THE FLEXIBILITY OF *SHARIAH* (ISLAMIC LAW) WITH REFERENCE TO THE IRANIAN EXPERIENCE

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Abstract

This thesis verifies that no laws in Islam are immutable. Immutability is only applicable to faith, values and ultimate goals in *Shariah*. Those laws which look immutable even in ritual part of the religion are not actually immutable and are subject to change under special circumstances. Islamic laws have been developed out of certain conditions and necessities of the time and space. This flexibility must be known as the essential feature of the Islamic law. The framework for this flexibility and change has been predicted and verified in the main sources of *Shariah* i.e. the *Quran*, the *Sunnah, Ijma, Qiyas, Aql* and *Urf*.

The primary source of the Islamic law (the *Quran)* is, in itself, flexible on the basis of the analysis that the Quranic legislation leaves room for flexibility in the evaluation of its injunctions. The *Quran* is not specific on the precise value of its injunctions, and it leaves open the possibility that a command in the *Quran* may sometimes imply an obligation, a recommendation or a mere permissibility. Commands and prohibitions in the *Quran* are expressed in a variety of forms which are often open to interpretation.

The main devices for change predicted in *Shariah* are *Ijtihad, Maslaha* and *Al-ahkam-al-thanaviiah* (secondary rules). Chapter one discusses the concept and development of *Ijtihad*. In chapter two, the role of *Ijtihad* in providing the *shariah* with flexibility will be analysed. Chapter three outlines how in practice *Ijtihad* has been effective in making the Islamic law flexible. Chapter four is devoted to the concept of *Al-ahkam-al-thanaviiah* (secondary rules) as it has been developed by Muslim jurists. Chapter five will deal with the theory of *Maslaha* as a dynamic device in *Shariah*. Finally, in chapter six, the role of *Al-ahkam-al-thanaviiah* and *Maslaha* in Islamic Iranian law will be examined as it has been developed over the years.

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1- *Ijtihad*

2- *Ijtihad* and the flexibility of *Shariah* in Theory

3- *Ijtihad* and the Flexibility of *Shariah* in Practice

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5- *Maslaha*

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Abbreviations

A. H. After *Hijra* (the origin of the Islamic history, when the holy Prophet (S.A.W.) emigrated from Mecca to Medina.

A. D. Anno domini (After Christ).

B.C. Before Christ.

S. A. W. Sallallah Alaih Wa Sallam (peace be upon him).

Introduction

The *Shariah* is that body of knowledge which provides the Muslim civilization with its major means of adjusting to change. The *Shariah* is normally described as "Islamic law". But the boundaries of *Shariah* extend

beyond the limited horizons of law. The *Shariah* is also a system of ethics and values, a pragmatic methodology geared to solving today's and tomorrow's problems. For a Muslim community, the *Shariah* represents that infinite spiritual and worldly thirst that is never satisfied. Muslims always seek an increasingly comprehensive implementation of the *Shariah* on their present and future affairs.

However in the entire history of Islam, the *Shariah* has not been more abused, misunderstood and misrepresented than in our epoch. It has been confined to observing formalities and ritual ceremonies while being projected as an ossified body of law that bears little or no relationship to modern times. It has been presented as an intellectually sterile body of knowledge that belongs to past history rather than the present and the future. All this has been to the detriment of the Muslim people; and has suffocated the true revival of Islam and a genuine emergence of a contemporary Muslim intellectual tradition.

Although *Shariah* comprises spiritual and ethical aspects of life in an

Islamic society, the legal aspect of *Shariah* is the dominant part and that is the legal part of *Shariah* which has been subjected to in-depth research and analysis in this thesis. If the *Shariah* is to become the dominant guiding principle of behaviour of contemporary Muslim societies, then it must be rescued from the clutches of fossilized traditional tendencies.

It is the purpose of this thesis to verify the hypothesis that Islamic law *(Shariah)* enjoys dynamic features and devices which are truly liberal,

progressive and broad-minded and therefore the application of these devices equips the Islamic law with features that it can cope with changing conditions of different eras. The thesis considers it a platitude that change is inescapable and that the details of the law must vary according to the exigencies of changing times. Owing to this fact, nearly all the legal provisions contained in the *Quran* reflect the social conditions and to treat them as binding for all time is to defy the primordial law of evolution and to ignore the spirit of the *Quran* which attributes the quality of permanence only to spiritual values and ultimate goals. All other aspects of life on earth are necessarily subject to change, and no enlightened community would legislate on a contrary principle.

Islamic system has faced different circumstances many times in practice as well. When the Islamic state expanded into provinces of the Byzantine and Persian empires, new problems had to be faced which had not been encountered during Muhammad's (S.A.W.) lifetime. The *Quran* and the *Sunna*, however, contained the principles on which such problems

could be solved. Islamic countries today are faced with many new social problems. Most of these are the inevitable result of the technological and industrial developments of the last two centuries, which have been made possible much larger conurbations, much larger political units and more rapid communications. Because Islamic societies want to have the products of industrial technology, they cannot avoid the relevant problems.

However, the fundamental difference between the Islamic laws and

the statute law (written law passed by a human law-making body) lies in the fact that the statute law is made by man and therefore can also be changed by man if need arises. When we are operating in the context of such laws, no one doubts that the laws can be changed if necessary. No one claims that these laws are eternal and immutable and there are even cases where the conditions for changing any items of the Constitution have been specified and set out. The man-written laws are not considered to be sacred by the society and therefore making any changes to such laws do not in normal circums-tances lead to any social turmoil vor disturbance if they were based on the needs of the society itself; rather, even the contrary is true in the sense that making changes to man-made laws is considered to be a necessary process of law making. The law of continental Europe looks back, generally speaking, to Roman law. And Roman law, of course, received its most authoritative articulation under Justinian, when the empire was already officially Christian. But the Justinian legislation itself looked back to the great jurists of the

Antonine era, who wrote at a time when the old paganism had already lost its hold over educated men, yet before the influence of Christianity had taken its place. Essentially, then, Roman law represents a law devised by men for men, a masterpiece of mature legal deliberation. It was therefore a law that could be changed, if circumstances so required, in much the same way in which it had been formulated.

The divine laws, however, are regarded as highly sacred and there exist much resistance and increased sensitivity to making changes to them or sometimes even discussing changes about them. In this context sometimes even the discussion of making changes to divine laws is considered to be tantamount to heresy. In fact, it has been this very sacredness of divine laws that has made the survival of such laws possible after the lapse of hundreds of years. On the basis of above-mentioned analysis the Islamic jurists assert that God is the sole lawgiver and no one else is authorized to make laws. The laws are considered to be eternal and immutable. If that is the case, the right of changing the laws is up to the almighty lawgiver. Now, the question is who can make changes to the divine laws in an Islamic system and how? Has

the dynamism of changing laws been predicted in the Islamic texts of law? Is there any authority recognizable in the text of the *Quran* and the *Sunnah* for changing and interpreting divine laws? The difference of opinion between the progressive Islamic scholars and the traditional forces became so acute that the latter claimed that "all innovation and change is the work of devil" to condemn

and suppress the former. This motto does not merely reflect the innate conservatism and the deep seated attachment to tradition which was so strong among the early Muslim peoples who formed the first adherents of the faith, it also expresses a principle which became a fundamental axiom of religious belief common to Islamic communities everywhere -- namely, that the code of conduct represented by the religious law, or *Sharia,* was fixed and final in its terms and that any modification thereof was necessarily a departure and a deviation from the one legitimate and valid standard. Based on the ideologies of Islam, the Islamic world has survived for many centuries, and its steadily increasing population is now said to surpass one billion. It has been able to operate effectively through out the ages and in all places under the *Sharia* law, generating a splendid civilization in its early history. Despite the savage wars of the Mongol hordes, the Crusades, and then the European colonialism, the Islamic world endured. This survival bears witness to the existence of a working and adaptable nature of the Islamic system.

Islamic guidance permeates all aspects of human life and divides all human behavior into five moral categories: obligatory (*Wajib*), merely desirable (*Mandub*), forbidden (*Haram)*, merely undesirable (*Makruh)*, and neutral (*Mobah)*. The question is whether all the human affairs which are among these categories are rigid so that no item can be transferred from one category to another because of changing circumstances of the time. In other words, are these categories so flexible that, for instance, one item which is

considered obligatory (*Wajib)* at a certain time becomes neutral (*Mobah)* at a different time (the secondary law). One of the major concerns of this thesis is to provide reliable and well-researched answers and good solutions to these complexities.

Islamic teachings does not confine man to a single course of action without choice, nor does it leave him a victim of uncontrolled greed, human vagaries, and stubbornness. It grants man a wide range of choices and creativity, motivates him to satisfy his physical and psychological needs in progressive processes, but seeks to protect him from evil. In order to direct man toward happiness and prosperity certain values have been introduced. In the light of these values, the Islamic concept of law may be defined as a framework for motivated but free human action within the Islamic value system. That action must respect specific ordinances pertaining to social life and take into account the spiritual and material needs of the individual and his or her society in a balanced and harmonized way.

while law in Islam is God-given, it is man who must apply the law. And between the original divine proposition and the eventual human disposition is interposed an extensive field of intellectual activity and sphere of decision making. In short, jurisprudence in Islam is the whole process of intellectual activity which ascertains and discovers the terms of the divine will and transforms this body of ideas into a system of legally enforceable rights and duties. It is within these terms of reference that the tensions and

conflicts of Islamic legal thought arise. Therefore, Islamic law has a distinctly dual basis.

It is a compound of the two separate spheres of divine ordinance and human decision. One obvious consequence is that the role of human reasoning in Islamic jurisprudence does not always meets with the approval of Muslim governments and some prominent Islamic jurists. There is still a deep-rooted opposition to change both in principle and in practice. The

above-stated problem can be more explored to clarify the nature and complexity of the issue under discussion.

In Medina, the first community of Islam, the Islamic city-state was established with the Prophet (S.A.W.) himself as its temporal head. With the basic ideology of Islam well entrenched, legislative guidance developed, aiming at the best possible results in all spheres of life, including the social, economic, and political domains. At the death of the Prophet (S.A.W.) in 632, the Holy Book of Islam, the *Quran,* had been completely revealed. It incorporates the basic guidance of Islam and is believed to be God's own word. Preserved in the hearts of thousands of the Prophet's disciples and also recorded in writing during his lifetime, the *Quran* was soon duplicated for wide distribution. As a source of Islamic guidance, the *Quran* was supplemented by the *Sunna*, the reported words and actions of the Prophet (S.A.W.), which run into tens of thousands of records, known as *hadiths* (traditions). Both these literary works have always been acknowledged as the

primary sources of guidance for Muslims on all aspects of life.

As the Islamic state expanded and incorporated most of the territories then known, Muslim leadership was confronted with innumerable problems, which they resolved with an amazing degree of efficiency. As a result, the Islamic legal system emerged, known as *Fiqh* or *Sharia*, based primarily on the *Quran* and the hadith records. Muslim jurists sought to answer every conceivable question and organized their findings into several categories--dealing first with the details of the ritual duties then with all types of human interactions, including what may be regarded as commercial law, personal law, and criminal law.

The first 150 years of Islam were characterized by an almost untrammeled freedom of juristic reasoning in the solution of problems not specifically regulated by divine revelation. Such rules of law as the *Quran* and the *Sunna* established were regarded simply as ad hoc modifications of the existing customary law. This existing law remained the accepted standard of conduct unless it was expressly superseded in some particular by the dictates of divine revelation. And when new circumstances posed fresh

problems, these were answered on the basis simply of what seemed the most proper solution to the individual judge or jurist concerned. In the expression of his personal opinion, known as *ra'y,* the individual was free to take into account any factors he deemed relevant. In short, in these early days law had a distinctly dual basis.

But this pragmatic attitude soon fell victim to the increasing sophistication of theological and philosophical inquiry. Among the growing body of scholars whose deliberations were attempting to explain the essence of their faith arose a group who took their stand on the principle that every aspect of human behavior must of necessity be regulated by the divine will. In their philosophy of law the legal sovereignty of God was all-embracing. To allow human reason to formulate a legal rule -- whether by continued recognition of a customary law or by juristic speculation on a new problem-- was tantamount to heresy. In the language of Islamic theology it was "to set up a competitor with Allah" *(sherk)* and to contradict the fundamental doctrine of the omniscience and omnipotence of the Creator.

Because this group believed that every rule of law must be derived either from the *Quran* or from the Prophet's practice as recorded in reports known as *hadith,* they became known as "the supporters of *hadith*", *(ahl al-hadith),* as against "the supporters of *ra'y" (ahl al-ra'y),* who maintained that the free use of human reason to elaborate the law was both legitimate and necessary. The rift between the two groups hardens whenever the Islamic societies face with changing circumstances both domestically and internationally. Therefor, the tension arises again and again between the divine and the human element in law. Among Muslim peoples, therefore, it is what we may call the traditional or classical Islamic concept of law and its role in society that constitutes a most formidable obstacle to progress.

It is necessary to emphasize that finding solutions to these problems is of great significance. The population in 57 states are currently living either directly or indirectly under the Islamic system of laws. The way we interpret and understand the Islamic laws has a great and crucial impact on the quality of the life of millions of Muslims in the world.

It is to be noted that the twentieth century has been a difficult time for the lands of Islam. Despite the backwardness of Islamic societies, the spiritual vigour of the Muslim peoples never died. Beneath the surface of a society apparently acquiescent in its backwardness and enslavement to the great Powers, there is a long-standing vital current flowing, ready to burst into spiritual and intellectual life, as soon as conditions allowed. These conditions were enhanced by the First World War, at the end of which the Islamic world appeared to be emerging from its past lethargy into a new era of self-consciousness. It had also become evident that the Muslim people were endeavouring to readjust themselves to conditions in the modern world. This is one reason why so many Islamic societies have worked so hard to encourage new thinking about Islam.

At international level the objective and reasonable interpretation of Islamic laws can improve the relationships between the Islamic countries and the non-Muslim nations. An active religious revival and a modern and pragmatic approach to the Islamic laws are taking place in the Muslim countries. There is no part of the Islamic world where these changes are

succeeding one another so rapidly as in the Middle East, and it is in this region that today the observer can see at its best the transformation in progress. Here is the great meeting-place of world religions, races and cultures. A glance at the map will show the vast strategic importance of this region of the globe. Any development in rational and correct understanding of Islam can eventually help the non-Muslims to make a correct judgment of the

nature and features of the Islamic laws. This will help realize better relationship between the non-Muslim countries and the Islamic world. In such circumstances the significance of the interpretation and understanding of Islamic laws become even clearer from both domestic and international point of view. The solution to the problems specified above are lying in the complicated discussions of Islamic jurisprudence.

The Muslim peoples are rapidly adjusting themselves to modern conditions, but the type of culture, that they wish to carve out for themselves in this new age, is a revitalized Islamic culture with a glorification of the spiritual values and a fostering of the teachings of Islam. This thesis is an attempt to formulate the methods Islamic societies have used and can use to cope with modern changes.

This thesis also attempts to verify the hypothesis that Islamic laws are dynamic and that tools of flexibility are provided with the Islamic system of law. In-depth research has been carried out to verify whether dynamism is predicted in the original texts and primary sources of Islamic laws and

jurisprudence. The main features and devices of dynamism in Islamic laws will be identified and then the identified features will be applied in an analysis to test the hypothesis whether Islamic system itself visualizes a changing social order and therefore admits of change and flexibility of its laws. Reservations have been expressed by many Islamic scholars as to the relevance and application of the concept of dynamism to the Islamic laws.

An investigation of the literature on Islamic laws illustrates that on the one hand many writers and scholars have considered the inflexibility of Islamic laws as the main shortcoming of the Islamic legal system. Their main criticism was that social needs are mutable while divine laws are fundamentally immutable. On the other hand, other studies give the strong impression that Islam has granted man freedom and has left some margin of choice open to human beings. However, there is strong resistance against such a view to the extent that some writers have regarded the application of dynamism to Islamic laws as the demolitions of the pillars of Islam. The rigid interpretations and elaborations of the *Shariah* have been gradually misconceived as matters of indisputable validity, so much so that as soon as the

word *"Shariah"* is mentioned the concept of rigidity comes instantly to mind and impair the grace and flexibility of the Islamic law. Therefore, regarding the issues analyzed in this thesis, there are still many conflicts unresolved, many problems unanswered. This necessitates an in-depth research work to be carried out to do away with much of the controversy that exists. This thesis is

meant to be a step further to providing solutions and eliminating controversies through discovering and deriving evidences from the main Islamic sources of law to verify the hypothesis that Islamic laws are dynamic and permit of flexibility and change.

The thesis attempts to verify whether all the Islamic laws are subject to change and that they hold valid under certain conditions. Thus, are those laws which are believed by these scholars to be immutable also subject to change under certain circumstances? This requires new, consolidated and concrete evidence discovered or derived from the main sources of Islamic law if controversies are to be settled at least to some extent.

In the first the concept and proof of *Ijtihad* will be examined. Then the development of *Ijtihad* will be brought under scrutiny. Following that the qualifications of *Mujtihad* (qualifies Islamic lawyer) and the procedure for *Ijtihad* will be discussed.

The capability and robustness of *Ijtihad* will be analyzed in an attempt to identify its deserved position in the system of Islamic law. *Ijtihad* will be examined in this thesis in its modern sense is a dynamic device which deduces laws from the Islamic sources (the *Quran*, the *Sunnah*, *Ijma*, *Aql* and *Urf*). The traditional conception that deals with *Ijtihad* as a secondary source of the *Shariah* is not the concern of this thesis.

The second chapter of the thesis is concerned with the examination of the role that *Ijtihad* can perform in providing the *Shariah* with flexibility. In

this chapter it will examine how *Ijtihad* can be a device imparting prominent flexibility to *Shariah* in theory.

In order to do away with so much controversy, the verification of the hypothesis that the divine command itself visualizes a changing social order and thus approves of flexibility and change will be supported and substantiated by evidences discovered or derived from *Shariah* itself. Evidences will be derived from the main sources of Islamic law to verify if *Ijtihad*, or the exercise of informed, independent judgment is the key to the implementation of God's Will in any given time or place. The hypothesis tested will be to the effect that God has revealed only broad principles and has endowed man with the freedom to apply them in every age in the way suited to the spirit and conditions of that age. That people of every age try to implement and apply divine guidance to the problems of their times.

In the third chapter it will be explored how in practice *Ijtihad* had been effective in making the laws flexible and how it can be employed even further to flexibility effect in practice. In fact, in this section we will move from theoretical analysis to the tangible realities of the world of facts. Important cases of *fatwas* will be analyzed to illustrate the trend of the development of *Ijtihad* as an unrivalled dynamic device in the system of Islamic law.

Research will be carried out to show how *Ijtihad* can impart flexibility to *Shariah* when *Ijtihad* becomes operative as a dynamic device in the

deduction of *Ahkam* from the various Islamic sources. The potentialities of these Islamic sources will be identified to illustrate how these sources can become flexible through *Ijtihad* in the face of different circumstances and needs of time and space. As an essential procedure, those potentialities of individual Islamic sources which *Ijtihad* can deal with dynamically to find solutions to new problems will be identified and subjected to in-depth research. The purpose will be to verify the hypothesis that the *Shariah* is

able to provide solutions to new problems and needs of the modern Islamic societies.

The fourth chapter of the thesis is concerned with the examination of the secondary laws *(Al-Ahkam Al-Thanaviah)* in *Shariah*. Important concepts such as *Haraj* (hardships), *Zarar* (losses), *Zarurah* (urgencies) will be carefully examined in this chapter. Particular attention will be given to the analysis of these decrees to verify the hypothesis whether these secondary decrees of the *Shariah* can make the *Sharia* flexible.

The main purpose will be to verify whether these secondary decrees form a valuable source of legislation and a viable means by which the *Shariah* can meet the challenge of change. The verification to the effect that *Shariah* is completely open and that it can be developed and shaped according to the needs of society and time by any number of its secondary decrees will require in-depth analysis which will be presented in the fourth chapter. The main argument in this chapter comprises two issues. The first

issue is whether the application of the secondary decrees is limited only to certain cases or that it covers a much wider scope. The second issue will be whether the application of the secondary decrees are appropriated only to the individual cases or it can also apply to the public issues of the Islamic communities.

Chapter five will deal with the concepts of "*Maslaha*" which identified in the system of the Islamic law as a dynamic instrument. First, a comprehensive definition of the term will be given and then the type of *Masalih* (pl. of *Maslaha*) will be examined. It will be argued any reliance on *Maslaha* must be validated on certain conditions. These conditions will be set out to ensure that *Maslaha* does not become an instrument of arbitrary desire or individual bias in legislation. The conditions will be examined and clarified. In the course of analysis in this chapter distinctions between *Maslaha* and *Ijtihad* will be made in order to illustrate the place of each of these applications in the Islamic law system and how *Maslaha* can impart flexibility to the Islamic laws.

This chapter will also identify and examine another important device in

the Islamic law system as a dynamic feature. That will be the principle of *Maslaha* which is to be considered as an important branch of *Ijtihad*. The identification of *Maslaha* as a dynamic feature of the Islamic law not been made by the author on arbitrary basis but that the in-depth research carried out by the author has persuaded him that *Maslaha* can pay a prominent role in the

adaptation of Islamic law to the changing needs of the society and thus is apt to be chosen to test the flexibility of the Islamic legal system. The hypothesis will be tested to the effect if *Maslaha* can provide Islamic law with the necessary means with which to encourage flexibility and growth. Notwithstanding a measure of juristic technicality which seems to have been injected into an originally simple idea, *Maslaha* remains examined and analyzed in the thesis.

The sixth or last chapter of the thesis has been appropriated to a case study by focusing on Iran's legislative power. The process of legislating and the performance of two established institutions i.e. the Council of Guardians and the Expediency Council as well as the relationships between them and the *Majils* have been examined. Finally, the role of *Maslaha* and *Al-Ahkam al-thanaviiah* in Islamic Iranian laws and their scopes for providing the immutable laws of Islam with the possibilities of meeting the challenges of changing social needs, will be discussed in chapter six.

1

IJTIHAD

(Personal Reasoning)

Ijtihad is an effort or an exercise to arrive at one's own judgement. In its widest sense, it requires the use of human reason in the elaboration and explanation of the *Shariah*. It covers a variety of mental processes, ranging from the interpretation of texts of the *Quran* and the assessment of other sources.[1] *Ijtihad*, therefore, is an exercise of one's reasoning to arrive at a logical conclusion on a legal issue. The scope of *Ijtihad* ranges from textual interpretation, assessing the authenticity of a *hadith* (a saying of the Prophet (S.A.W.)), to systematic deductive reasoning from first principles.[2] It therefore allows for logical reasoning to deduce a rule where no precedent exists. If properly applied, *Ijtihad* bridges the apparent gap between theory and practice.[3]

> *"Ijtihad is defined as the total exercise of effort made by a jurist in order to infer the rules of Shariah from their detailed evidence in the sources. Some Islamic Jurists have defined Ijtihad as the application by a jurist of all his faculties either in inferring the rules of Shariah from their sources, or in implementing such rules and applying them to particular fresh issues".*[4]

Thus a person who knows the rules of *Shariah* in detail but is unable to exercise his judgement in the inference of the decree direct from their sources is not a *Mujtahid* (qualified Islamic lawyer). *Ijtihad*, in other words, consists of the formulation of an opinion in regard to a religious decree. The presence of an element of speculation in *Ijtihad* implies that the result arrived at is a human effort and therefore the possibility of its being erroneous is not excluded.[5]

Some Islamic scholars have imparted a narrow concept to *Ijtihad*

because they have asserted that the two principles of *Ijtihad* and *Qiyas* (analogy) are identical. Shafii, while criticizing the exercise of *ra'y* (individual reasoning), recognized the principle of *Qiyas* as a standard mode of legal reasoning.[6] However, since *Qiyas* and *Ijtihad* were identical in his opinion, the scope of *Ijtihad* was narrowed down by him. Some other scholars have asserted that *Ijtihad* is the same as *ra'y*.[7] However, *ra'y* was a very primitive form of *Ijtihad*.

Ijtihad covers a very wide scope so that it can be a bridge between all the sources of law and the everyday needs of the Islamic society.[8] Among the characteristic features of Islamic law, the principle of *Ijtihad* is very important.[9] Its application was absolutely necessary to develop the Muslim law so that it can administer justice and provide solutions to new problems. Without *Ijtihad* the Muslim law would have remained stagnant and in irretrievable ruin.

> *"The essential unity of the Shariah lies in the degree of harmony that is achieved between revelation and reason. Ijtihad is the*

> *principal instrument of maintaining this harmony. The various sources of Islamic law that feature next to the Quran and the Sunnah are all manifestations of Ijtihad. In this way, consensus of opinion (Ijma), analogy (Qiyas), juristic preference (Istihsan), considerations of public interest (maslahah), etc., are all interrelated under the main heading of Ijtihad".*[10]

Most authorities state that the use of *Ijtihad* died out in the tenth century on the grounds that its creative force had become exhausted and that there was in any case no requirement for further interpretation.

era of *Taqlid* (following of previous authorities) set in.[11] It is generally but erroneously asserted that, ever since the codification of the doctrine of Islam by the four great orthodox imams, this door of *Ijtihad* has been closed so that Muslims must conform their opinions strictly to the opinions enumerated by these imams without seeking to arrive by means of their own reasoning at a personal opinion about the tenets of Islam.[12]

Throughout the centuries, *Mujtahids* (qualified Islamic lawyers) have incessantly contributed to the further development of positive law and legal theory. This is an important point, since most leaders of reformist movements necessarily claim the right to practice *Ijtihad*. Legal activity, whether in theory or in practice, continued unceasingly. The vast bulk of *fatwas* (legal opinions) that have appeared and continued to grow quite rapidly from the tenth century onwards is a telling example of the importance of fatwas *as* personal legal opinions and precedents and tacit proof of the continuation of the use of *Ijtihad*.[13] It is in this large

body of material that one may look for positive legal developments.[14]

The distinction between *Ijtihad* and the revealed sources of the *Shariah* lies in the fact that *Ijtihad* is a continuous process of development whereas divine revelation and Prophetic legislation discontinued upon the demise of the Prophet (S.A.W.).[15] In this sense, *Ijtihad* continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim communities.

In this thesis, *Ijtihad* is being examined in its modern sense i.e. a

dynamic device which deduces laws from the Islamic sources (the *Quran*, the *Sunnah, Ijma, Aql and Urf*).

The Proof of *Ijtihad*

Ijtihad derives its validity from divine revelation. The primary source of law in the early era was the *Quran*. The *Quran* was elaborated and interpreted by the *Sunnah*.[16] Thus the *Quran* and the *Sunnah* constituted the primary sources of Islamic law. However, the society in which the *Quran* was revealed was naturally to develop further by the expansion of Islam. Most of the problems that confronted the Muslims living in the time of revelation were bound to differ from those of the coming generations in the wake of the interplay of Islam and other neighboring cultures with which they came in contact. As such, the law furnished by the *Quran-Sunnah* source in the time of the Prophet (S.A.W.) had to be supplemented and sometimes reinterpreted and elaborated to

cover new problems in order to find answers for them.[17] Islamic law, therefore, developed with the emergence of new problems from time to time since the days of the Prophet (S.A.W.), and was examined and re-examined, interpreted and reinterpreted, in accordance with the varying circumstances of the age. The process of rethinking and reinterpreting the law independently was carried out through *Ijtihad*.

Intellectual development and maturity in judgement had been since long a criterion of dynamism. The *Quran* itself time and again exhorts to

deep thinking and meditation over its verses.[18] It invites to the exercise of reason and personal opinion *(Ijtihad)* in legal matters.

The holy *Quran* says :

> *"And it does not beseem the believers that they should go forth all together; why should not then a company from every party from among them go forth that they may apply themselves to obtain understanding in religion".*[19]

In this verse, the *Quran* emphasises that at least some of the people must endeavor to become knowledgeable *(faqih)* so that they can guide the laymen.

The *Quran* also advises thus:

> *"Ask the knowledgeable scholars* if you do not know"[20]

The above-stated verse, while implicitly implying the importance of knowledge, explicitly urges people to seek specialized knowledge.

The *Quran* emphasises that there is a need for interpretation. When there are ambiguous verses, one should only refer to

knowledgeable scholars who have sound understanding. The *Quran* says:

> *"He it is who has sent down to thee the book, of it there are some verses decisive, they are the basis of the Book, and others are ambiguous: then as for those in whose hearts there is perversity, they follow the part of it which is ambiguous, seeking to mislead, and seeking to give it (their own) interpretation, but none knows its interpretation except Allah; and those who are firmly rooted in knowledge".*[21]

The *Quran* makes a difference between those who are knowledgeable and those ignorant and encourages man to pursue learning and understanding:

> *"What! He, who is obedient during hours of the night, prostrating himself and standing, takes care of the hereafter and hopes for the mercy of his Lord! Say: Are those who know and those who do not know alike? Only the men of understanding are mindful".*[22]

The *Quran* insists that one should not follow that which he does not have knowledge about:

> *"And follow not that of which you have not the knowledge; surely the hearing and the sight and the heart, all of these, shall be questioned about that".*[23]

The *Quran* considers faith and knowledge having the same importance:

> *"Allah will exalt those of you who believe, and those who are given knowledge, in high degrees; and Allah is aware of what you do".*[24]

The above-stated verses are presented just as a few examples illustrating how the *Quran* encourages man to pursue understanding and

knowledge. The verses all verify the fact that the *Quran* as the main and most important source of law in Islam necessitates the use of reason and the exercise of efforts to acquire sound understanding. That was such Quranic verses that formed the pillars on which the Islamic knowledge and science and later science of Islamic jurisprudence were based.

In addition to the teachings of the *Quran*, the other primary source of Islamic law i.e. the *Sunnah* also encourages and makes it incumbent on every Muslim to seek knowledge and correct understanding continuously.

The *hadith* of Muaz-Ibn-Jabal provides clear authority for *Ijtihad* teaching how to apply laws under different circumstances. In this context the issue of *Ijtihad* emerged as a mechanism for handling problems for which there existed no specified laws. When the Prophet (S.A.W.) decided to send Muaz-Ibn-Jabal to Yemen, he said, "How will you execute judgement when a case comes before you, Muaz replied" I will judge by the *Quran*. The Prophet (S.A.W.) said, "And if you do not find a similar case in the *Quran* and the traditions?", Muaz replied "Then I will decide according to my own judgement and will not abandon effort. "Thereupon the Prophet (S.A.W.) was pleased and said "Praise be to God who has caused the messenger of the Apostle of God to agree with what the God and his apostle like".[25]

There is a very important *hadith* related to the holy Prophet (S.A.W.) which reads thus:

> *"When a judge exercises Ijtihad and gives a right judgement, he will have two rewards, but if he errs in his judgment, he will still have earned one reward".*[26]

This *hadith* implies that regardless of its results, *Ijtihad* never partakes in sin. When the necessary requirements of *Ijtihad* are present, the result is always meritorious and never blameworthy. In another *hadith*, the Prophet (S.A.W.) is reported to have said:

> *"Strive and endeavour, for everyone is ordained to accomplish that which he is created for".*[27]

According to the Quranic verses, man has been created for the purpose of fulfilling his ultimate obligation and responsibility. The

discovery of those responsibilities in various circumstances of time and space can not be realized without the application of *Ijtihad*. The *Quran* specifies that man has not been created purposelessly and that he must not think that he is left to wander without an aim.[28] The *Quran* also specifies that the man is being continuously tested as he has been endowed with the tools of understanding.[29]

There is also the *hadith*, which reads thus:

> *"When God favours one of His servants, He enables him to acquire knowledge in* religion".[30]

The Islamic Jurists of *Osul* have also quoted in this connection two other *ahadith* from the holy Prophet (S.A.W.), one of which makes the pursuit of knowledge and understanding an obligation of every Muslim, man or woman.

> *"All Muslims must aspire after knowledge".*[31]

And the other declares the Islamic Jurists to be the successors of

the Prophets:

> *"The Islamic Jurists are the successors of the* Prophets".[32]

The relevance of the last two *ahadith* to *Ijtihad* is borne out by the fact that *Ijtihad* is the main instrument of creativity and knowledge in Islam.

We also find in the *Sunnah* of the Prophet (S.A.W.) that the holy Prophet (S.A.W.) sought the advice and opinions of his companions and encouraged them to comment on daily issues of the community. This fact

provided the first cornerstone of *ra'y* (as a primitive mode of *Ijtihad)* and *Ijtihad.* On the occasion of Badr, to give an instance, the Prophet (S.A.W.) chose a particular place for the encampment of the Muslim forces. A companion, Hubab Al-Munzer, asked him whether he had chosen that place on his own judgement (*ra'y*) or on revelation from God. The Prophet (S.A.W.) replied that he had done so on his own judgement. When the Companion suggested a more suitable place, the Prophet (S.A.W.) told him:

"You have made a sound suggestion".[33]

Examples are abundant where the Prophet (S.A.W.) consulted the Companions and accepted their opinions. The *Quran's* insistence on consulting the Companions in different matters presupposes its approval of exercise of personal opinion in deciding problems.[34]

The rational argument in support of *Ijtihad* is to be sought in the fact that while the *nusus* (texts) of *Shariah* are limited, new experiences in the life of the community continue to give rise to new problems. It is,

therefore, imperative for the learned members of the community to attempt to find solutions to such problems through *Ijtihad.*

The Development of *Ijtihad*

Evidence was the cornerstone of laws devised by early Muslims. The said Muslims were, nonetheless, divided over the interpretation of evidence, which was mostly based on Arabic texts. For instance, they widely differed in the implied meanings of words, particularly the legal

terminology.[35] Furthermore, the traditions differ widely in respect of the reliability of the recessions. Their legal contents, as a rule, seem to be contradictory. Therefore, a decision is needed. This makes for differences of opinion. Furthermore, evidence not derived from texts causes other differences of opinion. Then, there are new cases, which arise and are not covered by the texts. Proponents of logical reasoning or analogy resorted to reason even when texts existed about certain cases. As such, differences of opinion seemed unavoidable and justified among the early Muslims and the posterior religious authorities.[36]

> *Moreover, not all of the men around Mohammad (S.A.W) were qualified to give legal decisions. Not all of them could serve as sources for religion. That was restricted to men who knew the Quran and were acquainted with the abrogating and abrogated, the ambiguous and unambiguous verses, and with all the rest of the evidence that can be derived from the Quran, since they had learned these matters from the Prophet (S.A.W) directly or*

> *from the companions who had learned it from him. These men, therefore, were called "readers", that is, men who were able to read the Quran.*[37]

The rise of the Islamic civilization and expansion of the cities served as the bedrock for Islamic science. Mere reading of the *Quran* was no longer sufficient. Something more was imperative. This move necessitated the rise and perfection of jurisprudence based on specific sources. Jurisprudence, consequently, evolved as a craft and science. The

Quran readers were no longer called *Quran* readers but jurists and religious scholars. The jurists developed two different approaches to jurisprudence. One of them hinged on analogy and reasoning, while the other relied on the traditions. In a drive to initiate the *Ijtihad*, the advocates of the first approach resorted to *ra'y* (personal reasoning).[38] The *ra'y* was actually initiated and later on supported by the story of the conversation between the holy Prophet (S.A.W.) and Muaz whom he was sending as a judge to the Yemen. It was not very long, however, before the view came to prevail that this juristic opinion (*ra'y)* was at once too subjective and too fallible a basis on which to found a law which was divinely authoritative.[39] Being too subjective, the *ra'y* prompted the jurist to mainly rely on analogy (*Qiyas*) to apply a rule of the *Quran* or the *Sunnah* to a similar - yet not totally identical - case.[40] But *Qiyas* was also too fallible, for it was recognized that even in the application of rules of analogy an individual jurist might err. So the opinion gained ground that although individuals might err, the great jurists, collectively, could not;

so the consensus of the jurists *(Ijma)* came to be regarded as yet another manifestation of the divine voice. Such development was requisite, given the exigency of interpreting the *Quran* and the necessity of authenticating the traditions.[41]

Now the problem posed itself as how a jurist must derive *Shariah* from these sources. The discovery of a novel and consolidated approach was imperative; hence the emergence of *Ijtihad*. During the early days, any competent jurist was believed to possess the capability for *Ijtihad*.

However, with the passage of the years, the crystallization of the different schools of law and the progressive enunciation of the doctrine, this faculty was held to have fallen into abeyance; and, since about the end of the third century of the *hijra*, all jurists have been regarded as mere *muqallids* (persons bound to practice *Taqlid)*, that is, those whose duty it is to accept the opinions of their great predecessors without the exercise of private judgment.[42]

> *"It is true that many authorities allow that even a muqallid may, in the exigencies of private life, pick and choose between the different opinions of his great predecessors; but it was generally asserted that the judge and the jurisconsult had no such liberty in their public capacity, but must follow the dominant opinion in their particular school in every detail.[43] It was thus that until recently a big part of the Muslim world had become largely stagnant. The law was still the principal discipline for study; but this study showed itself in the production of commentaries most of which represented a substantial repetition of what had gone before. There was indeed*

> *a certain development, particularly in the books of fatawa or legal decisions, but it was very slow; and it was the dominant opinion that came to prevail in each of the schools, on this point or that, which constituted the authoritative criterion.[44]"*

As per the diverse schools of law, it is interesting to note that jurists of the early days formed regional groupings. Later on, such regional groupings were converted to center around a renowned personality such as *Shafii*. From then on, the names of the prominent

jurists were used in reference to the regional groups.[45] Eventually four schools not only established themselves but survived in *Sunni* Islam (Hanafi, Maliki, Shafii, and Hanbali); and these, although they differ from each other on innumerable points, mutually recognize each other's orthodoxy.[46]

Diverse elements - including extremist legal groups demanding *Taqlid* or denouncing *Qiyas* - rejected *Ijtihad* all through the third, fourth and fifth centuries after *hijrah* (A.H.). These groups came mainly from the lines of the "people of *hadith*", or Traditionalists, who were primarily concerned with the study of transmitted sources and their literal interpretation, while denying human reason in *Ijtihad* or in the process of legal reasoning.[47] A distinction among different groups of Traditionalists seemed in point, as they ranged from moderates opting for co-existence with the "people of ra'y" to extremists denouncing *Qiyas*, even if it was totally reliant on the Book.[48] More than two centuries later, when all legal schisms became well defined, Mawardi described the status of this

extreme Traditionalist party vis-a-vis *Ijtihad* as follows:

> *"There are two kinds of people who reject analogy. Some reject it, follow the text literally and are guided by the sayings of their ancestors if there is no contradiction to the text in question. They reject completely the independent Ijtihad and turn away from individual contemplation and free investigation. No judgeships may be entrusted to such persons since they apply the methods of jurisprudence insufficiently. The other category of people does reject analogy, but still uses independent judgement in legal*

deduction through reliance on the meaning (spirit) of the words and the sense of the address. Al-Shafii's followers are divided as to whether or not such theologians may be entrusted with a judgeship".[49]

Scholars of all schools, in early fourth century A.H., came to the conclusion that all major questions had been duly addressed and resolved. Little by little, a consensus appeared regarding disqualification of individuals for independent reasoning in law. Based on the same consensus, explication, application and interpretation of the final doctrine were determined as the main tasks ahead for the years to come. The closing of the door of *Ijtihad,* as it was called, amounted to the demand for *Taqlid,* a term which had originally denoted the kind of reference to Companions of the Prophet (S.A.W.) that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities.[50]

According to Anderson and many other scholars, the gate of

Ijtihad was believed to have been shut by the late third century A.H.[51]. And to confirm that this closure was a *fait accompli,* Gibb asserted that the early Muslim scholars held that "the gate was closed, never again to be reopened".[52] Though Watt sees certain inaccuracies in this standard view, he has not offered another substitute outlook.[53] Depending on the particular subject of their discussion, many scholars would have believed that the closure of the gate had an impact on, or was influenced by, this or that element in Islamic history. The closure of the gate of *Ijtihad* had

dual applications: On the one hand, it served to immunize the *Shariah* against government interference. On the other hand, it was used to demonstrate the problem of retrogression in Islamic institutions and culture. Some date the closure at the beginning of the fourth Islamic century and others advance it to the seventh, depending on the facts and analyses involved in each study. Thus, on the basis of this alleged closure, aspects of Islamic history were reconstructed and interpreted time after time.

The baselessness and inaccuracy of the said approaches toward the history of *Ijtihad* following the second century A.H. come to the fore through meticulous survey of the original legal sources. Interestingly, traditional attempts to root out *Ijtihad* were thwarted, primarily because of the firm establishment of *Osul-Al-Fiqh* (principles of jurisprudence) which included the indispensable component of *Ijtihad*. In fact, an examination of the writings of jurists after the third century will

demonstrate that *Ijtihad* was exercised with no interruption.[54]

The Methodology of Islamic Jurisprudence

The science of the principles of Islamic jurisprudence (*Osul-Al-Fiqh)* is one of the most significant disciplines of the Islamic law.[55] The early Muslims could dispense with it. Nothing more than the linguistic habit they possessed was needed for deriving ideas from words. The early

Muslims themselves also were the source for most of the norms needed in special cases for deriving laws. They had no need to study the chains of transmitters, because they were close to the transmitters in time and had personal knowledge and experience of them. When the early Muslims died, the first period of Islam was over. All the sciences became technical.[56] Jurists and religious scholars of independent judgement now had to acquire these norms and basic rules, in order to be able to derive the laws from the evidence. They wrote them down as a discipline in its own right and called it "principles of jurisprudence". The first scholar to write on the subject was Al-Shafii. He dictated his famous *Risalah* on the subject.[57]

The same subject was later taken up by both Hanafite jurists who confirmed and thoroughly discussed the fundamental laws and the speculative theologians. But the work of the former was more adequate for jurisprudence and better applicable to specific cases than what was

done by the latter. This is because the jurists present examples and rely on legal issues while dealing with a problem. The theologians, on the other hand, present these problems in their bare outlines, without reference to jurisprudence, and are inclined to use abstract logical deduction as much as possible, since that is their scholarly approach and required by their method.[58]

Discovery of God's law is of paramount importance in Islamic legal theory, as it allows man to realize the behavior, which *Allah*

approves of. It is exactly for the purpose of finding the rulings decreed by God that the methodology of *Osul-Al-Fiqh* was established.[59] The *Quran* and the *Sunnah* of the Prophet (S.A.W.) do not, as a rule, specify the law as it might be stated in specialized law manuals, but only contain rulings and indications that lead to the causes of these rulings. On the basis of these indications and causes the *mujtahid* may attempt, by employing the procedure of *Qiyas* to discover the judgement of an unprecedented case. But before embarking on this original task, he must first search for the judgement in the works of renowned jurists. If he fails to find a precedent in these works he may look for a similar case in which legal acts are different but legal facts are the same. Failing this he must turn to the *Quran*, the *Sunnah*, or *Ijma* for a precedent. When this is reached he is to apply the principles of *Qiyas* in order to reach the rulings of the case in question. This ruling may be one of the following: the obligatory (*wajib*), the forbidden (*haram*), the recommended (*mandub*), the

permissible (*mubah*), or the disapproved (*makruh*).[60]

As such, development of a system of principles based on which competent jurists could issue verdicts for new cases was vested with legal theory. Jurists, since the third century A.H., have unanimously regarded this as the lofty objective of *Osul-Al-Fiqh*.[61] Legal theory in all its parts is sanctioned by divine authority, that is, it derives its authority from revealed sources. It is partly for this reason and partly for the reason of man's duty to worship his Creator in accordance with divine law that the

practice of *Ijtihad* was declared to be a religious duty incumbent upon all qualified jurists whenever a new case should appear. Until *Ijtihad* is performed by at least one *mujtahid*, the Muslim community remains under the spell of this unfulfilled duty. Legal theory has played a rather significant role in favor of *Ijtihad*. Thus, the practice of *Ijtihad* was the primary objective of the methodology and theory of *Osul-Al-Fiqh* throughout Islamic history.[62]

Shia theory on the sources of the law and on the nature of the law provides a dynamic form of law.[63] By elevating *Aql* (reason) to the status of a source of the law, they have given deductive reasoning a more important place than it occupies in *Sunni* theory.[64] In the case of the *Sunnah,* the *Shia* accept only those *hadith* transmitted through one or more of the twelve impeccable Imams, and some believe that traditions of the holy Prophet (S.A.W.) should be accepted through the channel of narrations by the people of the holy Prophet's Progeny.[65] The *Shia*

concept of *Aql* is closely linked to *Ijtihad*, since the *Shia* jurist uses *Aql*, usually supported by the other three sources of the law.[66] The notion of *Aql* specifies that God, the Creator and the Formulator of the law, has bestowed man with the faculty of reason to appropriately determine the terms of the law. *Aql*, as a source of Islamic law in the view of the *Shia*, imparts the flexibility feature to *Ijtihad* in the same manner that *Qiyas* equips *Aql* with the feature of flexibility in the *Sunni* doctrine.

The theory set out briefly above is essentially that of the *Osuli*

school and was largely in place by the tenth century. However, an opposing school, the *Akhbari* (Traditionalist), rose to prominence and doctrinal development paused until the controversy between the two was finally resolved in favour of the *Osulis* towards the end of the eighteenth century. In essence, *Akhbari* theory rejected the rationalist basis of the *Osuli* view in favour of heavy reliance upon the *Quran* and the *Sunna* as explained by the Imams and upon a much larger corpus of *hadith* than that accepted as valid by the *Osulis*. It follows that the *Akhbaris* rejected the *Osuli* linkage between the sources of the law and rational principles and they equally reject *Ijtihad* in favour of *taqlid*.[68] The *Osuli* victory was followed by a resurgence of theoretical development, with the main contribution coming from Sheikh Murtaza Ansari in his definition of the principles to be followed in reaching a decision in cases where there was doubt. In such cases, he argued, the principles to be applied were: *Al-bara'a* (freedom from obligation or liability in the absence of proof); *Al-Takhir* (freedom to select the opinion of other jurists or even other schools if these seem more suitable); *Al-Istishab* (the continuation of any

state of affairs in existence or legal decisions already accepted unless the contrary can be proved); and *Al-Ihtiyat* (prudent caution whenever in doubt).[69]

Whether dealing with implications of primary texts or with cases in the absence of directly relevant texts, juristic reasoning is never final and ultimate. Says Gibb: "The *Quran* and the Tradition are not, as it is often said, the basis of Islamic legal speculation but only its sources".[70] This statement presents a basic fact regarding the course of evolution in

the applicability of the *Shariah*. It emphasizes the role of human thought, as called upon, urged and directed by the legal authority of *Quran* and *Sunnah*. Apart from the *Shariah*, there is no legal speculation to a world prone to constant change and transformation. None of the recorded works by the distinguished Islamic jurists suggest a monopoly of interpretation or finality. The imputation of finality to the findings of the schools of law is contrary to the creative spirit of the *Quran*, specifying thus:

> *"This is a Book that we have revealed to you abounding in good, that they may ponder over its verses, and that men of understanding may mind."* [71]

Iqbal, in his Reconstruction of Religious Thought in Islam, states:

> *"Turning now to the groundwork of legal principles in the Quran, it is perfectly clear that far from leaving no scope for human thoughts and legislative activity, the intensive breadth of these principles virtually acts as an awakener of human thought. Our early doctors of law taking their clue mainly from this groundwork evolved a number of legal system; and the student of Mohammadan history*

> *knows very well that nearly half the triumphs of Islam as a social and political power were due to the legal acuteness of these doctors. .... The teachings of the Quran that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems".* [72]

Ijtihad as an evolutionary field

of specialized knowledge

Ijtihad is a complex and complicated process in the Islamic legal system so that the jurist who is going to exercise *Ijtihad* must possess certain qualifications.[73] The examination of these qualifications can bear witness to the important fact that *Ijtihad* has consistently been viewed as a specialised skill whose application has been indispensable. Not only have the great Islamic jurists believed in *Ijtihad* but also they have demanded higher qualifications from *Mujtahids*. A survey of the Islamic legal theory illustrates that since the earliest time of the Islamic century the qualifications of *Mujtahids* have been considered an important issue, which per se can be taken as a consolidated evidence of the recognition of *Ijtihad* as a significant dynamic feature of the Islamic law. Abu Husayn al Basri (d. 436) believes that mastery of the *Quran*, the *Sunnah* of the Prophet (S.A.W.), and the rudimentary principles of inference *(istidlal)* and *Qiyas* are the prerequisites and preconditions of *Ijtihad*.[74] The

investigation of the ways of *hadith* transmission and the trustworthiness of transmitters is necessary for verifying the credibility of *hadith*. Basri particularly underlines the indispensability of *Qiyas* for *Ijtihad*. He also holds that *Ijtihad* hinges on knowledge of rules of *illah* (cause), *asl* (fundamental case), *fara* (parallel case), and *hukm* (legal competence).[75] In the process of deducing the *illa* from the *asl*, the text, with its inner contradictions and linguistic-legal complications, has to be analyzed. To solve these contradictions and to understand intricate exegetical matters

the jurist must have a thorough knowledge of the principles of *majaz* (metaphors), particularization, and *Naskh* (abrogation). Familiarity with the Arabic language, particularly with the *khass* (particular) and the *a'mm* (general), is a prerequisite. Basri regards familiarity with customary law *(Urf)* as a qualification required for *Ijtihad,* for it is essential, he argues, to determine God's law in the light of the exigencies of human life.[76]

The jurist should, in addition, be versed with the attributes of God to safely come up with a sound awareness of His Will as specified in the Book. Basri, moreover, argues that a case with a ruling cannot be taken up by any other jurist. This implies that whoever intends to practice *Ijtihad* to solve a specific case must first be certain that it was not treated before, and this consequently requires of him to know the *furua* of at least his school. Basri mitigates the rigorousness of these requirements in the law of inheritance.[77] In a single case of inheritance and without possession of the aforementioned skills, a jurist may be allowed to practice *Ijtihad*. According to Basri, this is justified on the grounds that

methodical principles and textual subject matter related to inheritance are independent of and unconnected with, other parts of the law. Otherwise, the jurist must not attempt *Ijtihad* in any other area of law until he is well equipped with the necessary tools.[78]

Shirazi (d. 467) is of the view that only those parts of the *Quran* and the *Sunnah* with direct relevance to the *Shariah* should be known to the jurist. This provision allows for the omission of the inapplicable parts. The principles of Arabic language, views of the former generations, and

Qiyas are the fundamentals of *Osul*. The jurist must know the texts from which he can extract the *illah* and must possess the methods to do so. Given the fact more than one *illah* may be deduced in a single case, he must be able to distinguish between a variety of *ilal* and to determine which deserves to be advanced over the others.[79]

Ghazali (d. 505), commenting on the qualifications for *Ijtihad*, asserted that a jurist should just know - not memorize - the 500 verses required in law to become a *Mujtahid*.[80] He must also know the methods by which legal evidence is derived from the texts and know the Arabic language; complete mastery of its principles is not a prerequisite. The jurist should, moreover, be versed with the rules of the doctrine of *Naskh* (abrogation), and not the details, to determine the authenticity of *hadith*. The *Mujtahid* must be able to investigate the authenticity of *hadith*. If the *hadith* has been accepted by Muslims as reliable, it may not be questioned. If a transmitter was known for probity, all *ahadith* related through him are to be accepted.[81]

According to Ghazali, a jurist wishing to engage in *Ijtihad* in all

branches of substantive law must have all these qualifications. Those who want to practice *Ijtihad* in one area, e.g., family law, or only in a single case, say a case of divorce, need not fulfill all the conditions but are instead required to know the methodological principles and the textual material needed to solve that particular problem.[82]

Ghazali's legal doctrine was almost fully followed by his successors such as Baydawi, Subki, Isnawi, and Ibn Abd Al-Shakur. Some of these authors, such as Baydawi, demanded encompassing

knowledge of the *Quran*. The more important point is that the divisibility of *Ijtihad* was recognized to be lawful and thus a limited knowledge of the principles of *Ijtihad* was sufficient to allow a jurist to practice *Ijtihad* in an individual case.[83] However, only Basri and Shirazi did not consider the divisibility of *Ijtihad* permissible in all areas of law. [84]

Though Muslim legal texts presented difficult qualifications for *Ijtihad*, prominent Islamic jurists embarked on *Ijtihad* in accordance with the requirements of life and prescribed the needed conditions. Further investigation of the role of *Ijtihad* and *Mujtahids* (qualified Islamic lawyers) in Islamic legal history following the eleventh century will show that *Ijtihad* remained an integral part of the Islamic legal system and that those who opposed it were virtually pushed to the corner as minorities.[85]

Ijtihad was taken by Abd Al-Jabbar to be a requisite part of the law, without it, law could not flourish. For them *taqlid* is to be used only by the commoner and by those for whom the exercise of *Ijtihad* is impossible. Ibn Abd Al-Barr devoted a whole chapter in refutation of *taqlid*. He maintained that on the basis of many Quranic verses an

agreement among scholars has been reached on the nullity of *taqlid*. The works of these scholars reflect the conviction of Muslim lawyers with regard to matters of religious and legal practices.[86]

The influence of *Ijtihad* transcended law to embrace the political thought of medieval Islam. An account of the transforming 11th century politics sheds light on the essential role of *Ijtihad* in the political institution dominated by the Islamic Jurists. Such a discussion will also demonstrate that whereas political theory, which was the product of

juristic thought, recognized the failure of Caliphs to meet the requirements of *Shariah* by their incompetence to practice *Ijtihad*. In his discussion of the qualifications of the Imam, Baghdadi considers the ability to practice *Ijtihad* as one of the four conditions that the Imam (or Caliph) must satisfy in order to rule efficiently.[87] Mawardi also sets a similar condition, stressing the need for the Imam to master *Ijtihad*, since he needs to be versed with law and to find solutions to new tangles. Based on the political theory of Juwayni, Ghazali, Mawardi, Baghdadi, and others, *Ijtihad* is regarded as a rudimentary pillar of both the legal and the political life of Islam.[88]

The analysis presented thus far makes it clear that in practice and in theory the activity of *Ijtihad* during the period under discussion was uninterrupted. Furthermore, *Mujtahids* proved to have existed at all times, a fact which finds full support in the ample material available from the period itself.[89]

The analysis so far made confirms the inevitability of newly

emerging problems in a gradually evolving society. *Ijtihad* served as the sole solution to the problems, which surfaced. As a result, the methodology of *Ijtihad* was practically enforced but without reference to its designation. Many jurists admitted that it was indispensable, and so it was, but they were convinced that very few contemporary jurists possessed the qualification to practice it. Due to the inner dynamic attribute of *Ijtihad* which arises from its capacity to find appropriate solutions to the problems risen from different circumstances, of time and

place the complication of the problems necessitated higher and much expertwise qualifications on the part of the Islamic jurists. In other words, with the passage of time there was a need for higher qualified *Mujtahids* to issue *Ijtihad*. The more complicated problems called for better qualified *foqaha* to the effect that each Islamic jurist was required to be a specialist in the field he was intending to exercise *Ijtihad*.

Ijtihad as a principle of movement

The 19th and 20th centuries marked the advent of modernization in the Islamic countries. As such, it was imperative to revamp the Islamic understanding to insure the presentation of solutions to newly appearing problems. However, the failure to apply the device of *Ijtihad* to seek solutions, which was the result of the extreme conservatism of traditional Islamic scholars and their static approach, led to the adoption of different methodologies. For instance, in Iran as a Muslim nation the idea of separation of religious and secular affairs was propounded.[90] The two

were respectively directed by the jurist and the head of the state. The theoreticians of the day stressed that the jurist should cooperate with the head of the state. Separation of the religious and secular rules and regulations, power distribution, and cooperation are of importance here.[91] This theory stipulates the superiority of the religious laws and the need for the head of the state to adapt himself with the jurist. The importance of such classification cannot be overlooked. The courts presided over by the *foqaha* were known as *sharei* courts, with the law being dispensed

that evolved by *Shia* Islam; the system of law controlled by the state was called *Urfi*. *Urfi* has been called common law or law of precedent, but since no records of proceedings were kept, and since the verdicts delivered were not necessarily committed to writing, it is difficult to see what basis of precedent could have been referred to. The exigencies of the state at a specific time entailed the *Urfi* jurisdiction by town governors. Consequently, *Urfi* jurisdiction can be snugly dubbed as arbitrary law, notwithstanding the contradiction at the heart of such classification.[92]

Seemingly, the *Urfi* and *sharei* jurisdictions were not exactly demarcated. A distinction can, nonetheless, be detected: *Urfi* jurisdiction mainly zoomed in on offenses against the state or public security, while *sharei* jurisdiction took up personal or commercial conflicts and litigations. Theft and drunkenness might, however, come within the jurisdiction of a *shara'* court.[93] Thus the jurisdictions of *sharei* and *Urfi* frequently overlapped, and in general the system was conductive to a certain interaction, not to say conflict, between its two parts. *shara'*

courts were powerless in that they lacked the ability, for the most part to enforce their decisions.[94]

In like manner, *Urfi* jurisdiction was exposed to *sharei* intervention, such that the *shara'* court had the authority to reverse the verdicts issued by *Urfi*.[95] A governor in judging a case brought before him might request a *fatwa* from a *mujtahid,* as might either of the parties to the dispute; such a *fatwa*, once issued, was normally acted upon.[96] The

fatwa of a *mujtahid* might also be used to settle a case out of court; since litigation was generally a costly and unprofitable business, recourse was had to it only in case of absolute necessity.[97]

Such an interaction, coupled with absence of distinction between the two jurisdictions, sparked sundry clashes between the state and the *foqaha*. The state's attempts to assert its judicial power inevitably meant a lessening of the prerogatives of the *foqaha,* who for their part could not accept the validity of *Urfi* jurisdiction.[98] It is noteworthy that during that period, the great Islamic jurists issued *fatwas* incessantly. The last *fatwa* given by Imam Khomeini to the effect that the head of the state must necessarily be a qualified Islamic jurist led to the increasing weakening of the secular government so that it ultimately lost its legitimacy and popularity among the people.[99] This was again a proof of the influence Islam enjoyed with Muslims. The conflict ultimately led to the fall of the secular system of government and an Islamic government was established in 1979. The collapse of the secular government in Iran actually witnessed the fact that modern problems could not be solved through means ignorant of Islamic values. However, as the Islamic government

was established in Iran, they faced the same problem i.e. solving the issues arisen from modernization. As it had been established that the problems had to be solved in the context of Islamic values, the Islamic scholars found no other choice but to reconsider their traditional views and seek a device in Islam to enable them to solve new problems. That device was *Ijtihad, which* enabled them to make appropriate decisions. Such was the case with most of the Islamic societies in the world and so great Islamic scholars some of whom were also important governmental

officials started to rethink and re-examine their faith looking for dynamic devices to solve the everyday needs of their modernizing societies.

Sheikh Mohammad Abdu in Egypt blasted the stagnation of the Islamic world for not duly reaping benefit of the dynamic *Ijtihad*. Abdu staunchly held that man's freedom of conscience and belief is insured by the legal system of Islam. He found that "reason" was denied its role in understanding the *Shariah* and in deducing judgements from it. He observed that Muslim people were satisfied with books written by latter-day scholars who were a product of the period of stagnation of thought and whose books, reflecting popular religious lore, incorporated many nonsensical concepts.

Abdu, while glancing abroad, reflected on the sanctification of reason in the 18th century Europe, following dramatic scientific discoveries and predominance of rationalism as a philosophy which branded reason as an unlimited faculty. At the same time, Orientalists of various hues were busy attacking the Islamic concept, the belief in the Will and Power of *Allah* and the apportionment of good and evil and were blaming Islam for the lethargy and intellectual inactivity of Muslims.

Consequently Abduh decided to address himself to this particular situation.[100]

Through revitalizing the principle of *Ijtihad*, he corroborated the importance of reason in connection with the *Quran* and countered the piffle which had turned into a popular cult. Based on his views, Islam attaches high importance to man's reason and accords it a conspicuous role in both religion and every day practical affairs. He fought the claims made outside the realm of Islam by stressing that absolute predestination

without free will is not a teaching of Islam. However, caught between the two extremes of the intellectual inertia in the Muslim world and the deification of reason in Europe, he propounded the theory that human reason and divine revelation are of equal importance for the guidance of man, and that it is impossible that knowledge acquired through rational thought should come in conflict with divinely-revealed truths.[101]

This in accordance with the teaching of the *Quran* which says:

"Faith and knowledge have the same weight"[102]

Iqbal emphasized the elements of change in life. He stated emphatically that: "This is a dynamic universe and it calls for positive action! Believe in yourself, for only in the development of the self can success be found. The self could best develop to its fullest capacity only within the circle of a righteous community such as the community of Islam. Yet Islam — properly the best of all righteous communities — was deep in a dogmatic slumber that denied intellectual freedom."[103]

Iqbal's views and methodology illustrates very well the role of

Ijtihad can play as a dynamic device in the system of Islamic law. Iqbal believed that liberating Islam from its medieval shackles required first of all liberating the concept of individual interpretation in legal matters - *Ijtihad*- from the restrictions that had grown around it.[104] He stated:

> *"Such a conception of Reality must reconcile, in its life, the categories of permanence and change. It must possess eternal principles to regulate its collective life; for the eternal gives us a foothold in the world of perpetual change. But eternal principles*

when they are understood to exclude all possibilities of change which according to the Quran, is one of the greatest signs of God, that tend to immobilize what is essentially mobile in its nature. The failure of Europe in political and social science illustrates the former principle; the immobility of Islam during the last 500 years illustrates the latter. What then is the principle of movement in the structure of Islam? This is known as Ijtihad. It means to exert with a view to form an independent judgement on a legal question. The idea, I believe, has its origin in a well-known verse of the Quran: "And to those who exert We show Our path".[105]

In the initial days of Islam, *Ijtihad* was used interchangeably with opinion, he contended, adding that it assumed a specific meaning later on, standing for an opinion shaped and presented by people entitled to relevant judgments.

Iqbal believed this narrow definition of the term was the result of three things: the activity of conservative thinkers, the appeal of aesthetic Sufism, and the destruction wrought by the Mongols. Firstly,

conservative thinkers, afraid of the early rationalist (Mu'tazileh) movement in Islam, had utilized Islamic law to hamstring the rationalist movement. The Sufis, in turn, reacted against subtleties of the legalists and attracted to themselves, and absorbed, the best minds in Islam. As a result, the Muslim state was left in the hands of mediocrities who "found their security only in blindly following the schools" of Muslim law.[106]

The coup de grace, according to Iqbal, was inflicted by the Mongols whose sack of Baghdad destroyed the center of Muslim

intellectual life and threatened Islamic society as a whole. To meet this threat, and to preserve what remained, conservative thinkers tended to resist all innovation in Islamic law, no matter what the practice of the early Muslims may have been. In the modern era, Iqbal insisted, there was no need for restrictions so hidebound as to be almost impossible of realization by any individual.[107]

Iqbal's intellectual activity is praiseworthy due to his insistence on surveying the Islamic law with a critical eye.[108] He argued that modernization of the law would pave the way for settling basic problems gripping Islam. The problem of *Ijtihad* disturbed Iqbal because he was trying to effect a change within the established order. He strongly supported the idea that *Ijtihad* had always been a vital part of Islam; it was the only way through which the needs of succeeding generations and the requirements of the different races merging into Islam could be met.

Abul Kalam Azad was another contemporary scholar advocating

Islam's support for dynamism. Singling out man's reform and welfare as the aim of religion, he stressed that materialization of this aim hinges on the adequacy of the code of conduct to issues such as time and place, as well as social and intellectual conditions of the people for whom the code is formulated.[109] When people begin to attach primary importance to difference, they are beginning to stray from true religion. The *Quran*, Azad maintained, really set out to distinguish between the principles and

the forms of religion; its purpose was to direct attention to the essence of religion. Azad refers to the *Quran*, which says thus:

> *"We have set for each (group) of you a particular code and path. Had God so willed, He could have made you one people, but He tests you by the separate regulations which He has made for you (according to your different circumstances and capacities). So (do not lose yourself in these differences but) endeavor to surpass each other through your good deeds".*[110]

Muslim modernists generally believed the traditionalist religious leaders were improperly interpreting the *Quran*. By heeding certain social and political concerns of his time, Maududi was reputed as a Muslim modernist. The role of Maududi was to show that a conservative interpretation of Islam need not be out of place in the modern world; perhaps his most important function was to weaken the extreme traditionalists, but he lent at least temporary relief to many Muslims who wanted to remain traditionalists and also accept - or reject in a rational manner - the teachings of modern science.[111] Maududi was a prominent

and unrivaled intellectual and religious personality of the pre World War II era. He highly attracted the educated Muslims and generally those Muslims who perceived what impacts different educational approaches had on the followers of Islam. He won greater appeal, especially between the two wars, due to his insistence that religion - i.e. Islam - and politics should go hand in hand. The universe, Maududi holds, is God's kingdom, and this kingdom has the earth as solely a province.[112] Man is an autonomous being on earth, but his autonomy entails a responsible

understanding to him is given the power to distinguish between good and evil and to adopt whatever manner of life he will.[113] He maintains that:

> *"In fact, there are two spheres to human life: the physical and the moral. In the physical sphere man has practically no option at all; he has to adjust himself to the laws of nature. All that man can do is to discover them. In the physical sphere everything is created as it is. Personally, I would prefer not to believe in evolution, I believe that man exists very much as he was created. In any case, the problem of evolution is a problem of the physical sphere; it is not the function of religion to give guidance in this. Religion is confined to the moral sphere, and deals with the proper conduct of man. Progress in our knowledge of the physical sphere may be effected by scientific investigation, but progress in the moral sphere - including political, social, and economic realms - requires guidance through the prophets."*[114]

Maududi maintains that "quest for knowledge of reality", mastery

over the moral order, and reliance on facts of the universe to form views about life and the world are Quranic injunctions. The *Quran* forbids and discourages only "the fanciful and speculative" theories and philosophies. It is left to the properly educated individual to determine whether a given theory does not in itself transgress revealed knowledge. It is revealed knowledge, after all, that is the basis for salvation, and that knowledge is not the product of any human experience, whether in the physical or

social sciences or in philosophy. Maududi deems it inadvisable to back up such sciences by reference to the scriptures. He, furthermore, notes the incorrectness of saying that Islam discourages the experimental sciences and that Muslims believe they need nothing further than knowledge sent down by God. Nonetheless, such a basically traditionalist interpretation of divine religion and attempts to stave off fanciful theories preclude diverse forms of interpretation of the revelation.[115] Some analysts hold the view that:

> *"Maududi removed himself from the ranks of the modernists because he insisted that the Quran can be interpreted only against a background of Muslim philosophy, that western philosophy has no place in it. When, for instance, a British scholar advocated a synthesis of scientific and religious spirit, Maududi argued that no such synthesis could ever be effected because religion is "the soul and the guiding spirit behind science".*[116]

The analysis presented above clearly demonstrates the fact that although Islamic modernism has contained many variations, two features

can be identified. Firstly, all the Islamic scholars recognize the significance of the necessities and changing circumstances of the time. However, some of the progressive scholars like Iqbal hold the view that *Ijtihad* is the dynamic device through which Islam can liberate itself from reactionary tendencies. To that effect the Islamic scholars must try to liberate the concept of individual interpretation in legal matters-*Ijtihad*- from the restrictions that had grown around it.

Secondly, the idea that it was not the Islamic concept that had

changed but the mind-set of some Muslims was propounded by other Islamic scholars such as Maududi. These scholars, in the meantime, heeded the contemporary conditions. The dynamics of Islam do not lie in reinterpretation and conscious adaptation to changing conditions, but rather in the simple affirmation that the Man's dynamics can only be toward closer and closer obedience to the sayings and actions of the Prophet (S.A.W.). However, he knowingly or unknowingly admits that Man's interpretation and mentality has been subjected to change in practice.[117]

Maududi appears to be a modernist through his admission of the revival and renaissance of Islam and of the 20th century challenges Islam faces.[118] However, when he comes to the interpretation of the *Shariah* to meet the new challenges he forwards the view that dynamism lies in the absolute submission to God: "Man's dynamics can only be toward closer and closer obedience to the sayings and actions of the Prophet (S.A.W.)" Maududi actually does not provide any solutions to the new problems and challenges the Islamic societies face today. Maududi actually confuses the concept of followership with that of dynamism. He also ignores the

methodology the holy Prophet (S.A.W.) and his companions applied to the effect that whenever it was necessary they made the laws flexible. Iqbal takes a brave step further and introduces *Ijtihad* as the dynamic device, which can be implemented to seek solutions to the problems of the changing circumstances of the time.

Conclusion

As yet, *Ijtihad* serves as the major vehicle to interpret the divine revelation and to apply the latter to the dynamic Muslim society which opts for equity, redemption, and truth. *Ijtihad* should be in accordance with the *Quran* and the *Sunnah* to insure validity. The sources of Islamic law are therefore essentially monolithic. The essential unity of the *Shariah* lies in the degree of harmony that is achieved between revelation and reason. *Ijtihad* is the principal instrument of maintaining this harmony.

Ijtihad is enforced in connection to three types of evidence: 1. authentic but speculative in purport; 2. authenticity doubted but meaning definite; 3. speculative in both authenticity and meaning. The practice of *Ijtihad* is a religious duty. The Islamic Jurists are in agreement that *Ijtihad* is the collective obligation (*Wajeb-al Kefa'ei)* of all qualified jurists in the event where an issue arises but no urgency is encountered over its ruling. The duty remains unfulfilled until it is performed by at least one *mujtahid*. Many *ayat* in the *Quran* lend support to the conclusion that it is the duty of the learned to study and investigate the

Quran and the teachings of the Prophet (S.A.W.).

The *Mujtahid* must be a highly qualified person of sound mind, enjoying superb intellectual faculty, possessed of knowledge of different religious disciplines for independent judgment. He must be knowledgeable in Arabic that enables the scholar to enjoy a correct understanding of the *Shariah's* texts, and he must also be a knowledgeable in the *Quran* and the *Sunnah* especially that part of it which relates to the subject of his *Ijtihad*. The *Mujtahid* must also know

the substance of the *furu* works and the points on which there is an *ijma*, and he should also know the objectives (*Maqased)* of the *Shariah*, which consist of the *Maslaha*.

Though *Ijtihad* has no uniform procedure, it should primarily be based on the *Quran* and the *hadith*, as two sources with highest priority over any other evidence. Should there be no *nass* on the matter, then he must find out if there is a ruling of *ijma, Qiyas* or other sources available on the problem in the works of the renowned jurists.

Today the former conditions of *Ijtihad* practiced by the earlier Islamic Jurists are not extant. For one thing, the prevalence of statutory legislation as the main instrument of government in modern times has led to the imposition of further restrictions on *Ijtihad*. The revival of *Ijtihad* in our times would necessitate efforts, which the government must undertake. Since education is the business and responsibility of modern governments, it should be possible to provide the necessary education and

training that a *mujtahid* would need to possess, and to make attainment to this rank dependent on special qualifications.

Notes :

1. Bannerman Patrick, *Islam in Perspective; a guide to Islamic society, Politics & law,* London, 1988, P. 38.
2. Mutahhari, *Jurisprudence and its Principles,* California, 1988, P. 48.

3. To the earliest specialists in religious law, the search for legal rulings had been identical with the exercise of their personal opinion (*Ijtihad Al-Ra'y),* of their own judgement on what the law ought to be. They based themselves on the rudimentary guidance available in the *Quran* and in the practice of the local community of Muslims, and applied the standards so gained to the administrative practice and customary law prevailing in Arabia and in the recently conquered territories. (Schacht, *An introduction to Islamic law,* P. 69)
4. Jannaty, *Al-Ijtihad,* Qom, 1981, P. 5.
5. Shawkani, *Irshad,* Cairo, 1978, P. 250; Zuhayr, *Osul*, Vol. 4, PP. 223-251.
6. Al-Bazdawi, *Kanz Al-Wusul ila Ilm Al-Osul,* Karachi, 1966, PP. 248-253.
7. Ibn Abd Al-Bar, *Jami Bayan Al-Ilm,* Vol. 2, Cairo, 1962, PP. 138-140.
8. Individual reasoning in general is called *ra'y,* "opinion", in the particular meaning of sound, considered opinion. When it is directed towards achieving systematic consistency and guided by the parallel of an existing institution or decision it is called *Qiyas*, analogy, and parity of reasoning. When it reflects the personal

choice and discretionary opinion of the lawyer, guided by his idea of appropriateness, it is called *istihsan* or *istihbab,* "approval" or "preference". The term *istihsan* therefore came to signify a breach of strict analogy for reasons of public interest, convenience, or similar considerations. The use of individual reasoning in general is called *Ijtihad* or *Ijtihad Al-Ra'y* and *mujtahid* is the qualified lawyer who uses it. (Schacht, *An Introduction to Islamic law,* P.37).
9. Mutahhari, op.cit, P.28.
10. Allameh Tabatabaii, *Shia in Islam,* Qom, 1964, P. 76.

11. Anderson J.N.D. *Law Reform in the Muslim World*, London, 1976, P.7.
12. Ibid, PP. 6-11.
13. Wael B. Hallaq, *Was the Gate of Ijtihad closed?* International Journal of Middle East Studies, 1984, No. 16, PP 3-41.
14. Muslim jurisprudence of the early tenth century formally recognized that its creative force was now spent and exhausted in the doctrine known as "the closing of the door of *Ijtihad*". The right of *Ijtihad* was replaced by the duty of *taqlid* or "imitation". Henceforth every jurist was an "imitator" (*muqallid*), bound to accept and follow the doctrine established by his predecessors. When the consensus of opinion in the tenth century asserted that the door of *Ijtihad* was closed, Islamic jurisprudence had resigned itself to the inevitable outcome of its self-imposed terms of reference. Thus circumscribed and fettered by the principle of *Taqlid*, jurisprudentially activities were henceforth confined to the elaboration and detailed analysis of established rules. (Coulson M.A., *A history of Islamic Law*, PP. 80-81)
15. Zuhayr, Mohammad Abu Al-Nur, *Osul-Al-Fiqh*, Cairo, 1965, Vol. 4, PP. 251-260.
16. Mutahhari, op.cit., P. 67.

17. Allameh Tabatabaii, *Islam and Quran*, Tehran, 1972, P.62.
18. The *Quran*, 47: 24.
19. Ibid, 9: 122.
20. Ibid, 21: 7
21. Ibid, 3:7
22. Ibid, 39:9
23. Ibid, 17: 36
24. Ibid, 57: 11
25. Abu Dawud, *Sunan*, Beirut, 1970, Vol. 3, P. 109. (*hadith* 1038): Waqedi, *Tabaqat-Al-Kobra*, Vol. 3, P. 584.

26. Abu Dawud, op.cit., Vol. 3, *(hadith* 3567).
27. Bukhari, *Sahih*, Istanbul, 1981, Vol. 1, P.84; Amidi, *Ihkam*, Vol.4, P. 209.
28. The *Quran*, 75: 36.
29. Ibid, 76: 2.
30. Bukhari, op.cit, Vol. 1, PP. 25-26.
31. Kulaini, *Osul-e-Kafi*, Beirut, 1985, Vol. 1, P. 30.
32. Ibn Majah, *Sunna*, Vol. I, P. 81, *hadith* no. 224; Amid, *Ihkam*, Vol.4, PP. 230, 234; Shatibi, *Muwafaqat*, Vol. 4, P. 140.
33. Ibn Hisham, *Sirat Al-Nabii*, Cairo, 1329 A.H., Vol. 2, PP. 210-211.
34. The *Quran*, 42: 38.
35. Suyuti, *Itqan*, Cairo, 1899, Vol. 2, PP. 55-56.
36. Ibn Khaldun, *The Muqaddimah*, New York, 1958, Vol. 3, PP. 3-4.
37. Ibid, PP. 4-6.
38. Ibid, P.7.
39. Ibn-Al-Qaiim Jwzy, *Ealam-Al-Mowaqqaeen*, Beirut, 1987, Vol. 2, P. 32.
40. Ibid.
41. Jannaty Ibrahim, *Ijtihad*, Tehran, 1993, P. 29.

42. Ibid, P. 199.
43. Ibn Khaldun, op.cit., Vol. 3, PP. 8-24.
44. Ibid.
45. Ibid.
46. The earliest school was the Hanafite. Abu-Hanifah, legal scholar of Kufah and Baghdad, held a tolerant view on the use of analogy and consensus and particularly emphasized the value and necessity of private opinion and judgment on the part of those administering the law. The second orthodox school was the Malikite. Malik ibn Anas of Medina, who died in 795, codified

the traditions of Islam and acknowledged the authority of the consensus of the Medina community. Malikite jurists, however, never equivocated in their stand against general consensus, private opinion, and the broad use of analogy. The jurist Al-Shafii studied under Malik in Medina and taught in Baghdad and Fustat (Cairo), where he died in 820. The Shafiite rites permitted wider use of consensus than did those of the Malikites, and Al-Shafii asserted that consensus was the safest and highest legislative authority in Islam. The Hanbalite school was the fourth and smallest among the orthodox schools. Its founder, Ahmad, Ibn Hanbal, a student of Al-Shafii, rebelled against the teachings of his master. The Hanbalites accepted neither private opinion nor analogy and scorned the use of consensus. (Fisher, *The Middle East,* P. 93).

47. Schacht Joseph, *An Introduction to Islamic law,* Oxford, 1964, PP. 37-53; 202-211.
48. Ibid.
49. Modhaffar, *Osul-Al-Fiqh,* Tehran, 1961, PP. 21-22.
50. Schacht Joseph, op.cit., PP.70-72.
51. Anderson Norman, op.cit., P.59.
52. Gibb H. A. R., *Modern Trends in Islam,* Chicago, 1947, P. 13;

Mohammedanism, P. 98.

53. Wael B. Hallaq, *Was the Gate of Ijtihad closed?,* op.cit., PP. 3-4.
54. The closing of the door of *Ijtihad* is pure fiction suggested partly by the crystallization of legal thought in Islam, and partly by that intellectual laziness which, especially in the period of spiritual decay, turns great thinkers into idols. If some of the later doctors have upheld this fiction, modern Islam is not bound by this voluntary surrender of intellectual independence. Sarakhsi writing in the fifth century of the *Hijrah* rightly observes: If the upholders of this fiction mean that the previous writers had more facilities,

while the later writers had more difficulties in their way, it is nonsense; for it does not require much understanding to see that *Ijtihad* for later doctors is easier than for the earlier doctors. Indeed the commentaries on the *Quran* and *Sunnah* have been compiled and multiplied to such an extent that the Mujtahid of to day has more material for interpretation than he needs. (Iqbal, *the reconstruction of religious thought in Islam,* P. 178).

55. Ibn Khaldun, op.cit., Vol. 3, P. 23.

56. Ibid, P. 28.

57. Shafii's legal theory is a perfectly coherent system, superior by far to the theory of the ancient schools, and he became the founder of the *Osul-Al-Fiqh,* the discipline dealing with the theoretical bases of Islamic law. It was the achievement of a powerful mind, and at the same times the logical outcome of a process, which had begun much earlier. The development of legal theory in the second century of Islam was dominated by the struggle between two concepts: that of the common doctrine of the community, and that of the authority of the traditions from the Prophet (S.A.W). The doctrine of the ancient schools of law represented an uneasy compromise; Shafii vindicated the thesis of the Traditionalists, and the later schools had no choice but to

accept his essential thesis. (Schacht, ***An Introduction & Islamic Law,*** P. 48).

58. Ibn Khaldun, op.cit., Vol. 3, P. 23.

59. Bannerman Patrick, PP. 47, 50, 260, London, 1988.

60. Abu Ishaq Al-Shirazi, *Osul-Al-Fiqh,* Cairo, 1908, PP. 83-84, Shawkani, *Irshad,* P. 420; B. Weis, *Interpretation in Islamic Law: The Theory of Ijtihad,* The American Journal of Comparative Law, 1978, PP. 209-210.

61. Shirazi, *Islam and Revolution,* Cairo, 1985, P.6; Abu Hamid Al-Ghazali, *Al-Mustasfa min Ilm Al-Osul,* Cairo, 1971, P. 5.

62. Coulson, *A history of Islamic Law,* Edinburgh university press, 1941, PP. 76-81.
63. Mutahhari, *Jurisprudence and its Principles,* op.cit., P. 11.
64. Ibid, P. 18.
65. Kashif Al-Ghita, *The Shiah Origin and Faith,* London, 1985, P. 139.
66. Ibid. P. 186.
67. Mutahhari, op.cit., P. 22.
68. Momen, *An Introduction to Shia Islam,* Tehran, 1980, PP. 185-6.
69. Ibid, P. 187.
70. Gibb, *Islam: An Historical Survey,* Oxford, 1975, PP. 117-121.
71. The *Quran*, 38: 29.
72. Iqbal Mohammad, *The Reconstruction of Religious Thought in Islam,* Dehli, 1975, PP. 167-168.
73. The schools of law recognize three degrees of *Ijtihad:* (I) complete authority in legislation which is practically confined to the founders of the schools, (2) relative authority which is to be exercised within the limits of a particular school, and (3) special authority which relates to the determining of the law applicable to a particular case left undetermined by the founders. (Iqbal Mohammad, *The reconstruction of Religious Thought in Islam,*

PP. 148-149).
74. Mohammad Ali Al-Basri , *Al-Mutamad fi Osul-Al-Fiqh,* Beirut, 1961, Vol. 2, PP. 928-932.
75. Ibid, Vol. 2, PP. 932-938.
76. Ibid.
77. Ibid.
78. Ibid.
79. Shirazi, *Luma'h,* Cairo, 1970, PP. 84-87.
80. Ghazali, *Mustasfa,* Vol. 2, Cairo, 1937, PP. 348-357.
81. Maududi states that no healthy *Ijtihad* is possible unless our

lawmakers are equipped with the following qualifications: 1) Faith in the *Shariah* and conviction of its truthfulness; a sincere intention to follow it; absence of any desire to act independently of it. 2) A proper knowledge of the Arabic language, its grammar and literature. 3) Such knowledge and insight in the teachings of the *Quran* and the *Sunnah* as would enable one not only to be conversant with the details of Islamic injunctions and their application in actual practice but also fully to appreciate the basic principles of the *Shariah* and its objectives. 4) Acquaintance with the contributions of the earlier jurists and thinkers *(Mujtahidin)* of Islam. This is necessary not merely for training in the technique of *Ijtihad* but also for the sake of ensuring continuity in the evolution of law. 5) Acquaintance with the problems and conditions of our times - the new problems of life to which an answer is sought and the new conditions in which the principles and injunctions of the *Shari'ah* are to be applied. 6) Commendable character and conduct according to the Islamic ethical standard. Absence of this virtue is bound to affect adversely the quantum of public trust in the legislators. (Maududi, *The Islamic Law and Constitution,* PP. 77-78).

82. Ghazali, op.cit., 1937, PP. 352-254.

83. Isnawi, *Nihayat Al-Osul,* Vol. 3, Beirut, 1984, PP. 306-308.
84. The divisibility of *Ijtihad* was recognized by the great majority of jurists, for example, Shawkani, *Irshad,* P.237.
85. Basri, *Al-Mutamad fi Osul-Al-Fiqh,* Beirut, 1983, Vol. 2, PP. 933-935.
86. Ibn Abd Al-Barr, *Jami,* Beirut, 1981, PP. 383-398.
87. Baghdadi, *Al-Faqih,* Vol. 2, Beirut, 1979, PP. 65-71.
88. Al-Mawardi Ali b. Mohammad, *Al-Ahkam Al-Sultaniyya,* Cairo, 1960, PP. 5-7 & Rosenthal, E. I. J., *Political thought in medieval Islam,* Cambridge, 1958, PP. 28-30.

89. Ibid.

90. Algar Hamid, *Religion and State in Iran,* university of California Press, 1969, PP. 12-15.

91. Ibid.

92. Enyat Hamid, *Modern Islamic Political Thought,* University of Texas Press, 1985, P. 149.

93. Ibid.

94. Algar Hamid, op.cit., PP. 8-15.

95. Ibid, PP. 9-11.

96. Ibid

97. Ibid, PP. 21-25.

98. Qarawi Mahalati, *Wojub-Al-Mashrutah,* Tehran, 1948, PP. 30-37.

99. Algar Hamid, op.cit., PP. 73-81

100. Sayyid Qutb, *The Islamic Concept and its Characteristics,* PP. 12-13.

101. Ibid.

102. The *Quran,* 58: 11.

103. Iqbal Mohammad, op.cit., PP. 160-172.

104. Ibid.

105. Ibid.

106. Ibid.

107. Sardar Ziauddin, *Islamic Futures, the shape of ideas to come,* London & New York, 1985, PP. 8, 34-7, 135, 305-6.

108. Iqbal states thus: "I now proceed to see whether the history and structure of the Law of Islam indicate the possibility of any fresh interpretation of its principles. In other words, the question that I want to raise is -- Is the Law of Islam capable of evolution? Horten, Professor of Semitic Philology at the University of Bonn, raises the same question in connection with the Philosophy and Theology of Islam. Reviewing the work of Muslim thinkers in the

sphere of purely religious thought the points out that the history of Islam may aptly be described as a gradual interaction, harmony, and mutual deepening of two distinct forces, i.e., the element of Aryan culture and knowledge on the one hand, and a Semitic religion on the other. The Muslim has always adjusted his religious outlook to the elements of culture, which he assimilated from the peoples that surrounded him. He has been driven to the following conclusion: " The spirit of Islam is so broad that it is practically boundless. With the exception of atheistic ideas alone it has assimilated all the attainable ideas of surrounding peoples, and given them its own peculiar direction of development". (Iqbal Mohammad, *The Reconstruction of Religious thought in Islam,* PP. 163-164).

109. Sardar Ziauddin, *Islamic Futures, the shape of ideas to come,* London & New York, 1985, PP. 136-138.
110. The *Quran,* 5: 48.
111. Maududi Sayyid Abulala , *Towards Understanding Islam,* Lahore, 1948, PP. 4-15, .
112. Islam admits of no sovereignty except that of God and, consequently, does not recognize any Lawgiver other than Him. The Concept of the unity of God, as advocated by the *Quran,* is

not limited to His being the sole object of worship in the religious sense alone. Along with it, He is invested with complete legal sovereignty, in the sense in which the term is understood in Jurisprudence and Political Science. This aspect of the legal sovereignty of God is as much and as clearly emphasized by the *Quran* as the one pertaining to His being the only deity to be worshipped. The *Quran* leaves no room for the impression that the divine law may mean merely the law of nature and nothing more. On the contrary, it rears the entire edifice of its ideology on the basis that mankind should order the affairs of its ethical

and social life in accordance with the law that God has communicated through His Prophet. (Maududi, *The Islamic Law and Constitution*, P. 72).

113. Maududi Sayyid Abulala , op.cit., PP. 67-70.
114. Maududi Sayyid Abulala, *Islamic Law and Constitution*, Lahore, 1992, PP. 52-63.
115. Maududi Sayyid Abul Ala, *The Economic Problem of man and its Islamic solution*, Lahore, 1947, PP. 4-15.
116. Ibid, P. 83.
117. Maududi Sayyid Abulala, *Towards understanding Islam*, op.cit., PP.3-5.
118. Maududi Sayyid Abulala, *Islamic Law and Constitution*, op.cit., PP.1-5.

2

Ijtihad and the flexibility of *Shariah* in theory

It is essential to verify how *Ijtihad* can impart flexibility to *Shariah* when it becomes operative as a dynamic device in the deduction of *Ahkam* (legal qualifications) from the various Islamic sources. The potentialities of these Islamic sources have been identified to illustrate the important role that *Ijtihad* assumes and to verify how these sources can become flexible in the face of different circumstances and needs of time and space. As an essential procedure, those potentialities of each

individual Islamic sources which *Ijtihad* can deal with dynamically to find solutions to new problems have been identified and subjected to in-depth research. The purpose is to verify the hypothesis that the *Shariah* is able to provide solutions to new problems and needs of the Islamic society and that the application of *Ijtihad* to the Islamic sources to deduce laws is not only permissible but essential and indispensable.

It is a fact that *Shariah* in the past fourteen centuries has never been silent to provide solutions to the needs of a particular time. *Shariah* in particular Islamic communities in different parts of the world, has always challenged other particular methods of providing solution. These solutions have been put forward by the religious authority of the Islamic Jurists. Differences among Muslims have been ironed out by *Shara* courts in the Islamic communities. Tens of governments in the last centuries have ruled under the authority of *Shariah*. The legal and institutional systems have always been expanding and the legal parts of *Shariah* have always been considered as the main part of *Shariah*. These have all been witnesses to the fact that *Shariah* have never been static. The need to meet the necessities of changing and novel circumstances of different generations.

Hard work was undertaken by Islamic jurists such that from the middle of the first century until early fourth century, some nineteen Islamic law schools were set up. This fact alone is sufficient to show how incessantly the early Islamic jurists worked in order to meet the necessities of a growing civilization. With the expansion of conquest and the consequent widening of the outlook of Islam these early legists had to take a wider view of things, and to study local conditions of life and habits of

new peoples that came within the fold of Islam. A careful study of the various schools of legal opinion, in the light of contemporary social and political history, reveals that they gradually passed from the deductive to the inductive attitude in their efforts at interpretation.[1]

The device that has enabled *Shariah* to transfer from a static or

immobilized state to a dynamic and mobilized doctrine to meet the growing needs of different generations has been *Ijtihad*. However, the principle of *Ijtihad* had always had to challenge its way through the conservative dogmatism. Therefore, from the very beginning of the development of Islamic law, rigidity and conservative dogmatism have incessantly presented itself as a concrete obstacle on the way of the progress of Islam. The dogma was based on the wrong perception that because the *Quran* and the *Sunnah* can not allow of change and evolution.

This native though plausible view disabled the Muslims mind to think of the dynamic outlook of the *Quran* and the *Sunnah*.

Such a dogmatic view has sparked two pitiful and somewhat fatal impacts in the Islamic communities. Firstly, many Muslim communities lost the chance for technical and intellectual development. Secondly, many of the intellectuals in the Islamic societies either have completely abandoned or sometimes tend to reject their faith on the basis of this misunderstanding and wrong though plausible rigid view. This dogmatic attitude, however, is now facing the problems it deserves. Things have changed and the world of Islam is today confronted and affected by new

forces set free by the extraordinary development of human thought in all its directions. Hence, this attitude can not be maintained any longer. The wish of the present generation of Muslims to re-interpret the foundational legal principles, in the light of their own experience and the altered conditions of modern life is perfectly justified.

We will see how the teaching of the *Quran* that life is a process of

progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, must be permitted to solve its own problems.

As regards *hadith,* it is noteworthy that generally the law revealed by a prophet (S.A.W.) takes special notice of the habits, ways, and peculiarities of the people to whom he is specifically sent. The Prophet (S.A.W.) who aims at all-embracing principles, however, can neither reveal different principles for different peoples, nor leaves them to work

out their own rules of conduct. His method is to train one particular people, and to use them as a nucleus for the building up of a universal *Shariah.*

As such, he underscores the tenets of the social lives of all people and applies them to specific cases based on the particular habits of the people before him. The *Shariah* values *(Ahkam)* resulting from this application (e.g., rules relating to penalties for crimes) are in a sense specific to that people; and since their observance is not an end in itself they cannot be strictly enforced in the case of future generations.[2] It was perhaps in view of this that Abu Hanifa, who had a keen insight into the

universal character of Islam, made practically no use of these traditions.[3]

The fact that he introduced the principle of *Istihsan* which necessitates a careful study of actual conditions in legal thinking; throws further light on the motives which determined his attitude towards this source of Islamic law. It is said that Abu Hanifa made no use of traditions because there were no regular collections in his day. In the first place, it is not true to

say that there were no collections in his day, as the collections of Abdul Malik and Zuhri were made not less than thirty years before the death of Abu Hanifa. However, even if such collections did not supposedly reach him or lacked legally important traditions, Abu Hanifa, like Malik and Ahmad ibn Hanbal after him, could have prepared his own collection if he felt it was imperative. On the whole, then, the attitude of Abu Hanifa towards the traditions of a purely legal import is perfectly sound a further intelligent study of the literature of traditions, if used as indicative of the

spirit in which the Prophet (S.A.W.) himself interpreted his Revelation, may still be of great help in understanding the life-value of the legal principles enunciated in the *Quran*. A complete grasp of their life-value alone can equip us in our endeavour to re-interpret the foundational principles.

The precepts of Islam are derived from the holy Book and the *Sunnah* of the holy Prophet (S.A.W.) (the legal text). If so, for the soundness every one of these texts with the exception of the Quranic text and a small body of the texts of the *Sunnah* established by *tawator* (continuity), we have to rely upon the transmission of one of its

transmitters. Now howsoever carefully we may scrutinize the account about the transmitter and the extent of his trustworthiness and faithfulness as to his transmission, as long as we are made acquainted about the extent of the integrity and the faithfulness of the transmitters historically and not in a direct manner and so long as there is a likelihood that the faithful transmitter, being fallible, may have misconstructed the text and

transmitted it to us obliquely especially in circumstances in which the text reach our hands only after going around of passing through the hand of a number of transmitters, each transmitter, in his turn handing it down to the next till it reached us at the end of the long journey, we cannot be sure of the soundness of the text in an absolutely decisive manner. But even when we have made ourselves sure of the soundness of the text and of its having originated from the Prophet (S.A.W.), comprehension of this is based on our present lifestyle. On setting out the text with other legislative text to reconcile it with them, too, we are likely to make mistake in our mode of reconciliation and give preference to this or that text while that text may be sounder than it — and indeed even there might be existing an exception in yet another text and the exception may not have reached our ears.

This is the reason why Allameh Sadr maintains that the portion of the precepts of the law of Islam which has been kept preserved with its clarity, its need and its character of finality, notwithstanding these long centuries which separate us from the (early) law making age of Islam, is very small. Surely from among the body of the precepts we find in the

juristic books, those of the class which enjoys the quality of absolute finality does not exceed five per cent.[4]

In order to verify the hypothesis that the *Shariah* is flexible, it is necessary that we examine the main sources of *Shariah* i.e. The *Quran,* the *Sunnah, Ijma, Qiyas, Aql* and *Urf.* The purpose is to determine how

Ijtihad can be a device imparting flexibility to *Shariah* through the aforementioned sources. The emphasis will be focused on the *Quran* and the *Sunnah.*

In the case of the *Quran,* it can be viewed as dynamic source of law. This has been carried out through the examination of the most relevant important criteria, which the Islamic Jurists have applied to assess the Quranic injunctions. The theory of abrogation, the generality of the versus, the issue of ambiguity and decisiveness, the issues of *Tafsir* (interpretation) and *Ta'wil* (allegorical interpretation)[5], the *Nass* and *Zaher*[6], etc. have been applied to categorize the Quranic injunctions for the purpose of our analysis. Finally, the issue of how time and space plays a vital role in our interpretations of the Quranic injunctions will be investigated.

As regards the *Sunnah,* there are three important issues as follows:

1) meaning of the *hadith* (*Nass, Zaher*, etc), 2) the chain of *hadith* (*Mashhoor*, *Wahed*, *Mursal*, *Sahih*, *Hassan*, etc.)[7] 3) the role of

time and space with a view to explore the relevancy of the Islamic decrees to the particular circumstances. Overall, the purpose is to verify whether the alleged rigidity is correct or that it is merely a misunderstanding, which must be corrected.

The Features of the Quranic Injunctions

The *Quran* is the primary source of legislation in the Islamic law. Numerous Quranic verses explicitly indicate that it is the basic and main source of law in Islam.[8] The type of guidance, which the Muslims required at Medina, was not the same as they had needed at Mecca. That is why the Medinese *suvar* (Pl. of *Surah*) differ in character from those revealed at Mecca. The latter are comparatively small in size, and generally deal with the basic beliefs of Islam. The Medinese *Suvar,* on the other hand, are rich in laws relating to civil, criminal, social, and political problems of life.[9] We do find the term *Zakat* in several Meccan *Suvar;*[10] but *Zakat* was not in existence at Mecca in its institutional form. In Mecca, the term *Zakat* denoted voluntary financial help or ethical purity. It was not an obligatory social duty of the opulents. Moreover, at Mecca no administrative staff was recruited for this purpose. From this observation, we can infer that the laws of the *Quran* were issued appropriate to the circumstances and new conditions.

Rather than presenting meticulous or unimportant details, the *Quran* specifies fundamental principles that guide a Muslim to a specific direction, where he has to strive to get the answers. Moreover, it

presents the Islamic values in a general form, suited to the changing circumstances in all ages. The *Quran* calls itself "guidance", and not a code of law.[11] It goes without saying that the *Quran* does not seek 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 *Quran* is the 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 (S.A.W.) in connection with certain significant problems.[12]

A common reader begins to read the *Quran* as a versatile code and an all-embracing law book. He does not find in detail the laws and by-laws relating to the social life, culture, and political problems. Further, in the *Quran* he reads numerous verses to the effect that everything has been mentioned in this Book and nothing has been left out.[13] Besides, he notices that the *Quran* lays great emphasis on saying prayers and giving *Zakat,* 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 *Quran*. The difficulty arises from ignoring the fact that God did not reveal the *Quran* in a vacuum, but as a guide to a living community with certain characteristics.

As such, the Islamic law evolved such that exegesis of the *Quran* became more sophisticated as time went by. The legal rules not derived from the specific verses of the *Quran* in the early period were sought to

be so drawn later on. This was a continuous activity.[14] The methodology of inference from the *Quran* grew more and more intricate and philosophical in the wake of the deep and minute study of the *Quran* by jurists in the later ages.[15] The corpus of Islamic law is rich in examples where, with regard to a problem, some jurists argued on the basis of the

Quran, while the others did so on the basis of traditions or personal opinion, for these latter did not think the *Quranic* verse relevant to the point at issue. Although, generally, the legal verses of the *Quran* are quite definite, nevertheless all such verses are open to interpretation, and different rules can be derived from the same verse on the basis of *Ijtihad.*[16] 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. Thus, one argues on the same point on the basis of the *Quran,* while the other on the basis of the *Sunnah.*

The doctrine of abrogation (*Naskh)* of the individual verses in the *Quran* is significant in Islamic jurisprudence.[17] The classical concept of this doctrine affirms that a number of verses in the *Quran,* having been repealed, are no longer operative. These revealed verses are no doubt part of the *Quran* but they carry no practical value. This verifies the point that some of the Quranic verses in the form of decrees were appropriate to certain circumstances and necessities of the time.[18]

Though different in form, the abrogative and the abrogated share the perfection and the benefit. The demise of a prophet (S.A.W.) and his substitution by another is fully compatible with the natural system, since

both are signs of *Allah* and since one abrogates the other. Life, death, sustenance and other such things often replace each other, the succeeding factors abrogating the preceding ones. It all depends on the varying needs of the society's welfare, on ever-changing level of the man's perfection. Likewise, when a religious law is replaced by another, the abrogating one has the same power as the abrogated one had, to lead to

the spiritual and temporal well-being of the individual and the society; each perfectly suitable for the time it was, or is, in force; each more beneficial in the context of its time. For example, the order to "forgive" in the beginning of the call when the Muslims had neither the manpower nor the armaments, and the command to "fight" when Islam had gained some strength, when the Muslims had gathered enough force and the disbelievers and the polytheists were frightened of them. However, seldom is an abrogated verse devoid of some phrase showing that it was a

transitory order, which would be abrogated in due course. For example: The verse: *"But pardon and forgive (them) until Allah should bring about His command"*[19], which was abrogated by the verse of fighting. And: *" confine them until death takes them away or Allah makes some way for them. "*[20] which was abrogated by the verse of flogging. The phrases, "*until Allah should bring about His command*", and "*or Allah makes some way for them*", give clear indication that the order given therein was temporary and transitory which would soon be abrogated.[21]

The Quranic injunctions are not all definitive and decisive. The *Quran* verifies this when it says:

"He it is who has sent down to thee the Book, of it there are some

verses decisive, they are the basis of the Book, and others are ambiguous; then as for those in whose hearts there is perversity, they follow the part of it which is ambiguous, seeking to mislead, and seeking to give it (their own) interpretation, but none knows its interpretation except Allah; and those who are firmly rooted in knowledge".[22]

The following points can be derived from the above-stated verse:

First; The *Quran* contains two kinds of verses, the decisive and the ambiguous. If a verse, seen alone, is capable of more than one meaning, it is ambiguous; otherwise, it is decisive. Second; The whole *Quran,* with all its decisive and ambiguous verses, has its interpretation. That interpretation is not the connotation of its words; it is an actually existing reality; a reality that has the same relation with the knowledge, facts and ideas mentioned in the *Quran,* as the significance of a proverb has with that proverb. All the Quranic knowledge is like a similitude for the Quranic interpretation that is with *Allah*. Third; Decisiveness and ambiguousness are relative qualities. The same verse may be decisive in one context and ambiguous in another. Also, it may be decisive in comparison to one verse and ambiguous in relation to the other.[23]

The most salient feature of the Quranic laws is the categorization of the verses as decisive or ambiguous.[24] A decisive verse is one which is straightforward and specific. It can have only one specific meaning. An example of this is as follows:

"Come I will recite what your Lord has forbidden to you (remember) that you do not associate anything with Him and be

good to (your) parents, and do not slay your children for (fear of) poverty -- We provide for you and for them -- and do not draw near to indecencies.... This He has enjoined you with that you may be mindful".[25]

Being straightforward and lucid, this verse lends only one meaning and interpretation. Other verses in this category such as prayers,

fasting, the specified shares in inheritance are all clear and definitive and therefore not subject to different interpretations.

The speculative injunctions of the *Quran,* however, are open to interpretation and *Ijtihad.*[26] The *Quran* in such cases candidly approves of the exercise of individual opinion, employment of personal judgement, and employing the faculty of speculation, conjecture, deep thinking and contemplation in affairs. It provides a wide latitude for variant approaches to a problem. The divergent views on a problem, provided they stand on a sound basis, are to be accommodated. One point of view cannot be declared right and the other absolutely wrong. Since no absolute certainly can be claimed in such decisions, various opinions on a single point shall be entertained. It will be shown somehow Quranic verses provide religious sanction for the use of reason and analogical deductions in formulating fresh laws. The *Quran* reads:

"Mothers shall suckle their children two years completely, for such as desire to fulfil the suckling. It is for the father to provide them and cloth (clothe) them honourably.... But if the couple desire by mutual consent and consultation to wean, then it is no fault in them".[27]

Based on this verse, a mother breast-feeding her child should be honorably or customarily be furnished with food and clothing. The verse does not qualify food and clothing. It gives liberty in providing maintenance honourably or according to the prevalent custom. Moreover, mutual consultation and agreement require freedom of opinion in making a decision for weaning the child. Both these points are to be settled by

one's own choice and judgment. Another verse reads as follows:

> *"There is no fault in you, if you divorce women while as yet you have not touched them nor appointed any dower for them; yet make provision for them, the affluent according to his means, and the needy according to his means, a fair provision".*[28]

The verse recommends that the husband must make some provision for the divorced woman in addition to the dower. The *Quran* is silent on the quality and quantity of the provision. This will be determined by husband's fair judgment.

The Quranic commandment that the Prophet (S.A.W.) should hold consultations with his companions on significant issues justifies the use of individual opinion and reason in legal reasoning.[29] The Prophet (S.A.W.) used to consult his Companions in questions not decided by revelation. He then adopted the opinion, which was sound and reasonable in his eyes. This shows that mutual consultation was designed to elicit public opinion. The Prophet (S.A.W.) himself exercised *Ijtihad* along with them.[30] The mutual consultation of the Prophet (S.A.W.) with the Companions was in fact an implementation of the Quranic commandment. The *Quran* Says:

> *"So pardon them, and pray forgiveness for them, and take counsel with them in the affair; and when you are resolved, put thy trust in God".*[31]

A Quranic commandment may have a speculative and a definitive meaning at the same time. The two meanings will, nevertheless, present two totally independent rulings.[32] An example of this is the injunction

concerning the requirement of ablution for prayers which reads in part *"... and wipe your heads"*.[33] This text is definitive on the requirement of wiping *(mash)* of the head in *wuzu*, but since it does not specify the precise area of the head to be wiped, it is speculative in regard to this point. Hence we find that the jurists are unanimous in regard to the first, but have differed in regard to the second aspect of this injunction.[34]

There are sometime instances where the scope of disagreement over the interpretation of the *Quran* is fairly extensive. At times seven or eight different juristic conclusions have been arrived at one and the same issue.[35] These are *Ijtihad* opinions. The great Islamic scholars have practice *Ijtihad* because they believe that *Ijtihad* is not only permissible but is obligatory.[36] For the *Shariah* does not restrict the liberty of the individual to investigate and express an opinion. The diversity of opinion offers a range of choice from which one can select the view it deems to be most beneficial.[37]

So far, the study of the Islamic law's evolution corroborates the fact that interpretation of the decisive verses is also possible. This broadens the scope of *Ijtihad* even more. For example, the penance *(kaffarah)* of a false oath according to textual ruling of the *Quran*[38] is of three types, one of which is to feed ten poor persons. This is a specific ruling in the sense that ten poor persons has only one meaning. But even so, the Hanafis have given this text an alternative interpretation, which is that instead of feeding ten poor persons, one such person may be fed ten times. The majority of Islamic Jurists, however, do not agree with the

Hanafis on this point. This example will serve to show that the scope of *Ijtihad* is not always confined to the *A'mm* (general) but that even the *khass* (specific) and definitive rulings may require elaboration which might be based on speculative reasoning.[39]

In addition, it is noteworthy that the Islamic jurists have deduced the rules of *Shariah* not only from the explicit words of the *Quran*, which is referred to as the *mantoq,* but also from the implicit meanings of the text through inference and logical construction, which is referred to as the implied meaning, or *mafhum*.[40] Therefore, the deduction of the rules of *Shariah* by way of inference from the implied meaning of a text partakes in speculative reasoning and *Ijtihad*.

Sometimes each verse of the *Quran* must be explained and interpreted by means of other Quranic verses.[41] Imam Ali has said:

> *"Some parts of the Quran speak with other parts of it revealing to us their meaning and some parts attest to the meaning of others".*[42]

And the Prophet (S.A.W.) has said: "*part of the Quran verify other parts.*"[43] As a simple example of the commentary of the *Quran* through the *Quran* may be cited the story of the torture of the people of Lot about whom in one place God says, "*and we rained on them a main*,"[44] and in another place He has changed this phrase to, "*Lot! We sent a storm of stones upon them (all)".*[45] By relating the second verse to the first it becomes clear that by "precipitation" is meant "stones" from heaven. Therefore, a speculative indication in the text of the *Quran* or *hadith* may be supported by a definitive evidence in either, in which case it is as valid

as one which was definitive in the first place. All the "*Wahed*" *ahadith* (narrated by only a single individuals) which elaborate the definitive Quranic prohibition of usury (*riba*)[46] are speculative by virtue of being *Wahed*. Nevertheless, as the definitive text of the *Quran* supports their substance, they become definitive not withstanding any possible doubts about their authenticity. Thus as a general rule, all *Wahed ahadith* whose authenticity is open to speculation are elevated to the rank of *qata;* if they can be substantiated by clear evidence in the *Quran*.[47]

General rules, however, permeate the *Quran's* legal contents, even though there are specific commandments on some subjects, the conclusion which can lead us to the correct understanding of the *Quran* is that the *Quran* is specific on matters which are deemed to be unchangeable (values and ultimate human goals), but in matters which are liable to change, it merely lays down general guidelines and the details is left to the knowledgeable scholars of the time to provide solutions to the problems through *Ijtihad*. The *Quran* itself warns the believers against seeking the regulation of everything by the express terms of divine revelation, as this is likely to lead to rigidity and cumbersome restrictions: *"O you believers, do not keep asking about things which, if they were expounded to you, would become troublesome for you ..."*.[48]

In this way, the *Quran* discourages the development of an over-regulated society. What the *Quran* has left unregulated is meant to be devised, in accord with the general objectives of the Lawgiver, through

mutual consultation and *Ijtihad*. A careful reading of the *Quran* further reveals that on matters pertaining to belief, the basic principles of morality, man's relationship with his Creator, and transcendental matters which are characteristically unchangeable, the *Quran* is clear and detailed, as clarity and certainty are the necessary requirements of belief.

The relationship between the *Quran* and *Sunnah* is largely specified by the fact that Quranic legislation is presented briefly and generally. Since the general, the ambiguous and the difficult portions of the *Quran* were in need of elaboration, the Prophet was expected to provide the necessary details and determine the particular focus of the general rulings of the *Quran*. It was due to these and other such factors that a unique relationship was forged between the *Sunnah* and the *Quran* in that the two are often integral to one another and inseparable.

The dynamic outlook of the *Quran*

In verification of the fact that each generation has its own interpretation of the *Quran,* which is appropriate to that specific generation and that the interpretation of one generation may be quite different from the other, the holy Prophet says:

"The Quran is in motion as the sun and the moon are in motion."[49]

The relationship between the *Quran* and its interpretation is emphasized in the above-stated *hadith* by the holy Prophet. It is now more than fourteen centuries since the *Quran* was revealed. Each

generation has understood the *Quran* according to its own particular interpretation was subject to those specific circumstances of the time and place. However, every new interpretation abrogated the former one because the understanding and intellect of the people have incessantly been developing. That is the reason why the new generation reject the old interpretation of the *Quran*. But the *Quran* itself has been always alive and in motion. The holy Prophet advises the Muslims in a *hadith* as follows:

> *"The Quran is magnificent in appearance and deep in essence. There are unlimited layers of understanding in the Quran so that when you remove one layer, there is still another".*[50]

This bears witness to the truth that the interpretation of the *Quran* is always in a process of development.

The examination of the verses of the *Quran* provides the best witness to the dynamic feature of the *Quran*. For example, the *Quran* in the seventh year of the *Hijrah* orders that the hypocrites should leave Medina otherwise they will be killed. This verdict did not exist in Medina before. The reason for issuing such a verdict was that the hypocrites had adopted strict policies against the Muslims on the one hand and the Muslims were then strong enough to execute the order on the other hand. The verses read thus:

> *"If the hypocrites and those in whose hearts is a disease and the agitators in the city do not desist, We shall most certainly set you over them, then they shall not be your neighbors in it but for a little*

while".[51]

" Cursed: wherever they are found they shall be seized and murdered, a (horrible) murdering."[52]

At the time when the family of the Prophet (S.A.W.) were followed by the Muslims as good examples, the enemies of the Prophet (S.A.W.) were trying to find faults with the family of the prophet (S.A.W.) so that they will use them as malicious. Therefore, the *Quran* ordered the family of the holy Prophet (S.A.W.) thus:

"O wives of the Prophet! whoever of you commits an open indecency, the punishment shall be increased to her doubly; and this is easy to Allah".[53]

"And whoever of you is obedient to Allah and His Apostle and does good, We will give to her reward doubly, and We have prepared for her an honorable sustenance".[54]

Before the Muslims conquered the city of Mecca they followed certain rules and regulations. After the conquest of Mecca in the eighth year of the *Hijrah,* the laws regarding the sacrifice for the sake of God and charities given to the poor all underwent change. The reason was that the status of the Muslims before the conquest was different from that after the conquest. As a result and with a view to different circumstances of time and space, the *Quran* modified the regulations. The *Quran* reads thus:

"And what reason have you that you should not spend in Allah's way? And Allah's is the inheritance of the heavens and the earth; not alike among you are those who spent before the victory and

fought (and those who did not): they are more exalted in rank than those who spent and fought afterwards; and Allah has promised good to all;. and Allah is Aware of what you do".[55]

A point of reference which clearly illustrates the role of time and space in the teachings of the Quranic verses are those verses regarding the gains Muslims achieved from wars. First, the rule was established to the effect that four fifth of the booty should be given to the soldiers who took part in the wars. The *Quran* reads thus:

"And know that whatever thing you gain, a fifth of it is for Allah and for the Apostle and for the near of kin and the orphans and the needy and the wayfarer, if you believe in Allah and in that which We revealed to Our servant, on the day of distinction, the day on which the two parties met; and Allah has power over all things"[56]

However, in the war of Baninazir, as a result of different circumstances, the ruling was changed and a new ruling was established to the effect that all the war booty must be delivered to the public treasury to be used for the benefit of the needy and welfare of the Islamic society. The verses read thus:

"Whatever Allah has restored to His Apostle from the people of the towns, it is for Allah and for the Apostle, and for the near of kin and the orphans and the needy and the wayfarer, so that it may not be a thing taken by turns among the rich of you, and whatever the Apostle gives you, accept it, and from whatever he forbids you, keep back, and be careful of (your duty to) Allah; surely Allah is severe in retributing (evil):"[57]

"(It is) for the poor who fled, those who were driven from their homes and their possessions, seeking grace of Allah and (His) pleasure, and assisting Allah and His Apostle: these it is that are the truthful."[58]

"And those who made their abode in the city and in the faith before them love those who have fled to them, and do not find in their hearts a need of what they are given, and prefer (them) before themselves though poverty may afflict them, and whoever is preserved from the niggardliness of his soul, these it is that are the successful ones."[59]

The new ruling was established due to different circumstances of time and space. The war of Baninazir was actually settled by peaceful negotiations and Muslims did not suffer any hardship. Moreover, the war was emerging in a situation where the Muslims' welfare was relatively good and the new ruling prevented the accumulation of wealth in the hands of only a few Muslims.

There are many passages in the Meccan *suvar* that ask the Muslims to be patient and to tolerate the aggression of the infidels.

"And be patient and your patience is not but by (the assistance of) Allah, and grieve not for them, and do not distress yourself at what they plan".[60]

On the contrary, the Medinese *surahs* consist of a few verses that call upon the Muslims to launch an attack on the infidels and kill them wherever they are found.

"So when the sacred months have passed away, then slay the

idolaters wherever you find them, and take them captives and besiege them and lie in wait for them in every ambush, then if they repent and keep up prayer and pay the poor-rate, leave their way free to them; surely Allah is Forgiving, Merciful."[61]

When these two verses are compared, one may jump to the conclusion that the verses are contradictory. However, the two different attitudes ordered reflects the different circumstances of time and space. The Meccan verses containing the order of tolerance were revealed in a situation when the Muslims were weak and could not retaliate the aggression of the infidels, while the verses containing the command of *Jihad* belong to a period when the strength of the Muslims had grown considerably. Thus, these different types of rulings belong to different situations. Hence, there is no contradiction between them. From this it may be inferred that, in the first place, if the Muslims anywhere are weak, they may tolerate the aggression of the non-Muslims temporarily. But simultaneously they are duty-bound to make preparations and make themselves powerful. Secondly, when they grow powerful they are required to live in a state of preparedness and to shatter the power of the enemies of Islam. It is, therefore, clear that the rulings of the *Quran* revealed in different situations may be implemented in view of their perspective and situational context.

The analysis in this section leads us to the conclusion that although the *Quran* is a holy book which must always be eternal and esteemed, our interpretation and understanding derived from it can be different. The

definitive and clear injunctions are also subject to certain conditions the details of which will be examined in the next two chapters.

Given the fact that the *Quran* does not discuss details and usually issues decrees on general values, Islamic jurists have extracted dissimilar verdicts from the same injunction. A review of such verdicts makes it clear that the qualifications of the Islamic jurists (*Mujtahids)* and the different conditions and circumstances of the time have played the major role in the variation of juristic decrees (*fatwas)*. The best testimony to

The Essential Role of *Ijtihad* in the *Sunnah*

Though the *Quran* presents the basic rule of life, it remains silent on many issues which necessitate guidance for practical life. In such cases

the obvious thing was to follow the custom or usage of the Prophet (S.A.W.).[62] Literally, *Sunnah* means a way or rule or manner of acting or mode of life.[63] In consequence of this, there arose in Islam a class of students who made it their business to investigate and hand down the minutest details concerning the life of the Prophet (S.A.W.). As a result, the Muslims considered the Prophet's *Sunnah* (i.e. his words and deeds) as the yardstick and as the source of inspiration. After his death, reports

of the Prophet's wonderful sayings and doings began to circulate.[64] These sayings continued to increase from time to time as they were collected from the *Sahabah* (the Companions of the Prophet (S.A.W.)) and became subject to standardization and selection. This represented the word of the Prophet (S.A.W.) as supplemented to the word of *Allah*. The *hadith*, in other words, is the second pillar after the *Quran* upon which every Muslim rests the structure of his faith and life. The body of traditions circulated orally for some time, as indicated by the word *"hadith"*, commonly used for tradition and which literally means a saying conveyed to man either through hearing or through witnessing an event.[65]

The *hadith*, in short, is the reservoir of the *Sunnah* of the Prophet (S.A.W.), serving an essential need of the Muslims, be they individuals or communities. The *hadith* has come to supplement the *Quran* as a source of the Islamic religious law. Whenever legal problems arise, Muslims can resort to both sources. Following the Prophet's demise, the Holy *Quran*

and the prophetic judgments and sayings served as the groundwork for decisions on cases that appeared. The holy *Quran* with its wealth of detail is still insufficient by itself without the assistance of *fatwa* (a religious decision) and Tradition, and the *hadith* arose to supply this need.[66]

> *"However, the majority of the texts available to us under the category of the Sunnah in Shariah, are not definitive either with respect to their meanings of the ahadith or to that of their chains. The application of Ijtihad assumes an indispensable role in this*

context. Ijtihad must be used here to determine firstly which ahadith are authentic and secondly to clarify the meaning and implications of the ahadith. Even after a hadith is made clear with respect to its meaning and its authentication, the issue of the conditions of the time and place appropriate to the application of the respected hadith emerges as a very vital concern".[67]

Clear understanding of the *Quran* and the *Sunnah* is the prerequisite for deduction of legal rules from them. In order to use these sources, the *Mujtahid* must be well versed with the words and their exact implications.[68] For this purpose, the Islamic Jurists include the classification of words and their usages in the methodology of *Osul-Al-Fiqh*.[69] The rules which govern the origin of words, their usages and classification are primarily determined on linguistic grounds and, as such, they are not an integral part of the law or religion. But they are instrumental as an aid to the correct understanding of the *Shariah*.[70]

When the text is self-explanatory and clear, the *Mujtahid* will not

make use of interpretation. Yet a major part of *fiqh* is based on rules which interpretation and *Ijtihad* yield. *Ijtihad* can take a variety of forms, and interpretation which aims at the correct understanding of the words and sentences of a legal text is of crucial significance to all forms of *Ijtihad*.[71]

Interpretation aims at realizing the lawgiver's intention from his words and deeds. Discovery of that which is not self-evident is the task of interpretation. Thus the object of interpretation in Islamic law, as in any

other law, is to ascertain the intention of the Lawgiver with regard to what has been left unexpressed as a matter of necessary inference from the surrounding circumstances.[72]

Words fall into two categories based on their lucidity, scope, and capacity to convey a specific meaning. With reference to their conceptual clarity, the Islamic Jurists of *Osul* have classified words into the two main categories of "clear" and "unclear" words.[73] The main purpose of this division is to identify the extent to which the meaning of a word is made clear or left ambiguous and doubtful. The significance of this classification can be readily observed in the linguistic forms and implications of commands and prohibitions. The task of evaluating the precise purport of a command is greatly facilitated if one is able to ascertain the degree of clarity (or of ambiguity) in which it is conveyed. Thus the manifest (*Zaher*) and explicit (*Nass*) are "clear" words, and yet the jurist may abandon their primary meaning in favour of a different

meaning as the context and circumstances may require. Words are also classified, from the viewpoint of their scope, into homonym, general, specific, absolute and qualified. Based on this categorization, the grammatical application of words to concepts is clarified, indicating the meaning, specificity or generality of a word, and limitation of a word's absolute application to its subject.[74]

> *"The strength of a legal rule is to a large extent determined by the language in which it is communicated. To distinguish the clear*

from the ambiguous and to determine the degrees of clarity/ambiguity in words also helps the jurist in his efforts at resolving instances of conflict in the law. When the Mujtahid is engaged in the deduction of rules from indications which often amount to no more than probabilities, some of his conclusions may turn out to be at odds with others. Ijtihad is therefore not only in need of comprehending the language of the law, but also needs a methodology and guidelines with which to resolve instances of conflict in its conclusions".[75]

The *ahadith* fall into yet another classification based on the continuity and completeness of the chain of their transmitters. Continuous (*mottasel*) and discontinued.[76] A continuous *hadith* is one which has a complete chain of transmission from the last narrator all the way back to the Prophet (S.A.W.). A discontinued *hadith*, also known as *Morsal*, is a *hadith* whose chain of transmitters is broken and incomplete. The majority of Islamic Jurists have divided the continuous *hadith* into the two main varieties of *Motawater* and *Wahed*. To this the *Ahadith* have added

an intermediate category, namely the well-known, or *Mashhoor*.[77]

Motawater means a report by many people presented in a way to prevent any collusion and machination to lie. This possibility is beyond conception due to the huge number and diverse residence and reliability of those relating it.[78] A report would not be called *Motawater* if its contents were believed on other grounds, such as the rationality of its content, or that it is deemed to be a matter of axiomatic knowledge.[79] A

report is classified as *Motawater* only when it fulfills the following conditions:

A) In each period or generation, there should be a large number of reporters to prevent any collusion in presenting a falsehood. In case the reporter's number does not make a reliable multitude, their report will not lead to positive knowledge and is therefore not *Mutawatir*.[80] Some Islamic Jurists have attempted to specify a minimum, varying from as low as four to as many as twenty, forty and seventy up into the hundreds. All of these figures are based on analogies: The requirement of four is based on the similar number of witnesses which constitute legal proof; twenty is analogous to the Quranic *ayah* in *sura Al-Anfal*[81] which reads: *"If there are twenty steadfast men among you, they will overcome two hundred fighters"*. The next number, that is seventy, represents an analogy to another Quranic passage where we read that *"Moses chose seventy men among his people for an appointment with us"*.[82]

B) According to some Islamic Jurists, the reporters should be equitable people *(A'del)*, indicating that they should not be infidels or

profligates. The correct view, however, is that neither of these conditions are necessary. What is essential in *Motawater* is the attainment of certainty, and this even can be obtained through the reports of non-Muslims.[83]

C) That the reporters are not based in their cause and are not associated with one another through a political or sectarian movement. And finally, all of these conditions must be met from the origin of the

report to the very end.[84]

The flexibility of the *Quran* through the *Sunnah*

The *Quran* was descended within a 23-year period. Each revelation was descended based on particular social conditions. The Quranic revelations kept a breast of the developments of the Muslim society. The revelations that came earlier and in certain circumstances were modified or enlarged or amended later. Thus, to implement the Quranic rulings in different times and places, one must study the historical context of each revelation and then the *Quran* in its totality must be implemented. As a consequence, it can be generalized that Quranic commandments descended in given situations. This is a major reason why the *Sunnah* became so instrumental to the Muslims after the demise of the Holy Prophet (S.A.W.). As the Prophet (S.A.W.) passed away the flow of the

revelations ceased but the changing circumstances of time and space was a fact of life. So, the problem was to apply the teachings of the *Quran* to the new generation's different situations and needs. The fact was that the generation who followed the Prophet (S.A.W.) needed to find solutions to new problems and therefore had to heed the feature of flexibility of the *Quran*. The safe way for them to do so was to resort to the *Sunnah*. Hence the *Sunnah* imparted flexibility to the *Quran* in three ways:

The first was the interpretation of the *Quran* through the *Sunnah*. The

rationale behind this was provided by the Islamic jurists to the effect that the *Quran* is mainly concerned with general principles borne out by the fact that its contents require a great deal of elaboration, which must be provided by the *Sunnah*. To give an example, the following Quranic *ayah* provides the textual authority for all the material sources of the *Shariah*, namely the *Quran*, the *Sunnah*, *Ijma* and *Qiyas*. The *ayah* reads:

> *"O you who believe, obey God and obey the Messenger, and those of you who are in authority; and if you have a dispute concerning any matter refer it to God and to the Messenger.*[85]

The word "obey" in this verse has two references: the *Quran* as the first source and the Prophet's *Sunnah*, and those of you who are in authority pertains to the Islamic Jurists' consensus. The last portion of the *ayah* (and if you have a dispute...) validates *Ijtihad*. For a dispute can only be referred to God and to the Messenger by extending the rulings of the *Quran* and *Sunnah* through analogy to similar cases. In this sense one

might say that the whole body of *Osul-Al-Fiqh* is a commentary on this single Quranic *ayah*.[86] Al-Shatibi further observes that wherever the *Quran* Provides specific details it is related to the exposition and better understanding of its general principles.[87] Most of the legal contents of the *Quran* consist of general rules, although it contains specific injunctions on a number of topics.

At times, the *Sunnah* clarifies any ambiguity of the *Quran*, and

such clarification turns into an inseparable part of the *Quran*.[88] There are numerous examples of this, such as the words *salah, zakat, hajj, riba,* which occur in the following *ayat:*

> *"Perform the salah and pay the Zakat".*[89]
>
> *"God has enacted upon people the pilgrimage of hajj to be performed by all who are capable of it".*[90]
>
> *"God permitted sale and prohibited usury (riba)"*[91]

The brief references of the Quranic verses to *salah*, *Zakat*, *hajj* and *riba* do not shed light on the juridical meanings of these terms. Hence the Prophet (S.A.W.) provided the necessary explanation in the form of both verbal and practical instructions. In this way the text which was initially ambivalent (*mujmal)* became unequivocal *(Mufassar)*. With regard to *salah,* for example, the Prophet (S.A.W.) instructed his followers to perform the *salah* the way you see me performing it.[92] And regarding the *hajj* he ordered them to: *"take from me the rituals of the hajj".*[93] And

there are also many *ahadith* which explain the Quranic prohibition of *riba* in specific and elaborate detail.[94]

Secondly, an argument was raised whether the *Sunnah* could annul Quranic commands and vice versa in accordance with the exigencies of time and place and to seek solutions to emerging problems.[95] The opinion of the jurists is divided on this point.[96] One of them is the well-known dictum which says: "The *Sunnah* decides upon the

Quran, while the *Quran* does not decide upon the *Sunnah*."[97] Al-Amidi has listed a number of examples where the *Quran* had abrogated the *Sunnah*.[98]

A glance on earlier literature on the subject suggests that the posing of this issue itself is a result of the rigid formalization of the juristic doctrines and the absolute fixation of the relative position of the *Quran* and the *Sunnah* therein. What seems to be the case is that where long standing customs, particularly those including fundamental policy, were sought to be changed whereby great opposition was feared, the *Quran* had to intervene; and this may, in a loose sense, be regarded as an abrogation of the *Sunnah* by the *Quran*. This leaves little doubt that the *Quran* wielded higher authority than the Prophetic sayings themselves. However, there are many cases in which the precise sense and the manner of application of the Quranic injunctions and statements was determined by the *Sunnah* the question whether in some case it was done rightly and in others wrongly is irrelevant here. There are cases like the Quranic law

of evidence on the point of minimum number of witnesses being two and on the question whether the evidence of two women is equal to that of one man. On these and many other points, the *Sunnah* apparently determined the application of the *Quran*, and in some cases went against the literal meaning of the *Quran*. This process was also inevitable. In the face of this situation and when we take into account both sides of the picture, the whole complexion of the problem changes.

"Al-Shafii has dealt with the Problem of abrogation at a greater

length in his work Al-Risalah. He maintains that the Quranic commands can be abrogated only by the Quran, and those of the Sunnah only by the Sunnah. He is opposed to the view that the Sunnah can abrogate the Quran and vice versa. In support of his view, he adduces the Quranic verse 2:106 which explicitly speaks, according to him, of the abrogation of the Quran by the Quran. He argues that the Prophet (S.A.W.) was ordered by God to follow the revelation and not to change the Quran himself. He quotes several Quranic verses which indicate that God alone can change revelation".[99]

Why does Al-Shafii believe that the *Quran* cannot abrogate the *Sunnah?* He argues that in case of the *Quran's* abrogation of any *Sunnah*, this means that all Prophet's commands that do not conform to the *Quran* is regarded as abrogated by the *Quran*. For the abrogation of a *Sunnah* he thinks it necessary that the Prophet (S.A.W.) should have informed the people specifically, even if it is abrogated by the *Quran*. Thus, he takes this information by the Prophet as abrogation of the *Sunnah* by the

Sunnah. He gives several illustrations of how a host of rules framed by the Prophet (S.A.W.) would be abrogated if the *Quran* was accepted to abrogate the *Sunnah*. He says that various types of sale which the Prophet (S.A.W.) had made unlawful would be considered to be abrogated by the Quranic verse: *"Whereas Allah permitted trading and forbidden usury"*.[100] Again, the *Sunnah* with regard to stoning the adulterer and the adulteress would be regarded as repealed by the verse:

"The adulterer and the adulteress, scourge each one of them (with)

a hundred stripes".[101]

In like manner, he notes that the *Quran* abrogates one-fourth of a Dinnar as minimum amount for amputation of a thief's hand. *"As for the thief, both male and female, cut off their hands".*[102] For this he gives the reason that the *Quran* does not lay down any minimum value of theft. But Al-Shafii also believes that no *Sunnah* of the Prophet (S.A.W.) contradicts the Quran; on the contrary it elaborates it.[103] Therefore, the *Quran* does not abrogate any *Sunnah*.

> *"Likewise, no Sunnah of the Prophet (S.A.W.), according to Al-Shafii, abrogates the Quranic injunctions. He contends that the function of the Sunnah is to point out which of the Quranic passages are abrogating and which abrogated. Again, he argues that the Sunnah follows the spirit of the Quran. In cases of the clear-cut injunctions it follows the Quran; while in case of general or ambiguous commands, it explains and elaborates them".*[104]

In this way, the *Sunnah's* abrogation of the *Quran* is out of the

question. He, moreover, furnishes examples of the way the *Sunnah* refers to abrogation of individual Quranic verses. He says that the *Quran,* in verse 2:180, commands to leave a will in favour of the parents and other near relatives at the time of death. Similarly, in passage 2: 240 it commands the husbands to bequeath in favour of their wives before their death. Simultaneously, the *Quran* prescribes respective shares in the inheritance of the deceased for his parents, widows, and the near relatives. Now, Al-Shafii says that there may be a twofold meaning of

these passages. Firstly, the bequest and their shares of inheritance as determined by the *Quran* are granted to parents and wives. Secondly, the Quranic verses that name the share of the wives and parents in the inheritance may be treated as abrogating (*Naskh)* the injunction about making a will contained in the passages 2:180, 240. But of these two alternatives, he chooses the latter in the light of the *Sunnah*. He quotes a *hadith,* which states that no will is valid in favour of a legal heir. This *hadith* shows, according to him, that the injunction with regard to leaving a will at the time of death had been abrogated by the fixation of the shares in the inheritance.[105] It should be noted that Al-Shafii does not regard the *hadith* quoted above as repealing the Quranic injunction about leaving a will at the time of death. as held by the classical jurists. According to him, the Quranic rulings, as we explained earlier, can be abrogated only by the *Quran* and not by the *Sunnah (hadith)*.

The idea that the *Quran* has some abrogated verses is the cornerstone of all these contentions. Al-Shafii was no exception either but

his difference with other may lay in the verses he deemed abrogated. They can be shown to be operative if interpreted in a different manner. Suppose the parents of a deceased are non-Muslim, he can leave a will in their favour at the time of his death. Malik holds that a person can bequeath in favour of his legal heirs with the permission of other heirs.[106] Similarly, there is no harm if the husband leaves a will for the maintenance of his wife for one year, as the *Quran* is clear on this point.

The matter, however, depends on adequate interpretation of the *Quranic* passages.

The third important role that the *Sunnah* has played in the flexibility of the Quranic verses when the verses are going to be exercised in practice is the transforming of the *Amm* (general ruling) to the *Khass* (exceptional cases). An example is when we refer to the Quranic proclamation that "*God has permitted sale but prohibited usury*"[107] This is a general ruling in the sense that sale, that is any sale, is made lawful. But there are certain varieties of sale, which are specifically forbidden by the *Sunnah*. Consequently, the *Amm* of this *ayah* is specified by the *Sunnah* to the extent that some varieties of sale, such as sale of unripened fruit on a tree, were forbidden and therefore excluded from the scope of this *ayah*.

Another example is the ruling of the *Quran* regarding a thief. The *Quran* reads thus:

> *"And (as for) the man who steals and the woman who steals, cut off their hands as a punishment for what they have earned, an*

> *exemplary punishment from Allah; and Allah is Mighty, Wise."*[108]

According to the *hadith*, the Prophet (S.A.W.) has rejected the execution of the ruling if the stolen good is worth less than one fourth of a Dinnar of pure gold.[109] The Islamic jurists have also aggregated 25 exceptional cases where the ruling of cutting hands of thieves must not be put into effect.[110]

The Question of *Nass*

The exercise of the principle of *Ijtihad* was not confined only to cases where there are no injunction in the *Quran* and the *Sunnah*. Even in the presence of the Quranic verses and traditions on a certain problem the employment of *Ijtihad* could not be avoided. The reason for this is obvious. The Quranic verses and traditions are to be interpreted by the Muslims in order to be definite whether a certain verse or tradition is applicable to a certain situation. Interpretation and application, therefore, presuppose exercise of personal judgement. Hence, since the early days of Islam, there has been perpetual conflict between the letter and the spirit of the law. Thus, it is not correct to say that *Ijtihad* was exercised only in the absence of the Quranic verses or traditions on a problem. The opponent of Shafii contends that in the absence of Quranic injunctions or *Sunnah*, differences appear over the problems. However, Shafii, in response, stresses that even when explicit rules of the *Quran* or the

Sunnah exist, differences will appear as well. Thereafter Shafii recounts a number of the Quranic verses and traditions on which the Companions and the early jurists differed because of their interpretation.[111]

Can *Ijtihad* be used when there is *nass* on some point?" Classical legal theory leaves no room for *Ijtihad* when there is *nass*.[112] We have previously pointed out that every command, whether in the *Quran* or *hadith*, requires interpretation and application to a given situation. That is why the Companions differed in the interpretation of the Quranic

verses.[113] Therefore, we think, there is no escape from the use of *Ijtihad* even in the presence of *nass*. But it is worthy of note that where there is no allowance of any interpretation except in one aspect, the decision will naturally be taken on the basis of *nass*. Nevertheless, the point of subtle significance is that the issue of time and space still hold valid regarding the *nass* verses as well. As a matter of clarification, we can consider the verse of the holy *Quran* reading as follows:

> *"And prepare against them what force you can and horses tied at the frontier, to frighten thereby the enemy of Allah and your enemy and others besides them, whom you do not know (but) Allah knows them; and whatever thing you will spend in Allah's way, it will be paid back to you fully and you shall not be dealt with unjustly."*[114]

The verse specifies that the Muslims must be prepared against the enemy by having horses. However, today, horses are of no avail when fighting against the enemy. Thus, even the *nass* verses of the *Quran* are subject to interpretation appropriate to the time and place. What we

understand from this verse is that we should be prepared to defend ourselves against the enemy with a view to the fact that technology has now superseded horses.

Nass has been defined in the classical literature on jurisprudence as "the text which conveys only one meaning", or "whose interpretation is the text itself."[175] Based on such definition, *nass* can be applied only to a few texts. In addition, texts which do not lend themselves to different

interpretations of *nass* in his own time. Discussing the problem of giving protection to the enemy he remarks that the protection given by a free Muslim man, whether he be an upright person (*adel*) or a profligate (*fasiq*), will be binding on all Muslims. He justifies this view by quoting a *hadith* from the Prophet, which says:

> *"Muslims are equal in respect of blood and they are like one hand over against all those who are outside the Community. The lowest of them is entitled to give protection on behalf of them."*[116]

Commenting on the word *adna* (translated here as "lowest") he says that, if it means "minor" as in the Quranic verse[117], it is a textual evidence that protection given by one man is valid. But, if it is a derivative of *dunuw* which means "nearness" as in the Quranic verse[118], then it would be taken as (textual) evidence for giving protection by a Muslim who resides in the border area (on the enemy's territory) being

close to the enemy. Further, he observes that if it is derived from *dana'ah* which means lowliness, it would be textual evidence for the validity of giving protection even by a profligate *(fasiq)* Muslim.[119]

For Shafii, *nass* stands in opposition to *Ijtihad,* which had appeared among the traditionalists prior to Shafii but which Shafii took as a principle of law.[120] The cases to which Shafii applies the principle of *nass* or which are regarded by him as being clear injunctions are not open to reasoning, whether they be in the *Quran* or in *hadith*. He himself

explains the idea of *nass* to his opponents. This, too, implies that his opponents, who represents the early schools, is not perfectly aware of the concept of *nass* now developing by degrees. Shafii says that on the emergence of fresh problems (*Waqeah*), the *Quran* directs explicitly (*nass*) or implicitly *(mojmal)*. Further, he remarks that *nass* means whatever had been ordered or forbidden by God in plain words (*nass*).[121] He then cites cases, which fall under *nass* and *mojmal* respectively. Under *nass* he mentions the relatives with whom marriage is forbidden, prohibited edibles like blood and pork, and the ritual purity. *Mojmal*, according to him, stands for the duties made obligatory by God like *salah, Zakat*, and *hajj*. These duties, he says, were explained and elaborated by the Prophet (S.A.W.)[122] Of the cases which he mentions under *nass* he remarks that the *Quran* is enough for them and no further argumentation is needed.[123] This means that Shafii validates the employment of *Ijtihad* in cases which fall under *mojmal*.

In his *Al-Risalah*, Shafii uses the term *nass* in different forms. In

these different places in the *Risalah* he seems to mean by *nass* the direct textual evidence whether in the *Quran* or in the *Sunnah*.[124]

At times, he distinguishes *Nass Al-Kitab* from the *Sunnah* in places where he particularly lays stress on the text of the *Quran*.[125] He devotes a chapter to duties specified by the *Quran* for which the *Sunnah* of the prophet (S.A.W.) offers details. Some Quranic verses on ritual purity are cited in this chapter, together with several prophetic traditions expounding there. This chapter is followed by another one entitled the

duty laid down in the text of the *Quran* limited and particularized by the *Sunnah*. Shafii discusses, in this chapter, several problems, namely, heritage, homicide, and usury. From the wordings of the Quranic verses dealt with in this chapter it appears that the injunctions contained in them were of general nature. But he, by quoting the traditions from the Prophet, explained that they had specific and definite meaning.[126] This implies that *nass* requires details, elaboration and amplification. Hence, there can be allowance for the difference of opinion. That is why we find that usury, homicide and heritage are cases subject to legal differences, although Shafii describes them as *mansos*.[127] Shafii's detailed discussion of *nass* indicates the novelty of this problem for the early schools and his attempt to fully familiarize them with it. The theory of *nass* later on became a dogmatic instrument for justifying one's own views on some legal problems and for rejecting those of others. Moreover, emphasis on *nass* closed the door to the use of *Ijtihad* in law in some periods.

The early authorities' regular issuance of *ra'y* in law sparked

disorder in various areas. In case it had continued, Islamic law would not have arrived at any unity. The necessity for basic unity in law was felt to overcome such diversity and dissensions.

> *"Ibn Al-Muqaffa, having been fed up with the differences in law, suggests a method to bring about unity. He assigns the right of exercising Ijtihad, only to the Imam, i.e. the political authority. He maintains that people can make suggestions to the Caliph but have no right to stick to and implement their personal opinion. This was indeed a reaction against the free interpretation of law by*

individual lawyers. He rejects the idea of a "total law" which, he thinks, would make religion too rigid for the people. Therefore, he appreciates the exercise of reason and personal opinion in religion. On account of the differences caused by Ijtihad he occasionally attacks it, but does not want to eliminate its employment. He perhaps intends to restrict it in order to avoid chaos in law".[128]

The Potentialities of *Ijma*

Ijma is recognized by Islamic jurists as an important source of *Shariah.*[129] *Ijma* is defined as the unanimous agreement of the *mujtahidun* of the Muslim community of any period following the demise of the Prophet Mohammad (S.A.W.) on any matter.[130] In this definition, the reference to the *mujtahidun* precludes the agreement of laymen from the purview of *Ijma.*[131]

Ijma can only occur after the demise of the Prophet. For during

his lifetime, the Prophet alone was the highest authority on *Shariah,* hence the agreement or disagreement of others did not affect the overriding authority of the Prophet. In all probabilities, *Ijma* occurred for the first time among the Companions in the city of Madinah. Following the demise of the Prophet (S.A.W.), the Companions used to consult each other over the problems they encountered, and their collective agreement was accepted by the community. After the Companions, this leadership role passed on to the next generation, the Successors (*tab'iun)* and then to

the second generation of Successors. When these latter differed on a point, they naturally referred to the views and practices of the Companions and the Successors.[132] In this way, a fertile ground was created for the development of the theory of *Ijma*.[133] The essence of *Ijma* lies in the natural growth of ideas. It begins with the personal *Ijtihad* of individual jurists and culminates in the universal acceptance of a particular opinion over a period of time. Before a consensus is reached, differences of opinion are tolerated. During the process for a consensus, compulsion and imposition of views on the people are ruled out.

Ijma plays a crucial role in the development of *Shariah*. Iqbal considers it as the most important legal notion in Islam.[134] The existing body of *fiqh* is the product of a long process of *Ijtihad* and *Ijma*. Since *Ijma* reflects the natural evolution and acceptance of ideas in the life of the community, the basic notion of *Ijma* can never be expected to discontinue.

"The idea that Ijma came to a halt after the first three generations

following the advent of Islam seems to be a by-product of the phenomenon known as the closure of the gate of Ijtihad. Since Ijma originates in Ijtihad, with the closure of the gate of Ijtihad, it was expected that Ijma also came to a close. This is, however, no more than a superficial equation, as in all probabilities Ijma continued to play a role in consolidating and unifying the law after the supposed termination of Ijtihad".[135]

Considering the *Ijma's* dynamism and infallibility, the Islamic

Jurists did not impose any advance reservations on it. *Ijma* warrants the sound Quranic interpretation, the *Sunnah's* faithful understanding and transmission, and the authorized application of *Ijtihad*.[136] The question as to whether the law, as contained in the divine sources, has been properly interpreted is always open to a measure of uncertainty and doubt, especially in regard to the deduction of new rules by way of analogy and *Ijtihad*. Only *Ijma* can put an end to doubt, and when it throws its weight behind a ruling, this becomes decisive and infallible. *Ijma* provides Islam with a potential for freedom of movement and a capacity for evolution.

Ijma is authorized mainly on the basis of a *hadith* quoted from the holy Prophet (S.A.W.). The *hadith* reads thus:

"My community shall never agree on an error".[137]

There are other *ahadith*[138] in support of *Ijma* including the following:

"God will not let my community agree upon an error"[139]

and:

"Whoever separates himself from the community and dies, dies the death of before Islam (jahiliyyah)".[140]

and:

"Those who seek the joy of residing in Paradise will follow the community. For Satan can case an individual but he stands farther away from two people"[141]

There are also numerous cases, which clearly show the authority of *Ijma*. A few cases are cited here:

(i) Drinking liquor is prohibited by the *Quran*, but the Book does not determine any particular penalty for this wrong. The Holy Prophet (S.A.W.) imparted different punishments to different offenders -- each suiting the specific case in which it was awarded. As such, He did not prescribe any specific punishment *(hadd)* for this offense. *Abu Bakr* and *Umar* gave the punishment of forty stripes to the offender but they too did not make any law to that effect. During the reign of *Uthman*, when the number of offenders increased, the problem was presented before the *Majlis-i-Shura*. In the meeting of this council, *Ali* made a brief but impressive speech and suggested that eighty stripes be laid as punishment for the crime. They unanimously adopted this suggestion and through this *Ijma* the decision became law.[142]

(ii) During the Khilafat-e Rashidah, a worker or manufacturer was entitled to protect the commodity on which he had to work. He had to compensate for any losses or destruction of the commodity while it was

with him. For instance, if some cloth has been given to a tailor or a piece of gold to a goldsmith and the commodity is destroyed while in his possession, he will have to make good the loss. This decision too was made on the plea made by *Ali*. He argued that although on the face of it, the worker or the manufacturer does not seem to be responsible for the loss which is not the result of his own negligence, but if there is no such law of vicarious liability, the workers will normally become negligent towards the properties of others and this would involve a greater national

loss. Thus it is expediential to hold him responsible for the goods given to him. This law, too, was made through *Ijma*.[143]

(iii) Based on *Umar's* judicial decision, when more than one person were involved in a murder, all accomplices were subject to *Qisas* (law of equal). The same position has been taken by *Malik* and *Shafei*. But the decision of *Umar* has not been regarded as a part of the law, for it was a judicial verdict, and was not enacted into law by an *Ijma* or the majority of the *Shura*.[144]

(iv) There was a question about a man whose whereabouts were unknown and whose wife had a second marriage based on court verdict. Once the said man appears, which of the two husbands would have preferential right on the wife? *Khulafa-e-Rashidin* gave quite different verdicts in such cases. But none of the decisions enjoys the status of law, for the problem was never presented before the *Shura* and no *Ijma* was ever arrived at on the same.[145]

The potentialities of *Ijma* as a concept that can impart flexibility to the *Shariah* have been analyzed by great contemporary Islamic jurists. Iqbal finds it strange that this important notion has remained practically a mere idea, and rarely assumed the form of a permanent institution in any Muslim country. He further maintains that it was favourable to the interest of the Omyyad and the Abbaside Caliphs to leave the power of *Ijtihad* to individual *Mujtahids* rather than encourage the formation of a permanent assembly which might become too powerful for them.[146]

The application of the potentials of *Ijma* to modern statutory legislation is expounded by Iqbal, who takes it as an important, yet largely theoretical, doctrine. It is strange, Iqbal writes, that this important notion rarely assumed the form of a permanent institution. He then suggests that the transfer of the power of *Ijtihad* from individual representatives of schools to a Muslim legislative assembly is the only possible form of *Ijma* can take in modern times.[147] The Islamic Jurists should have a pivotal role in such an assembly which must, nevertheless, include laymen who normally have keen insight into the affairs. Furthermore Iqbal draws a distinction between the two functions of *Ijma* as discovering the law and implementing the law. He maintains that the former function is related to the question of facts and the latter relates to the question of law. In the former case, as for instance, when the question arose whether the two small *suvar* known as Mu'awwazatain formed part of the *Quran* or not, and the Companions unanimously

decided that they did, we are bound by their decision, obviously because the Companions alone were in a position to know the fact. In the latter case, the question is one of interpretation only, and so one ventures to think that later generations are not bound by the decision of the Companions.[148]

Clearly, Iqbal considers *Ijma* binding in as much as it relates to facts but not when it is based on juridical *Ijtihad*. This distinction between

the factual and juridical *Ijma* will not apply to the *Ijma* that Iqbal has proposed: the collective decisions of the legislative assembly will naturally be binding on points of law.

Iqbal's proposed reform has been widely supported by other scholars.[149] It is a basically sound proposal. But to relate this to the idea of a distinction between the factual and juridical *Ijma* seems questionable. Apart from the difficulty that might be involved in distinguishing a factual from a juridical *Ijma* one can expect but little support for the view that the *Ijma* of the Companions on *Ijtihad* matters is not binding.

Criticism of Iqbal's views has been rife for other reasons.[150] The critics blast Iqbal's attempt to turn *Ijma* into a modern legislative institution. They argue that *Ijtihad* and *Ijma* have never been the prerogatives of a political organization, and any attempt to institutionalize *Ijma* is bound to alter the nature of *Ijma* and defeat its basic purpose. For *Ijtihad* is a non-transferable right of every competent scholar, and a *mujtahid* is recognized by the community by virtue of his merits known over a period of time, not through election campaigns or awards of

official certificates. The process of arriving at *Ijma* is entirely different from that of legislation in a modern state assembly. *Ijma* passes through a natural process, which resembles that of the survival of the fittest. No attempt is made in this process to silence the opposition or to defeat the minority opinion. Opposition is tolerated until the truth emerges and prevails. *Ijma* is a manifestation of the conscience of the community, and it is due mainly to the natural strength of *Ijma* and the absence of rigid organization that no one is able to lay his hands on Islam.[151]

Iqbal's suggested reform is criticized on the dubious supposition that an elected legislative assembly will not represent the community's collective conscience and will be a tool of power politics. Although the cautious advice of this approach may be persuasive, the assumption behind it goes counter to the spirit and theory of *Ijma* which endows the community with the divine trust of having the capacity and competence to make the right decisions. According to the *ahadith* stated earlier, one must trust the community itself to elect only persons who will honour their collective conscience and interest. In addition, such critique of Iqbal merely suggests that nothing should be done to relate *Ijma* to the realities of contemporary life. The critic is content with the idea of letting *Ijma* and *Ijtihad* remain beyond the reach of the individuals and societies of today. On the contrary, the argument for taking a positive approach to *Ijma* is overwhelming. The gap between the theory and practice of *Shariah* law has grown to alarming proportions, and any attempt at prolonging it further will have to be exceedingly persuasive. The main

issue in institutionalizing is that freedom of opinion should be vouchsafed the participants of *Ijma*. This is the essence of the challenge, which has to be met through *Ijtihad* and *Ijma*.

Ijma has proved itself an outstanding factor in the adaptability of Islam[152] to new circumstances and hence has imparted the important element of flexibility to the *Shariah* on the one hand and has rendered *Ijtihad* the most powerful and authoritative role.

The Assessment of *Qiyas*

The emergence of the methodology of *Qiyas* as a systematic expert knowledge for solving problems was an indication to the fact that the other three sources of the *Shariah* (the *Quran,* the *Sunnah* and *Ijma)* were not sufficient to provide solutions to the everyday problems of different generations. For example, in view of different social and agricultural conditions prevailing in the countries conquered by Islam, the school of Abu Hanifa seem to have found, on the whole, little or no guidance from the precedents recorded in the literature of traditions. The only alternative open to them was to resort to speculative reason in their interpretations.

> *"The application of Aristotelian logic, however, though suggested by the discovery of new conditions in Iraq, was likely to prove exceedingly harmful in the preliminary stages of legal development. The intricate behaviour of life cannot be subjected to hard and fast rules logically deducible from certain general notions. Yet looked*

> *at through the spectacles of Aristotle's logic it appears to be a mechanism pure and simple with no internal principle of movement. Thus the school of Abu Hanifa tended to ignore the creative freedom and arbitrariness of life, and hoped to build a logically perfect legal system on the lines of pure reason. The legists of Hedjaz, however, true to the practical genius of their race, raised strong protests against the scholastic subtleties of the legists of Iraq, and their tendency to imagine unreal cases which they rightly thought would turn the Law of Islam into a kind of lifeless*

mechanism".[153]

The early Islamic jurists' biting disputes sparked a critical definition of the restrictions, conditions, and correctives of *Qiyas* which, though originally appeared as a mere disguise for the *Mujtahid's* personal opinion, eventually became a source of life and movement in the law of Islam.

Iqbal maintains that the spirit of the acute criticism of Malik and Shafii on Abu Hanifa's principle of *Qiyas*, as a source of law, constitutes really an effective Semitic restraint on the Aryan tendency to seize the abstract in preference to the concrete, to enjoy the idea rather than the event. This was really a controversy between the advocates of deductive and inductive methods in legal research. The legists of Iraq originally emphasized the eternal aspect of the notion while those of Hedjaz laid stress on its temporal aspect. The latter, however, did not see the full significance of their own position, and their instinctive partiality to the

legal tradition of Hedjaz narrowed their vision to the precedents that had actually happened in the days of the Prophet and his companions. No doubt they recognized the value of the concrete, but at the same time they eternalized it, rarely resorting to *Qiyas* based on the study of the concrete as such.[154] Their criticism of Abu Hanifa and his school, however, emancipated the concrete as it were, and brought out the necessity of observing the actual movement and variety of life in the interpretation of juristic principles. In fact, the emergence of different schools of law was

the result of various circumstances of time and space.

Due to the dual reasons of the *Qiyas'* fallibility and diversity of life in various areas, *Qiyas*, after some time, appeared as a complicated methodology. Hence the correct application of *Qiyas* required *Ijtihad*. And here again *Ijtihad* assumed its supremacy. The complication of *Qiyas* emerged to be even greater as issue like the conditions and the types of *Qiyas* called for expert knowledge. The validity and the determination of appropriate circumstances in which *Qiyas* could be applied, added even more to the complication. Nevertheless, *Qiyas* has proved to be a useful method of solving new problems in spite of its complexity.

Qiyas attempts to establish the law of the original case for the parallel case on the basis of their common legal cause (*illah)*. *Qiyas* in its early stages was simple and used in its rudimentary form.[155]

> *"The Quran uses many similitudes employing words "mathal", to denote similarity between various cases. These similes cannot be*

> *called Qiyas in strict sense of the term. It seems however plausible that such Quranic expressions might have contributed to the emergence of the notion of Qiyas. Reasoning based on similarity of parallel cases is also noticed in hadith literature. It shows the frequent use of Qiyas in the early phase of Islam. We find its technical use in Umar's well-known letter addressed to Abu Musa Al-Ashari".*[156]

It was also used in the reasoning of the companions. As an

instance, Ibn Abbas reportedly determined the compensation for the injury of teeth to be analogous to that of the fingers. The fourfold confession of Muaz before the Prophet, apart from the variety of its versions and criticism upon it, indicate the non-technical use of *Qiyas* in its early stages.[157] The principle of fourfold confession of the accused in the absence of four witnesses as required by the *Quran* is followed by the Iraqis basing themselves on the tradition of Muaz. The examples of the use of *Qiyas* in its rudimentary form by the Iraqis can be cited endlessly.[158] The starting point seems to be, as Schacht observes, the fixing of the minimum value of dower by drawing an analogy with the minimum value of stolen goods for *hadd*. This is based on the traditions reported from the Prophet (S.A.W.), Umar, and Ibn Masud.[159]

Qiyas, as used earlier, is general and closer to *ra'y* than to technical *Qiyas*. The frequent use of words such as *mathal* in Malik's Muwatta reflected the similarity of parallel cases.[160] They are at times

accused of inconsistency in *Qiyas* by Shafii for their inclination towards *ra'y*.[161] It appears that the use of *Qiyas* was a part of their individual reasoning (*ra'y*).

At the time of the Prophet (S.A.W.) when the companions asked the Prophet about religious decrees, the Prophet (S.A.W.), while answering their questions, taught them the application of *Qiyas*. On being asked about the performance of *hajj* by proxy the Prophet (S.A.W.) replied to the questioner:

"What do you think if your father runs into debt and you pay it off on his behalf, would it be valid? .... Likewise the religion of God is more deserving".[162]

According to a tradition Umar kissed his wife while he was fasting. When the matter was reported to the Prophet (S.A.W.) he said that there was no harm in kissing the wife while one was fasting, just as there was no harm in rinsing the mouth during the fast. We adduce some illustrations of *Qiyas* to elucidate its definition and application in legal cases.[163]

According to the *Quran*, the orphans who are weak in understanding cannot be guardians of property. Only when they come of age and attain intellectual maturity are they allowed guardianship of property.[164] From this verse a law has been derived by analogy that all transactions of a minor are not valid without the permission of the guardian. The legal cause *(illah)* is the immaturity of understanding.

Drinking wine is forbidden according to the *Quran*.[165] The beverage called *nabiz* and similar other drinks which are intoxicant are also unlawful on the basis of analogy. According to the Quranic verse,[166] all transactions or sale are forbidden after the call to Friday prayers. On the analogy of this injunction all kinds of business, such as hiring, borrowing, working in the factories and offices and similar other engagements which prevent a man from offering Friday prayers are forbidden.

Several examples of earlier *Qiyas* are presented here. The minimum dower of a woman, as fixed by the people of Medina, was one fourth of a Dinnar by analogy to the minimum value of stolen goods for enforcing *hadd*. Malik says that the dower of a woman should not be less than one-fourth of a Dinnar, the minimum value for which a hand is mutilated for theft. Further, they fixed the compensation of the fingers of a woman at ten camels each, despite variety of their size and number. Malik does not follow the doctrine narrated by Ibn Al-Musayyib where the compensation is fixed at ten camels for one finger, twenty for two, and thirty for three, but twenty for four. Ibn Al-Musayyib calls this doctrine *Sunnah,* but Rabi'ah expresses his astonishment, as the doctrine goes against *Qiyas*.[167]

> *"From the various examples of Qiyas it is manifested that the doctrine in the early schools of law was under development. It carried the sense of parallel, precedent, reason and established rule. Minor resemblance was sufficient to employ Qiyas by the early authorities. There were no hard and fast rules for its*

> *employment. By degrees it was substituted by logical Qiyas in later times. Shafii theorized it in the early period".*[168]

Shafii's adduced reflection of the legitimacy of *Qiyas* allows the jurist to resort to *Ijtihad* on issues not taken up by the *Quran* and *Sunnah*. A man who wants to offer his prayers but does not know the right direction of the *kabah* makes strenuous efforts to search it by means of signs and indications.[169] Likewise, a jurist who is confronted with a legal problem but does not know its answer tries to find confirmatory evidence.

This example given by Al-Shafii underlines a methodology for legal reasoning.[170] A jurist, as a researcher, tries to find the relevant material on a given subject thinks over the problem, and interprets his evidence to prove his proposition. The conclusion thus reached may vary from person to person. This also justifies disagreement and divergence of opinion on a disputed question.

There are four parts to every *Qiyas*: 1) The original case covered by the text. This is known as *asl* (the original). 2) The parallel or fresh case which is not covered by the text. A jurist finds out a rule of law for this case by the exercise of *Qiyas*. This is known as *fara* (parallel case). 3) The *ratio legis* of the law. This is known as *ellah* (cause of the textual law of the original case). 4) The law of the original case covered by the text.[171] In the illustration of prohibition of *nabiz,* the original case (*asl)* is wine forbidden by the *Quran;* the parallel case (*fara)* is *nabiz* for which a rule of law is sought; the cause (*illah)* or *ratio legis* of the law is intoxication which is common to both cases; and the rule of law of the

original case is the prohibition of drinking wine.[172] Shafii considers *Qiyas* and *Ijtihad* identical, being two separate terms carrying the same meaning.[173] The reason seems to be that *Qiyas* was in its rudimentary form during the time of Shafii. As the Islamic legal thinking developed with the passage of time, *Qiyas* became an independent doctrine having its own characteristics and uses other than *Ijtihad*.

Actually, *Qiyas* serves as one of the several modes of *Ijtihad*. Every *Qiyas* is *Ijtihad*, but the opposite is not true. *Ijtihad* is based on the

literal interpretation of the *Quran*, the *Sunnah* and on personal opinion not grounded on systematic reasoning. In point of fact, *Ijtihad* is a best possible attempt at seeking the truth by any means of reasoning. Before the development of the systematic reasoning known as *Qiyas*, all modes of reasoning leading to the discovery of truth were termed *Qiyas*.[174]

> *"Ibn Rushd draws a distinction between Qiyas and Ijtihad. According to him, Ijtihad applies to a case which can be returned to the original, (asl) and also to a case which cannot be returned to the original, such as determining the compensation of injuries, maintenance of wives, and the bloodwit imposed on the clan of the murderer. Qiyas, on the contrary, applies only to a case which can be returned to the original. It is in fact a mode of Ijtihad. Thus Ijtihad is general and Qiyas is particular".*[175]

Another paramount issue is the condition for *Qiyas'* validity as determined by most Islamic scholars to be as follows: Firstly, to be valid, *Qiyas* should be based on a non-exceptional textual injunction about an

original case. The reason is that the legal cause of the law of the original case is determined for generalization. If a certain injunction is exceptional and confined to a particular case and situation, that cannot be evaluated rationally and generalized. Al-Sarakhsi has cited a number of examples of such *Qiyas*.[176] According to the *Quran* two males or one male and two females are required to bear witness in a case of evidence.[177] But the Prophet (S.A.W.) accepted the evidence of Khuzaymah alone in a certain

case for his merit and eminence known to the Prophet (S.A.W.). This case of Khuzaymah, being exceptional, cannot be logically evaluated and generalized. In other words, as against the general law of evidence, the case of Khuzaymah cannot be made an original basis for analogy. It will not be valid to produce only one witness in a suit by drawing an analogy with the exceptional case of Khuzaymah.[178]

Secondly, the original case's law should not be in contradiction to human reason, since a law's causation extends it analogically to other parallel cases. However, a law open to rational evaluation cannot be generalized. In case human reason rejects the application of a law to a parallel case, analogical extension will not be valid.[179]

For example, the ritual ablution becomes void in case one laughs loudly during prayers.[180] The breach of ablution by laughing is not rationally intelligible. Reason requires that only prayers should break by laughing and not ablution. Hence the law cannot be rationally evaluated

and generalized. It is, therefore, not extendible to the funeral prayers and prostration for thanks giving. If a man laughs loudly in the funeral prayer or in the prostration for thanks - giving, his ablution will not become void. One more example is given: The fast does not become void by eating or drinking in forgetfulness. Human reason requires that the fast should become void by eating or drinking because prevention from eating and drinking is an essential condition of fasting. Rationally there should be no fast if this condition is not present. But as a tradition of the Prophet

says that the fast is not affected by eating or drinking, this injunction becomes rational. There will be no causation of this rule for analogical extension to eating and drinking during fast by mistake, under duress, and during sleep. The fast will become void by eating or drinking in all such conditions.[181]

Thirdly, a law must be applied on legal - and not lexical or medical - grounds. In addition, the law should be extendible in tune with the extension of the original case, as put forward by the Hanafis. But according to the Shafii jurists its extendibility is not necessary. Moreover, the parallel should be similar to the original case. In other words, if the original case is not extendible after causation of the law, the original and the parallel case will be equal. Hence analogy will not be operative therein. Analogy operates in two similar and equal cases. In case the original and the parallel are varying, they cannot be made corresponding by the process of causation. Hence in such a position analogy will not work.[182]

Fourthly, the textual law of the original case must not be changed after causation and after extension to the parallel case. According to the Hanafis, a man who is punished for false accusation of adultery (*qazf*) cannot give evidence even after repentance as required by the Quranic verse.[183] In all other affairs if the offender is punished or repents, his evidence is valid. In case the law of *qazf* is compared with other offenses by causation, the law of the original case (*asl)* will be changed.[184]

Finally, the law's workings should not change after causation,

since a textual injunction is, in letter and spirit, prior to *Qiyas* which is invalid in the presence of a textual law. Similarly, it is not valid if the words of the law of the original case are changed. For example the Prophet has allowed to kill only five reptiles specified by him within the premises of *haram* (sacred territory at Mecca). The analogy of these reptiles cannot be extended to other animals because the causation changes the words of the text. As such, the number of animals exempted by the Prophet will be more than five. Hence this cannot be allowed.[185]

It is unanimously agreed that *Qiyas* reveals the law, which already exists; it does not originate it. The rule of law exists in the original case and *Qiyas* merely indicates that the divine command is so and so. Thus the law is originated by God and discovered by *Qiyas*.

Reasoning (*Aql*)

Reasoning is one of the sources of *Shariah*. What is meant is that sometimes we discover a law of the *Shariah* by the proof of reason. That

is by means of the deduction and logic of reason we discover that in a certain instance a certain necessary law or prohibitive law exists, or we discover what type of law it is and what type it is not.[186]

The binding testimony of reason is proved by the law of reason and also by the confirmation of the *Shariah*. The holy *Quran* advises man to listen carefully to the remarks, ponder on them and pick out the best of them. The *Quran* reads thus:

"Therefore give good news to my servants. Those who listen to the

remarks, then follow the best of them; those are they whom Allah has guided, and those it is who are the men of understanding."[187]

Another verse emphasizes thus:

"In case your fathers do not reason and do not follow the right path, be aware not to follow them."[188]

The *Quran* says that the philosophy of its existence is to urge man to ponder and understand. It says thus:

"Surely the Quran is revealed to urge you to apply your reason and intellect".[189]

The holy *Quran* places great emphasis on the power and application of reasoning. The *Quran* reads thus:

"Allah has revealed all the necessary signs for you so that you may apply your reasoning to understand."[190]

The *Quran* considers those who do not use their reason and intellect to be the worst of the creatures.[191] Along with the *Quran,* the *Sunnah* considers the application of reason and intellect to be incumbent

on every man as well. The holy Prophet says:

"The best friend for the man is his reason and intellect."[192]

The holy Prophet also emphasizes thus:

"The religion and the reason (aql) are inseparable."[193]

Imam Ali had defended his right of reasoning. When Muslims assembled to choose the third Caliph, Imam Ali had been asked if he promises as Caliph, to follow the *Quran*, the traditions of Mohammad and the conduct of ruling of the two late Caliphs, Abu Bakr and Umar,

Ali said no, I follow the *Quran*, the traditions of *Allah*'s Prophet Mohammad and my Reasoning and he persisted in for the third time that he should not follow the conduct of ruling of the two previous Caliphs but, his own reasoning.[194] This principle of the right of reasoning had been followed by Imam Al-Sadiq. Imam Sadiq said: *"We give you the Roots and you must branch out".*[195] And this statement of Imam Al-Sadiq is a proof of the need of reasoning. On the basis of the verse of the *Quran* that reads thus:

> *"Indeed we see the turning of your face to heaven, so we shall surely turn you to a qiblah which you shall like; turn then your face towards the Sacred Mosque, and wherever you are, turn your face towards it".*[196]

When the *Ka'bah* is in sight, one should face it in prayer, Shafii stresses, noting that when it is away or out of sight, one should pray in the direction of the *Ka'bah*, not *Ka'bah* itself. The Ka'bah's direction can be determined by the indications. The indicators, which point to the

direction, are the sun, the moon, the stars, the seas, the mountains and the wind. People exercise their reasoning power to know the right direction of the Ka'bah by means of certain indications.[197]

Arguments over *Husn* and *Qubh*

With the development of the systematic reasoning in law there arose the question of authority. It became an important point of discussion

in Islamic law. The problem is whether the good *(Husn)* or the evil *(Qubh)* of actions is determined by reason or by authority, i.e. the lawgiver. There are two major points of view about this question. The Mu'tazilah[198] maintain that the determinant of the good and evil of actions is reason.[199] Their contention goes that the *Shariah* commanded to do an action because it is good by itself, and prohibited an action because it is evil by itself. The actions are good or bad by themselves and not by the commandment or prohibition of authority. Hence reason is an obligating authority. There are a number of actions that are taken as good or bad on rational grounds. The knowledge about the creator of the universe, thankfulness to God for His bounties, saving the life of a drowning or a burning man is good actions by themselves. Ignorance about God, ingratitude to His bounties, doing injustice and telling a lie are actions condemned by human reason. The legal causes are not the real causes, which obligate or prohibit actions by themselves. Instead, they are

virtually symbols subject to change and abrogation. Reason, on the contrary, is an autonomous authority, which obligates or prohibits actions on the basis of their intrinsic values. Hence it is superior to the legal values or causes.[200]

On these grounds the Mu'tazilah did not accept any religious doctrine, tenet or a rule of law which ran counter to reason. They also substantiated their stand on the basis of such Quranic verses as ask man to

look into the portents of God in the universe and from the anecdote of Abraham who argued logically to prove the existence of God.[201] A person, according to them, who does not exercise his reason to believe in God in the absence of divine revelation, and passes away, will not get salvation and will go to hell.[202]

The Asharis,[203] hold that the values of the legal injunctions or moral values are not objective. There is nothing good *(Husn)* or bad *(Qubh) per se*. The good or evil of actions is known through authority. There is no intellectual ground for goodness or badness of divine things. Whatever God commands is good, and whatever He forbids is evil. Hence it is the authority (the *Shariah)* which obligates or prohibits an action, and not reason. Reason plays no role in determining the goodness or badness of actions. The legal injunctions are therefore arbitrary; they are binding because they spring from authority. The *Shariah* is authority-based. The dictates of reason are not binding on God — a view contrary

to the stand of the Mu'tazilah.[204]

They maintain that this point of view is also justified on the basis of the *Quran*. The Asharis adduce such verses from the *Quran* as indicates that God will not punish any person or nation unless He sends a Prophet (S.A.W.) to them.[205] They are of the opinion that in the absence of revelation if a man does not exercise his reason to have his faith in God, and consequently dies, he will not be punished by God, even if he

believed in polytheism. Since orthodoxy was influenced by Asharism, Islam ultimately became the religion of authority. The tremendous emphasis on authority divested the Muslims of the Medieval period of rational thinking and approach to Islam. Asharism held, in its radicality, that it was permissible for God to forbid an action which He commanded to do and vice versa.[206] The advocates of this view were questioned whether God could prohibit prayer, *Zakat* and fasting. They replied that it would have been permissible for Him if He had done so.[207] The Mu'tazilah maintain that reason obligates or forbids actions by itself, just as man creates his actions by himself. But orthodoxy rejected this view. The determining authority, according to them, is God alone. Reason is an instrument of recognition of what is good or evil, or what is obligatory and forbidden. As God is the real authority through the Prophet (S.A.W.), He is also a guide and authority through reason. Reason, however, does not stand as a self-sufficient authority, even if it is combined with

traditional authority (*dalil sam'i*). In case reason is not combined with traditional authority, it stands only as an instrument and cannot obligate anything by itself. If it is combined with traditional authority, the act of obligation will be attributed to the traditional authority and not to reason.[208]

> *"Among the Islamic scholars who argued against the stand of the Mu'tazilah Imam Razi is the most important. Fakhr Al-Din Al-Razi (d. 606 A. H) maintains that God has not taken into account any*

public interest in divine injunctions. Arguing from verse 5:64 he remarks that the verse shows that the revelation enhanced the contumacy and unbelief of the most infidels. If the actions of God had been based on certain motives, and public weal were considered in His commands, He would have surely discontinued the revelation, particularly after realizing the consequences".[209]

Al-Razi refutes the stand of the Mu'tazilah that all divine injunctions have some purpose and objective behind them. They base themselves on the Quranic verse 14:1 which shows that the Quran was revealed for the guidance of the people.[210] This is not a correct view in the opinion of Al-Razi. He contends that if a person adopts some means to achieve his end, it signifies that he needs the means and he cannot secure his objective without it. How can it be true of God? He needs no means to achieve the end. The verse in question therefore should be interpreted in a different way. It is already established that actions of God have no motives.[211]

It may be pointed out that Al-Razi's argument from verse 5:64 is

untenable. The *Quran* never tells us that the divine revelation causes the enhancement of contumacy and unbelief of the infidels. Instead, it portrays their perverted nature and persistent obstinacy. Similarly, his refutation of the Mu'tazilah does not hold well. We observe in our daily life the causal connection in the functioning of nature throughout the whole universe. Moreover, no action of man is purposeless and futile. It is ridiculous to think about God that His actions are arbitrary, having no objective behind them. It goes without saying that God has sent down

revelation for the guidance and welfare of mankind.

The perpetual century-long discussions of the Islamic scholars is based on the fact that the Asharis did not believe in originality of good *(Husn)* independent of the lawgiver's (God's) will. Therefore, the good or the evil can not be determined or defined before God has desired so. Such an attitude resulted in no more than searching for textual sources whereas the Mu'tazilah believed in the originality of the good or the evil and argued that the good or the evil exists independently of the will of any authoritative lawgiver. All the modern legislation, the legal systems and free *Ijtihad* are, of course, based on the views of the Mu'tazilah. The development of the Islamic legal system has also been based on their dynamic views.

Since the *Quran* puts so much emphasis on rational approach to the injunctions, a number of the traditions of the Prophet were not accepted as genuine by some of the Companions. Ibn Abbas, for example, is reported to have rejected a tradition, which suggests that ablution becomes void by eating anything cooked with fire. He asked the

narrator whether one should perform the ablution again, if one washes with hot water. Similarly, he is reported to have questioned the tradition which says that if anyone carries the bier *(janazah)*, he should perform ablution, because it becomes void by touching it. He asked the reporter whether the ablution becomes void by carrying a few wood sticks.[212] Aishah also is reported to have doubted such traditions as conflicted with reason. This happened in the early decades of Islam.[213]

In the wake of the development of the science of traditions,

differences emerged among the scholar on the possibility of questioning any genuine prophetic tradition by recourse to reason. The Hanafis formulated a principle that if a tradition contradicts reason, but it is narrated by a Companion who has deep understanding in law, it will be recognized. In case it is reported by a Companion who is devoid of legal acumen, it will be rejected. On the basis of this principle they rejected a number of traditions reported by Abu Hurayrah, but validated many others transmitted by the Companions who were taken as lawyers by them.[214]

Shafii, though he criticized a number of traditions logically, validated all such traditions as were sound according to the principles formulated by him.[215]

> *"Malik had his own criterion to judge the traditions. He, however, did not give much weight to reason in this respect. In an attempt to reconcile between reason and authority, the Islamic scholar, Ibn Taymiyah also took an important step towards the reconciliation.*

> *He argued that there was no conflict between reason and tradition. He devoted a voluminous work to establish this theory".*[216]

Malik maintains that there is a harmony between the divine law and reason. The rules of law based on the *Quran* and the *Sunnah* never conflict with reason. No true dictates of reason contradict the revealed law except the doubtful and confused points. Such points are based on sheer speculation bearing ambiguous meaning and words. But when such equivocal points are examined, it is revealed that all that which appeared

to conflict with the law was sophistication and not rational demonstrative proofs.[217]

A thing being legal (*sharei)* is not antithetical to being rational *(aqli)*. One point can be legal as well as rational. The legal is opposite to heretical (*bid'a)* and not to rational. The quality of legality is praised whereas the quality of heresy is condemned. Sometimes a legal point may be traditional and sometimes rational. The legality of a point means that the law has established and disclosed it. A legal question may be understood by means of reason, but it is revealed by means of the law. Thus a question may be legal and rational because it is understood by reason and revealed by the law.[218] This can be illustrated by a variety of proofs from the *Quran*. They are, for instance, the unity of God, truthfulness of the Prophets, divine attributes and the life hereafter. They are legal as the *Quran* mentions them. They are rational because their truth is understood by reason.[219] To exclude the legal from the rational

and from the traditional is wrong. As the *Quran* uses rational as well as traditional proofs, both are legal. They may be classified as legal-traditional and legal-rational.[220] Further, Ibn Taymiyah observes that it is not necessary that anything, which is rationally wrong, must be recognized as unbelief by the law. Similarly, anything, which is rationally right, may not be recognized necessarily in law.[221]

What the *Quran* says about the use of reason in understanding the

religion must be taken as the criterion for answering questions and clarifying any ambiguity. The *Quran* addresses itself to human mind. It does not require that people may believe in its teaching blindly. It appeals to both believers and infidels to "reflect", "understand", "ponder", and use their reason and sense and not to lock their hearts while believing in the divine message. It appears that the *Quran* does not want a blind faith before entering the fold of Islam.[222] Instead, it inveighs against the blind allegiance to ones forbears.[223] Its repeated pronouncements like "haply you will understand", what, have you no reason? "Unto a people who understand"[224], Succinctly indicate that its teachings, moral or legal, must be purposive and logical.

> *"The Quran invokes reason before it invites man to have a faith. We find a multitude of verses, which provide a discursive reasoning for the unity of God. The most significant of them is the verse which substantiates this belief by saying that the whole universe would*

> *have perished if there existed several Gods beside Allah".*[225]

The *Quran* also expatiates on the arguments for the truthfulness of the Prophet (S.A.W.). It refers to his pious life which he had led in the society before the revelation came down to him.[226] Belief in the life hereafter has also been explained logically in the *Quran* at greater length. It is replete with the argumentation about the resurrection of man and his accountability. The *Quran* exhorts man to understand the spirit and

purpose of these injunctions. The prayer and many other forms of rituals enunciated by the *Quran* aim at the good and benefit of man himself. Hence the *Quran* is not content to pronounce certain laws; in a number of cases it also gives their teleological explanation. While prescribing prayer it points out that the prayer forbids indecency and dishonour. Man remembers God by the offering of prayer — a sort of communion of man with God.[227] The purpose of fasting is that man may become God-fearing and pious in his life.[228] *Zakat,* though not a ritual, was prescribed in order to arrest the concentration of wealth in the hands of the few and to generate and economic equilibrium in Muslim Society.[229] It also gives an explanation of *Hajj* by saying that they may witness things profitable to them and mention God's name.[230]

The *Quran* explains certain principles about its conception of law. The legal injunctions prescribed in the *Quran* are meant for "the ease and comfort of man" and there is "no intention of hardship" to him by

them.[231] Moreover, the Quranic legislation takes into consideration the nature and faculties of human and the social conditions.[232] The aim of the *Quran* in its legal prescriptions, though the legal element, in the strict sense of the term, is small in quantity, is the common weal and the good of man. It aims at building up an ideal man and society based on morality more than on law. Hence sometimes it gives an explanation of its injunctions in terms of reason and purpose, though an absolute authority is not required to do so. This is why the genre and tone of the Quranic

legislation is general and rational so that it may be adaptable to the changing conditions. That is the reason why the understanding of the Islamic law becomes necessary before its compliance. One can obey the law in a better way if one understands its purpose, too. The Quranic teachings, law and pronouncements are not arbitrary; they are to be followed with careful and deep understanding. The eternity of the Quranic message requires that emphasis should also be laid on the spirit, value, and ethos of divine commands along with their letters. The injunctions are obviously limited, while the situations are unending. The law therefore is to be applied by evaluation and not by literal adherence.

Aspects of Reasoning

The issues of the principles related to reason are in two parts. One part relates to the inner meaning or philosophy of the commandments. The other part is related to the requirements of the commands. The first part, one of the obvious elements of Islam is that the *Shariah* of Islam exists in accordance to what comprises the best interests of human beings. That is, each command (*Al-Amr*) of the *Shariah* is due to the necessity of meeting

the best interest of human beings and each prohibition (*Al-Nahy*) of the *Shariah* arises from the necessity of abstaining from their worst interests, i.e. the things that corrupt them.[233]

Almighty God, in order to inform them so to what comprises their best interests, in which lies their happiness and prosperity, has made a chain of commands obligatory (*wajeb)* or desirable *(mandub)* for them. And so as to keep human beings away from all that which corrupts them, He prohibits them from those things. If the best interests and forms of

corruption did not exist, neither command nor prohibition would exist. If the reasoning of human beings became aware of those best interests and those forms of corruption, they are such that it would devise the same laws that have been introduced in the *Shariah*.[234]

This is why the jurists consider that, because the laws of the *Shariah* accord to and are centered on the wisdom of what is best for human beings. Wherever laws of reason exist, so the corresponding laws of the *Shariah* also exist. And wherever there exists no law of reason, there exists no law of the *Shariah*. The holy Prophet has guided man thus by saying that "reason and religion are inseparable".[235]

Thus, if we suppose that in some case no law of the *Shariah* has been communicated to us, particularly by means of narration, but reasoning absolutely traces with certitude the particular wisdom of the other judgments of the *Shariah,* then it automatically discovers the law of the *Shariah* in this case too. In such instance reasoning forms a chain of logic: First, in such and such a case, there exists such and such a best

interest which must necessarily be met. Second, wherever there exists a best interest that must necessarily be met, the Legislator of Islam is definitely not indifferent, rather He commands the meeting of that best interest. Third, so, in the quoted instances, the law of the *Shariah* is that the best interests must be met.[236]

For instance, in the time of the Holy Prophet (S.A.W.) there was no opium or addiction to opium, and we, in the narrated testimonies of the *Quran* and the *Sunnah* and consensus, have no testimonies particular

to opium one way or the other, yet due to the obvious proofs of experiencing opium addiction, its corruption has been experienced. Thus, with our reasoning and knowledge, and on the basis of "a form of corruption which is essentially to be avoided", and because we know that a thing which is harmful for health is considered corruptive in the view of the *Shariah,* we have realized that the law about opium is that addiction to opium is forbidden.[237]

Similarly, As Motahhari maintains if it becomes established that smoking tobacco definitely causes cancer, a *mujtahid*, according to the judgment of reasoning will establish the law that smoking is forbidden according to the Divine Law.[238]

The jurists call reason and the *Shariah* inseparable from each other. They say that whatever law is established by reason is also established by the *Shariah.*[239] However, this of course is provided that reasoning traces in an absolute, certain and doubtless way those best interests which must be attended to and those worst interests or forms of

corruption that must be shunned. If not, the name reasoning cannot be given to the use of opinion, guesswork and conjecture. Analogy for this very factor is void for it is more opinion and imagination rather than reasoning and certitude.[240] Therefore, Some *Shia* jurist have argued that whatever is a law of reason is a law of the *Shariah* and whatever is a law of the *Shariah* is a law of reason.[241] Discussing the second part i.e. the requirements of the commands, we know that whatever law made by whatever sane law-maker possessing intellect naturally has a chain of

essentials that must be judged according to reason to see if, for example, that particular law necessitates a certain other law, or if it necessitates the negation of a certain other law.[242]

A clear example is the concept of "leading to an obligatory" (*Moqaddamah-Al-Wajib*).[243] This forms one of the principles of the *Osul* treatises, comprising some of the most typically convoluted discussions on the definitions and varieties of the preliminaries of an act.[244] The *Osulis* define *Moqaddamah* as the precondition of an act. They have numerous ways for dividing such preconditions. One is to divide them into internal and external, the internal being the inherent or essential components of an act, and the external being the outside factor causing or facilitating the performance of an act. As always, such divisions are rather abstract, and sometimes extremely difficult to differentiate. But the division which is of interest to us is that between a *Moqaddamah* which is explicitly required by the *Shariah* (such as ablution for prayer), and one which is not so but can become obligatory if another obligatory

act depends on it. For instance, horseracing and arrow throwing are normally permissible or recommended practices, but if it becomes necessary for Muslims to wage *jihad* (holy war), the same acts become obligatory by implication. In the same way the adoption of a constitution becomes obligatory for Muslims when it is a precondition of their welfare, security or progress.[245] The concept of obligatory preliminary is a device to circumvent any objection to law-making for which there is no specific canonical license.

Another example is where at one time a person is not able to do two things that are obligatory for him to do because they must be done separately. Like at the same time it is obligatory to pray one's obligatory ritual prayers, it is also obligatory, assuming it has become unclean by blood, etc., to clean the mosque. So the performing of one of these two duties demands the neglect of the other. Now, does one command necessitate and contain the prohibition of the other? Do both the commands include this prohibition?[246] If two things are obligatory for us while it is not possible for us to perform both of them at once, so that we have no option but to choose only one of them, then if one of the two is more important, we must definitely perform that one.[247] This brings us to another issue. Is our duty in regards to the important altogether lapsed by our duty in regards to the more important or not? For example, two men are in danger of their lives and it is only within our means to save one of them, and one of them is a good person who works for others while the other is a corrupt man who only troubles others, but whose life, all the

same, is still sacred. Naturally, we must save the one who is good and who helps others whose life is more valuable to society than the life of the other. That is, to save him is more important while to save the life of a lesser degree of importance.[248]

In the above mentioned examples, it is reasoning with its precise calculations which clarifies our specific duties, and in the study of Principles these issues and issues like these are all discussed and the way of properly determining the answers is learned. (*Asl-Al-Ahamm-wa-Al-*

Mohemm).

The jurists refer to the Islamic sources for their deducing of the laws of the *Shariah*. Sometimes in his referrals the jurist is successful and sometimes he is not. That is, sometimes (of course predominately) he attains the actual law of the *Shariah* in the form of certitude or a reliable probability, which means a probability that has been divinely endorsed. In such cases, the duty becomes clear and he realizes with certitude or with a strong and permissible probability what it is the *Shariah* of Islam demands. Occasionally, however, he is unable to discover the duty and the Divine Law from the sources, and he remains without a defined duty and in doubt.[249]

In these cases what must be done? Has the Legislator of Islam or reason or both specified a certain duty in the case of the actual duty being out of reach? And if so, what is it? The answer is that yes, such a duty has been specified. A system of rules and regulations has been specified for these types of circumstances. Reason too, in certain circumstances, confirms the law of the *Shariah,* for the independent law of (aware)

reasoning is the very same as the law of *Shariah,* and in certain other instances it is at least silent.[250]

In the part of Principles which concerns *Ijtihad,* we learn the correct and valid method of deducing the laws of the *Shariah,* and, in the part concerning the principles of Application, we learn the correct way of benefiting from the rules that have been introduced for the kind of situation mentioned above, and of putting them into practice.

The general principles of application that are used in all the

sections of Islamic Jurisprudence are four: 1) The principles of Exemption *(bara'ah)*; 2) The Principle of Precaution *(ehtiat)*; 3) The Principle of Option *(takhir)*; 4) The Principle of Continuity *(esteshab)*.[251]

Bara'ah means freedom from obligations until the contrary is proved. No person may, therefore, be compelled to perform any obligation unless the law requires so. For example, no one is required to perform the pilgrimage *(hajj)* more than once in his lifetime, because the *Shariah* imposes no such liability. Similarly, no one is liable to punishment until his guilt is established through lawful evidence.[252]

The Principle of Option *(takhir)* is that we have the option to choose one of two things, whichever we like. *Esteshab* is the principle that which existed remains in its original state - or masters the doubt that opposes it - while the doubt is ignored. *Ehtiat* is the principle that it is possible for both possible duties to act.[253] The question may arise in what circumstances the *bara'ah* applies and in what circumstances the *ehtiat*,

takhir and *esteshab* apply. Each of these has its particular instance.[254]

> *"Sometimes the jurist remains unable to deduce the law of the Shariah and is unable to trace a particular necessity and remains in a state of doubt, and it might be that the doubt is linked to some general or broad knowledge. The doubts of the jurists about an obligation either are linked to some general knowledge or are primary doubts. If they are linked to some general knowledge it is either possible to act in accordance to ehtiat, meaning that it is possible for both possible duties to be performed, or it is not*

possible to act in precaution. If ehtiat is possible, it must be acted in accordance with, and both of the possible duties must be performed, and such an instance calls for the Principle of ehtiat. Sometimes, however, precaution is not possible, because the doubt is between obligatory and forbidden".[255]

Assuming that our doubt is a primary doubt not linked to any general knowledge, the instance is either that we know the previous condition and the doubt is as to whether the previous law stands or is changed, or the instance is that the previous condition has not been established either. If the previous condition is established the situation calls for the Principle of *esteshab* and if the previous condition is not established the situation calls for the Principle of *bara'ah*.[256]

These four principles are not particular to *Mujtahids* for understanding the laws of the *Shariah*. They are also relevant to other subjects. People who are not *Mujtahids* can also benefit from them at the time of certain doubts. For example, imagine that an unweaned baby boy takes

milk from a woman other than his mother, and when that boy grows up, he wants to marry the daughter of that woman, and it is not known whether as a baby he drank so much milk from that woman's breast that he is to be counted as the "wet-nurse son" of that woman and her husband or not. That is, we doubt whether the boy drank milk from her breast fifteen consecutive times, or for a complete day and night, or so much that his bones grew from her milk (in which cases the boy becomes counted as her son and thus similar to the daughter's brother are

forbidden for her). This instance calls for the Principle of Mastery, because before the boy drank the woman's milk he was not her "wet-nurse son", and now we doubt whether or not he is. By the Principle of Mastery, we conclude that there is no question of a wet-nurse relationship.[257]

A *mujtahid* must, as the effect of frequent application, have great power of discernment in the execution of these four types of principles; discernment that sometimes is in need of exactitude, and if not he will encounter mistakes. Of these four principles, the Principle *esteshab* has been uniquely established by the *Shariah*.

For the *Shafiis* and the Hanbalis, *esteshab* denotes continuation of that which is proven and the negation of that which had not existed.[258] *Esteshab,* in other words, presumes the continuation of both the positive and the negative until the contrary is established by evidence. In its positive sense, *esteshab* requires, for example, that once a contract of sale is concluded, it is presumed to remain in force until there is a change.

Thus the ownership of the purchaser, and the marital status of the spouses, are presumed to continue until a transfer of ownership, or dissolution of marriage, can be established by evidence. Since both of these contracts are permanently valid under the *Shariah* and do not admit of any time limits it is reasonable to presume their continuity until there is evidence to the contrary. A mere possibility that the property in question might have been sold, or that the marriage might have been dissolved, is not enough to rebut the presumption of *esteshab*.[259]

"Esteshab also presumes the continuation of the negative. For example, someone purchases a hunting dog from another one with the proviso that it has been trained to hunt, but then the purchaser claims that the dog is untrained. His claim will be acceptable under esteshab unless there is evidence to the contrary".[260]

Because *eteshab* consists of a probability, namely the presumed continuity of the *status quo ante,* it is not a strong ground for the deduction of the rules of *Shariah*. Hence when *esteshab* comes into conflict with another proof, the latter takes priority. When the jurist is asked about the ruling of a particular case, he must first search for a solution in the *Quran*, the *Sunnah* and consensus of opinion. If a solution is still wanting, he may resort to *esteshab* in either its positive or negative capacities. Should there be doubt over the non-existence of something, it will be presumed to exist, but if the doubt is in the proof of something, the presumption will be that it is not proven. With regard to the determination of the rules of law that may be applicable to a particular

issue, the presumption of *esteshab* is also guided by the general norms of the *Shariah.*[261]

"Esteshab is supported by rational (aql) evidences. Reason tells us that in God's order of creation and in popular custom, it is normal to expect that pledges, contracts and laws will probably continue to remain operative until the contrary is established by evidence. It is equally normal to expect that things, which had not existed, will probably remain so until the contrary is proved. When reasonable

men (oqala) and men who comply with the accepted norms of society, have known of the existence or non-existence of something".[262]

From the viewpoint of the nature of the conditions that are presumed to continue, *esteshab* is divided into three types, as follows: 1) Presumption of original absence (*esteshab-e-adam)* which means that a fact or rule of law which had not existed in the past is presumed to be non-existent until the contrary is proved. Thus a child and an uneducated person are presumed to remain so until there is a change in their status.[263]

2) Presumption of original presence (*esteshab-e-Wojob)* variety of *esteshab* takes for granted the presence or existence of that which is indicated by the law or reason. For example when the presumption of original presence, the purchaser is presumed liable to pay the purchase price by virtue of the presence of the contract of sale until it is proved that he has paid it. By the same token, a husband is liable to pay his wife the dower (*mahr)* by virtue of the existence of a valid marriage contract.

In all these instances, *esteshab* presumes the presence of a liability or a right until an indication to the contrary is found. The Islamic Jurists are in agreement on the validity of this type of *esteshab,* which must prevail until the contrary is proved.[264]

3) *Esteshab-e-vasf,* or continuity of attributes, refers, for instance, to the presumption that clean water will remain clean until the contrary is proven. Though differing in the detailed enforcement of the first two types of *esteshab,* the jurists are unanimous on their validity. As

for the three types of *esteshab,* which relates to the attributes, whether new or well established, it is a subject on which the jurists have disagreed. The Shafii and the Hanbali schools have upheld it absolutely, whereas the Hanafi and Maliki schools accept it with reservations.[265]

The principle of *bara'ah* has important application in the courts of law. According to this principle, any one accused of a charge is considered innocent unless his accusation is proved.[266]

In law courts where there is doubt about a previously undoubted case, *esteshab* is often used. For instance, regarding the ownership of a property, if the property was in the possession of a person in the past but presently we are in doubt about his ownership, his right of possession of that property holds valid until the contrary is proved.

Defined as a principle of evidence, *esteshab* mainly establishes or rebuts the facts, and for this reason it bears greater relevance to the rules of evidence. The application of *esteshab* to penalties and to criminal law

in general is to some extent restricted by the fact that these areas are mainly governed by the definitive rules of *Shariah* or statutory legislation. The jurists have on the whole advised caution in the application of penalties on the basis of presumptive evidence only. Having said this, however, the principle of the original absence of liability is undoubtedly an important feature of *esteshab* which is widely upheld not only in the field of criminal law but also in constitutional law and civil litigations generally. This is perhaps equally true of the principle

of *baraah,* which is an essential component of the principle of legality, also known as the principle of the rule of law. This feature of *esteshab* is once again in harmony with the modern concept of legality in that permissibility is the norm in areas where the law imposes no prohibition.

Urf

The collective practice of a large number of people is normally denoted by *Urf.* Thus the habits of a few or even a substantial minority within a group do not constitute "*Urf*".[267] *Urf* is defined as recurring practices which are acceptable to people of sound nature. This definition is clear on the point that custom, in order to constitute a valid basis for legal decisions, must be sound and reasonable. Hence recurring practices among some people in which there is no benefit or which partake in prejudice and corruption are excluded from the definition of *Urf.*[268]

The *Quran* specifies the importance of *Urf* in the text found in

Surah-Al-Araf which reads thus:

"Exercise forgiveness, enjoin "Urf" and bear with the ignorant".[269]

According to this Surah *Urf* is clearly upheld in the *Quran* as a proof of *Shariah* and an integral part of it. As ignoring the prevailing *Urf* is likely to lead to inflicting hardship on the people, the text in *Surah Al-Hajj* which reads thus:

"God has not laid upon you any hardship in religion".[270]

This is an indirect authority on the validity of *Urf.*

Despite the importance attached to *Urf* in the *Shariah*, some Islamic scholars, especially in the West, have maintained that *Urf* does not hold a prominent position in the *Shariah*. For example, Coulson maintains thus "it will be evident from the classical doctrine of the sources of law that custom (*Urf*) per se had no binding force in Islamic legal theory and within the framework of the recognized *Osuli Urf* operated as a principle of subsidiary value". In fact, Coulson considers the role of *Urf* in Islamic legal theory very limited. Coulson's impression of *Urf* is not baseless.[271] The Islamic jurists have also had hot debates regarding the authoritativeness of *Urf*. Allameh Sadr discusses the issue of *Urf* under the title of *Al-taqrir*. He defines *taqrir* as the silence of the Prophet or Imam as in regard of a definite action which takes place in the presence of him or which comes to his ear - a silence which reveals his (*Al-taqrir)* tacit consent (approval) of it and its validity in Islam.[272]

He maintains that *Al-Taqrir* is of two kinds because at one time it will constitute a *taqrir* for a definite action, which an individual carries

out such as when one drinks beer in front (in the presence) of the Prophet (S.A.W.) and the Prophet (S.A.W.) keeps silence. This silence on the part of the Prophet (S.A.W.) reveals the permission of the drinking of it in Islam. At another time it will constitute a *taqrir* for a common action, frequently carried at by the people in their usual life. Such as when we learn from the usual practice of the people, during the Islamic legislative age of extracting mineral riches from the bowels of the earth and owning it on the ground of their having extracted these riches, the silence and non-

objection of the *Shariah* to this usual practice will be considered a (consent) *taqrir* in respect of that practice and will constitute a ground of Islam's sanction to individuals to extract from the bowels of the earth its mineral riches and to own them. It is to this that the name *Al-Urf Al-Amm* or *surat Al-Aqlaiyyah* (common usage, or practice of the common people) is applied in juridical discussion. Recourse to it, in fact reveals *Shariah* agreement with a practice common contemporaneously with the age of legislation by way of the non-occurrence of prohibition against it from the *Shariah;* for if the *Shariah* did not agree with that practice which was contemporaneous with it, it would have forbidden that practice. So the absence of the *Shariah's* prohibition against it constitutes its permissibility.[273]

This mode of reasoning depends upon a number of things: Firstly, the contemporaneous existence of that practice with the age of Islamic legislation should be established with historical certainty; for it were found that the practice obtained at later date than its being

contemporaneous with the age of legislation then the silence of *Shariah* in respect of it would not constitute *Shariah's* approval of it. Secondly, the absence of the issuance of prohibition by the *Shariah* against that practice should be established with certainty absence of its prohibition would not be deemed sufficient until the investigator establishes the absence of the issuance of the prohibition in respect of that practice, otherwise he will have no right to declare Islam's sanction of that practice, since it is probable the *Shariah* might have prohibited it.

Thirdly, all the objectively satisfied circumstances and conditions should have been obtained by a personal observation since it is possible that some of these circumstances and conditions may have affected the sanction of that practice and the non-prohibition of it. And when we have drawn up and methodically arranged with scrupulous exactness all the circumstances and conditions which surround that practice which existed contemporaneously with the age of legislation, it will be possible for us to discover from *Shariah's* silence, *Shariah's* permission of that practice when found within those circumstances which we have drawn up and arranged with scrupulous exactness.[274]

"Some other Islamic jurists argue that Urf is not an independent proof in its own right and that it has not played a significant role in the development of the Shariah".[275]

However, the reluctance of the Islamic jurists in recognizing *Urf* as a proof has been partly due to the circumstantial character of the principle, in that it is changeable upon changes of conditions of time and place. This would mean that the rules of *fiqh* which have at one time been

formulated in the light of the prevailing custom would be liable to change when the same custom is no longer prevalent. The different *fatwas* that the later Islamic Jurists of different schools have occasionally given in opposition to those of their predecessors on the same issues are reflective of the change of custom on which the *fatwa* was founded in the first place. In addition, since custom is basically unstable it is often difficult to ascertain its precise terms. These terms may not be self-evident, and the frequent absence of written records and documents might add to the

difficulty of verification. The issue has become even more complex in modern times. Owing to a variety of new factors, modern societies have experienced a disintegration of their traditional patterns of social organization. The accelerated pace of social change in modern times is likely to further undermine the stability of social customs and organizations. The increased mobility of the individual in terms of socio-economic status, massive urbanization and the unprecedented shift of populations to major urban centres, and so forth, tend to interfere with the stability and continuity of *Urf*.

Despite the aforestated conditions, the careful survey of the application of *Urf* verifies the point that the *foqaha* are on record as having changed the rulings of the earlier jurists which were based in custom (*Urf*) owing to subsequent changes in the custom itself.

The Islamic jurists have generally accepted *Urf*, though reluctantly, as a valid Quranic commentators have referred to *Urf* in determining the precise amount of maintenance that a husband must provide for his wife. This is the subject of *sura Al-Talaq*[276] which provides: *"Let those who possess the means pay according to their means"*. In this *ayah*, the *Quran* does not specify the exact amount of maintenance, which is to be determined by reference to custom. Similarly, in regard to the maintenance of children, the *Quran* only specifies that this is the duty of the father, but leaves the quantum of maintenance to be determined by reference to custom (*Al-Baqarah*).[277]

> *"The Shariah has, in principle, accredited approved custom as a valid ground in the determination of its rules relating to halal and haram. This is in turn reflected in the practice of the foqaha, who*

have adopted Urf, whether general or specific, as a valid criterion in the determination of the ahkam of Shariah".[278]

The rules of *fiqh* which are based in juristic opinion (*ra'y)* or in speculative analogy and *Ijtihad* have often been formulated in the light of prevailing custom; it is therefore permissible to depart from them if the custom on which they were founded changes in the course of time. The rules of *fiqh (Ijtihad)* are, for the most part, changeable with changes of time and circumstance. To deny social change due to recognition in the determination of the rules of *fiqh* would amount to exposing the people to hardship, which the *Shariah* forbids. Sometimes even the same *mujtahid* has changed his previous *Ijtihad* with a view to bringing it into harmony with the prevailing custom. It is well-known, for example, that Imam Al-Shafii laid the foundations of his school in Iraq, but that when he went to Egypt, he changed some of his earlier views owing to the different customs he encountered in Egyptian society. On the whole, the Islamic jurists have accepted *Urf* as a valid basis of *Ijtihad.*[279]

Conclusion

Four types of flexibility have been identified in the *Shariah*. Firstly, the primary source of the Islamic law (the *Quran*) is, in itself, flexible on the basis of the analysis that the Quranic legislation leaves room for flexibility in the evaluation of its injunctions. The *Quran* is not specific on the precise value of its injunctions, and it leaves open the possibility that a command in the *Quran* may sometimes imply an

obligation, a recommendation or a mere permissibility. Commands and prohibitions in the *Quran* are expressed in a variety of forms, which are often open to interpretation and *Ijtihad*. The question as to whether a particular injunction in the *Quran* amounts to a binding command or to a mere recommendation or even permissibility cannot always be determined from the words and sentences of its text.

Secondly, each individual source of the Islamic law has the authority to abrogate its previous decisions by passing new laws. For example, the *Quran* abrogates its former verdicts when new circumstances require a different and an appropriate solution to a new problem. The decisions made through *Ijma* can also be annulled by the decisions through *Ijma* of later generations owing to the changing circumstances.

Thirdly, each individual source of Islamic law brings about flexibility for the other through specification, expansion or interpretation. As circumstances change new methods and devices are needed to modify

the previous source to adapt to new conditions. As a result, initially the *Sunnah* took up the role of interpreting the *Quran*. On the same bases *Urf* interprets the *Sunnah* and *Ijma* interprets the *Quran*, etc.

Finally, the examination of the Islamic sources of law in the context of time and space leads to the conclusion that the element of time and space imparts the greatest flexibility to these sources. The emergence of the science of *Asbab Al-Nuzul*, which explains and examines the

events, which led to the revelation of a particular verse, was the outcome of this development.

For the Islamic sources of law, *Ijtihad* is to be viewed as the supreme dynamic device when we deal with imparting dynamism and flexibility to *Shariah* owing to the necessities of time and space. *Ijtihad* bridges between all the sources of law and the everyday needs of the Islamic society and its application has been absolutely necessary to develop the Muslim law. The analysis presented makes it clear that all the Islamic sources stand in need of *Ijtihad* in order to be practically exercised. For example, as the most part of the *Sunnah* has been narrated and transmitted in the form of solitary or *Wahed* and only a small portion of the *Sunnah* has been transmitted in the form of *Mutawatir*, the *Sunnah*, itself stood in need of *Ijtihad* in order to be practically exercised. The same is true with the rest of the sources. Making decisions through any one of the other sources also required the practice of *Ijtihad*.

Notes:

1 Iqbal Mohammad, *The reconstruction of religious thought in Islam*, Dehli, 1975, P.165.

2 Ibid, PP. 171-172.

3 Ibid, P. 172.

4 Sadr, Mohammad Baqir, *Iqtisaduna*, Qom 1969, PP. 414-423.

5 "There are two common words for "interpretation", namely *tafsir* and *ta'wil*. The latter is perhaps closer to "interpretation", whereas *tafsir* literally means "explanation". "Allegorical interpretation" is an acceptable equivalent of *ta'wil*. *Tafsir*

basically aims at explaining the meaning of a given text and deducing a *hukm* from it within the confines of its words and sentences. The explanation so provided is, in other words, borne out by the content and linguistic composition of the text. *Ta'wil*, on the other hand, goes beyond the literal meaning of words and sentences and reads into them a hidden meaning which is often based on speculative reasoning and *Ijtihad*. The norm in regard to words is that they impart their obvious meaning. *Ta'wil* is a departure from this norm, and is presumed to be absent unless there is reason to justify its application. *Ta'wil* may operate in various capacities, such as specifying the general, or qualifying the absolute terms of a given text. All words are presumed to convey their absolute, general, and unqualified meanings unless there is reason to warrant a departure to an alternative meaning.

Juridically, *Ta'wil* and *Tafsir* share the same basic purpose, which is to clarify the law and to discover the intention of the Lawgiver in the light of the indications, some of which may be definite and others more speculative. Both are primarily concerned with speech that is not self-evident and requires clarification." (Allameh Tabatabaii, *Tafsir-Al-Mizan*, Vol.5, PP. 64-65)

meant a brave man. *Zaher* has been defined as a word or words which convey a clear meaning, while this meaning is not the principal theme of the text in which they appear. When a word conveys a clear meaning that is also in harmony with the context in which it appears, and yet is still open to *ta'wil*, it is classified as *Nass*. The distinction between the *Zaher* and *Nass* mainly depends on their relationship with the context in which they occur. *Zaher* and *Nass* both denote clear words, but the two differ in that the former does not constitute the dominant theme of the text whereas the *Nass* does." (Kamali, *Principles of Islamic Jurisprudence*, PP. 87-88.)

7 The *Mashhoor* is a *hadith, which* is originally reported by one, two or more Companions from the Prophet or from another Companion but has later become well known and transmitted by an indefinite number of people. It is necessary that the diffusion of the report should have taken place during the first or the

second generation following the demise of the Prophet (S.A.W.), not later. This would mean that the *hadith* became widely known during the period of the Companions or the Successors. For it is argued that after this period, all the *hadith* became well-known, in which case there will be no grounds for distinguishing the *Mashhoor* from the general body of *hadith*.

The Wahed, or single hadith is a hadith which is reported by a single person or by odd individuals from the Prophet. Shafi'i refers to it as khass, which applies to every report narrated by

one, two or more persons from the Prophet but which fails to fulfil the requirements of either the Motawater or the Mashhoor. It is a hadith which does not impart positive knowledge on its own unless it is supported by extraneous or circumstantial evidence.

Sahih or authentic when it is with a continuous all the way back to the Prophet (S.A.W.) consisting of upright persons who also possess retentive memories and whose narration is free both of obvious and of subtle defects. The *Hassan* differs from the *Sahih* in that it may include among its narrators a person or

persons who belong to the fourth, fifth or sixth grades on the foregoing scale. The weak, or *Zaif,* is a *hadith* whose narrators do not possess the qualifications required in *Sahih* or *Hassan."* (Kamali, *Principles of Islamic Jurisprudence,* PP. 70-82.)

8 The *Quran,* 5: 47, 48, 49, 50.

9 "It is true that exhortations to good and noble deeds are met within the Mecca revelation, and in the Madinah revelation faith is still shown to be the foundation on which the structure of deeds should be built, but, in the main, stress is laid on the former on faith in an Omnipotent and omnipresent God Who requites every good and every evil deed, and the latter deals chiefly with what is good and what is evil, in other words, with the details of the law. The second feature distinguishing the two revelations is that while that of Mecca is generally prophetical, that which came at

Madinah deals with the fulfillment of prophecy. Thirdly, while the Mecca revelation shows how true happiness of mind may be sought in communion with God, that of Madinah points out how man's dealing with man may also be a source of bliss and comfort to him". (Mohammad Ali, *The Religion of Islam*, P. 49).

10 The *Quran*, 7: 156; 23:4.

11 The *Quran*, 2:2.

12 Allameh Tabatabaii, *Tafsir-Al-Mizan*, Tehran, 1983, Vol.1,

PP. 4-15.

13 The *Quran*, 6:59.

14 Ibn Khaldun, *Moqaddamah, an Introduction to History*, New York, 1958, Vol. 3, PP. 2-15.

15 Ibid, PP. 5-8.

16 Al Khui, *Tafsir-Al-Bayan*, Najaf, 1964, PP. 24-27.

17 Mutahhari Mortaza, *Islam and the exegesis of the time*, Tehran, 1982, Vol. 1, P.371.

18 Shafii had dealt with the problem of abrogation at a great length in his work *Al-Risalah*. He maintains that the Quranic commands can be abrogated only by the *Quran*, and those of the *Sunnah* only by the *Sunnah*. He is opposed to the view that the *Sunnah* can abrogate the *Quran* and vice versa. In support of his view, he adduces the Quranic verse 2:106 which explicitly speaks, according to him, the abrogation of the *Quran* by the *Quran*. He argues that the Prophet was ordered by God to follow the revelation and not to change the *Quran* himself. He quotes several Quranic verses, which indicate that God alone, can change revelation. (Shafii, *Al-Risalah*, P.17)

19 The *Quran* 2: 109.

20 Ibid. 4: 15.

21 Allameh Tabatabaii, op.cit., Vol. 2, P. 47.

22 The *Quran*, 3: 7.

23 Allameh Tabatabaii, op.cit., Vol. 5, PP. 93-5.

24 Ibid.

25 The *Quran*, 6: 152-154.

26 Doi, Abdur Rahman, *Shariah: The Islamic Law*, London, 1984, PP. 22-26.

27 The *Quran*, 2: 233.

28 Ibid. 2: 236.

29 Ibid. 3: 159.

30 Ramadan Said, *Islamic law, its scope & equity*, London, 1961,

PP. 64-67.

31 The *Quran*, 3: 159.

32 Allameh Tabatabaii, op.cit., Vol. 5, PP. 92-94.

33 The *Quran*, 5: 6.

34 Malik, *Al-Muwatta*, Beirut, 1971, Vol. 2, P. 513.

35 Allameh Tabatabaii, op.cit., Vol. 5, PP. 47-73.

36 Enayat Hamid, *Modern Islamic Political Though*, University of Texas Press, PP. 160-161.

37 Ibid, PP. 82-101.

38 The *Quran*, 5: 92.

39 Jafari Mohammad, *Islamic Law*, Tehran, 1991, PP. 174-175.

40 Khorasani, *Kefayah-Al-Osul*, Tehran, 1961, Vol. 1, PP. 22-35.

41 Doi Abdur Rahman, op.cit., 1984, P. 23.

42 Seyyad Razi, *Nahaj-Al-Balaqah*, Tehran, 1996, Sermon No. 7.

43 Koleini, *Al-Kafi*, Vol.2, Beirut, 1985, P. 595-597.

44 The *Quran*, 7: 84.

45 Ibid. 11: 82.

46 The *Quran*, 2: 275.

47 Shatibi, *Muwafaqat*, Cairo, 1341 A.H, Vol. 3, P. 82.

48 The *Quran*, 5:104.

49 Mutahhari Mortaza, op.cit., P. 263.

50 Ibid, P. 247.

51 The *Quran*, 33: 60.

52 Ibid, 33: 61.

53 Ibid, 33: 30.

54 Ibid, 33: 31.

55 Ibid, 57: 10.

56 Ibid, 8: 41.

57 Ibid, 59: 7.

58 Ibid, 59: 8.

59 Ibid, 59: 9.

60 Ibid, 16: 126.

61 Ibid, 9: 5.

62 Doi, Abdur Rahman, op.cit., PP. 45-49.

63 At an early period the ancient Arab idea of *Sunna*, precedent or normative custom, reasserted itself in Islam. The Arabs were, and are, bound by tradition and precedent. Whatever was customary was right and proper; whatever the fore-fathers had done deserved to be imitated. This was the golden rule of the Arabs whose existence on a narrow margin in an unpropitious environment did not leave them much room for experiments and innovations which might upset the precarious balance of their lives. In this idea of precedent or *Sunna* the whole conservatism of the Arabs found expression. They recognized, of course, that a *Sunna* might have been laid down by an individual in the relatively recent past, but then that individual was considered the spokesman and representative, the leader *(imam)* of the whole group. The idea of *Sunna* presented a formidable obstacle to every innovation, and in order to discredit anything it was, and still is, enough to call it an innovation. Islam, the greatest innovation that Arabia saw, had to overcome this obstacle, and a hard fight it was. But once Islam had prevailed, even among one single group of Arabs, the old conservatism reasserted itself; what had shortly before been an innovation now became the thing to do, a thing hallowed by precedent and tradition, a *sunna*. This

ancient Arab concept of *Sunna* was to become one of the central concepts of Islamic law. (Schacht, *An Introduction to Islamic Law*, P. 17).

64 Doi, Abdur Rahman, op.cit., PP. 47-49.

65 Ibid, P. 48.

66 Mutahhari Mortaza, op.cit., PP. 15-23.

67 Jafari, op.cit., p. 124.

68 The linguistic sciences became technical discussions of the lexicographical meaning of words, the rules governing vowel

endings (*ira'b*), and style in the use of word combinations. Systematic works were written on these subjects. Formerly, these subjects had been habits with the Arabs. No recourse to oral and written transmission had been necessary with respect to them. When the state of affairs was forgotten, and these subjects were learned from the books of philologists, they were needed for the interpretation of the *Quran*, and the *Sunnah*, because the *Quran* and the *Sunnah* is in Arabic and follows the stylistic technique of the Arabs. (Ibn Khaldun, *The Muqaddimah*, Vol. 2, P. 444).

69 Mutahhari Mortaza, op.cit., PP. 15-23.

70 Ibid, PP. 21-27.

71 Ibid.

72 Allameh Tabatabaii, op.cit., Vol. 5, PP. 7-12.

73 Rahim, Abdur, *Principles of Mohammadan Jurisprudence*, London, 1960, PP. 55-78.

74 Ibid.

75 Mutahhari Mortaza, op.cit., P. 19.

76 Allameh Tabatabaii, op.cit., Vol.2, PP. 11-23.

77 Abu Zahrah Mohammad, op.cit., PP. 80-85.

78 Shawkani, *Irshad*, Cairo, 1973, PP. 42-48.

79 Khudari, Majid, *Osul-Al-Fiqh*, Cairo 1981, PP. 209-215.

80 Shawkani, *op*.cit., P. 47.

81 The *Quran*, 8: 6.

82 Ibid, 7: 155.

83 Ibid, 7: 155.

84 Ghazali Abu Hamid Mohammad, op.cit., Vol. 1, P. 86.

85 The *Quran*, 4: 58.

86 Sabuni, Abd Al-Rahman, op.cit., P. 31.

87 Shatibi, op.cit., P. 217.

88 One kind of *Quran* interpretation is traditional. It is based upon information received from the early Muslims. It consists of knowledge of the abrogating verses and of the verses that are

abrogated by them, of the reasons why a given verse was revealed, and of the purposes of individual verses. All this can be known only through traditions based on the authority of the men around Mohammad and the men of the second generation. The early scholars had already made complete compilations on the subject. The other kind of *Quran* interpretation has recourse to linguistic knowledge, such as lexicography and the stylistic form used for conveying meaning through the appropriate means and methods. This kind of *Quran* interpretation rarely appears separately from the first kind. The first kind is the one that is wanted essentially. The second kind made its appearance only after language and the philological sciences had become crafts. However, it has become preponderant, as certain *Quran* commentaries are concerned. (Ibn Khaldun, *the Muqaddimah*, P. 446).

89 The *Quran*, 16: 44.

90 Ibid, 3: 97.

91 Ibid, 2: 275.

92 Al-Hendi, *Kanz-Al-Umal*, Beirut, 1985, Vol. 7, P. 281.

93 Tabrizi Mohammad, op.cit., Vol. 1, P. 215.

94 Al-A'meli Horr, op.cit., Vol. 12, P. 422.

95 Al-Ashari, *Maqalat-Al-Isl-miyyin wa Ikhtilaf Al-Musallin*, Cairo, 1950, Vol. 2, P.251.

96 Al-Nahhas, *Kitab Al-Naskh wal-Mansukh fil-Quran-Al-Karim,* Cairo, 1323 A.H., P.5.

97 Al-Darimi, *Sunan,* Cairo, 1349 A.H., Vol. 1, P.145.

98 Al-Amidi, *Al-Ihkam fi Osul Al-Ahkam,* Cairo, 1914, Vol. 3, P. 213.

99 Mutahhari Mortaza, op.cit., P. 188.

100 The *Quran,* 2: 275.

101 Ibid, 24:2.

102 Ibid, 5: 38.

103 Al-Shafii, op.cit., PP. 17-18.

104 Mutahhari Mortaza, op.cit., P. 251.

105 Al-Shafii, op.cit., PP. 21-22.

106 Malik, *Al-Muwatta,* Cairo, 1951, Vol. 2, P. 265.

107 The *Quran,* 2: 275.

108 Ibid, 5: 38.

109 Allameh Tabatabaii, op.cit., P.335.

110 Imam Khomeini, *Tahrir-Al-Wasilah,* Tehran, 1982, Vol. 2, P.437.

111 Al-Shafii, *Kitab Al-Umm,* Cairo, 1324 A.H., Vol. VII, P. 245.

112 Sheikh Tusi, *oddah,* Tehran, 1954, P. 162.

113 Ibn Khaldun, op.cit., Vol. 2, 443-463.

114 The *Quran,* 8: 60.

115 Allameh Tabatabaii, op.cit., Vol. 5, PP. 338-339.

116 Al-Kolani, *A-Kafi,* Beirut 1985 , Vol. 2, P. 199.

117 The *Quran*, 58: 7.

118 Ibid, 53: 9.

119 Al-Shaybani, Mohammad b. Al-Hassan, *Al-Siyar Al-Kabir,* Cairo, 1995, Vol.1, PP. 252-53.

120 Shafii, op.cit., PP. 245-50.

121 Ibid.

122 Ibid.

123 Ibid.

124 Shafii, op.cit., PP. 5, 7, 16, 50, 66, 78.

125 Ibid., PP. 21, 24, 63, 66.

126 Ibid., PP. 21-25.

127 Ibid.

128 Mutahhari Mortaza, op.cit., P.291.

129 Schacht Joseph, op.cit., P. 30:

"There has been some differences of opinion as to the exact definition of *Ijma*. According to *Shafii*, *Ijma* is "a complete consensus of all the learned on a certain point of law".

According to him, there should not be a single opinion against the consensus. *Ibn Jarir, Al-Tabari* and *Abu Bakr Al-Razi* regard even a majority decision as *ijma*. The position of *Ahmad ibn Hanbal* is that when he says " we know of no opposition to this view" that means that he regards that decision as *Ijma*.

All are agreed that *ijma* is a final authority. This means that when the *ijma* has been arrived at on a certain interpretation of a *nass* or on a certain *Ijtihad, Qiyas* or expediential legislation, then such an *ijma* is binding on all and must be followed. Differences arise only as to the question whether there has been an *ijma* on a certain legal point or not? No one challenges the authority of *ijma* as such. The controversy hovers round the point: *Whether it has been arrived at or not!"*

130. Amidi, op.cit., Vol. 1, P.196.

131. It is noteworthy that *ijma* has always been exercised in two forms. The consensus of the learned or *ulama* and the consensus of the community. Those who believe in the former argue that the latter tried to limit it to the consensus of the learned. But a striking incident in the seventeenth century showed the robustness of the consensus of the community. When the use of coffee began to spread in the Near East the jurists almost unanimously took the view that coffee-drinking was unlawful and punishable with the same penalties as wine drinking, and a number of persons were actually executed for indulging in this vicious practice. But the

will of the community prevailed, and today coffee is freely consumed even by those puritans who reject *ijma* in principle altogether.

Schacht also examines this issue and writes: "The consensus of the scholars is different from the consensus of all Muslims on essentials. This last, in the nature of things, covers the whole of the Islamic world but is vague and general, whereas the consensus of the scholars is geographically limited to the seat of

the school in question, is concrete and detailed, but also tolerant and not exclusive, recognizing, as it does, the existence of other doctrines in other centres. Both kinds of consensus count as final arguments in the ancient schools of law, though the consensus of the scholars is of much greater practical importance and is the real basis of their teaching. It is only natural that the consensus of all Muslims should be regarded as not subject to error; that the consensus of the scholars, too, should be so regarded is not equally obvious, and the whole highly organized concept seems to have been influenced from abroad". (Schacht Joseph, *An Introduction to Islamic Law,* P. 30)

132. Ibn Hazm states that it is not possible to oppose *Ijma* because *Ijma* enjoys the support of public opinion. (Ibn Hazm, *Al-Ahkam*, Vol. 1, P. 506).
133. Aghnides Nicolas, *Mohammedan theories of finance,* PP. 37-38.
134. Iqbal Mohammad, op.cit., PP. 173-174.
135. Jafari, op.cit., P. 98.
136. Ibid, PP. 99-102.
137. Ibn Majah, *Sunan,* op.cit., Vol. 2, P. 271.
138. A number of other *ahadith* on *ijma* have been quoted by both Ghazali and Amidi.
139. Ghazali, *Ihia'al-Ulum,* Beirut, 1981, Vol. 2, PP. 198-199.
140. Ibid.
141. Ibid.

142. Shatibi, Al-I'tisam, Beirut, 1961, Vol. 2, P. 101.
143. Ibid, Vol. 2, P. 102.
144. Ibid, P. 107.
145. Ibid, P. 126.
146. Iqbal Mohammad, op.cit., PP. 173-177.
147. Ibid.
148. Ibid, P. 175.
149. Jannti Mohammad Ibrahim, *Al-Ijtihad,* Tehran, 1992, PP. 110-122.

150. Yusuf S. M. , *Studies in Islamic History and culture*, Lahore, 1970, PP. 212-218.
151. Ibid.
152. Goldziher Ignas, *Introduction to Islamic theology and law,* Princeton university press, 1984, P. 52.
153. Mutahhari Mortaza, op.cit. P. 244.
154. Iqbal Mohammad, op.cit., PP. 176-177.
155. Schacht Joseph, *The Origins of Mohammadan Jurisprudence,* op.cit., PP. 98-103.
156. Jafari, op.cit., P. 214.
157. Anderson Norman, op.cit., P. 5.
158. Schacht Joseph, *The origins of Mohammadan Jurisprudence,* Oxford, 1953, PP. 27-35.
159. Ibid.
160. Malik, op.cit., Vol. 2, P. 862.
161. Shafii, op.cit., PP. 200-211.
162. Al-A'meli, op.cit., Vol. 8, P. 115.
163. Ibid, P. 119.
164. The *Quran,* 4: 5.
165. Ibid, 5: 90.
166. Ibid, 62: 9.
167. Malik, op.cit., Vol. 2, PP. 841-802.
168. Mutahhari Mortaza, op.cit., P. 172.

169. Shafii, op.cit., PP. 64-68.

170. Ibid.

171. Doi Abdur Rahman, op.cit., P. 80.

172. Ibid.

173. Shafii, op.cit., PP. 65-71.

174. Mutahhari Mortaza, *Marjayyat,* Tehran, Enteshar Publisher, 1962, PP. 40-47.

175. Jafari, op.cit., P. 178.

176. Al-Sarakhsi, *Osul-Al-Sarakhsi,* Cairo, 1954, PP. 146-151.

177. The *Quran,* 2: 282.

178. Sobhani, Foruq-E-Abadiat, Tehran, 1968, ol. 2, PP. 15-18.

"The case of the *salaf* transaction (contract of delivery of goods with pre-payment) is also exceptional although the jurists have made it a basis for analogy. As a general rule it is necessary for the validity of a sale transaction that the seller should have the articles in his possession at the time of transaction. Hence any contract of sale where the seller has no article in his possession will not be valid according to the *Shariah*. But the Prophet in public interest and as policy for the general weal in the sale transactions allowed the contract of *salaf* with certain conditions enunciated by him. The purchaser pays the price of the articles in advance to the seller by a mutual agreement that the seller will deliver the articles to him at a definite date." (Sobhani, P.30)

179. Abu-Zohrah, op.cit., PP. 204-207.

180. Bokhari, op.cit., Vol. 1, P. 251.

181. Jannaty, op.cit., PP. 320-322.

182. Sheikh Tusi, *Udah-Al-Osul,* Beirut, 1980, PP. 298-310.

183. The *Quran,* 24:4.

184. Sarakhsi, op.cit., Vol. 16, PP. 62-63.

185. Ibid.

186. Mutahhari Mortaza, op.cit., PP. 15-22.

187. The *Quran*, 39:18.
188. Ibid, 2: 170.
189. Ibid, 12: 2.
190. Ibid, 2: 242.
191. Ibid, 8: 22.
192. Koleini, Al-Kafi, Vol. 1, P. 11.
193. Ibid, P. 10.
194. Al-Najjar, Majid, op.cit., P.9.

195. Al-A'meli, op.cit., Vol. 18, P. 41.
196. The *Quran*, 2: 145
197. Shafii, op.cit., PP. 63-70.
198. "One of the most rationalistic groups of Muslim thinkers, named "Mu'tazilites" consequent on the dissension or secession of their leader Wasilbin-'Ata from the rank of Hassan Al-Basri. They founded the structure of their school on two great principles, -- Divine Unity and Divine Justice. The Mu'tazilites called themselves "Ahlul-Tauhid-Wal-'Adl" (Partisans of Divine Unity and Justice). Mu'tazilites believe that:
    1) Man has freewill and liberty of action. He has been given power to build his own fortune. He can lead a virtuous or vicious life in accordance with his wishes.
    2) Reason is the true criterion of good and evil. This question has agitated the minds of thinkers in all ages. As among others, so among the Muslims; opinions differed as to the right criterion of good and evil.
    3) It is impossible for God to act irrationally or undesirably. Godhead with all that it stands for makes it ridiculous to suppose that He can ever think to act in a way, which does not tally with reason. When we all agree that He is the very incarnation of purity and wisdom, the very essence of all that is holy and great, we cannot imagine for a single moment that

He can ever act in a wrong way.

4) All acts of the Supreme Being must be based on some aims and motives. No act of the Deity can be supposed to be aimless. He cannot do anything, which does not serve any useful purpose.

5) Every action must take its natural course. God must reward the virtuous and punish the wicked. He cannot do otherwise. He cannot reverse the order of nature. It is impossible for

Him to reward the evildoers or punish the righteous. (Nadvi, Muslim thought and it's source, PP. 24-50)

199. Tusi Nasir-Al-din, *Tajrid-Al-Aqa-ed*, PP. 72-75.

200. Ibn-A'bedin, *Hashia-Radd-Al-Mutar*, Vol.4, P. 28.

201. The *Quran*, 6: 75-79; 7: 185; 22: 46; 30: 8;41: 53; 51: 20.

202. Al-Bazdawi, *Kashif Al-Asrar*, Vol. 4, PP. 1350-51.

203. "The Asharism has rightly been characterized as a reactionary movement against Mu'tazelism. From the first rise of the rationalistic school in Islam, a section of the Muslim community, chiefly composed of divines, had viewed it with suspicion and disfavour. They contended that the Mu'tazilite doctrines were rather abstract for the general Muslim public, and apprehended that the masses might be led into the conclusion that religion was no longer binding and that they might rid themselves of its control as they liked. Al-Ashari began his creed with the following declaration:

The *Quran*, and every part of it, is uncreated and eternal, that everything on the earth and heaven, good or bad, comes into existence by the Will of the Supreme Intelligence, that man is unable to originate or create anything without the initiative of God; that God will revive the dead on the Day of Judgment; and that God will appear to human sight on the Day of Resurrection. Al-Ashari believe that:

1) God's power is supreme over the affairs of earth and heaven. He speaks by an eternal Word and wills by an eternal Will. He, being the Supreme Sovereign, commands and prohibits as He deems fit. Man has got no free will, no liberty of action, but he has been given some subordinate power of appropriation or acquisition. Every action is pre-arranged by the Deity to be performed by a particular person who with the intention to finish it does it.

2) God does not impose such a task on man, but that He can if He likes. There is no power limiting His actions.
3) God can act in any way He likes. He can do even those things which do not tally with man's reason. But in practice He always acts reasonably.
4) In practice, all actions of God are based on some object and purpose, but, in theory, He can act aimlessly if He ever so desires.
5) Reward and punishment are entirely in His gift. He can reward whom He will and punish whom He will. Of course, it is certain that He will favour the righteous and punish the wicked because He has promised to do so; but no consideration can bind His discretion or compel Him to do this or that." (Nadvi, Muslim thought and it's source, pp. 51-73)

204. Khezry Bak, *Osul-Al-Fiqh*, Beirut, 1985, P. 23.
205. The *Quran*, 4 : 165; 17 : 15; 28 : 59; 39 : 71.
206. Al-Bazdawi, *Kashif Al-Asrar*, Vol. 4, Istanbul, 1307 A.H., PP. 1350-51.
207. Al-Baghdadi, *Osul Al-Din*, Istanbul, 1928, P. 213.
208. Al-Bukhari, op.cit., Vol. 4, P. 78.
209. Mutahhari Mortaza, op.cit., P. 177.
210. "Alif lam Ra. (This is) a Book which We have revealed to you that you may bring forth men, by their Lord's permission from

utter darkness into light -- to the way of the Mighty, the Praised One".

211. Al-Razi, *Mafatih Al-Ghayb*, Cairo, 1308 .H.313., Vol. 5, P. 211.
212. Al-Sarakhsi, op.cit., Vol. 1, P. 340.
213. Ibid.
214. Khezry Bak, op.cit., PP. 23-25.
215. In theory, *Shafii* distinguished sharply between the argument

taken from traditions and the result of systematic thought. In his actual reasoning, however, both aspects are closely interwoven; he shows himself tradition-bound and systematic at the same time, and we may consider this new synthesis typical of his legal thought. *Shafii* recognized in principle only strict analogical and systematic reasoning (*Qiyas*, *Ijtihad*, also *aql* "reason" what is reasonable, in a narrow technical sense), to the exclusion of arbitrary opinions and discretionary decisions (*ra'y* and *istihsan*, which *Shafii* uses as synonyms), such as had been customary among his predecessors. (Schacht, *An Introduction to Islamic Law*, P. 46).

216. Jafari, op.cit., P. 251.
217. Ibn Taymiyah, *Dar'u ta'arud Al-Aql wa'l Naql*, Cairo, 1971, PP. 155-56.
218. Ibid.
219. Ibid, PP. 191-202.
220. Ibid.
221. Ibid.
222. The *Quran*, 3: 65, 118; 12: 2; 38 : 29; 47: 24; 59. 17.
223. Ibid. 2: 170; 10: 78; 26 : 74; 43 : 24.
224. Ibid, 3: 65, 110; 12: 2; 29 : 35.
225. Mutahhari Mortaza, op.cit., P. 73.
226. The *Quran*, 10: 16.
227. Ibid, 20: 14; 29 : 45.

228. Ibid, 2: 183.
229. Ibid,9 : 60; 59: 7.
230. Ibid, 22 : 28.
231. Ibid,2: 185; 5: 7.
232. Ibid, 2: 233, 286; 6: 152; 7: 42.
233. Mutahhari Mortaza, op.cit., PP. 44-47.
234. Ibid, P.46.
235. Ibid, PP. 46-47.

236. Bannerman Patrick, op.cit., P. 47.
237. Mutahhari Mortaza, op.cit., P. 48.
238. Ibid.
239. Naeeni, *Fawaed-Al-Osul*, Najaf, 1960, Vol. 4, P. 144.
240. Ibid, PP. 145-148.
241. Ibid.
242. Mutahhari Mortaza, op.cit., PP. 47-49.
243. Naeeni, *Muniah-Al-Taleb*, Qom, 1953, Vol.1, P. 12.
244. Mohammadi Abul Hassan, *Mabani-Istinbati huquqi Islam*, Tehran, 1977, PP. 152-155.

245. Naeeni Mohammad Husayn, *Tanbih-Al-Ummah wa Tanzil Al-Millah*, PP. 74-75.
246. Mutahhari Mortaza, op.cit., P.52.
247. Ibid.
248. Ibid, P. 54.
249. Naeeni, op.cit., Vol. 4, P. 149-153.
250. Ibid.
251. Jafari, op.cit., P. 121.
252. Ibid.
253. Sheikh Ansari, *Fara-ed-Al-Osul*, Tehran, 1951, PP. 221-222.
254. Jafari, op.cit., P.129.
255. Naeeni, Fawaed-Al-Osul, Vol. 4, PP. 153-154, Najaf, 1960.
256. Naeeni, *Fara-ed-Al-Osul*, Tehran, 1951, PP. 221-222.
257. Sheikh Ansari, op.cit., PP. 241-242.

258. Shawkani, op.cit., PP. 236-239.
259. Ibn Al-Qayyim, op.cit., Vol. 1, P.294.
260. Mutahhari Mortaza, op.cit., P. 149.
261. Shawkani, op.cit., P. 237.
262. Mutahhari Mortaza, op.cit., P. 177.
263. Sheikh Ansari, op.cit., PP. 283-285.
264. Ibid, PP. 385-388.
265. Ibid.

266. Therefore, insufficient evidence can not lead to conviction. Also in cases where explicit texts do not exist, the jurists exercise *Ijtihad* to the effect that no one is accountable bearing any responsibility.
267. Hakim Mohammad Taqi, *Al-Osul-Al-Ameh-le-Al-Fiqh-Al-Moqaren*, Najaf, 1983, P. 198.
268. Ibid, P. 199.
269. The *Quran*, 7: 199.
270. Ibid, 22: 78.
271. Coulson Noel J , op.cit., PP. 143-145.
272. Sadr Mohammad Baqr, op.cit., P. 168.
273. Sadr Mohammad Baqr, op.cit., PP. 409-411.
274. Ibid.
275. Jafari, op.cit., P. 183.
276. The *Quran*, 65: 7.
277. Ibid, 2: 233.
278. Jannati, Mohammad, *Ijtihad,* Qom, 1989, P. 121.
279. Abu Zohreh, Mohammad, op.cit., P. 217.

Ijtihad and the flexibility of *Shariah* in practice

The best evidence for the flexibility of *Shariah* can be explored in the exercise of *Ijtihad* by the companions of the holy Prophet (S.A.W.) and the Islamic jurists. The holy Prophet (S.A.W.) placed emphasis on this attribute of the *Shariah* when he said thus:

> *"The Islamic jurist who masters the circumstances of his time never goes stray".*[1]

This *hadith* of the Prophet (S.A.W.) clearly bears witness to the fact that one of the most important qualifications that an Islamic jurist (*Mujtahid*) must possess is the awareness and mastery of the needs and conditions of his time so that he can provide solutions to the everyday problems with a view to the Islamic values. This bears witness to the fact that Islam is opposed to confining and limiting the process of development and progress. That is the reason why the holy Prophet (S.A.W.) advises thus:

> *"Bring up your offsprings not according to the exigencies of your time but according to the exigencies of the next generation they are going to live in."*[2]

Imam Ali recognizes this important Islamic value by advising his son as follows:

> *"My son, if you happen to live in a new land or another region, live according to their way of life and manners."*[3]

During the lifetime of Prophet (S.A.W.) in Medina we witness how

the holy Prophet (S.A.W.) decided cases according to the necessities arisen from different circumstances. Abdullah bin Masud remarks as follows:

> *"We used to go on Ghazawat with the Messenger of Allah, and we did not take our women with us. We asked (the Prophet) if we could get ourselves castrated. The Messenger of Allah refused us to do so and allowed us to marry women by giving them clothes for a certain period."* [4]

It is also narrated by "Ali": I said to Ibn Abbas during the Battle of Khaibar:

> *"The Prophet (S.A.W) forbade the temporary marriage and the eating of the flesh of donkey."* [5]

After the *Shariah* of Islam reached its completion, those were made lawful (*Halal*). Temporary permission due to force of circumstances that the Prophet (S.A.W.) had given was made *haram* immediately after the conquest of Mecca as narrated by Ali. He says:

> *"He was with the Prophet (S.A.W.) on the occasion of the Battle for the conquest of Mecca. The Prophet (S.A.W.) had permitted*

> *Mut'ah marriage for the Sahabah. He says that the Prophet (S.A.W.) declared it unlawful even before leaving that place."* [6]

Ijtihad in the Caliphs' Era

On going through the cases of *Ijtihad* of several Companions we find that *Ijtihad* was exercised even in the presence of the injunction in the *Quran* or the *Sunnah*. The fact is that one Companion singled out one

verse or tradition for a situation while another pointed to quite a different verse. We give below a few cases where Umar exercised his personal opinion, although instructions on these very points can be taken to have already existed in the texts of the *Quran* or the *Sunnah*.

Umar is known to have abolished a share of *Zakat* which was given to certain Muslims or non-Muslims for conciliation of their heart, as ordained by the Holy *Quran*.[7] The Prophet (S.A.W.) used to give this share to chiefs of certain Arab tribes in order to attract them to embrace Islam or to prevent them from doing harm to the Muslims. This share was given also to the neo-Muslims so that they might remain steadfast in Islam. But Umar discarded the order, which Abu Bakr had written in his caliphate for donation of certain lands to some persons on this basis. He argued that the Prophet (S.A.W.) had given this share to strengthen Islam; but as the conditions had changed, this share ceased to be valid.[8] Umar's action seems apparently contrary to the *Quran*. But, in fact he considered the obtaining situation and followed the spirit of the Quranic injunction. His personal judgement led him to decide that if the Prophet

(S.A.W.) had lived in similar conditions he would have done the same. Umar b. Abd Al-Aziz, during his caliphate, had given this share to a certain person to the same purpose for which the Prophet (S.A.W.) used to give in his lifetime.[9] Both these examples show how *Ijtihad* decided where to apply a Quranic injunction and where not.

The point is further illustrated by Umar's decision not to distribute Iraqi and Syrian lands among the companions, in the face of Muslim insistence that the land should be distributed among them in tune with the

practice of the Prophet (S.A.W.). To all their contentions Umar replied that if he kept on distributing the lands, from where he would maintain the army to protect the borders and the newly conquered towns. The Companions, therefore, finally agreed with him and remarked: "Yours is the correct opinion". Umar later on found the justification of this decision in the Quranic verses 59:6-10 which entitled the *Muhajirun*, the Ansar, and the coming generations to receive the Share from booty *(ghanimah)*.[10] Umar apparently departed from those Quranic verses which contain the injunction of distributing booty among the Muslims. According to the rule and practice, the lands, too, should have been distributed like other articles of *ghanimah*. But Umar preferred the general benefit of the Muslims to that of the individuals. Social justice demanded that these conquered lands should not be distributed among the army. This illustration provides an important example of early *Ijtihad*.

It is documented in history that some slaves had stolen a camel, slaughtered and eaten it. When the matter was referred to Umar, he in the first instance ordered the cutting of the hands of the thieves, but after

a moment's reflection he said, addressing the slaves' master: "I think you must have starved these slaves out". He, therefore, ordered the master of the slaves to pay double the price of the camel and withdrew his order for the cutting of the thieves' hands.[11] Another story runs that a man stole something from *Bayt Al-Mal* (an Islamic treasury) but Umar did not amputate his hand.[12] That Umar desisted from cutting the hands of thieves during the days of famine is a well-known fact of history. In these cases Umar apparently contravened the Quranic verses which contain the injunction of cutting the hands of a thief. But it should be

noted that the *Quran* is silent on the details of the punishment of the amputation of hands. It is for the *Sunnah* or *Ijtihad* to decide where and when to cut the hand and where or when not.

Umar, as recorded in history, banned the sale of the slave mother-of-the-child *(Umm Al-Walad)* or offering her as a gift or inheritance. After the death of her master, he declared her to be free.[13] On this problem he discontinued the practice rampant during the time of the Prophet (S.A.W.) and the predecessor, Abu Bakr. Of course, it may be objected that he changed the *Sunnah* through his personal opinion. Here it may be remarked that Umar was faced with a social situation which was radically different from that of his predecessors. People used to keep slave-girls, who abounded in Umar's time because of conquests, with them for some time. Then these slave-girls fell into the hands of another master with the result that none took the responsibility to look after these women's children. Moreover, this practice was giving an impetus to the growth of the institution of slavery. The following remarks of Umar

show how grave the situation had become, and how seriously he was taking this problem. According to *Al-Muwatta'*, he remarked: "why is it that people have intercourse with their slave-girls, and why then abandon them to go out freely? If any slave-girl comes to me and her master confesses cohabitation with her, I shall assign her child to him. Henceforth, either set them free or keep hold of them".[14]

During the life time of the Prophet (S.A.W.), the holy Prophet (S.A.W.) had imposed *Zakat* on nine pieces of property as follows: gold,

(S.A.W.) had imposed *Zakat* on nine pieces of property as follows: gold, silver, camel, cow, sheep, wheat, barley, date and raisin.[15] When Imam Ali became the head of the state he imposed *Zakat* on horses as well. The companions of the Prophet (S.A.W.) questioned the policy of Imam Ali. He replied that firstly, at the time of the Prophet (S.A.W.) the number of horses were limited; secondly, at the time of the Prophet (S.A.W.) it was possible to run the affairs of the society on the basis of *Zakat* on those nine pieces of property while the income was no longer sufficient.[16]

From these it is clear that this problem had become acute for the caliphs and they were forced to take these stern measures due to the changed social conditions. Similar considerations explain exercising *Ijtihad* in the other cases mentioned above. These are a few examples where the caliphs apparently departed from the clear injunctions or the previous practice. But it should be noted that this was not really a departure but true adherence to the spirit and intention of the command based on their personal judgements *(Ijtihad)*.

Ijtihad in Contemporary Era

After the demise of the four orthodox caliphs, the necessity of considering the needs and conditions of different eras urged the Islamic jurists to issue decrees appropriate to the new situation. For example, the injunction of the *Quran* is quite explicit regarding the remarriage of the divorced women. The *Quran* reads thus:

> *The divorced women shall wait concerning themselves for three monthly periods."*[17]

This verse had a very important object to serve, that is it may make it known whether the woman is having a child of the former

husband in her womb so that there may be no confusion about the paternity of such a child if the woman seeks to remarry. However, today the medical development has made it possible to ensure if the divorced woman is having a child and therefore some Islamic jurists argue that the waiting period of three months (*iddah*) can now be shortened.[18]

Another case is where divorce becomes inevitable. When marriage becomes indefinitely. In Islam marriage is a contract and the contract should be made to work but not when it becomes humanly impossible. It is only in such unavoidable circumstances that divorce is permitted in *Shariah*.

Although Islam allows divorce if there are sufficient grounds for it yet the right is to be exercised only under exceptional circumstances. The *Quran* reads thus:

> *"If you fear a break between them two, appoint, (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause them reconciliation: for Allah has full knowledge*

> *and is acquainted with all things".*[19]

Given the fact that today the issue of divorce must be settled through the courts of law, Some Islamic jurists have issued the decree that the appointment of two arbitrators is no longer necessary.[20]

Islamic jurists have also confirmed the element of flexibility in the issue of maintenance. Maintenance (*Nafaqah*) is the right of one's wife and children to get food, clothing and a residence, some other essential services and medicine, even if the wife happens to be a rich lady.

Maintenance in this form is essential (*Wajeb*) according to the *Quran*, *Sunnah* and the consensus of opinion of the Jurists. The necessity of providing maintenance is emphasized in the Farewell Pilgrimage (*Haj Al-Wida*) address of the Prophet (S.A.W.):

> *"Beware about your treatment of women. You have accepted them with the word of Allah, and have made lawful sexual relationship with the word of Allah ... as you have a duty to provide them with reasonable maintenance and clothing".*[21]

Some jurists have given detailed instants of things to be provided as *Nafaqah* during the time they were writing about it. These are to be adjusted in the light of modern necessities to suit the circumstances of the countries and their living standards. It will be the responsibility of a father to maintain his daughters until they are married, and sons until they reach the age of puberty.[22]

As regards to marriage, the holy Prophet (S.A.W.) rules thus:

> *"And there is no marriage except with the permission of guardian and payment of dower and two reliable witnesses".*[23]

What is a reasonable amount of dower will depend on the relative position in life and social status of parties to marriage and differ from place to place, period to period and country to country. Some Islamic jurists have now passed judgement through *Ijtihad* that given the present status of women in the society, no longer is it necessary to seek the permission of guardian and two reliable witnesses on condition that the girl has reached the age of majority.[24]

It is noteworthy in this context that regarding the penal law

(Hudud and Ta'zirat) all the violations and breaches of Divine limits in a general sense are not punishable since the punishment is only inflicted in those cases in which there is violation or breach of other people's rights.[25] As for example, if someone neglects his prayers *(Salat)*, or does not observe fasts or perform pilgrimage when he has the means, they are not punishable. But if one does not pay *Zakat* or poor due, which is a charity as well as a tax from the rich to the poor, there will be punishment accorded to the defaulter.[26]

Punishment is only given when there is a violation of People's Rights and for this reason, it is a restrictive and preventive ordinance. In Islamic jurisprudence, Holy *Quran* or the *Sunnah* of the Prophet (S.A.W.) while other punishments are left to the discretion by *Ijtihad* which are called *Ta'azir* (disgracing the criminal).[27]

On the basis of the verse of the Holy *Quran* which reads as follows:

> *"Good men are for good women and good women are for good men".*[28]

Some Islamic jurists had concluded that Muslim men must marry only Muslim women.[29] But as a result of changing circumstances, in a *fatwa* the late Sayyid Muhsin Al-Hakeem, the great profound scholar of our time has decided lately that it is legally to a Muslim man to marry, in permanent marriage, a woman even she is Jewish or Christian. And this was an answer to the Court of Religious Affairs in Baghdad, The Court said in her letter to The Scholar Al-Hakeem that there are numerous marriage affairs between Muslim-Shiite men and scriptural women and it

is not fair to tell the girl or the woman that her marriage to the Iraqian is a temporary marriage even for ninety nine years. The late Al-Hakeem's answer was that a Muslim has the right to marry permanently a scriptural woman.[30]

This *fatwa* of Al-Hakeem indicates how he was, always, in connection with the modern problems of Muslim Community in this modern world. And this *fatwa* may be or should be generalized forever, if we consider the relations amidst people of all nations and the new methods of communication between man and woman.

There are other similar cases, which confirms how the necessities of time and space have urged the Islamic jurists to adopt flexibility in their *fatwas*. For example, the sale of blood which was forbidden by the

their *fatwas*. For example, the sale of blood which was forbidden by the
fatwas of the earlier Islamic jurists due to the uncleanness of blood [31] is now permissible because they can use the blood to save another person's life.[32] The examination of a dead body which was formerly made forbidden by the Islamic jurists to teach medical students has now been made permissible by Islamic jurists.[33] The transplantation of bodily

organs are now allowed by Islamic jurists to save the life of another human being.[34] All these cases have been decided through the significant device of *Ijtihad* which allows of the element of time and space.

One of the outstanding achievements of *Ijtihad* in practice in recent time is the change of attitude it has prompted among Islamic creeds. Changing attitude towards the Sunnis has acted as one of the factors of Shia modernism while with the Sunnis modernism has stimulated a re-evaluation of the pristine notions about all heterodox sects

including *Shiism*.

> *"For the Shia, any rethinking was bound, to touch upon their disagreements with the majority sect, disagreements which are all bound up with the raison d'etre of Shiism. For the Sunnis, rethinking implied no inescapable necessity of an excursus into the relationship with the heterodox sects, at least not in the beginning, since its most pressing concern was a frontal assault on the problems posed by modernization. Apart from the affirmation of Islamic unity as an overriding objective shared with all other Muslims, Sunni modernism has brought about a change in the essential area of religious thinking i.e. on the principle of Ijtihad or the exercise of individual judgement".*[35]

Ijtihad was one of the causes of dispute, because the *Shia* hold it to be not only permissible, but also a permanent, imperative duty of the learned as the principal means of extracting the religious rules from the *Quran*, the Tradition and the consensus,[36] while the *Sunnis* have repudiated it ever since the ninth century as an aberration leading to

intellectual disarray and legal void.[37] The teachings of Asad-abadi, Abduh, Muhammad Iqbal and other modernists on the necessity of reconstructing Muslim thought gradually generated an atmosphere in which *Ijtihad* could rid itself of much of the opprobrium formerly attached to it.[38] Later, the advent of state ideologies requiring the orthodox legitimization for public acceptance became another contributory factor: governments put pressure on the Islamic Jurists to justify the various reforms they were carrying out in the name of

nationalism or socialism, and the Islamic Jurists could give their blessings to such reforms, which violated the traditional sanctity of ownership, the standing of women, and the jurisdiction of religious courts, only by seeking the liberating intervention of *Ijtihad*.[39] A convergence has thus slowly taken shape between the positions of both sides, and, in theory, the Shia should now draw comfort from the Sunnis conversion to their view that *Ijtihad* is indispensable to the proper understanding of the religious rules.[40]

Aspects of Sheikh Mahmud Shaltut

The revival of *Ijtihad* among the *Sunnis* have affected the *Sunni-Shia* dialogue by encouraging individual initiative for effecting some measure of reconciliation. Cairo's official Al-Azhar review, in February 1959, ran a *fatwa* by its Rector, Sheikh Mahmud Shaltut, allowing instruction in *Shia* jurisprudence. This *fatwa* indicated that Shiism was recognized as being on a par with the four orthodox *Sunni* legal schools.

When Shaltut gave his *fatwa*, *Shia* studies had been absent from the curriculum of that university for over nine hundred years.[41]

> *"Under the title "Islam the religion of unity", the fatwa is prefaced by two arguments in its justification, one historical, the other pragmatic. The historical argument is a reminder of the spirit of mutual respect and tolerance, which permeated the relationship between the legal schools in early Islam. At that time, says Shaltut, Ijtihad was a source of plurality of ideas, but not discord, because*

the different schools were united by their belief in the paramount authority of the Quran and the Tradition. The motto of the founders of all schools was: "when a hadith is proved authentic, It is my opinion; and do not care at all for my word".[42]

This allowed the cooperation of all groups - the *Sunnis* among themselves and with the *Shia* - to promote Islamic jurisprudence. It is obvious that in this argument, Shaltut is using the term *Ijtihad* in the sense of the exercise of collective judgement because he goes on to say that legal plurality degenerated into antagonism once the individual form of *Ijtihad* was introduced. Subordinated as it was to personal whims and wishes, *Ijtihad* then became a factor of dissension, to be later exploited and intensified by the imperialist enemies who fostered enmity among the Muslims, setting every group against another.[43]

Shaltut then blasts prejudice and partiality and its adverse practical effect on quests for best solutions to the social tangles grappling the Muslims. He says that the legal schools of all persuasions should now be ready to accept from one another any idea which conforms to Islamic

principles, and can best ensure the welfare of family and society. By way of example, he mentions his own *fatwas* in favour of the *shia* rejection of the validity of suspended divorce and divorce by triple repudiation in one sitting.[44]

In a more outspoken *fatwa*, Shaltut raised similar arguments, proving that *Shia* worship rites were credible. Combined with other conciliatory gestures such as the publication of *Wasael Al- Shia*,[45] one of the most authoritative sources of traditional *Shiism* and *Majma' Al-*

Bayan,[512] a *shia* commentary on the *Quran*, both with Al-Azhar's blessings, and a series of friendly communications between Shaltut and two *Shia* leaders in Iraq, Muhammad Khalisi and Muhammad Hussein Kashef Al-Gheta, these *farwas* given through *Ijtihad* established a distinct trend towards greater *Sunni-Shia* understanding.[47]

Through *Ijtihad*, caliphate was abolished in Turkey. A clear judgment advocating the Turkish move was presented by Iqbal as the most sophisticated Islamic modernist. Iqbal's basic answer to this question was that the Turks had merely practiced *Ijtihad* by taking the view that the Caliphate could be vested sometimes in a body of persons, or an elected assembly. Although the religious doctors had not yet expressed themselves on the point, he personally found the Turkish view to be perfectly sound: The republican form of government is not only thoroughly consistent with the spirit of Islam, but has also become a necessity in view of the new forces that are set free in the world of Islam.[48] He further cited two examples of earlier *Sunni* adaptation of the Caliphate to political realities: first was the abolition of the condition of

Qarashiyat (descent from the tribe of Quraysh) by Qazi Abu Bakr Baqillani (d. 1013), for the candidates of the Caliphate, in deference to the facts of experience, namely the political fall of the Quraysh and their consequent inability to rule the world of Islam. The second was Ibn Khaldun's suggestion, four centuries later, that since the power of the Quraysh had vanished, there was no alternative but to accept the most powerful man as Imam or Caliph in the country where he happens to be powerful. Iqbal concluded from all this that there was no difference

between the position of Ibn Khaldun, who had realised the hard logic of facts, and the attitude of modern Turks, who were equally inspired by the realities of experience, and not by the scholastic reasonings of jurists who lived and thought under different conditions of life.[49]

These were brave words at the time, expressive of an enlightened spirit impatient with the backwardness of the Muslims and the obscurantism of their religious leaders. They were meant to persuade those leaders to change their attitude, and come to terms with the modern world. That was the exercise of *Ijtihad* as Iqbal also emphasizes, that could realize such big achievements and remove obstacles.

The Repeal of the Tobacco Concession

The twofold impacts of the unrest against the tobacco concession included an accentuation of the Islamic Jurists' traditional role in confronting the state and served as a prelude to the constitutional movement. On numerous occasions, the Islamic Jurists acted against the

state in order to defend national interests. In each case, they gave expression at the same time to the demands or grievances of various persons or groups; yet in the case of the tobacco concession, virtually the whole nation was united under their leadership.[50] The agitation was not merely a protest against a specific measure taken by the government, for although centered on the question of the tobacco monopoly, it was essentially a confrontation between the people and the state, in which the leadership exercised by the Islamic Jurists showed a new determination

and sense of direction.[51]

Early in the last decade of the 19th century, Iran was witness to the tobacco monopoly, which was among the concessions given to foreign economic interests. The preliminary negotiations were completed in London during Naser-Al-Din Shah's third visit to Europe in 1889, and in the spring of 1891, the agents of the British company to which the monopoly had been granted began to arrive in Iran. All rights concerning the sale and distribution of tobacco inside Iran, and the export of all tobacco produced in Iran, were vested in the Imperial Tobacco Corporation, which in return was to pay the Iranian government £15 million a year.[52] Furthermore, the regulation of the yearly crop was to be the prerogative of the company. Whether or not these conditions were known of accurately and in detail, popular discontent arose as soon as the agents of the monopoly started their activities.

In September, 1891, protests began to be heard in Tabriz. As a sign of dissatisfaction, the Islamic Jurists stopped teaching in the Madrasas, and the commercial life of the city was brought to a standstill

by the closure of the Bazaar. A telegram was sent to the Shah demanding the withdrawal of the concession, threatening armed resistance if he failed to do so.[53]

Lead by Aqa Najafi, the Islamic Jurist of Isfahan, an ancient clerical bastion, opposed the tobacco monopoly. They went so far as to prevent the sale of tobacco even before the issue of the celebrated *fatwa*.[54]

These expressions of discontent and anger, despite their similarity, do not appear to have formed part of accordinated plan. Such unity, both

among the Islamic Jurists and, through their medium, among the people, was achieved in the first place by the *fatwa* prohibiting the use of tobacco, attributed to Mirza Hassan Shirazi Mujtahid.[55]

In a telegram to Naser Al-Din Shah on July 26, 1891, Mirza Hassan objected to the tobacco monopoly. Soon after the receipt of this telegram in Tehran, the Iranian charge d'affaires in Baghdad, Mahmud Khan Mushir ul -Vuzara, was sent to Samarra to point out to Mirza Hassan Shirazi the benefits accruing to Iran from the concession, but he was unable to deflect him from his opposition. Flattering letters from Amin-Al-Sultan and Mirza Zayn-Al-Abidin were similarly ineffective in influencing Mirza Hassan's opinion of the tobacco monopoly. The Shah did not reply to his first telegram, and Mirza Hassan wrote to him again in September, 1891, setting forth in detail his objections to the tobacco concession.[56]

Early in December, Mirza Shirazi issued a fatwa in Tehran declaring *"the use of tobacco in any form to be tantamount to war against the Hidden Imam"*, i.e., haram. Its effect was immediate and total:

throughout the country the use of tobacco was abandoned. The unity the people was due to the obligatory nature of the *fatwa*.[57]

Feuvrier writes of the surprise felt in Tehran, by both the court and the British embassy, at the purposeful manner in which the boycott was applied. More than ever before, the Islamic Jurists were in control of the people and represented an authority firmer than that of the Shah. This result had been achieved by the unity of the *marja'-i taqlid* and the unity of direction and could be destroyed only by breaking that unity. For this

purpose too it was necessary to rely on the Islamic Jurists, such was the measure of clerical ascendancy. After a direct and violent confrontation between the government and the people of Tehran. Naser-Al-Din Shah was obliged to yield to the demands of the Islamic Jurists.[58]

Aspects of Shia Modernism

Another significant event highlighting the decisive rolc *Ijtihad* played in shaping the Iranian history was the clerical approach to Constitutionalism led by the writings of Mirza Muhammad Husayn Naini (1860 - 1936). In 1906, the Iranian Constitutional Revolution occurred under the impact of the a *fatwa* issued by Islamic jurists. The arbitrary rule and corruption, on the part of the Persian government in Tehran and the provinces, were such as to necessitate an abrupt change. Most of the people, including the Islamic Jurists were unhappy with the Qajar rulers. The positions of the Islamic Jurists and the religious institutions were being called into question by the growth of foreign interventions as well

as the force of Westernization.[59]

There was needed a mediator to ally all the different groups of the people who, for different reasons, were aiming at the downfall of the Iranian regime. Sayyid Jamal Al-Din Asad-abadi, proved to be the architect of this alliance.[60]

In the wake of some events occurring in Tehran, three prominent *Mujtahids*, namely Nuri, Bihbahani, and Tabatabaii revolted against the oppressive government and called for reforms in the justice

administration. They enjoyed a great following from among a variety of groups, including clerical students. This movement finally resulted in the declaration of the Persian Constitution of 1906.[61]

Since the Islamic Jurists believed that Constitutionalism was in conformity with Islam, they focused all their powers to support the new regime. In their speeches and writings they strongly advocated a constitutional from of government. They made an attempt to reconcile democratic Constitutionalism with the *Shia* system to government in order to put an end to tyranny and arbitrary rule which they considered to be un-Islamic. The Islamic Jurists' participation in the Revolution allowed it, from the outset, to enjoy nation-wide support.[62]

It is generally held, and rightly so, that the most influential force behind the Iranian Revolution was the Islamic Jurists' support of the constitutionalists. Had the Islamic Jurists not sanctioned the Revolution, it would definitely have died still born.[63]

A study of Naini's writings on Constitutionalism will help us understand the Islamic Jurists' own justification for their participation in

the Constitutional Revolution. By examining Naini's accounts of the principles of democratic Constitutionalism, such as liberty, equality, the parliamentary system, and so on, we shall discover to what extent the Islamic Jurists were aware of the idea of democracy and to what extent they were prepared to make concessions to modernism in general and to accommodate Constitutionalism in particular.[64]

Renowned as a prominent *Mujtahid* of his own time, Naini played an active role in the Revolution and events on the trail of the 1911 Anglo-

Russian invasion of Iran and in Iraqi politics. While in Iran as an "exile", Naini was involved in the republican movement of that country. The role of the Islamic Jurists in power politics in the course of the Persian Revolution, the Anglo-Russian invasion of Iran, the Iraqi Revolution of 1920, and finally the republican movement of Iran in 1924 reflects the vital role of *Ijtihad* in the form of *fatwas*.[65]

The Islamic Revolution of 1979 in Iran which terminated the rule of 2500 years of monarchy in Iran was also realized and triggered by Imam Khomeini who was a *Mujtahid*. The revolution actually occurred on the basis of four fatwas issued by Imam Khomeini.[66] The four *fatwas* were as follows:

1- The *fatwa* to the effect that monarchy is no longer a legitimate system of government:

"Now the regime of Shah is ruling tyrannically over our oppressed people today. He continues to rule in defiance of the law and the wishes of the people, who have risen up against him throughout Iran, and he threatens the higher interests of the Muslims and the

dictates of Islam with imminent destruction for the sake of his own satanic rule and his parasitic masters. It is the duty of the entire nation that has now risen in revolt to pursue and broaden its struggle against the Shah with all its strength and to bring down his harmful, disastrous regime".[67]

2- The fatwa which made it incumbent on all the soldiers to leave their military bases:

"Members of the armed forces. Islam is better for you than unbelief, and your own nation is better for you than the foreigners.

It is for your sake, too, that we are demanding independence, so you should do your part by abandoning this man. Do not think that if you do, we will slaughter you all. Other people behave that way. Look at the Humafars and officers who have joined us; they are treated with the utmost respect. We want our country to be powerful and to have strong armed forces. We do not wish to destroy our armed forces; we wish rather to preserve them so that they belong to the people and serve their interests, instead of being under the command and supervision of foreigners." [68]

3- The *fatwa* calling upon all the governmental employees to go on strike till the downfall of the regime:

"The military government is usurpatory and contrary to both the law and the Shariah. It is the duty of everyone to oppose it, to refrain from aiding it in any way, to refuse to pay taxes or render any other assistance to this oppressive regime of transgressors, and it is the duty of all oil company officials and workers to prevent the export of oil, this vital resource.

Do those workers and officials know that the bullets that pierce the breasts of our precious youths, that drown our men, our women, our infants in blood, are paid for with the money earned by the oil that their exhausting labor produces? Do they know that the major part of the oil used by Israel, that obstinate enemy of Islam and upurper of the rights of Muslims, is provided by Shah?" [69]

4- The *fatwa* to break the martial law:

"Although I have not given the order for sacred Ijtihad, and I still wish matters to be settled peacefully, in accordance with the will of

the people and legal criteria, I cannot tolerate these barbarous actions, and I issue a solemn warning that if the Imperial Guard does not desist from this fratricidal slaughter and return to its barracks, and if the military authorities fail to prevent these attacks, I will take my final decision, placing my trust in God. The responsibility for whatever ensues will then belong to those shameless aggressors.

If the aggressors retreat, I request the courageous people of Tehran to retain their state of readiness and to be alert for the stratagems of the enemy and to preserve order and tranquility. They should be fully equipped and prepared to defend Islam and the orders issued by the Muslim authorities.

As for the declaration of martial law, that is a mere trick. It is contrary to the Shariah and people should not pay it the slightest attention." [70]

It is to be noted that Imam Khomeini issued all these fatwas on the basis of the authority of *Ijtihad* which he exercised decisively. The

analysis presented thus illustrates how the practice of *Ijtihad* has offered solutions to the problems of the time and place and on occasions even revolutionized the situations. *Ijtihad* has been actually that driving engine which on the one hand have empowered the great Islamic leaders to discover solutions to the problems of the modern time and on the other have practically equipped *Shariah* with the most dynamic device. Hence, the exercise of *Ijtihad* is not only the right, but also the duty of present generations if Islam is to adapt itself successfully to the modern world.

Conclusion

The divine revelation guides the Prophet (S.A.W.) and that is the basis of all his utterances. In other words, the Prophet's rulings are based on Divine revelation and not on *Ijtihad*. The majority of Islamic Jurists have, however, held that the Prophet (S.A.W.) in fact practiced *Ijtihad* just as he was allowed to do so, such as temporal and military affairs. The Prophet (S.A.W.) often resorted to reasoning by way of analogy and *Ijtihad*, and did not postpone all matters until the reception of divine revelation.

The term *qurra'* was prevalent among the Muslims living during the Prophet's time. Through contact with new cultures and civilizations, the Arabs later spread knowledge and progressed in different branches of learning. Now that Islamic law was perfected and other branches of Islamic learning had developed, the *Quran* readers were no longer called *qurra'* but were known as *Mujtahids* and Islamic Jurists.

During the Prophet's life, *Ijtihad* was lawful for the companions,

irrespective of whether it occurred in the presence or absence of the Prophet (S.A.W.). The companions did, on numerous occasions, practice *Ijtihad* both in the presence of the Prophet (S.A.W.) and in his absence. The Prophet (S.A.W.) while laying down a law, primarily considered the value and spirit of the action and not the form of the action itself. The companions formed an opinion by looking to the *Shariah* value, which led the Prophet (S.A.W.) to take a decision.

The major sources of Islamic law for jurists are the *Quran* and the prophetic traditions. But compared with what is now known as Islamic

law, the legal norms of these sources appear to be very few. The Quranic decreed are mostly general principles, and although the Prophet's tradition provides more detail, it, too, is concerned primarily with religious rites and less with real legal matters. Most detailed laws provided by the Prophet's tradition originally arose under special circumstances, and their applicability to later circumstances is not always clear.

Generally, the Companions did not ask many questions from the Prophet (S.A.W.). Consequently, the *Sunna*h appeared mainly as a general guideline that was acted upon and that had different interpretations by early Muslims. People did not know the details of many problems even in the lifetime of the Prophet (S.A.W.). Of course, the Prophet (S.A.W.) 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 (S.A.W.) 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.

For the most part, then, Islamic law has not received through the

two main sources by *Ijtihad*. Yet, the system that exist today as Islamic law is actually much broader, the product of a centuries-long process of legal interpretation rendered by numerous jurists who derived the relevant legal precepts for various case from the general principles.

Therefore the flexibility of Islamic law in practice and the emphasis on *Ijtihad* sufficiently demonstrate that Islamic law is adaptable to social change and the *Ijtihad* is a solution to the paradox of the dilemma of Islamic law, namely: that of being immutable and yet adaptable to social changes.

Notes:

1. Majlesi, Mohammad Baqer, *Bahar-Al-Anwar*, Beirut, 1979, Vol. 2, P. 28
2. Mutahhari Mortaza, op.cit., Vol. 1, P.281.
3. Ibid, P. 282.
4. Al-Bokhari, *Sahih*, op.cit., Vol. 7, PP. 48-51.
5. Ibid, P. 50.
6. Ibid.
7. The *Quran*, 11: 27.
8. Al-Jassas Abu Bakr Al-Razi, Ahkam *Al-Quran*, Cairo, 1325 A.H., Vol. 3, PP. 123-124.
9. Ibn Athir, *Al-Kamel-fi-Al-Tarikh*, Beirut, 1966, Vol. 5, PP.341-343.
10. Ab Yusuf, *Al-kharaj*, Cairo, 1302 A.H, PP. 13-15.
11. Malik, *Al-Muwatta*, Cairo, 1986, P. 748.
12. Abu Yusuf, *Al-Kharaj*, Cairo, 1302 A.H., P.14.
13. Malik, *Al-Muwatta*, Cairo, 1962, Vol. 2, P. 776.
14. Ibid, PP. 742-43.

15. Al-A'meli, *Wasa'el-Al-Shia*, Beirut, 1983, Vol.6, P. 32.
16. Ibid, P. 51.
17. The *Quran*, 2: 228.
18. Makarem Naser, *Esteftahat-Al-Jadidah*, Qom, 1991, P. 32.
19. The *Quran*, 4: 35.
20. Al-Hakim Mohsen, *Mostamsek-Al-Urwah*, Najaf, 1968, Vol.8, P. 196.
21. Al-A'meli, *Wasel-Al-Shia*, Beirut, 1983, Vol. 15, P. 223.
22. The *Quran*, 4: 20.

23. Al-Hendi Ala-Al-Din, *Kanz-Al-Umal*, Beirut, 1985, Vol. 16, P. 503.
24. Al Khui Abolghasem, *Al-Manahej*, Qom, 1984, Vol.8, p. 182.
25. Helli Allameh, *Shara'eh-Al-Ahkam*, Beirut, 1983, Vol. 4, P. 168.
26. Ibid, 178.
27. Ibid, 182.
28. The *Quran*, 24 : 26.
29. Al Khomeini, *Tahrir-Al-Wasilah*, Qom, 1982, Vol. 2, P. 255.
30. Hamad Al-Najjar Majid, *Islam-Jafari Rules of Personal Status*, Tehran, Iran, 1974, P.11.
31. Helli Allameh, *Shara'eh-Al-Ahkam*, Beirut, 1983, Vol. 2, P. 9.
32. Al-Khomeini, *Tahrir-Al-Wasilah*, Qom, 1982, Vol. 2, P. 562.
33. Ibid, P. 561.
34. Ibid, P. 562.
35. Jafari, Hussein, *Origins and Early Development of Shia Islam*, Tehran, 1987, PP. 259-83.
36. Kashef-Al-Qeta, *Asl-Al-Shia*, Najaf 1961, P.59.
37. Rashid, Reza, *Al wahah-Al-Islamiieh*, Cairo, 1957, P.37.
38. Middle Eastern Studies, *Islam and socialism in Egypt*, Cairo, 1968, No.42, PP.156ff.
39. Jannati, *Ijtihad*, Tehran, 1994, PP. 195-99.
40. Ibid.

41. *MajAllah' Al-Azhar*, No. 38, Cairo, 1959.
42. Jafari, Hussein, op.cit., P. 271.
43. *Two Historical Documents*, Da'r-Al-Taqreeb, Cairo 1383 A.H., PP. 8-9.
44. Qummi, Muhammad Taqi, *Qessah-Al-Taqreeh*, Cairo, 1960, PP.6-11.
45. *Wasael-Al-Shia*, is a book of *hadith* which is written by Mohammad-Ibn-Hassan Al-hor-Al-ameli (d. 1104 A.H.) and compiles all the Shia authentic *ahadith*. Its new publication covers 30 volumes.
46. *Majma-Al-Bayan* is a book of *tafsir* which was authored by Sheikh

Tabarsi. This book is in 10 volumes.

47. Shirazi Abd-Al-Karim, *Mazahib-e-Islami*, Tehran, 1979, PP.72-85.
48. Iqbal Muhammad, op.cit, P. 152.
49. Ibid, P. 153.
50. Mustawfi, Abdullah, *Tarikh-e-Idari-va-Ijtema'yi*, Tehran 1943, Vol.1, PP. 470-1
51. Kasravi, Ahmad, *Tarikh-e-Mashruta'yi Iran*, Tehran, 1961, P. 15.
52. Ibid PP. 19-20.
53. Keddie, Nikki, *Religion and Rebellion in Iran: The Tobacco Protest of 1891-1892*, London, 1966, PP. 50-2.
54. Eatemad-Al-Saltanah, *Al-Maa'ther va-Al-A'thar*, Tehran, 1306 A.H., P. 144.
55. Ibid, PP. 148-9.
56. Taymuri, Ibrahim, *Tahrim-e-Tanbako*, Tehran, 1949, P.72.
57. Mustawfi, Abdullah, op.cit., Vol. 1, P.471.
58. Ibid, P. 473.
59. Kasravi, Ahmad, *Tarikh-e-Mashruteh Iran*, Tehran, 1961, PP.168-176.
60. Zanjani, Amid, *Fiqe-e-Siasi*, Tehran, 1989, Vol.1, PP. 173-179.
61. Ibid.

62. Hairi, *Mashruteh-dar-Iran*, Tehran, 1985, PP. 252-262.
63. Abdul-hadi, Hairi, *Shiism and Constitutionalism in Iran*, Belgium, 1977, PP. 189-193.
64. Naini, Muhammad Hussein, op.cit., PP. 8-12.
65. Ibid, P. 15.
66. Algar, Hamid, London, 1985, PP. 242-261.
67. Imam Khomeini, *Sahifeh-e-Noor*, Tehran, 1985, Vol.3, P. 271.
68. This speech, delivered at the cemetery outside Tehran where many of the martyrs of the Islamic Revolution are buried, is devoted chiefly to the questions of formal legality that were being raised in a

hopeless effort to stem the tide of revolution, Source: Majmu'a-yi Kamil, PP. 10-17.

69. Imam Khomeini issued this declaration from Neauphle-le-Chateau one week before the beginning of Muharram, the month in which the Iranian people, emulating Imam Hussein (whose martydom took place on the tenth day of the month) advanced their confrontation with the Shah's regime to a point of no return. After Muharram, it was clear that the regime could not survive. Source: *Sahifeh-e-Noor*, Vol. 4, P. 189.

70. This declaration was issued in Tehran shortly after the decisive confrontation had begun between the Islamic Revolution recalcitrant elements in the armed forces. Source: Majmu'a-yi Kamil, P. 40.

4

Al Ahkam Al Thanaviiah

(The Secondary Laws)

Islamic laws and rules due to the conditions in which the people qualified to fulfil their responsibilities and the circumstances prevailing and governing, are divided into two categories:

a. Al ahkam al avvaliiah

(the Primary Laws and rules or the Original Laws)

The primaries are those laws and rules that remain the same and are for normal conditions. They are called the primary or the original laws.

b. *Al ahkam al thanaviiah*

(the Secondary or the Alternate Laws)

The Secondary laws and rules are those sanctioned with due effect but are enforceable for a limited time and in exceptional cases and conditions. Such laws are called the secondary and alternate laws.[1] In other words, the laws and rules that are sanctioned without having in consideration the special and exceptional conditions are called the primary and original laws and those that are sanctioned for exceptional conditions are called the secondary laws.[2]

It is the responsibility of a Muslim to practice and follow the primary laws and rules of *Shariah* unless it becomes impossible to do so. Such impossibility and reason may come into existence due to the

circumstances prevailing and governing the society, such as birth control (to control the population) when population explosion would cause huge social, economic and educational hardships in the society. In such cases it becomes obligatory to control the exploding population. There is also the need to see that prices for much needed marketable commodities are reasonable and to see that harmful monopoly of goods in public demand is controlled. This is so if non-intervention of government would lead to the deprivation of the disadvantaged groups of people in the society. Sometimes the reason for the inability to follow the primary laws may come from ones personal conditions and circumstances such as unbearable hardships and impasses (*osr and haraj*) or harms (*zarar)* related to ones own circumstances, which will be discussed, in greater details later.[3]

As a matter of fact, the case that the emergence of certain conditions and elements or new issues could become reasons for changing the primary laws and rules existed in the very early days of the history of Islam. The Muslims were aware of the criteria of *Shariah* knew them because the general principles such as abolishment of hardships and extreme harms are founded on the basis of the text from the *Quran* and the *Sunnah*.[4]

The fact that the emergence of certain conditions and circumstances may become the reason for change in the good (*Husn)* and the evil (*Qubh)* of certain facts is also one of the issues that since a long

time has been considered by the scholars. Allamah Helly in the topics dealing with the issue of *Husn* and *Qubh* as factors based on grounds of reason has said the following:

"The theologians of the *Shia* and the *Mu'tazilah* maintain that the grounds for the validity and genuineness of the existence of *Husn* and *Qubh* in human deeds are based on the decision and the judgment of reason. They also maintain that such issues can sometimes be made clear and plain with a simple and normal consideration of reason. Sometimes

they are very complex and exist in certain cases and conditions such as exacerbating truth or expedient lies"[5]

However, the terms such as the secondary laws, or the secondary responsibility do not have a very long history. These terms are mostly found in the works of the *Shia* scholars. The Muslim scholar who first made use of the term "the secondary laws" was Sheikh Muhammad Taqi Isfahani (d. in 1248 H.). In *Hedayat Al Mustarshedin,* he has called the fatwa of a *Mujtahid* that may not concede the actual rule of *Shariah* for a case, a secondary law and responsibility.[6] Today the scholars call such a case the apparent rules *(Al-Ahkam Al-Zaheriiah)* as opposed to the actual rule not a secondary law and rule. Following him Muhammad Hussein Ibn Abdurrahim (d. 1250 H.) the author of *Fusul* expressed the primary and the secondary laws by the expression and terms as the

original and temporary responsibilities. In his discourses on the issues of *Ijtihad* where he has a short discussion about the primary laws, hinted to the secondary laws. He divides the applicable rules and laws into the actual and primary and the actual non-primary laws.[7]

In fact, the beginning of the investigations and verifications of the issue of the secondary laws was the time of Sheikh Ansari (d. 1281 H.).[8] The previous scholars of *Fiqh* have made certain presentations on the

issue of the secondary laws and principles but within such presentations what exist are discussions on the issue without specifying the title of the issue.[9]

On examining the works of the *Sunni* scholars I did not find anyone writing about the secondary laws in *Shariah,* although there are certain precedents in the works of a number of earlier *Sunni* scholars.[10] Malik Ibn Anas (d. 179 H.) in "*Al-Modavvanah-Al-Kobra*" about the secondary titles of vows, covenants and oath has some discourses.[11]

Muhammad Ibn Idris Shafei (d. 204 H.) also towards the end of the book *Al-Omm* has some discourses on this issue.[12] He under the heading "what may become lawful due to necessity" has dealt with the issues of necessity, which are of the secondary laws.[13] Abul Qasim Kharafi (d. 334 H.) also under the heading, "coercion" (*Ikrah)* has dealt with such discourses.[14]

The Views of the *Foqaha* on the Definition of the Secondary Laws

In the works on *Osul-Al-Fiqh* and *Fiqh* one may find such terms as Secondary Rules, Secondary Legislation, Secondary Principles, and the Secondary Order. Such terms in some respects are similar and in other respects they are different.

1. On the basis of what is popular among the *Foqaha* the primary

laws are such laws that are sanctioned for certain cases in normal conditions such as the obligation of prayers, unlawfulness of drinking intoxicating substances. The secondary laws are such laws that are sanctioned for certain cases in abnormal conditions such as emergencies, coercion etc. Such as fasting in the month of *Ramadhan* for one who may suffer harms due to fasting.[15]

2. Some of the *Foqaha* have defined the primary and secondary laws differently. They say that the primary laws are those that are permanently applicable at all times and conditions and the secondary laws are those that are of a general nature not in the absolute sense but with conditions and restrictions. In this way the proposition comes out of permanency and assumes a timely nature.[16] One of the contemporary scholars has a similar view and he says, "Those Islamic Laws that are

based on permanent needs of human beings are the primary laws".[17] On this basis, the laws that are sanctioned for timely needs are called the secondary laws.

3. From other scholars point of view the primary laws are those that are sanctioned on the basis of the benefits and harms or the good *(Husn)* and the evil *(Qubh)* that exist in certain cases to which such laws apply. The secondary laws are those that are sanctioned on the basis of

the existence of a conflict between a benefit and harm, a good and evil and for certain conditions.[18]

Sheikh Ansari has said, the primary laws are sanctioned regardless of the possibility for its applicability to other cases. What follows it is that there will be no conflict between such laws and those that may come into being due to certain conditions. For example, consuming meat for food in normal conditions are permissible (*Mubah),* however, if one would swear not to consume it for food it becomes unlawful (*Haram)* for him to consume it for food. Or it may become obligatory to consume it. For example one may have made a vow to consume meat for food.[19]

4. According to some scholars the primary and secondary status are relative conditions. When laws are sanctioned regardless of other conditions they are called primary laws but if they are sanctioned with a

view to certain conditions and cases they are called secondary laws.[20] For example *vozu* (ablution) is a case that has a special status in *Shariah* and its primary rule is that it is a preferable act and in certain cases it becomes obligatory. In some cases if *vozu* would be harmful to a person or cause suffering to one its status changes into a harmful and hardship causing status as its secondary name and title and accordingly to avoid it becomes permissible (*Mubah)* and even performing *vozu* may become unlawful

(*Haram*).

The Differences between the Primary and Secondary Laws

From the above details it becomes clear that the differences between the secondary and the primary laws are as follows:

1. In the terminology of the *Foqaha* the secondary laws always are in a longitudinal line with primary laws not at the same time and simultaneous which means that as long as it is possible to observe the primary laws there is no need to apply the secondary laws. The secondary laws are followed only when one is not able to follow the primary laws.

2. The primary laws are permanent while the secondary laws are temporary. According to certain *Hadith* (format tradition deriving from

the Prophet (S.A.W.)) the primary laws remain valid until the Day of Judgement. As the sixth Imam[21] has said, "Whatever Prophet Muhammad (S.A.W.) made lawful (*Halal)* will be lawful to the Day of Judgement and whatever he made unlawful (*Haram)* will be unlawful to the Day of Judgement".[22]

3. Whenever a conflict may rise between the secondary and the primary laws the secondary laws will have priority because the secondary

laws would have the effect of an exception to and limiting the primary laws. Just as a particular rule comes before the general rule in the same way the secondary laws come before the primary laws.

4. In other words, the secondary laws are in fact the same primary laws but a change has taken place in the case or subject to which they apply in that case in the terminology of the *Foqaha* they are called the secondary laws. Therefore the difference between the two comes from the change and difference in the case and subject to which they apply.

The Kinds of the Secondary Laws

After considering the secondary laws of every case or subject and its primary laws it is possible to picture a great number of the secondary laws. For example with a view to the five categories of rules, namely

the obligatory (*Wajeb)*, the desirable (*Mandub*), the prohibited (*Haram*), the detestable (*Makruh),* and the allowable (*Mubah*), if the primary rule of a case would be permissible the secondary rule may become either one of the five therefore five multiplied by five would result into twenty five cases. There is, however, one exception: Both the primary and secondary rules can not become of the same nature like both being obligatory or prohibited. Based on this five out of twenty five will become exceptional

and the remaining twenty cases will remain valid possibilities.

There are also some other examples that do not seem to have clear applications in *Shariah,* This may happen when the primary rule for a case would be a prohibition and its secondary rule would be a desirable one or that the primary rule would be detestable and its secondary rule would be a desirable one or vice versa. The rest of the possibilities may have certain applications and one may find real examples in *Shariah* for them.[23]

Some Examples of the Secondary Laws.

1. The case wherein the primary rule would be detestable (*Makruh*) and the secondary rule would be a prohibited one (*Haram).*

One example is hoarding of in-public-demand-commodities, which

is considered as detestable in normal conditions by a group of *Foqaha.* However, in the other conditions such as when famine would exist and people would direly need the commodity, hoarding is prohibited and the Islamic government will make the hoarder sell such commodity.[24]

2. The case wherein the primary rule would be permissible (*Mubah)* and the secondary would be obligatory (*Wajeb).* An example of such case is learning industrial skills according to the primary rules is

only permissible (*Mubah*), however, if the protection and the security of the Islamic system would depend on it, then as being an introductory step for the fulfillment of an obligation it becomes obligatory (*Wajeb*). Muhaqqiq Khoei in this matter has said, "learning all industrial skills are of the permissible tasks. It is not even desirable thus; there is no question about its being an obligatory task. However, if ignoring to learn it would cause huge losses to the system then its learning becomes necessary".[25] Another example of this nature is the case of drinking or eating in normal conditions as a permissible act and an obligatory act when preserving one's life would depend upon eating and drinking.

3. The case wherein the primary case would be a prohibition (*Haram*) and its secondary rule a permissible one (*Mubah*). An example of such case is consuming for food of carcasses or pork as a permissible act to preserve one's life, while in normal conditions and as a primary

rule it is prohibited. This example, however, would only hold when following the laws for emergencies would only be permissible (*Mubah*) and not obligatory (*Wajeb*).

4. The case wherein the primary rule would be a prohibition (*Hurmat*) and its secondary rule an obligation (*Wujub*). An example of such case is the same as the one in 3 when following the rule for emergency is obligatory. (in such a case the opinion of the *Foqaha* are

different).[26]

5. The case wherein the primary rule would be an obligation and its secondary rule a prohibited one. An example of such a case is obeying parents as an obligation according to many of the *Foqaha*.[27] This is obligatory as long as it would not lead to an unlawful act and disobedience to God in which case it becomes prohibited.

6. The case wherein its primary rule would be permissible and its secondary rule a prohibition. An example of this case is consuming the flesh of lamb or cow and other animals for food while if such animals would feed solely on human waste, as a secondary rule consuming their flesh for food becomes prohibited.

7. The case wherein the primary rule would be permissible and the secondary one would be a desirable rule. An example of such case would be making people to smile for fun, which is a permissible act but it may become a desirable act when it would make people happy.

The Difference between the Secondary Laws and the Abrogation of the Laws

Apparently people who have discussed the abrogated and the abrogating verses of the *Quran* they have taken the verses indicating the primary laws as the abrogated and those indicating the secondary rules and laws as

the abrogating ones.

It is very possible that the words of Hibbatullah Ibn Salamah (d. 410 H.) in "*Al-naskh va Almansoukh*"[28] and those of Abdurrahman Ibn Ata'eqi (a scholar of the eighth century) in their discourses about the *Quran* may have such implications.[29] The interpretation of the first and last part of the verse 2:173 is being considered as abrogated and abrogating ones. In the first part of this verse pork is prohibited (*He has only forbidden you what dies of itself, and blood, and flesh of swine*).[30] and in the second part in an emergency it is permissible (*But whoever is*

and in the second part in an emergency it is permissible (*But whoever is* *driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him).*[31] thus, these scholars have called the first part as abrogated and the second part of the verse as abrogating. One of the contemporary scholars has considered this opinion as the one to apply to all the works

on abrogated and abrogating texts.[32]

Obviously, there is a fundamental difference between the abrogation and secondary laws. In the definition of abrogation it is said, "Abrogation means the removal of the previously existing law by the law and a rule that is sanctioned later. The relations between the two laws would be as such that both laws would not possibly exist together".[33] In the case of emergencies, coercion and sever hardships and such other

secondary status the previously sanctioned laws do not become obliterated only their subjects change because the subjects of the previously sanctioned laws are for normal conditions and subjects of the secondary laws are for unusual conditions. In the case of consuming carcasses for food a prohibition is for normal conditions and permissibility is for the case of emergency.

In other words, an abrogation is thinkable only in the case of such two laws that would be of totally opposite nature and as such they would not exist together at the same time. Secondly, the subject for both laws would be the same. Such conditions do not exist in the case of the secondary laws. It is possible in the case of a primary and secondary law to exist at the same time. The author of "*Haqa'eq Al Osul*" also says it clearly, "*Naskh* or abrogation means obliteration of the primary or the

secondary laws of a subject".[34]

Therefore, although the secondary laws are for accidental and unusual conditions they in such conditions have the due force of validity. It is possible that the *Shariah* for some reason in a later time abrogates them just as is the case with primary laws.

The Criteria to Discern the Primary

and the Secondary Laws

According to many of the *Foqaha* the secondary laws are associated with exceptional conditions and the primary laws are associated with the normal conditions. On this basis the text of verse 173 of chapter 2 gives a secondary status to an emergency.

> *"He has only forbidden you what dies of itself, and blood, and flesh of swine, and that over which any other (name) than (that of) Allah has been invoked; but whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him".*[35]

Just because a status of a law is secondary it can not be considered a secondary law. This is true because it is a fact in the case of the apparent, as opposed to actual, laws such as the laws on the basis of *bar'aah (*freedom from responsibility on the basis of the absence of sufficient reason to prove responsibility) and emergencies. This also

applies to the cases of the primary laws for emergencies like the obligation of *Tayammum* (particular ablution with pure earth)[36] for a person who does not have any water for *vozu* or using water would be harmful for him. For this reason some of the *Foqaha* have considered these two kinds of laws as the secondary laws. Of such *Foqaha* is Muhaqqiq-e-Naeeni who calls the primary laws for emergencies as the secondary laws.[37] Allamah Muzaffar also has considered such rules as the

apparent ones (*Al Ahkam Al Zaheriiah*) as opposed to the actual ones like precaution and freedom from responsibility as the secondary laws.[38]

The task of discerning the primary laws from the secondary ones although may not seem to be difficult, but in some cases it may not be that easy. Of such examples are the cases wherein the primary laws would have several possibilities. One such case comes in the sections of the laws of worships (*Ibadat)*. For one who may have access to water, the rule is to have a *Ghusl* (a shower) or *vozu,* but for one who may not have access to water for good reasons such as when using water would be harmful for him he must perform *Tayammum*. At first, it may seem as if the law therein is a secondary one but there is no doubt that the law in this case also is a primary law.

In certain cases the *Shariah* pictures several conditions for the people qualified to shoulder a responsibility and on such basis it has

classified, or has categorized such people. For example, a person is not on a journey or is on a journey. A person not on a journey must pray in full and a person on a journey must shorten the prayers (*qasr*). Or that a person who intends to pray he may have access to water or does not have access to water or that the use of water is harmful for him or it is not harmful for him. All the laws in such cases are the primary laws.[39]

For some cases in *Shariah* there are certain rules without

categorization and dividing methods and for certain conditions other laws are declared. In such instances the second law is a secondary law.[40] In other words in the first examples the laws from the very beginning are introduced in categories and in divisions but in the second examples such laws are introduced in the form of exceptions.

The task of discerning and properly identifying the cases and the subjects to which such laws apply is also very important. A lower degree of carefulness and proper expertise may lead a *Faqih* to confusion and instead of a more important case he may give more consideration to what is less important, or in a crucial time the Islamic system and its protection may be exposed to dangers and insecurity.

The significance of this task for the leader and the *Imam* of the society is of a much greater degree. The position of the *Imam* and leader is one that, in order to manage and supervise the system properly,

requires discerning precisely all the laws and cases related to the management of the state. It is very important to discern what is important and more beneficial for the state and what is not important and beneficial for it. The leader and the *Imam* may even need the help of the experts in certain fields related to the management of the state. Imam Khomeini with a view to such task has said:

> *"It is possible, based on the fact that the running of the government is only for the just* Foqaha, *an objection or question*

may arise in the minds. One may say that Foqaha *are not capable of running the state. This question and objection does not have a strong base because we see that in every state the affair are managed with cooperation of a great many of the experts and knowledgeable people. The kings and the Chief Executives a long time ago until our times did not know all the issues related to the running and management of the state. The experts of every field managed the affairs of the state. If the head of the government is a just person he finds the just or trustworthy ministers and officers and in this way he brings injustice, transgression and corruption in the public treasury, against people's lives, honor and properties under control. Just as during the government of Imam Ali all the affairs of the government were not managed by him alone, instead the governors, the judges and commanders of the army were involved. Today also we see that the management of the political issues, the army and defence of the solidarity and the independence*

of the country each post and position is assigned to qualified persons".[41]

It is certain that if the secondary status of a rule would become an individualized matter in such a case the task of discerning the cases to which such rules and laws may apply will not be very difficult. Obviously and very often the individuals easily discern what is difficult, harmful and a case of emergency for him or her. Although in some cases even individuals need the help of an expert of the field to which the case is

related such as the physicians etc., especially when the level and degree of difficulties and hardships would be such that is judged by commonsense not according to the individuals standards.

The Procedures to Enforce or Practice the Secondary Laws

In general, three stages can be presumed for the secondary laws:

A. The initiation;

B. The discernment;

C. The enforcement stage.

The first stage is of the functions of the legislative authorities in *Shariah*. When there is a need and there is no obstacle the *Shariah* may sanction a law, which will be addressed to all Muslims universally and not

individually, like the following verse of the *Quran:*

"Allah has not laid upon you any hardship (haraj) in religion".[42]

The second stage, which can also be called the stage of discernment, is when the people study the individual case to find which rule is applicable to it. The ordinary people themselves can, sometimes, carry this task. One example of such a case is the case of one who finds himself in a difficult position of consuming pork or carcasses

for food or in the month of *Ramadhan* one is convinced that fasting is harmful for him due to a certain illness.

In some cases the leadership or the legislative body carries the task of the stage of discernment. This is when the government, in order to solve social problems, would need to benefit from the secondary laws. If the leadership or the advisors would see that standardizing the prices of in-public-demand commodities would help to overcome certain difficulties they may do so for the protection of the system. The author of *Al-Jawahir* in the section on "unlawfulness of wages for obligatory acts" writes:

> *"It is not an offense to receive wages for teaching certain industrial skills that are needed in the society because running of the social order and the lives of industrialist depend on it".*[43]

The author of *"Miftah al Keramah"* in his discussion on the barren and unutilized lands points out to one of the cases to which the rule of no

hardships (*la-haraj*) applies, and says:

> *"By utilizing the unutilized land* (Mavat) *one becomes the owner of such land. Because of the fact that people need to live in civilized manners if utilizing the land would not give one the right to become the owner it will cause huge hardships* (haraj) *to the society".*[44]

Obviously the task of deducing the secondary laws from the texts of *Shariah* is the task of a *Mujtahid* just as deducing the primary laws

and the branches of such laws is.[45] Those of the secondary laws that in regards to their applicability are not of limited nature are dealt with only in the section to which such laws belong as branches in a process jurisprudentially accepted. Those of the secondary laws that are dealt with in several sections of *Fiqh* are treated as the rules of *Fiqh*, such as the principle of no harm (*la-zarar)* and no hardships (*la-haraj)*. The task of a *Faqih* is to study the basis of such rules in regards to their authority and authenticity and clarify their limits and domain.[46]

In regards to the third stage, namely the application and execution stage, in general, one may say that it is the task of the people or the government and from this aspect there is no difference between the secondary and the primary laws.[47]

One very important point to note in this regard is the fact that the secondary rules are often involved in the social issues and it, obviously, in the first place, is the duty of the government to see it executed

properly. For this reason it is important to consider the secondary laws from two angles:

(a) The Secondary Laws Applicable to the individuals only:

Examples of such laws are the obligations of fulfilling one's vows, covenants, oaths, the conditions set along with a contract, involvement in certain prohibited matters due to emergencies, coercion and missing certain obligations due to an emergency. Such cases are of the ones for

which people and individuals are responsible to fulfil and the govern-ment or the leadership does not play any role therein.[48]

(b) The Secondary Laws that are Applicable to the Social Issues:

Just as discernment of the secondary laws applicable to the social issues is the duty of the government so also is its application and execution. The reason for this is also clear. Of such reasons are disruption and chaos that may follow due to ignoring the duty of enforcing such laws.[49]

For example, adjustment of prices of certain commodities and controlling them and controlling the activities of hoarding urgently needed commodities are all of the duties of the government and no one would have the right to interfere with such issues. Of such examples are the issues related to the export and import of the commodities, during peace or war times if they would affect the security of the state.

Imam Ali in one of his instructions to Malik-e Ashtar has

considered the tasks of controlling hoarding of needed commodities and of maintaining proper prices for the needed goods among the duties of the governor. The Imam has said:

> *"Do not allow hoarding of in-public-demand goods because the Holy Prophet (S.A.W.) would not allow it. The dealings of the people must be based on justice and fairness. In the exchange of the goods no harm or loss should be caused to the buyers or sellers. After warning people against the evil of hoarding you may*

bring such people into account through balanced penalties".[50]

One of the contemporary jurists after giving some explanation about the secondary rules, says: "How many great problems which were solved in the light of the secondary rules and how many sophisticated and difficult problems will be solved by these rules; the secondary rules are the greatest instrument available in the Islamic government for solving the problems of the society". Certainly, one should not exaggerate the usefulness of the secondary rules and with the emergence of every problem resort to them. The expediency of the Islamic society is that its

problem resort to them. The expediency of the Islamic society is that its difficulties should be solved as much as possible by the primary rules except in the emergency times; only when the primary rules are not useful, the secondary rules should be used. Recognition of the criteria of the secondary rules requires awareness. The criteria of the secondary rules is the impossibility of acting upon the primary rules and following

them. Recognition of this and recognition of the instances and cases requires religious knowledge; for example wherein *zarar* and *haraj* is instance of the secondary rule, or distinguishing of the most important matter from more important ones (*Ahamm and Mohemm),* requires the religious expertise.[51]

Categories of the Secondary Laws

None of the *Foqaha* in their investigations and works have specified the number of the titles for the categories of the secondary laws. Only the following are the well-known titles for the categories of such laws.

1. Protection of the Islamic system. (*Hefz alnedam)*
2. The Urgencies and Pressing Needs. (*Izterar)*
3. Losses. (*zarar)*
4. Hardships and Constraints (*Osr and haraj*)
5. Coercion (*Ikrah)*
6. Being a lead, or Introductory (*Muqaddimah-Al-Wajeb or Haram)*
7. Important and more important (*Ahamm and Mohemm)*

Initially, each of the above mentioned titles seems independent titles but a careful study and proper consideration of these titles reveal that many of them are very closely related to the others. These relations are as such that in some cases two of them can be considered as one and

the same.

In the views of some of the scholars of *Shariah* urgency (*Izterar*) is a universal title and the issues of hardships and constraints are some of the examples of urgency and pressing needs. The author of *Al-Jawahir* in the section of the *Taharat* dealing with rules of cleanliness has said this:

> *"It is not permissible to have* Vozu *or* Ghusl *with unclean water nor is it permissible to drink such water except in the case of*

urgency. Hardships and extreme constraints are of such examples".[52]

In some cases he considers the case of losses *(Zarar)* the same as an urgency. In the section of the law about food and drinks he has the following expressions, "In all cases wherein eating or drinking is not permissible, in all such cases due to urgency it all becomes permissible. Proof for such rules are the verses of the Quran, the principle of no harm, no constraints *(la-haraj)* and that Islam is an easily practicable religion *(Al Shariah Al samhah)*.[53]

Although, hardships and constraints (*Osr and Haraj)* may be considered the same as "urgency" (*Izterar)* each one is dealt with separately as an independent principle and rule. The existence of *Ahadith* in the *Shariah* is the reason for such separation. In some of these *Ahadith* the title "urgency" *(Izterar)* and in some of them "hardships"

and "constraints" (*osr* and *haraj*) or "losses" (*zarar*) are mentioned. One of the contemporary *Foqaha* also points out saying:

"Coercion may also be considered an other example of "urgency". Some of the scholars have even considered both titles; (coercion and urgency) as one and the same as in the interpretation of verse 173 of chapter two wherein a compelled person (moztarr) *is considered as a coerced one* (mokrah).[54]

The *Foqaha* have considered the titles such as "important and

more important" (*Ahamm and Mohemm)* as the secondary titles side by side with the other secondary titles such as extreme "hardships and constraints" and it seems as if it is not a separate title. In fact, urgency should, with a view to the following, be considered a basic standard for the practice of the secondary laws. Although the primary laws from the point of view of the *Shariah* are important and in normal conditions it is necessary to obey such laws but in certain cases obedience to the secondary laws is more important. In the *Quran* and *Sunnah* also there are no such captions. It is only the decision of reason that when facing an

important and more important (*Ahamm and Mohemm)* issue the more important must be given priority.

Therefore, the law of "important and more important" is the criteria and standard that dictates to obey the secondary laws, in certain

cases, before the primary laws. On this basis one may say that giving priority to the secondary laws before the primary laws for practical reasons is because of the fact that a more important case has priority over an important case. Some scholars have also stressed on this point.[55]

The law of "important and more important" is not limited to the cases of the secondary laws. In the case of a conflict between two laws of primary nature also this law is followed. For example, in the case of

saving a life from drowning the *Foqaha* consider it permissible to walk on a piece of land that is currently under the control of some one due to usurpation, if saving a life may require it. It is very likely that in those cases wherein making an untrue statement or a statement that involves backbiting is considered permissible is based on this law.[56] However, the number of the secondary laws can not be limited to a known number of cases, even though the idea about the applicability of the popularly known secondary laws may be considered a good possibility. It is not so in the cases of the secondary laws that are not so popular because there are no known rules to follow in discerning and distinguishing such laws. Such secondary laws are found only in scattered sections of the law where one may face them.

It seems necessary to conduct more precise and profound studies

to discern, distinguish and analyze the issues of the principles of jurisprudence and issues of jurisprudence. It is also necessary to deduce and infer secondary laws for the newly emerging issues and cases that require the application of such laws.

Titles of the Popularly Known Secondary Laws:

Protection of the System

Of the most important issues, according to the *Shariah,* one is the protection of the Islamic system (*Hefz-al-Nedam)*. This caption and title implies sometimes (a) the preservation and protection of the sovereignty of the Islamic system and the prevention of confusion and uncertainty from creeping into the system at the hands of the internal and external enemies. For this reason Naeeni considered the protection of the sovereignty of the country against the hostile intentions of the foreigners and their plots to mobilize the defence capabilities as preservation and protection of the Islamic system. In other words he considered preserving the sovereignty and independence of Muslim lands.[57] (b) Sometimes it means to enforce and bring about law and order within the Muslim society. It is to enforce the rules of discipline among the people, the establishments and institutions of the society. Protection of the system

in this sense is opposed directly to chaos and anarchy.

The caption "protection and preservation of the system" in the majority of cases, applies to its meaning in case (b), the author of *Jawahir,* on the issue and discourse that in order to settle the court cases and disputes among people, [58] and it is obligatory to acquire the qualification of a *Mujtahid,* has said this: "The basis and proof for such necessity is that the Islamic system needs it."[59]

According to Imam Khomeini, prevention of chaos and anarchy from creeping into the society is the basis of the philosophy to establish a government.[60] According to Naeeni, in a discourse on preservation and protection of the system it indicates and refers to both meanings of the phrase preservation and protection of the system, mentioned in (a) and (b). Naeeni has said:

> *"In* Shariah, *the protection and preservation of the Islamic system is one of the most important obligations. Evidently, all of the aspects related to the foundation of the government, protection of the honor and the rights of the people are based on two principles: (a) The maintenance of law and order as means of progress in the society is one of such principles. It is the protection of the people's rights, maintaining justice and other obligations related to the welfare of the country and people. (b) The other such principle is*

> *defending the country against the invaders and intruders".*[61]

Both tasks of the safeguard and protection of the system in the sense mentioned in (a) or (b) are obligatory tasks according to *Shariah* and according to reason. The scholars consider this issue and principle a firmly and already settled one, free from any need of further analysis. They have based many rules on this principle. For example Naeeni writes:

"The Shariah *does not agree with causing anarchy and chaos in the society is clearly evident and all the duties related to the protection and safeguarding of the system and the country are of the urgent obligations beyond any doubt".*[62]

The reason that these laws are considered as the secondary ones is because of the fact that in many cases the protection and the safeguarding of the system involves doing or otherwise of certain acts. Such acts that may have been permissible in normal conditions may be due to the efforts of providing security to the system have become obligatory or otherwise. Therefore, the title and caption of being a secondary law is an introductory and a step towards some other tasks and because of this they have become obligatory or otherwise Al-Khoei has said, "Learning all artistic abilities are of the permissible activities and they do not even come under the desirable activities far from being obligatory or otherwise ones. However, if ignoring to learn such skills would lead to the

emergence of chaos in the society and the system then learning such skills becomes an obligation (*Wajeb*).[63]

Hardships and Constraints

One of the important rules and principles that apply very frequently in *Fiqh* and the Islamic law is the principle of "no hardships and no constraints". (*La-haraj*) The fact that so many of the *Foqaha* apply it in

so many sections of the law to various cases is proof of the significance and usefulness of this principle. In most of the issues related to the government and the society and some of the newly emerging complex cases that require ruling from *Shariah* this principle may provide key answers and solutions.

There is another point that reveals the significance of more investigations into this principle. It is the fact that some people, despite the existence of solid evidence to prove "hardships" authority and authenticity and the fact that so many of the *Foqaha* have applied this principle to so many cases, they have considered its nature and applicability unclear.

They have limited its authority to the obligations whose fulfillment is beyond human capabilities. Thus, practically they have denied its authority unaware of the fact that in such cases reason independently negates the responsibility and there will be no need on the part of

Shariah to declare such a principle. Of such people one may name Sheikh Hurr Ammili".[64]

Hardships and Constraint are of Four Kinds

(1) Hardships and Constraints beyond human capabilities to bear.

(2) Hardships and Constraints of a smaller degree than the one mentioned, but they would cause disruption in the society.

(3) Constraints that would be to none of the degrees mentioned above, but they would cause loss of life, property or honor.

(4) The degree of constraint that is not beyond human capabilities to bear and would not cause disruption or losses in the social system, but to endure and bear it would cause a great deal of suffering.

From the *Foqaha's* point of view, the first kind of constraints and hardships are not of the cases to which the secondary laws may apply. It is obvious that the *Shariah* does not impose a responsibility beyond peoples' capabilities. The second kind of hardships and constraints is just like the first one because the expressions and the pronouncements of *Foqaha* on the issue of hardships and constraints do not include this kind.

Evidence to this is the fact that the unreasonibleness of imposing an obligation that would cause disruption in the social system is obvious and without any shred of doubt. We all know that the goal of *Shariah* for

having such laws is not to disrupt and destroy the social orders and paralyze the sound and peaceful way of life of individuals. The final goal of the *Shariah* is to, in most of the rules, safeguard and protect society to the highest level of excellence and decency. With the view to this, how could it be acceptable on the part of the *Shariah* to command people for the duties that would disrupt social order?

As far as the case in (3) is concerned, it may fall under the laws of

the "principle of no harm" and that the "principle of no constraint" does not apply to it, although in many cases of no harm one could present evidence from both principles. Therefore, the fundamental argument in the "principle of no constraint" is only related to the fourth kind of hardships and constraints, mentioned above.[65]

Evidence of the Authority and Sources of this Principle

(a) Evidence of the Authority of this Principle from The verses of the Holy *Quran*

1. *"Allah has not laid upon you any hardship (haraj) in religion".*[66]
2. *"Allah does not desire to put on you any difficulty" (haraj).*[67]
3. *"Allah desires ease for you, and He does not desire for you difficulty (Osr)".*[68]
4. *"Allah does not impose upon any soul a duty but to the extent of its ability".*[69]

(b) Evidence of the Authority of this Principle from *Ahadith*

1. *"A man asked Imam Ali, my fingernail came off in an accident. How should I make* vozu? *"Wipe it from the surface a piece*

of cloth and you do not have to wash it". Replied Imam Ali.[70]

2. *"Imam Ali was asked about the use of a jacket made of the leather from an animal that is not known as regards being slaughtered properly according to the instructions of the* Shariah *or not. The Imam considered its use lawful even during prayers on the basis that Islam is a religion that does not impose hardships on people".*[71]

Muhaqqiq-e Bujnurdi also writes in this regard, "The evidence for relieving people from the burden of the laws that cause constraints on the Muslims is the kindness and the grace of Lord God on His servants. He wanted the religion to be easy to follow for the people and without difficulties".[72]

The Meaning and the Implications of this Principle

The meaning and the implication of the Principle under consideration are indicative of the fact that God has not sanctioned any law that would cause constraints on the people. For example, in the case of a person whose injured finger is bandaged and difficult to remove such bandages for *Vozu*, no obligation that would make him have *Vozu* as in normal conditions is sanctioned. Also, if severe weather would cause a great deal

of constraints, compared to normal conditions, no law that would obligate him to have *Ghusl* in such condition is sanctioned.

Therefore, all the Islamic responsibilities of the people at first relates to conditions free from constraints as if all the laws and religious rules initially are sanctioned with the stipulation of freedom from hardships and difficulties.[73]

The Meaning of Hardships and Constraints

Constraint, in its dictionary definition is narrowness and impasse. In *Hadith,* sometimes it refers to sin and unlawful matters.[74] The author of *Sihah al Lughah* and Ibn Manzur say "Constraint means sin, difficulty and narrowness".[75] Taking this into consideration, the original meaning

of "constraint" is narrowness. Also sin and unlawful matters are called constraints (*Haraj)* because of this aspect, sins and unlawful matters committed in this world will cause constraints and narrowness in the next world and life.

In the following verses of the *Quran* the word *Haraj* (constraints) is used to mean sins and unlawful matters:

> *"It shall be no crime (haraj) in the weak, nor in the sick, nor in those who do not find what they should spend (to stay behind)".*[76]

"There is no blame (haraj) on the blind man, nor is there blame on the lame, nor is there blame on the sick, nor on yourselves that you eat from your houses, or your fathers' houses or your mothers' houses, or your brothers' houses, or your sisters' houses ..."[77]

Also in these two following verses *"haraj"* has been used in its main meaning:

"Therefore (for) whomsoever Allah intends that He would guide him aright, He expands his breast for Islam, and (for) whomsoever He intends that He should cause him to err, He makes his breast strait (haraj) and narrow".[78]

"A book revealed to you - so let there be no constraints (haraj) in your breast on account of it -- that you may warn thereby, and a reminder close to the believers".[79]

According to the linguists one may find a meaning for the word *Osr* (hardships) very close to that of the word *Haraj* (constraints).

In *Al-Nihayah*, Ibn Athir has said, "The word *Osr* (hardships) is opposite of the word *Yusr* meaning ease and comfort. *Osr* means hardships and narrowness.[80] In *Lisan Al-Arab* it is recorded, "*Osr* is opposite to *Yusr* that means ease and comfort".[81]

From the above one may have the understanding that *Osr* and *Haraj* both have the same meaning or very closely similar meanings as such that to draw a fundamental distinction is not possible. A further

evidence to this is the fact that the *Foqaha* in many cases have placed the two next to each other.

Cases to which this Principle may apply

The evidence related to the principle of "no hardships" and "no constraints" clearly show that this principle has a vast field for application. Verse 78 of chapter 22, which is the fundamental evidence[82] to prove its authority requires many *Ahadith* to take it in due consideration.[83]

The above verse considers what is outside the limits of "no constraints" law as the field of application for the religious laws, and it negates the existence of narrowness and constraint from religion. Therefore, the domain of this principle extends to all the laws applicable to both the individual and the society.

Muhaqqiq-e Bujnurdi, has explained the supporting evidence for the authority of this principle in the form of the verses of the *Quran* and the *Ahadith*, He has pointed out the domain of this principle. He has said, "The verses of the Holy *Quran* and the *Ahadith* have clearly stated that this religion, Islam, is not a religion to impose hardships and constraints upon people, and God did not want Muslims to suffer hardships in following the laws of this religion".[84]

The *Foqaha* have based their decision of applying this law only in

the case of the obligations of the form of compulsory or prohibitions not the desirable or the detestable ones. It is because of the fact that the kindness and grace of *Allah* come to relieve people from "hardships" and "constraints". In the case of the detestable and desirable duties because such duties do not force one to suffer hardships and constraints the rules of this law do not apply to them. As a result of this, if one would engage himself in non-compulsory duties due to extra-ordinary attention and carefulness towards one's duty that may cause him suffering and hardships, under the application of this law he can not be subjected to any admonition and objections.[85]

Some Examples of the Inference of *Foqaha* in the Light of this Principle

1. In *Miftah Al-Keramah*, in the discourse over the issue of the unutilized land in relation with the fact that people need food and shelter, Amily writes this:

> *"The unutilized lands become the property of those who revive and utilize them because of such act. Otherwise, it will become the cause of suffering from hardships and difficulties".*[86]

2. Allamah Helli has considered the mental and psychological sufferings due to hardships and constraints as the cases to which this principle applies.[87] Therefore, if a duty would cause mental and psychological hardships and sufferings to one he may benefit in such duties under this principle.

3. The author of *Al-Jawahir,* in a discourse on the issue of *Tayammum* (the process of purification for prayers when water is not available) when the cause would be fear from thieves or wild beasts or the loss of life or property has said this:

"The statement of the author of Al-Hadaeq *on the issue that fear for loss of property does not become a good cause to give up one's duty is opposed to the evidence in support of the law of "no constraints". This law is universal. The evidence from religion clearly say that there is no constraints and hardships in religion".*[88]

From this it appears that the author of Jawahir considers the evidence in support of this law an evidence from reason, which does not accept any exceptions.

4. Also the author of *Jawahir* in a discourse on the issue of whether or not it is necessary for a person praying to keep his mind all the time during prayers on his intention to pray. He says:

"The idea that it is necessary to keep one's mind on the act all the time during an act of worship such as prayers etc., is against the law of "no hardships" and "constraints".[89]

5. In a discourse on "justice of witnesses" he has also said:

"The Foqaha *of the past would also consider the proper appearance of the people as sufficient proof of one's justice. If one would not openly and publicly commit sins he would have been considered a just person. In search for a just person to the extreme limits would cause hardships and constraints.*[90]

6. A divorce is possible in the following cases: If the husband of a woman disappeared and she knows that he is alive but she is not able to live alone patiently and even in the case of woman whose husband has not disappeared but is somewhere and unable to come home such as being in jail etc. This also applies if he is at home but is so poor that is not able to provide sustenance for her and she can't tolerate it. For such cases he has said, "In all of such cases under the law of "no hardships" and "no

constraints" the court is authorized to issue her a divorce especially if she is a young woman".[91]

One of the contemporary *Foqaha* includes another case to the above ones. It is the case of a woman whose personal safety and her sexual needs would depend on having a husband in such a case one may consider it unnecessary on her part to wait for four years. If her husband has disappeared in such a case a Muslim judge may issue her a divorce so she can marry another man.[92]

With a view to the meaning and implications of the law of no hardships and no constraints a question may rise that in the Islamic system there are many instances that involve hardships and difficulties. An example of such a case is becoming a member of the army for defence, the prohibition of fleeing from the battle field, fasting in the month of *Ramadhan* in summer, surrendering to judicial penalties, applying *hudud* (punishment)[93] and *qesas* (law of equality)[94], leaving the country when one feels that it is necessary etc.

How could all such cases be reconciled with the universal nature of the law of "no hardships and no constraints"? The Holy *Quran* (22: 78) says in a very general manner that *"He has not sanctioned any hardships upon you in religion"*. Can one say that the above law has priority over so many of the obligations and prohibitions? Or that certain

cases due to their greater significance such as the cause of defence, prayers, saving lives and unlawful sexual activities, have a particular status in the Islamic system. Just because this law exists, such cases can not be over looked even though this law has a priority over less significant obligations and duties. The author of *Fusul* has said in this regard:

"What is required as to the degree of hardships is what the

majority of people normally would not bear. A small degree of hardships do not justify the case. There is no doubt that in the cases such as defence, in order to repulse evil from oneself and protect the property, family, tribe and compatriots is a job that most people stand up as a matter of honor and dignity and it is not considered difficult. It is not so especially in the case of Muslims who expect great rewards for such heroic deeds in the life to come".[95]

The author of *Jawahir* has said, "In the case of very important duties like defence matters such obligations never fall under the law of "no hardships and no constraints" because of the great benefits of these duties". In the book of *Taharat*, after applying the law of no hardships he has said, "For one who can acquire water only through buying and it would be, in such conditions, difficult for him he must perform *Tayammum* (particular ablution with pure earth) instead of *vozu*".[96] He

further adds, "In some of the very important duties such as defence matters the law of no hardship and no constraints do not apply because of the very important benefits involved in such matters, however, in the cases that do not have such significance this law is applicable".[97]

It can, however, be said that the existence of hardships and constraints in difficult matters like defence is very obvious. Just because some people due to their expectation of reward in the next life and for

the sake of spiritual accomplishments do not dislike such hardships does not remove the hardships from such matters.

According to Muhaqqiq-e Bujnurdi, the verse of the Holy *Quran* that says, *"God has not sanctioned any thing that would cause you hardships"*[98] from the meaning of this verse that is obvious and apparent that, it is of a universal nature. It includes all the laws of *Shariah* that involve hardships and constraints, i.e. all the obligations and prohibitions.[99] However, the *Foqaha* have not dealt with it in this way, especially, when the hardships and constraints would be of a personal nature not one for a whole species. Staying away from most of the prohibited matters does cause hardships and constraints to some people, and no *Faqih* would issue a *fatwa* in favor of such case.

With a view of the evidence supporting the authority of this law

and opinions of the scholars in this matter it is possible to find several categories of the issues that cause hardships and constraints:

1. There are the kinds of hardships and constraints that do exist in certain duties but they are normally tolerated. It is obvious that this law does not apply to such cases.

2. There are also the kinds of duties that normally do not cause any hardships and constraints. Although many people consider them of such nature such as paying *Zakat* (taxes), but due to the social benefits

and the service for the well being of the society they are not of the duties that cause hardships and constraints.

3. Some of the obligations, without any doubt, involve great degrees of hardships and constraints but because they are the outcome of the wrong doings of the people themselves, such as the judicial penalties, compensations and punishments for such crimes they do not fall under this law. Such hardships are exceptions to this law.

4. There is another category of duties that cause hardships and constraints to some people only and they are not as such for the others such as fasting during summer. In such cases the law is applicable to some and it is not applicable to the others. The degree of the hardships and constraints, however, must be to the degree that is not normally tolerated.

5. There are the duties that involve a great degree of hardships

and constraints such as serving for defence matters and even the Holy *Quran* also acknowledges such hardships despite this, this law does not apply to them:

> *"Fighting is made mandatory for you, but you dislike it. You may not like something which, in fact, is for your good and something that you may love, in fact, may be evil. God knows, but you do not know".*[100]
>
> *"Eyes became dull and hearts almost reached the throat when they*

attacked you from above and below and you started to think of God with suspicion. There the believers were tested and tremendously shaken".[101]

God pardoned the Prophet (S.A.W.), the Emigrants, the Helpers, and those who followed them, when the hearts of some of them almost deviated (from the truth) in their hour of difficulty.[102] *God forgave them because of His Compassion and Mercy.*[103]

Some Points in the Law of "No hardships"

1. *Azimah* or *Rokhsah* (obligation or Permission)

The fact that the application of the law "no hardships and no constraints" is obligatory or permissible. Some of the scholars consider it an obligation. The author of *Al-Jawahir* is one of such scholars who in the issue that "fasting is not obligatory for very old people" has said, *"In*

such a case the application of this law is obligatory because of the no hardships".[104]

Some scholars have decided according to the second form, the permissibility. Among them is Muhaqqiq-e Hamedani, who writes:

"Tayammum in the conditions wherein it is permissible is based on the law of "no hardships" as a permissible duty and not an obligatory one. As a result of this if one would bear great hardships and instead of Tayammum make vozu or Ghusl his

choice is acceptable."[105]

Proof for this is the fact that the evidence supporting the authority of the law of "no hardships" are to provide ease and to facilitate, for this reason such evidence are qualified for the negation of obligation not for non-permission.

The author of *Orvah* in the section on *Tayammum* points out to this viewpoint and considers a *vozu* made with suffering hardships and constraints as a valid one.[106]

The fact that removal of hardships from the servants of God is a favor from Him, can not become evidence for the validity of the very desirability of the act, it, in fact, can become evidence of its undesirability. It, in fact, is a form of disregard for the favor like the act of ignoring the rule of shortened prayers on a journey and instead praying a complete prayers and fast during a journey which indeed is an

undesirable act.[107]

Muhaqqiq-e Hamedani, defending his view has said, "The reason for exception in choosing the primary laws instead of following the secondary laws in the kind of duties such as *Vozu* and *Gusl* are the constraints in them without having any evil in performing such acts. On this basis, the exception is because of "no necessity" not because of "undesirability" of the duty.[108] As a result if one would bear the

hardships and perform the act that was not required of him he has performed an act that was desirable in the sight of God.

Quite opposite of this is what one of the scholars of our time believes:

> *"The imposition of heavy duties causes disobedience and opposition in people and this by itself is a great evil. For this reason, some of the scholars have maintained that the law of "no hardship" due to the kindness of God towards people is based on an obligatory ground".*[109]

2. Is the Criteria in the Law of "No Hardships"

Hardships for Individuals or for a whole Species?

Some of the scholars have for two reasons affirmed the hardships for individuals

1. All the captions and titles that are mentioned in the *Ahadith*, like "constraints" "losses" and "emergency" etc. are related to individuals

cases.

2. The hardship for a whole species is not definite and distinguishable because it does not say whether the species of people of all times are the criteria or those of a particular time and place.[110]

Another reason that could be added to this would be the case of a commander that may issue an order for his subordinates to follow with a choice that in the case of hardships they may disregard it. In such a case if one of them did not follow the orders due to such reasons he could be

excused even if it would not be hard for others. The hardships in individuals cases may be considered as the criteria but it is possible that such law would apply to the Islamic government in which case consideration of the welfare of the whole species and society would have to be studied.

3. Does the Law of "No hardships" Apply to Negativities also?

Sometimes the negativity and absence of something may become the cause for hardships and constraints. For example not removing certain buildings from the road areas may cause traffic congestion, not broadening roads may also cause delays for the emergency services such as ambulances and fire fighting machines, leaving certain shops and stands may cause bad congestion on the footpaths and sidewalks. It seems that in such cases also the law of "no hardships" applies very well. As discussed above the meaning of the evidence supporting the authority

of this law is the removal of all kinds of rules that would cause hardships, regardless of their applicability to the positive matters or those of negative nature.

In the matters of the above cases it is possible to say that non-permissibility of doing any thing to the properties of the others may cause huge hardships and the *Shariah* does not agree with it. This is in addition to the evidence in the Holy *Quran* that has clearly removed all kinds of hardships. [111] In *Ahadith*, also one finds such expressions as "there is no

religion more facilitating than Islam".[112] Islam is a very easy system to follow".[113] Without any doubt such expressions include the negativity and absence of some thing also.

4. How much Hardship Justifies the Applicability of this Law?

The existence of any degree of hardships and constraints may not justify the application of this law. It must be as such and to the degree that normally people would not agree to bear.

The evidence supporting the authority of this law also does not support its applicability to the smaller degrees of hardships, otherwise, most of the religious duties would fall under this law because almost all the obligations in religion involve some degree of hardships. Therefore, this does not agree with the fundamentals of religion. It is for this reason

that the *Foqaha* whenever discussing this issue have included in their expressions the words like "great", "sever" and "huge" hardships. Sheikh Ansari has said, "Whenever there are huge "hardships" and "constraints" this law may be applied".[114]

Losses (*Zarar*)

Another caption and title for the secondary laws that has been discussed

very often in *Fiqh* and applied is the law of "no losses" (*la-Zarar*). The *Foqaha* have been applying this law for a long time. For example, Sheikh-e Tusi in *Al-Khilaf* in the section on the contracts of exchanging certain merchandise in which losses have taken place against one of the parties, expresses his belief in the nullification of such contract. It is based on a *Hadith* from the Holy Prophet (S.A.W.) that says, "There is no losses in Islam".[115]

Also Ibn Zuhra in the section of *Fiqh* dealing with the "choice" to revoke the contract due to the defect in the merchandise, writes: "The evidence supporting this fact is the *Hadith* from the Holy Prophet (S.A.W.) that says, "There is no losses in Islam".[116] Allamah Helli also in

revoke the contract due to the defect in the merchandise, writes: "The evidence supporting this fact is the *Hadith* from the Holy Prophet (S.A.W.) that says, "There is no losses in Islam".[116] Allamah Helli also in *Tadhkirah* in the section on losses has based his decision on the above *Hadith* from the Holy Prophet (S.A.W.).

The evidence proving the authority of this law is the same *Hadith* the, "no (suffering) losses" and "no (causing) losses". This *Hadith* is

recorded in the books like *Sunan* Ibn Dawud,[117] *Sahih-e Termezi*,[118] and *Sunan* Ibn *Majeh*.[119] Some of the *Foqaha* along with this law have discussed another law that says, "The losses are to be abolished". The two laws are dealt with separately. Of these scholars is Abdul Karim Zeydan who has discussed it in *Al-Madkhal*.[120] Others like Ibn Najim have considered the two laws as one.[121] Najmuddin Tufi also gives preference to the supporting proof of this law over those of the primary

law.[122]

The Evidence Proving the Authority of this Law

The evidence proving the authority of this law are many *Ahadith* which contain the very popularly known expression, "no losses and no suffering losses". Fakhral Muhaqqiqin has stated that this *Hadith* is *Mutawatir*, (unanimously reported).[123]

The *Ahadith* Narrated from the Holy Prophet (S.A.W.) about this Matter.

1. Samrat Ibn Jundab had a palm tree inside the compound of the house of a man who belonged to *Ansar*, (of the people of Madina who helped the Prophet (S.A.W.)). Anytime he wanted he would enter the man's house without permission to see his palm tree. The Ansari man complained about it before the Holy Prophet (S.A.W.). The Holy Prophet

(S.A.W.) asked Samrat Ibn Jundab to ask permission from the Ansari man any time he wanted to see his palm tree but Jundab did not agree. The Holy Prophet (S.A.W.) said, "I am ready to buy this tree for whatever price you would ask". Jundab did not agree. The Holy Prophet (S.A.W.) said, "For this tree God in the next life will give you a tree in Paradise". Jundab did not accept the offer. The Holy Prophet (S.A.W.) then told the Ansari man to uproot the palm tree and throw it away because there is no causing losses in Islam.[124]

2. The Holy Prophet (S.A.W.) declared to the people of Madina that no one must create obstacles on the way of irrigating the palm trees, or prevent others from utilizing the excess waters because according to *Shariah* "no (suffering) losses" and "no (causing) losses is the law".[125]

3. The Holy Prophet (S.A.W.) also declared that there must be sufficient distance between two water tunnels so that they would not effect each other in reducing or increasing of the amount of water that would normally come out of each of them.[126]

4. The Holy Prophet (S.A.W.) was asked about a canal through which water would flow for a certain distance in a field and between the source of water and the field there would be palm trees that belong to people other than the owner of the canal. Can the owner of the canal create another canal to let the water flow to his field away from the palm trees that exist on the old canal? "Have fear of God and do not cause any losses to your brethren". Replied the Holy Prophet (S.A.W.).[127]

which water would flow for a certain distance in a field and between the source of water and the field there would be palm trees that belong to people other than the owner of the canal. Can the owner of the canal create another canal to let the water flow to his field away from the palm trees that exist on the old canal? "Have fear of God and do not cause any

The Meaning of this Law

The *Foqaha* within the limits of this law have expressed differing opinions.

1. The Theory of Sheikh Ansari

From Sheikh Ansari's point of view, the meaning of the law "no (suffering) losses" and "no (causing) losses" is the negation of any rule in *Shariah* that would involve losses to people. Any such rule is declared none existent, i.e. if a contract which would cause losses to one party would have been considered binding and irrevocable it would be contrary to the above-mentioned law, but no such law is sanctioned in *Shariah*. The same is true in the case of a person who can not have any water without a great deal of difficulties or expenses. In such case he is not required to find water for *Vozu*. He has emphatically relied on this law in many instances in the books on *Fiqh* and the principles of jurisprudence.[128]

2. The Theory of Sheik Al-Shariah Isfahani

From this scholar's point of view, the meaning of this law amounts to an imperative prohibition. According to him any act that involves losses is prohibited and people must not involve themselves in such acts. As evidence to prove this he points out a great deal of expressions from the Holy *Quran* and the *Sunnah* which are very similar to what the law of no losses states.[129] Of such expressions is this, " ... *after commencing the acts of Hajj, he is not allowed to have carnal relations or to lie or to Swear by the Name of God*".[130] He (Moses) said:

> *"Go away; throughout your life you will not be able to let anyone touch you. This will be your punishment in this life. The time for your final punishment is inevitable. You will never be able to avoid it. Look at your god, which you have been worshipping. We will burn it in the fire and scatter its ashes into the sea".*[131]

From the *Sunnah* he quotes the following *Hadith:* Obedience to someone that would lead you to disobey the Creator is prohibited". That cheating Muslims is prohibited.[132]

3. The Theory of Imam Khomeini

He maintained that the law of "no losses" falls under the governmental commandments. It is on this basis that the Holy Prophet (S.A.W.) served as the administrator of the government and commander of the Muslim nation. He sanctioned such laws to abolish corruption not that they were

the Divine laws. The following are of the evidence to establish this theory.

(a) Ahmad Ibn Hanbal has mentioned the expression of "no losses" among the rulings and judicial decrees of the Holy Prophet (S.A.W.). He has narrated it from Ubadah Ibn Samit saying. "Judging is no (suffering) losses and no (causing) losses". It is a fact that this expression is not a ruling to settle a dispute between two parties. Therefore, it must be of one of the commandments of the Holy Prophet (S.A.W.) that he issued to declare that no one has the right to cause losses to others and cause sufferings and constraints to others and that Muslims must also obey this commandment.

(b) The case (of Jundab and the Ansari man mentioned above) that lead to the issuance of such commandment is another evidence to prove this point. The complaint of the Ansari man to the Holy Prophet (S.A.W.) was due to the fact that he was the head of the government of the Islamic system capable of abolishing the evils of a transgressor. Samrat Ibn Jundab was summoned and was informed of the complaint against him and that because he did not obey the commandment of the head of the government an order was issued to uproot his palm tree. This was to make a point that no one has the right to disobey the Islamic government and cause losses to others. The step taken by the Holy Prophet (S.A.W.) in this case was an order of the government to establish a fact that people do not have the right to cause losses to each other.[133]

4. The Theories of Some of the Contemporary Foqaha

Some of the contemporary scholars have come up with a new theory about the law of "no losses". They maintain that this law is related to the relations among the people and not to the rules of *Shariah* and the Divine duties. With a view to the fact that in the society some times losses are found, the objective of this law is to inform people of the unacceptability of the activities that cause losses.

The apparent meaning of this law indicates the negation of losses. It should be considered a metaphorical expression of discrediting all the activities that cause losses. Thus, the goal is to teach people that causing losses according to *Shariah* is prohibited and any thing that would cause losses or sufferings to others such as neighbors is unlawful. That the transactions that cause losses to one party are invalid. This theory, although in some respects, in regards to the results, is the same as some of the above-mentioned ones, however, in the matters of the acts of worship such as *Vozu* and fasting, it is different from them. According to those theories on the basis of the existence of hardships and losses such acts of worships could be negated but on the basis of this new theory this can not be done on the basis of the law of "no losses". An act that would cause losses may be negated by this theory because the meaning of losses according to this theory is the losses that are caused by the people not the losses because of *Shariah*.[134]

Coreion and Compulsion (*Ikrah*)

Coercion is one of the titles and captions that appears in various sections of the *Fiqh* with various kinds of effects and consequences and in most cases the rules of this law receives priority over the primary laws. According to the dictionary it means compelling and coercing some one to do something.[135]

The Evidence proving the Authority of this Law

In order to prove the authority of this law the *Foqaha* have mentioned some verses of the Holy *Quran* and some *Ahadith* as proof.

1. *"No one verbally denounces his faith in God - Unless he is forced but his heart is confident about his faith. But those whose breasts have become open to disbelief will be subject to the wrath of God and will suffer a great torment"*[136]

This does not apply to people like *Ammar-e Yasir*. It applies to those who with open hearts became unbelievers. It is they who are subject to the anger of God.

2. *"Do not force your girls into prostitution to make money if they want to be chaste. If they have been compelled to do so, God will be all merciful and all forgiving to them".*[137]

3. The Holy Prophet (S.A.W.) addressing his followers said, *"Mistakes, forgetting and all that is due to coercion, ignorance, inability*

and due urgency are forgiven (there is no sin for such acts)".[138]

The kinds of Coercion and Compulsion (*Ikrah*)

There are two kinds of coercion and compulsion:

1. The use of force against someone who is not able to counter such force such as water being forced to enter one's throat while he is fasting. This kind is called a complete compulsion (*Iljaei*)

2. The other kind of compulsion is like the case wherein one is threatened to imprisonment or physically hurt if he would not do a certain act. In this case one still may have the ability not to do it. This kind of compulsion is called an incomplete compulsion, (*gheir -Iljaei*).[139]

The Difference between the Compulsion and Urgency

Compulsion (*Ikrah)* is used when some one else would force one to do something or not to do some thing. In this case there are three elements, compulsion, compelling and compelled.

Urgency (*Izterar)*, however, is often used in a case wherein someone without the involvement of others is compelled to do or not to do something.

The Rules for Compulsion (*Ikrah)*

The rules for compulsion and coercion are scattered in various sections of the law without any proper categorization and order and to show a certain order for it is not an easy task. Because of this reason for one case of compulsion different kinds of *Fatwa* and legal opinion may come into existence. All that could be stated in such a case is that the ruling for an incomplete compulsion in terms of effects is different from those for a

complete compulsion and coercion. In some cases both kinds of compulsion may have the same kind of rule. Along with the rule for an act under compulsion its primary rule should also be taken into consideration. This will help to find out if such rules could be removed due to compulsion or not and if so it then should be considered whether it is so due to complete compulsion or even incomplete compulsion would require such rules.

For example one may consider the case of the contracts for certain transactions in which the invalidity of a contract incomplete compulsion is sufficient because of *Ahadith* and the Holy *Quran* consent of parties for the validity of a contract is one condition. "*Believers, do not exchange your property in wrongful ways unless it is in trade by mutual agreement*".[140]

Since the consent of parties is a condition for the validity of the contract even incomplete compulsion would invalidate it. Also from the

Shariah one may have an understanding that in the case of the unlawfulness of murder and injuries to Muslims ... due to the seriousness of such cases an incomplete compulsion would not justify it to follow the rules for compulsion. In such a case the rules for "important" and "more important" matters play their role.[141]

Urgency or Exigency (*Izterar or Zarurah*)

Izterar literally and linguistically means to become compelled to do something.[142] It also means dire need for something.[142] To become compelled in doing something or to have a dire need for something may be considered as a cause and reason as when one urgently needs to sale his house due to a need. The first meaning is in consideration of the meaning of exigency and the second meaning is in consideration of the cause of the emergence of the exigency.[144] The great exegete (Tabari) in the interpretation of verse 173 chapter two writes: "*Izterar*, is a condition from which man can not escape like hunger that is not avoidable.[145]

The Evidence Proving the Authority of the Law of Exigency

All the *Foqaha* agree on the issue that the secondary title like exigency

may become the cause for the inapplicability of some of the primary laws. Certain verses of the Holy *Quran* and certain *Ahadith* are cited as evidence in this matter.

1. *"God has forbidden you to eat that which has not been properly slaughtered, blood, pork, and the flesh of any animal which has not been consecrated with a mention of the Name of Allah, God.. However, in an emergency, without the intention of transgression or repeating transgression, one will*

intention of transgression or repeating transgression, one will not be considered to have committed a sin. God is all forgiving and all merciful".[146]

2. *"It is unlawful for you to consume the following as food: an animal that has not been properly slaughtered, blood, pork, an animal slaughtered and consecrated in the name of someone other than Allah ... If anyone not (normally) inclined to sin is forced by hunger to eat unlawful substances instead of proper food, he may do so to spare his life. God is all forgiving and all merciful.*[147]

3. *"If you have faith in God's revelations, eat the flesh of the animal, which has been slaughtered, with a mention of His Name. Why should you not eat such flesh when God has told you in detail what is unlawful to eat under normal conditions. Most people, out of ignorance, are led astray by their desires. Your Lord knows best those who transgress"*[148]

4. The Holy Prophet (S.A.W.) has said:

"If one would not spare his life even by consuming carcasses for food until he dies he will die without faith".[149]

5. "The Holy Prophet (S.A.W.) has said:

"If you are compelled, God has announced it lawful ".[150]

6. Imam Ali has said:

"There is not anything that God has made unlawful but that He

has made it lawful for one who is compelled".[151]

Cases to which this Law may apply

The *Foqaha* have applied this law to cases wherein there is an order or prohibition from *Shariah*. Only when there is an obligation or prohibition then this law is applied. In cases of desirable, detestable or permissible matters there is no need for the application of this law because acting against such cases is permissible any way.

Although the evidence supporting the authority of this law such as the verses (in 1 and 2) above are indicative of certain prohibited matters only, however, the indications in the *Sunnah* on this issue is rather of a general expression. They include all that is a must to do or to avoid. Some of the *Foqaha* have considered this quite beneficial in the cases wherein dangers to lives are involved.[152]

Imam Khomeini has said this on this issue, "All the unlawful

matters become lawful in exigencies either because of saving lives, the body from decease or other such dangerous conditions wherein not acting in an unlawful manner would cause such a degree of hardship, e.g. in the case of hunger that normally is not bearable".[153]

The Exceptional Cases

Although it may appear that all unlawful matters due to an exigency

become lawful, however, as mentioned in the discourse on negation of hardships, this law is not applicable to those cases that the *Shariah* treats them in a special way. In those cases to which the indications of the verses of the Holy *Quran* and the *Sunnah* point out that even in exigencies one must not act in such an unlawful way, the *Foqaha* in such cases benefit from and apply the law of "important" and "more important". One example is taking the life of another human being due to an exigency. From the *Shariah's* point of view, without any doubt, to save one's own life or the lives of one's children one can not endanger the lives of other human beings.[154]

Of some of the rules of the law of exigency, which by itself may be treated, as a very important subsection in *Fiqh* is this: "Acting against the primary law due to an exigency is permissible until it is over and not

more".[155] The *Foqaha* have considered this rule as a rule whose authority is self-evident and as a rule of reason. In other words, the law of exigency has two conditions: One is quantity, e.g. in the case of hunger one is allowed to use inedible substances as much as it spares one's life and not more. The other condition is time. This rule is applicable only until the exigency exists. As soon as it is over the primary law will apply.[156]

The application of this law in social issues and the issues that relate to the government also is subject to the two above-mentioned conditions. For example if the Islamic government due to an exigency would assign definite prices for certain commodities, firstly, it should be only to the limit of getting over with a dire need. Such a step would only be necessary in the case of the goods, which are being sold with excessive prices. Secondly, as soon as the conditions would turn to normal controlled prices should be abolished because the primary law in *Shariah* is for an open market and free competition in trade.

About the permissibility of inedible substances for food in an exigency, Sheikh Tusi has said this, "If one would fear for his life, he may consume inedible substances for food only to spare his life but not a bellyful of it".[157]

An Introductory Condition

(*Muqaddimah-Al-Wajeb/Haram*)

(Something leading to an obligatory or prohibited act)

The issue of being a lead or an introduction to something is one of the secondary titles that has produced a great deal of lengthy discourses in the works on *Fiqh* and the principles of jurisprudence. An act that in relation

to the primary laws falls under one of the three of the universal categories such as being desirable, detestable and permissible may, for certain reasons, become an introductory act. And as such it may become an obligation or a prohibition when it becomes a lead and an introductory factor towards the completion of another act that is a must to do or otherwise. Therefore, a change in the status comes into existence in the form of an obligatory or prohibited act that was only a desirable, a detestable or permissible before. This comes into existence as an introductory or a leading relationship with something. An introductory or being a lead means to be as such that completion of an obligatory or a prohibited one etc. would depend on it and without it such obligation etc. would not come into existence. Because of such relationship the lead or the introduction also under a secondary title becomes either obligatory or

prohibited.

The Evidence Proving the Authority of this Law

Most of the *Foqaha* have considered such evidence to come from reason only. They do not accept the fact that *Shariah* has given it an obligatory or prohibited status. Muhaqqiq-e Naeeni has said, "If completion of some

act would depend on something else the latter also becomes obligatory because of the decision of reason. It is so because of the fact that the existence of such relation, both from the point of views of reason and common sense, the lead and introduction also become obligatory. All scholars agree on this issue".[158]

Some of the *Foqaha* instead of considering something as a lead and an introduction to a prohibited act have called it (*sadd-e zara'i*) which is one of the established principles and it literally implies blocking the means to an expected end. Imam Malik and Ahmad Ibn Hanbal have considered this to be one of the principles in the fundamentals of religion. Ibn Qayyim has said that *Sadd-e Zara'i* is one fourth of religion. He has refered to about one hundred verses and *Ahadith* as being the evidence for its authority. Abu Hanifah and Shafi'i also have applied this principle in

some cases.[159] From the point of view of these scholars anything that would serve as lead to and introduction for a prohibited act and the spread of evil must be stopped from taking place so that evil would not spread in the society and among the people.

On the other hand anything that would become the lead to and an introduction for an obligatory act is obligatory. It has called *Fath-e Zara'i* (opening the way). However, the term *Zara'i* is used more often for the

first case, (i.e. the acts that would lead to evil).[160]

The following verses of *Quran* and *Ahadith* are pointed out to be evidence of the authority of this view.

1. *"Believers, do not say bad words against the idols lest they (pagans) in their hostility and ignorance say such words against God. We have made every nation's deeds seem attractive to them. One day they will all return to their Lord who will inform them of all that they have done".*[161]
2. *"Believers, do not address the Prophet (S.A.W.) as ra'ina (whereby the Jews, in their own accent, meant: Would that you would never hear), but call him unzurna (meaning: Please speak to us slowly so that we understand), and then listen. The unbelievers will face a painful torment".*[162]

In this verse it is prohibited to use the word *ra'ina* because the

unbelievers would use this word in a slandering manner.

3. From *Hadith*, those *Ahadith* that prohibit hoarding of goods are considered to be *sadd-e zara'i* (to remove the ladder to evil)[163]

4. The *Ahadith* of the Holy Prophet (S.A.W.) prohibiting to accept gratuity from an indebted person is considered as *sadd-e zara'i* so that people would not become involved in accepting usury.[164]

The Effects of this Law on Social Issues

The existence of this law in *Fiqh* has a great deal of favorable effects. Many of the obligations and prohibitions of social nature related to the society and the government are based on this law. It is a fact that the prosperity of an orderly social life depends on the existence of people educated and skillful in different social enterprises such as industries, education, the army, medicine and agriculture. The *Foqaha* have also issued the *Fatwa*, that if there is not enough people with such skills it is

an obligation on the whole society in the form of a social obligation to acquire such skills and know-how. They must do so until enough people are educated for such tasks, even though, regardless of the social nature of these obligations, they by themselves are not obligatory. Many of the

commandments that come from the Islamic government are based on this law. The instructions and the commandment of the Holy Prophet (S.A.W.) to manage and maintain the social order all may have been based on this law.

Conclusion

Without any doubt, the Islamic society due to new changes and developments in all walks of life is facing new problems and the *Shariah* must accommodate such issues and solve such problems according to its own standards. In such a case it is the task of the *Faqih* who is well aware of the conditions of the time to take two steps: First, he must clarify properly the basics that *Fiqh* requires and rectify all the complexities through the skills of being a *Faqih*. It is very much possible to solve a case with the application of the primary laws without resorting to the secondary laws. Secondly, he must carefully study the cases and subjects to which the secondary laws could be applied so that when necessary after inapplicability of the primary laws the secondary laws would be applied. Through such process it becomes possible to find proper Islamic solutions to all the issues and the problems of the society in all times and

circumstances.

The secondary laws are beneficial utilities for the government. The Islamic government may study any newly emerging case and find proper solutions for the key issues such as balancing the economy, curbing inflation, controlling the population, regulating prices of goods, issues related to currencies, banking issues, taxes, internal and external affairs of trade etc.

The secondary laws, however, must not be carried out to their extremities and with the emergence of every new case the secondary laws must not, before proper studies, be declared as solutions. Proper discernment of the cases and subjects to which a secondary law could be applied requires a sound degree of knowledge and awareness. The basis for the application of the secondary laws is when it would not be possible to apply the primary laws. To explore this and the case to which the secondary laws could be applied, as just mentioned, requires a sound degree of knowledge of the Islamic resources. For example when and to which case the rules of no harm and no hardships are applied or that which case is important and which one is more important all require proper knowledge of the *Shariah*.

The secondary laws come from very high grounds in the *Shariah*

and that such laws play very significant roles in the law. In many cases the primary laws do not have the necessary force, especially, the social issues. In such fields the secondary laws work as the key to solve difficult problems. Taking into consideration the availability of such sources of laws to the Islamic social system in all times and places it will have proper laws for all cases. In reality the secondary laws are complimentary to the primary laws.

The existence of the secondary laws in the Islamic system is not due to shortages of legal resources. On the contrary, it is the sign of its richness and the vastness of its resources. These laws exist due to the unavoidable emergence of changes that take place in human life and in certain circumstances and surroundings. The presence of such categories of laws in the *Shariah* of Islam are significant factors in dealing with changes. It is a degree of flexibility for variously changing needs of all times and locations. Islam is a religion with preciseness of mathematical characteristics. It calculates with accuracy and balances that which is important and which is more important. According to the Islamic system in times of need, an issue of vitality could and should be sacrificed for that of greater vitality. This factor has bestowed proper flexibility to the system. We have not introduced such a factor into the system. The

system has been made this way and in this form it has been given to us. Even if we wanted to make the system flexible, we did not have such a right in the first place. Flexibility is a component part of the nature of this system, and it is an equating process that it contains for us.

The position of the secondary rules and laws in the *Shariah* is as those of an integral part in a system. Evidence to this is the fact that the authoritative basis for these laws and the primary laws are the Holy

Quran and the *Sunnah*. Secondly, the *Foqaha* according to their methodology of reasoning have dealt with the secondary laws along with the primary laws. They have not dealt with the secondary laws in a separate chapter.

Notes :

1. Hakim Muhssen, *Haqaq Al-Osul*, Najaf, 1968, Vol.1, P. 504.
2. The laws which have been laid down irrespective of the special and extraordinary circumstances are called *Al ahkam al avvaliiah*; and the laws which have been laid down for the special and extraordinary circumstances are called *Al ahkam al thanaviiah* (Makarem, *Alqavaed Al Fiqhiiah*, Vol. 1, P. 147).
3. Khoei Abolqasim, *Mesbah Al-Fiqahah*, Najaf, 1973, Vol. 1, P. 23.
4. Makarem Naser, *Al-Qavaed Al Fiqhiiah*, Qom, 1966, Vol. 1,

P.149.
5. Allameh Helli, *Nahaj Al Haqq*, Tehran, 1990, P. 82.
6. Isphahani Muhammad Taghi, *Hedayat Al-Mustarshedin*, Qom, 1951, P. 112.
7. Muhammad Hussein, *Fusul*, Tehran 1948, P. 335.
8. In his book "*Makasib*" and also in "*Fraed Al Osul*", when he discusses about *la-zarar* rule has put forth some precise and valuable subjects about *Al ahkam al thanaviiah*. (Ansari Mortaza, *Al-Makasib* Vol.2, P. 58).

   Mohaqqiq Khorasani (d. 1329) in his book "*Kefayah-Al-*

usul" when discussing about *la-zarar* rule makes some remarks about the secondary rule (Khorasani Kadem, *Kefayal Al-Osul,* Vol.1, P.348).

9. For example, Allameh Majlesi (d. 1111) in his account of the *hadith "la-zarar and la-zarar"* writes: This *hadith* has been reported by all the *ulama* and has become an important legal principle (Majlesi, *Behar al Anvar,* Vol. 92, P.75).

10. Ibn Hazam Andolosi (d. 456) in his book "*Al-Mohalla*" has discussed about "*Ikrah*" and its kinds in several pages. He also has some remarks about oblation, promise and oath in this book. Ahmad ibn Hussein Beihagqi (d. 458) in his book "*Al-Sonanal-kobra*" has discussed in detail about oblation, promise and oath. Abu Bakr ibn Masoud in his book "*Badae'Al- Sanae'*" under the heading of *Ikrah* has discussed about literary and legal sense of *Ikrah* and its kinds, conditions and rules in several pages. He has also some remarks about oblation, promise and oath. Also Ibn Qudameh (d. 620) in the 5th and 8th volume of his book "*Al-moqni*" has discussed about *Izterar* (emergency) and *Ikrah* and the

conditions for their realization and their rules. He has some remarks about oblation, promise and oath in the 11th volume of this book. Abd-Al-Aziz ibn Abd-Al-Salam (d. 660) in his book "*Qava'ed Al Ahkam*" has discussed about *Ikrah*, *Izterar*, *Ahamm* and *Mohemm* (important and more important) law and lesser of two evils law. He discusses about the matter of how a *Haram* (prohibited) action becomes *Mubah* (permitted) and considers it a case of "victimize an expediency for a more important one". Mohie Al-din Novi (d. 676) in his book "*Sharh Al-Mohazzab*", in several instances resorts to the *La-zarar* rule and in the 13th

volume of this book in the subject of mortgage, have a brief explanation about the *hadith* of *la-zarar and la-zarar*. In the 9th volume of this book, we encounter some issues about *Ikrah* and *Izterar*. Suiuti (d. 911) in his book "*Al-Ashbah and Al-nazae'r*" has discussed about the negation of *haraj* rule and the negation of *Zarar* rule and about *Ikrah* respectively in 9 pages.

11. Malek Ibn Anas, *Almodavvanah-Al-Kobra,* Birut, 1931, Vol.2, PP. 291-292.
12. Shafei, *Al-Omm,* Birut, 1959, Vol.1, P. 254.
13. Ibid, P. 252.
14. Ibn Qudameh, *Al-Moghni,* Birut, 1989, Vol. 5, P. 273.
15. Meshkini Ali, *Estelahat Al-Osul,* Qom 1969, P. 121.
16. Sharabiani Abd Al-Majid, *Majmueh Aathar,* Tehran, 1996, Vol.9, P. 290.
17. Jafari Muhammad Taqi, *Majmueh Aathar,* Tehran, 1996, Vol. 3, P. 91.
18. Yazdt Muhammad, *Nor-e-ilm,* Qom, 1981, Vol. 9, P. 86.
19. Ansari, *Al-Makaseb,* Tabriz, 1940, P. 278.

20. Makarem Naser, op.cit., Qom, 1966, Vol. 1, P. 169.
21. Imam Jafar Sadeq, the son of the fifth Imam, was born in 83/702. He died in 148/765 according to Shiite tradition. During the imamate of the sixth Imam greater possibilities and a more favorable climate existed for him to propagate religious teachings. This came about as a result of revolts in Islamic lands, especially the uprising of the Muswaddah to overthrow the Umayyad caliphate, and the bloody wars which finally led to the fall and extinction of the Umayyads. The greater opportunities for Shiite teachings were also a result of the favorable grounds the fifth

Imam had prepared during the twenty years of his imamate through the propagation of the true teachings of Islam and the sciences of the Household of the Prophet (S.A.W.). The Imam took advantage of the occasion to propagate the religious sciences until the very end of his imamate, which was contemporary with the end of the Umayyad and beginning of the Abbasid caliphates. He instructed many scholars in different fields of the intellectual and transmitted sciences.

22. Koleini Muhammad, Osul-*e-Kafi,* Birut, 1987, Vol. 2, P. 327.
23. Saremi, *Majmueh Aathar,* Tehran, 1996, Vol. 7, P. 337.
24. Allameh Helli, *Mokhtalaf Al-Shia,* Qom, 1995, Vol. 5, P. 41.
25. Khoei Abolqasim, *Mesbah Al-Feqahah,* Najaf, 1973, Vol. 4, P. 93.
26. Ansari Mortaza, *Almakaseb,* Birut, 1995, Vol. 2, P.17.
27. Allameh Helli, *Sharaie Al Ahkam,* Tehran, 1977, Vol. 2, P. 331.
28. Ben Salameh Hebatollah, *Al-naskh va Al mansookh,* Cairo, 1983, P.15.
29. Ata'eqi Abd-Al-Rahman, *Tafsir Ata'eqi,* Qom, 1980, Vol. 1,

P.142.

30. The *Quran* 2: 173.
31. Ibid.
32. Mareft Hadi, *Talkhis al Tamhid*, Qom, 1994, Vol. 1, P. 412.
33. Ibid.
34. Hakim Muhseen, *Haqa'eq Al-Osul,* Najaf, 1968, Vol. 1, P. 542.
35. The *Quran* 2: 173.
36. The word "*Tayammum"* is derived from "amma": he repaired a thing and "*Tayammum", therefore,* means, originally, betaking oneself to a thing and, since the word is used here is connection

with betaking oneself to pure earth, "*Tayammum*" has come technically to mean this particular practice of touching the earth and then wiping over the face and hands.

37. Naeeni Muhammad Hussein, *Al Taqrirat,* Najaf, 1951, Vol. 1, P. 194.
38. Mozaffar Muhammad Reza, *Osul-Al-Fiqh,* Tehran, 1968, Vol. 1, P.6.
39. The *Quran,* 5: 6; 4: 43.
40. The *Quran* 6: 119; 2:173; 5:3 .
41. Imam Khomeini, *Al Beia,* Qom, 1980, Vol. 2, P. 498.
42. The *Quran* 22:78.
43. Najafi Muhammad Hassan, *Jawahir Al-Kalam,* Birut, 1981, Vol. 21, P. 404.
44. A'meli Javad, *Miftah al Keramah,* Qom, 1973, Vol. 7, P. 3.
45. Those secondary rules which are represented in few cases in one or two chapter of *fiqh*, are surveyed in the same chapters such as the discussion about the prohibition of eating the meat of an animal who eats *nejasat,* but those secondary rules which flow in

the majority or all of the chapters of *fiqh* are surveyed as main rules, such as the *la-zarar* and *la-haraj* rule.

46. Ansari Mortaza, *Faraed Al-Osul,* Tabriz, 1932, P. 279.
47. Montazeri, *Velaiat Al Faqih,* Qom, 1985, Vol. 2, P. 194.
48. Ibid.
49. Ansari Mortaza, *Al-Makaseb,* Birut, 1995, Vol. 1, P. 392.
50. Imam Ali, *Nahjul Balaghah,* Rome , 1984, P.542.
51. Makarem Naser, *Anvar Al Fiqahah,* Vol. 1, P. 546.
52. Najafi Muhammad Hassan, *Jawahir al Kalam,* Birut, 1981, Vol.1, PP. 289-290.

53. Ibid, Vol. 36, PP. 424-425.
54. Makarem Naser, *Al Qavaed Al Fiqhiiah* Qom, 1966, Vol. 1, P. 393.
55. Therefore, "the most important and important" rule is the criterion and reason for precedence of the secondary rules in relation to the primary rules. Thus, it is not very unusual to say that the precedence of the secondary rules in relation to the primary rules practically is placed under the heading of the precedence of the most important in relation to an important case.
56. Ansari Mortaza, *Al Makaseb,* Birut, 1995, Vol. 2, P. 452.
57. Naeeni Muhammad Hussein, *Tanbih al Ummah,* Tehran, 1961, P. 5.
58. Najafi Muhammad Hassan, *Jawahir Al-Kalam,* Birut, 1981, P. 5.

58. Najafi Muhammad Hassan, *Jawahir Al-Kalam,* Birut, 1981,
Vol.1, P. 404.
59. Ibid. Vol. 22, P. 119.
60. Imam Khomeini, *Al Beia',* Qom 1980, Vol.2, P. 461.
61. Naeeni Muhammad Hussein, *Tanbih al Ummah,* Tehran, 1961, P. 5.

62. Ibid, P. 46.
63. Khoei Abolqasim, *Mesbah Al-Fiqahah,* Najaf, 1973, Vol. 1, P. 27.
64. Some jurists in spite of strong reasons for this rule and its frequent use by the jurists, considers its content ambiguous and by limiting its authencity (*hojiyyat*) to the obligatory cases that are out of the power of the human beings, actually have denied its authencity, neglecting this fact that in these cases the reason itself independently rules the negation of obligation and *Shariah* no longer needs this rule. (A'meli, *Al Fosul al Muhemmah,* P. 249).

65. Makarem Naser, *Al qavaed al fiqhiiah*, Qom, 1966, Vol. 1, P. 160.
66. The *Quran*, 22: 78.
67. Ibid, 5: 6.
68. Ibid, 2: 185.
69. Ibid, 2: 286.
70. A'meli, *Vasael Al Shia*, Birut, 1983, Vol.1, P. 326.
71. Ibid, Vol. 2, P. 1072.
72. Bujnurdi Hassan, *Alqavaed Al Fiqhiiah*, Najaf, 1979, Vol. 1, P. 211.
73. Ibid, P. 183.
74. Ibn Al Athir, *Al Nehaiah*, Cairo, 1967, Vol. 1, P. 251.
75. Ibn Manzur, *Lesan Al Arab*, Birut, 1970, Vol. 2, P. 233; Jowhari, *Sehah Al Lughah*, Birut, 1956, Vol. 1, P. 305.
76. The *Quran*, 9: 91.
77. Ibid, 24: 61.
78. Ibid, 6: 125.
79. Ibid, 7: 2.

80. Ibn Athir, *Al Nehaia*, Cairo, 1967, Vol. 1, P. 342.
81. Jowhari, *Sehah Al Lughah*, Birut, 1956, Vol. 1, P. 42; *Lesan al Arab*, Vol. 2, P. 314.
82. *"And strive hard in (the way of) Allah , (such) a striving as is due to Him; He has chosen you and has not laid upon you any hardship in religion" (the Quran , 22: 78).*
83. A'meli, op.cit., Vol. 1, P.179.
84. Bujnurdi Hassan, *Al Qavaed al fiqhiiah*, Najaf, 1979, Vol. 1, P. 209.
85. Ibid, PP. 211-214.

86. A'meli, *Miftah-Al-Keramah,* Birut, 1981, Vol. 7, P. 3.

87. Bahrani, *Hadaeq-Al-Nazereh,* Birut, 1985, Vol. 12, P. 473.

88. Najafi Muhammad Hassan, *Jawahir-Al-Kalam*, Birut, 1981, Vol. 5, PP. 102-103.

89. Ibid, Vol. 12, PP. 250-251.

90. Ibid, Vol. 13, P. 283.

91. Tabatabaii, *Al Orvah Al Wuthqa,* Najaf, 1974, Vol.2, P. 75.

92. "Hadd" punishment only given when there is a violation of people's Rights. The word *Hudud* is the plural of an Arabic word *Hadd*, which means prevention, restraint or prohibition, and for this reason, it is a restrictive and preventive ordinance, or statute, of *Allah* concerning things lawful *(Halal)* and things unlawful *(Haram)*. *Hudud* of *Allah* are of two categories. Firstly, those statutes prescribed to mankind in respect of foods and drinks and marriages and divorce, etc., what are lawful thereof and what are unlawful; secondly, the punishments, prescribed, or appointed, to be inflicted upon him who does that which he has been forbidden to do. In Islamic jurisprudence, the word *hudud* is limited to

punishments for crimes mentioned by the Holy *Quran* or the *Sunnah* of the Prophet (S.A.W.) while other punishments are left to the discretion of the *Qazi* or the rule which are called *Taazir* (disgracing the criminal).

93. The word "*qesas"* is derived from an Arabic word *qessa* meaning he cut or he followed his track in pursuit, and it comes therefore to mean Law of Equality or equitable retaliation for the murder already committed. The treatment of the murderer should be the same as his horrible act, that is, his own life should be taken just as he took the life of his fellow man. This does not mean that he

should also be killed with the same instrument or weapon. The injunctions on qesas in the *Quran* are based on the principles of strict justice and equality of the value of human life.

94. The *Quran*, 22: 78.
95. Muhammad Hussein, *Al Fosul,* Qom, 1932, P. 334.
96. Najafi, *Javaher Al Kalam,* Birut, 1981, Vol. 5, P. 103; Vol.21, P. 62.
97. Ibid.
98. The *Quran*, 22:78.
99. Bujnurdi, *Qavaed Al Fiqhiiah,* Najaf, 1979, Vol.1, P.74.
100. The *Quran,* 2: 216.
101. Ibid, 33: 10.
102. Makarem Naser, *Al Qavaed Al Fiqhiiah,* Qom, 1966, Vol. 1, P. 194.
103. The *Quran*, 9: 117.
104. Najafi, *Jawahir Al Kalam,* Birut, 1981, Vol. 17, P. 150.
105. Hamedani Reza, *Mesbah Al Faqih,* Qom, 1941, P. 463.
106. Tabatabaii, *Al Orvah Al Wuthqa,* Birut, 1990, Vol. 1, P. 351.

107. A'meli, *Vasael Al Shia,* Birut, 1983, Vol. 5, P. 417.
108. Hamedani, *Mesbah-Al-Faqih,* Qom, 194, P. 463.
109. Makarem Naser, *Al Qavaed al Fiqhiiah,* Qom, 1966, Vol. 1, P. 198.
110. Andari, *Al Fraed Al Osul,* Tabriz, 1932, Vol. 1, P. 198.
111. Al A'meli, *Vasael Al Shia,* Birut, 1983, Vol. 2, P. 512.
112. Ibid, P. 995.
113. Kolani, *Osul al Kafi*, Birut, 1985, Vol. 2, P. 512.
114. Ansari, *Al Makaseb,* Birut, 1995, P. 360.
115. Tosi Muhammad Hassan, *Al Khelaf,* Qom, 1989, Vol. 1, P. 552.

116. Ibn Zohreh, *Qonyah Al Nuzua'*, Cairo, 1995, P. 588.
117. Ibn Dawud, *Al Sunan*, Cairo, 1971, Vol. 3, P. 315, *hadith* no. 3035.
118. Termezi, *Al Sahih*, Cairo, 1968, Vol. 4, P. 332, *hadith* no. 1940.
119. Ibn Majeh, *Al Sunan*, Birut, 1981, Vol. 2, P. 5800.
120. Zeydan Abdulkarim, *Al Madkhal le derasah al Shariah*, PP. 98-99.
121. Ibn Najim, *Al Ashbah va Al Nazaer*, Cairo, 1988, P. 85.
122. Abd al Munem, *Al Ijtihad*, Cairo 1995, P. 106.
123. Fakhr Al-Muhaqqiqin, *Izah-Al-Favaed*, Qom, 1991, Vol. 2, P. 48.
124. A'meli, *Vasael Al Shia*, Birut, 1983, Vol. 17, P. 256.
125. Ibid, P. 179.
126. Ibid, P. 324.
127. Ibn Athir *Al Nehaiah*, Cairo, 1978, Vol. 3, P. 129.
128. Ansari, *Faraed Al Osul*, Tabriz, 1932, Vol. 2, P. 314.
129. Meshkini, *Astelahatol Osul*, Qom, 1969, P. 167.
130. The *Quran*, 2: 197.

131. Ibid, 20: 97.
132. Koleini, *Osul Al Kafi*, Birut, 1995, Vol. 2, P. 183.
133. Imam Khomeini, *Tahzib Al Osul*, Qom 1959, Vol. 2, PP. 112-117.
134. Makarem Naser, *Al Qavaed Al Fiqhiiah*, Qom, 1966, Vol. 1, PP. 61-65.
135. Ibid, P.68.
136. The *Quran*, 16:106.
137. Ibid, 24: 33.
138. Saduq, *Al Khesal*, Tehran, 1948, Vol. 2, P. 45.

139. Ansari, *Alma Kaseb,* Birut, 1995, Vol. 2, P. 87.

140. The *Quran* 4: 29.

141. Imam Khomeini, *Al Rasael,* Qom, 1948, Vol. 2, P. 65.

142. Jowhari, *Al Sehah,* Cairo, 1973, Vol. 3, P. 72.

143. Ibn Manzur, *Lesan Al Arab,* Birut , Vol. 6, P. 94.

144. *Ikrah* is used in the cases that the other person forces an individual to implement or abandon a job, in this event, three headings of *mokreh, mokrah* and *Ikrah* are found, but *Izterar* is used often where the person without imposition by the other person is forced to implement or abandon a job.

145. Tabari Fasl Ibn Hassan, *Majma' al Baian,* Birut, 1995, Vol. 1, P. 257.

146. The *Quran,* 2: 173.

147. Ibid, 5: 3.

148. Ibid. 6: 119.

149. A'meli, *Vasael Al Shia',* Birut, 1983, Vol. 16, P. 214.

150. Nori Hussein, *Mostadrak al Vasael,* Birut, 1993, Vol. 16. P.166.

151. Ameli, *Vasael Al Shia',* Birut, 1983, Vol. 2, P. 690.

152. Tosi Muhammad Hassan, *Al Nehaiah,* Birut, 1980, P. 586.

153. Imam Khomeini, *Tahrir al Vasilah,* Najaf, 1966, Vol. 2, PP. 169-170.

154. Helli, *Sharaea Al Islam,* Tehran, 1977, Vol. 2, P. 418.

155. Makarem Naser, *Anvar Al Fiqahah,* Qom, 1983, Vol. 2, P. 199.

156. Ibid, PP. 199-202.

157. Tosi Muhammad Hassan, *Al Nehaiah,* Birut, 1980, P. 586.

158. Naeeni, *Tanbih Al Ummah,* Tehran, 1961, P. 50.

159. Zohalei, *Ijtihad,* Cairo 1982, P. 37.

160. Zeydan Abdulkarim, *Al Madkhal,* Cairo, 1981, P. 204.

161. The *Quran,* 6: 108.

162. Ibid, 2: 104.

163. Zeydan Abadul Karim, *Al Madkhal,* Cairo, 1981, P. 201.

164. Ameli, *Vasael Al Shia',* Vol. 18, Birut, 1983, PP. 152-159.

(public interest)

Literally, *Maslaha* means "benefit" or "interest". The lexicographers believe that "*saluha*" which is the root of the word "*Maslaha*" is opposite to the word "*fasad*" and interpret it as anti-corruption.[1] In their opinion, corruption means going out of moderation.[2] Therefore, "*Maslaha*" can be considered as something which brings about moderation. Because of this some of the lexicographers believe that the word "*Maslaha*" is equivalent of the word "*manfaa'*" (interest) in respect of rhythm and meaning.[3]

In the *Quran* various derivatives of the root of *Maslaha (Saluha)* are used, the word *Maslaha,* however, does not appear there. The *Quran* uses *zalama* (he did wrong)[4] and *fasada* (he/it is corrupted)[5] as opposite terms to *Saluha*. *Saleh* the active participle of *Saluha* occurs very frequently in the *Quran*. On one occasion the meaning of this term is elaborated textually as follows:

> *"They believe in God and in the last day and enjoin goodness and forbid evil and hasten to do good deeds and these are the righteous ones (salehin).* [6]

Whereas it is clear that its use in the early period and in the *Quran* was essentially related to the meanings of good and utility, there can be no doubt that the word had not yet become a technical term.

For the term *Maslaha* some scholars use other terms. Some call it as *Maslaha mursalah* (considerations of public interest), others use the

term *istislah* (seeking the better) and still others use the term *istihsan* (equity). Although these terms may seem different, in reality they imply the same objective. Yet, each term looks at the same objective from a different angle.[7]

Obviously, the *Maslaha* is not a primary source of the *Shariah* and cannot be used alone in legislation unless dictated by the existing certain conditions. Some Islamic jurists have outlined nineteen sources for Islamic law in which *Maslaha* could be described as one of these sources.[8] Some of these sources are accepted by all Islamic jurists and lawyers and some of them are disagreed upon. Clearly the strongest of these nineteen sources are the *Quran* and *Sunnah,* which are the prime origins of the *Shariah*. As far as *Maslaha* is concerned, it is derived from the *Quranic a'yat* and the sayings of the Prophet (S.A.W.).[9]

After realizing the *Maslaha* and failing to find an explicit ruling in

the *Quran* and *Sunnah* (or *nusus*), the *Mujtahid* has to take the required steps to come up with it. This is justified by saying that God's purpose in revealing the *Shariah* is to promote man's welfare and to prevent corruption in the world. This is, as Shatebi points out, the purport of the *Quranic a'yah* in Sura Al-Anbiya[10] where the purpose of the prophethood of Muhammad (S.A.W.) is described in the following terms: *"We have not sent you but as a mercy for all creatures"*. In another passage, the *Quran*

describes itself, saying: *"O mankind, a direction has come to you from your Lord, a healing for the ailments in your hearts"*.[11] The message here transcends all barriers that divide humanity; none must stand in the way of seeking mercy and beneficence for human beings. Elsewhere, God describes His purpose in the relevation of religion, saying that it is not within His intentions to make religion a means of imposing hardship.[12] This is confirmed elsewhere in Sura Al-Ma'idah[13] where we read, in more general terms, that "*God never intends to impose hardship upon people*".[14] These are some of the Quranic objectives which grasp the essence of *Maslaha;* they are permanent in character and would be frustrated if they were to be subjected to the kind of restrictions that the opponents of *Maslaha* have proposed.

Several *ahadith* (pl. of *hadith*) have been quoted by the Islamic Jurists to allow acting upon *Maslaha*, but none is a clear *nass* on issue. Particular attention is given, in this context, to the *hadith* which provides

that "No harm shall be inflicted or reciprocated in Islam".[15] This indicates the importance of confirming the consideration of benefits and the negation of injuries; and since the injuries are detested in the *Shariah* and benefits are confirmed it thus formulates the basis of the theory of *Maslaha*.

The substance of this *hadith* is upheld in a number of other *ahadith,* and it is argued that this *hadith* encompasses the essence of *Maslaha* in all of its varieties.[16] Al-Tufi (d. 716 A.H.), has gone so far as

to maintain that this *hadith* provides a decisive *nass* on *istislah*. Aiesheh said that "the Prophet (S.A.W.) only chose the easier of two alternatives, so long as it did not amount to a sin".[17] According to another *hadith*, the Prophet (S.A.W.) is reported to have said that "Muslims are bound by their stipulations unless it be a condition which turns a *haram* into *halal* or a *halal* into a *haram*".[18]

Thus the Muslims are given freedom to insure their benefits, on condition that they abide by the *Shariah*. In yet another *hadith*, the Prophet (S.A.W.) is quoted to have said: "God loves to see that His concessions *(rukhsah)* are observed, just as He loves to see that His strict laws *(azimah)* are obeyed".[19]

This would confirm the doctrine that no unnecessary rigour in the enforcement of the *ahkam* is recommended, and that the Muslims should avail themselves of the flexibility and concessions that the Lawgiver has

granted them and utilise them in pursuit of their *Maslaha*.

The nature of the theory of *Maslaha*

In the strict sense of *Maslaha* the terminology is limited within the environment of benefits, which have not been dealt with by the main origins of the *Shariah*. The benefits should be independently judged by a *Mujtahid* and weighed out without referring to previous experience,

simply because when new cases are referred to old ones bearing the same causes, the whole exercise develops into analogy and ceases to work under the theory of *Maslaha*. The Islamic understanding is that God has made rules in the best way to fit the lives of people by providing general principles and guidance and has left out the details of things to be discovered by the people themselves through observation and the use of common sense. He has dealt with the primary issues of life in general and has left the secondary ones to be tackled by the human beings themselves (as a mercy to them and not through forgetfulness or failure). The *Quran* says:

> *"O ye who believe! Ask not questions about things which may cause trouble. But if you ask about things when the Quran is being revealed, they will be made plain to you, God will forgive those: for God is oft forgiving, Most Forbearing. Some people before you did ask such questions, and on that account lost their faith".* [20]

The Prophet (S.A.W.) is also reported to have said:

> *"... And (God) has kept silent over some things as a mercy to you without forgetting them, so do not ask about them".* [21]

Whenever the *Quran* and the *Sunnah* are reticent on any issue, the theory of *Maslaha* can be resorted to. Actually, the *Quran* and the *Sunnah's* ordinances on legal issues are very few in comparisons to injections pertinent to other aspects of life in general. The main purpose of this is to give enough room to accommodate every benefit possible without

the need of altering anything in the main structure of the *Shariah*. The *Quran*, for instance, has not gone into detail of laying each and every rule, but instead it has just laid down general principles for the legislation.[22]

The Legal Definition of *Maslaha*

The Islamic jurists have differing definitions of *Maslaha* and its specifications. To Al-Ghazali (d. 1111) the word *Maslaha* denotes "obtaining benefit and preventing injury". He goes further adding after that,

> *"We do not mean by interpreting Maslaha as obtaining benefit and preventing injury only because these are human aims concerned with human welfare in human terms only, whereas what we actually mean by Maslaha is the preservation of the aims of the Shariah. The aim of the Shariah in regard to man is fivefold: viz: (i) to preserve his religion, (ii) to preserve his life, (iii) to preserve his*

> *mind (reason), (iv) to preserve his offspring and (v) to preserve his material wealth. Everything which secures the preservation of these five elements is a Maslaha, and everything which jeopardizes them is a "mafsada" (injury), the prevention of which is a Maslaha.*[23]

Apparently, the general meaning of *Maslaha* cannot be clearly distinguished from the definition put forward by Al-Ghazzali, since the *Shariah* actually fosters the attainment of benefit and the preclusion of injury and loss. Still, there is not anything which brings benefits and

repels injuries that is not encompassed in the intention of the *Shariah* and is directly or indirectly connected with religion, or life, or mind, or offspring, or material wealth. Nevertheless, does it not happen that an individual person considers a thing to be beneficial to him while the Lawgiver considers it the other way round? We read, for instance, in the *Quran:*

> *"Fighting is prescribed for you, and ye dislike it. But it is possible that ye dislike a thing, which is good for you, and that ye love a thing, which is bad for you. But God knoweth and ye know not".* [24]

On the other hand, Al-khwarizmi (d.850) defines *Maslaha* by saying:

> *"It is the preservation of the objective of the Shariah to prevent injuries to human beings".* [25]

Maslaha, or protection of the *Shariah's* objectivity, does not solely signify preclusion of injuries to human beings, and this is only one side

and aspect of it. The other aspect, which is equally important, is the positive side of *Maslaha* - the obtaining of benefits. Although the Islamic juristic principle has stressed the prevention of injury more than the attainment of benefit by saying: "Prevention of injury precedes the attainment of benefit", in reality they are two different things altogether and are therefore not the same; nonetheless it is necessary, in order to understand them both, that they should be considered as complementary.

However, in defining *Maslaha* Ibn Abd Al-Salaam (d. 1263 A.H.)

puts a check and says:

> *"He who wants to know the rights, the benefits and the injuries, strong amongst them as well as the weak, has to review his mind with a visualization as to why the Shariah hasn't mentioned the solution or judgment of a particular problem he is confronted with in spite of the fact that the Shariah manifested rules in which every single rule demands the subservience of human beings to their Creator and has not necessarily informed them of the benefit or injury of a thing in particular".*

Then he goes on to define benefits and injuries saying:

> *"Benefits are four kinds: needs and their causes; and happiness and their causes. Injuries are also of four kinds: pains and their causes and worries and their causes".*[26]

Ibn Abd Al-Salam elsewhere depicts real and allegorical benefits, noting that benefits fall into two categories: "real (happiness and desire)

and allegorical (their causes)". At times, the causes of benefits crate injuries; nevertheless, they are commanded or allowed since they serve as a means to insure benefits, for instance, amputating the hand of a thief to safeguard the wealth of the people and issuing warning ahead of *Jihad* to safeguard the lives of the people. As is also the case with all legal punishments which are in actual fact not pleasant due to their injury, nonetheless, they are enforced to attain peace and security which is in one way or the other meant to attain benefits such as killing the transgressors,

stoning the married adulterers and lashing or deporting the unmarried adulterers etc. All these injuries have been legalised in the *Shariah* to attain real benefits, and they are called allegorical benefits, although this seems to be calling them "means" when it is "ends" that is really meant.[27]

The Polemics over *Maslaha*

Contrary to most jurists, who reject the use of *istislah* when a textual ruling exists, Najm Al-Din Al-Tufi, a celebrated jurist, allows the use of *Maslaha* irrespective of the presence or absence of *nass*. In a treatise entitled *Maslaha* which is a commentary on the *hadith* that "no harm shall be inflicted or reciprocated in Islam", Al-Tufi argues that this *hadith* provides a clear *nass* in favour of *Maslaha*. It enshrines the first and most important principle of *Shariah* and enables *Maslaha* to take precedence over all other considerations. Al-Tufi precludes devotional matters, and

specific injunctions such as the prescribed penalties, from the scope of *Maslaha*. In regard to these matters, the law can only be established by the *nass* and *Ijma*. If the *nass* and *Ijma* endorse one another on *ibadat* (worship), the proof is decisive and must be followed. Should there be a conflict of authority between the *nass* and *Ijma,* but it is possible to reconcile them without interfering with the integrity of either, this should be done. But if this is not possible, then *Ijma* should take priority over other indications.[28]

As for transactions and temporal affairs (*Al-Muamalat and Al-Siyasiyyat)*, Al-Tufi maintains that if the text and other proofs of *Shariah* happen to conform to the *Maslaha* of the people in a particular case, they should be applied forthwith, but if they oppose it, then *Maslaha* should take precedence over them. The conflict is really not between the *nass* and *Maslaha,* but between one *nass* and another, the latter being the *hadith* of *"la-zarar wa la-zarar fi Al-Islam"*.[29] One must therefore not fail to act upon that text which materialises the *Maslaha*. This process would amount to restricting the application of one *nass* by reason of another *nass* and not to a suspension or abrogation thereof. It is a process of specification and explanation, just as the *Sunnah* is sometimes given preference over the *Quran* by way of clarifying the text of the *Quran*.[30]

Al-Tufi, moreover, notes that in transactions and state affairs, *Maslaha* serves as the goal while other proofs constitute the means. The

goal must be prioritized over the means. The rules of *Shariah* on these matters have been enacted in order to secure the *Maslaha* of the people, and therefore when there is a conflict between a *Maslaha* and *nass,* the *hadith "la zarar wa la zarar"* clearly dictates that the former must take priority.[31]

One of the contemporary jurists says: the *Maslaha* has pre-eminence over all the proof of the *Shariah*. He goes on to say: "The consideration of *Maslaha* is in actual fact a support of the *nusus* (the

Quran and the *Sunnah)* and *Ijma* in the acts of worship whereas its consideration in transactions, customary law and general social obligations, it is a basic condition". [32] In connection with acts of worship he says the rules and judgments are verified either by single clear cut proofs or by a variety of proofs which are congruent in meaning, or by contradicting proofs which could be grouped together without affecting the *nusus*. But if the contradicting proofs could not be grouped together, then *nusus* take precedence over the rest of the proofs.

Whereas in connection with transactions and practices the established norm is the consideration of *Maslaha* of people in the first place before all else, then if any other proof agrees with it, no word is to be added as is the case with the five fundamentals where *nass, Ijma* and *Maslaha* have all agreed together - e.g., to kill the killer, or to amputate the hand of a thief, in the case of divergence between the *Quran* and the

Sunnah when there is the possibility of merging some of the proofs into others in some judgments or conditions while excluding the others or of taking into account the consideration of *Maslaha,* then they could be grouped together. If grouping them together is not possible, *Maslaha* takes precedence over the rest of the proofs due to the fact that the *hadith "la-zarar wa la-zarar"* states categorically the negation of injury which prompts the consideration of *Maslaha,* and thus it must take precedence due to the fact that *Maslaha* is the main objective as far as people are

concerned in the legislation of laws, whereas the rest of the proofs are in reality a means to this objective. Logically, the ends should take pre-eminence over the means.[33]

Types of *Maslaha*

The *masalih* (Pl. of *Maslaha)* in general are divided into three types, namely, the "essential" (*zaruriiah),* the "complementary" (*ha'jiiah),* and the "embellishment" *(tahsiniiah).* The *Shariah* in all of its parts aims at the realisation of one or the other of these *masalih.* The "essential" *masalih* are the groundworks for the people's lives. Disregard for them leads to complete disruption and chaos. The five essential values - namely religion, life, intellect, offspring, and property - comprise the "essential" *masalih.* These must not only be promoted but also protected against any real or

unexpected threat, which undermines their safety.

The *Shariah* has comprehensively dealt with the conservation of religion as a salient benefit. The *Shariah* has obliged able Muslims to fight for the cause of God *(jihad)* to preserve religion, so that the doctrine of monotheism should reign supreme and eradicate all the impediments and shackles confronting humanity at large. [34]

The *Shariah* has fully dealt with the conservation of life as a legal

benefit. The *Shariah* ordains a severe penalty for illegitimate murder to protect man's life and preclude the extinction of the human race. The rule of legal retaliation *(Qisas)* has been laid down by the *Shariah* in order to prevent any hostility among human beings.[35]

In order to assure the security of mankind and the right to life for every human being the *Quran* has laid underlying principles for the preservation of human life, prevention of committing sins, removal of severity in duties, in addition to the illegalization of committing suicide; all these show clearly that the *Shariah* is deeply concerned with the preservation of life.[36]

In order to preserve a balanced mind, the *Shariah* has prohibited intoxicants and has enjoined the Muslims to refrain from all activities, which make the mind vicious, and speculative.[37]

The *Shariah* ordains marriage as a positive act preserving offspring, which is deemed by certain scholars as the preservation of

kinship and chastity. To the Same end, the *Shariah* has prohibited adultery and fornication and laid down a painful punishment to those who do it and has legislated it in order to close all the doors leading to this sinful act which, in the long run, breaks down the bonds of kinship and demolishes good character and generates recklessness and irresponsibility in society.[38]

Concerning the preservation of material wealth, the *Shariah* has imposed a severe punishment to thieves and robbers and laid down various rules to enable people to earn their living legally, and prohibited them

from plundering the belongings of others.[39]

Altogether, *the ha'jiiah* supplement the five basic values and point to interests whose disregard brings about hardship, not collapse, for the community. Thus in the area of *ibadat* the concessions that the *Shariah* has granted to the sick and to the traveler, permitting them not to observe the fast, and to shorten the *salah (*prayers), are aimed at preventing hardship. Similarly, the basic permissibility regarding the enjoyment of victuals and hunting is complementary to the main objectives of protecting life and intellect.[40]

The "embellishment" *(tahsiniiah)* denotes interests whose realisation lead to improvement and the attainment of that which is desirable. Thus the observance of cleanliness in personal appearance and *ibadat,* moral virtues, avoiding extravagance in consumption and moderation in the enforcement of penalties fall within the scope of

tahsiniiah.[41]

Maslaha is further classed in three groups based on availability or textual authority advocating it. First, the *Maslaha* explicitly propounded by the lawgiver and enforced through the enactment of a law. This is called *Maslaha Al-Mutabarah,* or accredited *Maslaha,* such as protecting life by enacting the law of retaliation *(Qisas),* or defending the right of ownership by penalising the thief, or protecting the dignity and honour of the individual by penalising adultery and false accusation. The Lawgiver

has, in other words, upheld that each of these offenses constitutes a proper ground for the punishment in question. The validity of *Maslaha* in these cases is definitive and no longer open to debate. The Islamic Jurists are in agreement that promoting and protecting such values constitutes a proper ground for legislation.[42]

But the *masalih* that have been validated after the divine revelation came to an end fall under the second class, namely the *Maslaha mursalah*. Although this too consists of a proper attribute to justify the necessary legislation, but since the Lawgiver has neither upheld nor nullified it, it constitutes *Maslaha* of the second rank.[43]

The third variety of *Maslaha* is the discredited *Maslaha*, or *mulghah*, which the Lawgiver has nullified either explicitly or by an indication that could be found in the *Shariah*. The Islamic Jurists are in agreement that legislation in the pursuance of such interests is invalid and no judicial decree may be issued in their favour.[44]

Maslaha Tashreaiiah and *Maslaha Ijraiiah*

It is without doubt that all the regulations of *Shariah* are based on the *Maslaha* or benefit of the people.[45] Also, since some of the *masalih* and requirements of the people are permanent and some of them are variable, to the same degree, some of the Islamic laws are permanent and some of them are variable. On the basis of this, the law in Islam has two

meanings: the permanent and fixed laws which have been issued and explained by God and the Prophet (S.A.W.) and the variable laws which are laid down according to the variable demands or so-called requirements of the time. The variable laws are not confined to those which had been laid out in the light of the rules and permanent laws and objectives and purposes of Islam, having in mind the requirements of the time, in the era of the Prophet (S.A.W.) and caliphs. Rather, all the regulations in an Islamic state are among the variable rules which along with the permanent rules are responsive to the human demands.[46]

Also, the element of *Maslaha* has the main role not only in laying out and implementing the variable laws but also in implementing the permanent laws and in issuing the governmental orders and commands. Therefore, there are two main positions for the element of *Maslaha* known as "*tashrea'*" and "*ijra'*". Everything which has been demanded of man, under the permanent laws or the general objectives and purposes, is based

upon *Maslaha* which comes back to him; this position of *Maslaha* is called the position of "*tashrea'*". The other position occurs when those demands and purposes are implemented by man. *Shariah* requires man to implement its demands and objectives. The man should evaluate the circumstances in every situation and implements the demands of Islam.[47]

If we disregard the worship sector (*Ibadat*) of *Shariah* and also neglect the social tasks of individuals, it is the Islamic state which is committed and responsible for implementing the rules, demands and

general and specific objectives of *Shariah* which should recognize the demands of *Shariah* in the light of the reason and science in various circumstances, and tries to implement them. Here, the element of the *Maslaha* shows itself once again, that is the position of "*ijra'*".[48]

On the basis of these two different position for the *Maslaha*, it can be divided into "*Maslaha-Al-Tashreaiiah*" and "*Maslaha-Al-Ijraiiah*". Both kinds of the *Maslaha* refer to the mundane and eschatological of the man, but the recognizer in "*Maslaha-Al-Tashreaiiah*" could be someone who is completely aware of the all dimensions of the man and his interests and corruptions, and there is no such a source except God, but the recognizer in the phase of implementing the rules and demands of the *Shariah*, is people at the level of the society of the Islamic state.[49]

In other words, "*Maslaha-Al-Tashreaiiah*" is placed in an order prior to the rules and general and specific demands of the *Shariah* and its recognizer is God, but "*Maslaha-Al-Ijraiiah*" is placed in an order after

the rules and demands and its recognizer is people and it is placed in the scope of the social problems of the Islamic state.[50]

Today in the juridical discussions, *Maslaha* often is intended to mean "*Maslaha-Al-Ijraiiah*". Of course, the application of the word "*ijra*" does not imply that we should neglect that "*Maslaha-Al-Ijraiiah*" could be in its turn a basis for laying down the laws and regulations by the Islamic state. In other words, the "executive" characteristic of this position is in comparison with the rules and demands of the whole *Shariah*, but in

comparison with the organization of a state and that of its executive and legislative branches, this *Maslaha* is not simply executive, rather it is also involved in the foundations of legislation and many of laws are laid down on the basis of *Maslaha*.

Maslaha in the Prophet (S.A.W.) and Caliphs era :

The era of the Prophet (S.A.W.) and caliphs are shared in some points: 1) the commitment of the society to the *Shariah* 2) the simplicity of the socio-political system; 3) the stability of government; during this period the government did not transform into a monarchy. Although, there were also serious differences in these two periods, such as changes in the social system and leadership system; however, altogether, these two periods can be observed as a homogeneous society. Many attempts in this era have been implemented in terms of "*Maslaha*".

Using the human experiences:

In the first half of the first century in Islamic history, there was a great enthusiasm in acquiring experiences and techniques. Although, these contacts were not extensive. In the beginning of the Islamic civilization, there was not a great opportunity for using the experiences; enmities and suspicions constrained the room for acquiring the sciences from non-Muslim nations; however, partly this productivity is observed. In the era

of the Prophet (S.A.W.), which is considered the beginning of the Islamic civilization, these communications were established in the lowest possible level. The policy of enmity, which was pursued by the pagans *(Mush-rekin)*, slowed the speed of the communications; but at the same time, there were examples of the Prophet (S.A.W.), which showed encouragement in acquiring human experiences.

Of these, we can indicate using the moat methods which was the common method in Iranian's defense system, and using the expertise of Salman Farsi in Ahzab war. In Ta'ef war, for breaching the castle, catapults (ballistas) were used. Salman told the Prophet (S.A.W.) that "in my opinion, we should use catapults for attacking the castles which serve as refuges. We, in the Pars territory (Iran) mounted the catapults on top of the castles and used them; if catapults were not used, surrounding the castles would last long"; then the Prophet (S.A.W.) used this method.[51] The

other example is to allow the Jews of Khaibar to remain in their lands: the Prophet (S.A.W.) after the war of Khaibar, envisaged the emigration of Jews, and intended that the policy of exile to be executed in their case; but the Jews of Khaibar said that: "We have knowledge and expertise in managing and maintaining palms, thus keep us in this land".[52] The Prophet (S.A.W.) who considered their view right, agreed that they remain in their lands and signed a treaty with them so that the Islamic society could use

the expertise and knowledge of this group.

These instances are not plenty in the era of the Prophet (S.A.W.). The weakness of the government and repeated enmities did not bring about a fertile ground for acquiring experiences and techniques; but in the period of the development of Islamic civilization, productivity increased. For example, we can refer to the problem of financial administration: in the beginning of the Islamic government, the limitation of income resources was too high, so that there was no need to regulate financial affairs. The Prophet (S.A.W.) distributed rapidly the limited incomes and there was no difficulty in distribution; but the development of the scope of Islamic civilization and growing incomes made this method impossible.[53] In the period of second caliph the experience of Iranians through an Iranian frontiersman whose name is "Hormozan" according to Mawardi was used for formulating a financial administration.[54] Using Persian language in the

financial administration until the period of Hajjaj which is the period of transformation of the above mentioned administration into Arabic,[55] shows that, the administrators of financial order in Islamic state have used the experiences of Iranian civilization and made them the basis of affairs.

Also, we can mention the regulation of taxes in the domain of Islamic civilization. Although, in this field, the serious developments occurred, but these developments took place on the cornerstone of existing

regional civilizations. On this issue Spiuler says: "In practice, both in Egypt and Iraq, all kinds of tribute and other taxes which were common in Byzantium and ancient Iran, including forced labor and in older times particularly included obligation to naval services, were kept during the long periods, because maintaining an orderly financial administration without using the existing authorities and files was impossible."[56]

These events and similar instances show that in acquiring the human experiences and techniques, Muslim administrators in the era of the Prophet (S.A.W.) and Caliphate tried hard. The observance of expediency *(Maslaha)* of Islamic *Umma*, called them up for learning these experiences and techniques; even in some cases, the non-Muslim advisors were employed. Belazari in his book, titled Ansab-Al-Ashraf cites the letter of the second caliph to the governor of Syria: "Send us a Roman for undertaking the tribute and heritage affairs.[57]

Sources of Budget

Despite that Islamic state was not very extensive in the first half of the first century and was not forced to meet special requirements of a great body of personnel but the improvement of the economic situation of the society required sources for income. In these cases, the element of

Maslaha was remarkable. On the amount of the governmental taxes, a serious variety was observed; its basis was the different expediencies of time and place. For example, we mention two cases of making taxes:

(1) - Land-tax *(kharaj)*

With the development of conquests, the problem of conquered territories was among the matters that the Islamic government should decide about them. The Prophet (S.A.W.) had distributed lands and instituted sharing among Muslims in several cases. After the war of Khaibar, the Prophet (S.A.W.) divided the lands of region in 36 shares and allocated 18 shares as source of income for general problems of the Islamic society and distributed the rest among Muslims; each 100 persons received a share;[58] or after the war with Bani Nazir, the Prophet (S.A.W.) divided their lands between immigrants and two persons of "*Ansar*"[59]; but,

in the period of second caliph and the extension of government and territories he rejected the proposal of dividing the conquered territories. Despite the expectation of *mujahedin* (participants in the wars); he explained his theory as such: "Land-tax should be laid down in the conquered territories and their habitants should pay "*Jeziah*" (poll-tax)[60] so that all the Muslims, warriors and their children can benefit of them". The second caliph for making his view rational, says: "within these frontiers, there should be individuals to protect them. These cities and

great regions (Syria, Jazirah, Kufa, Basra, Egypt) should be protected by soldiers, and they should receive salaries. If these lands were distributed, how should their expenditures be earned".[61] In this way, social *Maslaha* prevents the land distribution and by keeping the lands in the hands of indigenous habitants and receiving tributes, makes them a special source of income.

Environmental and regional differences influenced the amount of land-tax. For example, Mogheira-ibn Shubah, the agent of second caliph in Kufa, exempted the palms from tribute.[62] Othman ibn Honaif, the agent of second caliph in Iraqi territories laid down such a *kharaj*: "for every acre of grape, 10 *derhams*, for every acre of date, 8 *derhams*, for every acre of sugar cane, 6 *derhams*, for every acre of wheat, 4 *derhams* and for every acre of barley 2 *derhams*".[63]

Belazari cites that "Ali ordered his agent in Iraq: The territories

which are irrigated by Euphrates, for every acre of land whose harvest is good and excellent, 1.5 *derhams*, and for every acre of wheat which has a mediocre harvest, 1 *derham*, and for every acre whose harvest is lower than mediocre, 1/3 of *derham*, and for the lands planted with barley, the half of what is determined for that of wheat, and for every acre of palm, 10 *derhams*, and for every acre of grape garden which has entered its fourth year and yielded products, 10 *derhams* was to be determined. The palms (in the form of individual tree and not a garden), vegetables, beans

and cotton should be exempted from *kharaj*". In this way, the clear and serious changes are observed in determining the amount and limit of tribute.[64] The major factor in these changes and differences has been the temporal and regional *Maslaha* and the general requirements of the government which by their interaction have determined the amount and limit of *kharaj*.

(2) - Alms-tax (*Zakat*)

The properties which are placed under the regulation of *Zakat* are not confined to certain cases and therefore, the Prophet (S.A.W.) ordered to collect $^{1}/_{10}$ as "*Zakat*" for honey;[65] but in this very case (*Zakat* of honey), it is observed that in the period of the second caliph, a governor writes to the Caliph that: the owners of honey, refuse to pay what they were paying in the time of the Prophet (S.A.W.). The Caliph responded "if they paid

the same amount that they were paying to the Prophet (S.A.W.), protect the deserts in which they put their beehives; and if they didn't pay that amount don't do this"[66]. In this way, the second Caliph conditions services of the Islamic government by paying honey tax. In the case of the "*Zakat* of horse"[67], it is cited from the Prophet (S.A.W.) that "I forgave the *Zakat* of horse". But, in the period of Imam Ali, he collected *Zakat* for horses.[68] This variety in regulations refers to the *Maslaha*.

Imam Sadeq[69] says about the *Zakat* of rice: "Madina, in the time of the Prophet (S.A.W.) had no lands for planting rice, therefore there was no rule about it; however, at the present the *Zakat* of rice is obligatory because the major part of the Iraqi *kharaj* and *Zakat* is provided from it".[70]

Organization change

In the first half of the first century, changes were observed in the organizational and administrative framework:

1- The powers of governors: sometimes, they were appointed with extensive powers. They had the right to appoint agents within their jurisdiction, without referring to the central government. They could act as a judge and execute legal punishments. They undertook receiving and collecting taxes. These extensive powers imply a kind of federal govern-

ment in which the central government intervenes with little powers in the affairs of provinces. For instance, we can refer to the existing and valid document to "Malek Ashtar" who was appointed by Imam Ali as the governor of Egypt and was given extensive powers.[71] In this document we find that Imam Ali has given to Malek responsibilities such as: commanding military and police forces of that region, appointing the judges, selecting governmental agents, preparing and collecting taxes...[72]

Also, from the letter of second caliph to Abu Obeideh Jarrah, the governor

of Syria and that of Abu Mousa-Al-Ashari, the governor of Kufa, we infer that: Caliph has considered the two as responsible for appointing judges in their respective jurisdictions.[73]

But, in some cases, it is observed that the central government intervenes directly in regional problems. For example, second caliph appointed Abdollah ibn Masoud as the judge of Kufa,[74] Othman ibn Honaif as responsible for measuring the lands of Iraq and collecting taxes of that region,[75] and Shoraih as the judge of kufa.[76] These changes arose from necessities and expediencies (*masalih)* which intervened in decision - making. For example: the executive power of Malek and the long distance of Egypt and other factors were probably among factors that Imam Ali envisaged when appointing the governor with extraordinary powers.

2- Establishing new institutions: The evolution of Islamic state required the *Maslaha* of establishing new institutions, including:

establishing of police institutions which were responsible for the security of cities. In the era of the Prophet (S.A.W.) except in fighting camps or when Madina was under the siege of enemy, protecting Muslims were not observed, but after the increase in the population of Madina, the idea of "night-patrol" appeared in the era of the first caliph. It is cited that " Abdollah ibn Masoud was appointed to patrol the streets and alleys of Madina every night. In the era of second caliph, there are also stories about night-patrol.[77]

In the era of Imam Ali the institution of the security of city was improved and found a more complete form and constabulary organization was formed, and Imam Ali appointed someone to be responsible for it.[78] It seems that this institution was not confined to the center of government (kufa), but had been developed in the other Islamic cities, at least major cities. In the letter of Imam Ali to Malek Ashtar, we read: "hold a session for your guardians and police, so that they will report whatever happened without any fear". In this way, the security of city and government found a separate and independent organization and the creation of this institution has been nothing except the requirement of *Maslaha* and resulted necessities. In the document of Imam Ali to Malek Ashtar, other new units and institutions are also observed that were created on the basis of the *Maslaha* of Islamic society in those days. Units such as: officers who supervised the acts of agents, governmental correspondence, advisors of the governors etc.

3- Evolution of old units and institutions: with extension of Islamic civilization in the first half century, the familiar and old institutions of society dramatically changed. For example, we can refer to the evolution of "prison" in the first half century of the era of the Prophet (S.A.W.) and Caliphs. Despite that "detention" (*habs*) is mentioned as one of the punishments in the *Quran*, but in the era of the Prophet (S.A.W.), there was no special place for criminals. What is cited in that era is

temporary detention. In some cases, a particular house as a temporary prison had been selected by the Prophet (S.A.W.). For example, the men of Bani-Quraizeh, from the time of imprisonment until the execution of verdict, were detained in a house of Bani-Najjar tribe upon the order of the Prophet (S.A.W.).[79] Also, the prisoners of war of Badr were divided among Muslims and were detained.[80]

All of these cases show that in the era of the Prophet (S.A.W.), there was no particular place as "prison", although, the imprisonment as a punishment existed. With the extension of Islamic regions and growing urban population and consequently the emergence of professional criminals, the idea of selecting particular places for detaining the criminals was borne. It is cited that: In Mecca, second caliph, bought the house of Safvan ibn Omayyeh at the price of 4000 *derhams* and allocated it for detainees.[81] Of course, some historians ascribe the building of the first prison to the era of the government of Imam Ali who built two prisons

known as "Nafea'" and "Mokhayyes" in Kufa. These evidences show that the institution of "prison" has found a more complete form in the period of government of Imam Ali; so that Imam Ali has been known as the founder of this institution.[82] Therefore, it is clear that the establishment or evolution of social institutions, have depended directly on the social necessities and expediencies (*masalih*).

Enmities and Treaties

In the first half of the first century, peace and war were the main problems of Islamic society. Here, also *Maslaha* was a determining factor:

1. **Decisiveness and moderation;** attention to the *Maslaha* element caused that variety was created in dealing with problems. For example: the tough decision of the Prophet (S.A.W.) about the Jews of Bani-Quraizeh is comparable with his soft approach to the pagans of Mecca, after its conquest. Leaders and aristocrats of Quraish even benefited from *Zakat*. In the period of extension of Islam, similar differences are also seen: for example, the soft approach of second caliph in response to the people of Beit-Al-Muqaddas who asked him to travel to their city for signing the peace treaty; the second caliph, despite all the difficulties of the journey, accepted their request and went from Madina to Beit-Al-Muqaddas and signed the peace treaty with them.[83]

2- **War regulations;** battles are subject to regulations, but

expediencies (*masalih)* and necessities overshadow particular regulations. The Prophet (S.A.W.) in the war of Bani-Nazir ordered cutting and setting to fire the trees around the castle.[84] Also, in the war of Taef in which Thaqeaf tribe was deployed in the natural fortification of castle and by shooting killed Muslims, the Prophet (S.A.W.) said: "for every Muslim cut five trees". By this method, the natural fortification of the pagans of Taef was removed.[85] The order of the Prophet (S.A.W.) for cutting trees was a temporary order and out of the *Maslaha*, because the Prophet (S.A.W.) has

prohibited cutting trees in normal and unnecessary circumstances.[86]

3- Time of peace and war; circumstances and *masalih* influenced in acceleration and delaying the state of peace and war. For example: after surrounding Antakiiah and giving up of its people and signing the peace treaty, habitants of the city rebelled after the commander of Muslim forces left, Abu Obeideh Jarrah. Ibn Khaldoun says: "Abu Obeideh sent Ayyaz ibn Ghanam and Habib ibn Muslemah for entering the city and its people were forced to sign the peace treaty under the previous conditions. Antakiiah was a famous city in the view of Muslims".[87] In this way, repeated rebellion of habitants did not overshadow the idea of peaceful approach, and the peace treaty was signed under the previous conditions. The cause of this lenience is seen in the speech of Ibn Khaldoun: The situation of "Antakiiah" in Byzantium Empire was such that it was not compatible with severity and harshness. Seizure of the city and holding it

had a special importance that the peace treaty ensured. The above mentioned approach is comparable with the kind of confrontation with rebellions in some places like the cities of Khurasan; in some of these cities, after signing the peace treaty, some rebellions took place.[88]

4. Terms of treaties; formulation of peace treaties were varied. General conditions, strength and weakness of Muslims and the power of the adversary were the major factors, which determined the content of treaty. For example, the peace of Hudabiieh, despite its future interests

had a humiliating appearance. Specially its fifth clause was such: those from Quraish who become Muslim and come to the Prophet (S.A.W.), he is obliged to return them, but if people from Madina took refuge in Quraish tribe, Quraish and habitants of Mecca had not such an obligation.[89] This article of treaty was implemented on the same day of signing the treaty. Because Soheil-ibn-Omar, the son of the representative of pagans, who converted to Islam, took refuge to Muslims; but under the treaty, he was returned to the pagans.

The above mentioned peace treaty is comparable with examples like signing treaty with Najran Christians. The Prophet (S.A.W.) in the treaty has written: The habitants of Najran should keep my agents for a month and if Muslims had feared and were threatened by any deception from the region of Yaman, lend 30 armors and 30 horses to Muslims.[90] This decisiveness and moderation in determining the terms of treaty were

done on the basis of different circumstances. The other example of flexibility based on expediency can be observed in the letter of the Prophet (S.A.W.) to Najran Bishop. We read in this letter: "from Muhammad, the Prophet (S.A.W.) of God to Bishop Abelhareth and Najran Bishops and their monks. All of their affairs, more or less, and their religious sites should be kept at their hands. No rights and powers should be denied of them and all their manners should be kept untouched, until they have not diverted from goodness and truth".[91] The study and survey of the text of

treaties in the era of the Prophet (S.A.W.) and Caliphs shows that *Maslaha* element is the cornerstone of other elements.

5- Prisoners of war; There are many different approaches to this matter. In the battle of Badr, the Prophet (S.A.W.) consulted with his advisors about the fate of prisoners.[92] This point shows that in this position, *Maslaha* element has an importance. In final decisions about the Badr captives, there were no similar methods. Some people like Nazr ibn Hareth, Aqabah-ibn-abi-Moit was murdered.[93] Some people paid money (fedyeh). The amount of this money was not alike; it varied from 2000 *derhams* to 4000 *derhams*.[94] In some cases, people were not forced to pay any money. In other cases, those pagans who could read and write were freed as a reward for teaching several Muslims.[95]

But, in cases such as Bani-Quraizeh prisoners of war, all the men of tribe were killed; in some cases the prisoners of war were exiled (Bani-

Nazir and Bani Qinqa'); in other cases; initially, the captives were sentenced to exile, then this sentence was cancelled, and all the captives were freed (the battle of Bani-Hovazen) and sometimes from the beginning of dominance, freedom sentence was issued (like the seizure of Mecca). In the period of Caliphs, we see also some of these *masalih*: Sometimes all the prisoners of war have been killed, sometimes they have been exiled and sometimes they have been freed by paying money (fedyeh). Also in the time of Imam Ali, it is seen different approaches to the prisoners of

war.[96]

Juridical Problems

In judicial system and executing the judicial decisions variety of approaches as well as methods of execution are observed. Appointment of judges sometimes was done by the central government and sometimes by provincial government, in some cases, the governor of province was committed to appoint a certain judge in the region. The second caliph ordered Amr-Ibn-Al-A'ss, the agent of government in Egypt, that Kaab ibn Zanneh be selected as the judge of that region.[97]

The jurisdictions of judges were also different. For example, in the period of second caliph, the judge of Egypt, Qeis-ibn-A'ss was also the judge of Sham region (Syria, Jordan, Palestine and Lebanon) and Sham

was under the judicial system of Egypt.[98] Separation of leadership from judgement position, because of the extension of tasks, occurred in the period of second caliph, something which was required by common *maslaha* in Islamic Society.

The selection of judges have taken place by the expedient vision *(Maslaha)* of caliphs and governors. In the letter of Umar to Abu Musa we read: do not select as judge no one other than the rich and aristocrats, because the rich don't look forward to the people's property and the

aristocrat is not fearful of his status among people.[99] This approach and advice was not anything but the perception of the caliph was from the *Maslaha* of selection among these two groups.

Also, the vast spectrum of tasks of judges required that this work was regarded as a job. If in the beginning of the rise of Islam, the judgement of judges was the gratis task, development of Urban and civil society created many differences and conflicts and called for judges whose permanent job would be judgement. In this view, the problem of salary of judges is advanced. The second caliph writes to Abu Obeideh and Moaz that: "Watch and select some men to act as judges and set a salary for them".[100] Imam Ali in the Malek Ashtar document has advised: "be generous so that the judge will not be in hardship and feel no need to the people".[101]

In the method of execution of sentences is also observed varieties

based on social and governmental *masalih*. It is cited that the second caliph wrote to all Islamic regions that nobody should be excuted without his order.[102]

This historical citation shows a kind of higher court in the center of the government which addressed the sentence of death and regional judges did not have such right personally without the signature of caliph who in fact had the role of high judicial institution to execute the sentences of death. Preferably, judgments such as addressing the crime of

Moqeirah-ibn Shoabah, the governor of Kufa, in Madina shows that the problematic cases (such as addressing the crime of governors) was referred to the center of government and regional judges did not intervene in them. In some cases, delaying of penal sentences has been done for *masalih*.

Specific Regulations

In the government of the Prophet (S.A.W.) and caliphs, we encounter cases which have been dealt with based on *Maslaha* :

1- The Prophet (S.A.W.) ordered that: the trees of a region in Taef should not be cut and nobody should hunt in that region and punish the aggressors.[103] This rule, undoubtedly has been a special *Maslaha* which was required in that region and that period. Doubtless, we can not regard it an eternal rule for Taef region rather, it is a rule which was issued out

of a particular expediency (*Maslaha)*.

2. The rule of Zarar mosque: despite that the primary rule about mosques is that they should be respected, but after descending the *Quran* verse about a particular mosque, the Prophet (S.A.W.) ordered to destroy it and some people were committed to set that place on fire and after that, the Prophet (S.A.W.) ordered that place should become a garbage can.[104]

3. Despite this the Prophet (S.A.W.) refused to select personal

guards, but in the battle of Tabuk, it is cited that: Some people guarded him in the Muslim Camp. "A group of Muslims were awake during the nights and guarded him. Therefore, circumstances and *masalih* forced the Prophet (S.A.W.) to accept personal guards.[105]

4- In returning from the battle of Tabuk, the event of "Aqabah" occurred and some of the "*Munafeqein*" (hypocrites) decided to kill the Prophet (S.A.W.). Despite the fact that the Prophet (S.A.W.) recognized them, he refused to punish and explained as such: "I do not consider it good to say people, since the war between Muhammad (S.A.W.) and the pagans have been finished, he began to kill his friends". In this way, the *Maslaha* of preventing the circulation of this accusation forced the Prophet (S.A.W.) to not persecute and punish them.[106]

5- Abdollah Ibn Obii was the chief of the "*Munafeqein*" in Madina and from the beginning of emigration was involved in disrupting affairs and his presence in the majority of internal and external plots was felt.

The Prophet (S.A.W.) did not have a harsh contact with him and his friends. This kind of approach was nothing other than understanding the *Maslaha* of Islamic society and doing on the basis of attracting his tribe.[107]

6- The Prophet (S.A.W.) initially prohibited people from eating sacrificed meat after 3 days, so that there would be enough meat for the poor and not be preserved for them. But after that because the situation of the Muslims had improved, he allowed its preservation.[108]

7- The second caliph had ordered that the agents of government, should not enter Madina at night.[109] This order was so that they could not exploit the darkness of night for transferring their illegitimate properties to Madinah. Also, he had ordered that before going to the governmental district, the properties of governors should be noted, so that they could be confiscated in the case of disproportional increase.[110]

8- The second caliph when building the cities of Basra and Kufa ordered that nobody should build more than three rooms or increase the height of the houses.[111] The existence of *Maslaha* element in this order is clear. The caliph issued this order to prevent luxury. Thus, in continuance of this order, we read: "you observe the *Sunnah* so that you always have power."

9- The second caliph arrived in Mecca in 17 H. and decided to enlarge the "Masjid-Al-Haram", ordered that those who agree to sell their

houses, the houses should be bought and those who refuse to sell their houses, the houses should be demolished and be added to Masjid-Al-Haram.[112] This decision was made because that caliph considered that the space of "Masjid-Al-Haram" was not enough for the large number of people and there was no solution except its expantion.

10- The Prophet (S.A.W.) has said to the companions that: "change the color of your white hair and do not make yourself similar to the Jews".

Imam Ali was asked about this order, he said: the reason for this order was that the followers of Islam were few, but today Islam has developed and the security is established everyone has the right to do it or not.[113]

11- After Madina was the center of Islamic caliphate for about 35 years, paying attention to economic, political and military expediencies, Kufa was selected as the base of the Islamic government.[114]

The above mentioned points and examples show that the *Maslaha* element in social problems had clear existence. The case of evaluation of expediency in the period of the Prophet (S.A.W.) and Caliphs is the clear reason for the role of *Maslaha* in the social problems. What is important in this matter is that paying attention in formulating the methods of action has not been criticized by the Prophet (S.A.W.) and caliphs and they have not monopolized this method for themselves and have not prohibited it for others. Their method was such that the expediency point of view should be

respected and the views which are based on them should be paid attention to, such as: exit from Madina in the battle of "Ohod" and using the "moat" which both were done according to the people's view. Thus, we can not confine *Maslaha* to the Prophet (S.A.W.) alone.

The Role of *Maslaha* in Islamic state:

In an Islamic government, an Islamic state can intervene in every case in

terms of *Maslaha* and regulate the society affairs. This matter is not unique to an Islamic government. All the governments in cases that the *Maslaha* of society is required, give themselves the right to intervene in the affairs of society.

If the Islamic state felt the *Maslaha* for delimiting properties, it has right to do this. Even, in some cases if the benefit of society was required, would have the right to expropriate some people. Also, if for *Maslaha* of society and administration of the system, there is a need, has the right in addition to the taxes which is mentioned in *Shariah*, get extra taxes from the owners of property. The Islamic governor when faced with the conflict of *masalih* of individual and that of society, gives top priority to the social *Maslaha* and when faced with the conflict of primary rules and governmental rules, gives priority to that is more important.[115]

The jurists have advanced the powers of an Islamic governor in

various matters,[116] including: divorce in some cases,[117] forcing the hoarder to sell his goods,[118] pricing the goods,[119] intervening in Islamic tax and big mines and jungles,[120] executing "*hudud*" and "*tazirat*",[121] intervening in unowned properties,[122] intervening in public "*waqf*" (pious foundation, mortmain), intervening in the legacy of a man who lacks heirs.[123]

The rule of an Islamic State always revolves around the *masalih*

and its scope is very extensive and includes all the economic, political, juridical, military and cultural matters. The Islamic state in all these fields can issue governmental rules for solving the problems on the basis of the *Maslaha* by the recognition of experts.

Conflict of governmental rules with primary rules

Giving priority to more important (*Ahamm*) issue is a rational principle which is affirmed by Islam. All the Islamic jurists have said about the conflict that the more important task should be implemented and important task should be disregarded. For example: if the enemy attacked an Islamic country and Islamic army was forced to pass the property of others for expulsing the aggressor; if an owner did not permit it, the governor can rule the passage and his rule has a priority over the right of ownership. The jurists in the matter of *Jihad* have advanced an argument, known as "*tatarrus*" (establishing a shield) that if the offensive enemy had placed a Moslem or Moslems in front of his division and by this clear the path for

his purposes, what is to be done? the jurists have said that: it should be studied whether the danger which is predicted by the enemy is more critical than death of certain number of Moslems. If Islamic state or experts believed that the danger of enemy was more fatal, there would be no choice except accepting the death of those Muslims and they would be martyrs of this war.[124]

Islamic government in legal vision of Islam has a high position, so that the importance of other obligation, prohibitions in the face of the

principle of Islamic government and state is less, therefore in interference and conflict maintaining Islamic government has priority over other rules.

The reason for necessity of maintaining Islamic system has priority over other reasons.[125] The above example is the strongest evidence for our claim. Despite that the life of man, in Islamic point of view has the highest position and respect, but if we should choose between death of a number of men and Islamic system, it is clear that maintaining the Islamic system has priority.

Among Islamic principles that Islamic government should seek to realize them, justice, adjustment of wealth, anti-poverty policies and the like should be mentioned, and Islamic government can not have the laws and rules that are incompatible with these principles. Because this would involve contradictions. Therefore, Islamic government in conflict between these principles and other laws, rules to the sovereignty of above principles to the other laws. For example if an Islamic governor on the

basis of available statistics, considered the class distance undesirable he can issue orders for adjustment of wealth and reducing the class distance; or if an Islamic governor recognized that the rapid rate of population growth would have undesirable consequences including that bringing about poverty and dependence on outsiders and weakness of Muslims, he can rule for birth control and for the more important *Maslaha* prevents important *Maslaha*.

In these cases the Islamic government when faced with interference

and conflict gives priority to the more important matter. *Masalih* and corruptions should be evaluated and the best way should be selected. Mortaza Mutahhari calls this the war of *masalih* and considers the jurist responsible for doing this. He made an example about taxes in this regard.[126]

Conclusion

The rules or laws in Islam are not established for an individual or a particular family or for a specific group, but they are generally promulgated for all individuals; because one of the most important qualities of the nature of Islamic legislation is universality. The *Quran* and *Sunnah* have given broad lines to the tackling of the legal problems leaving so much space to accommodate every sensible legislation which considers public interest in the strict sense of the word. In this way the

theory of *Maslaha* has a great role to play. It stands as a useful tool to a *faqih* without which his potential to solve new problems according to the *Shariah* could not work. The *Quran* and *Sunnah* have not mentioned all legal cases known to mankind and thus have not given ready made answers to all possible problems, which could occur. This gives scope for a *Mujtahid* to find answers to the daily questions of the society. For the very nature of the theory of *Maslaha* demands that a *Mujtahid* has to consider the unrestricted benefits in the light and according to the

intentions of the lawgiver.

The lawgiver (God) has considered each and every benefit in the *Shariah* in a sense that all benefits are connected, whether directly or indirectly, to the preservation of the five fundamentals, viz: religion, life, mind, offspring and material wealth. There is no difference of opinion between the Islamic scholars in that whatever preserves these fundamentals is a benefit and therefore must be taken into consideration, and whatsoever jeopardizes them has to be eradicated.

Despite their different approaches to *Maslaha,* the leading Islamic Jurists of the Islamic schools are in agreement, in principle, that all genuine *Maslaha* which do not conflict with the objectives of the Lawgiver must be upheld.

The changing conditions of life never cease to generate new interests. If legislation were to be confined to the values, which the

Lawgiver has expressly decreed, the *Shariah* would inevitably fall short of meeting the *Maslaha* of the community. To close the door of *Maslaha* would be tantamount to enforcing stagnation and unnecessary restriction on the capacity of the *Shariah* to accommodate social change.

As for the concern that the opponents of *Maslaha* have expressed that validating this doctrine would enable arbitrary and self-seeking interests to find their way under to banner of *Maslaha,* they only need to be reminded that careful observance of the conditions that are attached to

Maslaha will ensure that only the genuine interests of the people which are in harmony with the objectives of the *Shariah* would qualify.

Notes:

1. *Lesan-Al-Arab,* op.cit., Vol. 7, P. 384; *Aqrab-Al-Mavared,* op.cit., Vol. 1, P. 656; *Muajam Maqaiss Al-Lughah,* op.cit., Vol. 3, P. 385.
2. *Mufradat-Al-Ragheb,* op.cit., P. 393.
3. Langarudi Jafar, *Laws in Islam,* Tehran, 1978 , P.158 ; Qazzali, *Al-Mostasfa,* op.cit., Vol.2, P. 286.
4. The *Quran,* 5: 39.
5. Ibid, 26: 125; 27: 142; 2: 220.
6. Ibid, 3: 114.
7. Makarem Naser, *Al Qawaed Al Fiqhiiah,* Qom, 1967, Vol. 1, P.98.
8. These sources are: (1) The *Quran;* (2) the *Sunnah;* (3) *Ijma* of the

Islamic Ummah; (4) *Ijma* of the Madinah people; (5) Qiyas; (6) A saying of the Companion of the Prophet (S.A.W.); (7) *Al-maslaha* (8) *Istishab* (continuation of a practice); (9) *Al-Bara' Al-Asliyyah* (original exemption); (10) *Al-Urf* (customs); (11) *Al-istiqra'* (induction); (12) *Sadd Al-Zarai* (preventive measures); (13) *Istidlal* (deducation); (14) *Istihsan* (equity); (15) *Ikhtiyar Al-Aysar* (taking the simple); (16) *Al-ismah* (immunity from sins); (17) *Ijma* of the people of Kufah; (18) *Ijma* of *Al-Itrah* (the house of the Prophet (S.A.W.)); and (19) *Ijma* of the four caliphs. (Abd Al-Wahhab, *masader Al-Tashriih, P.* 109)

9. Makarem Naser, op.cit., Vol. 1, P. 98.
10. The *Quran*, 21: 107.
11. Ibid, 10: 75.
12. Ibid, 22: 78.
13. Ibid, 5: 6.
14. Shatebi, *Muwafaqat fi Usul-Al-Ahkam*, Cairo, 1922, Vol. 2, P. 3.
15. Ibn Majah, *Sunan*, Cairo, 1981, *hadith* no. 2340.
16. Abu Zahraa, *Usul Al-Fiqh*, Cairo, 1958, P. 222.
17. Muslim, *Sahih Muslim*, Beirut, 1983, hadith no. 1546.
18. Abu Dawud, *Sunan*, Cairo, 1975, hadith no. 3587.
19. Mostafa Zayd, *Maslahah*, Cairo, 1964, P. 120.
20. The *Quran*, 5: 104-105.
21. Bukhari, *Sahih Bukhari*, Cairo, 1981, hadith no. 4379.
22. For example, in trade the *Quran* has limited its rules to four things only:

(1) its legality:

" ..... And God has permitted trade and forbidden usury ...";
(the Quran 2: 275)

(2) The condition of mutual agreement:

"O ye who believe! Eat not your property among yourselves in vanities: but let there be amongst you traffic and trade of mutual good-will ..." (the Quran 4: 29);

(3) The act of witnessing:

"... And take witnesses whenever ye make a commercial contract..." (the Quran 2: 282);

and (4) its prohibition:

"O ye who believe! when a call is made for the prayer of Friday, rush for the rememberance of God, and leave trade ..." (the Quran 62:9).

23. Ghazzali, *Al-Mustasfa*, Beirut, 1937, Vol. 1, PP. 286-287.
24. The *Quran*, 2: 216.
25. Al-Kharazmi, *Irshad-Al-fuhul*, Tehran, 1979, P. 213.
26. Abd Al-Salam, *Qawaed Al-ahkam*, Beirut, 1981, Vol. 1, PP. 9-10.
27. Ibid, P. 12.
28. Tufi, *Najm-Al-Din, Masalih*, Kuwait, 1970, P. 139.
29. Ibid, P. 141.
30. Mustafa Zayd, *Maslahah*, Cairo, 1964, P. 121.
31. Tufi, op.cit., P. 141.
32. Makarem Naser, op.cit., Vol. 1, P. 353.
33. Ibid, PP. 358-360.
34. *"And fight them (the transgressors) until there is no more tumult or oppression, and there prevail justice and faith in God. But if they cease, let there be no hostility except to those who practise oppression". (the Quran, 2:193).*
35. *"And if anyone is slain wrongfully, we have given his heir (next of kin) authority (to demand qisas or to forgive); but let him not exceed bounds in the matter of taking life; for he is helped (by the Law)". (the Quran, 17:33).*

36. *"O ye who believe! the law of equality is prescribed to you in cases of murder: The free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty". (the Quran 2: 178)*
37. *"O ye who believe! Wine and gambling, (dedication of) stones, and (divination by) arrows, are an abomination of Satan's handiwork; Eschew such (abomination), that ye may prosper". (the*

Quran 5:90)

38. The Prophet (S.A.W.) of Islam said:

"Intermarry extensively and spread so that I may stand proudly with you as the best of the nations on the Day of Judgment". (Al-Bukhari hadith no. 4157)

39. *"As to the thief, male or female, cut off his or her hand; a punishment by way of example from God for their crime; and God is Exalted in Power". (the Quran 5:38)*

40. Shatebi, *Muwafeqat,* Vol. 2, P. 5-6.

41. Ibid.

42. Khallaf, *Ilm Osul-Al-Fiqh,* Kuwait, 1978, P. 84.

43. Ibid, P. 85.

44. Badran, *Osul-Al-Fiqh Al-Islam,* Beirut, 1984, *P.* 209.

45. Montazeri, *Derasat fi Velaiat al faqih,* Tehran, 1984, Vol. 2, P. 322.

46. Marashi Muhammad, *Maslaha and fiqh,* Tehran, 1992, P. 14.

47. Kashef Al-Gheta', *Kashf Al-Gheta',* Najaf, 1965, P. 421.

48. Mutahhari, *Islam and time,* Tehran, 1977, Vol. 2, P. 73.

49. Zane Al-Din, *Al Qawaed and Al Fawaed,* op.cit., Vol. 1, P.294.

50. A'meli, *Madarek Al-Ahkam,* Qom, 1962, P. 371.

51. Waqedi, *Maghazi,* Vol. 3, Beirut, 1979, P. 297.

52. Belazari, *Futuh Al-Buldan,* Cairo, 1959, P. 36.

53. Teb Taqtaqi, *Tarijal-fahri,* Beirut, 1983, P. 113.

54. Maverdi, *Al-ahkam Al-Soltaniiah,* Qom 1980, P. 199.

55. Ibid, P. 203.

56. Esbuler, *Islamic world,* Tehran, 1981, P. 52.

57. Al Qurashi, *Mowsueh Al-Kheraj,* Qom, 1982, P. 38.

58. Abu-Yusuf, *Mowsueh Al-Kheraj,* Beirut, 1968, P. 26.

59. Belazari, *Futuh Al-buldan,* Cairo, 1959, P. 269.

60. "The jeziah is imposed as a poll-tax - and the word is derived from *jazaa* (he penalised, compensated) - either as a penalty for their disbelief in which case it is exacted to humiliate them, or as compensation paid in return for their being guaranteed safe-passage, in which case it is taken with gentleness from them. The *Fuqaha* differ as to the amount of the jeziah. Abu Hanifah considers that those subject to this tax are of three kinds: the rich from whom forty-eight dirhams are taken; those of average means from whom twenty-four are taken, and the poor from whom twelve dirhams are taken: he thus stipulates the minimum and maximum amounts and prohibits any further judgement on behalf of those responsible for its collection. Malik, however, does not fix its minimum and maximum amount and considers that those responsible should make their own judgement as to the minimum and maximum. Al-Shafi'i considers that the minimum is a dinar, and that it is not permitted to go below this while he does not stipulate the maximum, the latter being dependent upon the *ijtihad* of those responsible: the Imam, however, should try to harmonise between the different amounts, or to exact an amount in

accordance with people's means. If he has used his judgement to conclude the contract of Jeziah to the satisfaction of the leaders of the people to be taxed, then it becomes binding on all of them and their descendants, generation after generation, and a leader may not afterwards change this amount, be it to decrease or increase it". (Mawardi, *Al-Ahkam-Al-Sultaniiah*, PP. 207-210)

61. Abu Yusuf, op.cit., P. 29.
62. Belazari, op.cit., P. 271.
63. Abu Yusuf, op.cit., P. 36.
64. Belazari, op.cit., P. 270.

65. Ibid.

66. Ibid.

67. Jowzy, *Al Jamea' Al-Osul*, Beirut, 1980, Vol. 5, P. 315 .

68. Ijtihadi Abulqasem, *Waza Mali Mosalmanan,* Tehran, 1994, P. 324.

69. "Imam Jafar Al-Sadeq, si Imam of Shia', he belonged to the family of the Prophet (S.A.W.). He was a great scholar. The chain of his narration of *Ahadith* goes back to his father Imam Muhammad Baqer. (Abdur Rahman Doi, *Shariah the Islamic Law,* P. 96).

70. A'meli, op.cit. Vol. 6, P. 41.

71. This document, which deserves to be called the constitution of Islamic policy, was prepared by the person who was the greatest scholar of Divine law and acted upon it more than anyone else. From the study of Imam Ali's way of governance in these pages it can be concluded that his aim was only the enforcement of Divine law and the improvement of social conditions, and not to disrupt public security or to fill treasures by plunder, or to strive to extend the country's boundaries by fair means or foul. Worldly

governments generally adopt such constitutions which cater to their utmost benefit and try to change every law which is against that aim or is injurious for their objective. But every article of this constitution serves as a custodian of common interests and protector of collective organization. Its enforcement has no touch of selfishness or any iota of self-interest. It contains such basic principles of the fulfilment of Allah's obbligations, the protection of human rights without distinction of religion or community, the care of the destitute and the poor and the provision of succour to the low and the down-trodden from which full guidance can be

had for the propagation of right and justice, the establishment of peace and security, and the prosperity and well-being of the people.

Imam Ali wrote this instrument for Malek Ashtar when he was appointed the Governor of Egypt in 38 A.H.. Malek Ashtar was one of the chief companions of Amir Al-Mu'minin. He had shown great endurance and steadfastness and perfect confidence and trust in Amir Al-Mu'minin. He had attained the utmost nearness and attachment to him by moulding his conduct and character after the conduct and charachter of Amir Al-Mu'minin. This can be gauged by Amir Al-Mu'minin's words: "Malek was to me as I was to the Messenger of *Allah*".

72. Imam Ali, *Nahjul Balagha,* Rome 1984, letter 53, P. 534.
73. Hamid Al-Allah, *Al Wathaeq,* Tehran, 1991, PP. 322-323.
74. Ibid.
75. Abu Yusuf, op.cit., P. 38.
76. Mamaqani, *Tanqih Al-Maqal,* Qom, 1966, Vol. 2, P. 83.
77. Saket, *Dadrasi Dar Islam,* Tehran, 1981, P.63.
78. Sheikh Mufid, *Al Ikhtesas,* Beirut, 1991, P. 2.

79. Waqedi, *Al Maghazi,* Beirut, 1979, Vol. 1, P. 513.
80. Ibid, PP. 138-141.
81. Saket, *Dadrasi Dar Islam,* Tehran, 1981, P. 379.
82. Montazeri, op.cit., Vol. 2, P. 435.
83. Ibn Khaldun, op.cit., Vol. 1, P. 528.
84. Beihaqi, *Sunan,* op.cit., Vol.9, P. 83.
85. Ibid, P. 84.
86. Kolani, *Kafi,* Beirut, 1983, Vol. 5, P. 27.
87. Ibn Khaldun, op.cit., Vol. 1, P. 257.
88. For example, it is cited about the rebellion in Sarakhs: "Ibn

A'mer, sent another division to Sarakhs, its frontiers man called for security of 100 persons, but did not write his name among them. Because of this, he was killed and the city was sized by war.

89. Ahmadi, Ali, *Makatib Al-Rasul,* Beirut, 1981, P. 257.
90. Ibid, P. 318.
91. Ibid, P. 333.
92. Termedi, op.cit., Vol. 3, P. 129.
93. Suiuti, *Al-Dorr Al-Manthur,* Cairo, 1963, Vol. 3, P. 202.
94. Al Hassani, *Sirah-Al-Mustafa,* Beirut, 1989, P. 362.
95. Ibid.
96. Sheikh Tusi, *Tahzib Al-Ahkam,* Beirut, 1978, Vol. 6, P. 154.
97. Balaghi, *Adalat wa Qaza Dar Islam,* Tehran, 1972, P. 116.
98. Saket, *dadrasi Dar Islam,* Tehran, 1981, P. 71.
99. Hamid Al-Allah, op.cit., P. 322.
100. Ibid, P. 323.
101. Imam Ali, op.cit., letter 53, P. 534.
102. Hamid Al-Allah, op.cit., P. 382.
103. Waqedi, op.cit., Vol. 3, P. 973.
104. Suiuti, op.cit., Vol. 3, P. 276.

105. Ibid, P. 1021.
106. Ibid, P. 1042.
107. Sharaf Al-Din, *Alnass we Al-Ijtihad,* Najaf, 1963, P. 186.
108. Kolani, *Alkafi,* Vol.4, Beirut, 1983, P. 501.
109. Suiuti, *Tarikh Al Khutafa,* Cairo, 1964, Vol. 1, P. 141.
110. Tabari, *Tarikh Tabari,* Beirut, 1981, Vol. 1, PP. 2741-2939.
111. A'meli, op.cit., Vol. 16, P. 322.
112. Belazari, op.cit., P. 271.
113. Imam Ali, op.cit., P. 642.
114. Mutahhari, *Imam Ali,* Tehran, 1971, Vol. 1, P. 251.

115. Imam Khomeini, *Sahifeh Al-Noor,* Tehran, 1989, Vol. 20, P. 170.
116. Mir fattah, *Ana'veen,* Qom, 1985, P. 353.
117. Sheikh Tusi, op.cit., PP. 475-509.
118. Najafi, *Jawaher Al-Kalam,* Beirut, 1983, Vol. 22, P. 458.
119. Ibid.
120. Ibid, Vol. 15, PP. 421-422.
121. Sheikh Mufid, *Al Moqneah,* Beirut, 1980, P. 810.
122. Najafi, op.cit., Vol. 22, P. 458.
123. Ibid, Vol. 39, P. 263.
124. Zane Al-Din, *Al Qawaed and Al Fawaed,* Qom, 1961, Vol. 1, P.294.
125. *Quran :* 15
126. Mutahhari, *Islam and Time,* Tehran, 1977, Vol. 2, PP. 84- 86.

6

The Case of Iran

Prior to the Islamic revolution in Iran, the legal system was a division between *Shariah* and State law.[1] On the one hand, the *Shariah* as the religious law regulated the life of every Muslim in different aspects based on the degree of their faith. The *Shariah* is derived from two textual sources of the *Quran* and the *Sunnah*. These two sources of law have always been interpreted for the Muslims by *foqaha*.[2] Notwithstanding its supreme character as religious law, the *Shariah* was not applied in the important aspects of the community's life. On the other hand most incidents of modern life, such as incidents of the modern law of obligations, were regulated by State law.[3] Indeed some of these State provisions would be hard for the people to comply with if judged strictly against the *Shariah*. So the modern secular law existed to eliminate rather than to complement or conform with the *Shariah*. Thus, confrontation rather than conformity between the two systems became the distinctive feature of the legislative system.[4] In today's Islamic community of Iran,

two types of regulations still exist. The first type of regulations is mandatory for the people to observe.[5] These regulations are referred to as state laws which are enacted by the Islamic Consultative Assembly which is a post-revolution Islamic institution.[6] The other type of regulations are those which people comply with on the basis of their beliefs and faith. These second type of regulations are set and defined for the people by *foqaha*. These regulations are referred to as *fatva*.[7]

At times, the laws which are enacted in the Islamic Consultative Assembly (*Majlis)* are either the same as *fatva,* such as family, divorce, inheritance and penal laws or a combination of *fatva* and experts' views such as the laws related to Islamic banking and labour. At other times, the *Majlis* bases its legislation only on the experts' views and advice such as the employment, environmental and driving regulations.[8] Therefore, in the case of today's enacted Islamic laws in Iran, the *Majlis* makes use of not only Islamic sources but experts' views and specialists as well.[9] In fact the Islamic Assembly endeavors to put the people's will in the framework of the Islamic principles.[10] The legislative actions mainly take place through the *Majlis,* deputies of which are elected by people.[11] On important economic, political, social and cultural issues, the Legislative body might take actions with direct reference to popular voting and referendums.[12] Therefore, there are two legislation sources in the Islamic Republic of

Iran; one being the *Majlis* and the other being a referendum which can be a source for ratification of law on special occasions and under special conditions.[13] Alongside the Assembly there are other institutions like the Council of Guardians and the Expediency Council that play their roles in the process of ratification. These institutions will be discussed in the fore coming pages.[14]

The Islamic Consultative Assembly (the *Majlis)* is the source or center for formulating and passing laws. The Islamic Republic of Iran's

Constitution has provided for only the *Majlis* to ratify laws on a single stage process.[15] The Council of Guardians and the Expediency Council that play a role in the final ratification process are not considered legislators.

The Council of Guardians

The law is passed in the *Majlis*[16] must be sent to the Council of Guardians. There it is reviewed.[17] If it is not in contradiction to the Constitution or Islamic rules, then it is ratified, otherwise it is referred back to the *Majlis* to make the necessary adjustments or amendments.[18] The establishment of such an institution in the Iranian system of legislation emanates from the long lasting though among the Islamic jurists that no laws are to be enacted if they are contrary to the Islamic criteria.[19] The *Quranic* texts[20]

and the *Sunnah* of the Prophet (S.A.W.)[21] specifies that the Islamic laws are eternal and immutable. Historically, this issue was a matter of debate in Iran even at the time of the Constitutionalism (1906)[22]; hence in the second article of the then Constitution[23] it was stipulated that a group *(Shura of foqaha)* must be entrusted the power to guarantee that no laws are enacted against the Islamic criteria.

The Council of Guardians consists of 12 members. Six of the members are appointed by the Islamic Leader as the Islamic jurists and six

others are lawyers proposed by the Judicial power and approved by the *Majlis*.[24] The Islamic jurists who must be knowledgeable and of high rank in *fiqh* (Islamic Law), while also being aware of the needs of our time, being equitable as well, are directly appointed by the leader-ship.[25] Lawyers of the Council are qualified lawyers introduced to *Majlis* by the Judiciary Chief, and are elected by the *Majlis* members' voting.[26] Although the Constitution points to three duties for the Council as: 1) review of the *Majlis;* 2) interpretation of the Constitution; 3) supervising elections and referendums; however, the main obligation which occupies most part of the Council's time, aimed at ensuring that those ratification correspond to the Constitution and Islamic criteria. The Council reviews those ratifications for two major reasons: First to assure their compliance

with religious principles, and secondly their correspondence with the Constitution.[27] However, if a law contradicts Islamic principles, in fact, it has contradicted the Constitution. Because, according to the Constitu-tion, all rules and regulations must coincide with Islamic values, and the *Majlis* can not ratify laws contradicting the official religion[28] or it has acted against the Constitution.[29] For this reason the jurist members of the Council pay special attention to the *Majlis* ratifications to ensure their

compliance with the Islamic principles.

The main articles on the Council of Guardians form part of chapter six of the Constitution, on "the Legislative Power", and complement the dispositions dealing with Parliament and its prerogatives. One could presume that, on the surface, the Council of Guardians is no more than a corrective to possible exaggerations of the *Majlis,* or eventual gross departures from accepted principles of the *Shariah*. But the reality is different. As appears from Article 94, the Council of Guardians was destined to play a major role in the definition of the functions of Islamic law. But important as that was, this supervision did not constitute the sole significant prerogative of this body. In other texts of the Constitution, the Council of Guardians was entrusted with the scrutiny, not only of Parliament's acts, but of the other important institutions of the country.[30]

The dispositions in Art. 94 give an extremely wide role to the Council of Guardians in the legislative process, and these powers are

further comforted by Articles 95 to 98, which allow the Council of Guardians, inter alia, to attend the sessions of the *Majlis* while a draft law is being debated, and for its members to express their views if an urgent Bill is on the floor.[31]

Thus, on the one hand, the Council of Guardians bears resemblance to some of the constitutional systems of the West, particularly in France and in the United States. With France, it shares the immediate scrutiny of legislation discussed in Parliament.[32] With the United States, a

similar scrutiny is carried out by the Judiciary, but it is only after a protracted process that it reaches the Supreme Court.[33]

On the other hand, the Council of Guardians is set apart by the systematic and automatic revision power through which the Constitution empowers it to examine, and possibly undermine, all legislation. Furthermore, the Council of Guardians can allow itself ten extra days if it deems the first period insufficient for its analysis.[34] With such unparalleled power, the Council of Guardians was bound to become a Super-Legislature, and its extraordinary prerogatives have been compounded by the vagueness of its mandate. The "tenets of Islam" and the "constitutional law" of the land are vast categories, which encompass virtually any area which the Council deems prone to its intervention, scrutiny, and possible rejection.[35]

Conflict between the *Majlis* and the Council of Guardians

The Islamic Consultative Assembly and the Council of Guardians' review of laws and their compatibility with religious criteria[36] were brought up leading to emergence of differing opinions. The most important case applied to land reform.

By October 1981, the *Majlis* had not been able to agree on any

proposal. Frustrated by the lack of progress, the speaker of the *Majlis* sent a letter to the Leader "seeking consultations on the property question". In the letter, the speaker explained to the Leader that a sizable number of the *Majlis'* members believe that the institution of *Majlis* does not have the authority to act on this issue. According to the letter, the speaker said that these members think that the property question is in the purview of the *Faqih* (the Leader). "He is the guardian of the community, he can exercise his authority in situations of extreme importance".[37] The Speaker's reservations on whether the institution of *Majlis* is suited to deal with this sensitive issue was compounded by the views from *foqaha*. The powerful senior clerics did not remain on the sideline.

A senior religious leader in Qom, had issued a statement opposing land reform. A member of the Council of Guardians believed any interference in property ownership by the state is against Islamic tenets.[38] The society of seminary *foqaha* in Qom also issued a declaration warning

against bills "damaging to the interests of the oppressed, which appear in the dress of Islam." [39] Therefore, the Speaker was fully aware of how divisive this issue can be, and did not want to bring the *Majlis* into this unless the Leader made his position more clear.

Following the Speaker's meeting with the Leader, the government submitted a land reform bill to the *Majlis* on October 24, 1981. It was drafted by the officials in the ministry of agriculture. The bill was similar to the previous one enacted by the revolutionary council with some

technical change in the language regarding compensation, as well as a more flexible time-limits for the owners of fallow lands to begin cultivation. Another proposal submitted by 16 deputies gave more emphasis to whether any property was acquired "illegally" as well as the properties of those owners which had "increased their wealth by oppressing the peasant". The sponsors of this proposal thought that this is what the Leader wanted since the latter repeatedly had mentioned the plight of the peasants in regard to confiscations of land. The proposal called for the creation of investigatory bodies to review the acquisition manners of land. After a year, both proposals had failed to gain enough support in the *Majlis*. Some accused the government of having a different motive: the identifications of the landlords and tenants for tax purposes.[40]

Finally, on December 28, 1982, the *Majlis* passed a measure called the Agrarian Reform Law. It was by far the most favorable to the

landlords. It allowed them to select their own lessees, including if they wanted, their children. It excluded dairy farms, livestock, and mechanized farms. Owners of fallow lands were given one year to bring the land into cultivation, and the absentee landlords could retain the land so long as they were engaged in agriculture. Contrary to its title, the Agrarian Reform measure of 1982 did not envisage any distribution of land. Instead, it consolidated the leasing system.

Even this moderate attempt was deemed to be in violation of

Islamic principles by the Council of Guardians, which vetoed the law on January 18, 1983.[41] This brought all the efforts of the past two years to a sudden halt. The measures that did pass into law, such as a law envisaging compensation for agricultural losses caused by pests or plant illness (7 April 1983) and a measure that provided rice farmers with a special bonus (15 October 1993) were the Council of Guardians allowed.

The usual approach and the primary principle in dealing with the issue of the peoples' properties, according to Islamic criteria, was respect for individual ownership. According to the conventional guideline "people have full authority over their properties".[42] In special cases, however, if it was proven that someone was in desperate need of another person's land, the primary rule could be overlooked, preparing the grounds for a forced sale of the property by its owner. If such an exigency justified a change in the primary rule, could the case be generalized and determined by the

legislator to restrict the authorities of the owner and approve and implement the forced sales of his land?[43]

Over the next several months, the *Majlis* came under increasing pressure to address the foreign trade issue. In March 1981, twenty deputies successfully organized the passage of a resolution that gave the government two months to submit a proposal for the nationalization of foreign trade. Conservative elements in the *Majlis* were pushed aside, and those who argued for a "reasoned approach" were accused of representing

the profiteers:

In May 1981, the government submitted a nationalization bill to the *Majlis*. The bill had three amendments concerning purchase, export, and commerce service centers that were to be submitted later. The bill for the nationalization of foreign trade also entailed a plan for the formation of liaison offices and information centers in foreign countries. The deputy minister for foreign trade stated that the bill was prepared with the help of the trade ministry's experts. "some of these experts have attached their views regarding the risks associated with this bill so that the deputies in the *Majlis* can study the ramification of this bill more accurately"[44]. Six committees in the *Majlis* re-worked the bill for a vote in November 1981, and in April 1982, the *Majlis* overwhelmingly passed the nationalization of foreign trade bill. The *Majlis'* version called for the creation of consumption cooperatives to take over the task of domestic distribution of

commodities.

The parliamentarians' attempt to nationalize the foreign trade was dealt a blow by the Council of Guardians which vetoed the bill on the grounds that it was contrary to Islamic law. The Council maintained that by specifying total nationalization, the bill excluded privately financed imports altogether, something contrary to Islamic tenets which hold private trading sacrosanct.[45] The Council recommended that the foreign currencies earned by the private sector should be allocated to finance

direct imports by traders' guilds.

Assuming this to be possible, in the Legislative system of the Islamic Republic of Iran where the Council of Guardians is to review the *Majlis* approvals for their compatibility with the Constitution and the Islamic laws,[46] the question is whether the *Majlis* deliberations would be sufficient, or the Council too must clear this out. In case the Council did not recognize the exigency, could it turn down the *Majlis* approval, and in fact discredit its determination?[47] In 1981, the Speaker of the *Majlis* requested Imam Khomeini's views on the case. Both the question and the Imam's response are reflected in the following text of letters:

> *"As you are aware, parts of the bills approved by the Majlis have to be put into effect on the basis of secondary rules and on a temporary basis required by the general trend of affairs and for the protection of interests and repulsion of corruptions, but they indeed*

> *relate to the implementation of those Islamic rules and policies that the sacred Legislator would not consent to abandon. In this connection, there-fore, the guidelines of the leadership, who according to the Constitutional Law supervises the trinary branches is needed and sought. Thus, it is requested that necessary guidelines be granted to the Islamic Consultative Assembly".*[48]

In response, Imam Khomeini wrote:

> *"Whatever affects the Islamic Republic of Iran in the manner that when done or otherwise would cause interruptions in the system,*

and what is exigent that when abandoned or done would bring about corruption, or its abandon-ment or resumptions would create faults can be approved and put into effect, provided that the majority of the Assembly deputies recognize the case, which would cancel after the repulsion, and it should be stipulated that any of the authorities that violate, would be pursued by law and penalized (tazir)".[49]

The important impact of the decree of the Islamic revolution's leader was that it made the determination of the majority of the *Majlis* deputies credible and allowed them to abandon the primary rules for secondary ones with the aim of resolving "exigency". As a result, the *Majlis* approved certain laws on the basis of exigency and the Guardians Council did not raise any objections.[50]

Laws passed by the *Majlis* based on *Al-Ahkam Al-Thanaviiah* :

1- On March 18, 1982 the *Majlis* passed the law of "Urban Lands" on the basis of which the government was authorized to sell barren urban lands to the people in need at fair rates or use them for the construction of essential urban establishments. Since the denial of property rights was in violation of *Shariah,* and the Council of Guardians would turn down such

laws, the *Majlis* with reference to the September 1981 permission of Imam Khomeini and on the basis of necessity and secondary laws (*Al-Ahkam Al-Thanaviiah*) passed the law for a period of 5 years. According to article 1 of the Law:

"Article 1: To attain the objectives set in articles 31, 43, 45 and 47 of the Constitution which oblige the government to meet the public's needs for housing and general urban facilities, and to prevent land speculations and make investments in infrastructural production sectors (agriculture and industry), the *Majlis* has drawn on the Sep 10, 1981 permission of Imam Khomeini, where the Assembly is regarded to be authorized to identify essential legislative cases for the prevention of corruption and disruption in the society, and considers the implementation of the law temporarily necessary for a period of five years".

And according to article 5 of this law all property rights relating to such lands are nullified, except for documents issued by the government

after the victory of the Islamic Revolution (11. 2. 1979):

"Article 5: All urban barren lands are owned by the Government, and past property documents are of no legal value, excluding those for which relevant documents were issued by the government, as of 11. 2. 1979".[51]

2. On May 3, 1983 the *Majlis* passed the "law of the lessor and the lessee relations". According to this law, if there is a residential or a commercial site for rent, but its owner does not rent it out for undue

reasons, the nearest local court may rent it out to those in need at rates determined by relevant experts. Although this law contravenes the primary rules of *Shariah* and would be rejected by the Council of Guardians, the *Majlis* passed it for a period of five years based on necessity and secondary laws. Article 14 of the law puts it this way:

"Article 14: Due to housing problems in urban areas and the need to stabilize rent rates, the ministry of housing is allowed to fixed residential sites' rent rates according to the area, quality, type of building, local and regional expediencies, etc., 2 months after the passage of the law and on the basis of a directive was prepared jointly by the ministry of justice and the ministry of housing.

Note 1: If the lessor charges the lessee additional rates, according to court rulings and as requested by the lessee, the additional amount would have to be reimbursed.

Note 2: If the owner refrains, without justification, from renting the site, the local court is allowed to rent it out for a period of 5 years, and transfer the rent fees to the account of the proprietor."[52]

3. On October 16, 1985 a law was passed by the *Majlis* on "the lessor and the lessee relations" according to which the courts were not allowed to issue evacuation orders either because the rent period had ended or the lessor had filed a complaint. Since this law is incompatible with

primary rules of *Shariah*, and no legislator has the power to impede the rulings of a court, the *Majlis* passed this law for a period of 5 years based on reasons of poverty and need and secondary laws (*Al-Ahkam-Al-Thanaviiah)*. According to article 1 of the law:

"In cases when a court recognizes the evacuation of educational and public building or those occupied by war emigrants and combatants as inappropriate, it may refrain from issuing evacuation orders for a period of 5 years, and the lessees of such building are obliged to take due measures to make up for the shortage of such sites in that period.[53]

4. On the 30th of October 1986 the law of "cultivated and uncultivated lands" was passed in the *Majlis* according to which farmers cultivating lands after the Islamic Revolution could purchase those lands from their original owners by fair prices. Because the passage of such a law was incompatible with *Shariah* (primary rules) and according to Islamic regulations no landlord may be forced to sell land, the *Majlis*

passed the law for a period of three years based on necessity and secondary rules. According to article 1 of the law:

"All cultivated or uncultivated lands that after the Islamic Revolution up to the end of the year 1980 were at the disposal of non-proprietors who have tilled the land (temporarily) may be transferred to the occupying farmers who have the following qualifications:

A. Farmers owning no land or little land;

B. Farmers with no means of sustenance other than farming;

C. Farmers with local residence.

The payment of the price of land may be made in installments, and upon the recommendation of 7 member land delegates official provisional ownership documents will be issued, which after the payment of the last installment may be turned into final ownership papers. The fair price of land will be returned to the original land owners minus legal and religious dues. This law is passed and implemented for a period of 3 years based on necessity".[54]

5 - On September 13, 1987 the *Majlis* passed the law of "Urban Lands" according to which in 32 major cities who ever that owned lands more than 1000 square meters, had to sell the additional amount to the government. This law was passed on the basis of necessity for a period of 5 years. According to article 9 of the law:

"Based on Imam Khomeini's permission of Sep 10, 1981

recognizing the *Majlis* as the main authority to identify necessities, this law was passed for a 5 year period to be implemented in cities annexed to the law. The law's points 7 and 8 are applicable in all cities and towns across the country".[55]

The Expediency Factor

The dispute went on between most jurist members of the Council of

Guardians, the *Majlis* and other decision making circles including the Judicial Branch . This was natural to an extent because the affairs of the country and new requirements on the one hand, called for new rules and regulations which were tangible for the direct executors of affairs in both the Legislative Branch and the Executive Body, but on the other hand, the reliance of the system on Islamic rules and the need for their implementation increased the commitments of the Council of Guardians jurists to maintain Islamic laws and to prevent the imposition of laws violating religious principles, which in turn made them approach the case with more prudence, thereby, turning down all those bills that even seemed to contradict *Shariah*.[56]

Besides, Islamic jurisprudence had no active part in the social life of people during the past regime. And although Islamic precepts were the back-bones of the subjective rules and regulations, gradually they were not

paid enough attention in this respect.[57] And basically in penal and trade affairs, laws were enacted and implemented without regards to religious and jurisprudential principles. Even in debates of the laws or interpretations of courts or faculties of law, no sufficient consideration was given to religion and Islamic jurisprudence.[58] Theological schools and jurists too did not embark on a discussion of their practical aspects. In formulating or enacting rules and regulations required by the society on the

basis of religious principles or the compatibility of religious and jurisprudential principles with new requirements, sometimes extremism appears and differences of opinions come about.[59] This conflict of opinion on the principles of jurisprudence and their correspondence with society needs and the formulation of rules and regulations, specially those restricting the owners' rights or the rights of parties to a contract or an employment contract that had undergone transformations as a result of changes brought about by the expansion of industry and technology, continued unabated.[60]

The case of exigency, whose determination was placed within the authorities of the *Majlis*, lost its efficiency in practice since there were cases of expediency rather than exigency which had to be dealt with.[61] Besides, the determination or recognition of such a case was left to the

majority of the *Majlis* deputies who lacked necessary qualifications. This situation raised criticisms. Furthermore, a majority of votes of two- thirds[62] of deputies were required for the approval of laws, which was at times very difficult to achieve.[63]

Formation of the Expediency Council (*Majma-e-Tashkhis-e-Maslaha*)

The conflict between the Council of Guardians and the majority of Parliamentarians and Ministers continued to run over the new social problems. The debate was anchored in the most delicate issues of economic freedom and the social balance which the State should or shouldn't establish. To that extent, the problems between the Council of Guardians and its critics was eminently social.[64]

The importance of social issues for the determination of the nature of the Islamic revolution carries the investigation away from the formal-constitutional domain in which it expressed itself, to the deeper background relating to complex themes like social justice, the state role in the economy, freedom of contract, property rights and duties, and land and labour reform.[65]

The articulation of "social justice" themes on the constitutional

controversy must be made clear, for the issue was generally muted in the formal debate. In itself, the constitutional controversy was a major event in Iranian history, and led to fundamental institutional changes. The deadlock reached in 1979 was broken by the redrafting of the 1988 Constitution.[66]

Those persons in the system who were reeling from the extraordinary powers of the Council of Guardians - the President, the Speaker, and the members of Cabinet - were eager to read into Imam Khomeini's letter the important "clarification" needed to break the ties imposed by the

Council of Guardians as an institution. One way to achieve their means with the new theory would possibly have been to push forward with the bills held in abeyance until then, and pass them immediately, while the effects of the new theory had not yet dissipated. In fact this course was started, but it was not deemed sufficient in the long run from an institutional point of view, probably because nothing prevented the Council of Guardians from regaining its former power under other circumstances. But the choice of a more drastic measure against the constitutional review was rooted also, no doubt, in the twisted way in which the weakening of the Council of Guardians had taken place.

A formal decision was needed to do away, for good, with the problem that the Council of Guardians represented. On February 6, 1988, a letter was sent to the Leader by a high-powered group. In it, Imam Khomeini was asked to solve "the problem which remains, i.e. the method

of implementation of the Islamic sovereign right with regard to Government ruling".[67]

The signatories then complained about the operation of the separation of powers in the legislative field:

> *"At present, government bills are discussed in the relevant cabinet committees and then in the cabinet itself. After being read in the Majlis, they are usually examined twice in the specialized committees. These examinations are carried out in the presence of*

government experts and the views of the experts are also taken into account. These views are usualty communicated to the committees after having been stated and published. Usually, a single government bill is examined in several commi-ttees depending on its content. Then it has two readings in plenary session, in which all the Majlis deputies and cabinet ministers, or deputy ministers in the relevant ministries, participate. They will explain their views in line with their specialization; in the same manner they also make amendment proposals.

If it [a piece of legislation] originates as a private member's bill, although initially it does not benefit from the expert view of the Government, in committee and in plenary session it is discussed like a government bill, and the relevant experts express their views on it. And after final ratification, the Council of Guardians announces its views in the framework of theological rulings or the Constitution. In some cases the Majlis accords with its view, but in others it cannot do so. In such a case the Majlis and the Council of Guardians fail to

come to an understanding".[68]

The deadlock, the signatories suggest, is then complete: "It is here that the need arises for intervention by the *faqih* to clarify the subject matter of the government ruling. Though many of these examples are due to differences of view among experts, they concern the issue of Islamic rulings and the generalities of the Constitution.[69]

The problem of the confrontation between the Council of Guar-

dians and the other branches could not be explained in a clearer way. For the personalities who signed the letter, the question can be summarized in the following manner: what is the point of a *Majlis* and a Cabinet that spend years preparing bills to have them repeatedly destroyed by the Council of Guardians over generalities of the Constitution? Why should the members of parliament, who are elected by the people, and who claim no less expertise and Islamic truthfulness than the Council of Guardians' members, bow to that unelected body's decisions?

Yet, Imam Khomeini was hesitant to take the final step, and tip the balance clearly against the Council of Guardians. So the signatories tried to force the game by insisting on the urgency of breaking the deadlock. They wrote that they were "informed that Imam Khomeini has decided to appoint an authority to state the decision of the sovereign body in case of failure to solve the differences between the *Majlis* and the Council of Guardians". They urged him "speed of action ... since at the present numerous issues of importance to society are left undecided".

The answer of Imam Khomeini can be considered to have led to the most important constitutional development since the 1979 Constitution. Along with his letter on January 6th, to which it is an almost inescapable conclusion, Imam Khomeini's edict of February 6th represents a significant contribution to the whole theory underlying the Constitution, *Velaiah Al-Faqih*.[70]

Imam Khomeini assented to the signatories' suggestion :

In case the Majlis and the Council of Guardians should fail to come

to an understanding on theological and legal points, then a council must be set up consisting of the honourable theologians of the Council of Guardians and holders of the title Hujjat Al-Islam Messrs Khamene'i, Hashemi Rafsanjani, Ardebili, Tavasoli, Musavi Khoiniha and Mir Hoseyn Musavi and the relevant minister. The council is to discuss the interests of the Islamic state. In case of need, other experts can also be invited. After the necessary consultations, the decision of the majority of those present in the Council must be complied with.[71]

Thus was born a new institution in the Islamic Republic of Iran, which came to be known as *Majma-e-Tashkhis-e-Maslaha* (the Expediency Council). The structure of the original *de jure* members is such that the majority "government" members can override the decisions of the six members belonging to the Council of Guardians, to whose detriment the deadlock was broken.[72]

The fact that the newly established council was not given an official name of its own by the Leader,[73] as well as the designation of the government members personally rather than under their official positions, increases the sense that Imam Khomeini's wish was not to see the new Council perpetuated as an institution. Furthermore, the Council is considered to meet on the condition that an unbridgeable dispute between the *Majlis* and the Council of Guardians has emerged. Thus, in theory, it is

only after a repeated deadlock between the *Majlis* and the Council of Guardians that Council meets. Thirdly, the Council cannot be considered as a fixed institution in so far as some members can be ad hoc experts who are invited for one specific bill.[74]

However, in practice, this new-born institution has been consolidated because in a very short time it managed to solve long-lasting problems.[75] The efficiency of this council led to the amendment of the 1979 Constitution in 1989 when this institution was formally established. Article 112 of the amended Constitution specifies thus:

> *"Upon the order of the Leader the Nation's Expediency Council shall meet at any time the Council of Guardians judges a proposed bill of the Islamic Consultative Assembly to be against the principles of Shariah or the Constitution, and the Assembly is unable to meet the expectations of the Council of Guardians. Also, the Council shall meet for consideration on any issue forwarded to it by the Leader*

> *and shall carry out any other responsibility as mentioned in this Constitution. The permanent and changeable members of the Council shall be appointed by the Leader. The rules for the Council shall be formulated and approved by the Council members subject to the confirmation by the Leader".*

Duties of the Expediency Council

The most important duty of the Expediency Council which is the *Raison*

D'eter of its formation is, as stipulated in article 112, to determine the expediency and reflect its views and comments on disputed issues of the *Majlis* and the Council of Guardians. There are, however, other duties anticipated for the Expediency Council that are, according to the Constitution, as follows:

I) resolution of disputes between the Council of Guardians and the *Majlis*;[76] II) acting as an (executive) arm of the leadership in resolving problems of the system;[77] III) advising the leadership on the general policy outlines of the system;[78] IV) advising the leadership on issuing decrees for the revision of the Constitution.[79]

As indicated in article 112 of the Constitution, when a *Majlis* approval is regarded incompatible with religious criteria or the Constitution by the Council of Guardians, yet the former insists on its implementation in light of the system's Expediency, the Expediency Council should step in to review the case and ratify it if found to the benefit of the system, in which

case it would become law.[80] But if it determined that, it was not to the expediency of the system, the *Majlis* then would have to act according to the will of the Council of Guardians and amend the bill. Also, if the Expediency Council found a third case to the benefit of the system, it can recommend along with guidelines as a basis for the amendment of the law. The determination of the Expediency Council is binding for both the *Majlis* and the Council of Guardians.

The rationale behind the establishment of the Expediency Council

lies in the policies and procedures adopted by the holy Prophet (S.A.W.) himself. On many occasions the Prophet (S.A.W.) made decisions on the basis of the expediency (*Maslaha)*[81] which later on developed to be known as the *Sunnah* of the Prophet (S.A.W.). The orthodox Caliphs, trying to follow the *Sunnah* of the Prophet (S.A.W.) formed a group called "*Ahl-Al-Hall-wal-Aqd*"[82] to whom they made consultations on special occasions. The function of the Expediency Council today is in fact the same as that of the "*Ahl-Al-Hall-Wal-Aqd*". The establishment of such an institution whether for the purpose of resolving issues between the *Majlis* and the Council of Guardians or for the purpose of resolving problems arisen from daily needs, which require enacting temporary laws that may not correspond to Islamic criteria or the Constitution, was a matter of necessity.

It is clear that the function of this institution is limited to only special cases.[83] Nevertheless, it sometimes prompts problems regarding the smooth functioning of the separation of powers mechanism since it actually performs its task as a legislator whose members were appointed from among the three powers[84] albeit its performance was confined to special circumstances.

Laws passed by the Expediency Council based

on the needs of the Islamic system and society:

1. On December 27, 1982, the *Majlis* passed a bill on cultivable lands, according to which all lands not cultivated for five consecutive years have to be rented or sold to the ministry of agriculture, unless the lands are cultivated within one year.[85]

The Council of Guardians in January 1983, rejected the law as a violation of the *Shariah* and a denial of property rights. Consequent damage to the country's agriculture did not convince the Council as a sufficient reason to force the owner to sell or rent the lands.[86]

For two years the *Majlis* repeatedly rewrote the bill, but the Council consistently declared it unacceptable. When the Expediency Council was formed, the bill was referred to it in 1988. On August 16, 1988 the Expediency Council approved the view of the *Majlis* and passed the

measure with some changes:

"All uncultivated lands, if abandoned by their owners will immediately come under the ownership of the government. In the case of non-abandonment, owners because of necessity, are either to cultivate the land based on agricultural regulations, or sell, and/or rent their uncultivated lands. If in the period of one year from this date, either of the above actions are not taken, the ministry of agriculture will sell the land at a fair price for farming purposes. Uncultivated lands are those not cultivated for

five years without due justification. In that period, if the owner provides a reasonable pretext, he will be given another year's grace. Payment of a fair price in all cases, will be minus the legal costs of the owner".[87]

After years of debate and review between the *Majlis* and the Council of Guardians, it was the Expediency Council that ultimately approved the view of the *Majlis* and declared that leaving farming lands uncultivated would be to the detriment of the country, when the nation is in need of agricultural production. The Council also gave the landlords' a year's time to either cultivate their lands or sell them at a fair prices. In fact, the Expediency Council, gave priority to the interests of the country over those of the individuals.

2- On September 19, 1985, the *Majlis* passed a law increasing the severity of punishment for crimes such as embezzlement, bribery and fraud. According to the law, violators would be sentenced from 1-7 years

of imprisonment and payment of a fine equivalent to the amount of fraud. The law also ruled that if those crimes were committed by a network, its leader would be declared "seditious on earth" and sentenced to death.[88]

On September 29, 1985, the Council of Guardians declared the said law to be against the *Shariah* for two reasons: 1)- Since incarceration and payment of a fine were to be determined by a judge (*as ta'zir punishments)*, legislators could not intervene. 2)- According to the Holy *Quran*, a "seditious on earth" (*Mufsid fi Al-Arz)* should suffer one of the four types

of punishments including execution.[89] Thus restricting the punishment to execution would be in violation of religion and its principles.[90] The law was rewritten several times in the *Majlis*, but the Council of Guardians deemed the changes insufficient and did not approve it. The measure was referred to the Expediency Council, which gave its approval on 6 December 1988, with of course many modifications. According to the decision of the Council the punishment is already clear, and the court is not to determine it; but in the punishment for the "seditious on earth", the court may choose the type of punishment (of the four types cited in the *Quran*).[91]

3 - The *Majlis* on November 14, 1987 passed the "Labour Law" with 197 articles, describing the authorities and obligations of both the employer and the employee.[92]

The Council of Guardians, finally on November 30, 1987 declared its view, that, in 43 instances the law violated *Shariah*. Over the next two

years, the *Majlis* revised the proposed legislation several times, but the Council of Guardians regarded the changes as insufficient. On 24 September 1989, the law was referred to the Expediency Council, which finally on November 20, 1990, approved it in 203 articles.[93]

In approving the Labour law, the Expediency Council in fact rewrote the law, rather than just concentrating on points of difference between the *Majlis* and the Council of Guardians. Concerning the 43 points of contention underlined by the Council of Guardians, the Expediency

Council had to impose its own reforms on the articles of the law that would have appeared contradictory and incongruous.

4. The *Majlis* on December 15, 1987, passed the banking and monetary law. Accordingly, whoever delays the repayment of money borrowed from a bank would have to reimburse the principal amount and the relevant service charges, while also paying a fine for late payment.[94]

In January 1988 the Council of Guardians called it in violation of *Shariah* and said the amount of fine for delayed repayment was also against the religious principles. In the council's view the latter amount was nothing less than usury.[95]

In late January 1988, the *Majlis* did not accept the view of the Council and declared the penalty for delayed repayment as a necessity without which the banking operations of the country would be seriously disrupted. The law was passed on to the Expediency Council.[96]

On February 26, 1989, the Expediency Council approved the views of the *Majlis* with some reforms:

"On the basis of the *Majlis'* law of "usury-free banking operations", all banking loans and facilities provided to real and legal persons are repayable based on conditions which the loans or the facilities were granted; thus all judicial bodies are to take due action for the repayment of the principal amount, costs and the reparation of financial damages (fines for delayed repayments)."[97]

Thus, the Expediency Council approved the process as being compatible with the requirements of the Islamic society. It pointed out that in the absence of such regulations banking operations would become disrupted, and the society would suffer the damage caused by the violators.

5 - On September 27, 1989, the *Majlis* passed a law on court trials of *Majlis* representatives; according to which: "To fully implement the contents of Article 86 of the Constitution on offenses of the *Majlis* representatives, courts and judicial bodies based in Tehran (capital of Iran) are authorized. All notices, summons or arrests should be forwarded to the *Majlis* in advance. The above mentioned courts may not delegate their responsibilities to courts outside Tehran. In all cases filed against a representative, the latter, if convicted, has to pay all legal expenses incurred by the complainant".[98]

The Council of Guardians on October 5, 1989 considered the law a

violation of the *Shariah*, and said:

"Since in this law special arrangements and privileges are foreseen for *Majlis* representatives that are to go on trial, which is in contravention both to the principle of equality of all before the judiciary bodies, and the need to remove undesired discriminations as reflected in Article 140 of the Constitution, and in some cases would violate the rights of the complainants inflicting damage on them, and since the law contradicts the religious rules and judicial regulations of *Shariah*, and the equality of all

before the Islamic courts, it is regarded in violation of the *Shariah*".[99]

The *Majlis* in its 26th of October 1989 session, did not accept the above view, and said the law was aimed at the protection of the legislative body's independence and the partial immunity of *Majlis* representatives on the basis of which local courts are not deemed competent to put delegates on trial. Thus the law was referred to the Expediency Council.[100]

In February 1990, the Expediency Council approved the *Majlis'* view, and compared it to the September 1980 law, based on which, governors were to go on trial in Tehran and local courts have no jurisdiction in this respect.[101] The Expediency Council considered the law and its content to benefit the Islamic system (*Maslaha)*, in the absence of which the freedom of action of representatives in their constituencies would restricted, paving the way for conspiracies aimed at filing complaints against and summoning the delegates aimed at to appear in local courts.

6 - In late December 1990, the *Majlis* passed a law regarding the

right to legal representation in court. According to the law, parties to a complaint have the right to legal counsel. In all stages of a trial and investigation, no court may deprive individuals of this right. If the court denies the right the subsequent verdict will be considered null and void. If it is the judge's first offense, he will be sentenced to third degree disciplinary punishment. A second offense will mean the divestment of his judicial position.[102]

The Council of Guardians in December 1990 declared the law to be

in violation of *Shariah*. It also ruled that the decision of a judge can not be declared null and void, even if the accused is denied the right of access to a lawyer. If the court's verdict is issued on the basis of legal regulations, it can not be nullified because of denial of access to a lawyer. On the other hand, it would be very difficult to prove that the court has denied the right of access to a lawyer.[103]

The *Majlis* in its second meeting in January 1991 did not accept the view held by the Council of Guardians, noting people would be deprived of their natural rights. The *Majlis* also said if the court's verdict were not nullifiable, there would be no guarantee for the proper execution of this law and many individuals would be deprived of their rights. Thus the law was referred to the Expediency Council.[104]

On October 3, 1991, the Expediency Council reviewed the case and approved the *Majlis* view with certain changes and stipulations:

"Whenever, upon the recognition of the Supreme Court, a court

denies an individual his or her right of access to a lawyer, the judge will be sentenced for the first time, to third degree disciplinary punishment, and for a second offense, will be divested of his judicial position".[105]

According to the Expediency Council access to legal counsel was very important for the restoration of an individual's rights, and in most cases, justice may not materialize in the absence of the same. Thus the law was approved to benefit the Islamic system and society (*Maslaha*).

7- The *Majlis* on September 25, 1991, passed a law on divorce.

According to one of its articles, if a man decides to divorce his wife unjustifiably, he must pay the value of the works the wife has performed out in the course of their marriage period (because according to the *Shariah* a woman does not have to cook, clean house, etc. for her husband).[106]

On October 2, 1991, the Council of Guardians declared this article in violation of *Shariah*. According to the Council's view, whatever the wife does in her house was meant to be free of charge with no intention of earning a salary or payments. Hence the court can not force the husband to pay her the value of her labor in cash.[107]

The *Majlis* on November 19, 1991 did not accept the Council's view and argued that unjustified divorce was tantamount to a man's oppression of his wife which must be compensated for. It was held impossible to determine if a wife intended to work free of charge in her home. Thus the *Majlis* stressed this point and referred the case to the

Expediency Council.[108]

On November 19, 1992, the Expediency Council approved the *Majlis'* view with certain changes as follows:

"After divorce, if the wife requests payment of wages for work she was religiously not obliged to carry out, the court must, first, peacefully attempt to secure her rights. If that was not possible, the court should call on the husband to meet the conditions set at the time of marriage. Otherwise, if the divorce was not requested by the wife, and provided that

divorce was not based on the wife's violation of her obligations, or her misbehavior, actions should be taken in the following manner: A- If the wife has performed tasks free of charge that she was not obliged to do according to the *Shariah,* upon the instructions of the husband and the case is proven for the court, the court is to obtain the customary value of her labor *(Ojrat Al-Methl)* and issue the verdict for its payment. B- If the article "A" did not apply, the court is to set an amount as *nahlah* (generosity) taking into account the years of their joint life together, the type of work the wife carried out, and the financial power of the husband, to be paid to the wife. The issue of *nahlah* is brought up in the *Quran* as follows:

> *"And give women their dowries as a free gift (nehleh), but if they of themselves be pleased to give up to you a portion of it, then eat it with enjoyment and with wholesome result".*[109]

Thus the Expediency Council has recognized that the assistance of the husband to the divorcee is in the interest of the Islamic system and society *(Maslaha)* and has compelled him to compensate the divorced wife.

8- On January 13, 1993, the *Majlis* passed the law for the protection of forests and pasture lands. According to the law, those who have occupied forest or pasture lands and turned them into orchards or agricultural lands would have to either pay the full price of those lands to the ministry of reconstruction, or pay to the ministry a yearly rental fee.

From then on, it was stipulated, the occupation of forest and pasture lands would be in violation of the law, and would entail evacuation.[110]

On January 20, 1993 the Council of Guardians declared the law to be in contravention of *Shariah* and said whoever that revives a land (*Ehia'-Al-Mavat)* will be its proprietor. Thus those who have already turned such lands into orchards or farm lands are their true owners, and the government is not in a position to obtain the full value of the land or a rental fee. The government, however, can from now on enact regulations to make such conversion of lands illegal and forbidden, since forests and pastures are public assets (*anfal)* belonging to the Islamic state. But because the government has not duely warned people, and since there has been no law in this respect, previous conversions of land can not be declared to be illegal.[111]

In February 1993, the *Majlis* did not accept the council's view and

argued that land reclamation (*Ehia'-Al-Mavat)* did not cover forests and pastures. Also the occupants were already aware that they were violating rules and regulations and causing serious damage to the forests and the environment. The *Majlis* then requested the Expediency Council to rule on the case.[112]

On October 11, 1993, the Expediency Council reviewed the case and approved the view of the *Majlis*. The council regarded the occupation of forest and pasture lands serious damage to the environment, and also

ruled that evacuation of the already converted lands would inflict loss and damage to people and the society. The Council however said it was fair and just to obtain the value of those lands from their current occupants. According to the Expediency Council's view, from then on, occupation of forest and pasture lands would be illegal and would be dealt with decisively, entailing unconditional evacuation.[113]

9- The *Majlis* on October 19, 1995 passed a government bill preventing the evacuation of student dormitories for a period of three years. According to the bill, if the proprietors of such buildings referred to the courts to obtain evacuation orders, the courts would not issue such orders for a period of three years, allowing the government to make necessary provision and then move to evacuate them.[114]

The Council of Guardians on October 19, 1995 rejected the bill

because it was recognized to violate the *Shariah*. The Council said if those dorms were not evacuated upon the request of their owners, the refusal would be in violation of the *Shariah*. The Council also ruled that such building should be returned to their proprietors.[115]

The *Majlis* on November 8, 1995, did not accept the view of the council and argued that since the educational year had already begun and it was impossible for the government to provide new dormitories, thousands of students would face problems. The government require three years time

to provide alternate facilities and then evacuate the present dorms. Thus the *Majlis* referred the case to the Expediency Council.[116]

On 30 November 1995, the council approved of the *Majlis* view and ruled that evacuations should be delayed for a period of three years. In that time the government has to build new dorms. In the meantime, rental fees for the dorms will be determined by official experts, to be paid to the owners of the buildings. After the three year period, if the owners requested, buildings should be handed over to them.[117] The Expediency Council said the evacuation of the dorms would inflict hardships on the students, and create problems for both universities and the government, recognizing the delay in their evacuation for a period of three years to be in the interest of the Islamic system and society (*Maslaha)*.

10 - The *Majlis* on November 14, 1996, passed the government bill on the issuance of cheque. Accordingly, those who issue cheque, must

have an equivalent amount in their bank accounts, otherwise in addition to paying the amount due, they would have to compensate for damages caused and expenses incurred.[118]

The Council of Guardians on November 21st declared the bill in violation of the *Shariah,* arguing that those with justifiable reasons for not having the due amount in their bank accounts should be exempt from paying the financial damage incurred (referring to a verse in the *Quran* that if the indebted does not have the ability to repay his loans, enough time

should be provided to him or her).[119] Thus the Council called on the *Majlis* to clarify that if there were no justifiable reason for not having the due amount in the bank account, the payment of financial damage and costs would have to be made.[120]

In March 1997, the *Majlis* did not accept the Council's view and argued that strengthening the rules governing cheque transactions was very essential. According to convention, a cheque amounted to cash money, hence the council's view was considered impractical, and the case was referred to the Expediency Council.[121]

In April 1997, the Expediency Council reviewed the case and approved the *Majlis* view, and also argued that the Quranic verse[122] the Council of Guardians had referred to was related to a loan extended on good will (*Qarz-Al-Hasanah*); while a cheque was equal to cash and in addition confidence building in cheque transactions was in the interest of

the Islamic system and society *(Maslaha)*.[123]

11- The *Majlis* in March 1997 passed the government bill on annexing Iran to "International Transportation of Goods Convention".[124] The Council of Guardians declared the bill's 27th and 37th articles in contradiction to the *Shariah*. Article 27 stipulates that, "The complainant has the right to require interest for damage which would amount to 5% per year". Article 37 states, "A carrier that has payed for damage according to the convention's regulations, may ask other carriers that played a part in

the transportation process, to pay for the damage and the relevant interest caused by the delay". The council in both articles had interpreted the word "interest" as "usury".[125]

On May 18, 1997, the *Majlis* did not accept the council's view and declared: 1). The international convention can not be changed or reformed, and the annexation of the country to the same was in the interest of the country's transportation. 2). "Interest" for the delayed payment of damage or compensation was in no way tantamount to "usury", and thus the *Majlis* stressed on its point and referred the case to the Expediency Council.[126]

Ultimately the council on May 9, 1997, approved the view of the *Majlis* and considered the annexation to be in the interest of the Islamic system and society *(Maslaha)*.[127]

Conclusion

After the establishment of the Islamic mode of governance in Iran (in 1979), the execution of primary and general Islamic rules in some important social cases met with difficulties. To overcome those obstacles, it was necessary to apply "secondary rules" *(Al-Ahkam-Al-Thanaviiah)* or laws based on the "expediency" *(Maslaha)*. This is a vital requirement already envisalied by and embodied in *Shariah*.

The first case, involved farming lands. The ownership documents of huge farming lands were, on the one hand, registered in the name of

individuals, a number of whom had already left the country. In certain cases, others had abandoned their farms, and declined to resume agricultural activities. There were also cases, where owners and the actual farmers disagreed on property or ownership rights. As result of the aforementioned cases, agricultural activities had become stagnant, and the country faced the shortage of agricultural products.

Thus it was necessary to have a legal provision according to which all cultivable lands would be fully utilised, leaving no spot idle, and also determine and decide on the farming lands' ownership rights. Thus, on the basis of the *Maslaha,* a bill was passed, which stipulated that, if proprietors did not resume utilisation of the agricultural lands, farming areas would be sold to actual farmers at fair prices, which would be given to the proprietor. The bill also stipulated that farming lands could also be rented to farmers, with the rent to be paid to owners or landlords. The passage of the bill, resolved this social dilemma, and while clarifying the situation

pertaining to the farming lands' ownership rights, allowed agricultural activities to reach a desirable level. There is no doubt that in such cases, the *Maslaha* and general interest will be superior to primary rules (the full authority of proprietors over their properties). Therefore, *Maslaha* as a principle may override such primary rules, and allow for allocations.

In the banking sector too, sometimes the implementation of Islamic primary rules created problems, calling for bills based on "secondary rules" or *Maslaha*. To facilitate trade and transactions, for example, checks

were to have a stronger and sufficient credibility to easily replace money.

Another case which required relevant laws based on expediency concerns the "Labour law". According to Islam's primary rules, relations of employer and employee are somehow similar to the relations of landlords and tenants. The employer, in facts, rents a labour's work and acts only on the basis of a contract's content. However because of the employment situation, rising unemployment, and the rising rate of workers in our society, the government's support of the labour force is a must.

Present social conditions, the needs of the labour force as a major part of the society to enjoy the least salary required, rest hours, suitable holidays, insurance, social security, medical and health care insurance, and other essential requirements, necessitates that a series of general supportive rules should dominate the employer-employee contracts. In the labour law passed in 1990, there are many cases passed within the framework of the "expediency of Islamic society and system" that do not conform to primary

rules.

Since 1979, when the Islamic government was established in Iran, laws have been enacted on the basis of "secondary rules" and "expediency" (*Maslaha)* that are not approved by many Islamic scholars on the basis of Islamic primary law. They are, however, clear examples of Islamic *Shariah's* dynamism which can meet the daily needs of the society, on the basis of *Ijtihad*, *Al-Ahkam-Al-Thanaviiah* or *Maslaha*.

Notes:

1. Algar Hamid, *Religion and State in Iran*, university of California Press, 1988, PP. 292-290.
2. Ibid.
3. Amin H., *Islamic Law and its Implications for the Modern world*, Glasgow, 1989, PP. 9-13.
4. Bushehri Jafar, *Constitutional Law, Tehran University*, 1968, PP. 21-26.
5. One of the contemporary *foqaha* develops a three-stage theory in Islamic law-making: "The first stage is to elucidate the general issues which have been revealed through inspiration to the Prophet (S.A.W.) by God. All laws and ordinances, even the important laws regarding the absolute *velaiah* of the Prophet and the pure Imams and the fully qualified, have been revealed by God. Regarding the absolute *velaiah* of the Holy Prophet (S.A.W.), the *Quran* clearly states: "The Prophet (S.A.W.) is closer to the Believers than their own selves. After himself, the Prophet (S.A.W.) of Islam conferred this position on the holy Imams, and

the immaculate Imams passed it on to the fully qualified *foqaha*, and the necessary conditions for it are based on the Book and on the *Sunnah*. If the [leading] *faqih*, who enjoys the position of vice-regent on behalf of the immaculate Imams, issues a decree or an order, it is incumbent upon all individuals and strata, even other *foqaha*, to obey it.

The stage of implementation and deciding on appropriateness, which is performed by the *Majlis* and the Council of Guardians. It is as this stage that the needs and requirements of each time and each region should be investigated and the appropriateness of the

laws which have been legislated will be decided upon and clarified. The needs and requirements of various times and places have been registered in different books of jurisprudence and opinions of the *faqihs,* such as *Jawahir* and *Tahrir.* (Montazerei, *Velaiah-Al-Faqih,* vol.1, p. 79).

6. The Constitution, article 71: "The Islamic Consultative Assembly can establish laws on all matters, within the limits of its competence as laid down in the Constitution".
7. Zanjani Amid, *Feq-e-Siasi,* Tehran, 1989, Vol. 1, P. 222.
8. Algar. Hamid, *Islam and Revolution,* London, 1985, PP. 362-378.
9. Montazeri, *Velaiah-Al-Faqih,* Qom, 1991, P. 121.
10. Ibid, P. 124.
11. The Constitution, article 71.
12. Ibid, article 59.
13. The Constitution, article 177.
14. The Constitution, articles 91, 94, 96 and 112.
15. Ibid, article, 71.
16. Ibid.
17. Ibid, article 94: "All legislation passed by the Islamic Consultative

Assembly must be sent to the Council of Guardians. The Guardian Council must review it within a maximum of ten days from its receipt with a view to ensuring its compatibility with the criteria of Islam and the Constitution. If it finds the legislation incompatible, it will return it to the Assembly for review. Otherwise the legislation will be deemed enforceable".

18. Ibid.
19. Montazeri, *Velaiah-Al-Faqih,* Qom, 1987, vol. 1, P. 127.
20. The *Quran,* sura *"Mai'dah",* verse 44: ".... and whoever did not judge by what *Allah* revealed, those are they that are the

unbelievers."

21. Al-Ameli, *Wasa-el-Al-Shia,* op.cit., vol. 6, P. 379.

22. Algar Hamed, *Religion and State in Iran,* op.cit., PP. 153-259.

23. One element within the *Majlis* that they borrowed from the past was a body called the Council of Guardians. The 1906 Constitution envisaged a council of senior religious leaders assigned to the *Majlis* to make sure that legislation passed would not conflict with Islam. In article 2 of the supple-mentary fundamental laws of 7 October 1907, it is stated:

> At no time must any legal enactment of the sacred National Consultative Assembly be at variance with the sacred principles of Islam or the laws established by His Holiness the Best of Mankind [the Prophet Muhammad (S.A.W.)]... It is therefore officially enacted that there shall at all times exist a committee composed of not less than five *mujtahids* or other devout theologians, cognizant also of the requirement of the age, [which the committee shall elect], in this manner. The *Islamic Jurists* shall present the names of twenty of the *Islamic Jurists* possessing the attributes mentioned above, and the members of the National Consultative Assembly

> shall, either by unanimous acclamation, or by vote, designate five or more of these as members, so that they may carefully discuss and consider all matters proposed by the Assembly. (Browne, *The Persian Revolution,* pp. 372-373).

24. The Constitution article 91: "With a view to safeguard the Islamic ordinances and the Constitution, in order to examine the compatibility of the legislations passed by the Islamic Consultative Assembly with Islam, a council to be known as the Council of Guardians is to be constituted with the following composition: 1) six *"Adil foqaha"*, conscious of the present needs and the issues of

the day, to be selected by the Leader, and 2) six jurists, specializing in different areas of law, to be elected by the Islamic Consultative Assembly from among the Muslim jurists nominated by the Head of the Judicial Power".

25. Ibid.
26. Ibid.
27. The Constitution, article 94.
28. Ibid, article 4: "All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the *foqaha* of the Council of Guardians are judges in this matter".
29. Ibid, article 71.
30. Ibid, articles 98-99.
31. In the case of urgent drafts, they were even allowed to intervence in the debate. It is generally after a long process of discussions and arguments that the deadlock intervenes. Nor is this surprising, considering that the power of the Council of Guardians in the

supervision of the laws, being automatic, is so large. It is a legitimate question to wonder what in these circumstances remains of the power of a Parliament under permanent, immediate and total scrutiny, and what is left of the legislative power of the Legislature. With article 4 of the Iranian Constitution gives the Council of Guardians a quasi-absolute legislative mandate:

All civil, penal, financial, economic, administrative, military and political laws, shall be based on the Islamic standards. This article shall generally govern all the articles of the Constitutional law and also other laws and regulations and this shall be at the

discretion of the religious jurists who are members of the Council of Guardians. (Amid, *The first decade of the Iranian Constitution,* p. 95).

32. Most of the French jurists, referring to the equality of the threefold powers, the judiciary, the legislative and executive, argue that the reviewing authority ensuring that the ordinary laws are in accordance with the Constitution must necessarily be at a higher level than that of the legislative power. When the judge is, himself, to be obedient to the laws, how can the judicial power be given the authority to comment on the essence of laws. The interference of the courts in this affair causes the judicial power to gain supremacy over the legislative Power, violating the rule of popular will which is, in fact, materialized in the parliamentary representatives. (Chaplay Et Mottier, *Constitution federale Suisse,* PP. 34-41).

33. This method is derived from the American laws which became prevalent in that country in 19th century and is now in practice in many countries of the world. The system of judicial review of the ordinary laws in relation to the Constitution specifies that the judicial power when reviewing judicial cases, is entitled to refrain

from enforcing those laws contradicting the Constitution and to declare them ineffective and annul them under certain circumstances. In this way, the judge who is to enforce the law ratified by the legislative is, at the same time, to ensure and supervise that the laws are in accordance with the Constitution. This implies that the Constitution can be referred to in the court as having judicial value. Such a method was first used by Marshall (the chief of the U.S. Supreme Court) in 1803. (Gunter Gerald, *Constitutional Law,* PP. 13-28).

34. The Constitution, article 95, & rules of procedure of the *Majlis*,

article 139: "All the *Majlis* enactments shall be formally submitted to the Council of Guardians. In the event the Council does not pronounce dissent within 10 days as from receipt of the Act or after extension of a further 10 days provided in Article 95 of the Constitution, the *Majlis* enactments shall be submitted to the President's Office for endorsement as per article 94 of the Constitution".

35. Ibid, article 94.
36. Ibid, article, 72.
37. Kayhan, 12 Oct. 1981.
38. Ettela'ate, 9 April 1980.
39. M. Moaddel, *Class, Politics and Ideology in the Iranian Revolution,* New York, Columbia university press, 1993, p. 246.
40. FBIS, South Asia, 30 September 1982.
41. Ettela'at, 19 January 1983.
42. This is a jurist case which is emphasized by all religious scholars, with abundant examples in narrated sayings of the Holy Prophet (S.A.W.) and the verses of the Holy *Quran*. e.g. Ansari, *Al-Makaseb, chapter Al-Baya'*.

43. The law was approved by the Expediency Council in 1991.
44. Kayhan, 15 May, 1981.
45. FBIs, South Asia, 12 May 1982.
46. The Constitution, article 4.
47. *Negotiations of the first term of the Islamic Consultative Assembly,* April 1981.
48. Mehrpour H., *Views of the Council of Guardians* , Tehran, 1992, vol. 1, P.68.
49. *"Tazir"* is the Islamic penalty whose harshness is less severe than *"Hadd"*.

50. The most important one was the law relating to city lands approved in 1990 which was revised and amended in 1981 (the law of temporary cultivation in 1986) and item 14 of the law of lessor and lessee in 1982. (Mehrpour H., *Views of the Council of Guardians*, vol. 1, PP. 22-34).
51. Kayhan, 19 March 1982.
52. Ibid, 6 May 1983.
53. Ettela'ate, 17 October 1985.
54. Kayhan, 2 November, 1986.
55. Ettela'ate, 15 September 1987.
56. Montazeri, *Velaiah-Al-Faqih*, Qom, 1987, vol. 1, P. 211.
57. Imam Khomeini, *Islamic Government*, Tehran, 1979, P. 121.
58. Ibid.
59. Khalilian Khalil, *The Constitution of the Islamic Republic of Iran*, 1981, P. 196.
60. Zanjani Amid, *Feqh-e-Siasi*, Tehran, Pub. Amirkabir, 1989, vol. 1, PP. 266-275.
61. The authorities granted to the *Majlis* by Imam Khomeini was confined to exigency cases, however, other problems called for

additional authorities that the *Majlis* was lacking.
62. Initially the majority of votes (half plus one of the votes) of the *Majlis* deputies was sufficient for identifying the exigency cases; however, the objections made by the Council of Guardians turned the majority of votes to two thirds of the votes by order of Imam Khomeini.
63. The well-known conflict between the *Majlis* and the Council of Guardians took place over the land reform in 1987.
64. Madani Jallal-Al-din, *the Constitutional Law in the Islamic Republic of Iran*, vol. 4, Tehran, Pub. Sorush, 1987, PP. 371-420.

65. The labour law was a matter of dispute between the *Majlis* and the Council of Guardians in the third term of the *Majlis*. Ultimately, the Expediency Council enacted the law in 1990 (*collection of the enacted laws of the Expediency Council*, Tehran , 1995, P.99).

66. As a result of the problems emerging from the relationships between the powers, Imam Khomeini was forced to issue a decree for the establishment of the Expert Assembly to make amendments to the constitutional law which was, later on, put to referendum.

67. Imam Khomeini, *Sahifeh Nur*, vol. 18, P. 79, and also Imam Khomeini's letter was published in *Summary of World Broadcasts: Middle East and Africa*, 8 Jan., 1988, P. A/7.

68. Those who signed the letter were Ali Khamenei (the President), Mir Hosein Musavi (the Prime Minister), Akbar Hashemi Rafsanjani (the speaker of the *Majlis*, Ahmad Khomeini and Abdolkarim Musavi).

69. Imam Khomeini, *Sahifeh Nur*, vol. 18, P.79.

70. Ibid.

71. Imam Khomeini has in effect undermined the blocking power of the Council of Guardians.

72. The Council of Guardians used to be the final authority in resolving issues between the *Majlis* and itself. But now a third authority (the Expediency Council) is the final authority.

73. Imam Khomeini himself did not mention an explicit title for the Expediency Council in his letter, however the title was later derived from the contents of the letter.

74. Two members of the Expediency Council are changeable, namely the respective Minister and the head of the respective committee of the *Majlis*. The rest are immutable.

75. So far, 68 laws have been ratified by the Expediency Council.

76. The Constitution, article 112.
77. Ibid, article 110.
78. Ibid.
79. Ibid, article 177.
80. *Collection of the Approvals of the Expediency Council*, Tehran, 1995, P. 7.
81. A'meli, *Wasa'el-Al-shia*, op.cit., vol. 16, P. 325.
82. Kashef-Al-Qeta, *Kashf-Al-Qeta*, Isfahan, Pub. Mahdavi, 1975, P. 420.
83. Cases can be referred to thus: 1) The order issued by the prophet (S.A.W.) for the destruction of the mosque which had been built by the hypocrites (the mosque was known as the Zerar Mosque). 2) After the conquest of the area known as *Kheilbar*, the Prophet (S.A.W.) put a ban on the killing of the animals whose meats were allowed to be eaten by Muslims.(Arusi, *Nur-Al-Saqalein*, vol. 2, P. 269).
84. For example, the heads of the three powers are permanent members of the Expediency Council.
85. Parliament debates, the minutes of the first-term, 27 Dec. 1982.

86. Kayhan, 18 Jan. 1983.
87. Ibid, 19 Aug. 1988.
88. Parliament debates, the minutes of second-term, 19 sep. 1985.
89. The *Quran*, 5:33: *"The punishment of those who wage war against Allah and His apostle and strive to make mischief in the land is only this, that they should be murdered or crucified or their hands and their feet should be cut off on opposite sides or they should be imprisoned; this shall be as a disgrace for them in this world, and in the hereafter they shall have a grievous chastisement"*.
90. Kayhan, 30 sep. 1985.

91. Ettela'ate, 10 Dec. 1988.
92. Parliament debates, the minutes of the second - term, 14 Nov. 1987.
93. Kayhan, 27 Sep. 1989.
94. Parliament debates, the minutes of the third-term, 15 Dec. 1987.
95. Kayhan, 5 Jan. 1988.
96. Parliament debates, the minutes of the third-term, 26 Feb. 1989.
97. Kayhan, 29 Feb. 1989.
98. Parliament debates, the minutes of the, third-term, 27 Sep. 1989.
99. Ettela'ate, 8 Oct. 1989.
100. Parliament debates, the minutes of the third-term, 27 oct. 1989.
101. Kayhan, 25 Feb. 1990.
102. Parliament debates, the minutes of the fourth-term, 30 Dec. 1990.
103. Kayhan, 2 Jan. 1991.
104. Parliament debates, the minutes of the fourth-term, 2 Jan. 1991.
105. Ettela'ate, 5 Oct. 1991.
106. Parliament debates, the minutes of the fourth-term, 25 Sep. 1991.
107. Kayhan, 4 Oct. 1991.
108. Parliament debates, the minutes of the fourth-term, 19 Nov. 1991.

109. The *Quran* 4:4.
110. Parliament debates, the minutes of the fourth-term, 13 Jan. 1993.
111. Kayhan, 22 Jan. 1993.
112. Parliament debates, the minutes of fourth-term, 20 Feb. 1993.
113. Ettela'ate, 14 Oct. 1993.
114. Parliament debates, the minutes of the fourth-term, 19 Oct. 1995.
115. Kayhan, 21 Oct. 1995.
116. Parliament debates, the minutes of the fourth-term, 8 Nov. 1995.
117. Kayhan, 2 Dec. 1995.
118. Parliament debates, the minutes of the fifth-term, 14 Nov. 1996.

119. The *Quran* 2: 280: *"And if (the debtor) is in straitness, then let there be postponement until (he is in) ease; and that you remit (it) as alms is better for you, if you knew".*

120. Kayhan, 23 Nov. 1996.

121. Parliament debates, the minutes of the fifth-term 16 March 1997.

122. The *Quran* 2: 280.

123. Kayhan, 20 April 1997.

124. Parliament debates, the minutes of the fifth-term 20 March 1997.

125. Kayhan, 25 March 1997.

126. Parliament debates, the minutes of the fifth-term 18. May 1997.

Ettela'ate, 30 May 1997.

Final Conclusion

Islamic law (*Shariah*) enjoys a series of dynamic features and juridical instruments which objective analyses would define as liberal, progressive and broad- minded. Hence the application of these methods equips Islamic law with techniques through which it can cope with the diverse conditions of different eras; and it has proven adaptable to the extent that after 14 centuries change and modernization sought under its aegis is still being pursued. It is an incorrect and unschooled assumption that Islamic law is a static body of ideas and lacks flexibility or that it does not possess the potential to accommodate itself to the growing needs of society.

Four instances of the laws' characteristic resilience have been identified in the *Shariah*. Firstly, the primary source of the Islamic law (the *Quran*) is, in itself, flexible in that the Quranic verses specific to positive legislation, leave room for interpretation in the evaluation of its injunctions. The *Quran* is clearly elastic on the precise value of its injunctions. It allows for possibility that a command in the *Quran* may

sometimes imply an obligation, a recommendation or mere permissibility.

Commands and prohibitions in the *Quran* are expressed in a variety of forms which are often open to interpretation and *Ijtihad*. The question as to whether a particular injunction in the *Quran* amounts to a

binding command or to a mere recommendation or even permissibility cannot always be determined from the words and sentences of its text.

Secondly, each individual source of Islamic law can abrogate previous decisions by reaching new juridical conclusion. For example, the *Quran* abrogates certain verdicts when new circumstances require a different and more precise solution to a new problem. The decisions made through *Ijma* (or the consensus of opinion) can also be annulled by the decisions through the *Ijma* of later generations, owing to changing circumstances.

Thirdly, each individual source of Islamic law facilitates flexibility for the other sources through specification, expansion and interpretation. As circumstances change, new methods and devices are needed to modify the existing source to adapt to new conditions. As a result, initially the *Sunnah* (or the authentic traditions of Muhammad) took up the role of interpreting the *Quran*. On the same bases *Urf* (the custom and the usage of a particular society, both in speech and in action) interprets the *Sunnah* and *Ijma* interprets the *Quran*, etc.

Fourthly, the examination of the Islamic sources of law, according to time and space leads to the conclusion that the elements of time and space imparts the greatest flexibility to these sources. The emergence of science of *Asbab Al-Nuzul*, which explains and examines the events which led to the revelation of a particular verse, was the outcome of this development. For the Islamic sources of law, *Ijtihad* is to be viewed as the

premier dynamic instrument when vitalizing and applying the inherent pliancy of the *Shariah*, owing to the necessities of time and space.

Ijtihad bridges between all the sources of law and the everyday needs of the Islamic society. It application has been an absolute necessity in developing Muslim law. This analysis makes clear that all the Islamic sources stand in need of *Ijtihad*, in order to be practically exercised.

For example, as the bulk of the corpus to the *Sunnah* has been narrated and transmitted in the form of solitary or *Wahed* traditions and only a small portion of the *Sunnah* has been transmitted in the form of *Mutawatir*, the *Sunnah*, itself stood in need of *Ijtihad*, in order to be Implemented. The same is true of the rest of the sources. Making decisions through any one of the other sources, also required the practice of *Ijtihad*.

The exercise of the principle of *Ijtihad* was not confined only to cases where there are no relevant injunctions in the *Quran* and the *Sunnah*. Even in the presence of the Quranic verses and traditions on a certain problem, the employment of *Ijtihad* could not be avoided. The reason for this is that the Quranic verses and traditions are to be interpreted by the Muslims in order to authoritatively ascertain whether a certain verse of tradition is applicable to a certain situation. Interpretation and application, therefore, presuppose the exercise of personal judgement. Thus, it is not correct to say that *Ijtihad* was exercised only in the absence of specific Quranic verses or traditions on a problem.

Three important issues have been examined. Firstly, how *Ijtihad* developed from a primitive concept to a stringently demanding science. Secondly, it was verified how *Ijtihad* imparts flexibility to *Shariah* in theory. Thirdly, the performance of *Ijtihad* as a dynamic device in practice, has been scrutinized, thereby illustrating the positive and indispensable role *Ijtihad* has played in different social circumstances, by finding solutions to new problems in Islamic societies. The practice of *Ijtihad* has proven to be an instrument that marks a turning point in the destiny of Islamic nations.

The Second important device giving flexibility to the Shariah is the theory of *Al Akham Al Thanaviiah*. Islamic law and rule which outlines the conditions in which people qualify to fulfil their responsibilities, are divided into two categories: *Al Ahkam Al Avvaliiah* (the primary law and rule) and *Al Ahkam Al Thanaviiah* (the secondary law). The primary laws are the laws that are sanctioned for certain cases, under abnormal conditions such as emergencies, duress etc.

The secondary laws are of positive usefulness in government administration. The Islamic government may study any newly emerging situation and find proper solutions for key issues such as balancing the economy, curbing inflation, population control, establishing price controls, related to currencies, banking, taxes and domestic and foreign affairs relating to commerce etc.

The secondary laws, however, must not be applied beyond their intended limits. With the rise of every new circumstantial case, the

secondary laws must not, before detailed review, be declared as solutions. The correct discernment of situations to which a secondary law could be applicable requires a sound degree of knowledge and awareness. The basis for the application of the secondary laws arises when it is not possible to apply the primary laws.

To explore this point and the instances in which the secondary laws can be applied, as just mentioned, requires a profound knowledge of the Islamic legal sources. For example, when and to which case the rules of no harm and no hardship are to be applied and the relative degrees of importance involved in the decision all require proper knowledge of the *Shariah*.

The secondary laws are rooted in the lofty principles of the *Shariah* and play a very significant role in positive law. In many instances, the primary laws do not have the necessary force, especially concerning social issues. In such spheres, the secondary laws work to unlock difficult questions. Taking into consideration the availability of these sources of law in the Islamic social system, in all times and places indicates that it juridical instruments have sufficient scope to evolve with the ever - changing dynamics of human society. In reality, the secondary laws are complimentary to the primary laws.

The existence of secondary laws in the Islamic system is not due to a paucity of legal resources. On the contrary, it is a sign of its richness and thc vastness of its practical methods. These laws exist due to the unavoidable emergence of changes that take place in the circumstances

surrounding human life. The existence of different categories of law in the *Shariah* of Islam, are significant factors in dealing with the inevitability of change. It represents and essential degree of flexibility for meeting the ceaselessly shifting needs of time and context.

Islam is a religion with preciseness analogous to mathematical exactitude. It calculates with accuracy and balances that which is important, with what is more important. According to the Islamic system in times of need, certain vital issues can and should be sacrificed for questions of greater import. This factor has given dynamic regulated flexibility to the system.

The Muslims have not introduced this systemic energizing element. It is inherent in the system and the form in which it was first revealed and applied. It then evaded a well-documented methodology, which continues to progress down through today.

Even if we wanted to impart flexibility to the system, the right to do so is non- existent. Flexibility is a component part of the nature of Islamic law, that affords a timeless of balancing and undating the law while remaining to its original texts and intent process.

The third dynamic feature in the Islamic legal system is the theory of *Maslaha* (expediency). This concept can play an outstanding role in the adaptation of Islamic law to the changing needs of the society. As a consequence, it is apt to be viewed as a basic test of the resiliency of the Islamic legal system. The instrument of *Maslaha* derives its significance from its role in putting into context and implementing the variables laws,

in addition to applying the permanent laws and in issuing governmental orders and commands, based on the same sources.

The Lawgiver (God) has considered each and every benefit in the *Shariah* so that its implications are interconnected, whether directly or indirectly, to the preservation of the five fundamentals. viz: religion, life, intellect, offspring and material wealth. There is no difference of opinion among Islamic scholars in that whatever preserves these fundamentals, is a positive value and therefore must be taken into consideration, conversely,

Despite their different approaches to *Maslaha*, the leading of Islamic jurists are in agreement, in principle, that all genuine *Maslaha* or questions of public expediency which do not conflict with the objectives of the Lawgiver, must be upheld.

The evolution of human life never ceases to generate new interests. If legislation were to be confined to the values which the Lawgiver has expressly decreed, the *Shariah* would inevitably fall short of meeting the utilitarian needs of community. To close the door of *Maslaha*, would be tantamount to encouraging stagnation and enforcing unnecessary restrictions on the capacity of the *Shariah* to accommodate social change.

As for the concern that the opponents of *Maslaha* have expressed:

As for the concern that the opponents of *Maslaha* have expressed:
namely that empowering this doctrine would enable arbitrary and self - interested points of view to emerge from under the umbrella of *Maslaha*, they need only be reminded that a careful observance of the conditions that are attached to *Maslaha*, will ensure that only the genuine interests of the

general public which are in harmony with the objectives of the *Shariah*, are the objectives at issue.

After the establishment of the Islamic Republic of Iran (in 1979), the execution of primary and general Islamic rules in certain important social questions met with many practical difficulties. To overcome those obstacles, it was necessary to apply secondary rules *(Al-Ahkam-Al-Thanaviiah)* or laws based on the "expediency of both the Islamic society and system" *(Maslaha)*. This is a vital requirement already envisaged by and embodied in *Shariah*.

The first case, involved farm lands. The title deeds of huge tracts of arable land were, on the one hand, registered in the name of individuals, a number of whom had already left the country. In some instances, others has abandoned their farms, and declined to resume agricultural activities. There were also examples where the actun owners and the renters of sharecroppers disagreed on property of ownership rights. The cumulative affect of these differing circumstances resulted in stagnation in the agricultural sector, and the country faced basic shortages of foodstuffs.

According to Islamic primary rules, owners have full authority and jurisdiction over their properties. The owners of the farming lands claimed to have the exclusive right in adopting any decision whatsoever, in relation to their cultivable lands. The requirements of the society and country, however, called for a full-fledged utilization of all arable lands, to enable the nation to attain agricultural self-sufficiency. On the other hand, in

most cases the real proprietorship of the landlords was in doubt because farmers had tilled those lands, and not the owners; and according to *Shariah*, the person who revives a piece of land and makes it cultivable, is the actual owner of that land.

Thus it was necessary to develop a legal provision, according to which all cultivable lands would be fully utilized, and a determination be made to decide on the ownership rights of faming land. Thus, on the basis of *Maslaha*, a bill was passed, which stipulated that, if proprietors did not resume utilization of the agricultural lands, the land would be sold to the actual famers at market, which would be given to the proprietor.

The law also stipulated that farming lands could also be rented to farmers, with the rental to be paid to the owners of landlords. The passage of the bill resolved this social dilemma, and while clarifying the situation pertaining to the ownership rights of farming lands, it allowed the normal resumption of agricultural activities.

Obviously in such cases, *Maslaha* and general interest take precedence over primary rules (the full authority of proprietors over their properties). Therefore, *Maslaha* as a principle may override such primary rules, and allow for a variety of procedures in keeping with the public interest.

Housing was another problem with which the country was grappling. Most renters would increase the rate every year, making life very difficult for tenants. There were also proprietors who would take their properties off the market, to force up rental rates.

According to Islamic primary rules, owners have full authority over their properties, and are free to either lease their premises or keep them vacant. They also enjoyed full authority on decisions relating to rental rates. Hence, according to Islam's primary rules, a proprietor can not forced to either rent a property or rent it out at a rate not be determined by the proprietor.

According to secondary rules (such as hardship and poverty) and according to the principle of *Maslaha*, the problem of housing could be resolved by specific regulations. Thus a bill was passed, obliging the government to set a fair rate for housing rentals for every city, thereby preventing owners from arbitrary price gouging. According to the sam law, the judiciary could rent vacant houses to the needy.

This measure was regarded as temporary and applicable only for a period of five years, to allow for fundamental solutions to the housing problem to be devised. Accordingly, all owners were prohibited from vacating residential units for some time. As part of an overall solution, rural lands were sold to those who lacked adequate housing, at low rates. Construction loans were granted as well, to allow for the gradual easing of the housing dilemma.

In the banking sector too, the implementation of Islmaic primary rules sometimes created problems. calling for new legislation based on secondary rules or *Maslaha*. To facilitate trade and transactions, for example, cheques were given stronger heavier legal weight and enhanced credibility in order to replace paper money in commercial transactions.

Thus, the legislators instituted harsh penalties for those who issued bad cheques. Such penalization measures were in some cases not in conformity to primary rules. For example, if a debtor gave a cheque to a creditor, who tried to cash the cheque but failed due to a lack of sufficient fund in the debtor's account, the former had to accept serious repercussions. Although from the standpoint of Shairah, the debtor is entitled to a grace period, the legislated punishments were deemed necessary to enhance the strength of the cheque, as a commercial instrument and to prevent various types of cheque fraud from spreading. Thus, violators were sentenced to pay fines and even serve jail terms.

Also in certain instances when a debtor can not repay his arrears to a bank, he / she is obliged to pay a fine for the delay. These fines contradict religious criteria, and are considered to be usury. But for the banking system, the government and the bank account holders, there is no choice other than receiving the fine to cover the loss incurred by the delayed payment. In all of the above-mentioned cases, laws have been passed based on secondary rules or *Maslaha*.

There were also problems in the judicial sector, that could not be resolved through Islam's primary rules; but they were solved through expediency or secondary rules. In the *Shariah*, punishments are divided into the categories of *Hudud* and *Tazir*. In *Hudud* the extent of the penalty is clearly stipulated in the *Quran*. But in *Tazir* the verdict is set by the presiding judge.

The implementation of *Tazir* punishments had created problems, because different judges in different courts set different limits of punishment as *Tazir* for similar crimes or violations. This lack of standardization beside being a form of discrimination, also had negative of consequences on public opinion. Under those conditions, the legal attempts aimed at setting the limits of *Tazir* for different violations helped unify and coordinate the approach of the judicial system, thereby paving the way for a more efficient effectuation of justice. Although the legislator can not determine the limits of *Tazir* within the framework of primary rules, yet in many cases and on the basis of expediency, they have already set the limits and the extent of the *Tazir*.

Concerning the right of the accused having access to legal counsel, and the judiciary's compliance with this principle, this situation has been regarded as one necessitating expediency measures, as according to Islamic regulations, a judge is authorized to put a defendant on trial, even in the absence of a lawyer.

Since most defendants are not familiar with legal proceedings, and are not aware of the fact that in the presence of a lawyer, justice will be implemented more carefully, the relevant articles of the law have stipulated that court rulings will be null and void, if the accused is denied access to a lawyer.

In certain cases, the restoration of women's rights also required secondary rules and conformity with *Maslaha*. According to Islamic primary rules, men enjoy the exclusive right to divorce and women have

no corresponding right. In cases, however, where a woman can not continue to live with her husband, while the latter refuses to divorce her, provisions have been made to give her relief.

First, at the time of marriage, a woman may set unambiguous conditions to enable her to have the right to divorce. According to new regulations, there are 12 cases including a husband's addiction to drugs, ill treatment of his wife, marrying another woman and his refusal to provide her living expenses. Any of these circumstances can enable the woman to go to court and apply for divorce. In certain cases, when a man harasses his wife, or does not provide money for living expenses, the wife may refer to the courts, which can force the man to divorce her. The court may even issue the divorce order in the absence of her husband.

When petitioning for divorce, a woman may even ask to be compensated for all the work she has done in the house of her husband. If the husband does not comply, the court will order him to pay her the value of the labor she claims to have performed. Taking the financial statues of the husband into consideration, the court can order the payment of specified amount as a gift *(Nahlah)* to the wife. In all of the above cases, the laws have been enacted on the basis of *Maslaha*.

Another case which required new legal measures based on expediency, concerns the Iranian labor law. According to Islam's primary rules, relations between employer and employee, are somehow similar to the relations of landlords and tenants. The employer, in fact, rents laborer's services and his only obligation rests on the basis of a contract's

content. However because of the employment situation, rising unemployment, and the increasing wages of workers in our society, government support of the labor force is a must.

Present social conditions, plus the requirement of the labor force as a major part of the society, to enjoy at least a standard minimum wage, suitable holidays, insurance, social security, medical and health care insurance and other essential requirements, necessitates that a series of general supportive rules should characterize employer-employee contracts.

In the labor law passed in 1990, there are many situations foreseen within the framework of the "expediency of the Islamic society and system" that do not conform to primary rules.

Since 1979 when the Islamic government was established in Iran, laws have been enacted on the basis of secondary rules and expediency (*Maslaha*) that are not approved by many Muslim jurists who cite the basis of Islamic primary rules as their proofs. The secondary rules, however, are clear examples of the *Shariah*'s dynamism which allows it to meet the daily needs of the society, on the basis of *Ijtihad*, *Al Ahkam-Al-Thanaviiah* and *Maslaha*.

Glossary

***Adillah* (pl. of *dalil*)**

Proofs, evidences, indications.

***Ahadith* (pl. of *Hadith*)**

Narratives and reports of the deeds and sayings of the Prophet (S.A.W.).

Ahkam (pl. of *hukm)*

"Legal status". According to Islamic law, there are five kinds of *ahkam:*

1. Compulsory (*Wajib)*
2. Desirable but not compulsory (*Mandub)*
3. Forbidden (*Haram)*
4. Disliked but not forbidden (*Makruh)*
5. Lawful and allowed (*Mubah*)

Ahliyyah

Capacity.

Akhbari

One of the two schools of thought in *Shia*. The *Akhbaris* opposed the use of *ijtihad* and sought to base *Shia* jurisprudence on the use of *hadith* in place of the rationalist principles advocated by their opponents the *usulis*.

Ahl-al-Hadith

Another term referring to those who have adopted the *Akhbari* school.

Ahl-al-Hall-wa-al-Aqd

The group of scholars who formed an ad hoc committee to give consultations to the Caliphs .

Ahzab

"The Clans". A famous battle between the early Muslims and the rejectors, in which the Muslims, under the direction of Salman al-Farisi, dug a Trench around the city of al-Madinah to thwart the advance of the unbelievers in 5 AH. The battle is also known as the Battle of the Khandaq (Battle of the Trench).

Allah

The Name of the Creator of the Universe and all that it contains.

Ansar

"Helpers" or "adherents". The term is normally applied to those inhabitants of Medina who supported and assisted the Prophet (S.A.W.) after he moved from Mecca to Medina in 622.

Aql

Intellect or reason. For the *Shia*, however, *aql* has been elevated to a primary source of doctrine and law.

Aqliyyat

Rational questions.

Asl

Root, origin, source.

Asl-la-Zarar

The Islamic principle which holds that no Muslim is allowed to do harm or damage to another Muslim arguing that he is implementing the law.

Ayah (pl. ayat)

A verse of the Holy *Quran*. Literally means "a sign".

Azimah

Strict or unmodified law which remains in its original rigour due to the absence of mitigating factors.

Bani Quraizah

A Jewish tribe from Madinah. They plotted to destroy the Prophet Muhammad (S.A.W.). By attacking the Muslims from within Madinah at the Battle of the Ditch.

Bara'ah

Exemption from a duty, from an accusation, and from responsibility, etc. The term has acquired a technical meaning in doctrine and law: in the

absence of proof to the contrary, the natural presumption is freedom from obligation or liability.

Caliph

Literally, a successor or one who comes after. In Islam the title was applied to the successors to the Prophet's temporal authority over the community.

Council of Guardians

The institution established in the Islamic Republic of Iran to supervise the Islamic Consultative Assembly not to pass laws against the Islamic principles or the Constitution.

Dinar

An ancient gold coin.

Dirham

A silver coin.

Faqih* (Pl. *Fuqaha)

An Islamic scholar who can give an authontative legal opinion or judgement.

Fasid

Corrupt, void.

Fatva (Pl. Fatava)

Deduction by the Islamic jurist on a point of law or legal problem from Islamic sources. A *Fatva* may deal with social issues, ritual matters and political issues.

Fedyah

Compensation for missing or wrongly practising necessary acts of worship.

Fiqh

Originally, understanding or intelligence, the term has become the technical term for jurisprudence, the science of Muslim law, which covers all aspects of religious, political, and civil life.

Ghusl

The full ritual washing of the body with water alone to be pure for the prayer.

Hadd (pl. hudud)

Literally, "limits". The term has acquired a narrow technical meaning: Punishments laid down in the *Sharia* for specified crimes.

Hadith

Tradition of the Prophet (S.A.W.), being an account of what the Prophet (S.A.W.) said and did, and of his tacit approval or disapproval of things said or done in his presence.

Halal

That being permissible in Islam.

Haraj

Distress, difficulty, hardship.

Hijrah

The emigration of the holy Prophet (S.A.W.) from Mecca to Medina, which was later on recognized as the origin of the Islamic history.

Hujjiyyah

Producing the necessary proof/authority to validate a rule or concept.

Ihtiyat

Literally, "caution". When there is a difference of opinion between *mujtahids* on the correct ruling on a particular issue, the rulings of the most eminent *mujtahids* should be examined and the strictest of those rulings adopted.

Ijma

Literally, consensus. *Ijma* is one of the recognized sources of the law in both *Sunni* and *Shia* doctrine.

Ijtihad

Literally, "exertion", and technically the effort a jurist makes in order to deduce the law, which is not self-evident, from its sources.

Illah

Effective cause, or *ratio legis,* of a particular ruling.

Imam

The spiritual leader of the community.

Isnad

The detection and quotation of the chains of *hadiths* up to the original source.

Istihsan

Literally, choosing for the better, the term is variously translated "juristic preference" and "favourable construction". In dealing with legal issues which are not covered by a clear and incontrovertible authority in the *Shariah*.

Istishab

Presumption of continuity, or presuming continuation of the *Status quo ante*.

Istislah

To seek a legal rule by reasoning, on the basis of *maslahah* (public

interest).

Jihad

Islamic holy war.

Jizyah

A tax imposed on non-Muslims who are under Muslim rule.

Khafi

Hidden, obscure; also refers to a category of unclear words.

Khandaq

"The Ditch". A famous battle between the early Muslims and the pagans in which the Muslims built a Khandaq (trench) on the unprotected side of the city of Madinah.

Kharaj

Zakat imposed on the yield of the land (1/10th or 1/20th)

Khass

Specific, a word or a text which conveys a specific meaning.

Kuffar

Unbelievers. Those who reject *Allah* and His messengers (S).

Madinah

Well-known city in Saudi Arabia, where the Prophet's mosque is situated.

Makruh

That which is recommended to be avoided. However, its doing is not considered to be a sin.

Majma-e-Tashkhis-e-Maslahat

The Persian term used to refer to the Expediency Council.

Majlis-al-Shura

The other term for the Consultative Assembly.

Mandub

The deed a Muslim is recommended to perform though being under no obligation.

Mashhur

Well-known, widespread.

Maslaha

The public interest. A legal principle based on the maxim that necessity makes prohibited things permissible.

Mubah

Permissible.

Mukallaf

A competent person who is in full possession of his faculties.

Mujmal

Ambivalent, ambiguous, referring to a category of unclear words.

Mujtahid (pl. Mujtahidin)

One who may act according to his own judgment in matters relating to religious law; who practice *ijtihad*.

Mushrikun (Mushrikeen)

Polytheists, pagans, idolaters and disbelievers.

Munafiqeen (Munafiqun)

Hypocrites. They are the worst of created beings, for they pretend to, but do not believe in *Allah* and the Last Day.

Muqayyad

Qualified, restricted.

Mursal

"Discontinued" or "disconnected" *Hadith*.

Mushtarak

Homonym, a word or phrase imparting more than one meaning.

Musnad

Hadith with a continuous chain of transmitters.

Mutashabihat

Quranic Verses which are not clear and are difficult to understand.

Mutlaq

Absolute, unqualified.

Naskh

abrogation, repeal.

Nass

A clear injunction, an explicit textual ruling.

Nusus (pl. of nass)

Clear textual rulings.

Qazi (pl. Quzat)

Normally translated "judge". However, his function is to dispense justice

in accordance with the revealed law.

Qisas

Laws of equality in punishment for wounds etc.

Qiyas

Analogy, analogical reasoning or deduction, general rules and principles.

Quran

Muslims believe that the *Quran* is the Word of God, that it is the last and most perfect of a series of revelations transmitted by God through a series of Prophets, and that it contains God's commands to man covering all aspects of man's behaviour.

Riba

The taking of interest, usury. *Riba* is forbidden in Muslim law.

Sahih

Healthy and sound with no defects. Authentic, as regards Ahadeeth, such as Sahih Bukhari and Sahih Muslim.

Salat

Islamic daily prayers.

Sanad

The chains of *hadiths*.

Shafi'i

One of the four recognized *Sunni* schools of law and doctrine.

Shariah

The revealed law of Islam.

Shia

Those who believed that Ali was the rightful successor to the Prophet (S.A.W.).

Shura

Consultation. Modernists have translated the concept into a form of democratic Assembly (the *Majlis al Shura*).

Sunnah

The practice of the Prophet, inclusive of his sayings and actions, as recorded in the *hadith*. The *Sunnah* of the Prophet is one of the primary sources of the Islamic law.

Surah (pl. Suwar)

A chapter of the *Holy Quran*. Literally means "a form". There are 114 Suwar in the *Holy Quran*.

Sunni

"Orthodox" Muslims. Those who accept the legitimacy of the line of *Caliphs* who succeeded the Prophet (S.A.W.).

Tabeie (pl. Tabein)

Follower. The ones who sighted the companions of the Prophet (S.A.W.) but not the Prophet (S.A.W.) himself.

Tafsir

Commentary or interpretation, particularly of the *Quran*.

Taharat

Ritual purity, purification.

Takhyir

The right to choose between alternatives.

Takhsis

Specifying the general.

Tashria

Legislation.

Tawatur

Continuous recurrence, continuous testimony.

Tayammum

Purification for prayer using clean dust, earth or stone, when water for *Ghusl* or *Vozu* is either unavailable or would be detrimentalto health.

Tazir

Literally, deterrence. The term describes those punishments for transgression of the law which were not perscribed in the *Quran* and were therefore left to the discretion of the judge.

Ulama (Pl. of a'lim)

People of learning, scholars. More narrowly, the term is normally applied to those who are learned in Muslim theology, doctrine, law, etc.

Ummah

Community of Nation. The body of the Muslims as one distinct and integrated community.

Urf

Custom, usage, customary law.

Usul

Principles, the principles of Islamic law, jurisprudence.

Velayat al faqih

The guardianship or governance of the Islamic jurisconsult.

Wajib

That which is incumbent on every Muslim to do or comply with.

Obligatory.

Vozu

Ritual washing with water alone to be pure for the prayer.

Zahir

Obvious, manifest.

Zakat

A certain fixed proportion of the wealth and of every kind of the property liable to *Zakat* of a Muslim to be paid yearly for the benefit of the poor in the Muslim community.

Zann

Speculation, doubt, conjecture.

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