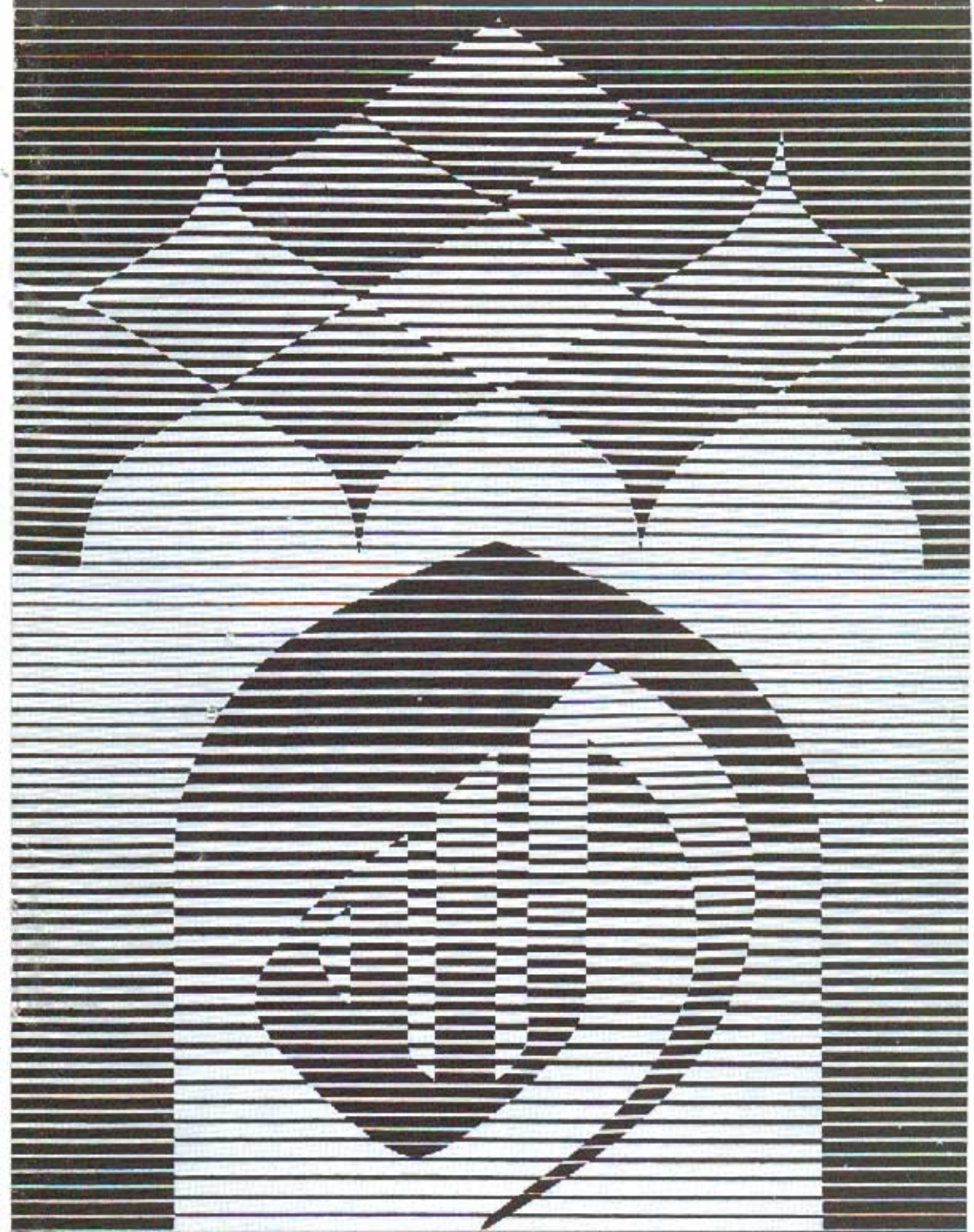
ISLAMIC CORRESPONDENCE COURSE 15



ISLAMIC JURISPRUDENCE

UNIT: 15

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(English)

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FOREWORD

Muslim communities all over the world are faced with a variety of challenges in their Dawah activities. One major challenge relates with the area of education. It is not easy to develop, in every community, an educational institution which may provide professional assistance and back up to members of community in acquiring Islamic knowledge and information. In some Muslim communities full time educational institutions have been established. In others, educational needs of the community are met through weekend programmes, seminars, symposia and other such activities.

Some Muslim communities have given serious thought to programmes of distance teaching, however, such programmes have not been materialized with proper know-how and professional assistance.

The Dawah Academy, at a humble level, is in the process of developing a series of correspondence courses in English and other languages. In order to develop a suitable introductory course on Islam as the way of life, we are introducing, at this point, material selected from existing Islamic literature.

Our next step will be to produce our own material in view of the needs of Muslim communities in various parts of the world. This will have two levels: first general level and second a post-graduate course on Islam. The present selection from Islamic literature deals with first level. This covers a variety of topics dealing with Islam as a complete way of life. We hope this course will provide initial information on important aspects of Islam.

We will greatly appreciate critical comments and observations of participants on this course. This will help us in development of our own material for both levels of study. Please do not hesitate to write to us if you have some suggestions to improve the material or methodology. Address all your observations at the following:

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MEANING OF THE TERM *FIQH* AND OTHER ALLIED TERMS

The original meaning of *fiqh* is the understanding and knowledge of something. In this sense, *fiqh* and *fahm* are synonyms. An Arabic idiom goes: فلان لايفقه ولا ينقه (So-and-so neither understands nor comprehends)[1]. The word *fiqh* was originally used by the Arabs for a camel expert in covering; he who distinguishes the she-camels that are lusting from those that are pregnant. Accordingly, the expression فحل فقيه was current among them.[2] From this expression, it is believed, the meaning of deep knowledge and understanding of anything has been derived. Hence, *Fiqh al-Lughah* (understanding of the science of language) is the title of a work produced by al-Tha'ālibī (d. 429 A.H.). This work has nothing to do with law; instead, it deals with the rules and regulations the mastery of which enables a person to acquire command over the Arabic language. In pre-Islamic days the term *Faqīh al-'Arab* was an appellation given to al-Hārith b. Kaladah who was also called *Tabīb al-'Arab,* this latter expression being synonymous with the former term.[3]

In more than one place the Qur'ān has used the word *fiqh* in its general sense of "understanding". The Qur'ānic expression ليتفقهوا فى الدين (that they may gain understanding in religion) shows that in the Prophet's (pbuh) time the term *fiqh* was not applied in the legal sense alone but carried a wider meaning covering all aspects of Islam, namely, theological, political, economic, and legal. In the following paragraphs we

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[1]Al-Jawharī, *al-Sihāh* (s.v.)

[2]Ibn Manzūr, *Lisān al-'Arab,* Beirut, 1956, vol.XIII, p. 253.

[3]Lane, Edward William, *Arabic-English Lexicon,* (s.v.); cf. al-Suyūtī, Jalāl al-Dīn, *al-Muzhir,* Cairo, n.d., vol. I, p. 638.

shall discuss in greater detail how this developed from its original meaning into its technical sense.

In the early period we find a number of terms like *fiqh, 'ilm, imān, tawhīd, tadhkīr* and *hikmah*[1] that were used in a broader sense; but later on their original meanings changed and became more narrow and specific. The reason for this change is obvious. The Muslim society during the Prophet's lifetime was not so much diversified and complex as it became later. The association of the Muslims with the non-Muslims of conquered territories, the emergence of several legal and theological schools in Islam, and the development of Islamic learning were the major factors that caused a change in the simple and unsophisticated meanings of several Islamic terms as understood by the Muslims of the Prophet's time. It will take us far afield if we discuss how each of the aforesaid terms shifted its meanings from the original. We shall discuss the term *fiqh* alone with which we are concerned here. It may be noted that in the early days of Islam the terms *'ilm* and *fiqh* were frequently used for an understanding of Islam in general. The Prophet (pbuh) is reported to have blessed Ibn 'Abbās (d.68 A.H.) saying: "O God, give him understanding in religion" (اللهم فقهه فى الدين)[2]! It is quite obvious that the Prophet could not have meant exclusively knowledge of the law; but rather a deeper understanding of Islam in general. In the times of the Prophet some bedouins are reported to have requested him to depute someone to their tribe to instruct them in religion (يفقهو نا فى الدين)[3] These examples show that the term *fiqh* was used in its broader sense extending to the tenets as well as the law of Islam. The bedouins obviously did not intend to be taught exclusively the legal rules leaving aside other essentials of religion.

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[1]Al-Ghazālī, *Ihyā' 'ulūm al-Dīn*, Cairo, 1939, vol. I, p. 38.

[2]Ibn Sa'd, *al-Tabaqāt al-Kubrā*, Beirut, 1957, vol. II, p.363.

[3]Ibn-Hishām, *al-Sīrah*, Cairo, 1329 A.H., vol. III, p.32.

In its broader sense, the term *fiqh* could perhaps even cover the meaning of asceticism in the early period. It is reported that the Sūfī Farqad (d. ca. 131 A.H.), while discussing certain questions, said to al-Hasan al-Basrī (d. 110 A.H.), that the *fuqahā* would oppose him on this. Al-Hasan replied that a real *faqīh*, as a matter of fact, was a person who despised the world, was interested in the hereafter, possessed a deeper knowledge of religion, was regular in his prayers, pious in his dealings, refrained from disparaging Muslims and was the well-wisher of the community.[1] (This sort of report, however, does not prove that this term *was not applied* to the legal issues). The reason for its generic use in the early days of Islam appears to be that primarily the fundamentals of religion were emphasised. People were not engaged in the *minutiae*. Hence, this term signified, besides the purely intellectual understanding, also *depth and intensity of faith,* knowledge of the Qur'ān, laws relating to rituals and other general injunctions of Islam.

It is to be noted that *kalām* and *fiqh* were not separated till the time of al-Ma'mūn (d. 218 A.H.). It appears that *fiqh* embraced the theological problems as well as the legal issues till the second century of the Hijrah. A book known as *al-fiqh al-Akbar* and attributed to Abū Hanīfah (d. 150 A.H.) against the beliefs of *Ahl al-Qadar* deals with the basic tenets of Islam like faith, unity of God, His attributes, the life hereafter, prophethood, etc. These are problems that are dealt with in *kalām* and not in the science of law. The name of this book, therefore, suggests that *kalām*, too, was covered by the term *fiqh* in the early stages. Due to its comprehensive and generic meaning Abū Hanīfah is reported to have defined *fiqh* as 'a soul's knowledge of its rights and obligations'.[2] When theological problems arose among the Muslims and the *ummah* was

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[1]Al-Ghazālī, *op. cit.*, vol. I, p.39.

[2]Abū Hanīfah, al-Fiqh al-Absat, quoted by Kamāl al-Dīn Ahmad al-Bayādī in *Ishārāt al-Marām min 'Ibārāt al-Imām*, Cairo, 1949, pp.28-29.

معرفة النفس مالها وما عليها

divided into several sects, considerable importance came to be attached to the veracity of beliefs. At this time Abū Hanīfah is said to have declared that obtaining the knowledge of *dīn* was better than that of *ahkām*. By *dīn* he obviously meant the basic beliefs of Islam, because he calls the knowledge of the unity of God and other allied beliefs *'al-fiqh al-akbar'* (the greater understanding).[1] *kalām* was introduced for the first time by the *Mu'tazilah* as an independent science, when Greek works on philosophy were rendered into Arabic during the time of al-Ma'mūn.[2] This indicates that prior to the existence of *kalām* as an independent science, *fiqh* covered the problems of this science.

Like the term *fiqh* world *'ilm* also had a comprehensive meaning in the early period. On the occasion of the death of 'Umar, the second Caliph, in the year 24 A.H., Ibn Mas'ūd (d.32 A.H.) is said to have remarked that nine-tenths of *'ilm* had gone away with him.[3] It may be noted that 'Umar had not only legislated and settled points of theology, but possessed a comprehensive knowledge of Islam. It seems, therefore, that Ibn Mas'ūd used the term *'ilm* not for a specific branch of knowledge but in a broader sense. After the lifetime of the Prophet (pbuh), Muslims were confronted with new problems, and had to exercise their personal judgement. At this stage the term *fiqh* came to be frequently used for the exercise of intelligence. At the same time, people endeavoured to collect and record the traditions coming through the chains of narrators. Thus, the knowledge resulting from the exercise of intelligence and personal opinion was termed as *fiqh,* and the knowledge that came through the reporters was described as *'ilm.* The term *'ilm* came generally to be used in the

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[1]*Ibid.*, pp. 28-30. and اعلم ان الفقه فى الدين افضل من الفقه
اصل التوحيد وما يصح الاعتقاد عليه وما يتعلق الاعتقاد منها فى
الاعتقاديات هو الفقه الاكبر

[2]Al-Shahristānī, *al-Milal wa'l-Nihal*, Cairo, 1317 A.H., vol. I, p. 32.

[3]Ibn Sa'd, *op. cit.*, vol. II, p. 336.

sense of the knowledge of the Tradition, i.e.Hadith and *Āthār*, when the movement of collecting Hadīth towards the end of the first century of the Hijrah started. Simultaneously, the term *fiqh* came to be used exclusively for the knowledge based on the exercise of intelligence and independent judgement. Roughly, in this period these two terms began to separate from each other. The year 94 A.H. is known as *'sanat al-fuqahā'* (the year of the jurists) because a number of the celebrated jurists of Madinah like Sa'īd b. al-Musayyib and Abū Bakr b. 'Abd al-Rahmān died in that year.[1] It seems, therefore, reasonable to assume that the terms *'ilm* and *fiqh* were separated when jurists and specialists in Hadīth came into existence towards the end of the first century. In the Qur'ān the derivatives of the word *fiqh* have been frequently used denoting understanding of any matter. We do not find this word in the Qur'ān used in the sense of learning. On the other hand, the word *'ilm* has been used in the Qur'ān for learning. A Qur'ānic passage reads: "And hasten not with the Qur'ān ere its revelation hath been perfected unto thee, and say: My Lord! increase me in knowledge (*'ilm*)"[2] In this passage, *'ilm* refers to the revelation that came to the Prophet (pbuh). This revelation in the form of the Qur'ān was learnt and read by the Muslims. Now *fiqh* was not learnt and read like *'ilm*, i.e. Qur'ān or Hadīth. But with the passage of time, a body of laws came into existence, and this whole corpus came to be known as *fiqh* — now a systematic science of law that was *learnt* and *acquired* like *'ilm*.

It is a point to be noted that *'ilm* from the beginning carried the sense of the knowledge which came through an authority — it may be God or the Prophet (*i.e.* the Qur'ān and Hadith) — while *fiqh*, by its very definition involved the exercise of one's intelligence and personal thinking. We have earlier shown its usage in the pre-Islamic days. In this

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[1]Ibid., vol. V, pp. 143, 208.

[2]Qur'ān, 20 : 114.

sense, *fiqh* always remained distinct from *'ilm*. Although both these terms were used in their broader meanings and were more or less interchangeable, yet *fiqh* never lost its intellectual character. The Companions of the Prophet (pbuh) who gave legal judgements and were noted for exercising intelligence in their decisions were known as *fuqahā*. A report indicates that the *fuqahā* in the presence of 'Umar, the second Caliph, dared not speak, as he dominated them by virtue of his *fiqh* (intelligence) and *'ilm* (knowledge).[1] Here the term *fuqahā* appears to signify those persons who were distinguished for employing their reason and intelligence in solving legal and administrative problems. 'Umar b. al-Khattāb, in his speech at Jābiyah, *inter alia,* said: "Let him who desires to seek *fiqh* go to Mu'ādh b. Jabal" (d. 18 A.H.).[2] Since Mu'ādh had worked as a judge in the Yemen during the time of the Prophet, 'Umar might be referring to his intelligence and legal experience. It is, however, difficult to draw a sharp distinction between the meanings of these terms especially in the early decades of Islam.

From the above analysis, it may be gathered that the scope of the term *fiqh* was gradually narrowed down, and ultimately came to be applied to the legal problems and even simply to legal literature. Similarly, the term *'ilm* lost its general meaning and was confined to Hadīth and *Āthār*. With the growth of legal activity and with the development of Hadīth, *ra'y* and *riwāyah"* became synonymous with *fiqh* and *'ilm* respectively. A report indicates that when 'Atā' b. Abī Rabāh (d. 114 A.H.) gave an opinion, Ibn Jurayj (d. 150 A.H.) asked him whether he had made the statement on the basis of *'ilm* or ra'y.[3] Here *'ilm* is distinguished from *ra'y*, and has been used in the sense of the knowledge based on tradition. 'Umar b. Abd al-'Azīz (d. 101 A.H.) is reported to

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[1]Ibn Sa'd, *op. cit.*, vol.II, p. 336.

[2]*Ibid.*, p. 348.

[3]*Ibid.*, p. 386.

have advised Abū Bakr b. Muhammad b. 'Amr b. Hazam (d. 120 A.H.) to collect and record Hadīth arguing that he feared the 'extinction of knowledge' (*durūs al 'ilm*).[1]

To sum up, *'ilm* and *fiqh* had, in the beginning, a broader sense but were restricted to specific meanings subsequently. This is the reason why the chapters on *'ilm* in the collections of Hadīth consist of a number of reports that contain the word *fiqh* used in its earlier and broader sense.

Alongside of the term *fiqh*, the term *sharā'i'* (in the plural) was also current among the early Muslims. Reports indicate that the newly converted Muslims who had come to the Prophet (pbuh) from different parts of Arabia, requested him to depute someone to their locality to instruct them in the *sharā'i'* of Islam.[2] As for the term *sharī'ah*, it was hardly used in the early days of Islam. It was introduced to carry the specific meaning, i.e. the law of Islam, at a later date. Literally, the word *sharī'ah* means a 'course to the watering-place' and a 'resort of drinkers.' The Arabs applied this term particularly to a course leading to a watering place, which was permanent and clearly marked out to the eye. Hence, it means the clear path or the 'highway' to be followed.[3] The Qur'ān uses

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[1]Al-Shaybānī, *al-Muwatta'*, Deoband, n.d., p. 391.

ان عمر بن عبدالعزيز كتب الى ابى بكر بن عمرو بن حزم ان انظر ما كان من حديث رسول الله صلى الله عليه وسلم او سنته او حديث عمر او نحو هذا فانى خفت دروس العلم وذهاب العلماء

[2]Ibn Sa'd, *op. cit.*, vol.I, pp. 333, 345, 355. It appears that terms like *sharā'i'* and *farā'id* were synonymous in the Prophet's time and meant performatory duties. The Prophet is reported to have written to a bedouin a letter which contained فرائض الصدقات and another of his letters is reported to have consisted of شرائع الاسلام (Ibn Sa'd, *op. cit.*, vol.I, pp. 307, 327).

[3]Ibn Manzūr, *Lisān al-'Arab (s.v)*,

the words *shir'ah* and *sharī'ah*[1] in the meaning of *dīn* (religion), in the sense that it is the way ordained by God for man, or in the sense that it is the clear-cut path of God for man. The term *sharā'i'* (pl of *shir'ah*) was used in the Prophet's time for the essentials of Islam. The bedouins who requested the Prophet to depute someone to their tribe to teach them the *sharā'i'* of Islam, obviously meant the essentials of religion. They wanted to be acquainted with the fundamentals and obligatory duties of Islam. This presumption is supported by the tradition which states that the Prophet (pbuh), when once asked about the sharā'i' of Islam, mentioned prayer, *zakāh*, fasting of *Ramadān* and *Hajj* pilgrimage.[2] It shows that the term *sharā'i'* meant *farā'id* (obligatory duties).

Abū Hanīfah, if the ascription of K. *al-'Ālim wal-Muta'allim* to him is correct, distinguished *dīn* from *sharā'i'* on the ground that *dīn* was never changed, whereas *sharī'ah* continued to change through history. By *dīn* he meant the basic tenets of the faith like belief in the unity of God, in the prophets, in the life after death, etc., while by *sharī'ah* he meant the performatory duties. He does not recognize any difference between the *dīn* of various prophets, but differentiates between their *sharā'i'*. He holds that every prophet invited the people to his own *sharī'ah* and forbade them to follow the *sharī'ah* of earlier Prophets.[3] The term *dīn* came to be used in a restricted sense, *i.e.* tenets of Islam, in Abū Hanīfah's time, for the reasons given earlier. Hence, the term *Usūl al-Dīn* was used for *kalām* in later ages.

Al-Shāfi'ī uses the term *sharā'i'* in the sense of institution. He disagrees with Mālik who disallows *Hajj* by proxy *(Hajj badal)* in the

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[1]Qur'ān, 5: 51; 45 : 17.

[2]Abū Hanīfah, *op. cit.*, pp. 52-56.

[3]Abū Hanīfah, *Kitāb al-'Ālim wal-Muta'allim*. Hyderabad, Deccan, 1349 A.H., pp. 5-6.

lifetime of a person. Mālik compares *Hajj* with prayer and fasting which cannot be performed, according to all the jurists, on behalf of another person. Refuting Mālik's opinion al-Shāfi'ī remarks: "One *shari'ah* (institution) should not be compared with another *sharī'ah* (institution) analogically."[1] The use of this term in the sense of institution is unique with al-Shāfi'ī, because it is not generally used in this meaning. Moreover, he uses the term *sharā'i'* in the sense of performatory duties.[2]

Today the term *sharī'ah* covers all aspects of Islam. It combines *fiqh* and *kalām* both. A contemporary author defines *sharī'ah* and distinguishes it from *fiqh* in the following words:-

> "*Sharī'ah* is the wider circle, it embraces in its orbit all human actions; *fiqh* is the narrow one, and deals with what are commonly understood legal acts. *Sharī'ah* reminds us always of revelation, that *'ilm* (knowledge) which we could never have possessed but for the Qur'an or hadīth; in *fiqh*, the power of reasoning is stressed, and deductions based upon *'ilm* are continuously cited with approval. The path of *sharī'ah* is laid down by God and His Prophet; the edifice of *fiqh* is erected by human endeavour. In the *fiqh*, and action is either legal or illegal, *yajūzu wa mā lā yajūzu*, permissible or not permissible. In the *sharī'ah* there are various grades of approval or disapproval. *fiqh* is the term used for the law as a science; and *sharī'ah*, for the law as the divinely ordained path of rectitude."[3]

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[1] *Al-Shafi'ī*, Kitāb al-Umm, Cairo, 1325 A.H., vol VII, pp. 196-97.
لاتقاس شريعة على شريعة

[2] AlShāfi'ī, *Jimā' al-'Ilm*, Cairo, 1940, p. 104.

[3] Fayzee, Asaf A.A., *Outlines of Muhammadan Law*, London, 1960, p.21.

It is, however, difficult to draw a sharp line of distinction between them as they are generally used interchangeably. One difference may, however, be noted that *sharī'ah* combines law and tenets both, while *fiqh* deals with law alone. Here it may be pointed out that neither *fiqh* nor *Sharī'ah* corresponds to the Canon Law of Christianity or to the 'Law' in the West in its purely technical sense.

In the Prophet's time the term *qurrā'* was also current among the Muslims. As reading was not common in Arabia, it was applied to those persons who could read the Qur'ān. The seventy persons whom the Prophet (pbuh) had deputed to the newly converted Muslims for teaching the Qur'ān and the essentials of Islam came to be known as *qurrā'*.[1] Later, when the Arabs came in contact with new cultures and civilizations, knowledge spread among them, and they advanced in various fields of learning. Now that Islamic law was perfected and other branches of Islamic learning had developed, the Qur'ān readers, according to Ibn Khaldūn, were no longer called *qurrā'* but were known as *fuqahā'* and *'ulamā'*.[2] Among the *Successors (Tābi'ūn)* there were *fuqahā'* and

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[1]Ibn Sa'd, *op. cit.*, vol. II, p. 52.

[2]Ibn Khaldūn, *Muqaddimah*, Beirut, 1900, p. 446.

Ibn Khaldūn's statement is supported by al-Shaybānī's remarks that in those days the people who had more knowledge of the Qur'ān had more understanding in the religion. انما قيل اقراهم لكتاب الله لان الناس كانوا فى ذلك الزمان اقراهم للقرآن افقههم فى الدين

Al-Shaybānī, *Kitāb al-Āthār*, Karachi, n.d., p. 68. It appears that the term *qurrā'*, in the time of Ibn Mas'ūd, began to have been used in its literal sense, *i.e.* reciters, and ceased to convey the meaning of 'learned'. This is implied from the following report :

ان عبدالله بن مسعود قال لانسائة انك فى زمان كثير فقهاؤه ' قليل قراؤه تحفظ فيه حدود القران و تضيع حروفه .... وسياتى على الناس زمان قليل فقهاؤه ' كثير قراؤه ' يحفظ فيه حروف القرآن و تضيع حدوده

Mālik, *al-Muwatta'*, Cairo, 1951, vol.I, p. 173.

'ulamā', *i.e.* those who were authorities in law and *Hadīth*.[1] Among the learned men of Madinah, Sa'id b. al-Musayyib (d. 94 A.H.) figured prominently and was known as *faqīh al-fuqahā'* and *'ālim al-ulamā'*.[2] The phrase *ahl al-'ilm* and sometimes *ahl al-fiqh* was commonly used in the second generation as is obvious from *al-Muwatta'* of Mālik. It appears that these expressions were applied to those learned persons who were deeply concerned with deriving rules from the Qur'ān and the Sunnah and giving verdicts on legal issues.

At the time when the term *fiqh* came to be applied exclusively to the legal problems, people began to write independent works on this particular subject. 'Abd Allāh b. al-Mubārak (d. 181 A.H.) is reported to have compiled *'ilm* (i.e. *hadīth*) in a book and arranged it according to the order of legal topics (*fiqh*), battles (*ghazawāt*) and asceticism (*zuhd*)[3] etc. Towards the middle of the second century of the Hijrah we find a number of books written exclusively on *fiqh*. The works of Abū Yūsuf (d. 182 A.H.) and specially of al-Shaybānī (d. 189 A.H.) were the first systematic efforts in this field. *Al-Muwatta'* of Mālik is the first in the list of the early available literature, but it may be noted that it is a book neither exclusively on *hadīth* nor on *fiqh*. It is, in fact, the remnant of the literature of the period when *fiqh* and *hadīth* were intermingled. Henceforth, books began to be written on these two subjects separately. The result of our inquiry so far is that the generality of the term *fiqh* gradually became restricted until it began to be applied to the legal sphere alone.

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[1]Ibn Sa'd, *op. cit.*, vol. II, p. 378.

[2]*Ibid.*, vol. V, p. 121.

[3]Al-Dhahabī, *Tadhkirat al-Huffāz*, Hyderabad, Deccan, n.d., vol. I, p. 250.

ORIGINS OF THE EARLY SCHOOLS OF LAW

The Historical Background

During the time of the Prophet (pbuh), there was no such science as that of jurisprudence. The Prophet did not categorise the injunctions into *wājib* (imperative), *mandūb* (recommended), *harām* (forbidden), *makrūh* (disapproved) and *mubāh*(indifferent) as propounded in the later legal theory. This classification of acts is the work of the jurists themselves who studied different passages of the Qur'ān, various traditions of the Prophet, the practice of the Companions and the early Muslims.[1] According to the jurists, every act must fall under one of these five categories. But this was not the case with the Companions in the Prophet's lifetime. The only 'ideal' for them was the conduct of the Prophet. They learnt ablutions, saying prayers, performing *Hajj* etc. by observing the Prophet's normative actions under his instructions. But they did not reflect what parts of these actions constituted *arkān* (essentials) and what constituted ādāb (adjuncts). On occasions, cases were brought to the Prophet for his decision. In his decisions the people around him did not ask about the particular points of law for purely theoretical purposes; they took his decisions as a model for taking similar decisions in similar cases.

There is no doubt that the Companions occasionally asked him questions relating to certain serious problems, as we learn from the Qur'ān.[2] The Prophet (pbuh) gave suitable replies to them. People in his lifetime were not apparently interested in unnecessary philosophical discussions or in the meticulous details of all regulations. From the Qur'ān

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[1]According to Prof. Schacht, the scale of 'five qualifications' (*al-ahkām al-khamsah*) was derived from Stoic Philosophy by the later jurists. Cf. Schacht, *An Introduction to Islamic Law*, Oxford, 1964, p.20. This may be true. It should be noted, however, that the existence of a counterpart in a foreign culture does not indicate its foreign provenance unless the ideational influence from without is positively proved.

[2]Qur'ān, 2 : 189, 215 and 8 :1 etc.

it appears that the Companions generally asked the Prophet (pbuh) very few questions. On one occasion when some person put unnecessary questions to him, the Qur'ān asked the Companions to desist from doing so.[1] The result was that the Sunnah remained mostly a general directive, performatory in character and interpreted by the early Muslims in different ways. People did not know the details of many a problem even in the lifetime of the Prophet.[2] Of course, the Prophet laid down certain regulations, but the jurists elaborated them with more details. The reason for this further addition to the laws enunciated by the Prophet (pbuh) by interpretation is that he himself had made allowances in his commands. He left many things to the discretion of the community to be decided according to a given situation.

Law was neither inflexible nor so rigidly applied in the early days of Islam as one finds it in the later days. Different and even contradictory laws relating to many problems could be tolerated on the basis of argument. This is obvious from the differences of the Companions of the Prophet (pbuh) after his death and from the practice of the early legists. It seems that the Prophet (pbuh) provided a wide scope for differences by giving instructions of a general nature or, by validating two diverse actions in the same situation. Since it was a period of the evolution of a pattern of behaviour for the coming generations, the Prophet (pbuh) aimed at providing opportunities for the employment of human reason and common sense in diverse circumstances. Had the Prophet (pbuh) laid down specific and rigid rules for each problem once and for all —what was not possible for him in face of urgency of conducting the struggle for Islam —the coming generations would have been deprived of exercising reason and framing laws according to the exegencies of time. Hence, in

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[1]Qur'ān, 5: 101.

[2]Abū Yūsuf quotes several instances which indicate that even 'Umar lacked detailed knowledge from the Prophet on several issues. He is, therefore, reported to have consulted the people. See *Kitāb al-Kharāj*, Cairo, 1332 A.H., pp. 13-20, 25, 106.

the Prophet's time, it was possible for two persons to take different courses in one and the same situation. To illustrate our viewpoint, we may give an example. On the occasion of the battle of Banū Qurayzah, the Prophet (pbuh) sent some of his companions to the enemy territory and asked them to say their *'Asr* prayers on arrival at their destination. But it so happened that the time of the prayers came on the way. Therefore, some of the Companions said their prayers on the way arguing that the Prophet (pbuh) had not meant to postpone the prayers, while others said their prayers on reaching the destination at nightfall, taking the Prophet's command literally. When the incident was reported to the Prophet (pbuh), he kept silent. The Companions deemed this to be a tacit approval of the actions of both the parties.[1] Had the actions of either party been considered unlawful, it is argued, the Prophet (pbuh) would have pointed out and corrected it.

The above example shows that the Prophet (pbuh) while laying down a law, primarily considered the value and spirit of the action and not the form of the action itself. What appears significant in this case was the obedience to divine commandments. It may be noted that both the parties exhibited their allegiance to God. One of them obeyed the Prophet's command taking it literally and performed *'Asr* prayers at nightfall, while the other obeyed him in spirit. It is important to note that the commandment is not intended *per se;* what counts is intention and the spirit which constitutes the allegiance to God and the Prophet (pbuh). This, too, implies that people can differ in the form of obedience on the basis of interpretation. Hence, differences arose in law among the jurists.

After the death of the Prophet (pbuh) the Companions were spread out in different parts of the Muslim world. Most of them came to occupy

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[1]Ibn Sa'd, *al-Tabaqāt al-Kubrā,* Beirut, 1957, vol.II, p.76. Ibn Hazm has mentioned several examples that substantiate this viewpoint. See Ibn Hazm, *al-Ihkām fī Usūl al-Ahkām,* Cairo, 1947, vol. V, p. 72 ff.

the positions of intellectual and religious leadership. They were approached by the people of their regions for decisions regarding various problems. They gave their decisions sometimes according to what they had learnt and retained in their memory from the commandments of the Prophet (pbuh); at other times according to what they understood from the Qur'ān and the Sunnah. Often they formed an opinion by looking to the *sharī'ah*-value which led the Prophet (pbuh) to take a decision. Once, for example, Ibn Mas'ūd was reportedly asked whether a woman would be entitled to dower if her husband died without fixing its amount and consummating the marriage. Ibn Mas'ūd at first replied that he had not heard anything from the Prophet (pbuh) on the subject. But when he was requested to make a suggestion he opined that the woman would be entitled to the average dower which a woman of her social standing might expect. He further suggested that she would receive full share from the heritage of her husband, and that there would be a period of waiting for her. Ma'qil b. Sinān (d. 63 A.H.) is reported to have stood up on the occasion and said that the Prophet (pbuh) had given a similar decision.[1] But Ibn 'Umar (d. 73 A.H.) and Zayd b. Thābit (d. 45 A.H.) are reported to have given a different decision in a similar case. According to them, such a widow would not receive any dower but, instead, would be entitled only to her share in the heritage. The 'Irāqīs follow the opinion of Ibn Mas'ūd and reject the decision of Ibn 'Umar and Zayd b. Thābit.[2] The reason for this preference may be that the former view is attributed to the Prophet (pbuh), while the latter is not. In case each is based on traditions, neither of the two opposing views can, as a general rule, go back to the Prophet (pbuh). For, if there had been a clear decision from the Prophet (pbuh) on such an important social institution as marriage, how could such differences of opinion, leading in opposite directions, ever arise? Further, in case only the 'Irāqī opinion claims the authority of the tradition from

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[1]Abū Yūsuf,*Kitāb al-Āthār*, Cairo, 1356 A.H., p. 132.

[2]Al-Shaybānī, *al-Muwatta'*, Deoband, n.d., pp. 249-50.

the Prophet (pbuh), the ignorance of this *hadīth* on the part of such prominent Companions like Ibn 'Umar, Zayd b. Thābit and even Ibn Mas'ūd makes its authenticity extremely doubtful, particularly when the point in question is such an important one as that of marriage. It is difficult to believe that the Prophet's decision on such an important question remained so private and isolated that it was known only to a Companion or two. Therefore, the usual way of answering such problems *viz.* that the *hadīth* might not have reached other Companions, cannot be accepted.

There were occasions when some *hadīth* was adduced, but rejected because it was found contrary to the Qur'ānic verses. Take, for example, the case of Fātimah b. Qays. She is reported to have testified before 'Umar, the second Caliph, that she was given a triple divorce by her husband, but the Prophet (pbuh) made no provision for her residential accommodation during the period of waiting, nor did he recommend expenses for her maintenance. 'Umar did not accept this *hadīth* saying that he could not abandon the Book of Allāh for the report of a woman when he could not judge whether she was speaking the truth or telling a lie.[1] What is interesting here is that this remark of 'Umar is known only to the 'Irāqīs and reported by Abū Yūsuf alone. Mālik and al-Shāfi'ī have, therefore, followed this *hadīth* providing no maintenance to a divorced woman (in the case of an irrevocable divorce) during the period of waiting. They interpret the Qur'ānic verse 65:6 which contains the injunction of providing maintenance to the divorce in favour of the pregnant woman alone.[2]

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[1]Abū Yūsuf, *Kitāb al-Āthār*, p.132.
According to 'Umar, the tradition reported by Fātimah b. Qays might contradict the Qur'ānic verse 65 : 6.

[2]Mālik, *al-Muwatta'*, Cairo, 1951, vol.II, p. 581; al-Shāfi'ī, *Kitāb al-Umm*, Cairo, 1322, A.H., vol. V, p. 219.

The interpretation of the Qur'ān also caused differences of opinion among the Companions. The points on which the Qur'ānic injunctions were either silent or ambiguous were to be explained. The result was that these verses were sometimes interpreted in the light of the traditions from the Prophet (pbuh), and sometimes on the basis of the lawyers' opinion. Moreover, since the traditions themselves were diverse, the differences were natural. Al-Shāfi'ī mentions several instance on the subject.[1] A Qur'ānic verse says: "Women who are divorced shall wait, keeping themselves apart, three courses (*qurū'*)[2]. In this verse, the word *qurū'* is ambiguous. It has been taken to stand for menstruation, and for the state of purity (*tuhr*). Thus, 'Umar, the second Caliph, 'Alī, Ibn Mas'ūd, Abū Mūsā al-Ash'ari are reported to have held that *aqrā'* (sing. *qur'*) means menstruations (*hiyad*). This view is also said to have been held by Sa'īd b. al-Musayyib, 'Atā' and a group of Successors and a number of jurists. On the other hand, 'Ā'ishah, Zayd b. Thābit, and Ibn 'Umar are reported to have maintained that *aqrā'* means the periods of purity between menstruations (*tuhr*). The result of the difference between the two views is that, according to the former, the waiting period is finished after the completion of the third course, while according to the latter it comes to an end with the beginning of the third course. Similarly, the Companions are reported to have differed in the interpretation of the verses 65:6 and 2:226.[3] The difference of opinion among the jurists is, as a matter of fact, due to the difference among the Companions in interpreting the Qur'ān.

The same is the case with *hadīth*. Differences arose in *hadīth* due to several factors. Sometimes two contradictory traditions were reported from the Prophet (pbuh). Some Companions followed one of them, and

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[1]Al-Shāfi'ī, *op. cit.*, vol. VII, p. 245.

[2]Qur'ān, 2: 228.

[3]Al-Shāfi'ī, *op. cit.*, vol. VII, p. 245.

some followed the other. Traditions on *ribā* provide the best illustration for contradictory *hadīth*. Ibn 'Abbās reports, on the authority of Usāmah b. Zayd from the Prophet (pbuh), that there is no *ribā* except on loan. But 'Ubādah b. al-Sāmit, Abū Sa'īd al-Khudrī, 'Uthmān b. 'Affān and Abū Hurayrah reported the famous tradition of *ribā'* in six commodities in a hand-to-hand transaction. The former view is reported to be held by the followers of Ibn 'Abbās and the jurists of Makkah. According to this view, there is no harm in exchanging one *dirham* for two and one *dīnār* for two *dīnārs*. Ibn Mas'ūd, too, is reported to have said that he did not see any harm in the exchange of one *dirham* for two *dirhams* although according to the report, he did not do so himself. Al-Shāfi'ī explains away this contradiction and follows the opinion of the majority.[1] In fact, such stray opinions did always exist since the first generation after the Prophet (pbuh), but they were neglected on the basis of *ijmā'* and submerged.

In some cases, a *hadīth* was not known to a Companion; hence, he decided the problem on the basis of his own opinion. When the relevant *hadīth* was brought to his notice, he withdrew his personal judgement. Al-Shāfi'ī has given several instances where 'Umar, the second Caliph, is reported to have changed his opinions.[2]

On certain occasions it so happened that the relevant *hadīth* was available but the reporter himself could not understand its real import. Ibn 'Umar is reported to have narrated a *hadīth* from the Prophet (pbuh) that a deceased is punished on account of the mourning of his relatives. When this tradition reached 'Ā'ishah, she rebutted it saying that Ibn 'Umar might have been mistaken or he might have forgotten some relevant part of the tradition. "The fact is," she remarked, "that the Prophet (pbuh)

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[1]Al-Shāfi'ī, *Ikhtilāf al-Hadīth* (on the margin of *Kitāb al-Umm*), Cairo, 1322 A.H., vol. VII, pp. 241-43; *Kitāb al-Umm*, vol. VII, p. 163; cf. al-Shāfi'ī, *al-Risālah*, Cairo, 1321 A.H., p. 40.

[2]Al-Shāfi'ī, *Ikhtilāf al-Hadīth*, *ed. cit.*, p. 140.

once heard the relatives of a deceased Jewess weeping over her death. On this occasion, he remarked that the relatives were mourning her demise, while the deceased was being punished in the grave."[1] Later works add that 'Ā'ishah also said that the *hadīth* reported by Ibn 'Umar goes against the Qur'ānic verse" "No soul bears the burden of another."[2]

The contradiction of certain *hadīth* by a verse from the Qur'ān also gave rise to differences of opinion among the Companions. Earlier we have shown how 'Umar rejected the tradition reported by Fātimah b. Qays because it contradicted the Qur'ān.

The Companions, however, tried their best to base their decisions on the Qur'ān and the Sunnah. They aspired to keep their decisions and personal judgements as much close to those of the Prophet (pbuh) as possible. Despite their differences, they did not, in any way, deviate from the spirit of the Qur'ān and the Sunnah.

The Successors took their stand on the opinions expressed by the Companions.They retained in their memory, what they could, of the *hadīth* of the Prophet (pbuh) and the opinions of his Companions. Further, at this stage attempts were made to reconcile opposite opinions held by the Companions on many problems ; nevertheless, the Successors exercised *ijtihād* (independent interpretation) in two ways. First, they were not afraid of giving preference to the opinions of one Companion over another's and, sometimes, even the opinions of a Successor over those of a Companion. Secondly, they exercised original thinking themselves and, in fact, the real formation of Islamic law starts in a more or less

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[1]Mālik, *op. cit.*, vol. I, p. 234; cf. al-Shāfi'ī, *Ikhtilāf al-Hadīth, ed. cit.*, pp. 266-67.

[2]Qur'ān 6 : 165.

professional manner at the hands of the Successors.[1] Finally, differences in legal opinion were, to no small degree, due to local and regional factors.

During the time of the second generation, *i.e.* the Successors, there emerged three great geographical divisions in the Islamic world, where independent legal activity was going on. They were Iraq, Hejaz and Syria. Iraq further had two schools, those of Basra and Kufa. We know comparatively more about the development of legal thought in Kufa than in Basra. Similarly, Hejaz also had two well-known centres of legal activity, namely, Makkah and Madinah. Of these two, Madinah was more prominent and took a lead in the development of law in Hejaz. The Syrian school is not so frequently mentioned in the early texts; nevertheless, the legal trend of this school is authoritatively known to us through the writings of Abū Yūsuf. We cannot include Egypt in the early schools of law as it did not develop its own legal thought. There were some lawyers in Egypt who followed the doctrines of Iraq while other followed those of

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[1]By this we mean that the Islamic law was not systematised during the time of the Prophet and the Companions. Since the Successors' time it began to take its formal shape and to develop into a body and independent subject of study. Western writers such as Schacht present a different picture of the development of the Islamic law. The popular and administrative practice of the late Umayyad period, according to them, was transformed into Islamic Law. (See Majid Khadduri, *Law in the Middle East*, Washington, 1955, p. 40, article 'Pre-Islamic background and early development of jurisprudence' by Joseph Schacht). The Orientalists ignore the fact that the Muslims had the Qur'ān and the precedents left by the Prophet and the Companions. Where there was no precedent or clear instructions, they exercised their personal opinion. But this, too, was not against spirit of the teachings of the Qur'ān and the Sunnah of the Prophet. All this raw material, practised and produced by the early Muslims, developed into a systematic law. Certain popular customs no doubt permeated the law; but these did not deviate from the fundamental principles of Islam. The view that the law of Islam is purely based on the popular practice of the Umayyads, and does not take its thread from the Qur'ān and the Sunnah of the Prophet is contrary to facts and untenable.

Madinah.[1] Al-Layth b. Sa'd (d. 175 A.H.) seems to have figured prominently in Egyptian legal circles. He had certain differences with Mālik. A letter by him to Mālik, if it is genuine,[2] shows his legal acumen and independent thinking.

Every important town had its own leader of opinion who contributed to the development of legal thought in that province. The following are reported to be the well-known early jurists of various localities:

Makkah:

'Atā b. Abī Rabah (d. 114 A.H.)
'Amr b. Dīnar (d. 126 A.H.)

Madinah:

Sa'īd b. al-Musayyib (d. ca. 94 A.H.)
'Urwah b. al-Zubayr (d. 93 or 94 A.H.)
'Abū Bakr b. 'Abd al-Rahmān (d. 94 or 95 A.H.)
Ubayd Allah b. 'Abd Allāh (d. ca 98 A.H)
Khārijah b. Zayd (d. 99 A.H.)

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[1]Al-Shaybānī refers only to three schools, that is, Iraq, Syria and Madinah. This shows that Egypt had no independent status in legal thought. See his *al-Siyar al-Kabīr* (with commentary by al-Sarkhsī), Cairo, 1957, vol I, p. 230.

قال محمد رحمه الله : الشهيد اذا قتل فى المعركة لم يغسل و يصلى عليه فى قول اهل العراق و اهل الشام وبه ناخذ و فى قول اهل المدينة لا يصلى عليه و ممن قال ذلك مالك بن انس

[2]The letter of al-Layth b. Sa'd to Mālik has been reported by Ibn Qayyim (d. 751 A.H.) in *I'lām al-Muwaqqi'īn*. But since he is too late and the letter is not traceable in any early sources, we did not take it into consideration.

Sulaymān b. Yasār (d. ca. 107 A.H.)
Al-Qāsim b. Muhammad (d. 107 A.H.)[1]

These were generally included in the list of the "seven jurists of Madinah." Besides, there were other celebrated names:

Sālim b. 'Abd Allāh b. 'Umar (d. 107 A.H.)
Ibn Shihāb al-Zuhrī (d. 124 A.H.)
Rabī'ah b. Abī 'Abd al-Rahmān (d. 136 A.H.)
Yahyā b. Sa'īd (d. 143 A.H.)

Mālik (d. 179 A.H.) and his contemporary jurists were the last exponents of the Madinese school.

Basra:

Muslim b. Yasār (d. 108 A.H.)
Al-Hassan b. Yasār (d. 110 A.H.)
Muhammad b. Sīrīn (d. 110 A.H.)

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[1]The term 'seven jurists of al-Madīnah' *(fuqahā' Sab'ah al-Madinah)* is not traceable in the early texts of law. Ibn Sa'd (d. 230 A.H.) lists some of them together, but does not mention this appellation (Ibn Sa'd, *op. cit.*, vol V, p. 334). Ibn al-Nadīm (d. ca. 385 A.H.) mentions a book known as *'Kitāb ra'y al-fuquahā' al-Sab'ah min Ahl al-Madīnah wa ma'khtalafū fi hi', Al-Fihrist,* Cairo, 1348 A.H., p. 315) by Ibn Abī'l-Zinād (d. 174 A.H.). This shows that the term was known in the middle of the second century. Prof. Schacht regards the title of this book as Ibn al-Nadīm's own formulation (*The Origins* etc., p. 350. See also pp. 243-44). Prof. Schacht may be right in his conjecture. But to begin with, it is a mere conjecture that the title is Ibn al-Nadim's own and not by Ibn Abīl'l-Zinād himself. Secondly, even if the title be late, surely the important point is that about the middle of the second century a book was written containing the legal opinion of seven lawyers of Madinah. This itself clearly shows that Ibn Abīl'l-Zinād considered it important to record the opinion of the seven early lawyers of Madinah. Given this concept, the term becomes of comparatively little importance.

Kufa:

'Alqamah b. Qays (d. 62 A.H.)
Masrūq b. al-Ajda' (d. 63 A.H.)
Al-Aswad b. Yazīd (d. 75 A.H.)
Shurayh b. al-Hārith (d. 78 A.H.)

These were the celebrated companions of 'Abd Allah b. Mas'ūd.

Ibrāhīm al-Nakha'ī (d. 96 A.H.)
Al-Sha'bī (d. ca. 103 A.H.)
Hammād b. Abī Sulayman al-Ash'ārī (d. 120 A.H.)
Abū Hanīfah and his disciples.

Syria :

Qabīsah b. Dhuwayb (d. 86 A.H.)
'Umar b. 'Abd al-'Azīz (d. 101 A.H.)
Makhūl (d. 113 A.H.)
Al-Awzā'ī (d. 157 A.H.), the last of the leaders of the Syrian school.

These jurists of different regions based their decisions and legal verdicts on the opinions and decisions of the Companions who lived in their respective places. The jurists of Madinah derived their legal knowledge from the reports of the verdicts of 'Umar, 'Ā'ishah and Ibn 'Umar. The Kūfī jurists derived their legal doctrines from the opinions and judgements of Ibn Mas'ūd and 'Alī. This was their general trend, otherwise each of these schools also quotes several other Companions in

support of its legal opinion.[1]

Al-Shaʻfiʻī mentions these centres of learning in his writings. He says that every town of the Muslims was a seat of learning whose people followed the opinion of ancient jurists of their town in most cases.[2] Further, he mentions the authorities of Makkah, Madina, Kufa, Basra and Syria. In al-Shāfiʻī's time these early regional schools were engaged in an intense legal activity and controversy. He mentions differences among the jurists in each principal town. He says that some people in Makkah nearly differed from the opinion of 'Atā, while others followed a different opinion. Similar was the case in Madina. Most people followed the opinions of Ibn al-Musayyib, but afterwards they abandoned some of his

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[1]Prof. Schacht regards the period before Ibrahīm al-Nakhaʻī (d. 96 A.H.) as legendary in the history of development of law in Kufa. According to him, the reports ascribed to Ibn Masʻūd, his companion and Shurayh on legal problems are spurious. He does not think al-Hasan of Basra a lawyer or even a traditionist. According to him, the development of legal thought in Kufa starts from Ibrahīm al-Nakhaʻī. Similarly, he easily dismisses 'Umar and Ibn 'Umar as early authorities of Madinah by saying: "traditionists from Companions cannot be regarded as genuine." He, therefore, starts his investigation from 'the seven lawyers of al-Madīnah' (see Schacht, Joseph, *The Origins of Muhammadan Jurisprudence*, Oxford, 1959, pp. 229-237 and 243-244).

It may be remarked that adequate information about these early authorities is not available in the early legal texts which are the sole basis of enquiry. But even these texts throw enough light on the legal background of these authorities. To prove every statement and report ascribed to them as spurious and fictitious has become customary among the Orientalists. We could judge them only from their works, which have not, unfortunately, reached us. Lack of information on the subject does not prove that the early authorities were legendary. We may partly rely on their biographies.

It is reported about al-Hasan of Basra that his legal opinion and decisions were collected in seven volumes. (See Ibn Hazm, *al-Ihkām, ed. cit.*, vol. V, p.97). When al-Hasan, according to Schacht, was not a lawyer, how could his legal decisions be collected?

The development of legal thought in Kufa is itself a wide field for research. It requires a detailed inquiry which will examine the reports stated by Prof. Schacht as fiction. This brief study does not allow us to enter into this field.

[2]Al-Shāfiʻī, *Kitāb al-Umm, ed. cit.*, vol. VII, p.246.

principles for those of Mālik. Mālik in turn was treated similarly. While Ibn Abi'l-Zinād exaggerated his opposition to Mālik, Mughīrah Ibn Hāzim and al-Darāwardī followed some of his opinions, but other opposed them. In Kufa, he says, some people were inclined towards Ibn Abī Laylā, and opposed the opinions of Abū Yūsuf; but others followed Abū Yūsuf and attacked the doctrines of Ibn Abī Laylā.[1]

The local element was very powerful in the early schools. Abū Ja'far al-Mansūr (d. 158 A.H.), the 'Abbasid Caliph, is reported to have gone for *Hajj*. He told Mālik that he was thinking of distributing the copies of the latter's book, *al-Mawatta'*, in the provinces with the instructions that it should be taken back as the sole authority in law. Mālik advised him not to do so on the ground that people in various localities had already developed divergent opinions basing themselves on diverse traditions. He, therefore, suggested to al-Mansūr not to interfere with the laws of these localities which they had already come to adopt.[2] Mālik's reply provides justification for the difference of opinion in the legal field. It also implies that Islamic law has, ever since its early days, remained flexible, allowing a wide margin for differences.

The reasons for differences of opinion among the prominent scholars of each province are almost the same as we have mentioned earlier in the case of the Companions. With the end of the *Tābi'ūn* (Successors), there began a period wherein the traditions of the Prophet(pbuh), the opinions and personal decisions of the Companions as

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[1]*Ibid.*, p. 257.

[2]Ibn 'Abd al-Barr, *Jāmi' Bayān al-'Ilm*, Cairo, n. d., vol. I, p. 132. Cf. Ibn Qutaybah, *al-Imāmah wa'l-Siyāsah* (as attributed to him), Cairo, n.d., vol. II, p. 155. It should be noted, however, that this anecdote coming about Mālik, although famous, has been attributed sometimes to al-Mansūr, sometimes to Harūn al-Rashīd, and sometimes even to al-Mahdī. This may put the whole story in doubt. In any case, it throws light on the local character of the schools. (See *Shorter Enc. of Islam*, Joseph Schacht, article Mālik).

well as of the Successors were in circulation in each principal town. Besides contradictory traditions from the Prophet (pbuh), there were contradictory reports from the Companions about their own opinions and practice. According to one report, Abū Bakr and 'Umar used to recite *qunūt* (imprecations) in *fajr* prayers, but according to another they never recited it. Sometimes opinions and practices of the Companions, opposed to the traditions from the Prophet (pbuh), were reported. A report indicates that Abū Bakr, 'Umar, and 'Uthmān practised *muzāra'ah* and gave their lands on one-third share.[1] But this report goes against the traditions of the Prophet (pbuh) reported by Jābir and Rāfi' b. Khadīj which regard the recontract of *muzāra'ah* as illegal.[2] A report states that the Prophet (pbuh) performed *mash* on socks, but 'Alī, 'Ā'ishah, Ibn 'Abbās, and Abū Hurayrah are reported to have denied it.[3] There are other numerous such examples of contradictory reports from early authorities. Thus, with the compilation of *hadīth* and *athār,* contradictions increased day by day, and the jurists came to argue on the basis of these contradictory reports.

Another vital factor that produced differences among these jurists was the exercise of personal opinion. As a result of this more or less common procedure of personal opinions, differences were bound to arise and, indeed, contradictory legal decisions were given on the same case in different quarters of a city at the same time. In order to check this chaotic state of affairs and to protect the *ummah* from disintegration, the institution of *ijmā'* was introduced. Leaving aside the stray opinions, the average general opinion of each locality was taken as the local *ijmā'*.

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[1]Al-Shāfi'ī, *Kitāb al-Umm, ed. cit.,* vol. VII, p. 129; Abū Yūsuf, *Kitāb al-Āthār,* Cairo, 1355 A.H., pp. 70, 71; al-Shaybānī, *Kitāb al-Āthār,* Karachi, n.d., pp. 112, 113.

[2]Abū Yūsuf, *Kitāb al-Kharāj, ed. cit.,* pp. 50-51.

[3]Al-Shāfi'ī, *Kitāb al-Umm, ed. cit.,* vol. VII, p. 245; *Ikhtilāf al-Hadīth, ed. cit.,* p. 47.

Another method followed by these early jurists to eliminate this chaos was that they adopted such traditions from the Prophet (pbuh) or from the Companions as were confirmed by the practice of the Muslims. This is the reason why we find so much emphasis on 'practice' in these early schools of law.[1] Mālik repeatedly refers to the 'agreed practice' of Madinah.[2] Abū Yūsuf warns against the isolated traditions and lays stress on well-known *Sunnah*, and al-Awzā'ī frequently uses the phrase 'the practice of the past leaders of the Muslims.'[3]

Among the early schools of law we repeatedly hear the names of Abū Hanīfah, Abū Yūsuf, al-Shaybānī, Mālik, and al-Awzā'ī in different regions. It is usually thought that they won their fame for their independent *ijtihād* based on pure reasoning in the sphere of Islamic Law. This apparently leads us to believe that these jurists were not influenced by the milieu in which they lived, or by the general trend of their respective regions. This is clearly reflected in their reasoning. In Madinah, for example, a specific trend of opinion was already in existence before the appearance of Mālik on the scene. There had lived in Madinah a number of persons from among the Companions as well as from the Successors who had insight in law. Ibn 'Umar, 'Ā'ishah, Ibn al-Masayyib and the rest of the seven celebrated jurists of Madinah contributed much to the formation of legal opinion in Madinah. These predecessors of Mālik

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[1]By early schools of law we mean more or less definite and identifiable traditions prevalent in different regions before al-Shāfi'ī and against which al-Shāfi'ī argues. Thus, according to our terminology, Abū Hanifah, al-Awzā'ī and Mālik fall among the early schools. It must be constantly borne in mind, however, that the early schools already developed and experienced certain changes, among the main ones being the development and acceptance of legal *hadīth* which Abū Hanīfah, al-Awzā'ī and Mālik use in varying extent.

[2]The phrases like *al-amr al-mujtama' 'alayh 'indanā* (the agreed practice with us) which recur in *al-Muwatta'* indicate Mālik's view.

[3]Abū Yūsuf, *al-Radd 'alā Siyar al-Awzā'ī,* Cairo, n.d., pp. 1, 5, 20, 24, 30, 76 *passim.*

originally exercised *ijtihād,* and left a mass of legal opinion behind them. Mālik, undoubtedly, exercised *ijtihād* himself in several cases; nevertheless, he did not deviate from the spirit of his predecessors. Similarly was the case with Iraq. A trend of 'Irāqī opinion had already been formed before Abū Hanīfah. Companions like 'Alī, 'Abd Allāh b. Mas'ūd and Successors like 'Alqamah, al-Aswad, al-Sha'bī, Ibrāhīm al-Nakha'ī and others had lived in Iraq. These people left a rich heritage of legal decisions which represent 'Irāqī tradition. Abū Hanīfah studied these precedents, held discussions with his contemporary jurists, and arrived at some conclusions. He exercised *ijtihād* on the lines of his predecessors but keeping alive the spirit and practice prevalent in Iraq. His influence, however, spread far and wide, and he became a symbol around which the 'Irāqī tradition crystalized. In short, these early schools of law owe their origins to a long process of independent interpretation of law, that continued in different regions from the earliest time. As time went on, people began to depend mostly on the decisions and legal opinions of these early authorities and ultimately *ijtihād,* which was previously open to every competent Muslim, came to be restricted to the minimum.

While this process of crystallization of legal opinion in different schools was still underway, al-Shāfi'ī appeared on the scene. He studied the works of his predecessors, travelled to several towns in various regions and learnt *hadīth* from a number of specialists. He held lengthy discussions with the 'Irāqī and Madinese jurists, and differed from them on a number of problems. In the system of his predecessors and contemporary jurists, he found several things which prevented him from following them. He found inconsistency in their reasoning. In other words, he saw that despite the existence of the traditions from the Prophet(pbuh), these early jurists occasionally preferred the opinions of the Companions or ignored the traditions if these went against the local practice. Mālik, for instance, reports a *hadīth* of *khiyār al-majlis* from the Prophet (pbuh). The *hadīth* gives to the parties, in a contract of sale, the right of option as long as they have not separated. After reporting this

Hadīth, Mālik says: "We have no fixed limit (of time) and no established practice on that matter."[1] But in many other cases Mālik quotes *hadīth* from the Prophet (pbuh) and follows it. Al-Shāfi'ī, however, insists that when a tradition from the Prophet (pbuh) is established to be genuine, it must be accepted. He says: "I have unwaveringly held, thanks be to Allāh, that if something is related from the Prophet (pbuh), I do not venture to neglect it, whether we have a great or small opposition of Companions and Successors against us."[2] Moreover, he saw that most cases were decided on the basis of personal opinion. There were no strict rules to bring about uniformity in their decisions. Hence, he formulated rules for *qiyās*. Above all, he witnessed these jurists reporting traditions from the prophet (pbuh), sometimes without the relevant chain of narrators, sometimes with a broken chain. He, therefore, emphasised the importance of narrating the chain of reporters punctiliously. This we shall discuss later.

The reason of al-Shāfi'ī emphasis on *hadīth* is that in the pre-*Shāfi'ī* period *hadīth* was not properly compiled. It was afterwards that there came forward a group of people who made it their life-work to probe into *hadīth* and determined the criterion to judge the authenticity of *hadīth*. They travelled throughout the Muslim world, and collected *hadīth* from different places. Although the six collections of *hadīth* had not yet come into existence, the movement of collecting *hadīth* already started in his time. Al-Shāfi'ī refers to the term *'Ahl al-hadīth*'[3] in his writings. By this he means the specialists in *hadīth*. Moreover, with the wide circulation of *hadīth* people began to accept even isolated traditions that were neglected by the early schools. This explains why al-Shāfi'ī regards

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[1]Mālik, *op. cit.*, vol. II, p. 671.

[2]Al-Shāfi'ī, *Kitāb al-Umm, ed. cit.*, vol. VII, p. 247 (rendering by J. Schacht, *The Origins*, p. II).

[3]*Ibid.*, pp. 102, 147, 211, 338.

hadīth as more authoritative than the agreed practice of the Muslims in different regions. Al-Shāfi'ī, despite his best endeavours to reconcile the differences among the early jurists by establishing the principle of authentic *hadīth* from the Prophet (pbuh), could not put an end to this conflict of opinions rather paved the way for the rise of a new school. Besides, there could be no compromise between al-Shāfi'ī and the early schools, because the theory of law and the principles enunciated by him were mostly alien to them.

In the first two centuries of the Hijrah, there was no strict personal allegiance to one master. There did exist these geographical divisions of which we spoke previously. There were some common principles and the lawyers in each division were more or less like-minded. These early schools, however, concentrated their traditions around certain persons from whom they claimed to have acquired their knowledge. In the arly texts Abū Hanīfah has been reported to have taken his knowledge from Ibrāhīm al-Nakha'ī through his teacher Hammād. Despite his sporadic differences on some points, he mostly follows Ibrāhīm. Al-Shaybānī refers to Abū Hanīfah in *al-Muwatta'*. He generally concludes each chapter with his formula, 'this is the opinion of Abū Hanīfah and our jurists in general.'[1] Abū Yūsuf often refers to 'our masters' or 'our jurists' in his writings.[2] Al-Shāfi'ī tells us that a group in Kufa followed Abū Yūsuf, while another followed Ibn Abī Laylā.[3] He calls some people in Kufa 'the followers of Abū Hanīfah'.[4]

Similar was the case in Madinah where a group of people relied

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[1]Al-Shaybānī, *op. cit.*, pp. 68, 71, 78 *passim.*

[2]Abū Yūsuf, *Kitāb al-Kharāj ed. cit.*, oo. 43, 99, 101 *passim.*

[3]Al-Shāfi'ī, *Kitāb al-Umm, ed. cit.*, vol. VII, p. 257.

[4]*Ibid.*, p. 207.

mostly on Mālik. They took his opinions as the *ijmā'*[1] of Madinah. On one occasion some of the Madinese are reported to have remarked expressly: "We follow the opinion of our master",[2] referring particularly to Mālik. Al-Shāfi'ī himself, during the course of his debates with the Medinese, calls Mālik as 'their master', and sometimes 'my master and theirs'.[3] Even Abū Yūsuf calls the Madinese 'our Companions from Hejaz'.[4] All these examples show that people had some personal attachment to Mālik. The other reason for calling Mālik as 'their master' may be that they had gained knowledge from him. Mālik had composed the first systematic work on *fiqh* and people from far and wide, indeed, from Iraq, Africa, and Spain, flocked to him to acquire knowledge from him.

Al-Shāfi'ī is himself opposed to the personal allegiance to an individual jurist. He condemns it in his writings.[5] Nevertheless, he considers himself a member of the school of Madinah. Occasionally, he refers to the Madinese as 'our companions' and to Mālik as 'our master'.[6] Al-Shāfi'ī, however, separates himself from the Madinese when he criticizes their doctrines. On the whole he seems to be free from school bias.

The above analysis shows that the trend towards personal allegiance started roughly towards the middle of the second century of the Hijrah. Apart from these groupings in different regions, people were

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[1]*Ibid.*, pp. 240, 257 *passim.*

[2]*Ibid.*, p. 230.

[3]*Ibid.*, pp. 110, 170, 194, 275; and *Ikhtilāf al-Hadīth*, pp. 34, 35.

[4]Abū Yūsuf, *Kitāb al-Khārāj, ed. cit.*, p. 50.

[5]Al-Shāfi'ī, *Jimā' al-Ilm,* Cairo, 1940, p. 12; *idem, al-Risālah, ed. cit.*, p.8.

[6]Al-Shafi'ī, *Jimā' al-'Umm,* ed. cit., vol. VII, pp. 170, 194 and 275.

generally engaged in independent thinking on law. Later on, Al-Shāfi'ī developed his own legal theory and tried to bring about strict consistency in law. After him the regional character of the early schools began to be corroded; and the influence of personal allegiance to one master and to his principles prevailed gradually.

THE SOURCES OF ISLAMIC LAW

I

According to Islam, the ultimate source of authority is God alone. In the ideal of Islamic law, everyone except God, including the Prophet (pbuh) and ruling authorities, is subordinate to Divine Law, which emanates from Divine Revelation. Islamic law, irrespective of the variety of its "sources", emanates from God and aims at discovering and formulating His will. God's will is not once-and-for-all defined as a static system; rather it comprehends all spheres of man's life and is progressively unfolded. As Islam gives guidance in all walks of life, *fiqh,* the law of Islam, as developed from the very beginning, comprehends, with special care, religio-moral, social, economic, and political aspects of human life. That is why a man acting according to the Islamic law is, in all circumstances, deemed to be fulfilling God's will. Thus, Islamic law is a manifestation of God's will.

The term "law" in this context, as hinted above, includes both the moral law as well as the legal enactments, particularly and more properly the former. It would thus be more accurate to say that while the (moral) law was revealed in the specific context of the Qur'ān and the Sunnah as the will of God, the Muslims' duty is to embody it in legal enactments in their own context. Indeed, a number of legal rules have been given by the Qur'ān to embody the will of God. The Qur'ānic rulings may be divided into two broad categories, namely *halāl* (permissible) and *harām* (forbidden). The classical legal categories owe their origin to these two terms frequently used by the Qur'ān[1]. The Qur'ān itself does not lay down the various degrees of permissibility and prohibition. These degrees

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[1]Qur'ān, 2 : 173, 275 ; 4:19; 5: 3, 96.

came into existence later when *fiqh* developed as an independent science. The terminology used by the early jurists is a little different from the five categories evolved later. Today we hear the terms *wājib, harām, makrūh, mandūb* and *mubāh*. This classification is based on moral assumptions and is primarily legal. Since every act of a Muslim must fall, according to the later *fiqh* literature, under a certain legal category, this sort of classification became essential. The early works on *fiqh* indicate that there were no such fixed categories; the terminology of the early Muslim period was general.

Al-Awazā'ī uses the terms *lā ba'sa, hālāl, harām* and *makrūh* in his writings. The terms *lā ba'sa* and *makrūh* have been used by him in the sense of permissible and disapproved respectively. While discussing the question of selling prisoners of war he remarks that the Muslims did not consider it objectionable (*lā ba'sa*) to sell female prisoners of war. They disapproved (*yakrahūna*) of the sale of male prisoners, but approved of their exchange for Muslim prisoners of war.[1] It seems that these two terms conveyed a sense more literal than legal. The terms *halāl* and *harām* recur in his reasoning. He uses these two terms even for those cases which are disputed and not categorically permitted or prohibited in the Qur'ān or the Sunnah.[2]

The five legal categories (*al-ahkām al-khamsah*) are not to be found in Mālik either. His terminology is similar to that of al-Awzā'ī. The term *lā ba'sa* (no harm) and *makrūh* (disapproved) have been used by him as opposed to each other like al-Awzā'ī. The terms *halāl* and *harām* are not very frequent in his work. He also uses the term *wājib* in the sense of obligatory, but does not draw any distinction between fard and *wājib* as the late Hanafī jurists do. Of course, he distinguishes *wājib* from Sunnah.

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[1]Abū Yūsuf, al-Radd "alā Siyar al-Awzā"ī, Cairo, n.d., pp. 61-62.

[2]Ibid., pp.70, 96.

For instance, he says that the sacrifice of animals (on the occasion of *'Id*) is Sunnah (recommended and not *wājib* (obligatory.)[1] The term *makrūh* or *yukrahu* has been used by him sometimes in the sense of forbidden and sometimes in the sense of disapproved.[2] The terms *hasan* (good), *astahibbu* (I like) are also available in his writings. They convey the sense of recommendation— categories below *wājib*. All such terms as indicate recommendation fall under *mandūb* according to late classification.

The Irāqīs avoid the use of the terms *halāl* and *harām*, except for matters permitted or prohibited categorically in the Qur'ān. That is why the use of the terms *lā ba'sa* and *makrūh* is frequent in their writings. Abū Yūsuf criticizes al-Awzā'ī for his easy use of the terms *halāl* and *harām*, particularly his statement: "this is *halāl* from God". He says that he found his teachers disliking the practice of saying in their legal decisions: 'this is *halāl* (lawful) and this is *harām* (unlawful)', except what was mentioned expressly in the Qur'ān as such without any qualification. He refers to Rabī' b. Khaytham, a Successor, as having remarked: "One ought not to say that God made such-and-such lawful (*halāl*) or that He liked it, lest God tell him that He did not make it lawful nor did He like it. Similarly, one should not say that God made such-and-such unlawful (*harām*); lest God say that he told a lie; He did not make it unlawful nor did He forbid it." He adds that Ibrāhīm al-Nakha'ī is reported to have mentioned about his companions that whenever they gave some legal decision, they used to say: "This is disapproved (*makrūh*), and there is no harm in so-and-so (*lā ba'sa bihī*)." Concluding he remarks: "If we say 'this is lawful (*halāl*) and 'this is unlawful (*harām*)' what a tall talk it would be."[3] But it is interesting that Abū Yūsuf does not strictly follow this rule himself; he uses the term *halāl'* even in a case which is not expressly mentioned in

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[1]Mālik, *al-Muwatta'*, Cairo, 1951, vol II, p.487.

[2]Ibid., vil. I, p. 230, and vol. II, p. 984.

[3]Abū Yūsuf, *op. cit.*, pp. 72-73.

the Qur'ān as such. He, for instance, says: "If a Muslim in the enemy territory has no animal for riding, while the Muslims there have no animal except those of ghanīmah, and he cannot walk on food, in such a situation it is not lawful (*lā yahillu*) for the Muslims to leave him behind."[1] It should be noted that this sort of prohibition is not available in the Qur'ān, yet he uses *lā yahillu* which generally stands in his writings, for explicit prohibition like *ribā'* and marrying more than four women.[2] The terms *yajūzu* and *lā yajūzu* are also found in Abū Yūsuf's works.[3]

Al-Shaybānī frequently uses the terms *jā'iz* and *lā ba'sa bihī* for 'allowed' and *lā khayra* (not good) for 'forbidden'.[4] He does not make any clear distinction between prohibition (*harām*) and disapproved (*makrūh*). This term *makrūh* or *yukrahu* recurs in his writings standing sometimes for forbidden and sometimes for disapproved.[5] The terms *halāl* and *harām* are no doubt visible occasionally in certain cases but not so frequently.

The term Sunnah in the sense of recommended, according to traditional categories, is rarely used in this period. In a case al-Shaybānī says that the recitation of *al-Fātihah* in the last two *rak'ah* of prayers is Sunnah; but non-recitation so is equally valid.[6] The Sunnah prayer said

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[1]*Ibid.*, p. 15. His remark كيف يحل هذا مادام فى المعمعة و يحرم بعد ذلك is significant. See also p. 66.

[2]*Ibid.*, pp. 97, 105.

[3]*Ibid.*, p. 70.

[4]Al-Shaybānī, Muhammad b. al-Hassan, *al-Asl*, Cairo, 1954, pp. 3, 4, 5, 6 passim.

[5]Al-Shaybānī, *al-Jāmi' al-Saghīr*, Lucknow, 1291 A.H., pp. 8, 9, 10, 92, *passim*.

[6]Al-Shaybānī, *al-Muattā'*, Deoband, n.d., p. 104.

before or after *fardh* prayers is known as *tatawwu'* and not Sunnah or *nafl*[1] as the name came to be established later. Al-Shaybānī sometimes interprets *wājib* (obligatory) as *afdal* (better or recommended). Quoting a tradition from the Prophet (pbuh) that bathing on Friday is obligatory (*wājib*) for Muslims, al-Shaybānī remarks: "Taking a bath on Friday is better (*afdal*) and not obligatory (*wājib*),"[2] Since the term *wājib* has occured in this *hadīth* with reference to the Friday bath it is to be inferred that al-Shaybānī treats it as a non-technical term; hence he considers it to be better. Otherwise, it would mean that al-Shaybānī does not apparently accept the tradition which characterizes Friday bath as *wājib* (obligation).

Both *fardh* and *wājib* have been used by al-Shaybānī for 'obligatory'.[3] But *fardh* has been generally used for those rules that are based on the Qur'ānic injunctions.[4] It appears to be more technical than *wājib*. The term *wājib* no doubt stands for obligatory, but sometimes it is used in the non-technical sense denoting 'essential' or 'necessary'. So far it had not assumed its position next to the category *fardh* in sense and usage. There is a clear distinction between *farīdah* and *sunnah* in his writings. He called *'Id* prayer *sunnah* and Friday prayer *farīdah*. He remarks, however, that none of them should be abandoned. For this emphasis, we presume, *'Id* prayer was described as *wājib* in later *fiqh* literature.[5]

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[1]*Ibid.*, pp. 162, 192

[2]*Ibid.*, pp. 72-73.

قال محمد : الغسل افضل يوم الجمعة و ليس بواجب

[3]*Ibid.*, pp. 16, 76, 103.

[4]Al-Shaybānī, *al-Siyar al-Kabīr* (with commentary by al-Sarakhsi), Cairo, 1957, vol. I, pp. 23, 94, 187.

[5]Al-Shaybānī, *al-Fāmi' al-Saghir*, p.20.

We find the term *hasan* being used most frequently in al-Shaybānī's writings. It seems that this was a non-technical word used in a general approbatory sense. It stands sometimes for 'approved', often for 'recommended', and occasionally for 'imperative'[1] We think that later on this term was divided into several categories, e.g. *wājib, sunnah, mustahab* etc. In most places al-Shaybānī uses this term along with the term *afdal* (better). He says, for instance, it is better (*afdal*) if the *mu'adhdhin* puts his fingers in his ears (while calling for prayers), but in case he does not do so, it is all right (*hasan*).[2] The use of *mushtahab* is not frequent in al-Shaybānī's works. It is mostly used in its literal sense.[3]

In the late legal categories there appeared a clear distinction between *fāsid* and *bātil. Fāsid,* according to the late terminology, stands for 'corrupt' or 'voidable' while *bātil* for 'null and void'. Al-Shaybānī uses these terms in several contexts, but the distinction is not very clear. Sometimes while discussing one and the same problem he uses both these terms interchangeably which implies that here he draws no such distinction between them.[4]

When we come to al-Shāfi'ī, we notice a great deal of development in categories both by way of their subdivision and by way of introduction of new categories. These subdivisions are not found in Mālik's or al-Shaybānī's works. Prohibition, for example, is of two kinds according to him. The first is forbidden (*harām*) for intrinsic reasons, and the second is forbidden for extrinsic reasons (*tanzīhan*). He demonstrates the

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[1]*Ibid.*, pp. 10, 37; *idem, al-Muwattā'*, pp. 105, 110, 123 *passim.*

[2]*Ibid.*, pp. 10.

[3]*Ibid.*, pp. 112, 149; *al-Siyar al-Kabīr,* vol. I, p. 226.

[4]Al-Shāfi'ī, *Siyar al-Kabīr,* vol. VII, p. 265; cf. *idem, al-Risālah,* Cairo, 1321 A.H., p. 48 f.

distinction between them with complete illustrations'.[1] Similarly, he divides *wājib* into two subcategories: *wājib* proper and *wājib* optional (*fi'l-ikhtiyār*). According to him, taking a bath on account of *janābah* (major impurity) is *wājib* proper, while a bath for the purpose of general cleanliness in *wājib* optional. He says that the term *wājib* which occurs in the *hadīth* for Friday bath is capable for having both meanings. First, apparently it means that Friday bath is as obligatory as the bath for major impurity. But it might simply mean desirability for the purpose of good deportment and cleanliness. He refers to 'Uthmān b. 'Affān as having said his Friday prayer without taking a bath which corroborates the second meaning. Further, he argues on the basis of a *hadīth* of the Prophet (pbuh) and a tradition (*athar*) of 'A'ishah which indicate that Friday bath was not meant for the validity of Friday prayer but for cleanliness. Therefore, al-Shafi'ī does not hold taking a bath on Friday to be *wājib* proper.[2]

The term *mubāh*[3] which stands for actions in relation to which the *sharī'ah* is neutral, appears for the first time in al-Shāfi'ī. He elaborates it and gives its implications. He mentions several prohibitions made by the Prophet (pbuh) in *mubāh* actions. For instance, he says that the Prophet(pbuh) forbade wearing *sammā'* (single robe) sitting in *ihibā'* condition (to lean against a single cloth by drawing together and covering one's back and shanks with it), and commanded to take food at one's own side from plate and prohibited taking food from the middle, and forbade halting on the road at night. He draws a distinction between such prohibitions in *mubāh* acts and the prohibitions proper. He thinks that this sort of prohibition was made for etiquette. Therefore, these prohibitions,

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[1]Al-Shāfi'ī, *al-Risālah, ed. cit.,* p.43.

[2]Al-Shāfi'ī, *al-Risālah, ed. cit.,* p. 43.

[3]The term *mubāh* has been used by al-Shaybānī in non-technical sense. See his *al-Siyar al-Kabīr, ed. cit.,* vol. I, pp. 191, 318.

according to him, do not render these *mubāh* acts *harām*, while the prohibition with regard to sale and marriage contracts made them *harām*. Nevertheless, he regards violation in both the cases as disobedience, but disobedience in the latter is greater than in the former.[1]

Al-Shāfi'ī also introduced the term *fardh kifāyah* which is not to be found before him. He defines it as 'the *fardh* which if performed by a sufficient number of Muslims, the remaining Muslims who did not perform it would not be sinful.' He justifies this sort of *fardh* on the basis of the Qur'ānic verses 9:5, 36, 41, 111, 122 and 4:95 concerning *Jihād*. He regards *Jihad*,[2] saying funeral prayers for a Muslim, his burial and return of salutation (*salām*) as *kifāyah*. He thinks that in this category of *fardh* the intention is sufficiency, i.e. devolving upon the community as a whole and hence requiring a "sufficient number" of agents as distinguished from what devolves as a duty upon every individual. As regards *fardh, 'ayn*, he does not use this term in his writings. But it seems that the concept is there. He divides legal knowledge into *'āmmah* and *khassāh*. Under *'āmmah* he mentions five prayers, fasting during Ramadān, *Hajj* and Zakāh, and prohibition of murder, usury, fornication, theft and drinking. With regard to these acts he remarks that all individuals are obligated therewith (*kullifa*). It is this concept which appeared in the

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[1] *Ibid.*, p. 49.

[2] It appears that the term *Kifāyah*, a subdivision of obligatory, was first introduced by al-Shāfi'ī, but the concept of *fard 'ayn* and *kifāyah* was already in existence before him. For, al-Shaybānī regards *Jihād* as obligatory (*wājib*) on all the Muslims individually in case of emergency, and insists that this struggle should continue at all time. In case, he adds, the Muslim *en masse*, abandon this struggle, all will be sinful. Further, he remarked that if the purpose of *Jihad* is fulfilled by some of them, the rest will be exonerated from the performance of this duty. This view has been attributed by him to Abū Hanīfah. Al-Shaybānī, *al-Siyar al-Kabīr, ed. cit*, vol. I, pp. 187, 189)

It seems that institutions like funeral prayers, *Jihād* return of salutation in a gathering must have been performed by some of the Muslims and not by all and sundry from the early days of Islam. This practice has been described by al-Shāfi'ī as *kifāyah* in legal terminology.

form of *fardh 'ayn* in the later *fiqh* literature.[1]

The process of development of these categories from the early schools to al-Shāfi'ī and onward is not very much clear from the available early literature. It is, however, clear that these categories began to take their formal shape from al-Shāfi'ī and resulted in five fixed values (*al-ahkām al-khamsah*) after him with the passage of time.

II

The above categories are based on four foundations (*usūl*). According to the classical legal theory, they are: the Qur'ān, the Sunnah, *ijmā'* and *qiyās*. Works on Islamic jurisprudence composed since the time of al-Shāfi'ī (d. 204 A.H.), and certain reports[2] claiming to go back earlier, convince us that the present sequence of the sources of Islamic Law was in existence in the earliest days of Islam. It is, however, difficult to accept that the present order of the legal theory dates back to the time of the Companions. There are various reasons for our doubt. Firstly, the scheme of this legal theory, i.e. the Qur'ān, the Sunnah, *ijmā* and *qiyās*, is itself the result of historical development starting from the time of the Companions. Secondly, the technical order of the sources of law, as the reports claim to show, is actually a later product; hence such reports cannot be genuine. Thirdly, the idea of the rightly-guided leaders

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[1]Al-Shāfi'ī, *al-Risālah, ed. cit.*, pp. 50-51.

[2]Ibn Hazm, *al-Ihkām fi Usūl al-Ahkām,* Cairo, 1345 A.H., vol. VI, p. 29f.

عن الشعبى قال: كتب عمر الى شريح: اذا اتاك امر فى كتاب الله فاقض به ولا يلفتنك عنه الرجال فان لم يكن فى كتاب الله فبما فى سنة رسول الله صلى الله عليه وسلم فان لم يكن فى كتاب الله و سنة رسول الله صلى الله عليه وسلم ولا فيما قضى به ائمة الهدى بالخيار ان شئت ان يجتهد رايك وان شئت ان توامرنى ولا ارى موامرتك اياى الا خيرا لك

Cf.Ibn 'Abd al-Barr, *Jāmi' Bayān al-'Ilm wa fadlihī*, Cairo, 1954, p. 127.

(*a'immah al-hudā*) must have emerged after the first four Caliphs. Therefore, the reports showing the use of the term *qiyās* by 'Umar, the second Caliph, in his instructions to the judges, appear to be doubtful. Fourthly, the Concept of *ijmā'*, particularly the *ijmā'* of the Companions, most probably appeared after the first generation (i.e. the Companions). Hence, the question of its existence in a legal theory in the days of the Companions does not arise. Fifthly, *qiyās* developed as a technical doctrine during the second and the third generations, although the idea was present in the form of *ra'y* (considered opinion) during the first generation. From al-Shāfi'ī's discussions with his opponents it appears that the jurists of the early schools placed *qiyās* before *ijmā'*. The change in the order of the sources of law first appeared in al-Shāfi'ī; though the ground seems to have been prepared long before him. We analyse here a few examples in order to illustrate that before al-Shāfi'ī *ijmā'* was placed after *qiyās*.

While discussing the principle of *ijmā'*, al-Shāfi'ī's opponent seeks to establish the authority of *ijmā'* in opposition to the isolated traditions advocated by al-Shāfi'ī. The opponent remarks that *ijmā'* of the scholars (*'ulamā'*) on the points of detail should be followed, because they alone have the legal knowledge and are agreed upon an opinion. *ijmā'*, according to him, stands as an authority for those who have no legal knowledge, in case the scholars are agreed. But if the scholars differ, their opinions do not have any binding authority. Further, he suggests that the unsettled points in which there is difference of opinion should be referred back to *qiyās* on the basis of their agreed points.[1] This implies that, according to him, *qiyās-ijmā'* process should go on continuously and that *qiyās* precedes *ijmā'*.

In addition to al-Shāfi'ī's controversies, we find numerous other instances that confirm our view. Ibn al-Muqaffa' (d. 140 A.H.) suggests

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[1]Al-Shāfi'ī, *Kitāb al-Umm, ed. cit.,* vol. VII, p. 255.

to the Caliph al-Mansūr that he should apply his own reason to the heritage of the past on the basis of Sunnah or qiyās. Concluding, he remarks that the collection of these practices (*siyar*) along with the personal opinion of the Caliph himself may likely form the nearest approach (*qarīnah*) for future agreement.[1] This agreement indicates that Ibn al-Muqaffa' puts *ijmā'* at the end of the scheme and assigns the third position to *qiyās* after the Sunnah.

Further, Wāsil b. 'Atā' (d. 131 A.H.) is reported to have said that a right judgement can be arrived at through four sources: 'the express word of the Book, unanimously recognized traditions, logical reasoning, and consensus of the Community.[2] Here, too, we notice that *qiyās* is given priority over *ijmā'* and *ijmā'* comes in the last. Ample evidence can, however, be produced to prove that a change occurred in the order of the terms of the legal theory later, and the early procedure was reversed.

From a purely theoretical point of view also the interaction of *qiyās* and *ijmā'* is absolutely essential. If there were no *qiyās* (*ijtihād*), how could an *ijmā'* be considered? For *ijmā'* can be arrived at only through the difference of opinion as a result of the exercise of *qiyās* by several persons. Out of these diverse opinions, an accepted general opinion emerges through a process of gradual integration. This means that *qiyās* (*ijtihād*) and *ijmā'* are two complementary factors of a continuous process. *ijmā'*, being an agreed and accepted opinion, implies that it carries more weight and force than other non-agreed individual opinions

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[1]Ibn al-Muqaffa', *Risālah fi'l-Sahābah in Rasā'il al-Bulaghā'*, Cairo, 1954, p. 127.

[2]Abū Hilal al-'Askari, *Kitāb al-Awā'il* quoted in the article *Islām mayn 'ilm wa hikmat ka āghāz* (beginning of learning and philosophy in Islam), by Shabbīr Ahmad Khān Ghawrī. *Ma'ārif*, 'Āzamgarh, April, 1962, vol. LXXXIX, No. 4, p. 278.

وهو اول من قال : الحق يعرف من وجوه اربعة : كتاب ناطق ، وخبر مجتمع عليه ، وحجة عقل ، والاجماع من الامة

based on *qiyās*. This might be the reason why al-Shāfi'ī and the later jurists gave priority to *ijmā'* over *qiyās*. The process, however, requires that *qiyās* must precede *ijmā'*.

The primary source of Islamic legislation is the Qur'ān. The Sunnah explains and elaborates the Qur'ān. While Sunnah undoubtedly constitutes also an independent source, it is closely linked with and is secondary to the Qur'ān. *qiyās* is the systematic form of *ra'y* (considered individual opinion) and is based on the Qur'ān and the Sunnah. Personal opinion results in *ijmā'* when it receives the universal acceptance of the Community. In a word, the Qur'ān, the Sunnah, *qiyās* and *ijmā'* are interlinked; the same spirit pervades these sources for which the final authority is the Qur'ān.

The basic material sources of Islamic law are the Qur'ān and the Sunnah. Their authority is unchanged in all times and circumstances. *qiyās* and *ijmā'* are, in fact, instruments or agencies for legislation on new problems for whose solution a direct guidance from the Qur'ān and the Sunnah is not available. It is, therefore, obvious that *qiyās* and *ijmā'* are considered to be an authoritative source of law being subservient to the Qur'ān and Sunnah. The authenticity of these auxiliary sources shall be determined only by the degree of their consonance with the other two original and unchallenged sources of law.

III

We may now discuss briefly each of these sources of law. The Qur'ān, as we said before, is the primary source of legislation. Several Qur'ānic verses expressly indicate that it is the basis and main source of law in Islam.[1] The Prophet (pbuh) lived at Makkah for 13 years and at Madinah for 10 years. The period after the *Hijrah*, unlike that of Makkah, was no longer a period of humiliation, and persecution of the Muslims.

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[1]Qur'ān, 5:47, 48, 49, 50.

The type of guidance which the Muslims required at Madinah was not the same as they had needed at Makkah. That is why the Medinese *sūrahs* differ in character from those revealed at Makkah. The latter are comparatively small in size, and generally deal with the basic beliefs of Islam. They provide guidance to an individual soul. The Medinese *sūrahs*, on the other hand, are rich in law relating to civil, criminal, social, and political problems of life. They provide guidance to a nascent social and political community. We do find the term *zakāh* in several Makkan *sūrahs;*[1] but *zakāh* was not in existence at Makkah in its institutional form. At Makkah, this term has been used in the sense of monetary help on a voluntary basis or in the sense of moral purity. It was not an obligatory social duty of the opulents. Moreover, at Makkah no administrative staff was recruited for this purpose.

Apart from the controversy over the number of the legal verse in the Qur'ān, it is clear that the Qur'ān is neither a legal code in the modern sense, nor is it a compendium of ethics. The primary purpose of the Qur'ān is to lay down a way of life which regulates the relationship of man with man and his relationship with God. The Qur'ān gives directions for man's social life as well as for his communion with his Creator. The laws of inheritance, rulings for marriage and divorce, provisions for war and peace, punishments for theft, adultery and homicide, are all meant for regulating the ties of man with his fellow beings. In addition to these specific legal rules, the Qur'ān abounds in moral teachings. Therefore, it is not correct to say, as Coulson presumes, that "the primary purpose of the Qur'ān is to regulate not the relationship of man with his fellows but his relationship with his Creator."[2]

The Qur'ānic quasi-legislation is not couched in purely legal terms.

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[1]Qur'ān, 7: 156; 23 : 4.

[2]Conclusion N.J., *A History of Islamic Law,* Edinburgh, 1964, p. 12.

There is an amalgam of law and ethics.The Qur'ān, is fact, address itself to the conscience of man. That is why the legal verses were revealed in the form of moral exhortation, sometimes exhorting people to the obedience of God and occasionally instilling a keen sense of fear of God in the minds of Muslims. Hence, it contains emphatic statements about certain specific attributes of God, e.g. God is all-hearing, all-seeing and the like, at the end of its verses. Further, it goes without saying that the Qur'ān does not seek to be pan-legistic, i.e. to lay down once and for all the details of life. Broadly speaking, it should be borne in mind that the legislative part of the Qur'ān is the model illustration for future legislation and does not constitute a legal code by itself. History tells us that the revelation came down when some social necessity arose, or some Companion consulted the Prophet (pbuh) in connection with certain significant problems. Thus, the specific rules, the legal norms, and the juridical values furnished by the Qur'ān constitute its legislative side which, however, is in no way less important than its purely ethical side.

A common reader begins to read the Qur'ān with an idea that it is a versatile code and a comprehensive book of law. He does not find in detail the laws and by-laws relating to the social life, culture, and political problems. Further, in the Qur'ān he reads numerous verses to the effect that everything has been mentioned in this Book and nothing has been left out. Besides, he notices that the Qur'ān lays great emphasis on saying prayer and giving *zakāh,* but at the same time he finds that it does not mention their specific definitions or details. Questions, therefore, arise in the mind of the layman as to the nature of the comprehensiveness of the Qur'ān.

The difficulty arises from ignoring the fact that God did not reveal the Qur'ān in a vacuum, but as a guide to a living Prophet (pbuh), who was engaged in an actual struggle. The Qur'ān, however, instead of giving the minutiae, indicates basic principles that lead a Muslim to a certain direction, where he can find the answer by his own effort. Moreover, it

presents the Islamic ideology in a general form, suited to the changing circumstances in all ages and climes. The Qur'ān calls itself 'guidance' and not a code of law. It should be noted that the Qur'ān sometimes explains itself, and as a book of guidance (*hidāyah*) it did not leave untouched anything relating to the fundamentals. As regards the actual practical shape of life to be led by a Muslim and the community as a whole, it shows and demarcates the borders of the various aspects of life. It was the task of the Prophet (pbuh) to present the ideal practical life in the light of those limits enunciated by the Qur'ān. The Prophet (pbuh) was, in fact, sent primarily to exemplify the teachings of the Qur'ān. That is why the Sunnah by its very nature never goes against the Qur'ān, nor the Qur'ān against the Sunnah.[1]

In his work, '*The Origins of Muhammadan Jurisprudence,*' Prof. Joseph Schacht holds that "apart from the most elementary rules, norms derived from the Qur'ān were introduced into Muhammadan law almost invariably at a secondary stage." He illustrates this by quoting the cases of divorce, the maxim that spoils belong to the killer, and the policy of not laying waste the enemy country, the oath of the plaintiff in confirmation of the evidence of one witness and the evidence of minors. From the difference of opinion among the early jurists in the aforesaid cases, he draws the conclusion that these people argued on the basis of their personal judgements, which they sought to justify through the Qur'ān.[2] This, however, appears to be incorrect, as it stands. Prof. Schacht, of course, admits that the clear rules provided for in the Qur'ān — for example, those of inheritance, evidence, punishment, etc. were from the very beginning operative, and, in fact, formed the nucleus of the *sharī'ah*. What causes him to reach his conclusions about the secondary introduction of the Qur'ānic norms is that, in cases where the Qur'ān did

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[1]Qur'ān, 6: 38; 7; 52, 12 : 111.

[2]Schacht, Joseph, *The Origins of Muhammadan Jurisprudence*, Oxford, 1959, pp. 224,226.

not provide any explicit guidance, the Muslims formed their own opinion. However, this considered opinion was never expected to be opposed to or independent of the spirit of the Qur'ān and, if someone at a later stage, thought of a verse which could have possible relevance to this question, he quoted the verse. But this certainly does not show that the Qur'ān was introduced at a secondary stage.

It is needless to say that Islamic law underwent a long process of evolution. The interpretation of the Qur'ān in the early period was not so complex and sophisticated as it developed in the later ages. The legal rules not derived from the specific verses of the Qur'ān in the early period were sought to be so drawn later on. This was a continuous activity. The methodology of inference from the Qur'ān grew more and more intricate and philosophical in the wake of the deep and minute study of the Qur'ān by jurists in the later ages. The corpus of Islamic law is rich in examples where, with regard to a problem, some jurists argued on the basis of the Qur'ān, while the others did so on the basis of traditions or personal opinion, for these latter did not think the Qur'ānic verse relevant to the point at issue. Such differences do not imply that "in every single case the place given to the Qur'ān", in Prof. Schacht's words, "was determined by the attitude of the group concerned to the ever-mounting tide of traditions from the Prophet (pbuh);" and that "the Qur'ān taken by itself, apart from it possible bearing on the problem raised by the traditions from the Prophet (pbuh), can hardly be called the first and foremost basis of early legal theory."[1]

Prof. Schacht does admit that "a number of legal rules, particularly in family law and law of inheritance, not to mention cult and ritual, were based on the Qur'ān from the beginning."[2] It is of supreme importance

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[1]*Ibid.*, p. 224.

[2]*Ibid.*

to note that the Qur'ān's position as the first and foremost basis for legal theory does not mean that it treats of every problem meticulously. The Qur'ān, as we know, is not basically a code of law, but a document of spiritual and moral guidance. The presentation of the details of legal rules does not fall under the basic objectives of the Divine Book. The instances quoted by Prof. Schacht relate mainly to the cases, where detailed manner of application has been prescribed by the Qur'ān. Although, generally, the legal verses of the Qur'ān are quote definite, nevertheless all such verses are open to interpretation, and different rules can be derived from the same verse on the basis of *ijtihād*. This is the reason for the difference of opinion among the jurists in the cases mentioned by Prof. Schacht. According to one jurist, a law can be deduced from some verse but the same verse is silent on the same problem according to the other. Hence, one argues on the same point on the basis of the Qur'ān, while the other on the basis of the Sunnah. It is reported, for example, that during the caliphate of Abū Bakr a grandmother approached him asking her share from the heritage of her deceased grandson. Abū Bakr reportedly replied: "Neither in the Book of Allāh is there anything for you, nor do I know of anything in the Sunnah of the Prophet (pbuh)..."[1] Abū Bakr's reference in the first instance to the Qur'ān clearly shows that this was the practice from the earliest days of Islam.

Let us take another example. A slave of Ibn 'Umar, who deserted him, a report says, committed theft. Ibn 'Umar asked Sa'īd b. al-'Ās, the governor of Madinah, to amputate his hand. But Sa'īd refused to do so on the plea that the hand of a deserting slave is not amputated. Thereupon Ibn 'Umar reportedly asked: "In which Book of Allāh did you find it?"[2] This sort of report represents the trend of the early generations towards the Qur'ān, and shows its primary role in the process of law-

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[1]Mālik, *op. cit.*, vol.II, p. 513.

[2]*Ibid.*, p. 833.

making.

The doctrine of abrogation (*naskh*) of the individual verses in the Qur'ān is also significant in Islamic jurisprudence. The classical concept of this doctrine affirms that a number of verses in the Qur'ān, having been repealed, are no longer operative. These repealed verses are no doubt part of the Qur'ān, but they carry no practical value. This raises a very serious question: When the Qur'ān is eternal and its injunctions are valid for all ages, how is it possible that some of its passages lost their practical value? It seems that such a concept of abrogation was not in existence in the lifetime of the Prophet (pbuh) or in the early generation. It must have emerged sometime later for reasons of legal consistency not definitely known to us. We shall discuss this problem afterwards.

IV

Another important source of Islamic law is the Sunnah. Sunnah essentially means exemplary conduct of some person. In the context of Islamic jurisprudence, it refers to the model behaviour of the Prophet(pbuh). The Islamic concept of the Sunnah, originates with the advent of the Prophet (pbuh). Since the Qur'ān enjoins upon the Muslims to follow the conduct of the Prophet (pbuh), which is distinguished as 'exemplary and great,'[1] it became 'ideal' for the Muslim community.

The Qur'ān asks the Prophet (pbuh) to decide the problems of the Muslims according to the Revelation.[2] As such, the basic authority for legislation, as we have already pointed out, is the Qur'ān. Nevertheless, the Qur'ān declared the Prophet (pbuh) to be the interpreter of the Qur'ānic texts.[3] Moreover, it describes the functions of the Prophet

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[1]Qur'ān, 33:21; 68 : 4.

[2]Qur'ān, 5 : 48, 49.

[3]Qur'ān, 16 : 44.

(pbuh), namely, announcing of the revelation before people, giving moral training to them, and to teach them the Divine Book and wisdom.[1] The Sunnah is therefore closely linked with the Qur'ān and it is, therefore, rather difficult to maintain that these are two separate sources. It is the Sunnah that gives the concrete shape to the Qur'ānic teachings. The Qur'ān, for instance, mentions *salāh* and *zakāh* but does not lay down their details. It is the Prophet (pbuh) who explained them to his followers in a practical form. Moreover, the Divine Book made obedience to the Prophet (pbuh) obligatory; hence, the Sunnah, i.e. the model behaviour of the Prophet (pbuh), be it in the form of precept or example, became ultimately a source of law. The decisions taken by the Prophet (pbuh) were elevated by God to such a degree that their acceptance and willing submission to them was declared to be a fundamental of the faith. The Qur'ān, accordingly, says: "But nay, by thy Lord, they will not believe (in truth) until they make thee judge of what is in dispute between them and find within themselves no dislike of that which though decides, and submit with full submission".[2]

The source of law is the "ideal Sunnah" or the model behaviour of the Prophet (pbuh). *Hadīth* is the index and vehicle of the Sunnah. The early schools of law, as we pointed out previously, generally accepted those traditions that were well-known and practised by the Muslims. That is why the early jurists arguing on the basis of the Sunnah differed from one another. Their differences were mainly due to the differences in the interpretation and application of a particular *hadīth* to a particular case. One jurist might consider one particular incident in the life of the Prophet (pbuh) as more relevant than others to a given situation; while another jurist might single out another incident. Through this activity more or less regional interpretation of the Sunnah came into existence. They were all

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[1]Qur'ān 3:164.

[2]Qur'ān, 4: 65.

termed Sunnah but each one of them was associated with the Sunnah of the Prophet (pbuh) and ultimately based on it.

According to al-Shāfi'ī, the Sunnah coming direct from the Prophet(pbuh) in the form of *hadīth* through a reliable chain of narrators is a source of law, irrespective of whether it was accepted by the people or not, and even if it was an isolated tradition. He emphasized the value of the traditions from the Prophet (pbuh) in preference to the opinions of the Companions or their practice (*'amal*). In some cases, the early jurists followed the practice or the opinion of the Companions even in the presence of a tradition from the Prophet (pbuh). But al-Shāfi'ī vehemently opposed this practice. He contended that in the presence of the Prophet's tradition, no other authority can stand. He tried to convince his opponents that they should not set aside a *hadīth* from the Prophet (pbuh) even if it came through a single narrator, unless another *hadīth* on the same subject carried over by a chain of reliable narrators is available. In case of conflict between two reports from the Prophet (pbuh), the one which is more authentic must be preferred.[1]

Al-Shāfi'ī interprets the word '*hikmah*' occuring in the Qur'ān together with 'the Book' as the Sunnah of the Prophet (pbuh).[2] He argues that since God made obedience of the Prophet (pbuh) obligatory on people, this means that what comes from the Prophet (pbuh) comes from God.[3] He believes that the Sunnah of the Prophet (pbuh) is revelation from God. He reports that Tā'ūs, a Successors, had possessed a document which contained a list of wergilds (*'uqūl*) which were divinely inspired. Again he says: "Whatever the Prophet (pbuh) made obligatory he did so on the basis of a divine revelation, because there is a kind of revelation

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[1]Al-Shāfi'ī, *Kitāb al-Umm,ed.cit.*, vol. VII, pp. 177, 179, 184 *passim.*

[2]Al-Shāfi'ī, *al-Risālah, ed. cit.*, p. 13.

[3]*Ibid.*, p. 7.

which is recited (*māyutlā,* i.e. the Qur'ān) while there is another kind which is sent to the Prophet (pbuh) and forms the Sunnah." He elaborates this point by quoting several reports to show that there used to come revelation to the Prophet (pbuh) in addition to the Qur'ān.[1] It appears that the concept of two kinds of revelation, namely, *jalīy* (patent) and *khafī* (assumed), begins rather earlier than al-Shāfi'ī as the reports quoted by him indicate. We do not think he was non-committal in regarding the Sunnah of the Prophet (pbuh) as revelation, as Prof. Schacht holds.[2]

The next important basis of law which is, in fact, a supplement to the Sunnah, is the opinions and practice (*āthār* and *'amal*) of the Companions. From the early days of Islam the Muslims have taken the legal decisions of the Companions as the source of law. The reason behind this is that the Companions were the immediate observers of the Sunnah of the Prophet (pbuh). Having been in association with him for years together, they were expected to be acquainted not only with his sayings and behaviour but also with the spirit and character of the ideal Sunnah left by him for the coming generations. Their legal opinions, despite differences carried the spirit of the Prophetic Sunnah, whence they cannot be divorced. That is the reason why the jurists of the early schools frequently argued on the basis of the Companions' legal decisions. The practice and opinions of the Companions were so important a source of law that Mālik sometimes set aside a tradition from the Prophet (pbuh) in their favour. Al-Shāfi'ī, for instance, reports a tradition on the authority of Mālik that Sa'd b. Abī Waqqās and Dahhāk b. Qays were once discussing the question of performing *'umrah* along with *Hajj*. Dahhāk said that only a man who was ignorant of God's commands would combine the two. Further, he remarked that 'Umar, the second Caliph, had forbidden such practice. Rejecting his opinion, Sa'd replied that the

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[1]Al-Shāfi'ī, *Kitāb al-Umm, ed. cit.*, vol. VII, p. 271.

[2]Schacht, Joseph, *op. cit.*, p. 16.

Prophet (pbuh) had performed *'Umrah* along with *Hajj,* and he himself did so with him. Mālik reportedly held that the opinion of Dahhāk was more to his liking than that of Sa'd, and that 'Umar knew the Prophet (pbuh) better than Sa'd.[1] Why the Medinese sometimes follow the opinion of the Companions or the local practice and set aside Prophetic traditions is a serious question which we shall discuss in detail in the chapters of Sunnah and *ijmā'*.

The Companions played a vital role in establishing the Sunnah of the Prophet (pbuh). Hence, it became more or less customary with the early schools to argue on the basis of the practice of the Companions. They have considered that their action was based on the Prophetic Sunnah or they were better equipped to take decisions in the light of the Sunnah. But al-Shāfi'ī was strongly opposed to this view. He does not regard the sayings of the Companions or their practice as necessarily the Sunnah of the Prophet (pbuh) unless there exists an explicit tradition from the Prophet (pbuh). In the absence of a tradition from the Prophet (pbuh), he no doubt follows the opinions of the Companions. In case of difference of opinion among them, he prefers the opinion of the first four Caliphs to those of others, or the opinion which coincides with the Qur'ān, or the Sunnah or *ijmā'* or the opinion which is correct according to *qiyās*.[2] His utmost endeavour, however, was adhere to the Sunnah of the Prophet(pbuh) to which he gave absolute priority and which he radically distinguished from the subsequent practice and opinion.

The successors, too, played a major role in the development of Islamic law. Since they had association with the Companions, their opinions, too, carried weight in law. Their legal decisions constituted a source of law for the early schools. Not infrequently, we find cases where

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[1]Al-Shāfi'ī, *Kitāb al-Umm,* ed.cit., vol. VII, p. 199.

[2]*Ibid.*, p. 246; cf. al-Shāfi'ī, *al-Risālah, ed. cit.*, p. 82.

the opinion of a Successor was even preferred to that of a Companion.[1] Early works on *fiqh* are replete with the legal opinions of the Successors.The early schools quote their opinions in support of their doctrines, and occasionally make them the sole basis of their arguments. After quoting the traditions from the Prophet (pbuh) and the Companions, Mālik quotes the practice and opinion of the Successors. But from this it does not follow that he always adheres to them, because on occasions he does not act upon the traditions from the Companions either. Abū Yūsuf clearly bases the principle of 'avoiding to inflict *had* punishment on the accused in case of doubt' on the opinions of the Companions and the Successors.[2] As the practice and opinions of the Companions and the Successors reflected the Sunnah of the Prophet (pbuh), the early schools regarded them as an important source of law.

We have previously shown that al-Shāfi'ī regards the opinions of the Companions as a source of law. Sometimes he calls following their practice *taqlīd*.[3] But he does not make any mention of the Successors in his theory of law. It appears from *Kitāb al-Umm* that he follows the opinions of the Successors as a support of his thesis and not as a basis of his argument. He quotes, for instance, Shurayh, alsha'bī, Sa'īd b. al-Musayyib 'Atā', Tā'ūs and Mujāhid in the case of accepting the evidence given by a slanderer *(qādhif)*.[4]

Another source of Islamic law is *qiyās* (analogical deductions). It is, in fact, a systemic and developed form of *ra'y* (considered opinion). The most natural and simple mode of reasoning is *ra'y* that played a paramount role prior to the dominance of *qiyās*. In the early days of

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[1]Al-Shaybānī, *al-Siyar al-Kabīr*, Hyderabad Deccan, 1335 A.H., vol. II, p. 260.

[2]Abū Yūsuf, *Kitāb al-Kharāj*, Cairo, 1302 A.H., p. 90.

[3]Al-Shāfi'ī, *kitāb al-Umm, ed. cit.*, vol. VII, pp. 221, 246.

[4]*Ibid.*, p. 41.

Islam, *ra'y* was a generic term that covered a variety of modes of *ijtihād*. We find its use in the Prophet's time as well as after him by the Companions. The Qur'ān and the Sunnah no doubt provide us with some legal rules with regard to the individual and social life of Muslims. But human life, being dynamic, requires law that should change with the changing circumstances. *Ra'y* is an instrument that enables the coverage of diverse situations and enables Muslims to make new laws according to their requirements. The period of 'Umar's Caliphate abounds in such instances.

We first meet with a semi-technical use of the term *qiyās* in the alleged letter of 'Umar, the second Caliph, to Abū Mūsā al-Ash'arī (d. 44 A.H.). 'Umar is reported to have advised him to acquaint himself with the "parallels and precedents" (of legal cases) and then to "weigh up" the cases *(qīs al-umūra)*, deciding what in his judgement would be the most pleasing to God and nearest to the truth.[1] From such beginnings as this reported advice of 'Umar, *ra'y* appears to have developed later into legal and technical concept of *qiyās*, viz. to find out an essential common factor between two similar cases and to apply the rule of one to the other. It is, however, noteworthy that the result after the application of *qiyās* by different persons is not necessarily one and the same. The reason is that the actual location of the common factor *('illah)* is open to difference of opinion. As such a given rule inferred by applying *qiyās* is always subject to challenge, and can be denied by those who think differently.

Qiyās comes last in al-Shāfi'ī's scheme of the legal theory. He regards it as weaker than *ijmā'*. He does not allow the use of *qiyās* in the presence of a tradition (*khabar*). He takes it as something for the sake of need (*manzilatu darūratin*) As *tayammum* is allowed, he argues, in the absence of water during a journey, so is the case with *qiyās*. Further, he contends that since no *tahārah* is valid with *tayammum* when water

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[1] Al-Mubarrad, *al-Kāmil*,, Cairo, 1936, vol. I, p. 14.

becomes available, similarly use of *qiyās* is invalid in the presence of *khabar*[1] He seeks to prove the validity of *qiyās* on the basis of the Qur'ānic verse" "Whencesoever thou comest forth turn thy face toward it so that men may have no argument against you."[2] From this verse he infers that the use of *qiyās* in reasoning is obligatory on Muslims. Explaining this verse he remarks that the man who is far away from the *Ka'bah* depends on the indications *(dalā'il)* like stars and mountains. Similarly, he says, one should depend on the indications to reach a certain conclusion.[3] These pro-*qiyās* and pro-*ijtihād* arguments are, in fact, aimed at the refutation of the use of unrestricted *ra'y,* which he thinks arbitrary and subjective.

VI

The last source of Islamic law, according to the scheme, is *ijmā'*. We have already explained in this chapter its position in the order of the legal theory. *ijmā'* is a principle for guaranteeing the veracity of the new legal content that emerges as a result of exercising *qiyās* and *ijtihād.* It is, in fact, a check against the fallibility of *qiyās*. There are points which have been universally accepted and agreed upon by the entire Community. This sort of *ijmā'* that allows no difference of opinion is generally confined to obligatory duties (*farā'id*). This is known as *ijmā'* of the Community. On the other hand, there are certain rules which we may call positive law that are agreed upon by the learned of a particular region, but they do not carry the force of the consensus of the Community. This is known as *ijmā'* of the learned (*ijmā'* al-Khāssah). The *ijmā'* of the learned (*ijmā'* al-Khāssah), in the early schools, was a mechanism for creating a sort of integration of the divergent opinions which arose as a result of the

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[1]Al-Shāfi'ī, *al-Risālah, ed. cit.,* p. 82.

[2]Qur'ān, 2: 150.

[3]Al-Shāfi'ī, *al-Risālah, ed. cit.,* p. 66 *passim; idem, Kitāb al-Umm,* vol. VI, p. 272f.

individual legal activity of jurists. It seems that the whole system of law in the pre-Shāfi'ī period was held together and strengthened by this implicit or explicit principle. It represents the average general opinion of each region in respect of the positive law. It sets aside the stray and 'unsuccessful' opinions circulating in each locality. It is important to note that the *ijmā'* of the learned is not the name of the decisions on legal issues taken by an assembly of Muslim jurists. It emerges, in fact, by itself through a process of integration, and creates for itself a position in the Community.

It is significant to note that al-Shāfi'ī's concept of *ijmā'* is different from that of the early schools. He holds, as is evident from his writings, that *ijmā'* is something static and formal having no room for disagreement. That is why he is reluctant in accepting the validity of the *ijmā'* of the learned as a source of law due to the differences among them. Only the *ijmā'* of the Community is valid according to him. In support of his argument he says that the Community at large cannot neglect the Sunnah of the Prophet (pbuh), which, however, the individuals may neglect. Further, he contends that the Community —God willing— can never agree on a decision opposed to the Sunnah of the Prophet (pbuh) nor on an error.[1] As such, he restricted *ijmā'* only to the *farā'id. ijmā'*, therefore, according to al-Shāfi'ī, became merely a theoretical source of law than a practical one.

However, despite his real position on *ijmā'* al-Shāfi'ī regards it as a source of law after the Qur'ān and the Sunnah of the Prophet (pbuh). In case these sources are silent on a point, he follows first the agreed opinion of the Companions. Then, in case of differences among them, he adopts the opinion of one Companion especially of each of the first four Caliphs. He argues finally on the basis of *qiyās* which is strictly based on the

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[1]Al-Shāfi'ī, *al-Risālah, ed. cit.*, p.66.

Qur'ān and the Sunnah of the Prophet (pbuh) alone.[1] In fact, al-Shāfi'ī confines legal knowledge to the two basic sources, namely, the Qur'ān and the Sunnah, which he calls *aslān* (the two bases). He regards these two sources as independent entities *('aynān)*, while *Ijtihād*, according to him, is not an *'ayn* (entity), but something created by human intelligence.[2] He believes that the Qur'ān and the Sunnah provide answers to all possible problems concerning religion. Thus, the whole emphasis throughout his writings centres around these two sources.

Note: The above material has been taken from Ahmad Hassan's *"The early Development of Islamic Jurisprudence"* Islamabad, Islamic Research Institute, IIU, 1988.

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[1]Al-Shāfi'ī, *Kitāb al-Umm, ed. cit.* vol. VII, p. 246.

[2]*Ibid.*, vol. VI, p. 203.