelity and polytheism and worship Allah the Almighty alone Who is the Creator, Sustainer and over-all Administrator of all that exists anywhere and in any form what-soever. They also contain details of the horrible incidents of the Day of Judgment and the Hell in order to give a warning to the non-believers of the ensuing serious punishment for infidelity and idolatry, as well as pleasing narrations about Paradise which the righteous of Allah will get as reward for submitting to the Word of Allah. There are also details regarding the nature, status and functions of the angels, and the lives, status and duties of Prophet Muhammad (peace be upon him) and other Prophets who were before him, as well as the unfortunate ultimate fate of the nations who opposed and tortured them. All necessary details regarding revelation, sanctity, and the purpose of the Holy Qur'an, and the previously revealed Divine Book, particularly

Torat, Injeel and Zuboor, are also mentioned. ¹

In short, the Islamic faith, with all of its elements, has been fully stated, explained and emphasised in this period, and this forms the first and the major part of the Fiqah laid down in the Holy Prophet's Mission at Mecca. The second and the remaining part of the Fiqah of this period consists of the commands relating to the recitation of the Holy Qur'an, purification and performance of Wuzu (ablution), and establishment of Salaat (prayer).

As regards recitation of the Holy Qur'an, the very first duty of the Holy Prophet was "to recite to them (i.e. the people) the Messages of Allah (i.e. Qur'an), ² and therefore he was commanded to "recite that which has been revealed to you of the Book", ³ and "recite the Qur'an by and by", ⁴ so that "they may ponder over its verses." ⁵ Qur'an also commanded the people saying "when the Qur'an is recited, listen to it and remain silent," ⁶ and "when you recite the Qur'an, seek refuge in Allah from the accursed Satan," ⁷ and offer prostration when (the verse of prostration in the) Qur'an is recited, ⁸ and also made it clear that "none touches it (i.e. Qur'an) except the purified ones." ⁹

As regards purification and performance of ablution, Qur'an in the very next revelation asked the Holy Prophet to "purify your garments and shun the uncleanness," ¹⁰ and also said that "he indeed is successful who purifies himself and remembers the Name of his Lord, then prays." ¹¹ According to a Hadees,

1. All Divine Revelations relating to Faith in Allah the Almighty, Prophet Muhammad (peace be upon him) and other Prophets, Qur'an and other Divine Books, Angels, Day of Judgment, Paradise and Hell, Destiny, Life and death, Creation and end of the Universe, Reward and Punishment, etc., are contained in the Holy Qur'an, and the explanations and news given by the Holy Prophet are safely noted by the Compilers of Ahadees in their Compilations, particularly the Saha Sitta, an authentic selection of which is contained in the Mishkatul Masabeeh, Vol. I, Kitab-ul-Eiman, Kitabus Salaat, Baab Faza'ilil Qur'an; and Vol. III, Kitab-ul-Fitan.

2. Qur'an, *Aale Imran*, 3:164 3. Ibid, *Ankaboot*, 29:45; *Kahf*, 18:27

4. Ibid, *Muzzammil*, 73:4 5. Ibid, *Swaad*, 38:29 6. Ibid, *Aaraaf*, 7:208

7. Ibid, *Nahl*, 16:98 8. Ibid, *Inshiqaaq*, 84:21 9. Ibid, *Waaqi'ah*, 56:79

10. Ibid, *Muddassir*, 74:4-5 11. Ibid, *A'laa*, 87:14-15

reported by Ahmad and Daara Qutni, on the authority of Zaid bin Harisah, when Gabriel brought the first revelation, he taught the performance of Wuzu (ablution) and offering of the Salaat to the Holy Prophet (Mishkat-ul-Masabeeh, Kitab-ut-Taharat, Baabo Aadaabil Khalaa, No. 337/31)

Further, in those days the non-believers used to perform the "Tawaaf" of the Kab'ah in the state of nudeness.¹ As against this, it was specifically said "O children of Adam, dress yourselves (properly) while coming to the Mosque (for prayer)."²

As regards Salaat, it has been the first and the foremost mode of prayer by all Prophets of Allah right from Adam. Accordingly, the Holy Prophet and his followers were also commanded to "keep up prayer and keep your duty to Him (i.e. Allah)."³ and serve Him."⁴ But, as stated earlier, the Mecci period of the Holy Prophet's Mission was full of enmity and persecution by the non-believers so much so that the lives and properties of the Muslims were always and at every moment at serious stake at the hands of their opponents, therefore it was not possible for them to offer the Salaat openly and with full liberty. In view of these circumstances, the commands for Salaat were given by and by. Firstly, the command was "call on your Lord humbly and in secret",⁵ and "utter not your prayer loudly nor be silent in it, but seek a way between them."⁶ Accordingly, the Salaat was offered in night and in the valley of Mecca or the house of Arqam. Then it was made compulsory for morning (before sunrise) and evening (sunset).⁷ Then a third one to be offered in the night was also added.⁸ Ultimately, during the Me'raaj (journey through the Heavens), five times Salaat was made compulsory.⁹ According to a Hadees, reported by Abu Dawud and Tirmizi, on the authority of Abdullah Ibne Abbas, the angel Gabriel made known the five times of the daily prayers to the Holy Prophet by leading him twice in all the five times

1. Tareekh Fiqah-e-Islami, ibid, pp. 50-51 2. Qur'an, *Aa'raaf*, 7:31

3. Ibid, *An'aam*, 6:72. 4. Ibid, *An'aam*, 6:102 5. Ibid, *Aa'raaf*, 7:55

6. Ibid, *Bani Israel*, 17:110

7. Ibid, *Aa'raaf*, 7:205, *Kahf*, 18:28

8. Ibid, *Dahr*, 76:26 9. Ibid, *Hood*, 11:114 ; *Bani Israel*, 17:78 ; *Taa Haa*, 20:130 ; *Rom*, 30:17-18.

prayers near the Ka'bah (the House of the Lord) (Mishkat-ul-Masabeeh, Kitab-ut-Taharat, Baab-ul-Mawaqeeet, No. 636/3)

It may also be noted that in view of the peculiar circumstances, in this period, the prayer for each time was only of two Rak'ats.¹

More details regarding the five times prayers, the prayers of Jumu'ah and Eedain, prayers in journey and during the wars, etc., and other modes of "Ibaadaat", were given in the Madani period.

Thus the commands given by Qur'an and Sunnah regarding the recitation of Qur'an, purification, performance of ablution, and offering of the Salaat, besides the revelations relating to Eiman (Faith), during the Mecci period of the Holy Prophet's Mission, form the First step in the development of the Islamic Fiqah. In that period Qur'an and Sunnah were the only two sources of Fiqah.

Section 2

NEXT ELEVEN YEARS OF THE HOLY PROPHET'S MISSION (MADANI PERIOD) (1 A.H. to 11 A.H.)

(Legislative Period)

This period is known as the Madani Period of the Holy Prophet's Mission. It is of eleven years starting from the Holy Prophet's migration from Mecca to Medinah in 622 A.D. and ending on his passing away in 632 A.D. (11th years of Hijra).

This period is actually the "Legislative Period" of the Islamic Fiqah. In fact in this period the situation was totally different from that which the Muslims had to face in Mecca. Here they got an open air to pass their lives according to the

1. Tareekh Fiqah-e-Islami, ibid, p. 51

Islamic order, and consolidate their strength. Here open propagation and acting upon the Islamic ideology took the place of secret activities, and defensive measures to the extent of armed battles against the enemies took the place of patient and unmitigated suffering at the hands of the non-believers. Here the Holy Prophet succeeded in laying down the foundation of a model Islamic State and thereby re-modelling the entire society according to the Commands of Allah. According to the nature of the work done in this period, revelations from Allah contained instructions relating to war and peace, captives of war and booty, treaties and pacts, administration of justice, moral uplift of the society, economic and social development, rights of the rulers and the public, men and women, parents and children, husband and wife, friends and relations, citizens and foreigners, as well as the commands relating to Salaat (prayer), Som (fast), Zakaat (poor-rate) and Hajj, till it was announced, in the 10th year of Hijra, that "this day have I perfected for you your religion, and completed My favour to you, and chosen for you Islam as religion." ¹

But in this period also the system of piecemeal revelation of the Commands was maintained keeping in view the situations at hand, not only as regards the worldly life but also as regards the "Ibaadaat." Thus, the number of Rak'ats which was only two in each prayer in the Mecci period was increased to four for the Zuhr, Asr and Isha prayers, Jumu'ah prayer as well as prayers of Eidain were introduced and "Azaan", i.e. calling for the prayers, was started. In the Mecci period there was no Som (fasting). In Medinah first one days' fasting (on the 10th of Muharram), then three day's fasting in a year, and finally thirty days' fasting in a year was established. Since the financial position of the Muslims was not sound, the command for Zakaat was not given till about 7th or 8th year of Hijra. Similarly, before the conquest of Mecca the performance of Hajj was not possible, and therefore command for Hajj was given in the 10th year of Hijra. Thus, in this period the legislation of the laws relating to all affairs of the individual as well as social life of man was made by revelation from Allah as well as Sunnah of the Holy

-----1.

Prophet which were only two sources of the Islamic Fiqah in this period also. The revelations from Allah, forming the remaining 28 (out of 114) chapters of the Holy Qur'an, revealed in this period, contained fundamental principles of universal application which were explained and applied by the Holy Prophet by his word (Hadees) and deed (Sunnah).¹ But when no revelation was forthcoming from Allah on any matter at hand, the Holy Prophet himself made pronouncements on it² which also form the Sunnah, and thus with the Qur'an, the Sunnah is also of equal sacred authority for the Muslim Ummah to follow. In fact the words and deeds of the Holy Prophet were all inspired and guided by Allah. Thus, while the Qur'an was and is from Allah, both in spirit as well as in language, the Sunnah was and is the one inspired by Allah but expressed in the words or deeds of the Holy Prophet. Further, the approval or disapproval by the Holy Prophet, expressed or implied, of any word or deed of his Sahabah also form part of the Sunnah and is equally binding.

The laws promulgated in this period by Qur'an and Sunnah relate to :

- (1) Ibaadaat, i.e. Taharat (purification), Salaat (prayer), Zakaat (poor-rate), Som (fasting), and Hajj (pilgrimage to Mecca);
- (2) Akhlaqiyaat, i.e. morality;
- (3) Manakahaat, i.e. marriage, divorce, inheritance; etc.;
- (4) Mu'aamlaat, i.e. social and financial dealings;
- (5) 'Uqubaat, i.e. crimes and punishment of the criminals;
- (6) Mukhasimaat, i.e. legislation and judiciary;
- (7) Siyasiyaat, i.e. formation of government and dealings with the foreign people and nations.

(1) IBADAAT (PRAYERS)

(a) Salaat (prayer)

In order of merit, according to the Islamic Shari'at, next to

-----1.
We have given many instances of the ways in which the Holy Prophet explained the Qur'anic verses in chapter 4, "Sources of Fiqah."

2. See chapter 4, "Sources of Fiqah."

'Aqa'id (Faith) are the 'Ibaadaat (prayers), and, among the 'Ibaadaat, Salaat is the first and the foremost in that it has to be offered irrespective of whatever may be the circumstances, and in whatever permissible form it is possible, even on the death bed.

We have already noted that as regards the 'Aqa'id (Faith), they were fully stated, explained and emphasised in the Mecci period by Qur'an and Sunnah, and as regards the 'Ibaadaat only Salaat was established and that too in its initial and simple form. Detailed commands for Salaat also were given in the Madani period.

On leaving Mecca in 622 A.D. the Holy Prophet first arrived at Quba, a village nearly three miles away from Medinah. He stayed there for about fourteen days,¹ and the first thing which he did there was that he constructed the first mosque of the Islamic world which is known as the "Masjid-e-Quba", which in fact is the first step towards "Iqamis Salaat" i.e. establishment of the prayer. In the construction work the Holy Prophet himself took part as labourer along with his Companions.² Regarding this particular mosque the Holy Qur'an said, "certainly a mosque founded on observance of duty from the first day is more deserving that you should stand (for prayer) in it. In it are men who love to purify themselves. And Allah loves those who purify themselves" (*Taubah*, 9:108).

When the Holy Prophet came to Bani Saalim, a vicinity of Madinah, it was Friday and the time for the Jumu'ah prayer. The Holy Prophet gave the Sermon and offered the Jumu'ah prayer. It was his first Jumu'ah prayer³

When the Holy Prophet arrived at Medinah, there also he in the first instance constructed the mosque which is known as the "Masjid-un-Nabavi." Thereafter, with the increase of the Muslim community, other mosques were also constructed in different vicinities of Medinah, as well as other parts of Arabia.

-----1.
 Bukhari 2. Seerat-un-Nabi, by Shibli No'mani, Vol. I, p. 277
 3. Ibid.

Thus the first step which the Holy Prophet took after getting relief from the persecution by the non-believers was that he constructed the mosque so that he and his followers could offer the "Salaat-bil-Jama'at" i.e. prayer-in-company all the five times.

In order to enable the Muslims to offer the prayer without any disturbance by the non-believers, the Holy Qur'an firstly said that, "who is more unjust than he who prevents (men) from the mosque of Allah, from His Name being remembered therein, and strives to ruine them ? It was not proper for them to enter them except in fear. For them is disgrace in his world, and theirs is a grievous punishment in the Hereafter" (*Baqarah*, 2:114) ; and that, "the idolaters have no light to maintain the mosque of Allah, while bearing witness to disbelief against themselves, these it is whose works are vain ; and in the Fire (of Hell) will they abide" (*Taubah*, 9:17) ; and that, "only he can maintain the mosques of Allah who believes in Allah and the Last Day, and keeps up prayer, and pays the poor-rate, and fears none but Allah. So these it is who may be of the Guided Ones" (*Taubah*, 9:18) ; and then finally banned the entry of the non-believers in the Ka'bah, and consequently in all the mosques, saying, "O you who believe, the idolaters are surely unclean, so they shall not approach the Sacred Mosque after this year of theirs" (*Taubah*, 9:28).

Thus sanctity of the Ka'bah and the other mosques all over the world was finally established by revelations from Allah the Almighty. The Holy Prophet also from time to time issued necessary commands, directions or instructions relating to the construction, maintenance and sanctity of the mosque, the call for five times' prayer, i.e. Azaan¹ as well as Iqamah,² the acquiring of purification (Taharat) by taking bath (if necessary) or performance of Wuzu (ablution) or Tayyammum (if permissible)³ and offering of the prayer.

-----1.

Azaan is also mentioned in the Holy Qur'an, vide *Maa'idah*, 5:58 and *Jumu'ah*, 62:9

2. Second call for prayer immediately before resuming the prayer-in-company.

3. *Qur'an*, *Nisa*, 4:43 and *Maa'idah*, 5:

Further, as we have already noted, in the Meccan period, from the very beginning Qur'an gave the command for prayer and repeatedly laid emphasis on its establishment even in adverse circumstances. But as regards the performance of prayer, Qur'an only mentioned facing towards the Qiblah,¹ utterance of the Takbeer-e-Tehrimah,² standing known as Qiyaam,³ recitation of the Holy Qur'an known as Qir'at,⁴ bowing known as Ruku⁵ and prostration known as Sajdah.⁶ Qur'an also ordered for offering the prayer in company,⁷ observance of humbleness in prayer,⁸ and guarding of the prayer.⁹ But as regards the number of Rak'ats to be offered in each of the five times' prayers, complete procedure of offering the prayers, the recitations to be made in the Qiyaam, Ruku, Qauma, Sajdah, and Qaa'idah, the supplication to be made during and after the prayers, the conditions to be fulfilled before starting the prayer, the situation arising out of breaking the Wuzu during the prayer, the exact postures of standing, bowing, prostrating and sitting during the prayer, the formation of the rows in the prayer in company, offering of the prayer individually, taking part of the women in the prayer in company, Imamat and qualification of the Imam in the prayer in company, commission of any error by the Imam in the prayer and the response to it by the men and women following him in the prayer, virtues of going to the mosques for prayer, waiting in the mosque for the prayer, offering of the prayer by women in their houses, offering of the Sunnah prayers by men in their houses rather than in the mosque, and large number of all other details relating to the offering of the "Farz" and "Nafil" prayers are laid down by the Holy Prophet himself, though, no doubt, under the guidance from Allah the Almighty.

Offering of the compulsory prayer in exceptional circumstances were also ordered by Allah the Almighty, as for example in the state of any danger,¹⁰ or war,¹¹ or in journey,¹² and the detailed procedure for these was laid down by the Holy Prophet.

-----1.
 Qur'an, *Baqarah*, 2:144 2. *Ibid*, *Bani Israil*, 17:111 and *Muddassir*, 74:3
 3. *Ibid*, *Muzzammil*, 73:2 4. *Ibid*, 73:4 and 20 5. *Ibid*, *Hajj*, 22:77 6. *Ibid*.
 7. *Ibid*, *Baqarah*, 2:43 8. *Ibid*, *Mominoon*, 23:2 9. *Ibid*, 23:9
 10. *Nisa*, 4:101 11. *Ibid*, 4:102 12. *Ibid*, 101

Besides the five times' compulsory prayers, the weekly prayer of Friday known as the *Salaatil Jumu'ah*¹ the yearly prayer on completion of the "Som" (i.e. fasting) during the month of Ramazan (9th month of Hijra) known as *Eidul Fitr*,² and the prayer on yearly commemoration of the sacrifice of his son Ismail by Prophet Abraham known as the *Eidul Azha* were also started and all necessary details for their performances as well as the Sermons which are to be delivered by the Imam before the *Jumu'ah* and after the *Eidain* prayers, were provided by the Holy Prophet.

In addition to the "Farz" (compulsory) and "Wajib" (obligatory) prayers mentioned above, the Holy Prophet also offered the "Nafl" (optional) prayers of "Tahajjud,"³ (after mid-night), *Ashraaq* (after sunrise), *Chaasht* (forenoon), *Abwaabain* (immediately after the sunset prayer) and *Taraweeh* (after the *Isha* prayer in the month of Ramazan), under the command of Allah,⁴ and also laid down the details thereof.

The Holy Prophet also offered the prayer for rainfall known as the "*Salaatil Istisqaa*", and the prayer on the eclipse of the sun known as the "*Salaatil Khasoof*" and also on the eclipse of the moon known as the "*Salaatil Kasoof*" and laid down the details thereof.

When any of his followers died, the Holy Prophet also offered his funeral prayer⁵ and also laid down the special procedure for it.

The Holy Prophet also offered optional prayers on specific occasions, viz., "*Tahiyat-ul-Wuzu*" (on performance of ablution), "*Tahiyat-ul-Masjid*" (on entry into the mosque), "*Salat-ul-Haajaat*" (on any need or necessity), "*Salat-ul-Istighfar* or *Taubah*" (to seek forgiveness), "*Salat-ul-Istikharah*" (to seek guidance in respect of any matter), and "*Salat-ut-Tasbeeh*" (for

-----1.

Qur'an, *Jumu'ah*, 62:9-11 2. Ibid, *Baqarah*, 2:185

3. Ibid, *Bani Israil*, 17:79 ; *Furqan*, 25:64 ; *Sajdah*, 32:16 ; *Muzzammil*, 73:6 and *Dahr*, 76:26

4. Ibid, *Inshirah*, 94:7-8

5. Qur'an also speaks of the funeral prayer, vide *Taubah*, 9:54

remembrance and glorification of Allah).

The Holy Prophet also told us the detailed procedure of performing the "Wuzu" (ablution) and "Ghusl" (bath) for obtaining Taharat (purification) before the prayer or recitation of the Holy Qur'an.

All basic commands for the Salaat (prayer) are contained in the Holy Qur'an and the details for all prayers mentioned above as well as purification including the use of "Miswaak" (tooth stick), the nature and qualities of the water to be used, and their rewards, have been laid down by the Holy Prophet by his Traditions, which are safely recorded by compilers of the Ahadees, particularly the Saha Sitta, an authentic selection of which is contained in the Mishkat-ul-Masabeeh, Kitab-ul-Taharat and Kitab-ul-Salaat. On these injunctions of Qur'an and Sunnah of the Holy Prophet is based the Fiqah relating to the observance of Taharat and offering of the Salaat.

In the second year of Hijrah, the Qiblah was changed, and the Muslims for all times to come were ordered to face the Ka'bah at Mecca instead of the Baitul Muqaddas in the prayers.¹

(b) Som (Fasting)

In the second year of Hijra, Som (fasting) during the whole month of Ramazan (9th month of Hijra) was made compulsory.² Qur'an said, "O you who believe, fasting is prescribed for you, as it was prescribed for those before you, so that you may guard against evil, for a certain number of days. But whoever among you is sick or on a journey, (he shall fast) a (like) number of other days. And those who find it extremely hard may effect redemption by feeding a poor man. So whoever does good spontaneously, it is better for him; and that you fast is better for you if you know. The month of Ramazan is that in which the Qur'an was revealed, a guidance to men and the Criterion. So whoever of you is present in the month, he shall

-----1.

Qur'an, *Baqarah*, 2:17,18 and 22

2. *Seeratun Nabi*, by Shibli No'mani, Vol. II, p. 118.

fast therein, and whoever is sick or on a journey, (he shall fast) a (like) number of other days. Allah desires ease for you, and He desires not hardship for you, and (He desires) that you should complete the number and you should exalt the Greatness of Allah for having guided you and that you may give thanks" (*Baqarah*, 2:183-185); and, "it is made lawful for you to go in to your wives on the night of the fast. They are an apparel for you and you are an apparel for them. Allah knows that you acted unjustly to yourselves, so He turned to you in mercy and removed (the burden) from you. So now be in contact with them and seek what Allah has ordained for you, and eat and drink until the whiteness of the day becomes distinct from the blackness of the night at dawn, then complete the fast till nightfall, and touch them not while you keep to the mosque. These are the Limits of Allah, so go not near them. Thus does Allah make clear His Messages for men that they may keep their duty" (*Baqarah*, 2:187).

These were basic commands given by the Holy Qur'an for compulsory observance of the fast during the month of Ramazan. But details for explaining and putting these commands into practice, including citing of moon (Rooyat-e-Hilaal) to begin and finish the fasting, taking the food before dawn (Sehri) and breaking the fast immediately after the sunset (Aftaar), permissible and prohibited things during the state of fasting, situations arising out of breaking the fast by mistake (Khataa) or forgetfulness (Sehv), ransom (Fidyah) or making up (Qaza) for the left over or broken fasts, prayer of Traaweeh after the Isha prayer, excellence of and prayer in the night of Mejesty (Shab-e-Qadr), retirement (E'tikaaf) in the mosque during the last ten days of Ramazan, charity of Fitr (Sadaqatul Fitr), offering of prayer on the competition of the month of Ramazan (Eidul Fitr), and all other necessary commands, directions and instructions including details of the virtues and rewards for the fasting, recitation of Qur'an, offering the compulsory and optional prayers and other acts of devotion for the Pleasure of Allah have been provided by the Holy Prophet by his words (Ahadees) and deeds (Sunnah).

In addition to the compulsory (Farz) fasting during the month of Ramazan, the Holy Prophet also observed the optional fasts as follows :

- (1) Six days' fasting in the month of Shawwaal (10th month of Hirja) after the Eidul Fitr ;
- (2) Fasting on the 9th of the month of Zil Hijj (12th month of Hijra)
- (3) Fasting on the 9th and 10th or 10th and 11th of the month of Muharram (1st month of Hijra);
- (4) Fasting on Monday and Thursday each week ;
- (5) Fasting on the 13th, 14th and 15th of each month ;
- (6) Fasting on alternate days of the month;
- (7) Fasting during the whole or on some days of the month of Sha'baan (8th month of the Hijra)

Details of all these compulsory and optional fasts are contained in the Ahadees noted by the compilers of Ahadees, particularly the Saha Sitta, an authentic selection of which is contained in the Mishkat-ul-masabeeh, Kitabus Som, which form the basis of Fiqah regarding the Som (fasting).

(C) Zakaat (Poor-Rate)

In its primitive sense Zakaat means purification, whence it is also used to express a portion of property bestowed in alms, as a sanctification of the remainder to the owner of it. ¹

Zakaat was made compulsory in the 8th year of Hijra after the conquest of Mecca. ² Qur'an says :

i.e. keep up prayer and pay the poor-rate (*Baqarah*, 2:110)³. Qur'an lays emphasis on payment of the Zakaat and speaks of its excellence and reward in many of its verses. It also says that , "charity (Zakaat) is only for the poor and the needy, and those employed to administer it, and those whose hearts are made to incline (to Islam), and (to free) the captives, and those in debt,

1. Dictionary of Islam, by T.P. Hughes, p. 699.

2. Seeratun Nabi, by Shibli No'mani, Vol. II , p. 122

3. Also see *Hajj*, 22:78 ; *Noor*, 24:56 ; *Mujadilah*, 58:13 ; *Muzzaamil*, 73:20

and in the Way of Allah, and for the wayfarer – an Ordinance from Allah, and Allah is Knowing, Wise. (*Taubah*, 9:60).

Qur'an also commanded for the charity in general saying, "tell My servants who believe to keep up prayer and spend out of what We have given them, secretly and openly, before the coming of the Day in which there is no bartering nor befriending." (*Ibrahim*, 14:31).¹

Qur'an also asked the Holy Prophet to, "take alms of their property – you would clean them and purify them thereby" (*Taubah*, 9:103).

But Qur'an neither mentioned the properties on which the Zakaat was to be imposed, nor the ratio by which the Zakaat was to be paid or recovered.

The Holy Prophet by his Traditions laid down the nature and kinds of the properties on which Zakaat was payable, the ratio by which Zakaat was chargeable, the period after which Zakaat became due, as well as the qualifications of the persons on whom Zakaat was obligatory, and in the 9th year of Hijra also appointed the collectors of Zakaat.²

Thus while the basic commands for Zakaat and charity in general are given in the Holy Qur'an, all necessary details of it are provided by the Holy Prophet in his Ahadees safely noted by compilers of the Ahadees, particularly the *Saha Sitta*, an authentic selection of which is contained in the *Mishkat-ul-Masabeeh*, *Kitabuz – Zakaat*, which form the basis of Fiqah regarding the Zakaat (poor-rate).

(d) Hajj (Pilgrimage) and Umrah (Visitation)

Hajj literally means "setting out" or "tending towards";³ but according to the Islamic Shari'at it means the pilgrimage to

1. Also see *Baqarah*, 2:195,267-277 ; *Aale Imran*, 3:91 ; *Taubah*, 9:34-35 ; *Fatir*, 35:29 ; *Munafiqoon*, 63:10-11 ;

2. *Seeratun Nabi*, by Shibli No'mani, Vol. II , p. 122

3. *Dictionary of Islam*, by T.P. Hughes, p. 155.

Mecca, which is performed in the month of Zil Hijjah (12th month of Hijra).

Hajj was made compulsory, after the conquest over Mecca, in 9th year of Hijra, ¹ saying, "and pilgrimage to the House (i.e. Ka'bah) is a duty which men owe to Allah – whoever can find a way to it. And whoever disbelieves, surely Allah is above need of the worlds" (*Aale Imran*, 3:97) ; and "and accomplish the Hajj (pilgrimage) and the Umrah (visit)" (*Baqarah*, 2:196)

As regards the period of Hajj, Qur'an said, "the months of pilgrimage are well known ; so whoever determines to perform pilgrimage therein there shall be no immodest speech, nor altercation in the pilgrimage" (*Baqarah*, 2:197)

Before proceeding further, it may be noted that Hajj was being performed even before the advent of Islam, Qur'an says, and for every nation We appointed acts of devotion that they might mention the Name of Allah on what He has given them of the cattle quadrupeds" (*Hajj*, 22:23) ; and "to every nation We appointed act of devotion, which they observe" (*Hajj*, 22:67)

Accordingly, from the very beginning, the Ka'bah was the center of devotion to Allah the Almighty. Qur'an says, "certainly the First House appointed for men is the one at Bakkah (i.e. Mecca), Blessed and a Guidance for the nations" (*Aale Imran*, 3:96) ; and "and when We pointed to Abraham the place of the House (i.e. Kab'ah), saying : Associate not with Me, and purify My House for those who make circuits and stand to pray and bow and prostrate themselves. And proclaim to men the pilgrimage : they will come to you on foot and on every lean camel, coming from every remote path ; that they may witness benefits (provided) for them, and mention the Name of Allah on Appointed Days over what He has given them of the cattle quadrupeds : then eat of them and feed the distressed one, the needy. Then let them accomplish their needful acts of cleansing,

1. Seeratun Nabi, by Shibli No'mani, Vol. II , p. 123

and let them fulfil their vows and go round the Ancient House” (*Hajj*, 22:26-29).

Qur’an further says, “and when Abraham and Ishmael raised the foundation of the House (i.e. Ka’bah, they said) : Our Lord accept from us ; surely You are the Hearing, the Knowing. Our Lord, and make us both submissive to You, and (raise) from our offspring a nation submissive to You, and show us our ways of devotion and turn to us (mercifully) ; surely You are the Oft – returning (to mercy), the Merciful” (*Baqarah*, 2:127-128).

The polytheists of Mecca, however, changed the whole system of Hajj according to their own self – made ideologies. They placed a large number of idols in the Ka’bah, and instead of making circuits round the Ka’bah, they started making the circuits round their big idol “Manaat”, and totally gave up the “Sa’ee” i.e. running between Safa and Marwah. They also gave up going upto the Arafat, and when they stayed at Muzdalifah they used to boast about their ancestors instead of glorifying Allah the Almighty. They also used to go round the Ka’bah in the state of total nakedness. Qur’an, therefore, while commanding the Muslims to perform the Hajj, made known to them the real purpose, nature and high status of the Ka’bah and the pilgrimage to it, and revived the exact and correct rites of it.

Qur’an says, “the Safa and the Marwah are truly among the Signs of Allah ; so whoever makes a Hajj (pilgrimage) to the House (i.e. Ka’bah) or Umrah (visit to it), there is no blame on him if he goes round them. And whoever does good spontaneously – surely Allah is Bountiful in rewarding, Knowing” (*Baqarah*, 2:158).

Regarding the stay in Arafat and Muzdalifah, Qur’an says and “when you press on from Arafat, remember Allah near the “Mash’aril Haraam” (Holy Monument), and remember Him as He has guided you, though before that you were certainly of the erring ones. Then hasten on from where the people hasten on, and ask the forgiveness of Allah. Surely Allah is Forgiving, Merciful. And when you have performed your devotions, laud

Allah as you lauded your gather, rather a more hearty lauding” (*Baqarah*, 2:198-200)

Regarding the stay at Mina, Qur’an says, “and remember Allah during the Appointed Days. Then whoever hastens off in two days, it is no sin for him ; and whoever stays behind, it is no sin for him, for one who keeps his duty. And keep your duty to Allah, and know that you will be gathered to Him” (*Baqarah*, 2:203).

Regarding the sacrifices of cattle quadrupeds, Qur’an says, “that (shall be so). and whoever respects the Ordinances of Allah, this is surely from the piety of the hearts. Therein (i.e. in the cattle quadrupeds) are benefits for you for a term appointed, then their place of sacrifice is the Ancient House” (*Hajj*, 22:32-33) ; and, “and the camels, We have made them of the Signs appointed by Allah for you – for you therein is much good. So mention the Name of Allah on them standing in a row. Then when they fall down on their sides, eat of them and feed the contended one and the beggar. Thus have We made them subservient to you that you may be grateful.” (*Hajj*, 22:36) ; and, “O you who believe, fulfil the obligations. The cattle quadrupeds are allowed to you except that which is recited you, not violating the prohibition against game when you are on the pilgrimage. Surely Allah orders what He pleases. O you who believe, violate not the Signs of Allah, nor the Sacred Month, nor the Offering, nor the victims with garlands, nor those repairing to the Sacred House seeking the Grace and Pleasure of their Lord” (*Maa'idah*, 5:1-2)

Regarding the prohibition against hunting, Qur’an says, “and when you are free from pilgrimage obligations, then hunt” (*Maa'idah*, 5:2) ; and “O you who believe, kill not game while you are on pilgrimage. And whoever among you kills it intentionally, the compensation thereof is the like of what he killed, from the cattle, as two just persons among them judge, as an offering to be brought to the Ka’bah, or the expiation thereof is the feeding of the poor or equivalent of it in fasting” (*Maa'idah*, 5:95).

Regarding the one prevented from pilgrimage, Qur'an says, "but if you are prevented, (send) whatever offering is easy to obtain ; and shave not your heads until offering reaches its destination." (*Baqarah*, 2:196).

The polytheists used to rub the blood of the animal scarified on the walls of Ka'bah and thought it to be an act of virtue. ¹ Qur'an said, "neither their flesh nor their blood reaches Allah, but to Him is acceptable observance of duty on your part" (*Hajj*, 22:37).

The polytheists used not to shave off their heads even though they suffered on account of lice so much so that some of them also lost their eye-sight. ² Qur'an said, "then whoever among you is sick or has an ailment of the head, he (may effect) a compensation by fasting or alms or scarifying (for shaving) off his head)" (*Baqarah*, 2:196).

The polytheists (both men as well as women) used to make circuit round the Ka'bah in the state of total nudeness. ³ Qur'an said, "O children of Adam, attend to your adornment when you come to the mosques" (*Aa'raaf*, 7 ; 31),

These are the basic commands given by the Holy Qur'an for the performance of Hajj and Umrah, but the explanations and extensions thereof and the details relating to the fixing of "Meeqaat", i.e. places from where the pilgrims enter the Limits of Haram, the acts of cleansing, the wearing of the pilgrim dress, i.e. Ehraam and the prohibitions thereof, the use of oil, antimony, perfume, the shaving, the cutting of the nails, combing, etc., the wordings and recitation of the "Talbiah", entry into Mecca, making the circuits round the Kab'ah, kissing of the Black Stone, i.e. the "Sang-e-Aswad", conduct during the state of "Ehraam", putting off the "Ehraam", bathing during or after the "Ehraam", fixing of the dates and timings for proceeding to Mina, then to Arafaat, then to Muzdalifah, then again to Mina, stoning the

1. Seeratun Nabi, by Shibli No'mani, Vol. II, p. 126

2. Seeratun Nabi, ibid, p. 125

3. Seeratun Nabi, ibid, pp. 127-128

“Jumaraat” i.e. signs of the Satan, sacrificing the cattle quadru-peds and qualifications thereof, shaving or cutting short the hair, then performing the “Tawaful Ziarat”, then leaving the Mina for Mecca, then performance of the “Tawaful Widaa” on leaving the Mecca, the recitations and supplications as well as the prayers to be offered at various stages during the days of Hajj, particularly during the stay at Arafaat and Muzdalifah, the delivery of the Sermon of Hajj on the day of Arafaat, hunting in the state of “Ehraam,” situation arising out of prevention from the performance of Hajj or Umrah, the Sanctity of Mecca and the presence therein as well as the sanctity of Medinah and the presence therein including the presence and offering of Salutation at the Shrine of Holy Prophet, and offering of prayers in the Masjidun Nabawi, and all other necessary details, have been provided by the Holy Prophet by his Traditions which have been safely noted by the compilers of Ahadees, particularly the Saha Sitta, an authentic selection of which is contained in the Mishkat-ul-Masabeeh, Kitab-ul-Manasik, which form the basis of Fiqah regarding the Hajj and Umrah.

(2) AKHLAQIYAAT (MORALITY)

After the establishment of faith in the Absolute Unity of Allah and Prophethood of the Holy Prophet Muhammad (peace be upon him), and total submission to Allah the Almighty through “Ibaadaat”, the first and the foremost aim of Islam is to create good moral character among the people which in fact is the backbone of a good human society.

The first thing which Islam teaches in this connection is that a Muslim really sells himself for the Pleasure of Allah (*Baqarah*, 2:207), and therefore he declares that all his prayer, sacrifice, life and death are for Allah alone (*An'aam*, 6:163) ; and as such, whatever good he does, it is for the Pleasure of Allah (*Nisa*, 4:114) ; and that the Ultimate Goal of all activities for a Muslim is only the Pleasure of his Lord (*Lail*, 92:19-20) ; and that really is the Grand Achievement (*Taubah*, 9:72).

The second thing is that Qur'an declares that, "certainly you have in the Messenger of Allah an Excellent Exemplar for him who hopes in Allah and the Last Day, and remembers Allah much" (*Ahzaab*, 33:21).

Thirdly, it is to be noted that morality deals with the questions of right and good or good or bad with regard to the acts of an individual relating to his own self or to the society at large, and thus the entire dealings of a man with other individuals fall within the ambit of morality. Man being a social being is always subject to relations with other individuals of the society. The most fundamental relations which an individual has *per force* to maintain with other individuals of the society are those of parents and children, husband and wife, relatives and friends, state and public, and so on.

Qur'an gives basic commands in respect of the relation between parents and children, vide *Nisa*, 4:11-12 ; *Bani Israel*, 17:23-24 ; *Taa Haa*, 20:132 ; *Ankaboot*, 29:8 ; *Luqman*, 31:13, 14,15,16,19 ; *Ahqaaf*, 46:15 ; husband and wife, vide *Baqarah*, 2:187,222,223,224,228,229,232,233,237, 240, *Nisa*,4:3,15,16,22, 23,24,25,34 ; *Mominoon*, 23:31 ; *Noor*, 24:27, 58 ; *Ahzaab*, 33:32 ; *Fatir*, 35:53 ; relatives and friends, vide *Baqarah*, 2:177, 180, 215 ; *Nisa*, 4:8, 36 ; *Anfaal*, 8:41, 75 ; *Nahl*, 16:90 ; *Noor*, 24:22, 61 ; *Shu'araa*, 26:214-216 ; *Rum*, 30:38 ; *Ahzaab*, 33:6 ; *Shura*, 42:23 ; and State and public, vide *Nisa*, 4:59; *Hajj*, 22:41, and many other verses.

Generally also, Qur'an commands for Speaking the Truth, vide *Aale Imran*, 3:6 ; *Maa'idah*, 5:19 ; *Taubah*, 9:19 ; *Nahl*, 16:116 ; *Bani Israel*, 17:81 ; *Hajj*, 22:30 ; *Furqan*, 25:72 ; *Ahzaab*, 33:24, 35, 70 ; *Zumar*, 39:3, 32 ; *Asr*, 103:3 ; Doing of Justice, vide *Baqarah*, 2:282, 283 ; *Nisa*, 4:58, 105,135; *An'aam*, 6:90, 135 ; *Nahl*, 16:90 ; Honouring the Trust, vide *Baqarah*, 2:283 ; *Aale Imran*, 3:160 ; *Nisa*, 4:2,6,10,58 ; *An'aam*, 6:153 ; *Anfaal*, 8:27, 28 ; *Bani Israel*, 17:34 ; *Mominoon*, 23:8 ; Respect for Life, vide *Baqarah*, 2:178, 179 ; *Nisa*, 29,30; *An'aam*, 6:152; *Bani Israel*, 17:31,33 ; Respect for Property, vide *Baqarah*, 2:188 ; *Aale Imran*, 3 : 13, 14 ; *Nisa*, 4: 32 ; *Maa'idah*, 5:88 ;

Hijr, 15:88 ; Sincerity, vide *Nisa*, 4:107, 142, 145, 146 ; *Zumar*, 39:2,3 ; *Bayyinah*, 98:5 ; Purity, vide *Baqarah*, 2:222 ; *Maa'idah*, 5:6 ; *Taubah*, 9:108 ; *Noor*, 24:21 ; *Ahzaab*, 33:33 ; *Najm*, 53:32 ; *Muddassir*, 74:4-5 ; *Aalaa*, 87:14 ; Unselfishness, vide *Baqarah*, 2:262 ; *Aale Imran*, 3:91 ; *An'aam*, 6:163 ; *Taghabun*, 64:16 ; *Dahr*, 76:8,9 ; *Lail*, 92:19,20 ; Avoiding Niggardliness, vide *Aale Imran*, 3:179 ; *Nisa*, 4:37 , *Hashr*, 59:9; Humility, vide *Aa'raaf* , 7:13,55,146 ; *Nahl*, 16:23,29 ; *Bani Israil*, 17:13,37,38 ; *Qasas*, 28:83; *Luqman*, 31:18,19 ; *Momin*, 40:35 ; Patience, vide *Baqarah*, 2:153,155,157,177,249 ; *Aale Imran*, 3:145,199 ; *Hood*, 11:11; *Nahl*, 16:126,127 ; *Qasas*, 28:80 ; *Ankaboot*, 29:58,59; *Zumar*, 39:10 ; *Shura*, 42:43 ; *Asr*, 103:3 ; Perseverance, vide *Hood*, 112,113 ; *R'ad*, 13:22,24; *Rum*, 30:43 ; *Haa Meem*, 41:6,30; Thankfulness, vide *Baqarah*, 2:152, 172, 185, 243; *Maa'idah*, 5:6 ; *Ibrahim*, 14:7 ; *Qasas*, 28:73 ; *Zumar*, 39:66 ; *Ahqaaf*, 46:15; Self-Control, vide *Nisa*, 4:135 ; *Aa'raaf*, 7:199, 200, 201 ; *Kahf*, 18:28 ; *Rum*, 30:29 ; *Swaad*, 38:26 ; *Shura*, 42:36, 37 ; *Naazi'aat*, 79:40, 41 ; Forgiveness, vide *Baqarah*, 2:109 ; *Aale Imran*, 3:132, 133, 158; *Nisa*, 4:149; *Maa'idah*, 5:13; *Aa'raaf* , 7:199 ; *Noor*, 24:22 ; *Haa Meem*, 41:34 ; Courage, vide *Baqarah*, 2:38, 112 ; *Aale Imran*, 3:138, 145, 172 ; *Nisa*, 4:104 ; *An'aam*, 6:81, 83 ; *Taubah*, 9:40 ; *Taa Haa*, 20:46 ; *Ahzaab*, 33:39; Chastity, vide *Bani Israil*, 17:32 ; *Mominoon*, 23:5.7 ; *Furqan*, 25:68 ; *Ma'arij*, 70:29, 31 ; Doing of good, vide *Baqarah*, 2:82, 148 ; *Nisa*, 4:48 ; *Maa'idah*, 5:48 ; *R'ad*, 13:22 ; *Luqman*, 31:17 ; Largeheartedness, vide *Baqarah*, 2:237 ; *Aale Imran*, 3:170 ; *Nisa*, 4:8, 24,33,37,58, 128 ; *An'am*, 6:121, 153 ; *Nahl*, 16:94, 153 ; Remain within the Limits of Allah, vide *Maa'idah*, 5:87-88 ; Do not accuse the innocent, vide *Nisa*, 4:112 ; Avoid indecency, evil and rebellion, vide *Nahl*, 16:90 ; Give full measure and weight, vide *Bani Israil*, 17:31-40; Do not laugh at people or find fault or nickname, vide *Hujuraat*, 49:11 ; Avoid suspicion and backbiting, vide *Hujuraat*, 49:12, Be good to the neighbours, vide *Nisa*, 4:36 ; Help the kindred, needy and way – fairer (*Nahl*, 16:90 ; *Bani Israil*, 17:26 ; Speak a gentle word, vide, *Bani Israil*, 17:28 ; Do not oppress the orphans and chide not the one who asks, vide *Duha*, 93:10 ; and so on .

In order to maintain the purity of the family life and the generation, Qur'an also commands for marriage ¹, and observance of "purdah" (privacy) by the Muslim women (vide *Noor*, 24:27, 28, 29, 30, 31, 50, 58, 60, 61 and *Ahzaab*, 33:53, 55,59), and provides very serious punishment for rape and adultery. ²

These are the basic commands given by the Holy Qur'an for moral development of the human society, and the Holy Prophet by his Traditions explained and applied these commands to the Muslim Ummah and also laid down further necessary commands, directions and instructions in order to establish good moral conduct among his followers, particularly relating to salutation, seeking permission for entry in the house, observance of purdah (privacy) by the Muslim women, shaking hands, embracing, kissing, manners of standing, sitting, sneezing, yawning, smiling, laughing, naming the children, speech and poetry, backbiting, slandering, fulfillment of promise, joking, pleasing, tribal pride, relationship, loving and respecting the human beings, love and hate for the sake of Allah, moderation in deeds, modesty, anger and boasting, tyranny, enjoining the Good and forbidding the Evil, softening the hearts, excellence of poverty and the poor, greed and hope, age, patience and reliance on Allah, hypocrisy, weeping and fearing, warning and admonition, so on. All these Ahadees have been safely noted by compilers of Ahadees, particularly the *Saha Sitta*, an authentic selection of which is also contained in the *Mishkat-ul-Masabeeh*, *Kitab-ul-Aadaab* and *Kitabur Riqaaq*, which form the basis of Fiqah relating to "Akhlaqiyaat" (morality).

(3) MANAKAHAAT (MARRIAGE, etc.)

"Manakahaat" deal with marriage, dower, divorce, children, maintenance and inheritance.

1. We will deal with it under the "Manakahaat"

2. We will deal with it under the "Uqubaat"

(a) Marriage

Qur'an says that, "of His Signs is this that He created mates for you from your selves so that you might find comfort of mind in them, and He put between you love and compassion" (*Rum*, 30:21); and commands for marriage saying, "marry those among you who are single, and those who are fit among your male slaves and your female slaves. If they are needy, Allah will make them free from want out of His Grace. And Allah is Ample-giving, Knowing" (*Noor*, 24:32); and "marry such women as may seem good to you, two or three or four; but if you fear that you will not do justice, then (marry) only one or that which your right hands possess. That is more proper that you may not do injustice" (*Nisa*, 4:3). Qur'an declares husband and wife as an apparel of each other (*Baqarah*, 2:187), and the marriage contract as "Meesaqan Ghalizah" i.e. Strong Covenant" (*Nisa*, 4:21). Qur'an also permits marriage with the chaste women of the People of the Book (*Maa'idah*, 5:5); as well as with the slave girls (*Nisa*, 4:25).

As regards the divorced women, Qur'an says, "when you divorce women and they complete their term (i.e. period of Iddat), prevent them not from marrying their husbands if they agree among themselves in a lawful manner" (*Baqarah*, 2:232).

As regards the remarriage by the widows, and the offer of marriage to them, Qur'an says, "and as for those of you who die and leave wives behind, such women should keep themselves in waiting (i.e. Iddat) for four months and ten days. When they reach their term, there is no blame on you for what they do for themselves in a lawful manner. And Allah is Aware of what you do. And there is no blame on you respecting that which you speak indirectly in the asking of such women in marriage or keep (the proposal) concealed within your minds. Allah knows that you will have them in your minds, but give them not a promise in secret unless you speak in a lawful manner. And confirm not the marriage tie until the prescribed period reaches its end. And know that Allah knows what is in your minds; so beware of Him; and know that Allah is Forgiving, Forbearing" (*Baqarah*, 2:234-235).

As regards the nature of relationship between husband and wife, Qur'an says, "women have rights similar to those against them in a just manner, and men are a degree above them ; and Allah is Mighty, Wise" (*Baqarah*, 2:228) ; and, "men are the Guardians over women, with what Allah has made some of them to excel others and with what they spend out of their wealth. So the good women are obedient, guarding the unseen as Allah has guarded. And (as to) those on whose part you fear desertion, admonish them, and leave them alone in beds and punish them. So if they obey you, seek not a way against them. Surely Allah is ever Exalted, Great" (*Nisa*, 4:34).

As regards any dispute between husband and wife, Qur'an says, "and if you fear a breach between the two, appoint an orbiter from his people and an orbiter from her people. If they both desire agreement, Allah will effect harmony between them. Surely Allah is ever Knowing, Aware" (*Nisa*, 4:35) ; and, "if a woman fears ill-treatment from her husband or desertion, no blame is on them if they effect a reconciliation between them, and reconciliation is better. And avarice is met with in (men's) minds. And if you do good and keep your duty, surely Allah is ever Aware of what you do" (*Nisa*, 4:128).

Qur'an, however, prohibits marriage with ex-wives of the father (*Nisa*, 4:22), the idolatresses (*Baqarah*, 2:221), the adulteresses (*Noor*, 24:3), the mothers, daughters, sisters, paternal aunts, maternal aunts, brothers' daughters, sisters' daughters, father's mothers, foster sisters, mothers of wives, stepdaughters of the wives, the wives of the sons, two sisters at a time, and all married women (*Nisa*, 4:23-24). Qur'an also prohibits the taking of women by way of inheritance. (*Nisa*, 4:19).

(b) Dower

Qur'an lays great emphasis on payment of dower while marrying a woman (*Nisa*, 4:24) , even though she be a slave girl (*Nisa*, 4:25) or a Muslim woman coming fleeing from the camp of the enemy (*Mumtahinah*, 60:10) , and prohibits taking back of the dower (*Nisa*, 4:19-21), although allows the woman to remit it

herself by her own consent (*Nisa*, 4:4), or to take “Khula” (*Baqarah*, 2:229). In case of divorce, however, before cohabitation, half of the dower is to be paid (*Baqarah*, 2:237), and if no dower is fixed, then dower is to be paid according to the usage and status of the husband (*Baqarah*, 2:236).

(c) Divorce and Iddat

Qur’an permits divorce, but commands for its pronouncement at the beginning of menstruation and calculation of the period of Iddat (*Talaq*, 65:1), and says that revocable divorce is twice only (*Baqarah*, 2:229), and became unrevocable after the third pronouncement (*Baqarah*, 2:230), and permits the husband to take his wife during the period of Iddat in case of a revocable divorce (*Baqarah*, 2:231) or if the period of Iddat is completed, then to remarry her (*Baqarah*, 2:232), and commands for the maintenance of the women during Iddat (*Baqarah*, 2:236), and not to turn them out from the houses during Iddat (*Talaq*, 65:1), and maintain them till delivery if they are pregnant (*Talaq*, 65:6) and to spend on them according to the means (*Talaq*, 65:7).

If a man puts away his wife by “Izhaar”, i.e. calling her as the back of his mother, and wants to go back to her, he may do so by freeing a slave, or fasting for two months, or feeding sixty needy ones (*Mujadilah*, 58:3-4).

Qur’an also permits a woman to obtain separation from her husband by way of “Khula” (*Baqarah*, 2:229). There is also the separation by “Li’an” i.e. invoking of curses by the husband and the wife (*Noor*, 24:6-10).

Consequent upon divorce the wife is to observe a period of Iddat (waiting) before re-marriage, for three courses (*Baqarah*, 2:228) ; but if she is not menstruating, then three months only (*Talaq*, 65:4) ; and if she is pregnant, then till delivery (*Talaq*, 65:4). There is, however, no Iddat if she is divorced before cohabitation (*Ahzaab*, 33:49).

(d) Children

Qur'an fixes the period of weaning of the children as two years (*Luqman*, 31:14), and provides that mothers shall suckle their children for complete two years if their husband so desire (*Baqarah*, 2:233), and will be entitled to maintenance during this period (Ibid). Also see *Talaq*, 65:6 and 7.

Side by side to bringing up of the children, the parents are also to educate them, and the first and the foremost education is that of total submission to Allah the Almighty. According to Qur'an, Prophets Abraham and Jacob (Ya'qub) enjoined on their sons, "O my sons, surely Allah has chosen for you (this) religion (i.e. Islam), so die not unless you are the Muslims, i.e. the submitting ones" (*Baqarah*, 2:132); and on the verge of his death Prophet Jacob also said to his sons, "What will you serve after me? They said: we shall serve your God and the God of your fathers, Abraham and Ishmael and Ishaq, One God only, and to Him do we submit." (*Baqarah*, 2:133). Through the tongue of Luqman, Qur'an also provided the lessons which the parents should give to their children, viz., "O my son, ascribe no partner to Allah. Surely ascribing partners (to Allah) is a grievous iniquity"; and "O my son, even if it be the weight of a grain of mustard – seed, even though it be in a rock, or in the heaven or in the earth, Allah will bring it forth. Surely Allah is Knower of subtleties, Aware. O son, keep up prayer and enjoin Good and forbid Evil, and bear patiently that which befalls you. Surely this is an affair of great resolution. And turn not your face away from people in contempt, nor go about in the land exultingly. Surely Allah loves not any self – conceited boaster. And pursue the right course in your going about and lower your voice. Surely the most hateful of voices is braying of ass" (*Luqman*, 31:13, 16-19). The basic aim of the Holy Prophet's Mission was to recite the Book i.e. Qur'an, to purify, and to teach the Book and the Wisdom (*Aale Imran*, 3:164), and therefore the primary education to be given to the children is the education of Qur'an and Sunnah.

As regards the orphans, Qur'an commands that they should not be oppressed (*Duha*, 93:9) ; people should not be rough to them (*Maa'oon*, 107:2) ; or dishonour them (*Fajr*, 89:17) ; set right their affairs (*Baqarah*, 2:220) ; be good to them (*Nisa*, 4:36) ; deal with them justly (*Nisa*, 4:127) ; draw not near to their property except in a goodly way (*An'aam*, 6:152 ; *Bani Israil*, 17:34) ; do not change their good property with bad one (*Nisa*, 4:2) ; and return their property to them (*Nisa*, 4:6).

As regards the commands relating to the relationship between parents and children, we have already noted the verses of the Holy Qur'an under the heading "Akhlaqiyyaat."

(e) Maintenance and Inheritance

Maintenance is an inherent incidence of marriage, meaning, thereby that the marriage tie inherently makes it obligatory for a husband to maintain his wife according to his means. Qur'an says, "men are guardians over women with what Allah has made some of them to excel others and with what they spend out of their wealth" (*Nisa*, 4:34), and also commands the husband to maintain his wife even during Iddat after divorce (*Baqarah*, 2:236), and for one year in case of the death of the husband (*Baqarah*, 2:240), and also during suckling of the child (*Baqarah*, 2:233 ; *Talaq*, 65:6).

As regards inheritance, it may be noted that before the advent of Islam, among the Arabs only the major sons were entitled to inherit. In the absence of the sons, the father ; and in the absence of the father, the real brother ; and in the absence of the real brother, the real uncle, was to inherit.

Islam, firstly made the "Muhajir" (emigrants) and the "Ansaar" (helpers) as heirs to each other (*Anfaal*, 8:72-75) ; and then declared the near relations to be the heirs (*Anfaal*, 8:75) ; and also permitted the Muslims to give whatever they liked to their friends out of their properties (*Ahzaab*, 33:6) ; and along with the heirs also recognized the rights of inheritance by contract (*Nisa*, 4:33) ; and finally mentioned the heirs as well as their shares,

making both men as well as women to inherit (*Nisa*, 4:7), commanding that son should get double that of the daughter, and if there is no son, but there are two or more daughter, they will get two-third ; and if she is only one, she will get one-half (*Nisa*, 4:11).

As regards the parents, for each of them is one – sixth, if there is a child also ; and if there is no child, for the mother is one – third ; but if there is also brother, the mother will get one-sixth (*Nisa*, 4:11).

As regards husband and the wife, if there is no child, the husband will get one-half ; and the wife will get one-fourth. But if there is a child, the husband will get one-fourth ; and the wife will get one-eighth.

As regards the heirs of the mother, if there is no father or children, but a sister and a brother (through the mother), each of them will get one-sixth ; and if they are more, then they will share equally in one-third (*Nisa*, 4:12).

As regards “Kalalah” i.e. the one leaving no parents and no children, but having a sister, then she will get one-half ; and if a woman dies leaving only a brother, he will get the whole; and if there are two sisters, they will get two third ; but if there are sisters as well as brothers, the males will get double that of the females (*Nisa*, 4:176).

The legal heirs mentioned in these verses are known as the “Zul Farooz” (sharers), and their shares, being the Qur’anic shares, are to be satisfied first from the inheritance, after satisfaction of the debts and legacies, if any.

All these verses bear the basic commands revealed in the Qur’an regarding the “Manakahaat”, i.e. marriage, dower, divorce and Iddat, children, maintenance and inheritance, but while applying these commands the Holy Prophet explained them, provided necessary details thereof and made provisions where necessary, particularly relating to the method of offer and acceptance for marriage, performance of marriage before the

witnesses, and the general public, the delivery of the Sermon of Marriage, the seeing of the proposed wife by the man before marriage, guardianship in marriage, permission of the woman, prohibited women, cohabitation with the wives after the marriage, marriage with the slave girls, payment of dower, wedding feast (Walimah), fixing turns between the wives if more than one, rights of wives, divorce, Li'aan, Iddat, maintenance, Istabra, custody of minor children, age of puberty, looking after and maintenance of the orphans, giving shares in the property left after satisfaction of the shares of the "Zul Farooz" (sharers) to the residuaries and the next of kindred, etc., and all necessary details regarding putting the commands of Allah in actual practice. All these are contained in the Ahadees which have been safely noted by the compilers of Ahadees, particularly the Saha Sitta, an authentic selection of which is contained in the Mishkat-ul-Masabeeh, Kitabun Nikah, and Fara'iz, which form the basis of Fiqah regarding the "Manakahaat."

(4) MU'AAMLAAT

Under this topic come the individual and social life as well as the financial and political dealings of men.

As regards the individual life, a man must always keep in mind that he has been created by Allah so that he may serve Him (*Zaariyaat*, 51:56). He should therefore serve Allah being sincere to Him in obedience, be upright, and keep up prayer and pay the poor-rate (*Bayyinah*, 98:5). He should fear Allah, seek means of nearness to Him, and strive hard in His Way (*Maa'idah*, 5:35); be upright for Allah, bearer of witness with justice, and let not hatred of a people incite you not to act equitably, be just (*Maa'idah*, 5:8).

Qur'an teaches the manner of Salutation (*Nisa*, 4:86 ; *Noor*, 24:61) ; permission for entry into the house and attending the feasts (*Noor*, 24:27-29 ; *Ahzaab*, 33:53) ; sitting in the meetings (*Mujadilah*, 58:11) ; speaking what is the best (*Bani Israil*, 17:53); walking in humility (*Furqan*, 25:63) ; not turning away faces from the people nor be exultant nor talk in a loud voice *Luqman*,

31:18-19) ; maintaining unity (*Aale Imran*, 3:103) ; enjoining for good and forbidding evil (*Taubah*, 9:71) ; not to devour each other's property by injustice (*Nisa*, 4:29) ; not to make jokes of others, avoid suspicion, spy not nor backbite (*Hujurat*, 49:11-12) ; and help the weak (*Nisa*, 4:75) ; be good to the orphans (*Baqarah*, 2:220) ; and the relatives, the poor, the way-farers (*Rum*, 30:38) ; and the neighbours (*Nisa*, 4:36) ; and the parents (*Ankaboot*, 29:8) and the slaves (*Nisa*, 4:36) ; give full measure and weight (*Rahman*, 55:8-9), and so on.

As regards the food and dress, Qur'an permits eating of whatever is made lawful by Allah (*Nahl*, 16:114) ; and wearing of the dress to cover the shame and to safeguard the body and to acquire adornment (*Aa'raaf*, 7:26).

As regards the commands relating to the relations between parents and children, husband and wife, and individual and State, and so on, we have already noted the Qur'anic verses under the "Akhlaiyyaat", and therefore need not to be repeated here again.

As regards financial dealing, they consists in (1) acquisition and (2) disposal of wealth including property, and (3) bargains, i.e. sale and purchase, as well as business transactions including agreements, contracts, partnerships , and giving properties on rent, and so on.

As regards acquisition of wealth of wealth and property, Qur'an, says : for every body is what he (lawfully) earns (*Baqarah*, 2:86 ; *Nisa*, 4:32). It says : eat of the lawful things that Allah has given you (*Maa'idah*, 5:28 ; *Mominoon*, 23:51), and do not look at what Allah has given to others (*Hijr*, 15:38) , and swallow not up the property of others by false means (*Baqarah*, 2:88), and devour not your property among yourselves by illegal methods except that it be trading by mutual consent (*Nisa*, 4:29).

Qur'an condemns breach of trust (*Aale Imran*, 3:160), and orders that the trusts should be returned to their owners (*Baqarah*, 2:285 ; *Nisa*, 4:58). It says : approach not the property

of the orphan except in the best manner until the orphan attains his maturity (*An'aam*, 6:153).

Qur'an permits trade (*Baqarah*, 2:275), bounties of war (*Anfaal*, 8:41), charity (*Baqarah*, 2:277), inheritance (*Nisa*, 4:11-12), and will (*Baqarah*, 2:180).

Qur'an forbids bribery (*Baqarah*, 2:188), condemns dishonesty (*Aale Imran*, 3:160), commands for giving full measure and weight (*An'aam*, 6:153), condemns and forbids intoxicants and gambling (*Baqarah*, 2:219 ; *Maa'idah*, 5:90), and also condemns and forbids usury (*Baqarah*, 2:276 ; *Aale Imran*, 3:129).

As regards disposal of wealth and property, Qur'an discourages hoarding up as well as remaining of the property in few hands (*Homazah*, 104:2-9 ; *Hashr*, 59:7), condemns niggardliness (*Aale Imran*, 3:179 ; *Taubah*, 9:35) as well as squandering (*Bani Israil*, 17:26-27) and commands for adopting a middle course (*Bani Israil*, 17:29 ; *Furqan*, 25:63-67), encourages spending in the Way of Allah (*Baqarah*, 2:274), loaning without interest (*Baqarah*, 2:275-279) and as Qarze Hasanah" (*Baqarah*, 2:245), giving time to the debtor (*Baqarah*, 2:280), and prefers remittance of it (*Baqarah*, 2:280). As already noted, Qur'an provides for disposal of property by way of Charity (Zakaat and Khairaat), will as well as inheritance.

As regards the bargains, Qur'an permits the trade (*Baqarah*, 2:275), orders for putting into writing the contracts of debts (*Baqarah*, 2:282) before two male or one male and two female witnesses (ibid) and says that writing is not necessary if the transaction is by hand to hand (ibid), and orders for having witnesses of the sale (ibid), and also permits mortgage (*Baqarah*, 2:283)

These are the few basic commands given by the Holy Qur'an relating to the "Mu'aamlaat" in the individual as well as the social life of man, but the details thereof together with further necessary commands, directions and instructions in this

connection have been provided by the Holy Prophet himself relating particularly to the disposal of property by Hiba (gift) and Wakf¹ (trust), the limit and conditions governing the Wasiyat (Will), distribution of the inheritance among the residuaries and the distant kindred after satisfaction of the shares of the Zul Farooz (Sharers), charity of Eidul Fitr (ordered in the 2nd year of Hijrah), Zakaat (enforced in 8th year of Hijrah and rules governing it and its collection (in the 9th year of Hijrah), kinds, extent and conditions of the business transactions, usury, hoarding up, allowing time to the debtors, partnership and agency, giving articles on loan, right of presumption (Shuf'ah), giving the lands on rent or share basis, finds, slaves, oaths and vows, journeys, foods, dress, feasts, dress, shoes and socks, adornment, use of oil, antimony, cuppling and tattooing, pictures, decoration of the houses, keeping of dogs and cats, hunting and slaughtering, curing of diseases through medicines as well as through the spells, good and bad omen, foretellings, sorcery, dreams, and so on. The Ahadees on all these aspects of the human life have been safely recorded by the compilers of the Ahadees, particularly by the Saha Sitta, an authentic selection of which is contained in the Mishkat-ul-Masabeeh, Kitabuz Zakaat, Kitab-ul-Buyoo', Kitabun Nikah, Kitabus Sayd Waz Zaba'eh, Kitab-ul-At'imah, Kitab-ul-Libaas, Kitabut Tib War Raqi and Kitabur Roya, which form the basis of Fiqah relating to "Ma'aamlaat."

(5) 'UQUBAAT

Under this topic come the crimes and the punishment of the criminals. Qur'an has laid down punishment for five offences only as follows :-

- (a) Qisaas or retaliation for murder, saying, "O you who believe, retaliation is prescribed for you in the matter of a slain : the free for the free, and the slave for the slave, and the female for the female"¹ (*Baqarah*, 2:178) ; and, "and whoever is slain unjustly, We have indeed given to his heir

1. Created firstly of the land of Masjid Nabavi in the 1st year of Hijrah, then of the garden of Abu Talha in the 4th or 5th year of Hijrah, then of the land of Khaybar by Umar in 7th year of Hijrah (*Seeratun Nabi*, by Shibli No'mani, Vol. II, pp. 131-132).

authority (to take retaliation), but let him not exceed the limit in slaying. Surely he will be helped" (*Bani Israil*, 17:33).

Qur'an also provides for "Deeyat" or blood-wit, in place of retaliation, saying, "but if remission is made to one by his (aggrieved) brother, prosecution (for blood-wit) should be according to the usage, and payment to him in a good manner" (*Baqarah*, 2:178); and, "and he who kills a believer by mistake should free a believing slave, and blood-wit should be paid to his people unless they remit it as alms. But if he be from a tribe hostile to you and he is believer, the freeing of a believing slave (only). And if he be from a tribe between whom and you there is a covenant, the blood-wit should be paid to his people along with the freeing of a believing slave; but he who has not the means should fast for two months successively." (*Nisa*, 4:92)

As regards retaliation for the wounds, Qur'an says, "and We prescribed to them (i.e. the Bani Israil) in it (i.e. the Torah) that life is for life, and eye for eye, and nose for nose, and ear for ear, and tooth for tooth, and for wounds retaliation, but whoso foregoes it, it shall be an expiation for him" (*Maa'idah*, 5:45).

- (b) Hadd for fornication, saying, "the fornicatoress and the fornicator, flog each of them (with) a hundred stripes, and let not pity for them detain you from obedience to Allah, if you believe in Allah and the Last Day, and let a party of believers witness their punishment" (*Noor*, 24:2). But if the fornicatoress is a slave girl, she will be given half of the punishment (*Nisa*, 4:25)
- (c) Hadd for Qazf or false accusation, saying, "and those who accuse free women and bring not four witnesses, flog them (with) eighty stripes and never accept their evidence, and these are the transgressors, except those who after-wards repent and act aright; surely Allah is Forgiving, Merciful" (*Noor*, 24:4-5)

As regards the accusation by a husband against his wife, Qur'an says, "and those who accuse their wives and have no

1. Thus the system of retaliation which was extant among the Arabs (see the topic "Pre-Islamic Period" above) was modified.

witness except themselves, let one of them testify four times, bearing Allah to witness, that he is of those who speak the truth ; and the fifth time that the curse of Allah be on him, if he is of those who lie. And it shall avert the punishment from her, if she testify four times, bearing Allah to witness, that he is of those who lie ; and the fifth time that the Wrath of Allah be on her, if he is of those who speak the truth" (*Noor*, 24:6-9).

- (d) Hadd for theft, saying, "and the man and woman who commit the theft, cut off their hands as a punishment for what they have earned, an exemplary punishment from Allah" (*Maa'idah*, 5:38)
- (e) Hadd for highway robbery, saying, "the only punishment of those who wage war against Allah and His Messenger and strive to make mischief in the land is that they should be murdered, or crucified, or their hands and their feet should cut off on opposite sides, or they should be imprisoned" (*Maa'idah*, 5:33)

These are the only punishment which Qur'an has prescribed, and the Holy Prophet by his Traditions has explained and imposed these punishments, and has laid down the conditions governing these punishments. The Holy Prophet has also laid down the punishment of "Rajm" for adultery by married persons, and punishment for drinking the wine, and prohibited all sorts of dealings in the wine.¹ He also condemned recommendations in criminal cases and prohibited abusing of the convicts after the infliction of the punishments. All these are safely recorded by the compilers of Ahadees, particularly the Saha Sitta, an authentic compilation of which is contained in the Mishkat-ul-Masabeeh, Kitab-ul-Hudood, which form the basis of Fiqah for the 'Uqubaat.

(6) MUKHASAMAAT (LITIGATIONS)

Administration of justice is one of the basic aims of the Holy Qur'an. It addresses the Holy Prophet saying, "surely We

1. In the 8th year of Hijrah (Seeratun Nabi, by Shibli No'mani, Vol. II, p. 144)

have revealed to you with truth so that you may judge between the people by means of what Allah has taught you" (*Nisa*, 4:105); and, "judge between the people by what Allah has revealed" (*Maa'idah*, 5:48); and, "whoever judges not by what Allah has revealed is disbeliever, wrongdoer, and transgressor" (*Maa'idah*, 5:44, 45, 47); and, "when you judge between the people, judge with justice" (*Nisa*, 4:58) and, "be not one pleading the cause of the dishonest" (*Nisa*, 4:105); and "contend not on behalf of those who act unfaithfully to their souls; surely Allah loves not him who is treacherous, sinful" (*Nisa*, 107); and, "follow not their low desires, turning away from the truth that has come to you" (*Maa'idah*, 5:58); and, "be maintainers of justice, become witnesses for Allah, even though it be against your own selves, your parents or near relatives, whether he be rich or poor" (*Nisa*, 4:135); and, "when you speak, be just, though it be against a relative" (*An'aam*, 6:153).

As regards documentary evidence, it should be in writing, signed by the parties and attested by at least two male witnesses, or one male and two female witnesses (*Baqarah*, 2:282); or oral evidence of four male witnesses in a case of adultery (*Noor*, 24:4,13; *Nisa*, 4:15); or two witnesses in any other case (*Maa'idah*, 5:106-107). Witnesses are to take oath before they depose (*Maa'idah*, 5:107). The witnesses should not refuse when they are summoned (*Baqarah*, 2:282), and no harm should be done to the witnesses (*ibid*). witnesses should speak the truth even though it be against a relative (*An'aam*, 6:153), or even against their own selves or parents (*Nisa*, 4:135). Testimony should not be concealed (*Baqarah*, 2:283).

Judgment can also be given on basis of circumstantial evidence (*Yusuf*, 12:26-28). Cases may also be decided through arbitration (*Nisa*, 4:35).

As regards the debt, Qur'an gives it preference over the inheritance (*Nisa*, 4:11-12), recommends postponement of the recovery if the debtor is in hard circumstances, and approves its remittance as charity (*Baqarah*, 2:280).

These are the few basic commands which Allah the Almighty Himself revealed in the Holy Qur'an for the administration of justice between the people ; and the Holy Prophet explained them and put them in actual practice, and for this purpose he himself acted as a judge and decided large number of cases civil as well as criminal, which came before him, ¹ and also appointed Qazis (judges) in different places.² He entrusted the duties of police to Qais bin Sa'd, and that of "Jallaad" (executors) to Zubair, Ali, Miqdaad Binul Aswad, Muhammad bin Muslimah, Aasim bin Saabit, and Zahaak bin Sufyan Kalaabi. ³ The Holy Prophet also defined the qualifications, duties and responsibilities of the judges and other officials concerned with the administration of justice, as well as their remunerations. He also laid down the punishment of "Rajm" (stoning to death) for adultery committed by a married man or woman, flogging by stripes the drunkard, and also the punishment of death for sodomy or unnatural offence. The Holy Prophet also laid down the principles for evidence and witnesses, the qualifications of the witnesses and the manner of taking their evidence, pronouncement of judgments and executions of the court decisions, and so on. All these have been safely recorded by the compilers of the Ahadees, particularly the Saha Sitta, an authentic selection of which is also contained in the Mishkat-ul-Masabeeh, which form the basis of Fiqah relating to the Mukhasamaat.

(6) SIYASIYAAT

Under this topic come the form, formation, and purpose of government, as well as peace within and peace outside the country.

Qur'an does not lay down any particular form or the method to form the government. According to Qur'an, sovereignty vests in Allah. It says, "Allah's is the kingdom of the Heavens and the Earth" (*Shura*, 42:49); and, "to Him belongs whatever is in the Heavens and whatever is in the Earth and

1. *Seeratun Nabi*, by Shibli No'mani, Vol. II, p. 61,77.

2. *Ibid*, p. 61, 68, 69, 77, in the 10th year of Hijrah (*ibid*, p. 58).

3. *Ibid*. p. 78.

whatever is in between them and whatever is beneath the soil" (*Taa Haa*, 20:6); and, "Allah ever encompasses all things" (*Nisa*, 4:126); and, "Blessed is He in Whose Hand is the kingdom, and He is Possessor of Power over all things" (*Mulk*, 67:1); and so on.

Allah has made man His vicegerent on earth (*Baqarah*, 2:30; *An'aam*, 6:165; *Ambia*, 21:105; *Faatir*, 35:39; *Swaad*, 38:26); and "say: O Allah. Owner of the Kingdom, You give the Kingdom to whom you Please, and take away the Kingdom from whom You please, and You exalt whom You please, and abase whom You please. In Your Hand is the Good. Surely, You are Possessor of Power over all things" (*Aale Imran*, 3:26)

As regards the purpose of giving the rule to anybody on earth, Allah the Almighty says (that believers are) "those who, if We give them the rule in the land, keep up prayer, pay the poor-rate, enjoin the Good and forbid the Evil" (*Hajj*, 22:41); and, "whose affairs are (decided) by counsel among themselves" (*Shura*, 42:38; *Aale Imran*, 3:159); and, "judge between them (i.e. the people) by what Allah has revealed" (*Maa'idah*, 5:48)

Qur'an stands for equality of all citizens before the law as well as equality of status and opportunity (*Nisa*, 4:1; *Qasas*, 28:4). It vouchsafes for everybody the right of life (*Bani Israil*, 17:23), property (*Baqarah*, 2:188), privacy (*Noor*, 24:27; *Hujuraat*, 49:12), reputation (*Hujuraat*, 49:12; *Ahzaab*, 33:58), and decision according to law (*Hujuraat*, 49:6; *Bani Israil*, 17:36; *Nisa*, 4:58).

Qur'an also grants freedom of religion (*Baqarah*, 2:256; *Yumus*, 10:99; *An'aam*, 6:108; *Ankabut*, 29:46), freedom of opinion (*Nisa*, 4:148; *Maa'idah*, 5:78; *Aa'raaf*, 7:164; *Aale Imran*, 3:110), freedom of movement (*Mulk*, 67:15), and freedom of association (*Aale Imran*, 3:103), to every citizen of the State. It also gives the right to everybody to secure the basic necessities of life through lawful means (*Baqarah*, 2:286; *Nisa*, 4:32).

Among the basic duties of the government are justice, education and health.

As regards justice, we have already noted the Qur'anic verses under the "Mukhasamaat" and need not be repeated here again.

As regards education, the very first revelation (vide *Alaq*, 96:1-5) and all subsequent revelations from Allah to the Holy Prophet were in the form of education through the angel Gabriel, and as regards the Mission of the Holy Prophet the first and foremost aim of it was to (1) recite to the people the Message of Allah, (2) purify them, (3) teach them the Book and the wisdom, and (4) teach them that which they did not know (*Baqarah*, 2:151).

Further, the very first revelation started with the word, "Read" (*Alaq*, 96:1), and then also said, "Who (i.e. Allah) taught man by the pen" (*Alaq*, 96:4), which shows that "reading" and "writing" which are the two sources of knowledge were and are to be used for the propagation of Islam. Then by another verse it was said, "and the believers should not go forth all together. Why, then, does not a party from among them go forth that they may apply themselves to obtain understanding in religion, and that they may warn their people, when they come back to them, (so) that they may be cautious" (*Taubah*, 9:122).

As regards health, along with the purity of the soul, Qur'an also lays emphasis on cleanness¹ of the body (*Muddassir*, 87,14 ; *Faatir*, 35:18) ; as well as clothes (*Muddassir*, 74:4) ; commands for taking bath after sexual defilement (*Nisa*, 4:43), and for ablution before the prayers (*Maa'idah*, 5:6), keeping away from the wives during menstruation (*Baqarah*, 2:222), and keeping away from prayer while intoxicated (*Nisa*, 4:43). The commands for eating the lawful things only (*Nahl*, 16:114) and use of the dress (*Aa'raaf*,

1. The word "Rujzaa," meaning "impurity" or "un-cleanness", used in verse 5 of Chapter 74 (*Muddassir*), implies the impurity or uncleanness of the soul as well as body, and, in its extended sense, it appears to be wide enough to include the uncleanness of the body, house, street, as well as the city as a whole, and therefore to remove the uncleanness wherever it is found is necessary for maintenance of the health.

7:26), giving up of the intoxicants (*Maa'idah*, 5:90), and the commands for offering the five times' prayers and fasting during the month of Ramazan are all meant not only for the purification of the soul but also for health of the body.

As regards peace within the country, it may be noted that the commands which Qur'an issues relating to governing the affairs of the people according to the law of Allah, doing justice, equality of all citizens, status, opportunity, safeguard of life, property, privacy, reputation, freedom of religion, freedom of opinion, freedom of movement, and freedom of association, seeking basic necessities of life, education, and health, which we have already noted, are all to safeguard the peace within the country.

As regards peace outside the country, it depends upon agreements and treaties, defensive measures, and ultimately upon the wars.

The Holy Prophet and his followers suffered very seriously at the hands of the non-believers of Mecca during the first thirteen years of the Holy Prophet's mission, but they were not allowed to fight. But when even after the migration of the Holy Prophet to Medinah, the non-believers of Mecca did not keep silent and tried their best to cause harm to him and his followers. Allah the Almighty permitted the Muslims also to fight against the non-believers, saying, "permission (to fight) is given to those (i.e. Muslims) on whom war is made (by the non-believers), because they (i.e. the Muslims) are oppressed" (*Hajj*, 22:39. Also see 40). This is because, "whoever defends himself after his being oppressed, these it is against whom there is no way (to blame). The way (to blame) is only against those who oppress men and revolt in the earth unjustly. For such there is a painful punishment" (*Shura*, 42:41-42). For this reason it was said, "and fight in the Way of Allah against those who fight against you but be not aggressive. Surely Allah loves not the aggressors" (*Baqarah*, 2:190. Also see 191 to 194) ; and, "fight with them until there is no more persecution" (*Anfaal*, 8:39. Also see 40) ; and, "what reason have you not to fight in the Way of

Allah, and the weak among the men and the women and children who say : Our Lord, take us out of this town whose people are oppressors, and grant us from You a friend, and grant us from You a helper” (*Nisa*, 4:75)

Regarding those of the non-believers who were neutral, it was said, “so if they withdraw from you and fight not and offer you peace, then Allah allows you no way against them” (*Nisa*, 4:90).

But they should be sincere in their offer of peace. Qur’an says, “you will find others who desire to be secure from you and secure from their own people. Whenever they are made to return to hostility, they are plunged into it. So if they withdraw not from you, nor offer you peace and restrain their hands, then seize them and kill them wherever you find them. as against these We have given you a clear authority” (*Nisa*, 4:91).

Regarding the offer of peace, Qur’an said, “and if they incline to peace, incline you also to it, and trust in Allah. Surely He is the Hearer, the Knower. And if they intend to deceive you, then surely Allah is Sufficient for you. He is Who strengthened you with His help and with the believers” (*Anfaal*, 8:61-62).

It was also said, “and if they break their oaths after their agreements and revile your religion, then fight the leaders of disbelief – surely their oaths are nothing – so that they may desist. Will you not fight against a people who broke their oaths and aimed at the expulsion of the Messenger, and they attacked you first ? Do you fear them ? But Allah has more right that you should fear Him, if you are believers” (*Taubah*, 9:12-13).

The Jews of Medinah had broken the agreements with the Holy Prophet, excited the non-believers of Mecca and the hypocrites against the Muslims, and harassed the Muslims in the battle of the Trench, Qur’an therefore commanded the Muslims to fight against them saying, “fight those who believe not in Allah, nor in the Last Day, nor forbid that which Allah and His Messenger have forbidden, nor follow the Religion of Truth, out

of those who have been given the Book, until they pay the tax in acknowledgment of superiority and they are in a state of subjection" (*Taubah*, 9:29).

Previously the command to fight was against the non-believers of Mecca and the Jews of Medinah only, but when other tribes of Arabia also joined hands with them, Qur'an commanded to fight against all saying, "and fight the polytheists all together as they fight you all together, and know that Allah is with the righteous ones" (*Taubah*, 9:36).

Regarding those who were never hostile towards the Muslims, Qur'an said, "Allah forbids you not respecting those who fight you not for religion, nor derive you forth from your homes, that you show them kindness and deal with them justly. Surely Allah loves the doers of justice. Allah forbids you only respecting those who fight you for religion, and derive you forth from your homes, and help (others) in your expulsion, that you may take friends of them, these are wrongdoers" (*Mumtahinah*, 60:8-9)

Side by side to the commands for fighting, Qur'an also laid emphasis on honouring the agreements and treaties :

(a) generally, viz., "O you who believe, fulfil the obligations" (*Maa'idah*, 5:1) ; and, "fulfil the covenant of Allah, when you have made a covenant, and break not the oaths after making them fast, and you have indeed made Allah your Surety" (*Nahl*, 16:91. Also see 92) ; and, "fulfil the promise ; surely, the promise will be enquired into" (*Bani Israil*, 17:34) ; and also

(b) specially, viz., inspite of declaration of immunity against the polytheist in general, it was said, "except those of the idolaters with whom you had made an agreement, then they have not failed you in any thing and have not backed up anyone against you ; so fulfil their agreement to the end of their term. Surely Allah loves those who keep their duty" (*Taubah*, 9:4) ; and, "except those with whom you made an agreement at the Sacred Mosque. So as long as they are true to you, be true to

them. Surely Allah loves those who keep their duty" (*Taubah*, 9:7)

But in case of an expected treachery, Qur'an says, "and if you fear treachery on the part of a people, throw back to them (their agreement) on basis of equality. Surely Allah loves not the treacherous" (*Anfaal*, 8:58).

When Qur'an asked the Muslims not to make friends the hypocrites and to seize them and kill them if they come to hostility, it also said, "except those who join a people between whom and you there is an alliance" (*Nisa*, 4:90), which shows that respect for the country with whom there is an agreement is necessary and whoever is settled therein is safe. Not only this, but if any person of the nation with whom there is an agreement is killed, his blood-wit is the same as that of killing a Muslim by mistake (*Nisa*, 4:92), although the blood-wit of a Muslim belonging to the enemy is less than that (*ibid*).

Regarding those Muslims who are living in the enemy country Qur'an said, "if they seek your help from you in the matter of religion, it is your duty to help (them) except against a people between whom and you there is a treaty" (*Anfaal*, 8:72); which means that in such a case also the agreement is to be honoured.

As regards the defensive measures, Qur'an says, "make ready for them (i.e. the enemy) whatever force you can and horses tied at the frontier, to frighten thereby the enemy of Allah and your enemy and others besides them, whom you know not – Allah knows them. And whatever you spend in the Way of Allah, it will be paid back to you fully and you will not be wronged" (*Anfaal*, 8:60); and, "O you who believe, take your precautions, then go forth in detachments or go forth in a body" (*Nisa*, 4:71). Qur'an also commands for making investigations (*Nisa*, 4:94), and lays down special form for offering the prayer in the battle field (*Nisa*, 4:102).

As regards the captives of war, Qur'an permitted their release by way of favour or against compensation (*Muhammad*, 47:4), but before taking them as captives there should be thorough smiting of the enemy (*Anfaal*, 8:67)

Then as regards those who were taken as slaves or slave-girls, Qur'an recommended their freedom by way of thanks to the Favours of Allah (*Balad*, 90:11, 13), or by way of ransom for the sin of murder (*Nisa*, 4:92), or of Zihar (*Mujadilah*, 58:3), or for breaking of the oath (*Maa'idah*, 5:89). Qur'an fixed a portion in the Zakaat for freedom of the slaves (*Taubah*, 9:60), and also ordered for helping the slaves who desired freedom against payment (*Noor*, 24:33).

As regards the booty or spoils of the war, the pre-Islamic Arabs used to divide it among the participants of war and larger portion of it was to go to the chief of the army, who used to get the "Marbaa" i.e. one-fourth, the "Safi" i.e. that which he liked, the "Nashitah" i.e. that which the army got before the start of the war, and the "Fuzool" i.e. that which remained after the division.

The first command which the Muslims received in this connection was regarding the booty of Badr, in which it was said, "the booty is for Allah and His Messenger" (*Anfaal*, 8:1); and then the manner of its distribution was laid down, saying, "and know that whatever you acquire in the war, a fifth of it is for Allah and for the Messenger and for the near of kin and the orphans and the needy and the way-farer" (*Anfaal*, 8:41)

As regards the "Fai" i.e. that which was acquired without fighting, Qur'an said, "whatever Allah restored to His Messenger from the people of the towns, it is for Allah and for the Messenger, and for the near of kin and the orphans and the needy and the wayfarer, so that it be not taken by turns by the rich among you" (*Hashr*, 59:7); and, "it is for the poor ones of the emigrants, who were driven from their homes and their possessions, seeking the Grace of Allah and (His) Pleasure, and helping Allah and His Messenger. These it is who are the Truth-ful. And those who made their abodes in the city (i.e. Medinah) and in faith before them, love those who have migrated to them, and find in their hearts no need of what they are given, and prefer (them) before themselves, though poverty may afflict them. And whoever is saved from the niggardliness of his soul, these it is that are the successful. And those who come after them

say : Our Lord, forgive us and our brethren who had precedence of us in faith, and leave no spite in our hearts towards those who believe. Our Lord, surely you are Kind, Merciful" (*Hashr*, 59:8-10).

Qur'an, while laid emphasis on the believers to fight against the non-believers in the Way of Allah, also exempted the weak, the sick, and those who could find nothing to spend (*Taubah*, 9:91), and those to whom no mount could be supplied and they went back weeping (*Taubah*, 9:92), and those who were blind or lame or sick (*Fatha*, 48:17), from fighting.

Qur'an also gave promise of Great Reward for those who fought in the Way of Allah, irrespective of the fact whether they were slain in the war or were victorious (*Nisa*, 4:74 ; *Muhammad*, 47:4, 5, 6).

These were the basic commands revealed by Allah the Almighty in the Holy Qur'an relating to the government, and maintenance of peace within and peace outside the country including the war against the enemies of Islam. The Holy Prophet explained and enforced these commands while fighting against the non-believers in the Way of Allah, and himself laid down further necessary commands, directions and instructions relating to appointment and duties of the officials, doing of justice and looking after the welfare of the public including their health and education, treatment and freedom of slaves, punishment of the apostates and the mischief-makers, preparation for the war, journey for the war, invitation of Islam to the non-believers, way of fighting, taking captives, giving security to the infidels, distribution of the "Ghanimat" (booty) and "Fai", imposition and recovery of "Jizyah" (tax) on non-believers of the conquered territories, peace, expulsion of the Jews from Arabia, and many other things, in his Traditions which have been safely recorded by compilers of the Ahadees, particularly the Saha Sitta, an authentic selection of which is contained in the Mishkat-ul-Masabeeh, Kitab-ul-'Itq, Kitab-ul-Hudood and Kitab-ul-Jihaad, which form the basis of Fiqah relating to Siyasiyaat.

Note : Even apart from these major categories of Fiqah, which we have so far dealt with, all other necessary commands, directions, and instructions relating to all aspects of the human life, individual as well as social, were also issued by the Qur'an and Sunnah in this period of eleven years (1 A.H. to 11 A.H.) known as the Madani Period of the Holy Prophet's Mission, and thus legislation of the law was completed, and that is why this period is also known as Legislative Period of the Islamic Fiqah.

Further, as we have already discussed in detail,¹ in this very period, the Qur'an and Sunnah also gave sanction for Qiyas, i.e. use of ones own opinion to decide the matter coming before him, if he is unable to find anything in the Qur'an and Sunnah, but the decision must remain within the limits of Qur'an and Sunnah or, in other words, it must not be against them. This is because Qur'an and Sunnah are the basic sources of the Islamic Fiqah, and therefore cannot be superceded by Qiyas or personal opinion, however sound it may be. In fact Qiyas means analogy and the only purpose of it is to extend the law laid down by Qur'an and Sunnah to given facts and circumstances and not to lay down any new law at all.

Section 3

NEXT THIRTY YEARS – KHILAFAT-E-RAASHIDAH (11 A.H. TO 40 A.H.)

(Period of collection, interpretation and extension of the laws)

COLLECTION

As we have also noted in brief in chapter 4 "Sources of Fiqah", in this period the Holy Qur'an was compiled in the form of a compact volume. The Holy Qur'an was revealed in piece-meal to the Holy Prophet, and whenever any verse or verses were revealed, the Holy Prophet used to dictate them to the scribes, tell them their arrangement and order them to write

1. See Chapter 4 "Sources of Fiqah".

down in their proper places. Thus the Qur'an was either in the memories of the scribes or the parchments on which they used to write it down. In the days of Abu Bakr, many Huffaaz" (i.e. those who had learnt the Qur'an by heart) were slain in the army of Yamamah, and, therefore, feeling the need to compile the Qur'an in one compact volume, Abu Bakr, at the instance of Umar, ordered Zaid bin Saabit, a prominent scribe and Haafiz of Qur'an to collect the Qur'an in one compact volume. He accordingly gathered all pieces of bones, date-leaves and tablets of stones on which Qur'anic verses were written down and which were kept by different Companions of the Holy Prophet, and then, with the help of his own written materials and memory and assistance of other Huffaaz and the written materials kept by them, collected and compiled the Qur'an in one compact volume. He accomplished this task between 11 to 14 A.H. This compilation was kept firstly by Abu Bakr, then by Umar, and after him by Hazrat Hafsah.¹

Then, when, in the days of Usman, there arose differences in the recitation of Qur'an on account of difference in the accents of the people of different regions of the Islamic State, and Huzaifah bin No'man particularly invited the attention of Usman to it, Usman called for the compilation kept by Hazrat Hafsah, and ordered Zaid bin Sabit, Abdullah bin Zubair, Sa'eed binul Aas, and Abdur Rahman bin Haris bin Hishaam to prepare more copies from it, and also ordered that in case of difference of opinion between them, it should be written in the accent of the Quraish, because Qur'an was revealed in the language of the Quraish. They did accordingly. Then the original compilation was returned to Hazrat Hafsah, and the copies prepared thus were sent to different places, particularly Kufah, Damascus and Mecca and were kept in the Central Mosques for use as the only authentic official copies and all other compilations prepared and kept by different persons were ordered to be burnt up. This was done in the 25th year of Hijrah.²

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Taareekh Fiqah-e-Islami, *ibid*, pp. 157-159.

2. *Ibid*, 159-161.

Here it may also be noted that compilation of the Holy Qur'an as such was also necessary in view of the fact that promulgation of the Divine Law had already been completed in it and all affairs of the Muslims community at large were to be governed by it.

No such step was, however, taken to compile the Ahadees of the Holy Prophet in this period. It was rather discouraged even by Abu Bakr and Umar who had also ordered the other Companions not to narrate the Ahadees frequently, and when-ever any Hadees was narrated before them they used to get it confirmed by witnesses and then accept it as an authority to decide any matter in respect of which no direct verse of the Holy Qur'an was available.¹ The reason for this was that they feared lest people may start narrating falsely from the Holy Prophet or lest they may ignore the Book of Allah as did the previous nations.²

But inspite of this strict attitude of the State, the narration and study of the Ahadees continued among the learned ones around whom the people used to gather and learn the Ahadees, and thus the study of Ahadees continued with progress of time to be pursued with all the greater vigour.³

But all scholars of Hadees were not also the Faqeeh or Jurists. Among those who acquired prominence in Fiqah were Abu Bakr, Umar, Usman, Ali, Abdullah bin Mas'ud, Abdullah bin Umar, Abdullah bin Abbas, Abu Musa Ash'ari, Mu'aaz bin Jabal, Ubay bin Ka'b and Zaid bin Saabit, and on their juristic opinions are based many principles of the Islamic Jurisprudence. For a long time Abdullah bin Mas'ud taught Hadees and Fiqah at Kufah, Abdullah bin Abbas at Mecca and other jurists at Medinah.

1. Taareekh Fiqah-e-Islami, ibid, pp. 165-166.

2. Ibid, pp. 161-168.

3. Muhammadan Jurisprudence, by Abdur Rahim, p. 20.

INTERPRETATION AND EXTENSION

The learned jurists of this period were the first to interpret and extend or apply the laws laid down by Qur'an and Sunnah to the cases coming before them for decision through the process of Ijtihad. This they did in two ways, viz., (1) juristic deduction from the obvious words of Qur'an and Sunnah, and (2) juristic deduction from the implied sense of Qur'an and Sunnah, which in other words means the Qiyas.

Juristic deduction in this period was restricted to the Fatwaas which the jurists pronounced on particular actual facts which came before them. They never made any pronouncements on presumptions, pre-suppositions or imaginary problems, and that is the reason that the number of Fatwaas issued in this period is very less. Further, in their Fatwaas they used to rely upon only two things, viz., (1) Qur'an, which is the basic source of the Law, which was revealed in their own language and therefore they understood it fully well and they also knew the occasions of its revelation, and (2) Hadees, which they whole-heartedly followed provided it was proved by witnesses.

The usual practice of Abu Bakr was that whenever any case was brought before him, he used to first look into the Holy Qur'an and decide it on its basis. But if he could not get anything in the Qur'an,¹ then he used to look for it in the Ahadees, and finding nothing by himself he also used to ask the other Companions whether anybody of them knew any Hadees of the Holy Prophet relevant to it, and, on getting one, decide the case on its authority.

Umar, while deciding a case, used to consult first the Qur'an and Sunnah, and finding nothing in them used to enquire whether there was any decision of Abu Bakr on a similar case, and, finding one, if there was nothing contrary, used to decide the case accordingly.

1. Meaning the obvious word of Qur'an.

Similar was the practice of Usman and Ali.

Finding nothing in the Qur'an and Sunnah,¹ the jurists among the Companions of the Holy Prophet used to decide by Qiyas (analogy). When Abu Bakr could not find anything in Qur'an and Sunnah, he used to collect the learned ones and put before them the problem, and on whatever they all agreed he used to give the decision. Similar was the practice of Umar. When he appointed Qazi Shuraih as the Qazi of Kufah, he directed him to do Ijtihaad on basis of his own understanding in matters on which he could not find anything in Qur'an and Sunnah. He also gave similar direction to Abu Musa Ash'ari and asked him to study the "Ashbah Wan Nazaa'ir" i.e. precedences and use them in the decision of cases where nothing was available in Qur'an and Sunnah relating to any matter.

When Abdullah bin Mas'ud was asked about a "Mafudah" i.e. the woman given the right to divorce herself, he said, "I decide it by my opinion. If it is correct, it is from Allah ; and if it is wrong, it is from me and from the Satan ; and Allah and His Messenger are free from it." Abdullah bin Abbas said to Zaid bin Saabit, "is there Sulus (one-third) in the Baqiah (remainder) in the Book of Allah." He said, "I say from my opinion and you say from your opinion." Umar enquired from a man, "what is decided in your case." He said, "Ali and Zaid gave this decision". Umar said, "I would have decided like this." He said, "who has stopped you ; you are Caliph." Umar said, "could I take you to Qur'an and Hadees, I would have done so, but I take you to my opinion, and opinion is a common thing. For this reason he upheld the decision of Ali and Zaid.

Thus the jurists among the Companions also used their personal opinions in deciding the cases provided they could not get anything in the Qur'an and Hadees, but the opinion which they relied upon was honest, unbiased and sincere proceeding on basis of analogy, and that is very well expressed by Umar in the words, "try to ascertain similar incidents in the previously dedicated cases and then decide on basis of Qiyas or analogy"

1. Meaning the obvious words thereof

which he had conveyed to Abu Musa Ash'ari, and that is actually acting upon the implied sense of Qur'an and Sunnah.

Apart from personal opinion or Qiyas, as also previously stated, Abu Bakr and Umar also used to take a unanimous opinion on important matters from the learned ones among the Companions of the Holy Prophet, and act upon it, and therefore there was no chance for anybody to oppose it. This was known as the Ijma or consensus of opinion.

Thus in this period there were four sources of the Islamic Fiqah, viz., Qur'an, Sunnah, Qiyas and Ijma. Qiyas is in fact a "Fara" of Qur'an and Sunnah, and Ijmaa is dependant on the former three.

Due to the practice of the Shaikhain i.e. Abu Bakr and Umar in deciding the cases on basis of Qur'an and Hadees, or Ijmaa i.e. consensus of opinion of the learned ones, there arose less occasion for anybody to differ. The difference, however, arose as regards the Qiyas or personal opinion, and that was the reason that the learned jurists, while giving decision on basis of personal opinions, also used to say, "this is my opinion, if it is correct, it is from Allah, and if it is incorrect, it is from me and from the Satan", and they also used to ask forgiveness from Allah for it.

As an instance of difference of opinion, we may quote that a man married a woman without fixing the dower and died before having sexual contact with her. Abdullah Mas'ud gave decision for full "Mehr-e-Misl" for her and said, "if it is correct, it is from Allah, and if it is incorrect, it is from me and from the Satan, and Allah and His Messenger are free from it." A man Ma'qil bin Sinaan al-Ashja'ee, a Companion of the Holy Prophet, who was present, stood up and said, "by Allah, you have given the same decision which the Holy Prophet had given in the case of Baru' binte Waashiqul Ashja'ee. But Ali differed with this decision. On basis of the Qur'anic verse, "there is no blame on you if you divorce women while yet you have not touched them, nor appointed for them a portion (i.e. dower)" (*Baqarah*, 2:236), he pleaded that death is just like Talaq, and if such a woman

could not be given dower in case of Talaq, she could not also be given the dower in case of death. Further, as against the Book of Allah, he also did not give preference to the word of a Bedouin of the Ashja'ee tribe. On the other hand, Abdullah bin Mas'ud did not treat death like Talaq, and supported his decision by a Hadees reported by Ma'qal.

There are some other such examples¹ also in which the jurists among the Companions of the Holy Prophet differed themselves on basis of personal opinions, but they supported their opinions by interpretation of the Qur'an and Sunnah, and the sincerity of their Ijtihaad in this connection was beyond doubt.

The reason for this difference of opinions was twofold, viz.,

- (1) difference in the understanding of Qur'an, which also resulted in the difference in the Fatawaas. This was on account of :
 - (a) the words having two obvious meanings, e.g., the word "Quru", appearing in verse 228 of chapter 2, which means "Haiz" (menstruation) as well as "Tuhur" (purification). Umar and Abdullah bin Mas'ud take the former and Zaid bin Saabit the latter meaning, and give decision accordingly ;
 - (b) two different commands having something common as well as something differing, e.g., the Iddat of a widow is four months ten says (vide verse 234 of chapter 2 *Baqarah*), while the Iddat of a divorcee pregnant woman is till the delivery of the child (vide verse 4 of chapter 65-*Talaq*). Thus the pregnant woman whose husband has died can come under both these verses. According to the former verse, her Iddat is four months ten days, while according to the latter verse, it is delivery. Some of the jurists adopted the former view while some adopted the latter view, and gave their Fatwaas accordingly.

1. See Taareekh Fiqah-e-Islami, ibid, pp. 174-184.

- (2) difference on account of lack of knowledge, and acceptance, or non – acceptance, of the Ahadees. As we have already noted, in this period there was no authentic compilation of the Ahadees. There were Ahadees which were generally known to the Companions who had also seen the practice of the Holy Prophet in many matters. But there were also Ahadees which were known to very few Companions or few Companions had seen the practice of the Holy Prophet in matters connected therewith. For this reason, Abu Bakr, Umar and Ali were very particular in the acceptance of any Hadees unless it was proved by oath of the narrator or the witnesses.
- (3) difference on account of personal opinions. When the jurists could not find anything in the obvious words of Qur'an and Sunnah, they used to decide according to their own understanding keeping in view the "Maslehat", and the spirit of Islamic Shari'ah, and that was the reason that they also differed in many matters. But it is also a fact that in this period the differences were not very much.¹ The jurists used to give their Fatwaas only in respect of those problems which were brought before them, and in that their first and foremost endeavour was to search for its solution in the Holy Qur'an, then in the Ahadees, then in the Ijmaa and lastly give decision on basis of Qiyas strictly keeping it within the limits of, and on basis of analogy drawn from, the first three.

As regards the administration of justice, in this period, Abu Bakr, like the Holy Prophet, used to decide the cases himself; but when affairs of the Ummah increased, he delegated his judicial functions to Umar. Abu Bakr also established a prison – house for the malefactors. When Umar became the Caliph, he also appointed the Qazis, and upheld the supremacy of the Law to this extent that when he appeared in a case against a Jew before the Qazi, and the Qazi, out of respect for him, stood up from his seat, he forthwith dismissed him. In the days of Ali, who was himself a notable jurist, the jurisdiction of the Qazi and the legal procedure acquired greater fixity and certainty.²

1. *Ibid*, pp. 154-192 2. *Muhammadan Jurisprudence*, by Abdur Rahim, p. 21.

Section 4

NEXT NINETY TWO YEARS – THE UMAYYAD RULE (41 A.H. TO 132 A.H.)

(Period of laying down the Foundation for the Codification of Fiqah)

This period is known as the period of laying down the foundation for the codification of Fiqah. In this period also the Qazis administered the justice, but due to political anarchy, disturbance and establishment of personal rule, the law developed mostly in the lecture rooms of the scholars. It was also influenced with the newly introduced science of divinity and scholastic logic. This, however, developed a scientific spirit of classifying the laws under different subjects, of introducing the use of technical phraseology, and of arranging the different sources of law. ¹

In this happy development the following factors also played their part :

- (1) The division of the Muslim community into the Shiahs who were in favour of Ali and the Ahle Bait, the Khawarij who were against Usman, Ali and Mu'awiyah, and the common Muslims supporting Mu'awiah. Since all the three were opposed to each other, they also did not follow the views of each other and this also affected the deduction and settlement of the laws :
- (2) The shifting of the scholars among the Companions of the Holy Prophet from Medinah to other places of the Islamic State who worked as Qaaris or teachers of Qur'an and Sunnah to the people at large, which prepared a great band of Taaba'ee scholars, who devoted themselves wholeheartedly to the study of Fiqah and gave it prominence ;
- (3) The narration of Hadees became common, because the restraint which the four early Caliphs had imposed on the narration of Hadees had loosened. People from different

1. Muhammadan Jurisprudence, by Abdur Rahim, p. 22.

places started coming to the Companions and the Taaba'een for their Fatwaas on different problems, and the scholars used to give their opinions primarily on basis of Qur'an and Hadees. In this respect Medinah was the center of Hazrat 'Aa'isha, Abu Hurairah, and Abdullah Ibne Umar ; Mecca of Abdullah Ibne Abbas ; Fistaat (Egypt) of Abdullah bin Amr binul Aas ; Basra of Anas bin Maalik ; and Kufah of Ali, Abu Musa Ash'ari and Abdullah bin Mas'ud. They used to give Fatwaas according to the Ahadees which they knew, and this also resulted in the difference in the Fatwaas.

- (4) There also developed the practice of circulating forged Ahadees – a thing which was feared by Abu Bakr and Umar and on account of which they had imposed the ban on frequent narration of Hadees. Among those who played the prominent role in this were the Zanadiqah whose main purpose was to misguide the people, the illiterate ones who were devoid of the true knowledge and spirit of Islam, the evildoers, the innovators, and those who wanted to support the evil actions of their friends. They used to either forge the Ahadees, or change the Asaaneed (authorities) or plead a weak Hadees as authentic, or falsely claim to have themselves heard the Hadees from authentic sources, and so on.

This was the reason that the scholars devoted themselves to the study of Hadees, sifted the correct from the wrong ones, and ultimately succeeded in preparing authentic compilations of Ahadees.

- (5) Many of the learned ones from Iran, Rum and Egypt who had accepted Islam as well as many of the freed slaves devoted themselves to the study of Qur'an, Sunnah and Fiqah. These were settled in different places and used to give Fatwaas on the problems of Fiqah and were taken as authority on the subject. In this connection, the names of Ikramah, the Maula of Abdullah bin Abbas, Naafe the Maula of Abdullah Ibne Umar, Muhammad bin Seereen the Maula of Anas bin Maalik, Abdur Rahman bin Harmar A'raj the spokesman of Abu Hurairah, were very prominent

- (6) There arose difference in the use of “Raa’e” (opinion) and Hadees, on account of which two different schools of Fiqah came into existence – the one used to give Fatwaas on basis of the Ahadees only and therefore its scope was limited, and the other used to rely upon intellect in the absence of any verse of Qur’an or any Hadees and therefore its scope was much wider. The former was that of the Hijaz with its center at Medinah and the latter of Iraq with its center at Kufah. In Iraq, due to foreign influences and wider contacts with other nations, the nature and number of problems was very great and the jurists had to deal with them firstly on basis of Qur’an and Sunnah, and then, finding nothing in their obvious wordings, use their intellect in finding the solution from their meaning and intent and form their opinion on basis of analogy. This naturally developed the doctrines of Qiyas, Istehsaan, Istislah, etc.

As we have already noted in chapter 6 “History of Fiqah and Fuqahaa”, in this period there also started the development of the science of Qir’at, Tafseer, and the need to prepare authentic compilations of Ahadees.

Section 5

NEXT ONE HUNDRED AND SIXTY EIGHT YEARS – THE ABBASIDE RULE (133 A.H. TO 300 A.H.)

(Period of the Codification of Fiqah)

This period is marked for the codification of Fiqah as well as for the compilation of Ahadees. In this period there appeared on the scene the most renowned personalities of the Islamic Fiqah, namely Abu Hanifah, Maalik, Shaafe’ee and Hambal, as well as the most prominent compilers of Ahadees, namely Bukhari, Muslim, Tirmizi, Abu Dawud, Ibne Majah and Nisa’ee.

In this period the scholars got the patronage of the Abbaside rulers who loved to promote the learning and give respect to the scholars. They used to appoint the Qazis from amongst the most able and learned ones noted for their knowledge and acumen, gave them handsome salaries, and high place of dignity in the State, with the result that Baghdad, the capital of the Abbasides, soon became the center of learning, and scholars from all over the Islamic State came and settled there.

In this period due to the expansion of the Islamic State far and wide, the Muslims came in contact with different peoples and different civilizations giving rise to new problems relating to the individual as well as social life, which they had to deal with and find the solutions for them in the Qur'an and Sunnah, and for this purpose also to make use of Ijmaa and Qiyas which further gave rise to the doctrines of Istehsaan, Istislah or Masalehul Mursalah, etc. Side by side, there was also introduction of the Greek, Roman, and western thought which gave rise to the modern art and science and brought on the scene many prominent philosophers and scientists of the Muslim world. Study of the Greek Philosophy became a challenge to the Islamic Faith and new science of Divinity, known as "Ilmul Kalaam" came into existence.

HIFZ AND QIR'AT

In order to meet the challenges of secular thought, the sincere devotees of Islam devoted more enthusiastically to the learning and spreading of the Islamic teachings. They primarily gave attention to learning by heart and recitation of the Holy Qur'an in its well – established seven modes of recitation, and made "Qir'at" an altogether independent science. In this respect the most prominent fourteen "Qaaris" (reciters) of the Muslim world played the prominent role. They were (1) Naafe' bin Abi Nu'aim (d. 167 A.H.) at Medinah, (2) Abdullah bin Kaseer (d. 120 A.H.) at Mecca, (3) Abu Amr binul Ula al-Mazani (d. 154 A.H.) at Basra, (4) Abdullah bin Aamir (d. 118 A.H.) at Damascus, (5) Abu Bakr Aasim bin Abin Najwad (d. 127 A.H.) at Kufah, (6) Hamzah bin Habib-uz-Zayaat (d. 154 A.H.) at

Kufah, (7) Abul Hasan Ali Hamzatul Kasaa'ee (d. 189 A.H.) at Kufah, ¹ (8) Abu Jafar Yazid binul Qa'qaa' al-Madani (d. 130 A.H.), (9) Yaqub bin Ishaq al-Hazrami (d.205 A.H.), (10) Khalaf bin Hisham al-Bazar, ² (11) Muhammad bin Abdur Rahman al-Makki alias Ibne Mohsiyeen, (12) Yahya bin Mubarak al-Tabreedi, (13) Hasan bin Abil Hasan al-Basri, and (14) A'amash Sulalman bin Mehr. ³

TAFSEER

The scholars also gave attention to the interpretation of Qur'an, and Allama Abu Jafar Muhammad bin Jareer Tabari (d. 310 A.H.) wrote one of the most prominent commentaries of the Holy Qur'an known as "Jaame'ul Bayaan." It is in thirty volumes and serves as a research material for subsequent commentaries because in it he has collected all available material relating to the interpretation of Qur'an supported by authentic resources. ⁴

FIQAH

As regards development of Fiqah, this period is marked for the codification of Fiqah. In this period many schools of Fiqah ⁵ came into existence out of which only four, namely Hanafiah, Maalikiah, Shaafe'eeyah, and Hambaliah got the prominence and are still extant. It may, however, be noted that, "the principles of these four schools are substantially the same, and they differ from each other merely in matters of detail. They are classed together in contradistinction to the only other important existing school of law among the Muhammadans, namely the Shiah School, though the differences even between the Shiahs and the Sunnis center round questions relating to political events of the past, rather than to any general principles of law or jurisprudence." ⁶

1. These seven are known as "Qura' Sab'ah" (Taareekh Fiqah-e-Islami, by Muhammad al-Khizri, p. 253) 2. These ten are known as "Qura' Ashrah (ibid)

3. The last four are known as "Shaaz" (ibid, p. 254)

4. Ma'ariful Qur'an, by Mufti Muhammad Shafie, Vol. I, 9. 56

5. See chapter 6 "History of Fiqah and Fuqahaa"

6. Muhammadan Jurisprudence, by Abdur Rahim, p. 23.

THE HANAFIAH

The first school of Fiqah which came into existence in this period was that of the Hanafiah. It was founded by No'man bin Saabit known as Imam Abu Hanifah.¹ He was born at Kufah in the year 80 A.H. during the reign of Ummayyid ruler Abdul Maalik, and died at Baghdad in 150 A.H. during the Abbaside rule.

In fact Kufah became a center of Islamic learning and Fiqah on account of Abdullah bin Mas'ud – a Companion of the Holy Prophet, who had been deputed by Umar to teach the Hadees and Fiqah to the people of Iraq. Accordingly he used to give lectures and also to issue Fatwaas on judicial matters on basis of Qur'a and Sunnah as well as his own Qiyas. On account of his vast Knowledge he soon acquired the fame and reputation of a great scholar of Hadees and Fiqah and many prominent students of law gathered round him. When Usman recalled him back to Medinah, his seat of knowledge, learning and Fiqah was succeeded by his pupil 'Alqamah, and after 'Alqamah it was occupied by Aswad, and after him by Ibrahim Nakh'ee who was known as the "Jurist of Iraq" who is said to have also made a collection of the principles of Laws till then established. Ibrahim Nakh'ee was succeeded by Hammaad. All these scholars followed the Tradition of Abdullah bin Mas'ud and thus the Kufah or Iraqian School of Fiqah, which later came to be known as the school of "Ahlur Raa'e, owes its existence to Abdullah bin Mas'ud.

Abu Hanifah first studied the scholastic divinity and then devoted himself to the study of Fiqah. He learned Fiqah from Hammaad. He also attended the lectures of Imam Jafar al-Sadiq, a descendant of the Holy Prophet, who was known for his piety and knowledge and was the Imam of the Shiah Imamiah school of Fiqah. He also heard the Ahadees from Ash-Sha'bi, Qatadah, Al-A'mash and other notable scholars of that time. Abu Hanifah possessed the extra-ordinary talent of a true lawyer having remarkable power of making juristic deductions which soon brought him in prominence as an expert of jurisprudence, with

1. For detailed life sketch, see chapter 11 "The Four Imams"

the result that large number of students of law gathered round him. Among his chief pupils were Abu Yusuf, Muhammad, Zufar and Hasan ¹ who rendered valuable services for the propagation and development of their teacher's point of view.

The teachings of Abu Hanifah brought for him the title of "Ahlur Raa'e" i.e. "Upholder of Private Judgment", and his school is also known by this title, as distinguished from the Medinite school which is known as the "Ahle Hadees" i.e. the "Upholder of Tradition." He himself used to say, "this 'Ilm of ours is Raa'e, and to me this is the best of all. If anybody thinks another Raa'e as better, his Raa'e is for him and our Raa'e for us" ² In fact Abu Hanifah relies less upon the Tradition in deriving legal conclusions and more upon logical deductions. But this was not because of giving less credence to the Traditions. It was merely because, "in sifting the Traditions Abu Hanifah was more strict than others, and the tests which he applied to them resulted in excluding many Traditions which the people generally accepted as genuine. Further, the principles that he laid down confined within a narrow compass the Traditions from which a rule of law might be legitimately deduced. It is said that he felt justified in acting upon eighteen Traditions only out of the great mass that was then in vague." ³

But basically the general practice of Abu Hanifah, in making juristic deduction, as he himself puts it, was that if he could get the answer from the Qur'an, he used to adopt it. Next he used to search for it in the authentic Traditions of the Holy Prophet. But finding no answer in them, look for it in the Traditions of the Sahabah, which also being silent, he used to do

1. For details of their lives and works, and other pupils of Abu Hanifah, see chapter 6 "History of Fiqah and Fuqahaa"

2. Al-Milal Wan Nahl, Vol. II, p. 39 ; Falsafah-e-Shari' at-e-Islam, ibid, p.41.

3. Taareekh Fiqah-e-Islami, ibid, p. 322 ; Falsafah-e-Shari' at-e-Islam, ibid, p.41.

Ijtihad as did Ibrahim, Sha'bi, Hasan, Ibne Sirin and Sa'eed binul Musayyab.¹

The chief contribution of Abu Hanifah, however, is the formulation of the theories and principles of Fiqah, and he in fact is the founder of the science of Islamic Jurisprudence as we now have it. He was the first to give prominence to the doctrine of Qiyas² or analogical deduction, though no doubt it was in vogue even from before his time. He, however, extensively made use of it, gave it a prominent position in the Islamic Jurisprudence, and also gave it a distinct name, viz., "Istihsaan"³ which in many respect bears remarkable resemblance with the doctrine of Equity of the modern jurisprudence. Abu Hanifah also extended the doctrine of Ijmaa'⁴ i.e. consensus of opinion to all ages, as against the view of others who confined it only to the age of the Companions of the Holy Prophet. He also recognised the authority of "Urf"⁵ i.e. local customs and usages as guiding the application of law.

In the codification of Fiqah, Abu Hanifah was assisted by a committee of forty scholars including his prominent pupils namely Abu Yusuf,⁶ Muhammad, Zufar, Hasan, Yahya bin Zaid, Hafs bin Ghiyaas, Dawud Taa'ee, Habbaan and Mandal. Among them Zufar was noted for his great power of juristic deduction, Muhammad for his knowledge of the Arabic language,⁷ and others were prominent scholars of Ahadees. The committee used to discuss all practical or theoretical questions that were brought to it or which it itself suggested, and the conclusions which were ultimately drawn were recorded⁸ and circulated. It took about thirty years to complete the work of codification.

1. Muqaddamah, Ibne Khuldoon, Vol. I, p. 371. Another reason for this appears to be that till then the Traditions had not been compiled, and there were in circulation large number of forged and fabric Traditions (Author)

2. See chapter 4 "Sources of Fiqah" 3. Ibid. 4. Ibid. 5. Ibid.

6. Later he also became the Qazi-al-Quzzaat (Chief Justice) of Baghdad.

7. He was also a copious writer, and some of his books are still available.

8. See the "Books of Fiqah" in chapter 2 "Fiqah"

THE MAALIKIAH

Side by side to the development of the Hanafiah School of Fiqah known as the School of "Ahlur Raa'e" at Kufah in Iraq, there also developed the Maaliki School of Fiqah known as the School of "Ahle Hadees" at Medinah in Hijaz. It was founded by Imam Maalik bin Anas.¹ He was born at Medinah in 95 A.H., where he lived, studied, taught, did his work, and died in 179 A.H. He was the grandson of Abu 'Aamir who was a Companion of the Holy Prophet.²

After the "Hijrat" (migration), Medinah was the center of Divine Revelations to the Holy Prophet and accordingly the first center of the development of Islamic learning and Fiqah. In this center, besides the first four Caliphs of the Holy Prophet, amongst those who got prominence in knowledge and learning were Abdullah bin Abbas, Abdullah bin Umar, Zaid bin Saabit and Hazrat 'Aa'isha among the Companions of the Holy Prophet, and after them their successors Saeed binul Musayyib, Urwah bin Zubair, Qasim bin Muhammad, Abu Bakr bin Abdur Rahman, Sulaiman bin Yasaar, Khaarijah bin Zaid, and Abdullah bin Abdullah.³ They were all the Upholders of Hadees and maintainers of the Tradition of Medinah.

From this center arose Imam Maalik who, on account of his extraordinary caliber and knowledge, soon became the greatest "Aalim" and "Faqeeh" of his time. Maalik learned Fiqah from Rabi'ah bin Abdur Rahman alias Rabi'ah Raa'e, and Hadees from Zahri the slave of Naaf'e bin Umar, Abuz Zinnaad and Yahya bin Saeed Ansari, and other prominent scholars of Hadees, and then himself prepared his own famous compilation of Ahadees known as the "Muwatta" which in fact is a book of Fiqah, and according to Inam Shaafe'ee, "after the Book of

1. For detailed life sketch, see chapter 11 "The four Imams."

2. Tareekh Fiqah-e-Islami, *ibid*, p. 330.

3. Falsafah-e-Shari'at-e-Islam, *ibid*, p. 52. Abdullah bin Mas'ud also arose from this center but Umar deputed him to Kufah to teach Hadees and Fiqah to the people where he worked for many years, and the Hanafiah School actually owns its existence to him.

Allah there is no other book in the world more authentic than the Muwatta.”¹

Maalik’s School of thought is known as the School of “Ahlur Raa’e” i.e. Upholder of Tradition because he relies more on Traditions and the usages of Medinah consisting of the practice of the Holy Prophet and the precedents established by his Companions. In his Ijtihaad, Maalik used to basically rely upon Qur’an and Sunnah, and in this connection he used to rely upon even a Hadees reported only by one single narrator provided it was authentic. He also treated as authentic the opinions of the Companions and the Tradition of the people of Medinah. He used Qiyas only when he could not find anything in the Qur’an and Sunnah, but in this connection he had introduced his own principle known as Istaslah or Masaalehul Mursalah² or public welfare as a basic of juristic deduction.

To the four basic and well recognised sources of Fiqah, viz., Qur’an, Sunnah, Qiyas, and Ijmaa, Imam Maalik also added a fifth one, namely the Istidlaal,³ which, according to him, does not come within the scope of Qiyas or analogy.⁴

Among his prominent pupils were Imam Muhammad bin Hasan Shaibani the pupil of Imam Abu Hanifah, and Imam Shaafe’ee the founder of the Shaafe’eeyah School of Fiqah. On account of his fame and reputation as the greatest “Aalim” and “Faqeeh”, scholars used to come to him from all round, particularly Egypt, Africa, Spain, Baghdad, Khurasan and other places.⁵

SOME BASIC AND IMPORTANT DISPUTES

The development of the Hanafiah School at Kufah which gave prominence to “Raa’e”, and the Maalikiah School at

1. Tanweerul Hawalik, p. 6 (ibid. p. 54)

2. See chapter 4 “Sources of Fiqah”

3. Ibid.

4. Muthasar of Ibne Hajib, Vol. II, p. 281 (Muhammadan Jurisprudence, by Abdur Rahim, p. 28.

5. For details, see, chapter 6 “History of Fiqah and Fuqahaa”

Medinah which gave prominence to Hadees on one hand, and the development of "Ilmul Kalaam" at Basrah on the other whose main exponents i.e. the Mo'tazilah denied the authority of Hadees as a source of Fiqah, and circulation of forged and fabricated Ahadees on a large scale, gave rise to some basic and important disputes between the learned jurists relating to (1) the authority of Hadees as a source of Fiqah, (2) authority of Qiyas and Istehsaan, (3) conditions governing the Ijmaa, and (4) grades and nature of the Ehkaam (Commands).

(1) As regards the authority of Hadees, there is no doubt that from the very beginning Hadees has been one of the basic sources of Fiqah, and even the Hanafiah and Maalikiah have accepted it as such, but some, particularly the Mo'tazilah, denied its authority. Imam Shaafe'ee, therefore, came forward to meet their challenge, and in the seventh part of his book "Umm" he dealt with this issue in detail. He reproduced their plea, discussed it, pointed out their fallacy, refuted their argument, and proved the need and authenticity of Hadees as a valid and basic source of Fiqah.¹

(2) As regards Qiyas and Istehsaan, although both have been given prominence by Abu Hanifah, yet in fact both these have existed since long, and are found in the decisions of Umar and Abdullah ibne Abbas among the Companions and Rabee'ah and Ibrahim Nakh'ee among the Taaba'een.²

Abu Hanifah and his disciples adopted Qiyas as a principle of Shari'at, and Shaafe'ee in his "Risalah" and "Umm" supported it, but Dawud Zaahiri totally rejected it as a source of Fiqah. Shaafe'ee, however, in the seventh part of his book "Umm" seriously attacked the doctrine of Istehsaan which was introduced and acted upon by Abu Hanifah, and said that to decide on basis of Istehsaan is not permissible.³

1. For details, see Taareekh Fiqah-e-Islami, ibid, pp. 257-278

2. Ibid. p, 281.

3. Ibid. p. 283.

Qiyas was, however, adopted and made use of extensively by the Hanafiah, in the least by the Maalikiah and the Hambaliah, and limitedly by the Shaafe'iyah.

(3) As regards the conditions governing the Ijmaa, the jurists differed and held lengthy discussions on it. Imam Shaafe'ee's views and discussions in this connection are very prominent.¹

(4) As regards the grades and nature of the "Ehkaam" (Commands) the jurists differed² as to how any "Hukm" or Command is "Laazim" (binding) or "Ghair Lazzim" (not binding). This, however, ultimately resulted in fixing the grades and nature of the Commands, as to whether they are Farz, Waajib, Sunnat, Mustahab, Mandoob, etc.

COMPILATION OF USUL-E-FIQAH

The above mentioned disputes, however, necessitated the compilation of the "Usul-e-Fiqah", i.e. the fundamental rules which every jurist must follow while making juristic deduction on any point of law.

In this respect Abu Yusuf and Muhammad bin Hasan, the pupils of Abu Hanifah, were the first to write the books on "Usul" but unfortunately their books are not now available. The only and undoubtedly the most important book on "Usul" now available is the "Risalah" of Imam Shaafe'ee, in which he has dealt with Qur'an, Hadees, Naasikh and Mansookh, 'Ilal-e-Ahadees, Khabar-e-Wahid, Ijmaa, Qiyas, Ijtihad, Istehsann, and Ikhtilaaf, in detail.³

THE SHAAFE'EEYAH

The third School of Fiqah that came into existence in this period was that of the Shaafe'eeyah. It was founded by Imam Abu Abdullah Muhammad bin Idrees Ash-Shaafe'ee.⁴ He was a

1. For details see Ibid, pp. 288-292. 2. Ibid. pp. 292-307 3. Ibid. pp. 307-316

4. For details life sketch, see chapter, 11 "The four Imams"

Quraish and a descendant of 'Abd-e-Manaaf belonging to the Banu Abdul Muttalib. His mother belonged to the Azd tribe of Yemen. He was born in 150 A.H. at Ghazzah (Palestine) where his ancestors were settled. After his father's death, his mother brought him to Mecca, where he first learned the Qur'an by heart, then studied literature from Huzail who was a great literary figure of that time, then studied the religious subjects from Muslim bin Khalid al-Zanji who also gave him the permission to issue the Fatwaa, then he went to Medinah and became a pupil of Imam Maalik the great 'Aalim and Faqeeh of Medinah. He learned by heart his "Muwattah." He also heard the Ahadees from Sufyan bin 'Ainiah of Mecca and Imam Maalik of Medinah. After leaving Medinah, he went to Iraq, studied the books of Iraqi jurists, attended the lectures of Muhammad bin Hasan the disciple of Imam Abu Hanifah and also held "Manazirahs" with him on religious matters. He then came to Mecca and held religious "Manazirahs" with the scholars, and on account of his extra-ordinary talent and vast knowledge soon acquired the fame and reputation of a great jurist. After the death of Haroon Rashid in 195 A.H. he again came to Iraq and many scholars became his pupils, and he dictated to them his books on his initial views which are known as his old or Iraqi views.¹ Then he again came to Hijaz, but after a short time came to Iraq the third time in 198 A.H. Then he came to Egypt and stayed at Fistaat and dictated his books to his Egyptian disciples on his final views which are known as his new or Egyptian views² which are extant till now. He died in 204 A.H. in Egypt.

Imam Shaafe'ee got so much prominence that his School ranks as next to the School of Abu Hanifah. He was noted for his balance of judgment and moderation of views and though reckoned among the "Ahle Hadees" i.e. Upholders of Traditions, he examined the Ahadees more strictly, and made more use of analogy than Imam Maalik. He allowed greater scope to Ijma i.e. consensus of opinion than Maalik, putting a more liberal and

1. Adopting a middle course between the views of Hanafiah and Maalikiah (Falsafah-e-Shari'at-e-Islam, ibid, p. 59)

2. In which he gave up some of his former views and directed his pupils accordingly (Ibid, p. 58)

workable interpretation on the well – known dictum of the Holy Prophet that, “my Ummah will never agree in an error.” He agreed with Imam Malik in adopting Istidlaal ¹ as the fifth source of Fiqah and rejected the Istehsaan of Imam Abu Hanifah. ²

As we have already stated, Imam Shaafe’ee played the chief role in the settlement of the disputes which had arisen between the jurists of this age in respect of many aspects of Fiqah. In this connection his books “Umm” ³ and “Risalah” ⁴ are very important.

Imam Shaafe’ee primarily relies upon Qur’an. Then he gives prominence to Hadees and relies upon even on “Khabar-e-Wahid” provided its narrator is authentic. Unlike the Iraqi jurists, he does not insist for the fame and reputation of any Hadees. He is particular only in respect of the authority of the Hadees reaching the Holy Prophet. For this reason, he was known as “Naasir-us-Sunnat” in Baghdad. He keeps at par the Qur’an and the authentic Hadees and treats them both as binding and to be acted upon. After Hadees, he relies upon Ijma’, and Ijma’ according to him is one against which nothing is known. In the absence of “Nasoos”, he acts upon Qiyas provided some “Asle Mo’een” for it is existing. But he does not act upon Istehsaan of the Hanafiah nor Istaslah or Masaalehul Mursalah of the Maalikiah, which he seriously rejects, and follows the Istidlaal. ⁵

1. Aayaatul Bayyinaat, vol. IV, p. 174

2. Al-Mankhul, pp. 213-215 and 229 ; Muhammadan Jurisprudence, by Abdur Rahim, p. 29.

3. Kitab-ul-Umm deals with many topics of Fiqah, viz., Ibaadat, Mu’aamlaat, Uqubaat, Manakahaat, differences between Ali and Ibne Mas’ud, Shaafe’ee and Malik, views of those who reject Ahadees, rejection of Istehsaan, and so on, (Falsafah-e-Shari’at-e-Islam, ibid, pp. 60-61)

4. See “Books of Usul” in chapter 1 “Usul”.

5. Taareekh Fiqah-e-Islami, ibid, pp. 349-350.

Among his prominent disciples was Imam Ahmad bin Hambal – the founder of the fourth prominent school of Fiqah, i.e. the Hambaliah.

THE HAMBALIAH

The fourth and the final prominent school of Fiqah that come into existence in this period was that of the Hambaliah. It was founded by Imam Abu Abdullah Ahmad bin Hambal.¹ He was born at Baghdad in 164 A.H. He travelled far and wide, particularly Syria, Hijaz, Yemen, Kufah and Basra for acquiring the knowledge. He learned the Ahadees from Hushaim and Sufyan bin Uyainiah the great scholars of Hadees of that time, and learned the Fiqah from Imam Shaafe'ee. He in fact was more learned in Ahadees than in Fiqah. He had prepared a well-known compilation of forty thousand Ahadees known as the "Musnadul Imam Hambal." As a traditionalist and theologian his reputation stood very high, and therefore some writers have included him among the great traditionalists instead of jurists.² But in fact he was also a jurist of great caliber and his school is therefore included in the four prominent schools of Fiqah, which has its own definite style and principles of Usul and Fara'.

The five basic principles on which the Hambaliah school is based are : (1) Verses of the Qur'an and Ahadees of the Holy Prophet ; (2) the Fatwaas of the Sahabah (Companions of the Holy Prophet) provided nothing opposed to them is available ; (3) Sayings of certain Sahabah provided they are in conformity with the Qur'an and Hadees ; (4) Mursal and Za'eef Ahadees ; and (5) Qiyas at the time of need.³

In fact Imam Hambal adhered rigidly to the Traditions and his interpretation of them was liberal and unbending, and he allowed a very narrow margin to the doctrines of agreement and analogy.⁴

Imam Hambal died in 241 A.H. at Baghdad.

1. For detailed life sketch, see chapter, 11 "The four Imams"

2. Falsafah-e-Shari'at-e-Islam, ibid, p. 65

3. E'lamul Muqe'een, by Ibnul Qayyim Jozi, pp. 23 and 26 (ibid, p. 65)

4. Muhammadan Jurisprudence, by Abdur Rahim, p. 29.

COMPILATION OF AHADEES

We have already noted that while Imam Maalik laid the main emphasis on relying upon the Ahadees and the Tradition of Medinah, Imam Abu Hanifah adopted a very strict view in accepting the authenticity of any Hadees while relying upon it for juristic deduction, and on account of circulation of large number of forged and fabricated Ahadees there also arose the dispute between the jurists relating to the authority of Hadees as a source of Fiqah. This ultimately necessitated the preparation of authentic compilations of the Ahadees., and to quote Abdur Rahim, "Imam Hambal's remarkable erudition in traditional learning combined with the austere piety of his life gave a fresh impetus, if any indeed was needed, to the study of Traditions. A new band of scholars, the most prominent of whom are known as the Imams of Traditions as distinguished from Imams of Jurisprudence, headed by Abu Abdullah Muhammad Abu Ismail al-Bukhari, a pupil of Imam Hambal, devoted themselves exclusively to the scientific investigation of this important branch of religious learning. Zahri, Maalik and Ibne Juraij ¹ had already set the example in collecting Traditions in the more durable and reliable form of a book, and the jurists had generally demonstrated the need for critically sifting and examining them, laying down, each according to his own light, rules for their interpretation and application as a source of laws." ²

After a laborious task of collecting and sifting the Traditions, Imam Bukhari (d. 256 A.H.) prepared a compilation of about seven thousand authentic Traditions out of a mass of over seven lacs. Then Muslim bin Hajjaaj of Neshapur (d. 261 A.H.) prepared his compilation having a less number of Traditions. Both these compilations are known as the "Shahiheen" and are taken to be authentic. Then four other scholars, namely, Tirmizi (d. 279 A.H.), Abu Dawud (d. 275 A.H.), Ibne Majah (d. 273 A.H.) and Nasa'ee (d. 303 A.H.) prepared their compilations. All these taken together are known as the "Saha Sittah."

1. Also see chapter 6 "History of Fiqah and Fuqahaa"

2. Muhammadan Jurisprudence, by Abdur Rahim, p. 30.

INFLUENCE OF COMPILATIONS OF AHADEES

The influence of the compilations of Ahadees, particularly the Bukhari and Muslim on Fiqah, has been very great, and although it has directly given strength to the position of the Ahle Hadees i.e. Upholders of Traditions of the Hijazi school yet it has also exercised considerable influence on the Ahlur Raa'e i.e. Upholders of private judgment of the Iraqi school, and all subsequent jurists, of both the schools, have supported their views with the Traditions reported by Bukhari and Muslim. In fact it has brought both these schools to the spirit of compromise in that while "the Hanafis have made considerable advance towards the Upholders of Traditions in making larger use of Traditions in matters of law, the jurists of Ahle Hadees (the Maaliki and Shaafe'ee) have also shown an increasing inclination to the use of those methods of interpretation and deductions of which Abu Hanifah was the most eminent exponent." ¹

DEVELOPMENT OF THE SHIAH SCHOOLS OF FIQAH

In this period there also developed the Zaidiah and Imaamiah schools of Fiqah. The former was founded by Zaid bin Ali bin Hussain bin Ali bin Abi Talib, and the other by Imam Abu Abdullah Jafar al-Sadiq. ²

SOME OTHER SCHOOLS WHICH BECAME EXTINCT

Among the Sunnis also there came into existence the schools of Abu Abdur Rahman Auza'ee, Abu Sulaiman Dawud bin Ali bin Khalaf al-Asbanani known as Zaahiri, and Abu Jafar Muhammad bin Jareer bin Tabari, but after remaining in the field for some time they all became extinct." ³

1. Muhammadan Jurisprudence, *ibid*, p. 32

2. See chapter 6 "History of Fiqah and Fuqahaa."

3. *Ibid*.

AGE OF INDEPENDENT JURISTS ENDED

With the death of Imam Ahmad bin Hambal, the age of independent jurists ended. The work which Abu Hanifah, Maalik, Shaafe'ee and Hambal did in this period is of a twofold character. Firstly, many rules of law were laid down in this period ; and secondly, the principles of the science of Usul were also formulated which concerns itself with the sources of law. Usul corresponds to the European Jurisprudence, but, unlike the latter, it is not purely a formal science, because it discusses the theories and general principles of law, deals with the application of law to man's actions, classifies the legal concepts, and interprets Qur'an and Sunnah, Ijmaa and Qiyas. After these four jurists, no such work was done in the History of Fiqah. All subsequent jurists are merely the followers, and therefore the age subsequent to this age is the age of Taqleed.

Section 6

NEXT SIX HUNDRED AND TWENTY THREE YEARS – TILL THE END OF ABBASIDE RULE (301 A.H. TO 923 A.H.)

This period, as stated earlier, is the period of Tadleed, i.e. following of the four Imams. In this period, therefore, there is no independent exposition of law. But in this period, we firstly have the jurists¹ who, while following the juristic deductions of their predecessors, also endeavoured to find out their "Asbab-o-Ilal", which is technically known as the "Takhreej." Thus they "applied themselves to the task of completing the work done by the founders of the four schools, particularly the Hanafiah, the Maalikiah and the Shaafe'eeyah, both in the domain of material and theoretical science of law. They devoted their attention to concrete questions which had not been dealt with by the four Imams and their disciples. This work continued among the

1. See chapter 6 "History of Fiqah and Fuqahaa."

Hanafiah till the age of Qazi Khan ¹ i.e. the sixth century of the Hijrah.

Next came the jurists ² who devoted themselves to determine which of the conflicting versions of the views of the four Imams and their disciples, on given question, was correct ; and in the event of difference of opinion among them, whose dictum was to be taken as representing the accepted law. One of the last jurists of this era was Sadrush Shari'ah who died in 750 A.H. ³

In this period we also have some very important books on the Usul (Islamic Jurisprudence) ⁴ written by prominent scholars, viz.,

“Kitab-ul-Usul”, by Ali bin Muhammad Buzdawi (d. 482 A.H.),
 “Tanqeeh” and its commentary “Tauzeeh”, by Sadrush Shari'ah (d. 750 A.H.), and another commentary “Talweeh” by Sa'duddin Taftazani,

“At-Taqreer Wat Tehbeer”, by Ibne Humaam (d. 861 A.H.), - the author of “Fathul Qadeer”

“Nurul Anwaar”, a commentary on “Al-Manaar,” by the author of Tafseer-e-Ahmadi ;

“Musallamus Suboot” and its commentary by Behrul Uloom ; among the Hanafis ; ⁵

“Jaame'ul Jawame”, by Tajuddin Subki (d. 771 A.H.), and its commentary by Al-Mahalli (d. 864 A.H.), and an annotation by Ahmad ibne Qasim called “Al-Aayaatul Bayyinaat”, among the Shaafe'ees ;

“Mukhtasar”, by Ibne Hajib (d. 646 A.H.), and its commentary by Qazi Wadood (d. 756 A.H.), among the Maalikis

In this period many compilations of the Fatawaa were also prepared. ⁵

But in this period, as we have already stated in Chapter 6 “History of Fiqah and Fuqahaa”, there also developed the “Ta'assub” or party spirit among the followers of different

1. Muhammadan Jurisprudence, by Abdur Rahim, p. 22.

2. See chapter 6 “History of Fiqah and Fuqahaa.”

3. Muhammadan Jurisprudence, by Abdur Rahim, p. 22.

4. Also see chapter 6 “History of Fiqah and Fuqahaa.”

5. For details, see chapter 6 “History of Fiqah and Fuqahaa.”

schools of Fiqah, who in order to defend the views of their masters also held "Manazirahs" with each other.

The third school of Fiqah among the Shiahs, namely the Ismailiah, was also formed in this very period, who for some time had the supremacy particularly in the Egypt.

Section 7

NEXT FOUR HUNDRED AND FIVE YEARS – THE USMANIAH RULE (923 A.H. TO 1328 A.H. OR 1518 A.D. TO 1923 A.D.)

This period is also the period of Taqleed, and no original work on Fiqah was done by any jurist. The jurists generally known as "Muftis" used to issue the Fatwaas on the problems coming before them on the authority of their predecessor jurists ultimate relying upon the views of the four Imams and their disciples. In this period there have also been commentators and annotators. There are two main and important contributions of the jurists of this age, namely, the compilation of "Fatawaa-e-Hindiah" also known as the "Fatawaa-e-Alangiri" in the eleventh century Hijri in India, and the compilation of the "Mujallatul Ehkamul 'Adliyah" in the thirteenth century Hijri in Turkey.

In the eleventh century Hijri. Urangzeb Aalamgeer (1028 A.H. to 1118 A.H.) the Emperor of India, appointed a committee of scholars headed by Shaikh Nizamuddin to collect the agreed views of the prominent jurists on all matters relating to the day to day affairs of the individual as well as social life of man so that it may serve as a guide for the future scholars. This committee prepared this compilation in six big volumes on the pattern of "Hidayah" and other books of Fiqah dealing with all problems relating to Ibaadaat as well as Mu'aamlaat which serves as an authentic book of the Hanafi Fiqah. It contains the views of prominent jurists on actual as well as presumptive problems. It is named as "Faatawa-e-Aalangiri" after the name of Emperor Aurangzeb Aalamgeer, and is also known as the "Faatawa-e-Hindiah." ¹

1. Falsafah-e-Shari'at-e-Islam, ibid, pp. 88-89

It was originally written in Arabic, then it was translated into Persian by Maulana Chalpi Abdullah Rumi, and then also in Urdu by Syed Ameer Ali.

In the thirteenth century Hijri (nineteenth century A.D.), when there was codification of the laws in the Europe, the Usmania of Turkey also thought it necessary to promulgate the Laws on the pattern of the European laws. Accordingly, following the French Laws, first in 1850 A.D. the Law of Trade, then in 1858 A.D. the Revenue Law, then the Penal Law, then in 1861 A.D. the Law of Commercial Courts, then in 1864 A.D. the Law of Trade through the Sea, then in 1880 the Law of Civil Courts, and other such laws were imposed. But these laws were all on the basis of European Laws and therefore the penal laws did not include the Islamic Laws of Hudood and Ta'zeer, and the Commercial Laws did not prohibited the usury. ¹

The Usmaniah Regime therefore appointed a Majlis (Committee) of seven scholars headed by Ahmad Jodat Pasha, Naazim Mehkamah-e-Ehkaam-e-'Adaliah, to compile the Islamic Civil Law. In 1285 A.H. (1869 A.D.) this Committee prepared the "Muqaddamah" and chapter 1 of the Mujallah and presented it to Shaikul Islam and other Officials of the government which was finalised after some modifications. Then the members of the Committee divided among themselves the different parts of the Mujallah, and completed it in 1293 A.H. (1876 A.D.). Thus the Civil Law of the Usmaniah Regime was codified and, under the order of the Sultan, was published under the name "Mujallatul Ehakaamul 'Adaliah." ²

The Mujallah consists of 1881 sections. It has one Muqaddamah and sixteen chapters. The Muqaddamah contains 100 articles – first one deals with the definition and kinds of Fiqah and the rest contain the legal maxims. The sixteen chapters deal with (1) Kitab-ul-Buyoo, (2) Kitab-ul-Ijaraat, (3) Kitab-ul-Kifalat, (4) Kitab-ul-Hawalah, (5) Kitab-ur-Rehn, (6) Kitab-ul-

1. Falsafah-e-Shari'at-e-Islam, ibid, pp. 90-91

2. Ibid, pp. 91-93

Amanaat, (7) Kitab-ul-Hibbah, (8) Kitab-ul-Ghasb wal Itlaaf, (9) Kitab-ul-Hajar wal Shufa, (10) Kitab-ul-Shurakaat, (11) Kitab-ul-Wikalat, (12) Kitabus Sulha wal Ibra, (13) Kitab-ul-Iqraar, (14) Kitab-ul-Dawaa, (15) Kitab-ul-Bayyenaat wal Tahleef, and (16) Kitab-ul-Qaza.

Thus, unlike the Fatawaa-e-Aalamgiree and other books of Fiqah, the Mujallah does not deal with the Ibaadaat the Manakahaat and the 'Uqubaat. As regards Manakahaat, however, in 1336 A.H. (1917 A.D.) the government promulgated the Law of Nikah and Talaq (Family Law).¹

Besides this, in some of the Muslim States which had declared their independence on the end of the Abbaside Rule, and separated from the Usmaniah Rule, some fresh laws were framed and enforced. Thus in Egypt., in 1875 A.D. for decisions of the cases of the foreigners, "Makhloot Adalatain" (Combined Courts) were established under the Combined Civil Law, in 1883 the Civil Courts were re-organised and Combined Laws of Citizenship were enforced. In 1920 amendments were made in the Shari'at Courts Act 1910. In the un-divided India, although originally the Courts used to decide the cases relating to the Muslims according to the Shari'at and Books of Fiqah, but the British government departed from this practice and started making its own Laws. Thus, in 1843 the Laws relating to banning of slavery, in 1862 the Penal Law and the Law relating to Criminal Procedure, in 1872 the Law of Evidence, in 1913 the Law of Waqf, and in 1937 the Shari'at Act were enforced.²

Section 8

AFTER THE END OF THE USMANIAH RULE (1328 A.H. OR 1928 A.D. ONWARDS)

The Mujallah remained enforced in all Islamic Regions under the Usmaniah Regime till the First World War (1914 A.D), but after the war it was abrogated in Turkey and after sometime also in Labanan. It, however, continued in Iraq, Suriah (Syria) Palestine and Jordan.

1. Falsafah-e-Shari'at-e-Islam, ibid, pp. 93-101

2. Ibid, 103-119

Here it may be noted that by the end of the Abbaside Rule, and the Usmanis coming in power, many of the Sultans declared independence in their provinces and separated themselves from the Usmaniah Kingdom, and by the fall of the Usmaniah Caliphate in 1928 A.D., the regions which were under it also became independent, and thus the Islamic State was divided in independent States of Arabia, Iran, Afghanistan, Iraq, Jordan, Egypt, Libya, Tunis, Morocco, Sudan, Algeria, Suria (Syria), Lebanon, Palestine, Bukhara and Tashqand, and so on. In 1945 A.D. Indonesia also got independence, and in 1947, on division of India, Pakistan also came into existence, which in 1971 was itself divided in two independent states, namely Pakistan and Bangladesh.

In all these Islamic States, while the Fiqah of either of the four Imams was being followed by the people, the government in some states also made some laws. Thus in Egypt the new Law of Inheritance was enforced in 1943 A.D. , and laws of Waqf and Will were enforced in 1946 A.D. and in 1938 A.D. amendments were also made in the Civil Law. In Lebanon, in 1931 A.D. the Law of Citizenship (1930) and in 1934 A.D. the Law of Contracts (1932) were imposed. The latter also abrogated many provisions of the Mujallah. In 1943 A.D. the Law of Trade, and the new Law of Crimes were enforced. The other laws enforced were the Penal Law of the Armed Forces, Law of Sea Trade, Law of Courts, Army Law and Law of Forests, etc. All these laws were based on the laws of France, Germany and Switzerland. In 1942 A.D. the Law of Shari'at Courts was enforced. In Syria, in 1948 A.D. the Law of Evidence, and in 1949 A.D. the Law of Trade, the Civil Law, and the Penal Law were enforced. In Turkey, in 1926 A.D. the Swiss Penal Law ¹ was enforced. In Pakistan in 1961 A.D. the Conciliation Courts Ordinance, and the Muslim Family Laws Ordinance, in 1964 A.D. the Family Courts Act, in 1979 A.D. the Offence of Zina (Enforcement of Hudood) Ordinance, Offence of Qazf (Enforcement of Hudood) Ordinance, Offence against Property (Enforcement of Hudood) Ordinance, Prohibition (Enforcement of Hadd) Ordinance , and the Execution of the

1. Ibid. pp. 103-131

Punishment of Whipping Ordinance, were enforced, and under the provisions of the Constitution of 1973, Federal Shari'at Court was also established.¹

The new laws have actually been framed by the westernised Muslim scholars who have themselves leaned the Fiqah through the European and American teachers, particularly the Jews and Christians, and that is the reason that in this legislation of laws, particularly relating to the personal affairs, as also noted by a non-Muslim writer,² there is "change and variation in the law" in that from "rigid stability in law" the Contemporary Muslim Jurisprudence has advanced towards "liberalism", and permitted "independent enquiry," and adopted a "realistic approach to the fact of life."

In this connection, as he writes, "changes in the substance of Shari'ah family law as applied by the courts in the past few decades have been of profound social significanes. The status of women has been immeasurably improved – for example, by freeing them from the institution of a compulsory marriage concluded by their guardians, by safeguarding their position during marriage by allowing them to stipulate special terms or conditions in the marriage contract which will be enforceable against the husband, by granting them the right to petition for divorce where the husband is guilty of some matrimonial offence, and by restricting the husbands rights of polygamy and unilateral repudiation." But, inspite of all this, according to the writer himself, "the advancement of Muslim women towards the goal of equality between the sexes, desirable an end though it may be in itself, is merely part of a much fundamental evolution of Muslim Society," which means that the real aim underlying these changes is "total liberty" as the Jews and Christian women are enjoying, even though it be against the teachings of Qur'an and Sunnah.

1. We have dealt with the modern legislations in chapter 9.

2. "Conflicts and Tensions in Islamic Jurisprudence," by Neol J. Coulson, 1969 Edition, University of Chicago Press, chapter 6 "Stability and Change," pp. 96-117

There are also changes in the law of succession. As he further writes, “under the traditional Sunni law of inheritance, a daughter or granddaughter who is the sole surviving of the deceased is restricted to a share of one – half of the inheritance, and the residue of the estate will go to the brothers or more distant male agnate relatives of the *praepositus*. Today, however, under Iraqi law any female descendant of the deceased will totally exclude any collateral male agnate, as will a daughter or agnate granddaughter under Tunisian law. And there is one another important reform in the bequest which deserves notice in this context. According to the consensus of Traditional Sunni authorities, ¹ a person may not validly make any bequest in favour of a relative who is entitled under the rules of inheritance to take a share in the estate as a legal heir. In the Sudan, Egypt, and Iraq, however, this rule has now been abandoned, and a testator has freedom to make bequests in favour of whomsoever he wishes within the limit of one-third of the net estate.” This, in other words, entitles a man to increase or decrease the Qur’anic shares in favour of any of his legal heirs and thus violate the Holy Qur’an itself. It also violates the Hadees of the Holy Prophet which we have noted in the Foot Note.

As regards inheritance by grandchildren through a pre-deceased heir, in 1946, the Egyptian Law made provision for “obligatory bequest”, and in 1961 the Pakistan law introduced the representational rule, but neither of these have the sanction of Qur’an and Sunnah nor of the four prominent jurist consults of the Islamic Fiqah.

The same writer has also noted that “in matrimonial issue the courts in the Middle Eastern countries are now playing an increasingly active role as custodians of the religious and social ethic of contemporary Islam. Permission of the court is now often a prerequisite of a marriage contract. ² Such permission may be refused in Syria and Jordan, for example, if

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1. This view is also based upon a Hadees of the Holy Prophet (*Mishkat-ul-Masabeeh*, *Kitab-ul-Buyoo*, *Babul Wasayaa*, No. 2941/4).
 2. It is not at all the case in the Muslim countries in general. Moreover such “Perquisite” is totally against Qur’an and Sunnah.

there is such a difference between the ages of the husband and wife as to make the proposed union undesirable in the court's opinion. So too, in giving permission for a polygamous marriage the courts in Syria are required to be satisfied that the husband is financially able to provide proper maintenance and support for a plurality of wives.¹ In Iraq the courts must also be satisfied that there is 'some lawful benefit involved' in a proposed polygamous union, and may refuse their permission 'if any failure of equal treatment between co-wives is feared.'² In the case of a husband exercising his power to divorce his wife by repudiation the courts now have a discretionary power to award the wife suitable compensation in Tunisia, Syria, and, to a lesser degree, in Morocco."

In cases of *Hizanath* (custody) of minor children, according to Egyptian Law of 1929, the courts have liberty to decide what is of most benefit to the child rather than granting custody according to the Traditional law. In 1932 the Sudan extended the discretion of the courts upto puberty for boys and marriage of the girls. The Syrian Law of 1953 also gives preference to the welfare of the child. So too does the Tunisian Law of 1957 and the Iraqi law of 1961.

The same writer also writes that "equally as radical as these substantive reforms have been the changes which have taken place in recent years in the form in which Shari'ah Law is applied through the courts." Further, "behind and in support of these developments lies an evolving system of legal education in Shari'ah Law, which is now being studied, through the medium of modern textbooks³ and so forth, as an integral part of a

1. Otherwise the permission is to be refused even though a man has a genuine sexual need for more than one wives which may otherwise force him to illicit sexual relation with other women.

2. Although in terms of verse 3 of chapter 4 (*Nisa*) the fear is to be determined by the man himself and not by the courts, and by verse 129 of the same chapter the condition of "equal treatment" has been treatment by the Holy Qur'an itself. Further, how can the court judge with certainty in advance that there will be no equal treatment.

3. Written and also taught by the Jew and Christian writers of Europe and America.

general law curriculum.”

“The result,” as the same writer himself puts in writing,” of course, will be that Shari’ah Law will become externally divorced from religion, not of course in the sense that it will cease to have a religious significance, but in the sense that it will lose its traditionally close and exclusive association with religious personages and institutions and become instead the province of the professional lawyer,” or, to put it more correctly, of the free lancers like the Jews and Christians.

But, “such a development”, he admits, “is not, of course, without its fierce critics”, and in fact in all Muslim countries, where such development are being made, the learned Muslim Ulamas (scholars) have seriously opposed it. The writer himself says, “notwithstanding the achievements of the reform movement todate, however, it would be wholly wrong to suppose that these have met with general approval or that any Muslim government has yet a mandate to proceed fully ahead along the course of what the modernists would describe as social progress. There is still a deep-rooted opposition to change both in principle and in practice.”

He further says that, “on the theoretical level conservative elements ¹ roundly condemn the new liberalism in legal thought as un-Islamic. They see it, not merely as an undesirable and unnecessary departure from the *status quo*, but as a process of secularization of the law. The impetus behind the reforms, they claim, is simply a desire to adopt the standards and values of western civilization, and the claim of reinterpreting the Qur’an is a mere device to achieve this preconceived purpose. So to allow social aims to fashion the terms of law is a direct contradiction of the fundamental principle of Islam and that it is for society to conform to the terms of the Divine Law objectively determined. It is therefore a process which ultimately must undermine the very roots of the religious faith itself.”

1. Meaning the learned Muslim Ulama (scholars)

The reason for this opposition by the learned Ulama (scholars) is that the modernists among the Muslims are in fact the agents of the anti-Islamic elements whose main aim is to uproot the faith in Qur'an and Sunnah from the hearts of the Muslims and make them free lancers and adopt the evil ways of the non-Muslims, particularly the condemned ones by the Qur'an, i.e. the Jews and Christians, under the garb of social developments. They have no thorough knowledge of Qur'an, Sunnah and Fiqah, and do not even qualify themselves for the status of a "Mujtahid" even of the lowest rank, what to say of the first-rank jurist consults of the Islamic world. They are not suggesting or making changes in the Fiqah because of their own better understanding of Qur'an, Sunnah, or Fiqah, but because of the understanding which they have acquired from their non-Muslim patrons. They do not even follow the Islamic Shari'ah in their individual as well as social life. They only remember the Shari'ah and call for a "Mulla" to read the Sermon of Nikah in the marriage ceremony, or to say the "Azaan" in the ears of the newly born, or to lead the funeral prayer of the dead one, among them. But nowadays unfortunately, through political intrigues and planning's, they have acquired the upper hand in many Muslim countries, and, at the instance of their Jew and Christian masters, are trying their best to deviate the Muslim Ummah from the Path of Allah and His Prophet Muhammad (peace be upon him). But their endeavours are sooner or later bound to fail, because the Holy Prophet has already said, that, "Allah will never unite my Ummah on error" (Mishkat-ul-Masabeeh, Kitab-ul-Eiman, Baab-ul-E'tisaam Bil Kitab Was Sunnah, No. 163/32)

CHAPTER 6

HISTORY OF FIQAH AND FUQAHAA ¹

History of Fiqah (Islamic Jurisprudence) and Fuqahaa (Muslim Jurists) passed through different periods as follows :-

FIRST PERIOD (1 TO 11 A.H.)

LEGISLATIVE PERIOD

This period is known as the “Legislative Period.” ² It starts from “Hijrat” i.e. migration of the Holy Prophet and his Companions from Mecca to Medinah in 622 A.D. and ends on his leaving this world in 632 A.D. or 11 A.H. when the revelation of Qur’an was also completed. Revelation of Qur’an had started before twelve years of Hijrat. It took about twenty two years and four months in all, divided in the Mecci and Madani periods. In the Meeci period 86 Suras (chapters) were revealed which are mostly short and deal with particularly the Faith, the Absolute Unity of Allah, the Prophethood of the Holy Prophet and the Day of Judgment. In the Madani period 28 Suras (chapters) were revealed which are mostly long and deal with all affairs of the (individual, social, moral, financial and political) life of man, and this period in particularly known as the “Legislative Period”. During this period the Qur’an and Sunnah were the only two sources of Fiqah.

QUR’AN COMPLETED AND MEMORISED

In this period all verses of Qur’an, as and when revealed, were put to writing as dictated, and in the arrangement as directed, by the Holy Prophet, by scribes known as “Kaatibaan-e-Wahi,” namely Abu Bakr, Umar, Usman, Ali, Aamir bin Fahirah, Ubay bin Ka’b, Zaid bin Sabit, Mu’awiyah bin Abi

1. Facts relating to the Fuqahaa have been noted in brief from “Taareekh Fiqah-e-Islami”, ibid, and “Taareekh Hadees and Muhaddaseen”, by Hakim Syed Ahmad Nadvi. Both these books may be seen for more details.

2. Muhammadan Jurisprudence, by Abdur Rahim, p. 16.

Sufyan , Sabit bin Qais bin Shimaas, Yazid, Mughirah bin Shobah, Zubair binul Awaam, Khalid bin Waleed. Ala binul Hazrami, Amr binul Aas, Abdullah binul Hazrami, Muhammad bin Muslimah and Abdullah bin Abdullah bin Abi Ibne Salool. Besides this, Qur'an was also fully and completely memorised by many Companions of the Holy Prophet, particularly Mu'aaz bin Jabl, Ubay bin Ka'b, Abdullah bin Mas'ud, Saalim bin Ma'qal, Zaid bin Sabit, Abu Zaid, and Abud Darda.

AHADEES MEMORISED AND PUT INTO PRACTICE

Side by side to the Holy Qur'an, the Hadees (saying of the Holy Prophet) and the Sunnah (practice of the Holy Prophet) were also memorised by heart, and put to practice in matters of daily life, by the Companions, and thus Qur'an and Sunnah both became the fundamental sources of the Fiqah.

SECOND PERIOD (11 TO 40 A.H.)

COLLECTION, INTERPRETATION AND EXTENSION OF LAWS

It was the age of collection, interpretation and extension of laws by Collective Deliberations. ¹ In this period particular care was taken that only those Ahadees of the Holy Prophet should be accepted which were proved by at least two persons. Abu Bakr and Umar were particularly very strict in this respect. In this period due to vast expansion of the Islamic State and coming forth of many issues of private and public importance, side by side to Qur'an and Sunnah, resort was also had to Ijma (consensus of opinions) and Qiyas (personal judgment). But both these were kept subordinate to Qur'an and Sunnah.

1. Muhammadan Jurisprudence, by Abdur Rahim, p. 17.

PROMINENT JURISTS OF THE SECOND PERIOD

ABU BAKR SIDDIQUE

Abu Bakr was a close friend of the Holy Prophet from childhood. He was two years younger to him in age. He was the first among men to accept Islam at the hands of the Holy Prophet when he proclaimed his Prophethood. He always gave an all-out support to the Holy Prophet in the cause of Islam. He was also the Companion of the Holy Prophet during migration from Mecca to Medinah. He was the first worthy caliph of the Holy Prophet. He remained in office for two years only, i.e., from 11 to 13 A.H. or 632 to 634 A.D.

UMAR BIN KHATTAAB

Umar had accepted Islam in the sixth year of the Holy Prophet's Mission in Mecca. He was nominated as a caliph by Abu Bakr Siddique. In his reign the great empires of Rome and Persia were subdued and vast expansion of the Islamic State was made by conquering many countries including Syria, Iraq, Egypt, Palestine, etc., The surrender of Jerusalem was also a very important event of his reign. In fact his reign was the most important period of the Islamic History after the Holy Prophet. He reigned from 13 to 24 A.H. or 634 to 645 A.D. when he was attacked and wounded by a fire-worshipper slave Abu Lulu Fayruz, as a result of which he died.

USMAN BIN AFFAAN

Usman was a close friend of Abu Bakr and it was at his instance that he had accepted Islam in the earliest period and was perhaps the sixth or seventh to become a Muslim. He was a wealthy merchant and contributed freely for the cause of Islam. He was envoy of the Holy Prophet to the Meccans at Hudaibaih, and for him the Holy Prophet had taken the famous "Oath of Rizwan" when rumours spread that he had been killed by the non-believers of Mecca. He had married two daughters of the Holy Prophet Ruqaiyah and Umme Kulsum and was known as

the "Zul-Nurain". He was elected as the third caliph of the Islamic State by a committee of six persons nominated by Umar. He remained in office from 24 to 35 A.H. or 645 to 656 A.H.) when he was assassinated by the conspirators.

ALI BIN ABI TALIB

Ali was the a cousin of the Holy Prophet and remained under his care from the beginning. He was one of the earliest converts to Islam. While leaving Mecca for migration to Medinah the Holy Prophet had left him on his bed to return the trust properties to their owners. The Holy Prophet had also married his beloved youngest daughter Fatimah to Ali. He succeeded as the fourth caliph of the Holy Prophet and remained in office only five years, i.e. from 35 to 40 A.H. or 656 to 661 A.D. when he was injured by a poison sword by Ibne Muljim at Kufah and died after three days.

ABDULLAH IBNE MAS'UD

He belonged to the Hazali tribe. He was one of the earliest converts to Islam. The Holy Prophet had permitted him to freely come to him. He used to remain in service to the Holy Prophet throughout. He was a migrant to both Abbyssinia as well as Medinah. He took part in all battles along with the Holy Prophet. He was very learned in religion as well as law and many Ahadees have been narrated from him. Umar had sent to Kufah as a "Mu'allim" i.e. teacher. At Kufah he acted, as Qazi and also gave lectures on Fiqah. He was succeeded by Alqamah, who by Aswad, who by Ibrahim Nakh'ee (also known as the "Jurist of Iraq"), who by Hammad – the teacher of Abu Hanifah. Thus Abdullah Ibne Mas'ud was the first to lay the foundation of Fiqah in Iraq and it was due to him that the Hanafiah School of Fiqah came into existence. In his last days Abdullah Ibne Mas'ud was summoned to Medinah by Usman where he died in 32 A.H., and Usman himself led his funeral prayer.

ZAID BIN SABIT

He belonged to the Banu Najjaar tribe of the Ansaar of Medinah. He took part in the battles of the trench and Tabuk, and in the latter the banner was given to him by the Holy Prophet. He was also an Scribe to the Holy Prophet and used to write down the Wahi. He had also learnt the Suryani language to write down letters of the Holy Prophet in that language. He also worked as an Scribe to Abu Bakr and Umar. He was also appointed as successor to Umar and Usman in Medinah when they went for Hajj. He was great " 'Aalim" (learned) among the Companions of the Holy Prophet. He was the one to compile the Holy Qur'an in the Days of Abu Bakr. He was also one of those who compiled the Holy Qur'an at the instance of Usman. Many Companions and Taba'een narrated from him the Ahadees. The Holy Prophet had said, "Zaid knows the 'Ilmul Fara'iz' more among you."

**THIRD PERIOD
(41 TO 100 A.H.)****POLITICAL ANARCHY**

This period was marked with political anarchy which divided the people in three groups, viz., (1) the majority of the Muslims who, after withdrawal of Imam Hasan from the caliphate, accepted the rule of Amir Mu'awiah, (2) the Shiahs who did not accept the right of anybody to the rule except the descendants of Ali, and (3) the Khawarij who disliked Usman, Ali as well as Mu'awiyah. This also adversely affected the opinions as regards the Fiqah.

MIGRATION OF SCHOLARS FROM MEDINAH

In this period the scholars migrated from Medinah to different cities of the Islamic State, and it was through their teachings and lectures on religion that a large number of the Taba'een appeared on the scene. Each Companion and Taaba'ee at his place was a center of Islamic learning, and people used to

come to him for Pronouncements (Fatawaa) on problems relating to their personal as well as public problems.

UN-RESTRICTED NARRATION OF AHADEES

In this period the narration of Ahadees did not remain restricted as in the days of the four early caliphs, with the result that the volume of Ahadees increased to a huge number. The Companions as well as the Taaba'een gave decisions on basis of the Ahadees which they had heard direct from the Holy Prophet or from the senior Companions. There also arose the malpractice of forging and circulation of forged Ahadees by different groups in their favour or against their opponents. The jurists also became divided in two main schools of thought. Thus as regards the jurists of Iraq, they gave preference to "Raa'e" i.e. personal opinion, while the jurists of Medinah strictly adhered to the Ahadees (Traditions) of the Holy Prophet. All this also necessitated the collection of correct Ahadees, and in this respect Umar bin Abdul Aziz took personal interest, and ordered the people to search for, and make compilations of, the correct Ahadees of the Holy Prophet.

PROMINENT JURISTS OF THE THIRD PERIOD

In this period Medinah, Mecca, Kufah, Basrah, Syria, Egypt and Yemen became centres of Islamic learning and development of Fiqah under the guidance and patronage of different Companions of the Holy Prophet and the Taaba'een as follows :

JURISTS OF MEDINAH

HAZRAT 'AA'ISHA

She was daughter of Abu Bakr and wife of the Holy Prophet. According to Ata Ibne Ribah, she was the greatest lady Jurist and her opinion on religious matters was thought to be authentic. Urwah says that he did not see anybody more learned in poetry and jurisprudence than her. She narrated large number of Ahadees from the Holy Prophet relating to all aspects of Fiqah

and also as regards the household life of the Holy Prophet. The Companions of the Holy Prophet used to consult her on different problems of Fiqah. Many Companions and Taaba'een, particularly Urwah bin Zubair and Qasim bin Muhammad, who were also related to her, have reported the Ahadees from her. She died in Medinah in 57 A.H.

ABDULLAH BIN UMAR

He was the son of Umar and had accepted Islam during childhood along with his father. He took part in many battles. He used to strictly follow the Sunnah of the Holy Prophet. He never took part in any dispute relating to the caliphate nor in any battle during the period of political turmoil. He narrated large number of Ahadees from the Holy Prophet as well as from the Companions. Many Taaba'een, particularly his son Saalim and his freed slave Naafe, reported the Ahadees from him. He used to issue the Fatawaa to guide the people during the Hajj. He died in 73 A.H.

ABU HURAIRAH

He was the son of Abdur Rahman bin Sukhr and belonged to the Dos tribe. He came to the Holy Prophet in 7 A.H. after the Khayber expedition and remained in his service till the last. He narrated the largest number of Ahadees from the Holy Prophet and the Companions. Many Taaba'een, particularly his son-in-law Saeed binul-Musayyib and his freed slave A'araj, reported the Ahadees from him. He was among the greatest Ulama (learned) and the Fuqahaa (jurists) as well as knower of Ahadees of his time. He died in 58 A.H.

Note : all these three worthy Companions of the Holy Prophet were the leading experts of Hadees and Fiqah of their time who laid the foundation of further development of the learning in religion and jurisprudence by their successors i.e. the Taaba'een of Medinah as follows :

SA'EED BINUL MUSAYYIB AL-MAKHZOOMI

He was born two years after the caliphate of Umar. He was very intelligent, truthful and learned. Ibne Umar said that Sa'eed binul Mussayib is a Mufti (jurist) among the Muftis. Qatadah said that he did not see anybody more learned than him. Ali Madini said that he did not see anybody else among the Taaba'een having more extensive knowledge than him, and that to him he was the greatest of the Taaba'een. He narrated Ahadees from Abu Hurairah. Hasan Basri also used to consult him on difficult matters. He died in 94 A.H.

URWAH BINUZ ZUBAIR BINUL AWAAM AL-ASADI

He was born during the caliphate of Usman. He reported Ahadees from many Companions and learned Fiqah from his "Khalah" Hazrat 'Aa'isha. He was very learned in "Seerat" and was a "Hafiz" of Hadees. From him his son Hishaam, and other learned ones of Medinah, namely Zahri and Abuz Zanaad, reported the Ahadees. Zahri used to say that he found him like a river (of knowledge) which never becomes dry. He died in 94 A.H.

ABU BAKR BIN ABDUR RAHMAN BIN HARIS-BIN-HISHAAM AL-MAKHZOOMI

He was born during the caliphate of Umar. He reported Ahadees from his father and other Companions, and from him Zahri and other Taaba'een reported the Ahadees. He was an authentic reporter of Hadees and a jurist. He died in 94 A.H.

ALI BIN AL-HUSSAIN BIN ALI BIN ABI TALIB AL-HASHIMI

He was the fourth of the twelve Imams of the Shiahs, also known as Zainul Abidin. He reported the Ahadees from his father Hussain, uncle Hasan, Hazrat 'Aa'isha, Ibne 'Abbas, and others. Zahri said that he did not see anybody greater jurist than him. He was "Qaleelul Hadees." He died in 94 A.H.

UBAIDULLAH BIN ABDULLAH BIN UTBAH BIN MAS'UD

He acquired the knowledge from Hazrat 'Aa'isha, Abu Hurairah, Ibne Abbas, and others. Besides being an expert jurist he was also a poet. He was teacher of Umar bin Abdul Aziz. Zahri said that Ubaidullah was a river among the rivers of knowledge. He died in 98 A.H.

SAALIM BIN ABDULLAH BIN UMAR

He heard the Ahadees from his father Abdullah bin Umar, Hazrat 'Aa'isha, Abu Hurairah, Sa'eed binul Musayyib, and others. According to Imam Maalik, he was a symbol of the righteous ones of the past. He died in 106 A.H.

SULAIMAN BIN YASAAR

He was freed slave of Hazrat Maimunah – the mother of the believers. He reported Ahadees from Hazrat Maimunah, Hazrat 'Aa'isha, Abu Hurairah, Abdullah ibne Abbas, Zaid bin Sabit, and others. According to Hasan bin Muhammad bin al-Hanafiah, he was more intelligent than Sa'eed binul Mussayib. When anybody used to come to him for "Fatwa", he used to tell him that he should have gone to Sulaiman bin Yasaar. He died in 107 A.H.

QASIM BIN MUHAMMAD BIN ABI BAKR

He reported Ahadees from his paternal aunt Hazrat 'Aa'isha, Abdullah ibne Abbas, Abdullah ibne Umar, and others. According to Yahya bin Sa'eed, there was none to be preferred over Qasim in Medinah. Abuz Zanaad said that he did not find anybody more learned in Fiqah and Hadees than him. Ibne Uyainah said that Qasim was the greatest learned man of his time. Ibne Sa'eed said that he was Imam, Faqeeh, authority, and narrator of many Ahadees. Umar bin Abdul Aziz said that had he the authority to appoint the caliph, he would have appointed him as a caliph. He died in 106 A.H.

NAAFE MAULA ABDULLAH BIN UMAR

He was a freed slave of Abdullah bin Umar. He reported Ahadees from Abdullah bin Umar, Hazrat 'Aa'isha, Abu Hurairah, and others. Umar bin Abdul Aziz had sent him to Egypt to teach the Ahadees to the people. He died in 117 A.H.

MUHAMMAD BIN MUSLIM KNOWN AS IBNE SHIHAAB AZ-ZAHRI

He was born in 50 A.H. He reported Ahadees from Abdullah bin Umar, Anas bin Maalik, Saeed binul Musayyib, and others. Lais bin S'ad has said that he did not see anybody more comprehensive in Knowledge than Zahri. Umar bin Abdul Aziz said that there was none having the knowledge of past Ahadees more than Zahri. Imam Maalik said that Ibne Shihaab passed his life in such a manner that there was none like him in the world. He was teacher of the son of Hishaam bin Maalik. He died in 124 A.H.

ABU JAFAR MUHAMMAD BIN ALI BIN AL-HUSSAIN KNOWN AS BAQAR

He was the fifth of the twelve Imams of the Shiahs. He reported Ahadees from his father Ali bin al-Hussain, Jabbar, Abdullah bin Umar, and others. He was the chief of Banu Hashim in his time. He died in 114 A.H.

ABUZ ZANAAD ABDULLAH BIN ZAKWAAN

He reported Ahadees from Anas bin Maalik and many other Companions. Abu Hanifah said that he saw both Abuz Zanaad and Rabi'ah but among them Abuz Zanaad was a greater Faqeeh. Sufyan used to call Abuz Zanaad as "Amirul Mo'minen Fil Hadees." He was also known as the "Faqeeh-e-Medinah". He died in 131 A.H.

YAHYA BIN SA'EED ANSARI

He reported Ahadees from Anas bin Maalik and many Taaba'een. Imam Hambal said that Yahya bin Sa'eed was very careful among all the people Wahb said that when he came to Medinah, he found none except Yahya bin Sa'eed and Imam Maalik regarding whom there were no two opinions. He died in 143 A.H.

RABI'AH BIN ABI ABDUR RAHMAN FAROKH

He reported Ahadees from Anas bin Maalik and many other Companions. He was Imam, Faqeeh, Hafiz, Mujtahid, and expert of "Raa'e" and was therefore known as "Rabi'atur Raa'e". Yahya bin Sa'eed said that he did not see anybody more intelligent than him. Qazi Sawaar bin Abdullah said that he did not see anybody more expert of "Raa'e" than Rabi'ah. Imam Maalik had learnt Fiqah from him. He died in 136 A.H.

JURISTS OF MECCA

ABDULLAH BIN ABBAS BIN ABDUL MUTTALIB

He was born two years after migration. The Holy Prophet had prayed for him, "may Allah make him Faqeeh in religion and teach him the Taaweel". He was a great interpreter of Qur'an. According to Mo'annar, he gained knowledge from Umar, Ali and Ubay bin Ka'b. The knowledge of the people of Mecca as regards "Tafseer" (interpretation of Qur'an) and Fiqah (Jurisprudence) depends upon the Knowledge of Abdullah ibne Abbas. He died in 68 A.H. at Ta'if.

MUJAHID BIN JUBAIR

He was a freed slave of Ibne Makhzoom. He heard the Ahadees from Hazrat 'Aa'isha, S'ad, Abu Hurairah, and Abdullah ibne Abbas (all Companions), and learned Qur'an from Abdullah Ibne Abbas. According to Qatadah, he was the greatest "Aalim" of "Tafseer" of his time. He died in 103 A.H.

'IKRAMAH

He was a freed slave of Abdullah Ibne Abbas. He reported Ahadees from Abdullah Ibne Abbas, Hazrat 'Aa'isha, Abu Hurairah, and others. He learned Fiqah from Abdullah ibne Abbas. According to Sa'eed bin Jubair, 'Ikramah was more learned than him. Sha'bi said that there was none more learned in the Book of Allah than him (in his time). It is said that since he remained with the Khawaarij, therefore Muslim and Maalik did not report any Hadees from him. He died in 107 A.H.

'ATA BIN ABI RIBAH

He was a freed slave of the Quraish. He was born during the caliphate of Umar. He reported Ahadees from Hazrat 'Aa'isha, Abu Hurairah, Abdullah Ibne Abbas, and others. He was a very learned man of his time. He died in 114 A.H.

ABUZ ZUBAIR MUHAMMAD MUSLIM BIN TADRAS

He was a freed slave of Hizaam. He reported Ahadees from Abdullah Ibne Abbas, Abdullah ibne Umar, Sa'eed bin Jubair, and others. According to Ya'la bin Ata, he was very intelligent and Hafiz. He died in 128 A.H.

JURISTS OF KUPAH**'ALQAMAH BIN QAIS AL-NAKH'EE**

He was born during the life time of the Holy Prophet. He heard the Ahadees from Umar, Abdullah bin Mas'ud and Ali. He learned Fiqah from Abdullah bin Mas'ud, and was his most worthy and close companion, and also a successor to him in Kupah. According to Zahbi, he was Faqeeh and Imam. He was very careful in the narration of Hadees. He was known as the "Faqeeh-e-Iraq." He died in 62 A.H.

MASROOQ BINUL AJDA AL-HAMDANI AL-FAQEEH

He reported the Ahadees from Umar, Ali and Abdullah Ibne Mas'ud. He was more learned in "Fatwa" than Shuraih who used to consult him. He died in 63 A.H.

UBAIDAH BIN AMR ASLAMANI AL-MARAADI

He accepted Islam during the conquest of Mecca. He acquired knowledge from Ali and Abdullah bin Mas'ud. According to Sha'bi, he was equal to Shuraih in Fiqah. He used to teach the people and issue the Fatawaa. He died in 92 A.H.

ASWAD BIN YAZID AL-NAKH'EE

He acquired the knowledge from Mu'aaz and Abdullah bin Mas'ud. He was a very learned man of Kufah. He was the successor to 'Alqamah in Kufah. He died in 95 A.H.

SHURAIH BIN AL-HARIS AL-KINDI

He was appointed as Qazi of Kufah by Umar, and remained in office for about sixty years till the time of Hajjaaj bin Yusuf. He resigned one year before his death. he reported Ahadees from Umar, Ali and Abdullah bin Mas'ud. He died in 78 A.H.

IBRAHIM BIN YAZID AL-NAKH'EE

He reported Ahadees from 'Alqamah, Masrooq, Aswad and others. He was a successor to Aswad, and was known as the "Faqeeh-e-Iraq." He was teacher of Hammaad. He died in 95 A.H.

SA'EED BIN JUBAIR

He was a freed slave of Waalibah. He heard the Ahadees from Abdullah bin Abbas and Abdullah bin Umar. He was very learned. He was slain by Hajjaaj bin Yusuf in 98 A.H.

'AAMIR BIN SHARAHEEL AL-SHA'BI

He was born in 17 A.H. during the caliphate of Umar. He was Imam, Hafiz, Faqeeh, and expert of many "Uloom". He reported Ahadees from Ali, Abu Hurairah, Abdullah Ibne Abbas, Hazrat 'Aa'isha, Abdullah bin Umar and others. He was a teacher of Abu Hanifah. He was a Qazi of Kufah. Makhool said that he did not see anybody more learned than him, and Abu Heseen said that he did not see anybody more Faqeeh than him. According to Ibne Sireen, people used to take Fatawaas from him although many Companions were present at that time. According to Ibne Abi Laila, he was "Saahib-e-Aasaar" (or Saahib-e-Hadees) and Ibrahim was "Saahib-e-Qiyas." He was known as "Allamatut Taaba'een." He died in 104 A.H.

JURISTS OF BASRA**ANAS BIN MAALIK ANSARI**

He remained in the service of the Holy Prophet for many years and has narrated a large number of Ahadees. He also gained knowledge from Abu Bakr, Umar, Usman and Abi bin K'ab. Bukhari has noted eighty Ahadees, and Muslim has noted seventy Ahadees, from him. He died in 93 A.H.

ABUL 'AALIAH RAFEE BIN MEHRAN AR-RIYAH

He was a freed slave of a woman belonging to the Riyah – a branch of the Banu Tameem tribe. He heard the Ahadees from Umar, Abdullah Ibne Mas'ud, Ali, and Hazrat 'Aa'isha. He died in 90 A.H.

HASAN BIN ABIL HASAN YASAAR

He was a freed slave of Zaid bin Sabit. He was born in Medinah. In the days of Usman he memorised the Holy Qur'an, devoted himself for acquiring knowledge and also took part in battles. He reported Ahadees from many Companions. He died in 110 A.H.

ABUL SHA'SHA JABIR BIN ZAID

'Amr bin Dinaar said that he did not see anybody more learned in Fatwa than him. He was a very learned man of his time. He died in 93 A.H.

MUHAMMAH BIN SIREEN

He was a freed slave of Anas bin Maalik. He was born during the rule of Usman. He reported Ahadees from Anas bin Maalik, Abu Hurairah, Abdullah Ibne Abbas, Abdullah Ibne Umar, and others. He was Faqeeh, Imam, and very learned, and interpreter of the dreams. He died in 110 A.H.

QATADAH BIN DA'AMATUS SADUMI

He was blind but had a very sharp memory. He reported Ahadees from Anas bin Maalik and Sa'eed binul Musayyib. Ibne Sireen said that Qatadah was the biggest Hafiz among the people. Imam Hambal said that Qatadah was very learned in Tafseer and Differences between the "Ulama". According to him, there are very few who can have preference over him. He was also learned in Lexicography, Arabic language, History of the Arabs, and Ansaab. He died in 118 A.H.

JURISTS OF SYRIA**ABDUR RAHMAN BIN GHANAMUL ASH'ARI**

He reported Ahadees from Umar, Mu'aaz, and others. Umar had sent him to Syria to teach Fiqah to the people. The Taaba'een of Syria learned Fiqah from him. He died in 78 A.H.

**ABU IDRIS AL-KHAULANI AA'IZULLAH BIN
ABDULLAH**

He acquired knowledge from Mu'aaz bin Jabl and many other Companions. He was "Waa'iz" and Qazi of Damascus. He died in 80 A.H.

QABISAH BIN ZUWAIB

He reported Ahadees from Abu Bakr, Umar, and others. He was the bearer of the seal of Abdul Malik. Zahri said that he was a great learned man. Makhool said that he was the greatest knower of the decisions of Zaid bin Sabit. He died in 81 A.H.

MAKHOOL BIN ABU MUSLIM

He was a freed slave of a woman of the Huzail tribe. He undertook long journeys for gaining knowledge. Zahri named three as "Ulama" including Makhool. Abu Hatim said that he did not know anybody greater Faqeeh than him in Syria. He died in 113 A.H.

RIJA BIN HEEWATUL KANDI

He reported Ahadees from Amir Mu'awiah, Abdullah bin Umar, Jaabir, and others. He was "Shaikh" of the people of Syria. Makhool said that Rija was chief of the people of Syria. According to Ibne S'ad, he was very learned. He died in 112 A.H.

UMAR BIN ABDUL AZIZ

He was the eighth caliph of the Umayyads. He was born in Medinah and was brought up in Egypt. He reported Ahadees from Anas bin Maalik and many Taaba'een. He was Imam, Faqeeh, Mujtahid, Muhaddis, Hafiz, and a just ruler like Umar. He died in 101 A.H.

JURISTS OF EGYPT**ABDULLAH BIN 'AMR BINUL AAS**

He put into writing many Ahadees after hearing them from the Holy Prophet. He also studied many books of the People of the Book. The Egyptians gained knowledge from him. He died in 65 A.H.

ABUL KHAIR MARSAD BIN ABDULLAH AL-YAZANI

He reported Ahadees from Abu Ayub Ansari, Abu Basrah Ghifari and Uqbah bin Aamir al-Jehni. He learned Fiqah from him and Abdullah bin Umar. Ibne Yunus says that he was "Mufti" of the people of Egypt in his time. He died in 90 A.H.

YAZID BIN ABI HABIB

He was a freed slave of Al-Azd. He reported Ahadees mostly from the Taaba'een. According to Abu Sa'eed bin Yunus, he was "Mufti" of the people of Egypt. He was the first to spread the knowledge of "Halaal" and "Haraam" and religious knowledge. It is said that he was one of those three whom Umar bin Abdul Aziz had entrusted the responsibility of "Ufta" in Egypt. He died in 128 A.H.

JURISTS OF YEMEN**TA'US BIN KISAAN AL-JUNDI**

He was the son of a captive of war. He heard Ahadees from Zaid bin Sabit, Hazrat 'Aa'isha, Abu Hurairah, and others. He was very learned. Amr bin Dinaar said that he did not see a like of him. Qais bin S'ad said that he was among them like Ibne Sireen among the people of Basra. Zahbi said that he was "Shaikh" and Faqeeh of the people of Yemen. He died in 106 A.H. at Mecca.

WAHB BIN MAMBAH AL-SAN'ANI

He reported Ahadees from Abdullah Ibne Umar, Abdullah Ibne Abbas, Jaabir, and others. He had also studied the books of the People of the Book and had many of their books with him. He was an authentic Taaba'ee and Qazi. He died in 114 A.H.

YAHYA BIN ABI KASEER

He was a freed slave of Tay. He reported Ahadees from Anas bin Maalik, and many Taaba'een. Sho'bah said that he was superior to Zahri in Hadees. Ahmed said that as against Zahri the view of Yahya would be accepted. He died in 129 A.H.

All these scholars worked on their seats for propagation of the knowledge of religion and development of the Fiqah. They used to issue Fatwaas (judicious pronouncements) on religious problems brought to them by the people, and the people used to follow their Fatwaas in their personal as well as social dealings. In this period, however, neither any codification of the Fiqah was made nor any particular School of Fiqah was established. The "Muftees" and Qazees" used to give decisions on basis of Qur'an, Sunnah, Ijma of the Companions, and their own Qiyas.

**FOURTH PERIOD
(101 TO 350 A.H.)**

FIQAH, HADEES, QIR'AT AND TAFSEER

This was the period of the codification of Fiqah and compilation of Ahadees. In this period there came on the scene the scholars of most outstanding caliber, knowledge and understanding who founded prominent Schools of Fiqah and also prepared most authentic compilations of the Ahadees of the Holy Prophet which are taken to be next to the Holy Qur'an in authenticity. Side by side, there also developed the science of "Qir'at" and "Tafseer".

DEVELOPMENT OF "QIR'AT" AND "TAFSEER"

In this period Baghdad (founded by Abu Jafar Mansoor) in Iraq ; Qurtabah in Spain ; Qeerwaan in Africa ; Fistaat in Egypt ; Damascus in Syria ; Kufah and Basra in Iraq ; Marw ; and Neshapur became the chief centers of the Islamic learning and Fiqah. In this period rendering of the Iranian, Roman, and Greek books of learning and knowledge into Arabic gave rise to

the "Ilmul Kalaam" and many prominent Muslim Mutakallimeen came in field in opposition to the Muhaddiseen, but ultimately the latter got the upper hand and the Islamic Faith remained safe from the troubles created by the former. The Muslims became more particular about the study, understanding and memorization of the Holy Qur'an, and many prominent "Qaarees" of the Muslim history, namely, Naafe bin Abi Nu'aim (freed slave of Ja'unah) (d. 167 A.H.) in Medinah ; Abdullah bin Kaseer (freed slave of Amr bin Alqamah) (d. 120 A.H.) in Mecca ; Abu Amr binul Ula al-Mazani (d. 154 A.H.) in Basra ; Abdullah bin Aamir (d. 118 A.H.) in Damascus ; Abu Bakr Aasim bin Abin Najwad (d. 127 A.H.), Hamzah bin Habib-uz-Ziyaat (d. 154 A.H.), and Abu Hasan Ali bin Hamzatul Kasaa'ee (freed slave of Banu Asad) (d. 189 A.H.), in Kufah ; appeared on the scene, wholeheartedly devoted themselves to "Qir'at" of the Holy Qur'an, and gave it the status of a separate science on which books were written.

All these seven "Qaarees" are known as the "Qura-e Sab'ah" in the Islamic history and it is their "Qir'at" (reciting of Qur'an) which is taken to be authentic and is being followed by subsequent "Qaarees".

Some other prominent "Qaarees" of this period were Abu Jafar Yazid binul Qa'qaa al-Madani (d. 130 A.H.), Yaqub bin Ishaq al-Hazrami d. 205 A.H.), Khalaf bin Hishaam al-Bazaar, Muhammad bin Abdur Rahman al-Makki known as Ibne Mahiseen, Yahya bin Mubarak al-Tabreedi, Hasan bin Abil Hasan al-Basri, and A'amash Sulaiman bin Mehr. The "Qir'ats" of the last four are however not taken as "Mutawatir" and as such they are known as "Shaaz."

Side by side to the development of "Qir'at", the learned scholars also gave attention to writing Tafseer (commentaries) of the Holy Qur'an. In this respect Abu Jafar Muhammad bin Jareer Tabari (d. 310 A.H.) took the lead and wrote one of the best commentaries of the Holy Qur'an which is taken to be authentic even today.

COMPILATION OF AHADEES

Another important work of this period was the compilation of Ahadees. Firstly, the Ahadees relating to special topics, e.g., Salaat and Som were put together. In this connection the work of compiling the Ahadees was undertaken by the scholars in various regions, e.g., in Medinah by Imam Maalik (the compiler of Muwatta), in Mecca by Abdul Aziz bin Juraih, in Kufah by Sufyan Suri, in Basra by Hammaad bin Salamah and Sa'eed bin Aroobah, in Waasit by Hasheem bin Bashir, in Syria by Abdur Rahman Auza'ee, in Yemen by Mu'ammam bin Raashid, in Khurasan by Abdullah bin Mubarak, and in Ray by Jareer bin Abdul Hameed. But in these compilations there were also included the sayings of the Companions along with the Ahadees of the Holy Prophet. Later the scholars separated the Ahadees of the Holy Prophet from the sayings of the Companions, and compiled the books known as "Masaaneed", e.g. "Musnad Abdullah bin Musa Kufi", "Musnad Asad bin Musa al-Misri", "Musnad Nu'aim bin Hammaad al-Khazaa'ee", "Musnad Ishaq bin Rahwaya", "Musnad Usman bin Abi Shaibah", and "Musnad Imam Ahmad bin Hambal". They arranged the Ahadees under the names of the Companions from whom they were narrated. Then came the period of the compilation of the "Saha Sitta" which are the most prominent compilations of Ahadees, by Imam Bukhari (d. 256 A.H.), Muslim (d. 261 A.H.), Abu Dawud (d. 275 A.H.), Tirmizi (d. 279 A.H.), Ibne Majah (d. 273 A.H.), and Nasa'ee (d. 303 A.H.). With the compilation of the "Saha Sitta" there also developed a separate science known as "Ilmul Hadees" in which principles for governing the authenticity of the Hadees and its narrators were laid down.

CODIFICATION OF FIQAH

Next important work of this period was the codification of Fiqah. In this period the principles of Fiqah known as the "Usool" were laid down which are necessary for every jurist to follow in juristic deductions. In this respect Imam Yusuf and Imam Muhammad wrote books relating to "Usool", but their books are not available. We, however, have the "Risalah" of

Imam Shaafe'ee which is taken to be the basic and most fundamental book on this subject. In this "Risalah" he explained in detail the sources of Fiqah, viz., Qur'an, Hadees, Naasikh and Mansookh, Ilal-e-Ahadees, Khabar-e-Wahid, Ijma, Qiyas, Ijtihad, Istehsaan, Ikhtilaaf, etc.

Besides this, some differences which arose regarding the authority of Hadees, Qiyas and Istehsaan as sources of Fiqah, conditions governing the Ijma, principles governing the Ehkaam (Commands), etc., were settled ; and technical terms of Farz, Wajib, Sunnat, Mustahab, etc., and so on, were also defined.

THE SUNNI SCHOOLS OF FIQAH

Thus, in short, in this period there was a theoretical and scientific study of the law and religion, and it was in this period that there came into existence the four most prominent Sunni Schools of Fiqah (Islamic Jurisprudence), viz., Hanafiah, Maalikiah, Shaafe'eeyah and Hambaliah, besides some other also, viz., the Schools of Hasan Basari (d. 110 A.H.), Auza'ee ¹ (d. 157 A.H.), Sufyan Suri (d. 161 A.H.), Abu Saur ² (d. 240 or 246 A.H.), Dawud Zaahiri ³ (d. 270 A.H.), and Ibne Jareer Tabari ⁴ (d. 310 A.H.), but they sooner or later became extinct, and there only remained in the field the four Sunni Schools of Abu Hanafiah (d. 150 A.H.), Maalik (d. 179 A.H.), Shaafe'ee (d. 204 A.H.) and Hambal (d. 214 A.H.).

1. Abu Abdur Rahman bin Muhammad al-Auza'ee was born at Ba'labak in 88 A.H. He reported Ahadees from Ata bin Abi Ribah and Zahri. From him many prominent scholars reported the Ahadees. He was also a great scholar of "Adab" and "Insha." In Fiqah he did not like "Qiyas". He was Qazi of Syria and the people of Syria were on his Mazhab. His Mazhab was also introduced in Spain by Banu Umayyah. In the third century Hijri his Mazhab was replaced by the Shaafe'eeyah in Syria and by Maalikiah in Spain. He died in 157 A.H.

2. See the topic "Disciples of Imam Shaafe'ee".

3. See the topic "Disciples of the Iraqi Disciples of Imam Shaafe'ee"

4. Ibid.

THE FOUR PROMINENT SCHOOLS OF FIQAH

In this period Fiqah, as we have it today, was first of all codified by Imam Abu Hanifah with the help of about forty scholars including particularly his prominent pupils Imam Yusuf, Imam Muhammad and Imam Zufar. Abu Hanifah was the first to give prominence to Qiyas or analogical deduction, and therefore his School is known as the School of "Ahlur Raa'e" or "upholders of private Judgment. He also introduced "Istehsaan" which is nearer to the modern doctrine of equity. He also extended the Ijma to all ages. Then Maalik formed his School basing it totally on the Ahadees and the usage of Medinah as maintained by the Companions of the Holy Prophet. His School is therefore called the School of "Ahle Hadees" or "upholders of the Hadees." Accordingly, while the former was mere "rationalist," the latter was mere "traditionalist." Maalik also introduced "Maslehat", i.e. public welfare, as a basis of juristic deduction. He also added "Istidlaal" ¹ as a fifth source of Fiqah. Then came Shaafe'ee who adopted a middle course in between "rationalism" and "traditionalism" by being more strict in accepting the Ahadees than Maalik and less liberal in analogy than Abu Hanifah. In other words he was less traditionalist than Maalik and also equally less rationalist than Abu Hanifah. Thus he maintained a balance of judgment and moderation of views, although his School is also included among those of "Ahle Hadees". He also agreed with Maalik in adopting "Istidlaal" as a fifth source of Fiqah, and rejected Abu Hanifah's "Istehsaan." ² Shaafe'ee's view also got prominence and his School is now next to the Hanafiah. Lastly, Hambal formed his own School. He adhered strictly to the Ahadees. His interpretation of Hadees was literal and unbending, and he allowed a very narrow margin to the doctrines of agreement and analogy. ³

With Imam Hambal, the age of independent jurists came to an end, and the work that has been done since then in developing the law and legal science has been mainly supplementary. ⁴

1. Mukhtasar of Ibne Hajib, Vol. II, p. 282

2. Al-Manqool, pp. 213, 215 and 229

3. Ibid.

4. Muhammadan Jurisprudence, by Abdur Rahim, p. 30.

THE FOUR MOST PROMINENT IMAMS OF FIQAH

Among all jurists of their time as well as their predecessors, only these four i.e. Abu Hanifah, Maalik, Shaafe'ee and Hambal got the prominence. Their views were properly recorded and propagated by their pupils and their successors. They also got patronage of the State, and the laws laid down by them became the laws of the Muslim world, and are being followed by the Muslims for the last over twelve centuries. In fact the principles laid down by them for juristic deductions are based on Qur'an and Sunnah and are of universal application, and although "Ijtihad" in its primary sense (i.e. independent exposition of law) has ceased since their time, but in its secondary sense (i.e. interoperation and application) it has always continued and still continues in that, following the universal principles laid down by them, the jurists of all ages have been issuing Fatwaas on problems arising in day to day life of the Muslims.

THE SHIAH SCHOOLS OF FIQAH

Side by side to the development of the Four prominent Schools of Fiqah of the Ahle Sunnat, the two prominent Schools of the Shiah also developed in this very period. They are known as Zaidiah and Imamiah.

(1) The Zaidiah is known after Zaid bin Ali bin al-Hussain bin Ali bin Abi Talib. He was the second son of Imam Ali bin Husain also known as Zainul Aabidin (d. 92 A.H.).¹ After Imam Zainul Aabidin, when his first son Imam Muhammad Baqar (d. 112 A.H.) was declared as the fifth Imam by the Shiahs, he did not accept his Imamah, and claimed the Imamah for himself. On basis of his claim for Imamah he also stood against Omayyad Caliph Hishaam bin Abdul Malik, and was slain in a fight against him in 122 A.H.

1. The fourth Imam from amongst Ahle Bait.

Zaid was a great scholar and jurist. He wrote the first book on Fiqah which is known as the "Al-Majmoo' " on basis of which he is accepted to be the first Faqeeh. ¹

The Zaidiahs are nearer to the Ahle Sunnat. They do not hold the Imams to be of the rank of the Prophets. They hold that the Imams are also just like other human beings but after the Holy Prophet they are superior to other people. They do not insult the Companions of the Holy Prophet, particularly the first three Caliphs who were accepted as successors to the Holy Prophet by the Ummah in general. They claim to be the followers of Imam Ali bin Hussain known as Zainul Aabidin. ²

Syed Ameer Ali, the famous Shiah scholar of the Sub-Continent, also writes, "in their doctrines they (i.e. the Zaidiahs) closely approach the Ahle Sunnat." ³ On account of this fact, a foreign scholar R. Strothman, in his article, ⁴ says, "we find individual Zaidis appearing with individual Sunnis against other Zaidis and other Sunnis in changing combinations, so that the Zaidi Mazhab in particular is a fifth along side the four (Sunni Mazahib).

According to this School the condition of "Ijtihaad" is necessary for its Imams. There have been a large number of Imams in this System who were "Ahlur Raa'e", most prominent among them were :

1. al-Hasan bin Ali al-Hasan bin Zaid bin Umar bin Ali bin al-Hasan bin Ali. He wrote many books of Fiqah in which the arrangement is like that of the books of Fiqah in general.

1. Tareekh-e-Tafseer Wa Mufasssareen, by Professor Ghulam Ahmad Hareeri
 2. Islami Mazahib, by Shaikh Muhammad Abu Zohra, of Jaame'atul Qahirah, Egypt, p. 79
 3. The Spirit of Islam, p. 321
 4. The article "Az-Zaidiah", p. 651. Note all these references are from "Saadaat-e-Bani Fatimah Aur Imamiaah Maktaba-e-Fikr Taareekhi Nukta-e-Nazar Se", by Syed Tanzeem Hussain (1411 A.H.).

2. al-Hasan bin Zaid bin Muhammad bin Ismail bin al-Hasan bin Zaid bin al-Hasan bin Ali. He wrote in Fiqah the books "Kitab-ul-Jaame" and Kitab-ul-Yayaan". He died in 270 A.H.
3. Qasim bin Ibrahim al-Alvi al-Yarsi. He was author of "Kitab-ul-Ashrabah", and "Kitab-ul-Aimaan wan Nuzoor". The Zaidiah Qasimiyah are known after him.
4. Hadi Yahya bin al-Hasan bin al-Qasim bin Ibrahim. He wrote a very comprehensive book on Fiqah. The Zaidiah Hadiyah are known after him.

(2) The Imamiah, also known as the Asna Ashriah, claim their origin to Imam Abu Abdullah Jafar al-Sadiq. He belonged to the Ahle Bait. He was very learned and truthful and was accordingly known as the al-Sadiq. Malik, Abu Hanifah and many other scholars acquired knowledge from him. The Fiqah-e-Jafariyah¹ owes its existence to him and his father Abu Jafar Muhammad Baqir. The most famous writers of this School were Abun Nasr Muhammad bin Mas'ud al-Ayashi, Abu Ali Muhammad bin Ahmad bin al-Junaid, and Zirarah bin A'ayun. The basic view of this School is that the Imams are "Ma'soom", and Ali is "Wasi" of the Holy Prophet, and that the Holy Prophet gave him knowledge of "Zaahir" and "Batin", and that he gave this knowledge to his successor Imams, and therefore for them the views of Imams are "Nasoos", and that "Ahkaam" cannot be deduced from Ijtihaad or "Raa'e", but only through the Imams, and therefore they do not treat Qiyas and Ijma as sources of Fiqah. They do not believe in Ijma because unless a man is from among the Imams, his view has no importance and also in Qiyas

1. The "Fiqah-e-Ja'fariah" is not strictly a book of Fiqah. It is in fact a collection of the "Fatawaa" (pronouncements on juristic problems) from Imam Baqar, Imam Muhammad Jafar al-Sadiq and Imam Musa Kazim. It is based on (1) Kitab al-Kaafi, by Abu Jafar Kalini (d. 330 A.H.), (2) Kitab Mann Laa Yahzarah-ul-Faqeeh, by Muhammad bin Ali Ibne Babuyah (d. 381 A.H.), (3) Kitab-ul-Istabsaar, by Muhammad bin Hasan Tusi (d. 460 A.H.) and (4) Tehzeeb-ul-Ehkam, by Muhammad bin Hasan Tusi (d. 460 A.H.). It was first compiled in Arabic by Shaikh Abul Qasim Halli and entitled as "Jaame'ul Ja'fari", then it was translated in Persian by Abdul Ghani Ibne Abi Talib and entitled as "Sharaya'ul Islam", and then also translated in Urdu by Syed Aabid Hussain and entitled as "Jaame'ur Rizvi".

because they say that religion cannot be deduced from "Raa'e". They also believe in "Taqiyah", and declare the views of their Imams agreeing with the "Jamhoor" (i.e. Ahle Sunnat) as based on "Taqiyah."

PROMINENT JURISTS OF THE FOURTH PERIOD

1. IMAM ABU HANIFAH (80 to 150 A.H.), founder of the Hanafiah School of Fiqah. We will give a bit detailed account of his life and works in a separate article under chapter 11 "The Four Imams."

DISCIPLES OF ABU HANIFAH

1. ABU YUSUF YAQUB BIN IBRAHIM ANSARI

He was born in 113 A.H. He first reported Ahadees from Hishaam bin Urwah, Abu Ishaq Shaibani, Ata binus Saa'ib, and learned Fiqah from Ibne Abi Laila, and then came to Abu Hanifah and soon became his prominent disciple and helper in the codification of Fiqah. He was the first man to write down books on the Fiqah of Abu Hanifah. He put on record the principles of Fiqah, and spread the Hanafiah Fiqah wide and large. According to Yahya bin Mo'een, he was also "Kaseerur Riwayat" and "Saheehur Riwayat". He died in 183 A.H.

2. MUHAMMAD BIN HASAN BIN FARQAD SHAIBANI

He was born in 132 A.H. at wasit (a place in Iraq). He became a disciple of Abu Hanifah in a very young age but could not learn much from him because of the death of Abu Hanifah. After him he completed his training under the care of Abu Yusuf and soon became a great exponent of the Hanifah School, and through his endeavours and writings the Hanafiah Fiqah spread throughout. Shaafe'ee had also met him and read his books. The dialogues of Muhammad and Shaafe'ee are still available in the form of books. He died in 189 A.H. at Ray.

3. ZUFAR BIN HUZAIL BIN QAIS KUFİ

He was born in 110 A.H. Firstly he was a “Ahle Hadees”, but subsequently he became “Ahlur Raa’e”, and was known as the greatest propounder of Qiyas among the disciples of Abu Hanifah. He always devoted himself to learning and teaching. He died in 158 A.H.

4. HASAN BIN ZIAD LULU’EE KUFİ

He was a freed slave of the Ansar. He first became pupil of Abu Hanifah, then of Abu Yusuf and lastly of Imam Muhammad, and wrote books on the Hanafiah Fiqah. He died in 204 A.H.

Note : In Iraq the Hanafiah Fiqah spread on account of these four prominent pupils of Imam Abu Hanifah. Imam Abu Yusuf and Imam Muhammad in fact made the Hanafiah as the State Mazhab of the Abbasides. But they were not mere “Muqalladeen” or followers of their teacher. They were independent “Mujtahids” and had their own binding opinions. They differed on many issues from Abu Hanifah and also recorded the same with reasons in their books.

DISCIPLES OF THE DISCIPLES OF ABU HANIFAH

1. IBRAHİM BIN RUSTAM MARUZI

He learned Fiqah from Imam Muhammad, and also heard Ahadees from Imam Malik. He wrote on various problems which he heard from Imam Muhammad. He died in 211 A.H.

2. AHMAD BIN HAFS AL-KABIR AL-BUKHARI

He learned Fiqah from Imam Muhammad and wrote his books, including “Mabsoot”.

3. BISHR BIN GHAYAS AL-MARISI

He learned Fiqah from Imam Abu Yusuf. But since he was also a philosopher, he was not liked very much by the people. He has narrated many things from Imam Abu Yusuf. He also held dialogues with Imam Shaafe'ee. He had some of his rare views, one of them being the validity of the flesh of ass for the purpose of eating. The Marisiah are named after him. He died in 228 A.H.

4. BISHR BIN WALEED KINDI

He learned Fiqah from Imam Abu Yusuf, and narrated his books. He was appointed as Qazi of Baghdad in the days of Mo'tasim. He died in 238 A.H.

5. ESA BIN ABAAN BIN SADAQAH QAZI

He learned Fiqah from Imam Muhammad and Hasan. He was a Muhaddis. He died in 221 A.H.

6. MUHAMMAD BIN SAMA'AH TAMIMI

He reported Ahadees from Lais bin S'ad, Imam Abu Yusuf and Imam Muhammad, and learned Fiqah from Imam Abu Yusuf, Imam Muhammad and Hasan bin Ziad, and recorded the "Nawaa-dir-e-Masaa'il" from Imam Muhammad and Imam Abu Yusuf. He was a Qazi of Mamun in Baghdad. He died in 233 A.H.

7. MUHAMMAD BIN SHUJA AL-SALJI

He learned Fiqah from Hasan bin Ziad. He was "Faqeeh" of Iraq in his time. He was author of *Tashee-ul-Aasaar*, *Kitabun Nawaadir*, and *Kitab-ul-Muzaribah*. He died in 267 A.H.

8. ABU SULAIMAN MUSA BIN SULAIMAN AL-JOZAJANI

He learned Fiqah from Imam Muhammad, and wrote the "Masaa'il" of "Usul" and "Amaali."

9. HILAL BIN YAHYA BIN MUSLIM AL-RAA'E AL-BASARI

He learned Fiqah from Imam Abu Yusuf and Imam Zufar. He was known as "Raa'e" on account of his vast knowledge. He wrote a book on "Shuroot" and "Ahkaamul Wakf". He died in 245 A.H.

10. ABU JAFAR AHMED BIN ABI IMRAN.

He learned Fiqah from Muhammad bin Sama'ah. He was a Qazi of Egypt. He was teacher of Abu Jafar Tahawi. He was author of "Hijaj." He died in 280 A.H.

11. AHMAD BIN UMAR BIN AL-SHAHEER BIN-KHASSAAF

He learned Fiqah from his father who was a pupil of Hasan bin Ziad. He was expert of "Fara'iz", Arithmetic, and the Fiqah of Abu Hanifah. He wrote "Kitab-ul-Khiraaj" for Mehdi Billah. He was also the author of "Kitab-ul-Heel", "Kitabul Wasaya", "Kitabush Shuroot", and "Kitab-ul-Waqf". He died in 261 A.H.

12. BAKA BIN QUTAIBAH BIN ASADUL QAZI AL-MISRI

He was born at Basra in 182 A.H. He learned Fiqah from Hilalur Raa'e. He was the greatest Faqeeh of his time. He wrote "Kitabush Shuroot", "Kitab-ul-Mahazir was Sajalaat", "Kitab-ul-Wasaa'iq Wal Ehd." He also wrote a big book in refutation of the book which Imam Shaafe'ee had written in refutation of Imam Abu Hanifah. He died in 290 A.H.

13. QAZI ABU KHAZIM ABDUL HAMID BIN ABDUL AZIZ

He learned Fiqah from Esa bin Abaan and Hilal. He was author of "Kitab-ul-Mahazir Was Sajalaat" "Kitab Aadaab-ul-Qazi", and "Kitab-ul-Fara'iz". He died in 292 A.H.

14. ABU SA'EED BIN AL-HUSSAIN AL-BARDA'EE

He learned Fiqah from Ismail bin Hammad bin Abu Hanifah through his father and grandfather as well as from Imam Muhammad through Musa bin Naseer. He held a dialogue with Dawud Zaahiri. He died in 317 A.H.

15. ABU JAFAR AHMED BIN MUHAMMAD IBNE SALAMAH AZDI TAHAWI

He was born in 230 A.H. He received education first from his maternal uncle Muzni the pupil of Imam Shaafe'ee, and then learned Fiqah from Qazi Abu Jafar Ahmad bin Imran, and then also from Qazi-ul-Quzzaat Abu Khaazim in Syria. He was Imam of "Akhbaar" and "Ahadees" of his time, and was author of many books.

II. IMAM MAALIK BIN ANAS (93-179 A.H.), founder of the Maalikiah School of Fiqah. We will give a bit detailed account of his life and works in a separate article under chapter 11 "The Four Imams."

DISCIPLES OF IMAM MAALIK**(a) (FROM EGYPT)****1. ABU MUHAMMAD ABDULLAH BIN WAHB BIN MUSLIM QARSHI**

He came to Imam Maalik in 148 A.H. and remained with him till his death. He narrated Ahadees from Maalik, Lais bin S'ad, Sufyan bin Uyainah, Sufyan Suri, and learned Fiqah from Maalik and Lais. Maalik used to write him "Faqeeh-e-Misr" and "Abu Muhammad Mufti." He was expert of the Maalikiah Mazhab as well as of "Sunan" and "Aasaar". He, however also narrated from "Za'eef" sources. He died in 197 A.H. in Egypt.

2. ABU ABDULLAH ABDUR RAHMAN BIN AL-QASIM AL-ITQI

He narrated Ahadees from Maalik, Lais, Ibnul Maajishoon, and Muslim bin Khalid. He remained for many years with Imam Maalik and became expert of his Mazhab. Imam Maalik said that Ibne Wahb is "Aalim" and Ibne Qasim is "Faqeeh". According to Yahya bin Yahya, he was the greatest knower of the "Ilm" of Imam Maalik and most reliable as regards his Mazhab. He died in Egypt in 191 A.H.

3. ASH-HAB BIN ABDUL AZIZ AL-QAISI AL-AAMIRI AL-JA'DI

He reported Ahadees from Maalik and Lais, and learned Fiqah from Maalik and other jurists of Medinah and Egypt. Imam Shaafe'ee said that he did not see anybody more Faqeeh than Ash-hab. He died in Egypt in 204 A.H.

4. ABU MUHAMMAD ABDULLAH BIN ABDUL HIKAM BIN A'UN BIN LAIS

He reported Ahadees from Maalik, Lais bin Sa'd, Ibne Uyainah and Abi Lehi'ah. He was an expert of the Mazhab of Maalik. He lived with Shaafe'ee in Egypt and wrote his books for himself and his son. He died in Egypt in 214 A.H.

5. MUHAMMAD BIN ABDULLAH BIN ABDUL HIKAM

He heard Ahadees from his own father, Ibne Wahb, Ash-hab, and Ibne Qasim the disciples of Maalik. He remained in the company of Imam Shaafe'ee and wrote his books. He was very learned in Fiqah and scholars used to come to him from the West and Spain. He died in 268 A.H.

6. ASBAGH BINUL FARAJ AL-UMAVI

He heard Ahadees and learned Fiqah from Ibne Qasim, Ibne Wahb, and Ash-hab. He was among the most revered pupils of Ibne Wahb, and was also his scribe. According to Ibne Mo'een, he was the greatest knower of the Mazhab of Maalik

7. MUHAMMAD BIN IBRAHIM BIN ZIAD AL-ASKANDARI

He was know as Ibnul Mawaaz. He learned Fiqah from Ibnul Majishoon and Ibne Abdul Hikam. He was an authority in Fiqah and Fatwa. He died at Damascus in 269 A.H.

(b) (FROM AFRICA AND SPAIN)

(1) ABU ABDULLAH ZIAD BIN ABDUR RAHMAN AL-QURTABI

He was known as Sabtoon. He heard Muwatta from Imam Maalik. He wrote a book "Sama'e Ziad" after hearing about Fatawaa from Imam Maalik. He reported from many scholars including Lais bin S'ad and Ibne Uyainah. He was the first to introduce Muwatta as Fiqah in Spain. He was known as "Faqeeh-e-Undlus." He died in 193 A.H.

2. ESA BIN DINAAR UNDLUSI

He learned Fiqah from Ibne Qasim. In Spain he was the greatest authority on Fatawaa in his time. Ibne Yameen said that, "he taught to us the Masa'il". Ibne Qasim used to praise and respect him very much. He died in 212 A.H.

3. YAHYA BIN KASEER AL-LAISI

He heard Muwatta of Imam Maalik from Ziad bin Abdur Rahman. He met Imam Maalik in 179 A.H. He learned Fiqah from Ibne Qasim. After Esa bin Dinaar he was the authority on Fatawaa in Spain. Practically he had superiority over Esa bin

Dinar. Ibne Sababah said that Esa bin Dinaar was the "Faqeeh", and Ibne Habib was the "Aalim", and Yahya was the "Aaqil", of Spain. He died in 234 A.H.

4. ABDUL MALIK BIN HABIB BIN SULAIMAN AL-SALAMI

He heard Ahadees from Ibne Maajishoon, Mutrif, Abdullah bin Hikam and Asad bin Musa. On hearing about him, Amir Abdur Rahman bin Abdul Hikam called him to Qurtabah and gave him a seat among the Muftis. He stayed with Yahya bin Yahya and after him became the "Peshwa" in his place. He was Hafiz of the Fiqah of Imam Maalik. He was also an "Adeeb". He was author of "Kitab-ul-Waaziha" and also other books. He died in 238 A.H.

5. ABUL HASAN ALI BIN ZIAD TAUNSI

He heard Ahadees from Maalik and Lais bin S'ad. There was none equal to him in Africa in his time. From him Asad binul Furaat and Sahnoun heard the Ahadees. He reported Muwatta and other books of Imam Maalik. He was teacher of Sahnoun in Fiqah. When the learned ones of Qeerwaan differed on any matter, they used to refer it to him for decision. He died in 183 A.H.

6. ASAD BIN FURAAT

He learned Fiqah from Ali bin Ziad, and heard Muwatta from Imam Maalik. Then he went to Iraq and acquired further knowledge of Fiqah from Abu Yusuf, Muhammad bin Hasan, Asad bin Umar, and other companions of Abu Hanifah. Imam Yusuf himself heard Muwatta from him. He wrote "Mudawwanah." He died in 213 A.H.

7. ABDUS SALAAM BIN SA'EED AL-TANOKHI

He was known as Sahnoun. He was a Syrian. He came to Tunis and acquired knowledge from Ali bin Ziad. Then he came

to Egypt and heard Ahadees from Ibne Qasim and Ibne Wahb. Then he came to Medinah and met the learned ones. Then he came to Africa. According to Abul Arab, he was an authentic Hafiz and Faqeeh. He was appointed as Qazi of Africa in 234 A.H. at the age of 74 years. He did never take any remuneration or allowances for himself if. He died in 240 A.H.

Note : all these were the scholars who saw Imam Maalik, acquired knowledge from him, and popularised his Fiqah in the West.

(c) (FROM OTHER PLACES)

In the East also there were scholars who worked for the Maalikiah School although they had neither seen Imam Maalik nor acquired knowledge from him. Most prominent among them were :

**(1) AHMAD BIN M'DAL BIN GHILAN AL-ABDI
AL-FAQEEH AL-MUTAKALLIM**

He was a pupil of Abdul Malik bin Maajishoon and Muhammad bin Muslimah. He was expert of the Fiqah of Maalik in Iraq and through him the Maalikiah Fiqah spread in the East.

**(2) QAZI ABU ISHAQ ISMAIL BIN ISHAQ BIN ISMAIL
BIN HAMMAAD BIN ZAID**

He was born in Basra and settled in Baghdad where he heard the Ahadees and learned Fiqah from Ibne M'adal, and Hadees from Ibnul Madini. He wrote commentary on the Maalikiah Fiqah and supported it with arguments, and also books on "Uloomul Qur'an", and "Musnad". He also collected Ahadees from Maalik, Sa'eedul Ansari and Ayub Sakhtiani. He was appointed as Qazi in Baghdad, Madayan, Nehr and Anaat, and ultimately also the Qazi-ul-Quzzaat. He died in 282 A.H.

3. ABU MARWAAN ABDUL MALIK BIN ABDUL AZIZ BIN ABDULLAH BIN ABI SALAMAH AL-MAAJISHOON

He was the most prominent pupil of Imam Maalik in Medinah. He was a freed slave of the Banu Tameem. He was a Fiqeeh and throughout acted as a Mufti in Medinah. He learned Fiqah from his own father and Imaam Maalik. He used to hold discussions with Imam Shaafe'ee. Ahmad bin M'adal, Ibne Habib, and many other prominent scholars learned Fiqah from him. He died in 212 A.H.

III. IMAM SHAAFE'EE (150-204 A.H.), founder of the Shaafe'ee School of Fiqah. We will give a bit detailed account of his life and works in a separate article under chapter 11 "The Four Imams."

DISCIPLES OF IMAM SHAAFE'EE (IN IRAQ)

1. ABU SAUR IBRAHIM BIN KHALID BIN AL- YAMAAN AL-KALBI AL-BAGHDADI

He was "Ahlur Raa'e", but when Shaafe'ee came to Baghdad, he acquired knowledge from him. Still he was not a "Muqallid" of Shaafe'ee, because he differed with him on account of "Raa'e". He is, however, included among the "Fuqahaa" of Shaafe'eeyah. He had introduced his own Fiqah but it could not become popular. He differed with the majority in some matters. He died in 240 or 246 A.H.

2. AHMAD BIN HAMBAL

See chapter 11 "The Four Imams."

3. HASAN BIN MUHAMMAD BIN AL-SABAH AL-ZA'FRANI AL-BAGHDADI

He was an authentic narrator of the Old System. He heard Ahadees from Subyan bin Utbah and Shaafe'ee.

Imam Bukhari and other scholars have reported from him. He died in 260 A.H.

4. ABU ALI AL-HUSAIN BIN ALI AL-KIRABISI

He first learned Fiqah according to the Iraqi System and then from Imam Shaafe'ee, and also heard Ahadees from him and other scholars. He was, however, condemned by Imam Hambal on account of the issue of "Khalq-e-Qur'an".

5. AHMAD BIN YAHYA BIN ABDUL AZIZ AL-BAGHDADI AL-MUTAKALLIM

He was among the prominent pupils of Imam Shaafe'ee. Later he became pupil of Ahmad Ibne Abi Dawud and followed his views. He, however, was discarded on account of following the views of the "Mo'tazilah".

DISCIPLES OF THE IRAQI DISCIPLES OF IMAM SHAAFE'EE

1. DAWUD BIN ALI

Abu Sulaiman Dawud bin Ali bin Khalaf al-Asbahani known as Az-Zaahiri was born at Kufah in 202 A.H. He was founder of the Zaahiri School of Fiqah. He acquired knowledge from Abu Saur and Ibne Rahwayah. He was a great follower of Imam Shaafe'ee and wrote two books in his praise. Later he developed his own School of thought claiming to act on the "Zaahiri" or obvious meaning of Qur'an and Sunnah, and having resort to "Ijma" only when nothing comes out from the obvious meaning of Qur'an and Sunnah. He totally gave up the "Qiyas". According to him, every problem has its solution through the general meaning of Qur'an and Sunnah. He wrote many books on Usool and Fiqah including "Kitab Abtaalut Taqleed", "Kitab Abtaalul Qiyas", "Kitab Khabarul Waahid", "Kitab-ul-Khabar al-Mujib Lil Ilm", "Kitab-ul-Hajjah", "Kitab-ul-Khusoos wal Umoom", and "Kitab-ul-Mufassar wal Mujmal". His son Muhammad acquired knowledge from him and followed his

Fiqah. Dawud Zaahir died in 270 A.H. Among his disciples were Abul Hasan Abdullah bin Ahmad bin Muhammad bin al-Muflis (d. 324 A.H) who wrote books on his Fiqah, and Abu Muhammad Ali bin Ahmad bin Sa'eed bin Hazm al-Undlusi (d. 456 A.H.) whose book *al-Muhalli* is very prominent on his Mazhab as well as on Fiqah. The Zaahiri School was totally finished in the 8th century Hijri.

2. ABU USMAN BIN SA'EEDUL ANMAATI

He acquired knowledge from Muzni and Rabee, and through him the books of Imam Shaafe'ee became prominent in Baghdad, Ibne Suraij learned Fiqah from him. He died in 288 A.H.

3. ABUL ABBAS AHMAD BIN UMAR BIN SURAIJ

He heard the Ahadees from Hasan Za'afarani and others, and learned Fiqah from Abu Usman bin Sa'eedul Anmaati. He is preferred over all disciples of Shaafe'ee including Muzni. He was the first to begin the "Manazirah" and taught the ways of discussion. He was author of more than four hundred books. His dialogues with Muhammad the son of Dawud bin Ali Zaahiri are very famous. He died in 306 A.H.

4. ABUL ABBAS AHMAD BIN ABI AHMAD AL-TABARI

He was known as Ibnul Qaas. He learned Fiqh from Ibne Suraij. He was author of "Talkhees", "Miftah" and "Adabul Qazi." He also wrote on "Usool". He died in 335 A.H.

5. ABU JAFAR BIN JAREER AL-TABARI

Abu Jafar Muhammad bin Jareer bin Yazeed Tabari was born in Aamil Tabristan in 224 A.H. He was founder of the Tabari School of Fiqah. He travelled far and wide to acquire the knowledge. He was Hafiz of Qur'an, Expert of the Usool of Sahabah and Taaba'een, and scholar of History. His "Tafseer" (Commentary of Qur'an) and his History are most prominent and

taken to be authentic. He was also author of "Kitab Tehzeebul Aasaar" and "Kitab Ikhtilaaful Fuqahaa." He read the Fiqah of Imam Shaafe'ee from Rabee bin Sulaiman in Egypt, and the Fiqah of Imam Maalik from Yunus bin Abdul Aalaa and Bani Abdul Hikam, and the Fiqah of Ahle Iraq from Abu Muqatil in Ray, and then by his own "Ijtihaad" he developed his own School of thought which he discussed in his books "Latiful Qaul", "Khafeef" and "Kitab-ul-Baseet", etc. His prominent disciples were (1) Ali bin Abdul Aziz bin Muhammad Daulabi who wrote a book in refutation of the disciples of Dawud bin Mughlas, and also a book entitled as "Af'aalun Nabi Sallaho Alaihi Wasallam"; (2) Abu Bakr Muhammad bin Ahmad bin Muhammad bin Abis Salj al-Katib ; (3) Abul Hasan Ahmad bin Yahya al-Munajjim al-Mutakallim, who was the author of "Kitab-ul-Madkhal Ila Mazhabut Tabri Wa Nusrate Mazheb", "Kitab-ul-Ijma Fil Fiqah Ala Mazhab-e-Tabri", and "Kitabur Radd Ala Mukhaalifeen" ; (4) Abu Hasan al-Daqiqi al-Halwani ; and (5) Abul Faraj al-Ma'ani bin Zakaria al-Neharwani, who was expert of the Mazhab and books of Tabri, and wrote many books on the Fiqah of Tabari. Tabari died in 310 A.H.

(IN EGYPT)

1. YUSUS BIN YAHYA AL-BULITI-AL-MISRI

He was most prominent among the Egyptian disciples of Shaafe'ee. He learned Fiqah from Imam Shaafe'ee, and also reported Ahadees from him and Ibne Wahb. He wrote "Mutkhtasar" from the book of Imam Shaafe'ee. Imam Shaafe'ee used to rely on him in respect of Fatwas ; and whenever any matter came to him, he used to refer it to him. He also made him his successor. He popularised the Fiqah of Shaafe'ee in many cities. He died in 231 A.H. while he was under arrest on account of the issue of "Khalq-e-Qur'an" at Baghdad.

2. ABU IBRAHIM ISMAIL BIN YAHYA AL-MUZANI AL-MISRI

He learned Fiqah from Imam Shaafe'ee. He was the one

who wrote those books of Imam Shaafe'ee on which the Shaafe'eeyah Fiqah is based. Many scholars of Iraq, Khurasan and Syria acquired knowledge from him. He died in 264 A.H.

3. RABEE BIN SULAIMAN BIN ABDUL JABBAR AL-MARAADI

He narrated many things from Imam Shaafe'ee. He is also narrator of his books, and his narration is taken to be authentic by the disciples of Shaafe'ee. He died in 270 A.H.

4. HURMALAH BIN YAHYA BIN ABDULLAH AL-TAJIBI

He reported many Ahadees from Ibne Wahb, and learned Fiqah from Imam Shaafe'ee and wrote books on his Fiqah. He died in 243 A.H.

5. YUNUS BIN ABDUL AALAA AL-SADAFI AL-MISRI

He heard Ahadees from Sufyan bin Uyainah and Ibne Wahb, and learned Fiqah from Imam Shaafe'ee, who used to say that he did not see anybody more "Aaqil" than Yunus bin Abdul Aalaa in Egypt. He died in 264 A.H.

6. ABU BAKR MUHAMMAD BIN AHMAD KNOWN AS IBNUL HADAAD

He was Hafiz of Qur'an, Imam of Fiqah and expert of "Lughat". He had extraordinary caliber in juristic deductions. He was author of "Kitab-ul-Bahar" and "Kitab Adabul Quzzaat." He died in 345 A.H.

Note : All these were prominent disciples of Imam Shaafe'ee and through their books and propagation the Shaafe'eeyah Mazhab prevailed.

IV. IMAM AHMAD BIN HAMBAL (164-241 A.H.) – founder of the Hambaliah School of Fiqah. We will give a bit detailed account of his life and works in a separate article under chapter 11 "The Four Imams."

DISCIPLES OF IMAM HAMBAL

1. ABU BAKR AHMAD BIN MUHAMMAD BIN HANI KNOWN AS ASRAM

He wrote a book of Fiqah "Al-Sunan" on the Mazhab of Imam Hambal, and also supported it with the Ahadees.

2. AHMAD BIN MUHAMMAD BINUL HAJJAAJ AL-MARUZI

He wrote a book "Al-Sunan" supporting it with the Ahadees.

3. ISHAQ BIN IBRAHIM KNOWN AS IBNE RAHWAYAH AL-MARUZI

He was a very prominent disciple of Imam Hambal. He wrote a book of Fiqah entitled as "Al-Sunan."

PERIOD OF INDEPENDENT "IJTIHAAD" ENDED

With Abu Hanifah, Malik, Shaafe'ee, Hambal, and their disciples ended the period of independent "Ijtihad" in Fiqah, and definite Schools of Fiqah were established. Prior to this period, Fiqah was restricted only to particular problems which the people felt in their practical day to day life, but in this period, besides dealing with the actual problems, the learned scholars also themselves theoretically visualised large number of problems and laid down the principles to solve them. In this respect the scholars of Iraq played the main role. They even dealt with the problems which arose many years after them as well as also those which may arise in the future. This huge literature of Fiqah is now the record of History which has been safely maintained by the subsequent scholars. After this period started the period of "Taqlaed", i.e. following of the four prominent Imams of Fiqah, and it still continues.

FIFTH PERIOD (351 TO 700 A.H.)

POLITICAL CONDITIONS

In this period although the political conditions of the Islamic State remained seriously disturbed till the end of Abbaside rule over Baghdad, and establishment of the rules of different Sultans in different parts of the State, but this did not cause any disturbance to the advancement of learning and development of Fiqah, and many scholars of great caliber were born particularly in Egypt.

NATURE OF "IJTIHAAD" IN THIS PERIOD

As stated earlier with this period started the age of "Taqleed", i.e. following of the four prominent Imams of Fiqah. In fact "Mujtahids" (those whose juristic deductions are being followed) and "Muqallids" (those who follow the "Mujtahids") always existed side by side, but with this period the age of "Mujtahids" ended, and the Ulama as well as the common people both started relying upon what the former "Mujtahids" had laid down. The "Ijtihad" by the scholars, however, continued firstly, in the sense that while deciding about any matter they used to draw the authority from the former jurists and in this respect also find out the "Asbaab-o-illal" which had been propounded by their predecessors and this was technically known as the "Takhreej", which in other words means the discussion about the "Illat" or cause of any Command. In this respect the Hanafiah scholars played the chief role, because their predecessors had left unexplained the "Illat" of many Commands. On the other hand, the Shaafe'eeyah did not pay much heed to it because their Imam had already propounded the principles. Same was the condition of the Maalikiah and Hambaliah, because they remained away from "Manaazirah". Secondly, in case of differences between the reports by different scholars previous to them, they had also to give preference to one over the other, e.g., the Hanafiah gave preference to the reports of Imam Muhammad over the other disciples of Imam

Abu Hanifah ; and the Shaafe'eeah gave preference to the reports of Rabee bin Sulaiman over the other Shaafe'ee scholars, and the Maalikaah gave preference to the reports of Ibne Qasim over the other Maalikiah scholars. Sometimes preference was also given to one report over the other of one and the same Imam, or the reports of the Imam over his disciples. Such preference was given on basis of the basic principles of Usool and Fiqah as well as the fundamental sources, viz., Qur'an, Hadees and Qiyas. Thirdly, each scholar supported his own Imam by praising him as well as giving preference to the view of his School.

PRACTICE OF "MANAAZIRAH"

In this period there also developed the practice of "Manaazirah", i.e., discussions between the scholars on any problem of Fiqah. In fact "Manaazirah" was also extant in the days of Imam Shaafe'ee and he himself held "Manaazirah" with Imam Muhammad, but it was restricted only to the extent of finding out the correct view in respect of any problem, and in doing so the scholars were always ready to change their view and accept the correct view of the other. But now the "Manaazirah" took the form of literary combats between the scholars the main purpose of which was to gain superiority over the other. In other words, the real spirit of "Manaazirah" for the purpose of arriving at, and accepting with open mind, the correct view, was not maintained.

THIRD SCHOOL OF THE SHIAH

In this period there also developed the third School of the Shiah viz., the Ismailiah in Egypt and its neighbouring places. This School is named after the name of Ismail bin Jafar al-Sadiq. It may be noted that while after the death of Imam Jafar al-Sadiq, the Shiahs in general accepted the Imamah of his son Musa Kazim, a group of them did not agree to it and made his another son Ismail as their Imam, and thus there came into existence the third School of the Shiah, in addition to the Zaidiah and Imamiah or Asna Ash'ariah. All these three Schools are different to each other but the basic view of "Itrat" is common

to them and holds them together. When Mu'izzuddin –ullah came to Cairi, he also brought with him a Faaqeeh of Ismailiah and made him the Qazi-ul-Quzzaat of Egypt who used to decide between the people according to Ismailiah Fiqah. The Ismailiah scholars also used to teach in the "Jaam'atul Azhar" and also wrote books of this Fiqah. But they could not supercede the Maalikiah and Shaafe'eeyah which were already extant. Ultimately Abu Ahmad binul Afzal the minister of Mustansar appointed four Qazis in Egypt, one Ismaili, one Imami, one Maaliki and one Shaafe'ee in 525 A.H. When the Ismaili rule became weak, in 547 A.H. Abul Ma'ali Mujalli bin Jaamee al-Shaafe'ee was appointed as the Qazi-ul-Quzzaat. Later when Salahuddin became the minister of Aazid, he removed Qazi Jalaluddin bin Hibbatullah bin Kamil Suwari and thus finished the sign of Ismailiah, and in 566 A.H. appointed Sadruddin Abdul Malik bin Daryaas al-Kurdi al-Shaafe'ee as the Qazi-ul-Quzzaat. Thus the Ismailiah School was ended. In fact the people at large never accepted it. They rather hated it and took it as the sign of "Kufir" and "Alhaad."

TA'ASSUB (PARTY SPIRIT)

In this period, on account of the spirit of upholding the view of their own Imam as against that of the others, there also developed "Ta'aasub" (party spirit) between the scholars. In the days of the four Imams, such a spirit did never exist, and even though Imam Shaafe'ee differed with Imam Abu Hanifah yet he also used to say it openly that "people have to deponed upon Imam Abu Hanifah in Fiqah", and even though in the "Manaazirah" he was an opponent of Imam Muhammad yet he also always praised him very much. Similarly, although Imam Hambal was a disciple of Imam Shaafe'ee yet Imam Shaafe'ee asked him to tell him a correct Hadees whenever it comes to his knowledge. Imam Shaafe'ee differed from Maalik in Fiqah but still he used to say that "Imam Maalik is a shining star." All this shows that among those scholars there was never any "Ta'aasub", and they always open-heartedly praised, appreciated and accepted the correct views of their opponents. But in the present period the "Ta'aasub" increased so much that the scholars went to the

extent of rightly or wrongly condemning their opponents merely with a view to uphold the superiority of their views over those of the others. In this respect the instance of Ibne Hazm Undlusi and his books “Kitab-ul-Ehkaam Le Usoolul Ehkaam” and “Al-Muhalli” may be cited.

JURISTS OF THE FIFTH PERIOD

The prominent jurists of this period who are thought to be the completers of the work of their Imams because they discussed and found out the “Asbaab-o-Ilal” of the “Ehkaam”, discussed the differing reports and gave preference to one or the other, and issued fatwaas on the problems which came before them by their own Qiyas on basis of the views of their Imams, are as follows :

(a) HANAFIAH

1. ABUL HASAN UBAIDULLAH BIN AL-HASAN AL-KARKHI

He was chief of the Hanafiah in Iraq. He was author of “Mukhtasar” and commentaries on “Jaame’-as-Sagheer” and “Jaame’-al-Kabir” of Imam Muhammad. He was a great Faqeeh of his time and was included among the “Mujtahideen Fil Masa’il”. He died in 340 A.H.

2. ABU BAKR AHMAD BIN ALI AR-RAZI AL-JASSAAS

He was a pupil of Karkhi and became the chief of Hanafiah after him. He wrote one book on “Fiqah” and one on “Aadaab-e-Qazi.” He also wrote commentaries on the “Mukhtasar” of Karkhi and the “Mukhtasar” of Tahawi and “Jaame” of Imam Muhammad. He died in 370 A.H.

3. ABU JAFAR MUHAMMAD BIN ABDULLAH AL-BALKHI AL-HINDWANI

He was known as the “Minor Abu Hanifah”, and was one of the Imams of Balkh. He died at Bukhara in 363 A.H.

4. ABUL LAIS NASR BIN MUHAMMAD AL-SAMARQANDI

He was known as "Imamul Huda." He was a pupil of Hindwani. He was author of "Nawazil", "Al-Uyoon Wal Fatawaa", and "Khazanatul Fiqah". He also wrote a commentary on the "Jaame'-as-Sagheer." He died in 373 A.H.

5. ABU ABDULLAH YUSUF BIN MUHAMMAD AL-JARJANI

He was a pupil of Karkhi. He was author of "Khazanatul Akmal" in six volumes. He also wrote commentaries on "Ziadaat" and "Jaame'-al-Kabir", and "Mukhtasar" of Karkhi. He died in 398. A.H.

6. ABUL HASAN AHMAD BIN MUHAMMAD AL-QUDURI AL-BAGHADADI

He was author of "Mukhtasar" and "Kitabut Tajreed" which deals with the problems on which Abu Hanifah and Shaafe'ee differed. He also wrote a commentary on the "Mikhtasar" of Karkhi. He died in 428 A.H.

7. ABU ZAID UBaidULLAH BIN UMAR AL-DABUSI AL-SAMARQANDI

He was author of "Israar", "Kitabut Taqweem-ud-Daulah", and "Nazm Fil Fatawaa". He was prominent in "Manaazirah" and "Istikhraaj." He died in 430 A.H.

8. ABU ABDULLAH AL-HUSSAIN BIN ALI AS-SAMIRI

He was a very prominent Hanafi Jurist. He died in 436 A.H.

9. ABU BAKR KHAWAHARZADAH MUHAMMAD BIN AL-HUSAIN AL-BUKHARI

He was nephew of Qazi Abu Sabit Muhammad bin Bukhari,

and one of the greatest Ulama of Maa Wara-un-Nahr. He was author of "Mukhtasar," "Tajnees", and "Mabsoot." He died in 433 A.H.

10. SHAMSUL A'IMMAH ABDUL AZIZ BIN AHMAD AL-HALWANI

He was a very prominent scholar and Imam of Bukhara of his time. He was author of "Mabsoot". He died in 448 A.H.

11. SHAMSUL A'IMMAH MUHAMMAD BIN AHMED AL-SARAKHSI

He was a pupil of Halwani, and was known among the "Mujtahideen Fil Masa'il" He was Imam, Allama, Mutakallim, Manaazir, Usuli and Mujtahid. He had given a "Nasihah" to Khaqaan and for this reason was confined in a well, and from the well he dictated the "Mabsoot" to his pupils. He was author of a book on the Usool-e-Fiqah. He also wrote commentaries of the "Kafi" of Haakim Shaheed. He died in the end of fifth century A.H.

12. ABU ABDULLAH MUHAMMAD BIN ALI AL-DAAMAGHANI

He was a pupil of Samiri and Quduri. He was a Qazi of Baghdad. Abut Teeb al-Shaafe'ee used to praise him as having more knowledge about the Shaafe'eeyah Fiqah than many disciples of Shaafe'ee. He used to hold "Manaazirah" with Shaikh Abu Ishaq Shirazi ash-Shaafe'ee. He died in 478 A.H.

13. ALI BIN MUHAMMAD AL-BUZDAWI

He wrote "Mabsoot" in eleven volumes. He also wrote commentaries on "Jaame'-al-Kabir" and "Jaam'-as-Sagheer". He was also author of a book on Usool known as "Kitab-ul-Usool", also known as "Usulul Buzdawi", and another book on Fiqah known as "Ghina-ul-Fuqahaa". He died in 482 A.H.

14. SHAMSUL A'IMMAH BIKR BIN MUHAMMAD

He acquired knowledge from Halwani. He was a great Imam of his time. He died in 512 A.H.

15. ABU ISHAQ IBRAHIM BIN ISMAIL AL SAFAAR

He was teacher of Qazi Khan and was a descendant of great jurists. He died at Bukhara in 574 A.H.

**16. TAHIR BIN AHMAD BIN ABDUR RASHID
AL-BUKHARI**

He was author of "Khulaasatul Fatawaa al-Nisaab". He was the Shaikh of the Hanafiah and among the great "Mujtahideen Fil Masa'il". He also wrote "Khaza'inul Waaqi'at." He died in 542 A.H.

**17. ZAHEERUDDIN ABDUR RASHID BIN ABI HANIFAH
BIN ABDUR RAZZAAQ AL-WALWAALJI**

He was author of the famous "Fatawaa-e-Walwaaljiah." He died after 540 A.H.

18. ABU BAKR BIN MAS'UD BIN AHMAD AL-KASANI

He was author of "Kitab-ul-Bada'e". He also wrote commentary on "Tohfatul Fuqahaa" which was the book of his Shaikah Alauddin Muhammad bin Ahmad al-Samarqandi. He died in 587 A.H.

**19. FAKHRUDDIN HASAN BIN MANSUR AUZ JANDI
AL-FARGHANI KNOWN AS QAZI KHAN**

He was a great Imam. He wrote "Fatawaa", "Waaqi'at", "Amaali", and "Mahazir", and commentaries on "Ziadaat", "Jaame'-as-Sagheer", and also on "Adabul Quzzaat" of Khassaaf. He was among the "Mujtahideen Fil Masa'il." He died in 592 A.H.

20. ALI BIN ABI BIKR BIN ABDUL JALIL AL-FARGHANI AL-MARGHINANI

He was author of "Hidayah", and also "Kitab-ul-Mantaqi", "Nashrul Mazhab", "Tajnees", "Manasikul Hajj", "Mukhtasaratun Nawaazil" and "Kitab-ul-Fara'iz". He was Imam, Faqeeh and Hafiz. He died in 593 A.H.

(b) MAALIKIAH

1. MUHAMMAD BIN YAHYA BIN LABABATUL UNDLUSI

He was a great Hafiz and expert of Fiqah. He was author of many books including "Muntakhibah" and "Kitab-ul-Wasaa'iq". He died in 336 A.H.

2. ABU BAKR BINUL ULA AL-QASHAIRI

He was of Basra, but settled in Egypt. He acquired knowledge of Fiqah from the disciples of Qazi Ismail, and wrote many books including "Kitab-ul-Ehkaam" which is a precis of the book of Ismail bin Ishaq and an addition to it, "Kitabur Radd Alal Muzni", "Kitab Usool-e-Fiqah" and "Kitab-ul-Qiyas." He died in 344 A.H.

3. ABU ISHAQ MUHAMMAD BIN AL-QASIM BIN SHA'BAAN AL-'ANSI

He was chief of the Maalikiah scholars of his time. In his books there are rare views of Maalik which were not common among the disciples of Imam Maalik. He wrote "Kitabuz Zaahi al-Sha'baani." He died in 355 A.H.

4. MUHAMMAD BIN HARIS BIN ASAD AL-KHASHNI

He first acquired knowledge of Fiqah in Qeerwaan, then he came to Spain and acquired knowledge from Spanish scholars, and then settled in Qurtabah. He was Hafiz, expert of Fiqah, and good in Qiyas. He wrote on agreement and disagreement in the

Maalikiah Fiqah, and also on that view of Imam Maalik with which his disciples differed. He was also author of "Kitab-ul-Fitya." He died in 361 A.H.

5. ABU BAKR MUHAMMAD BIN ABDULLAH AL-MU'EETI AL-UNDLUSI

He was Hafiz of Fiqah, and expert of the views of Imam Maalik and his companions. He along with Abu Umar al-Ashbeli wrote the "Kitab-ul-Isti'aab in one hundred volumes at the command of Hakam. He died in 367 A.H.

6. YUSUF BIN UMAR BIN ABDUL BARR

In his time he was the "Shaikh" of the scholars of Spain and a great "Muhaddis". He wrote a commentary on Muwatta, and also "Kitab-ul-Kafi" in Fiqah. He died in 380 A.H

7. ABU MUHAMMAD ABDULLAH BIN ABI ZAID ABDUR RAHMAN AL-NAFAZI AL-QEERWANI

He was the Imam of the Maalikiah in his time. He was an expert of the Fiqah of Maalik and propounder of his views. He had many prominent pupils. People used to come to him from far and wide for acquiring knowledge. He was known as the "Maalikus Sagheer", i.e., the "Minor Maalik." He wrote many books including "Nawaadir", "Az-Ziadaat", "Az-Ziadaat Alal Mudawwinah", "Mukhtasarul Mudawwinah", "Tahzeebul Atbiah", and "Kitabur Risalah". He died in 386 A.H.

8. ABU SA'EED KHALAF BIN ABIL QASIM AL-AZDI KNOWN AS AL-BARAADA'EE

He was a prominent pupil of Abu Muhammad bin Abi Zaid and Qabisi. He was Hafiz. He was author of "Kitabut Tehzeeb Fi Ikhtisaarul Mudawwinah", in which he followed the way of "Ikhtisaar" of Abu Muhammad but proceeded on the pattern of "Mudawwinah", and eliminated from it the additions made by Abu Muhammad. This book was taken as authority in

the West and Spain. He was also suthor of "Kitabut Tamheedul Masa'ilul Mudawwinah" which is on the pattern of "Ikhtisaar" of Abu Muhammad and his "Ziadaat", and also of "Kitab-ul-Waaziha."

9. ABU BAKR MUHAMMAD BIN AL-ABHARI

He acquired knowledge of Fiqah in Baghdad. He wrote books in support of the Fiqah of Maalik as well as in refutation of his opponents. He also wrote commentaries on the "Mukhtasar - Kabeer" and "Sahgeer" of Ibne Abdul Hikam. He was the upholder of the views of Imam Maalik in Iraq in his time. He gave lectures and issued Fatwaas for sixty years in Jaame' Mansoor. He was next to Qazi Ismail among the disciples of Maalik in Iraq. His pupils and followers were more in number than any other scholar. He was also author of "Ar-Radd Alal Muzni", "Kitab-ul-Usool" and "Kitab Ijma-e-Ahle Medinah." After him the Maalikiah Mazhab became weak in Iraq. He died in 395 A.H.

10. ABU ABDULLAH MUHAMMAD BIN ABDULLAH KNOWN AS IBNE ABI ZAMNEEN AL-BERI

He was among the great "Fuqahaa" and "Muhaddiseen." He wrote "Maghrib Fil Mudawwinah", "Kitab al-Muntakhab Fil Ehkaam", and "Kitab-ul-Mazhab". He died in 399 A.H.

11. ABUL HASAN ALI MUHAMMAD BIN KHALAFUL MAGHAAFIRI KNOWN AS IBNUL AL-QAABISI

He was expert in Hadees, Fiqah and Usool. He wrote "Kitab-ul-Munhid Fil Fiqah", "Ehkaamud Dayanatah" and "Kitab Mulkhisul Muwatta." He died in 403 A.H.

12. QAZI ABDUL WAHAB BIN NASR AL-BAGHDADI AL-MAALIKI

He acquired knowledge from prominent pupils of Abhari. He was a good "Manaazir". He came from Baghdad to Egypt

where he was welcomed by the people. He wrote many books including "Kitabun Nasr Le Mazhab Imam Darul Hijra", "Kitab Al-Ma'unah Le Mazhab Aalimul Medinah", "Kitab-ul-Aulah Fi Masa'il-ul-Khilaaf". He also wrote commentaries on the "Risalah" of Ibne Abi Zaid and "Mudawwinah." He died in 422 A.H.

13. ABUL QASIM ABDUR RAHMAN BIN MUHAMMAD AL-HAZRAMI KNOWN AS LABEEDI

He was a great scholar of Africa. He learned Fiqah from Ibne Abi Zaid and Abul Hasan al-Qaabisi. He wrote a volumous book in two hundred or more volumes on the Masa'il of Mudawwinah and its explanation. He also wrote "Ziadaatul Umahaat", and "Nawadirur Riwayaat", and also a book as summary of Mudawwinah known as "al-Mulakhkhas." He died in 440 A.H.

14. ABU BAKR MUHAMMAD BIN ABUDLLAH BIN YUNUS AL-SAQLI

He was Faqeeh, Imam and expert of "Fara'iz". He mostly remained busy in the Jihad. He wrote a book on "Fara'iz". He died in 451 A.H.

15. ABUL WALEED SULAIMAN BIN KHALAF AL-BAAJI

He was a contemporary of Ibne Hazm and held many "Manaazirah" with him. According to Ibne Hazm, there was none equal to him after Qazi Abdul Wahab among the Maalikiah. He wrote many books including "Kitab-ul-Istabqa Fil Sharhe al-Muwatta", and a summary of "Istabqa" known as "Al-Muntaqi", and "Kitabus Siraj Fil Ilmul Hajjaaj", "Kitab Masa'ilul Khilaaf", "Kitabul Muhazzab Fi Ikhtisaarul Mudawwinah", "Kitab Sharhe al-Mudawwinah", and "Kitab-ul-Fusool Fi Ehkaamul Usool." He died in 494 A.H.

**16. ABUL HASAN ALI BIN MUHAMMAD AL-RAB'EE
KNOWN AS LAKHMI QEERWANI**

He was a Fqeeh and scholar. He wrote a big "Ta'leeq" on "Mudawwinah." He died in 498 A.H.

**17. ABUL WALEED MUHAMMAD BIN AHMAD BIN
MUHAMMAD BIN RUSHD AL - QURTABI**

He was chief of the Fuqahaa of his time in Spain and West. He wrote "Kitab-ul-Bayaan Wat Tehseel Lema Fil Mustakhrijah Minat Taujeeh Wa Ta'leel", "Kitab-ul-Muqaddamaat Laa Waa'il Kutubul Mudawwinah". He also wrote summaries of bulky books of Yahya bin Ishaq and "Mushkilul Aasaar" of Tahawi. He died in 520 A.H.

**18. ABU ABDULLAH MUHAMMAD BIN ALI BIN UMAR
AL-TAMIMI AL-MAARIZI AL-SAQLI**

He was Imam of the people of Africa and the West. Among the "Shuyookh" of Africa he was the last research scholar of Fiqah and Ijtihad. He wrote books on Usool and Fiqah. He also wrote commentaries on "Muslim" and the book "As-Saqlain" of Qazi Abdul Wahab, as well as of "Burhan" of Imanul Haramain and named it as "Mehsool Min Burhanul Usool." He died in 536 A.H.

**19. ABU BAKR MUHAMMAD BIN ABDULLAH KNOWN
AS IBNUL ARABI AL-M'AFIRI AL - ASHBELI**

He travelled far and wide and acquired knowledge from many scholars including Imam Ghazali, and finally settled in Spain. He wrote many books including "Kitab Ehkaamul Qur'an", "Kitab-ul-Masaalik Fi Sharhe Muwatta Inam Maalik" and "Kitab-ul-Mehsool Fi Usool-ul-Fiqah." He died in 553 A.H.

20. QAZI ABUL FAZL AYZAZ BIN MUSA BIN AYZAZ AL-YAHSABI AL-SABTI

He was among the disciples of Ibne Rushd. He was Imam of Hadees, Tafseer and Fiqah and Hafiz of the Mazhab of Maalik in his time. He wrote many useful books including "Ikmaalul Mu'allim Fi Sharhe Saheeh Muslim", "Al-Shifa Ba Taa'reef Huqooqul Mustafa Sallalaho Alaihi Wasallam", "Mashaariqul Anwaar Fi Tafseer Ghareebul Muwatta Wal Bukhari Wa Muslim" and "Kitab Tarteedul Madaarik Wa Taqreebul Masaalik Le Maa'anifat E'laam Mazhab-e-Maalik." He died in 541 A.H.

21. ISMAIL BIN MAKKI AL-AUFI

He was a descendant of Hazrat Abdur Rehman bin Auf. In Alexanderiah his family was big and famous in learning. He was author of "Sharhe at-Tehzeeb al-Ma'roof bil Auniah which was in 36 volumes. He died in 581 A.H.

22. MUHAMMAD BIN AHMAD BIN MUHAMMAD BIN AHMAD BIN AHMAD BIN RUSHD KNOWN AS HAFIDAAN

He was next to none in knowledge in Spain. Among the best of his books are "Kitab Bidayatul Mujtahid Wa Nihayatul Muqtasid" on Fiqah and precis of "Mustasfi" on Usool. He died in 595 A.H.

23. ABU MUHAMMAD ABDULLAH BIN NAJM BIN SHASUL JUZAAMI AL-S'ADI

He wrote a good book on the Mazhab of Imam Maalik known as "Al-Jawahirul Saminah Fi Mazhab Aalimul Medinah" on the pattern of the book "Wajeez" of Imam Ghazali which was liked very much by the Maalikiah of Egypt. He died in 610 A.H.

(C) SHAAFE'EEYAH**1. ABU ISHAQ IBRAHIM BIN AHMAD AL-MARUZI**

He was Imam of "Fatwa" and "Tadrees" of his time. He learned Fiqah from Ibne Suraij and after him became the chief in Iraq. He wrote many books including a commentary on Muzni. In his last days he went to Egypt and died there in 340 A.H. and was buried near the grave of Imam Shaafe'ee.

2. ABU AHMAD MUHAMMAD BIN SA'EED ABI AL-QAZI AL-KHAWARAZMI

He learned Fiqah from Abu Bakr al-Seerafi and Abu Ishaq. He wrote "Kitabul Hadi" and "Umdatul Qadimeen" on the Shaafe'ee Fiqah, and also a book "Hidayah" on Usool.

3. ABU BAKR AHMAD BIN ISHAQ AL-ZAB'EE AL-NESHAPURI

He was a great expert of Fiqah and author of "Kitab-ul-Ehkaam." He died in 343 A.H.

4. ABU ALI AL-HUSSAIN BIN AL-HUSSAIN KNOWN AS IBNE ABI HURAIRAH

He was among the "Shuyookh" and "A'immah" of the Shaafe'eeyah. He learned Fiqah from Ibne Suraij and wrote a commentary on the "Mukhtasar." He died in 345 A.H.

5. QAZI ABUS SAA'IB UTBAH BIN UBAIDULLAH BIN MUSA

He was from among the "A'immah" and was the first Shaafe'ee appointed as Qazi-ul-Quzzat in Baghdad. He died in 350 A.H.

6. QAZI ABU HAMID AHMED BIN BISHR AL-MARUZI

He was a pupil of Abu Ishaq. He wrote "Kitab-ul-Jaame" which comprehensively deals with "Usool" and "Fara", and also mentions "Nusoos" and "Wujoooh", and is taken to be the best book among the Shaafe'eeyah. He also wrote commentary on the "Mukhtasar" of Muzni. He died in 362 A.H.

7. MUHAMMAD BIN ISMAIL KNOWN AS AL-QIFAALUL KABEER AL-SHASHI

He was a great Faqeeh among the Shaafe'ee Fuqahaa of Maa Wara-un-Nahr and through him the Shaafe'ee System spread in Maa Wara-un-Nahr. He wrote a book on Fiqah and also a commentary on the "Risalah." He died in 365 A.H.

8. ABU SEHL MUHAMMAD BIN SULAIMAN AL-SA'LUKI

He learned Fiqah from Abu Ishaq Maruzi, then come to Neshapur and devoted to "Dars" and "Fatwa". He died in 369 A.H.

9. ABUL QASIM ABDUL AZIZ BIN ABDULLAH AD-DAARAKI

He learned Fiqah from Abu Ishaq Maruzi and devoted himself to "Dars" in Neshapur, and many "Shuyookh" of Baghdad acquired knowledge from him. He died in 375 A.H.

10. ABUL QASIM ABDUL WAHID BIN AL-HUSSAIN AL-SAMIRI

He was Hafiz of Fiqah and a good writer. Large number of scholars learned from him including Maawardi. He was author of "Al-Afaah Fil Mazhab", "Kitab-ul-Kifayah", and also books on "Qiyas-o-Ilal", "Adabul Mufti Wal Mustaqi," and "Shuroof". He died in 386 A.H.

11. ABU ALI AL-HUSSAIN BIN SHU'AIB AL-SANJI

He was a scholar of Khurasan and the first man to combine the Traditions of Iraq and Khurasan. He was a prominent pupil of Qazi Hussain Qifaal. He wrote "Sharhe Mukhtasar" which was called as "Al-Mazhabul Kabeer" by Imamul Haramain. He also wrote "Talkhees Ibnul Qaas" and a commentary on "Faro' Ibnul Hadaad." He died in 403 A.H.

**12. ABU HAMID AHMAD BIN MUHAMMAD
AL-ASFARA'INI**

He was expert of the Tradition of Iraq in Fiqah. He was Imam and Hafiz. He learned Fiqah from Daariki. According to Quduri, he was greater "Faqeeh" and "Manaazir" than Imam Shaafe'ee. He died in 408 A.H.

**13. ABUL HASAN AHMAD BIN MUHAMMAD AL-ZABI
KNOWN AS IBNE AL-MAHAMILI**

He was a prominent pupil of Abu Hamid. He was author of "Majmoo", "Maqna" and "Lubaab." He died in 415 A.H.

**14. ABDULLAH BIN AHMAD KNOWN AS AL-QIFAALUS
SAGHEER**

He was among the great Fuqahaa of Khurasan. He died in 417 A.H.

**15. ABU ISHAQ IBRAHIM BIN MUHAMMAD
ASFARA'INI**

He was one of the greatest Imams of the Shaafe'eeyah. He wrote a memoirs on Usool. He died in 418 A.H. at Neshapur.

16. ABUT TEEB TAHIR BIN ABDULLAH AL-TABARI

He was a great Imam. The people of Iraq learned from Him. He wrote commentary on Muzni. He was author of many

books. After Qazi Samiri, he was appointed Qazi in Ruba-al-Karkh. He hold "Manaazirah" with Abul Hasan al-Taaliqaani and Quduri. He died in 450 A.H.

17. ABUL HASAN ALI BIN MUHAMMAD AL-MAAWARDI

He learned Fiqah from Samiri in Basra and then went to Abu Hamid al-Asfara'ini and acquired knowledge from him. He also gave lectures in both the places. He was author of "Haawi" and "Iqna" in Fiqah, and also of "Ehkaamus Sultaniah." He died in 450 A.H.

18. ABU AASIM MUHAMMAD BIN AHMAD MAAWARDI

He was a pupil of Abu Ishaq. He was author of "Ziadaat", "Mabsoot", "Hadi", and "Adabul Quzzaat." He died in 458 A.H.

19. ABUL QASIM ABDUR RAHMAN BIN MUHAMMAD AL-FAURANI AL-MARUZI

He was among the prominent pupils of Abu Bakr Qifaal. He was author of "Abaanah" and "Umdah." He was the "Shaikh" of the people of Marv. He died in 461 A.H.

20. ABU ABDULLAH AL-QAZI AL-HUSSAIN AL-MARUZI

He learned Fiqah from Qifaal. He was teacher of Imamul Haramain. He died in 462 A.H.

21. ABU ISHAQ IBRAHIM BIN ALI AL-FEEROZABADI AL-SHIRAZI

He was expert in "Fasahat" and "Manaazirah" and was thought to be a counterpart of Ibne Suraij in "Usool-e-Tafree" of Fiqah and had large number of pupils. He used to hold "Manazirah" with Abu Abdullah al-Daamaghaani al-Hanafi. He was author of "Tambeeh" and "Muhazzab" in Fiqah ; "Nakat" and Lam'a and its commentary in Khilaaf ; "Tabsirah" in Usool-

e-Fiqah ; and “Mulakhkhas” and “Ma’unah” in Jadal. He died in 476 A.H.

22. ABUN NASR ABDUL SAEED BIN MUHAMMAD KNOWN AS IBNUS SABAAGH

He was the first scholar to teach in the Nizamiah Baghdadiyah. He was like Abu Ishaq Shirazi. He was head of the Shaafe’eeyah in Baghdad. He was author of “Shaamil”, “Kaamil”, “’Aadatul Aalim Wa Tareeqis Saalim”, and “Kifayatus Saa’il Wal Fatawaa”. He died in 477 A.H.

23. ABU S’AD ABDUR RAHMAN BIN MAMUN AL-MUTAWALLI

He was author of “Al-Tatimmah” which he had written on the pattern of his Shaikh Farani’s book “Abaanah”. He also wrote a book on “Fara’iz” and another book on “Khilaaf.” He taught in Nizamiah after Shaikh Abu Ishaq. He died in 478 A.H.

24. ABUL MA’ALI ABDUL MALIK BIN ABDULLAH AL-JAWENI KNOWN AS IMAMUL HARAMAIN

He learned Fiqah from his father. He was Imam of Fiqah, Usool and Kalaam in the entire East. He lived in Mecca for four years and got the title of Imamul Haramain. When he returned to Neshapur, Nizamul Mulk established the Madrasah Nizamiah for him. He was author of “Nahaya” in Fiqah, “Burhan” in Usool-e-Fiqah and “Mughisul Khalq” on excellence of the Shaafe’eeyah. According to Subki, there is no other book like the “Nahaya”. He died in 478 A.H.

25. ABUL MAHASIN ABDUL WAHID BIN ISMAIL AR-ROYANI

He was an Imam in Fiqah. He was excellent in “Hifz”. Nizamul Mulk used to respect him very much, and had appointed him as Qazi in Tabristan and Royan. He was author of “Bahr” which was an addition to Maawardi’s book “Haawi”. He was slain in 502 A.H.

26. ABU HAMID MUHAMMAD BIN MUHAMMAD BIN MUHAMMAD AL-GHAZALI

He learned Fiqah from Imamul Haramain. He was expert in Mazhab, Khilaaf, Jadal, Usool-e-Fiqah, Kalaam, Mantaq, Hikmat and Falsafah. Imamul Haramain used to call him an "overflowing river". After the death of Imamul Haramain he went to Baghdad and was appointed as teacher in the Nizamiah. There he wrote "Baseet", "Waseet", "Wajeez" and "Khulasah" on Mazhab ; and "Mustasfi", "Nakhool" and "Hidayatul Hadayah" on Usool-e-Fiqah ; and "Maakhaz" and "Shifa-ul-Ghaleel Fi Masa'ilut Ta'leel" on Khilaafiyat. His books "Ehya-ul-Uloom-ud-Deen" and "Keemya-e-Sa'aadat" are very prominent. He died in 505 A.H.

27. ABU ISHAQ IBRAHIM BIN MANSOOR BIN MUSLIM AL-IRAQI AL-FAQEEHUL MISRI

He was a commentator of "Muhazzab" and Imam and Khateeb of Jaame' Ateeq of Egypt. He had also gone to Iraq and was therefore known as Iraqi. The scholars of Egypt acquired knowledge from him. He died in 596 A.H.

28. ABU S'AD ABDULLAH BIN MUHAMMAD BIN HIB- BATULLAH KNOWN AS IBNE ABI ASROON AL- TAMIMI AL-MUSALI

He learned Fiqah first in Musal and then in Baghdad. Then he taught in Musal and finally settled in Damascus and was appointed there as Qazi-ul-Quzzaat in 573 A.H. He was author of many books including "Safwatul Mazhab Ala Nahayatul Matlab", "Kitab-ul-Intisaar", "Murshid," "Az-Zariah Fi Ma'arifatush Shari'ah", "Taisiar", and "Kitabul Irshaad Fi Nusratul Mazhab" which he could not complete.

29. ABUL QASIM ABDUL KARIM BIN MUHAMMAD AL-QAZWENI AR-RAAFE'EE

He was an expert of "Faro" and Fiqah and a Mujtahid of his time. He wrote a big commentary on "Wajeez" known as "Al-Aziz Fi Sharhe Al-Wajeez" also named as "Fathul Aziz". He

was author of "Muharrar" and commentator of "Musnad-e-Shaafe'ee." He died in 623 A.H.

30. MUHIUDDIN ABU ZAKARIA YAHYA BIN SHARF BIN MARI AN-NAWAWI

He was last of the "Muhaqqaqeen" and was among the most prominent scholars of the Shaafe'eeyah. He wrote "Ar-Rozah" which was a summary of "Sharhe Kabir Raafe'ee."

SIXTH PERIOD (701 A.H. TODATE)

POLITICAL CONDITIONS

In this period the Abbaside rule was finished even from Egypt, and the Usmaniah got control over all the Islamic regions, and the capital shifted from Cairo to Constantinoplo. Side by side, the Europe also took up the torch of learning. All this adversely affected the advancement of learning among the Muslims. The "Ijtihad" in the sense of independent forming of Juristic opinions totally ended and mere "Taqlaed" became the sole purpose of Fiqah.

SET BACK TO THE ADVANCEMENT IN FIQAH

This was the reason that although before passing over of the rule to the Usmaniah (in the 10th century Hijri) we have the names of some prominent scholars e.g., Izzuddin bin Abdus Salam, ¹ Ibnul Hajib, Ibne Daqeeq-ul-Eid, Ibnur Rif'ah, Ibne Taimeeyah, ² Subki, Ibne Subki, Ibne Qayyim ³, Balqeeni, Asnawi, Kamal Ibnul Humaam, Jalaluddin al-Muhalli and Jalaluddin Suyuti, ⁴ but after it there came on the scene no scholar of any prominence to be mentioned. The reason for this was also that the contacts between the scholars themselves on one hand, and that of the scholars with the books of the primitive writers on the other, was not maintained. Further, the writers also

1. (d. 660 A.H.) 2. (d. 728 A.H.) 3. (d. 791 A.H.) 4. (d. 911 A.H.)

started writing on summary basis and in doing so they left over many details, which, though of importance, were having no relevance to the problems at hand. Besides this, such books were written in which large number of problems were put together without explanations which adversely affected the interest of the students of Fiqah and ultimately also the advancement in the knowledge of Fiqah.

TO SUM UP

Thus the history of Fiqah which started with the Legislative Period in the days of the Holy Prophet, passing through the age of Interpretation, Collective Deliberation, and application of the law, by the Companions (Sahaabah) and the Taaba'een, culminated in the formation of the four prominent Schools of Fiqah by Abu Hanifah, Malik, Shaafe'ee, and Hambal, who have been given the status of "Mujtahidoon Fish Shara'" because they only had the absolute and independent power of expounding the Law.

Thereafter came the age of "Mujtahidoon Fil Mazhab" in which the jurists had only the authority to expound the Law according to a particular School. They were actually the first disciples of the jurists of the first rank i.e. the four Imams.

Then there was the age of "Mujtahidoon Fil Mas'il" who were competent only to expound the Law on particular questions which were left unsettled by the jurists of the first and the second ranks but were not competent to oppose them on matters of principles. Among them were Khassaaf, Tahawi, Sarkhasi, Karkhi, Buzdawi, Halwani and Qazi Khan of the Hanafi School.

The last class was further sub-divided into : (1) "Ashaabut Takhreej" i.e. those who occupied themselves in drawing inferences and conclusions from the law laid down by higher authorities and in explaining and illustrating what had been left doubtful or generally applicable. Abu Bakr Razi was a jurist of this class; (2) "Aahaabut Tarjeeh" i.e. those who were competent

to discriminate between two conflicting opinions held by jurists of a higher rank and to pronounce that "this is more correct or better or agreeable to people." Quduri and author of Hidayah belongs to this class; and (3) "Ashaabut Tasheeh" i.e. those who have the authority to say whether a particular version of the law is strong or weak, namely, whether it is a manifest or rare version of the views of the Mujahids of his School. There is a presumption in their favour that they do not embody in their books rejected or weak reports of the law. Sadrush-Shariah (Abu Hanifah the second) and the author of "al-Mukhtaar" (not "Durrul Mukhtaar") (Abdullah Musali) and, according to some, the author of "Kanz" (Hafizuddin Nasafi) fall in this class. ¹

Those who cannot even decide for themselves whether a particular rule of law is strong or weak in authority, they have to accept what the jurists of the above mentioned classes have laid down, and, on any question not dealt with by them, they have to proceed upon the analogy of what has been laid down in similar matters, taking into account the change in the customs and affairs of men, and must adopt a rule which would be most suitable to them in the circumstances of the case and in accordance with their usage. ² The author of "Durrul Mukhtaar" and modern jurists belong to them. ³ This is actually, "Taqleed" and this had begun with the start of the 8th century A.H. During all this period the "Muftis" (jurists) of all the four Schools have been issuing Fatwaas on problems coming to them according to what their predecessors have laid down.

Thus since the start of the 8th century A.H. there has been no new development in the Fiqah of any of the four Schools except that in the 8th century A.H. Ibne Taimeeyah ⁴ (d. 728 A.H.) and in the 12th century A.H. Shaikh Abdul Wahab of

1. Muhammadan Jurisprudence, by Abdur Rahim, pp. 182-184

2. Durrul Mukhtaar Vol. I, p. 57

3. Muhammadan Jurisprudence, by Abdur Rahim, p. 185.

4. who attacked the cult of saints in many of his writings (Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 618

Najd, a follower of Imam Hambal, revived the Hambaliah Mazhab ¹ by making changes in it ² particularly as regards the beliefs on the pretext of eliminating the "Bid'at" (innovations) from the Muslim community. ³ But the main aim of Shaikh Abdul Wahab, as it is clear from his writings and movement, ⁴

1. Falsafah-e-Sharai'at-e-Islam, ibid, p. 68

2. Because, it said, he departed from the Mazhab of Imam Hambal in the following matters :

(1) attendance at public Salaat is obligatory ; (2) smoking of tobacco is forbidden and is to be punished with stripes not exceeding forty, the shaving of the beard and the use of abusive language are to be punished at the Qazi's discretion ; (3) alms (Zakaat) are to be paid on secret profits, such as those of trading, whereas Imam Hambal exacted them only from manifest produce ; (4) the mere utterance of the Islamic creed is not sufficient to make a man believer, so that animals slaughtered by him may be fit for food. Further inquiry must be made into his character (Shorter Encyclopaedia of Islam, ibid, p. 618). S. Zwemer gives one more item, viz., 'they forbid the use of rosary, and count the names of God and their prayers on the knuckles of the hand instead' (The Muhammadan World of Today) (Shorter Encyclopaedia of Islam, ibid, p. 619).

(3) His general aim was to do away with all innovations (Bid'at) which were later than the third century of Islam ; thus the community are able to acknowledge the authority of the four Sunni Law Schools, and the six books of Traditions (Shorter Encyclopaedia of Islam, ibid, p. 618)

(4) His written polemic and that of his followers is almost entirely aimed at the cult of saints, as exhibited in the building of mausoleums, their employment as mosques, and their visitation (Shorter Encyclopaedia of Islam, ibid, p. 618). In this connection, the following of their views are worth noting, viz.,

- (1) all objects of worship other than Allah are false, and all who worship such are deserving of death ;
- (2) the bulk of mankind are not monotheists, since they endeavour to win God's favour by visiting the tombs of saints ; their practice therefore resembles what is recorded in the Qur'an of the Meccan Mushrikeen;
- (3) it is polytheism (Shirk) to introduce the name of a Prophet, saint, or angel, into a prayer ;
- (4) it is Shirk to seek intercession from any but Allah ;
- (5) it is Shirk to make vows to any other being ;
- (6) it involves unbelief (Kufr) to profess knowledge not based on the Qur'an, the Sunnah, or the necessary inferences of the reason ;
- (7) it involves unbelief to interpret the Qur'an by Taaweel ;
- (8) it involves unbelief and hearsay (Ilhaad) to deny Qadr in all acts (Shorter Encyclopaedia of Islam, ibid, p. 618).

was to undermine the high status of the Holy Prophet, the Companions and the "Ahle Tariqat" or the "Aulia Allah" (Muslim Mystics) and wipe out from the hearts of the Muslims the extreme love and respect which they had, and still have, for the Holy Prophet, his Companions and his righteous followers ; and although Shaikh Abdul Wahab got the support of the Aale Saud and his Mazhab was adopted as the State Mazhab of the Saudi Government in Arabia, ¹ and also by some other Governments in the Middle East, yet it was never accepted by the Muslims at large ; ² and when it was introduced in India in 13th century A.H., by Moulvi Syed Ahmed of Bariely (India) (1200 – 1246 A.H.) and further developed by his disciple Moulvi Muhammad Ismail of Delhi (1193 – 1246 A.H.) (writer of "Taqweeyatul Eimaan"), the Ulama of the Ahle Sunnat very seriously opposed it. Allama Fazle Haq Khairabadi wrote "Al-Fatwa Fi Abtaal at-Taghwa" (1240 A.H.) having the confirmation by many prominent pupils of Shah Abdul Aziz Muhaddis of Delhi. Maulana Makhsoosullah bin Shah Rafiuddin (Cousin of Moulvi Muhammad Ismail) wrote "Mo'eed-ul-Eimaan", and his another brother Maulana Muhammad Musa wrote "Hujjatul Amal Fi Isbaatul Heel" in refutation of "Taqweeyatul Eimaan." (Noor-o-Naar, by Professor Dr. Muhammad Mas'ud Ahmad, 1993 Edition, Tehreek Tafheemul Islam, Karachi). Similarly many other scholars including Maulana Ahmad Raza Khan of Bariely (1272 – 1340 A.H.) by

1. Falsafah-e-Shari'at-e-Islam, ibid, p. 68

2. Among his contemporary Ulamas about Forty Ulama wrote in refutation of his views (See "Al-Tawassul Bin Nabi Wa Jehlatul Wahabeen", by Abu Hamid bin Marzooq, Astambol Edition. 1976), his own father was not happy with him, and his real brother Shaikh Sulaiman bin Abdul Wahab wrote a "Risalah" (Al-Sawa'iqul Ilahiah Fir Radd Alal Wahabiah, 1167 A.H.) in which he argumentatively refuted all his views one by one (Noor-o-Naar, ibid, p. 76). Maulana Syed Anwar Shah Kashmiri, the then "Shaikhul Hadees" of the Darul Uloom of Deoban (India) said that, "Muhammad bin Abdul Wahab of Najd was "Kam Fehm" (short of understanding) and "Kam Ilm" (short of knowledge) ("Fazlul Bari", Vol. I , p. 170, by Badre Aalam, Deoband, 1980). Similarly, Allama Abdul Hafeez bin Usman Qari of Taa'if wrote Ibne Abdul Wahab as "Jaahil" (illiterate) and "Ghabi" (Unintelligent) ("Jila'ul Quloob Wa Kashful Kuroob", by Abdul Hafeez bin Usman, Astambol, 1298 A.H.) (Noor-o-Naar, ibid, p. 74).

their writings and lectures proved the Wahabiah cult to be totally against the basic tenets of Islam ; and by their Fatwaas gave new life to the pre-Wahabiah spirit of extreme love and respect for the Holy Prophet, his Companions and the "Aulia Allah" and the overwhelming majority of the Muslims all over the sub-continent most enthusiastically responded to their call. Thus the Ulama not only stopped the Wahabiah movement in the Sub-Continent but in fact gave it a very serious blow with the result that its followers remained of a very negligible number ; and not only the "Ahle Sunnat Wal Jama'at" as a whole, but even the followers of the Deoband School of thought (founded ¹ in 1283 A.H), the "Tablighi Jama'at (founded ² in 1344 A.H.), and the Jama'at -e-Islami (founded ³ in 1351 A.H.), who also aim to eliminate the "Bid'aat" from the Muslim society, rejected the views of the Wahibiah.

As regards Fiqah, the Wahabiah are "Ghair Muqallids" i.e. those who do not follow either of the Four Imams. They even reject the views on which all the four Imams are unanimous, as for example the validity of the Talaq pronounced three times at one and the same time as an irrevocable Talaq, or validity of a Wakf for the benefit principally of the donar's family and posterity. They do not even call themselves Hambaliah although Shaikh Abdul Wahab was originally an Hambali and the Wahbiah movement was actually a development in the Hambali School of Fiqah. They call themselves "Ahle Hadees" and make extensive use of Ahadees but do not accept the interpretation of any Hadees, even though unanimous, by the Four Imams. They accept Qur'an and Sunnah, and also, at least in theory the Ijma ⁴ and Qiyas ⁵ (analogy) as the legitimate sources of Law, but give analogy a very limited scope, and as regards Ijma, on particular questions they consider themselves entitled to hold a view in opposition to the view of the Four Imams ⁶

1. By Maulana Muhammad Qasim Nanotwi (1248 – 1297 A.H.)

2. By Maulana Muhammad Ilyas (1303 – 1363 A.H.)

3. By Syed Abul Aala Maududi (d. 1399 A.H.)

4. Rozatun Nadia (Bolaq Ed.), p. 284, a commentary by Nawab Siddique Hasan on "Durrul Bahiya" by Shaukani of Yemen (d. 1255 A.H.)

5. *ibid*

6. Muhammadan Jurisprudence, by Abdur Rahim, p. 22.

MODERN LEGISLATION

Since the fourteenth century A.H. the governments in many of the Muslim countries, under influence of the West, have started making laws, particularly in respect of Nikah, Talaq, Maintenance, Inheritance, etc., in clear disregard to even the agreed views of the four Imams as well as the opinions of the rightly guided Ulamas. We will deal with this topic in a bit detail in a separate chapter entitled as "Modern Legislation."

CHAPTER 7

SCHOOLS OF FIQAH AND THE MUSLIM WORLD ¹

In the second century Hijri, during the age of Taaba'een, there came on the scene many scholars of Fiqah, particularly Rabi'ab Raa'ee, Abu Hanifah (80 – 150 A.H.), Malik bin Anas (93 – 179 A.H.), Hasan Basari (d. 110 A.H.), Auza'ee (d. 157 A.H.), Sufyan Suri (d. 161 A.H.), Lais bin S'ad and others. They learned the Ahdees and the ways of juristic deductions from the Taaba'een ² and devoted themselves wholeheartedly to the study of Fiqah. On account of their outstanding calibre and knowledge of Fiqah they soon acquired the status of "Imam" i.e. authorities on Fiqah and people started following their pronouncements on religious matters, and ultimately they succeeded in forming their own Schools (Masaalik) of Fiqah.

Side by side, the Ahle Bait ³ scholars Imam Zaid bin Ali bin Hussain ⁴ (d. 122 A.H.), Imam Muhammad Baqar and Imam Abu Abdullah Jafar al-Sadiq (d. 148 A.H.) also developed their Schools of Fiqah basing them totally on the Ahadees narrated by Hazrat Ali and his sons. ⁵

In the third century Hijri two more outstanding scholars of Fiqah came in the field, namely Shaafe'ee (150- 204 A.H.), and Hambal (164 – 241 A.H.). Shaafe'ee was the pupil of Malik bin Anas but while he was in Iraq he developed his own School

1. The details regarding the development of the Schools of Fiqah in the Muslim World have been noted from "Nazrata Taareekhiya Fee Hudoos al-Mazaahibul Faqihayatul Arb'ata Wa Intishaaroha 'Inda Jamhoorul Muslimeen", by Allama Ahmad Temuri Passha, of Egypt Urdu Translation "Islami Dunya Main Fiqahi Mazaahib-e-Arab Ka Farogh", by Meraj Muhammad Baariq, with his permission and with due thanks to him.

2. e.g. in Kufah, Abu Hanifah learned Fiqah from Ibrahim Nakh'ee, Ata, and Hammaad ; and in Medinah, Malik learned Fiqah from Naafe', Muhammad Ibne Shihaab Zahri and Qasim bin Muhammad (Fiqahi Mazaahib-e-Arba Ka Farogh, *ibid*, p. 31.

3. The descendants of Hazrat Ali through Hazrat Fatimah daughter of the Holy Prophet.

4. Ali bin Hussain is also known as Zainul Abideen

5. Fiqahi Mazaahib-e-Arba Ka Farogh, *ibid*, 32.

of Fiqah. Similarly Hambal, a pupil of Shaafe'ee, also developed his own School of Fiqah at Baghdad. Three more scholars who succeeded in forming their own Schools in this century were Abu Saur (d. 240 A.H.), Dawud Zaahiri (d. 270 A.H.) and Ibne Jareer Tabrai (d. 303 A.H.),

Thus during the second and third century Hijri there came into existence the Schools of Abu Hanifah (at Kufah), Maalik (at Medinah), Shaafe'ee (first in Iraq and then in Egypt), Hambal (at Baghdad), Sufyan Suri (at Kufah), Hasan Basri (at Basrah), Auzaa'ee (in Syria and Spain), Ibne Jareer Tabari (at Baghdad), Abu Saur (at Baghdad), Dawud Zaahiri, Imam Zain bin Ali bin Hussain, Imam Abu Abdullah Jafar al-Sadiq, and Abdullah bin Ibaad.

Out of these Schools, the first four got prominence and are still extant. The schools of Sufyan Suri and Hasan Basri did not flourish at all and were soon finished. The Schools of Auzaa'ee finished after the second century Hijri,¹ that of Abu Saur finished after the third century Hijri, and that of Ibne Jareer Tabari finished after the fourth century Hijri.²

The School of Dawud Zaahiri, however, remained in the field upto the eight century Hijri, whereafter it also finished and was never revived. Dawud Zaahiri was a pupil of Shaafe'ee. He restricted the juristic deductions to the "Nasoos" i.e. Qur'an and Sunnah only and gave up "Qiyas" and "Masalehul Mursalah", etc. He is known as "Zahiriah" because it acts upon the "Zahiri" or obvious meaning of Qur'an and Hadees.³ His School was developed after him by Ibne Hazm of Spain who also wrote a book on it, namely "Al-Mohalli", which is still taken to be an important book on Fiqah.⁴

1. Except in Spain where it remained for about two hundred years till the reign of Amir Hishaam bin Abdur Rahman, whereafter it was replaced by the Maalikiyah System (Fiqahi Mazaahib-e-Araba Ka Farogh, *ibid*, p. 92)

2. *ibid*, p. 66

3. "Falsafah-e-Shari'at-e-Islam", *ibid*, p. 72.

4. *ibid*, p. 41

In the fourth century Hijri, Maqdisi, in his book "Ahsanut Taqaseem", included the Zaahiriah in the four prominent Schools of Ahle Sunnat instead of Hambaliah whom he placed among the "Ashaab-e-Hadees."¹ But in the eighth century Hijri, Farhoon, in his book "Al-Deebaajul Mazhab", counted it as the fifth School of Ahle Sunnat.² However, as stated earlier, this School finished after the eight century Hijri, and, as stated by Ibne Khuldoon (d. 808 A.H.) due to the passing away of all of its exponents it was never revived.³

Thus as regards the Schools of Ahle Sunnat, only four of them, namely Hanafiah, Maalikiah, Shaafe'eeyah and Hambaliah remained in the field and are still extant throughout the world. We will shortly deal with them in detail, but let us first deal with the Schools which are extant among the Shiah.

THE SHIAH SCHOOLS OF FIQAH

The School of Zaid⁴ bin Ali bin Hussain, known as the "Zaidiah", is nearer to the Sunni Schools of Fiqah so much so that if the Zaidiah scholars do not get any thing from Zainul Aabidin,⁵ they adopt the view of Abu Hanifah. Its followers are mostly in Yemen and Khurasan.⁶

The School of Abu Abdullah Jafar al-Sadiq,⁷ known as Jafariah, is extant among the Shiahs of Iraq, Iran, Indonesia, Pakistan and India.⁸

1. "Ahsanut Tasaameem", by Maqdisi (Lyden Ed., 1906, p. 37)

2. "Al-Deebaajul Mazhab" (Cairo, 1329-30 A.H.)

3. "Muqaddamah," Ibne Khuldoon (Beiru, 1900 A.H.), pp. 446-447.

4. Zaid bin Ali (d. 122 A.H.). For more details see chapter 6 "History of Fiqah and Fuqahaa".

5. Ali bin Hussain is also known as Zainul Aabidin

6. Fiqhai Mazaahib-e-Arba Ka Farogh, ibid, p. 40

7. Jafar Al-Sadiq (d. 148 A.H.). For more details see chapter 6 "History of Fiqah and Fuqahaa".

8. Fiqahi Mazaahib-e-Araba Ka Farogh, ibid, p. 41.

The School of Abdullah bin Ibaad, ¹ known as the "Ibaadiyah", is based exclusively on Ahadees of the Holy Prophet. The Ibaadiyah differ with the Ahle Sunnat only in respect of the "Faro'at" (side issues). Abdullah bin Ibaad belonged to that group of the "Khawaarij" who did not hold the general Muslims as "Kafir", but simply said that on account of their errors they committed "Kufr-e-Ne'mat" (unthankfulness to the Favours of Allah). His followers who live in the Islands and Nakhlistans, ² however, say that he was a "Taaba'ee" and not a "Khaariji." His School is in a codified form. It also deals with the "Faro'at", and it is said that the Egyptian Law of Inheritance, 1943 is based, among others, on the Ibaadiyah Fiqah ³ also.

The followers of the Ibaadiyah Schools are still present in Libya, Al-Jaza'ir, Tunis, and Zanjibaar. In Ammaan they are in majority. ⁴

THE FOUR PROMINENT SCHOOLS OF AHLE SUNNAT

As also stated earlier, ultimately four Schools of Fiqah got prominence among the Ahle Sunnat who form the overwhelming majority of the Muslim Ummah, and are extant for the last over twelve hundred years in the Muslim world. The first of these Schools is of Hanafiah which is also known as the School of "Ahlur Raa'e" or Rationalists. It took its start in Iraq and Abu Hanifah was its founder. Next to it gained prominence the school of Maalikiah, also known as the School of "Ahle Hadees" or Traditionalists. It was founded by Maalik in Medinah. Reconciling both these, Shaafe'ee laid the foundation of the third School, i.e. the Shaafe'eeyah, first in Iraq and then in Egypt. The fourth one i.e. the Hambaliah was founded by Hambal in Baghdad.

1. Abdullah bin Ibaad () al-Mari at-Tamimi (d. 86 A.H. or 705 A.D.)

2. Here it refers to the "Shraa-e-Azam" (Fiqahi Mazaahib-e-Arba Ka Farogh, ibid, p. 43 , Foot Note)

3. Fiqahi Mazaahib-e-Arba Ka Farogh, ibid, p. 43.

4. ibid, p. 42, Foot Note

HANAFIAH

Hanafiah is the oldest School of Fiqh named against the Kuniyah of its founder (Imam) Abu Hanifah. ¹ Abu Hanifah gave prominence to "Qiyas" in juristic deductions and therefore his School is known as the School of "Ahlur Raa'e" or Rationalists. His School got approval of the masses, and taking start in Kufah it soon prevailed in many other regions of the Muslim world, e.g., Baghdad, Egypt, Persia, Rom, Turkey, Balkh, Bukhara, Farghana, Yemen and India ² (now India, Pakistan, and Bangladesh).

In Northern Africa, for the first time, a Hanafi scholar, namely Abdullah bin Farrooh Abu Muhammad al-Faasi, came and introduced the Hanafiah School of Fiqah. Then when another Hanafi Scholar Asad Binul Faraat Bin Sanaan ³ was appointed as Qazi, this School prevailed very soon and people

1. Imam Abu Hanifah (80-150 A.H.)

2. "Al-Fawa'idul Bahiyah Fi Taraajimul Hanafiah", by Muhammad Abdul Hai al-Kanawi, Qairo, 1324 A.H. (Fiqahi Mazaahib-e-Arab Ka Farogh, *ibid*, pp. 69-70. One reason for swift flourishing of the Hanafiah System, it is said, was that after the appointment of Abu Yusuf as Chief Justice (Qazi-ul-Quzzaat) by Haroon Rashid in 170 A.H. all appointments on the offices of Qazi in the Islamic State were made from amongst the Hanafiah who used to decide the matters according to the Hanafiah System {"Al-Khatatul Maqreziyah" (Bolaq Ed., 1270 A.H.), Vol. II, p. 333, vide Fiqahi Mazaahib-e-Arba, *ibid*, p. 70}. Ibne Hazm has said that two Systems, viz., Hanafiah and Maalikiah from the very beginning flourished under the State patronage – the one in the East and the other in Spain ("Nafhut Teeb Min Gasnul Undlusur Teeb," by Ahmad al-Muqri (Bolaq Ed., 1279 A.H.) ; and "Baghiyatul Multamis Fi Tareekh Rijaal Ahlul Undlus," by Ibne Amiratul Ghabbi, al-Qurtabi (Medrid Ed. 1883,92), p. 497 (*ibid*, 71).

3. Abu Abdullah Asad Binul Faraat was the pupil of Imam Muhammad binul Hasan Shebani (the prominent pupil of Abu Hanifah). He had first gone to Maalik at Medinah and after learning the Fiqah from him, at his advice, he went to Iraq for further study of the subject under the pupilage of Imam Muhammad. Then he went to Egypt and gained further knowledge from well – known Maaliki scholar Abdur Rahman bin Qasim and compiled his first book on Fiqah known as "Al-Asadiyah". Then he went to Qeerwaan and was appointed as the Qazi-ul-Quzzat (Chief Justice) and died there in 213 A.H. ("Ma'alimul Eiman Lil Dabbaagh", Vol. II, p. 2-13 and "Tarteebul Madarik Lil Qazi Ayaz," Vol. II, p. 72 – vide Fiqahi Mazaahib-e-Arba Ka Farogh, *ibid*, pp. 74-77, also the Foot Note on p. 77).

started following it.¹ This School had the upper hand there till Mo'iz bin Baades (d. 451 A.H.) gained power in 407 A.H. and enforced the Maalikiah School² which is still extant among the majority of the people.³

In Egypt, Qazi Ismail bin Al-Yasa⁴ introduced the Hanafiah School when he was appointed Qazi by Mehdi Abbasi in 164 A.H. The Hanafiah School remained extant in Egypt throughout the Abbaside period till the Fatimids gained the power. They were followers of Shiah Ismaili School of Fiqah and therefore they appointed all Qazis of their School, and thus, under their patronage, this School got the upper hand. They, however, did not interfere in religious performances by Ahle Sunnat according to their own Schools.⁵

After some time, however, when their Minister Abu Ali Ahmad binul Afzal deposed the Caliph Al-Hafiz Le-Deenillah and took over the rule himself, he announced his "Imamah" Fiqah and appointed two Qazis from the Shiah, one from the Maalikiah and one from the Shaafe'eeya. Each used to give the

1. "Al-Khatatul Maqreziyah," *ibid*, Vol. II, p. 2 (*ibid*, p. 73)

2. "Al-Kamil Le Ibne Aseer", Vol. IX, p. 95.

3. "Ma'alimul Eiman", *ibid* Vol. IX, p. 3 and 10 and "Safwatul E'tibaar Ba Mustauda-ul-Absaar Wal Aqtaar", by al-Shaikh Muhammad Berum al-Khamis al-Tunisi, Qairo Ed., 1302 - 11 A.).

4. Ismail bin Al-Yasa was a very honest and pious Qazi but since he was in favour of revocation of a trust in certain conditions, he, on complaint of the people, was removed from the office of the Qazi. It is said that in this connection he used to follow the view of Abu Hanifah, although Abu Yusuf and Muhammad and, following them, the majority of the people held the different view. Lais bin S'ad the prominent jurist of Egypt tried to persuade him to change his view but Ismail bin Al-Yasa did not agree and therefore Lais bin Sa'd got his appointment cancelled by the Caliph ("Al-Mirqatul Wafiah Lil Ferozabadi," p. 1417, "Raf'ul Isr Le Ibne Hajar" and "Qazatul Misr Le Ibne Abdul Qadir Al-Tukhi", p. 10, "Maqalatul Kausari Lil Shaikh Muhammad Zahid al-Kausari", Qairo, 1373, pp. 202 - 215 - Fiqahi Mazaahib-e-Arba Ka Farogh, *ibid*, pp. 78 - 79 and also Foot Note on p. 79).

5. "Subhul A'asha Fi Sana'atul Insha", by Ahmadul Qalqashqandi, Bolaq, Ed., 1905 (Fiqahi Mazaahib-e-Arba Ka Farogh, *ibid*, p. 79).

decision according to his own Fiqah and also divide the inheritance accordingly. But when Abu Ali was killed, the previous practice was again restored and only the Ismaili Qazis was appointed. ¹

When Salahuddin Ayyubi established his rule over Egypt, he finished the Shiah Fiqah. His "Sultans" were all Shaafe'ee and therefore they established Shaafe'eeyah and Maalikiah institutions (Madresahs) in different places. But since in Syria Sultan Nooruddin Shaheed was a Hanafi, due to him the Hanafiah School prevailed all over Syria and from there large number of Hanafis and Hanafi jurists came to Egypt. Salahuddin Ayubi, therefore, established an Institution (Madresah) for them in Qairo by the name "Madresah Sayufiah." Thus the Hanafiah School also spread in Egypt, but, it is said that, in the last days of Ayyubi, it got a slight set back. ²

In 641 A.H. Swaleh Najmuddin Ayyub established in Qairo the "Madresah Swalehiah" for the study of all the four Sunni Schools of Fiqah. ³ Thereafter similar institutions were also established in Turkey and Charkasiah, ⁴ and Qazis of all the four Schools were appointed, and in Egypt also the office of Qazi was reserved for the Hanafiah only, and thus the Hanafiah Fiqah became the Law of the State.

As regards the other regions of the then Muslim world, according to Maqdisi, as he writes in his "Ahsanut Taqaseem", in the fourth century Hijri, Hanafiah Fiqah was extant in both the important cities of Yemen, namely San'a and S'sdah. ⁵ The jurists and Qazis of Iraq were also the followers of this School. ⁶

1. "Al-Khatatul Maqreziyah", *ibid*, Vol. II , p. 343. This was on account of the fact that the Ismailiah disliked the Hanafiah System because this System was adopted by the Abbasides who were their opponents in the East (Fiqahi Mazaahib-e-Arba Ka Farogh, *ibid*, p. 81)

2. "Al-Khatatul Maqreziyah", *ibid*, Vol. II , p. 363 (*ibid*)

3. *Ibid*, p. 374, and "Tugfatul Ahbaab" Lil Sakhawi, p. 61 (*ibid*, 81).

4. *Ibid*, p. 272, (*ibid*, 82) 5. "Ahsanut Taqaseem", *ibid*, p. 96 6. *Ibid*, p. 127

Same was the condition in Syria,¹ though in the days of Fatimids, like Egypt, Syria was also governed by the Fatimid Law.²

In the East, Khurasan, Sajistan, and Maa-Wara-un-Nahr were having the Hanafiah Fiqah except a few regions where the Shaafe'ee Fiqah was extant.³ All the people of Jarjaan in Welum, and some people of Tabristan were also the followers of the Hanafiah School.⁴

In Rahaab, majority of the people of Dabeel were Hanafis. In Raan, Arminiah, Azerbaijan, and Tabrez also there were Hanafis but they were not in majority.⁵

In Jibaal, the majority of the people of Ray followed the Hanafiah School.⁶ In Khuzistan also which was previously known as Ahwaz and now it is known as Mahmarah, Hanafiah was extant and there the Hanafi jurists and scholars were in large numbers.⁷

In Persia also the Hanafis were in large majority but among them the Zaahiriah had the upper hand and the Qazis were also appointed from amongst them.⁸ In Sindh also the Hanafiah jurists had the upper hand.⁹ In Bengal all rulers were Hanafis.¹⁰

1. Ibid, pp. 179-180

2. Ibid, p. 202

3. "Ahsanut Taqaseem", ibid, pp. 333-336, and "Mu'ajjamul Baladaan", by Yaqoot, Vol. II, p. 894.

4. Ibid, p. 365

5. Ibid, p. 378

6. Ibid, p. 395. According to Yaqoot, in Ray there were three Systems, viz., Shaafe'ee, Hanafi and Shiah. The first two were in minority while the third one was in majority. Subsequently the first two were finished and only the third remained in the field ("Mu'ajjamul Baladaan", Vol. II, pp. 893-894

7. "Ahsanut Taqaseem", Ibid, p. 415

8. Ibid, p. 439

9. Ibid, p. 481.

10. "Al-Minhalus Saafi Wal Mustaufi B'adul Waafi", by Ibne Tughri Bardi (Qairo, 1375 A.H.), Vol. V, p. 155.

This was the situation in the fourth century Hijri, ¹ but now in the present century, ² in Al – Jaza'ir, Yunis and Trablis (Libya), the Hanafiah are in minority ; in Egypt, the Hanafiah are next to Shaafe'eeyah and Maalikiah, but Hanafiah is the Law of the State ; in Syria, the Hanafiah School has the upper hand ; in Palestine the Hanafiah are in minority ; in Iraq they are in large majority ; the people of Albanaia and Balqan are mostly Hanafi ; in Iran, ³ they are in minority ; in Western Turkistan ⁴ including Bukhara, Khewa and Eastern Turkistan (also known as Chinise Turkistan) they are in majority ; in Qauwqaaz ⁵ and its neighbouring regions, the majority is of the Hanafiah ; in the Sub-continent (i.e. Pakistan, Bangladesh and India), the Hanafis are in huge majority, in Sri Lanka (Ceylon), Philippines, Malaysia, Jawa, Indonesia and Thailand the Hanafis are less in number ; in South America, particularly in Brazil, in Hijaz, Yemen, Adan and Hazramaut the Hanafis are in minority.

The total population of the Muslims all over the world, now, is about 130 Crores out of which the Hanafiah are two-third or about 86.5 Crores. ⁶

1. Fiqahi Mazaahib-e-Arba Ka Farogh, ibid, p. 85

2. Ibid, pp. 127-132

3. In the Southern Iran the Sunnis are in majority in Irani Baluchistan, and in the Northern Iran they are in majority in Azarbaijan and Kurdistan which are near Turkey Foot Note (ibid, p. 132,

4. Western Turkistan includes Qazaqistan, Turkmanistan, Uzbekistan, and Tajakistan etc. (ibid)

5. Qauqaaz or Qafqaas means (auseshia which consists of the regions between the Red Sea and the Caspian Sea, and also includes Daghistan (ibid)

6. Fiqahi Mazaahib-e-Arba Ka Farogh, ibid, p. 131, Foot Note ; Also see "Falsafah-e-Shari'at-e-Islam", ibid, p. 51 which also says that Hanafiah are the two third of the Muslim population of the world.

MAALIKIAH

Maalikiah is named after its founder (Imam) Maalik bin Anas Asbahi.¹ It is next to the Hanafiah. Maalik and its companions are known as the "Ahle Hadees"² because in juristic deductions they totally rely on Ahadees of the Holy Prophet, and not on "Qiyas". They also rely on the "Tradition of Medinah" as the source of Fiqah and that is the basic characteristic of their School.³

Maalikiah School started from Medinah and spread first all over Hijaz, and then in Basrah, Egypt, Africa, Spain, Sicily, Morocco, and Sudan.⁴ It is also got uplift in Baghdad but after the fourth century Hijri became weak in Baghdad and after the fifth century Hijri, also in Basrah. It also prevailed in Qazween⁷ and Abhur (cities of Khurasan) and also in Neshapur. In all these cities there were scholars and teachers of this School. It also reached Persia, and got prominence in Yemen and many cities of Syria.⁵

It is said that once in Medinah itself it lost its prominence but when Ibne Farhoon became Qazi in 793 A.H., he revived it again.⁶

In Egypt it was first introduced by Abdur Raheem bin Khalid bin Yazid bin Yahya Maula Jumh. Subsequently it was Abdur Rahman bin Qasim who made it popular. Thereafter the Maaliki scholars came in large number in Egypt and through their efforts this School prevailed more than the Hanafiah, and at one time the Hanafis were of a negligible number.⁷

1. Maalik bin Anas (93-179 A.H.)

2. Fiqahi Mazaahib-e-Arba Ka Farogh, *ibid*, p. 87

3. "Muqaddamah", Ibne Khuldoon, p. 447

4. "Al-Deebajul Mazhab", *ibid*, p. 12

5. *ibid*,

6. "Neelul Ibtahaaj Ba Tatreezud Deebaaaj" (Wa Huma Zailul Kitab "Ad-Deebaaajul Mazhab"), by Ahmad Baba Al-Tambakti, (Faas Ed., 1317 A.H.), Vol. I, p. 31 ; and "Muqaddamah" Ibne Khuldoon, pp. 446-447.

7. "Al-Khatatul Maqreziyah, *ibid*, Vol. II, p. 334

According to Suyuti, the first man to introduce the Hanafiah Fiqah in Egypt was Usman binul Hikam Juzami,¹ while Hafiz Ibne Hajar Asqalani, on the authority of Ibne Wahb, says that in fact Usman binul Hikam and Abdur Raheem bin Khalid bin Yazid both brought the Maalikiah Fiqah in Egypt.² It appears that since both of them were the pupils of Imam Maalik, they both came together to Egypt and introduced the Maalikiah Fiqah.³

According to Maqrezi, Maalikah as well as Shaafe'eeyah were both extant in Egypt side by side and Qazis were taken from both these Schools till Jauhar the Ismaili conquered Egypt and enforced the Shiah Fiqah and all court decisions were being given according to the Shiah Fiqah and all other Schools of Fiqah were finished.⁴

The Maalikiah School, was, however, revived when Salahuddin Ayyubi got the rule over Egypt. In this period "Madresahs" (Institutions) were establish for the Maalikiah scholars. When Sultan Zahir Babers of Turk Navy appointed Qazis from all the four Schools, Qazis from the Maalikiah were also appointed on permanent basis and they were given the rank next to the Shaafe'eeyah, although in the Ayyubiah period the office of Qazi was chiefly with the Shaafe'eeyah and representatives from other three were only to remain with him. Maalikiah is still extant in Egypt with the Shaafe'eeyah, and is more popular particularly in the upper region of the country.⁵

In Africa, first there were being followed the Ahadees and Sunnah, then the Hanafiah was introduced. Thereafter in 407 A.H. when Mo'iz bin Baades took over the rule, he forced the people to follow the Maalikiah Fiqah and finished all other

1. "Hasanul Muhadirah Fi Akhbaare Misr Wal Qahirah", by Jalaluddin Suyuti (Qairo, 1324 A.H.), Vol. I, p. 132. Juzami died in 163 A.H.

2. "Tehzeebut Tehzeeb" (Hyderabad, Deccan, 1325 A.H.), Vol. VIII, p. 110.

3. "Fiqahi Mazaahib-e-Arba Ka Farogh", *ibid*, p. 89.

4. "Al-Khatatul Maqreziah", *ibid*, Vol. II, p. 334.

5. "Fiqahi Mazaahib-e-Arba Ka Farogh", *ibid*, p. 90.

Schools ¹ Thus this School got prominence in the Northern Africa as well as Morocco, and it is still extant in these regions. ²

In Spain, first there was extant the Auza'ee Fiqah where it was introduced by S'ase'ah bin Salam. It remained extant there till the rein of Amir Hishaam bin Abdur Rahman. ³ After remaining in the field for about two hundred years it was replaced by the Maalikiah School. ⁴ The first scholars of Maalikiah School who came here and worked for this System were Ziad bin Abdur Rahman, Ghazi bin Qais, Qar'aus binul Abbas, and others who were pupils of Imam Maalik. It was accepted by Amir Hishaam bin Abdur Rahman and he asked the people also to follow it. Majority of the people accepted it but those who did not accept it were made to follow it by force. ⁵

According to Zabbi, the Malikiah School prevailed in Spain on account of the efforts of Yahya bin Yahya bin Kaseer Masmudi. Large majority of people learned this School from him. He died in 233 or 234 A.H. ⁶

But Maqrezi in "Al-Khatat" and Ibne Farhoon in "Al-Deebaaj" write that the first man to bring the Maalikiah School in Spain was Zaid bin Abdur Rahman al-Qurtabi. He was known as Shabtoon. He came to Spain prior to Yahya bin Yahya bin

1. "Al-Deebajul Mazhab", *ibid*, 187 ; "Wafiyatul A'ayaan", by Ibne Khalkan, (Bolaq Ed. 1275 to 1299 A.H.), Vol. II, p. 137 ; Al-Kamil Fit Taareekh", by Ibnul Aseer al-Jarzi (Lyden, 1851 - 71 A.D.), Vol. IX, p. 95 ; "Mawasimul Adab Wal Aasaarul Ajam Wal Arab" , by Jafar bin Muhammad al-Shaheer Balbaiti Baa Alvi al-Saqani, (Qairo, 1326 A.H.), Vol. II p. 90.

2. "Al-Aqdus Sameen Fi Taareekh al-Baladul Ameen", by Taqiuddin Muhammad bin Ahmadul Hasani al-Faasi (Makhtootul Khazanatul Taimuriah Ba Daarul Kutub al-Misriah, Raqam 849) (Qairo, 1958 A.D.), Vol. I , p. 135.

3. "Baghiyatul Multamis", *ibid*, p. 311.

4. "Al-Deebajul Mazhab", *ibid*, p. 13.

5. "Neelul Ibtahaaj Ba Tatrizud Deebaaj", *ibid*, p. 191.

6. "Baghiyatul Multamis", *ibid*, p. 496

Kaseer Masmoodi, because Ziad died in 203 or 204 A.H. and according to one view in 199 A.H. ¹

In the reign of Hikam bin Hishaam the Maalikiah School prevailed throughout Spain and other western regions, and all "Fatawaas" were issued on this School. In fact the well-known Maaliki scholars Yahya bin Yahya bin Kaseer Masmudi was in high esteem with Hikam bin Hishaam who used to act on his advice and never go against him in any matter. Even the Qazis were appointed on his recommendations. Thus, just the Hanafiah prevailed in the East on account of Abu Yusuf, in the West the Maalikiah prevailed on account of Yahya bin Yahya. ²

Ibne Khuldoon, however, gives a different reason. According to him, the people of the East and Spain used to go (for Hajj etc) to Hijaz, and since in those days Medinah was the centre of Islamic learning, they gained the "Ilm" or knowledge from the scholars of Medinah, particularly Imaam Maalik and after him from his pupils. Although Iraq had also acquired fame as a centre of "Ilm", but since Iraq was not on their route, they did not go to Iraq and always went to Medinah and followed the Maalikiah School. Actually other Schools could never reach them. Further, by nature the Spanish and Western people were Bedouin and were never inclined towards the urban ways of Iraq, and naturally therefore they liked the Medinite life which was also having the tint of Bedouin way, and for this reason the Maalikiah School also remained free from intricacies of the urban civilization. ³

1. "Al-Khatatul Maqreziyah", *ibid*, Vol. II, p. 333 ; "Al-Deebaajul Mazhab", *ibid*, p. 188. This is mentioned in more detail in "Nafhut Teeb Min Ghusnul Undlus ar-Rateeb", by Ahmadul Muqri (Balaq Ed. , 1279 A.H. and Qairo Ed. 1304 A.H), Vol. I, p. 35 which gives detailed narration as to how Amir Hishaam bin Abdur Rahman, the ruler of Spain, accepted the Maalikiah System and asked the people to give up the System of Auza'ee (*ibid*, Vol. II, p. 799). Also see "Sharhul Uyoon Sharhe Risalah Ibne Zaidoon", by Ibne Nubatul Misri, (Bolaq Ed., 1278 A.H., Egypt Ed., 1321 A.H., and Alexandariah Ed., 1290 A.H.), p. 141.

2. "Al-Khatatul Maqreziyah", *ibid*, Vol. II, p. 33 and 333 ; "Nafhut Teeb", *ibid*, Vol. I, p. 351, Vol. II, p. 719 ; "Baqhiyatul Multamis", *ibid*, p. 496

3. "Muqaddamah" Ibne Khuldoon p. 449. In this connection, Maqdisi's view vide "Ahsanut Taqaseem", pp. 236 and 237 may also be seen.

In Morocco, when in the fifth century Hijri Banu Tashfeen got the rule, he also occupied Spain. When his descendant Ali bin Yusuf bin Tashfeen succeeded him, he gave great respect to the jurists and scholars. He never used to decide anything without the advice of the learned ones and had ordered that all matters should be decided with the advice of at least four Jurists. As a result the Fiqah and literature of Maalikiah became very popular even to the extent that the people gave up thinking about Qur'an, Sunnah and other books.¹

After Banu Tashfeen, in the beginning of sixth century Hijri, when the Muwahideen got the rule, their ruler Abdul Mo'min bin Ali also followed the Maalikiah School and it remained extant in his days also.² It is, however, said that Abdul Mo'min and his son Yusuf had the intention at heart to replace the Maalikiah by the Hanafiah but could not succeed.³ But when his grandson Yaqub bin Yusuf bin Abdul Mo'min succeeded, he openly adopted the Zaahiriah School and thus the Maalikiah was replaced by Zaahiriah in Spain and the Western regions. The Zaahiriah were also known as the Hazmiah after the name of Ibne Hazm who was the most prominent exponent of this School. But in his last days Yaqub appointed Qazis from the Shaafe'eeyah and became inclined towards them.⁴

Marakishi writes that "Fiqah" was finished in the days of Yaqub. He had issued the orders to burn all books of "Fiqah" after separating from them the verses of Qur'an and the Ahadees of the Holy Prophet, and accordingly all books of Fiqah, e.g., "Al-Mudawwenah" of Sahnoun, "Sharhul Mudawwenah" of Ibne Yunus, "Nawadir" and "Mukhtasar" of Ibne Abi Zaid, "At-Tehzeeb" of Al-Barada'ee, and "Waaziha" of Ibne Habib and other like books were put to the flames. After this, Yaqub ordered for collecting the Ahadees of the Holy Prophet and

1. "Al-Mu'ajjab Fi Talkhees Akhbaarul Maghrib", by Abdul Wahid Al-Marakishi (Qairo, 1324 A.H.), pp. 122 and 123.

2. "Al-Kamil Fit Taareekh", *ibid*, Vol, XI, p. 118.

3. "Al-Mu'ajjab Fi Talkhees Akhbaarul Maghrib", *ibid*, p. 203.

4. "Al-Kamil Fit Taareekh", *ibid*, Vol, XI, p. 118.

making their compilations regarding "Salaat", etc., from the Saha Sitta and other books of Hadees, and asked the people to memorise them by heart, and fixed yearly grants, for those who put them to memory, in the form of clothes and cash. ¹

According to Maqdisi, the Maalikiah School was also extant in the fourth century Hijri in Iraq and Ahwaaz, and it spread widely in Egypt and western regions, and had the upper hand in Spain. ²

Now in the present century, the Maalikiah has the upper hand in the Western regions i.e. Morocco, Al-Jaza'ir, Tunis and Trablis (Libya). In Tunus most of the Qazis are from the Maalikiah, out of the two grand Muftis one is Hanafi and one Maaliki and both have the title of "Shaikh-ul-Islam". In "Jame-uz-Zaituniah" (the most famous institution of Tunus) half of the teachers are from the Hanafiah and half from the Maalikiah. In Egypt the Shaafe'eeyah are prominent in the north while in the south the Maalikiah have the upper hand. In Sudan also the Maalikiah is extant. All matters are decided there according to the Maalikiah. In Palestine and Iraq the Maalikiah are next to Hanafiah and Shaafe'eeyah. They are also in Hijaz but next to Shaafe'ee and Hambali. In Ahsaa ³ the Hambaliah and Maalikiah, and in Kuwait the Maalikiah are in majority. ⁴

The total number of the Maalikiah all over the world, as estimated in 1930A.D., was about four and a half crores. ⁵

1. "Al-Mu'ajjab Fi Talkhees Akhbaarul Maghrib", *ibid*, p. 203

2. The followers of Maalikiah are in majority in Morocco, Marintiniah, Tunis, Al-Jaza'ir, and Libya. In Egypt, Sudan, Syria, Lebanon and Hijaz they are in minority. (Fiqahi Mazaahib-e-Arab Ka Farogh, *ibid*, p. 100 (Foot Note))

3. Ahsaa is the name of the eastern coastal area of Saudia Arabia, which is in between Kuwait and Qatr. Previously this was known as "Hajar" and subsequently as "Bahrain" (*ibid*, p. 132)

4. "Fiqahi Mazaahib-e-Arab Ka Farogh", *ibid*, pp. 127-132

5. "Fiqahi Mazaahib-e-Araba Ka Farogh", *ibid*, p. 100 (Foot Note). Also see "Falsafah-e-Shari'at-e-Islam", *ibid*, p. 57 which also gives the total population of the Maalikiah in the world as 4.5 Crores.

SHAAFE'EEYAH

Shaafe'eeyah is named after the surname of its founder (Imam) Muhammad bin al-Shaafe'ee al-Qarshi.¹ It is the third one in the four Schools of Sunni Fiqah. Just like the Maalikiah, its followers are also known as the "Ahle Hadees."² The people of Khurasan particularly meant by "Ahle Hadees" the Shaafe'eeyah.³

According to Ibne Khuldoon, after getting education from Imaam Maalik, Shaafe'ee went to Iraq, met the pupils of Imam Abu Hanifah and got further education from them. Thereafter reconciling the Schools of Hijaz and Iraq developed a new School in which he differed from his teacher Imam Maalik in many matters.⁴

First of all the Shaafe'eeyah School prevailed in Egypt and acquired many followers. Then it got uplift in Iraq and prevailed in Baghdad, then in Syria, Khurasan, Turan and Yemen. It also reached Maa Wara'on Nahar, Persia and Hijaz, then in India, and in the fourth century Hijri it also reached northern Africa and Spain.⁵

When Shaafe'ee came to Egypt, there were extant the Maalikiah and Hanafiah, but after his arrival there also started the Shaafe'eeyah and soon the number of its followers increased. According to Ibne Khuldoon, the number of the followers of Shaafe'ee are more in Egypt than that of other Schools. When the Shiah got the rule over Egypt, the Sunni Fiqah got a serious set back, but when Salahuddin Ayyubi became the ruler, the Shaafe'ee Fiqah was again revived. Shaafe'ee scholars came from Iraq and Syria and worked for the uplift of this School.

1. Imam Shaafe'ee (150-204 A.H.)

2. "Muqaddamah", Ibne Khuldoon, p. 466 ; "Tabqaatus Subki", ibid, Vol. III, p. 285

3. "Tabqaatus Subki" ibid, Vol. III, p. 285.

4. Muqaddamah", Ibne Khuldoon, pp. 447-448

5. "Al-Deebaajul Mazhab", ibid, p. 13 ; "Al-Fawa'idul Bahiyah Fi Tarajimul Hanafiah", ibid, p. 6.

Among them the most prominent scholars were Allama Muhyuddin Nawawi and Allama Izzuddin bin Abdus Salam. Besides them, Allama Ibnur Rif'ah and Allama Taqiuddin bin Daqeequl Eid also played prominent role in Egypt. Allama Taqiuddin Subki and Shaikul Islam Sirajuddin Balqini were also the most prominent scholars of the Shaafe'eeyah.¹

Salahuddin Ayyubi was a Shaafe'ee, and during his rule Shaafe'eeyah was the Law of the State and all Qazis were appointed from this School and therefore this school prevailed in Egypt extensively. After Salahuddin, the Turk rulers, being Shaafe'ee,² also maintained the Shaafe'eeyah School till Zahir Babers started the practice of appointing Qazis from all the four Sunni Schools,³ each one having the authority to decide the matters according to his own School and appoint the deputy or subordinate Qazis and the court clerks. This was however in Qairo and Fistaat only. As regards other places, only the Shaafe'ee Qazi had such an authority. Further, he was also the sole trustee of the properties of the orphans and Auqaaf (trusts), and among the four Qazis, he was the first in rank, then the Maaliki, then the Hanafi and lastly the Hambali.⁴

This practice of judiciary continued in the days of Charkasees. But when the Usmanis took the rule in Egypt, they changed it, finished the practice of appointing Qazis from all the four Schools, and reserved the office of Qazi for the Hanafiah only, because Hanafiah was their State religion, and this continued till the end of their rule. This, however, did not have any adverse effect on the development of the Maalikiah and the Shaafe'eeyah Schools in Egypt which particularly dominated the northern region (Raif) and the southern region (Sa'eed).

1. Muqaddamah", Ibne Khuldoon, pp. 448-449

2. Before Sultan Babers, Sultan Saifuddolah Qatr was also a Hanafi but his period was very short and therefore he could not disturb the State System (Fiqahi Mazaahib-e-Arba Ka Farogh", ibid, p. 105. Foot Note 9).

3. "Subhul A'shi Fi Sana'atul Insha", ibid, Vol. IV, pp. 34-36 and 45.

4. Ibid.

In Egypt the office of the "Shaikhul Azhar" remained reserved for the Shaafe'ees from 1137 to 1287 A.H.,¹ and the "Shaikhul Azhar" was treated to be chief of the Ulama (religious Scholars) of Egypt. In 1287 A.H. the Hanafi scholar Shaikh Muhammad al-Mehdi al-Abbasi was appointed as the "Shaikhul Azhar" and he was also the "Mufti-e-Azam" (the Grand Mufti). Thereafter this office did not remain reserved for any particular School.

In Syria the Fiqah of Auzaa'ee was extant, but when Abu Zar'ah Muhammad bin Usman Damishki Shaafe'ee (d. 301 or 302 A.H) retired from the office of Qazi in Egypt and became the Qazi in Damascus, he introduced the Shaafe'eeyah Fiqah in Syria, and gave decisions according to the Shaafe'eeyah Fiqah. His successor Qazis also followed him.²

Maqdisi has said that in the fourth century Hijri all jurists in Syria were Shaafe'ee. There was neither any Maaliki nor Zaahiri.³

As regards Turkey, Iran and Iraq, it is said that the Shaafe'eeyah System spread in Maa Wara'un Nahr through Muhammad bin Ali bin Ismail al-Qifalul Kabeer al-Shashi (d. 365 A.H).⁴

1. The earliest known "Shaikhul Azhar" was Shaikh Muhammad al-Kharshi (d. 1101 A.H.). He was a Maaliki. After his was Shaikh Ibrahim bin Muhammad al-Barqaawi (d. 1106 A.H.). He was a Shaafe'ee. Then this office remained with the Maalikiah upto 1137 A.H. (Fiqahi Mazaahib-e-Arba Ka Farogh", *ibid*, p. 107, Foot Note 12).

2. "Raf'ul Isr Ann Qazaat-e-Misr", by Ibne Hajar Asqalani (Qairo, 1957), p. 481 ; "Al-E'laan Bil Taubeekh Leman Zamma Ilmut Taareekh", by Shamsuddin al-Shakhawi, (Damascus, 1930 A.D), . p. 128 ; "Al-Sughrul Bissaam Fi Qazat-ush-Shaam Le Ibne Tuloon, p. 66.

3. "Ahsanut Taqaseem", *ibid*,

4. "Tabqaatus Subki - Tabqaatush Shaafa'eeyahatul Kubra", by Tajuddin al-Subki, (Qairo, 1324 A.H.), Vol. II, p. 178 ; "Al-E'laan Bit Taubeekh Leman Zamma Ilmut Taareekh", *ibid*, p. 99

According to Maqdisi, in the fourth century Hijri, in most of the cities of the East. e.g., Koratush Shash, Elaaq, Tus, Nasa and Abyurad, etc., this Fiqah was prevailing throughout, ¹ and in Hirat, Sajistan, Sarkhas, Neshapur and Marw also the same Fiqah was extant but in Hirat, Sajistan and Sarkhas the Shaafe'eeyah and the Hanafiah were deadly against each and other and sometimes there also occurred bloodshed between them for which the Sultan had to interfere.² In Welum the people of Qoms in all, and of Jarjan mostly, and of Tabristan some, were Hanafis. Some people of these regions were Hambali and some Shaafe'ee, but in Bayaar there was none except Shaafe'ee among the "Ahle Hadees". ³ In Aaqoor, including Musal and Aamad, there were both i.e. Hanafi as well as Shaafe'ee, and some Hambali, but in Kirman the Shaafe'eeyah were in majority. ⁴

According to Sakhawi, in Marw and Khurasan, after Ahmad bin Yasaar(d. 268 A.H.), Abdaan bin Muhammad bin Esa al-Maruzi (d. 293 A.H.) developed the Shaafe'eeyah School. ⁵ In Asfara'een, the first man to introduce the Shaafe'eeyah System was Abu Awanah Yaqub bin Ishaq Neshapuri Asfara'eeni (d. 316 A.H.). He was author of "Al-Saheehul Mustakhraj Ala Muslim." ⁶

In Ray, as Yaqut writes, the Shiah were in majority. Next to them were the Hanafis and after them the Shaafe'ee. First the last two joined hands and finished the Shiahs, and then they also became hostile to each other and ultimately the Shaafe'ee, inspite of being in minority, got the upper hand. Thus the Shiah and the Hanafiah were finished and only the Shaafe'eeyah remained in a small vicinity. ⁷ In Saawah (a place

1. "Ehsanut Taqaseem", ibid, p. 323

2. Ibid.

3. Ibid, p. 365

4. Ibid, p. 468

5. "Al-E'laan Bit Taubeskh Leman Zamma Ilmut Taareekh", ibid, p. 128

6. Ibid, p. 129.

7. Mu'ajjamul Baladaan, ibid, Vol. II , pp. 893-894

between Ray and Hamadaan) all people were Shaafe'ee, and in a neighbouring city Aawah all were Shiah Imamiah, and both, being neighbours, used to remain in conflict with each other. ¹

According to Ibne Aseer, in 595 A.H., Sultan Ghiyasuddin bin Saam and some people of Khurasan gave up the Kiramiah Fiqah ² and adopted the Shaafe'eeyah. ³ It is said that the Sultan accepted the Shaafa'eeyah Fiqah at the instance of a Shaafe'ee jurist Shaikh Wajeehuddin Abul Fatha Muhammad bin Mahmood al-Maruzi. He built a mosque for him and established "Madresahs" (institutions) for the Shaafe'eeyah. ⁴

In Baghdad the Hanafiah had the upper hand. When the Shaafa'eeyah was introduced, they both came in conflict with each other. Although the State religion was Hanafiah but when Mutawakkil ⁵ and some other rulers adopted the Shaafa'eeyah, this School also spread, and among those who propagated the Shaafa'eeyah School in Baghdad, the name of Hasan bin Muhammad Za'afarani (d. 260 A.H.) was prominent. ⁶

In Northern Africa, Shaafa'eeyah could not flourish because of the Maalikiah. Maqdisi writes that in his days from Morocco upto Egypt, none knew the Shaafa'eeyah. ⁷ He also writes that the Maalikiah carry ill will against the Shaafa'eeyah,

1. Ibid, Vol. III, p. 24

2. This was introduced by Muhammad bin Kiraam Sajistani (d. 150 A.H.). He had his own ideas about many problems of Fiqah ("Al-Khatataul Maqreziyah", ibid, Vol. II, p. 349) after knowing which Ghayasuddin gave it up and adopted the Shaafe'eeyah System (Fiqahi Mazaahib-e-Arba Ka Farogh", ibid, p. 107, Foot Note 24).

3. "Al_Kamil Fit Taareekh" ibid, Vol. XII, pp. 64-65.

4. ibid.

5. "Mahaziratul Awa'il Wa Masamiratul Awakhir", by Ali Dada al-Saktawari al-Boosanawi (Bolaq Ed., 133 A.H.; Qairo Ed. 1311 A.H.

6. Tabqatus Subki", ibid, Vol. I, pp. 250-251

7. "Ahsanat Taqaseem", ibid, p. 236

because they say that Shaafa'ee learnt the Fiqah from Imam Maalik and then differed from him. ¹ He says that in Qeerwaan the Maaliki and Hanafi exist and are very cordial to each other. ² In Spain, he says, only the Maalikhah exist, and, if they find any body from Hanafiah or Shaafa'eeyah, they exile him from the country. ³ But when Yaqub bin Yusuf bin Abdul Mo'min, as also previously stated, succeeded the rule, he adopted the Zaahiriah School and gave up the Maalikhah. However, in his last days he became inclined towards the Shaafa'eeyah and appointed Shaafe'ee Qazis in some of his cities. ⁴

In the present century, in the Northern Egypt (Raif) the Shaafe'eeyah are in majority, in Syria one-fourth of the population is Shaafe'ee, in Palestine the Shaafe'eeyah are in majority, in Iraq the Shaafa'eeyah are next to the Hanafiah, majority of the Kurds is Shaafe'ee and same is the case in Arminiah, in Iran majority of the Sunnis is Shaafe'ee, in Afghasitan, West Turkistan (i.e. Qazistan, Turkmanistan, Uzbekistan, Tajikistan, etc.), including Bukhara and Khiwa, Qeuqeez or Caucashia, Pakistan, Bangladesh and India, the Shaafe'eeyah are in minority, in Sri Lanka, Philippines, Malaysia, Jawa and other Islands of Indonesia, Waitnam, Lawus Combodia, Australia and Thailand the Sunnis are Shaafe'ee, in Hijaz the people of Aseer, ⁵ Yemen, Adan and Hazramaut, the Sunnis are Shaafe'ee, in Ammaan the Shaafa'ee are very few.

The total number of Shaafa'eeyah all over the world, as estimated in 1930 A.D., was about then corores. ⁶

1. Ibid.

2. Ibid.

3. Ibid.

4. Ibid.

5. Aseer is a Hilly place in the coastal area between Hijaz and Yemen. (Fiqahi Mazaahib-e-Arba Ka Farogh", ibid, p. 132, (Foot Note 10). Also see pp. 127 to 132.)

6. "Fiqahi Mazaahib-e-Arba Ka Farogh", ibid, p. 116, Foot Note 36 ; "Falsafah-e- Shari'at-e-Islam," ibid, p. 63

HAMBALIAH

Hambaliah School is named after its founder (Imam) Ahmad bin Hambal Shaibani.¹ He was the most prominent pupil of Imam Shaafe'ee. Hambaliah is the fourth and the last of the four prominent Schools of Fiqah. It took its start in Baghdad and then spread in other places also but as against the earlier three this School received the least response.²

According to Ibne Farhoon, this School started from Baghdad, spread in many cities of Syria, but then in the eighth century Hijri it became weak.³ Ibne Khuldoon says that the followers of Hambal are the least in number, because he does not believe in "Ijtihaad" and relies only on those Ahadees which confirm and support each other. The Hambaliah are mostly in Syria and Iraq, particularly near about Baghdad. As against others, they are more particular about the Ahadees of the Holy Prophet and remain busy in their narration.⁴

According to Suyuti, the Hambaliah came in Egypt in the seventh century Hijri. The first man to introduce it in Egypt, after the decline of the Fatimids, was the author of "Umdatul Ehkaam" Hafiz Abdul Ghani Maqdisi (d. 600 A.H.).⁵ Maqrezi says that this School got the uplift in Egypt in the last days of the Ayyubi period.⁶ Then it got prominence through Qazi Abdullah bin Muhammad bin Muhammad Abdul Malik al-Hijawi who was appointed as Qazi on the Hambaliah seat in 738 A.H. and died in 769 A.H.⁷

-1. Imam Ahmad bin Hambal (164-241 A.H.)

2. "Al-Fawa'idul Bahiyah Fi Taraajimul Hanafiah", *ibid*, p. 6.

3. "Al-Deebajul Mazhab", *ibid*, p. 13

4. "Muqaddamah", Ibne Khuldoon, p. 448

5. "Hasanul Mahazirah Fi Akhbaar-e-Misir Wal Qahira", by Jalaluddin Suyuti (Qairo, 1299 A.H., 1321 A.H., 1324 A.H.) ; "Hilbatul Kamiyat", by Shamsuddin Muhammad al-Nawaji, (Bolaq Ed., 1276, Qairo Ed., 1299 A.H.), Vol. I, p. 222

6. "Al-Khatatul Maqreziyah", *ibid*, Vol. II, p. 343.

7. "Al-Subulul Wabilah Ala Zara'ehul Hanabilah", by Muhammad bin Hamidul Makki, p. 100.

Maqdisi says that the Hanabilah School existed in the fourth century Hijri in Basrah, Aaqoor (Musal Waragah), Welum (Caspian Sea – southern coastal area), Rahaab (Azarbiajan and Arminiah), and Soes (city of Khezistan), and Shiah and this School had the upper hand in Baghdad. ¹ In Egypt, along with others, this School was also present in one vicinity. ²

The followers of Hambaliah were always less in number. It had never prevailed as against the other Schools in any place. ³ At present, in Egypt it is rare, in Syria the Hambaliah are one-fourth, in Palestine they are next to the Shaafe'eeyah who are in majority, in Iraq and Afghanistan they are the least, in Najd (Hijaz) ⁴ they are dominant, in Ammaan also they are present and in Ahsa they and the Maalikiah are in majority. ⁵

The total number of the Hambaliah all over the world, as estimated in 1930, was between thirty to forty lacs. ⁶

1. "Ahsanut Taqaseem", *ibid*, pp. 112, 113, 126, 280, 291, 318 (Beirut Ed. 1987)

2. *Ibid*, p. 172

3. "Fiqahi Mazaahib-e-Arba Ka Farogh", *ibid*, p. 120-121

4. This System was revived first by Ibne Taimiah and his pupil Ibne Qayyim in the eight century Hijri, and then by Shaikh Muhammad bin Abdul Wahab of Najd (Hijaz) in the 12th century Hijri. He got the support of King Abdul Aziz Aale Saud, the founder of the Saudi Kingdom in Arabia and therefore it prevailed and became the official System of the Saudi Kingdom. It also exists in Palestine, Syria and Iraq (*ibid*, p. 121, Foot Note 10).

5. *Ibid*, pp. 127 – 132.

6. *Ibid*, p. 121, Foot Note 10. Also see "Falsafah-e-Shari'at-e-Islam, *ibid*, p. 68.

CHAPTER 8

FATWA AND MUFTI

FATWA

DEFINITION

Fatwa is “a religious or judicial sentence pronounced by the Khalifah or by a Mufti or Qazi. It is generally written.”¹ Literally, it means legal decision or opinion, or decision of a sacred law or a legal opinion.²

The word “Fatwa” in its different forms has also been used in the Holy Qur’an, as for example, “Yastaftunaka” (they ask you a decision), and “Yuftikum” (makes known to you the decision), appear in verses 127 and 176 of chapter 4 (*Nisa*); “Tastaftiyaan” (which you inquired) appears in verse 41, “Aftuni” (explain to me) appears in verse 43, and “Aftina” (explain to us) appears in verse 46, of chapter 12 (*Yusuf*). The word “Aftuni” (advise me) also appears in verse 32 of chapter 27 (*Naml*)

IMPORTANCE OF FATWA

Fatwa serves as an authoritative guide for the Muslims in all religious, and also secular, matters governed by the Islamic Shari’at, because whatever may be the law or circumstances of the country in which the Muslims reside, they are primarily bound to follow, in their individual as well as social life, the law laid down by the Islamic Shari’at.

Fatwa also serves as an authentic record of the nature, habits, usages, needs, as well as historical developments in the religious, moral, academic, political and cultural life, of the Muslims – individual as well as social, down the ages.

1. Dictionary of Islam, by T.P. Hughes, p. 127

2. Arabic – English Dictionary.

FORM OF FATWA

The Mufti of the Hanafī sect at Mecca in reply to a question as to whether India is a “Darul Islam”, had given the following Fatwa : -

“All Praises are due to the Almighty, Who is Lord of all the creation ;

O Almighty, increase my knowledge ;
As long as even some of the peculiar observances of Islam prevail in it, it is the Darul Islam.

The Almighty is Omniscient, Pure and High ;
This is the Fatwa passed by one who hopes for the secret favour of the Almighty, who praises Allah, and prays for blessings and peace on His Prophet.

(Signed) Jamal Ibne Abdullah
Shaikh Umarul Hana’i,
the present Mufti of
Mecca (the honoured).
May Allah favour him
and his father. ¹

According to the learned scholars, a Mufti, while writing a Fatwa, should follow the following principles :-

- (1) try to give the answer first from Qur’an, then from Ahadees, then from Ijma and then from Qiyas of the Mujtahideen ;
- (2) if the Hanafi jurists differ, and no view of “Ahsaabut Tarjeeh” is available, then issue Fatwa firstly according to the view of Abu Hanifah, then of Abu Yusuf, then of Imam Muhammad, then of Zufar (Shaami) ;
- (3) if the problem does not need Ijtihad, then, unless any view of “Ashaabut Tarjeeh” is proved, the Fatwa should be according to the view of Abu Hanifah (Shaami) ;

1. Dictionary of Islam, ibid,

- (4) if the "Ashaabut Tarjeeh" have given preference to the view of "Saahibain" i.e. Abu Yusuf and Imam Muhammad, the Fatwa should not be according to the view of Abu Hanifah (Shaami) ;
- (5) the view of "Sahibain" is actually the view of Abu Hanifah (Shaami) ;
- (6) in view of disagreement the majority view will prevail ;
- (7) Fatwa can be given on basis of Istehsaan (Shaami);
- (8) Mufti should give Fatwa according to his Mazhab and not according to the Mazhab of the Seeker of Fatwa (Aalamgiri) ;
- (9) in case no preference is available in different views, the mufti may give the Fatwa according to his better view (Shaami) ;
- (10) if there is preference in the latent view of the jurists over the obvious Mazhab, the Fatwa should not be according to the Latter (Tanqeen-e-Hamidiyah) ;
- (11) there should be no haste in giving the reply even if a ready reply is available unless confirmed from all available sources (ibid) ;
- (12) the Fatwa should be in detail (ibid). ¹

HISTORY OF FATWA

Issuance of Fatwaas started from the days of the Holy Prophet himself. Not only the common folk but even the learned ones among the Companions used to request for Fatwaas on different questions from the Holy Prophet. Fatwaas were also requested for by the governors of different regions through letters. Sometimes, when the Holy Prophet was busy in some important matters, he used to direct the persons to seek Fatwaa from Abu Bakr. Even the wives of the Holy Prophet used to guide the women on questions relating to their secret problems, as directed by the Holy Qur'an. ²

1. Fatawa-e-Mazhari, by Prof. Muhammad Masud Ahmad, pp. 66-67.

2. Qur'an, Ahzaab, 33:34

After the Holy Prophet, the learned ones among the Companions and Taaba'een, who acquired prominence in issuing the Fatwaas, were Hazrat Aa'isha, Abdullah Ibne Umar, Abu Hurairah, Sa'eed binul Musayyab, Urwah bin Zubair, Abu Bakr bin Abdur Rahman, Ali bin Hussain, and Ubaidullah bin Abdullah, at Medinah ; Abdullah bin Abbas, Mujahid bin Jubair, Ikramah bin Abbas, and Abuz Zubair Muhammad bin Muslim, at Mecca ; Abdullah Ibne Mas'ud, Alqama bin Qais, Masrooq binul Ajdah, Suraih binul Haris, Saeed bin Jubair, and Aamir bin Sharajeel, at Kufah ; Abdur Rahman bin al-Ghanam al-Ash'ari and Rija bin Heewatul Kandari, in Syria ; Abdullah bin Amr binul Aas and Yazid bin Habib, in Egypt ; and Ta'wus bin Kisaan al-Majandi and Wahb bin Mambah al-San'aani, in Yemen.

After the first century Hijri, there is a long list of the Muftis, whose Fatwaas are also present in writing. In this connection the first book of Fatwaas was the one of Ali which was presented to Abdullah bin Abbas in which the latter had also made some changes. Abul Husain al-Basri (d. 436 A.H.) in his book "Al-Mo'tamad Fi Usulil Fiqah" (Vol. II, pp. 729 – 730) mentions not only the Fatwaas of Ali but also of Zaid bin Saabit which were available in the form of book upto the fifth century Hijri.

In the days of Taaba'een, the Qazis used to give Fatwaas. In this connection a book of Fatwaas is referred to Imam Abu Yusuf, and also another, namely, "Ar-Ruqqayaat" was of the Fatwaas of Imam Muhammad Shaibani, which he had given as Qazi of Raqqah. Haji Khalifah, in his book "Kashfuz Zunoon 'Ann Asami al-Kutub wal Funoon"; and Ismail Basha al-Baghdadi, in his book "Hadiyatul 'Aarifeen Aasaarul Mu'allifeen wal Musannifeen" mentioned many books of Fatwaa compiled during the third to eleventh centuries A.H. The list of prominent compilations according to "Kashfuz Zunoon" is as follows :-

THIRD CENTURY HIJRI

- (1) Fatawa Abi Bakr, (2) Fatawa Abil Qasim

FOURTH CENTURY HIJRI

- (1) Fatawa Ibne Qataan, (2) Fatawa Abil Lais, (3) Fatawa Ibnul Haddaad

FIFTH CENTURY HIJRI

- (1) Fatawa Ibnul Sabaagh ; (2) Fatawa al-Asbijaabi, (3) Fatawa Khawahar Zadah, (4) Fatawa Shamsul A'immah, (5) Fatawa al-Fazli, (6) Fatawa al-Khajandi

SIXTH CENTURY HIJRI

- (1) Fatawa Ibne Abi Asroon, (2) Fatawa Abul Fazl, (3) Fatawa al-Arghayani, (4) Fatawa al-Tamar Tashi, (5) Fatawa Hisamuddin, (6) Fatawa ad-Dinari, (7) Fatawa ar-Rashidi, (8) Fatawa Zaheeriah, (9) Fatawa Qazi Khan, (10) Fatawa al-Kubra, (11) Fatawa Nasfiah, (12) Fatawa Waastiah, (13) Fatawa Sirajiah, (14) Fatawa Shahabuddin, (15) Fatawa al-Sughra,

SEVENTH CENTURY HIJRI

- (1) Fatawa Ibne Abil Umm, (2) Fatawa Ibne Razeen, (3) Fatawa Ibnus Salah, (4) Fatawa Ibne Abdus Salam, (5) Fatawa Ibne Maalik, (6) Fatawa Sufiah, (7) Fatawa al-Arabiah , (8) Fatawa Mohub, (9) Fatawa al-Walji

EIGHTH CENTURY HIJRI

- (1) Fatawa Ibne 'Aqeel, (2) Fatawa Ibne Far Kaakh (3) Fatawa Jalaluddin, (4) Fatawa Hanafiah, (5) Fatawa al-Zarkashi, (6) Fatawa al-Subki, (7) Fatawa Nawawi, (8) Fatawa Tarsusiah,

NINTH CENTURY HIJRI

- (1) Fatawa Ibne Abi Shareef, (2) Fatawa Hambali Zadah,
(3) Fatawa Qasimiah,

TENTH CENTURY HIJRI

- (1) Fatawa Ibnus Salbi, (2) Fatawa Abi Saud, (3) Fatawa Zainiah, (4) Fatawa 'Adliah (5) Fatawa al-Shibli

ELEVENTH CENTURY HIJRI

- (1) Fatawa Raza'ee, (2) Fatawa Shaikhul Islam,
(3) Majma'ul Anhar

In the Sub-Continent of India and Pakistan also many compilations of Fatawa were made at the instance of the Muslim rulers, including Fatawa Feeroz Shahi, ¹ Fatawa Ibraheem Shahee, ² Fatawa Akbar Shahi, ³ Fatawa 'Aadil Shahi, Fatawa Tataar Khani, ⁴ and Fatawa Aalamgiri. Among them the last one is very prominent. It was prepared by a committee of about fifty scholars headed by Shaikh Nizamuddin of Burhanpur, under the orders of Mughal Emperor Aurangzeb Aalamgeer, in the Arabic language, and was named after him. Later it was also translated into Persian by Maulana Chalpi Abdullah Rumi, and also in Urdu by Syed Ameer Ali. ⁵

In the Urdu language also large number of books of Fatawa have been compiled and published in the fourteenth century Hijri, viz., Fatawa Mahboobiah, by Ahmad Hussain

1. It was written by Maulana Muhammad Yaqub Muzaffar Kirmani. After him Sultan Feroz Shah get it revised and also translated in Persian.

2. It was compiled in the days of Sultan Ibrahim Sharqi (1402 – 1440 A.D.)

3. It was written by 'Atiqullah bin Ismail bin Shaikh Qasim

4. Amir Tataar Khan got it compiled during the reign of Sultan Ghiasuddin Tughlaq

5. For more details see Fatawaa-e-Mazhari, pp. 53-54

Khan ; Fatawa Rizviah, by Ahmad Raza Khan ; Fatawa Na'imiah, by Ahmad Yaar Khan ; Fatawa Irshadiah, by Irshad Hussain Rampuri ; Imadul Fatawa, by Ashraf Ali Thanwi ; Fatawa Muhammadiyah, by Asghar Hussain ; Fatawa Amjadiah, by Amjad Ali ; E'zazul Fatawa, by E'zaz Ali ; Imdadul Fatawa, by Imdad Ali ; Fatawa Amiriah, by Amiruddin Gopamwi ; Fatawa Hindiah (Urdu Translation of Fatawa, Aalamgiri), by Syed Amir Ali ; Fatawa Maulana Abdul Ha'I, Urdu translation by Barkat Ali Farangi Mehli ; Fatawa Sadaratul Aaliah Hyderabad Deccan, by Rahimuddin ; Fatawa Rashidiah, by Rashid Ahmad Gangohi ; Fatawa Nizamiah, by Ruknuddin ; Fatawa Aastanah, by Zahidul Qadri ; Majmu'ah Fatawa, by Siddiq Hasan Khan, Imdadul Ehkaam, by Zafar Ahmad ; Majmu'atul Fatawa Maulana Abdul Ha'i, by Abid Ali Kasmandwi ; Fatawa Qiamul Millat Wad Deen, by Abdul Bari Farangi Mehli ; Majmu'ah Fatawa, by Abdul Hafeez ; Fatawa Ehle Sunnat Wal Jama'at, by Abdur Rahman Mir ; Fatawa, al-Sunnat, by Abdur Razzaq Makki Hyderabadadi ; Fatawa Azizul Mukarram, by Abdul Aziz ; Fatawa Benazeer, by Abdul Ghaffar of Lucknow ; Jaame'ul Fatawa, by Abdul Fattah ; Sharhe al-Fatwa, by Abdul Quddus Shah ; Imdadul Masa'il, by Abdul Karim ; Fatawa Wahidi, by Abdul Wahid Sewastani ; Imdadul Mufteen, by Mufti Muhammad Shafi ; Fatawa Qasimiah, by Muhammad Qasim ; Fatawa Mas'udi, by Muhammad Mas'ud Shah ; Translation of Fatawa Azizi, by Murad Khan ; Majmu'ah Fatawa, by Mehr Ali Shah Golrawi ; Fatawa Naziriah, by Nazir Hussain ; Fatawa Nizamiah, by Nizamuddin Hanafi ; Fatawa Mazhari, by Mazharullah Shah of Delhi. Translation of Fatawa Azizi, by Nawab Ali and Abdul Jalil ; Jawahirul Fatawa, by Mufti Abdus Salam Chatgami. There are also Fatawa Ghausiah ; Fatawa Sa'diah, Fatawa Usmaniah ; Fatawa Mufti Muhammad Ramazan ; Fatawa Mufti Nisar Ahmad Cawnpuri. ¹

1. Ibid, pp. 58-59

MUFTI

DEFINITION

In the “Al-Munjid”¹, the “Mufti” is defined as, “the learned one to whom the problems relating to Shari’at are put and he answers them and gives decisions regarding them”

According to Dictionary of Islam, Mufti is “the officer who expounds the law. He assists the Qazi, or judge, and supplies him with Fataawa, or decisions. He must be learned in Qur’an and Hadees, and in the Muslim works of law.”²

QUALIFICATIONS OF A MUFTI

1. He should be Muslim, major, sane, intelligent, learned in Qur’an, Sunnah, and Fiqah ;
2. He should be strict follower and lover of the Holy Prophet ;
3. He should be honest and trustworthy ;
4. He should be truthful and beyond party spirit ;
5. He should be sincere ;
6. He should not be extremist ;
7. He should be subject to correction, and as soon as he comes to know that his opinion was wrong, he should withdraw it ;
8. He should be decent in writing the Fatwa and should not use filthy or abusive language in it even if he records his disagreement with anybody on any point in issue ;
9. He should be bold and always say what is right. ³

1. Beirut Edition, 1951. P. 98

2. Dictionary of Islam, by T. P. Hughes, p. 368

3. For more details see Fataawa-e-Mazhari, *ibid*, pp. 65-80

CHAPTER 9

MODERN LEGISLATION

As we have noted in chapter 5 "Development of Fiqah", by the end of the nineteenth century A.D., following the Europe, many of the Muslim States also started promulgating and enforcing the laws on different matters on the pattern of France, Germany and Switzerland. In this connection we have also mentioned many laws enforced upto the present century A.D. (i.e. twentieth century). Among the laws so made and enforced, the laws relating to marriage and inheritance are of primary concern for us because these laws directly hit the Fiqah which has been extant for the last over twelve centuries. The summary of these laws is as follows.

MARRIAGE

Modern legislation on marriage in the Muslim countries has been summarised by Dr. Tahir Mahmood in his book "Family Law Reform in the Muslim World",¹ as follows :

TURKEY AND CYPRUS

Betrothal²

In accordance with the traditional Islamic principles, Turkish family law provides that the Court shall not enforce specific performance of a promise to marry. If a party to an engagement breaks it without just reason the aggrieved party may claim from the former expenses incurred in good faith by such party, his or her parents or any other person acting in their place, in connection with or in contemplation of the proposed

1. 1972 Edition published by N.M. Tripathi PVT. Ltd., Bombay. Under the auspices of the Indian Law Institute, New Delhi. All summaries of Modern Legislation given in this chapter have been taken from this book with permission of Dr. Tahir Mahmood and with due thanks to him.

2. The Turkish Civil Code, 1926 articles 82 to 87 ; Turkish Family Law of Cyprus 1951, Sections 4 – 5.

marriage. If the aggrieved party suffers, by reason of the breach of promise to marry, personal or moral injury, the Court may direct the party at fault to pay a compensation. Any presents given on betrothal or, if they are no longer existing, their value is recoverable by the person making such presents, except when the betrothal ends on account of the death of either party. The period of limitation for an action under any of the above provisions is one year from the date when cause of action arises.

Marriage – Age

The Turkish Civil Code originally fixed the minimum marriage – age for boys and girls at the completion of eighteen and seventeen years respectively, with a provision that in exceptional cases the Court could, after hearing the parents or other guardians, permit the marriage of a boy or a girl after the completion of the fifteenth year of age. In 1938, an amending law reduced these limits.¹ Presently, men and woman can marry on the completion of seventeenth and fifteenth year of age respectively, and in exceptional cases the Court may, after hearing the guardians, permit the marriage of a boy of fifteen or a girl of fourteen years of age.²

In Cyprus under the Turkish Family (Marriage and Divorce) Law, 1951, men and women can marry normally on the completion of eighteenth and seventeenth year of age respectively, provided that if a girl is below the age of eighteen years, her guardian's consent shall be necessary.³ A boy of fifteen and a girl of fourteen years may, however, be permitted by the Court to marry in exceptional cases and for good reasons.⁴

1. Law No. 3453 of 1938

2. The Turkish Civil Code, 1926, Article 88.

3. The Turkish Family Law of Cyprus, 1951, Section 6 (1).

4. Ibid, Section 6(1) proviso 2.

Prohibited Degrees in Marriage

The Turkish Code lists those categories of relationship which constitute impediment to a marital union. These include blood relations in the direct line—brothers and sisters, full consanguine and uterine, uncles and nieces, aunts and nephews and also relations by marriage. The bar of fosterage is also specifically recognised and this is one significant instance of the adaptation of the parent Swiss Civil Code to the law of Islam.¹ Adoption, too, is mentioned as one of the impediments to marriage, although the legal fiction of adoption is unknown to Islamic jurisprudence.² Article 121 of the Code, however, provides that adoption ceases by the fact of marriage and that where a marriage takes place in violation of the bar of adoption, it cannot be declared void by the Court on that ground while these two provisions of the Code conflict with each other, the latter conforms to the legal position of adoption in Islam as stated in the Qur'an.³

In Cyprus, under the Turkish Family (Marriage and Divorce) Law, 1951, prohibited degrees in marriage are the same as in Turkey with the following two differences:

- i) neither fosterage nor adoption is mentioned by Cypriot law as a bar to marriage,⁴ and
- ii) as an additional principle, it provides that marriage of Muslim woman with a non-Muslim man is prohibited.⁵

Polygamy

The Turkish Code provides that no person shall marry again unless he proves that the earlier marriage has been dissolved by

1. Article 92(1)

2. Article 92(3).

3. The Qur'an, 33:4, 37.

4. Section 7.

5. Section 7(1) (c)

the death of either party or by divorce or by a decree of nullity,¹ and that a second marriage may be declared invalid by the Court on the ground that a person had a spouse living at the time of Marriage.² The same is the position under the Turkish Family Law of Cyprus.³ There is, however, an exceptional rule under the Turkish Code not found in the Cypriot Law, providing that where a person marries, in good faith, another person who is already married and the former marriage is subsequently dissolved, the second marriage shall not be declared invalid.⁴ The permission of polygamy given by the Qur'an subject to certain specified conditions has, thus, been voluntarily abandoned by the Turkish Muslims. The reason for this, as stated by some Turkish scholars, was that the Qur'anic legislation on the subject was "a great improvement over the unlimited polygamy of pre-Islamic Arabia thus pointing out the way to monogamy," and that the changed social and economic conditions of the Turks had made the Qur'anic conditions for polygamy "unrealisable."⁵

Solemnization of Marriage

The Turkish Civil Code provides that a marriage may be solemnized in accordance with any religious rites if the parties so desire, but registration of marriage preceding such a solemnization shall be necessary. Detailed rules are provided by the Code for registration of marriage.⁶ After the formalities required under these rules have been complied with the parties may either ask the marriage officer to solemnize the marriage in the presence of two witnesses or may instead ask for a certificate of compliance with the formalities and proceed to solemnize the marriage in the customary manner. Identical provisions are found in the Turkish Family Law of Cyprus.⁷ Neither in Turkey nor in Cyprus can a

1. Article 93.

2. Article 112(1)

3. Section 8, 19(a)

4. Article 114

5. *Supra*, note 14, at 79

6. Articles 97 to 109.

7. Sections 11 to 16.

marriage be declared invalid by a Court only on the ground of non-compliance with the prescribed formalities. ¹

Nullity of Marriage

A marriage shall be void under the Turkish Civil Code in the following circumstances. ²

- i) if either party has a spouse living at the time of marriage
- ii) if either spouse is, at the time of marriage, insane or if his or her judgement is affected by some permanent calamity, and
- iii) if the marriage is within prohibited degrees.

Under the Turkish Family Law of Cyprus, a marriage shall be void, in addition to the above three grounds, also if the bridegroom is a non-Muslim, or if a girl below the age of eighteen years marries without her guardian's consent provided that in the latter case it cannot be nullified if the girl has, after the marriage, completed her eighteenth year or has become pregnant or if the guardian had ratified the marriage. ³ In both the countries, any party interested in a marriage which is void may apply to the Court for a declaration of nullity.

Voidable Marriage

The Turkish Code specifies certain grounds on which the Court may, on the application of either spouse, declare a marriage invalid. All these grounds represent the cases in which consent of the aggrieved party has not been free. The grounds are : ⁴

1. The Turkish Civil Code, article 123 ; the Turkish Family of Cyprus, section 23 (a)
2. Article 112.
3. Section 19.
4. Articles 115 to 120.

- a) that at the time of marriage the aggrieved party's judgement was affected by reason of some temporary cause.
- b) that such party did not in fact intend to contract a marriage or particularly to marry the other party but did so under a bona fide mistake.
- c) that such party contracted the marriage under a bona fide belief that the other party possessed certain qualities absence of which would make the marital life intolerable,
- d) that such party was willfully deceived about the moral character of the other party either by the latter or by a third person,
- e) that the other party is suffering from a disease, concealed from the aggrieved party, endangering the latter's health or that of the children, and
- f) that the aggrieved party was induced to marry by threats of a grave and imminent danger to life, health or honour of his or her own or of such party's close relations.

Similar provisions are found in the Turkish Family Law of Cyprus.¹

Issues of a Marriage Annulled by the Court

In Turkey as well as in Cyprus, when a Court annuls a void or a voidable marriage, so far as the legitimacy of the issues from that marriage is concerned, it shall be presumed that it has been dissolved by a decree of divorce.²

LEBANON AND ISRAEL

Marriage-Age

The Ottoman Law of Family Rights places the marriage – age for Muslim boys and girls much above the traditionally accepted age of puberty. On the basis of the views of some

1. Section 20.

2. The Turkish Civil Code, article 125 ; the Turkish Family Law of Cyprus, Section 22.

earliest jurists of Islam, e.g., Ibne Shubruma, it gives men and women absolute freedom to marry only after the completion of eighteen and seventeen years of age respectively. It, however, authorises the Court to permit adequately mature male and female adolescents to contract a marriage provided they have completed the age of twelve and nine years respectively and, in case of girls, provided further that the guardian in marriage has given his consent.¹

Mental Capacity

In accordance with the Shafe'ee law, the Ottoman Law provides that an insane person is not capable to marry except when it is necessary to do so, in which case the guardian can contract such a person into marriage.²

Polygamy

The Ottoman Law does not prohibit polygamy. It only provides some safeguards in connection therewith.³ Thus, in accordance with the traditional Qur'anic law, it prohibits plurality of wives beyond the maximum of four and also enforces the Qur'anic injunction regarding equality of treatment between co-wives. It further recognises the validity and judicial enforceability of a stipulation in a marriage – contract providing that in the case of husband's bigamous marriage either the first or the second wife would stand divorced.

Equality of Spouses

The doctrine of 'equality of spouses' (*Kafa'a*) is well established in Islamic Family Law. According to this doctrine, there should not be much disparity between the parties to an intended marriage in respect of several aspects of life, e.g., social status, profession, etc., Conflicting opinions are found in the

1. The Ottoman Law of Family Rights, 1917, Articles 4 to 8.

2. Article 9.

3. Article 38, 54(b) and 74

different schools of Islamic law as to the extent of the application of this doctrine and the rights and liabilities attached thereto¹

With a view to enforcing a uniform law on this subject articles 45 to 50 of the Ottoman Law enforce a selection of such rules.

Irregular and Void Marriages

The Ottoman Law maintains the Hanafi distinction between irregular (*fasid*) marriages, but the only marriage declared void (*batil*), i.e. absolutely invalid thereunder is that of a Muslim woman with a non-Muslim man. All other invalid marriages shall, under its provisions,² be only irregular (*fasid*) – a concept which represents relative invalidity liable to be removed with the disappearance of the reason therefor. This is in conformity with the opinion of Imam Abu Hanifah himself.

EGYPT

Marriage – Age

At the time of marriage, men and women must have completed their eighteenth and sixteenth year of age respectively. A marriage in violation of this rule, although not invalid *per se*, will not be registered.³ Also such a marriage will not be recognised by the Court for the purpose of granting any relief, except in a claim relating to legitimacy of issues.⁴

1. See for the Hanafi Law, Fyzee, outlines, 104 – 5 ; Amir Ali, Muhammadan Law II, 364. The Shaafe'ee Law on the subject will be found in Fitzgerald, Muhammadan Law, 56

2. Articles 52 to 58.

3. Law No. 56 of 1923

4. Egyptian Civil Code, 1931, article 99.

JORDAN

Polygamy

The Jordanian law authorises a woman to stipulate with the husband, at the time of marriage, the condition that if he contracts another marriage during the continuance of their marital union, she would have a right to pronounce a 'delegated divorce' (*Talaq al-Tafwid*). Such a stipulation will, not, however, be enforced by the Court unless it is properly incorporated in the marriage – deed duly registered. ¹

Disparity in Age at the Time of Marriage

Under the Jordanian law, two persons cannot become husband and wife, if the difference in their age exceeds twenty years, except with the permission of the Court, which can be obtained only if ;

- i) the consent of the party who is younger in age has not been procured by compulsion, and
- ii) the proposed marriage will not be prejudicial to the interest of the younger party. ²

Void Marriage

Article 29 of Jordanian law lists only two circumstances in which a marriage shall be void (*batil*), namely, when it violates the bar of affinity or when it is a marriage of a Muslim girl with a non-Muslim man. As regards other marriages considered void by the traditional Hanafi law, e.g., one within the forbidden degrees of blood – relationship or fosterage, the Jordanian law is silent. The provision of article 29 cannot, however, be regarded as exhaustive. As provided by article 130, the uncodified Hanafi law relating to the aforementioned bars to a valid marriage will continue to apply.

1. The Jordanian Law of Family Rights, 1951, article 6.

2. Id. Article 21.

Wife's Liability to Travel and Live with the Husband

Under the general Islamic law a Muslim wife is bound to accompany her husband to any place of his choice provided there is no legal impediment to her doing so. This legal liability has been enforced by statutory law in some Muslim countries, without specifying any instance of a legal impediment thereto. Only the Jordanian law, while enforcing this principle, adds that it is not otherwise safe for her to accompany him shall constitute a legal impediment to her accompanying the husband.¹

Similarly, a wife should ordinarily live with her husband and not leave his house without his permission ; if she does so, she will lose her right to maintenance. Under the Jordanian law, if the wife leaves her husband's house because he has maltreated or injured her, her right to maintenance will remain unaffected by her conduct.²

The Jordanian law provides that if after the conclusion of a marriage contract the wife has received her dower from the husband, or has agreed to its payment being differed till a stipulated time, she cannot refuse consummation of the marriage.³

SYRIA

Stipulations in Marriage Contract

The Syrian law deals at unusual length with the freedom of parties to an intended marriage to stipulate conditions in the marriage contract. It merits any stipulation which is not opposed to the nature and purpose of the marriage – contract and does not violate the *Shari'ah*. If a marriage – contract is coupled with such a condition, the marriage shall be operative but the condition, shall have no effect.⁴ It is further sepecified that a

1. Article, 33.

2. Article, 64.

3. Article, 20.

4. Article, 14(1), the Syrian Law of Personal Status, 1953.

stipulation for the wife's benefit which, although not forbidden by the Shari'ah, affects the legal rights of the husband or a third person cannot itself be enforced, but the wife can demand dissolution of her marriage if the husband violates such a stipulation.¹

Capacity to Marry

Puberty and sanity are two essential conditions for marriage. The Court can permit the marriage of an insane on medical advice.² The normal age of marriage is eighteen years for man and seventeen years for women. A man of fifteen and a woman of thirteen years can, however, be permitted by the Court to marry, if he or she has attained puberty and the father or the grandfather, if living, has given his consent.³ In the case of disparity of age between the parties to a marriage, the Court can prohibit it unless it involves any benefit.⁴

Polygamy

Article 17 of the Syrian law authorises the Court to refuse to a person who is already married permission to marry another woman, if it is established that he cannot maintain two wives. This was the first statutory provision made in the Arab world restricting a man's power to contract a bigamous marriage. According to the interpretation given by the Shaafe'ee School, the Qur'an subjected, the permission for plurality of wives to the condition of the husband's financial capability to provide maintenance to more than one wife. The Shaafe'ee view represented in a particular form the basic and essential nature of the policy of Islamic law towards bigamy which it rather permitted as remedial measure with a view to avoiding greater social evils. Article 17 of the Syrian law authorises the Qazi to decide, on the basis of evidence, the question of financial

1. Article 14(2) and (3)

2. Article 15(2)

3. Article 18

4. Article 19

capability of a person to maintain two wives, and in case he is not so capable to refuse permission for the second marriage. As stated in the Statement of Objects this restrictive provision was based on the Qur'anic verse of Polygamy itself.¹

Rights of Wife under an Irregular Marriage

The Syrian law recognises the Hanafih distinction between a void (*batil*) and an irregular (*fasid*) marriage, the former being absolutely invalid and the latter being invalid due to a reason which can be lawfully removed. An irregular marriage does not give, under the Hanafih law, to the wife the right to maintenance. On this subject the Syrian law provides that if a wife is unaware of the fact that her marriage is irregular she shall be entitled to her maintenance so long as she remains so unaware.²

TUNISIA

Marriage – age

Men and women in Tunisia can freely marry on the completion of twenty years of age.³ A girl who has completed her seventeenth year can ; however, validly marry with the permission of her guardian, and if such a girl wishes to marry but her guardian does not permit her to do so, the case shall be decided by the Court.⁴ The Court may also authorise the marriage of a boy below the age of twenty or a girl below the age of seventeen years, if there are 'grave reasons' for that,⁵

Mental Capacity

Consent of the guardian is essential for the marriage of an insane; if the marriage of such a person is solemnized with-

1. The official statement issued with the Syrian Law, as quoted in Anderson, "Syrian Law of Personal Status", Bull. of S.O.A.S (1955), 25 – 59, AT 36

2. Article 51(3).

3. Tunisian Code of Personal Status, 1956, Article 5 as amended by Law No. 1 of 1964

4. Article 6. 5. Article 5

out the guardian's consent, the latter can apply for its cancellation by the Court before it is consummated.¹

Stipulations in Marriage – Contract

Parties to an intended marriage may agree to incorporate any stipulations in their marriage – contract ; violation of such a stipulation shall be a ground for the dissolution of marriage and if it occurs after the consummation of marriage it shall also entitle the aggrieved party to an indemnity to be paid by the party who is guilty of violation.²

Polygamy

Article 18 of the Tunisian Code says that “plurality of wives is prohibited.” It also provides penalty for persons marrying again during the subsistence of a valid marriage. Till 1964 there had been a controversy in Tunisia over the correct interpretation of the provisions of article 18. It was doubtful if a bigamous marriage would be invalid *per se* or would only make the husband liable to the prescribed penalty. The Amendment Law of 1964 settled the controversy by including bigamous marriages in the list of invalid (*fasid*) marriages.³

Invalid Marriages

Besides a bigamous marriage, the following marriage shall also be invalid (*fasid*) under the Tunisian law.⁴

- a) a marriage with a condition which is contrary to the essence of the marriage,⁵
- b) a marriage without the consent of either spouse,⁶

1. Article 7.

2. Article 11.

3. Article 21 as amended by Law No. 1 of 1964.

4. Article 21

5. *Ibid.*

6. Article 3.

- c) a marriage contracted before attaining puberty or to which there is any other legal impediment, ¹
- d) a marriage within any of the prohibited degrees, ² and
- e) a marriage with a woman observing *Iddat*. ³

As invalid marriage shall be compulsorily annulled. If such a marriage takes place and is consummated, it will give rise to the wife's right to dower and obligation of *Iddat*, and also to legitimacy of children and bar affinity, but not to mutual rights of inheritance between the spouses. ⁴

MOROCCO

Marriage – age

A male is competent under the Moroccan law to marry on the completion of eighteen years and a female on that of fifteen years of age. However, if a person who desires to marry is below the age of twenty one years, his or her freedom is curtailed by the requirement that the marriage – guardian must give consent to the proposed marriage. ⁵

Bigamous Marriage

The treatment of bigamy in the Moroccan Code is significantly different from the Tunisian reform on the subject. Article 30(1) of the Moroccan Code states that if any injustice between the co-wives is feared, plurality of wives is not permitted. No provision is, however, made by the Code for inquiry by any authority into a husband's capacity to do justice between the co-wives in the event of his contracting a bigamous marriage. The aforementioned provision, therefore, constitutes a reiteration of Qur'anic injunction that if one finds oneself unable

1. Article 5.

2. Articles 15 to 17.

3. Article 20

4. Article 22

5. The Moroccan Code of Personal Status, 1958, Articles 8 – 9.

to treat the co-wives equitably, one must confine to a single wife.

The Moroccan law, however, provides certain other rules relating to polygamy. First, no second marriage with a woman shall be contracted unless the fact of the man being already married is communicated to her.¹ Secondly, a woman may stipulate in her marriage contract against her husband's right to contract a bigamous marriage; in such a case, if the stipulation is violated, the wife shall have a right to dissolution of her marriage.² Thirdly, even in the absence of such a stipulation, if the second marriage causes injury to the first wife, the Court may dissolve her marriage.³ The Code once again stresses that if a man has more than one wife, he must treat the co-wives equitably in accordance with the Qur'anic injunction.⁴

Conditional Marriage

Article 38 of the Moroccan Code provides that if a marriage contract is coupled with a condition which is opposed to the Shari'ah or to the expense of the marital contract, the marriage shall be valid and the condition inoperative. It adds that a condition to the effect of wife's freedom to work in national interest shall not be invalid.

ALGERIA

Consent of Parties to Marriage

Article 2 of the Marriage Ordinance of 1959 provides that express consent of the bridegroom and the bride exchanged in words in the presence of two competent witnesses shall be essential for the solemnization of a marriage. Want of free consent of either party would invalidate the marriage. Where a party is minor or interdicted, approval of the marriage by the guardian of such party shall be necessary.

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1. Article 30(2)
 2. Article 31
 3. Article 30(2)
 4. Article 35.

Explaining the above provisions of the Marriage Ordinance, article 2 of the Decree of 1959 provides that the consent of parties should be explicit and unequivocal and should not be suspended on the happening or non-happening of a future uncertain event. Further, misrepresentation or compulsion shall invalidate the marriage contract.

Promise to Marry

Article 4 of the Marriage Ordinance provides that a mere promise of marriage or exchange of promises to marry shall neither constitute a marriage nor give rise to an obligation to marry on the part of the promisor.

Solemnization and Registration of Marriages

The Marriage Ordinance and its explanatory Decree provide detailed rules for solemnization and registration of marriages. When the parties to an intended marriage notify their consent to the Qazi, as required under article 2 of the ordinance, he will send the necessary records to the civil officials within three days and they will register the contract and issue a certificate. If the notification is sent directly to the civil officials themselves, they will register the marriage. In the latter case, marriage ceremonies may take place after a certificate of marriage is received.¹

Before issuing a certificate the Qazi or the civil official, as the case may be, shall ascertain names, places and dates of birth of the parties, their parents and witnesses. He shall also satisfy himself if the parties have freely consented the proposed marriage and also, in the case of minor or interdicted person, if permission of such person's guardian has been obtained.²

1. The Marriage Ordinance of 1959, Article 3.

2. Decree No. 1082 of 1959, Article 4.

IRAQ

Polygamy

The Law relating to polygamy, as presently applicable in Iraq, is found in Article 3 of the law of 1959 read with the provision of Amendment Law of 1963 modifying article 13 of the main law. According to Article 3, a man who wants to contract a bigamous marriage must apply to the Court for its permission. The Court shall give him such permission on three conditions : first, he should be financially capable of maintaining two wives simultaneously : secondly, some 'lawful benefit' should be involved in the second marriage, and lastly, there should be no fear of injustice between the co-wives, the ascertainment of which fact is to be made by the Court itself. The court shall not give the permission if, in the circumstances of the case, it finds that injustice between the co-wives may take place, even if the other two conditions are fulfilled. A man who contracts a bigamous marriage without seeking the Court's permission or in disregard of its denial thereof, shall be guilty of an offence punishment by law.

Article 13 of the law, as originally enacted in 1959, described permanent and temporary impediments to marriage. It mentioned marriage with more than one woman without the permission of the Qazi' as a marriage barred by a temporary impediment. So, a bigamous marriage without the Court's permission was to be irregular (*fasid*) in accordance with the general principle that any marriage in violation of a temporary impediment would be irregular. This provision was, however, not agreed to by the 'Ulama of Iraq as, in their opinion, man-made laws could, if necessary in the interest of the society, impose restrictions on something which was permissible under the divine law but could not declare it invalid altogether. The Personal Status (Amendment) Law. 1963, therefore, modified article 13 of Law of 1959 so as to expunge from it any reference to bigamous marriages. A bigamous marriage contracted in violation of the rules laid down in article 3 will, therefore, not be invalid ; it will only entail penal liabilities mentioned in article 3(6) of the Law.

Stipulations in Marriage – contract

The Iraqi law authorises the parties to an intended marriage to stipulate any lawful conditions in a marriage – contract. If the husband violates a condition so stipulated, the wife can seek dissolution of her marriage by the Court.¹

Capacity to Marry

Normally the minimum age for marriage shall be eighteen years for both men and women.² In special cases, however, the Court can permit a person to marry after the completion of sixteen years of age if such person has attained puberty, is medically fit for marriage, and has obtained the guardian's consent ; if a guardian unreasonably withholds consent, the Court may dispense with the requirement of the guardian's consent.³

The Court can permit an insane person to marry if it is satisfied that the proposed marriage is not prejudicial to public interest, that some 'personal benefit' is involved in it, and that the other party thereto has freely agreed to the proposed marriage.⁴

IRAN

Registration of Marriage

The present Iranian law requires that every marriage must be duly registered in accordance with the prescribed rules ; failure to do so will not affect the validity of the marriage but is punishable under law.⁵ Before a marriage is registered, the parties shall be asked to produce certificates of medical fitness.⁶

1. Article 6(3) and (4), Iraqi Law of Personal Status, 1959.

2. Article 8.

3. Article 9.

4. Article 7(2)

5. The Marriage Law, 1931, Article 1.

6. Production of Medical – Fitness Certificate Law, 1938, Article 1.

Free Consent

Both the parties to an intended marriage must give their free consent to it. It is an offence to obtain by inducement the consent of a person for his or her marriage.¹

Pre – Merital Stipulations

The parties to an intended marriage may incorporate in the deed of marriage, any lawful stipulations. So long as any such stipulation is not opposed to the very purpose of marriage, it shall be enforceable by the courts.²

Child Marriage

The minimum marriage-age as laid down in the Iranian Civil Code is eighteen years for men and fifteen for women.³ Marrying a person who is below this age is an offence punishable under the Marriage Law of 1931.⁴

Bigamous Marriage

The Marriage Law of 1931 requires that if at the time of marriage a man is already married he must inform the woman about the fact of his first marriage ; his failure to do so is an offence.⁵ To this rule, the Family Protection Law of 1967 adds that a person desiring to contract a bigamous marriage must seek the prior permission of the Court.⁶ Before giving such permission, the Court shall satisfy itself about the capacity of the husband to maintain more than one wife and to treat the co-wives equitably. A person violating this requirement shall incur the penalties laid down in the Marriage Law of 1931 for the

1. The Marriage Law, 1931, Article 5

2. *Idl.* Article 4.

3. Article 1041.

4. Article 2

5. Article 6

6. Article 14

offence of contracting a bigamous marriage by concealment from the second wife of the fact of the first marriage. ¹ A wife whose husband has contracted a second marriage, with or without the court's permission but against her own wishes, may seek dissolution of her marriage by the Court. ²

INDIA

Registration of Marriages and Divorces

It is customary among Muslims of India to prepare a written deed of marriage called *Nikah-Name* giving the details of marriage – contract. Copies of *Nikah – Name* are maintained by the *Qazis* who solemnize the marriage and the details given therein are entered by them in their registers, entries of which have evidentiary value. This unofficial and customary practice regarding registration of marriage has been given statutory form in some parts of India. However, the laws enacted for the purpose do not replace the practice of entries of details of *Nikah-Names* in *Qazi's* registers ; they provide only an additional facility for the local Muslims. It is entirely for their benefit and they may or may not avail it. The said laws provide rules for registration not only of marriages but also of divorces.

The Bengal Muhammadan Marriages and Divorces Registration Act, 1876 is applicable in the States of Bihar and West Bengal. The same Act has been adopted, with minor changes, in Assam State as the Assam Moslem Marriages and Divorces Registration Act, 1935. In the State of Orissa, the aforesaid Bengal Act has been re-enacted as the Orissa Muhammadan Marriages and Divorces Registration Act, 1949.

None of the above four state laws make registration of a marriage or a divorce obligatory. The parties to a marriage or divorce may voluntarily register it in accordance with the

1. Article 6

2. The Family Protection Law, 1967, Article 11(c)

procedure laid down by these laws. Further, all the four Acts make it clear that :

- a) non-registration will not render invalid any marriage or divorce which is otherwise valid under Muslim law,
- b) mere registration will not render valid any marriage or divorce which is otherwise invalid under Muslim law, and
- c) no provisions of the acts will affect any religious rites or usages of any person. ¹

The Child Marriage Restraint Act, 1929

This Act restrains solemnization of the marriage of a man below the age of eighteen and a girl below that of fifteen years of age. ² A marriage solemnize in disregard of its provisions will not be invalid. The Act only inflicts penalties on the persons responsible for such a marriage.

The Special Marriage Act, 1954

Any two persons, whether professing the same religion or different religions or no religion at all, can contract a marriage under the Special Marriage Act, 1954, provided that they fulfil the conditions mentioned in the Act, which include monogamy. ³ The Act provides for dissolution of marriage by the Court on certain social and medical grounds specified in it, and does not recognise any other form of divorce. ⁴ An existing marriage solemnized under any personal law can be registered under the Act, and thereupon its provisions will be applicable to the couple and the issues, in suppression of the corresponding principle of the personal law of the parties. ⁵

1. Assam Moslem Marriages and Divorces Registration Act, 1935, section 26; Bengal Muhammadan Marriages and Divorces Registration Act, 1876 (also applicable in Bihar), section 26 ; Orissa Muhammadan Marriages and Divorces Registration Act, 1949, section 26.

2. Section 2(a)

3. Section 4(a)

4. Sections 27 – 28

5. Sections 15 – 18.

INDONESIA

Registration of Marriage

The Law of 1946 provides for registration of all marriages taking place in the country. Under this law, it is compulsory for the parties to a marriage to register it with the marriage officials. A detailed procedure for such registration is laid down by the rules framed under this law. The validity of a marriage shall not, however, be affected by the failure to comply with the requirement of compulsory registration.

Child – Marriage

The regulations issued in 1947 direct the marriage officials to discourage the practice of child – marriage. Under these Regulations, it is the liability of these officials to prevent, as far as possible, a child – marriage from taking place and being registered.

MALAYSIA, BRUNEI AND SINGAPORE

Promise to Marry

The law of Islam does not regard an engagement or a promise to marry as a binding agreement. Accordingly, the laws in Malaysia do not provide the remedy of specific performance for such agreements. The State Enactments provide that when an engagement is broken, the amount stated in the agreement to be payable will become recoverable along with the expenses made, in good faith, by the aggrieved party in preparation of the proposed marriage.¹ Further, if the man breaks the engagement he will have to pay as damages the dower² and, in some States, also an additional customary amount known as *hantaran*. If the

1. Kedah, Section 119 ; Penang, Section 191 ; Negri Sembilan, Section 119 ; Selangor, Section 124.

2. In Kelantan, (Section 137) and Trengganu, (Section 95) only this rule is applicable in a case of breach of promise to marry.

default lies on the part of the woman, she shall return all betrothal gifts made to her, if possible, or pay their value. ¹

In Brunei, the Enactment of 1955 provides ² that where an agreement of marriage is broken, if the defaulter is the man he shall be liable to pay as damages the amount of dower and any other money spent in good faith in preparation of the proposed marriage ; but if the fault lies on the part of the woman the betrothal gifts, if any, or the value thereof, will be recoverable from her along with other expenses incurred by the man towards the proposed marriage.

Marriage Guardians

A marriage shall be void in some States of Malaysia unless both the parties thereto have given their express consent ; whereas in the other States consent of the bride's guardian takes the place of that of the bride herself. ³ The guardian's consent is essential in all the States of Malaysia for the validity of a girl's marriage but if there is no guardian or if he unreasonably withholds his consent, the Court may permit another person to act as the guardian. ⁴

In Brunei, under the Enactment of 1955, a marriage shall be void unless both the parties have agreed to it and the bride's guardian or, in special cases, the Court has given consent to the proposed marriage. ⁵

In Singapore, the Muslims Ordinance, 1957 authorises the Kathi to Solemnize the marriage of a girl who has no guardian or guardian or whose guardian refuses his consent on unsatisfactory grounds, provided that there is no obstacle under the law of Islam to the proposed marriage. ⁶

1. Melaka, Kedah and Negri Sembilan, Sections 118, 119 and 119 respectively

2. Section 136.

3. Kaleman, Section 140 ; Trangganu, Section 98

4. Slengor, Section 121 ; Phang, Section 120 ; Negri Sembilan, Section 118.

5. Section 139

6. Section 7(3)

Registration of Marriage

The Enactments in Malaysia provide for compulsory registration of marriages. In all the State, it is made clear by the law that neither would non-registration invalidate nor mere registration validate a marriage which is otherwise valid or invalid under Islamic law ; but the failure to register a marriage is an offence in most of the States. ¹

In Burnei, a marriage not solemnized by a person holding a delegated authority from the Ruler must take place in the presence and with the permission of a Registrar. Every marriage is to be registered under the Enactment of 1955, unless it contravenes any provision of Islamic law, in which case it shall be void and cannot be registered. ²

In Singapore, every marriage is to be registered under the Muslim Ordinance, 1957 ; ³ but neither shall non-registration effect the validity of a marriage nor mere registration validate a marriage otherwise invalid in Islamic law ⁴

Bigamous Marriages

The only provision under the Malaysian law relating to bigamy is found in Sarawak. It is provided by law in that State that a man is permitted to marry more than one woman only if he can prove that he is capable to maintain more than wife. The scale of maintenance payable to a wife is prescribed by law, and if a husband has considerable means so as to provide such maintenance to more than one wife, he may be permitted to

1. Slengor, Sections 121, 160 ; Kelanton, Sections 144, 180 ; Trengganu, Sections 102, 138 ; Pehang, Sections 124, 159 ; Penang, Sections 116, 152 ; Melaka, Sections 115, 151 ; Negri Sembilan, Vs 116, 154 ; Kedah, Sections 116, 154 ; Perak, Sections 3, 6 ; Jahore, Section 7 ; Perlis, Sections 87, 120 ; Sabah, Section 5.

2. Sections 137 – 138, 143.

3. Sections 12, 16.

4. Section 19.

contract a second marriage.¹ The provision enforces, in effect, the Shaafe'ee school's interpretation of the Qur'anic verse of polygamy.

Besides the aforementioned law in the State of Sarawak, Administrative Rules, in two other States,² Slengor and Negri Sembilan, provide that a person contracting a marriage must declare, in a prescribed form, if he is already married and that if he makes such a declaration "further inquiries will be made." It is not specified what inquiries are to be made and what further steps to be taken in the matter. It may be presumed that the further steps to be taken in the matter. It may be presumed that the financial capability of the husband to maintain two wives, as expected under the Shaafe'ee law, will have to be ascertained.

In none of the aforesaid three States there is any provision specifying or suggesting that a bigamous marriage, if contracted without the required financial capability, shall be invalid.

There is no provision relating to polygamy in the law of Brunei. In Singapore, an amendment introduced in 1960 into the Muslims Ordinance of 1957 deals with bigamous marriages. It provides that a bigamous marriage can be solemnized only by the Chief Kathi or, with his permission, by a Kathi or the bride's guardian. Before solemnizing or permitting such a marriage, the Chief Kathi shall satisfy himself that there is no obstacle under Islamic law, to the proposed second marriage.³ In order to satisfy himself in that regard, the Chief Kathi has to make all necessary inquiries. The Muslim Marriage and Divorce Rules, 1959 of Singapore require that the notice of a bigamous marriage must be given to the Chief Kathi at least fourteen days before the date of marriage in order to enable him to make such inquiries.⁴

1. Sarawak, Section 37.

2. Slengor Administrative Rules, 1962 ; Negri Sembilan Marriage, Divorce and Reconciliation Rules ; 1963.

3. Section 7A(2) and (3)

4. G.N. No. 5239 of 1959 (as amended by G.N. No. 523 No. 523 of 1961), Rule 8C.

SRI LANKA (CEYLON)

Registration of Marriage

Every Muslim marriage is to be registered immediately after the conclusion of the *Nikah* ceremony. The responsibility to register the marriage lies with the bridegroom, the bride's guardian (if his consent to the marriage was necessary under the Muslim law and was not dispensed with by the Court), and the person who conducted the *Nikah* ceremony. ¹ For the purpose of registration, these persons have to make declarations relating to the details of the marriage in the prescribed forms. The law, however, makes it clear that failure to register a marriage shall not affect the validity of a marriage otherwise valid under Muslim law ; neither shall the mere fact of registration validate a marriage which is otherwise invalid under Muslim law. ² Failure to register a marriage, as required by law, is an offence punishable under the Act. ³

Marriage – Age

At the time of the registration of a marriage, under the Act of 1951, the female party thereto must have attained the age of twelve years. If this requirement is not fulfilled, the marriage shall not be registered unless its registration is authorised by the *Qazi* of the area in which the minor bride resides. ⁴

Marriage During 'Iddat

A woman undergoing the period of *Iddat*, whether of divorce or of death, is not permitted by Islamic law to remarry until the said period has expired. The law in Ceylon (Sri Lanka) enforces this principle by declaring its violation to be an offence. A woman who marries while observing *Iddat* as well as a person

1. Section 17.

2. Section 17.

3. Section 81.

4. Section 23.

who aids in or abets the contracting of such marriage shall be punishable under the Act. ¹ Also such a marriage is not to be registered in accordance with the provisions of Act. ²

Bigamous Marriage

Section 24 of the Act deals with bigamous marriages. Under its provision, a man desiring to contract a bigamous marriage cannot quietly do so. It makes provision for a wide publicity to be given to his intention. He is required to give, thirty days in advance, notice of his intention to the Qazis of the areas in which his own, his existing wife's and his proposed wife's residences are situate. Each of the Qazis shall thereupon cause copies of the notice to be exhibited in all the prominent mosques of his area and also at the residence of that of the three parties who lives in his jurisdiction. Thus, instead of giving authority in the matter of bigamous marriages to any judicial or administrative body, as has been done in some West Asian countries, the law in Ceylon has preferred to put a different sort of control on them. The procedure laid down in section 24 of the Act would furnish an opportunity to influential persons in all the three areas where the parties involved in an intended bigamous marriage are living to intervene and persuade the husband to change his mind, if the proposed bigamous marriage is unreasonable.

A bigamous marriage contracted without compliance with the aforesaid formalities, although not to be registered under the Act, ³ shall not be invalid. Non-fulfillment of the condition laid down in the Act for such a marriage shall, however, be an offence punishable under the general provisions of section 92.

1. Section 87.

2. Section 24.

3. Section 24.

Guardianship in Marriage

The Act incorporates the requirement of the Shaafe'ee law relating to guardian's consent to the marriage of a girl. It provides that if a girl belongs to the Shaafe'ee School of Islamic law, her marriage shall not be valid unless her guardian (*wali*) is present at the time of marriage and communicates his consent to, and approval of, the marriage. ¹ Only a person entitled under Islamic law to act as a guardian can do so ; if a person not so authorised has acted as the guardian, the marriage shall not be registered under the Act. ² Where a guardian unreasonably withholds his consent to the marriage desired by a girl, or where a woman has no guardian, the *Qazi* may, on her application, make an order dispensing with the requirement of guardian's consent. ³

PAKISTAN

Registration of Marriage

Section 5 of the Pakistan Ordinance of 1961 provides rule for the registration of Muslim marriages in accordance with its provisions. Every marriage which is not solemnised by a *Nikah* Registrar, is to be reported to him by the person who has solemnised it. Failure to do so is an offence.

In support of the provision requiring registration of marriages, the Family Law Commission referred to a verse of the Qur'an recommending that important transactions should be reduced to writings. The *'Ulama* of Pakistan agreed that, so long as non-registration did not affect the validity of a marriage, the provision of registration was not objectionable from the religious point of view. ⁴

1. Section 25(1) (a)

2. Section 26.

3. Section 47(2) and (3)

4. Usmani, M.T., "Hamare 'Aili Masall" (Urdu, Karachi 1962), 171

Polygamy

Section 6 of the Ordinance deals with bigamous marriages. Polygamy has never been regarded in Islam as a fundamental right of husband. While controlling the unrestricted polygamy of pre-Islamic days, the Qur'an gave a conditional permission for plurality of wives to a specified extent on account of some important social considerations. With a view to restraining the growing tendency in the present-day society to ignore the Qur'anic considerations and conditions relating to polygamy, various West Asian countries have introduced some important reforms.

In Pakistan, unlike the said countries, an Arbitration Council headed by a civil official (and not the judiciary) is to decide on the cases of bigamous marriages. The Arbitration Council is to be constituted by the representatives of the husband and the first wife and a chairman who is either the chairman of the Local Union Council,¹ or, in exceptional cases, one of its members or a person appointed by the Government. Permission for a bigamous marriage may be given by the Arbitration Council, subject to any conditions that it deems fit, only if the proposed marriage appears to be 'necessary and just.' In accordance with the provincial rules framed under section 11 of the ordinance, the Council may, without prejudice to its general powers to consider what is just and necessary, have regard to "such circumstances as the following among others ; sterility, physical infirmity, physical unfitness for conjugal relation, willful avoidance of a decree for restitution of conjugal rights, or insanity on the part of an existing wife."

Section 5 of the Ordinance requires the husband seeking permission for a bigamous marriage to state if the existing wife² has given her consent to the proposed second marriage. Although the section does not say how her consent, if obtained, will affect

1. Constituted under the Basic Democracies Order, 1952.

2. Who may or may not be a citizen of Pakistan ; see Ali Nawaz V.M Yusuf, P.L.D. 1963 S.C. 73.

the desirability of the permission asked for, it seems that the husband's claim to have obtained it (the veracity of which may be testified by the wife's representative in the Arbitration Council) may be a point in the favour.

Although a bigamous marriage contracted in violation of the above provisions will not be invalid, it will have the following consequences :

- a) the husband contracting it shall incur the prescribed penalties, ¹
- b) the dower of the first wife shall become immediately payable, irrespective of any division thereof, made at the time of marriage, into prompt and deferred parts; it shall be realised like the arrears of land revenue, ² and
- c) the first wife shall have a right to seek dissolution of her marriage by the Court under the Dissolution of Muslim Marriages Act, 1939. ³

Marriage – Age

After the amendment of 1961, the minimum marriage in Pakistan and the Child Marriage Restraint Act, 1929, is eighteen years for men and sixteen years for women. ⁴ Although a marriage solemnised in violation of this provision shall not be invalid, the following persons associated with such a marriage shall be guilty of an offence punishable under the Act :

- i) the husband, if he is above eighteen years of age, ⁵
- ii) the person who, having charge of the minor party, promotes, permits or negligently fails to prevent, the marriage, ⁶ and
- iii) the person conducting the marriage ceremony. ⁷

1. Section 6 (5) (b). 2. Section 6(5) (a).

3. See section 2(iia) of that Act added by the Ordinance.

4. Child Marriage Restraint Act, 1929, section 2(a)

5. Id. Section 4

6. Id. Section 6

7. Id. Section 5.

If the Court comes to know that a marriage either party to which is below the prescribed marriage-age is likely to take place, it can issue an injunction against the aforesaid persons, prohibiting the proposed marriage. Failure to comply with such an injunction will be an offence.¹

SOMALIA²

Promise and Contract of Marriage

Promise of marriage is permitted but shall not be judicially enforceable, though an intention to break a promise must be effectively communicated to the other party.³ A promise of marriage by a man to a woman who is already married or engaged to another man, or is observing *Iddat*, or is within prohibited degrees of marriages for the promisor, shall be unlawful.⁴ Failure to communicate intention of breaking the promise in any such case will, therefore, not attract punishment (unlike other such cases in which the failure may attract the statutory penalty).⁵ The “bride’s money” (paid under local custom and locally called *yarad*) shall be optional for the promisor ; it cannot be claimed by the promisee as of right-but where promisor has voluntarily paid it, on breach of promise he cannot recover it.⁶

Marriage is, legally, a contract (*aqd*) between a man and woman who have “equal rights”, but the husband is, at law, the head of the family,⁷

Age of Marriage and Guardianship

At the age of eighteen any Somali citizen of either sex can freely marry ; a girl in the age-group of 16–18 can, however,

1. Id. Section 12

2. Taken from the article “The Somalia experiment with Family Law Reform”, by Dr. Tahir Mahmood, published in “Islamic and Comparative Law Quarterly” Delhi, (December, 1982).

3. Act 2(1). Of Family Law Act of Somalia-Law No. XXIII of 1975.

4. Article 3. 5. Article 172

6. Article 2(2). 7. Article 4.

marry with her guardian's consent. ¹ Marriage guardianship belongs to the father and, failing him, in successive order to the mother, paternal grandfather, elder brother and paternal uncle. Majority, sanity and honesty are essential requisites for acting as marriage guardian (*wali*). Failing all these relations, guardianship may be assumed by the Qazi or by a person authorised by Ministry of Justice and Religious Affairs. ² So it can be where those relations are not interested in acting as guardian or are at a long distance (one hundred kilometers or more) ³ in a case of rival claims to marriage guardianship (equally valid) girl's choice, and if she has none *Qazi's* choice, shall be decisive. ⁴ Enticing away a girl with a view to matrimony against her guardian's wishes is an offence. ⁵ If the girl herself is interested in marriage but her guardian refuses consent, she can approach the *Qazi* or another prescribed authority for dispensation of the requirement. ⁶

Some of the aforestated provisions may not be in conformity with the traditional Shaafe'ee law on marriage guardianship, but authority is clearly found for them in various other schools of Islamic law, particularly the Hanafi school. However, under the Somali law the marriage of a girl below the age of sixteen, as also that of a boy below eighteen, will seemingly be void (*batil*). ⁷ This innovation cannot find support in any version of the law of Islam. Nor has it a parallel in the modern family laws of major Muslim and other eastern countries. Inclusion of this novel provision in the Somali law under review explains its silence on the Islamic doctrine of 'option of puberty' (*Khiyar al-bulugh*).

1. Article

2. Article 19

3. *Ibid*

4. Article 20.

5. Article 21.

6. *Ibid*.

7. Article 22(3) (a) read with article 16

Polygamy

In the Syrian and Iraqi legislative tradition,¹ the Somali law requires prior permission of the court for contracting a bigamous marriage ; and such permission can be granted on grounds of :²

- i) medically certified sterility of the wife (provided that, in the case of pre-marriage sterility, the husband was unaware of it at the time of marriage) ;
- ii) her contagious or chronic ailment which is incurable and medically certified ;
- iii) her imprisonment for over two years ; and
- iv) desertion on her part for more than one year.

To this power of the court is superadded that of the “prescribed authority” to permit bigamous marriage on the ground of “social necessity”³ – a term which nowhere the law explains (perhaps in order to keep the authority’s discretion unfettered). The ‘residuary power’ vested in this regard in the “authority” seems to have emanated from the view that under Islamic principles existence of a ‘just ground’ for bigamy is not a justiceable issue.

Notably, neither the court nor the “authority” is expressly required to ascertain the capacity of the man (seeking permission for a second marriage) to do justice between co-wives, which is Qur’an’s express conditions for bigamy.⁴ This seems to be a serious omission in the Somali enactment, though under its general provision directing adherence to Shaafe’ee law, the *Shari’ah* in general and the rule of social justice,⁵ this Qur’anic condition can be well enforced.

1. previously noted

2. Article 13(1) – 13(4)

3. Article 13(5).

4. Qur’an, IV : 5.

5. Article 1.

No provision of the Somali statute expressly specifies the consequences of contracting a bigamous marriage in violation of its aforesaid requirements. Such a marriage will not be void, as the provision relating to void (*batil*) marriages clearly leaves out the section on bigamy.¹ It may, at best, be irregular,² and will entail the general penalty for violation of the statute.³ Notably, if a person has been granted permission to marry again, his first wife if she has no child – can apply for divorce (*faskh*) on that ground.⁴ It is inexplicable why this ground for divorce is not made available also to woman whose husband has married again illegally.

The *Shari'ah* rule of unlawful conjunction (*jam'bayn al-mahramayn*) is enforced by the Somali enactment's chapter on polygamy.⁵

Other Conditions for Marriage

Marriage of an insane is void unless performed on medical advice.⁶ Also void is a marriage contracted under physical or compulsion or in a state of intoxication.⁷ The parties must not be within the prohibited degrees of consanguinity, affinity and fosterage (which the law specifies in conformity with the *Shari'ah* rules) – a marriage hit by this rule being void.⁸ So is marriage to a woman who is already married or is observing *Iddat* (of death or divorce)⁹ – while under the traditional law, notably, marriage during *Iddat* is only irregular (*fasid*) and not void.

1. Article 22(3)

2. Article 22(4)

3. Article 172

4. Article 42(2).

5. Ch. IV, article 14

6. Article 22(3) read with article 7.

7. *Ibid.*,

8. Article 22(3) (c) read with articles 10, 11, and 12

9. Article 22(3) (d).

Solemnization of Marriage

Within Somalia marriages are to be performed before a *Qazi* or the 'authority' or, where this is not possible, before an *'Alim-e-Deen* ; while outside Somalia a Somali can get his marriage performed before the local consular authority.¹ The form of marriage shall be in the Traditional method of offer (*Ijab*) and acceptance (*qubul*) made in the presence of two major and sane witnesses.² A marriage without witnesses is void (*batil*)³ (which rule, again does not agree with the Traditional law), a proposal and acceptance must be made in the same meeting ; and these can be made orally, in writing or by gesture – either personally or through another person (*wakil*).⁴ Registration of every marriage is compulsory. This must be done within fifteen days of marriage (within forty days in rural areas), and the responsibility for it lies with the person who has performed the marriage-failure to register a marriage being an offence punishable with one hundred Shillings.⁵

Conjugal Rights and Obligations

The Somali law requires the spouses to live together (unless either it is impossible or there is an agreement between them to the contrary) and directs the wife to follow her husband (except when there is a legal impediment).⁶

Maintenance and expenditure of the matrimonial home are to be shared by the spouses in proportion to their respective income ; if one of them has no income, it is to be borne fully by the other spouse. "Maintenance" in this context includes expenses of the kitchen and the wardrobe, boarding and lodging,

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1. Article 5
 2. Article 6
 3. Article 22(3) (b)
 4. Article 3(4).
 5. Article 5(6).
 6. Article 33.

medical bills, expenses of children and other expenses “necessary for the family’s welfare”. Where either spouse fails to contribute (despite capacity to do so) to the household expenditure, the court can intervene ; and it can authorise the aggrieved spouse to borrow money to be paid eventually by the defaulting spouse. In a disputed ease the court can also award maintenance *pendente lite*.¹

1. Articles 31 – 32.

INHERITANCE

Modern legislation on Inheritance in the Muslim Countries had been summarised by Dr. Tahir Mahmood in his book *Family Law Reform in the Muslim World*¹ as follows :

TURKEY AND CYPRUS

Book III of the Turkish Civil Code deals with the law of Inheritance. It introduces an entirely novel scheme of intestate succession adopted in toto from the Civil Code of Switzerland. The Hanafi law of succession followed in Turkey till 1926 stands replaced by this new scheme.

One of the most prominent features of the newly introduced law, which makes it wholly detached from the corresponding provisions of Islamic Law, is the principle of equality of males and females with regard to the right to inheritance. The Qur'an provides that degrees of proximity to the propositus being equal a male shall take a share double that of a female.² There has been a consensus of juristic opinion in the world of Islam on the fundamental place of this Qur'anic rule in the scheme of inheritance ; there being no differences in the matter between the various schools of law. Book III of the Turkish Civil Code now provides in general terms that children of the deceased shall inherit equally³

The very foundations of the Islamic and the existing Turkish laws of succession being diametrically opposed to each other, no fruitful comparison between the two systems can be made.

No provisions corresponding to the new Turkish law of succession are found in the Turkish Family Law of Cyprus, 1951.

1. 1972 edition published by N.M. Tripathi Pvt. Ltd., Bombay, under the auspicious of the Indian Law Institute, New Delhi.

2. The Qur'an, 4:11.

3. Article 439.

LEBANON AND ISRAEL

The scope of the Ottoman Law is confined to marriage, divorce and other matters connected therewith. It does not include any provision relating to inheritance and wills. These matters, therefore, continue to be governed, in Lebanon as well as in Israel, by the uncodified principles of the various schools of Muslim law prevailing in these countries.

EGYPT

The Egyptian Law No. 77 of 1943 deals with intestate succession. Most of its provisions have merely codified the well-known principles of the Hanafi law of inheritance. However, in some case, in which difference of opinion is found within the framework of Islamic law, the new enactment has enforced any one of the different verdicts or, occasionally, a rule evolved by a synthesis of two or more such verdicts. This has been done with a view to establishing uniformity in the system of inheritance. A summary of the outstanding provisions of the new law, which represent some degree of reform, follows.

Priority of Funeral Expenses

The Hanafi school recognised the priority of funeral expenses of the deceased over his or her unsecured debts. As regards secured debts, the dominant opinion in the Hanafi school did not give priority to such expenses.¹ A minority of the Hanafi jurists, however, dissented from the said opinion and, along with the Hanabali school, placed funeral expenses on the top in the order of priority.² The Egyptian law now enforces the latter view on the subject as the general law.

1. This was based on the logical argument that funeral expenses should be equated with maintenance, and since the deceased could not dispose of his securities for debts for the purpose of his maintenance, the encumbered property left by him, too, should not be applied to meet his funeral expenses.

2. Anderson, 'Recent Development in the Shari'ah Law', 41 Muslim World (1951), Note, 8, at 139.

Exclusion of Killer-Heir

Under an established rule of Islamic law, an heir who killed the propositus would be excluded from inheritance. As to the question what type of killing – only intentional and also accidental – would disqualify the killer, the schools of Islamic law are not in agreement. While the Hanafi jurists exclude all killers, in whatever circumstances the act might have been committed, the Maalikis apply the principle of exclusion only to an intentional killer, and not to one who is unintentionally involved in the circumstances leading to the death of the propositus. Abandoning the Hanafi law on the subject in favour of the Maaliki Law, the Egyptian Law of 1943 provides :

One of the impediments to the right of inheritance is that the heir has caused intentionally the death of the propositus, whether by himself, or as a false witness whose testimony led to his execution, provided that the act was without any legal excuse and the heir was sane and at least fifteen years of age ; excess over the lawful right of self-defence being one of the excuses. ¹

The Himaareeya Case

Uterine Brothers and Sisters of the deceased are placed, under the Islamic law of inheritance, among the Qur'anic heirs, whereas full brothers take only the residue of the estate along with other agnatic heirs. ² In certain cases under the scheme of distribution, the fixed shares of the Qur'anic heirs exhaust the estate leaving nothing for full brothers, although Uterine Brothers, as Qur'anic heirs, get their fixed shares. This is Traditionally known as the Himaareeya case. In respect of this case, there have been conflicting opinions in Islamic legal history ; the

1. Article 5

2. The reason of the difference mentioned here was that Uterine Brothers and Sisters did not get any shares at all in the pre-Islamic period. The Qur'an fixed shares only for those relations who were denied all rights, and kept silent as to others.

Hanafi and the Hanbali schools favour total exclusion of full brothers, and the other two schools make them co-sharers with Uterine Brothers. ¹ The present Egyptian law puts an end to the controversy by enforcing, as the general rule, the verdict under the latter two schools. ²

Paternal Grandfather's right to Inheritance

Conflicting juristic views are found in the Islamic law of inheritance in respect of another peculiar case, namely, the one in which the deceased is survived by his grandfather (who is a Qur'anic as well as an agnatic heir) and brothers and sisters, full or consanguine. The dominant Hanafi opinion and the Hanbali school allow, in such a case, the grandfather to exclude all brothers and sisters, while the Maaliki and the Shaafe'ee law equate him with brothers. ³ The Egyptian Law of 1943 provides, in effect, that in such a case the grandfather would not effect the Qur'anic shares of full sisters while they do not inherit as agnatic heirs, but in other cases, when in competition with brothers and sisters who inherit as agnates, he would count as brother. ⁴ This rule represents a combination of Caliph Ali's verdict in the case with the opinions under the Shaafe'ee and the Maaliki schools. ⁵

Spouse relict's right under Doctrine of Return

If in a case of inheritance the Qur'anic heirs do not exhaust the estate and there are no agnatic heirs, the residue reverts to the former in proportion to their fractional shares. This is called the Doctrine of Return. Under the dominant opinion in the Hanafi school, the surviving spouse does not get, under the

1. Details of the case will be found in Fyzee, *Outlines*, 405 ; Tyabji, *Muhammadian Law*, 623.

2. Law No. 77 of 1943, article 10.

3. Details of all these views in the case will be found in Tyebji, *Muhammadian Law*, 624 ; Mulla, *Principles*, 81.

4. Article 22

5. Anderson, 'Recent Developments in the Shari'ah Law, *op. Cit.*, note 8, at 131.

Doctrine of Return, any part of the residue even if other claimants are living. Caliph Uthman, however, treated the spouse-relict at par with other Qur'anic heirs and allowed to such spouse as well the benefit of the Doctrine of Return. The Egyptian Law of 1943 allows the spouse-relict to take the whole property when the deceased has left no Qur'anic, agnatic and uterine heirs.¹

Distribution of Estate Among Uterine Heirs

In respect of the class of heirs known as uterine heirs.² two different schemes for the calculation of shares, framed by the two companions of Imam Abu Hanifa are accepted by the followers of the Hanafi school. Generally Shaybani's scheme is considered to be easier and simpler than its Yusufi counterpart. The Egyptian law, therefore, disowns this complicated scheme and enforces that of Imam Shaybani.³

Orphaned Grandchildren

A major and important principle introduced in Egypt into the law of inheritance relates to right of orphaned grandchildren to inherit their grandparents' property. This has been a controversial issue under Islamic law. Non-recognition of Doctrine of Representation in Islamic law leads to the total exclusion of those grandchildren whose link-parent died before the propositus. The remedy provided for the case by the Egyptian law is an obligatory bequest in favour of such grandchildren. It forms part of the law of Bequest, 1946 which will be discussed below.

1. Article 30.

2. See Fyzee, outlines, 392 ; Mulla, Principles, 76 – 79.

3. For the details of the two schemes, see Tyebji, Muhammadan Law, 631 ; Mulla Principles, 76 – 79.

Testamentary Succession

The law enacted in Egypt on the basis of the recommendations made by the committee of jurists set up in 1936 was the Law of Bequests, 1946.¹ It is a comprehensive enactment (82 articles) dealing with all aspects of testamentary succession including the substantive law of wills as well as execution and administration of legacies. This law does not represent the enforcement of the rules relating to bequests taken from any one school of Islamic law. A synthesis of the various rules based on the authority of Muslim jurists of different schools is found in its provisions. Some of its principles are summarised below.

Basic Conditions for the Validity of Bequests

The Egyptian Law of Bequests, 1946 provides that it is essential for the validity of a bequest that it should not involve any *Ma'sia* (sin) and that its motives should not be contrary to the purpose of the Law-giver.² If a bequest is coupled with a condition which is contrary to the purposes of the Law-giver, the bequest will be effective but the condition inoperative.³ *Ma'sia*, which has been translated as any "disobedience to the Divine law"⁴ is a term of wide import and would include anything which directly or indirectly contravenes any principle of Islamic religion. The above two provisions of the Egyptian law expressly subject the making and administration of legacies to the condition that they must not contravene the religious and social policies of Islam.

Position of Killer-Legatee

In Islamic law a legatee who is involved in something leading to the death of the testator loses the benefit under the

1. Law No. 71 of 1946.

2. Article 3.

3. Article 4.

4. Anderson, 'Recent Developments in the Shari'ah Law, op. Cit., note 8, at 44.

Legacy. There is much difference of juristic opinion on whether only an intentional killer would be so excluded or even an innocent person, being an infant or insane or one doing so unintentionally or with a lawful excuse, would also stand to lose. ¹ The Egyptian Law of 1946 now enforces the following principle.

The legatee must not have killed the testator intentionally, whether as the main accused, an accomplice, or as a false witness whose testimony lead to the testator's execution, unless the legatee be insane or a child under fifteen years of age, or unless his act was otherwise legally justified ; excess over the proper limits of the right of self defence will be excused. ²

Bequests in Favour of Unborn Child

Under the new Egyptian law a bequest in favour of an embryo ³ is valid if the child is born alive within 365 days from the date of bequest provided that the testator has acknowledged conception. ⁴ If the testator has not acknowledged conception, the child should be born alive within 270 days from the date of bequest, unless it is a case in which the mother is observing *'iddat* of widowhood or an irrevocable divorce, in which latter case the period of 365 days will be counted from the date of husband's death or divorce, as the case may be. In all such cases, if the testator has mentioned the name of the child's father, establishment of paternity is also necessary. These rules have been enacted with a view to adapting the law to the period of gestation now generally recognised in Muslim countries.

1. For the different legal opinions in the matter, see Tyebji, *Muhammadian Law*, 587

2. Article 17.

3. For the Hanafi law on the subject, see Mulla, *Principles* 120 ; Fyzee, *Outlines*, 358 – 59.

4. Article 35.

Bequest in Favour of Heirs

The validity of a bequest in favour of an heir has been a controversial issue under Islamic law of wills. Conflicting views were expressed by the jurists in this respect. Under the Hanafi and the Hambali schools, a bequest in favour of an heir is valid but shall be effective only if consented to by other heirs after the testator's death. The Maaliki school regards such a bequest invalid *per se*. The Shaafe'ee jurists are divided on the point, some favouring the Maaliki and other supporting the Hanafi – Hambali view. Under the Jafri (Ithna Ash'ari) school, a bequest in favour of an heir is valid and effective irrespective of other heir's consent. To settle this controversy, the Egyptian Law of 1946 provides that a bequest in favour of an heir is valid and effective without regard to the consent of any other person.¹ In effect, this represents adoption of the Jafri law on the subject.

Principle of Obligatory Bequest

The Doctrine of Representation is not recognised by the Islamic law of inheritance under which the nearer relations always exclude remoter relations in the same category. So, if a son of the propositus is living at the time of his or her death, no grandson can claim any share in the estate left by the propositus. In such cases, it is immaterial if any of the grandsons had lost his father during the life of the propositus. The same rule is applicable also to female descendants. Since the extra-legal protection by way of help from near relations provided by Islam to orphaned grandchildren gradually lost its sanction, it became necessary to make some provision for such children. At the time reform of the law of succession was being considered in Egypt, this problem engaged attention of the legislature. The solution was found in introducing the principle of obligatory bequest introduced by articles 76 to 79 of the Law of Bequests 1946. The

1. Article 37.

provisions are quite detailed and may be analysed as follows :

- (i) If a person has grandchildren, male or female, whose link-parent died before or with such person, a bequest in their favour will be binding on such person. The amount of such bequest shall be equal to the share which the link-parent concerned would have inherited in case of his or her death just after the death of the propositus. It shall not, however, exceed the bequeathable third of the estate.
- (ii) The grandchildren will not be entitled to an obligatory bequest if the grandparent concerned has already made in their favour either a bequest or a gift *inter vivos* equivalent to what would otherwise be the amount of the obligatory bequest.
- (iii) The principle shall be applicable, among the descendants of a predeceased daughter, to the first generation only, but among those of a predeceased son agnatic descendants how-low-soever will have its benefit.
- (iv) While the entitlement to an obligatory bequest is being ascertained, each ascendant shall exclude his own descendants only.
- (v) The share of each predeceased descendant has to be divided among his or her heirs in accordance with the rule of double shares for the males.
- (vi) Where the propositus has already left a bequest in favour of an orphaned grandchild entitled otherwise to an obligatory bequest, if the optional bequest exceeds the amount of the obligatory bequest the excess will be governed by the general law of testamentary succession. On the contrary, if the amount of an optional bequest is less than that of the obligatory bequest, only the deficiency shall be made up.

- (vii) In case of plurality of grandchildren, if an optional bequest has been made in favour of some of them only, the rest of them shall be given their due. The aggregate of the said optional bequest and what is given to the latter should not exceed the bequeathable of the estate.
- (viii) An obligatory bequest shall take precedence over an optional bequest. If necessary, the amount of an optional bequest shall be appropriated towards an obligatory bequest.

The above law of obligatory bequests, first introduced in Egypt, has been adopted, *mutatis mutandis*, in several other Muslim countries. It was derived from and based upon the authority of the Qur'an itself,¹ as interpreted by some renowned jurist of Islam, including the founder of the Hambali school.² As a supplement to the Islamic law of inheritance, it makes that system more reasonable. Anderson says :

This ingenious device does not in any way affect the structure of the Islamic law of intestate succession which it leaves completely untouched, while it yet makes provision for orphaned grandchildren.³

SUDAN

In the field of intestate succession the Sudan has adopted only three of the numerous principles enacted by the Egyptian Law of Inheritance, 1943 with a view to effecting uniformity in some controversial cases.

1. The Qur'an : 11, 176, recommending bequest in favour of near relations.
 2. Other prominent jurists among these were Hasan al-Basri, al-Zahiri, Tawus al-Dahhak, Ibn Hazm, al-Tabari, and Abu Musa Asfahani.
 3. Anderson, 'Recent Reforms in the Islamic Law of Inheritance', 14 I.C.L.Q (1965), 358. The author also summarises the practical difficulties faced in applying the rule of obligatory bequests, as analysed by an Egyptian scholar, Muhammad Abu Zahra of the University of Kuwait.

Doctrine of Return

One of these namely the right of a spouse-relict to share under the Doctrine of Return the residue of the estate (when the Qur'anic heirs do not exhaust it and there are no agnatic heirs) has been enforced in the Sudan with a slight modification. ¹ The surviving spouse shall have such a right in the Sudan only if the deceased is not survived by an acknowledged kinsman. ² Whereas under the Egyptian law the surviving spouse shall have the said right even in preference to such a kinsman. The presence of an acknowledge kinsman being a rare circumstance, the law in the two countries will not, however, be much different in practice.

Controversial Cases of Inheritance

The other two principles of inheritance introduced in the Sudan relate to the controversial cases of full (or consanguine) and uterine brothers inheriting together (known as the Himaari'ya case), and a paternal grandfather inheriting with brothers and sisters. These are identical with the corresponding provisions of the Egyptian Law of Inheritance, 1943. ³

Testamentary Succession

Contrary to the Traditional Hanafi law, a bequest in favour of an heir shall be valid in the Sudan irrespective of other heirs' consent. ⁴

Another principle introduced into the law of bequest in the Sudan relates to testamentary distribution of estate by the propositus. It provides that if a person has, under a bequest, specifically distributed various items of his property among his legal heirs,

1. See the Egyptian Law of Inheritance, 1943, article 30, *Supra*.

2. Circular No. 26 of 1925 ; for the law relating to acknowledge kinsman see Fyzee, *Outlines*, 395.

3. Article 10 and 22

4. Circular No. 53 of 1945, article I, of, the Egyptian Law of Bequests, 1946, article 37.

such a distribution shall be valid and binding so long as the principle of bequeathable third is not thereby violated ; but if such a distribution would result into giving to any particular heir more than the bequeathable third of the whole property, it shall be governed by the ordinary law of bequests. ¹ This rule was derived from the Shaafe'ee and the Hambali rulings, as stated in the preamble to the Circular which enforced it. ²

JORDAN

As stated earlier, intestate and testamentary succession do not form part of the provisions of the Jordanian Law of Family Rights, 1951. Therefore, these matters continue to be governed by the Traditional legal system of the Hanafi school law. However in accordance with article 130 of the codified law of 1951, in the case of plurality of juristic opinion within the Hanafi school, such matters will be governed by the "authoritative verdicts" under the said school.

SYRIA

Validity of Conditional Bequest

The Syrian law deals at length with testamentary succession. Most of the provisions in this part of the Syrian law have been adopted from the Egyptian Law of Bequests, 1946. There are, however, certain features, in the Syrian law which do not have parallels in the said Egyptian law. Thus, article 210 provides that a conditional bequest shall be valid not only if the condition is not merely opposed to or forbidden by the Shari'ah but only if, in addition, it involves some 'lawful benefit' in favour of the legator, the lagatee or a third person. ³

1. Circular No. 53 of 1945, article 2

2. As quoted in Anderson, 'Recent Developments in Shari'ah Law', 41 Muslim World (1952), 34,

3. Cf. The Egyptian Law of Bequests 1946, articles 3-4, Supra, 56.

Obligatory Bequests

As stated earlier in the chapter on Egypt, in a case of inheritance under the Traditional Islamic law, if there are any grandchildren of the propositus whose link-parent had died before the opening of the succession, they are not included among heirs in the presence of a son or daughter or the propositus, as the case may be. For the benefit of such grandchildren, the Egyptian Law of Bequests, 1946 introduced the principles of obligatory bequest.¹ The same principle has been adopted by the Syrian law under review with two significant points of distinction. First, under the Syrian law, the newly introduced right shall be available to the issue only of a predeceased son or son's son how-low-soever and not to the children of a predeceased daughter as well, as under the Egyptian law.² Secondly, whereas under the Egyptian law the whole share of a predeceased child would go to his or her issues, the Syrian law gives to the child of a predeceased son only the share which such child would have received in its father's presumptive share in the estate of the propositus. It has been observed that due to these distinguishing features the Syrian law of obligatory bequests is :

More consistent with the Islamic system of inheritance as a whole, than the Egyptian provisions.³

Inheritance

Book VI of the Syrian law deals with intestate succession. Its provisions are generally based on the traditional Hanafi system of inheritance. Like the Egyptian Law of Inheritance, 1943, the Syrian law, too, has set aside the juristic controversies in certain special case of inheritance by enforcing either one of the conflicting opinions or a new rule evolved by synthesizing

1. Articles 76-79, *Supra*, 57-58.

2. Article 257(1) (a).

3. Anderson, 'Syrian Law of Personal Status', *op. cit.*, note 2, at 47

two or more of them. The following are more important among such provisions shared by the laws in both the countries :

- (i) the Shaafe'ee-Maaliki rulling in respect of the circumstances termed as the Himaariya case. ¹
- (ii) Caliph 'Ali's verdict in the case of grandfather's right to inheritance when in competition with brothers and sisters. ²
- (iii) The right of the surviving spouse to share the residue of the estate along with other Qur'anic heirs, under the Doctrine of Return ³ and
- (iv) The scheme of Imam Shaybani for the distribution of estate among uterine heirs. ⁴

The details of all these cases have been discussed under Egypt and are not, therefore, being repeated here.

TUNISIA

a) Law Relating to Inheritance

Book IX of the Tunisian Code of Personal Status (articles 85 to 152) deals with intestate succession. Generally the provisions of this part of the Code represent a mere codification of the traditional Maaliki law of Inheritance which has always been followed in Tunisia. Anderson has said :

The Maaliki law of intestate succession has been followed virtually exclusively in Tunisia even among those families which otherwise observe Hanafi principles – and this is faithfully reflected in the codified law. ⁵

1. Article 267(2) ; of the Egyptian Law of Inheritance, 1943, article 10 Supra, 54.

2. Article 279 ; of the Egyptian Law of Inheritance, 1943, article 22.

3. Article 288 ; of the Egyptian Law of Inheritance, 1943, article 30.

4. Article 290-297 ; of the Egyptian Law of Inheritance, 1943, article 41-45.

5. Anderson, 'Tunisian Law of Personal Status', *op. cit.*, note 2, at 274

A few provisions in Book IX of the Code are, however, different from the corresponding principles of the Maaliki school. These have been based on or derived from the opinions of jurists belonging to some other schools of Islamic law. The following are more important among these provisions.

Exclusion of a Killer-Heir

Article 88 of the Tunisian Code provides that a heir who has intentionally caused the death of the *propositus*, whether as a principal or as an accessory, or as a witness giving false testimony in a case leading to his death, shall have no right to inherit from the deceased.

Rights of the Surviving Spouse

The scope of the Doctrine of Return as laid down in Article 143 A of the Code ¹ is different from how it is applied under the traditional Maaliki law. Unlike the latter, the surviving spouse of the deceased shall not be excluded, under the present Tunisian law, from the benefit of the doctrine. Consequently, if in a case the Qur'anic heirs do not exhaust the estate and there are no agnatic heirs to take the residue, the former (including the surviving spouse) shall take it in proportion to their fractional shares. ²

Daughter and Son's Daughter

Similarly, in respect of a daughter or son's daughter inheriting as a Qur'anic heir, the Code provides that she shall take the residue of the estate even in the presence of an agnatic heir like a brother or uncle. ³ The principle places daughters and

1. Added by law No. 77 of 1959

2. Article 143 A(a)

3. Article 143 A(b)

son's daughters in a better position in the scheme of inheritance than that given to them by the traditional Maaliki law.¹

The Maaliki Principles

The provisions of Book IX of the Code dealing with general principles of inheritance,² capacity of heirs,³ entitlement of the Qur'anic and agnatic heirs,⁴ exclusion,⁵ and some extraordinary cases of inheritance,⁶ are all based almost exclusively on the traditional Maaliki law of intestate succession.⁷

b) Law Relating to Bequests

Book XI of the Tunisian Code⁸ deals with testamentary succession and execution of bequests. Some of its outstanding provisions are summarised below.

Difference of Religion and Nationality

A bequest is valid under the Code irrespective of the fact that the legator and the legatee profess different religions.⁹ Where, however, the legatee is a foreigner, a reciprocal transaction shall be essential.¹⁰

Proof of legacies

A bequest can be proved only by a written document signed and dated by the testator ; oral evidence will not be enough to prove it.¹¹

1. A brief discussion of the effect of the incorporation of this principle into the Maaliki law of inheritance and its similarity to the Shi'a law will be found in Anderson, 'Recent Reforms in Islamic law of Inheritance', 14 I.C.L.Q. (1965),362

2. Articles 85 to 88. 3. Articles 89 to 90. 4. Articles 91 to 121.

5. Articles 144 to 152.

6. The Maaliki principles of inheritance will be found in Ruxton, *Maaliki Law* (London, 1927), Chapter IX.

7. Added to the Code by Law No. 77 of 1959.

8. Article 174. 9. Article 175 10. Article 176

11. The Egyptian Law No. 77 of 1946, article 37 and the Sudanese Circular No. 53 of 1945, article, 1.

Bequest in Favour of an Heir

In accordance with the traditional Maaliki law, article 179 of the Tunisian Code provides that a bequest in favour of an heir shall be invalid. This provision distinguishes the Tunisian law from the corresponding Egyptian and Sudanese laws.¹

Obligatory Bequest

The principle of obligatory bequest was introduced by the Egyptian Law of Bequests, 1946, with a view to making a provision for orphaned grandchildren of *propositus*.² It was later adopted in Syria and has been enforced also in Tunisia. Under the Tunisian Code, the benefit of obligatory bequest is available only to the first generation of grandchildren, male or female.³ Articles 191 and 192 of the Code provide the detailed rules in accordance with which the amount of an obligatory bequest in favour of the children of a predeceased child of the *propositus* is to be worked out. These are identical with the corresponding provisions under Egyptian law.⁴

Killer – Legatee

If a legatee is intentionally involved in the circumstances leading to the death of the legator, whether as a principal, an accessory, or a witness whose false evidence leads to punishment to death inflicted upon the legator, he shall not get the benefit of either an optional bequest left by the legator or an obligatory bequest imposed by law. An optional bequest shall, under the Tunisian Code, become ineffective and the law of obligatory bequest will not be applied, in such a case.⁵

1. The Egyptian Law No. 77 of 1946, article 37 and the Sudanese Circular No. 53 1945, article 1.

2. Articles 76 to 79, see *Supra*.

3. Article 192

4. *Supra*.

5. Article 198

MOROCCO

Like the Books of Inheritance and Bequests, (Books IX and XI) of the Tunisian Code of personal Status 1956, the Moroccan Books of Inheritance and Bequests (Books V and VI) are also based, to a large extent, on the Traditional Maaliki law. Their provisions represent a codification of the Maaliki system of intestate and testamentary succession with some minor changes in a few cases. The following features of these Books of the Moroccan Code are notable.

Obligatory Bequests

The principle of obligatory bequests, adopted in Tunisia from the Egyptian Law of Bequests 1946, has been incorporated into the Maaliki law in Morocco with some changes.¹ Morocco was the fourth and so far the last country after Egypt, Syria and Tunisia to adopt this device for the benefit of orphaned grandchildren. Under the law in Morocco, the right to an obligatory bequest is available to the children (how-low-soever) only of a predeceased son of the propositus.²

Position of Killers

A legatee who has killed the legator, or an heir who has killed the propositus, shall have no rights in the estate of the deceased, provided that the killing was intentional and not inadvertent.³ In a case of inheritance, if the heir's act was unintentional, it will not affect his position in the scheme of distribution of the estate, although he shall be liable for the payment of blood money (*diya*).⁴

1. Articles 266, 269.

2. Cf. the Tunisian Code of Personal Status, 1956, article 192.

3. Articles 179, 229.

4. Article 229.

IRAQ

Bequests

A few provisions of the Iraqi law relating to bequests are quite significant. By implication of the provision of article 70 of the Law if a person has no heirs, the State shall be recognised as his heir. It implies the rule that such a person cannot bequeath more than one third of his estate without the consent of the State.

Article 73 makes certain provisions of the Iraq Civil Code applicable to all bequests. Under the said provisions, a bequest in favour of an heir within the limits of bequeathable third shall be valid without the consent of other heirs.¹

Ordinarily a bequest can be proved only by means of a written document signed by the testator ; only in a special case, where there is any 'material impediment' to the production of such a document, oral evidence shall be admissible.²

Intestate Succession

The law of intestate succession applicable to an Iraqi Muslim shall, as provided by article 90 of the Law of 1959 (added by the Law of 1963), be the Traditional Islamic Law in accordance with the school to which the parties to a case may belong. The law, as amended, does not incorporate the detailed scheme of inheritance under the Islamic law. Only some of the basic principles of inheritance have been laid down in articles 86 to 91. According to the practice established by the Iraqi courts, these are to be applied, in each case, in accordance with the school of law followed by the parties ; no one is forced to adopt the system of the inheritance under a school of Islamic law other than his own.³

1. Article 1108.

2. Article 65

3. Anderson, 'Changes in Law of Personal Status in Iraq', I.C.L.Q. (1963), 1031. The author, in this article, expressed an opinion that articles 86 to 91 of the Iraqi law would enforce the Jafri law of inheritance for all Muslims irrespective of their schools. In a later work he records the practice of the courts referred to here, which negative his opinion, expressed earlier. See his 'Recent Reforms in the Islamic Law of Inheritance', 14 I.C.L.Q. (1965), 364.

INDIA

Those provisions of the Indian Succession Act, 1925, which deal with the substantive law relating to inheritance and wills are not ordinarily applicable to various religious communities, including Muslims.¹ But a couple married under the Special Marriage Act, 1954, or whose marriage is registered under the provisions of the said Act, will be governed, in the matters relating to intestate and testamentary succession, by the aforesaid provisions of the Succession Act of 1925.²

PAKISTAN

A solitary provision under the Pakistan Ordinance * deals with the problem of orphaned grandchildren's right to inheritance and provides thereto a unique solution quite different from the doctrine of Obligatory Bequest introduced, for the same purposes, in Egypt, Syria, Tunisia and Morocco. Section 4 of the Ordinance provides that in the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter shall receive *per stripes* a share equivalent to that which such son or daughter would have received if alive.

The provision of section 4 is the most controversial aspect of the Ordinance. The *Ulema* of Pakistan regard it as a contravention of the Islamic law.³ Besides their objections, a Western scholar criticising "the havoc it plays with the traditional *Shari'ah* System" concludes that the provision would upset "the delicate balance achieved by the *Shari'ah* between the two distinct categories of heirs."⁴ Another noted orientalist working

1. See sections 4, 28 and 29

2. The Special Marriage Act, 1954, section 21.

* i.e. the Muslim Family Law Ordinance, 1961.

3. See Usmani, Maulana Muhammad Taqi, "Hamare 'Aili Masail" (Karachi, 1962), Chapter II, 36-76.

4. Coulson, 'Islamic Family Law : Progress in Pakistan' *op. cit.*, note 16, at 254

out the Pakistan provision describes its effect as “a gain achieved at the cost of a considerable number of anomalies.”¹ The provision does lead to anomalous situations and disturbs the scheme of intestate succession under the law of Islam. It is rather difficult to reconcile it with the constitutional directive in Pakistan requiring that all legislation must conform to the Holy Qur’an and the Sunnah.² The explanation of the situation created by this disputed provision seems to lie in what one of the two eminent orientalist quoted above has to say further.

One may perhaps be excused for wondering whether all its implications were fully appreciated or whether the reformers have in fact gone further than they intended.³

To the question why Pakistan could not adopt the undisputed provision of ‘obligatory bequests’ enacted in West Asia, there seems to be no reply.

SOMALI⁴

Inheritance and Wills

In two separate parts Book IV of the Somali law contains the laws of testamentary and intestate succession. Some provisions of this book – especially in the part dealing with inheritance – are noticeable for their clear deviation from the Traditional law.

Law of Wills

In conformity with the Traditional law, both written and oral wills (as well as one by gesture) are allowed.⁵ Majority,

1. Anderson, ‘Recent Reforms in the Islamic Law of Inheritance’, 14 I.C.L.Q (1965), 59.

2. The Constitution of Pakistan, 1962, article 204.

3. Coulson, *op. cit.*, note. 16, at 254.

4. Islamic and Comparative Law Quarterly, Delhi, December, 1982, p. 263 – 266.

5. Article 118, (Family Law Act of Somalia, 1975).

sanity and free will are pre-requisites for making a valid will. ¹ While the rest of the Somali law under comment (including the chapter on wills) seems to be providing legal rules for Muslims, abruptly it says that the will of a non-Muslim will be valid if it is not illegal under the law applicable to him. ² Almost in the same breath it adds that the will of an apostate shall be enforceable only if he reverts to Islam. ³ The former provision, thus, applies only to born non-Muslims. But are they to be governed both by their own law as well as the law under comment ? The answer is not clear.

Where the legatee has been named in the will he must be in existence when the will is made, otherwise he may not be in existence then or even when the testator dies (so that a life interest would be permissible) ; and a conditional will is valid if the condition is lawful. ⁴ A child in the womb is a rightful legatee if born alive to the satisfaction of the rules relating to gestation and legitimacy of children hitherto before laid down in the law ; and in any such case twins are to share the property. ⁵ Charitable bequests are valid except when they contravene Islamic law. ⁶

The Islamic legal principle of “bequeathable third” is enforced by the Somali law and a will in excess of it is not valid under its provisions unless assented to by testator’s heirs. Also enforced by the Somali law is the rule of the Hanafi – Shaafe’ee laws prohibiting a will in favour of testator’s heirs (except with the consent of his other heirs). ⁷

1. Articles 119, 121, 126

2. Article 119

3. Article 121.

4. Articles 120, 122, 136, see also articles 136-137.

5. Articles 139 - 140

6. Article 123.

7. Articles 125, 143, 144.

Every will is revocable by the testator. If it is not revoked and is otherwise valid, after the testator's death the legatee (or his guardian or representative if the will is in favour of an unborn child, minor or institution) must accept it – except where the legatee is a charitable body having no legal representative. Acceptance may be given at any time after testator's death ; but in case the will has been officially notified the time limit for it is ninety days from the date of notification. Legatee's refusal in the testator's lifetime has no effect ; and if the legatee dies after the testator's death without accepting the will, his heirs can accept it. ¹

The Somali law contains provisions relating to wills in favour of a class of persons, as also rules relating to 'general' and 'specific' legacies ² – parallels of which are found in the Indian Succession Act, 1925 which, in turn, is based on the British common law. It further provides detailed legal rules relating to bequests of usufruct. ³

Law of Inheritance

In the chapter of inheritance under the Somali law the Traditional Islamic law seems to have received a severe blow. Here the Qur'anic rule 'double share for the male' has been expressly done away with, describing this as a step towards implementing the two Charters of Revolution. ⁴ Discarding the Islamic scheme of classifying the heirs into *dhaw al-fara'id*, *asabat* and *zaw-al-arham*, in a span of eleven brief articles the Somali law introduces a novel scheme of inheritance, ⁵ which can be analysed in short as follows :

- (i) share of the widow has been increased to that of the widowers so that either of them will get $\frac{1}{4}$

1. Articles 131, 135.

2. Articles 136-138, 144-145.

3. Articles 147-151

4. Article 158.

5. Articles 159-169.

when sharing the property with children and $\frac{1}{2}$ otherwise ;

- (ii) if the deceased is survived by the spouse and both parents but no children, the spouse and the parents equally share the property (i.e., $\frac{1}{2}$ for spouse, $\frac{1}{2}$ for parents) to the exclusion of all others ;
- (iii) the share of either parent inheriting with children is $\frac{1}{6}$;
- (iv) in the absence of both parents, grandfathers (both paternal and maternal) and grandmothers (also both paternal and maternal) take the father's and mother's share respectively ;
- (v) in the absence of children, grandchildren (i.e., children of both son and daughter) inherit ;
- (vi) in the absence of children and grandchildren the parents (or either of them) get the whole property (to the exclusion of all others except the surviving spouse, if any) ;
- (vii) in the absence of children, grandchildren and parents of the deceased, the grandparents share the estate with the brothers and sisters-taking its $\frac{1}{6}$ (together) and leaving the remainder for them; where there is no brother or sister either, they get the whole property ;
- (viii) the surviving spouse in the absence of children, grandchildren, parents and grandparents of the deceased shares the estate with his brothers and sisters-taking $\frac{1}{2}$ of it and leaving for them the other $\frac{1}{2}$ which they divide, among themselves equally ;

- (ix) where the deceased is not survived by his or her spouse, children, or grandchildren, parents, or grandparents and brothers-sisters (full or half but not uterine) – the rule of escheat applies.

CHAPTER 10

COMPARATIVE JURISPRUDENCE

After knowing something about the origin and development of Islamic Jurisprudence (Fiqah) in the previous chapters, we are now in a position to rebut the assertions made by the non-Muslim writers that Islamic Jurisprudence has its origin in, or is otherwise influenced by, the Roman Law.

BASIC POINTS OF DIFFERENCE

(1) Non-Muslim Jurisprudence is based purely on human intellect guided by the circumstances – past as well as present, and as such its basic sources are folkways,¹ customs,² decisions of courts, and legislation. Islamic Jurisprudence, on the contrary, is based on “Wahi” i.e. revelation from Allah the Almighty in the form of Qur’an and Sunnah of the Holy Prophet Muhammad (peace be upon him). It is developed by the Muslim Jurists through Ijma (consensus of opinion) and Qiyas (analogy) which are also based on Qur’an and Sunnah. The principles of Istehsaan, Istislah or Masalehul Mursaleh, and Istadlaal, introduced by the Muslim Jurists for the purpose of Juristic Decuctions, are also bound to remain within the limits of Qur’an and Sunnah. Thus the ultimate basic source of the Islamic Jurisprudence is the “Wahi.” This is the first and foremost point of difference between the non-Muslim Jurisprudence and the Islamic Jurisprudence.

(2) The Islamic Jurisprudence, unlike the non-Muslim Jurisprudence, is not merely a formal science . While it includes within its scope the discussion of the theories and general properties of law, the application of law to man’s actions through the media of rights and obligations, and the classification of legal concepts, the main object of this science is to discuss the rules relating to the interpretation of the texts of Qur’an and Hadees,

1. Traditions of the elders

2. Established traditions and usages of many people or locality

the constitution of Ijma, and analogical extension of the law established by these three sources to cases not falling within the language of the texts, but coming within their intendment. ¹

(3) In the Islamic Jurisprudence, law is personal in its application to the Muslims, that is to say, it is not affected by the constitution of a particular society. This is because the authority of law, according to the Islamic theory, is primarily based on man's conscience and not on political force. Thus if a Muslim goes from one state to another, he is bound by the same law, and if he does not live within the jurisdiction of Muslim State, the Islamic Law still applies to his conscience. ²

(4) The means by which compliance with the laws is secured are also of wider character in the Islamic System than the sanctions of modern European laws. Islamic law has twofold object, spiritual benefit and social good, its policy is to encourage obedience by offer of reward, and to discourage disobedience by imposition of penalty which may be awardable in this world ('Iqaab) or in the next world ('Azaab), or in both, but reward (Swaab) is awardable only in the future life. ³

(5) In the Islamic Jurisprudence, decision of a court of Justice has no force of law and is not binding on other courts. Every court is free to decide the case before it according to its own understanding and discretion without following the decision of any other court in respect of similar case.

(6) Legislation in the non-Muslim countries, may it be a kingdom, aristocracy or democracy, always remains under the government, and no legislation can be made against the government in power. Further, the legislation made by one government is always subject to change, modification or repeal by the succeeding government. But in the case of legislation in

1. Muhammadan Jurisprudence, by Abdur Rahim, pp. 33 – 34.

2. Ibid, p. 59

3. Ibid, pp. 58 – 59.

Islamic countries, the position is totally different. Here the legislation has never been in the hands of the governments, nor was it subject to change, modification or repeal by succeeding governments. Here the basic law is the law of Qur'an and Sunnah by which the ruler as well as the ruled ones both are equally bound, and any legislation which has been through Ijma, or Qiyas i.e. analogical deductions has also been strictly in conformity with the Qur'an and Sunnah.

Further, legislation in the Islamic circles has always been on private level. The people, whenever any problem arose to them, used to refer it to the jurists who used to solve it through their Fatwaas. Similar was the practice with the rulers including the First four Caliphs. Instead of deciding themselves, they used to consult the learned ones on matters of law and issue the commands on basis of their agreed opinions.

Even the codification of Fiqah had been by the jurists on totally private level. The government neither interfered in it nor refused to follow the law laid down by the jurists ; they rather adopted and enforced the Fiqah of either of the four prominent Imams in the regions under their control.

The courts and judges were also equally bound by the law laid down by Qur'an, Sunnah and Ijma and analogical deduction by the jurists unless of course the judge was himself a "Mujtahid" in which case he could use his own discretion in deciding any matter but in any case he was to remain within the limits of Qur'an, and Sunnah and Ijma.

DEVELOPMENT OF JURISPRUDENCE

We have already studied, in the previous chapters, the development of the Islamic Jurisprudence in a bit detail. As regards the development of the non-Muslim Jurisprudence, the position is that it has its first enunciation in the Roman Law, then in the Nepeolean or French Law, then in the Laws of Switzerland and Germany, and then in the British and American Laws.

ROMAN LAW

Originally the Romans were governed by the customs and usages. In the fifth century B.C. the law based on customs and usages was embodied in the form of a code drawn up by the Decemviri,¹ and was known as the XII Tablets.²

Then from time to time the men coming in power framed the laws which are known as the laws of the kings, the laws of the lords, and the laws of the people.³ These were known as the Indirect Laws. As against these were the Direct laws which were the result of the decisions of the judges,⁴ or opinions⁵ of the five learned ones, namely, Papinianus, Ulpianus, Gaius, Paulus, and Modestinus.⁶ They used to give the opinions in answer to the questions put to them by their students or the needy persons or, sometimes also, by the judges. But the judges were not bound to follow them. Emperor Augustus, however, gave the authority to some scholars of law to give opinions on legal problems, and also issued a direction that their opinions were binding on the judges in the cases in which these opinions were given, unless some other scholar of law had given a different opinion on the same point.⁷

In 426 A.D., by law, the opinions of the above mentioned five jurists were made binding on the judges, and their books were to be relied upon as authorities in the decisions, and in case of unanimity, the opinion of the most learned one among them, namely, Papinianus, was to be preferred. But if his opinion was not clear, the judge was to adopt any of the differing views.⁸

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1. Roman Private Law, by R.W. Leage (1948, second edition), p. 6
 2. Dowdecim Tabulae (meaning twelve tablets)
 3. Leges Regiae, Senatus Consults, Leges Plebiscits, Constitutions
 4. Edicta Magistratum.
 5. Responsa Prudentium
 6. They were in the second century A.D.
 7. Falsafah-e-Shari'at-e-Islam, ibid, pp. 232 – 235
 8. Ibid.

This was the position as regards the opinions of the learned ones. But opinions of the judges were also of no less importance in the making of the law. In this connection the Chief Justice of Rome ¹ and other high officials also had the authority of making the law. They had the right to decide ² the cases, and issue manifestos, ³ which were compiled and were known as *Edicta Magistratum*, and which also played important role in the development of the Roman Law. ⁴

The mass of laws which came on record so far was broadly divided into (1) un-written law or the customary law known as *Jus non-scriptum*, and (2) written law known as *Jus Scriptum*, ⁵ which consisted of the following :

- (1) *Leges* – including the laws of (a) the early kings known as *Leges Regiae*, (b) the *Comitia Curiate* (a body of the people), (c) the *Comitia Centuriata* (also a body of the people), and (d) the *Comitia Tributa* (also a body of the people).
- (2) *Plebiscita*
- (3) *Senatus Consulta*
- (4) *Principum Placita*
- (5) *Magistratum Edicta*
- (6) *Responsa Prudentium* ⁶

When Emperor Justinian came to the throne (523 A.D.) he conceived the idea of codifying the whole of Roman Law in two great divisions – Statute Law (*Lex*) and non-Statute law (*Jus*), and in 528 A.D. he gave instructions for the compilation of a work which should embody every existing statute. ⁷

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1. Praetor Perogrinus and Praetor Urbanus, in particular.
 2. *Jus Jurisdicendi*
 3. *Jus Edicendi*
 4. *Falsafah-e-Shari'at-e-Islam*, *ibid.*
 5. *Roman Private Law*, *ibid.*, pp. 6 – 7.
 6. For details, see *Roman Private Law*, *ibid.*, pp. 8 – 40
 7. *Roman Private Law*, *ibid.*, p. 41

The Codex which resulted from Justinian's instructions was founded on the three codes already existing, viz, the Codex Gregorianus (a private work consisting of Imperial Rescripts from the time of Hadrian), the Codex Hermogenianus (another private work consisting of Imperial Constitutions), and the Codex Theodosianus (consisting of the Constitution of Constantine I (306-337 A.D.) and his successors). The Codex was prepared by a commission of ten persons (including his great minister, Tribonian, and Theophilus – a professor of law at Constantinople). They were authorised to omit what they considered superfluous and to reconcile laws which seemed inconsistent with one another, to remove obscurities, and to make such arrangement of the text as the subject matter required. The Codex was complete in 529 A.D. and thereupon received the legislative sanction of the Emperor, who abolished all preceding constitutions, whether considered singly or in any of the above mentioned compilations; the aim, obviously, being that the Codex Justinianus should thenceforth be the Sole source of Roman Statute Law for all time. ¹

In 530 A.D. Justinian appointed another commission of sixteen persons (including Tribonian as its head) to collect the juristic literature in the form of a Digest (also called as Pandects) which was prepared and became the law in 533 A.D. It consisted of 50 volumes. It was henceforth treated to be the sole source of non-statute law, as the Codex was of legislative enactments, and with this object Justinian forbade theoretical work of the jurists even to be cited by way of explaining ambiguities in the text. ²

In the same year as the Digest, were published the Institutes of Justinian, drawn up, on his instructions, by Tribonian, Theophilus, and Dorotheus. The Institutes were founded upon the earlier work of Gaius, with the necessary omissions, and the incorporation of new matter to bring the book up to date. They were intended as an elementary work to introduce students to the principles of Roman Private Law, and

1. Roman Private Law, *ibid*, pp. 41 – 42

2. Roman Private Law, *ibid*, pp. 42 - 43

to be studied as a preliminary to the more serious task of pursuing the Digest. ¹

By the time the Digest and the Institutes had been completed, the Codex already prepared also fell in the need of revision because of new constitutions promulgated by Justinian in the mean time. Tribonian was therefore appointed to revise the Codex and make it up do date. He accordingly prepared the new Codex known as Codex Repetitae Praelectionis in 529 A.D., which is the only code which survives to the present day. ²

In his reign, Justinian issued further enactments which were never officially collected, but exist in private collections and are known as Novellae Constitutions. ³

Justinian's various compilations, viz., the Institutes, the Digest, the Codex Repetitae Praelectionis, and the Novellae Constitutions, are collectively called the Corpus Juris Civilis. ⁴

LAW OF NEPOLEON

In the medieval ages, France was in serious disturbed conditions, both as regards the legal system as well as administration. It was actually divided in the northern part which was governed by customary laws, ⁵ and the southern part which was governed by codified laws, ⁶ which was actually the Roman Law.

When France succeeded in having a strong administration in the centre, there was felt the need of uniformity of the laws. For this purpose Napoleon formed a Committee under his own supervision, which framed the Civil Law of France in 1804 A.D.

1. Roman Private Law, *ibid*, p. 44

2. *Ibid*, p. 44.

3. *Ibid*.

4. *Ibid*.

5. Pays de droit coutumier

6. Pays de droit écrit.

This was the first official legislation of the laws in Europe and the beginning of modern legislation. ¹

Nepoleon Law is still the law of France subject to some modifications made therein keeping in view the needs of the time. Nepoleon Law consists of 2281 sections with an Introduction and three chapters. First chapter deals with individuals, second one with the finance and rights of the persons, and third one with the affairs of ownership's, e.g., inheritance, gift, will, contracts, special agreements, licences, mortgage, insurance, and sale.

Thereafter Civil Procedure Code and Mercantile Law were enforced in 1807 and Criminal Procedure Code in 1808 which were also subsequently amended and modified from time to time particularly during the second world war.

The European countries have generally followed the French laws, particularly the Civil Law. Some, for instance Belgium, have adopted all French laws in toto ; and some, for instance Germany and Switzerland, have adopted them by necessary modifications.

SWITZERLAND AND GERMANY

Laws of Switzerland and Germany are generally based on the Nepoleon Laws of France, but they also have their own pattern because they have been framed by learned Professors and therefore they are treated to be more advanced than the laws of Europe.

In 1881 A.D. the "Qanoon Meesaaq-e-Mutahiddah" ² was enforced in Switzerland. Then the work of framing the Civil Law was entrusted to Professor Eugen Huber of the Berlin University, which was passed by the Upper House in 1907 and enforced in 1912. Both these laws proved to be the best laws and were also adopted by Kamal Pasah of Turkey in 1926 A.D.

1. History of Legislation of French Laws, by Bilaneol, vol. I, pp. 34 -143; Cours elementaire histoire d' histoire du droit Francais (Paris, 1921).

2. Code Federal dos obligations.

In Germany, the Civil Law of Ceasure was framed in 1896 A.D. and was enforced in 1900 A.D. It consisted of 2385 sections divided in five chapters, dealing with agreements and contracts, personal rights, family rights and inheritance.

On the Nazi party coming in power, in 1925 the government made a Legislative Assembly to suggest amendments in the laws of Germany so as to bring them agree with the manifesto of the Nazi Party, and in this connection the Assembly also compiled a book, namely, "Die lehri von den Leistungss", but with the end of the Nazi rule in the second world war this movement also finished.

BRITAIN AND AMERICA

Britain and America remained away from the movement of the legislation of laws that was started in the nineteenth century A.D, and maintained their customary law which is known as the Common Law. Although there is no written official code of laws in these countries but the judges honour and follow the precedents, and while the lower courts are bound by the decisions of the higher courts, the higher courts also follow their previous decisions, and thus the rulings given by the higher courts provide the judicial laws which are not easily over-ruled, changed or modified by the courts themselves, and thus the precedents limit the authority of the courts in giving the decisions.

In the decisions of the courts, however, the Common Law was being followed, and thus together with the decisions of the courts the Common Law became a special law in the form of Case Law.

Besides this, in the nineteenth century, the Mercantile Laws 1882, Company Law 1890, Law of Sale 1893, Law of Marine Insurance 1906, Law of Theft 1916 and other laws, to be enforced in the countries under the British Rule, were made.

In England also there was movement to make the Laws on official level but due to some reasons it could not succeed because of different laws being in force in different regions, as, for example, the law of Scotland was influenced by the Roman Law, the law of South Africa was under the Dutch Law, a province of Canada and Morris was under the Napoleon Law, and in India the private law of Muslims was the Islamic Law.

In America, different states are governed by different laws, but the Common Law of England is extant throughout. America is, however, not as much influenced by the Roman Law.¹

FOLKWAYS, CUSTOMS, JUDICIAL DECISIONS AND LEGISLATION

From the above details it is clear that the non-Muslim Jurisprudence has its origin in the folkways and customs, and it has been developed by judicial decisions given by the judges and legislation of laws by the kings and Legislative Assemblies. On the other hand, Islamic Jurisprudence (Fiqh) has its origin in the Divine Revelations in the form of Qur'an and Sunnah, and has been developed by the "Mujtahids" (juristconsults) through Ijma and Qiyas, and in its development neither the kings nor the Legislative Assemblies have played any role, and further, the development has always remained within the spirit and limits of Qur'an and Sunnah.

FOLKWAYS

"Folkways" means "the Traditions of forefathers." The people in the primitive ages, and so too the Arabs before the advent of Islam, used to follow, and feel proud of, the ways of their forefathers, so much so that, when Qur'an said to them, "come to what Allah has revealed, come to the Messenger", they said, "enough for us are the way we found our fathers

1. *Falsafah-e-Shari'at-e-Islam*, *ibid*, pp. 132 – 142.

following.” In answer to it Qur’an said, “what, even though their fathers were void of knowledge and guidance” (*Qur’an, Maa’idah, 5:104*).

“Folkways” in their first and foremost form were “the ways of Adam”, the first man created, and sent down to reside on earth, by Allah the Almighty. But Adam was created to be the Vicegerent ¹ of Allah on earth, and therefore his first and foremost duty was to follow and enforce the Law of Allah. He was as such given the knowledge of all things, ² and was promised to be guided from time to time by revelation of the Commands from Allah, ³ and was also made clear that, “whoever follows My Guidance, no fear shall come upon them, nor shall they grieve ; but (as to) those who disbelieve in and reject Our Messages, they are companions of the Fire (of Hell) ; in it they will abide.” ⁴ Thus Allah the Almighty laid down the Law, or Rule of Conduct, for Adam, by which he and his immediate generation were governed, and this actually formed the “folkways” for their successors. But after them the people gave up the Traditions of Adam, formulated their own ways, and started worshipping sun, moon, stars, animals or idols. This they did because of the persuasions of Satain who had challenged to deviate the people from the Path of Allah. ⁵ Side by side, Allah the Almighty, in terms of His Promise, ⁶ also, from time to time, deputed His Messengers to revive His Messages to save the people from the ways of Satan. He also revealed the Torah to Prophet Moses, ⁷ Zubur to Prophet David, ⁸ and Injeel to Prophet Jesus Christ, ⁹ for the same purpose. But these books were not maintained by the people in their purity. They actually made corruptions in them to suit their own evil motives , with the result that after Prophet Jesus the human society became totally corrupt, not only as regards the faith but also as regards their conduct in the day to day life, and when Allah the Almighty

1. Qur’an, *Baqarah*, 2:30, 2. Ibid, 2:31 3. Ibid, 2:38 4. Ibid, 2:38-39

5. Ibid, *Aaraaf*, 7:11, 12 ; *Hijr*, 15:31- 37; *Bani Israil*, 17:61 ; *Kahf*, 18:50

6. See No. 3 above

7. Ibid, *Baqarah*, 2:53 ; *Aaraaf*, 7:144-145 ; *Maa’idah*, 5:44

8. Ibid, *Nisa*, 4:163. 9. Ibid, *Maa’idah*, 5:46.

raise the last Prophet Muhammad (peace be upon him) and revealed the last heavenly book i.e. Qur'an through him, calling upon the people to give up infidelity and polytheism as well as the life of misconduct, and return to the faith in the Absolute Unity of Allah, and adopt the life of righteousness, they said, "enough for us are the ways we found our forefathers following." Since the ways of their forefathers were in clear disregard to the ways revealed to Adam, and all Prophets raised after him, by Allah the Almighty, Qur'an condemned the ways of their forefathers saying, "what, even though their fathers were void of knowledge and guidance." ¹

Thus, while the "folkways" according to the non-Muslim Jurisprudence are the ways of the forefathers, may they be against the Guidance provided by Allah the Almighty through His Books and Prophets, the "folkways" within the meaning as laid down by the Islamic Jurisprudence are only those which are in conformity with the way revealed to Adam, and his succeeding Prophets, by Allah the Almighty, and the way revealed to them all was one and the same, i.e. faith in the absolute Unity of, and exclusive obedience to, Allah the Almighty, ² which, in other words, is known as "Islam", and for which Qur'an says, "surely the religion with Allah is Islam", ³ and, therefore, "whoever seeks a religion other than Islam, it will not be accepted from him, and in the Hereafter he will be one of the losers." ⁴

CUSTOMS

Custom is a rule of conduct based on traditions and usages voluntarily and continuously observed by a group of persons with the strength of public opinion as a sanction behind it. ⁵

1. Qur'an, *Maa'idah*, 5:104.

2. Qur'an, *Ambia*, 21:25.

3. Qur'an, *Aale Imran*, 3:18.

4. *Ibid*, 3:84

5. *Comparative Jurisprudence*, by Dr. M.S. Rana, pp. 3 and 4

Each group of people built their own set of customs ; and many of these developed into customary law and remained for centuries as “law,” and the courts also recognize the customs, e.g. mercantile usages and traditions as “Law.”

Islam also recognized some customs of the people and gave them the status of law, but the difference is that while the non-Muslim Jurisprudence totally originates from, and gives the status of law, to all established customs of people, may they be against the Guidance revealed by Allah the Almighty through His Books and Prophets, Islamic Jurisprudence does not originate from any custom, nor does it give the status of law to any custom which is against the spirit, and outside the limits, of Qur’an and Sunnah. According to the Islamic Jurisprudence, if there is nothing against Qur’an and Sunnah in any custom, it will be enforced as a law, otherwise not. ¹ In this connection, Qur’an also says, “take to forgiveness and enjoin good and turn away from the ignorant.” ² In this verse the word “Urf”, translated as “good”, according to the learned scholars, means “the good custom extant among the people”, ³ which, if not being against Qur’an and Sunnah, is to be given effect as a law.

According to the learned jurists also, “Al-‘Aadatun Mohkamatum”, i.e. custom is a source of judicial decision, ⁴ meaning that judicial decision can be based on mere custom. They are also of the agreed view that, “that which is proved by ‘Urf (custom) is like the one proved by Nass, ⁵ and “that which is proved by “ ‘Urf ” (custom) will be treated as proved by “Daleel-e-Shara’ee.” ⁶ They, therefore, say that, “decision should be given according to the “ ‘Urf ” (custom) of the people

1. Sharhe Sair-e-Kabir, Vol. I, p. 198

2. Qur’an, Aaraaf, 7:199

3. Fiqah-e-Islami Ka Taareekhi Pas Manzar, ibid, p. 225

4. See Legal Maxim No. 35 in chapter 1.

5. Sharhe Sair-e-Kabir, Vol. I, p. 115

6. Majmoo’ah Rasa’il-e-Aabidin, p. 115.

of the present time even though it be against the “ ‘Urf ” of the people of the past.”¹ The first and foremost condition, however, is that the ‘Urf or custom should not be against the Qur’an and Sunnah.²

JUDICIAL DECISIONS

We have already noted that “Magistratum Edicta”, i.e. judicial decisions by the judges also played important role in the development of the Roman Law. Similarly, in England and America also, judicial decisions of the judges have developed a special law known as the Case Law, according to which the judges follow the precedents, and while lower courts are bound by decisions of the high courts, the latter also honour and follow their own decisions, and thus the rulings given by the higher courts provide the judicial laws which are not easily over-ruled, changed or modified.

On the contrary, under the Islamic Jurisprudence, decision of a judge has no binding force as a law over other judges or courts, and even the same judge is not bound to follow his decision in a subsequent case. The decision in a particular case is binding only to the extent of that case. In a subsequent similar case the same judge or any other judge can give a different judgment.

Another important point of distinction is that while under the non-Muslim Jurisprudence a court has jurisdiction to declare any law, even though made by the ruler or the Parliament, and even any article of the Constitution, which is the fundamental law of a country, as illegal, void, or redundant ; under the Islamic Jurisprudence no court has jurisdiction to make any such declaration. On the contrary, each and every court is bound to decide according to Qur’an, Sunnah, and Ijma.

1. Raddul Mukhtaar,

2. Fiqah-e-Islami Ka Tarekhi Pas Manzar, ibid, pp. 227 – 229.

According to Qur'an, "whoever judges not by what Allah has revealed is a disbeliever,¹ wrongdoer,² and transgressor."³ As regards the authority of Sunnah, according to Qur'an, the believers are bound to make the Holy Prophet as their judge of what is in dispute between them, and find not any straitness in their hearts regarding that which he decides, and submit with full submission.⁴ As regards Ijma, the Muslim jurists are of the agreed view that when the "Mujtahids" decide and agree on any point, it is obligatory on all to follow it and not differ from it.⁵

LEGISLATION

Legislation of laws, under the non-Muslim Jurisprudence, right from the primitive ages up to the present day, has been by the rulers and kings or by the Legislative Assemblies or Parliaments, and it has been based purely on human reason.

On the contrary, under the Islamic Jurisprudence, it has been totally through revelation by Allah the Almighty in the form of Qur'an and Sunnah, and it has been completed by the death of the Holy Prophet. Since then there is no legislation, but only interpretation, extension and application of the law by the learned jurists through Ijma and Qiyas. Thus legislation, under the Islamic Jurisprudence has never been the concern of the rulers and kings or the Assemblies or Parliaments. Qur'an and Sunnah have always been kept intact, and the task of their interpretation, extension and application has been the concern of the learned ones, and all the Muslims, including the rulers and the ruled ones, are equally bound by it. None could ever dare to interfere in what the learned ones laid down in terms of Qur'an and Sunnah and the Ijma. Even today the Assemblies and Parliaments in the Muslim countries are bound to make laws, if required to meet new situations, keeping in view the spirit and limits of Qur'an and Sunnah.

1. Qur'an, *Maa'idah*, 5:44.

2. *Ibid*, 5:45.

3. *Ibid*, 5:47

4. *Ibid*, *Nisa*, 4:65

5. Tauzeeh Talweeh, Al-Ijma

In this connection, it may also be noted that Islamic Jurisprudence does not negate the human reason. It is rather a fact that all Islamic laws have full rational justification. The only difference is that while the non-Muslim Jurisprudence has total reliance on human reason, which may vary from people to people, which can even err in exact appreciation of many things, and which may not also lay down the law of universal application ; the Islamic Jurisprudence basically depends upon the Divine Revelation which is in all circumstances Supreme and fit for universal application. Human reason, of whatever strength it may, cannot replace the Divine Wisdom. While the Divine Wisdom is unlimited, the human reason is confined to natural causes and circumstances and cannot go beyond its own environment, and therefore it is just possible that whatever the human reason thinks to be good may be bad, or whatever it thinks to be bad may be good. ¹ On the contrary, whatever the Divine Wisdom has laid down is perfect, absolute and final, and applies to all people, of all ages, and of all places. Therefore the well-being and success, in its true sense, of the humanity at large, consists only in the sincere following of the law laid down by Allah the Almighty in the Form of Qur'an and Sunnah, and not at all in the legislation by any ruler, king, Assembly or Parliament. It is for this reason that Qur'an says, "O you who believe, obey Allah, and obey the Messenger and those of you who are the Oolul Amr ; and if you have any dispute concerning any matter, refer it to Allah and the Messenger, if you are in truth believers in Allah and the Last Day. That is better and more seemly in the end." ²

JURISPRUDENCE

As an study of law, the non-Muslim Jurisprudence "has been classified into three headings, viz., (1) Analytical or legal exposition, (2) Historical or legal history, and (3) Ethical or science of legislation." ³

1. Qur'an, *Aale Imran*, 3:216

2. Qur'an, *Nisa*, 4:59

3. *Comparative Jurisprudence*, by Dr. M.S. Rana, p. 14

This classification has, however, created divergence in the learning of the science of law. Thus, “the analytic jurist, for instance, mainly concerns himself with modern legal systems and phenomena of the advanced civilised societies wherein all laws conform to the standard of command emanating from the State, the historic jurist aspiring to be more thorough and profound himself with legal system in the progress of historical evolution,¹ and the ethical jurist deals more with the future rather than the past and expounds the law “not as it is or has been but as it ought to be,”² and their jurisprudence is really the science of legislation.³

The non-Muslim jurists are not even unanimous as regards the definition of Jurisprudence. Salmond defines it as “a systematized study of law”, but confines it to the study of the fundamentals of civil law. Cardozo suggests thorough study of law with reference to its origin, growth and function.⁴ Holland defines jurisprudence as “the science of positive law.”⁵ Sir Polak criticises this ideal and rigid separation of the “abstract or formal from the concrete or material, treatment of the legal science – of the science of legal relations from that of the legal rules – as a practical impossibility.”⁶

Under the Islamic Jurisprudence, on the contrary, there is no such divergence of opinion, neither as regards the definition nor as regards the classification of jurisprudence. All Muslim jurists are unanimous that, as defined by the Holy Qur’an, jurisprudence, in the Islamic sense, means “Taffaqqah Fid Deen,⁷ i.e. understanding in “Deen” (religion). Since the word “Deen” is more wide and comprehensive than “Mazhab”

1. Jurisprudence, by Holland, chapter 1

2. Ibid.

3. Basu, The Modern Theories of Jurisprudence (Tagore Law Lectures) Vol. I, p. XXV ; (Comparative Jurisprudence, by Dr. M.S. Rana, p. 16).

4. The Growth of the law, by Cardozo.

5. Jurisprudence, by Holland, chapter 1

6. Essays in Jurisprudence (Comparative Jurisprudence, ibid, p. 16)

7. Qur’an, *Taubah*, 9:122)

(religion), and covers all possible aspects of spiritual as well as material aspects of human life, the Muslim jurists are also unanimous as regards the classification of the laws into (1) Aqaa'id (beliefs), (2) Ibadaat (prayers), (3) Akhlaqiyaat (morality), (4) Manakahaat (family affairs), (5) Mu'aamilaat (worldly affairs – finance, business, contracts, politics, peace and war, etc.), (6) Uqubaat (punishments), and (7) Mukhasimaat (litigations and judiciary).

The Muslims jurists are also of the agreed view that the science of Islamic Jurisprudence, known as "Usul" or " 'Ilmul Usul" or "Usul-e-Fiqah", deals with the sources of Islamic Law, and that the sources are only four, namely, Qur'an, Sunnah, Ijma, and Qiyas, and further that Ijma and Qiyas have their sanction, as sources of law, in the Qur'an and Sunnah, and that they cannot go beyond the spirit and limits of Qur'an and Sunnah in any case whatsoever.

As regards the development of Jurisprudence, here also there is a clear distinction between the non-Muslim and the Islamic Jurisprudence. Roman law, as we have already seen, emerged out of customary rules, and was developed through legislation by the kings. When Greece was annexed to the Roman Empire in 146 B.C., it exerted its influence in the development of Roman Law and politics. Being pre-eminently a practical race of disciplined peasants and yeoman, Romans incorporated the legal philosophy of the Greeks in their system borrowing the Stoics and Aristotelian tenets respecting nature which suited to Roman realism more than the abstract principles propounded by Plato as regards "Realities", "Ideas." ¹

As regards the legal concepts in the Greek Philosophy, we may note that they centre round the ideology of State, as advanced by Plato, and Aristotle. According to Plato, the individual virtues of the head, heart and stomach depends on knowledge, and the virtue that coordinates and regulates all

1. Comparative Jurisprudence, by Dr. M.S. Rana, p. 42

individual virtues is justice, and that which is required to foster justice is known as the society or state. This is the gist of his well-known theory of justice and state. Plato's view thus requires complete domination of the state over the individual faculties.¹ Aristotle also is in line with Plato in holding that man's training of the natural character into moral can only be through the state, and says that justice must be adopted to circumstances fostering absolute equality between man and man in awarding the merit and punishing the quilt and distribution of the things according to the needs and circumstances.² State, according to the Stoics, emanates from the social nature of man, and therefore the whole human race should form one state with same principles of law according to Nature and Reason. According to them, justice based, not on enactments but, on nature and its laws is identical with natural justice.³

Introduction of these Greek ideologies helped the rigid and rough Roman Law give way to ethical or moral considerations and played important role in the development of the Roman Jurisprudence.

With the fall of the Roman empire and conquest of Europe by the Barbarians, the civilization suffered serious set back during the 5th to 15th centuries. But as regards the legal system, the Roman Church dominated in which the Pope claimed to be the centre of all powers. Prominent thinkers of the middle ages including Dente William Occan, Marsilius and Nicholaus Cusanus, however, stood against the dominance of the church and pleaded sovereignty of the people. Ultimately the theories of St. Aquinas, by which he classified the law into (1) the law of the Divine Reason (*Lex Aterna*), (2) the natural law (*Lex Naturalis*) in which man participates and by which men and states distinguish between good evil, and (3) the positive law which is enacted by the states for regulation of the individual

1. *Ibid*, p. 29

2. *Ibid*, p. 31

3. *Legal Philosophy*, by Berolzheimer, Art. 5. 2. (*Ibid*, p. 37)

conduct, played important role in the development of the Modern Jurisprudence.

As regards development of the Islamic Jurisprudence, however, the position is totally different. It has not at all emerged out of any custom of the people. Its origin totally consists in the Divine Revelation. It was never rigid or rough, but from the very beginning it proceeded on reason and maintained throughout the high norms of morality and good conduct. The concepts of justice and state, in Islam, are also totally different. According to Islam, sovereignty vests in Allah, and man is only a vicegerent of Allah on earth,¹ and therefore it is really Allah Who gives the rule on earth to anybody He likes,² or withdraws the rule from anybody He likes,³ and the purpose of giving the rule is that man may keep up prayer, pay the poor-rate, enjoin good and forbid evil.⁴ Similarly, as regards justice, it is also not left to the discretion of man to make whatever laws he may like, or do justice in whatever manner he may choose. It has been specifically laid down that, "whatever the Messenger gives you, accept it ; and whatever he forbids you, abstain from it,"⁵ and "judge between the people by what Allah has revealed,"⁶ and "whoever judges not by what Allah has revealed is a disbeliever,⁷ wrongdoer,⁸ and transgressor."⁹

Under the Islamic Jurisdiction there is no distinction of Divine, Natural or Positive Law. Here the Law is only the Divine Law revealed by Allah the Almighty in the form of Qur'an and Sunnah, and all the worthy Caliphs of the Holy Prophet, the jurists and the learned ones have only interpreted, extended and

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1. Qur'an, *Baqarah*, 2:30
 2. Qur'an, *Aale Imran*, 3:25
 3. *Ibid*.
 4. Qur'an, *Hajj*, 22:41
 5. Qur'an, *Hashr*, 59:7
 6. Qur'an, *Maa'idah*, 5:48
 7. *Ibid*, 5:44
 8. *Ibid*, 5:45
 9. *Ibid*, 5:47

applied the laws laid down by Qur'an and Sunnah through Ijma and Qiyas, and as regards the customs and usages of the people or localities, they have allowed to remain in force only those customs and usages which are not against the spirit and beyond the limits of Qur'an and Sunnah.

SOME POINTS OF SIMILARITY

As stated earlier, the Holy Prophet himself, and after him, his worthy Caliphs, and Mujtahids, allowed certain customs and usages that were already prevalent and were not against the spirit and outside the limits of Qur'an and Sunnah. Thus, for instance (1) in court litigations the practice was that the plaintiff was asked to prove his claim through evidence of the witnesses ; and in the absence of plaintiff's evidence, if the defendant denied the claim, he was asked to take the oath. The Holy Prophet also allowed this practice, and the Legal Maxim of Fiqah, viz., "proof is on the claimant ; oath on him who denies,"¹ is based on it ; (2) four different forms of marriage were extant among the pagan Arabs² out of which the one relating to "offer and acceptance" was allowed and the others being immoral and against Islam were rejected ; (3) for transfer of property, the methods of sale, gift, mortgage, and giving on rent were extant. All these being legal and valid from Islamic point of view were allowed ; (4) for sale of goods many ways were extant out of which only those were allowed which were within the spirit of Islam, and the rest were prohibited ; (5) agricultural lands and gardens were being given on rent or share of produce. This was also allowed ; (6) the system of wills and bequests was also allowed ; and so on.³

1. Legal Maxim No. 75 – chapter – 1 , "Usul"

2. See Chapter 5 "Development of Fiqah"

3. See Hujjatillahil Baaligha, by Shah Waliullah

The Companions of the Holy Prophet used to go for trade and business to Syria, Egypt, Abyssinia, Iraq and Yemen, where the laws of Rome and Persia were extant, and they used to honour them. Further, in the newly conquered territories, the language, culture, religion, and law of the people, to the extent permitted by the Islamic Shari'ah were permitted, and as regards the personal affairs of marriage, and inheritance, the non-Muslims were free to follow their own laws and customs.¹ After conquering Iraq, Syria, and Egypt, Umar allowed to continue the Revenue Laws that were extant there with some modifications to eliminate hardships to the peasants.²

But this does not prove that the Islamic Jurisprudence had its origin in, or was influenced by, the non-Muslim Jurisprudence. These instances merely show the spirit of toleration of, or permission for, the laws, customs or usages that were extant among any people, for their own benefit, and that too to the extent they were permissible by the Qur'an and Sunnah. In the Islamic Jurisprudence, as explained by Allama Shatabi, the sources are (1) the text and (2) the opinion. The former are based on Qur'an and Sunnah, and the latter on Qiyas and reasoning. But the later are recognized as sources not because they are proved by intelligence but because they are sanctioned by Qur'an and Sunnah both. Thus Qur'an and Sunnah are ultimate and real sources of Islamic Jurisprudence.³

Thus, if some of the laws, customs or usages have been tolerated or permitted by the Muslim Jurists, it is not only because they stand the test of reason but because they are also not found to be against the spirit of Qur'an and Sunnah.

In view of this, it is really understandable as to how one can dare say, except for the sake of some ulterior motives, that, "the comparative study on one chapter of private law has yielded

1. Kitabul Amwaal, p. 101

2. Islam Ka Zara'ee Nizam, by Maulana Muhammad Taqi Amini.

3. Al-Muwafiqaat, Vol. III, p. 41 (Fiqah-e-Islami Ka Taareekhi Pas Manzar, ibid, pp. 232-237)

the most conclusive proofs of the thorough going adoption of Roman Law by the jurists of Islam (Franz Frederik Schmidt, *Die Occupatio im Islamischen Recht*, reprint from *Isl.*, i, Strassburg, 1910). I. Goldziher had previously in this connection made the suggestion that even the names of legal speculation (Fikh – intelligence) and its students Fukaha (intelligent) have been influenced by the Latin terms (jiris) prudentia and (jiris) prudentes in their special application to the study of law and teachers of law. An analogous example in support of the influence of Roman Law is the use of the words chokhma and chakhamim among the Jews of Palestine (*Kultur d. Gegenw.*, Vol., i, part iii, 1st half, p. 103 ; *ZDMG*, li, 318)".¹

But then, after admitting in the same breath that, "Roman Law, however, does not exhaust the sources drawn upon in the development of Muslim Law," it is further said, "the receptive character that marks the formation and development of Islam also found expression, naturally first of all in matters of ritual (Wensinck, in *Isl.*, i. 101), in borrowings from Jewish Law (of *REJ*, xxxviii. 79 ; xliii. 4 ; E. Mittwoch, *Zur Entstehungsgeschichte des islamischen Gebets u. Kultus*, Abhandl. der Kon. Preuss. Akad. der Wissenschaften, Berlin, 1913) even many of the provisions of Roman Law that have been adopted by Islam only found a place in Fikh through the intermediary of the Jews. It still remains to be investigated, however, if and in what degree Persian influence can be traced in the development of many details of Muslim Law."²

But then, again comes to the truth, "we thus have four "roots" in operation for the deduction of laws, as methodical principles from which legal prescriptions may be legitimately laid down, viz., : (1) Kur'an, (2) Sunna, (3) Kiyas, (4) Idjma."³

If the assertion made in the last paragraph is correct, and no doubt it is correct, then where lies the justification in the

1. *Shorter Encyclopaedia of Islam*, by Gibb and Kramers, p. 103

2. *Ibid*, pp. 103 – 104

3. *Ibid*, p. 104

assertion that Islamic Jurisprudence has its source in, or is otherwise influenced by, the Roman or any other law ? It is nothing but a futile attempt, to prove the influence of Latin terms on the words “Fiqah” and “Fuqaha”, which are Arabic, and have their origin in the Qur’an itself, or the influence of Roman Law because of the use of the words “chokhna” or “chakhamim” by the Jews of Palestine.

Islamic Jurisprudence has not borrowed anything from any un-Islamic source. It is totally based on Divine Revelation, and merely because the words “Fiqah” and “Fuqahaa” have the same connotation as the Latin words “Jurisprudence” or “Jurisprudents”, or because any principle laid down by Islam coincides with any principle of the Roman Law, or because any ritual of Islam is similar to that of the Jewish Law, it cannot be said that Islamic Law originates from, or is influenced by, any other law. In its origin as well as development, Islamic Jurisprudence in fact is unique and independent of all other laws of the world.

CHAPTER 11

THE FOUR IMAMS

ABU HANIFAH

Nu'man bin Saabit, generally known as Abu Hanifah, was born at Kufah in 80 A.H. (699 A.D.).¹ His father, and he himself, was a merchant of silk in Kufah. It is said that his grandfather Zootaa was brought as a slave from Kabul to Kufah, and set free, by a member of the Arabian tribe of Taymullah bin Sa'labah, and he and his descendants therefore became the 'Maula' of this tribe. Abu Hanifah is, therefore, sometimes also called as al-Taymi.

Abu Hanifah started his academic career by the study of 'Ilmul Kalaam (Science of Divinity) but soon gave it up and attended the lectures of Hamaad bin Abi Sulaiman (d. 120 A.H.), who used to teach Fiqah in Kufah. During the Hajj he also attended the lectures of 'Ata bin Abi Rabah (d. 114 or 115 A.H.) at Mecca, and also of Jafar al-Sadiq (d. 148 A.H.) at Medinah. He also heard the Ahadees (Traditions) from Ash-Sha'bi, Qatadah, Al-Aa'mash and other prominent scholars of his time.

After the death of Hamaad, Abu Hanifah became the foremost authority on Fiqah (religious law) in Kufah, and accordingly the main representative of the Kufian School of Law, and collected many scholars including his chief disciples Abu Yusuf (d. 183 A.H.), Muhammad bin Hasan Shaibani (d. 189 A.H.), Zufar bin Huzail (d. 158 A.H.), and Hasan bin Zaid Lulu'ee (d. 204 A.H.), whom he taught Fiqah, and who helped him in the codification of Fiqah.

Abu Hanifah did not himself compose any book on Fiqah, but discussed his opinions with, and dictated them to, his disciples. Some of the works of his disciples are therefore the main sources of his doctrines, particularly the "Ikhtilaaf Abi

1. During the Omayyad Rule when Abdul Maalik was in power.

Hanifah Wa Ibne Abi Laila” and the “Al-Radd ‘Ala Siyar al-Auza’ee”, by Abu Yusuf; and the “Al-Hujaj” and the version of Maalik’s “Muwatta”, by Muhammad bin Hasan Shaibani. For the doctrine which Abu Hanifah received from Hammaad, the main sources are “al-Aasaar” of Abu Yusuf, and “al-Aasaar” of Muhammad bin Hasan Shaibani. ¹

As against his contemporaries, particularly Ibne Abi Laila (d. 148 A.H.) – the Qazi of Kufah, Abu Hanifah had a unique and high position in the development of Islamic legal thought and doctrine. Abu Hanifah in fact played the chief role in systematizing the law, and his legal thought is not only more broadly based and more thoroughly applied than that of his older contemporaries, but technically it is more highly developed, more circumspect, and more refined. His chief contribution as such is the formulation of the theories and principles of Fiqah, and he in fact is the founder of the Islamic Jurisprudence in its reality. He was also the first to give prominence to the doctrine of Qiyas (analogy or analogical deduction) and introduce “Istehsaan” which bears remarkable resemblance with the doctrine of “Equity” of the Modern Jurisprudence. He is as such also known as the “Ehlur Raa’e” or “Upholder of Private Judgment” ² as against the “Ehle Hadees” or “Upholder of Tradition” which is the title of the founders of the other three Schools of Fiqah.

In fact Abu Hanifah relies less upon the Ahadees (Traditions) in deriving legal conclusions and more upon logical deductions. But this was not because of giving less credence to the Traditions. It was because, “in sifting the Traditions he was more strict than others, and the tests which he applied to them resulted in excluding many Traditions which the people

1. Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 123

2. He himself used to say, “this ‘Ilm of ours is Raa’e, and to me this is the best of all. If anybody thinks another Raa’e as better, his Raa’e is for him and our Raa’e for us” (Al-Milal Wan Nahl, Vol. II, p. 39; Falsafah-e-Shari’at-e-Islam, ibid, p. 41).

generally accepted as genuine. Further, the principles that he laid down confined within the narrow compass the Traditions from which a rule of law might be legitimately deduced.”¹ Another reason for this appears to be that by that time no authentic compilation of the Ahadees was prepared, and there were in circulation large number of forged and fabricated Ahadees. But basically, like all other prominent jurists, the general practice of Abu Hanifah also, in making juristic deduction, as he himself puts it, was that if he could get the answer from the Qur’an, he used to adopt it. Getting no answer from the obvious words of Qur’an, he used to search for it in the Ahadees, and finding no authentic Hadees on the point, he used to look for it in the Traditions of the Sahabah (Companions of the Holy Prophet), failing which he used to do Ijtihaad as did other jurists among the Taaba’een.²

Abu Hanifah also extended the doctrine of Ijma to all ages, as against the view of other jurists who confined it to the age of the Sahabah only. He also recognised the authority of “Urf” i.e. local customs and usages as guiding the application of the law.

Yet another and the most important and everlasting contribution of Abu Hanifah was the codification of Fiqah. In this laborious and painstaking job he was assisted by a committee of forty scholars including his prominent disciples Abu Yusuf, Muhammad bin Hasan, Zufar bin Huzail, Hassan bin Ziyad Lulu’ee, Yahya bin Zaid, Hafs bin Ghiyaas, Dawud Taa’ee, Habbaan and Mandal. This committee used to discuss all practical or theoretical problems that were brought to it, or which it itself suggested to itself, and the conclusions which it derived were recorded as well as circulated. The work of codification was completed in thirty years.

1. Muqaddamah Ibne Khuldoon (Bolaq Edition), Vol. I, p. 371 ; Muhammadan Jurisprudence, by Abdur Rahim, p. 25.

2. Teereekh Fiqah-e-Islami, ibid, p. 322 ; Falsafah-e-Shari’at-e-Islam, ibid, p. 41.

Abu Hanifah was founder of the first School of Fiqah, namely, the Hanafiah, but on account of his extraordinary knowledge, caliber, power of juristic deduction, and contribution in the development of Fiqah he is also known as the "Imamul Aazam" or the Great Imam, and this epithet befits him not only for the reasons already stated but also because he has the largest number of followers in the Muslim Community of the world, i.e. about two-third of the entire Muslim population. Imam Shaafe'ee had rightly said for him that, "people have to depend upon Imam Abu Hanifah in Fiqah."

Abu Hanifah died at Bagdad at the age of seventy years in 150 A.H. (767 A.D.), ¹ while he was in the prison. It is generally said that Abu Hanifah was put in the prison by Al-Mansoor because of his refusal to accept the office of "Qazi'ul Quzzaat" (Chief Justice). It is also said that Ummayyad governor Yazid bin Umar bin Hubairah, under Marwan II, had also flogged him for the same reason. But Khizri has expressed the view that he was in fact punished for his disapproval of and non-cooperation with the Umayyad as well the Abbaside rulers. ²

Abu Hanifah's tomb still exists in Bagdad. It was built in 459 A.H. (1066 A.D.). The vicinity round his mausoleum is called al-Aazamiyah.

1. During the Abbaside Rule while Al-Mansoor was in power.

2. Taareekh Fiqah-e-Islam, ibid, pp. 320 – 321.

MAALIK BIN ANAS

Abu Abdullah Maalik bin Anas bin Maalik bin Abi Aamir bin Amr bin al-Haris bin Ghaymaan bin Khusayn bin Amr bin al-Haris al-Asbahi belonged to Humayr, who are included in the Banu Taym bin Murra (Taym Kuraysh). He was born at Medinah in 95 A.H. ¹

Maalik learned Fiqah from Rabi'a bin Abdur Rahman (d. 132 or 133 A.H.), who cultivated Raa'e in Medinah, and was accordingly known as Rabi'atur Raa'e. He learned Qir'at from Naafe' bin Abi Nu'aim, and transmitted Ahadees from al-Zuhri, Naafe' the Maula of Ibne Umar, Abuz Zinaad, Hashim bin Urwah, Yahya bin Sa'eed, Abdullah bin Dinaar, Muhammad bin al-Munkadir, Abuz Zubair and others.

It is said that when Muhammad bin Abdullah made himself the master of Medinah and made a coup against Abbaside ruler al-Mansoor in 145 A.H., Maalik declared in a Fatwa that the homage paid to al-Mansoor was not binding because it was given under compulsion, whereupon many who would otherwise have held back joined Muhammad bin Abdullah. But Maalik took no active part in the coup but stayed at home. On the failure of the coup, however, he was punished by flogging by Jafar bin Sulaiman, the governor of Medinah, and suffered a dislocation of the shoulder. ² But this increased his prestige so much that in 160 A.H. al-Mehdi consulted him on structural alterations in the Kabah at Mecca, and in 179 A.H. Harun Rashid visited him on the occasion of his pilgrimage.

Maalik's great and everlasting work in writing is the "Muwatta", which in fact is the first book of Fiqah, and according to Imam Shaafe'ee, "after the Book of Allah there is no book in the world more authentic than the Muwatta." ³ The

1. During the Umayyad Rule when Waleed bin Abdul Maalik was in power.

2. Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 263

3. Tanweer-ul-Hawalik, p. 6 ; Falsafah-e-Shari'at-e-Islam, ibid, p. 54

object of this book was to give a survey of law and justice ; ritual and practice of religion according to the Ijma of Islam in Medinah, according to the Sunnah usual in Medinah ; and to create a theoretical standard for matters which were not settled from the point of view of Ijma and Sunnah. In a period of recognition and appreciation of the Canon Law under the early Abbasides, there was a practical interest in pointing out a "smooth path" (this is what Muwatta means) through the far reaching difference of opinion even on the most elementary questions. Maalik wished to help this interest on the basis of the practice in Hijaz, and to codify and systematise the Customary law of Medinah. Tradition, which he interprets from the point of view of practice, is with him not an end but a means ; the older jurists are therefore hardly ever quoted except as authorities for Maalik himself. As he was only concerned with the documentation of the Sunnah and not with criticisms of its form, he is exceedingly careless as far as order is concerned in his treatment of Traditions. The Muwatta thus represents the transition from the simple Fiqah of the earliest period to the pure Science of Hadees of the later period. ¹

Maalik is the founder of the second School of Fiqah, namely, the Maalikiah, which is known as the School of "Ehle Hadees", i.e. "Upholder of Tradition", because he relies more on Traditions and the usages of Medinah consisting of the practices of the Holy Prophet and precedents of his Shahabah (Companions).

In his Ijtihad, Maalik basically used to rely upon Qur'an and Sunnah, and in this connection he used to rely upon even a Hadees reported by one single narrator, known as "Khabar-e-Wahid", provided it was authentic. He also treated as authentic the opinions of the Sahabah (Companions of the Holy Prophet) and the Tradition of the people of Medinah. He used Qiyas only when he could not find anything in the Qur'an and Sunnah, but in this connection he had introduced his own

1. Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 264

principle known as “Istislah” or Masaalehul Murslah,” or public welfare as a basis of juristic deduction.

To the four sources of Fiqah, namely, Qur’an, Sunnah, Ijma and Qiyas, he added “Istidlaal” as the fifth one, which according to him does not come within the scope of Qiyas or analogy.¹

Among his prominent disciples were Imam Muhammad bin Hasan Shaibani the disciple of Imam Abu Hanifah, and Imam Shaafe’ee the founder of the third school of Fiqah, namely, the Shaafe’iyah. Among those who transmitted the Ahadees from him were Abdullah bin Mubarak, Auza’ee, Ibne Juraij, Hamaad bin Zaid, Lais bin S’ad, Ibne Salamah, Sho’bah, Sauri, Ibne Uyainah, and Yazid bin Abdullah.²

On account of his high caliber, knowledge and contribution in the development of Fiqah and upholding the Tradition of Medinah, Imam Malik was also known as Imam of Medinah.” His fame and reputation as the “Great ‘Aalim and Faqeeh” of his time was so much that scholars from Egypt, Africa, Spain, Baghdad, Khurasan and other places used to come to him for learning the Hadees and Fiqah from him. Imam Shaafe’ee had rightly said that “Imam Malik is a shining star.” Imam Malik remained throughout his life in Medinah. He left Medinah only once and that too only for the performance of Hajj. He died in Medinah at the age of 85 years in 179 A.H. (796 A.D.) and was buried in Jannatul Baqi. His funeral prayer was led by Abdullah bin Zainab - the governor of Medinah. A “Kubbah” (tomb) was also built over his grave but it has since been demolished by the Aale Sa’ud regime along with other tombs of the Jannatul Baqi.

1. Mukhtasar of Ibne Hajib, Vol. II, p. 281 ; Muhammadan Jurisprudence, by Abdur Rahim, p. 28.

2. Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 263

SHAAFE'EE

Abu Abdullah Muhammd bin Idris al-Shaafe'ee was born in 150 A.H. (767 A.D.) in Gazza (Palestine). He was a Hashmi Quraish, a descendant of Abde Munaaf, belonging to the Banu Abdul Muttalib. Thus he was distantly related to the Holy Prophet. He derived his patronymic ash-Shaafe'ee from his grandfather Shaafe' ibne as-Shaa'ib. His mother belonged to the Azd tribe of Yemen.

His family, it is said, were at first among the most inveterate of the Holy Prophet's enemies. His father, carrying the standard of the tribe of Hashim at the battle of Badr, was taken prisoner by the Muslims, but released on ransom, and afterwards became a convert to Islam. ¹

After his father's death, his mother brought him to Mecca, where she brought him up in very poor circumstances. He passed his early time among the Bedouins and acquired thorough knowledge of old Arab poetry from Huzail - a great literary figure of that time. He committed to memory the Holy Qur'an at the age of six years. He also studied Hadees and Fiqah at Mecca from Muslim bin Khalid al-Zanji (d. 180 A.H.), and Sufyan bin Uyainah (d. 198 A.H) and at the age of fifteen years he obtained the rank of Mufti. Then he went to Medinah, became pupil of Imam Maalik and learned his Muwatta by heart.

He then went to occupy an office in Yemen. Here he became involved in Ali's intrigues who was a secret follower of Zaidi Imam Yahya bin Abdullah and was brought as a prisoner along with other Alis to the court of Harun Rashid in Rakka in 187 A.H. (803 A.D.). He was however, pardoned. Here he came in contact with Muhammad bin Hasan Shaibani (d. 189 A.H.) the famous disciple of Abu Hanifah, attended his lectures, and also held "Manazirahs" with him.

1. Dictionary of Islam, by T. P. Hughes, p. 570.

He then went to Egypt, through Harraan and Syria, in 188 A.H., where he was well received as a pupil of Imam Maalik. In 195 A.H., after the death of Haroun Rashid, he again came to Baghdad and set up as a teacher, and many scholars became his pupils to whom he dictated his first books. Among them Zafarani (d. 260 A.H.), Abu Saur (d. 240 A.H.), Ahmad bin Hambal (d. 241 A.H.) and Karabasi (d. 245 A.H.) are prominent and known as the transmitters of his old teachings.¹

In 198 A.H. he went to Egypt, and afterwards also went to Mecca, and then in 200 A.H. finally came to Egypt and settled at Fistaat (the capital of Egypt). Here he dictated the books based on his later or new ideas, also known as the Egyptian views, to his disciples, among whom Muzani (d. 264 A.H.), Rabee' bin Sulaiman al-Joozee (d. 256 A.H.), Rabee' bin Sulaiman al-Muraadi (d. 270 A.H.), Buwaiti (d. 231 A.H.), Harmalah (d. 243 A.H.), and Yunus bin Abdul A'ala (d. 264 A.H.) are prominent and are known as the transmitters of his new ideas.²

Imam Shaafe'ee, it is said, was forty-seven years of age when he started publishing his views, and he died at the age of fifty-four years, yet in this short period also his works are more voluminous than any other Muslim doctor. He was a great enemy to the scholastic divines and most of his productions (especially upon theology) were written with a view to controvert their absurdities. He is said to have been the first who reduced the science of Jurisprudence into a regular system, and to have made a systematic collection of Traditions. Imam Hambal remarks that until the time of Shaafe'ee men did not know how to distinguish between the Traditions that were in force and those that were cancelled. His first work was the "Usul" or fundamentals, containing all the principles of the Muslim Civil and Canon Law. His next literary products were the "Sunnan" and "Musnad", both works on the Traditional Law,

1. Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 513, on the authority of Ibne Khaliqaan, Wafayaat, Vol. I, p. 129

2. Ibid.

which are held in high estimation among the Sunnis. His works upon practical divinity are various, and those upon theology consists of fourteen volumes. ¹

Imam Shaafe'ee was the founder of the third school of Fiqah, i.e. the Shaafe'iyah. He was noted for his balance of judgment and moderation of views in that he adopted a middle course between Rationalism (of Imam Abu Hanifah) and Traditionalism (of Imam Maalik), and though he is reckoned among the "Ehle Hadees" (Upholder of Tradition), yet he examined the Ahadees more strictly, and made more use of analogy, than Imam Maalik. He allowed greater scope to Ijma (consensus of opinion) than Imam Maalik, putting a more liberal and workable interpretation on the well-known dictum of the Holy Prophet that, "my Ummah will never agree on error." He agreed with Imam Maalik in adopting "Istidlaal" ² as the fifth source of Fiqah, and rejected the "Istehsaan" of Imam Abu Hanifah, ³ and "Masaalehul Mursalah" of Imam Maalik.

Imam Shaafe'ee played the chief role in settling the disputes that arose between the jurists of his time relating to the authority of Hadees as a source of Fiqah, authority of Qiyas and Istehsaan, conditions governing the Ijma, and grades and nature of Ehkaam. In this connection his books "Umm" and "Risalah" are very important.

In juristic deduction, Imam Shaafe'ee, like all other jurists, primarily relies upon Qur'an. Then he gives prominence to Hadees and relies upon even a Khabar-e-Wahid provided its narrator is authentic. Unlike the Iraqi jurists, he does not insist for the fame and reputation of a Hadees. He is particular only in respect of the authority of Hadees reaching to the Holy Prophet. For this reason, he was also known as the "Naasir-us-Sunnat" in Baghdad. He keeps at par the Qur'an and the authentic Hadees, and treats them both as binding and to be acted upon. After

1. Dictionary of Islam, by T. P. Hughes, p. 570-571

2. Aayaatul Bayyinaat, Vol. IV, p. 174

3. Al-Mankhul, pp. 213-215 and 229 ; Muhammadan Jurisprudence, by Abdur Rahim, p. 29.

Hadees he relies upon Ijma, and Ijma according to him is the one against which nothing is known. In the absence of "Nusoos" he acts upon Qiyas provided some "Asle Mo'een" for it is existing. But he does not act upon Istehsaan of Abu Hanifah or Istislah or Masaalehul Mursalah of Maalik, which he rejects, and follows the Istidlaal. ¹

Among his chief disciples we have already noted the names of Ahmad bin Hambal and Muzani ; and among his followers were also many scholars of outstanding calibre and fame including Nasa'ee (d. 303 A.H.), Ash'ari (d. 324 A.H.), Maawardi (d. 450 A.H.), Shirazi (d. 476 A.H.), Imamul Haramain (d. 478 A.H.), Ghazali (d. 505 A.H.), Raafe'ee (d. 623 A.H.) and Nawawi (d. 676 A.H.).

Imam Shaafe'ee is said to have been a person of acute discernment and agreeable conversation. His manners were mild and ingratiating, and he reprobated all unnecessary moroseness or severity in a teacher, it being a saying of his that whoever advised his brother tenderly and in private did him a service, but that public reproof could only operate as a reproach. ²

Imam Shaafe'ee died at Fustaat (Cairo) at the age of 54 years in 204 A.H. (820 A.D.), and was buried in the vault of the Banu Abdul Hakam at the foot of the Mukattam. Salahuddin Ayyubi had a large and commodious Madressah built near his tomb in 587 A.H. for the propagation of his doctrine and preservation of his works, and Al-Malik al-Kamil, an Ayyubid, built a tomb over his grave in 608 A.H. and the mosque at Hira was built by Sultan Ghiyasuddin. ³

1. Taareekh Fiqah-e-Islami, *ibid*, pp. 349-350.

2. Dictionary of Islam, by T. P. Hughes, p. 571

3. Shorter Encyclopaedia of Islam, *ibid*, p. 513 ; Dictionary of Islam, *ibid*, p. 571

AHMAD BIN HAMBAL

Abu Abdullah Ahmad bin Hambal was born at Baghdad in 164 A.H. (780 A.D.). He was an Arab belonging to the Banu Shaibaan, of Rabi'ah, who had played an active role in the conquest of Iraq and Khurasan. His family, first resident of Basra, moved to Marv with Ahmad's grandfather, Hambal bin Hilaal, governor of Sarkhas under the Umayyads and one of the early Abbaside's Propagandists. Ahmad was born a few month after his father Muhammad bin Hambal, who was serving in the army of Khurasan, had removed to Baghdad, where he died three years later. ¹

After studying Lexicography, Jurisprudence and Tradition in Baghdad, he devoted himself from 179 A.H. to the study of Tradition, in pursuit of which he made a series of journeys to Iraq, Hijaz, Yemen, Syria, Iran, Khurasan, Kufah and Basra. He studied Fiqah and Hadees from many teachers including Qazi Abu Yusuf (d. 182 A.H.), Hushaim bin Bashir – a disciple of Ibrahim al-Nakh'ee, Sufyan bin Uyainah (d. 198 A.H.) who was the greatest authority of the school of Hijaz, Abdur Rahman bin Mehdi of Basra (d. 198 A.H.), and Waakee' bin al-Jarrah (d. 197 A.H.). But as Ibne Taymiah says, his juristic formation was due, above all, to the school of Hadees and of the Hijaz. ² When Imam Shaafe'ee came to Baghdad, he attended his lectures, and was instructed by him in Traditions, ³ and became one of his prominent disciples.

Imam Hambal acquired a high reputation from his profound knowledge of both the civil and spiritual law, and particularly for the extent of his erudition with respect to the precepts of the Holy Prophet, of which it is said he could repeat about a million.

1. Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 272,

2. Minhajul Sunnah, Vol. IV, p. 143

3. Dictionary of Islam, by T. P. Hughes, p. 188

The most important event which raised Imam Hambal to the status of Imam was his refusal to subscribe to the view that Qur'an was a creation, on account of which al-Mamun, under the influence of the Mo'tazilah, ordered his production before him, and he was taken to him in chains ; and when al-Mamun died, his successor al-Mo'tasim, for the same reason, put him into prison after a severe physical beating in 219 A.H. He was released after two years. He remained in retirement till the reign of al-Wasiq (d. 232 A.H.). When al-Mutawakkil succeeded to the throne, he issued a decree of general tolerance leaving every person at liberty to judge for himself upon that issue. He thus also set Imam Hambal to liberty, and received him in his court with honour and dignity. ¹

The most celebrated work of Imam Hambal is the well-known compilation of Ahadees known as the "Musnad Imam Hambal" which consists of forty thousand Ahadees arranged according to the names of their narrators. It thus consists of a number of particular Musnads juxtaposed, and includes those of Abu Bakr, Umar, Usman, Ali, and the principal Companions, and ends with the Musnads of the Ansaar, the Meccans, the Medinites, the people of Kufah and Basra, and the Syrians.

Within the framework of Tradition, Imam Hambal is to be regarded as an "independent Mujtahid", who, as Ibne Taymiah has remarked, was able, from amongst the mass of Traditions and opinions received from many teachers, to form his own doctrine. ² In no sense can he be regarded, in the manner of al-Tabari, as merely a Traditionalist, and nothing of a juristconsult (Faqih) concerned with normative rules. As pointed out by Ibne 'Aaqil, "certain positions adopted by Ibne Hambal are supported by him on Traditions with such consummate skill as few have equalled, and certain of his decisions bear witness to a juridical subtlety without parallel." ³

1. Dictionary of Islam, by T. P. Hughes, p. 188 ; Shorter Encyclopaedia of Islam, by Gibb and Kramers, p. 272

2. Minhajul Sunnah, Vol. IV, p. 143

3. Manaqib al-Imam Ahmad bin Hambal, pp. 64-66 ; Shorter Encyclopaedia of Islam, ibid, p. 273

In order to understand the dogmatic position of Imam Hambal, the "Radd 'Alal Jahimyah Wal Zanaadikah" and the "Kitabul Sunnah" are very important. In the former he expounds and refutes the doctrines of Jahm bin Safwan whose ideas, widely circulated in Khurasan, were adopted by certain disciples of Abu Hanifah and Amr bin Ubaid. In the latter he re-examines some of the theological questions already raised in the former and unequivocally defines his own position on all the principal points of his creed. Of his other surviving doctrinal works, the "Kitabus Salaat", on the importance of the communal prayer and rules for its correct observance, was transmitted by Muhanna bin Yahya al-Shaami, one of his early disciples, and extracted from the bio-bibliographical repertory of Qazi Abul Hussain. ¹

Imam Hambal was constantly consulted on question of all sorts relating to dogmatics, ethics or law, which were classified under general headings of Fiqah by his sons Swaleh and Abdullah, and also his disciples Ishaq bin Mansur al-Kawsadi, Abu Bakr al-Asram, Hambal bin Ishaq, Abdul Malik al-Maimuni, Abu Bakr al-Marwazi, Abu Dawud al-Sijistani, Harb al-Kirmani and Ibrahim bin Ishaq al-Harbi. These dispersed materials were assembled in the "Kitabul Jaame' Le Ulumul Imam Ahmad" by Abu Bakr al-Khallaal (d. 311 A.H.), a disciple of Abu Bakr al-Marwazi, which, according to Ibne Qayyim al-Jauzi, consisted of twenty volumes. ²

Imam Hambal as such was not merely a traditionist. He was also a jurist of outstanding calibre, knowledge and fame, and was the founder of the fourth school of Fiqah, namely, the Hambaliah, having its own style and principles of Usul and Fara'. The doctrine of Imam Hambal rests, above all, on Qur'an, literally understood, without any allegorical exegesis; and on Sunnah, i.e. the total of Traditions which can be regarded as deriving from the Holy Prophet. He relies upon "Mash-hoor", "Saheeh", as well as "Za'eef" Traditions for whose rejection

1. Shorter Encyclopaedia of Islam, *ibid*, p. 274

2. *ibid*.

there is no positive reason. He next relies upon Fatwaas of the Sahabah (Companions of the Holy Prophet) who, as he rightly pleads, knew, understood, and put into practice the Qur'an and Sunnah much better than later generations, and all of them are worthy of respect. According to him in their Fatwaas we have the continuation of Qur'an and Sunnah, and they as such form the third legitimate source of Fiqah. The Holy Prophet had also recommended the Muslims to follow together with his own Sunnah, the Sunnah of his "rightly-guided" Caliphs, and to avoid all "Bid'aat" (innovations). Where the Companions disagree, it is easy to determine the juster view by reference to the Qur'an and Sunnah, or by taking into account their order of pre-eminence.¹ He puts in order of "Tafzeel", Abu Bakr, then Umar, then Usman, Ali, Zubair, Talha, Abdur Rahman bin Auf, and S'ad bin Abil Waqqas ; then the fighters at Badr ; then the Muhajirs and Ansaars.² He also gives credence to the decisions of the Taaba'een as evidence of plausible interpretations. The consensus of the community (Ijma), in such a doctrine, expresses a general concentration around a truth founded on Qur'an and Sunnah ; it does not constitute in itself, properly speaking, an independent source of law. A community may fail into error collectively, if not guided by the light of revelation transmitted by the Tradition.³

Ibne Hambal condemns "Raa'e, the gratuitous expression of personal opinion,⁴ but without requiring as a rule of conduct an absolute and impossible passivity in face of the texts. He does reject analogical reasoning (Qiyas), but does not fully appreciate its value as an instrument of juridical systematization and discovery, as Ibne Taymiah and Ibne Qayyim were to do later, under intellectualizing influences.⁵

Ibne Hambal made an extensive use of "Istishaab", a method of reasoning which consists in maintaining a given

1. *Manaqib al-Imam Ahmad bin Hambal*, p. 161.

2. *Ibid* pp. 159-161.

3. *Encyclopaedia of Islam*, *ibid*, p. 276

4. *Masa'il*, by Abu Dawud, pp. 275-277

5. *Encyclopaedia of Islam*, *ibid*.

Juridical status so long as no new circumstance arises to authorise its modification ; and of “Zara’a”, another method of reasoning to the effect that, when a command or prohibition has been decreed by Allah, everything that is indispensable to the execution of that order or leads to the infringement of that prohibition must also, as a consequence, be commanded or prohibited. The notion of “Masleha”, or recognized common interest, which allows the limitation or extension of juridical status, is also in conformity with this doctrine, although he did not himself extend and regulate its use as Ibne Taymiah and his disciple al-Tufee were to do. ¹

Ibne Hambal died in 241 A.H. (855 A.D.) at the age of 75 years. He was buried in the Martyrs’ Cemetery (Maqabir-ush-Shuhada). His funeral was attended to by eight lacs men and sixty thousand women, and his tomb became one of the most frequented places of Baghdad. ²

1. Encyclopaedia of Islam, *ibid.*

2. Encyclopaedia of Islam, *ibid.*, p. 273 ; Dictionary of Islam, *Ibid.*, p. 188.

THE DIFFERENCE

Hanafiah

Ahlur Raa'e – Abu Hanifah said, “our this 'Ilm is “Raa'ee” and to me this is the best of all. If anybody thinks any other “Raa'e” as better, for him is his “Raa'e” and for us our “Raa'e.”¹ He said, “if anything is not found in the Qur'an or Sunnah of the Holy Prophet, I consider the view of Sahabah and do not give preference to the view of anybody else against their view. Ibrahim, Shaa'bi, Ibne Seerin, Ata and Saeed bin Jubair also did Ijtihad in their time. So as they did the Ijtihad I also do.”²

Maalikiah

Ahle Hadees – Malik used to rely only on the Qur'an and Hadees, and used to deduce the principles from that Hadees only which he thought to be correct even though it was narrated by only one person. He took as authority the Tradition of Medinah and the view of the Sahabah. In the absence of any Nass, he used to do Ijtihad on the principle of Masaalehul Mursalah i.e. requirement of the general benefit. This principle was his own. He pleaded “Istidlaal” as the fifth source of Fiqah.

Shaafe'eeyah

Reconciliation – Shaafe'ee reconciled both the Ahlur Raa'e and the Ahle Hadees in Ijtihad. He depended upon Qur'an, Sunnah, Qiyas and Ijma for deducing the principles. But he rejected the Istehsaan of the Hanafiah and Istislah or Masaalehul Mursalah of the Maalikiah. He agreed with Imam Malik in pleading “Istidlaal” as the fifth source of Fiqah.

1. “Al-Milal Wan Nahl”, by Sharistani, Vol. II, p. 39

2. “Intiqah”, by Ibne Abdur Barr (Qairo, 1350 A.H.), p. 143

Hambaliah

Hambal depended on (1) Qur'an and Hadees

(2) Fatawaa of the Sahaabah provided there was no view against them

(3) View of some Sahabah provided it was in conformity with Qur'an and Hadees

(4) Mursal and Za'eef Hadees

(5) Qiyas in case of need ¹

From the above details it is clear that all jurists are unanimous on the point that Qur'an and Sunnah are the basic sources of Fiqah. The difference between them is only as regards the use of 'Qiyas ; which, among the Hanafiah is extensive ; among the Shaafe'eeah moderate ; among the Maalikiah less ; and among the Hambiliah least or as a last resort. This difference is actually based on the use of intellect in deducing the laws, but this also strictly remains within the limits of Qur'an and Sunnah, because in using the 'Qiyas', the jurists, of any school, have not at all gone beyond the limits of Qur'an and Sunnah, and have used it only when nothing explicit was available in these basic sources of Fiqah, and because the sanction for Qiyas is contained in Qur'an as well as Sunnah itself.

Further, the difference was not for the sake of difference, or in order to satisfy the ego of the self, or to create rift between the Muslims, or to divide them in different sects, so as to keep them apart from each other in water – tight compartments. The difference actually arose on account of sincere attempts to interpret and understand the Qur'anic verses and the Traditions of the Holy Prophet and his worthy Companions to apply them

1. "E'laamul Muqe'een", by Ibne Qayyim al-Jozi, pp. 23 and 26

to changed circumstances, and to find out all possible ways of acting on any particular Command, and also in view of sometimes having different parallel authentic Traditions on one and the same point in issue.

It is therefore a well – settled principle among the Muslim Ummah that views of all the four juristconsults are perfectly legal, valid, and equally binding, and following of any of them in any matter is actually the following of the Islamic Shari'ah in its true sense.

CHAPTER 12

ISLAMIC SHARI'AH AND THE MODERN WORLD *

Apart from the non-Muslim writers, many of the westernized Muslim scholars also assert that Islamic Shari'ah cannot satisfy the requirements of the modern world, because, according to them, (1) Islam has no concern with the State or the Government, (2) Islamic Shari'ah cannot go on with the present age, (3) some of the commands of Shari'ah were timely, (4) some of the commands of Shari'ah are un-enforceable in the present age, (5) the Islamic Fiqah is based on opinions of the jurists, and so on.

In fact all these and such like assertions are the result of lack of knowledge about the Islamic Shari'ah. Therefore, before dealing with these assertions, let us first bring on record some basic facts relating to the nature, high status and comprehensive-ness of the Islamic Shari'ah in dealing with the requirements of the human life in its entirety.

Islamic Shari'ah is a Divine and Universal Law

The man-made laws that are extant in the non-Muslim countries are totally based on human intellect in that the laws as well as the basic principles on which they are made are both the result of human understanding, keeping in view the timely needs of the human society. They therefore differ from society to society and country to country and are always subject to change, and accordingly they are neither perfect nor universal.

As against this, the Islamic Shari'ah is the revelation from Allah the Almighty-the Creator, the Administrator and the Knower of all, through His worthy Prophet Muhammad (peace be upon him), so that it may be a guide for all human beings, and for

* Substantially this article is based on the booklet "Musalmano Ki Bekhabari Aur Ulama Ki Bebasi", by Abdul Qadir 'Audah Shaheed,

all times to come. Qur'an asks the Holy Prophet to announce :

“O mankind, I am the Messenger of Allah to you all, of Him Whose is the Kingdom of the heavens and the earth” (*A'araaf*, 7:158).

and

“He it is Who sent His Messenger with Guidance and the Religion of Truth, that He may cause it to prevail over all religions, though the polytheists are averse” (*Taubah*, 9:33)

Islamic Shari'ah is Eternal and Comprehensive

On completing the revelation of Qur'an, which spread over a period of twenty two years, Allah the Almighty declared :

“This day I have perfected for you your religion and completed My Favour to you and chosen for you Islam as a religion” (*Maa'idah*, 5:3);

and also announced the end of Prophethood on the Holy Prophet Muhammad (peace be upon him), saying :

“Muhammad is not the father of any of your men, but he is the Messenger of Allah and Seal of the Prophets” (*Ahzaab*, 33:40)

Unlike the man-made laws, therefore, the laws given by Allah in the form of Islamic Shari'ah are final, everlasting, comprehensive and are not subject to change that may occur in the human society. This is more particularly because the laws given by the Holy Qur'an are basic and fundamental which apply to all human beings and in all circumstances. Thus, for instance, Qur'an says :

“And consult them in matters” (*Imran*, 3:159)

which means that the Muslims are commanded to decide their matters, may they be personal or social, by consultation, and no doubt decisions taken on basis of consultation are always correct.

Not only this but it is declared by way of a necessary qualification of the Muslims that :

“They decide their affairs by consultation among themselves” (*Shura*, 42 :38)

Qur'an gives this basic principle and leaves the manner in which the people should make the consultation to their own understanding and need of the time and circumstances. At their own choice they may do so through a board of advisers, Jirgah or an elected Parliament.

Similarly, in order to keep the human society safe from vices, Qur'an commands the Muslims to :

“Help each other in (acts of) righteousness and piety, and help not each other in (acts of) sin and aggression” (*Maa'idah*, 5:2).

This principle also applies to all human beings and in all circumstances and no exception can ever be taken to it in any case whatsoever.

The Holy Prophet said :

“In Islam there is neither causing harm to anybody nor receiving harm from anybody” (Muwatta ; Dara Qutni).

The human mind could never imagine of a better principle than this to ensure the peace and tranquillity in the human society, which also applies to all human beings and all times to come

In Shari'ah the Final Authority Vests in Allah and His Prophet

Islam does not give the authority to make the law to the human beings. It makes the following of the law revealed by Allah the Almighty as obligatory, and condemns obedience to the self-made laws by the human beings if they are against the laws laid down by the Shari'ah. Qur'an says :

“But if they answer you not, know that they only follow their low desires ; and who is more erring than he who follows his low desires” (*Qasas*, 28:50) ;

and

“Then we made you follow a course in the Affair, so follow it, and follow not the low desires of those who know not. Surely they can avail you naught against Allah. And surely the wrongdoers are friends of each other, and Allah is the Friend of the dutiful” (*Jaasiah*, 45:18-19) ;

and

“Follow what has been revealed to you from your Lord and follow not besides Him any guardians ; little do you mind” (*A'araaf*, 7:3)

Decision Against Qur'an and Sunnah Condemned :

Qur'an condemns and declares as infidelity, wrongdoing and transgression, the decisions, and accordingly the law-making, against the Shari'ah. Qur'an says :

“Whoever judges not by what Allah has revealed, those are the disbelievers” (*Maa'idah*, 5:44)

and

“Whoever judges not by what Allah has revealed, those are wrongdoers” (*Maa'idah*, 5:45) ;

and

“Whoever judges not by what Allah has revealed, those are the transgressors” (*Maa'idah*, 5:47)

Qur'an Condemns Seeking Judgment from the Devil :-

Qur'an says :

“Have you not seen those who assert that they believe in that which has been revealed to you (O Prophet) and that which was revealed before you ? They desire to seek the judgment of the Devil, though they have been commanded to deny him. And the Devil desires to lead them far astray” (*Nisa*, 4:60).

Qur'an Condemns Self-Decisions against the Decision of Allah and His Prophet :

Qur'an says :

“And it behaves not a believing man and a believing woman, when Allah and His Messenger have decided an affair, to exercise a choice in their matter. And whoever disobeys Allah and His Messenger , he merely strays off to manifest error” (*Ahzaab*, 33:36)

Qur'an Declares as Infidelity the Disobedience to the Decision of the Holy Prophet :

Qur'an Says :

“But no, by your Lord, they believe not until they make you a judge of what is in dispute between them, then find not any straitness in their hearts as to what you decide and submit with full submission (*Nisa*, 4:65)

Qur'an Commands for obedience to the Holy Prophet :

Qur'an says :

“O you who believe, obey Allah and obey the Messenger (of Allah)” (*Nisa*, 4:59)

and declares obedience to the Holy Prophet as obedience to Allah, saying :

“Whoever obeys the Messenger (of Allah), he indeed obeys Allah” (*Nisa*, 4:80) ;

and also makes it clear that :

“Your companion (i.e. the Holy Prophet) errs not, nor does he deviate, nor does he speak out of desire ; it is not but revelation that is revealed” (*Najm*, 53:2-4)

Final Decision Vests in Allah and His Prophet :

Qur'an says :

“And in whatever you differ, the judgment thereof is with Allah” (*Shura*, 42:10) ;

and

“O you who believe, obey Allah and obey the Messenger (of Allah) and those in authority from among you ; then if you dispute about any thing, refer it to Allah and the Messenger (of Allah) if you believe in Allah and the Last Day. This is best and more suitable to (achieve) the end” (*Nisa*, 4:59).

No Command against Shari'ah is Binding :

The Holy Prophet has said :

“Obedience is only in respect of permissible things”
 (“Mishkat, Kitab-ul-Amarat Wal Qaza, 3495/5);

and

“There is no obedience to the creation (i.e. human beings) in disobedience to the Creator (i.e. Allah the Almighty) ;

(“Mishkat, Kitab-ul-Amarat Wal Qaza, 3525/35);

and

“If the man in authority gives the command in respect of anything impermissible, there is neither hearing nor obedience to him.”

(“Mishkat, Kitab-ul-Amarat Wal Qaza, 3494/4);

All this shows that Islamic Shari'ah is from Allah – the Creator, the Knower and the Administrator of all. It is not at all man-made. It is therefore final, everlasting, comprehensive and applying to all human beings for all times to come. It gives most fundamental and basic principles which never change. In it the final authority vests in Allah and His worthy Prophet Muhammad (peace be upon him), and none, may it be an individual or the State, has any right or authority to make any law or enforce any command upon the servants of Allah in disregard to the Shari'ah laid down by Allah Himself through His worthy Prophet Muhammad (peace be upon him), and if any body does so, it is not at all binding and is not to be obeyed.

Let us now deal with the objections raised by the westernized scholars mentioned above, one by one.

(a) That Islam has no Concern with the State or the Government

In other words, this objection may also impliedly mean that Islam is concerned only with the spiritual life of man and not with his material or worldly life. In this connection, let us first prove that Islam in fact is concerned with both the spiritual as well as the material or worldly life of man. Even a cursory reading of Qur'an and Sunnah proves that Islam not only deals with beliefs and manners of worship, but also with all affairs and

aspects of the human life including the family life, business dealings, punishment for offences, formation of government, relations with the foreign countries, war and peace, and so on, and by the Command "Udkhulu Fis Silme Kaafa" (enter Islam completely), makes it compulsory for every Muslim to submit whole heartedly to all the Commands of Shari'ah, and not only it condemns disobedience to it but also gives warning of punishment for disobedience in this world as well as in the Hereafter. Qur'an says :

"Do you then believe in a part of the Book and disbelieve in the other ? What then is the reward of such among you as do this but disgrace in the life of this world, and on the Day of Resurrection they shall be sent back to the most grievous punishment" (*Baqarah*, 2:85)

and

"Those who conceal the clear proofs and the guidance that We have revealed after We have made it clear in the Book for men, those it is whom Allah curses, and those who curse them (too)" (*Baqarah*, 2:159)

and

"Those who conceal aught of the Book that Allah has revealed and take for it a small price, they eat nothing but fire into their bellies, and Allah will not speak to them on the Day of Resurrection nor will He purify them, and for them is a painful punishment. (*Baqarah*, 2:174)

Qur'an gives warning of punishment in this world as well as in the Hereafter not only for infidelity and polytheism, but also for the offences. Thus, for instance, Qur'an says :

"The only punishment of those who wage war against Allah and His Messenger and strive to make mischief in the land is that they should be murdered, or crucified, or

their hands and their feet should be cut off on opposite sides, or they should be imprisoned. This shall be a disgrace for them in this world and in the Hereafter they shall have a grievous punishment." (*Maa'idah*, 5:33)

Same is the position as regards the offences of false accusation of adultery (vide *Noor*, 24:23-25) and intentional murder (vide *Baqarah*, 2:178 ; *Nisa*, 4:93).

Qur'an lays stress on all decisions relating to all affairs, spiritual as well as material or worldly, according to Qur'an and Sunnah. It says :

"And it behaves not a believing man and a believing woman, when Allah and His Messenger have decided an affair, to exercise a choice in their matter" (*Ahzaab*, 33:36).

Qur'an declares all decisions against Qur'an and Sunnah as infidelity, wrongdoing and transgression. It says :

"And whoever judges not by what Allah has revealed, those are the disbelievers (*Maa'idah*, 5:44) ; wrongdoers (*Maa'idah*, 5:45) and transgressors (*Maa'idah*, 5:47).

Coming particularly to the State and the Government, the basic purpose of forming the Government or the State is to ensure peace and tranquillity for the people. This is impossible unless the Good is established and the Evil is uprooted. Qur'an says :

"Those who, if We establish them in the land, will keep up prayer and pay the poor-rate and enjoin the Good and forbid the Evil" (*Hajj*, 22:41)

This verse very clearly shows that not only Allah Himself establishes the State or the Government but He also provides the guidance as to what the men in authority should do for the well being of His servants.

To achieve the basic purposes mentioned above, the government has to arrange for doing justice to the people as well as punish the offenders. Qur'an therefore provides the punishments for most heinous offences like the mischief-making (*Maa'idah*, 5:33); theft (*Maa'idah*, 5:38) ; fornication (*Noor*, 24:2) ; murder (*Baqarah*, 2:178 ; *Nisa*, 4:93) ; and false charge of adultery (*Noor*, 24:4) ; and lays emphasis for doing justice to the people (*Nisa*, 4:58) ; particularly according to the Commands given in the Qur'an' (*Maa'idah*, 5:49), and condemns those who do not decide according to the principles laid down by the Qur'an (*Maa'idah*, 5:44, 45 and 47).

Qur'an also provides for honouring the agreements and treaties with the foreign countries (*Maa'idah*, 5:1 ; *Nahl*, 16:91 ; *Mo'minoon*, 23:8 ; *Anfaal*, 8:56, 61, 62 ; *Taubah*, 9:1, 4) ; fighting against the enemy (*Baqarah*, 2:190, 191, 217 ; *Imran*, 3:166 ; *Nisa*, 4:91 ; *Taubah*, 9:73) ; condemns those who fear fighting (*Nisa*, 4:77, 78, 104) ; provides for exceptions (*Taubah*, 9:91, 92, 93, 94-96 ; *Fatha*, 48:17) ; commands for preparations (*Nisa*, 4:71 ; *Anfaal*, 8:60) ; and precautions (*Nisa*, 4:71, 94) ; lays down specific modes of prayer in the battlefield (*Nisa*, 4:102) ; makes provisions for retreat (*Anfaal*, 8:15) ; prisoners of war (*Muhammad*, 47:4) ; bounty of war (*Anfaal*, 8:41) ; gives promise of reward (*Nisa*, 4:74 ; *Imran*, 3:168, 169, *Muhammad*, 47:4-6) ; and so on.

There is no doubt that for all this formation of the Government and existence of the State is necessary.

(b) That Islamic Shari'ah cannot go on with the Present Age

While making this assertion the westernized scholars forget that Islam lays down such fundamental principles which apply to all ages. In this connection, we may refer to the principle of "Masaawwat" (Equality) which Qur'an gave fourteen hundred years before and which fully applies to the present age also.

Qur'an says :

“O mankind, surely We have created you from a male and a female, and made you tribes and families that you may know each other. Surely the noblest of you with Allah is the one who is most dutiful of you” (*Hujuraat*, 49:13)

The Holy Prophet has also said :

“All human beings are equal like the teeth of a comb, No Arab is superior to non-Arab except on account of righteousness”

The West could not discover this principle for its people earlier to the eighteenth century, and even today it is not applied to all people alike.

Another such principle which Qur'an gave us fourteen hundred years before and which applies with full force even today is the principle of “Human Freedom.” Qur'an says :

“Say, observe what is in the heavens and the earth” (*Yunus*, 10:101) ;

and

“None mind except men of understanding” (*Imran*, 3:7) ;

and

“From among you there should be a party who invite to Good and enjoin the Right and forbid the Wrong.” (*Imran*, 3:104)

For all these three branches of Freedom, viz., Thought, Faith and Expression, the West had no principle before the French Revolution.

Qur'an also gave the fundamental principle of "Justice."
It says :

"Surely Allah commands you to make over trusts to those worthy of them, and that when you judge between people, you judge with justice" (*Nisa*, 4:58)

and

"And let not hatred of a people incite you not to act with justice" (*Nisa*, 4:58).

and

"O you who believe, be maintainers of justice, bearers of witness for Allah, even though it be against your own selves or (your) parents or near relatives – whether he be rich or poor, Allah has a better right over them both. So follow not (your) low desires, lest you deviate" (*Nisa*, 4:35).

The West introduced these principles by the end of the twelfth century, but even today justice in the west is subject to ulterior motives particularly in international matters.

All these principles which form the foundation of the present legal system of the modern world, and which have been discovered by the West now, were introduced by the Qur'an in its revelations fourteen hundred years before, and they equally apply with full force even today.

Besides this, the principle of "Shura" (counsel) (*Imran*, 3:159 and *Shura*, 42:38) which Qur'an introduced in its earlier revelations even today forms the foundation of the present day Parliament. It not only holds good for deciding matters relating to the affairs of the State or Government but also equally applies to all matters relating to the private as well as social affairs of all individuals and societies.

As regards specific laws, many laws, which the West adopted in the present century, were introduced by the Qur'an fourteen hundred years before. As for instance, the banning of wine and gambling (*Maa'idah*, 5:90) ; permitting the divorce (*Baqarah*, 2:229) ; promoting cooperation and help of the poors from the government treasury (*Maa'idah*, 5:2 ; *Ma'arij*, 70:24-25 ; *Taubah*, 9:60, 103 ; *Hashr*, 59:7) ; banning of hoarding, exploitation and bribery (*Baqarah*, 2:188 ; the Holy Prophet also said : only the wrongdoer does the hoarding up) ; banning of all acts of indecency, sin and rebellion (*A'araaf*, 7:33) ; promotion of Good and uprooting of Evil (*Imran*, 3:104), and so on.

Inspite of all this, if anybody still says that Islamic Shari'ah cannot go on with the modern world, it is nothing but absurdity-pure and simple.

(c) That some of the Commands of Shari'ah were Timely

Allah says, "whatever Message We abrogate or cause to be forgotten, We bring better than it or one like it" (*Baqarah*, 2:106), which means that all those commands which were timely or were meant for particular incidents, individuals or nations were all abrogated, and when revelation of Qur'an was complete, it was declared that :

"This day have I perfected for you your religion and completed My Favour to you and chosen for you Islam as a religion" (*Maa'idah*, 5:2).

After this the objection that any command was timely and therefore does not apply to the present world has no force at all. Whatever we have in the form of Qur'an now applies to not only the present day world but also to all times to come till the end of this universe.

(d) That some of the Commands of Shari'ah are Un-enforceable in the Present Age

This objection actually refers to the punishments which Islam provides for theft, and adultery, viz., cutting of the hand and stoning to death respectively.

These punishment were also provided by the Torah, but since the West has not so far included these punishments in its penal laws, therefore the westernized scholars who have learnt the law through the western teachers and who take their word as the gospel truth, and are ignorant of Qur'an and Sunnah, raise objection fearing that if they subscribe to the need of these punishments to eradicate the evils of theft and adultery from the society, they will be subject to condemnation by the western scholars, but they forget that, in such circumstances, Allah asks the believers to :

“Fear not the people and fear Me, and take not a small price for My Messages. And whoever judges not by what Allah has revealed, those are the disbelievers” (*Maa'idah*, 5:44) ; wrongdoers (*Maa'idah*, 5:45) and Transgressors (*Maa'idah*, 5:47)

It is really understandable as to how one who is interested to see the society free from the evil of theft and adultery can object to these punishments which really are a sure guarantee for uprooting such evils from the human society. If the West has not so far adopted these punishments, the reason is obvious because the people there – the rich as well as the poor, the ruler as well as the ruled ones, are both addicted to vices with the result that their entire society has become morally corrupt and has lost the sense of decency and purity. None can therefore expect that they will like these punishments to be included in their penal laws.

(e) That the Islamic Fiqah is Based on Opinions of the Jurists

This objection is based on total ignorance of the Islamic Fiqah. In fact the Islamic Fiqah is totally based on Qur'an and Sunnah. Qur'an is undoubtedly the first and the foremost source of Fiqah. Since Qur'an itself says, "O you who believe, obey Allah and obey the Messenger (of Allah)" (*Nisa*, 4:59) ; and declares that, "whoever obeys the Messenger (of Allah), he indeed obeys Allah" (*Nisa*, 4:80) and also clarifies that, "your companion (i.e. the Holy Prophet) errs not, nor does he deviate, nor does he speak out of desire ; it is not but revelation that is revealed" (*Najm*, 53:2-4) ; and therefore, "whatever the Messenger gives you, accept it, and whatever he forbids you, abstain (therefrom)" (*Hashr*, 59:7), the second source of Fiqah, according to Qur'an itself, is the Sunnah of the Holy Prophet. Then there is the Qiyas (analogy), i.e. the opinion of a jurist and Ijma (consensus of opinion) i.e. the agreed view of all or large majority of the jurists. But Qiyas and Ijma both are subject to Qur'an and Sunnah. In no case they can go against Qur'an and Sunnah. The jurists have therefore only interpreted and explained the Qur'an and Sunnah and applied them to particular problems through Qiyas and Ijma. They have not at all laid down any law by themselves.

Thus for instance, the views of equality, freedom, consultation, and justice, which we have already referred to above, are all taken from Qur'an and Sunnah. Similarly, writing of deeds in respect of loans (*Baqarah*, 2:282) ; exceptions to the commands by change in the circumstances (*Baqarah*, 2:173,286; *Hajj*, 22:78 ; *An'aam*, 5:19 ; *Nahl*, 16:106) ; exceptions in respect of minors, lunatics and sleeping persons as well as unintentional acts and the acts committed on account of forgetfulness (Hadees); sharing of burden of one by another (*Fatir*, 35:18; and Hadees) ; difference between intentional and un-intentional offences (*Baqarah*, 2:178; *Nisa*, 4:92; *Ahzaab*, 33:5) are all from Qur'an and Sunnah and not at all from the jurists themselves.

Before raising any objection to the Islamic Shari'ah, one must also keep in mind that Islam is the name of the Faith in the Absolute Unity of Allah the Almighty, the Prophethood of Holy Prophet Muhammad (peace be upon him), and all Prophets who came previous to him, the Holy Qur'an, the last revealed Book of Allah, and all heavenly Books revealed previous to it, the Angels, the Destiny, the Day of Judgment, the Accountability to Allah the Almighty for all the deeds, the Paradise, and the Hell ; and offering of prayers, distribution of Alms, observance of Fast during the month of Ramazan, and performance of Hajj, in obedience to the Commands of Allah, according to the guidance provided by the Holy Prophet Muhammad (peace be upon him) ; and dealing with all affairs, spiritual as well as material, according to Qur'an and Sunnah.

Can anybody say that the Islamic Faith was timely ; it was meant for the primitive ages only. If not, and certainly not, then how can one say regarding the Prayers, the Alms, the Fasting, or the Hajj that these were timely and not applicable to the modern ages. Same is the position as regards all other affairs of the human life for which sure guidance has been provided by Allah and the Holy Prophet. The learned ones of the Muslim Ummah have simply interpreted, explained, and made known the application of the various Commands to situations arising in the day to day life of the Muslims ; they have not at all laid down anything new by themselves.

In the Faith in the Absolute Unity of Allah is the most fundamental basis of all other articles of faith as well as guidance as regards the 'Ibaadaat (Prayers) and Mu'aamlaat (Affairs) of the life of a Muslim. As soon as one accepts the Faith in the Absolute Unity of Allah the Almighty, he forthwith surrenders himself totally to the Commands of Allah and, under His Command, also to the commands of His worthy Prophet Muhammad (peace be upon him), and once for all gives up the obedience to his own self as well as to others. For him the only guidance in each and every affair of his life, spiritual as well as material, is the guidance provided by Allah through the Holy Qur'an, and by the Holy Prophet through his Sunnah. Since Qur'an and Sunnah are

both final, as no new Prophet is to come and no new Book is to be revealed, the Islamic Shari'ah, based on Qur'an and Sunnah, is also final and everlasting.

Before concluding, therefore, it may be noted that Islamic Shari'ah is the last Divine Shari'ah for the humanity at large. All those Shari'ahs which were revealed by Allah the Almighty previous to Qur'an, including those revealed through Torat and Injeel, stand merged in, and superceded by, the Islamic Shari'ah, and as such none of them has its own independent existence now, and is not therefore to be followed at all.

The Islamic Shari'ah is final, perfect and exhaustive of all that the human life requires, and shall hereafter require till the end of this universe, in order to achieve the well-being and success of this life as well as the life in the Hereafter.

The only right course for the Muslims in particular and the human beings in general, to follow, is therefore to adhere strictly to the Islamic Shari'ah in all affairs of the life.

If anybody thinks that by his not following, or making others not to follow, the Islamic Shari'ah or any particular command of it, the Islamic Shari'ah will finish, he is totally mistaken. Sooner or later he, as well as those who follow him, will pass away from this world, taking upon their shoulders the burden of transgression and disobedience to Allah and His Prophet Muhammad (peace be upon him), but the Islamic Shari'ah will remain, as it is, to guide the human beings, for all times to come. Thus by not following himself, or making others not to follow, the Islamic Shari'ah, one will only put his own self to destruction in this life as well as the life in the Hereafter, but will not be able to cause any harm to the Islamic Shari'ah in any respect whatsoever. It will always remain intact and continue to be followed by the righteous servants of Allah till the Day of Judgment.

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