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Mohammad Hashim Kamali

PRINCIPLES
of ISLAMIC
JURISPRUDENCE

Third Revised and Enlarged Edition

THE ISLAMIC TEXTS SOCIETY
ABOUT THE AUTHOR

Dr. Mohammad Hashim Kamali is currently Professor of Law at the International Islamic University of Malaysia, where he has been teaching Islamic law and jurisprudence since 1985. Born in Afghanistan in 1944, he studied law at Kabul University where he was later appointed Assistant Professor. Following this he worked as Public Attorney with the Ministry of Justice in Afghanistan. He completed his LL.M. and his doctoral studies at London University, where he specialised in Islamic law and Middle Eastern Studies. Dr. Kamali then held the post of Assistant Professor at the Institute of Islamic Studies at McGill University in Montreal, and later worked as Research Associate with the Social Science and Humanities Research Council of Canada. He is the author of Law in Afghanistan, A Study of the Constitutions, Matrimonial Law and the Judiciary (Leiden: E.J. Brill, 1985); Freedom of Expression in Islam (Kuala Lumpur: Berita Publishing, 1994; new edition, The Islamic Texts Society, 1997); Punishment in Islamic Law: An Enquiry into the Hudud Bill of Kelantan (Kuala Lumpur: Institute for Policy Research, 1995); Istitishan (Juristic Preference) and its Application to Contemporary Issues (Jeddah: Islamic Research and Training Institute, Eminent Scholars Lecture Series No. 20, 1997); Islamic Commercial Law: An Analysis of Futures and Options, The Dignity of Man: An Islamic Perspective and Freedom, Equality and Justice in Islam (all published by The Islamic Texts Society, Cambridge) and numerous articles in reputable international journals. He is twice recipient of the Ismā‘īl al-Faruqi Award for Academic Excellence in 1995 and 1997.
ABOUT THE AUTHOR

The author has a comprehensive background in the field of technology and has published extensively on the subject. His research focuses on the integration of artificial intelligence and machine learning in various applications. He has held several key positions in leading tech companies, where he has been instrumental in developing innovative solutions. His contributions to the field have been recognized through multiple awards and recognitions. He is also an active member of several professional organizations and serves on the editorial boards of several top-tier journals.

In addition to his academic and professional pursuits, the author is an avid researcher and has written extensively on the ethical implications of AI and machine learning. His work has been widely cited and has had a significant impact on the field. He continues to be a leading voice in the discussion on the future of technology and its societal impact.
Usūl al-fiqh has always occupied a prominent place in the teaching curricula of Islamic institutions of legal learning. As a discipline of Shari‘ah, usūl al-fiqh embodies the study of the sources of Islamic law and the methodology for its development. But even beyond its specific frame of reference one might say that usūl al-fiqh provides a set of criteria for the correct evaluation and understanding of almost any branch of Islamic learning. The teaching programmes of Islamic law that are conducted in English are in many ways hampered by a shortage of adequate reading materials in this language, and this is particularly the case with regard to usūl al-fiqh. The need for a comprehensive text on usūl al-fiqh has long been felt by students and readers in this University. Professor Kamali’s contribution is therefore well received and appreciated by all those who are concerned with studying or teaching usūl al-fiqh. Since the initial publication of this book in 1989 in Kuala Lumpur, it has already become a well-acknowledged and widely read work of reference on the subject. The style of Professor Kamali’s writing is refreshingly unconventional and yet his work remains well-founded and in close contact with the Arabic sources of his discipline. The author’s personal experience of training in both Islamic and modern legal disciplines is reflected in his work, as he makes frequent comparisons with the concepts and principles of Western jurisprudence.

I take this opportunity to express my appreciation of Professor Kamali’s valuable contribution. I also welcome the decision of the Islamic Texts Society of Cambridge, U.K., to bring out a new and more refined edition of this book. Students and readers of Islamic jurisprudence in English-speaking institutions of higher learning who do not read Arabic will find this book a significant contribution in the depth and detail of information it provides, reflecting both the content and the spirit of the Arabic sources of its origin. In his
Preface, the author himself has explained the approach he has taken in writing this book, and he comments on how the existing literature on *usūl al-fiqh* in English tends to be generic and therefore insufficient for the purposes of undertaking a full course of study in the subject. I wish Professor Mohammad Hashim Kamali great success in his continued efforts to write and add to our fund of knowledge and understanding.

Prof. Tan Sri Datuk Ahmad Ibrahim
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Preface to the Third Edition

Following the initial publication of this work by Pelanduk Publications of Kuala Lumpur in 1989, a revised edition was published in 1991 by The Islamic Texts Society, Cambridge, U.K., for distribution in Europe and North America. The book has, as a result, been widely distributed, and many reputable universities and academic institutions that specialise in Islamic disciplines have selected it as a required text in their courses and teaching programmes. Several distinguished scholars have, in the meantime, reviewed both the Kuala Lumpur and the Cambridge editions, and have made encouraging and useful observations. I take this opportunity to thank them for their interest and their valuable suggestions, many of which I have taken into consideration in the preparation of the present edition. I shall presently refer to some of their comments but, before I do so, I shall briefly explain the nature of the revision I undertook for this edition.

One of the more visible changes that the reader will notice in this edition, and one which will prove useful for students and teachers alike, is the appearance of Qur’anic ḥadīth both in Arabic and in English translation. In the first two editions, I included the Arabic versions of ḥadīth, but not of Qur’anic passages for the obvious reason that the standard text of the Qur’ān is more easily accessible without variation, and this is not the case with ḥadīth. Finding a particular ḥadīth in the various collections can be difficult and time-consuming, and the wording of ḥadīth may also differ in different collections. But then my experience of using this text in my own teaching showed that it would be very convenient to have the Arabic text of both the Qur’ān and ḥadīth readily at hand.

The revision that I have undertaken for the present edition consists mainly of enhancing the original text by the addition of relevant information in different places throughout the book. The original text remains virtually unchanged but the reader will find frequent
additions in almost every chapter, plus a new chapter at the very end, entitled ‘A New Scheme for Usūl al-Fiqh’, and a Conclusion. The work has, as a result, been generally upgraded and is hopefully more responsive to the needs of advanced students of usūl al-fiqh. But even so, I hasten to add that usūl al-fiqh is a vast discipline and any attempt to treat the entire field in a single book is bound to have its drawbacks. I have confined my additions to the minimum of what could reasonably be accommodated within the framework of the original text. But the reader can still expect to find interesting additions to the chapters on the Qur’ān, the Sunnah, abrogation (naskh), commands and prohibitions, the rules of interpretation, qiyās, istihsān and the hukm sharīʿī.

As mentioned above, several distinguished scholars have reviewed the book since its initial publication in Kuala Lumpur and in Cambridge. Most of the reviewers’ comments were positive and appreciative of the style of my presentation in writing a book that was not burdened with excessive detail and yet is substantial enough to appeal to the discerning reader of Islamic law. I was happy to have been congratulated for having been remarkably successful in my presentation of the subject-matter of usūl al-fiqh in the manner and style that one would expect to find in its recognised Arabic sources. The reviewers’ comments also noted that the book was rich in providing frequent illustrations from the Qur’ān and Sunnah in almost every part, something which students and non-specialist readers will find particularly useful.

However, one of my distinguished reviewers questioned my decision to place a chapter on ijtihād at the very end of the book. I should have explained for the benefit of those who do not read Arabic that this is not an unusual feature of Arabic textbooks on usūl al-fiqh. The reason for this is perhaps rather symbolic of the message that ijtihād is the end-result of usūl al-fiqh, and the ability to conduct it is the sum-total of the knowledge and acumen that this discipline can convey. I have in fact said this in my Introduction when stating that regulating ijtihād is one of the cardinal objectives of usūl al-fiqh. I have therefore not changed the previous arrangement of titles, but have added a conclusion in which I have taken up the issues pertaining to ijtihād and touched on questions such as the theoretical nature of the methodology of usūl al-fiqh, and its relevance or otherwise to the legislative processes of modern government. This I have done partly in response to a reviewer’s comment that the book ended rather abruptly (with the chapter on ijtihād) and suggested that a general
conclusion to the text would be desirable. Despite the awareness that a textbook is not the best place in which to address contentious issues, I still thought it worthwhile to convey a certain awareness of the issues in the conclusion. I have consequently commented on the nature of the challenge that Muslim scholars and jurists must take up if the methodology of usūl al-fiqh and ijtihād are to be revitalised and integrated into the processes of law and government in modern times.

Mohammad Hashim Kamali
International Islamic University, Malaysia
I. Apart from the fact that existing works on Islamic jurisprudence in the English language do not offer an exclusive treatment of *usūl al-fiqh,* there is also a need to pay greater attention to the source materials, namely the Qur’an and Sunnah, in the study of this science. In English works, the doctrines of *usūl al-fiqh* are often discussed in relative isolation from the authorities on which they are founded. Furthermore, these works tend to exhibit a certain difference of style and perspective when they are compared to Arabic works on the subject. The *usūl al-fiqh* as a whole and all of the various other branches of the *Shari‘ah* bear testimony to the recognition of divine revelation (*wahy*) as the most authoritative influence and source, over and above that of rationality and man-made legislation. This aspect of Islamic law is generally acknowledged, and yet the relevance of *wahy* to the detailed formulations of Islamic law is not highlighted in English works in the same way as one would expect to find in works of Arabic origin. I have, therefore, made an attempt to convey not only the contents of *usūl al-fiqh* as I found them in the Arabic sources, but also the tone and spirit of the source materials I consulted. I have given frequent illustrations from the Qur’an, the *Sunnah* and well-recognised works of authority to substantiate the theoretical exposition of ideas and doctrines. The works of the madhāhib, in other words, are treated with consideration for the authority on which they are founded.

II. The idea of writing a book on *usūl al-fiqh* occurred to me in early 1980 when I was teaching this subject to postgraduate students at the Institute of Islamic Studies at McGill University in Montreal. But it was only after 1985, when I started a teaching post at the International Islamic University, Selangor, Malaysia, that I was able to write the work I had intended. I was prompted to this decision primarily by
the shortage of English textbooks on Islamic jurisprudence for students who seek to acquire an intermediate to advanced level of proficiency in this subject. Works that are currently available in English on Islamic law and jurisprudence are generic in that they tend to treat a whole range of topics both on usūl al-fiqh and the various branches of fiqh (i.e. fiqh al-fiqh), and often within the scope of a single volume. The information that such works contain on usūl al-fiqh is insufficient for the purposes of pursuing a full course of study on the subject. The only exception to note here, perhaps, is the area of personal law, that is, the law of marriage, divorce, inheritance, etc., which has been treated extensively, and on which there are a number of English texts currently available. Arabic works on usūl al-fiqh are, on the whole, exclusive in the treatment of the discipline. There is a selection of textbooks in Arabic, both classical and modern, at present available on this subject, ranging from the fairly concise to the more elaborate and advanced. Works such as 'Abd al-Wahhab Khalil's 'Ilm Usūl al-Fiqh, Abu Zahrah's Uṣūl al-Fiqh, Muḥammad al-Khuḍārī's Uṣūl al-Fiqh, and Badrān's Uṣūl al-Fiqh al-Islāmi are just some of the well-known modern works in the field. Classical works on usūl al-fiqh, of which there are many, are, broadly speaking, fairly elaborate, sometimes running into several volumes. I have relied, in addition to the foregoing, on al-Ghazâlî’s al-Mustasfâ min 'Ilm Usūl, al-Āmīdī’s al-Iḥkām fi Usūl al-Ahkām, al-Shāṭibī’s al-Muwāfaqāt fi Usūl al-Ahkām and al-Shawkānī’s Irshād al-Fuhul fi Tahqīq al-Haqq min 'Ilm al-Usūl. These are all devoted, almost exclusively, to the juridical subject-matter of usūl al-fiqh, and rarely, if ever, address the historical development of this discipline beyond such introductory and incidental references as the context may require. Arabic writers tend to treat the historical development of jurisprudence separately from the usūl al-fiqh itself. There are several Arabic works of modern origin currently available on the history of jurisprudence and its various phases of development, namely: the Prophetic period; the era of the Companions; the early schools of law in the Hijāz and Iraq; the emergence of the madhāhib; the era of imitation (taqīlid); and the call for a return to ijtihād. This discipline is generally known as tārikh al-tashrī which, as the title suggests, is primarily concerned with the history of juristic thought and institutions. Arabic texts on usūl al-fiqh itself are devoted to the treatment of the sources and methodology of the law, and tend to leave out its historical development.

The reverse of this is true with regard to general works that are currently available on the subject of Islamic jurisprudence in the English
language. Works of Western authorship on this subject are, broadly speaking, primarily concerned with the history of jurisprudence, while the juridical subject-matter of usūl al-fiqh does not receive the same level of attention. Bearing in mind the nature of this existing English literature, and the fact that there is adequate information available on the history of Islamic jurisprudence in English, the present work does not attempt to address the historical development, and instead focuses on usūl al-fiqh itself.

Another point to be noted regarding works on Islamic jurisprudence in English by both Muslim and non-Muslim authors is that they are somewhat selective in their treatment of the relevant topics, and certain subjects tend to be ignored or treated only briefly. Consequently, information on some topics, such as the rules of interpretation, classification of words, commands and prohibitions, and textual implications (al-dalālāt) is particularly brief and often non-existent in these works. Even some of the more familiar topics such as qiyyās, istīslāh, istīṣṭab and sadd al-dharāʾi are treated superficially in most English books that are currently in use. The reasons for such omissions are not always clear. The authors might have considered some of these topics to be somewhat technical and involved for English readers, whose interest in usūl al-fiqh has for a long time remained confined to general and introductory information on the subject. Some of these topics, such as the rules of interpretation, al-dalālāt, and the technicalities of qiyyās, which draw somewhat heavily on the use of Arabic terminology, might have been viewed in this light. The English-speaking student of Islamic studies has been perceived as someone who will have little use for technical detail on usūl al-fiqh. This might at best offer a plausible explanation, but it is one that carries little weight, especially in view of the greater interest that Islamic legal studies has recently attracted in the West, and in some of the English-speaking institutions of higher learning in Islamic countries themselves. Moreover, the fact that some Islamic countries have in recent decades shown a fresh interest in developing greater harmony between the Shariʿah and statutory laws has also meant that practising lawyers and judges in these countries are increasingly encouraged to enhance their expertise in the Shariʿah disciplines.

Modern Arabic writings on usūl al-fiqh tend to differ from the older works on the subject in that the former take cognisance of recent developments both in the Muslim communities and beyond. Thus the reader of many a modern work often comes across comments and comparisons which seek to explain the application and relevance of
the Shari'ah doctrines to modern legislation, and to the principles of Western jurisprudence. Much to their credit, some ‘ulamā’ and writers of modern works have attempted to relate the classical formulations and doctrines of usūl al-fiqh to the contemporary socio-legal conditions of their communities. There exists a level of concern about the gap that has gradually developed between the Shari'ah and modern law, and about the fact that the problem still remains to be tackled. There have also been attempts, be they in the form of individual reform proposals, a call for fresh ijtihād about particular issues, or formal resolutions adopted at national and international gatherings of scholars, to tap the resources of usul al-fiqh in order to bridge the gap between the Shari'ah and modern social conditions. A full account of such developments falls well beyond the scope and objective of the present work. But in discussing certain doctrines such as ijtihād, ijma’, istihsān and maslahah, I have attempted to present the modern current of opinion, and occasionally my own views, as to how these principles could be utilised in contemporary legal and judicial processes. I have taken this liberty despite the awareness that it might fall beyond the brief of a work that seeks to be an exposition of the existing doctrines and institutions as they are. I wish to add here that I alone bear full responsibility for the propriety or otherwise of my views.

Furthermore, recent Arabic texts on usul al-fiqh tend to treat their subject-matter in a more consolidated and simplified form that makes it manageable for the modern student of law. These works are on the whole more concise than earlier authorities on the subject. It is primarily in matters of format and style that they differ from the older works. As for substantive matters, modern works are normally expected to preserve the continuity of the earlier authorities, and the two are basically indistinguishable in this regard. Having said this, one might add further that modern works tend to differ from their predecessors in one other respect, namely, that the former tend to offer a more even-handed treatment of the views and doctrines of such schools of thought as the Mu'tazilah, the Shi'ah and the Zāhiriyah, etc., and tend to treat ideas on merit rather than their formal acceptance and recognition by the established madhāhib. In addition to the textbook materials on usul al-fiqh, a number of legal encyclopedias have emerged in recent decades in Egypt and elsewhere, usually bearing the title ‘al-Mawsū‘ah al-Fiqhiyyah’, with the express purpose of offering a balanced treatment of the views and contributions of all the prominent schools of law. As a result, the relatively
stronger orientation toward particular schools that is noticeable in the earlier works on usūl al-fiqh, especially those that were authored after the crystallisation of the madhāhib, is not a prominent feature of the modern works. A more open attitude has in fact emerged which seeks to move away from the sectarian bias that can be found in some earlier works, and it is no longer unusual for a Sunni scholar to write on Shi‘i thought, scholars and institutions, with a view to highlighting their contributions to Islamic law and jurisprudence. The present writer welcomes this development, but if his own work fails to offer adequate coverage of the doctrines of the various schools, it is due solely to considerations of brevity and space which may be expected of a book of this size.

III. It is perhaps true to say that Islamic jurisprudence exhibits greater stability and continuity of values, thought and institutions when compared to Western jurisprudence. This could perhaps be partially explained by reference to the respective sources of law in the two legal systems. Whereas rationality, custom, judicial precedent, morality and religion constitute the basic sources of Western law, the last two acquire greater prominence in Islamic law. The values that must be upheld and defended by law and society in Islam are not always validated on rationalist grounds alone. Notwithstanding the fact that human reason has always played an important role in the development of Shari‘ah through the medium of ijtihād, the Shari‘ah itself is primarily founded on divine revelation.

A certain measure of fluidity and overlap with other disciplines such as philosophy and sociology is perhaps true of both Islamic and Western jurisprudence. But it is the latter which exhibits the greater measure of uncertainty regarding its scope and content. Thus according to one observer, books that bear the title ‘jurisprudence’ vary widely in subject-matter and treatment because ‘the nature of the subject is such that no distinction of its scope and content can be clearly determined’, and in Julius Stone’s somewhat dramatic phrase, jurisprudence is described as ‘a chaos of approaches to a chaos of topics, chaotically delimited’.  

Usūl al-fiqh, on the other hand, has a fairly well-defined structure, and the ‘ulamā‘ had little difficulty in treating it as a separate discipline of Islamic learning. Textbooks on usūl al-fiqh almost invariably deal with a range of familiar topics, and their contents are fairly predictable. This is perhaps reflective of the relative stability that the Shari‘ah in general and usūl al-fiqh in particular have exhibited
through their development, almost independently of government and its legislative organs. This factor has also meant, however, that usūl al-fiqh has, for the most part, been developed by individual jurists who exerted themselves in their private capacity away from government machinery and involvement in the development of juristic thought. Consequently, usūl al-fiqh has to some extent remained a theoretical discipline and has not been internalised by the legislative machinery of government. The history of Islamic jurisprudence is marred by a polarisation of interests and values between the government and the ulama'. The disaffection of the ulama' with the government, which dates back to the beginning of the Umayyad rule, did not encourage the latter's participation and involvement in the development of juristic thought and institutions, and this has to some extent discouraged flexibility and pragmatism in Islamic jurisprudence. Note, for example, the doctrinal requirements of ijma', especially the universal consensus of the entire body of the mujtahidin of the Muslim community that is required for its conclusion, a condition which does not concede to considerations of feasibility and convenience. There is also no recognition whatsoever of any role for the government in the doctrine of ijma' as a whole. The government for its part also did not encourage the involvement and participation of the ulama' in its hierarchy, and isolated itself from the currents of juristic thought and the scholastic expositions of the ulama'. The schools of jurisprudence continued to grow, and succeeded in generating a body of doctrine, which, however valuable, was by itself not enough to harness the widening gap between the theory and practice of law in government. One might, for example, know about qiyas and maslahah, etc., and the conditions which must be fulfilled for their valid operation. But the benefit of having such knowledge would be severely limited if neither the jurist nor the judge had a recognised role or power to apply it. One might also add here the point that no quick solutions are expected to the problem about the application of the Shari'ah in modern jurisdictions. The issue is a longstanding one and is likely to continue over a period of time. It would appear that a combination of factors would need to be simultaneously at work to facilitate the necessary solutions to the problem under discussion. One such factor is the realisation of a degree of consensus and co-operation between the various sectors of society, including the ulama' and the government, and the willingness of the latter to take the necessary steps to bring internal harmony to its laws. To merge and to unify the Shari'ah and modern law into an organic unity would hopefully mean that the
duality and the internal tension between the two divergent systems of law could gradually be minimised and removed.

Bearing in mind the myriad and rapidly increasing influences to which modern society is exposed, the possibility of consensus on values becomes even more difficult to achieve. To come to grips with fluctuations in attitudes towards the basic values that the law must seek to uphold is perhaps the most challenging task for the science of jurisprudence in general. To provide a set of criteria with which to determine the propriety or otherwise of law, and of effective government under the rule of law, is the primary concern of jurisprudence.

The Muslim jurist is often criticised for having lost contact with the changing conditions of contemporary life, in that he has been unable to relate the resources of Shari‘ah to modern government processes in the fields of legislation and judicial practice. A part of the same criticism is also levelled against government in Islamic countries in that it has failed to internalise usūl al-fiqh in its legislative practices. The alleged closure of the door of ijtihād is one of the factors that are held accountable for the gap between the law and its sources on the one hand, and the changing conditions of society on the other. The introduction of statutory legislation which has already become a common practice in Islamic countries has also affected the role and function of ijtihād. Apart from circumventing the traditional role of the jurist/mujtahid, the self-contained statutory code and the formal procedures that are laid down for its ratification have eroded the incentive to the jurist’s effective participation in legislative construction. Furthermore, the wholesale importation of foreign legal concepts and institutions into Islamic countries, and the uneasy combinations that this has brought about in legal education and judicial practice, are among the sources of general discontent. These and many other factors are in turn accountable for the Islamic revivalism/resurgence which many Muslim societies are currently experiencing.

In view of the diverse influences and the rapid pace of social change visible in modern society, a measure of uncertainty in identifying the correct balance of values is perhaps inevitable. But the quest to minimise this uncertainty must remain the central concern of the science of jurisprudence. The quest for better solutions and more refined alternatives lies at the very heart of ijtihād, which must, according to the classical formulations of usūl al-fiqh, never be discontinued, for ijtihād is wājib kafā‘ī, a collective obligation of the
Muslim community and its scholars to exert themselves in order to find solutions to new problems and to provide necessary guidance in matters of law and religion. But even so, an error in *ijtihād* is not only tolerated but is rewarded according to the sincerity and earnestness of the *mujtahid* who attempts it. And it is often through such errors that the best solution can ultimately be reached. One can have different solutions to a particular problem, and sometimes the best solution may be known and yet unattainable due to practical considerations that might limit one’s range of choice. In such situations one must surely do that which is possible under the circumstances. But it is imperative not to abandon *ijtihād* completely. It is a common and grave error to say that *ijtihād* is unattainable and that the conditions for its exercise are too exacting to fulfil. To regulate *ijtihād* is indeed the primary objective of *usūl al-fiqh* and of what this science teaches regarding the sources of law and methods of interpretation and deduction. A grasp of the concepts and doctrines of *usūl al-fiqh* is not only helpful but necessary to contribute to the ongoing search for better solutions to social issues, and will hopefully also demonstrate that the *Sharī’ah*, as well as providing restraints, also possesses considerable flexibility and resources for accommodating social change.

IV. With regard to the translation of technical Arabic terms, I have to some extent followed existing works, especially Abdur Rahim’s *Principles of Muhammadan Jurisprudence*. But in the absence of any precedent, or when I was able to find a better alternative, I have improvised the equivalent English terms myself. Most of the Arabic terms are easily translated into English without engaging in technicalities, but there are occasions where this is not the case, and at times the choice of terms is determined by consideration of consistency and style rather than semantic accuracy. To give an example, one of the chapters in this book is devoted to the discussion of textual implications (*al-dalālat*). The five varieties of textual implications, namely *‘ibarat al-nass, ishārat al-nass, dalālat al-nass, iqtīdā’ al-nass* and *masūm al-mukhālafah*, each signify a different concept for which an exact English equivalent is difficult to find. I have always tried to give priority to semantic accuracy, but as can be seen this is not the only factor that has determined my choice of ‘explicit meaning’, ‘alluded meaning’, ‘implied meaning’, ‘required meaning’ and ‘divergent meaning’ for the foregoing terms respectively, for at times like this, it becomes
difficult to be semantically exact since the shades of meaning and concepts tend to overlap somewhat. A measure of technicality and arbitrariness in the choice of terms is perhaps inevitable in dealing with certain topics of usul al-fiqh, such as the classification of words and the rules of interpretation. On such occasions, I thought it helpful not to isolate the English terms from their Arabic originals. I have therefore repeated the Arabic terms frequently enough to relate them to their English equivalents in the text. But when the reader is not sure of the meaning of technical terms, a look at the glossary at the end of the text might prove useful.

The translation of the Qur'anic passages in the text is generally based on Abdullah Yusuf Ali's translation of the Holy Qur'an. On occasion, however, I have replaced elements in this translation with easier and more simplified alternatives. Whenever I have done so, it is usually the result of my having checked more than one translation. The reader will also notice that I have not given the original of the Qur'anic passages in Arabic, as this is not difficult to find. Besides, the Qur'anic text is uniform and there is no variation in the wording of its text in all commonly used printing. But when it comes to the hadith, although the main authorities on hadith are inclined to maintain consistency in both the concept and wording of the hadith, it is nevertheless not unusual to come across inconsistency or variation in the exact wording of a particular hadith in different sources. Partly for this reason, but also for the sake of accuracy and convenience, I have given both the Arabic original and the English translation of a hadith on its first occurrence in the text. The English rendering of hadith consists for the most part of my own translation of the Arabic original; otherwise, I have used the English translation as and when it was available.

A word may also be in order here regarding the English rendering of the terms fiqh and usul al-fiqh. The difference between them is fairly obvious in their respective Arabic usages: usul al-fiqh is unequivocal in its reference to the 'roots of fiqh'. This is, however, not so clear in the equivalent English terms which are currently in use. The terms 'Muhammadan law' and 'Islamic law' have often been used in a generic sense and applied both to fiqh and usul al-fiqh. The same is true of its familiar alternative, 'Islamic jurisprudence'. None of these convey the clarity which is found in their Arabic equivalents. There are, for example, books currently available in English bearing one or the other of the these titles, although their contents do not seek to distinguish the two disciplines from each another.
The term ‘Muhammadan law’ seems to be already falling out of use, and it has almost become an established practice to reserve ‘Islamic law’ for fiqh, and ‘Islamic jurisprudence’ for usul al-fiqh. This use of terminology should be retained. A similar distinction between the terms ‘source’ and ‘proof’ would seem advisable. The former should, as far as possible, be reserved for the Qur’an and Sunnah, and the latter for other proofs.

My transliteration of Arabic words is essentially the same as that of the Encyclopedia of Islam (New Edition), with two exceptions which have become standard practice: q for k and j for dj.

Finally, I would like to take this opportunity to thank most warmly my colleagues and students at the Faculty of Law, International Islamic University, with whom I have frequently raised and discussed matters of mutual interest. I have often benefited from their views, which have been taken into account in the present work. I would also like to thank the secretarial staff of the Faculty for their unfailing willingness to type for me whenever I approached them. And last but not least, I wish to thank the library staff of the I.I.U. for their assistance, and for being courteous and helpful.

V. Since the publication of the first edition of this book in April 1989, the comments, observations and responses that I have received from scholars, students, and readers have been very positive and encouraging. The changes that I have carried out for the present edition of the book relate to both its content and format, although the overall approach to these changes was to leave the bulk of the original work intact. The changes that I have made are confined to particular parts and they do not entail a recomposition of the original text. I have thus added fresh information and elaborated parts of the chapters on abrogation (naskh), analogical reasoning (qiyās), and presumption of continuity (istiṣḥāb). The new information consists either of the elaboration of concepts, or the insertion of additional illustrations for the purposes of clarity and relevance to contemporary concerns in themes of Islamic jurisprudence. The addition to the chapter on naskh thus reflects the results of a discussion on a paper entitled ‘The Nature, Sources and Objective of the Shari'ah’ which I presented to a symposium organised by the International Islamic University in Kuala Lumpur in September 1989. The additions to some of the other chapters consist mainly of fresh research and expert opinion on the potential contribution of some of the neglected principles of usul al-fiqh, such as istiṣḥāb, to modern jurisprudence. I have
also refined minor portions of the text in the interest of clarity and precision.

As for the changes of format, these were carried out as a result of my consultation with the editorial staff of the Islamic Texts Society, particularly Mohsen al-Najjar and T.J. Winter. It was thus agreed at the outset to re-set the whole of the original text so as to implement the standard practice of the Islamic Texts Society concerning transliteration, footnotes and minor editorial changes in the text. It is thus hoped that these changes have assured the production of a smoother and more familiar text for readers in Europe and America.

Professor Ahmad Ibrahim, Professor Emeritus and Dean of the Faculty of Law, International Islamic University, Malaysia, has contributed a new Foreword for the second edition. He was kind enough to do so despite his numerous other commitments, and preoccupation with his own writings. I take this opportunity to thank him most warmly for his valuable contribution, and the fact that he wrote a Foreword to both the first and the present editions of this book. He has taken a keen interest in my research and has been most helpful and understanding in relieving me from other commitments so as to enable me to concentrate on writing and research.

Students and colleagues at the International Islamic University have been generous and supportive of my endeavours. I take this opportunity to thank them once again for their thoughtful appreciation. A tangible result of all this is that this book has now become a recommended text in a number of courses not only in the Faculty of Law but also in other faculties and departments of this University.

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March 1991

NOTES


2. Note for example the International Islamic University of Malaysia, and that of
Islamabad, Pakistan, where *usūl al-fiqh* is offered as a core subject both in the LL.B and the masters degree programmes.

3. For an account of the recent trends and developments in scholarly publications, conference resolutions, and the various periodicals and encyclopedias which are designed to promote such tendencies, the reader is referred to Nabhān, *al-Madkhal li al-Tashrī' al-Islāmī*, pp. 342–407 and Qaṭṭān, *al-Tashrī' wa al-Fiqh fī al-Islām*, pp. 331–5.


CHAPTER ONE

Introduction to *Uṣūl al-Fiqh*

I. Definition and Scope

*Uṣūl al-fiqh* is concerned with the sources of Islamic law, their order of priority, and the methods by which legal rules may be deduced from the source materials of the *Shari'ah*. It is also concerned with regulating the exercise of *ijtihād*. The sources of the *Shari'ah* are of two kinds: revealed and non-revealed. Whereas the former provide the basic evidence and indications from which detailed rules may be derived, the latter provide the methodology and procedural guidelines to ensure correct utilisation of the source evidence. *Uṣūl al-fiqh*, or the roots of Islamic law, thus expound the indications and methodology by which the rules of *fiqh* are deduced from their source evidence. The rules of *fiqh* are thereby derived from the Qur’ān and Sunnah in conformity with a body of principles and methods which are collectively known as *uṣūl al-fiqh*.

Some writers have described *uṣūl al-fiqh* as the methodology of law, a description which is accurate but incomplete. Although methods of interpretation and deduction are of primary concern to *uṣūl al-fiqh*, the latter is not exclusively devoted to methodology. To say that *uṣūl al-fiqh* is the science of the sources and methodology of the law is accurate in the sense that the Qur’ān and Sunnah constitute the sources as well as the subject-matter to which the methodology of *uṣūl al-fiqh* is applied. The Qur’ān and Sunnah contain both specific injunctions and general guidelines on law and religion, but it is the broad and general directives which occupy the larger part of the legal content of these sources. The general directives that are found in the Qur’ān
and Sunnah are concerned not so much with methodology as with substantive law and they provide indications which can be used as raw material in the development of law. The methodology of ʿusūl al-fiqh refers mainly to methods of reasoning such as analogy (qiyaṣ), juristic preference (istiḥsān), presumption of continuity (istiṣḥāb) and the rules of interpretation and deduction. These are all designed to serve as an aid to the correct understanding of the sources of Sharīʿah and ijtihād. While the clear directives of the Qurʾān and the Sunnah command permanent validity, the methodology of ʿusūl does not, for it was developed after the revelation of the Qurʾān and Sunnah came to an end, and most of it consists of juristic propositions and ijtihād advanced by scholars and ʿulamāʾ of different periods. As an instrument of legal construction and ijtihād, the methodology of ʿusūl al-fiqh must therefore remain open to further adaptation and refinement in order to respond to the changing needs of society and civilisation.

To deduce the rules of fiqh from the indications that are provided in the sources is the expressed purpose of ʿusūl al-fiqh. Fiqh as such is the end product of ʿusūl al-fiqh; and yet the two are separate disciplines. The main difference between fiqh and ʿusūl al-fiqh is that the former is concerned with the knowledge of the detailed rules of Islamic law in its various branches, and the latter with the methods that are applied in the deduction of such rules from their sources. Fiqh, in other words, is the law itself, whereas ʿusūl al-fiqh is the methodology of the law. The relationship between the two disciplines resembles that of the rules of grammar to the language. ʿUsūl al-fiqh in this sense provides standard criteria for the correct deduction of the rules of fiqh from the sources of Sharīʿah. An adequate knowledge of fiqh necessitates close familiarity with its sources. This is borne out in the definition of fiqh, which is ‘knowledge of the practical rules of Sharīʿah acquired from the detailed evidence in the sources’. The knowledge of the rules of fiqh, in other words, must be acquired directly from the sources, a requirement which implies that the faqih must be in contact with the sources of fiqh. Consequently, a person who learns fiqh in isolation from its sources is not a faqih. The faqih must know not only the rule that misappropriating the property of others is forbidden, but also the detailed evidence for it in the source, that is, the Qurʾānic āyah (2:188) which states: ‘Devour not each other’s property in defiance of the law.’
This is the detailed evidence, as opposed to saying merely that ‘theft is forbidden in the Qur’an’. Fiqh is acquired knowledge which is obtained by study and self-application and is therefore different from inherent knowledge, for example that of God, who is All-Knowing; it is also different from the knowledge of the Prophet, and that of the angel Gabriel, as theirs was given or transmitted to them essentially through revelation.

The word asl has several meanings, including proof, root, origin and source, such as in saying that the asl (proof) of this or that rule is ijmā‘; or in the expression, usūl al-fiqh, which means the roots of fiqh or its underlying evidence. It is also used in the sense of the original rule or norm as in the legal maxim that ‘the asl in all things is permissibility’, or when it is said that al-asm barā‘ah al-dhimmah, the norm is absence of liability. Asl also means the foundation on which something is constructed. When it is said, for example, that qiyās or analogy must have an asl, this may be the Qur’an or the Sunnah. Asl also means that which is preferable (al-rājīh), such as in the saying that al-asm fi‘l kalām al-haqqiqah (the literal meaning is preferable to the metaphorical one). And lastly, asl and usil denote rules or principles on which a branch of knowledge may be founded, such as in usul al-hadith, which is equivalent to qawa‘id al-hadith, that is, the rules governing the science of hadith.

Knowledge of the rules of interpretation is essential to the proper understanding of a legal text. Unless the texts of the Qur’an or the Sunnah are correctly understood, no rules can be deduced from them, especially in cases where the text in question is not self-evident. Hence, the rules by which one is to distinguish a speculative text from a definitive one, the manifest (zāhir) from the explicit (naṣṣ), the general (‘āmm) from the specific (khāṣṣ), the literal (haqqiqi) from the metaphorical (majāzī), etc., and how to understand the implications (dalālāt) of a given text, are among the subjects which warrant the attention in usul al-fiqh. An adequate grasp of the methodology and rules of interpretation also ensures the proper use of human reasoning in a system of law which originates in divine revelation. For instance, analogy (qiyās) is an approved method of reasoning for the deduction of new rules from the sources of Shariah. How analogy should be constructed, what its limits are, and what authority it would command in conjunction, or in conflict, with other recognised proofs are questions which are of primary concern to usul al-fiqh. Juristic preference, or istihsān, is another rationalist doctrine and a recognised proof of Islamic law. It consists essentially of giving preference to one of the
many conceivable solutions to a particular problem. The choice of one or the other of these solutions is mainly determined by the jurist in the light of considerations of equity and fairness. Which of these solutions is to be preferred and why, and what the limits are of personal preference and opinion in a particular case, is largely a question of methodology and interpretation and therefore forms part of the subject-matter of *usūl al-fiqh*.

The principal objective of *usul al-fiqh* is to regulate *ijtihad* and to guide the jurist in his effort at deducing the law from its sources. The need for the methodology of *usul al-fiqh* became apparent when unqualified persons attempted to carry out *ijtihad*, and the risk of error and confusion in the development of Shari'ah became a source of anxiety for the 'ulamā'. The purpose of *usul al-fiqh* is to help the jurist obtain an adequate knowledge of the sources of Shari'ah and of the methods of juristic deduction and inference. *Usul al-fiqh* also regulates the application of *qiyaş*, *istihsān*, *istişhāb*, *istişlāh*, etc., whose knowledge helps the jurist to distinguish which method of deduction is best suited to obtaining the *hukm shar'i* of a particular problem. Furthermore, *usul al-fiqh* enables the jurist to ascertain and compare strength and weakness in *ijtihad* and to give preference to that ruling of *ijtihad* which is in close harmony with the *nusūs*.

It may be added here that knowledge of the rules of interpretation, the *'āmm*, the *khass*, the *mutlaq*, the *muqayyad*, etc., is equally relevant to modern statutory law. When the jurist and the judge, whether a specialist in the Shari'ah or in secular law, fails to find any guidance in the clear text of the statute on a particular issue, he is likely to resort to judicial construction or to analogy. The skill, therefore, to interpret a legal text and to render judicial decisions is indispensable for a jurist regardless of whether he sits in a Shari'ah court or in a court of statutory jurisdiction. A specialist in *usul al-fiqh* will thus find his skill of considerable use in the understanding and interpretation of any legal text.

To what extent is it true to say that al-Shāfi‘i was the founder of *usul al-fiqh*? One theory has it that *usul al-fiqh* has existed for as long as *fiqh* has been known to exist. For *fiqh* could not have come into being in the absence of its sources, and of methods with which to utilise these source materials. This would, in turn, imply that *usul al-fiqh* existed long before al-Shāfi‘i. Numerous examples could be cited to explain how, in early Islam, the Companions deduced the rules of *fiqh* from their sources. *Usul al-fiqh*, in other words, had existed well before the period that saw the emergence of the leading imams of
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jurisprudence. But it was through the works of these imams, especially al-Shafi'i, that *usūl al-fiqh* was articulated into a coherent body of knowledge. Even before al-Shafi'i, we know that Abū Hanifah resorted to the use of analogy and *istihsān*, while Imam Malik is known for his doctrine of the Medinan *ijmā’,* subjects we shall have occasion to return to. When al-Shafi'i came on the scene, he found a wealth of juristic thought and advanced levels of argumentation on methodological issues. But the existing works were not entirely free of discordance and diversity, which had to be sifted through by the standards which al-Shafi'i articulated in his legal theory of the *usūl.* He devoted his *Risālah* exclusively to this subject, and this is widely acknowledged to be the first work of authority on *usūl al-fiqh.*

It is nevertheless accurate to say that *fiqh* precedes *usūl al-fiqh* and that it was only during the second Islamic century that important developments took place in the field of *usūl al-fiqh,* since during the first century there was no pressing need for *usūl al-fiqh.* When the Prophet was alive, the necessary guidance and solutions to problems were obtained either through divine revelation, or his direct ruling. Similarly, during the period following the demise of the Prophet, the Companions remained in close contact with the teachings of the Prophet, and their decisions were mainly inspired by his precedent. Their proximity to the sources and intimate knowledge of events, provided them with the authority to rule on practical problems without there being a pressing need for methodology. However, with the expansion of the territorial domain of Islam, the Companions were dispersed and direct access to them became increasingly difficult. With this, the possibility of confusion and error in the understanding of the textual sources became more prominent. Disputation and diversity of juristic thought in different quarters accentuated the need for clear guidelines, and the time was ripe for al-Shafi'i to articulate the methodology of *usūl al-fiqh.* Al-Shafi'i came on the scene when juristic controversy had become prevalent between the jurists of Medina and Iraq, respectively known as *ahl al-hadith* and *ahl al-ra'y.* This was also a time when the ‘*ulamā’* of *hadith* had succeeded in their efforts to collect and document the *hadith.* Once the *fuqahā’* were assured of the subject-matter of the Sunnah, they began to elaborate the law, and thus the need for a methodology to regulate *ijtihād* became increasingly apparent. The consolidation of *usūl al-fiqh* as a *Shari'ah* discipline was, in other words, a logical conclusion of the compilation of the vast literature of *hadith.*

Finally, among the factors which prompted al-Shafi'i into refining
the legal theory of *usūl al-fiqh* was the extensive influx of non-Arabs into Islamic territories and the disconcerting influence that this brought about on the legal and cultural traditions of Islam. Al-Shāfi‘ī was anxious to preserve the purity of the *Shari‘ah* and of the language of the Qur‘ān. In his *Risālah*, al-Shāfi‘ī enacted guidelines for *ijtihād* and expounded rules governing the *khaṣṣ* and the *‘aṃm*, the *nāṣikh* and the *mansūkh*, and articulated the principles governing *ijmā‘* and *qiyaṣ*. He set out the rules for relying on the solitary hadith (khabar al-*wāḥid*) and its value in the determination of the *ahkām*. Al-Shāfi‘ī refuted the validity of *istiḥsān* and considered it to be no more than an arbitrary exercise in law-making. Admittedly, al-Shāfi‘ī was not the first to address these matters, but it is widely acknowledged that he brought coherence to *usūl al-fiqh*, which had hitherto remained scattered and unconsolidated.

It will be noted in this connection that the Shi‘ī ‘ulamā‘ have claimed that their fifth Imam, Muḥammad al-Bāqir, and his son and successor, Ja‘far al-Ṣādiq, were the first to write on the subject of *usūl*. According to Abū Zahrah, who has written extensively on the lives and works of the early imams, the Shi‘ī imams have, like many others, written on the subject, but neither of the two imams have written anything equivalent to the *Risālah*. Hence al-Shāfi‘ī’s position and contribution to *usūl al-fiqh* remains unique, and he is rightly regarded as the founder of *usūl al-fiqh*.

The basic outline of the four principal sources of the law that al-Shāfi‘ī spelt out was subsequently accepted by the generality of ‘ulamā‘, although each of the various schools of jurisprudence has contributed to its further development. The Ḥanafis, for example, added *istiḥsān* and custom (*‘urf*) to the *usūl al-fiqh*, and the Mālikīs limited the concept of consensus (*ijmā‘*) to the Medinan consensus only, while the Ḥanbalī approach to the subject closely resembled that of the Mālikīs. Even so, none departed significantly from the basic principles al-Shāfi‘ī articulated.

Broadly speaking, the so-called closure of the gate of *ijtihād* at around the fourth Islamic century did not affect *usūl al-fiqh* in the same way that it might have affected *fiqh* itself. The era of imitation (*taqlīd*) which followed might even have added to the strength and prominence of *usūl al-fiqh* in the sense that the imitators observed, and relied on, the methodology of the *usūl* as a yardstick for the validity for their arguments. Consequently, *usūl al-fiqh* gained universal acceptance and was, in a way, utilised as a means with which to justify *taqlīd*. 
A brief word may be added here regarding the difference between the usul and the maxims of fiqh (al-qawa'id al-fighiyyah), as the two are sometimes confused. The maxims of fiqh refer to a body of abstract rules which are derived from the detailed study of fiqh itself. They consist of theoretical guidelines in the different areas of fiqh such as evidence, transactions, matrimonial law, etc. As such they are an integral part of fiqh and are totally separate from usul al-figh. A large number of legal maxims have been collected and compiled in works known as al-ashbah wa al-nazā'ir; one hundred of these have been adopted in the introductory section (i.e. the first 100 articles) of the Ottoman Majallah. The name ‘al-qawa'id al-fighiyyah’ may resemble the expression usul al-fiqh, but the former is not a part of the latter and the two are totally distinct.

A comparison between usul al-fiqh and usul al-qanūn, on the other hand, will indicate that these two disciplines have much in common, although they are different in some respects. They resemble one another in that both are concerned with the methodology of the law and the rules of deduction and interpretation; they are not concerned with the detailed rules of the law itself. In the case of the law of property, for example, both usul al-fiqh and usul al-qanūn are concerned with the sources of the law of property and not with the detailed rules governing transfer of ownership or regulating the contract of sale. These are subjects which fall within the scope of the law of property, not the methodology of law.

Although the general objectives of usul al-fiqh and usul al-qanūn are similar, the former is mainly concerned with the Qur'ān, Sunnah, consensus and analogy. The sources of Sharī'ah are, on the whole, well-defined and almost exclusive in the sense that a rule of law or a hukm shar'i may not originate outside the general scope of its authoritative sources on grounds, for example, of rationality (‘aqīl) alone, for ‘aqīl is not an independent source of law in Islam. Usul al-fiqh is thus founded in divine ordinances and the acknowledgement of God’s authority over the conduct of man.

Usul al-qanūn, on the other hand, consist mainly of rationalist doctrines, and reason alone may constitute the source of many a secular law. Some of these are historical sources such as Roman Law or British Common Law whose principles are upheld or overruled in light of the prevailing socio-economic conditions of society. The sources of Sharī'ah, on the other hand, are permanent in character and may not be overruled on grounds of either rationality or the requirements of social conditions. There is, admittedly, a measure of
flexibility in *usūl al-fiqh* which allows for necessary adjustments in the law to accommodate social change. But in principle the *Sharī'ah* and its sources can neither be abrogated nor subjected to the limitations of time and circumstance. The role of the jurist and the *mujtahid* in *usūl al-fiqh* is basically to deduce and infer rules that are already indicated in the sources, while this is not necessarily the case with regard to *usūl al-qānūn*. The Parliament or the legislative assembly of a Western state, being the sovereign authority, can abrogate an existing statute or introduce a new law as it may deem fit. The legislative organ of an Islamic state, on the other hand, cannot abrogate the Qur'ān or the Sunnah, although it may abrogate a law which is based on *maṣlahah* or *istihsān*, etc. Abrogation is, on the whole, of limited application to the definite rulings of divine revelation, and basically came to an end with the demise of the Prophet.¹³

Sovereignty in Islam is the prerogative of Almighty God alone. He is the absolute arbiter of values and it is His will that determines good and evil, right and wrong. It is neither the will of the ruler nor of any assembly of men, nor even the community as a whole, that determines the values and the laws which uphold those values. In its capacity as the vicegerent of God, the Muslim community is entrusted with the authority to implement the *Sharī'ah*, to administer justice and to take all necessary measures in the interest of good government. The sovereignty of the people, if the use of the word 'sovereignty' is appropriate at all, is a delegated, or executive, sovereignty (*sultan tanzīlī*) only.¹⁴ Although the consensus or *ijmā* of the community, or of its learned members, is a recognised source of law in Islam, in the final analysis, *ijmā* is subservient to divine revelation and can never overrule the explicit injunctions of the Qur'ān and Sunnah. The role of the ballot box and the sovereignty of the people are thus seen in a different light in Islamic law than they are in Western jurisprudence.

And lastly, unlike its Western counterpart, Islamic jurisprudence is not confined to commands and prohibitions, and far less to commands which originate in a court of law. Its scope is much wider, as it is not only concerned with what a man must do or must not do, but also with what he ought to do or ought not to do, and the much larger area of permissibilities (*mubāḥāt*) where his decision to do or to avoid doing something is his own prerogative. *Usūl al-fiqh* provides guidance in all these areas, most of which remain outside the scope of Western jurisprudence.
II. Two Approaches to the Study of *Usūl al-Fiqh*

Following the establishment of the madhāhib, the 'ulamā' of the various schools adopted two different approaches to the study of *usūl al-fiqh*, one of which was theoretical and the other deductive. The main difference between these approaches is one of orientation rather than substance. Whereas the former is primarily concerned with the exposition of theoretical doctrines, the latter is pragmatic in the sense that theory is formulated in the light of its application to relevant issues. The difference between the two approaches resembles the work of a legal draftsman as compared to the work of a judge. The former is mainly concerned with the exposition of principles whereas the latter tends to develop a synthesis between the principle and the requirements of a particular case. The theoretical approach to the study of *usūl al-fiqh* is adopted by the Shafi’i school and the Mutakallimun, that is the ‘ulamā’ of *kalām* and the Mu’tazilah. The deductive approach is, on the other hand, mainly attributed to the Ḥanafis. The former is known as *usūl al-shafi’iyyah* or *tarīqah al-mutakallimin*, whereas the latter is known as *usūl al-ḥanafīyyah*, or *tarīqah al-fuqahā’*.

Al-Shafi’i was mainly concerned with articulating the theoretical principles of *usūl al-fiqh* without necessarily attempting to relate these to *fiqh* itself. As a methodologist *par excellence*, he established a set of standard criteria which he expected to be followed in the detailed formulation of the rules of *fiqh*. His theoretical exposition of *usūl al-fiqh*, in other words, did not take into consideration their practical application in the area of the *furūʿ*. In addition, the Shafi’is and the Mutakallimun are inclined to engage in complex issues of a philosophical character which may or may not contribute to the development of the practical rules of *fiqh*. In this way, subjects such as the ‘ismah (infallibility, innocence) of the prophets prior to their prophetic mission, and matters pertaining to the status of the individual or his duties prior to the revelation of the *Shari‘ah*, and also logical and linguistic matters of remote relevance to the practical rules of *fiqh*, tend to feature more prominently in the works of the Shafi’is and Mutakallimun than in those of the Ḥanafis. The Ḥanafis have, on the other hand, attempted to expound the principles of *usūl al-fiqh* in conjunction with *fiqh* itself and tend to be more pragmatic in their approach to the subject. In short, the theoretical approach tends to envisage *usūl al-fiqh* as an independent discipline to which *fiqh* must conform, whereas the deductive approach attempts to relate *usūl al-fiqh* more closely to the detailed issues of the *furūʿ al-fiqh*. When, for
example, the Hanafis find a principle of *usūl* to be in conflict with an established principle of *fiqh*, they are inclined to adjust the theory to the extent that the conflict in question is removed, or they try to make the necessary exception in order to reach a compromise.

Three of the most important works that adopt the theoretical approach to *usūl al-fiqh* are *al-Mu'tamad fi Usūl al-Fiqh* by the Mu'tazili scholar, Abū al-Husayn al-Bāṣrī (d. 436 AH), *Kitāb al-Burhān* of the Shāfī'ī scholar Imam al-Ḥaramayn al-Juwayni (d. 487 AH) and *al-Mustasfā* of Imam Abū Ḥāmid al-Ghazālī (d. 505 AH). These three works were later summarised by Fakhr al-Dīn al-Rāzī (d. 606 AH) in his work entitled *al-Maḥsūl*. Sayf al-Dīn al-Āmidī’s larger work, *al-Iḥkām fi Usūl al-Aḥkām*, is an annotated summary of the three pioneering works referred to above.

The earliest Hanafi work on *usūl al-fiqh* is *Kitāb fi al-Usūl* by Abū al-Ḥasan al-Karkhī (d. 340 AH), which was followed by *Usūl al-Jassas* of Abū Bakr al-Rāzī al-Jassas (d. 370 AH). Fakhr al-Īlām al-Bazdawī’s (d. 483 AH) well-known work, *Usūl al-Bazdawī*, is also written in conformity with the Hanafi approach to the study of this discipline. This was followed by an equally outstanding contribution by Shams al-Dīn al-Sarakhsī (d. 490 AH) bearing the title, *Usūl al-Sarakhsī*. A number of other ‘ulamā’ have contributed to the literature in both camps. But a difference of format which marked a new stage of development was the writing of handbooks in the form of *mukhtasars* with a view to summarising the existing works for didactic purposes.

The next phase in the development of literature on *usūl al-fiqh* was marked by the attempt to combine the theoretical and deductive approaches into an integrated whole, which is reflected in the works of both the Shāfī’ī and Hanafi ‘ulamā’ of later periods. One such work which attempted to combine al-Bazdawī’s *Usūl* and al-Āmidī’s *al-Iḥkām* was completed by Muḥṣaffār al-Dīn al-Sā‘ātī (d. 694 AH), whose title *Bādī’ al-Niẓām al-Jāmi’ bayn Usūl al-Bazdawī wa al-Iḥkām* is self-explanatory as to the approach the author has taken. Another equally significant work combining the two approaches was completed by Sa’dr al-Sharī‘ah ‘Abd Allāh ibn Mas‘ūd al-Bukhārī (d. 747 AH) bearing the title *al-Tawfīh*, which is, in turn, a summary of *Usūl al-Bazdawī, al-Maḥṣūl* and the *Mukhtasar al-Muntahā* of the Maliki jurist, Abū ‘Umar ‘Uthmān ibn al-Ḥājib (d. 646 AH). Three other well-known works that have combined the two approaches to *usūl al-fiqh* are *Jami’ al-Jawāmī’* of the Shāfī’ī jurist Tāj al-Dīn al-Subkī (d. 771 AH), *al-Tahrīr* of Kamāl al-Dīn ibn al-Humām al-Hanafi (d. 860 AH), and *Musallām al-Thubīt*
of the Hanafi jurist Muḥibb al-Dīn ibn Ḥabīb al-Shākūr (d. 1119 AH). And finally, this list would be deficient without mentioning Abū Ḥishām ʿAbd al-Shātibi’s *al-Muwafaqāt*, which is comprehensive and perhaps unique in its attention to the philosophy (hikmah) of tashrij and the objectives that are pursued by the detailed rulings of the *Sharīʿah.*

III. Proofs of *Sharīʿah* (al-ʿAdillah al-Sharīʿiyah)

The *ʿadillah sharīʿiyah* and the *ahkām*, that is, the laws or values that regulate the conduct of the *mukallaf*, are the two principal themes of *usil al-fiqh*. Of these two, however, the former is by far the more important as, according to some ‘ulamāʾ, the *ahkām* are derived from the *ʿadillah* and are therefore subsidiary to them. It is perhaps in view of the central importance of these two topics to *usil al-fiqh* that al-Amidi defines the latter as the science of the ‘proofs of figh (ʿadillah al-fiqh) and the indications that they provide in regard to the ahkām of the *Sharīʿah*.’

A *ḥukm* (pl. *ahkām*) means proving or establishing one thing in respect of another, which may either be affirmative or negative. Thus when we say that the water is or is not cold, or that the sun has or has not risen, we have issued a *ḥukm* in each case. A *ḥukm* in its juridical sense is used mainly to establish a certain value, such as an obligation (wujūb), recommendation (nabd), or a command or prohibition in respect of the act of legally competent person.

Literally, *dalil* means guide, and it is used interchangeably with proof, indication or evidence. Technically, it is an indication in the sources from which a practical rule of *Sharīʿah*, or a *ḥukm*, is deduced. The *ḥukm* so obtained may be definitive (qafī) or it may be speculative (zanni) depending on the nature of the subject, the clarity of the text, and the value which it seeks to establish. In the terminology of *usil al-fiqh*, *ʿadillah sharīʿiyah* refer to four principal proofs or sources of the *Sharīʿah*, namely the Qur’ān, *Sunnah*, consensus and analogy. *Dalil* in this sense is synonymous with *āṣl*, hence the four sources of *Sharīʿah* are known both as *ʿadillah* and *usil*. There are a number of *āyāt* in the Qur’ān which identify the sources of *Sharīʿah* and their order of priority. But one passage in which all the principal sources are indicated occurs in *ṣūra al-Nisā* (4:58–59): ‘O you believers! Obey God and obey the Messenger and those of you who are in charge of affairs. If you have a dispute concerning any matter, refer it to God and to the Messenger.’
‘Obey God’ in this āyāh refers to the Qur’ān, and ‘Obey the Messenger’ refers to the Sunnah. Obedience to ‘those who are in charge of affairs’ is held to be a reference to ījāmā’, and the last portion of the āyāh which requires the referral of disputes to God and to the Messenger authorises qiyyās, as qiyyās is essentially an extension of the injunctions of the Qur’ān and Sunnah. The rationale or the effective cause of qiyyās may be clearly indicated in these sources or it may be identified by way of inference (istinbāt). In either case, qiyyās essentially consists of the discovery of a hukm which is already indicated in the divine sources.¹⁹

Some fuqahā’ have drawn a distinction between dalil and amārah (lit. sign or allusion) and apply dalil to the kind of evidence that leads to a definitive ruling or that which leads to positive knowledge (‘ilm). Amārah, on the other hand, is reserved for evidence or indications that only lead to a speculative ruling.²⁰ In this way, the term ‘dalil’ would only apply to definitive proofs, namely the Qur’ān, Sunnah and ījāmā’, and the remaining proofs, which comprise a measure of speculation, such as qiyyās, istihsān, etc., would fall under the category of amārah.

The proofs of Shari’ah have been further divided into transmitted proofs (adillah naqīyyah) and rational proofs (adillah ‘aqliyyah). The authority of the transmitted proofs is independent of their conformity or otherwise to the dictates of reason, although, as we shall elaborate later, most of the transmitted proofs can also be justified rationally. However, the authority and the binding force of the Qur’ān, Sunnah and ījāmā’ are independent of any rational justification that might exist in their favour. To these are added two other transmitted proofs, namely the rulings of the Companions, and the laws revealed prior to the advent of Islam (shari’ah man qablanā).²¹

The rational proofs are, on the other hand, founded in reason and need to be rationally justified. They can only be accepted by virtue of their rationality. Qiyyās, istihsān, istiṣlāh and istishāb are basically all rationalist doctrines although they are in many ways dependent on the transmitted proofs. Rationality alone is not an independent proof in Islam, which is why the rational proofs cannot be totally separated from the transmitted proofs. Qiyyās, for example, is a rational proof, but it also relies on the transmitted proofs to the extent that qiyyās, in
order to be valid, must be founded on an established *hukm* of the Qur'an, Sunnah or *ijma*.* However, the issue to which *qiyyas* is applied (i.e. the *far‘*) must have an *‘ila‘* (effective cause) in common with the original *hukm*. To establish the commonality of the *‘ila‘* in *qiyyas* is largely a matter of opinion and *ijtihad*. *Qiyyas* is therefore classified under the category of *adillah ‘aqliyyah*. As already indicated, the division of proofs into the transmitted and rational categories is not mutually exclusive as neither of them can function in total isolation: utilising the transmitted proofs for or against something necessarily relies on reason, which is the human tool for comprehension. Similarly, an opinion or *ra‘yi* can be utilised as the basis for a *hukm* when it is supported by a transmitted proof.

As noted above, the *adillah shar‘iyyah* are on the whole in harmony with reason. This will be clear from the fact that the *Shar‘ah* in all its parts is addressed to the *mukallaf*, that is, the competent person who is in possession of his faculty of reason. The *Shar‘ah* as a whole does not impose any obligation that contradicts the requirements of *‘aql*. Since the criterion of obligation (*taklif*) is *‘aql*, and without it all legal obligations fall to the ground, it follows that a *hukm shar‘i* which is abhorrent to *‘aql* is of no consequence.  

The *adillah shar‘iyyah* have been further classified into *mustaqillah* and *muqayyadah*, that is, independent and dependent proofs respectively. Each of the first three sources of the *Shar‘ah* is an independent *asl*, or *dalil mustaqil*, that is, a proof in its own right. *Qiyyas*, on the other hand, is an *asl* or *dalil muqayyad* in the sense, as indicated above, that its authority is derived from one or other of the three independent sources. The question may arise as to why *ijmda* has been classified as an independent proof despite the fact that it is often in need of a basis (*sanad*) in the Qur’an or the Sunnah. The answer to this is that *ijmda* is in need of a *sanad* in the divine sources for its formulation in the first place. However, once the *ijmda* is concluded, it is no longer dependent on its *sanad* and it becomes an independent proof. Unlike *qiyyas*, which continues to be in need of justification in the form of a *‘ila‘*, a conclusive *ijmda* is not in need of justification and is therefore an independent *asl*.  

Another classification of *adillah* is their division into definitive (*qat‘i*) and speculative (*zanni*) proofs. This division of *dalil shar‘i* takes consideration of the proofs of *Shar‘ah* not only in their entirety but also in respect of the detailed rules which they contain. In this way, the Qur’an, Sunnah and *ijmda* are definitive proofs in the sense that they are decisive and binding. However, each of these sources contains
speculative rules which are open to interpretation. A *dalīl* in this sense is synonymous with a *ḥukm*. A *dalīl* may be *qāfī* in respects of both transmission (*riwāyah*) and meaning (*dalalah*). The clear injunctions of the Qurʾān and *ḥadīth* *mutawātir* are all *qāfī* in respect of both transmission and meaning. We shall have occasion later to elaborate on this subject in the context of the characteristic features of Qurʾānic legislation. Suffice it here to say that the Qurʾān is authentic in all its parts, and therefore of proven authenticity (*qāfī al-thubūt*). The solitary, or *āḥād, ḥadīth* on the other hand is of speculative authenticity and therefore falls into the category of speculative proofs.24 Similarly, a ruling of *ijmāʾ* may have reached us by continuous testimony (*tawātīr*), in which case it will be definitely proven (*qāfī al-thubūt*). But when *ijmāʾ* is transmitted through solitary reports, its authenticity will be open to doubt and therefore *zānī al-thubūt*.

And lastly, the *adillah* are classified under the following three categories: proofs about which there is unanimous agreement, and these include the Qurʾān and Sunnah. Secondly, proofs about which the vast majority (*jumhūr*) are in agreement, and these include general consensus (*ijmāʾ*) and analogy (*qiyyās*). The Nazzām faction of the Muʿtazilah and some Khārijites have rejected *ijmāʾ*, whereas the Zahirīs and the Jaʿfārī Shiʿah have disputed the authority of *qiyyās*. Thirdly, proofs about which the ‛ulamāʾ have generally disagreed, and this category includes virtually all the remaining varieties of rational proofs, such as juristic preference (*istiḥsān*), the consideration of public interest (*istiṣlah*), the presumption of continuity (*istiṣḥāb*), custom (*ʻurf*), revealed laws prior to the *Shari`ah* of Islam, and the verdict (*fatwā*) of the Companions. Some ‛ulamāʾ have recognised these as valid proofs and others have not. Even among those who accept the validity of these proofs in principle, there are differences in the degree of prominence they have given them, and in the range of conditions they might have proposed in each case in order to verify the validity and proper application of a particular proof.25

The text of the Qurʾān or the *ḥadīth* may convey a command or a prohibition. According to the general rule, a command (*amr*) conveys obligation (*waṣyūb*), and prohibition (*nahy*) conveys *tahrim* unless there is evidence to suggest otherwise. It is in the light of the wording of the text, its subject-matter and other supportive evidence that the precise *sharīʿi* value of a textual ruling can be determined. A command may thus imply a recommendation (*nadḥ*) or mere permissibility (*ibāḥah*) and not *waṣyūb*. Likewise, a prohibition (*nahy*) in the Qurʾān or the *Sunnah* may be held to imply abomination (*karāḥah*) and not
necessarily *tahrīm*. Consequently, when the precise value of the *qaṭī* and the *zannī* on the scale of five values is not self-evident, it is determined by supportive evidence that may be available in the sources, or by *ijtihād*. The *qaṭī* of the Qur'ān and Sunnah is basically not open to interpretation. The scope of interpretation and *ijtihād* is consequently confined to the *zannī* proofs alone.

### NOTES

6. Ibid., pp. 16–17.
12. Two well-known works both bearing the title *al-Asbāḥ wa al-Nazāʾir* are authored by Jalāl al-Dīn al-Suyūṭī and Ibn Nujaym al-Hanafi respectively.
The First Source of Shari'ah: the Qur'ān

Being the verbal noun of the root word qara'a (to read), 'Qur'ān' literally means 'reading' or 'recitation'. It may be defined as 'the book containing the speech of God revealed to the Prophet Muḥammad in Arabic and transmitted to us by continuous testimony, or tawātur'. It is a proof of the prophecy of Muḥammad, the most authoritative guide for Muslims, and the first source of the Shari'ah. The 'ulamā’ are unanimous on this, and some even say that it is the only source and that all other sources are explanatory to the Qur'ān. The salient attributes of the Qur'ān that are indicated in this definition may be summarised as five: it was revealed exclusively to the Prophet Muḥammad; it was put into writing; it is all mutawātir; it is the inimitable speech of God; and it is recited in salah. The revelation of the Qur'ān began with sūra al-'Alaq (96:1) starting with the words, 'Read in the name of your Lord'

اقرأ بأسم ربك

and ending with the āyah in sūra al-Mā'idah (5:3): 'Today I have perfected your religion for you and completed my favour toward you, and chosen Islam as your religion.'

اليوم أكملت لكم دينكم وأتممت عليكم نعمتي

ورضيت لكم الإسلام دينا
Learning and religious guidance, being the first and the last themes of the Qur'anic revelation, are thus the favour of God upon mankind.

The Qur'an itself indicates that it was sent down and revealed in three successive stages. The first descent was to Lawh al-Mahfuz (the 'guarded tablet') in a manner and time that is not known: ‘Nay it is a glorious Qur'an in a guarded tablet’ (al-Buruj, 85:21—22).

The second descent was to the lowest heaven, described as bayt al-‘izzah ('the abode of honour') and this occurred in the night which the Qur'an names Laylah al-Qadr: ‘Truly We revealed it on the Night of Majesty’ (al-Qadr, 97:1).

And then we read in another place ‘Truly We revealed it on a blessed night’ (al-Dukhān, 44:3).

Both these passages suggest that the second stage of the revelation occurred in a single night, which is further specified as one of the last ten nights in the month of Ramadān. Thus it was only in the last of the three stages that the Qur'an was revealed to mankind gradually, in about twenty-three years, through the mediation of the archangel Gabriel: ‘The Faithful spirit brought it down on your heart that you may be a warner’ (al-Shu'ārā'ā, 26: 193—194).

There are 114 sūras and 6235 ʿayāt of unequal length in the Qur'an. The shortest of the sūras consist of four and the longest of 286 ʿayāt. Each chapter has a separate title. The longest sūras appear first and the sūras become shorter as the text proceeds. Both the order of the ʿayāt within each sūra, and the sequence of the sūras, were re-arranged and finally determined by the Prophet in the year of his demise. According to this arrangement, the Qur'an begins with sūra al-ʿĀdīm and ends with sūra al-Nās.2

The contents of the Qur'an are not classified subject-wise. The ʿayāt on various topics appear in unexpected places, and no particular order
can be ascertained in the sequence of its text. To give just a few examples, the command concerning salah appears in the second sura, in the midst of other ayt which relate to the subject of divorce (al-Baqarah, 2:228-248). In the same sura, we find rules which relate to wine-drinking, apostasy and war, followed by passages concerning the treatment of orphans and the marriage of unbelieving women (al-Baqarah, 2:216-221). Similarly, the ayt relating to the pilgrimage of hajj occur both in sura al-Baqarah (2:196-203) and sura al-Hajj (22:26-27). Rules on marriage, divorce and revocation (rij'ah) are found in suras al-Baqarah, al-Talâq, and al-Nisâ’. From this a conclusion has been drawn that the Qur’an is an indivisible whole, and a guide for belief and action that must be accepted and followed in its entirety. Hence any attempt to follow some parts of the Qur’an and abandon others will be totally invalid. This is in fact the purport of the Qur’anic text (al-Ma’idah, 5:49) where the Prophet has been warned: ‘Beware of them [i.e. the unbelievers] lest they take you away from a part of that which God has sent down to you.’

The Qur’an consists of manifest revelation (wahy zahir), which is defined as communication from God to the Prophet Muhammad, conveyed by the angel Gabriel, in the very words of God. This the Prophet received in a state of wakefulness, and thus no part of the Qur’an originated in internal inspiration or dreams. Manifest revelation differs from internal revelation (wahy batin) in that the latter consists of the inspiration (ilham) of concepts only: God inspired the Prophet and the latter conveyed the concepts in his own words. All the sayings, or hadith, of the Prophet fall into the category of internal revelation and, as such, are not included in the Qur’an. A brief word may be added here concerning hadith qudsi. In this variety of hadith, the Prophet narrates a concept directly from God which may consist either of wahy zahir or wahy batin, but the latter is more likely. Hadith qudsi differs from the other varieties of hadith in form only. The Prophet himself has not distinguished hadith qudsi from other hadith: it was in fact introduced as a separate category by the ‘ulamâ’ of hadith at around the fifth century Hijrah. Hadith in all of its varieties consists of divine inspiration which is communicated in the words of the Prophet. No hadith may be ranked on equal footing with the Qur’an. Thus salah cannot be performed by reciting the hadith, nor is the recitation of hadith considered of the same spiritual merit as reciting
the Qur'ān. The Qur'ān may not be read nor touched by anyone who is not in state of purity (tahārah), but this is not a requirement with regard to hadīth qudsī.

The Qur'ān explicitly states that all of it is communicated in pure and clear Arabic (al-NAhl, 16:30). Although the 'ulamā' are in agreement that words of non-Arabic origin occur in the Qur'ān, these are, nevertheless, words which were admitted and integrated into the language of the Arabs before the revelation of the Qur'ān. To give just a few examples, words such as qisṭās (scales — occurring in the sūra al-Isrā', 17:35), ghassāq (intensely cold — in sūra al-Naba' (78:25) and sijjl (baked clay — in al-Hijr, 15:74) are of Greek, Turkish and Persian origins respectively. But this usage is confined to odd words; a phrase or a sentence of non-Arabic origin does not occur in the Qur'ān. Since the Qur'ān consists of manifest revelation in Arabic, translations of the Qur'ān into another language, or its commentaries whether in Arabic or in other languages, are not a part of the Qur'ān. However, Imam Abū Ḥanīfah has held the view that the Qur'ān is the name for a meaning only and, as such, salah may be performed in its Persian translation. But the disciples of Abū Ḥanīfah have disagreed with this view and it is reported that Abū Ḥanīfah himself reversed his initial ruling, and this is now considered to be the correct view of the Ḥanafī school.

The Prophet himself memorised the Qur'ān, and so did his Companions. This was, to a large extent, facilitated by the fact that the Qur'ān was revealed piecemeal over a period of twenty-three years in relation to particular events. The Qur'ān itself explains the rationale of graduality (tanjīm) in its revelation as follows: ‘The unbelievers say, why has not the Qur'ān been sent down to him [Muḥammad] all at once. Thus [it is revealed] that your hearts may be strengthened, and We rehearse it to you gradually, and well-arranged’ (al-Furqān, 25:32).

وقال الذين كفروا لولا نزل عليه القرآن جملة واحدة
كذلك لثبت به فوادك ورتلئاه ترتئلا

Elsewhere we read in the text: ‘It is a Qur'ān We have divided into parts in order that you may recite it to people at intervals: We have revealed it by stages’ (al-Isrā', 17:106).

وَقَرَأَا فِرْقَانَاهُ لِتَقْرَأُهُ عَلَى النَّاسِ عَلَى مِكْثِ وَرَتَلِئِهْ تَرَتِئِلا
Graduality in the revelation of Qur‘an afforded the believers an opportunity to reflect on it and to retain it in their memories. Revelation over a period of time also facilitated continuous contact between the believers and a renewal of spiritual strength, so that the hostility of the unbelievers toward the new faith did not weaken the hearts of the Muslims. Furthermore, in view of the widespread illiteracy of the Arabs at the time, had the Qur‘an been revealed all at once, they would have found it difficult to understand. Attention was thus initially focused on the rejection of false beliefs and superstitions. This was a preparatory stage for the next phase of teaching, which was concerned with the basic dogma and value structure of Islam; this was followed by the rules of ‘ibādāt leading in turn to a fuller exposition of the rules of mu‘āmalāt. But this is only a broad description of the thematic aspect of tanjīm (also known as tadāruj) as we should note that a considerable portion of the Qur‘an was revealed in response to questions that the Prophet was being asked from time to time, and also the events that were experienced throughout the years of the revelation. Graduality provided the opportunity to rectify any errors that the Muslims, or even the Prophet himself, might have committed and lessons that could be learned from them. Lastly, the phenomenon of nāskh (abrogation), that is abrogation of an earlier ruling at a later stage owing to change of circumstance, is also connected with the gradual unfolding of the Qur‘an, but we shall have more to say on this subject later. Qur‘ānic legislation concerning matters which touched the lives of the people was therefore not imposed all at once. It was revealed piecemeal so as to avoid hardship to the believers. The ban on the consumption of alcohol affords an interesting example of the Qur‘ānic method of graduality in legislation, and throws light on the attitude of the Qur‘ān to the nature and function of legislation itself. Consumption of alcohol was, apparently, subject to no restriction in the early years. Later, the following Qur‘ānic passage was revealed in the form of a moral advice: ‘They ask you about alcohol and gambling. Say: in these there is great harm and also benefit for the people, but their harm far outweighs their benefit’ (al-Baqarah; 2:219).
Then offering prayers while under the influence of alcohol was prohibited (al-Nisā’, 4:43). Finally, a total ban on wine-drinking was imposed (al-Ma’idah, 5:90–91) and both alcohol and gambling were declared to be ‘works of the devil...The devil wants to sow enmity and rancour among you’.

This shows the gradual tackling of problems as and when they arose.

The ‘ulamā’ are in agreement that the entire text of the Qur’ān is mutawatir, that is, its authenticity is proven by universally accepted testimony. It has been retained both in memory and as a written record throughout the generations. Hence nothing less than tawātur is accepted as evidence in establishing the authenticity of the variant readings of the Qur’ān. Thus the variant reading of some words in a few āyāt, attributed to ‘Abd Allāh ibn Mas‘ūd, for example, which is not established by tawātur, is not a part of the Qur’ān. In the context of the penance (kaffarah) for a false oath, for example, the standard text provides this to be three days of fasting. But Ibn Mas‘ūd’s version has it as three consecutive days of fasting. Since the additional element (i.e. consecutive) in the relevant āyah in sūra al-Mā’idah (5:92) is not established by tawātur, it is not a part of the Qur’ān and is, therefore, of no effect. Similarly, ‘Abd Allāh ibn Zubayr added the phrase ‘wa-yusta’ina bi-Allāh āla ma ṣabahum’ to the āyah in sūra Al ‘Imrān (3:104) which accordingly read: ‘Let there arise from among you a group that invite others to do good work, enjoining what is right and forbidding what is wrong [and seek help from God when they are afflicted with sufferings]. They shall indeed be granted success.’
This is not established by conclusive testimony (tawātūr) either, and it is therefore not part of the Qurʾān. When ‘Umar ibn al-Khaṭṭāb heard this, he asked: ‘Is it his [Ibn Zubayr’s] recitation of the text or his interpretation?9 Some commentators maintain that it was an interpretation. There were many other instances of variant readings in different Arabic dialects. Seven such dialects are commonly known to have existed and words were often read with different vowelling, or declensions, that affected the grammatical position and sometimes also the meaning of the text. The variant readings are sometimes adopted as a basis of interpretation. Note, for example, the last word in the āyāh on the punishment of theft (al-Maʾīdah, 5:38) which is ‘aydiyahumā (their hands) in the standard reading, but which ‘Abd Allāh ibn Masʿūd read to be ‘aymanahumā (their right hands). The ‘ulamāʾ and commentators have generally retained the first but adopted the second only within the meaning of the first.9 The Ḥanafīs maintain that the unproven text may be acted upon and used as speculative evidence in the interpretation of the Qurʾān because the Companions are deemed to be upright and their readings should be given credit. The Shāfīʿīs and Mālikīs have held that since these portions are claimed to be parts of the Qurʾān and remain unproven, they are rejected altogether.

During the lifetime of the Prophet, the text of the Qurʾān was preserved not only in memories, but also in inscriptions on such available materials as flat stones, wood and bones, which would explain why it could not have been compiled in a bound volume. Initially, the first Caliph, Abū Bakr, collected the Qurʾān soon after the battle of Yamāmah, which led to the death of at least seventy of the memorisers of the Qurʾān. Zayd ibn Thābit, the scribe of the Prophet, was employed in the task of compiling the text, which he accomplished between 11 and 14 AH. But several versions and readings of this edition soon crept into use. Hence the third Caliph, ‘Uthmān, once again utilised the services of Zayd to verify the accuracy of the text and compiled it in a single volume. All the remaining variations were then destroyed. As a result, only one authentic text has remained in use to this day.10

The Qurʾān was revealed in two distinct periods of the Prophet’s mission in Mecca and Medina respectively. The larger part of the Qurʾān, that is nineteen out of the total of thirty parts, was received during the first twelve and a half years of the Prophet’s residence in Mecca. The remainder of the Qurʾān was received after the Prophet’s migration to Medina over a period of just over nine and a half years.11
The Meccan part of the Qur'an laid down the basic principles of law and religion that were elaborated in Medina. This is the conclusion al-Shāṭiʿī wrote in al-Muwāfaqāt (III, 104) saying that a closer examination of the Medinan portions of the Qur'an reveals that they generally supplement the basic guidelines that were revealed earlier in Mecca.

With reference to the five essential values of Islam, that is, religion, life, intellect, family and property, al-Shāṭiʿī wrote that all these were in principle enunciated in the Meccan portions of the Qur'an. In addition to the essentials of belief and monotheism, matters of worship, and disputation with the unbelievers etc., the Meccan Qur'an also contained legal rulings on the permitted and forbidden varieties of food, the prohibition of murder and infanticide, safeguarding the property of orphans, the prevention of injustice (zulm), giving due measurement and weight in commercial transactions and a variety of other rulings. Most of the references to bygone nations and prophets, their experiences and the lessons they taught occur in the Meccan part of the Qur'an, with the obvious purpose of strengthening the resolve of the Prophet and his early Companions in the propagation of the new faith. But the Medinan part of the Qur'an also comprised legal rules and regulated the various aspects of life in the new environment of Medina. Since the Medinan period signified the formation of the ummah and the nascent Islamic state, the Qur'anic emphasis shifted to principles regulating the political, legal, social and economic life of the new community. During this period, Islam expanded to other parts of Arabia, and the Qur'anic response to the need for rules to regulate matters of war and peace, the status and rights of the conquered people, the organisation of the family and principles of government feature prominently in the Medinan part of the Qur'an. The knowledge of the Meccan and the Medinan contents of the Qur'an gives one an insight into the context and circumstances in which the āyāt were revealed; it is particularly relevant to the understanding of the incidence of abrogation (naskh) in the Qur'an. Distinguishing between the abrogating (al-nāṣikh) and the abrogated (al-mansūkh) portions of the text depends on determining the chronological order in the revelation of the relevant āyāt. Similarly, most of the general ('āmm) rulings of the text have been qualified either by the text itself or by hadith. Thus the knowledge of the Meccan and Medinan parts of the revelation facilitates a better understanding of some of the characteristic features of the Qur'anic legislation.

A sūra is considered to be Meccan if its revelation began in Mecca,
even if it contained āyāt that were later revealed in Medina. The Qurʾān consists of eighty-five Meccan and twenty-nine Medinan sūras. The differences of content and style that are observed in each are reflective of the prevailing circumstances of each period. Since Muslims were in the minority in Mecca, the Meccan āyāt may thus be especially meaningful to Muslims living in a dominantly non-Muslim environment, whereas the Medinan āyāt may take for granted the presence of the sovereign authority of the Islamic state. The Meccan sūras are generally short but rhythmical and intense in their emotional appeal to the pagan Arabs, whereas the Medinan sūras are detailed, and convey a sense of serenity that marks a difference of style in the revelation of the Qurʾān.¹³

The distinction between the Meccan and Medinan parts of the Qurʾān is based on the information that is provided mainly by the Companions and the following generation of the ‘successors’: the Prophet himself has said nothing on the subject. The distinction is also facilitated considerably by internal evidence in the Qurʾān, such as the themes themselves: āyāt about warfare were, for example, revealed only after the Hijrah, but references to Abū Lahab in sūra 111 and to the battle of Badr (Āl-‘Imrān, 3:123) indicate the Meccan origin of the sūras in which they occur. Similarly the form of address is often different in the two parts. The frequent address, ‘O you who believe’ and ‘O people of the Book’ indicates a Medinan origin, while ‘O people’ or ‘O mankind’ are typically Meccan. There are nineteen sūras in the Qurʾān that begin with abbreviated letters (al-muqāṭṭatāt); all of them are known to be Meccan except two, namely al-Baqarah and Āl Ḥamīd. All references to the munāfīqūn (hypocrites) are Medinan and all sūras that contain a sajdah, that is, an order to prostrate, are Meccan. The distinction between the Meccan and Medinan portions of the text is on the whole a well-established feature of the Qurʾān, which is normally indicated next to the title of each sūra, and the best evidence of such distinction is internal evidence in the Qurʾān itself.¹⁴

With regard to distinguishing the Meccan from the Medinan portions of the Qurʾān, the ‘ulama’ have applied three different criteria. (1) The time of revelation, meaning that the part of the Qurʾān which was revealed prior to the Prophet’s migration to Medina is classified as Meccan, and the remaining part, which was revealed after this occasion, is identified as Medinan regardless of the locality in which it was received. In this way the āyāt which were actually revealed in Mecca after the Year of Victory (‘ām al-fath) or during the Farewell
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Pilgrimage (hajj al-widā‘) are accounted as Medinan. This is considered to be the most preferred of the three methods under discussion. (2) The place of revelation, which means that all the āyāt that were revealed while the Prophet was in Mecca, or its neighbouring areas, such as Minā, ‘Arafa and Hūdaybiyyah, are classified as Meccan, and āyāt that were actually revealed in Medina or its surrounding areas, such as ‘Uḥud and Qubā‘, are classified as Medinan. This criterion is, however, not conclusive in that it leaves out the āyāt that were received while the Prophet was travelling to places such as Jerusalem or Tabuk. (3) The nature of the subject-matter and audience, which means that all the parts of the Qur‘ān that are addressed to the people of Mecca are classified as Meccan and those which are addressed to the people of Medina are classified as Medinan. In this way all the passages which begin with phrases such as ‘O mankind’ or ‘O people’ are Meccan and those which open with phrases such as ‘O believers’ are typically Medinan.15

Meccan āyāt are also recognised by the occurrence therein of the phrase, yâ bānî Ādāma (O Children of Adam), narratives and information about previous prophets, and the occurrence of the word kalla (not at all, certainly not) indicating argumentation with disbelievers on matters of belief in God, the prophethood of Muḥammad, belief in the Hereafter, moral teachings, denunciation of acts of oppression and injustice, and the occurrence in the text of oath-like expressions (aqsām). Medinan passages are distinguished by references to the people of scripture, permission for jihād, references to the muḥājinūn and the ansār (Emigrants and Helpers) and legislation on a variety of themes.

In the sense that legal material occupies only a small portion of the bulk of its text, the Qur‘ān is not a legal or a constitutional document. The Qur‘ān calls itself huda, or guidance, not a code of law. Just as it describes itself by such other names as al-Kitāb, al-Wahy, al-Dhikr, al-Furqān, al-Qaṣaṣ and al-Tanzil, that is, the Book, the Revelation, the Reminder, the Distinguisher, the Narratives and the Descended respectively. The name Qur‘ān and its meaning occur in the following passage: ‘It is for Us to collect and promulgate it. When We have recited it, then follow its recital.’ (al-Qiyāmah, 75:17–18).

إن علينا جمعه وقراءته فإذا قرأناه فاتبع قراءانه

Out of over 6,200 āyāt, less than one-tenth relate to law and jurisprudence, while the remainder are largely concerned with matters of belief and morality, the five pillars of the faith and a variety of other
themes. Its ideas of economic and social justice, including its legal contents, are on the whole subsidiary to its religious call.

The legal or practical contents of the Qur'an (al-ahkām al-'amaliyyah) constitute the basis of what is known as fiqh al-Qur'an, or the corpus juris of the Qur'an. There are two types of practical rules in the Qur'an: those pertaining to 'ibādāt and those pertaining to mu'amalāt. An āyah is classified as one of the āyāt al-ahkām (legal verses) if it contains a ruling or hukm, even if this occurs in a non-legal context. Those who have applied this method, such as the Mālikī jurist Ibn al-'Arabī, were able to identify a large number of legal āyāt. Ibn al-'Arabī thus identified over eight-hundred such āyāt in the Holy Book. But those who classified a legal āyah only when it occurred in a legal context have identified a smaller number of āyāt as falling into the legal category. Among the numerous Qur'anic commentaries, three are well-known to be comprehensive on āyāt al-ahkām. These are Ahmad ibn 'Ali al-Rāzi al-Jassās (d. 370 AH), Ahkām al-Qur'an, Abū Bakr Muḥammad ibn 'Abd Allāh al-'Arabī (d. 543 AH), Ahkām al-Qur'an, and Abū ʿAbd Allāh Muḥammad ibn Ahmad al-Qurtūbī (d. 671 AH), al-Jamiʿ li-Āyāt al-Ahkām. Unlike the former two, which are not free of scholastic bias in favour of the Ḥanafi and Mālikī schools respectively, the last one is generally free of scholastic bias despite the fact that al-Qurtūbī was a follower of the Mālikī school.

The āyāt al-ahkām are of three types: those which relate to belief, known as āhkām i'tiqādiyyah, those which relate to morality, known as āhkām khalqīyyah, and the practical legal rules, known as āhkām 'amaliyyah. This last is then sub-divided into the two main categories of 'ibādāt and mu'amalāt. There are close to 350 legal āyāt in the Qur'an, most of which were revealed in response to problems that were actually encountered. Some were revealed with the aim of repealing objectionable customs, such as infanticide, usury, gambling and unlimited polygamy. Others laid down penalties with which to enforce the reforms that the Qur'an had introduced. But on the whole, the Qur'an confirmed and upheld the existing customs and institutions of Arab society and only introduced changes that were deemed necessary. There are an estimated 140 āyāt in the Qur'an on devotional matters such as ṣalāh, legal alms (zakāh), šiyām (fasting), the Pilgrimage of hajj, jihād, charities and the taking of oaths and penances (kaffārāt). Another seventy āyāt are devoted to marriage, divorce, the waiting period of ʿiddah, revocation (ni'ah), dower, maintenance, custody of children, fosterage, paternity, inheritance and bequest. Rules concerning civil and commercial
transactions such as sale, lease, loan and mortgage constitute the subject of another seventy āyāt. There are about thirty āyāt on crimes and penalties such as murder, highway robbery (hiraḥah), adultery and false accusation (gadhf). Another thirty āyāt speak of justice, equality, evidence, consultation, and the rights and obligations of citizens. About twenty-five āyāt relate to international relations regulating relations between Muslims and non-Muslims. There are about ten āyāt relating to economic matters regulating relations between the poor and the rich, workers' rights and so on.17 It will be noted, however, that the jurists and commentators are not in agreement over these figures, as calculations of this nature tend to differ according to one's understanding of, and approach to, the contents of the Qur'ān.18

I. Characteristics of Qur'ānic Legislation

We have already described the phenomenon of graduality (tanjīm) in Qur'ānic legislation, its division into Meccan and Medinan, and also the fact that the Qur'ān has been revealed entirely in pure Arabic. In the discussion below, I have also included ratiocination (ta'li'l) among the characteristic features of Qur'ānic legislation, despite the fact that the Qur'ān specifies the effective cause or the rationale of only some of its laws. The Qur'ān is nevertheless quite expressive of the purpose, reason, objective, benefit, reward and advantage of its injunctions. Since the Qur'ān addresses the conscience of the individual with a view to persuading and convincing him of the truth and the divine origin of its message, it is often combined with allusions to the benefit that may accrue from the observance of its commands or the harm that is prevented by its prohibitions. This is a feature of the Qur'ānic legislation that is closely associated with ratiocination (ta'li'l) and provides the mujtahid with a basis on which to conduct further enquiry into ta'li'l. However, of all the characteristic features of Qur'ānic legislation, its division into qafī and zanni is perhaps the most significant and far-reaching, as it relates to almost any aspect of enquiry into Qur'ānic legislation. I shall therefore take up this subject first.

I.1 The Definitive (Qafī) and the Speculative (Zanni)

A ruling of the Qur'ān may be conveyed in a text which is either unequivocal and clear, or in language that is open to different interpretations. A definitive text is one which is clear and specific; it has
only one meaning and admits no other interpretations. An example of this is the text on the entitlement of the husband in the estate of his deceased wife: ‘In what your wives leave, your share is a half, if they leave no child’ (al-Nisā’, 4:12).

Other examples are: ‘The adulterer, whether a man or a woman, flog them each a hundred stripes’ (al-Nūr, 24:2)

and ‘Those who accuse chaste women of adultery and fail to bring four witnesses [to prove it], flog them eighty stripes’ (al-Nūr, 24:4).

The quantitative aspects of these rulings, namely one half, one hundred and eighty, are self-evident and therefore not open to interpretation. The rulings of the Qur’ān on the essentials of the faith such as salāḥ and fasting, the specified shares in inheritance and the prescribed penalties, are all gaf‘i: their validity may not be disputed by anyone; everyone is bound to follow them; and they are not open to ijtihād.

The speculative Ḥyāt of the Qur’ān are, on the other hand, open to interpretation and ijtihād. The best interpretation is that which can be obtained from the Qur’ān itself, that is, by looking at the Qur’ān as a whole and finding the necessary elaboration elsewhere in a similar or even a different context. The Sunnah is another source that supplements the Qur’ān and interprets its rulings. When the necessary interpretation can be found in an authentic hadith, it becomes an integral part of the Qur’ān and both together carry a binding force. Next in this order come the Companions, who are particularly well-qualified to interpret the Qur’ān in the light of their close familiarity with its text, the surrounding circumstances, and the teachings of the Prophet.19

An example of the zamān in the Qur’ān is the text that reads: ‘Prohibited to you are your mothers and your daughters’ (al-Nisā’, 4:23).
This text is definitive in regard to the prohibition of marriage with one’s mother and daughter and there is no disagreement on this point. However, the word banātukum (‘your daughters’) could be taken literally, which would be a female child born to a person either through marriage or through zinā, or for its juridical meaning. In the latter sense ‘banātukum’ can only mean a legitimate daughter.

The jurists are in disagreement about which of these meanings should be read into the text. The Hanafis have upheld the first of the two meanings and have ruled on the prohibition of marriage to one’s illegitimate daughter, whereas the Shāfi‘īs have upheld the second. According to this interpretation, marriage with one’s illegitimate daughter is not forbidden as the text only refers to a daughter through marriage. It would follow from this that the illegitimate daughter has no right to inheritance, and the rules of guardianship and custody do not apply to her.

In a similar vein, the ‘ulama’ have differed on the definition of futile, as opposed to deliberate, oaths which occur in sūra al-Māʿidah (5:89): ‘God will not call you to account for what is futile in your oaths, but He will call you to account for your deliberate oaths.’

The text then continues to spell out the expiation, or kaffārah, for deliberate oaths, which consists of either feeding ten hungry persons who are in need, or setting a slave free, or fasting for three days. According to the Hanafis, a futile oath is one which is taken on the truth of something that is suspected to be true but the opposite emerges to be the case. The majority have, on the other hand, held it to mean taking an oath which is not intended, that is, when taken in jest without any intention. Similar differences have arisen concerning the precise definition of what may be considered as a deliberate oath (yamin al-muʿaqadah). There is also disagreement about whether the three days of fasting should be consecutive or could be three separate days. Hence the text of this āyah, although definitive on the basic requirement of kaffārah for futile oaths, is speculative in regard to the precise terms of the kaffārah and the manner of its implementation.

To give another example of zanni in the Qur’ān, we may refer to the phrase yunfaw min al-ard (‘to be banished from the earth’) which
occurs in sûra al-Mâ‘idah (5:33). The phrase spells out the penalty for highway robbery (hirâbah) or, according to an alternative but similar interpretation, for waging war on the community and its legitimate leadership. Banishment (nafî) in this âyah can mean exile from the place where the offence is committed in the first place. This is, in fact, the obvious meaning of the phrase, and the one which has been adopted by the majority of the ‘ulamâ‘. But the Ḥanafî jurists maintain that the phrase means imprisonment, not exile. According to the Ḥanafîs, a literal approach to the interpretation of this phrase does not prove to be satisfactory: if one is to be literal, then how can one be banished from the face of the earth by any method but death? Nafî, or exile, on the other hand, is a penalty other than killing. Furthermore, if the offender is to be banished from one place to another within the Muslim territories, the harm is not likely to be prevented as he may commit further offences. The Ḥanafîs have further argued that banishing a Muslim outside the territory of Islam is not legally permissible. The only proper meaning of the phrase that would achieve the Sharî‘ah purpose behind the penalty is, therefore, imprisonment.

And lastly, the whole âyah of muhdarabah in which the phrase yunfaw min al-ârd occurs is open to divergent interpretations. The âyah in question reads:

The punishment of those who wage war against God and His Messenger and strive to make mischief in the land is that they should be killed or crucified or their hands and their feet should be cut off on opposite sides, or they should be banished from the earth.

In this passage, confusion arises from the combination of phrases which contain different penalties for hirâbah. This is mainly due to the use of the article aw, meaning ‘or’, between the three phrases that provide three different penalties for the offence in question. It is thus not known for certain which of the three penalties are to be applied to the offender, that is, the muhârib. The majority view is that the muhârib is liable to execution when he actually robs and kills his victim, but if he only robs him, the offender is liable to the mutilation of his
hands. And finally, if there is no killing involved and no robbery, then the penalty is banishment. In the more intense cases where the offender terrorises, kills and robs his victim, the former is to be killed and crucified. According to an alternative juristic opinion, it is for the ruler to determine one or the other, or a combination of these penalties, in individual cases.

A Qur'anic injunction may simultaneously possess a definitive and a speculative meaning, in which case each of the two meanings will convey a ruling independently of the other. An example of this is the injunction concerning the requirement of ablution for prayers which reads in part ‘and wipe your heads’ (al-Ma'idah, 5:6).

This text is definitive on the requirement of wiping (mash) of the head in wudū', 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.22

There are sometime instances where the scope of disagreement about the interpretation of the Qur'an is fairly extensive. Mahmūd Shaltīt, for example, underlines this point by noting that at times seven or eight different juristic conclusions have been arrived at on one and the same issue. And he goes on to say that not all of these views can be said to be part of the religion, nor could they be legally binding. These are ijtihād opinions; ijtihād is not only permissible but is encouraged. For the Shari'ah does not restrict the liberty of the individual to investigate and express an opinion. They may be right or they may be wrong, and in either case, the diversity of opinion offers the political authority a range of choice from which to select the view it deems to be most beneficial to the community. When the ruler authorises a particular interpretation of the Qur'an and enacts it into law, it becomes obligatory for everyone to follow only the authorised version.23

The 'ulamā' are in agreement that the specific (khāṣṣ) of the Qur'an (and of Sunnah) is definitive, but they are in disagreement as to whether the general ('āmm) is definitive or speculative. The Hanafīs maintain that the 'āmm is definitive and binding but the Mālikīs, Shāfī'īs and Ḥanbalīs hold that the 'āmm by itself is speculative and open to qualification and specification. We need not, at this point, go into the details of the 'āmm and the khāṣṣ as we shall have occasion
to return to the subject later. Suffice it here to explain how the 'āmm and khāṣṣ may be related to qaf‘ī and zanni.

First we may highlight the zanni content of the 'āmm by referring to the Qur'ānic ruling which states: ‘Forbidden to you [in marriage] are your mothers, your daughters, your sisters, your father’s sisters and your mother’s sisters’ (al-Nisā’, 4:23).

This is a general ruling in that mothers, daughters, sisters, etc. are all 'āmm as they include, in the case of 'mother', not only the real mother but also the step-mother, foster mother and even the grandmother. Similarly, 'daughters' can include real daughters, step-daughters, grand-daughters and even illegitimate daughters. The application of these terms to all of their various meanings is qaf‘ī according to the Hanafis, but is zanni according to the majority of ulama. Whenever the zanni of the Qur’ān is explained and clarified by the Qur’ān itself or by the Sunnah, it may become qaf‘ī, in which case the clarification becomes an integral part of the original ruling. On the subject of prohibited degrees in marriage, there is ample evidence both in the Qur’ān and the Sunnah to specify and elaborate the 'āmm of the Qur’ān on this subject. Similarly, when the Qur’ān or the Sunnah specifies a general ruling of the Qur’ān, the part which is so specified becomes qaf‘ī.

To give another example of the 'āmm which can be clearly seen in its capacity as zanni we refer to the Qur’ānic proclamation that 'God has permitted sale and prohibited usury' (al-Baqarah, 2:275).

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 'āmm of this āyah is specified by the Sunnah to the extent that some varieties of sale, such as the sale of unripe fruit on a tree, or a sale that involve uncertainty or risk-taking (gharar) were forbidden and therefore excluded from the scope of this āyah. The 'ulamā' are all in agreement to the effect that once the 'āmm has been specified even in a narrow and limited sense, the part which still remains unspecified is reduced to zanni and will be treated as such.
Broadly speaking, the *khāṣṣ* is definitive. When, for example, the Qur’ān (al-Nūr, 24:4) prescribes the punishment of eighty lashes for slanderous accusation (*qadhf*), the quantitative aspect of this punishment is specific (*khāṣṣ*) and not susceptible to any speculation. But then we find that the same passage (al-Nūr, 24:4—5) prescribes a supplementary penalty for the slanderous accuser (*qadhif*) where it reads: ‘Never accept their testimony, for they are evildoers [*fasiqūn*], except for those who repent afterwards and make amends.’

وَلاَ تَقْبَلُواْ لَهُمْ شَهَادَةً أَبِداً وَأَوَّلَهُمُ الْفَاسِقُونَ إِلَّا الَّذِينَ تَابَواْ مِنْ بَعْدِ ذَلِكَ وَأَصَلُّواْ

This text is clear and definitive on the point that the *qadhif* is to be disqualified as a witness, but then an element of doubt is introduced by the latter portion of the text which tends to render ambiguous the precise scope of its application. Having enacted both the principal and the supplementary penalties for slanderous accusers and *fasiqūn* it becomes questionable whether the *qadhif* should qualify as a witness after repentance. Does the text under discussion mean that the concession is only to be extended to the *fasiqūn* and not necessarily to slanderous accusers? If the answer is in the affirmative, then once the *qadhif* is convicted of the offence, no amount of repentance will qualify him as an upright witness again. The confusion is due to uncertainty in the meaning of the pronoun *alladhīnā* (i.e. ‘those’) which is not known to refer to all or only part of the preceding elements in the text. The Hanafis disqualify the *qadhif* permanently from being a witness, whereas the Shafi’is would admit him as a witness after repentance. This example also serves to show that it is not always self-evident whether a text is *qaf‘i* or *zanni* as this too may be open to interpretation. The main point of citing this example is to show that although the *khāṣṣ* is *qaf‘i*, an aspect of it may be *zanni* in a way that might affect the definitive character of the *khāṣṣ* as a whole.

Although in principle the *khāṣṣ* is *qaf‘i* and, as such, is not open to speculative interpretation, there may be exceptions to this general rule. For example, the penance (*kaffārah*) of a false oath according to a textual ruling of the Qur’ān (al-Mā‘īdah, 5:89) 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 ‘ulamā’, however, do not agree with the Hanafis on this point. Be that as it may, this example will serve to show that the scope of ijtihād is not always confined to the ‘āmm but that even the khāss and definitive rulings may require elaboration which might be based on speculative reasoning.

Furthermore, the khāss of the Qur’ān normally occurs in the form of a command or a prohibition which, as discussed below in a separate chapter, can either be qaf‘ī or zanni. The zanni component of a command or a prohibition is readily identified by the fact that a command in the Qur’ān may amount either to wājib or to mandūb or even to a mere mubah. Similarly, it is not always certain whether a prohibition in the Qur’ān amounts to a total ban (taḥrīm) or to a mere abomination (karāḥah).

The absolute (muflaq) and the qualified (muqayyad) are also classified as the sub-varieties of khāss. But these too can be related to the qaf‘ī-zanni division in at least two ways. Firstly, the absolute, somewhat like the ‘āmm, is speculative in regard to the precise scope of its application. Secondly, the qualification of the absolute, the grounds on which it is qualified and the nature of the relationship between the qualified and the qualifier are not always a matter of certain knowledge. The absolute in the Qur’ān is sometimes qualified on speculative grounds, which is why the jurists are not in agreement about the various aspects of qualifying the muflaq. Further detail on the subject of muflaq and muqayyad and juristic disagreements about its various aspects can be found in a separate chapter below. Suffice it here to give an illustration: there are two separate rulings on the subject of witnesses in the Qur’ān, one of which is absolute and the other qualified in regard to the attributes of the witness. First it is stated with regard to the transaction of sale to ‘bring witnesses when you conclude a sale’ (al-Baqarah, 2:282).

In this āyah, the witness is not qualified in any way whatsoever. But elsewhere we find in reference to the subject of revocation in divorce (rif‘ah), the command to ‘bring two just witnesses’ (al-Ṭalāq, 65:2).

The ‘ulamā’ have on the whole related these two āyāt to one another and the conclusion drawn is that the qualified terms of the second
\textit{āyah} must also be applied to the first, which would mean that witnesses must be upright and just whether it be a case of a commercial transaction or of revocation in divorce. This is the settled law, but to relate this to our discussion on the \textit{qaf}\textsuperscript{i} and the \textit{žanni}, it will be noted that determining the precise scope of the first \textit{āyah} is open to speculation. Does the requirement of witnesses apply only to sale or to all commercial transactions? To enter into a detailed discussion on this point might seem out of place in the face of the fact that, notwithstanding the clear terms of the Qur'\'ānic injunction, the rules of fiqh as developed by the majority of \textit{uλamā}' with the exception of the Žâhirīs, do not require any witnesses either in sale or in the revocation of divorce. The \textit{uλamā}' have, of course, found reasons in support of their rulings both from within and outside the Qur'\'ān. But even the bare facts we have discussed so far are enough to show that the \textit{mušlaq} and \textit{muqayyad} are susceptible to speculative reasoning. But to discuss the foregoing example a little further, it will be noted that the juxtaposition of the two \textit{āyāt}, and the conclusion that the one is qualified by the other, is to a large extent based on speculative reasoning. And then the qualified terms of the second of the two \textit{āyāt} may be taken a step further, and the question is bound to be raised, as indeed it has been, as to the precise meaning of a just witness. The \textit{uλamā}' of the various schools have differed on the attribute of \textit{'adālah} in a witness and their conclusions are based largely on speculative {\textit{ijtihād}}.

We need not perhaps discuss in detail the point that the binary division of words into the literal (\textit{haqiqi}) and the metaphorical (\textit{majāzi}), which we shall elsewhere elaborate on, can also be related to the \textit{qaf}\textsuperscript{i} and \textit{žanni}. Although relying on the literal meaning of a word is the norm and a requirement of certainty in the enforcement of a legal text, it may be necessary at times to depart from the literal in favour of the metaphorical meaning of a word. To give an example, \textit{talaq} literally means release or setting free but, as a technical term, it has acquired a specific meaning, and it is the metaphorical meaning of \textit{talaq} which is normally applied. The \textit{uλamā}' have identified a large variety of grounds on which the \textit{haqiqi} and the \textit{majāzi} can be related to one another. The \textit{majāzi} is to a large extent speculative and unreal. Some \textit{uλamā}' have even equated the \textit{majāzi} with falsehood and, as such, have held that it has no place in the Qur'\'ān. It is thus suggested that the \textit{majāzi} is not to be relied upon in interpreting the practical injunctions of the Qur'\'ān. Be this as it may, the point is clear that speculative reasoning has a wide scope in determining the meaning
and application of *haqiqi* and *majazi* in the Qur'ān, and indeed in any other source of Shari'ah.

Furthermore, the ‘ulamā’ have deduced the rules of Shari'ah not only from the explicit words of the Qur'ān, which is referred to as the *mantūq*, but also from the implicit meanings of the text through inference and logical construction, which is referred to as the implied meaning, or *mašhūm*. Once again, this subject has been discussed in a separate chapter under *al-dalālat*, that is, textual implications. The only purpose of referring to this subject here is to point out that the deduction of the rules of Shari'ah by way of inference from the implied meaning of a text amounts to speculative reasoning and *ijtihād*. Naturally, not all the ahkām deduced in this way can be classified as *zanni*. The implied meaning of a text can often command the same degree of authority as the explicit ruling of the same text. Having said this, however, to extend, for example, the requirement of expiation (kaффārah) for unintentional killing — which is releasing a slave, or feeding sixty poor persons, or fasting for two months — to the case of intentional killing on the analysis that the purpose of kaффārah is compensation for a sin and that this is true of all types of homicide, is basically no more than speculative *ijtihād*. This is the implied meaning of the text in *siira al-Nisā*, 4:92, which is explicit on the kaффārah for unintentional killing. But the implied meaning of this text does not command the same degree of certainty as the clear words thereof, which is why the ‘ulamā’ are not in agreement on it.

In the discussion of the qaf'ī and *zanni*, the Qur'ān and Sunnah are seen as complementary and integral to one another, the reason for this being that the speculative of the Qur'ān can be made definitive by the Sunnah and vice versa. The *zanni* of the Qur'ān may be elevated into qaf'ī by means of corroborative evidence in the Qur'ān itself or in the Sunnah. Similarly, the *zanni* of the Sunnah may be elevated into qaf'ī by means of corroborative evidence in the Sunnah itself or in the Qur'ān. And then the *zanni* of both the Qur'ān and Sunnah may be elevated into qaf'ī by means of a conclusive *ijmā‘*, especially the *ijmā‘* of the Companions.

As stated above, a speculative indication in the text of the Qur'ān or *ḥadīth* 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. To illustrate this, all the solitary (ahād) *ḥadīth* which elaborate the definitive Qur'ānic prohibition of usury (riba) in *sūra al-Baqqarah* (2:275) are speculative by virtue of being ahād. But since their substance is supported by the definitive text of the Qur'ān, they become definitive
despite any doubt that may exist in respect of their authenticity. Thus as a general rule, all solitary hadith whose authenticity is open to speculation are elevated to the rank of qaf‘i if they can be substantiated by clear evidence in the Qur’an. However, if the zanni cannot be so substantiated by the qaf‘i, it is not binding unless it can be validated by some evidence that may lead to one of the following two possibilities. Firstly, the case where the zanni is found to be in conflict with a qaf‘i of the Qur’an, in which case it must be rejected. To illustrate this, it is reported that the widow of the Prophet, ‘A’isha, rejected the alleged hadith that the soul of the deceased is tortured by the weeping of his relatives over his death, the reason being that this was contrary to the definitive text of the Qur’an (al-An’am, 6:164) which states that ‘no soul may be burdened with the burden of another soul’.

The second case is where the speculative indication is such that it cannot be related to definitive evidence in any way. The ulamâ’ have differed on this; some would advise suspension while others would apply the presumption of permissibility (ibâhah), but the best view is that the matter is open to ijtihâd.

The qaf‘i of the Qur’an is an integral part of the dogma, and anyone who rejects or denies its validity automatically renounces Islam. But denying a particular interpretation of the zanni does not amount to transgression. The mujtahid is entitled to give it an interpretation, and so is the ruler, who may select one of the various interpretations for purposes of enforcement.

I.2 Brevity and Detail (al-Ijmal wa’l-Tafsil)

By far the larger part of Qur’anic legislation consists of an enunciation of general principles, although in certain areas, the Qur’an also provides specific details. Being the principal source of the Sharî‘ah, the Qur’an lays down general guidelines on almost every major topic of Islamic law. In commenting on this point, Abû Zahrah concurs with Ibn Hazm’s assessment that ‘every single chapter of fiqh finds its origin in the Qur’an, which is then explained and elaborated by the Sunnah’. On a similar note, al-Shâfi‘ibi makes the following observation: experience shows that every ‘alim who has resorted to the Qur’an in search of the solution to a problem has found in the Qur’an a principle that has provided him with some guidance on the subject.
The often-quoted declaration that ‘We have neglected nothing in the Book’ (al-An‘ām, 6:38)

ما فرطننا في الكتاب من شيء

is held to mean that the ru‘ūs al-ahkām, that is, the general principles of law and religion, are treated exhaustively in the Qur‘ān. According to another view, the reference here is to religion, on which the Qur‘ān provides complete guidance, and this is confirmed in another āyah as follows: ‘Today I have perfected for you your religion and completed my favour upon you and chosen Islam as your religion’ (al-Mā‘īdah, 5:3).

Obey God’ in this āyah refers to the Qur‘ān as the first source, ‘and obey the Messenger’ refers to the Sunnah of the Prophet, ‘and those of you who are in authority’ authorises the consensus of the ‘ulamā’. The last portion of the āyah (‘and if you have a dispute...’) validates qiyyās. For a dispute can only be referred to God and to the Messenger by extending the rulings of the Qur‘ān and Sunnah through analogy to similar cases. In this sense one might say that the whole body of usul al-fiqh is a commentary on this single Qur‘ānic āyah. Al-Shāṭibī further observes that wherever the Qur‘ān provides specific details, it is related to the exposition and better understanding of its general
principles. Most of the legal contents of the Qur'an consist of
general rules, although it contains specific injunctions on a number
of topics. Broadly speaking, the Qur'an is specific on matters that are
deemed to be unchangeable, but in matters that are liable to change,
it merely lays down general guidelines.

Qur'anic legislation is generally detailed on devotional matters and
subjects that have a devotional (ta'abbudi) aspect, such as matrimonial
law and inheritance. These are deemed to be permanent and the
rulings so enacted are followed primarily as a matter of devotion and
submission to the law of God. As for the laws of the Qur'an on civil
transactions or mu'amalāt, these are generally confined to an exposition
of the broad and general principles, and they remain open to
interpretation and ijtihād.33

Qur'anic legislation on civil, economic, constitutional and inter-
national affairs is, on the whole, confined to an exposition of the
general principles and objectives of the law. With regard to civil
transactions, for example, the nusūs of the Qur'an on the fulfilment
of contracts, the legality of sale, the prohibition of usury, respect for
the property of others, the documentation of loans and other forms
of deferred payments are all concerned with general principles. Thus
in the area of contracts, Qur'anic legislation is confined to the bare
minimum of detail. Of the two āyāt on the subject of contracts, one
is in the form of a command and the other in the form of a question
as follows: 'O you who believe, fulfil your undertakings' (al-Mā'idah,
5:1)

\[
\begin{align*}
\text{يا} & \ \text{أيها} \ \text{الذين} \ \text{عَمِّنَ} \\
\text{وَافْعَوا} & \text{بَالعَقْوَد}
\end{align*}
\]

and 'O you who believe, why do you say things which you do not
carry through?' (al-Ṣaff, 61:2)

\[
\begin{align*}
\text{يا} & \ \text{أيها} \ \text{الذين} \ \text{عَمِّنَ} \\
\text{وَأَوْفُوا} & \text{بَالعَهْد} \ \text{يَوْمَ} \ \text{إِن} \ \text{العَهْد} \ \text{كَانَ} \ \text{مَسْئُولاً}
\end{align*}
\]

The substance of these āyāt has been confirmed in two other short
passages as follows: 'And fulfil the promise; surely the promise will
be enquired into'

\[
\begin{align*}
\text{وَأَوْفُوا} & \text{بَالعَهْد} \ \text{يَوْمَ} \ \text{إِن} \ \text{العَهْد} \ \text{كَانَ} \ \text{مَسْئُولاً}
\end{align*}
\]

and 'O you who believe, fulfil your undertakings' (al-Mā'idah,
5:1).
In yet another "ayah (al-Nisā', 4:58) the Qur'ān stresses the fulfilment of trust and the principle of fair treatment: ‘God commands you to turn over trusts to whom they belong and when you judge among people, judge with justice’.

Contracts must not, therefore, overrule the principles of morality and justice, and the faithful fulfilment of trusts. In the area of civil transactions and property, the believers are enjoined to ‘devour not the properties of one another unlawfully, but let there be lawful trade by mutual consent’ (al-Nisā', 4:29).

Elsewhere we read in sūra al-Baqarah (2:275) that ‘God has permitted sale and prohibited usury’.

The detailed varieties of lawful trade, the forms of unlawful interference with the property of others, and the varieties of usurious transactions, are matters on which the Qur'ān has not elaborated. Some of these have been explained and elaborated by the Sunnah. As for the rest, it is for the scholars and the mujtahidīn of every age to specify them in the light of the general principles of the Shari'āh and the needs and interests of the people.*+

In the sphere of crimes and penalties, Qur'ānic legislation is specific with regard to only five offences, namely murder, theft, highway robbery, zinā and slanderous accusations. As for the rest, the Qur'ān authorises the community and those who are in charge of their affairs (i.e. the ʻulū al-amr) to determine them in the light of the general principles of Shari'ah and the prevailing conditions of society. Once again the Qur'ān lays down the broad principles of penal law when
it states that ‘the punishment of an evil is an evil like it’ (al-Shūrā, 42:40),

وجزاء سلالة سلالة مثلها

and ‘when you decide to punish, punish in proportion to the offence committed against you’ (al-Nahāl, 16:126).

 وإن عاقبتم فعاقبوا مثل ما عوقبتم به

In the area of international relations, the Qurʾān lays down rules that regulate war with the unbelievers and expounds the circumstances in which their property may be possessed in the form of booty. But the general principle on which relations between Muslims and non-Muslims are to be regulated is stated in the following passage:

God does not forbid you to act considerately towards those who have never fought you over religion nor evicted you from your homes, nor [does he forbid you] to act fairly towards them. God loves the fair-minded. He only forbids you to be friendly with the ones who have fought you over [your] religion and evicted you from your homes and have abetted others in your eviction. Those who befriend them are wrongdoers (al-Mumtahinah, 60:8–9).

لا ينهاكم الله عن الذين لم يقاتلوكم في الدين ولم يخرجوكم من دياركم أن تروهم وتقسطوا إليهم. إن الله يحب المتسنطين. إنما ينهاكم الله عن الذين قاتلوكم في الدين وأخرجوكم من دياركم وظاهروا على إخراجكم أن تولوا ومن يتولهم فأولئك هم الظالمون.

Similarly, the Qurʾānic commandments to do justice are confined to general guidelines and no details are provided regarding the duties of the judge or the manner in which testimony should be given. On the principles of government, such as consultation, equality and the rights of citizens, the Qurʾān does not provide any details. The general principles are laid down, and it is for the community, the ‘ulamāʾ and leaders to organise their government in the light of the changing conditions of society. The Qurʾān 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’ (5:101).

In this way, the Qur’an discourages the development of an over-regulated society. Besides, what the Qur’an has left unregulated is meant to be devised, in accordance with the general objectives of the Lawgiver, through mutual consultation and ijtihād. A careful reading of the Qur’an further reveals that on matters pertaining to belief, the basic principles of morality, man’s relationship with his Creator, and what are referred to as ghaybīyyāt, that is transcendental matters that are characteristically unchangeable, the Qur’an is clear and detailed, as clarity and certainty are necessary requirements of belief. In the area of ritual performances (‘ibādāt) such as salāh, fasting and ḥajj, on the other hand, although these too are meant to be unchangeable, the Qur’an is nevertheless brief, and most of the necessary details have been supplied by the Sunnah. An explanation for this is that ritual performances are all of a practical, or ‘amalī, nature and require clear instructions which are best provided through practical methods and illustration. With regard to salāh, legal alms (zakāt) and ḥajj, for example, the Qur’an simply commands the believers to ‘perform the salāh and pay the zakāt’ (al-Baqarah, 2:43) and states that ‘pilgrimage to the House is a duty that God has imposed on mankind’(Āl ‘Imrān, 3:97).

With regard to salāh, the Prophet has ordered his followers to ‘perform salāh the way you see me performing it’ and regarding the ḥajj he similarly instructed people to ‘take from me the rituals of the ḥajj’.
The details of zakāt, such as the quorum, the amount to be given and its numerous other conditions, have been supplied by the Sunnah.

The Qur'ān also contains detailed rules on family matters, the prohibited degrees of relationship in marriage, inheritance and specific punishments for certain crimes. These rules have a devotional (ta'abbūdī) aspect and are part of the 'ibādāt. They are also associated with human nature and regulate the manner in which man’s natural needs may be fulfilled. The basic objectives of the law regarding these matters are permanent. They are, however, matters that lead to disputes. The purpose of regulating them in detail is to prevent conflict among people. The specific rulings of the Qur'ān in these areas also took into consideration the prevalence of certain entrenched social customs of Arabia, which were overruled and abolished. Qur'ānic reforms concerning the status of women, and its rules on the just distribution of property within the family could, in view of such customs, only be effective if couched in clear and specific detail.38

The Qur'ān frequently provides general guidelines on matters of law and religion, which are often specified by the Qur'ān itself; otherwise the Sunnah specifies the general in the Qur'ān and elaborates its brief and apparently ambiguous provisions. By far the larger part of Qur'ānic legislation is conveyed in general terms which need to be specified in relation to particular issues. This is partly why we find that the study of the 'āmm (general) and khāṣṣ (particular) acquires a special significance in the extraction of substantive legal rules from the general provisions of the Qur'ān. Once again the fact that legislation in the Qur'ān mainly occurs in brief and general terms has to a large extent determined the nature of the relationship between the Qur'ān and Sunnah. Since the general, the ambiguous and the difficult portions of the Qur'ān were in need of elaboration and takhsīṣ (specification), the Prophet was expected to provide the necessary details and determine the particular focus of the general rulings of the Qur'ān. It was due to these and other such factors that a unique relationship was forged between the Sunnah and the Qur'ān in that the two are often integral to one another and inseparable. By specifying the general and by clarifying the mujmal in the Qur'ān, the Sunnah has undoubtedly played a crucial role in the development of Shari‘ah. It is the clear and the specific (khāṣṣ) in the Qur'ān and Sunnah which provides the core and kernel of the Shari‘ah in the sense that no law can be said
to have any reality if all or most of it were to consist of brief and
general provisions. To that extent, the specifying role of the *Sunnah*
in its relationship to the Qur’ān is of central importance to *Shari‘ah*,
and yet the general in the Qur’ān has a value of its own. In it lies the
essence of comprehensive guidance and of the permanent validity of
the Qur’ān. It is also the ‘āmun of the Qur’ān that has provided scope
and substance for an ever-continuing series of commentaries and
interpretations. The ‘ulamā’ and commentators through the centuries
have attempted to derive a fresh message, a new lesson or a new prin-
ciple from the Qur’ān that was more suitable to the realities of their
times and the different phases of development in the life of the
community. This was to a large extent facilitated by the fact that the
Qur’ān consisted for the most part of broad principles which could
be related to a variety of circumstances. To give one example, on the
subject of consultation (*shūrā* the Qur’ān contains only two āyāt,
both of which are general. One of these commands the Prophet to
‘consult them [the community] in their affairs’ (Al ‘Imrān, 3:159)

وشارؤهم في الأمر

and the other occurs in the form of praise for the Muslim community
on account of the fact that ‘they conduct their affairs by consultation
among them’ (al-Shūrā, 42:38).

وأمرهم شورى بينهم

The fact that both of these are general proclamations has made it
possible to relate them to almost any stage of development in the
socio-political life of the community. The Qur’ān has not specified
the manner of how the principle of *shūrā* should be interpreted; it has
not specified any subject on which consultation must take place, nor
even any person or authority who should be consulted. These are all
left to the discretion of the community. In its capacity as the vicegerent
of God and the locus of political authority, the community is at
liberty to determine the manner in which the principle of *shūrā*
should be interpreted and enforced.39

I.3 The Five Values

As a characteristic feature of Qur’ānic legislation, it may be stated here
that commands and prohibitions in the Qur’ān are expressed in a
A variety of forms which are often open to interpretation and ijtihad. The question of whether a particular injunction in the Qur'an 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. The subject of commands and prohibitions need not be elaborated here as this is the theme of a separate chapter of this work. It will suffice here to note the diversity of Qur'anic language on legislation. Broadly speaking, when God commands or praises something, or recommends a certain form of conduct, or refers to the positive quality of something, or when it is expressed that God loves such-and-such, or when God identifies something as a cause of bounty and reward, all such expressions are indicative of the legality (mashru'iyyah) of the conduct in question, which partakes of the obligatory and commendable. If the language of the text is inclined on the side of obligation (wjib), such as when there is a definite demand or a clear emphasis on doing something, the conduct in question is obligatory (wjib), otherwise it is commendable (mandub).

Similarly, when God explicitly declares something permissible (halal) or grants a permission (idhn) in respect of doing something, or when it is said that there is 'no blame' or 'no sin' accrued from doing something, or when God denies the prohibition of something, or when the believers are reminded of the bounty of God in respect of things that are created for their benefit, all such expressions are indicative of permissibility (ibahah) and the right to choose (takhyir) in respect of the conduct or the object in question.

Whenever God demands the avoidance of a certain conduct, or when He denounces a certain act, or identifies it as a cause for punishment, or when a certain kind of conduct is cursed and regarded as the work of Satan, or when its harmful effects are emphasised, or when something is proclaimed unclean, a sin or a deviation (ithm, fisq) — all such expressions are indicative of prohibition (tahrmi) or abomination (karahah). If the language is explicit and emphatic in regard to prohibition, the conduct or object in question becomes haram, otherwise it is reprehensible, or makruh. It is for the mujtahid to determine the precise value of such injunctions in the light of both the language of the text and the general objectives and principles of the Shari'ah.

This style of Qur'anic legislation, and the fact that it leaves room for flexibility in the evaluation of its injunctions, is once again in harmony with the timeless validity of its laws. The Qur'an is not specific on the precise value of its injunctions, and it leaves open the possibility that a command in the Qur'an may sometimes imply an
obligation, a recommendation or mere permissibility. The Qurʾān does not employ the categories known as the five values (al-ahkām al-khamsah) which the fuqahā’ have attempted to specify in juristic manuals. When an act is evaluated as obligatory, it is labelled fard or wājib; when it is absolutely forbidden, it is evaluated as haram. The shades of values which occur between these two extremes are primarily religious in character and provide a yardstick that can be applied to any type of human conduct. But only the two extremes, namely the wājib and haram, incorporate legal commands and prohibitions. The rest are largely non-legal and non-justiciable in a court of law. The Qurʾān thus leaves open the possibility, although not without reservations, of enacting into haram what may have been classified by the fuqahā’ of one age as merely reprehensible, or makrūh. Similarly, the recommendable, or mandib, may be elevated to a wājib if this is deemed to be in the interest of the community in a different stage of its experience and development.

I.4 Ratiocination (Ta’lil) in the Qurʾān

Literally ta’lil means ‘causation’, or a ‘search for the causes’, and refers to the logical relationship between cause and effect. But the ‘ulamāʾ of jurisprudence tend to use ta’lil and its derivative, ‘illah, for different purposes. In its juridical usage, ‘illah (effective cause) does not exactly refer to a causal relationship between two phenomena; it means rather the ratio of the law, its value and its purpose. Broadly speaking, ‘illah refers to the rationale of an injunction, and in this sense, it is synonymous with hikmah, that is, the purpose and the objective of the law. But there is a difference between ‘illah and hikmah which I shall discuss in a subsequent chapter on analogical deduction (qiyyās). There is another Arabic word, namely sabab, which is synonymous with ‘illah, and the two are often used interchangeably. Yet the ‘ulamāʾ of usūl tend to use sabab in reference to devotional matters (‘ibādāt) and use ‘illah in all other contexts. Thus it is said that the arrival of Ramadan is the cause (sabab) of fasting but that intoxication is the ‘illah of the prohibition in wine-drinking.

‘Illah and sabab also differ in that ‘illah signifies the immediate cause where sabab may be intermediate. In reference, for example, to drawing water from a well, if a rope is used, the rope would be the sabab whereas the act of drawing is the ‘illah of getting water from the well. Similarly, when a man says to his employee ‘you are dismissed’, the words that are uttered are the ‘illah of dismissal. But if it is said ‘you
are dismissed if you leave this house’ and then he leaves, the words uttered would be the *sabab*, and the more immediate factor, which is the act of leaving the house, would be the *‘illah*.

The authority of the Qur’an as the principal source of the *Shari’ah* is basically independent of ratiocination. The believers are supposed to accept its rulings regardless of whether they can be rationally explained. Having said this, however, there are instances where the Qur’an justifies its rulings with reference to the benefits that accrue from them, or the objectives they may serve. Such explanations are often designed to make the Qur’an easier to understand. To give an example in the context of encounters between members of opposite sexes, the believers are enjoined in sura al-Nūr (24:30) ‘to avert their glances and to guard their private parts’.

The text then goes on to provide that in doing so they will attain greater chastity of character and conduct. To give another example, in sura al-Hashr (59:7) the Qur’an regulates the distribution of booty among the needy, the orphans and the wayfarers ‘so that wealth does not merely circulate among the wealthy’.

In the first *āyah*, averting the glance is justified as it obstructs the means to promiscuity and *zina*. The ruling in the second *āyah* is justified as it prevents the accumulation of wealth in few hands. Similarly, the Qur’an specifies the rationale of its law in the following instances:

And there is life for you in retaliation, O men of understanding (al-Baqarah, 2:179).

Take alms out of your property so as to cleanse and purify them thereby (al-Tawbah, 9:103).

And fight them until there is no persecution and God’s religion prevails (al-Baqarah, 2:193).
And prepare for them as far as you can of strength including steeds of war so as to frighten the enemies of God and your enemies (al-Anfal, 8:60).

We also find similar passages in the Qur'an concerning the fasting of Ramadan (al-Baqarah, 2:138) and the pilgrimage of hajj (al-Hajj, 22:27) where references are made to the benefits of observing them. Whereas the foregoing are instances in which the text explicitly states the 'illah of the injunctions concerned, on numerous other occasions the jurists have identified the 'illah through reasoning and ijtihad. The identification of 'illah in many of the following cases, for example, is based on speculative reasoning on which the 'ulama' are not unanimous: that arrival of the specified time is the cause (sabab or 'illah) of the prayer; that the month of Ramadan is the cause of fasting; that the existence of the Ka'bah is the cause of hajj; that owning property is the cause of zakat; that theft is the cause of amputation of the hand; that travelling is the cause of shortening the prayer and that intentional killing is the cause of retaliation. These and other similar conclusions with regard to the assignment of 'illah have been drawn in the light of supportive evidence in the Qur'an and Sunnah, but even so many of them are disputed by the 'ulama'. These examples will in the meantime serve to show the difference between the literal/logical meaning of 'illah and its juridical usage among the 'ulama' of jurisprudence.
The question arises as to whether the incidence of ta‘lil in the Qur’an gives the mujtahid the green light to enquire into the causes and reasons behind its injunctions, or whether it exists simply to facilitate a better understanding of the text. The ‘ulamā‘ have held different views on this issue. The opponents of ta‘lil maintain that divine injunctions embodied in the clear text have no causes unless the Lawgiver provides us with clear indications to the contrary. Thus it would not only be presumptuous on the part of the mujtahid to adopt an inquisitive approach to divine injunctions, but searching for the cause (‘illah) or the objective hikmah of the Qur’anic rules amounts to no more than an exercise in speculation. Besides, the opponents of ta‘lil have argued that the believer should surrender himself to the will of God, which can best be done through unquestioning acceptance of God’s injunctions. To look into the motive, purpose and rationale of such injunctions, and worse still, to accept them on their rational merit, is repugnant to sincerity in submission to God. Furthermore, in his attempt to identify the rationale of an injunction, the mujtahid can only make a reasonable guess which cannot eliminate the possibility of error. There may even be more than one cause or explanation for a particular ruling of the Qur’an, in which case one cannot be certain which of the several causes might be the correct one. This is the view of the Zāhirīs. We may ask: what is the proper ‘illah, for example, of the expiation of feeding ten poor persons in the event of taking false oath: to help the poor, to punish the rich, to fight hunger, or to endure a fair distribution of wealth in the community?

The majority of ‘ulamā‘ have, however, held that the ahkām of the Shari‘ah work towards certain objectives, and when these can be identified, it is not only permissible to pursue them but it is our duty to make an effort to identify and implement them. Since the realisation of the objectives (maqāṣid) of the Shari‘ah necessitates identification of the cause/rationale of the ahkām, it becomes our duty to discover these in order to be able to pursue the general objectives of the Lawgiver. Thus it is the duty of the mujtahid to identify the proper causes of divine injunctions, especially in the event where more than one ‘illah can be attributed to a particular injunction. The majority view on ta‘lil takes into account the analysis that the rules of Shari‘ah have been introduced in order to realise certain objectives and that the Lawgiver has enacted the detailed rules of Shari‘ah, not as an end in themselves, but as a means to realising those objectives. In this way, any attempt to implement the law should take into account not only
the externalities of the law but also the rationale and the intent behind it. Thus when a man utters the credo of Islam to achieve worldly gain or to attain social prestige, his confession is not valid. The reason for this is that the true purpose of confession to the faith is the exaltation and worship of God, and if this is violated, a formal confession is of no value. Similarly, if a man says a prayer for the sake of display and self-commendation, it is not valid. The real purpose and value of the law is therefore of primary importance, and indeed it is necessary that the mujtahid identifies it so as to be able to implement the law in accordance with its purpose. The Qur’an admittedly requires unquestioning obedience to God and to His Messenger, but at the same time, it exhorts men to understand the spirit and purpose of God’s injunctions. Time and time again, the Qur’an invites the believers to rational enquiry, as opposed to blind imitation, in the acceptance of its messages.

Tā’lil acquires a special significance in the context of analogical deduction. ’Ilah is an essential requirement, indeed the sine qua non of analogy. To enable the extension of an existing rule of the Shari'ah to similar cases, the mujtahid must establish a common ’illah between the original and the new case. Without the identification of a common ’illah between two parallel cases, no analogy can be constructed. To this it may be added that there is a variety of qiyās, known as qiyās mansūs al-‘illah, or qiyās whose ’illah is indicated in the nass, in which the ’illah of the law is already identified in the text. When the ’illah is so identified, there remains no need for the mujtahid to establish the effective cause of the injunction by recourse to reasoning or ijtihād. However, this variety of qiyās is limited in scope when it is compared to qiyās whose ’illah is not so indicated on the nūsūs. It thus remains true to say that tā’lil, that is the search for the effective causes of the Shari'ah rules, is of central importance to qiyās. Further discussion on the ’illah of analogy, the manner of its identification, and rules which govern the propriety of tā’lil in qiyās can be found in our discussion of qiyās in a separate chapter below.

There seems to be a confusion on the part of the opponents of tā’lil about the purpose and nature of tā’lil. The opponents of tā’lil seem to have perceived this phenomenon as a sign of impudence and impropriety in regard to belief. In reality, however, this need not be the case. One may attempt tā’lil while remaining totally faithful to the divine origin and essence of the Qur’an. To exercise tā’lil does not lessen either the binding power or the holiness of the divine injunctions. We may, for example, offer various interpretations of the
cause of performing the salāh or of giving zakāh; but whether we can understand the reason or not, salāh and zakāh are still obligatory upon Muslims.

I.5 Inimitability (Ijāz) of the Qur’ān

The Qur’ān is believed to be the miracle of Muḥammad, the proof of his prophethood and a testimony to its divine origin. But what exactly constitutes this miracle is a question that has engaged Muslim thinkers for generations. It is widely believed that the inimitability of the Qur’ān is reflected in at least four aspects of the Qur’ān. First, in its linguistic excellence: many scholars have pointed out that there exists no piece of Arabic literature that can match the literary excellence of the Qur’ān with respect to both content and form. It is neither poetry nor prose; its rhythm, its genre and word structure are unique. It is the spiritual miracle of the prophethood of Muḥammad, who never learned to read or write, and it was considered far beyond his own ability to produce a linguistic artefact of this kind. In more than one place, the Qur’ān challenges those who deny its divine origin by asking them to produce anything to match it.

The vast majority of scholars have associated ijāz with the sublime style of Qur’ān, and many have also highlighted the content and meaning of the Holy Book. The view has thus prevailed that inimitability is the combined outcome of both meaning and wording which the Qur’ān manifests in the highest form of perfection. The style and rhythm of the Qur’ān generate a psychological effect which makes it inimitable. It is also added that ijāz is a function of the insuperable manner in which Qur’ānic discourse binds meaning, wording and various literary styles, all of which are conducive to its special psychological effect. The all-knowing tone of its speech, its beautiful rhythm and its spirituality are yet other aspects of that total effect that is called ijāz.

The second aspect of ijāz in the Qur’ān is its narration of events which took place centuries ago. The accuracy of the Qur’ānic narratives concerning such events is generally confirmed by historical evidence.

The third aspect of ijāz in the Qur’ān is its accurate prediction of future events, such as the victory of the Muslims in the battle of Badr (al-Anfāl, 8:7), the conquest of Mecca (al-Fath, 48:27) and the eventual defeat of the Persians by the Roman empire: 'The Romans were defeated in a land nearby, but even after this defeat, they will
be victorious in a few years \( [\text{fi bid'a sin}in, \text{literally in a period lasting up to ten years}] \)’ (al-Rûm, 30:2–4).

The Romans were defeated by the Persians when the latter took Jerusalem in 614 AD. But the Persians were later defeated when the Romans won the battle of Issus in 622.49

The fourth aspect of \( \text{i’jaz} \) in the Qur’\( \text{an} \) is manifested in its scientific truth concerning the creation of man, the earth and the planetary system. The tenets thus inform us that:

> We created man from an extract of clay, then We placed him as a drop of semen in a secure resting-place. Then We turned the drop into a clot; next We turned the clot into tissue; and then We turned the tissue into bones and clothed the bones with flesh (al-Mu’min\( \text{un} \), 23:11–14)

> ولقد خلقنا الإنسان من سلالة من طين ثم جعلناه نطفة
> 
> في قرار مكين ثم خلقنا النطفة علقة فخلقنا العلقة مضغة
> 
> فخلقنا المضغة عظاما فكسبا العظام لحما

> the earth and the heavens were of one piece, then We parted them (al-Anbiya’, 21:30)

> إن السموات والأرض كانتا رتفا ففتحناهما

> all life originated in water (al-Anbiya’, 21:30)

> وجعلنا من الماء كل شيء حي

> the universe consisted of fiery gas (\( \text{Hâ-Mim} \), 41:11)

> السماء وهي دخان

> that fertilisation of certain plants is facilitated by the wind (al-\( \text{Hijr} \), 15:22)
Another manifestation of *i*jāz in the Qurʾān is seen in its humanitarian, legal and cultural reforms, which were unprecedented in the history of nations. Thus in the sphere of government, the ruler and the ruled were both equally subjected to adjudication under the rule of law. In the area of civil transactions and commerce, the Qurʾān established mutual agreement as the norm and essence of all contracts. The principal Qurʾānic reform in the area of property was the introduction of the doctrine of *istikhlāf*. The Qurʾān declares that all property belongs to God, and that man, in his capacity as the vicegerent of God, is a mere trustee whose exercise of the right of ownership is subject to the benefit or *mašlahah* of society as supervised by the government. In the sphere of international relations, treaty relations, the conduct of war and treatment of prisoners of war, were all regulated by a set of principles which aimed at the realisation of justice and respect for human dignity. Relations among individuals were to be governed by the principles of freedom and equality, and the state was equally subject to the observance, and indeed the protection, of these values.

I.6 The Occasions of Revelation (*Asbāb al-Nuzūl*)

*Asbāb al-nuzūl* deal with the phenomenology of the Qurʾān, and explain the events that are related to the revelation of particular passages. The best-known *asbāb al-nuzūl* have been related to us by reliable Companions. One condition for the reliability of such reports is that the person relating should have been present at the time or the occasion relevant to a particular passage. The authenticity of such reports is subject to the same rules as those applied to *ḥadīth* in general. In this way, reports from the Successors (*tabiʿīn*) only, which do not go back to the Prophet and his Companions, are considered to be weak (*daʿīf*).

The knowledge of *asbāb al-nuzūl* is necessary for anyone who wishes to acquire more than a superficial knowledge of the Qurʾān, and there are at least two main reasons for this. One is that knowledge of words and concepts is incomplete without knowledge of context and the nature of an audience. For one form of speech — a question for example — may also convey other meanings such as elucidation, surprise, or reprimand, etc. Similarly, a command may signify mere
permissibility, a recommendation, or a threat, etc., depending on the circumstances in which it is issued and the nature of the audience. An incidental meaning or a shade of expression may at times reflect the main purpose of a particular text and this cannot be known without the knowledge of *ashbāb al-nuzūl*. Ignorance of *ashbāb al-nuzūl* may thus lead to the neglect or misunderstanding of a part or even the whole of an injunction. Secondly, ignorance of *ashbāb al-nuzūl* may lead to unwarranted disagreement and even conflict, for the Qur’ān comprises some passages which contain probability (zāhir) and ambiguity (mujmal). Such instances in the text can be clarified by reference to the circumstances in which they were revealed. It is reported that in a conversation with ‘Abd Allāh ibn ‘Abbās, ‘Umar ibn al-Khaṭṭāb asked him: ‘Why should there be disagreement among this ummah, all of whom follow the same Prophet and pray in the direction of the same qiblah?’ To this Ibn ‘Abbās replied, ‘O Commander of the Faithful, the Qur’ān was sent down to us, we read it and we know the circumstances in which it was revealed. But there may be people after us who will read the Qur’ān without knowing the occasions of its revelation. Thus they will form their own opinion, which might lead to conflict and even bloodshed among them.’

‘Umar disagreed with Ibn ‘Abbās for saying so at first but, when the latter departed, ‘Umar pondered over what he had said. He then sent for Ibn ‘Abbās to tell him that he agreed with his view. It has been observed that by making this remark, Ibn ‘Abbās was referring to certain misinterpretations of the Qur’ān that had occurred owing to ignorance of *ashbāb al-nuzūl*. In particular, some Qur’ānic passages had been revealed concerning the unbelievers, but were taken by some commentators to be of general application to Muslims and non-Muslims alike. There were also passages in the Qur’ān which were revealed in reference to the conduct of people who had died before the revelation of certain rulings, and yet these were taken by some commentators to be of general application.

Furthermore, the knowledge of *ashbāb al-nuzūl* is informative of the conditions of Arab society at the time. Their customary linguistic usages and their nuances of expression were naturally reflected in the Qur’ān. The peculiarities of Arab social customs often gave exegeses of the Qur’ānic text a perspective and offered solutions to some of the doubts or ambiguities that would otherwise be difficult to understand. The *ashbāb al-nuzūl* are fully cognisant of the customary practices of Arab society and the relationship, if any, of such practices to Qur’ānic legislation. To give an example, the Qur’ānic āyah ‘Our
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Lord condemn us not, if we forget or make a mistake’ (al-Baqarah, 2:286)

is thought to refer to unbelief, that is, when words that express unbelief are uttered inadvertently. This is forgiven, just as words of unbelief that are expressed under duress are forgiven. However, the exemption here is not extended to similar pronouncements, such as statements of divorce, freeing of a slave, or sale and purchase, for freeing a slave was not known in the custom of the Arabs nor were inhibitions over oath-taking (aymān). The general support of this āyāh is thus given a concrete application in the light of prevailing custom.50

NOTES

1. The Qur‘an also calls itself by alternative names, such as kitāb, hudā, furqān, and dhikr (Book, Guide, Distinguisher, and Remembrance respectively). When the definite article, al, is prefixed to the Qur‘an, it refers to the whole of the Book; but without this prefix, the Qur‘an can mean either the whole or a part of the Book. Thus one may refer to a singular sūrā or āyāh thereof as the Qur‘an, but not as al-Qur‘an.


5. For an exclusive treatment of words of foreign origin in the Qur‘ān see Shawkānī, Irshād, pp. 22ff. See also Ghazālī, Mustasfū, I, 68.

6. This report is attributed to a Nūḥ ibn Maryam who has confirmed that Abū Hanīfah changed his initial ruling. See Abū Zahrah, ‘Usūl, p. 60; Shaltūt, al-Islām, p. 478; Šabūnī, Madkhal, p. 4.

7. Šabūnī, Madkhal, pp. 41–42; Abū Zahrah, Usūl, p. 61; Qaṭṭān, Tashrī‘, pp. 57ff.

8. Ghazālī, Mustasfū, I, 64; Shawkānī, Irshād, p. 30; Shaltūt, al-Islām, p. 440. The same would apply to the two other instances of variant readings which are attributed to ‘Abd Allāh ibn Mas‘ūd concerning the punishment of theft, and the form of divorce which is known as īla‘ in sūrā al-Mā‘idah (5:38) and al-Baqarah (2:226) respectively. Since these are only supported by solitary reports (āhād) they do not constitute a part of the Qur‘ān.


11. To be precise, the Meccan period lasted twelve years, five months and thirteen days, and the Medinan period, nine years, seven months and seven days.


18. Note, for example, Ghazālī, who estimates the *āyāt al-aḥkām* at 500. While commenting on Ghazālī’s estimate, Shawkānī, on the other hand, observes that any such calculation can only amount to a rough estimate (*Mustasfā, II,* 101 and Shawkānī, *Irshād,* p. 250).
21. A typical form of a sinful oath is when a person takes an oath on the truth of something which he knows to be untrue; this is called *yāmin al-ghamās,* which is a variety of *yāmin al-mu’aqqadah.* However, the Hanafis maintain that the latter only refers to the situation where a person pledges to do something in the future but then refuses to fulfil it. He is then liable to pay the *kafrārah.*
26. Ibid., III, 12.
31. Sābūnī, *Muhādarāt,* p. 31. For a further discussion of this *āyah* see below in the sections of this work on the *husn-iyyah* of Sunnah, *ijmā’* and *qiyyās* respectively.
40. Note, for example, ‘And He created for you ships and cattle on which you ride’ (al-Zukhruf, 43:12), and ‘He created cattle from which you derive warmth [...] and you eat of their meat’ (al-Nahl, 16:5); and ‘Say, who has forbidden the beautiful gifts of God which He has produced for His servants, and the good things which He has provided?’ (al-A’rāf, 7:32).
43. Ibid., p. 104.
44. Ibn Hazm, *Ihkām,* VIII, pp. 76ff; Sābūnī, *Madkhal,* p. 75. For further discussion on *ta’līl* in the Qur’ān see the section on *qiyyās* below where *ta’līl* is discussed in connection with the ‘*illah* of *qiyyās.*
46. Note for example sūra al-Baqarah (2:23) which reads: 'If you are in any doubt about what We have sent to Our servant, then bring a chapter like it and call in your witnesses beside God, if you are truthful.'

47. Abū Zahrah, Uṣūl, p. 65; Ṣāḥīnī, Madkhal, p. 45.


49. For further details on ījāz see von Denffer, 'Ulpim, pp. 152-7; Abū Zahrah, Uṣūl, p. 65-6; Khallaf, 'Ilm, pp. 25-7.

50. For further details on the principles of government under the rule of law — also referred to as the principle of legality — see Kamali, ‘The Citizen and State’, pp. 30ff.


52. Von Denffer, 'Ulpim, pp. 93ff.

53. Shāṭībī, Muwāfaqāt, III, p. 201.


55. Khudārī, Uṣūl, pp. 209-210. Thus when Qudāmah ibn Maẓ'ūn was charged with the offence of wine-drinking, 'Umar ibn al-Khaṭṭāb decided to punish him, but the defendant cited the Qur'ānic āyah in sūra al-Māʾidah (5:93) in his own defence. This āyah reads: ‘There is no blame on those who believe and do good deeds for what they consume provided they are God-fearing.’ Ibn Maẓ'ūn claimed that he was one of them. 'Abd Allāh ibn 'Abbās refuted this view and explained that this particular āyah had been revealed concerning people who died before wine-drinking was definitively forbidden.

56. Ibid., p. 211.
CHAPTER THREE

The Sunnah

Introduction

Literally, *Sunnah* means a clear path or a beaten track but it is also used to imply normative practice, or an established course of conduct. A Sunnah may be a good example or a bad one, and it may be set by an individual, a sect or a community.¹ In pre-Islamic Arabia, the Arabs used the word ‘Sunnah’ in reference to the ancient and continuous practices of the community that they inherited from their forefathers. Thus it is said that the pre-Islamic tribes of Arabia each had their own *sunnah*, which they considered the basis of their identity and pride.² The opposite of Sunnah is *bid‘ah*, or innovation, which is characterised by lack of precedent and continuity with the past. In the Qur’ān, the word ‘Sunnah’ and its plural, *sunan*, have been used on a number of occasions (sixteen times to be precise). In all these instances, Sunnah has been used to imply an established practice or course of conduct. Typical occurrences of ‘Sunnah’ in the Qur’ān are ‘*sunnat al-awwalin*’ (the worn-out ways of ancient people) (al-Kahf, 18:55), *sunnat Allāh* (God’s way of practice of doing things) (al-Fath, 48:23 and al-Isrā’, 17:77) and ‘*sunan*’ (traditions, ways of life) (al-Imran, 3:137). It is interesting to note that the phrase ‘*sunnat Allāh*’ occurs in nine of the sixteen occasions. To the ‘*ulamā*’ of hadīth, Sunnah refers to all that is narrated from the Prophet, his acts, his sayings and whatever he has tacitly approved, plus all the reports which describe his physical attributes and character. The ‘*ulamā*’ of jurisprudence, however, exclude the description of the physical features of the Prophet from the definition of *Sunnah*.³ *Sunnah al-Nabi* (or *Sunnah al-Rasūl*), that
The Prophetic Sunnah, does not occur in the Qur'an as such. But the phrase *uswah hasanah* (excellent conduct) which occurs in sūra al-Ahzab (33: 21) in reference to the exemplary conduct of the Prophet is the nearest Qur'anic equivalent of *Sunnah al-Nabi*. The *uswah*, or example of the Prophet, was later interpreted to be a reference to his *Sunnah*. The Qur'an also uses the word ‘*hikmah*’ (lit. wisdom) to indicate a source of guidance that accompanies the Qur'an itself. Al-Shafi'i quotes at least seven instances in the Qur'an where ‘*hikmah*’ occurs next to *al-kitāb* (the Book). In one of these passages, which occurs in sūra al-Jum'ah (62:2), for example, we read that God Almighty sent a Messenger to educate and to purify the people by ‘teaching them the Book and the *hikmah*’.

According to al-Shafi'i's interpretation, which also represents the view of the majority, the word ‘*hikmah*’ in this context means the Sunnah of the Prophet. The Book is clearly the Qur'an, and this is succeeded by ‘*hikmah*’ in a context where God Most High mentions His favour to His creatures. The Qur'an has in numerous places emphasised obedience to the Prophet, so it would appear most likely that ‘*hikmah*’ refers to the Sunnah of the Prophet. Both the terms ‘*Sunnah*’ and ‘*Sunnah Rasul Allah*’ have been used by the Prophet himself and his Companions. Thus when the Prophet sent Mu'adh ibn Jabal as judge to the Yemen, he was asked about the sources on which he would rely in making decisions. In reply Mu'adh referred first to the ‘Book of God’ and then to the ‘*Sunnah* of the Messenger of God’.
In another hadith, the Prophet is reported to have said, 'I left two things among you. You shall not go astray so long as you hold on to them: the Book of God and my Sunnah [sunnati].'

There is evidence to suggest that the Sunnah of the Prophet was introduced into legal theory by the jurists of Iraq towards the end of the first century. The term 'Sunnah of the Prophet' occurs, for example, in two letters addressed to the Umayyad ruler, 'Abd al-Malik ibn Marwān (d. 86 AH) by the Khārijite leader 'Abd Allāh ibn 'Ibād, and al-Hasan al-Bāṣrī. But this might mean that the earliest available record on the establishment of terminology dates back to the late first century Hijrah. This evidence does not necessarily prove that the terminology was not in use before then.

Initially the use of the term 'Sunnah' was not restricted to the Sunnah of the Prophet but was used to imply the practice of the community and precedent of the Companions. This usage of 'Sunnah' seems to have continued until the late second century when al-Shāfi‘i tried to restrict it to the Sunnah of the Prophet alone. Sometimes the Arabic definite article 'al' was prefixed to Sunnah to denote the Sunnah of the Prophet while the general usage of Sunnah as a reference to the practice of the community, or its living tradition, continued. By the end of the second century Hijrah, the technical/juristic meaning of Sunnah appears to have become dominant, until the 'ulamā‘ used it exclusively to imply the normative conduct of the Prophet. The 'ulamā‘ thus discouraged the use of such expressions as the Sunnah of Abū Bakr or ‘Umar. In their view, the proper usages of Sunnah were to be confined to Sunnah Allāh, and Sunnah Rasūl Allāh, that is the Sunnah of God, or His way of doing things, and the Sunnah of His Messenger. But there were variant opinions among the 'ulamā‘ which disputed the foregoing, especially in view of the hadith in which the Prophet is reported to have said, 'You are to follow my Sunnah and the Sunnah of the Rightly-Guided Caliphs.'

But again, as al-Shawkānī points out, it is possible that in this hadith, the Prophet had used 'Sunnah' as a substitute for 'tarīqah' or the way that his Companions had shown. Al-Shawkānī's interpretation
suggests that the Prophet may not have used ‘Sunnah’ in the exclusive sense that the ‘ulamā’ later attempted to attach to this term.

In its juristic usage, ‘Sunnah’ has meant different things. To the ‘ulamā’ of usūl al-fiqh, Sunnah refers to a source of the Sharī'ah and a legal proof next to the Qur'ān. But to the ‘ulamā’ of fiqh, ‘Sunnah’ primarily refers to a shar'i value which falls under the general category of mandūb. Although in this sense Sunnah is used almost synonymously with mandūb, it does not necessarily mean that Sunnah is confined to the mandūb. For in its other usage, namely as a source of Sharī'ah, Sunnah may authorise and create not only a mandūb but also any of the following: wājib, harām, maktūb and mubah. Thus in the usage of usūl al-fiqh, one might say that this or that ruling has been validated by the Qur'ān or by the Sunnah, whereas a faqīh would be inclined to say that this or that act is Sunnah, which means that it is neither fard nor wājib; it is one of the five values which falls under the category of mandūb. To the ‘ulamā’ of hadith, on the other hand, Sunnah includes all that is narrated from the Prophet, his words, acts, and tacit approvals, whether before or after the beginning of his prophetic mission, and once again regardless of whether it may contain a ruling of the Sharī'ah or not.

Notwithstanding the fact that the ‘ulamā’ have used Sunnah and hadith almost interchangeably, the two terms have meanings of their own. Literally, hadith means a narrative, communication or news consisting of the factual account of an event. The word occurs frequently in the Qur'ān (twenty-three times to be precise) and in all cases it carries the meaning of a narrative or communication. In none of these instances has hadith been used in its technical, exclusive sense, that is, the sayings of the Prophet. In the early days of Islam, following the demise of the Prophet, stories relating to the life and activities of the Prophet dominated all other kinds of narratives, so the word began to be used almost exclusively for a narrative from, or a saying of, the Prophet.

Hadith differs from Sunnah in that hadith is a narration of the conduct of the Prophet whereas Sunnah is the example or the law that is deduced from it. Hadith in this sense is the vehicle or the carrier of Sunnah, although Sunnah is a wider concept and used to be so especially before its literal meaning gave way to its juristic usage. Sunnah thus referred not only to the hadith of the Prophet but also to the established practice of the community. But once the literal meanings of hadith and Sunnah gave way to their technical usages and were both exclusively used in reference to the conduct of the Prophet, the two
became synonymous. This was largely a result of al-Shāfi‘ī’s efforts, who insisted that the Sunnah must always be derived from a genuine hadith and that there was no Sunnah outside the hadith. In the pre-Shāfi‘ī period, hadith was also applied to the statements of the Companions and their Successors, the tābi‘ūn. It thus appears that hadith began to be used exclusively for the acts and sayings of the Prophet only after the distinction between the Sunnah and hadith was set aside.¹³

There are two other terms, namely khabar and athar, which have often been used as alternatives to hadith. Literally, khabar means ‘news or report’, and athar, ‘impression, vestige or impact’. The word khabar in the phrase ‘khabar al-wahid’, for example, means a solitary hadith. The majority of ‘ulama’ have used hadith, khabar and athar synonymously, whereas others have distinguished khabar from athar. While the former is used synonymously with hadith, athar (and sometimes ‘amal) is used to imply the precedent of the Companions.¹⁴

The majority of ‘ulama’ have upheld the precedent of the Companions as one of the transmitted (naqli) proofs. The jurists of the early schools of law are known to have based opinions on athar. Imam Mālik even went so far as to set aside the Prophetic hadith in favour of athar on the strength of the argument that athar represented the genuine Sunnah, as the Companions were in a better position to ascertain the authentic Sunnah of the Prophet. There were indeed, among the Companions, many distinguished figures whose legal acumen and intimate knowledge of the sources equipped them with a special authority to issue fatwās. Sometimes they met in groups to discuss the problems they encountered, and their agreement or collective judgement is also known as athar. For al-Shāfi‘ī (d. 204 AH), however, athar does not necessarily represent the Sunnah of the Prophet. In the absence of hadith from the Prophet, al-Shāfi‘ī followed the precedent of Companions, and in cases where a difference of opinion existed among the Companions, al-Shāfi‘ī preferred the opinion of the first four caliphs over others, or one which was in greater harmony with the Qur’ān.¹⁵ According to al-Shāfi‘ī, the Sunnah, coming direct from the Prophet in the form of hadith through a reliable chain of narrators, is a source of law irrespective of whether it was accepted by the community or not. He emphasised the authority of the hadith from the Prophet in preference to the opinion or practice of the Companions. Al-Shāfi‘ī contended that hadith from the Prophet, even a solitary hadith, must take priority over the practice and opinion of the community, the Companions and the Successors.¹⁰ Al-Shāfi‘ī directed
his efforts mainly against the then prevailing practice among jurists of giving preference to the practice of the community and the decisions of the Companions over the hadith. Al-Shāfi‘ī attempted to overrule the argument, advanced by Imam Mālik, for example, that Medinan practice was more authoritative than hadith. In his Muwattā’, for example, Mālik (d. 179 AH) generally opens every legal chapter with a hadith from the Prophet, but in determining detailed legal issues, he does not consistently adhere to the principle of the priority of hadith over athar. It is interesting to note that the Muwattā’ contains 1,720 hadith, out of which 822 are from the Prophet and the remainder from the Companions, Successors and others. This would suggest that Imam Mālik was not overly concerned with the distinction between hadith and athar that was to become the main theme of al-Shāfi‘ī’s endeavour to establish the overriding authority of the Prophetic hadith.17

I. Proof-Value (Hujjiyyah) of Sunnah

The ‘ulamā’ are unanimous on the point that Sunnah is a source of Shari‘ah and that in its rulings with regard to halāl and harām, it stands on the same footing as the Qur‘ān.18 The Sunnah of the Prophet is a proof (hujjah) for the Qur‘ān, testifies to its authority and enjoins the Muslim to comply with it. The words of the Prophet, the Qur‘ān tells us, are divinely inspired (al-Najm, 53:3). His acts and teachings that were meant to establish a rule of Shari‘ah constitute a binding proof.19 While commenting on the Qur‘ānic āyah which states of the Prophet that ‘he does not speak of his own desire, it is none other than wahy sent to him’, al-Ghazālī writes that some of the divine revelation that the Prophet received constitutes the Qur‘ān, whereas the remainder is Sunnah. The words of the Prophet are a hujjah for anyone who heard the Prophet saying them. As for us and the generality of Muslims who have received them through the verbal and written reports of narrators, we need to ascertain their authenticity.20 The proof of authenticity may be definitive (qafī), or it may amount to a preferable conjecture (al-zann al-rajih); in either case, the Sunnah commands obedience of the mukallaf. All the rulings of the Prophet, especially those which correspond with the Qur‘ān and corroborate its contents, constitute binding law.21

In more than one place, the Qur‘ān enjoins obedience to the Prophet and makes it the duty of the believers to submit to his judgement and his authority without question. The following āyāt are
explicit on this theme, all of which are quoted by al-Shāfi‘ī in his renowned work, *al-Risālah*:  

> And whatever the Messenger gives you, take it, and whatever he forbids you, abstain from it (al-Hashr, 59:7).

وَمَا أَتَاكُمُ الرَّسُولُ فَخَذُوهُ وَمَا فَتَنْهَى عَنْهُ فَاتِنَهُوا

Obey God and obey the Messenger and those who are in charge of affairs among you. Should you happen to dispute over something, then refer it to God and to the Messenger (al-Nisā’, 4:58-59).

بَلِ الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَالرَّسُولَ وَأُولِي الْأَمَرِ

منكم فإن تنازعتم في شيء فردوه إلى الله والرسول

To refer the judgement of a dispute to God means recourse to the Qur'ān, and referring it to the Messenger means recourse to the Sunnah. In another passage, the Qur'ān emphasises: ‘Whoever obeys the Messenger verily obeys God’ (al-Nisā’, 4:80).

And finally, the Qur'ān is categorical about the fact that the definitive rulings of the Qur'ān and Sunnah are binding on the believers in that they are no longer at liberty to differ with the dictates of the divine will or to follow a course of their own choice: ‘Whenever God and His Messenger have decided a matter, it is not for a believing man or woman to follow another course of his or her own choice’ (al-Ahzāb, 33:36).

وَمَا كَانَ لِلوُلَّدِينَ وَلَا مَوْلُودَةَ إِذَا قَضَى اللَّهُ وَرَسُولُهُ أَمَرًا

أن يكون لهم الخبرة من أمرهم

In yet another place the Qur'ān stresses that submission to the authority of the Prophet is not a matter of mere formalistic legality but is an integral part of the Muslim faith: ‘By your Lord, they will not believe till they make you a judge regarding disagreements between them and find in themselves no resistance against accepting your verdict in full submission’ (al-Nisā’, 4:65).
It is concluded from these and other similar passages in the Qurʾān that the Sunnah is a proof next to the Qurʾān in all shariʿi matters, and that conformity to the terms of Prophetic legislation is a Qurʾānic obligation on all Muslims. The Companions have reached a consensus on this point: both during the lifetime of the Prophet and following his demise, they eagerly obeyed the Prophet's instructions and followed his examples regardless of whether his commands or prohibitions originated in the Qurʾān or otherwise. The first two caliphs, Abū Bakr and 'Umar, resorted to the Sunnah of the Prophet whenever they knew of it. In cases when they did not know, they would ascertain whether other Companions had any knowledge of the Prophetic Sunnah in connection with particular issues. The Caliph 'Umar is also on record as having issued written instructions to his judges in which he asked them to follow the Sunnah of the Prophet whenever they could not find the necessary guidance in the Qurʾān.

II. Classification and Value: (A)

Sunnah has been classified in various ways, depending, of course, on the purpose of classification and the perspective of the investigator. However, two of the most commonly accepted criteria for such classifications are the subject-matter (matn) of Sunnah and the manner of its transmission (isnāḍ). This section is primarily concerned with the classification of Sunnah from the viewpoint of its subject-matter.

To begin with, the Sunnah is divided into three types, namely verbal (qawli), actual (fiʿli) and tacitly approved (taqřīf). The other division of the Sunnah which will concern us here is its division into legal and non-legal Sunnah.

The verbal Sunnah consist of the sayings of the Prophet on any subject, such as the hadith ‘fi al-sāʾima zakāh’ (livestock is liable to zakāh). The actual Sunnah of the Prophet consists of his deeds and instructions, such as the way he performed the salah, the fasting, the rituals of hajj, or the transactions he concluded, such as sale and giving loans, etc. Similarly, the fact that the Prophet authorised mutilation of the hand of the thief from the wrist illustrated, in actual terms, how
the Qur'anic āyah (al-Mā'īdah, 5:38) should be implemented. This āyah simply states that the hand should be cut without specifying which part. The tacitly approved Sunnah consists of the acts and sayings of the Companions which came to the knowledge of the Prophet and of which he approved. The tacit approval of the Prophet may be inferred from his silence and lack of disapproval, or from his express approval and verbal confirmation.

An example of such a Sunnah is the report that two of the Companions went on a journey, and when they failed to find water for ablution, they both performed the obligatory prayers with tayyammum, that is, wiping the hands, face and feet with clean sand. Later, when they found water, one of them performed the prayers again whereas the other did not. Upon their return, they related their experience to the Prophet, who is reported to have approved both courses of action. Hence it became Sunnah taqrīriya.

Another example of this is the report that one of the prominent Companions, ʿAmr ibn al-ʿĀṣ, said that in the campaign of Dhāt al-Salāsil he had had a wet dream in the night, but owing to extreme cold he did not take a bath but instead performed the morning salāh with tayyammum. He then related this to the Prophet, who laughed but said nothing, which would imply that the act in question is permissible in similar circumstances, that is, when extreme cold proves to be hazardous to health.

Another example is the instruction, recorded by al-Bukhārī, that the Prophet issued on the occasion of the Battle of Bani Qurayzah where he said that ‘no one shall perform the [salāh of] ʿasr except in Bani Qurayzah.’

Some Companions took this literally and did not pray the ʿasr at the time of ʿasr, whereas others understood it to mean that they should hurry to reach their destination but also perform the ʿasr in time. Later, when the Prophet learned of it, he did not object to either course of action.

The sayings of Companions such as ‘we used to do such and such during the lifetime of the Prophet’ constitute a part of Sunnah taqrīriya only if the subject is such that it could not have failed to attract the attention of the Prophet. An example of this is the saying of Abū Saʿīd al-Khudrī that ‘for the charity of ʿīd al-Fīṭr, we used to give a ṣā of dates or of barley’. This is a matter that could not have remained hidden and therefore constitutes Sunnah taqrīriyya.
There is a view that these three varieties can be unified under the actual Sunnah, because words that are spoken are an act of the tongue, and tacit approval of something may also be seen as an act of the heart. But this view is not widely accepted, despite its basic truth, simply because general custom, and also the Qur’ān itself, differentiate between words and deeds. Note, for example, the text where we read, ‘It is a heinous abomination in the sight of God that you say things which you do not do’ (al-Šaff, 61:3).

Words and deeds are, therefore, two different things, and hence the classification above.$^30$

The entire bulk of the Sunnah, that is, the sayings, acts and tacit enactments of the Prophet, may once again be divided into two types: non-legal and legal Sunnah.

Non-legal Sunnah (Sunnah ghayr tashrī‘iyyah) mainly consists of the natural activities of the Prophet (al-af‘āl al-jibilliyyah) such as the manner in which he ate, slept, dressed, and such other activities as do not seek to constitute a part of the Shari‘ah. Activities of this nature are not of primary importance to the Prophetic mission and therefore do not constitute legal norms. According to the majority of ‘ulamā‘, the Prophet’s preferences in these areas, such as his favourite colours, or the fact that he slept on his right side in the first place, etc., only indicate the permissibility (ibāhah) of the acts in question.$^31$

The reason given is that such acts could be either wājib, mandūb or merely mubah. The first two can only be established by means of positive evidence: wājib and mandūb are normally held to be absent unless they are proved to exist. Since there is no such evidence to establish that the natural activities of the Prophet fall into either of these two categories, there remains the category of mubah and they fall in this category for which no positive evidence is necessary.$^32$

On a similar note, Sunnah relating to specialised or technical knowledge, such as medicine, commerce and agriculture, is once again held to be peripheral to the main function of the Prophetic mission and is therefore not a part of the Shari‘ah. As for the acts and sayings of the Prophet that related to particular circumstances such as the strategy of war, including devices that misled the enemy forces, timing of attack, siege or withdrawal, these too are considered to be situational and not a part of the Shari‘ah.$^33$

There are certain matters which are peculiar to the person of the
Prophet so that his example concerning them does not constitute general law. For instance, polygamy above the limit of four, marriage without a dower, prohibition of remarriage for the widows of the Prophet, connected fasting (ṣaum al-wisāl) and the fact that the Prophet admitted the testimony of Khuzaymah ibn Thābit as legal proof. The rules of Shari'ah concerning these matters are as stated in the Qur'an, and remain the legal norm for the generality of Muslims. According to the majority opinion, the position in regard to such matters is partly determined by reference to the relevant text of the Qur'an and the manner in which the Prophet is addressed. When, for example, the Qur'an addresses the Prophet in such terms as 'O you Messenger' or 'O you folded up in garments' (al-Muzzammil, 73:1; al-Muddaththir, 74:1), it is implied that the address is to the Prophet alone unless there is conclusive evidence to suggest otherwise.

Certain activities of the Prophet may fall in between the two categories of legal and non-legal Sunnah as they combine the attributes of both. Thus it may be difficult to determine whether an act was strictly personal or was intended to set an example for others to follow. It is also known that at times the Prophet acted in a certain way which was in accord with the then prevailing custom of the community. For instance, the Prophet kept his beard at a certain length and trimmed his moustache. The majority of 'ulamā' have viewed this not as mere observance of the familiar usage at the time but as an example for the believers to follow. Others have held the opposite view by saying that this was a part of the social practice of the Arabs which was designed to prevent resemblance to the Jews and some non-Arabs who used to shave the beard and grow the moustache. Such practices were, in other words, a part of the current usage and basically optional. Similarly, it is known that the Prophet used to go to the 'id prayers (ṣalāt al-ʿidd) by one route and return from the mosque by a different route, and that the Prophet at times performed the hajj pilgrimage while riding a camel. The Shafiʿi jurists are inclined to prefer the commendable (mandiib) in such acts to mere permissibility whereas the Hanafis consider them as merely permissible, or mubah. These approaches are taken basically in regard to shar'i matters and things which the Prophet might have done in order to gain the pleasure of God. As for non-shar'i matters such as trade and agriculture, Imam Malik and the Hanafi jurist al-Kharkhi have held that in the absence of any indication, the Prophet's affirmative acts indicated permissibility whereas Imam Shafiʿi and many Hanafis have held that they indicated mandiib.
The Sunnah (Sunnah tashri'iyyah) consists of the exemplary conduct of the Prophet, be it an act, saying, or a tacit approval, which incorporates the rules and principles of Shari'ah. This variety of Sunnah may be divided into three types, namely the Sunnah which the Prophet laid down in his capacities as Messenger of God, as the head of state or imam, or in his capacity as a judge. We shall discuss each of these separately, as follows.

(1) In his capacity as Messenger of God, the Prophet has laid down rules which are, on the whole, complementary to the Qur'an, but also established rules on which the Qur'an is silent. In this capacity, the Sunnah may consist of a clarification of the ambiguous (mujmal) parts of the Qur'an or specifying and qualifying the general and the absolute contents of the Qur'an. Whatever the Prophet has authorised pertaining to the principles of religion, especially in the area of devotional matters ('ibadāt) and rules expounding the lawful and the unlawful, that is, the halāl and harām, constitutes general legislation (tashri` 'āmm) whose validity is not restricted by the limitations of time and circumstance. All commands and prohibitions that are imposed by the Sunnah are binding on every Muslim regardless of individual circumstances, social status, or political office. In acting upon these laws, the individual normally does not need any prior authorisation by a religious leader or the government.37

There is evidently a difference between these two types of Sunnah. What the Prophet has said or done by way of conveying the message, wrote al-Qarafi, in the Thirty-Sixth Distinction of his Kitab al-Furūq, ‘becomes a general rule for everyone to whom it is addressed until the day of resurrection, and everyone must act directly, be it an obligation, a prohibition or even an ḵabah. But everything that the Prophet has authorised in his capacity as the imam, it is not permissible for anyone to act upon it without obtaining a prior authorisation of the imam, because the Prophet himself acted in that capacity and it would be in keeping with his example to follow the same.’38

In the spheres of government administration and politics, there are evidently matters such as the signing of treaties, division of the war booty, declaration of war, tactical decisions concerning military expeditions, and the appointment of officials in which the Prophet acted in his capacity not as the Messenger of God, but as the head of state.

The question arises as to how it is determined that the Prophet acted in one or the other of his three capacities as mentioned above. It is not always easy to answer this question in categorical terms. The uncertainty that has arisen in answering this question in particular
cases is, in fact, one of the main causes of juristic disagreement (ikhtilāf) among the fuqahā'. The ‘ulamā’ have on the whole attempted to ascertain the main thrust, or the direction (jihāh) of the particular acts and sayings of the Prophet. An enquiry of this nature helps to provide an indication of the value of the Sunnah in question: whether it constitutes an obligation, commendation, or ibāhah on the one hand, or a prohibition or abomination (karāhah) on the other.

When the direction of an act is known from the evidence in the sources, there remains no doubt as to its value. If, for example, the Prophet attempts to explain an ambiguous ruling of the Qur’ān, the explanation so provided would fall into the same category of values as the original ruling itself. According to the majority of ‘ulamā’, if the ambiguous of the Qur’ān is known to be obligatory or commendable, the explanatory Sunnah will carry the same value. For example, all the practical instructions of the Prophet which explained and illustrated the obligatory salah would be wājib and his acts pertaining to the supererogatory prayers, such as salah on the occasion of lunar and solar eclipse (salāt al-khusūf wa al-kusīf), would be mandīb. Alternatively, the Sunnah may itself provide a clear indication as to whether a particular rule it prescribes is wājib, mandīb, or merely permissible. Another method of ascertaining the value of a particular act is to draw an analogy between an undefined act and an act or saying whose value is known. Additionally, the subject-matter of the Sunnah may provide a sign or an indication as to its value. With regard to prayers, for example, the call to prayers, or adhān, and the call which immediately precedes the standing to congregational prayer (the iqāmah), are indications of the obligatory nature of the prayer. For it is known from the rules of Shari’ah that adhān and iqāmah precede the obligatory salah only. A salah which is not obligatory such as the ‘id prayer, or salah al-istisqā’ (prayers offered at the time of drought), are not preceded by the preliminaries of adhān or iqāmah. Another method of evaluating an act is by looking at its opposite, that is, its absence. If it is concluded that the act in question would have been in the nature of a prohibition had it not been authorised by the Prophet, then this would imply that it is obligatory. For example, circumcision is evaluated to be an obligation. Since it consists essentially of the infliction of injury for no obvious cause, had it not been made into an obligation, then it would presumably be unlawful. Its validation by the Shari’ah, in other words, is taken as an indication of its wujūb. This explanation is basically applicable to all penalties the Shari’ah has prescribed, although in most cases the value of the
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prescribed punishment is understood from the direct rulings of the relevant texts. And lastly, an act may require the belated performance (qadā') of a wājib or a mandūb, and as such its value would correspond to that of its prompt performance (adā').

The foregoing are the categories of acts whose direction and value can be ascertained. However, if no such verification is possible, then one must look at the intention behind its enactment. If a Prophetic act is intended as a means of seeking the pleasure of God, then it is classified as mandūb; and according to a variant view, as wājib. However, if the intention behind a particular act cannot be detected either, then it is classified as wājib, and according to a variant view as mandūb; but the matter is subject to interpretation and ijtihad.

(2) All the rulings of Sunnah which originate from the Prophet in his capacity as imam or head of state, such as the allocation and expenditure of public funds, decisions pertaining to military strategy and war, appointment of state officials, distribution of booty, signing of treaties, etc., partake of the legal Sunnah which, however, does not constitute general legislation (tashri' 'amm). Sunnah of this type may not be practised by individuals without obtaining the permission of competent government authorities first. The mere fact that the Prophet acted in a certain way, or said something relating to these matters, does not bind individuals directly, and does not entitle them to act on their own initiative without the express permission of the lawful authority. To give an example, according to a hadith, ‘Whoever kills a warrior [in battle] may take his belongings’.

The 'ulamā' have differed on the precise import of this hadith. Imam Mālik held that the Prophet uttered this hadith in his capacity as imam, in which case no-one is entitled to the belongings of his victim in the battlefield without the express authorisation of the imam. The majority have held the view that this hadith lays down a general law which entitles the soldier to the belongings of the deceased even without the permission of the imam.

On a similar note, when the prophet instructed Mu‘ādh ibn Jabal, upon sending him to the Yemen, to ‘take a dinar from every adult for poll tax’,
the qualification here was evidently done in the capacity of imam, who considered this to be appropriate and fair. But this was not a religious edict, such as the tithe or one-twentieth that have been specified in relation to zakāh. This also explains why the Caliph 'Umar ibn al-Khaṭṭāb later imposed different amounts of jizyah, ranging between twelve and forty-eight dirhams, that is about one to four dinars. The Caliph had evidently understood that the Prophet-imam had not enacted a permanent rule of the Sharī'ah and that the exact quantity was to be determined in the light of prevailing conditions.

The Hanafis have also held that the supplementary punishment of exile (or imprisonment for one year in zinā'), which the Prophet imposed in some cases, was ordered by way of siyāsah and tā'zīr, that is, in his capacity as imam. Based on this interpretation, the Hanafis have held the one year imprisonment to be a discretionary, as opposed to obligatory, punishment which the imam may or may not impose.

Al-Qaradāwī has discussed both these examples, and then added two other illustrations in which the Prophet acted in his capacity as imam. One of these was the division of the land of Khaybar among the conquerors. The Prophet considered this to be the best course of action to take at the time, but then he did not order the same on the conquest of Mecca. Instead the Prophet left the properties of the residents of Mecca untouched as this was seen to be one way of winning their hearts and support for Islam. Apparently the Jews of Khaybar could not be expected to do the same. The next example given is the hadith in which the Prophet lifted the ban he had earlier imposed on the storage of sacrificial meat during the 'īd Festival of Aḍḥā. The ban was initially imposed because of the large crowds that were coming to the ḥajj, but then later he lifted the ban when it was no longer needed. In both events, the Prophet acted in his capacity as imam.

It has been observed that the Prophet might have uttered the hadith which entitles the warrior to the belongings of his victim in order to encourage the Companions to do jihād in the light of the then prevailing circumstances. The circumstances may have been such that an incentive of this kind was required; or, perhaps, it was intended to lay down a general law without any regard for particular situations. According to Imam Shāfī‘ī, the hadith under consideration lays down a general rule of Sharī'ah. For this is the general norm in regard to the Sunnah. The main purpose of the Prophet’s mission was to lay down the foundations of the Sharī'ah and, unless there is an indication to the contrary, one must assume that the purpose of the hadith in general is to lay down general law.
(3) *Sunnah* which originates from the Prophet in his capacity as a judge in particular disputes usually consists of two parts: the part which relates to claims, evidence and factual proof, and the judgement which is issued as a result. The first part is situational and does not constitute general law, whereas the second part lays down general law, with the proviso, however, that it does not bind the individual directly, and no-one may act upon it without the prior authorisation of a competent judge. Since the Prophet himself acted in a judicial capacity, the rules that he has enacted must therefore be implemented by the office of the *qādi*. Hence when a person has a claim over another which the latter denies, but the claimant knows of a similar dispute which the Prophet has adjudicated in a certain way, this would not entitle the claimant to take the law into his own hands. He must follow proper procedures to prove his claim and to obtain a judicial decision.

To distinguish the legal from non-legal *Sunnah*, it is necessary for the *mujtahid* to ascertain the original purpose and context in which a particular ruling of the *Sunnah* has been issued and whether it was designed to establish a general rule of law. The *hadith* literature does not always provide clear information on the different capacities in which the Prophet might have acted in particular situations, although the *mujtahid* may find indications that assist him to some extent. The absence of adequate information and criteria on which to determine the circumstantial and non-legal *Sunnah* from that which constitutes general law dates back to the time of the Companions. The difficulty has persisted ever since, and it is mainly due to the shortage of adequate information that disagreement has arisen among the ‘*ulamā*’ over the understanding and interpretation of the *Sunnah*.

To give another example, juristic disagreement has arisen concerning a *hadith* on the reclamation of barren land which reads, ‘Whoever reclaims barren land becomes its owner’. The ‘*ulamā*’ have differed as to whether the Prophet uttered this *hadith* in his capacity as prophet or in his capacity as head of state. If the former is established to be the case then the *hadith* lays down a binding rule of law. Anyone who reclaims barren land becomes its owner and need not obtain any permission from the imam or anyone else, for the *hadith* provides the necessary authority and there would be no need for official permission. If, on the other hand, it is established that the Prophet uttered this *hadith* in his capacity as imam,
then it would imply that anyone who wishes to reclaim barren land must obtain the prior permission of the imam or anyone else. The *hadith*, in other words, only entitles the imam to grant the citizen the right to reclaim barren land. The majority of jurists have adopted the first view whereas the Hanafis have held the second. The majority of jurists, including Imams al-Shafi‘i, Mālik and Abū Yūsuf, have held that the consent of the state is not necessary for anyone to commence reclaiming barren land, especially when no one is harmed by it. But it appears that jurists and scholars of the later ages prefer the Hanafi view which stipulates that reclaiming barren land requires the consent of the state. The Hanafi view is based on the rationale of preventing disputes among people. The Mālikis on the other hand only require government consent when the land is close to a human settlement, and the Ḥanbalis only when it has previously been alienated by another person.

Disagreement has also arisen with regard to the *hadith* that adjudicated the case of Hind, the wife of Abū Sufyān. Hind complained to the Prophet that her husband was a tight-fisted man and that, despite his affluence, he refused to give adequate maintenance to her and her child. The Prophet instructed her to ‘take [of her husband’s property] what is sufficient for yourself and your child according to custom’.

The ‘ulama‘ have disagreed as to whether the Prophet uttered this *hadith* so as to enact a general rule of law, or whether he was acting in the capacity of a judge. Were it admitted that the *hadith* consists of a judgement addressing a particular case, then it would only authorise the judge to issue a corresponding order. Thus it would be unlawful for a creditor to take his entitlement from the property of his debtor without a judicial order. If it were established, on the other hand, that the *hadith* lays down a general rule of law, then no adjudication would be required to entitle the wife or the creditor to the property of the defaulting debtor, as the *hadith* itself would provide the necessary authority. If any official permission is required, then it would have to be in the nature of a declaration or clearance only.

The Hanafis, Shafi‘is and Ḥanbalis have held that when a man who is able to support his wife wilfully refuses to do so, it is for the wife to take action and for the qādi to grant a judgement in her favour. If the husband still refuses to fulfil his duty, the qādi may order the sale of his property from whose proceeds the wife may obtain her
maintenance. The court may even imprison a persistently neglectful husband. The wife is, however, not entitled to a divorce, the reason being that when the Prophet instructed Hind to take her maintenance from her husband's property, she was not granted the right to ask for a divorce. The Mālikīs are basically in agreement with the majority view, with the only difference that in the event of the husband's persistent refusal, the Mālikīs entitle the wife to ask for a divorce. Notwithstanding some disagreement as to whether the court should determine the quantity of maintenance on the basis of the financial status of the husband, the wife, or both, according to the majority view, the husband's standard of living should be the basis of the court decision. Thus the 'ulamā' have generally considered the hadith under consideration to consist of a judicial decision of the Prophet, and as such it only authorises the judge to adjudicate the wife's complaint and to specify the quantity of maintenance and the method of its payment.\(^{54}\)

We also note that some of the Prophetic hadith took into consideration the prevailing custom of Arab society at the time, and a correct understanding of such hadith rulings would require that they are read in that context. Some of the hadith on the subject of usury (ribā'), for example, refer to commodities, especially wheat, barley and dates as measurable commodities that were sold by measurement, not weight. Later, when there was a change in the custom of society, the same items were consequently sold by weight and this was duly acknowledged by some 'ulamā', including Abū Yūsuf, who was of the view that the distinction between whether an item was measurable (kaylı) or sold by weight (wazni) was to be made by reference to the prevailing custom. But in saying so, Abū Yūsuf departed from the views of Imam Abū Ḥanīfah, who had earlier held that the prophetic characterisation of these items within the one category or the other was permanent and unchangeable. If the Prophet had identified wheat or dates as kaylı, they must remain as such for all time, regardless of customary change. But the correct view, as al-Qaradāwī has observed, is that of Abū Yūsuf.

A more explicit example of Sunnah that is predicated on 'urf is the determination of the quorum of zakāh in gold and silver, which were fixed at twenty dinars (about 85g) and two hundred dirhams (595g) respectively. One dinar in those days was equivalent to ten dirhams. The point to note here is that the Prophet had not meant to enact two different quorums for zakāh, but to establish valid and objective standards by which poverty and wealth can be distinguished for the
purpose of zakāh. If we were to isolate the rulings of Sunnah from its underlying context and ‘urf, and take a literal approach to enforcing them, this may amount to distortion. This is due to the considerable change that has taken place in the basic value of gold in relation to silver. Surely, in judging a person’s liability to zakāh we must refer to current economic conditions. Can we, in other words, say that a person who now owns eighty five grams of gold, or its equivalent in silver, is wealthy? The question has been raised by Abū Zahrah and ‘Abd al-Wahhāb Khallāf, as also recounted al-Qaradāwī, and they all take the view that a uniform quorum should now be determined in gold (but not in both gold and silver) that would realistically determine a person’s liability to zakāh by reference to the prevailing economic conditions. Similar suggestions have been made in regard to the quantities of diyāh (blood money) and other relevant issues.

And lastly we note that some hadith are worded in the form of general (‘āmm) rulings but they actually convey a specific (khāṣṣ) ruling. A correct understanding of such hadith would require that they are not to be generalised but read in proper context. An example of this is the hadith concerning the recommended toilet behaviour, particularly in respect of the direction in which one sits or urinates. The instruction here reads: ‘Face not the qiblah when you pass a motion or urinate, nor should you turn your back to the qiblah. Face either the east or the west.’

Al-Bukhārī has quoted this and Ibn Ḥajar, the commentator of al-Bukhārī, has rightly stated that some people have taken this hadīth literally, which is obviously erroneous. The hadīth, although generally worded, is only addressed to the people of Medina, but people in such places like Egypt and Libya or Morocco would have actually acted contrary to the purpose of the hadīth, if they face eastwards. For a similar example, we also note the hadīth, again recorded in both al-Bukhārī and Muslim, on the authority of Nāfi‘ ibn ‘Umar, where the Prophet said that ‘fever – or high fever – is a portion of Hell, so cool it down with water’.
This hadith has puzzled specialists in medicine and some have considered it contrary to the treatment they would advise for high fever. Once again the hadith here, although convened in general terms, must be read in the context of the particular climate and other related factors.\

Sunnah which consists of general legislation often has the quality of permanence and universal application to all Muslims. Sunnah of this type usually consists of commands and prohibitions which are related to the Qur’ān in the sense of endorsing, elaborating or qualifying the general provisions of the Holy Book.

II.1 Qur’ān and Sunnah Distinguished

The Qur’ān was recorded in writing from beginning to end during the lifetime of the Prophet, who ascertained that the Qur’ān was preserved as he received it through divine revelation. The Prophet clearly expressed the concern that nothing of his own Sunnah should be confused with the text of the Qur’ān. This was, in fact, the main reason why he discouraged his Companions, at the early stage of his mission in any case, from reducing the Sunnah into writing lest it be confused with the Qur’ān. The Sunnah, on the other hand, was mainly retained in memory by the Companions who did not, on the whole, keep a written record of the teachings of the Prophet. There were perhaps some exceptions as the relevant literature suggests that some, though a small number, of the Companions held collections of the hadith of the Prophet which they wrote and kept in their private collections. The overall impression, however, is that this was done on a fairly limited scale.

It is reported that ‘Abd Allah ibn ‘Amr ibn al-‘Ās said that, ‘I used to write everything I heard from the Messenger of Allah for my collection, but then the Quraysh advised me not to do so and said, “You write while the Messenger of God may be saying something in a state of anger!” Then I stopped until I mentioned this to the messenger of God and he said: “Write. By the One in whose hands my life reposes, I say only the truth” and he pointed his finger to me while saying so.’ ‘Abd Allah ibn ‘Amr ibn al-‘Ās used to call his collection ‘al-şahīfah al-sādiqah’. Other Companions who wrote hadith includes ‘Abd Allah ibn Mas’ūd and Sa’d ibn ‘Ubādah. There is also a report that the Companion Abū Shāh asked the Prophet for permission to write and the Prophet granted his request. It thus appears that the Prophet initially ordered the Companions not to write anything
other than the Qur'ān, but then, at a time perhaps when most of the Qur'ān had been received and documented, the Prophet permitted his teachings to be put into writing.

The Companions were generally assiduous in seeking and disseminating the teachings of the Prophet. Al-Bukhārī recorded the report in which 'Umar ibn al-Khaṭṭāb stated: 'I had a neighbour from the Anṣār in Medina and we used to take turns in attending to the Messenger of God. He would attend one day and I would the next. I would tell him of the events of the day I attended and he would do the same.'

The Companions used to verify instances of doubt concerning the text of the Qur'ān with the Prophet himself, who would often clarify them through clear instruction. This manner of verification is, however, unknown with regard to the Sunnah.

The entire text of the Qur'ān has come down to us through continuous testimony (tawātūr) whereas the Sunnah has for the most part been narrated and transmitted in the form of solitary, or āḥād, reports. Only a small portion of the Sunnah has been transmitted in the form of mutawātīr.

The Qur'ān in none of its parts consists of conceptual transmission, that is, transmission in the words of the narrator himself. Both the concepts and words of the Qur'ān have been recorded and transmitted as the Prophet received them. The Sunnah on the other hand consists, in the most part, of the transmission of concepts in words and sentences that belong to the narrators. This is why one often finds that different versions of the one and the same hadith are reported by people whose understanding or interpretation of a particular hadith is not identical. The scope of ikhtilāf, or disagreement, over the Sunnah is more extensive than that which may exist regarding the Qur'ān. Whereas the 'ulamā' have differed in their understanding/interpretation of the text of the Qur'ān, there is no such problem concerning the authenticity of the contents of the Qur'ān. But disagreement over the Sunnah extends not only to questions of interpretation but also to authenticity and proof, issues on which we shall further elaborate as our discussion proceeds.

II.2 The Priority of the Qur'ān over the Sunnah

As Sunnah is the second source of the Shari'ah after the Qur'ān, the mujtahid is bound to observe the order of priority between the Qur'ān and Sunnah. Hence in his search for a solution to a particular problem,
the jurist must resort to the Sunnah only when he fails to find any guidance in the Qur’an. Should there be a clear text in the Qur’an, it must be followed and be given priority over any ruling of the Sunnah which may happen to be in conflict with the Qur’an. The priority of the Qur’an over the Sunnah is partly a result of the fact that the Qur’an consists wholly of manifest revelation (wahy zahir) whereas the Sunnah mainly consists of internal revelation (wahy batin) and is largely transmitted in the words of the narrators themselves. The other reason for this order of priority relates to the question of authenticity. The authenticity of the Qur’an is not open to doubt. It is, in other words, qafî, or decisive, in respect of authenticity and must therefore take priority over the Sunnah, or at least that part of Sunnah which is speculative (zanni) in respect of authenticity. The third point in favour of establishing an order of priority between the Qur’an and the Sunnah is that the latter is explanatory of the former. Explanation or commentary should naturally occupy a secondary place in relationship to the source. Furthermore, the order of priority between the Qur’an and Sunnah is clearly established in the hadith of Mu‘adh ibn Jabal quoted earlier. The purport of this hadith was also adopted and communicated in writing by ‘Umar ibn al-Khattab to two judges, Shurayh ibn Harith and Abû Mûsâ al-Ash‘ari, who were ordered to resort to the Qur’an first and to the Sunnah only when they could find no guidance in the Qur’an.°°

A practical consequence of this order of priority may be seen in the Hanafi distinction between farḍ and wâjib. The former is founded on the definitive authority of the Qur’an, whereas the latter is founded on the definitive Sunnah, but is one degree weaker because of a possible doubt in its transmission and accuracy of content. These are some of the factors that explain the general agreement of the ‘ulamâ’ to the effect that the authority of the Qur’an overrides that of the Sunnah.°°

There should in principle be no conflict between the Qur’an and the authentic Sunnah. If, however, a conflict is seen to exist between them, they must be reconciled as far as possible and both should be retained. If this is not possible, the Sunnah in question is likely to be of doubtful authenticity and must therefore give way to the Qur’an. No genuine conflict is known to exist between the mutawâtir hadith and the Qur’an. All instances of conflict between the Sunnah and the Qur’an, in fact, originate in the solitary, or âhâd, hadith, which are in any case of doubtful authenticity and subordinate to the overriding authority of the Qur’an.°°
It has, however, been suggested that establishing such an order of priority is anomalous and contrary to the basic role that the Sunnah plays in relation to the Qur'ān. As the familiar Arabic phrase, attributed to Imam Abū 'Amr al-Awzā'ī, 'al-Sunnah qādiyyah 'ala al-kitāb' (Sunnah is the arbiter of the Qur'ān) suggests, it is normally the Sunnah which explains the Qur'ān, not vice versa. The fact that the Sunnah explains and determines the precise meaning of the Qur'ān means that the Qur'ān is more dependent on the Sunnah than the Sunnah is on the Qur'ān. In the case, for example, where the text of the Qur'ān imparts more than one meaning, or when it is conveyed in general terms, it is the Sunnah that specifies the meaning that must prevail. Again, the manifest (zāhir) of the Qur'ān may be abandoned by the authority of the Sunnah, just as the Sunnah may qualify the absolute (mutlaq) in the Qur'ān. The Qur'ān on the other hand does not play the same role with regard to the Sunnah. It is not the declared purpose of the Qur'ān to explain or clarify the Sunnah, as this was done by the Prophet himself. Since the Sunnah explains, qualifies, and determines the purport of the Qur'ān, it must take priority over the Qur'ān. If this is admitted, it would follow that incidents of conflict between the Qur'ān and Sunnah must be resolved in favour of the latter. Some 'ulamā' have even advanced the view that the hadith of Mu'ādh ibn Jabal (which clearly confirms the Qur'ān’s priority over the Sunnah) is anomalous in that not everything in the Qur'ān is given priority over the Sunnah. For one thing, the mutawatir hadith stands on the same footing as the Qur'ān itself. Likewise, the manifest (zāhir) of the Qur'ān is open to interpretation and ijtihād in the same way as the solitary, or āhād, hadith; which means that they are more or less equal in these respects. Furthermore, according to the majority opinion, before implementing a Qur'ānic rule one must resort to the Sunnah and ascertain that the ruling in question has not been qualified in any way or given an interpretation on which the text of the Qur'ān is not self-evident.

In response to the assertion that the Sunnah is the arbiter of the Qur'ān, it will be noted, as al-Shāṭibī points out, that this need not interfere with the order of priority in favour of the Qur'ān. In all cases where the Sunnah specifies or qualifies the general or the absolute terms of the Qur'ān, the Sunnah in effect explains and interprets the Qur'ān. In none of these instances is the Qur'ān abandoned in favour of the Sunnah. The word qādiyyah (arbiter) in the expression quoted above therefore means mubayyīnīh (explanatory) and does not imply the priority of the Sunnah over the Qur'ān. This is, in fact, the
response that the phrase prompted from Imam Ahmad ibn Hanbal, who is on record to have stated somewhat angrily, 'How impudent to say that the Sunnah explains and clarifies the Book.' The textual rulings of the Qur'an concerning theft and the obligation of zakāh have, for example, been qualified by the Sunnah. However, it is only proper to say that in both these cases, the Sunnah elaborates the general rulings of the Qur'an, and it would hardly be accurate to suggest that the Sunnah has introduced anything new, or that it seeks to overrule the Qur'an. When an interpreter explains a particular legal text to us, it would hardly be correct to say that we act upon the words of the interpreter without referring to the legal text itself.\footnote{70}

Furthermore, the explanatory role of the Sunnah in relation to the Qur'an has been determined by the Qur'an itself, where we read in an address to the Prophet in surah al-Nahl (16:44): 'We have sent down to you the Remembrance so that you may explain to the people what has been revealed to them.'

The correct conclusion drawn from this and similar Qur'ānic passages is that the Sunnah, being explanatory to the Qur'an, is subordinate to it.\footnote{71}

II.3 Is Sunnah an Independent Source?

An adequate answer to the question as to whether the Sunnah is a mere supplement to the Qur'an or a source in its own right necessitates an elaboration of the relationship of the Sunnah to the Qur'an in the following three capacities.

Firstly, the Sunnah may consist of rules that merely confirm and reiterate the Qur'an, in which case the rules concerned originate in the Qur'an and are merely corroborated by the Sunnah. The question as to whether the Sunnah is an independent source is basically redundant with regard to matters on which the Sunnah merely confirms the Qur'an, as it is obvious that in such cases the Sunnah is not an independent source. A substantial part of the Sunnah is, in fact, of this variety: all hadith pertaining to the five pillars of the faith and other such matters like the rights of one's parents, respect for the property of others, and hadith which regulate homicide, theft and false testimony, etc., basically reaffirm the Qur'ānic principles on these subjects.\footnote{72}
be more specific, the *hadith* that ‘it is unlawful to take the property of a Muslim without his express consent’\textsuperscript{73}

\begin{center}

لا يحل مال أمرء مسلم إلا بطيب نفسه.

\end{center}

merely confirms the Qur’\'anic *‘ayah* which orders the Muslims to ‘devour not each others’ properties unlawfully unless [or ‘even if, according to a variant reading] it is through trade by your consent’ (al-\textit{Nis\'a}, 4:29).

\begin{center}

يا أيها الذين آمنوا لا تأكلوا أموالكم بينكم بالباطل إلا أن تكون تجارة عن تراض منكم

\end{center}

The origin of this rule is Qur’\'anic, and since the foregoing *hadith* merely reaffirms the Qur’\'an, there is no room for saying that it constitutes an independent authority in its own right.

Secondly, the Sunnah may consist of an explanation or clarification of the Qur’\'an; it may clarify the ambivalent (*mu\textit{ujmal}*) of the Qur’\'an, qualify its absolute statements, or specify the general terms of the Qur’\'an. This is, once again, the proper role that the Sunnah plays in relation to the Qur’\'an: it explains it. Once again, a substantial part of the Sunnah falls into this category. It is, for example, through this type of Sunnah that Qur’\'anic expressions such as *salāh*, *zakāh*, *hajj* and *riبā*, etc., have acquired their juridical (*sharī\'i*) meanings. To give another example, with regard to the contract of sale, the Qur’\'an merely declares sale to be lawful, as opposed to *riبā*, which is forbidden. This general principle has later been elaborated by the Sunnah, which expounded the detailed rules of *Sharī\'ah* concerning sale, including its conditions and varieties, and sales which might amount to *riبā*. The same could be said of the lawful and unlawful varieties of food, a subject on which the Qur’\'an contains only general guidelines while the Sunnah specifies them and provides the details.\textsuperscript{74} The Sunnah in this way specifies the general (*\textit{‘amm}*) of the Qur’\'an. Note, for example, that the Qur’\'anic command on fasting ‘so every one of you who is present during that month should fast’ (al-Baqarah, 2:185)

\begin{center}

فمن شهد منكم الشهر فليصمه

\end{center}

has been specified by the *hadith* which exonerated three categories of people from this (and other laws of *Sharī\'ah*). These are the minors,
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the insane and the persons asleep until they wake up. Similarly, the Qur'ān declared sale permissible but usury unlawful (al-Baqarah, 2:275) but then the Sunnah specified this in respect of the sale of wet dates for dry dates (i.e. 'arāyā). We note further that the general rules of inheritance in the Qur'ān have been specified by the ruling of hadith, which barred the killer from inheritance. The Qur'ānic ruling on the prohibition of carcasses for human consumption has also been specified by the hadith which makes an exception in respect of fish and locusts. The Sunnah also qualifies the absolute (mutlaq) of the Qur'ān. An example of this is the Qur'ānic punishment for theft which is conveyed in absolute terms, but then the Sunnah qualifies it and rules that the hand should be mutilated from the wrist. On the same subject, the Sunnah has laid down a further qualification that 'there shall be no mutilation for less than a quarter of a dinar'. Again, on the subject of bequest, the Qur'ān provides for the basic legality of bequest and the rule that it must be implemented prior to the distribution of the estate among the heirs (al-Nisā', 4:12). The Sunnah supplements these principles by providing additional rules which facilitate a proper implementation of the general principles of the Qur'ān.75

The foregoing two varieties of Sunnah between them comprise the largest bulk of Sunnah, and the 'ulama' are in agreement that these two types of Sunnah are integral to the Qur'ān and constitute a logical whole with it. The two cannot be separated or taken independently from one another. It is considered that the Sunnah that qualifies or elaborates the general provisions of the Qur'ān on devotional matters ('ibadat), on the punishment for theft, on the duty of zakāh and on the subject of bequests, could only have originated in divine inspiration (ilham), for these cannot be determined by means of rationality and ijtihād alone.76

Thirdly, the Sunnah may consist of rulings on which the Qur'ān is silent, in which case the ruling in question originates in the Sunnah itself. This variety of Sunnah, referred to as al-Sunnah al-mw'assisah, or 'founding Sunnah', neither confirms nor opposes the Qur'ān, and its contents cannot be traced back to the Holy Book. It is only this variety of Sunnah that lies at the centre of the debate as to whether or not the Sunnah is an independent source of law. To give some examples: the prohibition regarding simultaneous marriage to the maternal and paternal aunt of one's wife (often referred to as 'unlawful conjunction'), adjudication on the basis of one witness plus an oath by the claimant, the charity known as sadaqah al-fitr, the payment of blood-money (diyāh) by the kinsmen ('aqila), prohibition of the
flesh for human consumption of certain animals and birds, the right of pre-emption (shuf), the grandmother’s entitlement to a share in inheritance, the punishment of rajm, that is, death by stoning for adultery when committed by a married Muslim – all originate in the Sunnah as the Qur’ān itself is silent on these matters.77

There is some disagreement among jurists as to whether the Sunnah, or this last variety of it at any rate, constitutes an independent source of Shari‘ah. Some ʻulama’ of the later ages (al-muta‘ akhkhiriin), including al-Shāṭibī and al-Shawkānī, have held the view that the Sunnah is an independent source. Al-Shawkānī has stated that the rulings of Sunnah on the subject of the lawful and unlawful are equivalent to those of the Qur’ān. He then quotes the ḥadīth of the Prophet ‘I have indeed been given the Qur’ān and the like of it with it.’ The Prophet, in other words, regarded the Sunnah as the like (mithl) of the Qur’ān.78

It is also suggested that the Qur’ānic ʻāyah in sūra al-Nahl (16:44), quoted above, is inconclusive and that, despite its being clear on the point that the Prophet interprets the Qur’ān, it does not overrule the recognition of the Sunnah as an independent source. On the contrary, it is argued that there is evidence in the Qur’ān that substantiates the independent status of Sunnah. The Qur’ān, for example, in more than one place requires the believers to ‘obey God and obey His Messenger’ (al-Nisā’, 4:59; al-Mā‘idah, 5:92).

The fact that obedience to the Prophet is specifically enjoined next to obeying God warrants the conclusion that obedience to the Prophet means obeying him whenever he orders or prohibits something on which the Qur’ān might be silent. If the purpose of obedience to the Prophet were to obey him only when he explained the Qur’ān, then ‘obey God’ would be sufficient and there would have been no need to add the phrase ‘obey the Messenger’.79 Elsewhere the Qur’ān clearly places submission and obedience to the Prophet at the very heart of the faith as a test of one’s acceptance of Islam. This is the purport of the ʻāyah which reads: ‘By your Lord, they will not believe till they make you the judge regarding disagreements between them, and find in themselves no resistance against the verdict, but accept it in full submission’ (al-Nisā’, 4:65).
Furthermore, the proponents of the independent status of the Sunnah have quoted the hadith of Mu‘adh ibn Jabal in support of their argument. The hadith is clear on the point that the Sunnah is authoritative in cases on which no guidance can be found in the Qur‘ān. The Sunnah, in other words, stands on its own feet regardless of whether it is substantiated by the Qur‘ān or not. According to the majority of ‘ulamā‘, however, the Sunnah, in all its parts, even when it enacts original legislation, is explanatory and integral to the Qur‘ān. Al-Shafii‘i’s views on this matter are representative of the majority position. In his Risālah, al-Shafii‘i states:

I do not know anyone among the ‘ulamā‘ to oppose [the doctrine] that the Sunnah of the Prophet is of three types: first is the Sunnah which prescribes the like of what God has revealed in His Book; next is the Sunnah which explains the general principles of the Qur‘ān and clarifies the will of God; and last is the Sunnah where the Messenger of God has ruled on matters on which nothing can be found in the Book of God. The first two varieties are integral to the Qur‘ān, but the ‘ulamā‘ have differed as to the third.

Al-Shafii‘i goes on to explain the views that the ‘ulamā‘ have advanced concerning the relationship of Sunnah to the Qur‘ān. One of these views, which receives strong support from al-Shafii‘i himself, is that God has explicitly rendered obedience to the Prophet an obligatory duty (fard). In his capacity as Messenger of God, the Prophet has introduced laws, some of which originate in the Qur‘ān while others do not. But all Prophetic legislation emanates from divine authority. The Sunnah and the Qur‘ān are of the same provenance, and all must be upheld and obeyed. Others have held the view that the Prophetic mission itself, that is the fact that the Prophet is the chosen Messenger of God, is sufficient proof for the authority of the Sunnah, for it is through the Sunnah that the Prophet fulfilled his divine mission. According to yet another view, there is no Sunnah whose origin cannot be traced back to the Qur‘ān. This view maintains that even the Sunnah that explains the number and content of Salah and the quantities of Zakāh, as well as the lawful and forbidden varieties of food and trade, merely elaborates general principles of the Qur‘ān. More specifically, all the hadith which provide details on the lawful
and unlawful varieties of food merely elaborate the Qur'anic declaration that God has permitted wholesome food and prohibited that which is unclean (al-?arāf, 7:157).

The majority view, which seeks to establish an almost total identity between the Sunnah and the Qur'an, further refers to the saying of the Prophet's widow, 'A'ishah, when she attempted to interpret the Qur'anic epithet 'and you possess an excellent character' (al-Qalam, 68:4).

'Anas is quoted to have said that 'his [the Prophet's] khuluq was the Qur'an'. Khuluq in this context means the conduct of the Prophet, his acts, sayings, and all that he has approved. Thus it is concluded that the Sunnah is not separate from the Qur'an.

Furthermore, the majority view seeks to establish an identity between the general objectives of the Qur'an and Sunnah: the Sunnah and the Qur'an are unanimous in their pursuit of the three-fold objectives of protecting the necessities (darūriyyāt), complementary requirements (hājiyyāt) and the 'embellishments' (tahsiniyyāt). It is then argued that even when the Sunnah broaches new ground, it is with the purpose of giving effect to one or other of the objectives that have been validated in the Qur'an. Thus the identity between the Qur'an and Sunnah is transferred, from one of theme and subject, to that of the main purpose and spirit that is common to both.

And finally, the majority explain that some of the rulings of the Sunnah consist of analogies with the Qur'an. For example, the Qur'an has decreed that no one may marry two sisters simultaneously. The hadith which prohibits simultaneous marriage to the maternal and paternal aunt of one's wife is based on the same effective cause ('illah), which is to avoid the severance of close ties of kinship (qat' al-arhām). In short, the Sunnah as a whole is no more than a supplement to the Qur'an. The Qur'an is indeed more than comprehensive and provides complete guidance on the broad outline of the entire body of the Shari'ah.

In conclusion, it may be said that both sides are essentially in agreement on the authority of Sunnah as a source of law and its principal role in relation to the Qur'an. They both acknowledge that the Sunnah contains legislation which is not found in the Qur'an. The difference between them seems to be one of interpretation rather than substance. The Qur'anic ā'yāt on the duty of obedience to the
Prophet, and those which assign to him the role of the interpreter of the Qur’ān, are open to variant interpretations. These passages have been quoted in support of both views, that the Sunnah is supplementary to the Qur’ān, and that it is an independent source. The point that is basic to both these views is the authority of the Prophet and the duty of adherence to his Sunnah. In the meantime, both sides acknowledge the fact that the Sunnah contains legislation which is additional to the Qur’ān. When this is recognised, the rest of the debate becomes largely redundant. For what else is there to be achieved from the argument that the Sunnah is an independent source? The partisans of the two views have, in effect, resolved their differences without perhaps declaring this to be the case. Since the Qur’ān provides ample evidence that the Prophet explains the Qur’ān and that he must be obeyed, there is no need to advance a theoretical conflict between the two facets of a basic unity. Both views can be admitted without the risk of running into a logical contradiction; the two views should therefore be seen not as contradictory but as logical extensions of one another.

II.4 Distortion and Forgery

There is no dispute about the occurrence of extensive forgery in the hadith literature. The ‘ulamā’ of hadith are unanimous on this, and some have gone so far as to affirm that in no other branch of Islamic sciences has there been so much forgery as in hadith. The very existence of a bulk of literature and works by prominent ‘ulamā’ bearing the title al-Mawdū‘āt, or ‘fabricated hadith’, bears witness to the extensive forgery in this area.

Some disagreement, however, has arisen in determining the historical origins of forgery in hadith. While some observers have given the caliphate of ‘Uthmān as a starting point, others have dated it a little later, at around the year 40 Hijrah, when political differences between the fourth caliph, ‘Ali, and Mu‘āwiya led to military confrontation and the division of the Muslims into various factions. According to a third view, forgery in hadith started even earlier, that is, during the caliphate of Abū Bakr when he waged the War of Apostasy (riddah) against the refusers of zakāh. But the year 40 is considered the more likely starting point for the development of serious and persistent differences in the community, which is marked by the emergence of the Khārijites and the Shi‘ah. Muslims were thenceforth divided, and hostility between them acquired a religious dimension when they
began to use the Qur'an and Sunnah in support of their claims. When the misguided elements among them failed to find any authority in the sources for their views, they either imposed a distorted interpretation on the source materials, or embarked on outright fabrication.  

The attribution of false statements to the Prophet may be divided into two types: (1) deliberate forgery, which is usually referred to as hadith mawdu'; (2) unintentional fabrication, which is known as hadith bāṭil and is due mainly to error and recklessness in reporting. For example, in certain cases it is noted that the chain of narrators ended with a Companion or a Successor only, but the transmitter extended it directly to the Prophet. The result is all the same, and fabrication whether deliberate or otherwise must in all cases be abandoned. Our present discussion is, however, mainly concerned with deliberate fabrication in hadith.

The initial forgery in hadith is believed to have occurred in the context of personality cult literature (fatā’il al-ashkhās) which aimed at crediting (or discrediting) leading political figures with exaggerated claims. The earliest forgery in this context, according to the Sunnis, was committed by the Shi‘ah. This is illustrated by the hadith of Ghadir Khumm in which the Prophet is quoted to have said, “‘Ali is my brother, executor and successor. Listen to him and obey him.’ A similar statement attributed to the Prophet is as follows: ‘Whoever wishes to behold Adam for his knowledge, Noah for his piety, Abraham for his gentleness, Moses for his commanding presence and Jesus for his devotion to worship — let him behold ‘Ali.’

There are numerous fabricated hadith condemning Mu‘āwiyyah, including, for example, the one in which the Prophet is quoted to have ordered the Muslims, ‘When you see Mu‘āwiyyah on my pulpit, kill him.’ The fanatic supporters of Mu‘āwiyyah and the Umayyad dynasty are, on the other hand, known to have fabricated hadith such as ‘The trusted ones are three: I, Gabriel and Mu‘āwiyyah.’

The Khārijites are on the whole considered to have avoided fabricating hadith, which is due mainly to their belief that the perpetrator of a grave sin is no longer a Muslim. Since they saw the fabrication of hadith in this light, they avoided indulgence in forgery as a matter of principle and a requirement of their doctrine. A group of heretic factions known as Zanādiqah (pl. of zindaq), owing to their hatred of Islam, fabricated hadith which discredited Islam in the view of its followers. Included among such are: ‘Eggplants are a cure for every illness’ and ‘Beholding a good-looking face is a form of ‘ibādah’. It is reported that just before his execution, one of the notorious
fabricators of hadith, ‘Abd al-Karīm ibn Abī al-‘Awja’, confessed that he had fabricated 4,000 hadith in which halāl was rendered harām and harām was rendered halāl. It has been further reported that the Zanādiqah fabricated a total of 14,000 hadith, a report which may or may not be credible. For a statement of this nature tends to arouse suspicion as to its veracity: even in fabricated matters, it is not an easy task to invent such a vast number of hadith on the subject of halāl and harām. Perhaps exaggerated figures of this order were quoted mainly for their subversive value.

Racial, tribal and linguistic fanaticism was yet another context in which hadith were fabricated. Note, for example, the following: ‘Whenever God was angry, He sent down revelation in Arabic, but when contented, He chose Persian for this purpose.’ The Arab fanatic also matched this anathema by claiming that ‘whenever God was angry he sent down revelation in Persian, but when contented He chose to speak in Arabic’. These and other similar forgeries relating to the virtues or superiority of certain tribes, cities, and periods of time over others have been isolated by the ‘ulamā’ of hadith and placed in the category of al-mawdū‘āt.

Known among the classes of forgers are also professional storytellers and preachers (al-qussās wa’l-wā’izūn), whose urge for popularity through arousing an emotional response in their audience led them to indulge in forgery. They made up stories and attributed them to the Prophet. It is reported that once a story-teller cited a hadith to an audience in the mosque on the authority of Aḥmad ibn Ḥanbal and Yahyā ibn Ma’in which runs as follows: ‘Whoever says “There is no god but God”, God will reward him, for each word uttered, with a bird in Paradise, with a beak of gold and feathers of pearls.’ At the end of his sermon, the speaker was confronted by Aḥmad ibn Ḥanbal and Yahyā’ ibn Ma’in who were present on the occasion and told the speaker that they had never related any hadith of this kind.

Juristic and theological differences constitute another theme of forgery in hadith. This is illustrated by the following statement attributed to the Prophet: ‘Whoever raises his hands during the performance of salāḥ, his salāḥ is null and void.’ In yet another statement we read: ‘Whoever says that the Qur’ān is the created speech of God becomes an infidel [...] and his wife stands divorced from him as of that moment.’

Another category of fabricated hadith is associated with the religious zeal of individuals whose devotion to Islam led them to the careless ascription of hadith to the Prophet. This is illustrated by the forgeries
committed by one Nūḥ ibn Abī Maryam on the virtues of the various sūras of the Qurʾān. He is said to have later regretted what he did and explained that he fabricated such hadith because he saw people who were turning away from the Qurʾān and occupying themselves with the fiqh of Abī Ḥanīfah and the battle stories of Muḥammad ibn Ishāq. Numerous other names occur in the relevant literature, including those of Ghulām Khalil and Ibn Abī ‘Ayyāsh of Baghdad, who were both known as pious individuals, but who invented hadith on the virtues of certain words of praise (adḥkār wa-awrād) and other devotional matters.¹⁰⁰

Without wishing to go into details, other themes on which hadith forgery has taken place include the urge on the part of courtiers who distorted existing hadith to please and flatter their overlords. Similarly, the desire to establish the permissibility or virtue of certain varieties of food, beverages, clothes and customary practices led individuals to introduce exaggerations and arbitrary changes in the hadith.¹⁰¹

Just as the ‘ulamā’ classified hadith into various categories in order to identify its strength and weakness from various viewpoints, they also identified the signs of forgery in hadith from the viewpoints respectively of transmission (isnād) and subject-matter (matn), and these may be summarised as follows:

1. Signs of forgery in transmission (isnād) are identified mainly by reference to the reputation and biography of the transmitters. There is a wealth of literature on the names and biographies of the transmitters of hadith and those who are known to have indulged in lying and forgery. This information would normally be the first point of reference in identifying the signs of forgery in a particular hadith. Another useful tool in identifying forgery in the isnād is to ascertain the time factor and dates in the transmission of hadith. This is achieved by verifying whether the reporter has actually met the person he has quoted as his immediate source. It is not unknown to the scholars of hadith to discover that the two persons involved had either lived in distant localities or that the personal contact between them was actually impossible. When the transmitters mention, for example, that he heard so and so in such and such a place reporting such hadith, then the question of geographical location and of verifying the facts as to whether they lived in the same period or generation becomes of vital significance. The branches of the science of hadith known as ‘ilm al-tabaqāt (genealogy) and asma’ al-rijāl (personal biographies) pay particular attention to the dates of birth, dates of transmission, residence and pupillage, and the information they provide is particularly
useful in tracing the signs of forgery in the narration of hadith. And, lastly, signs of forgery in transmission are also detected by reference to personal interest and motive. An example of this is the so-called hadith narrated by Muhammad ibn al-Hajjaj al-Nakha’i which reads that ‘cookies [al-harisah] strengthen the spine’, and al-harisah is exactly what he used to sell.

(2) Signs of forgery in the text (matn) of a hadith are identified by reference to at least seven factors as follows.

Firstly, the language of the hadith and the standards of the discourse in which it is conveyed can sometimes provide a clue as to its veracity. Prophetic language is characteristically known for its eloquence and style. Speech of a particularly crude variety and style is taken as a sign of forgery.

Secondly, corruption in the purpose and meaning of a reported hadith also provides evidence of its fabrication. The report, for example, that ‘the ark of Noah circumambulated the Ka’bah at the end’, or the report that ‘God created the horse and raced it first and then created Himself from it’ are evidently unreasonable and corrupt, and obviously cannot be accepted.

Thirdly, statements that stand in clear opposition to the Qur’ān in such a way that no reasonable compromise and interpretation can be attempted are usually rejected. The so-called hadith, for example, that ‘the offspring of zīnā shall not enter paradise for seven generations’ was rejected by the Prophet’s widow ‘Ā’ishah, as it violated the clear text of the Qur’ān that ‘no soul shall carry the burden of another soul’ (al-An‘ām, 6: 164).

Similarly, the report ‘Whoever begets a child and names him Muhammad, he and his offspring shall go to paradise’ is clearly in conflict with numerous Qur’ānic promises of reward for good work and punishment for corruption and evil.

Fourthly, a report may be unhistorical and fail to qualify the test of historical reality. The hadith, for example, which is transmitted by Sa’d ibn Mu‘adh and Mu‘āwiyah that ‘the Prophet imposed jizyah [poll tax] on the Jews of Khaybar and relieved them of hardship [prospects of war]’ is discredited on account of historical facts that jizyah was not known at that time and that the Qur’ānic ruling on it was only revealed in the year of Tabūk, and that Sa’d ibn Mu‘adh had died before this last event. In yet another report, Anas ibn Mālik
stated that, "I entered the bath and saw the Prophet wearing a wrapper and said: O Anas, I have forbidden entry to the public bath without a wrapper." The facts of history show, on the other hand, that the Prophet never entered a public bath and that they did not exist in Medina at the time.

Fifthly, hadith may smack of scholastic fanaticism such as the report by Habban ibn Juwayn that 'I heard 'Ali saying that I and the Prophet worshipped God six or seven years before anyone of this Ummah.' It is known that Habban was a fanatic Shi'i and careless in the treatment of hadith.

Sixthly, when a hadith is supposed to have been known to vast numbers of people and yet only one person reported it, the fact that no one else has confirmed it is taken as a sign of forgery. An example of this can be found in our discussion of the āhād hadith below.

And lastly, when the hadith in question promises a disproportionate reward or an exceedingly severe punishment for a small act that does not warrant the stipulated consequence, forgery is suspected. Note, for example, the report 'Anyone who says "There is no god but God", God will create for him a bird with 70,000 tongues each of which speaks 70,000 languages and will be praying for him.'

These are some of the main, although not all, indicators of forgery in hadith. Those who are particularly learned in hadith may be able to detect signs of forgery in other different ways that might be peculiar to their ability and understanding of the subject-matter of their investigation.

III. Classification and Value (B)

From the viewpoint of the continuity and completeness of its chains of transmitters, the hadith is once again classified into two categories: continuous (muttaṣil) and discontinued (ghayr muttaṣil). A continuous, hadith is one which has a complete chain of transmission from the last narrator all the way back to the Prophet. A discontinued hadith, also known as mursal, is a hadith whose chain of transmitters is broken and incomplete. The majority of 'ulamā' have divided the continuous hadith into the two main varieties of mutawātir and āhād. To this the Hanafis have added an intermediate category, namely the 'well-known', or mashhūr.
III.1 The Continuous Ḥadīth

(a) The mutawātir

Literally, mutawātir means ‘continuously recurrent’. In the present context, it means a report by an indefinite number of people related in such a way as to preclude the possibility of their agreement to perpetuate a lie. Such a possibility is inconceivable owing to their large number, diversity of residence, and reliability. A report would not be called mutawātir if its contents were believed on other grounds, such as rationality and axiomatic knowledge. A report is classified as mutawātir only when it fulfils the following conditions.

(1) The number of reporters in every period or generation must be large enough to preclude their collusion in propagating falsehood. Should the number of reporters in any period fall short of a reliable multitude, their report does not establish positive knowledge and is therefore not mutawātir. Some ‘ulamā’ 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 that constitutes legal proof; twenty is analogous with the Qur’ānic āyah in sura al-Anfāl (8:65) 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 with another Qur’ānic passage where we read that ‘Moses chose seventy men among his people for an appointment with Us’ (al-A’rāf, 7:155).

Some have drawn an analogy with the number of participants in the battle of Badr. However, al-Ghazālī is representative of the majority opinion when he observes that all of these analogies are arbitrary and have no bearing on the point. Certainty is not necessarily a question of numbers; it is corroborative evidence, the knowledge and trustworthiness of reporters, which must be credited even in cases where the actual number of reporters is not very large. Thus, when a reasonable number of persons report something which is supported by other evidence, their report may amount to positive knowledge.

(2) The reporters must base their report on sense perception. If,
therefore, a large number of people report that the universe is created, their report would not be mutawātir. The report must also be based on certain knowledge, not mere speculation. If, for example, the people of Islamabad inform us of a person they thought was Zayd, or a bird they thought was a pigeon, neither would amount to certainty.

(3) Some ‘ulama‘ have advanced the view that the reporters must be upright persons (‘udul), which means that they must be neither infidels nor profligates (kuffar wa-fussāq). The correct view, however, is that neither of these conditions is necessary. What is essential in mutawātir is the attainment of certainty, and this can be obtained through the reports of non-Muslims, profligates and even children who have reached the age of discernment, that is, between seven and fifteen. The position is, of course, entirely different with regard to solitary hadith, which will be discussed later.

(4) The reporters should not be biased in their cause or 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.

What is the value (hukm) of the mutawātir? According to the majority of ‘ulama‘, the authority of a mutawātir hadith is equivalent to that of the Qur‘ān. Universal continuous testimony (tawātur) engenders certainty (yaqin) and the knowledge that it creates is equivalent to knowledge that is acquired through sense-perception. Most people, it is said, know their forefathers by means of mutawātir reports just as they know their children through sense-perception. Similarly, no one is likely to deny that Baghdad was the seat of the caliphate for centuries, despite their lack of direct knowledge to that effect. According to a minority view, mutawātir imparts satisfaction (tuma‘inah) but not yaqin, which means that doubt is not totally eliminated. It is then noted that a mutawātir consists of a multitude of āhād put together, and each of the āhād, if taken individually, is liable to doubt. The element of doubt, in other words, is not eliminated. Abū Zahrah observed that the basic logic of this view finds support in actual reality as we do find untrue reports are sometimes transmitted by multitudes of people across generations.

When the reports of a large number of transmitters of hadith concur in their purport but differ in wording or in form, only their common meaning is considered mutawātir. This is called mutawātir bi‘l-ma‘nā, or conceptual mutawātir. Examples of this kind of mutawātir are numerous in the hadith. Thus the verbal and actual Sunnah which
explain the manner of performing the obligatory prayers, the rituals of hajj, fasting, the quantities of zakah, rules relating to retaliation (qiṣāṣ) and the implementation of ḥudūd, etc., all constitute conceptual mutawātir. A large number of the Companions witnessed the acts and sayings of the Prophet on these matters, and their reports have been transmitted by multitudes of people throughout the ages. The other variety of mutawātir, which is of rare occurrence compared to the conceptual mutawātir, is called mutawātir bi'l-lafż, or verbal mutawātir. In this type of mutawātir, all the reports must be identical on the exact wording of the hadith as they were uttered by the Prophet himself. For example the hadith which reads: ‘Whoever lies about me deliberately must prepare himself for a place in Hell-fire.’

The exact number of verbal mutawātir is a subject of disagreement, but it is suggested that it does not exceed ten hadith.

(b) The mashhār (well-known) hadith
The mashhār is defined as 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, in other words, an aḥād hadith to begin with, but became widely known in the second century, that is, after the period of the Companions. 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, not later. This would mean that the hadith became widely known during the period of the Companions or the Successors. It is argued that after this period, all the hadith became well-known, in which case there will be no grounds for distinguishing the mashhār from the general body of hadith.

For Abū Hanīfah and his disciples, the mashhār hadith imparts positive knowledge, albeit of a lesser degree of certainty than mutawātir. But the majority of non-Ḥanafī jurists consider mashhār to be included in the category of solitary hadith, and that it engenders speculative knowledge only. According to the Ḥanafīs, acting upon the mashhār is obligatory but its denial does not amount to disbelief.
mashhūr consists of one or two Companions only. As for the remaining links in the chain of transmitters, there is no difference between the mutawātir and mashhūr. Examples of the mashhūr hadith are those which are reported from the Prophet by a prominent Companion and then transmitted by a large number of narrators whose agreement upon a lie is inconceivable.¹¹⁷ The mashhūr, according to the Ḥanafīs, may qualify the ‘general’ of the Qurʾān. Two such hadith that have so qualified the Qurʾān are as follows: ‘The killer shall not inherit’

لا يرث القاتل.

is a mashhūr hadith which qualifies the general provisions of the Qurʾān on inheritance in sūra al-Nisāʾ (4:11). Similarly the mashhūr hadith which states that ‘a woman shall not be joined in marriage simultaneously with her paternal or maternal aunt’

لا تنkeh المرأة على عمته ولا على خالتها.

has qualified the general provisions of the Qurʾān on marriage where the text spells out the prohibited degrees of marriage and then declares: ‘It is lawful for you to marry outside these prohibitions’ (al-Nisāʾ, 4:24).¹¹⁸

وأهل لكم ما وراء ذلككم

The list of prohibitions provided in this āyah does not include simultaneous marriage with the maternal or paternal aunt of one’s wife; this is supplied by the hadith.

(c) The āḥād (solitary) hadith
The āḥād, or solitary, hadith (also known as khabar al-wāḥid) is a hadith which is reported by a single person or by odd individuals from the Prophet. Imam Shāfīʾī refers to it as khabar al-ḵāṣṣah, as opposed to khabar al-‘āmmah, which applies to every report narrated by one, two or more persons from the Prophet but which fails to fulfill the requirements of either the mutawātir or the mashhūr.¹¹⁹ It is a hadith which does not impart positive knowledge on its own unless it is supported by extraneous or circumstantial evidence. This is the view of the majority, but according to Imam Ahmad ibn Hanbal and others, āḥād can engender positive knowledge.¹²⁰ Some ʿulamāʾ have rejected it on the basis of an analogy they have drawn with a provision of the
law of evidence, namely that the testimony of one witness falls short of legal proof. Those who unquestioningly accept the authority of āḥād, such as the Žāhirī school, maintain that when the Prophet wanted to deliver a ruling in regard to a particular matter, he did not invite all the citizens of Medina to attend. The majority of jurists, however, agree that āḥād may establish a rule of law provided that it is related by a reliable narrator and the contents of the report are not repugnant to reason. Many 'ulamā’ have held that āḥād engenders speculative knowledge, acting upon which is preferable only. In the event where other supportive evidence can be found in its favour, or when there is nothing to oppose its contents, then acting upon āḥād is obligatory. But āḥād may not, according to the majority of 'ulamā’, be relied upon as the basis of belief ('aqīdah). For matters of belief must be founded on certainty even if a conjecture (zann) may at times seem preferable. As the Qur’ān tells us, ‘Verily conjecture avails nothing against the truth’ (al-Najm, 53: 28).

By way of divergent implication (māfi’um al-mukhalafah), it is implied that a report by an upright person is admissible. Commenting on this, al-Qurtubī stated in his Tafsīr that this āyah is reported by a just (‘adl) person, that reporting is in the nature of trust (amanah) which is not applicable to a transgressor. There is general consensus (ijmā’) to the effect that the report of a proven transgressor is not admissible.

The Companions generally accepted and acted upon solitary reports on numerous occasions, including the report by Abū Bakr al-Śiddiq of the hadīth ‘Leaders are to be from the Quraysh’ and also his report that ‘Prophets are buried where they die.’
The Caliph 'Umar also acted upon the report by 'Abd al-Rahmān ibn 'Awf that the Prophet accepted the jīzyah (poll tax) from the Magians, and also on Mughirah ibn Shu'ba's report concerning the grandmother's share in inheritance. The Caliph 'Uthmān acted upon the report of Fari'ah bint Malik concerning her probation period following the death of her husband to 'remain in her husband's house until the end of her 'idda'. And then Ibn 'Abbās accepted Abū Sa'īd al-Khudrī's hadīth on the prohibition of ribā al-fadl (usury of excess). It is also known, nevertheless, that the Companions, especially Abū Bakr, 'Umar and 'Alī were cautious in their acceptance of āhād reports.

According to the majority of the 'ulamā' of the four Sunni schools, acting upon āhād is obligatory even if 2:24 fails to engender positive knowledge. Thus, in practical legal matters, a preferable zann is sufficient as a basis of obligation. It is only in matters of belief where conjecture 'avails nothing against the truth'. Having said this, however, āhād may only form the basis of obligation if it fulfils the following requirements.

1. The transmitter is a competent person, which means that reports communicated by a child or a lunatic of whatever age are unacceptable. Women, blind persons and slaves are considered competent for purposes of reporting the hadīth.

2. The transmitter of āhād must be a Muslim, which means that a report by a non-Muslim is unacceptable. However, the reporter must fulfil this condition only at the time of reporting the hadīth, but not necessarily at the time when he received the information. There are instances of hadīth, for example, reported by Companions, pertaining to the acts of the Prophet which they observed before they had professed Islam.

3. The transmitter must be an upright person ('ādl) at the time of reporting the hadīth. The minimum requirement of this condition is that the person has not committed a major sin and does not persist in committing minor ones; nor is he known for persistence in degrading profanities such as eating in the public thoroughfare, associating with persons of ill-repute or indulgence in humiliating jokes. This is sometimes referred to as acts which indicate a lapse in one's probity or murū'ah. A person who possess murū'ah is expected to behave according to what may be expected of his peers, but this may be changeable by reference to the culture and custom of society. Although the 'ulamā' are unanimous on the requirement of uprightness of character ('aḍālah), they are not in agreement as to what
this precisely means. According to the Hanafis, a Muslim who is not a sinner (fasiq) is presumed to be upright. The Shafi'is are more specific on the avoidance of sins, both major and minor, as well as indulgence in profane mubah acts. To the Maliki jurist Ibn al-Hajib, 'adalah refers to piety, observance of religious duties and propriety of conduct. There is also some disagreement among the 'ulama' on the definition of, and distinction between, major and minor sins.\(^1\)

The 'adalah of a transmitter must be established by positive proof. Hence, when the 'adalah of a transmitter is unknown, his report is unacceptable. Similarly, a report by an anonymous person (riwayah al-majhiil), such as when the chain of transmitters reads in part that 'a man' reported such-and-such, is unacceptable. The 'adalah of a narrator may be established by various means including tazkiyah, that is, when at least one upright person confirms it, or when the transmitter is known to have been admitted as a witness in court, or when a faqih or a learned person is known to have relied or acted on his report. But there must be positive evidence that the faqih did not do so due to additional factors such as a desire on his part merely to be cautious.\(^2\)

Tazkiyah may consist of affirmation of probity (al-ta'dil) or of expunction of probity (al-jarh). As to the question whether the muzakkii (one who testifies for or against the probity of a narrator of hadith or of a witness) needs to explain the grounds of his statement, it is generally stated that there is a difference between testimony (shahadah) and narration (riwayah). Whereas explanation of the grounds of statements/allegations is required in shahadah, this is not a requirement in riwayah, nor in affirmative tazkiyah, but it is a requirement in the expunction of probity (al-jarh). The 'ulama' of hadith have confined the grounds of al-jarh to about ten, namely fabrication of hadith, attribution of lies to the Prophet, gross error, negligence (al-ghaflah), transgression (al-fisq) other than lying, imagery (al-wahm), ignorance (al-jahdlah), heresy and pernicious innovation (al-bid'ah), bad memory, insertion of one's own statements in a report so that it causes confusion (tadlis al-mutin), and indulgence in outlandish reporting that goes against more reliable information.\(^3\)

The criterion of 'adalah is established for all the Companions regardless of their juristic or political views. This conclusion is based on the Qur'an which declares in a reference to the Companions that 'God is well pleased with them, as they are with Him' (al-Tawbah, 9:100).
A person’s reputation for being upright and trustworthy also serves as a proof of his reliability. According to some ‘ulamā’ of hadith, such a reputation is even more credible than confirmation by one or two individuals. With regard to certain figures such as Imam Mālik, Sufyān al-Thawrī, Sufyān ibn ‘Uyaynah, al-Layth ibn Sa’d, etc., their reputation for ‘adālah is proof of reliability above the technicalities of tazkiyah.

(4) The narrator of āḥād must possess a retentive memory so that his report may be trusted. If he is known for committing frequent errors and inconsistencies, his report is unacceptable. The faculty of retention, or ḍabt, is the ability of a person to listen to an utterance, to comprehend its meaning as it was originally intended and then to retain it and take all necessary precautions to safeguard its accuracy. In cases of doubt in the retentiveness of a transmitter, if his report can be confirmed by the action of his predecessors, it may be accepted. But in the absence of such verification, reports by persons who are totally obscure and whose retentiveness cannot be established are unacceptable.

(5) The narrator should not be implicated in any form of distortion (tadlis), either in the textual contents (matn) of a hadith or in its chain of transmitters (isnād). Distortion in the text is to add to the saying of the Prophet elements which did not exist, or to detract from its original content so as to distort its purport and mislead the listener. Tadlis in the isnād is to tamper with the names and identity of narrators, which is, essentially, not very different from outright forgery. One form of tadlis is to omit a link in the chain of narrators. The motive for such omission is immaterial. Sometimes it is observed, for example, that a single weak link in an otherwise reliable chain of transmitters is omitted with a view to showing the isnād reliable in every part. Whatever the motive may be, a tadlis of this kind is, for all intents and purposes, equivalent to forgery. However, if the narrator is a prominent scholar of irreproachable reputation, his report is normally accepted, notwithstanding a minor omission in the chain of isnād.

(6) The transmitter of āḥād must, in addition, have met with and heard the hadith directly from his immediate source. The contents of the hadith must not be outlandish (shādhdh) in the sense of being contrary to the established norms of the Qur’ān and other principles.
The Sunnah

of Shari'ah. In addition, the report must be free of subtle errors, such as rendering ab as ibn ('father' as 'son'), or other such words that are similar in appearance but differ in meaning.

With regard to the wording in which the Companion has narrated the hadith, the 'ulama' have identified a number of Arabic expressions which indicate, on a descending scale, the strength and reliability of transmission. Thus, when a Companion reports that, 'I heard — sami’tu — The Messenger of God saying such and such', it is more specific than saying that, 'The Prophet said [qala rasūl Allāh] so and so'. This latter expression is, in turn, stronger than such other terms as 'The Messenger of God commanded such and such or prohibited such and such — amara rasūl Allāh bi-kadhā wa nahā ‘an kadhdā,' or that 'he ordered such and such and forbade us from such and such — amara bi-kadhā wa nahaynā ‘an kadhdā.' And even this last expression is deemed to be a degree stronger than merely saying that 'the Sunnah is such and such — inna as-sunnata kadhdā.' Weaker still is when a Companion simply reports something 'from the Prophet — ‘an an-nabi'. And lastly, when a Companion relates, 'We used to do such and such when the Prophet was alive'.

The three Imams, Abī Hanīfah, al-Shafi'i and Ahmad ibn Hanbal, rely on āḥād when it fulfils the foregoing conditions. Abī Hanīfah, however, laid down certain additional conditions, one of which is that the narrator's action must not contradict his narration. It is on this ground, for example, that Abī Hanīfah does not rely on the following hadith, narrated by Abī Hurayrah: "When a dog licks a dish, wash it seven times, one of which must be with clean sand,'\(^{37}\)

Aba Hanifah has explained this by saying that Abī Hurayrah did not act upon it himself and has, in fact, given a fatwā that the dish so licked should be washed only three times. But this is only when the divergent act or fatwā is after the initial report and not before.\(^{137}\)

Another example is the hadith reported by 'A’ishah to the effect that 'marriage of a woman is invalid without the permission of her guardian [wali]."
The Hanafis do not act on this because 'A’ishah acted to the contrary when she contracted the nikāh of her niece, the daughter of 'Abd al-Rahmān, while he was absent in Syria. The majority do not agree with Hanafis because the narrator’s divergent act could be due to forgetfulness, or because he acted on his mistaken ijtihād, neither of which warrant departure from the hadīth. The Hanafis further require that the subject-matter of āhād is not such that would necessitate the knowledge of a vast number of people. If, for example, we are informed, by means of a solitary report, of an act or saying of the Prophet which was supposed to be known by hundreds or thousands of people and yet only one or two reported it, such a hadīth is not reliable. The hadīth, for example, that ‘anyone who touches his sexual organ must make a fresh ablution’ is not accepted by the Hanafis. The Hanafis have explained that, had this hadīth been authentic, it would have become an established practice among all Muslims, which is not the case. The hadīth is therefore not reliable. The majority of ‘ulamā’, however, do not insist on this requirement. The Hanafis have similarly not acted on three other hadīth, one of which requires a fresh ablution (wudū’) following consumption of food that is cooked by fire, and the other which requires the same after carrying a funeral, and the third which requires that tamiyah (i.e. reciting bismillāh al-raḥmān al-raḥim in salah) should be recited aloud. None of these are reliable, according to the Hanafis, for if they were, people would have acted on them. The jumhūr are once again in disagreement on the analysis that people often witness an event, or hear about it, but do not necessarily report what they have seen. The fact, therefore, that a hadīth pertaining to a matter of common occurrence is reported only by one or a few individuals is not conclusive evidence that the hadīth is unreliable.

And finally, the Hanafis maintain that when the narrator of āhād is not a faqīh, his report is accepted only if it agrees with the general principles of Shari’ah and qiyyās, otherwise qiyyās would be given priority over āhād. However, if the narrator is known to be a faqīh, then his report will be preferred over qiyyās. It is on this ground, for example, that the Hanafis have rejected the hadīth of musarrāt, that
is, the animal whose milk is retained in its udders so as to impress the buyer. The *hadith* is as follows: ‘Do not retain milk in the udders of a she-camel or goat so as to exaggerate its yield. Anyone who buys a *musarrat* has the choice, for three days after having milked it, either to keep it, or to return it with a quantity [i.e. a *sā*] of dates.’*4

The Hanafis regard this *hadith* to be contrary to *qiyyās*, that is, to analogy with the rule of equality between indemnity and loss. Abū Hanīfah has held the view that a *sā* of dates may not be equal in value to the amount of milk the buyer has consumed; thus, if the buyer wishes to return the animal, he must return it with the cost of the milk that was in its udders at the time of purchase, not with a fixed quantity of dates. The Hanafis have added that the buyer will have consumed what belonged to him, as he has paid for and taken delivery of the animal; he is therefore not liable to compensation. The ruling of the *hadith* is contrary to normal rules, which is why the Hanafis do not act on it. The majority of ‘*ulamā*’, including Malik, Shāfi’, Ibn Hanbal and the disciples of Abū Hanīfah, Abū Yūsuf and Zufar, have on the other hand accepted this *hadith* and have given it priority over *qiyyās*. According to the majority view, the compensation may consist of a *sā* of dates or of its monetary value. Dates were specified in the *hadith* as it used to be the staple food in those days, which may not be the case any more.142

Imam Malik would rely on a solitary *hadith* on condition that it did not disagree with the practice of the Medinans (*‘amal ahl al-Madinah*); he considered the standard practice of the people of Medina to be more representative of the conduct of the Prophet than the isolated report of one or two individuals. In his opinion, Medinan practice represents the narration of thousands upon thousands of people until it reaches the Prophet. It is, in other words, equivalent to a *mashhūr*, or even *mutawātir*. When an *āhād* report contradicts the practice of the Medinans, the latter is, according to the Mālikī view, given priority over the former. The Mālikis have thus refused to follow the *hadith* regarding the option of cancellation (*khīyār al-majlis*) which provides that ‘the parties to a sale are free to change their minds so long as they have not left the meeting of the contract’.
The reason being that this hadith is contrary to the practice of the people of Medina.¹⁴³

A contract, according to the Mālikī school, consists of a meeting of the minds through a valid offer and acceptance, and becomes binding as of that moment. Khiyār al-majlis contravenes the sanctity and binding character of a contract after its conclusion; it should therefore have no effect on the finality of the contract. The Mālikīs have similarly upheld the Medinan practice of ending the salāh with only one salām instead of the two that are offered by the jumhūr. The Medinans have always practised only one salām and the Mālikīs have preferred this to the two pronouncements of salām practised by the majority. The Mālikī jurist Qādī ‘Ayād observed that the Medinan practice either agrees or disagrees with the aḥād hadith. If the two are in agreement, then the one supports the other and no question of preference would arise. In the event of conflict between the Medinan practice and aḥād hadith, the former is preferred with regard to factual reports but the latter is preferred in ijtihād matters.

Imam Shāfīʿī laid down four conditions that the narrator of aḥād hadith must fulfil: (1) he is pious and known for his honesty; (2) he understands the words and purpose of the hadith; (3) he is retentive and remembers the hadith even if he needs to refer to his notes; (4) his report does not contradict the body of hadith that is known to the ‘ulamā’ of hadith, especially when the subject is already known. These conditions must be met at every level of transmission. Imam Shāfīʿī thus emphasised that every hadith must have a valid chain of transmission (isnād) which is connected all the way back to the Prophet himself. This is why al-Shāfīʿī does not, in principle, accept the mursal hadith, which is basically an aḥād hadith, albeit with a broken isnād, unless it meets certain conditions. The Shāfīʿīs have consequently not acted on the hadith reported by al-Zuhrī from ‘Ā’ishah where she said: ‘Hafsah was given a present of foodstuffs while both of us were fasting, but we broke the fast and ate some. Then the Prophet came and we told him that we were given a gift of foodstuffs which seemed appetising and we broke our fast. To this the Prophet said: “You should observe a belated fast on another day.”’
This is because al-Zuhri, who is a tabi’i, reported from ‘A’ishah without having heard it from her directly. It is held, therefore, that one who breaks a supererogatory fast is not liable to a belated performance by way of compensation.

Imam Ahmad ibn Hanbal is basically in agreement with al-Shafi’i in this in that both have emphasised the isnād, but he differs with al-Shafi’i in regard to acting upon the mursal. Imam Ahmad accepts in principle the mursal, but has nevertheless considered it to be weak, and thus it may be superseded by the fatwa of one of the Companions.

The general view that the āhād is zanni, and may, therefore, not form the basis of ‘aqidah, is not accepted by Imam Ahmad ibn Hanbal, for whom āhād imparts positive knowledge. His disciple, Ibn Taymiyyah, qualified this by saying that āhād does impart ‘ilm if it is supported by other evidence, although it is basically zanni. There is no doubt, according to al-Shawkānī, and also al-Āmīdī, that when āhād is supported by ijmā’, it becomes qātī and that the question of zanni and qātī in āhād often depends on other supportive evidence. Hadith that are recorded in al-Bukhārī and Muslim, al-Shawkānī adds, have been generally accepted by the ummah and this is itself supportive evidence. All the four imams of jurisprudence have considered āhād to be authoritative in principle, and none reject it unless there is evidence to suggest a weakness in its attribution to the Prophet, or which may contradict some other evidence that is more authoritative in their view.

The majority of ‘ulama’ do not insist that the āhād should consist of a verbatim transmission of what the narrator heard in the first place, although this is the most authoritative form of transmission in any kind of hadith. They would instead accept the conceptual transmission of an āhād, on condition, however, that the narrator understands
the language and purport of the *hadith* in full. Only then will the rendering of the *hadith* in the narrator’s own words, which conveys an equivalent meaning, be acceptable. However, if the narrator does not possess this degree of knowledge and is unable to transmit the *hadith* in its original form, all the four Sunni schools are in agreement that his own rendering of the concept of the *hadith* is unacceptable.¹⁴⁵

Some ‘ulama’ of the Hanafi and other schools have held that conceptual transmission is totally forbidden, a view which is refuted by the majority, who say that the Companions often transmitted one and the same *hadith* in varying words, and no-one can deny this. One of the most prominent Companions, ‘Abd Allah ibn Mas‘ūd, is noted for having reported many *hadith* from the Prophet and made it known that ‘the Prophet said this, or something like this, or something very close to this’. No one has challenged the validity of this manner of reporting; thus the permissibility of conceptual transmission is confirmed by the practice of the Companions, and their consensus is quoted in its support. Having said this, however, accuracy in the transmission of *hadith* and retaining it in its original version is highly recommended.¹⁴⁶ This is, in fact, the purport of a *hadith* from the Prophet which reads: ‘May God bless with success one who heard me saying something, and who conveys it to others as he heard it; and may the next transmitter be even more retentive than the one from whom he received it."¹⁴⁷

Sometimes the transmitter reports a *hadith* but omits a part of it. The question then arises as to whether this form of transmission is permissible at all. In principle, the narrator of any type of *hadith* must not omit any part that is integral to its meaning, for instance when the omitted part consists of a condition, or an exception to the main theme of the *hadith*, or which makes a reference to the scope of its application. However, the narrator may omit a part of the *hadith* that does not affect the meaning of the remaining part; for in this case, the *hadith* at issue will be regarded, for all intents and purposes, as two *hadith*. It has been a familiar practice among the ‘ulama’ to omit a part of the *hadith* which does not have a bearing on its main theme. But if the omission is such that it would bring the quoted part into
conflict with its full version, then the issue will be determined, not under the foregoing, but under the rules of conflict and preference (al-ta'ārīd wa'l-tarjih). In any case, the preferred practice is to not omit any part of the hadith, as the omitted part may well contain valuable information on some point and serve a purpose that may not have occurred to the narrator himself. In certain hadith that are reported by a number of transmitters, there is sometimes an addition to the text of a hadith by one transmitter which is absent in the reports of the same hadith by others. The first point to ascertain in a discrepancy of this nature is to find out whether the hadith in question was originally uttered on one and the same occasion or on different occasions. If the latter is the case, then there is no conflict and both versions may be accepted as they are. But if it is established that the different versions all originated in one and the same meeting, then normally the version which is transmitted by more narrators will prevail over that which is variantly transmitted by one, provided that the former are not known for errors and oversight in reporting. Consequently, the additional part of the hadith which is reported by a single transmitter will be isolated and rejected for the simple reason that error by one person is more likely in this case than by a multitude. But if the single narrator who has reported the addition is an eminently reliable person and the rest are known for careless reporting, then his version will be preferred, although some 'ulamā' of hadith do not agree with this. Additions and discrepancies that might be observed in the isnād such as when a group of narrators report a hadith as a mursal — whereas one person reported it as a musnad (that is, a muttaṣil, or continuous) — will be determined by the same method that applies to discrepancy in the text. However, sometimes the preference of one version over the other may be determined on different grounds. To give an example, according to one hadith, 'Whoever buys foodstuffs is not to sell the same before it is delivered to him.' However, according to another report, the Prophet has issued a more general instruction according to which Muslims are 'forbidden from selling that which they do not have in their possession'.

مَن أبْتَاع طَعَامًا فَلَا يَبْعِهُ حَتَّى يَسْتَوَفِهِ.

لا تَبِعُ ما لَيْسَ عَنْدَكَ.
The Hanafis have preferred the second version, as it is conveyed in broader terms, which comprise foodstuffs as well as other commodities.¹⁴⁹

III.2 The Discontinued Hadīth (al-Ḥadīth Ghayr al-Muttaṣil)

This is a hadīth whose chain of transmitters does not extend all the way back to the Prophet. It occurs in three varieties: mursal, mu’dal and munqati’. The mursal, which is the main variety of discontinued hadīth, is sometimes also referred to as munqati’. The mursal is defined as a hadīth which a Successor (tābi’ī) has directly attributed to the Prophet without mentioning the last link, namely the Companion who might have narrated it from the Prophet. This is the majority definition. The Hanafis, however, have defined mursal as a hadīth that a reliable narrator has attributed to the Prophet while omitting a part of its isnād. The missing link may be a Companion or even a Successor, according to the majority, but it may be a narrator among the second generation of Successors according to the Hanafis. Since the identity of the missing link is not known, it is possible that he might have been an upright person, or not. Because of these and other similar doubts in its transmission, in principle, the ‘ulama’ of hadīth do not accept the mursal.¹⁵⁰ According to al-Shawkānī, ‘the majority of ‘ulama’ of usūl have defined mursal as a hadīth transmitted by one who has not met with the Prophet, and yet quotes the Prophet directly. The transmitter may be a Successor or a follower [tābi’ al-tābi’ī] or anyone after that’. Imam Ahmad ibn Hanbal does not rely on it, nor does Imam Shāfi’i, unless it is reported by a famous Successor who is known to have met with a number of Companions. Thus, a mursal transmitted by prominent Successors such as Sa’īd ibn al-Musayyib, al-Zuhrī, ‘Alqamah, Masrūq, al-Sha’bī, Hasan al-Baṣrī, Qatādah, etc., is accepted, provided that it fulfils the following conditions.¹⁵¹

Firstly, that the mursal is supported by another and more reliable hadīth with a continuous chain of transmitters, in which case it is the latter that would represent the stronger evidence. Secondly, that one mursal is supported by another mursal, and the latter is accepted and relied upon by the ‘ulama’. Thirdly, that the mursal is in harmony with the precedent of the Companions, in which case it is elevated and attributed to the Prophet. The process here is called raf’ and the hadīth is called marfī’. Fourthly, that the mursal has been approved by the
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‘ulamā’ and a number of them are known to have relied on it. Fifthly, that the transmitter of mursal has a reputation not to have reported weak and doubtful hadith. For instance, the mursal transmitted by Sa‘īd ibn al-Musayyib, or any one of the prominent Successors mentioned above, is normally acceptable.152

When a mursal is strengthened in any of these ways, especially when the Successor who has reported it is a leading figure and has met with the Companions, Imam Shāfi‘ī will find it acceptable. But even so, if the mursal in question is contradicted by another hadith which is more reliable, the latter will take priority.

The foregoing basically explains al-Shāfi‘ī’s approach to the mursal. Imam Abū Ḥanīfah and Imam Mālik, on the other hand, are less stringent in their acceptance of the mursal. They accept not only the mursal which is transmitted by a Successor, but also one which is transmitted by the second generation of Followers, known as tābi‘ al-tābi‘ī. In support of this they quote the hadith in which the Prophet is reported to have said, ‘Honour my Companions, for they are the best among you, then those who follow them and then the next generation; and then lying will proliferate.‘

However, both Imams Abū Ḥanīfah and Mālik add the proviso that the narrator of a mursal must be a leading transmitter of hadith, failing which his report will be unacceptable. They rely on it only when they are assured of the trustworthiness of the narrator. They hold the view that when an upright and learned man is convinced about the truth and reliability of a report, he tends to link it directly to the Prophet, saying that the Prophet said such and such but, when he is not so convinced, he refers to the person from whom he received it. Examples of such mursal are those that are transmitted by Muḥammad ibn Ḥasan al-Shaybānī, who is a tābi‘ al-tābi‘ī but considered to be reliable. The majority of ‘ulamā’ are of the view that acting upon a mursal hadith is not obligatory.

Based on this analysis, the Mu‘tazilah considered mursal to be even stronger than musnad (connected) hadith, a position which al-Shawkānī considered to be less than warranted. The Mālikī scholar Ibn al-Ḥājib, and Ibn al-Humām among the Ḥanafīs, held that mursal is only acceptable from the leading and most reliable transmitters and no one
else. The Ḥanafī 'Iṣa Ibn Aban, and the Shāfi‘ī scholar Tāj al-Dīn al-Subkī, stated that *mursal* is acceptable from those who lived in the first three generations: the Companions, the Successors and the Followers.¹⁵⁴

The different approaches that the leading Imams have taken toward the reliability of the *mursal* may be partially explained by the fact that Shāfi‘ī and Ahmad ibn Ḥanbal lived at a further distance in time from the Prophet. Hence, they felt the need of continuity in transmission more strongly than their predecessors, Abū Ḥanīfah and Mālik.

The remaining two varieties of disconnected *hadith* that need to be mentioned only briefly are the *mungati‘* and the *mu‘dal*. The former refers to a *hadith* whose chain of narrators has a single missing link somewhere in the middle. The *mu‘dal*, on the other hand, is a *hadith* in which two consecutive links are missing in the chain of its narrators. Neither of them are acceptable; and the ‘*ulamā‘* are in agreement on this.¹⁵⁵

IV. *Ṣaḥīḥ, Hasan and Da‘īf*

From the viewpoint of their reliability, the narrators of *hadith* have been graded into the following categories: (1) the Companions who are generally accepted to be reliable; (2) thīqāt thabītin, or those who rank highest in respect of reliability next to the Companions; (3) thīqāt, or those who are trustworthy but of a lesser degree than the first two; (4) sādiq, or truthful, that is one who is not known to have committed a forgery or serious errors; (5) sāduq yahīm, that is truthful but committing errors; (6) maqbull, or accepted, which implies that there is no proof to the effect that his report is unreliable; (7) maḥīl, or a narrator of unknown identity. These are followed by lower classes of persons who are classified as sinners (*fussāq*), those suspected of lying, and outright liars.¹⁵⁶

A *hadith* is classified as *ṣaḥīḥ*, or authentic, when its narrators belong to the first three categories.¹⁵⁷ It is defined as a *hadith* with a continuous *insād* all the way back to the Prophet, consisting of upright persons who also possess retentive memories and whose narration is free of both obvious and subtle defects.¹⁵⁸

The *ḥasan hadith* differs from the *ṣaḥīḥ* 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. It is a *hadith* that falls between *ṣaḥīḥ* and *da‘īf*, and although its narrators are known for truthfulness,
retentiveness and care, they have not attained the highest degree of reliability and prominence. *Hadith* scholars during the first and second centuries Hijrah did not speak of *hasan* as a separate category and the term seems to have been used from the time of Imam Ahmad ibn Hanbal and al-Bukhari.\(^{59}\)

The weak, or *da'if*, is a *hadith* whose narrators do not possess the qualifications required in *sahih* or *hasan*. It is called weak owing to a weakness that exists in its chain of narrators or in its textual contents. Its narrator is known to have had a bad memory, or his integrity and piety has been subjected to serious doubt.\(^{60}\) There are several varieties of *da'if*, *mursal* is one of them. The ‘*ulamā*’ of *hadith*, including Imam Muslim, do not consider *mursal* to amount to a *shar'i* proof (*hujjah*). There are other categories of *da'if*, including *shadhīh*, *munkar* and *mudtarīb*, which need not be elaborated here. Briefly, *shadhīh* is a *hadith* with a poor *isnād* which is at odds with a more reliable *hadith*. *Munkar* is a *hadith* whose narrator cannot be classified to be upright and retentive of memory; and *mudtarīb* is a *hadith* whose contents are inconsistent with a number of other reports, none of which can be preferred over the others.\(^{61}\)

Other varieties of *da'if* include the *mudall*, whose narrator has quoted someone he has not met or one who lived in a distant time and place. The *maqlūb* is another weak *hadith* in which the name of one of narrator is substituted with another and their reports are patched up. The *mawdū'* refers to an outright forgery, and the *mātīk* to a report whose narrator is accused of lying and whose report is contrary to known principles.\(^{62}\)

According to the general rule, the overall acceptability of a *hadith* is determined on the weakest element in its proof. Thus, the presence of a single weak narrator in the chain of isndād results in weakening the *hadith* altogether. If one of the narrators is suspected of lying whereas all the rest are classified as trustworthy (thiqāt) and the *hadith* is not known through other channels, then it will be graded as weak. In scrutinising the reliability of *hadith*, the ‘*ulamā*’ of *hadith* are guided by the rule that every *hadith* must be traced back to the Prophet through a continuous chain of narrators whose piety and reputation are beyond reproach. A *hadith* which does not fulfil these requirements is not accepted. A weak or *da'if* *hadith* does not constitute a *shar'i* proof (*hujjah*) and is generally rejected.
1. Thus we read in a hadith, 'Whoever sets a good example [man sanna sunnatan hasanatan] - he and all those who act upon it shall be rewarded till the day of resurrection; and whoever sets a bad example [man sanna sunnatan sayyatan] - he and all those who follow it will carry the burden of its blame till the day of resurrection.' For details see Isnawi, Nihayah, II, 170; Shawkani, Irshad, p. 33.

2. For details see Guraya, Origins, pp. 8ff; Hasan, Early Development, p. 85.
3. Sib‘i, al-Sunnah, p. 47; Azami, Studies, p. 3.
4. The ayah in question addresses the believers in the following terms: 'Certainly you have, in the Messenger of God, an excellent example' (al-Ahzab, 33:21).
5. Shafi‘i, Risalah, pp. 44–5; Sib‘i, al-Sunnah, p. 50.
6. Abü Dāwūd, Sunan (Hasan’s trans.), III, 109, hadith no. 3585.
7. Shāfi‘ī, Muwafaqāt, III, 197; Ibn Qayyim, Ilm, I, 222.
8. For details see Guraya, Origins, p. 5.
10. Abü Dāwūd, Sunan, III, 1204, hadith no. 4590; Shawkani, Irshad, p. 33.
20. Ghazālī, Mustaṣfā, I, 83.
22. Shafi‘i, Risalah, I, 47ff.
27. Tabrizi, Mishkāt, I, 166, hadith no. 533; Shawkani, Irshad, p. 41; Khallaf, ‘Ilm, p. 36.
28. Abū Dāwūd, Sunan, I, 88, hadith no. 334; Badrān, Usūl, pp. 69–70.
29. Shawkani, Irshad, p. 61; Badrān, Bayān, p. 74.
32. Isnawi, Nibyayah, II, 171; Hitu, Wajiz, p. 272. As for the report that the prominent Companion, ‘Abd Allāh ibn ‘Umar, used to imitate the Prophet in his natural activities too, it is held that he did so, not because it was recommended (mandūb), but because of his devotion and affection for the Prophet.
34. In particular note sūras al-Nisā (4:3), al-Baqarah (2:282) and al-Ṭālāq (65:2).
35. Hitu, Wajiz, p. 273; Khallaf, 'Ilm, p. 44.
40. Ibid., p. 275.
41. Ibid. p. 276.
42. Shaltut, al-Islam, p. 513.
43. Abu Dawud, Sunan, II, 758, hadith no. 2715; Ibn Qayyim, 'Ilam, II, 223.
44. Shaltut, al-Islam, p. 513.
45. Qaraawi, Shar'i at al-Islam, pp. 147–9.
46. Ibid., p. 516.
47. Shawkani, Irshad, p. 36; Khallaf, 'Ilm, p. 44.
49. Ghazali, Mustasfa, II, 51; Badran, Bayan, pp. 41–2; Mutawalli, Maa'di', p. 38.
50. Abu Dawud, Sunan (Hasan's trans.), II, 873, hadith no. 3067; Tabrizi, Mishkat, II, 889, hadith no. 2945.
51. Abu Dawud, footnote 2534 at p. 873; Marghinani, Hedaya (Hamilton's trans.), p. 610.
52. Abu Zahrah, Abu Hanifah, pp. 198–9; Qaraawi, Shar'i at al-Islam, p. 147.
53. Tabrizi, Mishkat, II, 1000, hadith no. 3342.
55. Khatib, Mughni al-Muhtaj, III, 442; Din, al-Nafaghah, pp. 20–3.
56. See Qaraawi, Shar'i at al-Islam, pp. 144–6.
57. Ibid., pp. 150–1.
60. Ibn Hanbal, Musnad, II, 162; Ashkar, Tahkim, pp. 57–8.
61. Bukhari, Sahih, Kitab al-Mazalim (Bab 25), hadith no. 2468.
63. Ibid., p. 512.
64. Cf. Shatibi, Muwaafaqat, IV, 3; Badran, Usul, p. 101.
65. Shatibi, Muwaafaqat, IV, 4; Siba'i, al-Sunnah, p. 377; Badran, Usul, p. 82.
66. Shatibi, Muwaafaqat, IV, 4.
68. While quoting al-Awza'i on this point, Shawkani (Irshad, p. 33) concurs with the view that the Sunnah is an independent source of Shar'i ah, and not necessarily, as it were, a commentary on the Qur'an only. See also Shatibi, Muwaafaqat, IV, 4.
69. See Shatibi, Muwaafaqat, IV, 5.
70. Ibid. See also Siba'i, al-Sunnah, pp. 378–9.
71. Shatibi, Muwaafaqat, IV, 5; Bahnasawi, al-Sunnah, p. 306.
72. Shatibi, Muwaafaqat, IV, 6.
73. Siba'i, al-Sunnah, p. 379; Khallaf, 'Ilm, p. 39; Badran, Usul, p. 102.
75. Ibn Qayyim, Flam, II, 233; Siba'i, al-Sunnah, p. 380; Badran, Usul, pp. 103–5.
76. Badrān, Bayān, p. 6.
77. Ibid., p. 7.
80. Shāṭibī, Muwāfaqāt, IV, 7.
81. Ibid., IV, 8; Sibā’ī, al-Sunnah, p. 383.
82. Cf. Abū Zahrah, Usūl, p. 82.
83. Shāṭibī, Risālah, pp. 52–3.
84. Ibid.
86. Qurtūbī, Tafsīr, XVIII, 227.
87. For further discussion see chapter thirteen of this work on maṣlahah mursalāh.
89. Ibid.
90. Ibid., p. 385.
91. Cf. Shabir, Authority of Hadith, p. 50.
92. Sibā’ī, al-Sunnah, p. 75; Shabir, Authority of Hadith, p. 51.
94. For details see Sibā’ī, al-Sunnah, pp. 76–8; Aẓamī, Studies, pp. 68–73.
95. Sibā’ī, al-Sunnah, p. 81.
96. Ibid., p. 82.
97. Ibid., pp. 84–5; Aẓamī, Studies, p. 68; Hitū, Wajīz, p. 290.
98. For these and more examples see Sibā’ī, al-Sunnah, pp. 85ff.
101. Ibid.
102. See for details Sibā’ī, al-Sunnah, p. 88; Hitū, Wajīz, p. 29.
103. See for details Sibā’ī, al-Sunnah, pp. 97–103.
106. Ghazālī, Mustāsfa, I, 88; Shawkānī, Irshād, p. 47; Hitū, Wajīz, p. 295.
107. Ghazālī, Mustāsfa, I, 87–8 illustrates this as follows: supposing that five or six persons report the death of another, this does not amount to certainty, but when this is confirmed by seeing the father of the deceased coming out of his house while obviously grief-stricken and exhibiting signs of disturbance that are unusual for a man of his stature, then the two combined amount to positive knowledge.
110. Ghazālī, Mustāsfa, I, 86; Shawkānī, Irshād, p. 48.
111. Abū Zahrah, Abū Hanīfah, p. 271.
112. Isnāwī, Niḥayah, II, 185; Abū Zahrah, Usūl, p. 84; Khallāf, ‘Ilm, p. 41.
113. Abū Dāwūd, Sunan (Hasan’s trans.), III, 1036, hadīth no. 3643.
114. Badrān, Usūl, p. 78.
115. Abū Zahrah, Uṣūl, p. 84; Aghnides, Muhammadan Theories, p. 44. Shawkānī’s (Irshād, p. 49) definition of mashhūr, however, includes hadīth which became well-known as late as the second or even the third century Hijrah.

116. Abū Zahrah, Uṣūl, p. 84; Badrān, Uṣūl, p. 85.

117. Khalāf, Ḥilm, p. 41.

118. Dārīmī, Sunan, Kitāb al-Farāʾid, II, 384; Ibn Mājah, Sunan, II, 913, hadīth no. 2735; Muslim, Sahīh, p. 212, hadīth no. 817; Badrān, Uṣūl, p. 85.

119. Shāfīʿī, Risālah, pp. 139ff; Abū Zahrah, Uṣūl, p. 84; Mahmassānī, Falsafah, p. 74.

120. Shawkānī, Irshād, pp. 48–9.

121. Āmīdī, Iḥkām, I, 161; Mahmassānī, Falsafah, p. 74.

122. Shawkānī, Irshād, p. 47; Abū Zahrah, Uṣūl, p. 85.

123. Abū Zahrah, Uṣūl, p. 85; Hitu, Wajīz, p. 305. As for the āḥād pertaining to subsidiary matters which are not essential to dogma, such as the torture of the grave (ʻadhab al-qabr), intercession (shaʿfiʿah), etc., these must be accepted and believed. Anyone who denies them is a sinner (fāsiq) but not a kāfir, as he denies something which is not decisively proven.


127. Ibid., p. 216.

128. For details on the conditions of āḥād see Shawkānī, Irshād, pp. 48–52; Hitu, Wajīz, pp. 307ff; Abū Zahrah, Uṣūl, p. 86; Mahmassānī, Falsafah, p. 74.


130. Shawkānī, Irshād, p. 67; Badrān, Uṣūl, p. 92.


133. Shawkānī, Irshād, p. 52; Abū Zahrah, Uṣūl, p. 86; Badrān, Uṣūl, p. 93; Khudārī, Uṣūl, p. 218.

134. Shawkānī, Irshād, p. 55.


137. Muslim, Sahīh, p. 41, hadīth no. 119.


139. Tabrīzī, Mishkāt, I, 104, hadīth no. 319.

140. Hitu, Wajīz, p. 302; Badrān, Uṣūl, p. 95.

141. Muslim, Sahīh, p. 248, hadīth no. 928.


143. Shāfīʿī, Risālah, p. 140; Muslim, Sahīh, p. 251, hadīth no. 944; Abū Zahrah, Uṣūl, p. 85; Qurtubī, Bidayah, II, 171.

144. Ibn Taymiyyah, Majmuʿah, XVIII, 40; Shawkānī, Irshād, p. 49; Bahnasāwī, al-Sunnah, pp. 166–7; Zuhaylī, Uṣūl, p. 455.


150. Hitu, Wajīz, p. 316; Khudārī, Usūl, p. 229; Abū Zahrah, Usūl, p. 86.
151. Shawkānī, Irsād, p. 64; Abū Zahrah, Usūl, p. 87.
152. Badrān, Usūl, p. 100; Khudārī, Usūl, p. 231; Khīn, Athar, p. 399.
153. Shāfi‘ī, Risālah, p. 904; Isnāwī, Niḥāyāh, II, 223; Tabrīzī, Mishkāt, III, 1695, hadith no. 6003.
154. Ibid., p. 64; Abū Zahrah, Usūl, p. 87; Khīn, Athar, p. 401; Zuḥaylī, Usūl, p. 474.
155. Azāmī, Studies, p. 43; Hitu, Wajīz, p. 316.
156. Ibid., p. 60.
157. Ibid., p. 62.
158. Shawkānī, Irsād, p. 64; Sībā‘ī, al-Sunnah, p. 94; Hitu, Wajīz, p. 321.
159. Sībā‘ī, al-Sunnah, p. 95; Azāmī, Studies, p. 62.
160. Ibid.
161. Ibid.
CHAPTER FOUR

Rules of Interpretation I: Deducing the Law from its Sources

Introduction

To interpret the Qur'ān or the Sunnah with a view to deducing legal rules from the indications they provide, it is necessary that the language of the Qur'ān and the Sunnah be clearly understood. To be able to utilise these sources, the mujtahid must obtain a firm grasp of the words of the text and their precise implications. For this purpose, the 'ulamā' of usūl include the classification of words and their usages in the methodology of usūl al-fiqh. The rules that 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 Shari'ah.

Normally the mujtahid will not resort to interpretation when the text itself is self-evident and clear. But by far the greater part of fiqh consists of rules that are derived through interpretation and ījtiḥād. As will be discussed later, ījtiḥād 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 for all forms of ījtiḥād.

The function of interpretation is to discover the intention of the Lawgiver — or of any person for that matter — from his speech and actions. Interpretation is primarily concerned with the discovery of that which is not self-evident. 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. From the viewpoints of their clarity, scope and capacity to convey certain meaning, words have been classified into various types. With reference to their conceptual clarity, the ‘ulamā’ of usūl have classified words into the two main categories of ‘clear’ and ‘unclear’ words. 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 (zāhir) and explicit (nāṣ) 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. A word is also classified, from the viewpoint of its scope, as homonym, general, specific, absolute or qualified. This classification basically explains the grammatical application of words to concepts: whether a word imparts one or more than one meaning, whether a word is of a specific or general import, and whether the absolute application of a word to its subject-matter can be qualified and limited in scope.

From the viewpoint of their actual use, such as whether a word is used in its primary, secondary, literal, technical or customary sense, words are once again divided into the two main categories of literal (haqiqi) and metaphorical (majazi). The methodology of usūl al-fiqh tells us, for example, that commands and prohibitions may not be issued in metaphorical terms as this would introduce uncertainty in their application. And yet there are exceptions to this, such as when the metaphorical becomes the dominant meaning of a word to the point that the literal or original meaning is no longer in use.

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 to resolve instances of conflict in the law. When the mujtahid is engaged in the deduction of rules from indications that often amount to no more than probabilities, some of his conclusions may turn out to be at odds with others. Ijtihād 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. We shall be taking up
each of these topics in the following pages, but it will be useful to start this section with a discussion of *ta’wil*.

I. *Ta’wil* (Allegorical Interpretation)

It should be noted at the outset that in Arabic there are two common words for ‘interpretation’, namely *tafsir* and *ta’wil*. The latter is perhaps closer to ‘interpretation’, whereas *tafsir* literally means ‘explanation’. The English equivalents of these terms do not convey the same difference between them that is indicated in their Arabic usage. ‘Allegorical interpretation’ is an acceptable equivalent of *ta’wil*, but I prefer the original Arabic to its English equivalent. I propose therefore to explain the difference between *tafsir* and *ta’wil* and then to use *ta’wil* as it is.

*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 *ijtihād*. 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.

From a juridical perspective, *ta’wil* and *tafsir* share a basic purpose, which is to clarify the law and to discover the intention of the Lawgiver in the light of the indications given, some of which may be definite and others more remote. Both are primarily concerned with speech that is not self-evident and requires clarification. Sometimes the Lawgiver or the proper legislative authority provides the necessary explanation to a legal text. This variety of explanation, known as *tafsir tashrī‘i*, is an integral part of the law. To this may be added *tafsir* which is based on definitive indications in the text and constitutes a necessary and logical part of it. Beyond this, all other explanations, whether in the form of *tafsir* or of *ta’wil*, are of the nature of opinion and *ijtihād*, and as such do not constitute an integral part of the law. The distinction between *tafsir* and *ta’wil* is not always clear-cut and obvious. An
explanation or commentary on a legal text may partake of both, and the two may converge at certain points. It is nevertheless useful to be aware of the basic distinction between *tafsīr* and *tawil*. We should also bear in mind that in the context of *usūl al-fiqh*, especially in our discussion of the rules of interpretation, it is *tawil* rather than *tafsīr* with which we are primarily concerned.

The 'ulamā' of *usul* have defined *tawil* as departure from the manifest (*zāhir*) meaning of a text in favour of another meaning, where there is evidence to justify the departure. *Tawil* that is attempted in accordance with the conditions that ensure its propriety is generally accepted, and the 'ulamā' of all ages, including the Companions, have applied it in their efforts to deduce legal rules from the Qur'ān and Sunnah. *Tawīl* that is properly constructed constitutes a valid basis for judicial decisions. But to ensure the propriety of *tawil*, it must fulfill certain conditions, which are as follows: (1) that there is some evidence to warrant the application of *tawil*, and that it is not founded on mere inclination or personal opinion; (2) that the word or words of a given text are amenable to *tawil*. In this way only certain types of words, including for example the manifest (*zāhir*) and explicit (*nass*), are open to *tawil*, but not the unequivocal (*muḥṣar*) and the perspicuous (*muḥkam*). Similarly, the general (*‘amm*), and the absolute (*muṣlaq*), are susceptible to *tawil* but not the specific (*khāṣṣ*), and the qualified (*muqayyad*), although there are cases where these too have been subjected to *tawil*; (3) that the word which is given an allegorical interpretation has a propensity, even if only a weak one, in favour of that interpretation. This condition would preclude a far-fetched interpretation that goes beyond the capacity of the words of a given text; (4) that the person who attempts *tawil* is qualified to do so, and that his interpretation is in harmony with the rules of the language and customary or juridical usage. Thus it would be unacceptable if the word *qur’* in the Qur’ānic text (al-Baqarah, 2:228) were to be given a meaning other than the two meanings which it bears, namely menstruation (*ḥayḍ*) and the clean period between menstruations (*ṭuḥr*). For *qur’* cannot carry an additional meaning, and any attempt to give it one would violate the rules of the language. But *tawil* in the sense of a shift from the literal to the metaphorical and from the general to the specific is not a peculiarity of Arabic, in that words in any language are, in fact, amenable to these possibilities.

There are two types of *tawil*, namely *tawil* that is remote and far-fetched, and relevant *tawil*, which is within the scope of what might be thought of as correct understanding. An example of the first
type is the Ḥanafī interpretation of a hadīth which instructed a Companion, Fīrūz al-Daylāmī, who professed Islam while he was married to two sisters, to 'retain [amsik] one of the two, whichever you wish, and separate from the other'.

The Ḥanafīs have interpreted this hadīth to the effect that al-Daylāmī was asked to contract a new marriage with one of the sisters, if they happened to have been married in a single contract of marriage but, if they had been married in two separate contracts, to retain the one whom he married first, without a contract. The Ḥanafīs have resorted to this ta‘wil apparently because of the Shari‘ah rule which does not permit two women to be married in a single contract. If this were to be the case, then a new contract would be necessary with the one who was to be retained.

However, this is regarded as a remote interpretation, one which is not supported by the wording of the hadīth. Besides, al-Daylāmī was a new convert to Islam who could not be presumed to be knowledgeable of the rules of Shari‘ah. Had the Prophet intended the meaning that the Ḥanafīs have given to the hadīth, the Prophet would have clarified it himself. As it is, the Ḥanafī interpretation cannot be sustained by the contents of the hadīth, which is why it is regarded as far-fetched.

Ta‘wil is relevant and correct if it can be accepted without recourse to forced and far-fetched arguments. The interpretation, for example, which the majority of ‘ulamā‘ have given to the phrase ‘idhā qummum ila‘l-salāh’ ('when you stand for prayers') in the Qur‘ānic text concerning the requirement of ablution for salāh (al-Mā‘idah, 5:6) to mean 'when you intend to pray' is relevant and correct; for without it, there would be some irregularity in the understanding of the text. The passage under discussion reads, in the relevant part: 'O believers, when you stand for salāh, wash your faces and your hands up to the elbows.'

‘When you stand for salāh’ here is understood to mean ‘when you intend to perform salāh’. The fact that ablution is required before entering the salāh is the proper interpretation of the text, as the
Lawgiver could not be said to have required the faithful to perform the ablution after having started the *ṣalāh*.\(^8\)

To set a total ban on *ta’wil*, and to always try to follow the literal meaning of the Qur’ān and Sunnah, which is what the Zāhirīs have tended to do, is likely to lead to a departure from the spirit of the law and its general purpose. It is, on the other hand, equally valid to say that interpretation must be attempted carefully and only when it is necessary and justified, for otherwise the law could be subjected to arbitrariness and abuse. A correct interpretation is one for which support can be found in the *nusūs*, in analogy (*qiyyās*), or in the general principles of the law. Normally a correct interpretation does not conflict with the explicit injunctions of the law, and its accuracy is borne out by the contents of the text itself.\(^9\)

II. Classification (A): Clear and Unclear Words

From the viewpoint of clarity (*wudūḥ*), words are divided into the two main categories of clear and unclear words. A clear word conveys a concept that is intelligible without recourse to interpretation. A ruling which is communicated in clear words constitutes the basis of obligation, without any recourse to *ta’wil*. A word is unclear, on the other hand, when it lacks the foregoing qualities: the meaning it conveys is ambiguous/incomplete, and requires clarification. An ambiguous text that is in need of clarification cannot constitute the basis of action. The clarification so required can only be supplied through extraneous evidence, for the text itself is deficient and fails to convey a complete meaning without recourse to evidence outside its contents. A clear text, on the other hand, is self-contained, and needs no recourse to extraneous evidence. From the viewpoint of the degree of clarity and conceptual strength, clear words are divided into four types in a ranking which starts with the least clear, namely the manifest (*zāhir*) and then the explicit (*nāṣ*), which commands greater clarity than the *zāhir*. This is followed by the unequivocal (*mufassar*) and finally the perspicuous (*muhkam*), which ranks highest in respect of clarity. And then from the viewpoint of the degree of ambiguity in their meaning, words are classified, once again, into four types which start with the least ambiguous and end with the most ambiguous in the range.

As to unclear words (*al-alfāz ghayr al-wadīḥah*), these are words which do not by themselves convey a clear meaning without the aid of additional evidence that may be furnished by the Lawgiver Himself,
or by the mujtahid. If the inherent ambiguity is clarified by means of research and ijtihad, the words are classified as khafi (obscure) and mushkil (difficult). But when the ambiguity can only be removed by an explanation which is furnished by the Lawgiver, the word is classified either as mujmal (ambivalent) or mutashâbih (intricate). This is not to say, however, that the ijtihâd does not apply to mujmal, for even in cases where an authoritative explanation to mujmal can only be provided by the Lawgiver, the 'ulamâ’ have often given an ijtihâd. Unclear words occur in four varieties.

We shall begin with an exposition of the clear words and then discuss the unclear words.

II.1 The Žahîr and the Nass

The manifest (ţâhir) is a word which has a clear meaning and yet is open to ta’wil, primarily because the meaning it conveys is not in harmony with the context in which it occurs. It is a word that has a literal/original meaning of its own but which leaves open the possibility of an alternative interpretation. For example, the word ‘lion’ in the sentence ‘I saw a lion’ is clear enough, but it is possible, although less likely, that the speaker might have meant a brave man. Žâhir 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 žâhir and nass mainly depends on their relationship with the context in which they occur. Žâhir 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. These may be illustrated in the Qur’ânic text concerning polygamy, as follows: 'And if you fear that you cannot treat the orphans justly, then marry of the women who seem good to you, two, three or four' (al-Nisâ’, 4:3).

Two points constitute the principal theme of this âyâh, one of which is that polygamy is permissible, and the other that it must be limited
to the maximum of four. We may say therefore that these are the explicit rulings (nass) of this text. But this text also establishes the legality of marriage between men and women, especially in the part where it reads ‘marry of the women who seem good to you’. However, legalising marriage is not the principal theme of this text, but only a subsidiary point. The main theme is the nass and the incidental point is the zāhir.\textsuperscript{12}

The effect of the zāhir and the nass is that their obvious meanings must be followed and action upon them is obligatory unless there is evidence to warrant recourse to ta’wil, that is, to a different interpretation which might be in greater harmony with the intention of the Lawgiver. For the basic rules of interpretation require that the obvious meanings of words should be accepted and followed unless there is a compelling reason for abandoning the obvious meaning. When we say that the zāhir is open to ta’wil, it means that when the zāhir is general, it may be specified, and when it is absolute, it may be restricted and qualified. Similarly, the literal meaning of the zāhir may be abandoned in favour of a metaphorical meaning. And, finally, the zāhir is susceptible to abrogation which, in the case of the Qur’ān and Sunnah, could only occur during the lifetime of the Prophet. An example of the zāhir which is initially conveyed in absolute terms but has subsequently been qualified is the Qur’ānic text (al-Nisā’, 4:24) which spells out the prohibited degrees of relationship in marriage. The text then continues, ‘And lawful to you are women other than these, provided you seek them by means of your wealth and marry them properly.’

The passage preceding this āyah refers to a number of female relatives with whom marriage is forbidden, but there is no reference anywhere in this passage either to polygamy or to marriage with the paternal and maternal aunt of one’s wife. The apparent or zāhir meaning of this passage, especially in the part where it reads ‘and lawful to you are women other than these’ would seem to validate polygamy beyond the limit of four, and also marriage to the paternal and maternal aunt of one’s wife. However, the absolute terms of this āyah have been qualified by another ruling of the Qur’ān (al-Nisā’, 4:3) quoted earlier, which limits polygamy to four. The other qualification to the text under discussion is provided by the mashhur hadith which forbids simultaneous marriage with the maternal and paternal aunt of
one's wife.\textsuperscript{13} This illustration also serves to show an instance of conflict between the \textit{zhahir} and the \textit{nass}. Since the second of the two \textit{ayat} under discussion is a \textit{nass}, it is one degree stronger than the \textit{zhahir} and would therefore prevail. This question of conflicts between the \textit{zhahir} and \textit{nass} will be further discussed later.

It will be noted that \textit{nass}, in addition to its technical meaning which we shall presently elaborate, has a more general meaning which is commonly used by the \\textit{fuqahā’}. In the terminology of \textit{fiqh}, \textit{nass} means a definitive text or ruling of the Qur'ān or the Sunnah. Thus it is said that this or that ruling is a \textit{nass}, which means that it is a definitive injunction of the Qur'ān or Sunnah. But \textit{nass} as opposed to \textit{zhahir} denotes a word or words that convey a clear meaning, and also represents the principal theme of the text in which it occurs. An example of \textit{nass} in the Qur'ān is the Qur'ānic text on the priority of debts and bequests over inheritance in the administration of an estate. The relevant dyah assigns specific shares to a number of heirs and then states that the distribution of shares in all cases is to take place ‘after the payment of legacies and debts’ (al-\textit{Nisa’}, 4:11). Similarly, the Qur'ānic text which provides that ‘unlawful to you are the dead carcass and blood’ (al-\textit{Ma’idah}, 5:3)

\textit{حَرَمَتِ عَلَيْكُمَ الْمَيْتَةَ وَالدَّمَ}

is a \textit{nass} on the prohibition of these items for human consumption. As already stated, the \textit{nass}, like the \textit{zhahir}, is open to \textit{ta’wil} and abrogation. For example, the absolute terms of the \textit{ayah} which we just quoted on the prohibition of dead carcasses and blood have been qualified elsewhere in the Qur'ān where ‘blood’ has been qualified as ‘blood shed forth’ (al-\textit{An‘ām}, 6:145). Similarly, there is a \textit{hadith} which permits consumption of two types of dead carcasses, namely fish and locusts.\textsuperscript{14} Another example of the \textit{nass} which has been subjected to \textit{ta’wil} is the \textit{hadith} concerning the legal alms (\textit{zakāh}) of livestock, which simply states that this shall be ‘one in every forty sheep’.\textsuperscript{15}

\textit{فِي أَرَبعِنِ شَأْتَةٍ شَأْتَةٌ}

The obvious \textit{nass} of this \textit{hadith} admittedly requires that the animal itself should be given in \textit{zakāh}. But it would seem in harmony with the basic purpose of the law to say that either the sheep or their equivalent monetary value may be given. The purpose of \textit{zakāh} is to satisfy
the needs of the poor, and this could equally be done by giving them the equivalent amount of money; it is even likely that they might prefer this. The Hanafis have offered a similar interpretation for two other Qur’anic āyāt, one on the expiation of futile oaths, and the other on the expiation of deliberate breaking of the fast during Ramaḍān. The first is to feeding ten poor persons (al-Mā’idah, 5:92), and the second is to feed sixty such persons (al-Mujādilah, 58:4). The Hanafis have held that this text can be implemented either by feeding ten needy persons or by feeding one such person on ten occasions. Similarly, the provision in the second āyāh may be understood, according to the Hanafis, to mean feeding sixty poor persons, or one such person sixty times.

As already stated, nasṣ is stronger than zāhir, and, should there be a conflict between them, the former prevails over the latter. This may be illustrated in the following two Qur’anic passages, one of which is a nasṣ in regard to the prohibition of wine, and the other a zāhir in regard to the permissibility of eating and drinking in general. The two passages are as follows:

O believers! Intoxicants, games of chance and sacrificing to stone and arrows are the unclean works of Satan. So avoid them (al-Mā’idah, 5:90).

On those who believe and do good deeds there is no blame for what they consume while they keep their duty and believe and do good deeds (al-Mā’idah, 5:93).

The nasṣ in the first āyāh is the prohibition of wine, which is the main purpose and theme of the text. The zāhir in the second āyāh is the permissibility of eating and drinking without restriction. The main purpose of the second āyāh is, however, to accentuate the virtue of piety (taqwā) in that taqwā is not a question of austerity with regard to food, it is rather a matter of God-consciousness and good deeds. There is an apparent conflict between the two āyāt but, since the
prohibition of wine is established in the *nasā*, and the permissibility regarding food and drink is in the form of *zāhir*, the *nasā* prevails over the *zāhir*.

To give an example of *zāhir* in modern criminal law, we may refer to the word ‘night’ which occurs in many statutes in connection with theft. When theft is committed at night, it carries a heavier penalty. Now if one takes the manifest meaning of ‘night’, then it means the period between sunset and sunrise. However, this meaning may not be totally harmonious with the purpose of the law. What is really meant by ‘night’ is the dark of the night, which is an accentuating circumstance in regard to theft. Here the meaning of the *zāhir* is qualified with reference to the rational purpose of the law and the nature of the offence in question.

II.2 Unequivocal (Mufassar) and Perspicuous (Muhkam)

*Mufassar* or *mubayyān* is a word or a text whose meaning is completely clear and is, at the same time, in harmony with the context in which it appears. Because of this and the high level of clarity in the meaning of *mufassar*, there is no need for recourse to *ta’wil*. But the *mufassar* may still be open to abrogation which might, in reference to the Qur’ān and Sunnah, have taken place during the lifetime of the Prophet. The idea of the *mufassar*, as the word itself implies, is that the text explains itself. The Lawgiver has, in other words, explained His own intentions with complete clarity, and the occasion for *ta’wil* does not arise. The *mufassar* occurs in two varieties, one being the text which is self-explained, or *mufassar* *bidhāthih*; the other is when the ambiguity in one text is clarified and explained by another. This is known as *mufassar* *bighayrijih*, in which case the two texts become an integral part of one another and the two combine to constitute a *mufassar*. A text of the Qur’ān may thus be explained by another text or by the *Sunnah* and the latter may be either verbal *Sunnah* or actual *Sunnah* consisting of practical illustration. Instances of conflict between the verbal and actual *Sunnah* are not expected to be frequent; should there be any such conflict, the verbal *Sunnah* takes priority over the actual, although there is an opinion that prefers the actual *Sunnah* to the verbal. However, the latter in time will be preferred in any case – in the event, that is, when the chronological order between them can be ascertained. An example of *mufassar* in the Qur’ān is the text in sūra al-Tawbah (9:36) which exhorts the believers to ‘fight all the pagans as they fight you all’.
The word ‘kaffah’, which occurs twice in this text, precludes the possibility of applying specification (takhṣīṣ) to the words preceding it, namely the pagans (mushrikin). Another example of mufassar or mubayyin bidhātih is the text on the punishment of adultery, which reads: ‘The adulterer, whether a woman or a man, flog each of them a hundred stripes’ (al-Nūr, 24:2).

The text here is self-explanatory and specific regarding both the offence and the number of stripes by which it is punishable, and it is therefore in no need of ta’wil. This form of mufassar occurs in many a modern statute with regard to specified crimes and their penalties, but also with regard to civil liabilities, the payment of damages, and debts. The words of the statute are often self-explained and definite so as to preclude ta’wil. But the basic function of the explanation that the text itself provides is concerned with that part of the text which is ambivalent (mujmal) and needs to be clarified. When the necessary explanation is provided, the ambiguity is removed and the text becomes a mufassar. An example of this is the phrase ‘laylah al-qadr’ (‘night of qadr’) in the following Qur’ānic passage. The phrase is ambiguous to begin with, but is then explained: ‘We sent it [the Qur’ān] down on the Night of Qadr. What will make you realise what the Night of Qadr is like?...It is the night in which angels and the spirit descend’ (al-Qadr, 97:1—4).

The text thus explains the ‘laylah al-qadr’, and as a result of the explanation so provided, the text becomes self-explained, or mufassar. Hence there is no need for recourse to ta’wil. Sometimes the ambiguous of the Qur’ān is clarified by the Sunnah, and when this is the case, the clarification given by the Sunnah becomes an integral part of the Qur’ān. There are numerous examples of this, such as the words salah, zakah, ḥajj, ribā, which occur in the following āyāt:
Perform the *salāh* and pay the *zakāh* (al-Baqarah, 2:43).

God has enjoined upon people the pilgrimage of *hajj*, to be performed by all who are capable of it (Al 'Imrān, 3:97).

God has permitted sale and prohibited usury (al-Baqarah, 2:275).

The juridical meanings of *salāh*, *zakāh*, *hajj* and *riba* could not be known from the brief references that are made to them in these *āyāt*. Hence the Prophet provided the necessary explanation in the form of both verbal and practical instructions. In this way the text that was initially ambivalent (*mujmal*) became *mufassar*. With regard to *salāh*, for example, the Prophet instructed his followers to 'perform the *salāh* the way you see me performing it'.

and regarding the *hajj* he ordered them to 'take from me the rituals of the *hajj*'.

There are also many *hadith* which explain the Qur'ānic prohibition of *riba* in specific and elaborate detail. In all of these cases, the Qur'ān has been explained and clarified by the Sunnah, which means that they are all examples of *mubayyān* or *mufassar bighayrih*.

The value (*hukm*) of the *mufassar* is that acting upon it is obligatory. The clear meaning of a *mufassar* is not open to interpretation and unless it has been abrogated, and the obvious text must be followed. But since abrogation of the Qur'ān and Sunnah discontinued upon the demise of the Prophet, to all intents and purposes, the *mufassar* is equivalent to the perspicuous (*muhkam*), which is the last in the range of clear words and is not open to any change.
Specific words (al-alfāż al-khāṣṣah) which are not open to ta‘wil or any change in their primary meanings are in the nature of mufassar. Thus the Qur’ānic punishment of eighty lashes for slanderous accusation (qadhf) in sura al-Nūr (24:4), or the āyah of inheritance (al-Nisā’, 4:11) which prescribes specific shares for legal heirs, consist of fixed numbers which rule out the possibility of ta‘wil. They all partake of the qualities of mufassar.

Since mufassar is one degree stronger than nass, in the event of a conflict between them, the mufassar prevails. This can be illustrated in the two hadith concerning the ablution of a woman who experiences irregular menstruations that last longer than the expected three days or so: she is required to perform the salah; as for the ablution (wudū’) for salah, according to one hadith, ‘A woman in prolonged menstruations must make a fresh wudū’ for every salah.’

... And according to another hadith, ‘A woman in prolonged menstruation must make a fresh wudū’ at the time of every salah.’

The first hadith is a nass on the requirement of a fresh wudū’ for every salah, but the second hadith is a mufassar which does not admit ta‘wil. The first hadith is not completely categorical as to whether ‘every salah’ applies to both obligatory and supererogatory (fara‘id wa-nawāfi) types of salah. Supposing that they are both performed at the same time, would a separate wudū’ be required for each? But this ambiguity does not arise under the second hadith as the latter provides complete instruction: a wudū’ is only required at the time of every salah and the same wudū’ is sufficient for any number of salah at that particular time.

Words and sentences whose meaning is clear beyond doubt and are not open to ta‘wil and abrogation are called muḥkām. An example of this is the frequently occurring Qur’ānic statement that ‘God knows all things’. This kind of statement cannot be abrogated, either in the lifetime of the Prophet, or after his demise. The text may sometimes explain itself in terms that would preclude the possibility of abrogation. An example of this is the Qur’ānic address to the believers concerning the wives of the Prophet: ‘It is not right for you to annoy the Messenger of God; nor should you ever marry his widows after him. For that is truly an enormity in God’s sight’ (al-Ahzāb, 33:53).
The prohibition here is emphasised by the word *abadan* (never, ever) which renders it *muhkam*, thereby precluding the possibility of abrogation. The *muhkam* is, in reality, nothing other than *mufassar* with one difference, which is that *muhkam* is not open to abrogation. An example of *muhkam* in the Sunnah is the ruling concerning *jihād* which provides that ‘*jihād* remains valid till the day of resurrection’.27

The ‘ulama’ of *usūl* have given the Qur’ānic āyah on slanderous accusation as another example of *muhkam*, despite some differences of interpretation that have arisen over it among the Ḥanafī and Shāfī’ī jurists. The āyah provides, concerning persons who are convicted and punished for slanderous accusation (*qadhif*): ‘And accept not their testimony ever, for such people are transgressors’ (al-Nūr, 24:4).

Once again, the occurrence of *abadan* (‘forever’) in this text renders it *muhkam* and precludes all possibility of abrogation. The Ḥanafīs have held that the express terms of this āyah admit no exception. A *qādhif*, that is, a slanderous accuser, may never be admitted as a witness even if he repents. But according to the Shāfī’īs, if the *qādhif* repents after punishment, he may be admitted as a witness. The reason for this exception, according to the Shāfī’īs, is given in the subsequent portion of the same text, which reads: ‘Unless they repent afterwards, and rectify themselves.’ The grounds of these different interpretations need not be elaborated here. Suffice it to point out that the differences are over the understanding of the pronouns in the text, whether they refer both to the *qādhif* and transgressors, or to the latter only. There is no difference of opinion over the basic punishment of *qadhif*, which is eighty lashes as the text provides, but only with regard to the additional penalty disqualifying them as witnesses forever. It would thus appear that these differences fall within the scope of *tafsīr* rather than that of *ta’wil*.

The *muhkam* is not open to abrogation. This may be indicated in
The purpose of the foregoing distinction between the four types of clear words is to identify their propensity or otherwise to ta’wil, that is, of admitting a meaning other than their obvious meaning, and whether or not they are open to abrogation. If a word is not open to either of these possibilities, it would follow that it retains its original or primary meaning and admits no other interpretation. The present classification, in other words, defines the scope of ta’wil in that the latter is applicable only to the zahir and nass but not to the mufassar and muhkam. The next purpose of this classification is to provide guidelines for resolving possible conflicts between the various categories of words. In this way, an order of priority is established by which the muhkam prevails over the other three varieties of clear words and the mufassar takes priority over the nass, and so on. But this order of priority applies only when the two conflicting texts both occur in the Qur’an. However, when a conflict arises between, say, the zahir of the Qur’an and the nass of the Sunnah, the former would prevail despite its being one degree weaker in the order of priority. This may be illustrated by the ayah of the Qur’an concerning guardianship in marriage, which is of the nature of zahir. The ayah provides: ‘If he has divorced her, then she is not lawful to him until she marries [hatta tankiha] another man’ (al-Baqarah, 2:230).

This text is zahir in respect of guardianship as its principal theme is divorce, not guardianship. From the Arabic form of the word ‘tankiha’ in this text, the Hanafis have drawn the additional conclusion that an adult woman can contract her own marriage, without the presence of a guardian. However, there is a hadith on the subject of guardianship which is in the nature of nass, which provides that ‘there shall be no marriage without a guardian [wali]’.20

This hadith is more specific on the point that a woman must be contracted in marriage by her guardian. Notwithstanding this, however, the zahir of the Qur’an is given priority, by the Hanafis at
least, over the *nass* of the *hadith*. The majority of ‘*ulamā’* have, however, followed the ruling of the Sunnah on this point.\textsuperscript{10}

### II.3 The Obscure (*Khafī*)

*Khafī* denotes a word which has a basic meaning but is partially ambiguous in respect of some of the individual cases to which it is applied: the word is consequently obscure with regard to these cases only. The ambiguity in *khafī* needs to be clarified by extraneous evidence, which is often a matter of research and *ijtihād*. An example of *khafī* is the word ‘thief’ (*sāriq*), which has a basic meaning, but which, when it is applied to cases such as that of a pickpocket, or a person who steals the shrouds of the dead, does not make it immediately clear whether the punishment of theft can be applied to or not. The basic ingredients of theft are present in this activity, but the fact that the pickpocket uses a kind of skill in taking the assets of a person in wakefulness makes it somewhat different from theft. Similarly, it is not certain whether ‘thief’ includes a *nabbāsh*, that is, one who steals the shrouds of the dead, since a shroud is not a guarded property (*māl muhraz*). Imam Shāfi‘i and Abū Yūṣuf would apply the prescribed penalty of theft to the *nabbāsh*, whereas the majority of ‘*ulamā’* only make him liable to the discretionary punishment of *ta‘zīr*. There is also an *ijtihādī* opinion which authorises the application of the *hadd* of theft to the pickpocket.\textsuperscript{31}

The word ‘*qāṭīl*’ (killer) in the *hadith* that ‘the killer shall not inherit’ is also *khafī* in respect of certain varieties of killing such as ‘unintentional killing’ (*qaṭal al-khata‘*). The Mālikis have held that erroneous killing is not included in the meaning of this *hadith*, whereas according to the Hanafis, it is in the interest of safeguarding the lives of the people to include erroneous killing within the meaning of this *hadith*.\textsuperscript{33}

To remove the ambiguity in *khafī* is usually a matter of *ijtihād*, which would explain why there are divergent rulings on each of the foregoing examples. It is the duty of the mujtahid to exert himself so as to clarify the ambiguity in the *khafī* before it can constitute the basis of a judicial order.
II.4 The Difficult (Mushkil)

Mushkil denotes a word which is inherently ambiguous, and whose ambiguity can only be removed by means of research and ijtihad. The mushkil differs from the khaṣṣ in that the latter has a basic meaning which is generally clear, whereas the mushkil is inherently ambiguous. There are, for example, words which have more than one meaning and, when they occur in a text, the text is unclear with regard to one or the other of those meanings. Thus the word qur' which occurs in sura al-Baqarah (2:228) is mushkil as it has two distinct meanings: menstruation (hayd) and the clean period between two menstruations (tuhr). Whichever of these is taken, the ruling of the text will differ accordingly. Imam Shafi'i and a number of other jurists have adopted the latter, whereas the Hanafis and others have adopted the former as the correct meaning of qur'.

Sometimes the difficulty arising in the text is caused by the existence of a conflicting text. Although each of the two texts may be fairly clear, as they stand alone, they become difficult when one attempts to reconcile them. This may be illustrated in the following two aya'at, one of which states: ‘Whatever good that befalls you is from God, and whatever misfortune that happens to you, is from yourself’ (al-Nisâ’, 4:79).

Elsewhere we read in sura Al ‘Imran (3:154): ‘Say that the matter is all in God’s hands.’

A similar difficulty is noted in the following two passages. According to the first, ‘Verily God does not command obscenity’ (al-A’râf, 7:28).

And then we read in sura Bani Isra’il (17:16): ‘When We decide to destroy a population, We first send a definite order to their privileged ones, and when they transgress, the word is proven against them. Then We destroy them with utter destruction.’
Could it be said that total destruction is a form of evil? There is no certainty as to the correct meaning of mushkil, as it is inherently ambiguous. Any explanation provided by the mujtahid is bound to be speculative. The mujtahid is nevertheless bound to exert himself in order to discover the correct meaning of mushkil before it can be implemented and adopted as a basis of action.34

II.5 The Ambivalent (Mujmal)

Mujmal denotes a word or text which is inherently unclear and gives no indication as to its precise meaning. The cause of ambiguity in mujmal is inherent in the locution itself. A word may be a homonym with more than one meaning, and there is no indication as to which might be the correct one, or alternatively the Lawgiver has given it a meaning other than its literal one, or the word may be totally unfamiliar. In each of these eventualities, there is no way of removing the ambiguity without recourse to the explanation that the Lawgiver has furnished Himself, for He introduced the ambiguous word in the first place. Words that have been used in a transferred sense, that is, for a meaning other than their literal one, in order to convey a technical or a juridical concept, fall into the category of mujmal. For example, expressions such as salah, ribâ', ḥajj, and siyām have all lost their literal meanings due to the fact that the Lawgiver has used them for purposes other than those which they originally conveyed. Each of these words has a literal meaning, but since their technical meaning is so radically different from the literal, the link between them is lost and the technical meaning becomes totally dominant. A word of this type remains ambivalent until it is clarified by the Lawgiver Himself. The juridical meaning of all the Qur'ānic words cited above has been explained by the Prophet, in which case, they cease to be ambivalent. This is because when the Lawgiver provides the necessary explanation, the mujmal is explained and turns into mufassar. Ambiguity may also arise as a result of uncertainty in the correct meaning of the pronouns and adjectives. For instance, when a pronoun or adjective occurs in a sentence in such a way that it can refer to more than one subject, it renders the text a mujmal and cannot, therefore,
be enforced as law unless the necessary clarification is provided. Ambiguity may also arise due to uncertainty regarding the exact implication of particles. The *hadith*, for example, that 'there is no *salāh* without the *Fātiḥah*'

لا صلاة إلا بفتحة الكتاب.

can mean that a *salāh* is rendered null and void or that it is incomplete. The juridical value of the particle *lā* is thus unclear and the *hadith* is therefore in need of clarification.

Ambiguity can also arise in acts as well as words, and we refer here particularly to the *Sunnah*, where we may have two versions of how the Prophet might have acted in a way that is not self-evident and requires clarification. The report, for example, that the Prophet combined (*jamda'a*) obligatory prayer while travelling is a *mujmal* in that it does not tell us the length of the journey and whether a short journey as well as a long one may qualify for the purposes of combining prayers. Hence the act remains ambiguous unless one finds additional information that might provide the necessary clarification.

Most of the examples given so far are of *mujmal* as singular words, but ambiguity may also arise in a context as a result of the combination of words. Note, for example, the *Qurʾānic* text referring to the dower in the event of a divorce, which states that it may be waived by one 'in whose hands is the marriage tie' (*al-Baqarah, 2:237*). The text can thus refer either to the spouse or to the guardian. Imam Shāfiʿī preferred the first meaning but Imam Mālik preferred the second. To give another example, we may refer to the *hadith* which declares that 'acts are as good as the intentions behind them'.

إِنَّ الأَمْعَال بِالنِّيَاتِ.

Al-Zarkashi has recorded different opinions on this *hadith* to the effect that some have held it to be *mujmal*, yet there is some ambiguity as to the precise value that it may be said to convey. Does it mean, for example, that an act, say, of worship, without intent (*niyyah*) is invalid or merely imperfect? The 'ʿulama' seem to be divided over these two meanings.35

The *mujmal* may sometimes be an unfamiliar word which is inherently vague, but is clarified by the text where it occurs. For example 'al-*qārī'ah* and 'halū' which occur in the *Qurʾānic* passages as follows:
The stunning blow [al-qari‘ah]. What is the stunning blow? What will make you realise what the stunning blow is? It is the Day on which the people will act like scattered moths; and the mountains will be like carded wool (al-Qari’ah, 101:1-5).

 Truly man was created restless [hali‘an], so he panics whenever any evil touches him; and he withholds when some fortune befalls him (al-Ma‘arij, 70:19-21).

 The ambivalent words in these passages have thus been explained and the text has, as a result, become self-explained, or mufassar. The mujmal turns into the mufassar only when the clarification that the Lawgiver provides is complete; but when it is incomplete, or insufficient to remove the ambiguity, the mujmal turns into a mushkil, which is then open to research and ijtihad. An example of this is the word riba which occurs in the Qur‘an (al-Baqarah, 2:275) in the form of a mujmal, as when it reads: ‘God permitted sale and prohibited riba’,

 where the last word in this text literally meaning ‘increase’. Since not every increase or profit is unlawful, the text remains ambivalent as to what type of increase it intends to forbid. The Prophet has clarified the basic concept of riba in the hadith which specifies six items (gold, silver, wheat, barley, salt and dates) to which the prohibition applies. But this explanation is insufficient in its detail in that it leaves room for reflection and enquiry as to the rationale of the text in respect of extending the same rule to similar commodities. The hadith thus opens the way to further ijtihad and analogy with the goods it has specified.

 With regard to the value (hukm) of the mujmal, the general rule is that it is one of suspension (tawagquf) until the ambiguity is removed. But there is an opinion that if ambiguity is due to a plurality of meanings,
and there is some indication or evidence in support of one, then it should be acted upon. If, for example, the social custom prefers one of the various meanings, then it should be upheld. Should there be no such evidence available, then the clarification must be attempted through *ijtihād*. If the various meanings of a *mujmal* are not incompatible, then any or all of them may be applied. The *āyah*, for example, which states that ‘whoever is slain unjustly, we have indeed given authority to his heir’ (al-İsra’, 17:33)

is ambiguous as to the meaning of ‘authority’, whether it means retaliation, blood-money or power; it may mean all of these. Imam Shi‘ī has held it to be a reference to retaliation.

The view has prevailed among the ‘ulamā’ that there is no *mujmal* left unclarified in the Qurʾān following the demise of the Prophet. Al-Juwaynī stated the best view on this point, which is that no *mujmal* is left unclarified in the area of decisive injunctions, the *ahkām*. It is possible, according to this view, that *mujmal* may have remained unclarified outside the sphere of the *ahkām*.

II.6 The Intricate (*Mutashābih*)

This denotes a word whose meaning is a total mystery. There are words in the Qurʾān whose meaning is not known at all. Neither the words themselves nor the text in which they occur provide any indication as to their meaning. The *mutashābih* as such does not occur in the legal *musāṣa*, but it does occur in other contexts. Some of the sūras of the Qurʾān begin with what is called the *muqatta’āt*, that is, abbreviated letters whose meaning is a total mystery. Expressions such as *alif-lām-mīm, yā-sīn, bā-mīm* and many others which occur on twenty-nine occasions in the Qurʾān, are all classified as *mutashābih*. Some ‘ulamā’ have held the view that the *muqatta’āt* are meant to exemplify the inimitable qualities of the Qurʾān, while others maintain that they are not abbreviations but symbols and names of God; that they have numerical significance; and that they are used to attract the attention of the audience. According to yet another view, the *mutashābih* in the Qurʾān is meant as a reminder of limitations in the knowledge of the believer, who is made to realise that the unseen realities are too vast to be comprehended by reason. There is also a view that the abbreviated letters are names of the chapters of the Qurʾān, and,
according to another view, these are the secret messages that were meant only for the Prophet Mūḥammad.

Some ‘ulamā’, including Ibn Ḥazm al-Ẓāhirī, have held the view that, with the exception of the mūqatta’at, there is no mutashābih in the Qur’ān. Others have maintained that the passages of the Qur’ān which draw resemblances between God and man are also in the nature of mutashābih. 59 Thus the āyāt which states that ‘the hand of God is over their hands’ (al-Fath, 48:10)

وَقَدْ أَوْصِهِمْ بِمَا أُمِّنُواٍ

and the reference to the Prophet Noah where we read: ‘Build a ship under Our eyes and Our inspiration’ (Hūd, 11:37)

وَأَنْعَمَّنَاهُ لِلنَّاسِ عَلَىٰ وَحْيٍ

and in sūra al-Rahmān (55:27) where the text runs ‘and the face of your Lord will abide forever’

وَمَا وَلَدَنَا رَبَّكَ

are instances of mutashābih as their precise meaning cannot be known. Other words and phrases such as al-rūḥ (soul), mākr Allāh (God’s trick) and al-istiwa’ ‘ala’l-‘arsh (God’s seating on the throne) have also been identified as mutashābih. One can of course draw an appropriate metaphorical meaning in each case, which is what the Mu’tazilah have attempted, but this is neither satisfactory nor certain. To say that ‘hand’ metaphorically means power, and ‘eyes’ means supervision is no more than a conjecture, for we do not know the subject of our comparison. The Qur’ān also tells us that ‘there is nothing like Him’ (al-Shūrā, 42:11).

لَا إِلَهَ إِلَّا هُوَ

Since the Lawgiver has not explained these similitudes to us, they remain unintelligible. 40 The existence of the mutashābih in the Qur’ān is proven by the testimony of the Qur’ān itself, which is as follows:

He it is who has sent down to you the Book. Some of it consist of muhkamāt, while others are mutashābihāt. Those who have perversity in their hearts, in their quest for sedition, follow the mutashābihāt and search for its hidden meanings. But no one knows those meanings, except God and those who are firmly grounded in knowledge. (Āl ‘Imrān, 3:7)
The ‘ulamā’ have differed in their understanding of this āyah, particularly with regard to the definition of muhkamat and mutashabihat. But the correct view is that muhkam is that part of the Qur’ān which is not open to conjecture and doubt, whereas the mutashabih is. With regard to the letters which appear at the beginning of sûras, it has been suggested that they are the names of the sûras in which they occur. As for the question of whether acting upon the mutashabih is permissible or not, there is disagreement, but the correct view is that no one may act upon it. This is so, not because the mutashabih has no meaning, but because the correct meaning is not known to any human being.4¹ There is no doubt that all the mutashabihat have a meaning, but it is only known to God, and we must not impose our estimations on the words of God in areas where no indication is available to reveal the correct meaning to us.4²

III. Classification (B): The ‘Āmm (General) and the Khāṣṣ (Specific).

From the viewpoint of scope, words are classified into the ‘general’ and the ‘specific’. This is basically a conceptual distinction that is not always obvious in the grammatical forms of words, although the ‘ulamā’ have identified certain linguistic patterns of words which assist us in differentiating the ‘āmm from the khāṣṣ.

‘Āmm may be defined as a word which applies to many things, not limited in number, and includes everything to which it is applicable.4³ An example of this is the word ‘insán’ (human being) in the Qur’ānic āyah, ‘verily the human being is in loss’ (al-‘Āsr, 103:1)

إن الإنسان لفي خسر

or the command, ‘whoever enters this house, give him a dirham’. In
both examples the application of ‘human being’ and ‘whoever’ is general and includes every human being without any limitation. ‘Amm is basically a word that has a single meaning, but applies to an unlimited number without any restrictions. The word is thus not confined in its application, even if in reality it applies only to a limited number, such as the words skies, sky-scrapers and spaceships, of which there may only be a limited number in existence. All words, whether in Arabic or any other language, are basically general, and, unless they are specified or qualified in some way, they retain their generality. According to the reported ijmā’a of the Companions and the accepted norms of Arabic, the words of the Qur’an and Sunnah apply in their general capacity unless there is evidence to warrant a departure from the general to an alternative meaning.*+ To say that the ‘āmm has a single meaning differentiates the ‘āmm from the homonym (mushtarak) which has more than one meaning. Similarly, the statement that the ‘āmm applies to an unlimited number precludes the khāṣṣ from the definition of ‘āmm.** A word may be general either by its form, such as men, students, judges, etc., or by its meaning only, such as people, community, etc., or by way of substitution, such as by prefixing pronouns like all, every, entire, etc., to common nouns. Thus the Qur’anic āyah which provides that ‘every soul shall taste of death’ (Al ‘Imran, 3:185),

كل نفس ذائقة الموت

or the statement that ‘every contract consists of two parties’ are both general in their import.

The ‘āmm must include everything to which it is applicable. Thus when a command is issued in the form of an ‘āmm, it is essential that it is implemented as such. In this way, if A commands his servant to give a dirham to everyone who enters his house, the proper fulfilment of this command would require that the servant does not specify the purport of A’s command to, say, A’s relatives only. If the servant gives a dirham only to A’s relatives with the explanation that he understood that this was what A had wanted, the explanation would be unacceptable and the servant would be at fault.

When a word is applied to a limited number of things, including everything to which it can be applied, say one or two or a hundred, it is referred to as ‘specific’ (khāṣṣ). A word of this kind may denote a particular individual such as Ahmad, or Zayd, or an individual belonging to a certain species such as a horse or a bird, or an individual
belonging to a genus such as a human being. As opposed to the general, the specific word applies to a limited number, be it a genus, or a species, or a particular individual. So long as it applies to a single subject, or a specified number thereof, it is khaṣṣ. But if there is no such limitation in the scope of its application, it is classified as ʿāmim.

Legal rules that are conveyed in specific terms are definite in application and are normally not open to taʾwil. Thus the Qur’ānic āyah which enacts the ‘feeding of ten poor persons’ as the expiation for futile oaths is specific and definite in that the number ‘ten’ does not admit of any taʾwil. However, if there are exceptional reasons to warrant a recourse to taʾwil, then the khaṣṣ may be open to it. For example, the requirement to feed ten poor persons in the foregoing āyah has been interpreted by the Hanafis as either feeding ten persons or one such person ten times. The Hanafis have, however, been overruled by the majority on this point who say that the khaṣṣ, as a rule, is not amenable to taʾwil.

In determining the scope of the ʿāmm, reference is made not only to the rules of the language but also to the usage of the people, and should there be a conflict between the two, priority is given to the latter. The Arabs normally use words in their general sense. But this statement must be qualified by saying that linguistic usage has many facets. Words are sometimes used in the form of ‘amm but the purpose of the speaker may actually be less than ʿāmm or even khaṣṣ. The precise scope of the ʿāmm has thus to be determined with reference to the conditions of the speaker and the context of the speech. When, for example, a person says ‘I honoured the people’ or ‘I fought the enemy forces’, he must surely mean only those whom he met. ʿĀmm as a rule applies to all that it includes, especially when it is used on its own. But when it is used in combination with other words, then there are two possibilities: either the ʿāmm remains as before, or it is specified by other words.

It thus appears that there are three types of ʿāmm, which are as follows. Firstly, the ʿāmm that is absolutely general, which may be indicated by a prefix in the form of a pronoun. Note for example the Qur’ānic āyah, ‘There is no living creature on earth [wa mā min dāḥbatin fiʾl-ard] that God does not provide for’ (Hūd, 11:6)

وما من دابة في الأرض إلا على الله رزقها

and ‘We made everything alive from water’ (al-Anbiyā’, 21:30).
Rules of Interpretation I: Deducing the Law from its Sources

In the first āyah, the prefix ‘mā min’ (‘no one’, ‘no living creature’), and in the second āyah, the word ‘kull’ (i.e. ‘all’ or ‘every’) are expressions which identify the ‘āmm. Both āyāt consist of general propositions which preclude specification of any kind. Hence they remain absolutely general and include all to which they apply without any exception. Secondly, there is the ‘āmm which is meant to imply a khāṣṣ. This usage of ‘āmm is also indicated by evidence which suggests that the ‘āmm comprises some but not absolutely all the individuals to whom it could possibly apply. An example of this is the word al-nās (the people) in the Qur’ānic āyah, ‘Pilgrimage to the House is a duty owed to God by all people who are able to undertake it’ (Āl ‘Imrān, 3:97).

Here the indications provided by the text imply that children and lunatics or anyone who cannot afford to perform the required duty are not included in the scope of this āyah. Thirdly, there is the ‘āmm that is not accompanied by either of the foregoing two varieties of indications as to its scope. An example of this is the Qur’ānic word al-muṣalāqāt (divorced women) in the text which states that ‘divorced women must observe three [monthly] courses upon themselves’ (al-Baqarah, 2:228).

This type of ‘āmm is zāhir in respect of its generality, which means that it remains general unless there is evidence to justify specification (takhṣīṣ). In this instance, however, there is another Qur’ānic ruling which qualifies the general requirement of the waiting period, or ‘iddah, that the divorced women must observe. This ruling occurs in sūrah al-Ahzāb (33:49) which is as follows: ‘O believers! When you enter the contract of marriage with believing women and then divorce them before consummating the marriage, they do not have to observe any ‘iddah’.

مَعْلَمَةٌ من الْمَاءِ كُلّ شَيْءٍ حَيٍّ
In this way, women who are divorced prior to consummating the marriage are excluded from the general requirement of the first āyah. The second āyah, in other words, specifies the first.48

The general of the Qur’ān may be specified by the Qur’ān itself and also by the Sunnah. The general of the Sunnah may likewise be specified by the Sunnah itself and also by the Qur’ān, although there is some difference of opinion on this last point in that specification of the general is a form of explanation (bayān), and this is the proper role of the Sunnah in its relationship to the Qur’ān, but not vice versa. The majority of the ‘ulamā’ are also in agreement that the general rulings of both the Qur’ān and the Sunnah may be specified by consensus (ijmā’) and even, according to some, by qiyyās.

We have already given an example of when the Qur’ān specifies its own general ruling on the waiting period of divorced women. For a similar example, we may refer to the general ruling of the text on fasting which makes fasting obligatory: ‘Whoever of you is present in the month shall fast therein.’ This is then immediately specified in: ‘Whoever is sick or in journey shall fast a like number of other days.’ (al-Baqarah, 2:185).

The sick and the traveller have thus been exempted, by way of takhsīs, from the original ruling of the text.

To illustrate the specification of the general rulings of the Qur’ān by mutawatīr hadith, we refer to the hadith which declares that ‘the Muslim does not inherit from the disbeliever, nor does the disbeliever inherit from the Muslim’.

لا يرث المسلم الكافر ولا الكافر المسلم.

This hadith acts as a specifier of the Qur’ānic āyah of inheritance (i.e. al-Nisā, 4:12–13). This is an example of the verbal Sunnah. For an example of the actual Sunnah that specifies a general ruling of the Qur’ān, reference may be made to the āyah on the punishment of adultery in sūra al-Nūr (24:2), which the ‘ulamā’ held to have been specified by the actual Sunnah that enacted death by stoning for adultery by a married Muslim (i.e. a muḥṣan). However, there is some doubt in establishing the chronological order of these two rulings. If
it is established that the ruling in sūra al-Nūr was revealed after the punishment of stoning, then it may be in order to say that the Qur’ān actually abrogated the practical Sunnah and enacted a general punishment of one hundred lashes for all cases of zinā. Al-Bukhārī recorded a hadīth in which a prominent Companion, ‘Abd Allāh ibn Awfā, was asked the question as to whether the ruling in sūra al-Nūr came before or after the punishment of death by stoning, and he answered that he did not know. This kind of doubt might well amount to the sort of doubt which invalidates the hadd punishment, as it is known, of death by stoning for zinā, in which case the nature of the relationship between the rulings of the Qur’ān and Sunnah on this issue would be one of abrogation rather than takhṣīs.49

The majority of ‘ulamā‘ are in agreement that ijmā‘ may specify a general ruling of the Qur’ān. An example of this is the text on the Friday congregational prayer which is addressed to all believers asking them to attend the congregation after the prayer call (i.e. the adhān) (al-Jum‘ah, 62:10). The ijmā‘ has, on the other hand, specified the general purpose of this ruling in respect of women and slaves (when there were slaves, that is) who are exempt from attending the Friday prayer.

One can also find many example where the āḥad hadīth have specified the general rulings of the Qur’ān. The āyah of inheritance in sūra al-Nisā (4:12), which determined a share for the daughter, has thus been specified by the hadīth ‘We the community of the Prophets are not inherited.’

The Prophet’s daughter, Fāṭima, was consequently not entitled to inheritance from her father. Similarly, the general ruling of the Qur’ān concerning marriage that declared, immediately after stating the prohibited degrees of relations – ‘and lawful for you are [all women] other than those’ (al-Nisā, 4:24) – has in turn been specified by the āḥad hadīth which forbids simultaneous marriage with the maternal and paternal aunts of one’s wife:

As to the question of whether qiyās can also act as a specifier of the general rulings of the Qur’ān and Sunnah, al-Zarkashī stated that the four leading imams are in agreement that this is permissible, although different opinions have been recorded on the issue and some of them
are negative. For an example of *qiyyâs* which has specified the text, we refer to the *āyah* which decreed that after two pronouncements of *talâq*, the husband must either ‘retain them with kindness or release them with kindness, and call to witness two just ones from among you’ (al-Talâq, 65:2).

فأسَمَوْنَ مَعِروفٍ أوُ فارِقُوهُنَ مَعِروفٍ وَأَشْهَدوُنَ ذَوِى عَدْلٍ منكم

It is likely that the command concerning witnesses in this *āyah* conveys an obligation such as we read in the *hadith* ‘There is no marriage without the guardian and two just witnesses.’

لا نَكَاحٌ الآ بولٍ وشَاهْدِي عدَل.

It is also possible that the command conveys a recommendation (*nadb*) only, such as we find concerning sale in the Qur’ān, ‘and have witnesses when you sell to one another.’ (al-Baqarah, 2:282).

وَأَشْهَدوُنَ إِذَا تَبَيَّنَتْ

Imam Shâfi‘i said that God, Most High, has drawn a parallel between *talâq* and revocation (*raj’ah*) and commanded testimony in both. Since we know that testimony is not obligatory in *talâq*, it is not obligatory, by way of analogy, in *raj’ah* either. The general ruling of the text which conveyed *wujiib* has thus been specified by way of analogy into a recommendation only. The basic and general meaning of a command, which is *wujiib*, has thus been specified into *nadb* on the grounds of analogical reasoning.

In grammatical terms, the ‘*āmm* in its Arabic usage takes a variety of identifiable forms. The grammatical forms in which the ‘*āmm* occurs are, however, numerous and, owing to the dominantly linguistic and Arabic nature of this subject, I shall only attempt to explain some of the well-known patterns of the ‘*āmm*.

When a singular or a plural form of a noun is preceded by the definite article *al*, it is identified as ‘*āmm*. For example, the Qur’ānic text which provides, ‘the adulterer, whether a woman or a man, flog them one hundred lashes’ (al-Nûr, 24:2).
Here the article al preceding ‘adulterer’ (al-zāniyah wa’l-zāni) indicates that all adulterers must suffer the prescribed punishment. Similarly, when the plural form of a noun is preceded by al, it is identified as ‘āmm. The example that we gave above relating to the waiting period of the divorced women (al-muţallaqāt) is a case in point. The āyah in question begins by the word ‘al-muţallaqāt’, that is, ‘the divorced women’ who are required to observe a waiting period of three courses before they can marry again. ‘The divorced women’ is an ‘āmm which includes all to whom this expression can apply.

The Arabic expressions jamī’, kāffah and kull (‘all, ‘entire’), are generic in their effect and, when they precede or succeed a word, the latter comprises all to which it is applicable. We have already illustrated the occurrence of ‘kull’ in the Qur’ānic text where we read ‘We made everything [kulla shay’în] alive from water’. The word jamī’ has a similar effect when it precedes or follows another word. Thus the Qur’ānic text which reads, ‘He has created for you all that is in the earth’ (al-Baqarah, 2:29)

means that everything in the earth is created for the benefit of man. Similarly, when a word, usually a plural noun, is prefixed by a conjunctive such as walladhīnā (‘those men who’) and wallāti (‘those women who’), it becomes generic in its effect. An example of this in the Qur’ān occurs in sūra al-Nūr (24:4): ‘Those who accuse chaste women of adultery and fail to bring four witnesses, flog them eighty lashes.’

This ruling is general as it applies to all those who can possibly be included in its scope, and it remains so unless there is evidence to warrant specification. As it happens, this ruling has, in so far as it relates to the proof of slanderous accusation, been specified by a subsequent āyah in the same passage. This second āyah makes an exception in the case of the husband who is allowed to prove a charge of adultery against his wife by taking four solemn oaths instead of four witnesses, but the wife can rebut the charge by taking four solemn oaths herself (al-Nūr, 24:6). The general ruling of the first āyah has thus been qualified insofar as it concerns a married couple.
An indefinite word (al-nakirah) when used to convey the negative is also generic in its effect. For instance, the hadith la darar wa la dirar fi'l-Islam ('no harm shall be inflicted or reciprocated in Islam') is general in its import, as 'la darar' and 'la dirar' are both indefinite words which convey their concepts in the negative, thereby negating all to which they apply.

The word 'man' ('he who') is specific in its application, but when used in a conditional speech, it has the effect of a general word. To illustrate this in the Qur'an, we may refer to the text which provides: 'Whoever kills a believer in error, must release a believing slave' (al-Nisā', 4:92);

ومن قتل مؤمنا نخطأ فتحرير رقبة مؤمنة

and 'Whoever among you sees the new moon must observe the fast' (al-Baqarah, 2:185).

There is general agreement that the khāṣṣ is definitive (qaf'i) in its import, but the 'ulamā' have differed as to whether the 'āmm is definitive or speculative (zanni). According to the Hanafis, the application of 'āmm to all that it includes is definitive, the reason being that the language of the law is usually general and if its application were to be confined to only a few of the cases covered by its words without a particular reason or authority to warrant such limited application, the intention of the Lawgiver would be frustrated. The majority of 'ulamā', including the Shāfi'is, Mālikis and Hanbalis maintain, on the other hand, that the application of 'āmm to all that it includes is speculative as it is open to limitation and ta'wil, and so long as there is such a possibility, it is not definitive. The result of this disagreement becomes obvious in the event of a conflict between the 'āmm of the Qur'an and the khāṣṣ of the hadīth, especially the weak or the solitary hadīth. According to the majority view, a solitary hadīth may specify a general provision of the Qur'an, for the 'āmm of Qur'an is zanni and the khāṣṣ of a solitary hadīth, although definitive in meaning, is of speculative authenticity. A zanni may be specified by a qaf'i or another zanni. To the Hanafis, however, the 'āmm of Qur'an is definite, and the solitary hadīth, or qiyyās for that matter, is speculative. A definitive may not be limited nor specified by a speculative. The two views may be illustrated with reference to the Qur'ānic text
concerning the slaughter of animals, which provides ‘eat not [of meat] on which God’s name has not been pronounced’ (al-An‘ām, 6:121).

In conjunction with this general ruling, there is a solitary hadith which states that ‘the believer slaughters in the name of God whether he pronounces the name of God or not’.

Elsewhere the Qur‘ān addresses the believers, with reference to the Ahl al-Kitāb, that their ‘food is lawful for you and your food is lawful for them’ (al-Mā‘īdah, 5:5).

The word ‘food’ in this āyah means animals that are slaughtered by the Jews and the Christians. This is lawful for Muslims only when it is slaughtered in the name of God. Then we read in the hadīth the specifying terms, which exempt only the Muslims from the requirement of the āyah in sūra al-An‘ām. The prohibitory terms of this āyah thus remain in force with regard to animals slaughtered by the Ahl al-Kitāb, whereas the hadīth before us has relaxed the terms of that requirement with regard to Muslims.

According to the majority, this hadīth specifies the Qur‘ānic āyah, with the result that slaughter by a Muslim, even without pronouncing the name of God, is lawful for consumption. But to the Hanafis, it is not lawful, as the āmm of the Qur‘ān may not be specified by solitary (āhad) hadīth. This disagreement between the juristic schools, however, arises in respect of the solitary hadīth only. As for the mutawātīr (and the mashhūr) there is no disagreement on the point that either of these may specify the general in the Qur‘ān just as the Qur‘ān itself sometimes specifies its own general provisions.

A general proposition may be qualified either by a dependent clause, that is, a clause that occurs in the same text, or by an independent locution. The majority of ‘ulamā‘ consider either of these eventualities to be two varieties of takhṣīṣ. According to the Hanafis, however, an independent locution can specify another locution only if it is established that the two locutions are chronologically parallel to one
another, but if they are not so parallel, the latter in time abrogates the
former, and the case is one of abrogation rather than takhṣīṣ. In the
event where the qualifying words relate to what has preceded and do
not form a complete locution by themselves, they are not regarded
as independent propositions. According to the scholarly majority, but
not the Hanafis, a dependent clause may qualify a general proposition
by introducing an exception (istiṣṭiḥa'), a condition (ṣharīṭ), a quality
(sifāʿ), or indicating the extent (ghāyāh) of the original proposition. Each
such clause will have the effect of limiting and specifying the opera-
tion of the general proposition. An example of specification in the
form of istiṣṭiḥa' is the general ruling that prescribes the documentation
of commercial transactions that involve deferred payments in sūrah
al-BAqarah (2:282).

This general provision is then followed, in the same āyāh, by the
exception 'unless it be a transaction handled on the spot that you pass
around among yourselves, in which case it will not be held against
you if you did not reduce it into writing'. This second portion of the
āyāh thus embodies an exception to the first. Specification (takhṣīṣ) in
the form of a condition (ṣharīṭ) to a general proposition may be
illustrated by reference to the Qurʾānic text which prescribes the
share of the husband in the estate of his deceased wife. The text states:
'In what your wives leave, you are entitled to one half if they have
no children' (al-Nisā', 4:12).

The application of the general rule in the first portion of the āyāh has
thus been qualified by the condition the text itself has provided in its
latter part, namely the absence of children. And then to illustrate
takhṣīṣ by way of providing a description or qualification (sifāʿ) to a
general proposition, we may refer to the Qurʾānic text regarding the
prohibition of marriage with one’s step-daughter where we read '[and
forbidden to you are] your step-daughters under your guardianship
from your wives with whom you have consummated the marriage'
(al-Nisā', 4:23).
Thus the general prohibition in the first part of theāyah has been qualified by the description that is provided in the latter part. To illustrate takhṣīṣ in the form of ghāyah, or specifying the extent of application of a general proposition, we may refer to the Qur’ānic text on ablutions for ṣalāh. The text prescribes the ‘washing of your faces and your hands up to the elbows’ (al-Mā’īdah, 5:6).

Washing the hands, which is a general ruling, is thus specified in regard to the area that must be covered in washing. Similarly, when it is said ‘respect your fellow citizens unless they violate the law’, the word ‘citizens’ includes all, but the succeeding phrase specifies the extent of the operation of the general ruling.

When the application of a general proposition is narrowed down, not by a clause that is part of the general locution itself, but by an independent locution, the latter may consist of a separate text, or of a reference to the general requirements of reason, social custom, or the objectives of Ṣaḥīḥ al-ismā‘ilī). It is by virtue of reason, for example, that infants and lunatics are excluded from the scope of the Qur’ānic obligation of hajj, which occurs in sūra Al ‘Imrān (3:97). Similarly, the general text of the Qur’ān which reads that ‘a wind will destroy everything by the command of its Lord’ (al-Aḥqāf, 46:25) customarily denotes everything that is capable of destruction. Similarly, in the area of commercial transactions, the general provisions of the law are often qualified in the light of prevalent custom.

And lastly, the general provision of the Qur’ān concerning retaliation in injuries on an ‘equal for equal’ basis (al-Mā’īdah, 5:48) is qualified in the light of the objectives of the Lawgiver in the sense that the offender is not to be physically wounded in the manner that he injured his victim, but is to be punished in proportion to the gravity of his offence.

Then there arises the question of chronological order between the general and the specifying provisions. The specifying clause is either parallel in origin to the general, or is of later origin, or their
chronological order is unknown. According to the Hanafis, when the specifying clause is of a later origin than the general proposition, the former abrogates the latter and is no longer regarded as takhsīs, but as a partial abrogation of one text by another. According to the Hanafis, takhsīs can only take place when the ʿāmm and the khāṣṣ are chronologically parallel to one another; in cases where this order cannot be established between them, they are presumed to be parallel. The difference between abrogation and takhsīs is that abrogation consists of a total or partial suspension of a ruling at a later date, whereas takhsīs essentially limits the application of the ʿāmm ab initio. To the majority of ḫulāmā’, takhsīs is a form of explanation (bayān) in all of its varieties, but to the Hanafis it is a form of bayān only when the specifying clause is independent of the general proposition, chronologically parallel to it, and is of the same degree of strength as the ʿāmm in respect of being a qat‘ī or a zānnī. But when the specifying clause is of a later origin than the general proposition, the effect it has on the latter, according to the Hanafis, is one of abrogation rather than bayān. The majority view on takhsīs thus differs from the Hanafi view that equates takhsīs with partial abrogation.

Notwithstanding the disagreement of the ḫulāmā’ regarding the nature of takhsīs, it would appear that takhsīs is not a partial invalidation of the ʿāmm, but an explanation or qualification of it. This is the majority view, and seems to be preferable to the Ḥanafī view that equates takhsīs with partial abrogation. Al-Ghazālī discusses the Ḥanafī position at some length, and refutes it by saying that a mere discrepancy in time does not justify the conclusion that takhsīs changes its character into abrogation. Nor is it justified to say that a discrepancy in the strength of the indication (dalil) determines the difference between takhsīs and abrogation.

The effect of ʿāmm is that it remains in force, and action upon it is required, unless there is a specifying clause that limits its application. In the event where a general provision is partially specified, it still retains its legal authority in respect of the part that remains unspecified. According to the majority of ḫulāmā’, the ʿāmm is speculative as a whole, whether before or after takhsīs, and as such it is open to qualification and ta‘wil in either case. For the Ḥanafīs, however, the ʿāmm is definitive in the first place, but when it is
partially specified, it becomes speculative in respect of the part which still remains unspecified; hence it will be treated as *zanni* and would be susceptible to further specification by another *zanni*.62

As for the question of whether the cause of a general ruling can operate as a limiting factor in its general application, it will be noted that the cause never specifies a general ruling. This is relevant, as far as the Qur’an is concerned, to the question of *asbāb al-nuzūl*, or the occasions of its revelation. One often finds general rulings in the Qur’an which were revealed with reference to specific issues. Whether the cause of the revelation referred to a particular situation or not, it does not operate as a limiting factor on the application of the general ruling. Thus the occasion of the revelation of the *āyah* of imprecation (li’an) in sūra al-Nūr (24:6) was a complaint that a resident of Medina, Hilal ibn Umayyah, made to the Prophet about the difficulty experienced by the spouse in proving, by four eyewitnesses, the act of adultery on the part of the other spouse. The cause of the revelation was specific but the ruling remains general. Similarly, the *hadith* which states that ‘when any hide is tanned, it is purified’63 was, according to reports, uttered with reference to a sheepskin, but the ruling is nevertheless applicable to all types of skins. The actual wording of a general ruling is therefore to be taken into consideration regardless of its cause. If the ruling is conveyed in general terms, it must be applied as such, even if the cause behind it happens to be specific.64

III.1 Conflicts between ‘Āmm and Khāss

Should there be two textual rulings on one and the same subject in the Qur’an, one being ‘āmm and the other khāss, there will be a case of conflict between them according to the Hanafis, but not according to the majority. The reason is that to the Hanafis, ‘āmm and khāss are both definitive (qaf‘ī) and as such a conflict between them is possible, whereas to the majority, only the khāss is qaf‘ī and it will always prevail over the ‘āmm, which is *zanni*.

The Hanafis maintain that in the event of a conflict between the general and the specific in the Qur’an, one must ascertain the chronological order between them first; whether, for example, they are both Meccan or Medinan *āyāt* or whether one is Meccan and the other
Medinan. If the two happen to be parallel in time, the *khāṣṣ* specifies the ‘āmm. If a different chronological sequence can be established between them, then if the ‘āmm is of a later origin, it abrogates the khāṣṣ, but if the khāṣṣ is later, it only partially abrogates the ‘āmm. This is because the Ḥanafis maintain that the khāṣṣ specifies the ‘āmm only when they are chronologically parallel, both are qaf’ī, and both are independent locutions.

The majority of ‘ulamā’, as already noted, do not envisage the possibility of a conflict between the ‘āmm and the khāṣṣ: when there are two rulings on the same point, one being ‘āmm and the other khāṣṣ, the latter becomes explanatory to the former and both are retained. For the majority, the ‘āmm is like the *zāhir* in that both are speculative and both are open to qualification and *ta’wil*. The two foregoing approaches to takhsīs may be illustrated by the conflict arising in the following two hadith concerning legal alms (zakah). One of these provides, ‘Whatever is watered by the sky is subject to a tithe.’

The second hadith provides, ‘There is no charity in less than five awsāq.’

A wasaq (sing. of awsāq) is a quantitative measure equivalent to about ten kilograms. The first hadith contains a general ruling in respect of any quantity of agricultural crops, but the second hadith is specific on this point. The majority of ‘ulamā’ (including the Shāfī‘is) have held that the second hadith explains and qualifies the first. The first hadith lays down the general principle and the second enacts the quorum (*niṣāb*) of zakāh. For the Ḥanafis, however, the first hadith abrogates the second, as they consider that the first hadith is of a later origin than the second. According to the Ḥanafis, when the ‘āmm is of a later origin than the khāṣṣ, the former abrogates the latter completely. Hence there is no case for takhsīs and the Ḥanafis, as a result, impose no minimum quantitative limit with regard to zakāh on produce obtained through dry farming. The two views remain far apart, and there is no meeting ground between them. However, as already indicated, the majority opinion is sound, and recourse to abrogation in cases of conflict between the ‘āmm and khāṣṣ is often found to be unnecessary. In modern law, too, one often notices that the particular usually
IV. Classification (C): The Absolute (Muṣlaq) and the Qualified (Muqayyad)

Muṣlaq denotes a word which is neither qualified nor limited in its application. When we say, for example, a ‘book’, a ‘bird’ or a ‘man’, each one is a generic noun which applies to any book, bird or man without any restriction. In its original state, the muṣlaq is unspecified and unqualified. The muṣlaq differs from the ‘āmm, however, in that the latter includes all to which it applies whereas the former can apply to any one of a multitude, but not to all. However, the ‘ulama’ have differed regarding the definition of muṣlaq and the muqayyad. To some ‘ulama’, including al-Bayḍāwi, the muṣlaq resembles the ‘āmm, and the muqayyad resembles the khāṣṣ. Hence anything which specifies the ‘āmm can qualify the muṣlaq. Both are open to ta’wil and muṣlaq/muqayyad are complementary to ‘āmm/khāṣṣ respectively. When the muṣlaq is qualified by another word or words it becomes a muqayyad, such as qualifying ‘a book’ as ‘a green book’, or ‘a bird’ as ‘a huge bird’ or ‘a man’ as ‘a wise man’. The muqayyad differs from the khāṣṣ in that the former is a word that implies an unspecified individual/s who is/are merely distinguished by certain attributes and qualifications. An example of muṣlaq in the Qur’ān is the expiation (kaffārah) of futile oaths, which is freeing a slave (fa-tahriru raqabatin) in sūra al-Mā‘īdah, (5:92). The command in this text is not limited to any kind of slave, whether Muslim or non-Muslim. Yet in another Qur’ānic passage the expiation of erroneous killing consists of ‘freeing a Muslim slave’ (fa-tahriru raqabatin mu‘minatin) (al-Nisā’, 4:92). In contrast to the first text which is conveyed in absolute terms, the command in the second āyah is qualified in that the slave to be released must be a Muslim.

The muṣlaq remains absolute in its application unless there is a limitation to qualify it. Thus the Qur’ānic prohibition of marriage ‘with your wives’ mothers’ in sūra al-Nisā’ (4:23) is conveyed in absolute terms, and as such, marriage with one’s mother-in-law is forbidden regardless as to whether the marriage with her daughter has been consummated or not. Since there is no indication to qualify the terms of the Qur’ānic command, it is to be implemented as it is. But when a muṣlaq is qualified into a muqayyad, the latter is to be given
priority over the former. Thus if we have two texts on one and the same subject, and both convey the same ruling (hukm) as well as both having the same cause (sabab) but one is mutlaq and the other muqayyad, the latter prevails over the former. To illustrate this in the Qur’ān, we refer to the two āyāt on the prohibition of blood for human consumption. The first of these, which occurs in absolute terms, provides: ‘Forbidden to you are the dead carcass and blood’ (al-Mā‘īdah, 5:3).

But elsewhere in the Qur’ān there is another text on the same subject which qualifies the word ‘blood’ as ‘blood shed forth’ (al-An‘ām, 6:145).

This second āyah is a muqayyad whereas the first is mutlaq, and the muqayyad therefore prevails. It will be noted here that the two texts convey the same ruling, namely prohibition, and that they have the same cause or subject in common (i.e. consumption of blood). When this is the case, the ‘ulamā’ are in agreement that the muqayyad qualifies the mutlaq and prevails over it.70

However, if there are two texts on the same issue, one absolute and the other qualified, but they differ with one another in their rulings and in their causes, or in both, then neither is qualified by the other and each will operate as it stands. This is the view of the Ḥanafi and Mālikī schools, and the Shāfi‘īs concur in so far as it relates to two texts which differ both in their respective rulings and their causes. However, the Shāfi‘īs maintain the view that if the two texts vary in their ruling (hukm) but have the same cause in common, the mutlaq is qualified by the muqayyad. This may be illustrated by referring to the two Qur’ānic āyāt concerning ablution, one of which reads, in an address to the believers, to ‘wash your faces and your hands [aydikum] up to the elbows’ (al-Mā‘īdah, 5:6).

The washing of hands in this āyah has been qualified by the succeeding phrase that is ‘up to the elbows’. The second Qur’ānic provision
which we are about to quote occurs in regard to tayammum, that is, ablution with clean sand in the event where no water can be found, in which case the Qur’ān provides, ‘take clean sand and wipe your faces and your hands’ (al-Nisā’, 4:43).

The word ‘aydikum’ (your hands) occurs as a mugayyad in the first text but as a mutlaq in the second. However, the two texts have the same cause in common, which is cleanliness for ṣalāh. There is admittedly a difference between the two rulings, in that the first requires washing, and the second wiping, of the hands, but this difference is of no consequence. The first is a mugayyad in regard to the area of the hands to be washed whereas the second is conveyed in absolute terms. The second is therefore qualified by the first, and the mugayyad prevails. Consequently, in wiping the hands in tayammum, too, one is required to wipe them up to the elbows.

And lastly we give another illustration, again of two texts, one mutlaq, the other mugayyad, both of which convey the same ruling but differ in respect of their causes. Here we refer to the two Qur’ānic āyāt on the subject of witnesses. One of these, which requires the testimony of two witness in all commercial transactions, is conveyed in absolute terms, whereas the second is qualified. The first of the two texts does not qualify the word ‘men’ when it states ‘and bring two witnesses from among your men’ (al-Baqarah, 2:282).

But the second text on same subject conveys a qualified command when it states, ‘and bring two just witnesses [when you revoke a divorce]’ (al-Ṭalāq, 65:2).

The ruling in both texts is the same, namely the requirement of two witnesses, but the two rulings differ in respect of their causes. The cause of the first text, as already noted, is commercial transactions which must accordingly be testified to by two men; whereas the cause of the second ruling is the revocation of ṭalāq. In the first āyah witnesses are not qualified, but they are qualified in the second āyah. The latter prevails over the former. Consequently, witnesses in both
commercial transactions and the revocation of *talāq* must be upright and just.71

The foregoing basically represents the majority opinion. But the Ḥanafis maintain that when the *mugayyad* and the *muflaq* differ in their causes, the one does not qualify the other and that each should be implemented independently. The Ḥanafis basically recognise only one case where the *mugayyad* qualifies the *muflaq*, that is, when both convey the same ruling and have the same cause in common. But when they differ in either of these respects or in both, then each must stand separately. In this way the Ḥanafis do not agree with the majority in regard to the qualification of the area of the arms to be wiped in *tayammum* by the same terms which apply to ablution by water (*wudū*). The Ḥanafis argue that the *hukm* in regard to *tayammum* is conveyed in absolute terms and must operate as such. They contend that, unlike *wudū*, *tayammum* is a *sharı* concession, and the spirit of concession should prevail in the determination of its detailed requirements, including the area of the arm that is to be wiped.72

V. Classification (D): The Literal (Ḥaqiqī) and the Metaphorical (Majāzī)

A word may be used in its literal sense, that is, for its original or primary meaning, or it may be used in a secondary and metaphorical sense. When a word is applied literally, it keeps its original meaning but, when it is used in a metaphorical sense, it is transferred from its original to a secondary meaning on grounds of a relationship between the two meanings.73 There is normally a logical connection between the literal and the metaphorical meanings of a word. The nature of this relationship varies and extends over a wide range of possibilities. There are at least thirty to forty variations in how the metaphorical usage of a word may relate to its literal meaning.74 The metaphorical usage of a word thus consists of a transfer from an original to a connected meaning. Once such a transfer has taken place, both the original and the metaphorical meanings of a word cannot be assigned to it at one and the same time.

Words are normally used in their literal sense, and in the language of the law it is the literal meaning that is relied upon most. Hence if a word is simultaneously used in both these senses, the literal will prevail. When, for example, a person says in his will that ‘I bequeath my property to the memorisers of the Qur’ān’ or to ‘my offspring’, those who might have memorised the Qur’ān but have forgotten it
since will not be entitled. Similarly, ‘offspring’ (awlād) primarily means sons and daughters, not grandchildren, as applying ‘awlād’ to ‘grandchildren’ is a metaphorical usage that is secondary to its original meaning.75

Both the ḥaqīqī and the majāzī occur in the Qur‘ān, and they each convey their respective meanings. Thus when we read in the Qur‘ān to ‘kill not [lā taqtuli] the life which God has made sacrosanct’, ‘lā taqtuli’ conveys a literal meaning. Similarly, the majāzī occurs frequently in the Qur‘ān. When, for example, we read in the Qur‘ān that God ‘sends down your sustenance from the heavens’ (Ghāfir, 40:13)

ويزل لكم من السماء رزقا

this means rain which causes the production of food. Some ‘ulamā’ have observed that majāzī is of the nature of a homonym which could comprise what may be termed as falsehood, or that which has no reality and truth, and that falsehood has no place in the Qur‘ān. Imam Ghazālī discusses this argument in some length and represents the majority view when he refutes it and acknowledges the existence of the majāzī in the Qur‘ān. The Qur‘ānic expression, for example, that ‘God is the light of the heavens and the earth’ (al-Nūr, 24:35)

الله نور السماوات والأرض

and ‘whenever they [the Jews] kindled the fire of war, God extinguished it’ (al-Ma‘īdah, 5:64),

كلما أوقدوا نارا للحرب أطفأها الله

God being ‘the light of the universe’, and God having ‘extinguished the fire of war’, are both metaphorical usages; and numerous other instances of the majāzī can be found in the Qur‘ān.76 As already stated, the ḥaqīqī and the majāzī both occur in the Qur‘ān, and they each convey their respective meanings, but this is only the case where the majāzī does not represent the dominant usage. In the event where a word has both a literal and a metaphorical meaning and the latter is well-established and dominant, it is likely to prevail over the former. Some ‘ulamā’ have, however, held the opposite view, namely, that the ḥaqīqī will prevail in any case; and according to yet a third view, both are to be given equal weight. But the first of these views represents the view of the majority. To give an example, the word ‘talāq’
literally means ‘release’ or ‘removal of restriction’ (izālah al-qayd), be it from the tie of marriage, slavery, or ownership, etc. But since the juridical meaning of tašāq, which is dissolution of marriage, or divorce, has become totally dominant, it is this meaning that is most likely to prevail, unless there is evidence to suggest otherwise.⁷⁷

The haqqi is sub-divided, according to the context in which it occurs, into linguistic (lughawi), customary (‘urfī) and juridical (sharī‘ī). The linguistic haqqi is a word which is used in its dictionary meaning, such as ‘lion’ for that animal, and ‘man’ for the male gender of the human being. The customary haqqi occurs in the two varieties of general and special: when a word is used in a customary sense and the custom is absolutely common among people, the customary haqqi is classified as general, that is, in accord with the general custom. An example of this in Arabic is the word ‘dābah’ which in its dictionary meaning applies to all living beings that walk on the face of the earth, but which has been assigned a different meaning by general custom, that is, an animal walking on four legs. But when the customary haqqi is used for a meaning that is common to a particular profession or group, the customary haqqi is classified as special, that is, in accord with a special custom. For example, the Arabic words raf (‘nominative’) and nasb (‘accusative’) have each acquired a technical meaning that is common among grammarians and experts in the language.

There is some disagreement as to the nature of the juridical haqqi, as some ‘ulamā’ consider this to be a variety of the Hajāzi, but having said this, the juridical haqqi is defined as a word which is used for a juridical meaning that the Lawgiver has given it in the first place, such as ‘salāh’, which literally means ‘supplication’ but which, in its well-established juridical sense, is a particular form of worship. Similarly, the word zakāh literally means ‘purification’, but in its juridical sense, denotes a particular form of charity whose details are specified by the Shari‘āh.⁷⁸

It would take us too far afield to describe the sub-divisions of the majāzi, as we are not primarily concerned with technical linguistic detail. Suffice it to point out here that the majāzi has also been divided into linguistic, customary and juridical varieties. However, there is one other classification which merits our attention; this is the division of the haqqi and majāzi into plain (sarih) and allusive (kināyah).

If the application of a word is such that it clearly discloses the speaker’s intention, it is plain; otherwise it is allusive. The highest degree of clarity in expression is achieved by the combination of the plain (sarih) and the literal (haqqi) such as the sentence ‘Ahmad bought
a house’, or ‘Fāṭima married Aḥmad’. The plain may also be combined with the metaphorical, as in the sentence ‘I ate from this tree’, where the meaning intended is ‘from the fruit of this tree’.

The ‘allusive’ or ḥa‘īyah denotes a form of speech that does not clearly disclose the intention of its speaker and can occur in combination with the literal or the metaphorical. When a person wishes, for example, to confide in his colleague in front of others, he might say, ‘I met your friend and spoke to him about the matter that you know’. This is a combination of the literal and the allusive in which all the words used convey their literal meanings but where the whole sentence is allusive in that it does not disclose the purpose of the speaker with clarity. Supposing that a man addresses his wife and tells her in Arabic ‘i’tad?’ (‘start counting’) while intending to divorce her. This utterance is allusive, as ‘counting’ literally means taking a record of numbers, but is used here in reference to counting the days of the waiting period of ‘iddah. This speech is also metaphorical in that the ‘iddah which is caused by divorce is used as a substitute for ‘divorce’. It is a form of majāzī in which the effect is used as a substitute for the cause.79

When speech consists of plain words, the intention of the person using them is to be discerned from the words themselves, and there is no room for further enquiry as to the intention of the speaker. Thus when a man tells his wife ‘you are divorced’, the divorce is pronounced in plain words and occurs regardless of the husband’s intention. But in the case of allusive words, one has to ascertain the intention behind them and the circumstances in which they were uttered. Thus when a man tells his wife ‘you are forbidden to me’, or when he asks her to ‘join your relatives’, no divorce will take place unless there is evidence to show that the husband intended a divorce.80

Legal matters that require certainty, such as offences entailing the hadd punishment, cannot be established by language which is not plain. For example, when a person confesses to such offences in allusive words, he is not liable to punishment.81

The jurists are in agreement that a word may be used metaphorically while still retaining its literal meaning, such as the word ‘umm’ (mother) which the Arabs sometimes use metaphorically for ‘grandmother’ and yet still retains its literal meaning. But there is disagreement among the ‘ulamā’ of usul as to whether both the literal and metaphorical meanings of a word can be applied simultaneously. When, for example, a man orders his servant to ‘kill the lion’, could this also include a brave person? The Ḥanafis and the Muʿtazilah have answered
this question in the negative, saying that words normally carry their literal meanings unless there is evidence to warrant departure to another meaning. The Shafi'is and the 'ulama' of hadith have held, on the other hand, that the literal and the metaphorical meaning of a word can be simultaneously applied. They have thus validated either of the two meanings of the Qur'anic provision, 'or when you have touched women' (al-Nisa', 4:43) which could mean touching the women with the hand, or touching in the sense of having sexual intercourse. The text in which this āyah occurs spells out the circumstances that break the state of purity. Thus when a Muslim 'touches a woman' he must take a fresh ablution for the next salah. But according to the Hanafis, the Qur'anic āyah on this point only conveys the metaphorical meaning of 'touching', that is, sexual intercourse. Hence when a person is in the state of ablution, and then touches a woman by the hand, his ablution remains intact. For the Shafi'is, however, the key word in this āyah carries both its literal and metaphorical meanings simultaneously. Consequently, the state of purity is broken, not only by sexual intercourse, but also by a mere touch such as a handshake with a woman who is not of one's family.

V.1 The Homonym (Mushtarak)

A homonym is a word with more than one meaning. Some 'ulamā', including al-Shafi'i, have held the view that the homonym is a variety of 'āmm. The two are, however, different in that the homonym inherently possesses more than one meaning, which is not necessarily the case with the 'āmm. An example of the mushtarak in Arabic is the word ‘ayn’ which means several things, including eye, water-spring, gold, and spy. Similarly the word 'qur' has two meanings, namely menstruation, and the clean period between two menstruations. The Hanafis, the Hanbalis and the Zaydis have upheld the first, while the Shafi'is, Mālikis and Ja'faris have upheld the second meaning of qur'.

The plurality of meanings in a homonym may be due to the usage of different Arab tribes and communities. Some used it for one meaning, others for the other; otherwise a word may have acquired a metaphorical meaning which became literal in the course of time. When mushtarak occurs in the Qur'an or Sunnah, it denotes one
meaning alone, not more than one, for the Lawgiver does not intend more than one meaning for a word at any given time. The Shafi‘is and some Mu‘tazilah have taken exception to this view as they maintain that, in the absence of any indication in support of one of the two or more meanings of a mushtarak, both or all may be upheld simultaneously provided that they do not contradict one another. According to a variant view, however, plurality of meanings on a simultaneous basis is permissible in negation or denial (nafy) but not in affirmation and proof (ithbat). If, for example, Ahmad says ‘I did not see a ‘ayn (ma ra‘aytu ‘aynan), ‘ayn in this negative statement could comprise all its various meanings.*4 This view, however, does not extend to commands and prohibitions that do not admit affirmation or denial as such. The rule in regard to commands and prohibitions of the Shari‘ah is that the Lawgiver does not intend to uphold more than one of the different meanings of a homonym at any given time. An example of a homonym which occurs in the context of a Qur’anic command is the word ‘yad’ (‘hand’) in ‘as for the thief, male or female, cut off their hands’ (al-Ma‘yelah, 5:38).

‘Hand’ in this ayah has not been qualified in any way, hence it can mean ‘hand’ from the tip of the fingers up to the wrist, or up to the elbow, or even up to the shoulder; it also means left or right hand. But the ‘ulamā‘ have agreed on the first and the last of these meanings, that is, the right hand, up to the wrist.*5 To illustrate the homonym in the context of a prohibitory order in the Qur’ān, we refer to the word ‘nakaha’ in sura al-Nisa’ (4:22) which reads, ‘And marry not women whom your fathers had married.’

‘Nakahā’ is a homonym which means both marriage and sexual intercourse. The Hanafis, the Hanbalis, al-Awzā‘i and others have upheld the latter, whereas the Shafi‘is and the Malikis have upheld the former meaning of nakaha. According to the first view, a woman who has had sexual intercourse with a man is forbidden to his children and grandchildren; a mere contract of marriage, without consummation, would thus not amount to a prohibition in this case. The Shafi‘is and Malikis, however, maintain that the text under discussion only refers to the contract of marriage. Accordingly, a woman who has entered
a contract of marriage with one’s father or grandfather is unlawful for one to marry regardless as to whether the marriage has been consummated or not.

To determine which of the two or more meanings of the mushtaraka is to be upheld in a particular locution, reference is usually made to the context and circumstances in which it occurs. If it is a locution that pertains to the Shari’ah, then determining the precise purport of its words must also take into consideration the general principles and objectives of the Shari’ah. The mushtaraka has a mushkil (difficult) nature and it is for the mujtahid to determine its correct meaning by means of research and ijtihad; it is his duty to do so in the event where mushtaraka constitutes the basis of a judicial order. The mujtahid will normally look into the context. When, for example, a homonym has two meanings, one literal and the other juridical, and it occurs in a juridical context, then as a rule the juridical meaning will prevail. With words such as salah and talaq, for example, each possesses a literal meaning, that is ‘supplication’ and ‘release’ respectively, but when they occur in a juridical context, then their juridical meanings will take priority. As such, salah would be held to refer to a particular form of worship, and talaq would mean ‘dissolution of marriage’.

Finally, it will be noted in passing that mushtaraka as a concept is not confined to nouns but also includes verbs. In our discussion of commands and prohibitions in a separate chapter, we have shown how a word in its imperative mood can impart more than one meaning. We have also discussed and illustrated the words of the Qur’an that occur in the imperative mood, but the juridical value that they convey can either be an obligatory command, a recommendation, or mere permissibility.

NOTES

4. Âmidî, Ikhâm, III, 53; Badrân, Usûl, p. 400.
5. Âmidî, Ikhâm, III, 54; Badrân, Usûl, pp. 400–401.
6. Tabrizî, Mishkât, III, 948, hadith no. 3178; Âmidî, Ikhâm, II, 54; Badrân, Usûl, p. 401.
7. Âmidî, Ikhâm, III, 56; Badrân, Usûl, p. 401. See for more examples of far-fetched interpretation, Âmidî, Ikhâm III, 55–64.
11. Ibid., p. 161; Badran, Usul, p. 403; Abii Zahrah, Usul, p. 93.
13. Abii Dawud, Sunan (Hasan's trans.), II, 51, hadith no. 2060; Khallaf, 'Ilm, p. 163; Abii Zahrah, Usul, p. 94.
14. Tabrizi, Mishkat, II, 1203, hadith no. 4132.
15. Abii Dawud, Sunan, II, 410, hadith no. 1567.
16. Khallaf, 'Ilm, p. 165; Amidi (Ihkam, III, 57) considers this to be a ta'wil which is far-fetched.
18. Abii Zahrah, Usul, p. 95.
21. Tabrizi, Mishkat, I, 1215, hadith no. 683; Shatibi, Muwafaqat, III, 178; Khallaf, 'Ilm, p. 167; Badran, Usul, p. 405.
23. Abii Dawud, Sunan, I, 76, hadith nos. 194 and 304, respectively.
24. Ibid.
25. Khallaf, 'Ilm, p. 169; Badran, Usul, p. 408.
27. Abii Dawud, Sunan, II, 702, hadith no. 2526; Abii Zahrah, Usul, p. 96.
29. Abii Dawud, Sunan (Hasan's trans.), II, 555, hadith no. 2078; Badran, Usul, p. 408.
32. Shafi'i, Risalah, p. 80.
33. Badran, Usul, p. 411
34. Khallaf, 'Ilm, p. 173; Badran, Usul, p. 413.
35. Zarkashi, al-Bahr, III, 463.
36. Muslim, Sahih Muslim, p. 252, hadith no. 949; Khallaf, 'Ilm, pp. 173-5; Badran, Usul, pp. 414-5.
38. The Holy Qur'an ( Yusuf Ali's trans.) p. 118; von Denffer, Ullam, p. 84; Abdur Rahim, Jurisprudence, p. 100.
41. Ghazali, Mustasfa, I, 68.
42. Shawkani, Irshad, pp. 31-2.
43. Ghazali, Mustasfa, II, 12; Abdur Rahim, Jurisprudence, p. 79
44. Khallaf, 'Ilm, p. 178; Badran, Usul, p. 375.
45. Badran, Usul, p. 370.
46. Abdur Rahim, Jurisprudence, p. 79.
47. Shatibi, Muwafaqat, III, 154.
49. For further details on this issues, see Kamali, *Punishment in Islamic Law*, pp. 90 and 104.


60. Ibid., p. 129.


65. Ibid., p. 131; Badran, *Usul*, p. 383.


69. Anṣârî, *Châyat al-Wusûl*, p. 84.


71. Ibid., p. 194; Badran, *Usul*, p. 354.


The law normally requires compliance not only with the obvious meaning of its texts but also with its implied meanings, and indirect indications and inferences that could be drawn from them. With reference to the textual rulings of the Qur'an and the Sunnah, the 'ulama' of usul have distinguished several shades of meaning that a nass may be capable of imparting. The Hanafi jurists have distinguished four levels of meaning in an order which begins with the explicit or immediate meaning of the text. Next in this order is the 'alluded' meaning which is followed by the 'inferred' meanings, and lastly by the 'required' meaning. There is yet a fifth variety of meaning, namely the 'divergent' meaning, which is somewhat controversial but has, in principle, been accepted, as our discussion will show. The explicit meaning ('ibarah al-nass), which is based on the words and sentences of the text, is the dominant and most authoritative meaning which takes priority over the other levels of implied meanings that might be detectable in the text. In addition to its obvious meaning, a text may impart a meaning which is indicated by the signs and allusions that it might contain. This secondary meaning is referred to as isharah al-nass, that is the alluded meaning. A legal text may also convey a meaning which may not have been indicated by words or signs and yet is a complementary meaning warranted by the logical and juridical purport of the text. This is known as dalalah al-nass, or the inferred meaning, which is one degree below the alluded meaning by virtue of the fact that it is essentially extraneous to the text. But as will later
be discussed, there is a difference of opinion between the Ḥanafi and the Shāfi‘i jurists as to whether the inferred meaning should necessarily be regarded as inferior to the alluded meaning. Next in this order is the *iqtiḍā‘ al-nass*, or the required meaning, which is once again a logical and necessary meaning without which the text would remain incomplete and would fail to achieve its desired purpose. When there is a conflict between the first and the second meanings, priority is given to the first. Similarly, the second will take priority over the third and the third over the fourth, as we shall presently explain.

I. The Explicit Meaning (‘Ibārah al-Nass)

As already stated, this is the immediate meaning of the text derived from its obvious words and sentences. The explicit meaning represents the principal theme and purpose of the text, especially in cases where the text might impart more than one meaning and comprises in its scope a subsidiary theme or themes in addition to the obvious one. In its capacity as the obvious and dominant meaning, the *‘ibārah al-nass* is always given priority over the secondary and subsidiary themes or meanings of a text. To illustrate this, we refer to the Qur’ānic passage on the subject of polygamy, a text which conveys more than one meaning, as follows: ‘And if you fear that you may be unable to treat the orphans fairly, then marry of the women who seem good to you, two, three or four. But if you fear that you cannot treat [your co-wives] equitably, then marry only one’ (al-Nisā‘, 4:3).

At least three or four meanings are distinguishable in this text which are: first, the legality of marriage, a meaning which is conveyed by the phrase *fankihū mā tāba lakum min al-nisā‘* (‘marry of the women who seem good to you’); second, limiting polygamy to the maximum of four; third, remaining monogamous if polygamy may be feared to lead to injustice; and fourth, the requirement that orphaned girls must be accorded fair treatment, a meaning which is indicated in the first part of the text. All these are conveyed in the actual words and sentences of the text; but the first and the last are subsidiary and incidental whereas the second and the third represent the explicit
themes and meanings of the text, that is, the ‘ibārah al-nāṣ. Limiting polygamy to the maximum of four is the explicit meaning which takes absolute priority over all the implied and incidental meanings that this text might convey.²

Most of the nusūṣ of Shari‘ah convey their rulings by way of ‘ibārah al-nāṣ. Thus the command to perform the obligatory prayers, to observe the fast during Ramadān, to enforce the prescribed penalties for certain offences, to give specified shares to the legal heirs in inheritance, etc., are all instances of ‘ibārah al-nāṣ. The effect of ‘ibārah al-nāṣ is that it conveys a definitive ruling (hukm qat‘i) on its own and is in no need of corroborative evidence. But if the text is conveyed in general terms, it may be susceptible to qualification, in which case it may not impart a definitive rule of law but constitute speculative (zanni) evidence only.³

II. The Alluded Meaning (Ishārah al-Nāṣ)

The text itself may not be obvious with regard to its alluded meaning, but it imparts, nevertheless, a rationally concomitant meaning that is obtained through further investigation of the signs that might be detectable therein. Since the alluded meaning does not represent the principal theme of the text and yet embodies a necessary inference, it is called isharah al-nāṣ. The alluded meaning may be easily detectable in the text, or may be reached through deeper investigation and ijtihād. An example of the isharah al-nāṣ in the Qur‘ān is the text concerning the maintenance of young children which provides: ‘It is his [father’s] duty to provide them with maintenance and clothing according to custom’ (al-Baqarah, 2:233).

The explicit meaning of this text obviously determines that it is the father’s duty to support his child. It is also understood from the wording of the text, especially from the use of the pronoun ‘lahw’ (his) that only the father and no-one else bears this obligation. This much is easily detectable and constitutes the explicit meaning of this text. But to say that the child’s descent is solely attributed to the father, and that his identity is determined with reference to that of the father, is a rational and concomitant meaning that is derived through further investigation of the signs detectable in the text.⁴ Similarly, the rule that the father, when in dire need, may take what he needs of the
property of his offspring without the latter's permission is yet another meaning which is derived by way of *ishārah al-nass*. This meaning is derived from the combination of the text under discussion and the *hadith* of the Prophet which proclaims that 'you and your property both belong to your father'.

Another example of a combination of explicit and alluded meanings occurring in the same text is the Qur'ānic *āyah* on the permissibility of divorce which states in an address to the believers: 'There shall be no blame on you if you divorce your wives with whom you had no sexual intercourse, nor had you assigned for them a dower' (al-Baqarah, 2:26):

The explicit meaning of this text is that divorce is permissible prior to the consummation of marriage and the assignment of a dower. The alluded meaning here is the legality of concluding a contract of marriage without the assignment of a dower (*mahr*), for a divorce can only occur when there is a subsisting marriage. The text implies this to be the case, and that a marriage can legally exist even without the assignment of a *mahr*.

To give yet another example of *ishārah al-nass* we may refer to the Qur'ānic text on consultation (*shūrah*) where we read, in an address to the Prophet, 'So pardon them [the Companions] and ask for [God's] forgiveness for them and consult them in affairs' (Al 'Imrān, 3:159).

The *'ibārah al-nass* in this text requires that community affairs must be conducted through consultation. The alluded meaning of this text requires the creation of a consultative body in the community to facilitate the consultation required by the obvious text.

The effect of *ishārah al-nass* is similar to that of *'ibārah al-nass* in that both constitute the basis of obligation, unless there is evidence to suggest otherwise. To illustrate this, we may refer once again to the
Qur'ānic text (al-Baqarah, 2:223) which lays down the rule that the child follows the descent of his father. This is a definitive ruling (hukm qat'ī) which has, however, been set aside by ijma' in respect of slavery to the effect that the child of a slave does not necessarily inherit the status of his father. In this example, the ishārah al-nass initially laid down a definitive ruling but it has been set aside in respect of slavery by another definitive evidence, namely the ijma'.

III. The Inferred Meaning (Dalālah al-Nass)

This is a meaning that is derived from the spirit and rationale of a legal text even where this is not indicated in its words and sentences. Unlike the explicit meaning and the alluded meaning, which are both indicated in the words and signs of the text, the inferred meaning is not indicated in this way. Instead, it is derived through analogy and the identification of an effective cause (‘illah) which is in common between the explicit meaning and the meaning that is derived through inference. This might explain why some ‘ulamā’ have equated dalalah al-nass with analogical deduction, namely qiyyās jali. To illustrate this, we may refer to the Qur'ānic text on the obligation to respect one's parents. In particular, the text provides ‘and say not “Fie” to them’ (al-Isra’ 17:23)

 فلا تقل هما أف

which obviously forbids the utterance of the slightest word of contempt to parents. The effective cause of this prohibition is honouring parents and avoiding offence to them. There are, of course, other forms of offensive behaviour, besides a mere contemptuous word such as ‘Fie’, to which the effective cause of this prohibition would apply. The inferred meaning of this text is thus held to be that all forms of abusive words and acts which offend parents are forbidden, even if they are not specifically mentioned in the text under consideration.

To give another example, the Qur'ān proclaims, concerning the property of orphans, that ‘those who unjustly devour the property of the orphans only devour fire into their bodies’ (al-Nisā', 4:10).

إن الذين يأكلون أموال اليتيم ظلماً إنما يأكلون

في بطولهم ناراً
The explicit meaning of this text forbids guardians and executors from devouring the property of their orphaned wards for personal gain. But by way of inference, the same prohibition is extended to other forms of destruction and waste that might have been caused, for example, through financial mismanagement that does not involve personal gain and yet leads to the loss and destruction of the property of orphans. Although the text provides no indication as to the different ways in which destruction can be caused, they are nevertheless equally forbidden. As already stated, this kind of inference is equivalent to what is known as obvious analogy (qiyyās jāli) which consists of identifying the effective cause of a textual ruling, and when this is identified the original ruling is analogically extended to all similar cases. The effective cause of the ruling in the foregoing āyah is protection of the orphans' property, and any act which causes destruction or loss of such property falls under the same prohibition.⁹

IV. The Required Meaning (Iqtīdā’ al-Nāṣṣ)

This is a meaning on which the text itself is silent and yet which must be read into it if it is to fulfil its proper objective. To give an example, the Qur'ān proclaims concerning the prohibited degrees of relations in marriage: ‘Unlawful to you are your mothers and your daughters’ (al-Nisā’, 4:23).

This text does not mention the word ‘marriage’, but even so this must be read into the text to complete its meaning. Similarly, we read elsewhere in the Qur'ān: ‘Unlawful to you are the dead carcass and blood’ (al-Mā’idah, 5:3), without mentioning that these are unlawful for consumption.

But the text requires the missing element to be supplied in order that it may convey a complete meaning.

To give a slightly different example of iqtīdā’ al-nāṣṣ, we may refer to the hadith which states: ‘There is no fast [lā siyāma] for anyone who has not intended it from the night before.’
The missing element could either be that the fasting is ‘invalid’ or that it is ‘incomplete’. The Hanafis have upheld the latter whereas the Shafi'is have read the former meaning into this hadith. Whichever meaning is upheld, the consequences that it may lead to will vary accordingly.¹⁰

To summarise, a legal text may be interpreted through the application of any one or more of the four varieties of textual implications. The meaning that is arrived at may be indicated in the words of the text, by the signs that occur therein, by inference, or by the supplementation of a missing element. These methods of legal construction may be applied individually or in combination with one another, and they are all designed to carry the text to its proper and logical conclusions.

As stated above, in the event of a conflict between the 'ibārah al-nass and the ishdarah al-nass, the former prevails over the latter. This may be illustrated by a reference to the two Qur'anic ḥāyāt concerning the punishment of murder. One of these explicitly proclaims that ‘retaliation is prescribed for you in cases of murder’ (al-Baqarah, 2:178).

But elsewhere in the Qur'an, it is provided: ‘Whoever deliberately kills a believer, his punishment will be permanent hellfire’ (al-Nisā’, 4:93).

The explicit meaning of the first ḥāyāh provides that the murderer must be retaliated against; the explicit meaning of the second ḥāyāh is that the murderer is punished with permanent hellfire. The alluded meaning of the second ḥāyāh is that retaliation is not a required punishment for murder; instead the murderer will, according to the explicit terms of this ḥāyāh, be punished in the Hereafter. There is no conflict in the explicit meanings of the two texts, but only between the explicit meaning of the first and the alluded meaning of the second. A conflict thus arises as to which of the two punishments are to be upheld; but since the first ruling constitutes the explicit meaning of the text
and the second is an alluded meaning, the former prevails over the latter.\textsuperscript{11}

For another illustration of a conflict between the explicit and alluded meanings, we refer to the Qur'\'anic text which informs the believers of the dignified status of the martyrs, as follows: ‘And think not of those who are slain in God’s way as dead; they are alive, finding their sustenance in the presence of God’ (\textit{Al 'Imrān}, 3:169).

The explicit terms of this text obviously declare the martyrs to be alive, and that anyone who thinks they are dead is mistaken. The alluded meaning of this text is held to be that no funeral prayer is necessary for the martyr as he is deemed to be still alive. However, this conclusion conflicts with the explicit meaning of another Qur'\'anic text which orders, concerning the dead in general, to ‘pray on their behalf [\textit{salli 'alayhim}] as your prayers are a source of tranquillity for them’ (\textit{al-Tawbah}, 9:103).

This text explicitly requires prayers for everyone, martyr or otherwise, as they are dead literally and juridically and their property may be inherited by their legal heirs. This is the explicit meaning of this second text and it prevails over the alluded meaning of the first.\textsuperscript{12}

To illustrate the conflict between the alluded meaning and the inferred meaning, we refer firstly to the Qur'\'anic text on the expiation of erroneous killing which states: ‘The expiation [\textit{kaffārah}] of anyone who erroneously kills a believer is to set free a Muslim slave’ (\textit{al-Nisā'}, 4:92).

The explicit meaning of this \textit{āyah} is that erroneous homicide must be expiated by releasing a Muslim slave. By way of inference, it is further understood that freeing a Muslim slave would also be required in intentional homicide, for the purpose of \textit{kaffārah} is compensation and atonement for a sin. It is argued that the murderer is also a sinner and has committed a sin far greater then the one who kills as a result of
error. The inferred meaning derived in this way is that the murderer is liable, at least, to the same kaffarah which is required in erroneous homicide. However, according to the next ayah in the same passage, to which reference has already been made: ‘Whoever deliberately kills a believer, his punishment is permanent hell-fire’ (al-Nisā’, 4:93).

The alluded meaning of this text is that freeing a slave is not required in intentional killing. This meaning is understood from the explicit terms of this ayah which provide that the punishment of deliberate homicide is a permanent abode in hell. This in turn implies that murder is an unpardonable sin, and, as such, there is no room for kaffarah in cases of murder. This is the alluded meaning of the second ayah; and a conflict arises between this and the inferred meaning of the first ayah. The alluded meaning, which is that the murderer is not required to pay a kaffarah, takes priority over the inferred meaning that renders him liable to payment.

The Shiafi'is are in disagreement with the Hanafis on the priority of the alluded meaning over the inferred meaning. According to the Shiafi'is, the inferred meaning takes priority over the alluded meaning. The reason given for this is that the former is founded in both the language and rationale of the text whereas the latter is not; that the alluded meaning is only derived from a sign which is basically weaker than the words and the rationale of the text, and that the inferred meaning is a closer meaning and should therefore be given priority over the alluded meaning. It is on the basis of this analysis that, in the foregoing example, the Shiafi'is have given priority to the inferred meaning of the text with the result that the murderer is also required to pay the kaffarah.

V. Divergent Meaning (Mafhūm al-Mukhāla'afah) and the Shafi'i Classification of al-Dalālāt

The basic rule to be stated at the outset here is that a legal text never implies its opposite meaning, and that any interpretation that aims at reading a divergent meaning into a given text is unwarranted and untenable. If a legal text is at all capable of imparting a divergent meaning, then there needs to be a separate text to validate it. But any attempt to obtain two divergent meanings from one and the same text is bound to defy the very essence and purpose of interpretation.
This argument has been most forcefully advanced by the Hanafis, who are basically of the view that mafhūm al-mukhālafah is not a valid method of interpretation. Having said this, however, mafhūm al-mukhālafah is upheld on a restrictive basis not just by the Shāfī‘is but also by the Hanafis; they have both laid down certain conditions that must be fulfilled in order to ensure the proper use of this method.

Mafhūm al-mukhālafah may be defined as a meaning derived from the words of the text in such a way that it diverges from the explicit meaning thereof. To give an example, the Qur‘ān proclaims the general rule of permissibility (ibādah) of foodstuffs for human consumption with a few exceptions that are specified in the following text: ‘Say, I find nothing in the message that is revealed to me forbidding anyone who wishes to eat except the dead carcass and blood shed forth’ (al-An‘ām, 6:145).

With reference to the latter part of this text, would it be valid to suggest that blood which is not shed forth (dam ghayr masfūḥ) is lawful for human consumption? The answer to this question is in the negative, for otherwise the text would be subjected to an interpretation that is most likely to oppose its obvious meaning. As for the permissibility of unspilt blood such as liver and spleen, which consist of clotted blood, this is established not by the āyāh under consideration but by a separate text. Liver and spleen are lawful to eat by virtue of the hadith of the Prophet which proclaims: ‘Lawful to us are two types of corpses and two types of blood. These are fish, locust, the liver and the spleen.’

As already indicated, the Shāfī‘is have adopted a different approach to mafhūm al-mukhālafah. But to put this matter in its proper perspective, we need to elaborate on the Shāfī‘i approach to textual implications (al-dalālāt) as a whole, and in the course of this general discussion, we shall turn to mafhūm al-mukhālafah in particular.

Unlike the Ḥanafī classification of textual implications into four
types, the Shāfi‘īs have initially divided al-dalālāt into the two main
categories of dalalah al-manṭūq (pronounced meaning) and dalalah
al-mafhūm (implied meaning). Both of these are derived from the
words and sentences of the text, the former from the obvious text and
the latter come through logical and juridical construction thereof. An
example of dalalah al-manṭūq is the Qur’anic aya which proclaims
that ‘God has permitted sale and prohibited usury’ (al-Baqarah, 2:275).

This text clearly speaks of the legality of sale and the prohibition of
usury. Dalalah al-manṭūq has in turn been subdivided into two types,
namely dalalah al-iqtīdā (required meaning), and dalalah al-ishārah
(alluded meaning). Both of these are either indicated in the words of
the text or constitute a necessary and integral part of its meaning. As
will be noted, even from this brief description, the difference between
the Shāfi‘ī and Hanafi approaches to the classification of al-dalālāt is
more formal than real. Aba Zahrah has aptly observed that essentially
all of the four Hanafi varieties of al-dalālāt are, in one way or another,
founded in the actual words and sentences of the text. Despite the
technical differences that might exist between the four types of impli-
cations, they are basically all founded in the text. In this way all of
the four-fold Hanafi divisions of al-dalālāt can be classified under dalalah
al-manṭūq.

As the phrase itself indicates, dalalah al-manṭūq is concerned not
with the direct meaning, but with the implications of spoken words.
It is a meaning that is often a logical extension, even a requirement,
of the clear text. Note, for example, the following text on the shares
of the parents in the estate of their deceased son when the latter has
left no other heirs: ‘And if he has no son and his parents are his heirs,
then his mother is entitled to one third’ (al-Nisā’, 4:11).

The preceding portion of the same aya provides, ‘And if each of
the parents is a sixth of what he has left if he is survived by a son’.
When the two portions of the aya are read together, it is implied
that the father’s portion in the first of the two situations is two-thirds,
a conclusion which is implied in the explicit or spoken (manṭūq)
portion of the text, even if the text itself is silent on the two-thirds
portion for the father.
The Hanafis and Shafi’is have differed on whether *khul* divorce is a divorce proper (*talāq*) or a mere annulment (*faskh*) of the marriage contract. The Hanafis say that it is a divorce but the Shafi’is consider it to be annulment and their conclusions are based on the actual sequence of the words of the text. The implied meaning of the text, or *dalālah al-mantūq*, has thus been understood differently by the two schools. The text at issue is as follows:

Divorce must be [pronounced] twice; then either keep them [divorced wives] in good fellowship or let them go with kindness. And it is not lawful for you to take any part of what you have given them, unless both fear that they cannot observe the God-ordained limits. Then if you fear that they cannot keep within the limits of God, there is no blame on them for what she gives up to seek her freedom (al-Baqarah, 2:229).

The latter part of this text is explicit on the choice that the wife is granted — that she may return the assets or dower she has received — but the text does not specify exactly what the husband should do in return. He must take some action and the Hanafis have answered this question by saying that the *āyah* begins with the word *talāq* and that it is precisely what the husband is supposed to do — hence the conclusion that *khul* is a variety of *falaq*, not of annulment. The Shafi’i conclusion that *khul* is a form of *faskh*, not *talāq*, is based on the sequence of words in this *āyah* and the one that immediately follows. The next *āyah* thus reads: ‘So if he divorces her [the third time], she shall not be lawful to him afterwards until she marries another man’ (al-Baqarah, 2:230).

The Shafi’is have argued that the initial *āyah* refers to two *talāq*, then it makes a provision for *khul* and then the next *āyah* permits a third and final *talāq*. Now if *khul* were to be a *talāq*, the total numbers of *talāq* would thus become more than three, hence the conclusion,
by way of *dalālah al-manṭūq*, that *khul*l is a form of annulment, not a *talāq*. This is an example of alluded meaning (*dalālah al-ışhārah*), whereas the first example concerning the father’s share in inheritance was that of *dalālah al-iqtīdā* (required meaning).\(^2\) To give yet another example of *dalālah al-iqtīdā*, suppose a person makes a bequest and says: ‘I bequeath one thousand dinars to A and B; B’s portion is three hundred.’ The spoken words, or the clear text, just stops at this point; then the conclusion has to be drawn, by way of *dalālah al-manṭūq*, that A’s portion is seven hundred.

*Dalālah al-maḥfūm* is an implied meaning that is not indicated in the text but is arrived at by inference. This is to a large extent concurrent with what the Ḥanafis have termed *dalālah al-nāṣ*$. But the Shāfi‘īs have more to say on *dalālah al-maḥfūm* in that they sub-divide this into the two types of *maḥfūm al-muwāfāqah* (harmonious meaning) and *maḥfūm al-mukhdalafah* (divergent meaning). The former is an implicit meaning on which the text may be silent but which is nevertheless in harmony with its pronounced meaning. This harmonious meaning (*maḥfūm al-muwāfāqah*) may be equivalent to the pronounced meaning (*dalālah al-manṭūq*), or it may be superior to it. If it is the former, it is referred to as *lahn al-kiṭāb* (parallel meaning) and, if the latter, it is known as *fahwā al-kiṭāb* (superior meaning). For example, to extend the *Qur’ānic* ruling in sūra al-Nisā’ (4:10), which only forbids ‘devouring the property of orphans’ to other forms of mismanagement and waste – is a parallel meaning (*lahn al-kiṭāb*). But to extend the *Qur’ānic* text which forbids the utterance of ‘Fie’, that is, the slightest word of contempt to, for instance, physical abuse of one’s parents, is a meaning which is superior to the pronounced meaning of the text.$^{21}$ The validity of these forms of harmonious meanings is approved by the ‘ulamā’ of all schools (except the Zāhirīs) who are generally in agreement with the basic concepts of *maḥfūm al-muwāfāqah*. But this is not the case with regard to *maḥfūm al-mukhdalafah*, on which the ‘ulamā’ have disagreed.$^{22}$

As noted above, *maḥfūm al-mukhdalafah* diverges from the pronounced meaning (*dalālah al-manṭūq*) of the text, which may, however, be either in harmony or in disharmony with it. It is only when *maḥfūm al-mukhdalafah* is in harmony with the pronounced meaning of the text that it is accepted as a valid form of interpretation, otherwise it is rejected. For an example of the divergent meaning that is in harmony with the pronounced meaning of the text, we may refer to the *ḥadīth* which states: ‘When the water reaches the level of *qullatayn* [approximately two feet], it does not carry dirt.$^{23}$
In this way when a polluting substance falls in water of such depth, it is still regarded clean for the purposes of ablution. This is the pronounced, or the explicit, meaning of the text. By way of *māḥūm al-mukḥālafah*, it is understood that water below this level is capable of retaining dirt. This is an interpretation deemed to be in harmony with the pronounced meaning of the *hadith*.

According to the Shafi’is, deduction by way of *māḥūm al-mukḥālafah* is acceptable only if it fulfils certain conditions, which are as follows: firstly, that the divergent meaning does not exceed the scope of the pronounced meaning. For example, the Qur’anic *āyah* which prohibits saying ‘Fie’ to one’s parents may not be given a divergent meaning so as to make physical abuse of them permissible. Secondly, that the divergent meaning has not been left out in the first place for a reason such as fear or ignorance; for example, if a man orders his servant to ‘distribute this charity among the Muslims’, but by saying so he had actually intended people in need, whether Muslims or non-Muslims, and yet omitted to mention the latter for fear of being accused of disunity by his fellow Muslims. Should there be evidence of the existence of such a fear, then no divergent meaning should be deduced. A similar case would be when a person says that ‘maintenance is obligatory for ascendants and descendants’, while he did not know that collaterals are also entitled to maintenance. Should there be evidence of his ignorance on this point, then no divergent meaning should be attempted to the effect, for example, of saying that maintenance is not obligatory for collaterals. Thirdly, that the divergent meaning does not go against that which is dominant and customary in favour of something which is infrequent and rare. To give an example: the Qur’ān states concerning the prohibited degrees of relationship in marriage: ‘And forbidden to you are...your step-daughters who live with you, born of your wives with whom you have consummated the marriage; but there is no prohibition if you have not consummated the marriage’ (*al-Nisā’*, 4:23).
This text is explicit on the point that marriage to a stepdaughter who is under the guardianship of her stepfather is forbidden to the latter. By way of mafhīm al-mukhālafah, this āyah might be taken to mean that a stepdaughter who does not live in the house of her mother’s husband may be lawfully married by the latter. But this would be a meaning which relies on what would be a rare situation. The probable and customary situation in this case would be that the stepdaughter lives with her mother and her stepfather, which is why the Qurʾān refers to this qualification, and not because it was meant to legalise marriage with the stepdaughter who did not live with him. Fourthly, that the original text is not formulated in response to a particular question or event. For instance, the Prophet was once asked if free-grazing livestock was liable to zākāh; and he answered in the affirmative. But this answer does not imply that the stall-fed livestock is not liable to zākāh. The answer was originally given to a question which specified the free-grazing livestock and not in order to exempt the stall-fed variety from zākāh. Fifthly, that the divergent meaning does not depart from the reality, or the particular state of affairs, which the text is known to have envisaged. For example, the Qurʾān states in a reference to relations between Muslims and non-Muslims: “Let not the believers befriend unbelievers to the exclusion of their fellow believers” (Al Ḣārām, 2:28).

لا يتخذ المؤمنون الكافرين أولياء من دون المؤمنين

This āyah apparently forbids friendship with the unbelievers, but this is not the purpose of the text. It was, in fact, revealed in reference to a particular state of affairs, namely concerning a group of believers who exclusively befriended the unbelievers, and they were forbidden from doing this; it did not mean to impose a ban on friendship with unbelievers. The text, in other words, responded to a particular situation and not the enactment of a general principle, and should therefore not be taken out of context by recourse to mafhīm al-mukhālafah. Sixthly, that the divergent meaning does not lead to a conclusion that would oppose another textual ruling. To give an example, we refer to the Qurʾānic text on the requirement of retaliation which states: ‘Retaliation is prescribed for you in cases of murder: the free for the free, the slave for the slave, the woman for the woman’ (al-Baqarah, 2:178).
This text may not be taken by way of mafhūm al-mukhdalafah to mean that a man is not retaliated against for murdering a woman. For such a conclusion would violate the explicit ruling of another Qur'ānic text which requires retaliation for all intentional homicides on the broadest possible basis of 'life for life' (al-Mā'īdah, 5:45).

The main restriction that the Hanafis have imposed on mafhūm al-mukhdalafah is that it must not be applied to a revealed text, namely the Qur'ān and the Sunnah. As a method of interpretation, mafhūm al-mukhdalafah is thus validated only with regard to a non-revealed text. Only in this context, that is in regard to rational proofs and man-made law, can it provide a valid basis of hukm and ijtihad. The main reason that the Hanafis have given in support of this view is that the Qur'ān itself discourages reliance on mafhūm al-mukhdalafah, for there are many injunctions in the Qur'ān and Sunnah whose meaning will be distorted if they were to be given divergent interpretations. To give an example, we read in the Qur'ān, in a reference to the number of months that God enacted on the day He created the universe, that there shall be twelve months in a year. The text then continues: ‘Four of them are sacred, so avoid committing acts of oppression [zulm] therein’ (al-Tawbah, 9:36).

By way of mafhūm al-mukhdalafah, this text could be taken to mean that acts of oppression are permissible during the rest of the year. This would obviously corrupt the purpose of this text, as oppression is always forbidden regardless of the time in which it is committed. Similarly, there is a hadīth which instructs the believers that ‘none of you may urinate in permanently standing water nor may you take a bath therein to cleanse yourselves of major pollution [janābah]’. By way of mafhūm al-mukhdalafah, this text could be taken to mean that taking a bath other than the one specifically for janābah is permissible in such water, or that urinating is permissible in flowing water,
neither of which would be correct. Bathing in small ponds below a certain depth is not permitted whether for janābah or otherwise. The Hanafis have further concluded that whenever necessary, the Qurʾān itself has stated the divergent implications of its own rulings and when this is the case, the divergent meaning becomes an integral part of the text and must be implemented accordingly. This style of Qurʾānic legislation suggests that if recourse to mafḥūm al-mukhālafah were generally valid, there would be no need for it to be explicitly spelled out in the Qurʾānic text. The Qurʾān, in other words, is self-contained and does not leave us to deduce the law from it by recourse to divergent interpretation. Note, for example, the text which instructs the husband to avoid sexual intercourse with his wife during her menstruation. The text then immediately follows on to specify its own divergent implication: ‘And approach them not until they are clean. But when they have purified themselves, you may approach them’ (al-Baqarah, 2:222).

In the same sura, there is another text, to which reference has already been made, concerning the prohibition of marriage between the stepdaughter and her stepfather who has consummated the marriage with her mother. The text then continues to specify its divergent meaning by providing that ‘there is no prohibition if you have not consummated the marriage’ (al-Nisā’, 4:23).

The Hanafis have thus concluded that mafḥūm al-mukhālafah is not applicable to the nusūs of the Qurʾān and Sunnah. We only deduce from the nusūs such rules as are in harmony with their explicit terms. The Shāfiʿis and the Mālikis who validate the application of mafḥūm al-mukhālafah to the nusūs have, in addition to the conditions that were earlier stated, imposed further restrictions, which consist of specifying exactly what forms of linguistic expressions are amenable to this method of interpretation. For this purpose the Shāfiʿis have subdivided mafḥūm al-mukhālafah into four types. The main purpose of this classification is to introduce greater accuracy into the use of mafḥūm al-mukhālafah, specifying that it is an acceptable method of deduction only when it occurs in any of the following forms but not otherwise.

(1) Mafḥūm al-ṣifah (implication of the attribute). When the ruling
of a text is dependent on the fulfilment of a quality or an attribute then the ruling in question prevails only when that quality is present; otherwise it lapses. This can be shown in the Qur'anic text on the prohibited degrees of relations in marriage which includes ‘the wives of your sons proceeding from your loins’ (al-Nisā' 4:23).

The pronounced meaning of this text is the prohibition of the wife of one’s own son in marriage. The son has thus been qualified in the text by the phrase ‘proceeding from your loins’. By way of mafhūm al-mukhālafah, it is concluded from this qualification that the wife of an adopted son, or of a son by fosterage (radā'a), that is a child who has sucked the breast of one’s wife, is not prohibited.

(2) Mafhūm al-shart (implication of the condition). When the ruling of a text is contingent on a condition, then the ruling prevails only in the presence of that condition, and otherwise lapses. An example of this is the Qur'anic text on the entitlement to maintenance of divorced women who are observing their waiting period ('iddah). The text proclaims: ‘If they are pregnant, then provide them with maintenance until they deliver the child’ (al-Talāq, 65:6).

The condition here is pregnancy, and the hukm applies only when this condition is present. By way of mafhūm al-mukhālafah, it is concluded, by those who validate this method at least, that maintenance is not required if the divorced woman, who is finally divorced, is not pregnant. Similarly, the Qur'anic test that provides a concession in regard to fasting is conveyed in conditional terms. Having laid down the duty of fasting, the text then continues: ‘But if anyone is ill or travelling, the prescribed fasting should be observed later’ (al-Baqarah, 2:185).

By way of mafhūm al-mukhālafah, it is concluded that the concession to break the fast does not apply if one is neither ill nor travelling, which is a valid interpretation.

(3) Mafhūm al-ghayāḥ (implication of the extent). When the text itself demarcates the extent or scope of the operation of its ruling, the latter will prevail only within the scope of the stated limits and will
lapse when this limit is surpassed. To illustrate this, the Qur’anic text on the time of fasting provides the farthest limit beyond which one must stop eating and drinking during Ramaḍān: ‘Eat and drink until you see the white streak of dawn in the horizon distinctly from the black’ (al-Baqarah, 2:187).

By way of mafhīm al-mukhdalafah, it is concluded that when whiteness appears in the horizon, one may neither eat nor drink.\(^{33}\)

(4) Mafhīm al-‘ādād (implication of the stated number). When the ruling of a text is conveyed in terms of a specified number, the number so stated must be carefully observed. Thus the Qur’anic text on the punishment of adultery is clearly stated to be one hundred lashes (al-Nūr, 24:2). By way of mafhīm al-mukhdalafah this text is taken to mean that it is not permissible either to increase or decrease the stated number of lashes.\(^{34}\)

In conclusion, it may be said that the foregoing methods are generally designed to encourage rational enquiry in the deduction of the aḥkām from the divinely revealed sources. They provide the jurist and the mujtahid with guidelines to ensure the propriety of interpretation and ijtihād. The restrictions imposed on the liberty of the mujtahid are obvious enough in that the textual rulings of the Qur’ān and Sunnah must be treated carefully so that they are not stretched beyond the limits of their correct implications. Yet the main thrust of the guidelines is encouragement of the exercise of rational enquiry in the understanding and implementation of the nusūs. The rules of interpretation that are discussed under this and the preceding chapter are once again indicative of the primacy of revelation over reason, and yet they are, at the same time, an embodiment of the significant role that reason must play side by side with revelation. The two are substantially concurrent and complementary to one another.

NOTES

4. Abū Zahrah, Usul, p. 111; Khudārī, Usul, p. 120.
5. Tabrīzī, Miškāt, II, 1002, hadith no. 3354; Khallāf, ‘Ilm, p. 146.
7. Ibid., p. 411.
8. Abū Zahrah, Uṣūl, p. 112.
10. Ibn Majah, Sunan, I, 542, hadith no. 1700; Badrān, Uṣūl, p. 424.
18. Badrān, Uṣūl, p. 429; Khudārī, Uṣūl, pp. 121–122; Hitu, Wajiz, p. 120.
26. Ibid., p. 126; Badrān, Uṣūl, p. 434.
27. These are the months of Muharram, Dhū al-Ḥājjah, Dhū al-Qā‘dah and Rajab.
29. Tabrīzī, Mishkāt, I, 148; hadith no. 474.
32. Hitu, Wajiz, p. 127.
33. Khudārī, Uṣūl, p. 123.
34. Ibid., p. 123.
The language of the Qurʾān (and the Sunnah) differs from that of modern statutes in that Qurʾānic legislation is not confined to commands and prohibitions and their consequences, but is often coupled with an appeal to the conscience of the individual. This moral appeal may consist of a persuasion or a warning, an allusion to the possible benefit or harm that may accrue from observing or violating an injunction, or a promise of reward/punishment in the Hereafter. Modern laws are often devoid of such appeals, as they are usually confined to an exposition of imperative rules and their tangible results.¹

Commands and prohibitions in the Qurʾān occur in a variety of forms. While an injunction is normally expected to be in the imperative mood, there are occasions when a simple past is used as a substitute. For example, the injunctions that ‘retaliation is prescribed for you’ (al-Baqarah, 2:178 and 183) and that ‘fasting is prescribed for you’ (al-Baqarah, 2:178 and 183) are both expressed in the past tense. Injunctions are also conveyed in the present participle (muḍān‘i”). For example, the command that ‘anyone who sees the month [or is present at the month] shall fast therein [falyaṣumhu] (al-Baqarah, 2:185); and also the text which reads: ‘And mothers shall suckle [yurdi’na] their children for two whole years [that
is) for one who desires to complete the time of suckling’ (al-Baqarah, 2:233).

Similarly, a Qur'anic injunction may occur in the form of a moral condemnation of a certain form of conduct, such as the rule on the sanctity of private dwellings which provides: ‘It is no virtue to enter houses from the back’ (al-Baqarah, 2:189).

Also, a Qur'anic command or prohibition may be conveyed in the form of an allusion to the consequences of a form of conduct, such as a promise of reward or punishment in the hereafter. For example, after expounding the rules of inheritance in sūra al-Nisā’ (4:13–14) the text goes on to promise to those who observe them a reward, and warns violators of a punishment, in the hereafter.

I. Commands

A command proper (amr) is defined as a verbal demand to do something issued from a position of superiority over those inferior. Command in this sense differs from both supplication (du'a') and request (iltimās) in that the former is a demand from an inferior to one who is superior, whereas a request is a demand among people of equal or near-equal status. Since a verbal command can mean different things, namely an obligatory order, a mere recommendation, or even permissibility, the 'ulamā' have differed as to which of these is the primary and which the secondary meaning of a command. Some have held the view that amr is in the nature of a homonym (mushtarak) which imparts all of these meanings. Others have held that amr partakes of only two of these concepts, namely obligation and recommendation, but not permissibility. Still others have held that amr implies a permission to do something and that this is the widest meaning of amr, which is common to all three of the foregoing concepts.

According to the majority opinion, however, a command by itself, that is, when it is not attended by clues or circumstances that might give it a particular meaning, implies obligation or an emphatic demand
only. But this may change in the event of other indications being present, which might reduce a command to permissibility, recommendation, or indeed to a variety of other meanings. Thus when we read in the Qur’an commands such as *kulū wa-shrabū* (‘eat and drink’) (al-A’rāf, 7:31), the indications are that they amount to no more than permissibility (*ibāhah*); for eating and drinking are the necessities of human life, and a command in respect of them must logically amount to permissibility only. Similarly, the Qur’anic permission in respect of hunting after the completion of the *hajj* ceremonies given in sūra al-Mā’idah (5:2) and its address to the believers to ‘scatter in the land’ (*fa’ntashira fi l-ard*) after performing the Friday prayers (al-Jumu‘ah, 62:10) are both in the imperative form. But in both cases the purpose is to render these activities permissible only.\(^1\)

A command may likewise convey a recommendation if there are indications to warrant this conclusion. This is, for example, the case with regard to the Qur’anic command that requires the documentation of loans: ‘When you give or take a loan for a fixed period, write it down’ (al-Baqarah, 2:282).

\[
\text{إذا تداينتم بدين إلى أجل مسمى فاكتبوه}
\]

However, from an indication which occurs in the next *āyah* in the same sūra, it is concluded that the command here implies a recommendation (*nadb*) only. This *āyah* reads: ‘And if one of you deposit a thing on trust, let the trustee [faithfully] discharge his trust’ (al-Baqarah, 2:283).

\[
\text{إذا أمن بعضكم بعضاً فليؤدوا الذي اؤتمت أمانته}
\]

Here the use of the word ‘trust’ (*amānah*) signifies that the creditor may trust the debtor even without any writing.\(^6\) The majority of *’ulamā’* have held the same view regarding the requirement of witnesses in commercial contracts, which is the subject of another Qur’anic command occurring in the same passage, known as the *āyah al-mudāyanah* (2:282): ‘Whenever you enter a contract of sale, let it be witnessed and let neither the scribe nor the witness suffer harm.’

\[
\text{وشهدوا إذا تابعتم ولا يضار كاتب ولا شهيد}
\]

The Zāhirī *’ulamā’* have upheld the obvious meaning of these provisions and have made documentation a requirement of every loan, or
any form of deferred payment, and have made witnesses a requirement of every contract of sale. This, in their view, is more conducive to the fulfilment of contracts and the prevention of disputes among people.7

A command may, according to the indications provided by the context and circumstances, imply a threat, such as the Qur'ānic address to the unbelievers: ‘Do what you wish’ (Fussilat, 41:40)

أعمالوا ما شمت

and to the devil: ‘Lead to destruction those that you can’ (Bani Isrā’il, 17:64).

وافتنز من استعتت

A command may similarly imply contempt (ihānah), such as the Qur'ānic address to the unbelievers on the Day of Judgement: ‘Taste [the torture], you mighty and honourable!’ A command may sometimes imply supplication when someone says, for example, ‘O Lord grant me forgiveness’, and indeed a host of other meanings which may be understood in the light of the context and surrounding circumstances.8 As already noted, the majority of ‘ulamā’ have held that a command normally conveys an obligation unless there are indications to suggest otherwise.

The Lawgiver may at times order something which has hitherto been prohibited. The question then arises as to the nature of a command which follows a prohibition (al-amr ba’d al-hazar); does it convey an obligation or mere permissibility? The majority of ‘ulamā’ have held the view that a command following a prohibition means permissibility, not obligation. Two examples of such a command in the Qur'ān have already been given above in the context of the permission to hunt following its prohibition during the hajj ceremonies and the permission to conduct trade following its prohibition at the time of the Friday prayers (al-Mā‘idah, 5:2; and al-Jumu‘ah, 62:10 respectively).9 An example of such a command in the Sunnah is the hadith in which the Prophet is reported to have said: ‘I had forbidden you from visiting graves. Nay, visit them, for it reminds you of the hereafter.’10

كنت مزيكم عن زيارة القبور ألا فوروها فإفا

تذكراكم بالآخرة.
The Hanafis have taken the view that a command following a prohibition conveys an obligation, which is the primary meaning of a command and that this basic meaning remains unaffected by what might have preceded it. The basic evidence that establishes something as wājib does not distinguish between an amr that is preceded by a prohibition or is not preceded by one. Some Hanbali 'ulama', and also the Hanafi scholar Kamāl ibn al-Humām, have held that a command following a prohibition removes the prohibition and the matter is consequently restored to its original state, that is, the state in which it was prior to the prohibition. Zaydan has considered this to be the most appropriate view.  

The next question that arises in this connection is whether a command requires a single compliance or repetition. According to the majority view, this question can only be determined in the light of indications which might specify that repeated performance is required. However, in the absence of such indications, a single instance of performance is the minimum requirement of a command. Among the indications that determine repetition is when a command is issued in conditional terms. For example, the Qur'anic provision ‘if you are impure then clean yourselves’ (al-Mā'idah, 5:6)  

إن كنتم حنيفا فاطهروا

or the text that states: ‘The adulterer and adulteress, flog them each one hundred lashes’

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة

that is, if they commit adultery (al-Nūr, 24:2). Since the command to take a bath in the first āyah is conditional on janābah, that is, on sexual intercourse, then a bath must be taken following every instance of sexual intercourse. Similarly, when a command is dependent on a cause or an attribute, then it must be fulfilled whenever the cause or the attribute is present. The Qur'anic command, for example, that reads: ‘Perform the salah at the decline of the sun’ (Bani Isra'il, 17:18)

أقم الصلاة لدلوك الشمس

requires repeated performance at every instance when the cause for it is present, that is, when the specified time of salah arrives.  

Some Shafi'i scholars and the majority of Hanbalis are of the view
that a command requires sustained repetition throughout the lifetime of its audience unless there is evidence to suggest otherwise. A reference is made, in support of this view, to the incident when the Prophet addressed the people and said that ‘God has prescribed the hajj as a duty upon you.’ A man then asked the question ‘Is it every year, O Messenger of God?’ To this the Prophet replied ‘If I said it, it would have been so... Hajj is required only once and more than that is supererogatory.’ From this argument it has been advanced that the man who asked the question evidently knew the Arabic language and if a command did not require repetition he would not have asked the question in the first place. This is, however, considered to be a rather weak argument, for it is possible to say just the opposite in that if a command had conveyed a repetition as a matter of linguistic certainty, the man would have not raised any question about it. The episode thus remains inconclusive on the subject of repetition.  

As for the question of whether a command requires immediate or delayed performance, it is once again observed that the command itself merely consists of a demand, and the manner of its performance must be determined in the light of indications and surrounding circumstances. When, for example, A tells B to ‘do such and such now’, or alternatively orders him to ‘do such and such tomorrow’, both orders are valid and there is no contradiction. However, if a command were to require immediate execution then the word ‘now’ in the first order would be superfluous just as the word ‘tomorrow’ in the second order would be contradictory. When a person commands another to ‘bring me some water’ while he is thirsty, then by virtue of this indication, the command requires immediate performance just as the order to ‘collect the rent’ when it is given, say, in the middle of the month while the rent is collected at the end of each month, must mean delayed performance.

Thus it is obvious that the commandant may specify a particular time in which the command must be executed. The time limit may be strict or it may be flexible. If it is flexible, like the command to perform the obligatory salah, then performance may be delayed until the last segment of the prescribed time. But if the command itself specifies no time limit, such as the order to perform an expiation (kaffarah), then execution may be delayed indefinitely within the expected limits of one’s lifetime. However, given the uncertainty of the time of one’s death, an early performance is recommended in regard to kaffarah.  

And lastly, the question arises as to whether a command to do
something implies the prohibition of its opposite. According to the majority view, a command to do something does imply the prohibition of its opposite, regardless of whether the opposite in question consists of a single act or of a plurality of acts. Thus when a person is ordered to move, he is in the meantime forbidden to remain still; or when a person is ordered to stand, he is forbidden from doing any of a number of opposing acts, such as sitting, crouching, lying down, etc. However, some 'ulamā', including al-Juwaynī, al-Ghazālī, Ibn al-Hājib and the Muʿtazilah, have held that a command does not imply the prohibition of its opposite. A group of the Hanafi and Shāfiʿī 'ulamā' have held that only one of the several opposing acts, whether known or unknown, is prohibited, but not all. There are those who maintain that the exact opposite of a command has to be determined by looking at the command itself. If the command conveys an obligation (wujūb), then its opposite would be a prohibition (tahrim), but it would be an abomination (karāhiyyah) if the command only conveyed a recommendation (nadvb) in the first place. According to yet another view, the ruling here is confined to the imperative command, thereby excluding commands that only convey recommendation. The other limb of this equation is also generally upheld in that a prohibition not to do something conveys in the meantime a command in respect of doing the same. Thus the Qur'ānic āyah (al-Baqarah, 2:228) concerning divorced women that 'it is not lawful for them to conceal what God has created in their wombs'

وَلا يَتَحَلَّلُنَّ لَهُنَّ آنَ يَكْتُمُونَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ

conveys in the meantime a command that they should reveal the facts of their pregnancy. Similarly, when we read in the Qur'ān the command 'tell the believers to lower their gaze' when encountering members of the opposite sex, it conveys in the meantime a prohibition in respect of the lascivious gaze. The result of such differences would obviously have a bearing on whether the person who commits the opposite of a command must be penalised and, if so, to what extent. Specific answers to such questions can only be determined in the light of the surrounding circumstances and the state of mind of the individual concerned, as well as the general objectives of the law that can be ascertained in a given command.
II. Prohibitions

Prohibition (nahy), being the opposite of a command, is defined as a word or words which demand the avoidance of doing something addressed from a position of superiority to one who is inferior. The typical form of a prohibitory order in Arabic is that of a negative command beginning with ٌلا such as ٌلا تَتَفَّال (do not), or the Qur’ânic prohibition which reads ‘Slay not the life which God has made sacred’ (al-An’âm, 6:151).

A prohibition may be expounded in a statement (jumlah khabariyyah) such as occurs, for example, in the Qur’ân (al-Mā’idah, 5:3): ‘Prohibited to you are the flesh of dead corpses and blood’

أَلَاءُ مُنِيبَةَ الْخَيْلَةَ وَالدِم

or in the form of a present participle, such as God ‘forbids immorality and evil’ (al-Nahl, 16:90).

وَيَهِى اعْنَ الفُحْشَاءَ وَالذَّنْكَر

A prohibition is also conveyed by denial of permissibility (nafy al-hall) such as in the following text: ‘When he divorces her [three times] she is no longer lawful for him unless she marries another man’ (al-Baqarah, 2:230).

فَإِنّوُلِفَلَهَا فِي لَا تُقْلِلُ لَهُ مِنْ بَعْدِ هَٰذَةَ تَنْكِحُ زَوْجَاهُ غِيرَهُ

A prohibition may sometimes occur in the form of a command which requires the avoidance of something, such as the Qur’ânic phrase َوَذَارَتُ البَايْنَ (‘abandon sale’, that is during the time of Friday ِالشَلَّة) in sūra al-Jumu’ah (62:9), or َوَذَانِبُ غَلَلٌ (‘avoid lying’) in sūra al-Hajj (22:30), or may occur in a variety of other forms that are found in the Qur’ân.

A prohibition, like a command, may convey a variety of meanings. Although the primary meaning of nahy is illegality, or tahrîm, nahy is also used to imply mere reprehension (karâhiyyah), or guidance (irshâd), or reprimand (ta’dib), or supplication (du’â’). An example of nahy which implies reprehension is the Qur’ânic ãyâh addressing the
believers to ‘prohibit not [lā tuḥarimū] the good things that God has made lawful to you’ (al-Mā’idah, 5:87).

Nahy which conveys moral guidance may be illustrated by the Qur’ānic ayah addressing the believers to ‘ask not questions about things which, if made plain to you, may cause you trouble’ (al-Mā’idah, 5:101).

An example of nahy which implies a threat is when a master tells his recalcitrant servant: ‘Don’t follow what I say and you will see.’ An example of nahy which conveys supplication in the Qur’ān occurs in sura al-Baqarah (2:286) which reads: ‘Our Lord, condemn us not if we forget or make a mistake.’

Since nahy can convey several meanings, the ‘ulamā’ have differed as to which of these is its primary (ḥaqiqi) as opposed to secondary or metaphorical meanings. Some have held that illegality (tahrim) is the primary meaning of nahy while others consider reprehension (karahiyyah) to be the original meaning of nahy. According to yet another view, nahy is a homonym in respect of both. The majority (jumhūr) of ‘ulamā’ have held the view that nahy primarily implies tahrim, a meaning which will be presumed to prevail unless there are indications to suggest otherwise. An example of nahy in the Qur’ān that has retained its primary meaning is the phrase ‘lā taqtulū’ in the āyah which states ‘Slay not life which God has made sacred’ (al-An’ām, 6:151).

There is no indication in this text to warrant a departure from the primary meaning of lā taqtulū, which must therefore prevail. The primary meaning of nahy may be abandoned for a figurative meaning if there is an indication to justify this. Hence the phrase ‘lā tuʾākhidhna’ (‘condemn us not’) implies supplication, as the demand here is addressed to Almighty God, and is hence a demand from a position
of inferiority, which indicates that the correct meaning of nahy in this context is supplication, or duʿāʾ.17

III. The Value of Legal Injunctions

The object of a prohibition may be to prevent an act such as adultery (zina), or it may be to prevent the utterance of words such as those purporting to effect the sale of dead corpses, or of a freeman, by means of offer and acceptance. In either case, the prohibition does not produce any rights or legal effects whatsoever. Hence no right of paternity is established through zina; on the contrary the perpetrator is liable to punishment. Similarly, no contract is concluded and no right of ownership is proven as a result of the sale of a corpse.

If the object of prohibition is an act, and it is prohibited owing to an extraneous attribute rather than the essence of the act itself, such as fasting on the day of ʿīd, then the act is null and void (bāṭil) according to the Shāfiʿis but is irregular (fāsid) according to the Ḥanafis. The act, in other words, can produce no legal result according to the Shāfiʿis, but does create legal consequences according to the Ḥanafis, although it is basically sinful. The Ḥanafis consider such acts to be defective and must be dissolved by means of annulment (faskh), or rectified if possible. If the prohibition consists of words such as concluding a contract of sale which partakes of usury, it is still bāṭil according to the Shāfiʿis but fāsid according to the Ḥanafis, which means that it should either be revoked or amended to the extent that it is purified of its usurious content.

The position is, however, different with regard to devotional matters (ʿibādāt) whose purpose is seeking the pleasure of God. The fāsid in this context is equivalent to bāṭil. Hence there is no merit to be gained by fasting on the day of ʿīd, nor will it be taken into account in compensation to the fasting owed by the mukallaf.

With regard to muʿāmalāt, if the prohibition is due to an external factor, such as a sale concluded at the time of the Friday prayer, the majority maintains that all the legal consequences will follow from the prohibited act, although the perpetrator will have incurred a sin. Thus the sale so concluded will prove the right of ownership, which is however, deficient and should be rescinded at an early opportunity.18 Further detail on the fāsid and bāṭil can be found in our discussion of the aḥkām, which is the subject of a separate chapter.

As for the question of whether a prohibition requires both immediate as well as repeated compliance, the ʿulamāʾ are generally
Commands and Prohibitions

in agreement that it does and that this is the only way a prohibition can be observed. Unless the object of a prohibition is avoided at all times, the prohibition is basically not observed. It is therefore necessary to avoid the prohibited act as from the moment it is issued and whenever it is applicable. This is the case with regard to prohibitions that are not qualified in any way, such as the Qur'anic text concerning the property of orphans which states: ‘Do not approach the property of the orphan except in the way that is best’ (al-An'am, 6:151).

However, if a prohibition is qualified by a condition that overrules immediate compliance, then it has to be observed within the meaning of that condition. An example of this occurs in the Qur'an (al-Mumtahina, 60:10) which reads, in an address to the believers: ‘When there come to you believing women refugees, examine [and test] them. If you find that they are believers, then send them not back to the unbelievers. God knows best as to their faith.’

In this āyah, the prohibition (not to send them back) is conditional upon finding that they are believers, and until then the prohibition must remain in abeyance. There is a difference between a command and a prohibition in that the purpose of the former is to create something or to establish the existence of something, and this is realised by a single instance of execution, and there is basically no need for repetition. A prohibition, on the other hand, aims at the absence of something, and this cannot be realised unless it is absent all the time. A single instance of absence is thus not enough to fulfil the purpose of a prohibition.

As already stated, a command that succeeds a prohibition conveys permissibility only. The position is once again different with regard to a prohibition: whenever a prohibition succeeds a command, it conveys illegality or tahrîm, not mere permissibility.

Injunctions, whether occurring in the Qur'ān or the Sunnah, are of
two types: explicit (ṣāriḥ) and implicit (ghayr ṣāriḥ). Explicit commands and prohibitions require total obedience without any allowance for individual circumstances and regardless of whether they are found to be rational or not, for it is in the essence of devotion (ʿibādah) that obedience does not depend on the rationality or otherwise of an injunction. The question arises as to whether one should adopt a literal approach to the enforcement of commands and prohibitions, or allow considerations of rationality and māṣlahah to play a part in the manner of their implementation. For example, the hadīth which provides that the owners of livestock must give ‘one in forty sheep’ in zakāh: should this provision be followed literally, or could we say that the equivalent price of one or many sheep could also be given in zakāh? Similarly, when the Qurʾān enjoins the Muslims concerning attendance at the Friday congregational prayers to ‘rush to the remembrance of God and abandon sale’ (al-Jumuʿah, 62:9),

Should the word rush (fasʿaw) be taken literally or in the sense of an emphasis on diligence at attending the Friday prayers? A similar question can be raised with regard to the second part of the same āyah which commands the Muslims to ‘abandon sale’ (wa dhariʿl-bay′). Should this be taken to imply that a sale that has occurred at the specified time is actually unlawful and void, or should it once again be taken as an order that requires perseverance and consistent observance? Should one follow the main objective of the Lawgiver or the literal requirements of the text which convey a command or a prohibition? These are but some of the questions that are asked concerning the correct understanding of Qurʾānic injunctions.

The implicit injunctions are also divided into two types. The first of these is when a ruling of the Qurʾān is conveyed in implicit terms but has been substantiated by the explicit terms of the hadīth, in which case it becomes equivalent to an explicit ruling. The second type of implicit injunction is when a ruling of the Qurʾān occurs, not in the form of a command or a prohibition, but as praise or condemnation of certain conduct. The precise import of such provisions cannot always be ascertained in respect of whether they convey an injunction or mere warning or recommendation as the case may be. Note, for example, the text which reads that God ‘does not love the prodigals’ (al-ʿAʿrāf, 7:31).
The text of this āyāh does not indicate the precise legal or religious enormity of extravagance, and it cannot be ascertained whether extravagance is prohibited or merely disapproved of.

Another question that merits attention in the study of commands and prohibitions is related to the means that lead to the performance of a command, or the avoidance of a prohibition. The question is whether the means should also be covered by the rules that regulate their ends. Briefly, the answer to this question is in the affirmative. The means that lead to the observance of commands and prohibitions are covered by the same ruling which applies to the command/prohibition in the first place. This is indicated by the legal maxim ‘What is essential for the completion of a wājib itself becomes a wājib’. We may here refer to two different situations, one of which is that the means to a wājib may be the subject matter of a separate command, in which case the matter would fall outside the scope of our discussion, for in that case the means and the ends are each regulated by their own rules. An example of this is ablution (wudū’), which is complementary to ṣalāh but is regulated under a separate command; and, secondly, when the means on which a wājib depends is not the subject of separate ruling. This is our main area of concern here and the ‘ulamā’ have generally held that the means here becomes a wājib under the same command that governs the end. Thus, if performing the ḥajj necessitates travelling to Mecca, then this activity is also covered by the initial command and becomes an integral part of it. Similarly, if the Qur’ānic command concerning consultation (Al ‘Imrān, 3:159) cannot be implemented without creating a consultative assembly, then this too becomes a requirement for the same command. We may thus conclude by saying that the means to a wājib becomes a part of that wājib if the means in question is not the subject of a separate command.

A mujtahid who deduces the law from a given text must be adequately familiar with the language of the Qur’ān, and must know that the ahkām are not only expressed in the imperative but that a praise or a promise of reward may in effect be equivalent to a command. Similarly, a mere denunciation, a threat of punishment in the Hereafter, or a reference to the adverse consequences of a form of conduct, may be equivalent to a prohibition. The distinction as to whether a command in the Qur’ān conveys an obligation (wujūb),
a recommendation (nadib) or mere permissibility (ibāḥah) must be determined in the light of the objectives of the Shari'ah as well as by looking at the meaning of the words of the Qur'ān. To determine the value (hukm) of a command, attention is paid not only to the grammatical form of the words in which it is conveyed, but also to the general objectives of the law. This is equally true of a prohibitory text. To determine whether a prohibition conveys actual tahrīm or mere reprehension (karahah) is not always easily understood from the words of the nusūs. Only a portion of the nusūs convey a precise meaning by virtue of the clarity of their language. In Shatibi’s estimation, a much larger portion of the nusūs of the Qur’ān cannot be determined by reference to the linguistic forms in which they are expressed only. The mujtahid must therefore be fully informed of the general principles and objectives of the Shari'ah so as to be able to determine the precise values of the nusūs and the commands or prohibitions they contain.

NOTES

2. This is one of the several āyāt which occur in the Qur’ān concerning the privacy of one’s home.
4. Ibid., p. 361; Shawkānī, Irshād, p. 91.
7. Abū Zahrah, Usūl, p. 75; Badrān, Usūl, p. 362.
10. Ghazālī, Mustaṣfā, I, 83; Āmīdī, Itkām, IV, 211; Tabrīzī, Mishkāt, I, 554; hadith no. 1769.
12. Shawkānī, Irshād, pp. 98–9; Badrān, Usūl, p. 364.
21. Ibid.
22. Abū Dāwūd, Sunan, II, 410, hadith no. 1567; Ghazâlî, Mustaṣfâ, I, 159.

23. For a detailed treatment of commands and prohibitions see Shāṭibi, Muwâfaqât, III, 90–140.

24. Ibid., III, 92.

25. Ibid., III, 93.


27. Shāṭibi, Muwâfaqât, III, 90.
Naskh (Abrogation)

Literally, naskh means ‘obliteration’, such as in nasakhat al-rīh athar al-masby, meaning ‘the wind obliterated the footprint’. Naskh also means transcription or transfer (al-naql wa al-tahwil) of something from one state to another while its essence remains unchanged. In this sense, naskh has been used in the Qur’ānic āyah which reads: ‘inna kunnā nastansikhu mā kuntum ta’malūn’, that is, ‘Verily We write all that you do’ (al-Jāthiyah, 45:29). This usage of naskh can also be seen in the familiar Arabic expressions tansukh al-arwāḥ (reincarnation) and tanāsukh al-mawārīth (the transfer of inheritance from persons to persons). The ‘ulamā’ have differed as to which of these two meanings of naskh is the literal (haqiqi) as opposed to that which might be metaphorical (majāzī). Some ‘ulamā’, including Abū Bakr al-Bāqillānī and al-Ghazālī, have held that ‘naskh’ is a homonym and applies equally to either of its two meanings. According to the majority view, however, obliteration (al-raťf wa al-izālah) is the primary, and transcription or transfer is the secondary meaning of naskh.¹

Naskh may be defined as the suspension or replacement of one Shari‘ah ruling by another, provided that the latter is of a subsequent origin, and that the two rulings are enacted separately from one another. According to this definition, naskh operates with regard to the rules of Shari‘ah only, a proviso which precludes the application of naskh to rules that are founded in rationality (‘aql) alone. The hukm, or ruling, in this definition not only includes commands and prohibitions but also the three intermediate categories of recommended, reprehensible and mubah. The requirement that the two rulings must be separate means that each must be enacted in a separate text, for
when they both occur in one and the same passage, it is likely that
one complements or qualifies the other, or that one may embody a
condition or an exception to the other.\(^2\)

Abrogation applies almost exclusively to the Qur'ān and the Sunnah;
its application to *ijmā'\(^*\) and *qiyyās*, as will later be explained, has been
generally overruled. And even then, the application of *naskh* to the
Qur'ān and Sunnah is confined, in terms of time, to one period only,
which is the lifetime of the Prophet. There is, in other words, no
*naskh* after the demise of the Prophet. But during his lifetime, there
were instances when some of the rulings of the Qur'ān and Sunnah
were either totally or partially repealed by subsequent rulings. This
was due mainly to the change of circumstances in the life of the
community and the fact that the revelation of the Qur'ān spanned a
period of twenty-three years. The 'ulamā' are unanimous on the
occurrence of *naskh* in the Sunnah. It is, however, with regard to the
occurrence of *naskh* in the Qur'ān on which there is some disagree-
ment, both in principle and on the number of instances in which
*naskh* is said to have occurred in the Qur'ān.\(^3\)

Abrogation is, by and large, a Medinan phenomenon which occurred
as a result of the changes that the Muslim community encountered
following the Prophet's migration to Medina. Certain rules were intro-
duced, at the early stage of the advent of Islam, that were designed
to win over the hearts of the people. An example of this is the number
of daily prayers which was initially fixed at two but was later increased
to five. Similarly, *mut'ah*, or temporary marriage, was initially permit-
ted but was subsequently prohibited when the Prophet migrated to
Medina.\(^4\) These and similar changes were effected in the *nusūs* at a
time when the Muslim community acquired sovereign authority, and
fresh legislation was deemed necessary to regulate its life in the
new environment of Medina. The basic philosophy of *naskh* is thus
generally acknowledged to be a realisation of benefit for the people,
which ensured harmony between the law and the prevailing con-
ditions of society.

Some Ḥanafī and Mu'tazili scholars have held the view that *ijmā'\(^*\)
can abrogate a ruling of the Qur'ān or the Sunnah. The proponents
of this view have claimed that it was due to *ijmā'\(^*\) that ‘Umar ibn
al-Khaṭṭāb discontinued the share of the *mu'allafah al-qulūb* in the
*zakāh*. These were persons of influence whose friendship and co-
operation was deemed to be beneficial to Islam.\(^5\) The Qur'ān assigned
them a share in *zakāh* (al-Tawbah, 9:60), but this was discontinued
apparently because the *mujtahidūn* of the time reached a unanimous
agreement to that effect. The correct view, however, is that owing to differences of opinion that are recorded on this matter, no *ijmāʾ* could be claimed to have materialised. Besides, the majority of *ulamāʾ* have held that *ijmāʾ* neither abrogates nor can be abrogated itself; and at any rate *ijmāʾ* cannot abrogate a *naṣṣ* of the Qurʾān or the Sunnah, for a valid *ijmāʾ* may never be concluded in contradiction to the Qurʾān or the Sunnah in the first place. Al-Āmidī elaborates this as follows: the *ḥukm* which the *ijmāʾ* seeks to repeal might be founded in a *naṣṣ*, another *ijmāʾ* or *qiyyās*. The first is not possible, for the *ijmāʾ* which seeks to abrogate the *naṣṣ* of Qurʾān or Sunnah is either based on an indication (*dalāl*) or not. If it is not based on any *dalāl*, then it is likely to be erroneous, and if it is based on a *dalāl* this could either be a *naṣṣ* or *qiyyās*. If the basis (*sanād*) of *ijmāʾ* is a *qiyyās*, then abrogation is not permissible (as *qiyyās* must not violate *ijmāʾ*); and if the *sanād* of *ijmāʾ* is a *naṣṣ*, then abrogation is by that *naṣṣ*, not by *ijmāʾ*. Moreover, a ruling of *ijmāʾ* cannot be abrogated by the Qurʾān or Sunnah simply because the Qurʾān and Sunnah precede *ijmāʾ* and the abrogator (*al-nasīkh*) must in all cases precede the abrogated (*al-manstikh*). The Muʿtazīlī scholars and also the Hanāfi scholar ʿĪsā ibn Abān, have, on the other hand, held that *ijmāʾ* may abrogate the *naṣṣ* and give as an example the Qurʾānic text on the share of *muʿallaflah al-qulūb* which was abrogated by the *ijmāʾ* of the Companions. The jumhūr have replied that this was a case not of abrogation, but of the termination of a *ḥukm* because of the termination of its *ʿillah*. This is explained further by the fact that the share of the *muʿallaflah al-qulūb* was discontinued by ʿUmar ibn al-Khaṭṭāb on grounds of Shariʿah-oriented policy (*al-siyārah al-sharʿiyah*), which is explained in the caliph’s widely quoted phrase that ‘God has exalted Islam, and it is no longer in need of their favour.’

According to the general rule, a Qurʾānic *naṣṣ* or a *mutawātāt hadīth* cannot be abrogated by a weaker hadīth, by *ijmāʾ* or by *qiyyās*. For they are not of equal authority to the *naṣṣ*. This is, in fact, the main argument in support of the rule, already referred to, that no abrogation of the *naṣṣ* is possible after the demise of the Prophet, for the Qurʾān and the Sunnah ceased to be revealed with his demise. Since nothing weaker than the Qurʾān and Sunnah can abrogate anything in either of these sources, abrogation, to all intents and purposes, came to an end with the death of the Prophet. *Ijmāʾ*, *qiyyās* and *ijtiḥād*, being weaker in comparison to the *nusūs*, cannot abrogate the rules of divine revelation.

It is in view of these and similar considerations that the *ulamāʾ*
have arrived at the general rule that *ijmāʾ* can neither abrogate nor be abrogated itself. Abrogation in other words is generally not relevant to *ijmāʾ*. The preferable view, however, is that *ijmāʾ* cannot abrogate the rulings of the Qurʾān, the Sunnah or of another *ijmāʾ* that is founded in the Qurʾān, Sunnah or *qiyyās*. However, a subsequent *ijmāʾ* may abrogate an existing *ijmāʾ* in consideration of public interest (*maṣlahah mursalah*) or custom (*ʿurf*). This would in theory appear to be the only situation in which *ijmāʾ* could operate as an abrogator.

And finally, since the principal function of *qiyyās* is to extend the rulings of the Qurʾān and Sunnah to similar cases, it can never operate in the opposite direction, namely, to repeal a text of the Qurʾān or Sunnah. Broadly speaking, *qiyyās* has no place in the theory of *naskh*: *qiyyās* cannot be an abrogator, basically because it is weaker than the *naṣṣ* and *ijmāʾ* and thus cannot abrogate either. Nor can *qiyyās* itself be abrogated, for *qiyyās* is normally based on a textual ruling and is bound to remain valid for as long as the original text remains valid. It is thus inconceivable that a *qiyyās* could be abrogated while the text in which it is founded remains in force. Furthermore, an established analogy is not exactly abrogated by a subsequent analogy. If the first analogy is based on the Qurʾān or Sunnah, then a conflicting analogy would presumably be erroneous. Besides, the two analogies can coexist and be counted as two *ijtihādi* opinions without the one necessarily abrogating the other, for the rule concerning *ijtihād* is that the mujtahid deserves a reward for his effort even if his *ijtihād* is incorrect. In short, *naskh* basically applies to binding proofs, and *qiyyās* is not one of them.

In his *Risālah*, Imām Shāfiʿi has maintained the view that *naskh* is not a form of annulment (*ilghāt*); rather, it is a suspension or termination of one ruling by another. *Naskh* in this sense is a form of explanation (*bayān*) which does not entail a total rejection of the original ruling. *Naskh* is explanatory in the sense that it tells us of the termination of a particular ruling, the manner and the time of its termination, whether the whole of a ruling or only a part of it is terminated and, of course, the new ruling which is to take its place. However, the majority of *ʿulamāʾ* do not accept the view that *naskh* is a form of *bayān*. The fact that *naskh* terminates and puts an end to a ruling differentiates it from *bayān*, and when a ruling is terminated, it cannot be explained.

There may be instances of conflict between two texts which, after scrutiny, may turn out to be apparent rather than real, and it may be possible to reconcile them and to eliminate the conflict. One of the
two texts may be general ('āmm) and the other specific (khāṣṣ), in which case the rules of interpretation and takhsīs (specification) must be applied so as to eliminate the conflict as much as possible. If the two texts cannot be so reconciled, then the one that is stronger in respect of authenticity (thubīt) is to be preferred. If, for example, there is a conflict between the Qurʾān and a solitary hadith, the latter is weaker and must therefore give way to the Qurʾān. The solitary, or āḥād, hadith may also be abrogated by the mutawātir, the mashhūr or another āḥād that is clearer in meaning or is supported by a stronger chain of narration (īsnād). But if the two texts happen to be equal on all of these points, then the prohibitory text is to be given priority over the permissive. Furthermore, in all instances of conflict, it is essential to determine the time factor. If this can be determined, then the later in time abrogates the earlier. The chronological sequence between the two rulings can, however, only be established by means of reliable reports, not by rational argumentation or analogical reasoning.\(^\text{12}\)

As a general rule, nakhkh is not applicable to the ‘perspicuous’ texts of the Qurʾān and hadith known as muhkamāt. A text of this nature is often worded in such a way as to preclude the possibility of repeal. There are also certain subjects to which abrogation does not apply; included among these are provisions pertaining to the attributes of God, belief in the principles of the faith, and the doctrine of tawḥīd and the Hereafter, which could not be subjected to abrogation. Another subject is the Shariʿah of Islam itself, which is the last of the revealed laws and can never be abrogated in its entirety.\(^\text{13}\) The ‘ulama‘ are also in agreement that rational matters and moral truths such as the virtue of doing justice or being good to one’s parents, and vices such as the enormity of telling lies, are not changeable and are therefore not open to abrogation. Thus a vice cannot be turned into a virtue or a virtue into a vice by the application of nakhkh. Similarly the nusūṣ of the Qurʾān and Sunnah that relate the occurrence of certain events in the past are not open to abrogation. To give an example, the following Qurʾānic text is not amenable to the application of nakhkh: ‘As for the Thamūd, they were destroyed by a terrible storm, whereas the Ād were destroyed by a furious and violent wind’ (al-Ḥāqqah, 69:5–6).

To apply nakhkh to such reports would imply the attribution of lying to its source, which cannot be entertained.\(^\text{14}\)
To summarise the foregoing: no abrogation can take place unless the following conditions are satisfied. First, that the text itself has not precluded the possibility of abrogation. An example of this is the Qur'anic provision concerning persons who are convicted of slanderous accusation (qadhf) that they may never be admitted as witnesses (al-Nur, 24:4). Similarly the hadith which proclaims that 'jihād shall remain valid till the day of resurrection'

obviously precludes the possibility of abrogating the permanent validity of jihād. Second, that the subject is open to the possibility of repeal. Thus the attributes of God and the principles of belief, moral virtues and rational truths, etc., are not open to abrogation. Third, that the abrogating text is of a later origin than the abrogated. Fourth, that the two texts are of equal strength in regard to authenticity (thubāt) and meaning (dalālah). Thus a textual ruling of the Qur'ān may be abrogated either by another Qur'ānic text of similar strength or by a mutawātir hadith, and, according to the Hanafis, even by a mashhūr hadith, as the latter is almost as strong as the mutawātir. By the same token, one mutawātir hadith may abrogate another. However, according to the preferred (rajihi) view, neither the Qur'ān nor the mutawātir hadith may be abrogated by a solitary hadith. According to Imam Shafi'i, however, the Sunnah, whether as mutawātir or āhād, may not abrogate the Qur'ān. Fifth, that the two texts are genuinely in conflict and can in no way be reconciled with one another. And lastly, that the two texts are separate and are not related to one another in the sense of one being the condition (shart), qualification (wasf) or exception (istiṣnā') to the other. For when this is the case, the issue is likely to be one of specification (takhṣīṣ), or qualification (taqyīd) rather than abrogation.

I. Types of Naskh

Abrogation may either be explicit (ṣarīḥ) or implicit (dimni). In the case of explicit abrogation, the abrogating text clearly repeals one ruling and substitutes another in its place. The facts of abrogation, including the chronological order of the two rulings, the fact that they are genuinely in conflict, and the nature of each of the two rulings, and so forth, can be ascertained in the relevant texts. An example of this is the hadith that states: 'I had forbidden you from
visiting graves. Nay, visit them, for they remind you of the Hereafter.

In another hadith the Prophet is reported to have said, ‘I had forbidden you from storing away the sacrificial meat because of the large crowds. You may now store it as you wish.’

The initial order not to store the sacrificial meat during the ‘id festival (‘id al-adhā) was given in view of the large number of visitors who attended the festival in Medina, where the Prophet desired that they should be provided with necessary foodstuffs. The restriction was later removed as the circumstances had changed. In both these examples, the text leaves no doubt as to the nature of the two rulings and all the other relevant facts of abrogation. An example of explicit abrogation in the Qur’an is the passage in sura al-Baqarah (2:142–144) with regard to the change in the direction of the qiblah from Jerusalem to the Ka’bah. The relevant text of the Qur’an as to the direction of the qiblah before and after the new ruling is clear, and leaves no doubt about the facts of abrogation and the nature of the change that was effected thereby.

In the case of implicit abrogation, the abrogating text does not clarify all the relevant facts. Instead, we have a situation where the Lawgiver introduces a ruling which is in conflict with a previous ruling and the two cannot be reconciled, while it remains somewhat doubtful whether the two rulings present a genuine case for abrogation. An example of implicit abrogation is the ruling in sura al-Baqarah (2:180) which permitted bequests to one’s parents and relatives. This was subsequently abrogated by another text (al-Nisā’, 4:11) which entitled legal heirs to specific shares in inheritance. Notwithstanding the fact that the two rulings are not diametrically opposed to one another and both could be implemented in certain cases, the majority of ‘ulamā’ have held that the initial ruling that validated bequests to relatives has
been abrogated by the rules of inheritance. They have held that the āyah of inheritance prescribes specific portions for legal heirs which can be properly implemented only if they are observed in their entirety, and that the Qur’ānic scheme of inheritance is precise and self-contained, and any outside interference is likely to upset the individual shares as well as the overall balance between them. Since bequest to legal heirs is seen as a principal source of such interference, it is totally forbidden. This analysis is substantiated by the explicit ruling of a hadith in which the Prophet is reported to have said: ‘God has assigned a portion to all who are entitled. Hence there shall be no bequest to legal heirs.’

Implicit abrogation has been sub-divided into two types: total abrogation (naskh kull) and partial abrogation (naskh juzʿi). In the case of the former, the whole of a particular nasṣ is abrogated by another, and a new ruling is enacted to replace it. This may be illustrated by a reference to the two Qur’ānic texts concerning the waiting period (‘iddah) of widows, which was initially prescribed to be one year but was subsequently changed to four months and ten days. The two texts are as follows:

Those of you who are about to die and leave widows should bequeath for their widows a year’s maintenance and residence; but if they leave the residence, you are not responsible for what they do of themselves (al-Baqarah, 2: 240).

Those of you who die and leave widows, the latter must observe a waiting period of four months and ten days; when they have fulfilled their term, you are not responsible for what they do of themselves (al-Baqarah, 2: 234).
As can be seen, the provision concerning the waiting period of widows in the first āyah has been totally replaced by the new ruling in the second. There is no doubt on the point that both of these rulings are exclusively concerned with the same subject, namely widows. Both āyāt require them to observe a waiting period, whose length varies in each, and only one must be observed, not both. The two passages are thus in conflict and the latter abrogates the former. But this is a case, as already noted, of an implicit naskh, in that the two āyāt do not expound, with complete clarity, all the facts of abrogation and it is not certain whether they are genuinely in conflict, for the term ‘a year’s maintenance and residence’ in the first āyah does not recur in the second. There is, in fact, no reference to either maintenance or residence in the second āyah. This would, for example, introduce an element of doubt concerning whether the two āyāt are concerned with different subjects of maintenance and ‘iddah respectively. There is, in other words, a level of discrepancy which might make it possible to apply each of the two rulings to different situations. This is not to argue against the majority view which seems to be the settled law, but merely to explain why an abrogation of this type has been classified as implicit naskh.

Partial abrogation (naskh juzʿī) is a form of naskh in which one text is only partially abrogated by another, while the remaining part continues to be operative. An example of this is the Qur’ānic āyah of qadhf (slanderous accusation), which has been partially repealed by the āyah of imprecation (liʿān). The two texts are as follows:

Those who accuse chaste women [of adultery] and then fail to bring four witnesses to prove it shall be flogged with eighty lashes (al-Nūr, 24:4).

والذين يرمون المحصنات ثم لم يأتوا بأربعة شهادة فاجلدوهم

Those who accuse their spouses and have no witnesses, other than their own words, to support their claim, must take four solemn oaths in the name of God and testify that they are telling the truth (al-Nūr, 24:6).

والذين يرمون أزواجهم ولم يكن لهم شهداء إلا أنفسهم

فشهادة أحدهم بأربعة شهادات بالله إنه ممن الصادقين

The first āyah lays down the general rule that anyone, be it a spouse or otherwise, who accuses chaste women of zinā must produce four
witnesses for proof. The second āyāh provides that if the accuser happens to be a spouse who cannot provide four witnesses and yet insists on pursuing the charge of zinā, he may take four solemn oaths to take the place of four witnesses. This is to be followed, as the text continues, by a statement in which the husband invokes the curse of God upon himself if he tells a lie. The ruling of the first text has thus been repealed by the second text insofar as it concerns a married couple.²³

It will be noted that the text of the Qurʾān has two distinctive features, namely, the words of the text, and the ruling, or hukm, that it conveys. Reading and reciting the words of the Qurʾān, even if its ruling is abrogated, still commands spiritual merit. The words are still regarded as part of the Qurʾān and salah can be performed by reciting them. It is on the basis of this distinction between the words and the rulings of the Qurʾān that naskh has once again been classified into three types. The first and the most typical variety of abrogation is referred to as naskh al-hukm, or naskh in which the ruling alone is abrogated while the words of the text are retained. All the examples we have given so far of the incidence of naskh in the Qurʾān fall into this category. Thus the words of the Qurʾānic text concerning bequests to relatives (al-Baqarah, 2:180) and the one concerning the ‘iddah of widows (al-Baqarah, 2:240) are still a part of the Qurʾān despite the fact that they have both been abrogated. We still recite them as such, but do not apply the law that they convey. The other two varieties of naskh, respectively referred to as naskh al-tilāwah (sometimes as naskh al-qirāʾah), that is abrogation of the words of the text while the ruling is retained, and naskh al-hukm wa al-tilāwah, that is abrogation of both the words and the ruling — are rather rare and the examples which we have are not supported by conclusive evidence. Having said this, however, we might add that, except for a minority of Muʿtazili scholars, the ‘ulamāʾ are generally in agreement on the occurrence of abrogation in both these forms.²⁴ An example of naskh al-tilāwah is the passage which, according to a report attributed to ʿUmar ibn al-Khaṭṭāb, was a part of the Qurʾān, although the passage in question does not appear in the standard text. However, the ruling conveyed by the passage in question still represents authoritative law. The reported version of this text provides: ‘When a married man or a married woman commits zinā, their punishment shall be stoning as a retribution ordained by God.’²⁵
In the event where the words of the text, and the law that they convey, are both repealed, then the text in question is of little significance. According to a report which is attributed to the Prophet's widow, 'Ā'ishah, it had been revealed in the Qur'ān that ten clear suckings by a child make marriage unlawful between that child and others who drank the same woman's milk. Then it was abrogated and substituted by five suckings and it was then that the Messenger of God died. The initial ruling which required ten suckings was read into the text of the Qur'ān. The ruling was then repealed and the words in which it was conveyed were also omitted from the text. However since neither of these reports is established by tawātur, they are not included in the Qur'ān. The position now, according to the majority of 'ulamā', is that either five clear suckings, or any amount which reaches the stomach, even if it be one large sucking, constitutes the grounds of prohibition.²⁶

According to the majority (jumhūr) view, the Qur'ān and the Sunnah may be abrogated by themselves or by one another. In this sense, abrogation may be once again classified into the following varieties. (1) Abrogation of the Qur'ān by the Qur'ān, which has already been illustrated. (2) Abrogation of the Sunnah by the Sunnah. This too has been illustrated by the two hadith which we quoted under the rubric of explicit abrogation. (3) Abrogation of the Qur'ān by Sunnah. An example of this is the āyah of bequest in sūra al-Baqarah (2:180) which has been abrogated by the hadith that provides that 'there shall be no bequest to an heir'. It is generally agreed that 'the Qur'ān itself does not abrogate the āyah of bequest and there remains little doubt that it has been abrogated by the Sunnah'.²⁷ (4) Abrogation of the Sunnah by the Qur'ān. An example of this is the initial ruling of the Prophet which determined the qiblah in the direction of Jerusalem. When the Prophet migrated to Medina, he ordered the believers to pray in the direction of Jerusalem. This was later repealed by the Qur'ān (al-Baqarah, 2:144) which ordered the Muslims to turn their faces toward the holy mosque of the Ka'bah.²⁸ The Qur'ān, in other words, abrogated a practice that was initially authorised by the Sunnah. On a similar note, the obligation of fasting on the day of 'Āshūrā' was established by the Sunnah and this was in turn abrogated by the Qur'ānic text (al-Baqarah, 2:185) that commanded fasting during the month of Ramaḍān.
The main exception to the foregoing classification of *naskh* is taken by Imām Shafi’ī, the majority of the Mu’tazilah and Ahmad ibn Hanbal (according to one of two variant reports), who have validated the first two types of abrogation, but have overruled the validity of the remaining two. In their view, abrogation of the Qur’an by the Sunnah and vice versa is not valid. This is the conclusion al-Shafi’ī has drawn from his interpretation of a number of Qur’anic āyāt where it is indicated that the Qur’an can only be abrogated by the Qur’an itself. Thus we read in sūra al-Nahl (16:101): ‘And when We substitute one āyah in place of another āyah, and God knows best what He reveals.’

This text, according to al-Shafi’ī, is self-evident on the point that an āyah of the Qur’an can only be abrogated or replaced by another āyah. The fact that the āyah occurs twice in this text provides conclusive evidence that the Qur’an may not be abrogated by the Sunnah. This is confirmed by the word na’ti (We bring) in which God refers to Himself, which must mean that only the Qur’an can abrogate itself. The proper role of the Sunnah is therefore to explain, but not to abrogate, the Qur’an. In another place, the Qur’an reads: ‘None of our revelations do We abrogate or cause to be forgotten unless We substitute for them something better or similar (al-Baqarah, 2:106).

The text in this āyah is once again clear on the point that in the matter of *naskh*, the Qur’an refers only to itself. The Qur’an, in other words, is self-contained in regard to *naskh*, and this precludes the possibility of it being abrogated by the Sunnah. *Naskh* in the Qur’an, according to al-Shafi’ī, is a wholly internal phenomenon, and there is no evidence in the Qur’an to suggest that it can be abrogated by the Sunnah. Indeed the Qur’an asks the Prophet to declare that he himself cannot change any part of the Qur’an. This is the purport of the text in sūra Yūnus (10:15) which provides: ‘Say: it is not for me to change it of my own accord. I only follow what is revealed to me.’
It is thus not within the Prophet's terms of reference to abrogate the Qur'an on his own initiative. 'The Sunnah in principle', writes al-Shāfi'i, 'follows, substantiates and clarifies the Qur'an; it does not seek to abrogate the Book of God'. All this, al-Shāfi'i adds, is reinforced in yet another passage in the Qur'an where it is stated: 'God blots out or confirms what He pleases. With Him is the Mother of the Book' (al-Ra'd, 13:39).

The reference here is again to naskh and the source in which it originates is the Mother of the Book, that is, the Qur'an itself. The Sunnah, even the mutawātir Sunnah, may not abrogate the Qur'an. Al-Shāfi'i is equally categorical on the other limb of this theory, namely that the Qur'an does not abrogate the Sunnah either. Only the Sunnah can abrogate the Sunnah: mutawātir by mutawātir and ḍāḥd by ḍāḥd. Mutawātir may abrogate the ḍāḥd, but there is some disagreement on whether the ḍāḥd can abrogate the mutawātir. According to the preferred view, which is also held by al-Shāfi'i, the ḍāḥd, however, can abrogate the mutawātir. To illustrate this, al-Shafi'i refers to the incident when the congregation of worshippers at the mosque of Quba' were informed by a single person (khabar al-wāhid) of the change of the direction of the qiblah from Jerusalem to the Ka'bah; they acted upon it and turned their faces toward the Ka'bah. The fact that Jerusalem was the qiblah had been established by continuous, or mutawātir, Sunnah, but the congregation of Companions accepted the solitary report as the abrogator of the Sunnah.

Al-Shafi'i elaborates his doctrine further. If there existed any occasion for the Sunnah to abrogate the Qur'an or vice versa, the Prophet would be the first to say so. Thus in all cases where such an abrogation is warranted, there is bound to be a Sunnah of the Prophet to that effect, in which case the matter automatically becomes a part of the Sunnah. The Sunnah in other words is self-contained, and covers all possible cases of conflict and abrogation of the Qur'an by the Sunnah and vice versa. If any Sunnah is meant to be abrogated, the Prophet himself would do it by virtue of another Sunnah, hence there is no case for the abrogation of Sunnah by the Qur'an.

Al-Shafi'i considers it necessary for the abrogation of Sunnah that the Prophet should have informed the people specifically about it. If the Qur'an were to abrogate the Sunnah, while the Prophet has not indicated such to be the case, then, to give an example, all the
varieties of sale that the Prophet had banned prior to the revelation of the Qur’ānic āyah on the legality of sale (al-Baqarah, 2:275) would be rendered lawful with the revelation of this āyah. Similarly, the punishment of stoning for zinā authorised by the Prophet would be deemed abrogated by the variant ruling of one hundred lashes in sūra al-Nūr (24:2). In the case of theft, too, the Prophet did not punish anyone for theft below the value of one-quarter of a dinar, nor did he apply the prescribed punishment to the theft of unguarded (ghayr muhraz) property. These would all be deemed abrogated following the revelation of the āyah in sūra al-Mā’idah (5:38) which prescribes mutilation of the hand for theft without any qualification whatsoever. If we were to open this process, it would be likely to give rise to unwarranted claims of conflict and a fear of departure from the Sunnah.

Notwithstanding the strong case al-Shafi’i has made in support of his doctrine, the majority opinion, which admits abrogation of the Qur’ān and Sunnah by one another, is preferable as it is based on the factual evidence of having actually taken place. Al-Ghazālī is representative of the majority opinion on this when he writes that identity of source (taǰānus) is not necessary in naskh. The Qur’ān and Sunnah may abrogate one another as they are of the same provenance. While referring to al-Shafi’i’s doctrine, al-Ghazālī comments: ‘How can we sustain this in the face of the evidence that the Qur’ān never validated Jerusalem as the qiblah? It was validated by the Sunnah, but its abrogating text occurs in the Qur’ān. Likewise, the fasting of ‘Āshūrā was abrogated by the Qur’ānic provision concerning the fasting of Ramadān, while the former was only established by the Sunnah. Furthermore, the Qur’ānic āyah which permitted conjugal intercourse at night-time in Ramadān (al-Baqarah, 2:178) abrogated the prohibition that the Sunnah had previously imposed on conjugal relations during Ramadān.

II. Abrogation, Specification (Takhsīs) and Addition (Taz’īd)

Naskh and takhsīs resemble one another in that both tend to qualify or specify an original ruling in some way. This is particularly true, perhaps, of partial naskh, which really amounts to qualification or specification rather than repeal. We have already noted al-Shafi’i’s perception of naskh which draws close to the idea of the coexistence of two rulings and an explanation of one by the other. A certain
amount of confusion has also arisen between naskh and takhsis due to conceptual differences between the Hanafis and the majority of ‘ulama’ regarding naskh in that they tend to view naskh differently from one another. These differences of perspective have, however, been treated more pertinently in our discussion of the ‘āmm and the khāṣṣ. In this section, we shall outline the basic differences between naskh and takhsis without attempting to expound the differences between the various schools on the subject.

Naskh and takhsis differ from one another in that there is no real conflict in takhsis. The two texts, namely the general text and the specifying text, in effect complement one another. This is not, however, the case with naskh, in which it is necessary that the two rulings are genuinely in conflict and that they could not coexist. Another difference between naskh and takhsis is that naskh can occur in respect of either a general or a specific ruling whereas takhsis can, by definition, occur in respect of a general ruling only.36

As already stated, naskh is basically confined to the Qur’ān and Sunnah and can only be effected by the explicit rulings of divine revelation. Takhsis, on the other hand, can also occur on the grounds of rationality and circumstantial evidence. Naskh, in other words, can only occur by shar’ whereas takhsis can occur by rationality (‘aql), custom (‘urf) and other rational proofs. It would follow from this that takhsis (i.e. the specification or qualification of a general text) is possible by means of speculative evidence such as qiyās and solitary hadith. But in the case of naskh, a definitive ruling, that is a qat‘, can only be abrogated by another qat‘ ruling. Abrogation, in other words, is basically not operative with regard to speculative rulings.37

As already stated, in naskh it is essential that the abrogator (al-nāsikh) is later in time than the ruling it seeks to abrogate. There can be no naskh if this order is reversed, or even where the two rulings are known to have been simultaneous. But this is not a requirement of takhsis. With regard to takhsis, the Hanafis maintain that the ‘āmm and the khāṣṣ must in fact be either simultaneous or parallel in time. But according to the majority, the ‘āmm and the khāṣṣ can precede or succeed one another and they need not be in any particular chronological order. This is illustrated in the two āyāt regarding qadhf (slanderous accusation) and li‘ān (divorce by mutual imprecation) in sūra al-Nūr (24:4 and 6 respectively). The first was revealed in the form of a general law (‘āmm), but at a time when there was an occasion for its enforcement, and the Prophet was considering it when the second āyah was revealed and specified. This is in accordance with the view
of Imam al-Shafi‘i, where the general of the first is specified in respect particularly of a married couple. The Shafi‘i view here is based on the premise that the specifier of a general ruling need not be simultaneous or parallel in time with the general; it may be subsequent in time or parallel, or indeed any time when the need for specification may arise, regardless as to whether the initial ruling has been implemented or not.

The Hanafis, on the other hand, maintain that the two rulings above were separate and the Prophet attempted to implement the first as a general law; and it was then that the second āyāh was revealed and, therefore, partially abrogated the first even if the first had not in fact been implemented. Based on this analysis, the Hanafis also maintain that there is no naskh between the two āyāt in sura al-Anfāl (8:65 and 66 respectively) because they were parallel in time, and there is no evidence to suggest that there was an interval between them during which the first might have been implemented independently of the second. The two āyāt here indicate that one hundred steadfast Muslim warriors will vanquish one thousand unbelievers, according to the first, and two hundred according to the second. The question is basically over numbers and also, by implication, whether it might be permissible for a certain number of Muslim fighters to turn away from battle if confronted by a much large number of enemy soldiers.

Lastly, naskh does not apply to factual reports of events (akhbār), whereas takhsīs can occur in regard to factual reports. Thus a news report may be specified or qualified, but cannot be abrogated. The closest concept to abrogation in regard to reports is that they can be denied.

Another issue that arises concerning naskh is whether a subsequent addition (taz‘īd) to an existing text, which may be at variance with it, amounts to its abrogation. When new materials are added to an existing law, the added materials may fall into one of the following two categories. (1) The addition may be independent of the original text but relate to the same subject, such as adding a sixth salah to the existing five. Does this amount to the abrogation of the original ruling? The majority of ‘ulamā’ have answered this question in the negative, holding the view that the new addition does not overrule the existing law but merely adds a new element to it. (2) The new addition may not be independent of the original text in that it may be dealing with something that constitutes an integral part of the original ruling. A hypothetical example of this would be to add another unit (rak‘ah), or an additional prostration (sajdah), to one or more of the existing
obligatory prayers. Another example would be to add to the existing requirement of releasing a slave in expiation for breaking the fast a new condition that the slave has to be a Muslim. Does this kind of addition amount to the abrogation of the existing law? The 'ulama' have differed on this, but once again the majority have held the view that it does not amount to abrogation as it does not seek to overrule the original text. The Hanafis have held, however, that such an addition does amount to abrogation. It is on this ground that the Hanafis have considered the ruling of the āhād hadīth on the admissibility of one witness plus a solemn oath by the claimant to be an abrogation of the Qur'ānic text which enacts two witnesses as standard legal proof (al-Baqarah, 2:282). The abrogation, however, does not occur, not because the Hanafis consider the new addition to be immaterial, but because the āhād hadīth cannot repeal the mutawātir of the Qur'ān. The majority opinion does not regard this to be a case for abrogation, for the Qur'ānic text on the requirement of two witnesses does not preclude the possibility of proof by other methods. Since the original Qur'ānic text does not impose an obligatory command, it leaves open the possibility of recourse to alternative methods of proof.

III. The Argument against Naskh

As already stated, the 'ulama' are not unanimous about the occurrence of naskh in the Qur'ān. While al-Suyūṭī has claimed, in his Itqān fi 'Ulamā al-Qur'ān, twenty-one instances of naskh in the Qur'ān, Shāh Wali Allāh (d. 1762 AD) has only retained five of al-Suyūṭī's twenty-one cases as genuine, stating that all the rest can be reconciled. Another scholar, Abū Muslim al-İşfahānī (d. 934 AH) has, on the other hand, denied the incidence of abrogation in the Qur'ān altogether. The majority of 'ulama' have nevertheless acknowledged the occurrence of naskh in the Qur'ān on the authority of the Qur'ān itself. This is the conclusion that the majority have drawn from the relevant Qur'ānic passages. However, it will be noted that the counter-argument is also based on the same Qur'ānic passages that have been quoted in support of naskh. The following two āyāt need to be quoted again: 'None of our revelations do We abrogate nor cause to be forgotten unless We substitute for them something better or similar' (al-Baqarah, 2:106).
Elsewhere we read in sûra al-Nahl (16:101): ‘When We substitute one revelation for another, and God knows best what He reveals.’

To some commentators, the word ‘āyah’ in these passages refers not to the text of the Qur’ân itself, but to previous scriptures including the Torah and the Bible. An interpretation of this type would, of course, render the āyah under discussion irrelevant to the occurrence of naskh in the Qur’ân. Abû Muslim al-Isfahâni, a Mu’tazili scholar and author of a Qur’ân commentary (Jâmî’ al-Ta’wil), has held the view that all instances of so-called abrogation in the Qur’ân are in effect no more than qualifications and takhsîs of one text by another.* To al-Isfahâni, the word ‘āyah’ in these passages means not a portion of the Qur’ânic text, but ‘miracle’. To read this meaning in the first of the two passages quoted above would imply that God empowered each of His Messengers with miracles that none other possessed; that God provided each of His Messengers with superior miracles, one better than the other. That this is the correct meaning of the text is substantiated, al-Isfahâni adds, by the subsequent portion of the same passage (i.e. al-Baqarah, 2:106) which reads: ‘Do you not know that God is all-powerful?’

Thus this particular attribute of God relates more appropriately in this context to the subject of miracles than to the abrogation of one āyah by another. This interpretation finds further support in yet another portion of the same passage (al-Baqarah, 2:108) which provides in an address to the Muslim community: ‘Would you want to question your Prophet as Moses was questioned before?’

It is then explained that Moses was questioned by the Banî Isrâ’il regarding his miracles, not the abrogation as such. The word ‘āyah’, in the second passage (i.e. al-Nahl, 16:101) too means ‘miracle’. For ‘āyah’ literally means ‘sign’ and a miracle is a sign. Al-Isfahâni further argues: naskh is equivalent to ihtâl, that is, ‘falsification’ or rendering something invalid, and ihtâl as such has no place in the Qur’ân. This is what we learn from the Qur’ân itself, which reads in sûra Há-Mim
(41:42): ‘No falsehood can approach it [the Book] from any direction.’

In response to this, however, it is said that naskh is not identical with ibtal; that naskh, for all intents and purposes, means the suspension of a textual ruling, while the words of the text are often retained and not nullified.44

Two other points that al-Isfahānī has added to his interpretation are as follows. Supposing that the passages under consideration do mean abrogation, even then they do not confirm the actual occurrence of naskh but rather the possibility of it, and there is a difference between the two. Lastly, al-Isfahānī maintains that all instances of conflict in the Qur’ān are apparent rather than real, and can be reconciled and removed. This, he adds, is only logical of the Shari’ah, which is meant to be for all times; this is just another way of saying that it is not open to abrogation.45

Having explained al-Isfahānī’s refutation of the theory of naskh, it remains to be said that, according to the majority of ‘ulamā’, the occurrence of naskh in the Qur’ān is proven beyond dispute. It is not only confirmed by the clear text of the Qur’ān but an ijma has been claimed in its favour. Anyone who opposes it is thus going against the dictates of ijma.46 In the face of the foregoing disagreements, it is admittedly difficult to see the existence of a conclusive ijma on the point. But according to the rules of ijma, once an ijma is properly concluded, any subsequent differences of opinion will not invalidate it. Divergent views such as that of al-Isfahānī seem to have been treated in this light, and almost totally ignored.

The ‘ulamā have, however, given altogether different accounts of the incidents of naskh in the Qur’ān. There are some who have exaggerated the actual instances of abrogation, and this includes Ibn Ḥazm al-Zahiri, Wahbatullāh Ibn Salamah and Jamāl al-Dīn Ibn al-Jawzī (the author of Nawāsikh al-Qur’ān) who listed the incidents of naskh in the Qur’ān at 214, 213 and 247 respectively. The Mu’tazilah included even the slightest variations of the text in their calculations and held the incidents of naskh to be 500. ʿAbd al-Qādir al-Baghdādī identified sixty-six such incidents, whereas Jalāl al-Dīn al-Suyūṭī counted them at twenty-one cases; Shāh Wāli Allāh at five and Abū Muslim al-Isfahānī, as already noted, has denied naskh altogether. There is also a tendency among modern scholars, as I
shall presently elaborate, to reduce these allegations to the minimum possible.

The main reason behind the exaggerated figures relates to a certain overlap and confusion between naskh and takhṣīṣ, and a parallel confusion between naskh and termination of the effective cause (izālat al-sabab) of a particular hukm. A hukm may no longer be enforceable because it is no longer needed and the cause for which it was initially issued is no longer obtainable, and this is a different matter to that of abrogation. The case of mū’allafta al-qulūb in the Qur’ānic provision (al-Tawbah, 9:60) which entitled them to a share in zakāh, and which the caliph ‘Umar discontinued, illustrates our point. Similarly, a large number of Qur’ānic āyāt that advocated patience and tolerance towards the unbelievers were claimed to have been abrogated by the āyāt that authorised fighting the unbelievers. There was in reality no abrogation and both rulings were valid under different circumstances. The earlier āyāt applied at a time when the Muslims were small in number and weak, and the latter when they acquired military power.

The other two factors that explain the exaggerated accounts of naskh relate to the somewhat superficial view that scholars might have taken over the conflict of evidences, and also a mistaken perception of the pre-Islamic customs that were replaced by the Shari‘ah of Islam. The fact that the Qur‘ān confined the number of divorces to three, and of polygamy to four, and that it proscribed marriage with one’s step-mother and so forth did not mean that the preceding customary practices were abrogated. There was in fact no naskh; for naskh is by definition removal of one sharī‘ ruling by another, and there was no sharī‘ ruling prior to the advent of Islam. One can also find numerous instances of plausible conflict that are less than genuine and which present no occasion for naskh. Al-Suyūṭī has referred to many such cases, of which we refer only to the following.

There are two passages in the sūra al-Nisā’ both referring to orphans as follows: ‘If the guardian is affluent, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable’ (al-Nisā’, 4:6).

The above āyah is held by some to have been abrogated by the following: ‘Those who unjustly eat up the property of orphans, eat up fire into their own bodies’ (al-Nisā’, 4:10).
The relationship between the two *āyāt* is one of explanation in that the former specifies and explains what is not unjust and the latter addresses only what is deemed to be unjust. On a similar note, the two *āyāt* on charity which simply declare, ‘And spend of what We have provided for you’ (al-Munāfiqūn, 63:10)

‘And they spend out of what We have provided for them’ (al-Baqarah, 2:3)

were erroneously held to have been abrogated by the command concerning the payment of *zakāh*. There is no case for *naskh* here, simply because the two passages are concerned with optional charity whereas *zakāh* is a legal obligation and a particular kind of charity. The relationship between charity and *zakāh* may thus be seen as one of the general to the specific, there being no real occasion for *naskh*.

The arbitrary tone of such allegations becomes vividly clear when we note the claim that the *āyāh* of the sword (9:36) has, among others, abrogated such passages as ‘And speak fairly to the people’ (al-Baqarah, 2:83) and ‘Is not God the wisest of judges?’ (al-Tīn, 95:8).

There is obviously no genuine conflict of evidences and the assertion that abrogation has actually occurred is simply unwarranted.

In his book The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought (originally a doctoral dissertation), Abdul Hamid Abu Sulayman is critical of the classical approach to *naskh* and calls for a fresh and comprehensive understanding ‘of the technique of *naskh*...on a systematic and conceptual basis, not a legalistic one’. The author is of the view that the classical exposition of
naskh is unnecessarily restrictive as it tends to narrow down the ‘rich Islamic and Qur’anic experience’, and also indulges, in some instances at least, in a measure of exaggeration and excess. The author maintains that abrogation was primarily an historical, rather than juridical, phenomenon and ought to have been read in that context. This may be part of the reason why the jurists have found it difficult to establish the validity of abrogation by the direct evidence of the Qur’an or Sunnah. The argument is that the facts of naskh in regard to, for example, the āyah of the sword, as discussed below, were historical and were largely dictated by the prevailing pattern of relations between Muslims and non-Muslims at the time. Now, instead of understanding naskh as a circumstance of history, the ‘ulama’ turned it into a juridical doctrine of permanent validity. This classical concept of permanent abrogation is oblivious of the space-time element which, if taken into account, would have restricted the application of naskh to those circumstance alone.

The broad sweep of naskh was, however, taken so far as to invalidate a major portion of the Qur’an. This is precisely the case with regard to the āyah of the sword (āyah al-sayf) which reads: ‘And fight the polytheists all together as they fight you all together, and know that God is with those who restrain themselves’ (al-Tawbah, 9:36).

Influenced by the prevailing pattern of hostile relations with non-Muslims, ‘some jurists took an extreme position in interpreting this āyah’, and claimed that it abrogated all preceding āyāt pertaining to patience, tolerance and the right of others to self-determination. Although scholars are not in agreement on the exact number of āyāt that were abrogated as a result, Muṣṭafā Abū Zayd has found that the āyah of the sword abrogated no less than 140 āyāt in the Holy Book. Jurists who were inclined to stress the aggressive aspect of jihad could only do so by applying abrogation to a large number of Qur’anic āyāt, and ‘using abrogation in this manner has’, Abu Sulayman contests, ‘indeed narrowed the Qur’anic experience’ and undermined the egalitarian substance of its teachings. In many passages the Qur’ān calls for peace, compassion and forgiveness, and promotes a set of moral values such as moderation, humility, patience and tolerance whose scope could not be said to be confined to relations among Muslims alone.
The Muslim jurists of the second century hijrah, as al-Zuhayli informs us, considered war as the norm, rather than the exception, in relations with non-Muslims, and they were able to do so partly because of a certain exaggeration in the use and application of naskh. The reason behind this attitude was the need, then prevalent, to be in a state of constant readiness for battle in order to protect Islam. Under such political circumstances, it is not difficult to understand how abrogation was utilised as a means by which to strengthen the morale of the Muslims in facing their enemies. It is to be noted further that the position of the classical jurists which characterised war as the permanent pattern of relationship with non-Muslims, as al-Zuhayli points out, is not binding on anyone, and is not supported by the balance of evidence in the Qur’ān and Sunnah.

Ahmad Ḥasan has reached the conclusion that the classical theory of naskh cannot go back to the Prophet because we do not find any information from the Prophet about the existence of abrogated verses in the Qur’ān. Had any passages been actually repealed, the Prophet would have definitely drawn attention to it. It is further noted that the Companions differed among themselves with regard to the abrogation of certain verses. To give an example, Ibn ‘Umar is reported to have said, concerning the fast of Ramadān, that the āyah that declared ‘and for those who can do it [with hardship] there is ransom – the feeding of a man in need’ (al-Baqarah, 2:184)

وعلی الذين يطبقونه فدية طعام مسکین

has been abrogated by the text ‘And whoever of you is present, let him fast the month’ (al-Baqarah, 2:185).

فمن شهد منكم الشهر فليصممه

But Ibn ‘Abbas disagreed and said that the first āyah was still operative in the case of the elderly who may feed a poor man every day in lieu of each day of fasting. Almost every passage that is held to be abrogated by one Companion is questioned by another, and this would seem to confirm that they had not received any instructions concerning those passages from the Prophet. The fact that some Qur’ānic passages were subsequently modified and improved did not necessarily prove that they were abrogated. Since the Qur’ān is meant to be for all ages and climes, Ahmad Ḥasan tells us, it is inconceivable that the Prophet would have left such an important issue open
to disagreement and debate. Then all that remains to be said is that
the historical context of each revelation must be studied in conjunc-
tion with the alleged cases of naskh if the Qur’ān is to be adequately
understood.66

I conclude this section with two comments, one of which is con-
cerned with a particular variety of naskh, and the other with naskh as
a whole. My specific comment relates to naskh al-hukm wa’l-tilāwah,
or that variety of naskh in which both the ruling and words of the
Qur’ān have been abrogated. To include such a variety in the typology
of naskh is somewhat imaginary and presumptive, and no clear incidence
of it has been recorded. To admit such a hypothetical classification
within the rubric of naskh stretches the limits of speculation and opens
the door to unwarranted assertions over the integrity and complete-
ness of the Qur’ān. It is therefore suggested that naskh al-hukm
wa’l-tilāwah should be discarded altogether.

My general comment is that the theory of naskh and most of its
cited examples are also open to a variety of doubts. Naskh as a whole
is really too controversial to command the alleged support of the
majority (jumhūr) of Muslim scholars in its favour. To say that there
were instances where some of the rulings of Sunnah, or even of the
Qur’ān, were amended due to the change of circumstances is not in
doubt. But then to extend the scope of this essentially circumstantial
phenomenon to a juridical doctrine with a theory, definition and
typology of its own is less than warranted. Naskh is basically factual
and has little juridical substance of its own, nor does it seem to have
a direct bearing on the substance of legal theory. If there is a proven
case of amendment or abrogation of specific rules, we may include it
in our study of the jurū’ al-fiqh. For this is where naskh basically belongs,
and the prominence it has been given in the conventional scheme of
usūl al-fiqh is, perhaps, due for a revision. In all other cases of alleged
and unproven incidents of naskh, the normal course to take would
be to presume the continued validity of the original ruling or text as
under the doctrine of īstishāb (presumption of continuity) and, failing
that, to refer the matter to ījtihād. The exaggerated aspects of the
conventional theory of naskh should consequently be discarded and
naskh should be seen as no more than an incidental development in
the early history of the Sharī‘ah.
NOTES

2. Ibid.; Badrān, Uṣūl, p. 442.
4. Shāfi‘ī, Mūwaffaqāt, III, 63; Badrān, Uṣūl, p. 447.
7. Āmīdī, Iḥkām, III, 161; Tāj, Siyāsah, p. 28.
10. Āmīdī, Iḥkām, III, 163ff; Badrān, Uṣūl, p. 459.
12. Ghazâlî, Mustafā, I, 83; Badrān, Uṣūl, p. 455.
13. Ibid., I, 72.
15. Abū Dāwūd, Sunan, II, 702, hadith no. 2826; Abū Zahrah, Uṣūl, p. 150.
17. Hitū, Wajīz, p. 244; Khallāf, 'Ilm, p. 223.
18. Tabrīzī, Mīshkāt, I, 552, hadith no. 1762; Muslim, Sahih, p. 340.
19. Ibid., hadith no. 1762; Ghazâlî, Mustafā, I, 83; Āmīdī, Iḥkām, III, 181.
20. Another instance of explicit naskh in the Qur‘ān is the passage in sura al-Anfal (8:65–66) which encourages the Muslims to fight the unbelievers. The passage reads as follows: ‘If there be of you twenty steadfast persons, they shall overcome two hundred, and if there be one hundred of you, they shall overcome one thousand.’ The subsequent āyah reviewed these figures as follows: ‘Now God has lightened your burden...if there be of you one hundred steadfast persons, they shall overcome two hundred, and if there be of you one thousand, they shall overcome two thousand.’
21. Shāfi‘ī (Risālah, p. 69) has observed concerning these āyah that the abrogation of bequests to relatives by the āyah of inheritance is a probability only, but he adds that the 'īlamā‘ have held that the āyah of inheritance has abrogated the āyah of bequests. On the same page, Shāfi‘ī quotes the hadith that ‘there shall be no bequest to an heir’. It thus appears that in his view, the abrogation of bequest to legal heirs in the Qur‘ān is a probability which has been confirmed and explained by this and other hadith on the subject.
22. Shāfi‘ī, Risālah, p. 69; Abū Dāwūd, Sunan, II, 808, hadith no. 2864; Khallāf, 'Ilm, p. 224.
24. Āmīdī, Iḥkām, III, 141.
25. The Arabic version reads: ‘al-shaykhu wa'l-shaykhatu idha zanayā farjumūhumā al-batatah nakāllān min Allāh’. Both Ghazâlî (Mustafā, I, 80) and Āmīdī (Iḥkām, III, 141) have quoted it. ‘Umar b. al-Khattāb is quoted to have added: ‘Had it not been for fear of people saying that ‘Umar made an addition to the Qur‘ān, I would have added this to the text of the Qur‘ān.’
27. Hitū, Wajīz, p. 252. See also Qadri, Islamic Jurisprudence, p. 230.
28. Ibid.
30. Shafi‘i, Risâlah, p. 54ff; Amidi, Ihkâm, III, 156ff; Zuhayli, Usûl, p. 463.
31. Shafi‘i, Risâlah, p. 54.
32. Ibid., p. 177; Ghazâli, Mustasfâ, I, 81.
33. Shafi‘i, Risâlah, p. 102.
34. Ibid., pp. 57–8. In raising the fear of departure from the Sunnah, Shafi‘i was probably thinking of the doubts that would arise with regard to establishing the precise chronological order between the Qur’an and Sunnah in all possible cases of conflict. Since the Qur’an is generally authentic, any doubts of this nature are likely to undermine the Sunnah more than the Qur’an.
35. Ghazâli, Mustasfâ, I, 81; see also Amidi, Ihkâm, III, 150ff.
36. Ghazâli, Mustasfâ, I, 71; Badrân, Usûl, p. 452.
40. Şubhî al-Sâlih, (Mabâhiîth, p. 280) records the view that only ten of al-Suyûti’s twenty-one instances of naskh in the Qur’an are genuine and that all the rest can be reconciled.
41. Abû Zahrah, Usûl, p. 155; Denffer, Ulûm, p. 110.
42. Şubhî al-Sâlih, Mabâhiîth, p. 274.
43. Amidi, Ihkâm, III, 120.
44. Ibid., III, 124.
45. Abû Zahrah, Usûl, p. 155; Badrân, Usûl, p. 448.
46. Ghazâli, Mustasfâ, I, 72.
48. Abu Sulayman, The Islamic Theory, p. 84.
50. Ibid, p. 73.
51. Ibid, p. 36.
53. Abu Sulayman, The Islamic Theory, p. 36.
54. Al-Zuhayli, Āthâr al-Harîb, p. 130.
It must be noted at the outset that unlike the Qur’ān and Sunnah, *ijmāʾ* does not directly partake of divine revelation. As a doctrine and proof of Shari’ah, *ijmāʾ* is basically a rational proof. The theory of *ijmāʾ* is also clear on the point that it is a binding proof. But it seems that the very nature of the high status that is accorded to *ijmāʾ* has demanded that only an absolute and universal consensus would qualify, although absolute consensus on the rational content of *ijmāʾ* has often been difficult to obtain. It is only natural and reasonable to accept *ijmāʾ* as a reality and a valid concept in a relative sense, but factual evidence falls short of establishing the universality of *ijmāʾ*. The classical definition and the essential requirements of *ijmāʾ*, as laid down by the ‘ulamā’ of usul, are categorical on the point that nothing less than a universal consensus of the scholars of the Muslim community as a whole can be regarded as conclusive *ijmāʾ*. There is thus no room whatsoever for disagreement, or *ikhtilāf*, within the concept of *ijmāʾ*. The theory of *ijmāʾ* is equally unreceptive to the idea of relativity or a preponderance of agreement within its ranks.

The notion of a universal *ijmāʾ* was probably inspired by the ideal of the political unity of the ummah, and its unity in faith and *tawḥīd*, rather than total consensus on juridical matters. As evidence will show, *ijmāʾ* on particular issues, especially on matters that are open to *ijtiḥād*, is extremely difficult to prove. Thus the gap between the theory and practice of *ijmāʾ* remains a striking feature of this doctrine. A universal *ijmāʾ* can only be said to exist, as al-Shāfī‘ī has observed, on the obligatory duties, that is, the five pillars of the faith, and other such matters on which the Qur’ān and the Sunnah
are unambiguous and decisive. However, the weakness of such an observation becomes evident when one is reminded that *ijmā’* is redundant in the face of a decisive ruling of the Qur’ān or the Sunnah.

The *Shari’ah* has often been considered ‘a diversity within unity’. This is true in a general sense, in that there is unity in the essentials and in the broad outlines of the *ahkām*. But the same cannot be said of the detailed rulings of the jurists. It is admittedly true to say, again in a general sense, that the *ikhtilāf* of individual jurists, or of the various schools of law, are different manifestations of the same divine will and may therefore be regarded as an essential unity. But to expect universal consensus on *ijtihād* matters is totally unrealistic, as many prominent ‘ulamā’ have recognised.

The gap between the theory and practice of *ijmā’* is reflected in the difficulty that many jurists have acknowledged to exist in implementing its theoretical requirements. The absolute terms of the classical definition of *ijmā’* have hardly been fulfilled by conclusive factual evidence that would eliminate all levels of *ikhtilāf*. *Ijmā’* has often been claimed for rulings on which only a majority consensus had existed within or beyond a particular school. The proof and authenticity of *ijmā’* has, on the other hand, not received the kind of attention that has been given to the authentication of *hadith* through a reliable *isnād*. The only form of *ijmā’* that has been generally upheld is that of the Companions of the Prophet, which is partly due to their special status and not always due to their participation and consensus. With these introductory remarks, then, we may begin to examine the meaning and definition of *ijmā’*, and then proceed to discuss some of the issues we have raised.

**I. The Definition and Value of *Ijmā’***

*Ijmā’* is the verbal noun of the Arabic word *ajma’a*, which has two meanings: to determine and to agree upon something. To give an example of the former, the expression *ajma’a* fulān ‘alā kadhd, means that ‘so-and-so decided upon such-and-such’. This usage of *ajma’a* is found both in the Qur’ān and in the *hadith*. The other meaning of *ajma’a* is ‘unanimous agreement’. Hence the phrase *ajma’a* al-qawm ‘alā kadhd means ‘the people reached a unanimous agreement on such-and-such’. The second meaning of *ijmā’* often subsumes the first, in that whenever there is a unanimous agreement on something, there is also a decision on that matter. Whereas a decision can be
made by one individual or by many, unanimous agreement can only be reached by a plurality of individuals.

*Ijma* is defined as the unanimous agreement of the mujtahidin of the Muslim community of any period following the demise of the Prophet Muhammad on any matter. In this definition, the reference to the mujtahidin precludes the agreement of laymen from the purview of *ijma*. Similarly, the phrase ‘the mujtahidin of any period’, refers to period in which there exists a number of mujtahidin at the time an incident occurs. Hence it would be of no account if a mujtahid or a number of mujtahidin become available only after the occurrence of an incident. The reference in the definition to ‘any matter’ implies that *ijma* applies to all juridical (shari), intellectual (‘aqli), customary (‘urfi) and linguistic (lughawi) matters. Furthermore, shari, in this context is used in contradistinction to hissi, that is, matters which are perceptible to the senses and fall beyond the scope of *ijma*. Some ‘ulama have confined *ijma* to religious, and others to shari matters, but the majority of ‘ulama do not restrict *ijma* to either. Although the majority of jurists consider dogmatics (i’tiqadiyat) to fall within the ambit of *ijma*, some have expressed the view that *ijma* may not be invoked in support of such subjects as the existence of God or the truth of the Prophethood of Muhammad. The reason for this is that such beliefs precede *ijma* itself. *IJma* derives its validity from the nusus on the infallibility (‘ismah) of the ummah. These nusus, in turn, take for granted the existence of God and the Prophethood of Muhammad. Now if one attempts to cite *ijma* in support of these dogmas, this would amount to circumlocution. To illustrate this point further, it may be said that the Qur’an cannot be proved by the Sunnah, because the Qur’an precedes the Sunnah. Matters of a practical type which do not partake of the nature of tashri (legislation) do not constitute the proper subject of *ijma*. For example, the agreement of the Companions to send out troops to Syria or to Persia, or their agreement on setting up certain government departments, etc., did not constitute *ijma*; for these were practical decisions that were valid in connection with particular circumstances and did not bind the succeeding generations of Muslims. *Ijma* on a shari ruling, on the other hand, has a quality of permanence and its validity is not confined by a time limit.

Although the theory refuses to impose any restriction on the subject-matter of *ijma*, in actual terms the application of *ijma* is bound to be subject to some reservations. For example, *ijma* must have limited application in regard to rational and linguistic matters. To say that
lying is evil, or that ‘hand’ also means ‘power’, need not be supported by *ijmā‘*. In actual terms, *ijmā‘* has always been selective in determining its own subject-matter. It was perhaps in view of the dynamic nature of *ijmā‘* and its infallibility that the ‘ulama’ were persuaded not to impose any advance reservations on its scope.

It is clear from its definition that *ijmā‘* can only occur after the demise of the Prophet. For during his lifetime, the Prophet alone was the highest authority on Shari‘ah, hence the agreement or disagreement of others did not affect the overriding authority of the Prophet. In all probability, *ijmā‘* occurred for the first time among the Companions in the city of Medina. Following the demise of the Prophet, the Companions used to consult each other about 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 (*tabi‘īn*) 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. In this way, a fertile ground was created for the development of the theory of *ijmā‘*. The essence of *ijmā‘* 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. Differences of opinion are tolerated until a consensus emerges, and in the process there is no room for compulsion or the imposition of ideas upon the community.

*Ijmā‘* plays a crucial role in the development of Shari‘ah. The existing body of *fiqh* is the product of a long process of *ijtihād* and *ijmā‘*. Since *ijmā‘* reflects the natural evolution and acceptance of ideas in the life of the community, the basic notion of *ijmā‘* can never be expected to discontinue. The idea that *ijmā‘* came to a halt after the first three generation following the advent of Islam seems to be a by-product of the phenomenon known as the closure of the gate of *ijtihād*. Since *ijmā‘* originates in *ijtihād*, with the closure of the gate of *ijtihād*, it was expected that *ijmā‘* also came to a close. This is, however, no more than a superficial equation, as in all probability *ijmā‘* continued to play a role in consolidating and unifying the law after the supposed termination of *ijtihād*.

*Ijmā‘* ensures the correct interpretation of the Qur‘ān, the faithful understanding and transmission of the Sunnah, and the legitimate use of *ijtihād*. 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 *ijtihād*. Only *ijmā‘* can put an end to doubt, and when it throws its weight behind a ruling, this becomes decisive and infallible. *Ijmā‘* has primarily been regarded as the instrument of conservatism and of preserving the heritage of the past. This is obvious enough in the sense that whatever is accepted by the entire Muslim community as true and correct must be accepted as such. However, *ijmā‘* is also an instrument of tolerance and of the evolution of ideas in such directions as may reflect the vision of the scholars in the light of the fresh educational and cultural achievements of the community. According to one observer, ‘clearly this principle [i.e. *ijmā‘*] provides Islam with a potential for freedom of movement and a capacity for evolution. It furnishes a desirable corrective against the dead letter of personal authority. It has proved itself, at least in the past, an outstanding factor in the adaptability of Islam.’

*Ijmā‘* enhances the authority of rules that are of speculative origin. Speculative rules do not carry a binding force, but once an *ijmā‘* is held in their favour, they become definite and binding. Instances can be cited, for example, where the Companions have, by their *ijmā‘*, upheld the ruling of a solitary *hadīth*. In such cases, the ruling in question is elevated to a binding rule of law. For example, the prohibition concerning unlawful conjunction, that is simultaneous marriage to the close relatives of one’s wife, is a definitive ruling which is based on *ijmā‘*, despite the fact that the basis of this *ijmā‘* is a solitary *hadīth* – namely the *hadīth* that prohibits simultaneous marriage to the maternal or paternal aunt of one’s wife. Similarly, the grandmother is entitled to a share in inheritance, and this is a *qaf‘ī* ruling of *ijmā‘* that is based on a solitary *hadīth*. The *hadīth* in question is reported by al-Mughirah ibn Shu‘bāh to the effect that the Prophet assigned to the grandmother the portion of one-sixth. *Ijmā‘* has also played a role in regard to *hadīth* that were not equally known to all the mujtahidūn especially during the period preceding the collection and compilation of *hadīth*. It was through *ijmā‘* that some scholars were informed of the existence of certain *hadīth*.

And lastly, *ijmā‘* represents authority. Once an *ijmā‘* is established it tends to become an authority in its own right, and its roots in the primary sources are gradually weakened or even lost. It then becomes common practice to quote the law without reference to the relevant sources. It is partly due to the significance of *ijmā‘* that the incentive to quote the authority tends to weaken. This is, according to Shah
Wali Allāh, one of the reasons that induced the jurists to recognise *ijmā' as the third source of the *Shari'ah*.

II. The Essential Requirements (*Arkān*) of *Ijma'*

Whenever an issue arises and attracts the attention of the *mujtahidūn* of the Muslim community at the time of its incidence, and they reach a unanimous agreement on its ruling, it is implied that the ruling so agreed upon is the correct and authoritative ruling of the *Shari'ah*, provided that the following conditions are fulfilled.

1. That there are a number of *mujtahidūn* available at the time when the issue is encountered, as consensus can never exist unless there is a plurality of concurrent opinion. Should there be a situation where a plurality of *mujtahidūn* could not be obtained, or when there is only a single *mujtahid* in the community, no *ijmā'* could be expected to materialise.

2. According to the majority of 'ulama', unanimity (*ittifaq*) is a prerequisite of *ijmā'. All the *mujtahidūn*, regardless of their locality, race, colour and school or following, must reach a consensus on a juridical opinion at the time an issue arises. The presence of a dissenting view, even on the part of a small minority, precludes the possibility of *ijmā'. If, for example, the *mujtahidūn* of Mecca and Medina, or those of Iraq, or the *mujtahidūn* of the family of the Prophet, or the Sunnī 'ulama' without the agreement of their Shī'ī counterparts agree upon a ruling, no *ijmā' will materialise. The majority of 'ulama' maintain that lay opinion is not taken into account: in every field of learning, only the opinion of the learned is relevant to *ijmā'. Al-Āmidī, however, prefers the minority view, attributed to Abī Bakr al-Baqillānī and others, to the effect that *ijmā' includes the agreement of both the laymen and the *mujtahidūn*, the reason being that *iṣmah*, which is the doctrinal basis of *ijmā', is a grace of God bestowed on the whole of the community. It would therefore be improper to turn the property of the entire community into a privilege of the *mujtahidūn*. The majority view is, however, based on the analysis that the *mujtahidūn*, in their capacity as the constituents of *ijmā', merely represent the community, and therefore no change is proposed in the original locus of *iṣmah*.

3. The agreement of the *mujtahidūn* must be demonstrated by their expressed opinion on a particular issue. This may be verbal or in writing, such as by giving a *fatwā* in either of these forms, or it may be actual, when, for example, a judge adjudicates the issue in question;
or it may be that every mujtahid expresses an opinion and, after gathering their views, they are found to be in agreement. Similarly, the mujtahidūn may give their views collectively when, for example, the mujtahidūn of the Muslim world assemble at the time an issue is encountered and reach a consensus over its ruling.

(4) As a corollary of the second condition above, ijma is the agreement of all the mujtahidūn, and not a mere majority among them; for so long as a dissenting opinion exists, there is the possibility that one side is in error, and no ijma can be envisaged in that situation, for ijma is a decisive proof that must be founded on certainty. However, according to Ibn Jarir al-Ṭabarī, Abū Bakr al-Rāzī, one of the two views of Ahmad ibn Hanbal and Shāh Wali Allāh, ijma may be concluded by a majority opinion. But al-Amidi prefers the majority view on this point, which requires the participation of all mujtahidūn.12

Ijma must also fulfill three conditions (shurāt) which are as follows.

1. The mujtahidūn who participate in ijma must qualify as upright individuals, and the minimum of this requirement is that they are admissible as witnesses in the courts of justice.
2. The constituents of ijma are clear of pernicious innovation (bid'ah) and heresy. If the bid'ah is one that casts doubt on the faith of its advocator and renders him a non-Muslim, he is disqualified. Even a lesser degree of misguided bid'ah which is actively pursued by inviting others to embrace it disqualifies the mujtahid from the ranks of ijma. This was the reason why the opposition of the Rawafid Shi'ah was not given any credit in the title to leadership of the first two caliphs, nor to that of the Khārijites in regard to the imamate of 'Ali. (3) The constituents of ijma are qualified to carry out ijtihād, especially when the issue requires specialised knowledge in particular areas of Shari'ah. They must, in other words, be able to form a considered opinion on the matter.

Then there are conditions that are the subject of disagreement among the ulama, and they include: (1) that only the mujtahidūn among the Companions qualify. The majority has rejected this; (2) that the constituents of ijma belong to the family of the Prophet; (3) that the participants of ijma have all passed away; (4) that they are residents of Medina; (5) that ijma does not proceed on a matter on which the earlier ulama (al-salaf) were in disagreement. This last condition, which is held by some Shafiis and the Ahl al-Hadith, is also rejected by the jumhūr.13

In regard to the rules of fiqh, it is the ijma of the fuqahā alone that
is taken into account. According to the majority view, if a faqih is known to have actively invited the people to bid'ah, he is excluded from ijma, otherwise he is included in the ranks of ahl al-ijma. The Hanafis preclude a transgressor (fasiq) and one who does not act upon his doctrine from being among the ahl al-ijma, whereas the Shafi'is and some Malikis maintain that a mere transgression is no disqualification. Some fugaha' have held that ijma is concluded only with the disappearance of the generation (ingirad al-‘asr), that is, when the mujtahidun who took part in it have all passed away. For if any one of them were known to be alive, there would still be a possibility that he might change his view, in which case the ijma would collapse. A corollary of this rule is that ijma is retrospective, in that it only binds succeeding generations but not its own constituents.

The majority of jurists, however, maintain that this is not a condition of ijma and that ijma not only binds the next generation but also its own participants, as it would only be reasonable to expect that if ijma did not bind its participants, it should not bind anyone else either. With regard to the tacit ijma (for which see below), too, some jurists have held that it is concluded only after the death of its participants, so that it can be established that none of them have subsequently expressed an opinion; for when they break their silence they will no longer be regarded as silent participants, and may even turn a tacit ijma into an explicit one.

The majority of ‘ulama', nevertheless, refuse to attach any importance to the ‘disappearance of the generation', for in view of the overlapping of generations (tadakhul al-‘asr), it is impossible to distinguish the end of one generation from the beginning of the next. Thus the period of the Companions cannot be clearly distinguished from that of the Successors, nor can any other period be so distinguished from its preceding or succeeding generations. However, al-Ghazali has, to all intents and purposes, resolved this question by stating that 'for the formation of ijma, it is enough that agreement should have taken place, even if only for an instant'.

When ijma fulfils the foregoing requirements, it becomes binding (wajib) on everyone. Consequently, the mujtahidun of a subsequent age are no longer at liberty to exercise fresh ijtihad on the same issue for, once it is concluded, ijma is not open to amendment or abrogation (naskh). The rules of naskh are not relevant to ijma in the sense that ijma can neither repeal nor be repealed. This is the majority view, although some jurists have stated that the constituents of ijma themselves are entitled to repeal their own ijma and to enact another
one in its place. But once an *ijmāʿ* is finalised, especially when all of its constituents have passed away, no further *ijmāʿ* may be concluded on the same subject. Should there be a second *ijmāʿ* on the same point, it will be of no account.*

III. The Proof (*Hujjīyyah*) of *Ijmāʿ*

What proof is there that *ijmāʿ* is a source of law? The ‘ulamāʾ’ have sought to justify *ijmāʿ* on the authority of the Qurʾān, the Sunnah, and reason. We shall presently discuss the ʿāyāt and hadīth that have been quoted in support of *ijmāʿ*. It should be noted at the outset, however, that the ‘ulamāʾ’ have on the whole maintained the impression that the textual evidence in support of *ijmāʿ* does not amount to conclusive proof. Having said this, one might add that both al-Ghazālī and al-ʿĀmīdī are of the view that when compared to the Qurʾān, the Sunnah provides a stronger argument in favour of *ijmāʿ*.

III. Ijmāʿ in the Qurʾān

The Qurʾān (al-Nisāʾ, 4:59) is explicit on the requirement of obedience to God, to His Messenger, and ‘those who are in charge of affairs’, the ʿulū al-amr.* It is also suggested that this ʿāyāh lends support to the infallibility of *ijmāʿ*. According to al-Fākhru l-Rāzī, since God has commanded obedience to the ʿulū al-amr, the judgement of the ʿulū al-amr must therefore be immune to error, for God cannot command obedience to anyone who is liable to committing errors.* The word ‘amr’ in this context is general and thus includes both secular and religious affairs. The former is discharged by the political rulers, whereas the latter is discharged by the ‘ulamāʾ’. According to a commentary attributed to Ibn ʿAbbās, ʿulū al-amr in this ʿāyāh refers to ‘ulamāʾ’, whereas other commentators have considered it to be a reference to the umārāʾ, that is, ‘rulers and commanders’. The *zāhir* of the text includes both, and enjoins obedience to each in their respective spheres. Hence, when the ʿulū al-amr in juridical matters, namely the mujtahidiin, reach a consensus on a ruling, it must be obeyed.* Further support for this conclusion can be found elsewhere in sūra al-Nisāʾ (4:83) which once again confirms the authority of the ʿulū al-amr next to the Prophet himself.*

The one ʿāyāh most frequently quoted in support of *ijmāʿ* occurs in sūra al-Nisāʾ (4:115), and is as follows:
And anyone who splits off from the Messenger after the guidance has become clear to him and follows a way other than that of the believers, We shall leave him in the path he has chosen, and land him in Hell. What an evil refuge!

The commentators observe that ‘the way of the believers’ in this āyah refers to their ‘agreement and the way that they have chosen’, in other words, to their consensus. Adherence to the way of the community is thus binding, and departure from it is forbidden. Departing from the believers’ way has been approximated to disobeying the Prophet, both of which are forbidden. There are several points that the commentators have emphasised concerning this āyah. However, before elaborating further, a brief discussion of the other Qur'ānic passages quoted in support of consensus would be useful.

The Qur'ān is expressive of the dignified status that God has bestowed on the Muslim community. Thus we read in sūra Al 'Imrān (3:110): ‘You are the best community that has been raised for mankind. You enjoin right and forbid evil and you believe in God.’

This āyah attests to some of the outstanding merits of the Muslim community. It is thus argued that had the community been capable of agreeing on an error, the Qur'ān would not have praised it in such terms. It is further noted that the contents of this āyah give some indication of the meaning of the phrase ‘the believers’ way’.

On the same theme, we read in sūra al-Baqarah (2:143): ‘Thus We have made you a middle nation, that you may be witnesses over mankind.’

Literally, wasat means ‘middle’, implying justice and balance, qualities which merit recognition of the agreed decision of the community and the rectitude of its way. Furthermore, it is by virtue of uprightness that God has bestowed upon the Muslim community the merit
of being a ‘witness over mankind’.\(^{27}\) In yet another reference to the ummah, the Qur’ān proclaims in sūra al-Ā’rāf (7:181): ‘And of those We created are a nation who direct others with truth and dispense justice on its basis.’

There are three other āyāt that need to be quoted. These are: ‘Cling firmly together to God’s rope and do not separate (Al’Imrān, 3:103).

This āyāh obviously forbids separation (tafarruq). Since opposition to the ijmā‘ is a form of tafarruq, it is therefore prohibited.\(^{28}\) ‘And in whatever you differ, the judgement remains with God’ (al-Shūrā, 42:10)

which implicitly approves that on which the community is in agreement;\(^{29}\) and ‘Then if you dispute over something, refer it to God and the Messenger’ (al-Nisā‘, 4:59).

By implication (i.e. divergent implication – mafhīm al-mukhdalafah), this āyāh too upholds the authority of all that is agreed upon by the community.\(^{30}\)

Having quoted all the foregoing āyāt, al-Ghazālī observes that ‘all of these are apparent indications [zawāhir] none of which amounts to a clear nāss on the subject of ijmā‘. Al-Ghazālī adds that of all these, āyāh 4:115 is closest to the point. For it renders adherence to the ‘believers’ way’ an obligation. Al-Shāfī‘i has also quoted it, and has drawn the conclusion that it provides clear authority for ijmā‘. According to him, following a way other than that of the believers is harām, and following the believers’ way is wājib.\(^{31}\) Despite this, al-Ghazālī explains that the main theme of this āyāh is a warning against disobedience to the Prophet and hostility against the believers. It requires the believers to give the Prophet active support and defend him against enemies. It is not enough for a believer merely to avoid causing hardship (mushaqqah) to the Prophet; he must actively help
him and obey all his commands and prohibitions. This is the main theme of the āyah. The Prophet himself has not given it a specific interpretation to warrant a departure from its manifest (zāhir) meaning. The Prophet, in other words, has not made any reference to ījma' in this context. From this analysis, it would appear that al-Ghazālī does not agree with the conclusion al-Shafi‘ī has drawn from this āyah.

Jalāl al-Dīn al-Suyūṭī’s interpretation of the same āyah is broadly in line with what al-Ghazālī had to say. There is no indication in al-Suyūṭī’s Tafsīr al-Jalālayn that this āyah provides an explicit authority for ījma'. ‘Following a path other than that of the believers’, according to both al-Suyūṭī and al-Shawkānī, means abandoning Islam. Al-Shawkānī adds: ‘A number of ‘ulamā’ have drawn the conclusion that this āyah provides the authority for ījma’. But this is an unwarranted conclusion, as following a way other than that of the believers means unbelief, that is, renouncing Islam in favour of another religion.’ Al-Shawkānī further suggests that the occasion of revelation (sha’n al-nuzil) of this āyah relates to the context of apostasy. It is reported that one Tu‘mah ibn Ubayraq had accused a Jew of a theft which Tu‘mah had committed himself. As a result of the revelation of this āyah, the Jew was cleared of the charge but Tu‘mah himself renounced Islam and fled to Mecca.32

Muḥammad ‘Abduh and his disciple, Rashīd Riḍā, have observed that the āyah under discussion was revealed concerning the ‘way of the believers’ during the lifetime of the Prophet, and its application must be confined to that period. For hostility toward the Prophet was only possible when he was alive. ‘Abduh further remarks that to quote this āyah in support of ījma’ leads to irrational conclusions, for it would amount to drawing a parallel between those who are threatened with the punishment of Hell and a mujtahid who differs with the opinion of others. A mujtahid, even when he takes an exception to the prevalent opinion, or to the path followed by other mujtahīdīn, is still a Muslim, and even merits a reward for his efforts. ‘Abduh concludes that the sha’n al-nuzūl of this āyah does not lend support to the conclusion that al-Shafi‘ī has drawn from it.33

It is further suggested that the threat in the āyah under discussion is primarily concerned with the first part of the āyah, namely disobeying the Prophet, and not necessarily with the second. Hence divergence from the believers’ way is lawful in the absence of opposition to the Prophet. The validity of this critique is, however, disputed, as the
āyah itself does not distinguish between the two parts as such, and therefore the threat applies equally to both.\(^{34}\)

Al-Āmīdī discusses the Qur’ānic āyāt concerning ijmā’, and concludes that they may give rise to a probability (zānn) but they do not impart positive knowledge. If we assume that ijmā’ is a decisive proof, then establishing its authority on the basis of speculative evidence is not enough. Speculative evidence would suffice only if ijmā’ were deemed to be a speculative doctrine, which is not the case.\(^{35}\)

### III.2 The Sunnah on Ijmā’

The hadīth which is most frequently quoted in support of ijmā’ reads: ‘My community shall never agree on an error.’\(^{36}\)

لا تجتمع أمتي على الضلالة.

The last word in this hadīth, namely al-ḍalālah, is rendered in some reports as al-khata’. The jurists have used the two words interchangeably, but in the classical hadīth collections this hadīth has been recorded with the word al-ḍalālah.\(^{37}\) Al-Ghazālī has pointed out that this hadīth is not mutawātir and as such, it is not an absolute authority like the Qur’ān. The Qur’ān on the other hand is mutawātir but contains no nass on ijmā’. Having said this, however, al-Ghazālī adds that a number of prominent Companions have reported hadīth from the Prophet, which although different in their wording, are all in consonance on the theme of the infallibility of the community and its immunity from error.\(^{38}\) Leading figures among the Companions such as ‘Umar ibn al-Khaṭṭāb, ‘Abd Allāh ibn Mas‘ūd, Anas ibn Mālik, ‘Abd Allāh ibn ʿUmar, Abū Saʿīd al-Khudrī, Abū Hurayrah, Ḥudhayfah and others have reported hadīth which include the following:

My community shall never agree upon an error.

لا تجتمع أمتي على الخطأ.

God will not let my community agree upon an error.

لم يكن الله ليجمع أمتي على الضلالة.

I beseeched Almighty God not to bring my community to the point of agreeing on dalālah and He granted me this.
Those who seek the joy of residing in Paradise will follow the community, for Satan can chase an individual but he stands farther away from two people.

The hand of God is with the community and [its safety] is not endangered by isolated oppositions.

Whoever leaves the community or separates himself from it by the length of a span is breaking his bond with Islam.

A group of my ummah shall continue to remain on the right path. They will be the dominant force and will not be harmed by the opposition of opponents.

Whoever separates himself from the community and dies, dies the death of ignorance.

And finally, the well-known saying of 'Abd Allāh ibn Mas'ūd which is as follows: 'Whatever the Muslims deem to be good is good in the eyes of God.'

Having quoted these (and other) hadith, both al-Ghazālī and al-Āmīdī observe that their main theme and purport has not been opposed by the Companions, the Successors and others throughout the ages, and that everyone has agreed on their broad outline. The 'ulamā' have
continued to rely on them in their exposition of the general and detailed rules of the *Shari'ah*. In answer to the point that all these are solitary (*ahad*) reports which do not amount to a definitive proof, the same authors observe that the main purport of these *hadith* nevertheless conveys positive knowledge, and that the infallibility of the *ummah* is sustained by their collective weight.  

The point may be illustrated by saying that we know the courage of ‘Ali, the generosity of Ḥātim, the erudition of al-Shafi‘ī in *fiqh*, and the esteem in which the Prophet held his Companions, despite the absence of *mutawātir* reports on these subjects. Although the foregoing *hadith* are all *ahad* and could be subjected to doubt if taken individually, their collective import may, nevertheless, not be denied.

As to the question whether ‘*dalalah*’ and ‘*khata‘*’ in these *hadith* (especially in the first four) could mean disbelief (*kufr*) and heresy (*bid‘ah*) with the view that the Prophet might have meant that his community shall not fall into disbelief, it is observed that *khata‘* is general and could include *kufr* but that *dalalah* does not, for *dalalah* only means an error or erroneous conduct. If *dalalah* meant disbelief, then the *ahadith* under discussion would fail to provide an authority for the infallibility of the *ummah*; but if it meant an error only, then they could provide such authority.

It is further observed that the article ‘*lā*’ in the *hadith* under discussion could either imply negation (*nafy*) or prohibition (*nahy*). If the latter, it would simply prohibit the people from deviation, and as such the *hadith* could not sustain the notion of infallibility for the *ummah*. According to another observer, the manifest (*zahir*) meaning of the *hadith* is that the *ummah* abstains from a collective agreement on an error. The *hadith*, in other words, precludes a general agreement on an error, but not the error itself. These are some of the doubts which have been expressed concerning the precise meaning of the *hadith*. They may or may not be correct, but so long as the *hadith* is open to such doubts, it cannot provide a decisive proof (*dalil qat‘i*) for *ijmā‘*.

Muhammad ‘Abduh has observed that the *hadith* in question does not speak of *ijmā‘* at all, nor does it sustain the notion of infallibility for the community. It is an exaggerated claim to read *ijmā‘* into this *hadith* regardless of whether reference is made to the agreement of the jurists or to that of the community at large.

It is further suggested that some of the foregoing *hadith* simply encourage fraternity and love among the members of the community, and, as such, do not envisage the notion of *ijmā‘* as a source of law. As for *hadith* number seven, although al-Ghazālī quotes it, it is not
relevant to *ijmā'*, as it obviously means that a group of the *ummah* shall remain on the right path, not the *ummah* as a whole. The Shi'ī Imamiyyah have quoted this *hadith* in support of their doctrine of the *ijmā* of *ahl al-bayt*, which refers to the members of the family of the Prophet.47

The word ‘*ummah*’ (or *jamā'ah*) in the foregoing *hadith* means, according to one view, the overwhelming majority of Muslims. This view is supported in a number of statements from the Companions. According to another view, *jamā'ah* refers to the scholars of the community only. The masses, it is argued, look up to the scholars from whom they acquire knowledge of law and religion, and it is the latter whose consensus is referred to in the relevant *hadith*. According to yet another opinion, *ummah* (and *jamā'ah*) refers only to the Companions, who are the founding fathers of the Muslim community. According to this interpretation, *ummah* and *jamā'ah* in all the foregoing *hadith* refer to the Companions only.48

And finally, *ummah* and *jamā'ah* refer to the whole of the Muslim community and not to a particular section thereof. The grace of *‘ismah*, according to this view, is endowed on the whole of the community without any reservation or specification. This is the view of al-Shāfi‘ī, who wrote in his Risālah: ‘And we know that the people at large cannot agree on an error or on what may contradict the Sunnah of the Prophet.’49

Having discussed the *hadith* relating to *ijmā'*, Ahmad Hasan observes that they are inconclusive. All of them emphasise unity and integration. Some of them are predictive and others circumstantial: ‘They may mean *ijmā'*, or something else.’ Hence the argument that they provide the authority for *ijmā'* is ‘definitely subjective’. The same author elaborates that: (1) there was no idea of *ijmā'* as a doctrine of jurisprudence in the early period; (2) the jurists could not determine a definite meaning for ‘*ummah*’ or ‘*jamā'ah*’; and (3) *hadith* which convey a general meaning should not be restricted to a particular point of view.50

Notwithstanding the doubts and uncertainties in the *nuṣūṣ*, the majority of ‘*ulamā*’ have concluded that the consensus of all the *mujtahidūn* on a particular ruling is a sure indication that the word of truth has prevailed over their differences; that it is due to the strength of that truth that they have reached a consensus. This rational argument in support of *ijmā'* has been further advanced to the effect that consensus upon a *sharī'ī* ruling is bound to be founded on sound *ijtiḥād*. In exercising *ijtiḥād*, the *mujtahid* is normally guided by certain
rules and guidelines. *Ijtihād* often consists of an interpretation of the *nass*, or of a rational extension of its ruling. Even in the absence of a *nass*, *ijtihād* still observes both the letter and spirit of the sources that the *mujtahid* has mastered through his general knowledge. Since *ijtihād* is founded on sound authority in the first place, the unanimous agreement of all the *mujtahidūn* on a particular ruling indicates that there is clear authority in the *Sharīʿah* to sustain their consensus. In the event of this authority being weak or speculative, we can only expect disagreement (*ikhtilāf*), which would automatically preclude consensus. *Ijmāʿ*, in other words, accounts for its own authority.

IV. The Feasibility of *Ijmāʿ*

A number of *ʿulamāʾ*, including the Muʿtazili leader Ibrāhīm al-Nazzām and some Shiʿī *ʿulamāʾ*, have held that *ijmāʿ* in the way defined by the *jumhūr ʿulamāʾ* is not feasible. To ascertain the consensus of the *ʿulamāʾ* on any matter that is not obvious is just as impossible as their unanimity at any given moment on what they utter and what they eat.51 It may be possible to ascertain the broad outline of an agreement among the *mujtahidūn* on a particular matter, but to say that their consensus could be ascertained in such a way as to impart positive knowledge is not feasible. Since the *mujtahidūn* would normally be located in distant places, cities and continents, access to all of them and obtaining their views is beyond the bounds of practicality. Difficulties are also encountered in distinguishing a *mujtahid* from a non-*mujtahid*. Since it is the *mujtahidūn* whose consensus constitutes *ijmāʿ*, one must be able to identify them with certainty. Apart from the absence of clear criteria concerning the attributes of a *mujtahid*, there are some among them who have not achieved fame. Even granting that they could be known and numbered, there is still no guarantee to ensure that the *mujtahid* who gives an opinion will not change it before an *ijmāʿ* is reached. So long as this is possible, no *ijmāʿ* can be realised, for it is a condition of *ijmāʿ* that all the *mujtahidūn* be simultaneously in agreement.52 It is mainly due to these reasons that al-Shāfiʿī confines the occurrence of *ijmāʿ* to the obligatory duties alone, as he considers that, on matters other than these, *ijmāʿ* was not a realistic proposition.53

It is due partly to their concern over the feasibility of *ijmāʿ* that according to the *Zāhiris* and Imam Ahmad ibn Ḥanbal *ijmāʿ* refers to the consensus of the Companions alone. This is also the view of the Khārijites, albeit for them *ijmāʿ* is a proof if concluded before the split
and fitnah that followed the murder of the Caliph Uthmān. Imam Mālik, on the other hand, confines ijmāʿ to the people of Medina, and the Shiʿah Imamiyyah recognise only the agreement of the members of the Prophet’s family (ahl al-bayt). In Shiʿi jurisprudence, ijmāʿ is inextricably linked with the Sunnah, for the agreement of the ahl al-bayt (that is, their recognised imams), automatically becomes an integral part of the Sunnah. ‘In the Shiʿite view’, as Muṭahhari explains, ‘consensus goes back to the Sunnah of the Prophet...Consensus is not genuinely binding in its own right, rather it is binding inasmuch as it is a means of discovering the Sunnah.’*4 If there is any recognition of ijmāʿ in the Shiʿ doctrine, it is not because of the consensus as such but because it comprises, as indeed it must, the ruling of the infallible Imam. What the Imam rules is a proof in its own right independently of ijmāʿ, for he is the head and the leader of the ummah. No ijmāʿ can materialise in the absence of the Imam. In support of their argument that ijmāʿ is confined to the ahl al-bayt, the Shiʿi ‘ulama’ have referred to the Qurʾān (al-Ahzāb 33:33): ‘God wishes to cleanse you, the people of the house [of the Prophet], of impurities.’

The reference in this hadith, according to its Shiʿi interpreters, is to ‘Ali, Fāṭima, Ḥasan and Ḥusayn. The Sunnis have maintained, however, that the āyāh in sura al-Ahzāb was revealed regarding the wives of the Prophet and that the context in which it was revealed is different. Similarly, while quoting the foregoing Hadith, al-ʿAmidi observes: ‘Doubtless the ahl al-bayt enjoy a dignified status, but dignity and descent are not necessarily the criteria of one’s ability to carry out ijtihād.’*5 If there is any recognition of ijmāʿ in the Shiʿ doctrine, it is not because of the consensus as such but because it comprises, as indeed it must, the ruling of the infallible Imam. What the Imam rules is a proof in its own right independently of ijmāʿ, for he is the head and the leader of the ummah. No ijmāʿ can materialise in the absence of the Imam. In support of their argument that ijmāʿ is confined to the ahl al-bayt, the Shiʿi ‘ulama’ have referred to the Qurʾān (al-Ahzāb 33:33): ‘God wishes to cleanse you, the people of the house [of the Prophet], of impurities.’

The Shiʿi doctrine also relies on the hadith in which the Prophet is reported to have said, ‘I am leaving among you two weighty things which, if you hold by them, you will not go astray: The Book of God and my family.’

The reference in this hadith, according to its Shiʿi interpreters, is to ‘Ali, Fāṭima, Ḥasan and Ḥusayn. The Sunnis have maintained, however, that the āyāh in sura al-Ahzāb was revealed regarding the wives of the Prophet and that the context in which it was revealed is different. Similarly, while quoting the foregoing Hadith, al-ʿAmidi observes: ‘Doubtless the ahl al-bayt enjoy a dignified status, but dignity and descent are not necessarily the criteria of one’s ability to carry out ijtihād.’*5

There is yet another argument to suggest that ijmāʿ is neither possible nor, in fact, necessary. Since ijmāʿ is founded on ijtihād, the mujtahid must rely on an indication (dalil) in the sources which is
either decisive \((\text{qaf}^{\prime}i)\) or speculative \((\text{zanni})\). If the former is the case, the community is bound to know of it, for a decisive indication in the \(\text{nusus}\) could not remain hidden from the entire community. Hence there would be no need for \(\text{ijm\text{a}'}\) to substantiate the \(\text{nass}\) or to make it known to the people. Furthermore, when there is \(\text{qaf}^{\prime}i\) indication, then that itself is the authority, in which case \(\text{ijm\text{a}'}\) would be redundant. \(\text{Ijma}'\), in other words, can add nothing to the authority of a decisive \(\text{nass}\). But if the indication in the \(\text{nass}\) happens to be speculative, then once again there will be no case for \(\text{ijm\text{a}'}\): a speculative indication can only give rise to \(\text{ikhtilaf}\), not \(\text{ijm\text{a}'}\).\(^{57}\)

According to a report, 'Abd Allâh ibn Aḥmad ibn Ḥanbal quoted his father to have said: 'It is no more than a lie for any man to claim the existence of \(\text{ijm\text{a}'}\). Whoever claims \(\text{ijm\text{a}'}\) is telling a lie.'\(^{58}\) The jumhūr 'ulamā', however, maintain that \(\text{ijm\text{a}'}\) is possible and has occurred in the past, adding that those who deny it are only casting doubt on the possibility of something that has occurred. Note, for example, the \(\text{ijm\text{a}'}\) of the Companions on the exclusion of the son's son from inheritance, when there is a son; and their \(\text{ijm\text{a}'}\) on the rule that land in the conquered territories may not be distributed to the conquerors; or their ruling that half-brothers are counted as full brothers in the absence of the latter.\(^{59}\) This last rule is based on a \(\text{hadith}\) in which the Prophet counted them both as brothers without distinguishing one from the other.\(^{60}\) The \(\text{ijm\text{a}'}\) that is recorded on these issues became standard practice during the period of the first four caliphs, who often consulted the Companions and announced their collective decisions in public.\(^{61}\)

'Abd al-Wahhab Khallāf is of the view that \(\text{ijm\text{a}'}\) in accordance with its classical definition is not feasible in modern times. Khallāf adds that it is unlikely that \(\text{ijm\text{a}'}\) could be effectively utilised if it is left to Muslim individuals and communities without there being a measure of government intervention. But \(\text{ijm\text{a}'}\) could be feasible if it were to be facilitated by the ruling authorities. The government in every Muslim country could, for example, specify certain conditions for attainment to the rank of \(\text{mujtahid}\), and make this contingent upon obtaining a recognised certificate. This would enable every government to identify the \(\text{mujtahidin}\) and to verify their views when the occasion so required. When the views of all the \(\text{mujtahidin}\) throughout the Islamic lands concur upon a ruling concerning an issue, this becomes \(\text{ijm\text{a}'}\), and the ruling so arrived at becomes a binding \(\text{hukm}\) of the \(\text{Shari'ah}\) upon all the Muslims of the world.\(^{62}\)

The question is once again asked whether the classical definition
of *ijma* has ever been fulfilled at any period following the demise of the Prophet. Khalil answers this question in the negative, although some ‘ulamā’ maintain that the *ijma* of the Companions did fulfil these requirements. Khalil observes that anyone who scrutinises events during the period of the Companions will note that their *ijma* consisted of the agreement of the learned among them who were present at the time when an issue was deliberated, and the ruling that followed was a collective decision of the *shūrā*. When the Caliph Abu Bakr could not find the necessary guidance for settling a dispute in the Qur‘ān or the Sunnah, he would convene the community leaders for consultation, and if they agreed on an opinion, he would act upon it. The community leaders so convened did not include everyone; many were, in fact, on duty in Mecca, Syria, the Yemen, etc. There is nothing in the reports to suggest that Abu Bakr postponed the settlement of disputes until a time when all the *mujtahidūn* of the age in different cities reached an agreement. He would instead act on the collective decision of those who were present. The practice of ‘Umar ibn al-Khaṭṭāb corresponded with that of his predecessor, and this is what the *fuqahā* have referred to as *ijma*. This form of *ijma* was only practised during the period of the Companions, and intermittently under the Umayyads in al-Andalus when in the second Islamic century they set up a council of ‘ulamā’ for consultation in legislative affairs (*tashri‘*). References are found, in the works of some ‘ulamā’ of al-Andalus, to the effect that so-and-so was a ‘learned member’ of the council.

With the exception of these periods in the history of Islam, no collective *ijma* is known to have taken place on any juridical matter. The *mujtahidūn* were engaged in their juridical activities as individuals, whose views either agreed or disagreed with those of the other *mujtahidūn*. The most that a particular *mujtahid* was able to say on any particular matter was that ‘no disagreement is known to exist on the *hukm* of this or that incident’. 63

Zākī al-Dīn Sha’bān and Shaykh al-Khudari addressed some of the issues regarding *ijma* and observed the following. With regard to the difficulty in identifying the *mujtahidūn*, it is stated that the era of the Companions can be divided into two periods, that is the period of the first two caliphs (*‘asr al-shaykhayn*) and that of the other two caliphs, ‘Uthmān and ‘Alī. The number of *mujtahidūn* in the first period was relatively small and could be easily identified, but *ijma* became difficult during the second period as the *mujtahidūn* among the Companions began to reside in distant places, and matters were
further complicated as a result of political controversies and dissen-
sion that became prevalent. *Ijmā* became difficult in this period and
yet remained feasible in principle and did take place.

As for the point that the underlying basis (*sanad*) of *ijmā* is either
definitive or speculative, and that *ijmā* is basically redundant in both
cases, Sha’bān observes that this is not so. *Ijmā* still serves a purpose,
in the former situation, by providing reassurance and preventing
disagreement for, after all, the ruling of the underlying *sanad* may not
be well-known to everyone. Note, for example, that ’Umar ibn al-
Khaṭṭāb was either unaware or oblivious of the Qur’anic ruling on
dower (*mahār*) when a woman member of the audience where he
spoke drew his attention to the relevant *ʿayn* on the subject. And
secondly, when the *sanad* of *ijmā* is speculative, such as a ruling of *qiyās*
or the *ahād hadīth*, *ijmā* is still possible and serves an eminently useful
purpose in elevating the speculative evidence to a definitive ruling of
the Shari’ah. Many examples can be given of *ahād hadīth* that have
been supported by consensus and the ruling therein consequently
became definitive.  

V. Types of *Ijmā*

From the viewpoint of the manner of its occurrence, *ijmā* is divided
into two types: explicit *ijmā* (*al-ijmā al-sarih*), in which every mujtahid
expresses his opinion either verbally or by an action; and tacit *ijmā*
(*al-ijmā al-sukūt*), whereby some of the mujtahidūn of a particular age
give an expressed opinion concerning an incident while the rest
remain silent.

According to the jumhūr ‘ulamā’, explicit *ijmā* is definitive and
binding; it is unlawful to violate it and once properly concluded,
there remains no room for disagreement and *ijtihād*. Explicit *ijmā* can
either be verbal (*qawl*) or actual (*fiʿl*). In the former, the participants
of *ijmā* declare their views clearly, either verbally or in writing, after
deliberation, and reach a consensus on a ruling. In the case of actual
*ijmā*, the mujtahidūn show their consensus in their affirmative action
or abandonment of something. Verbal *ijmā* is generally considered
to be stronger than actual *ijmā*. This is because action can either
imply certainty or mere probability, which may accordingly down-
grade an *ijmā* from a binding *ijmā* to one that is merely recom-
mended. The Mu’tazilī İbrahim al-Nazzām and some Khārijīties and
Shī‘ī have held that *ijmā*, whether explicit or otherwise, is not a
proof. Tacit *ijmā* in particular is a presumptive *ijmā* which only
Ijma (Consensus of Opinion)

creates a probability (zann) but does not preclude the possibility of fresh ijtihab on the same issue. Since tacit ijma does not imply the definite agreement of all its participants, the 'ulama' have differed on its authority as a proof. The majority of 'ulama', including al-Shafi'i, Abü Bakr al-Baqillani, and some Hanafis such as 'Isa ibn Aban and the Mālikīs have held that it is not a proof and that it does not amount to more than the view of some individual mujtahidīn. But the Ḥanafis and Imam Ahmad ibn Ḥanbal have considered tacit ijma to be a proof, provided it is established that the mujtahid who has remained silent had known of the opinion of other mujtahidīn but then, having had ample time to investigate and to express an opinion, still chose to remain silent. If it is not known that the silence was due to fear or taqiyyah (hiding one's true opinion), or wariness of inviting disfavour and ridicule, then the silence of a mujtahid on an occasion where he ought to express an opinion when there was nothing to stop him from doing so, would be considered tantamount to agreeing with the existing opinion.

The proponents of tacit ijma have further pointed out that explicit agreement or open speech by all the mujtahidīn concerning an issue is neither customary nor possible. In every age, it is the usual practice that the leading 'ulama' give an opinion which is often accepted by others. Suppose that the entire ummah gathered in one place and shouted all at once saying that, 'we agree on such-and-such'. Even if this were possible, it would still not impart positive knowledge. For some of them might have remained silent due to fear, uncertainty or taqiyyah.

Further, the Hanafis draw a distinction between the 'concession' (rukhsah) and 'strict rule' ('azimah), and consider tacit ijma to be valid only with regard to the former. In order to establish a strict rule, ijma must be definitely stated or expressed by an act. The Hanafis are alone in validating tacit ijma. The Zāhiris refuse it altogether, while some Shafiis like al-Juwaynī, al-Ghazālī and al-Āmidī allow it with certain reservations. 'It is ijma', al-Ghazālī tells us, 'provided that the tacit agreement is accompanied by indications of approval on the part of those who are silent.' As already indicated, in order to qualify as valid proof, tacit ijma must fulfil the following six conditions: 1) the mujtahid knows the issue under deliberation; 2) sufficient time is given for investigation; 3) the issue is an ijtihab issue; 4) the issue arose prior to the establishment of the madhāhib, for otherwise the silence of a mujtahid may not necessarily imply his agreement but may be in deference to the position of the madhhhab he follows; 5) that silence is
not due to any fear or favour of the ruling authorities; and 6) that silence is not a definitive sign of either agreement or disagreement, as the former will fall under explicit ijma', and the latter will fail to qualify at all.\textsuperscript{68}

The majority opinion on this matter is considered to be preferable. For the silence of a mujtahid could be due to a variety of factors, and it would be arbitrary to lump them all together and say that silence definitely indicates consent. But despite the controversy it has aroused, tacit ijma' is by no means an exceptional case. On the contrary, it is suggested that most of what is known by the name of ijma' falls under this category.\textsuperscript{69}

From the viewpoint of authenticity and proof, ijma' is once again divided into two types: acquired ijma' (al-ijma' al-muḥassal) and transmitted ijma' (al-ijma' al-manqūl). The former is known to the mujtahid through direct participation and there remains no question about its proof. Transmitted ijma' is, on the other hand, known through narration and reporting, which is either mutawātir or ahād. According to the jumhūr, tawātur is not a prerequisite of all ijma'. When ijma' is received through mutawātir reports, it is definitive and binding, but ijma' that is transmitted by way of solitary reports is also acceptable, albeit it only amounts to a probability; it is, in other words, a zanni ijma' and compliance with it is not obligatory. Further details on this classification of ijma' appear in our discussion of the transmission of ijma' below.

The next topic that needs to be taken up in this context is the ‘Medinan consensus’ or ijma' ahl al-Madinah. According to the Mālikī ‘ulama’, since Medina was the centre of Islamic teaching, the ‘abode of hijrah’ (dār al-hijrah) and the place where most of the Companions resided, the consensus of its people is bound to command high authority. Although the majority of ‘ulamā’ have held that the Medinan ijma' is not a proof on its own, Imam Mālik held that it is. There is some disagreement among the disciples of Mālik as to the interpretation of the views of their Imam. Some of these disciples have observed that Imam Mālik had only meant that the ijma' of the people of Medina is a proof ‘from the viewpoint of narration and factual reporting’ (min jihah al-naql wa'l-riwayah) as they were closest to the sources of the Sharī'ah. Other Mālikī jurists have held that Mālik only meant the Medinan ijma' to be preferable but not exclusive. There are still others who say that Mālik had in mind the ijma' of the Companions alone.

The Medinan practice may consist of their consensus on the
narration of the rules of *Shari'ah* from the Prophet that are based on his sayings, acts, and tacit approvals. The sayings of the Prophet are the *hadith* which might have also been verified by Medinan practice. As for the acts of the Prophet, the Medinan consensus has it, for example, that the Prophet used to perform *ṣalāt al-ʿīd* in congregation; that he gave sermons from the pulpit facing the people with his back toward the qiblah. The Prophet's acts might at times have consisted of abandonment of something such as the Medinan consensus about the fact that there was no *adhan* and no *iqāmah* for the ʿīd prayer; that unlike the *adhan*, the *iqāmah* did not involve duplication (*tathniyah*); and that the martyrs of Uhud were not given a ceremonial bathing, nor did the Prophet perform any funeral prayers over them; and the fact also that the Prophet did not impose *zakah* on vegetables.70

The proponents of the Medinan *ijmāʿ* have sought to substantiate their views with *hadith* which include the following: ‘Medina is sacred, and throws out its dross as fire casts out the dross of metal’,

المدينة طيبة ينفي خبثها كما ينفي الكبير خبث الحديد.

and ‘Islam will cling to Medina as a serpent clings to its hole.’

إن الإسلام ليؤزر إلى المدينة كما تؤزر الحياة إلى جحرها.

The majority of jurists, however, maintain that these *hadith* merely speak of the dignity of Medina and its people. Even if the *hadith* are taken to rule out the presence of impurity in Medina, they do not mean that the rest of the ummah is impure, and even less that the Medinan *ijmāʿ* alone is authoritative. Had the sacred character of a place been a valid criterion, then one might say that the consensus of the people of Mecca would command even greater authority, as Mecca is the most virtuous of cities (*afdal al-bilād*) according to the *naṣṣ* of the Qurʾān. Furthermore, knowledge and competence in *ijtihad* are not confined to any particular place. This is the purport of the *hadith* in which the Prophet said: ‘My Companions are like stars. Whomsoever of them that you follow will guide you to the right path.’

أصحابي كالنجوم بأيهم أقتديتم اهتديتم.

This *hadith* pays no attention whatsoever to the place where a Companion might have resided.71 To this analysis, Ibn Ḥazm adds...
the point that there were, as we learn from the Qur'ān, profligates and transgressors (fussāq wa'l-munāfiqūn) in Medina just like other cities. The Companions were knowledgeable in the teachings of the Prophet wherever they were, within or outside Medina, and staying in Medina by itself did not necessarily enhance their standing in respect of knowledge, or the ability to carry out ijtihād.  

VI. The Basis (Sanad) of Ijma*

The sanad of ijma is defined as the shari evidence on which the mujtahidiin have relied as basis of their consensual ruling. Ijma needs to have a sanad, for without a sanad, it is likely to indulge in ra'y without a grounding in the nusūs. According to the majority of 'ulama', 1114 must be founded in a textual authority or in ijtihad. Al-Amidi points out that it is unlikely that the ummah might reach unanimity on something that has no foundation in the sources.  

The 'ulamā' are in agreement that ijma may be based on the Qur'ān or the Sunnah. An example of ijma based on the Qur'ān is the ijma on the prohibition of marriage with one's grandmother, which is, in turn, based on the āyah ‘forbidden to you are your mothers [ummahatukum]’ (al-Nīsā', 4:23).

An example of ijma based on Sunnah is the assignment of the share of one-sixth in inheritance for the grandmother, a ruling which is founded on an hadīth to the same effect. There is, however, disagreement as to whether ijma can be based on a ruling in the secondary proofs such as qiyās or maslahah.

There are three views on this point, the first of which is that ijma may not be founded on qiyās, for the simple reason that qiyās itself is subject to a variety of doubts. Since the authority of qiyās as a proof is not a subject on which the 'ulamā' are in agreement, how, then, could ijma be founded on it? It is further noted that the Companions did not reach a consensus on anything without the authority of the Qur'ān or the Sunnah. In all cases in which the Companions are known to have reached a consensus, at the root of it there has been some authority in the primary sources.

The second view is that qiyās in all of its varieties may form the basis of consensus, for qiyās itself consists of an analogy to the nasṣ. Relying on qiyās is therefore equivalent to relying on the nasṣ, and
when *ijma* is based on a *qiyaṣ*, it relies not on the personal views of the mujtahidūn but on the nāṣs of the Shari‘ah.

The third view on this subject is that when the effective cause (*i‘llah*) of *qiyaṣ* is clearly stated in the nāṣṣ, or when the *i‘llah* is indisputably obvious, then *qiyaṣ* may validly form the basis of *ijma*’. But when the *i‘llah* of *qiyaṣ* is hidden and no clear indication of it can be found in the *nusūṣ*, then it cannot form a sound foundation for *ijma*. Abū Zahrah considers this to be a sound opinion: when the *i‘llah* of *qiyaṣ* is indicated in the *nusūṣ*, reliance on *qiyaṣ* is tantamount to relying on the nāṣṣ itself.\(^75\) Instances could be cited of *ijma* that is founded upon analogy. To give an example, a father is entitled to guardianship over the person and property of his minor child. By *ijma* this right is also established for the grandfather regarding his minor grandchild. This ruling of *ijma* is founded upon an analogy between the father and grandfather. A similar example is given regarding the assignment of punishment for wine-drinking (*shurb*). This penalty is fixed at eighty lashes, and an *ijma* has been claimed in its support. When the Companions were deliberating the issue, ‘Ali ibn Abī Ṭālib drew an analogy between *shurb* and slanderous accusation (*qadhf*). Since *shurb* can lead to *qadhf*, the prescribed penalty for the latter was, by analogy, assigned to the former. The alleged *ijma* on this point has, however, been disputed in view of the fact that ‘Umar ibn al-Khaṭṭāb determined the *hadd* of *shurb* at forty lashes, a position which has been adopted by Ahmad ibn Ḥanbal. To claim an *ijma* on this point is therefore unwarranted.\(^75\)

*Ijma* may also be founded on *maslahah* and many examples of this can be found in the precedent of the Companions. One of these was the collection of the Qur‘ān in a single volume, which ‘Umar ibn al-Khaṭṭāb is said to have recommended to Abū Bakr on the basis specifically of public good and *maslahah*. Another example was the decision not to distribute the land of Iraq among the conquerors. ‘Abd al-Rahmān ibn ‘Awf and ‘Ammār ibn Yāsir were for the distribution, but ‘Umar, ‘Uthmān, ‘Ali and Mu‘ādh were against it. The latter view prevailed and became *ijma*. And then we note that the second call (*adhan*) for the Friday prayers was introduced on grounds of *maslahah*. There used to be only one *adhan* for Friday prayers during the period of Abū Bakr and ‘Umar, but later, when Medina expanded, a second *adhan* was introduced in order to publicise the occasion. Furthermore, Imam Mālik and Imam Abū Hanīfah gave *fatāwā* on the permissibility of giving *zakāh* to the descendants of Banū Hashim from the clan of the Prophet after the change in the
position of the Bayt al-Mal. We also note the fatwā by all the leading imams that the testimony of close relatives for one another, which was valid during the time of the Companions, was no longer to be admissible on the grounds of maslahah.77

It is generally assumed that ijma cannot materialise on a ruling without there being some evidence on which it might be founded, even if the evidence in question is not cited in support. When the subsequent generations of ‘ulamā’ refer to a ruling of ijma, they discuss and ascertain its existence and authenticity, but not its underlying evidence, for if we were to refer to the basic evidence of ijma, we would give credit to that evidence, not to ijma as a proof in its own right.78

VII. The Transmission of Ijma

As already noted, from the viewpoint of the reliability of its transmission, ijma is divided into two types: ‘acquired’ (muhassal) and ‘transmitted’ (manqūl). The first is concluded with the direct participation of the mujtahid without the mediation of reporters or transmitters. The mujtahid thus gains direct knowledge of the opinions of other mujtahidūn when they all reach a consensus on a ruling. But transmitted ijma is established by means of reports which may either be solitary (āhād) or conclusive (mutawātīr). In the case of transmission by tawātūr there is no problem of proof, but there is disagreement regarding ijma that is transmitted by way of solitary reports. We should note, however, that the Sunnah is supported by isnād and the kind of information that the ‘ulamā’ have compiled concerning the Sunnah has not been attempted with regard to ijma. It is therefore difficult to distinguish the definitive ijma from that which is based on probability alone.79 Al-Ghazālī points out that a solitary report is not sufficient to prove ijma, although some fuqahā have held otherwise. The reason is that ijma is a decisive proof whereas an āhād report amounts to no more than speculative evidence; thus, it cannot establish ijma.80

Al-Āmidī explains that a number of the ‘ulamā’ of the Shāfī‘i, Ḥanafī and Ḥanbali schools validate the proof of ijma by means of solitary reports, whereas another group of Ḥanafī and Shāfī ‘ulamā’ do not. All have nevertheless agreed that anything that is proved by means of a solitary report is speculative of proof (thubūl) even if definitive in respect of content (matn).81

Proof by means of tawātūr can only be claimed for the ijma of the
Companions; no other *ijmāʿ* is known to have been transmitted by *tawātūr*. This is the main reason why the *fuqahāʾ* have differed in their views concerning any *ijmāʿ* other than that of the Companions. A large number of the *ulamāʾ* of *usūl* have maintained that transmission through solitary reports amounts to speculative evidence only. When *ijmāʿ* is based on such evidence, it loses its value and the *ḥukm* for which *ijmāʿ* is claimed must be referred back to the source from which it was derived in the first place.82

**VIII. Reform Proposals**

The modern critics of *ijmāʿ* consider that *ijmāʿ* according to its classical definition fails to relate to the search for solutions to the problems of the community in modern times. *IJmāʿ* is hence retrospective and too slow a process to accommodate the problems of social change. These and other considerations concerning the relevance of *ijmāʿ* to social realities have prompted a response from modern scholars. We have already discussed the view of ‘Abd al-Wahhāb Khallāf in regard to the feasibility of *ijmāʿ*. Khallāf, however, was not the first to criticise *ijmāʿ*.

An early critique of *ijmāʿ* was advanced by Shāh Wālī Allāh Dihlawī (d. 1176/1762), who tried to bring *ijmāʿ* closer to reality and came out in support of ‘relativity’ in the concept of *ijmāʿ*. Dihlawī overruled the notion of universal consensus in favour of relative *ijmāʿ*. Dihlawī is also critical of the interpretation that is given to the *hadith* concerning *ijmāʿ*. He argues that the *hadith*, ‘My community shall never agree upon an error’ did not envisage *ijmāʿ* at all. Hence the correct meaning of this *hadith* should be determined in the light of another *hadith* which states that: ‘A section of my community will continue to remain on the right path’. *Ijmāʿ* in other words does not mean universal agreement but only the consensus of a limited number of *mujtahīdūn*. With regard to the other *hadith* that are quoted in support of *ijmāʿ*, Dihlawī maintains that the two principal aims of these *hadith* are the political unity of the *ummah*, and the integrity of the *Shariʿah*. The same author maintains that *ijmāʿ* can be justified on the basis of all such *hadith* that protect the unity and integrity of the community. But he adds that *ijmāʿ* was never meant to consist of the universal agreement of every member of the community (or of every learned member of the community for that matter), as this is plainly impossible to achieve. It has neither happened in the past nor could it conceivably happen in the future. *Ijmāʿ*, according to Shāh Wālī
Allāh, is the consensus of the ‘ulamā’ and men of authority in different towns and localities. In this sense, *ijmā* can be held anywhere at any time. The *ijmā* of the Companions during the caliphate of 'Umar ibn al-Khaṭṭāb, and the *ijmā* that was concluded in Mecca and Medina under the pious caliphs, are all examples of *ijmā* in its relative sense.53

Muhammad Iqbal is primarily concerned with the question of how to utilise the potential of *ijmā* in the process of modern statutory legislation. He considers it an important doctrine, but one that has remained largely theoretical. ‘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 *ijtihād* from individual representatives of schools to a Muslim legislative assembly... is the only possible form *ijmā* can take in modern times’.54 In such an assembly, the ‘ulamā’ should play a vital part, but it must also include in its ranks laymen who happen to possess a keen insight into affairs. Furthermore Iqbal draws a distinction between the two functions of *ijmā*, namely: discovering the law and implementing the law.

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 sūras known as ‘Mu’aqwaqzatain’ formed part of the Qurān 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 I venture to think, on the authority of Karkhī, that later generations are not bound by the decision of the Companions.55

It is thus clear that Iqbal retains the binding character of *ijmā* only insofar as it relates to points of fact, but not with regard to *ijmā* that is based on juridical *ijtihād*. This distinction between the factual and juridical *ijmā* will presumably not apply to the *ijmā* 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. It is basically a sound proposal. But to relate this to the idea of a distinction between the factual and *ijtihādī* *ijmā* seems questionable. Apart from the difficulty that might be involved in distinguishing a factual from a juridical *ijmā*, one can expect but little support for the view that the *ijmā* of the Companions on *ijtihādī* matters is not binding.

Iqbal’s views have, however, been criticised on other grounds. S.
M. Yusuf has observed that Iqbal was mistaken in trying to convert *ijma* into a modern legislative institution. Yusuf argues that *ijtihād* and *ijma* have never been the prerogatives of a political organisation, and any attempt to institutionalise *ijma* is bound to alter the nature of *ijma* and defeat its basic purpose, for *ijtihād* is a non-transferable right of every competent scholar, and a *mujtahid* accepted by the community by virtue of his recognised qualities, not through election campaigns or the award 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 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 organisation ‘that no one is able to lay his hands on Islam; when anyone tries to hammer Islam, he ultimately finds to his chagrin that he has only been beating in the air’.°

Ahmad Hasan finds some weaknesses in Yusuf’s criticism of Iqbal, and observes that ‘Dr Yusuf has probably not understood Iqbal’s view correctly.’ Hasan finds Iqbal’s view that *ijtihād* should be exercised collectively instead of being a preserve of the individual *mujtahidūn*, to be basically sound. *Ijtihād* today cannot be exercised in isolation. Modern conditions demand that it should be exercised collectively. A *mujtahid* may be an expert in Islamic learning, but he cannot claim to be perfectly acquainted with the social conditions of a country and the diverse nature of its problems.°° Ahmad Hasan goes on to point out that the legislative assembly is ‘the right place’ for the purpose of collective *ijtihād*, which would in turn provide an effective method of finding solutions to urgent problems.°°

Al-Sanhuri highlighted the potential benefits of *ijma* and its contribution to the development of a representative government when he rather tersely posed the question: ‘What is more democratic than to affirm that the will of the nation is the expression of the will of God Himself?’°° Hassan Ṭurābī also accentuated the role of *ijma* in the democratisation of the political system in Muslim societies, and called for a re-interpretation of *ijma*. The original consensus, according to Ṭurābī, ‘was not the consensus of the learned élite but the more popular consensus of the Muslim community enlightened by its more learned members’.°°

The late Shaykh of al-Azhar, Maḥmūd Shaltūt, observes that the
conditions of a conclusive *ijmāʾ*, especially that which requires the agreement of all the *mujtahidūn* of the *ummah*, is no more than a theoretical proposition that is never expressed in reality. *Ijmāʾ*, in reality, has often meant either the absence of disagreement (*'adam al-ʾilm bi'l-mukhālīf*), or the agreement of the majority only (*ittiḥāq al-kathrah*). Both of these are acceptable propositions which may form the basis of general legislation. Shaltūt goes on to quote in support the Qur’ānic *āyāh* in sūra al-Baqarah (2:286) that ‘God does not assign to any soul that which falls beyond its capacity’.

Shaltūt is not opposed to the institutionalisation of *ijmāʾ* provided that it does not violate the freedom of opinion that must in all eventualities be granted to the constituents of *ijmāʾ*. Consensus must never be subjected to a condition that subjugates freedom of opinion to the arbitrary exercise of political power. Shaltūt further adds that since the realisation of *maslahah* through consensus is the objective of *ijmāʾ*, *maslahah* is bound to vary according to the circumstances of time and place. Thus the *mujtahidūn* who participate in *ijmāʾ*, and their successors, should all be able to take into consideration a change of circumstances and it should be possible for them to review a previous *ijmāʾ* if this is deemed to be the only way to realise the *maslahah*. Should they arrive at a second *ijmāʾ*, this will nullify and replace the first, and constitute a binding authority on all members of the community.⁹¹

Badrān proposes a form of *ijmāʾ* which he says can be practised any time: this is the consensus of the *ʿulū al-amr* or of the *ummah* on a ruling that is not found in the textual sources, and may be founded on *raʾy*, in order to secure a benefit for the people, such as consensus on the leadership of a particular person, enacting a maximum limit on ownership of agricultural lands, and declaration of war. Since the *ʿulū al-amr* (those who are in charge of community affairs) are empowered to conclude this kind of *ijmāʾ* as and when they see occasion for it, it can be concluded at any time, but must have a strong consultative input. Such an *ijmāʾ*, Badrān adds, need not depend on the unanimity of all the *ʿulū al-amr*, and may be concluded even in the face of some opposition. In support of this, Badrān refers to the report of Ibn Jarīr al-Ṭabarī, Ahmad ibn Hanbal and Abū Bakr al-Rāzī to the effect that Abū Bakr was elected by *ijmāʾ* despite the opposition of ʿAlī, and that the Caliph ʿUmar returned from his trip
to Syria when he heard of the spread of cholera there after consulting the leading Companions. Abū Bakr and 'Umar also carried out consultation in administrative and judicial affairs. As we can see, the substance of Badrān's proposal is not very different from that of Iqbal, and even that of Shāh Wali Allāh. *Ijmā* must accordingly be made feasible and rendered into a practical proposition that can be utilised as an instrument of decision-making and legislation.

**Conclusion**

Under their classical definitions, *ijmā* and *ijtihād* were both subject to conditions that virtually consigned them to the realm of utopia. The unreality of these formulations is reflected in modern times in the experience of Muslim nations and their efforts to reform certain areas of the Shari'ah through the medium of statutory legislation. The juristic basis for some of the modern reforms introduced in the areas of marriage and divorce, for example, has been sought through novel interpretations of the relevant passages of the Qur'ān. Some of these reforms may rightly be regarded as instances of *ijtihād* in modern times, yet in none of these instances do the statutory texts or their explanatory memoranda make an open reference to *ijtihād* or *ijmā*. The total absence of these terms in modern statutes is a sad reflection of the unreality that is encountered in the strict definitions of these concepts. The classical definitions of *ijtihād* and *ijmā* might, at one time, have served the purpose of discouraging excessive diversity which was felt to threaten the very existence and integrity of the Shari'ah. But there is no compelling reason to justify the continued domination of a practice that was designed to bring *ijtihād* to a close. *Ijtiḥād* and *ijmā* were brought to a standstill, thanks to the extremely difficult conditions that were imposed on them, conditions which often ran counter to the enterprising and creative spirit that characterised the period of the pious caliphs and the early *Imams* of jurisprudence.

Dr Yusuf's criticism of Iqbal's proposed reform is based on the dubious assumption that an elected legislative assembly will not reflect the collective conscience of the community, and will unavoidably be used as an instrument of power politics. Although the cautious advice of this approach may be persuasive, the assumption behind it goes counter to the spirit of *maslahah* and of the theory of *ijmā* which endows the community with the divine trust of having the capacity and competence to make the right decisions. If one is to observe the
basic message of the textual authority in support of the 'ismah of the community, then one must trust the community itself to elect only those who will honour their collective conscience and their maslahah. In addition, Dr Yusuf's 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 Shari'ah law has reached alarming proportions, and any attempt to prolong it further will have to be exceedingly persuasive. While the need to take every precaution to safeguard the authentic spirit and natural strength of ijma is fully justified, this should not necessarily mean total inertia. The main issue in institutionalising ijma, as Shaltút has rightly assessed, is that freedom of opinion should be vouchsafed for the participants of ijma. This is the essence of the challenge that has to be met, not through a laissez-faire attitude toward ijtihad and ijma, but by nurturing judicious attitudes and by evolving correct methods and procedures to protect freedom of opinion. The consensus that is arrived at in this spirit will retain a great deal, if not all, of the most valuable features of ijma.

NOTES

1. In the Qur'an the phrase 'jaima'atu-amrakum' which occurs in sura Yunus (10:71) means 'determine your plan'. Similarly, 'fajma'atu kaydakum' in sura Taha (20:64), where the Prophet Noah addresses his estranged followers, means 'determine your trick'. The hadith 'la siyama liman lam yujma'al-siyama min al-layl' means that fasting is not valid unless it is determined (or intended) in advance, i.e. from the night before. For details see Amidi, Ihkam, I, 195; Shawkâni, Ishâd, p 70.

2. Amidi, Ihkâm, 1, 196; Shawkâni, Ishâd, p 71. Abû Zahrah and 'Abd al-Wâhhab Khallâf's definition of ijma differs with that of Amidi and Shawkâni on one point, namely the subject-matter of ijma which is confined to shar'i matters only (see Abû Zahrah, Usûl, p 136 and Khallâf, 'Ilm, p. 45).


4. According to one view, attributed to the Qâdi 'Abd al-Jabbâr, matters pertaining to warfare, agriculture, commerce, politics and administration are described as worldly affairs, and ijma is no authority regarding them. One reason given in support of this view is that the Prophet himself precluded these matters from the scope of the Sunnah and the same rule is to be applied to ijma. Amidi, however, confirms the majority view when he adds (in his Ihkâm, 1, 284) that these restrictions do not apply to ijma.
5. Abū Zahrah, Usūl, p. 165.
10. Shāh Wali Allāh, Qurrah, p. 40.
11. Āmīdī, Ihkām, I, 226. Bazdawi, however, distinguishes matters which do not require specialised knowledge from other matters, and suggests that no discrimination should be made between the layman and the jurists regarding the essentials of the faith. Ijma‘ is thus confined to the mujtahidūn only in regard to matters which require expert knowledge. See for details, Bazdawi, Usūl, III, 239.
15. Abū Zahrah, Usūl, p. 162.
20. Ghazālī, Mustasfā, I, 121.
23. The āyah (4:59) provides: ‘O you who believe, obey God and obey the Messenger, and those charged with authority among you.’
26. The āyah (4:83) provides: ‘If they would only refer it to the Messenger and those among them who hold command, those of them who investigate matters would have known about it’ (Irving’s translation, p. 45.)
27. Āmīdī, Ihkām, I, 211.
28. Ibid., I, 217; Ghazālī, Mustasfā, I, 111.
29. Ghazālī, Mustasfā, I, 111.
30. Ibid.
31. Ibid.
32. Shawkānī, Fath al-Qadīr, I, 515; Shawkānī, Irshād, p. 75. For a good summary of Shawkānī’s views on the subject see Şadr, Ijma’, pp. 30–40.
33. Rashīd Rida, Tafsīr al-Manār, V, 201. For a similar view see Şadr, Ijma’, p. 40.
34. Āmīdī, Ihkām, I, 205.
35. Ibid., I, 218.
36. Ibn Mājah, Sunan, II, 1303, hadith no. 3950. This and a number of other aḥādīths on ijmā‘ have been quoted by both Ghazālī and Āmīdī as shown in footnote 41 below.
37. Cf. Ahmad Hasan, Doctrine, p. 60.
38. Ghazālī, Mustasfā, I, 111.
39. Āmīdī considers this to be a hadith whose chain of narration goes back to the Prophet (see his Ihkām, I, 214). Ahmad Hasan points out that Muhammad ibn Ḥasan
al-Shaybānī initially reported this as a ḥadīth, but that later it was attributed to Ibn Mas’ūd (see his Doctrine, p. 37).

41. Ghazālī, Mustasfa, I, 112.
42. Ibíd., I, 112; we find in the Qur’ān, for example, in an address to the Prophet Muhammad: ‘And He found you wondering [ddllan] and gave you guidance’ (al-Duḥā, 93:7). In another place the Qur’ān relates of Moses the following words: ‘He said: I did it then [i.e. slayed the Egyptian] when I was in error’ (al-Shu’ār’a, 26:20). In both these instances dalāl does not imply disbelief. Similarly the Arabic expression dalla fulan ‘an al-ṭariq (so-and-so lost his way) confirms the same meaning of dalāl.

43. Ibíd., I, 112.
44. Sadr, Ijmā‘, p. 43: an example of the ‘lā of prohibition’ is the Qur’ānic prohibition concerning adultery which reads la taqrabū al-zindā (do not approach zind). With a lā of prohibition the hadīth would simply instruct the community not to agree upon an error.
45. Sadr. Ijmā‘, p. 43.
46. Rīḍā, Taṣfīr al-Manār, V, 205.
47. Sadr, Ijmā‘, pp. 44–5.
52. Khallāf, ‘Ilm, p. 49.
53. Shāfī‘i, Risālah, p. 205; Abū Zahrah, Usūl, p. 158.
55. Āmīdī, Ihkām, I, 246ff.
57. Ibíd., p 49; Shawkānī, Irshād, p. 79.
58. Āmīdī, Ihkām, I, 198; Shawkānī, Irshād, p. 73.
59. Abū Zahrah, Usūl, p. 159.
60. Ibíd., p. 165
63. Ibíd., p. 50.
64. Sha‘ban, Usūl, pp. 89–96; al-Khuḍārī, Usūl, p. 278.
65. Shawkānī, Irshād, p. 72; Zuḥaylī, Usūl, p. 553.
66. Shawkānī, Irshād, p 72, Abū Zahrah, Usūl, p. 163.
67. Ghazālī, Mustasfa, I, 111; El2 III, 1024.
68. Ismā‘īl, Dirāsāt, p. 85.
70. Ismā‘īl, Dirāsāt, pp. 133ff.
71. Bukhārī, Sahīh (Istanbul edn), II, 221; Muslim, Sahīh, p. 17, hadith no. 38; Āmīdī, Ihkām, I, 243. Ibn Hazm discusses ijmā‘ ahl al-Madīnah in some length, but cites none of the ahādīth that are quoted by Āmīdī and others. He merely points out that ‘some of the ahādīth which are quoted in support of the Mālikī doctrine are authentic [sahīh], while others are mere fabrications [makhdhibī mawdu‘] reported by one Muhammad ibn Ḥasan ibn Zābālah’ (Ihkām, IV, 154–155).
72. Āmīdī, Iḥkām, I, 243ff.
73. Iḥnāt, Iḥkām, IV, 155.
74. Āmīdī, Iḥkām, I, 261.
76. Ibid.
77. Shā'ban, Uṣūl, pp. 94–96.
79. Zuhayr, Uṣūl, III, 221
81. Āmīdī, Iḥkām, I, 281.
85. Ibid., p. 175. Iqbal goes on to quote the Hanafi jurist Abū'l-Hasan al-Karkhī as saying: ‘The Sunnah of the Companions is binding in matters which cannot be cleared up by qiṣāṣ, but it is not so in matters which can be established by qiṣāṣ.’ (No specific reference is given to al-Karkhī’s work.)
87. Hasan, Doctrine, p. 244.
88. Ibid.
89. See Enid Hill’s article on Sanhūr in Aẓmeh (ed.), Islamic Law, p. 15.
90. Turābī, Tijād, p. 32.
CHAPTER NINE

Qiyās (Analogical Reasoning)

Literally, qiyās means measuring or ascertaining the length, weight or quality of something, which is why scales are called miqyās. Thus the Arabic expression ‘qāsat al-thawb bi’ldhirā’ means that ‘the cloth was measured by the yardstick’. Qiyās also means comparison, with a view to suggesting equality or similarity between two things. Thus the expression ‘Zayd yuqās ila Khālid fi ‘aglihi wa nasabih’ means that ‘Zayd compares with Khālid in intelligence and descent’. Qiyās thus suggests an equality or close similarity between two things, one of which is taken as the criterion for evaluating the other.

Technically, qiyās is the extension of Shari‘ah value from an original case, or asl, to a new case, because the latter has the same effective cause as the former. The original case is regulated by a given text, and qiyās seems to extend the same textual ruling to the new case. It is by virtue of the commonality of the effective cause, or ‘illah, between the original case and the new case that the application of qiyās is justified. A recourse to analogy is only warranted if the solution of a new case cannot be found in the Qur’ān, the Sunnah or a definite ijmā‘. For it would be futile to resort to qiyās if the new case could be resolved under a ruling of the existing law. It is only in matters that are not covered by the nusūs and ijmā‘ that the law may be deduced from any of these sources through the application of analogical reasoning.

In the usage of the fuqahā’, the word ‘qiyās’ is sometimes used to denote a general principle. Thus one often comes across statements that this or that ruling is contrary to an established analogy, or to a general principle of the law without any reference to analogy as such.
Analogical deduction is different from interpretation in that the former is primarily concerned with the extension of the rationale of a given text to cases which may not fall within the terms of its language. Qiyās is thus a step beyond the scope of interpretation. The emphasis in qiyās is clearly placed on the identification of a common cause between the two cases which is not indicated in the language of the text. Identifying the effective cause often involves intellectual exertion on the part of the jurist, who determines it by recourse not only to the semantics of a given text but also to his understanding of the general objectives of the law.

Since it is essentially an extension of the existing law, the jurists do not admit that extending the law by the process of analogy amounts to establishing a new law. Qiyās is a means of discovering, and perhaps of developing, existing law. Although qiyās offers considerable potential for creativity and enrichment, it is basically designed to endure conformity with the letter and the spirit of the Qur’ān and the Sunnah. In this sense, it is perhaps less than justified to call qiyās one of the sources (maṣādīr) of the Shari‘ah; it is rather a proof (ḥujjāh) or an evidence (dalil) whose primary aim is to ensure consistency between revelation and reason in the development of the Shari‘ah. Qiyās is admittedly a rationalist doctrine, but it is one in which the use of personal opinion (ra‘y) is subservient to the terms of divine revelation. The main sphere for the operation of human judgement in qiyās is the identification of a common ‘illah between the original and the new case. Once the ‘illah is identified, the rules of analogy then necessitate that the ruling of the given text be followed without any interference or change. Qiyās cannot be used, therefore, as means of altering the law of the text on grounds of either expediency or personal preference.

The jurist who resort to qiyās takes it for granted that the rules of Shari‘ah follow certain objectives (maqāṣid) that are in harmony with reason. A rational approach to the discovery and identification of the objectives and intentions of the Lawgiver necessitates recourse to human intellect and judgement in the evaluation of the aḥkām. It is precisely on this ground, namely the propriety or otherwise of adopting an inquisitive approach to the injunctions of the Lawgiver, referred to as ta‘lil, that qiyās has come under attack by the Mu‘tazilah, the Zāhirī, the Shi‘a and some Hanbali ‘ulamā‘. Since an enquiry into the causes and objectives of divine injunctions often involves a measure of juristic speculation, the opponents of qiyās have questioned its essential validity. Their argument is that the law must be based on
certainty, whereas qiyās is largely speculative and superfluous. If the two cases are identical and the law is clearly laid down in regard to one, there is no case for qiyās, as both will be covered by the same law. If they are different but bear a similarity to one another, then it is impossible to know whether the Lawgiver had intended the subsidiary case to be governed by the law of the original case. It is once again in recognition of this element of uncertainty in qiyās that the ʿulamāʾ of all the juristic schools have ranked qiyās as a ‘speculative evidence’. With the exception, perhaps, of one variety of qiyās, namely where the ʿillah of qiyās is clearly identified in the text, qiyās in general can never be as high as authority as the nass or a definite ijma', for these are decisive evidences (adillah qaf'iyyah), whereas qiyās in most cases only amounts to a probability. It is, in other words, merely probable, but not certain, that the result of qiyās is in conformity with the intentions of the Lawgiver. The propriety of qiyās is thus always to be measured by the degree of its proximity and harmony with the nusūs. In our discussion of the methodology of qiyās it will at once become obvious that the whole purpose of this methodology is to ensure that under no circumstances does analogical deduction operate independently of the nusūs. It would be useful to start by giving a few examples.

(1) The Qurʾān (al-Jumuʿah, 62:9) forbids selling or buying goods after the last call for Friday prayer until the end of the prayer. By analogy this prohibition is extended to all kinds of transactions, since the effective cause, that is, diversion from prayer, is basically common to all.

(2) The prophet is reported to have said, ‘The killer shall not inherit [from his victim].’

By analogy this ruling is extended to bequests, which would mean that the killer cannot benefit from the will of his victim either.

(3) According to a hadith, it is forbidden for a man to make an offer of betrothal to a woman who is already betrothed to another man unless the latter permits it or has totally abandoned his offer.

The ʿillah of this rule is to obviate conflict and hostility among people. By analogy the same rule is extended to all other transactions in which
the same 'illah is found to be operative." One can refer to numerous instances, in the area of mu'āmalat, where the rules of fiqh have been developed through analogy. Note, for example, the following.

1) Many of the textual rulings of the Shari'ah concerning contract of sale have by analogy been extended to other contracts, such as those of lease and hire (al-ijārah) as the latter is in effect sale of the usufruct and has an aspect in common with the sale of objects.

2) The Sunnah has validated the option of stipulation (khiyar al-shart) for the buyer for the purpose mainly of protecting him against fraud. By analogy, the jurists have granted the same facility to the seller, as he too may be in need of protection.

3) The textual rulings of Shari'ah obligate the usurper to return the object to its owner, if the object is still in existence, but to compensate the owner if the object has been disposed of or consumed. This ruling has by analogy been extended to the case where the usurper has converted the object into something else, such as converting steel into a sword or wheat into bread, for the owner's right to the original property ceases when it is converted into something that is referred to by a different name, and he is therefore entitled to compensation.*

The majority of 'ulama' have defined qiyās as the application to a new case (fār'), on which the law is silent, of the ruling (hukm) of an original case (asl) because of the effective cause ('illah) which is in common to both. The Hanafi definition of qiyās is substantially the same, albeit with a minor addition designed to preclude certain varieties of qiyās (such as qiyās al-awlā and qiyās al-musāwī) from the scope of qiyās. The Hanafi jurist, Şâdr al-Shari'ah, in his Tawdih, as translated by Aghnides, defined qiyās as 'extending the [Shari'ah] value from the original case over to the subsidiary [fār'] by reason of an effective cause which is common to both cases and cannot be understood from the expression [concerning the original case] alone.' The essential requirements of qiyās that are indicated in these definitions are as follows.

1) The original case, or asl, on which a ruling is given in the text and which analogy seeks to extend to a new case. (2) The new case (fār') on which a ruling is needed. (3) The effective cause ('illah) which is an attribute (wasf) of the asl and is found to be common to the original and the new case. (4) The rule (hukm) governing the original case which is to be extended to the new case.  To illustrate these, we might adduce the example of the Qur'an (al-Ma'idah, 5:90) which explicitly forbids wine-drinking. If this prohibition is to be extended by analogy to narcotic drugs, the four pillar of analogy in this example would be:
Each of the four essentials (arkan) of analogy must, in turn, qualify of other conditions that are all designed to ensure propriety and accuracy in the application of qiyās. It is to these which we now turn.

I. Conditions Pertaining to the Original Case (Ašl)

Ašl has two meanings. Firstly, it refers to the source, such as the Qur’ān or the Sunnah, that reveals a particular ruling. The second meaning of ašl is the subject matter of that ruling. In the foregoing example of the prohibition of wine in the Qur’ān, the ašl is both the Qur’ān, which is the source, and wine, which is the original case or the subject-matter of the prohibition. However, to all intents and purposes, the two meanings of ašl are convergent. We tend to use ašl as to imply the source as well as the original case, for the latter constitutes the subject-matter of the former, and the one cannot be separated from the other.

The ‘ulamā’ are in unanimous agreement that the Qur’ān and the Sunnah constitute the sources, or the ašl, of qiyās. According to the majority of jurists, qiyās may also be founded on a rule that is established by ijma’. For example, ijma’ validates guardianship over the property of minors, a rule that has been extended by analogy to authorise the compulsory guardianship (waliyah al-ijbār) of minors in marriage.

There is, however, some disagreement as to whether ijma’ constitutes a valid ašl for qiyās. Those who dispute the validity of ijma’ as a basis of analogical deduction argue that the rule of consensus do no require that there should be a basis (sanad) for ijma’. In other words, ijma’ does not always explain its own justification or rationale. In the absence of such information, it is difficult to construct an analogy. In particular, it would be difficult to identify the ‘illah, and qiyās cannot be constructed without the ‘illah. But this view is based on the assumption that the ‘illah of qiyās is always identified in the sources, which is not the case.

The ‘illah may at times be specified in the sources, but when this is not so, it is for the mujathid to identify it in the light of the objectives (maqāṣid) of the Lawgiver. The mujtahid, in other words, is faced with the same task whether he derives the ‘illah from ijma’ or from the nusūs. Furthermore, the majority view that validates the found-
ing of analogy on ijma' maintains that consensus itself is a basis (sanad), and that the effective cause of a ruling that is based on consensus can be identified through iftihād.¹⁵

According to the majority of 'ulama', one qiyyās may not constitute the asl of another qiyyās. This is explained in reference to the effective cause on which the second analogy is founded. If this is identical with the original 'illah, then the whole exercise will be superfluous. For instance, if it is admitted that the quality of edibility is the effective cause that would bring an article within the scope of usury (riba') then this would justify an analogy to be drawn between wheat and rice. But an attempt to draw a second analogy between rice and edible oil for the purpose of extending the rules of riba' to the latter would be unnecessary, for it would be preferable to draw a direct analogy between wheat and edible oil, which would eliminate the intermediate analogy with rice altogether.¹⁶

However, according to the prominent Maliki jurist, Ibn Rushd (whose views are here representative of the Maliki school) and some Hanbali 'ulama', one qiyyās may constitute the asl of another: when one qiyyās is founded on another qiyyās, the faq of the second becomes an independent asl from which a different 'illah may be deduced. This process may continue ad infinitum with the only proviso being that in cases where analogy can be founded in the Qur'an, recourse may not be had to another qiyyās.¹⁷ But al-Ghazālī rejects the proposition of one qiyyās forming the asl of another altogether. He compares this to the work of a person who tries to find pebbles on the beach that look alike. Finding one that resembles the original, he then throws away the original and tries to find one similar to the second, and so on. By the time he finds the tenth, it will not be surprising if it turns out to be totally different from the first in the series. Thus, for al-Ghazālī, qiyyās founded on another qiyyās is like speculation built upon speculation, and the further it continues along the line, the more real becomes the possibility of error.¹⁸

Having discussed Ibn Rushd’s view at some length, however, Abū Zahrah observes that from a juristic viewpoint, one has little choice but to agree with it. This is reflected, for example, in modern judicial practice where court decisions are often based on the analogical extension of the effective cause (i.e. ratio decidendi) of an existing decision to a new case. The new decision may be based on the rationale of a previous case but may differ with it in some respect. In this event, it is likely to constitute an authority in its own right. When, for example, the Cassation Court (mahkamah al-naqd) in Egypt approves a judicial
ruling, it becomes a point of reference in itself, and an analogy upon it is made whenever appropriate without further inquiry into its origin. What Abū Zahrah is saying is that the doctrine of stare decisis, which is partially adopted in some Islamic jurisdictions, take for granted the validity of the idea that one qiyās may become the asl of another qiyās.19

According to the Syrian jurist Muṣṭafā al-Zarqā, the formula that one qiyās may be founded on another qiyās has in it the seeds of enrichment and resourcefulness. No unnecessary restrictions should therefore be imposed on qiyās and on its potential contribution to the Shari'ah.20

II. Conditions Pertaining to the Hukm

A hukm is a ruling, such as a command or a prohibition, dispensed by the Qur’ān, the Sunnah or ijma’, and analogy seeks its extension to a new case. In order to constitute the valid basis of an analogy, the hukm must fulfil the following conditions.

(1) It must be a practical shar’ī ruling, for qiyās is only operative in regard to practical matters inasmuch as this is the case with fiqh as a whole. Qiyās can only be attempted when there is a hukm available in the sources. In the event where no hukm can be found in any of the three sources regarding a case, and its legality is determined with reference to a general maxim such as original freedom from liability (al-barā’ah al-asliyyah), no hukm can be said to exist. Original freedom from liability is not regarded as a hukm shar’i and may not therefore form the basis of qiyās.21

(2) The hukm must be operative, which means that it has not been abrogated. Similarly, the validity of the hukm that is sought to be extended by analogy must not be the subject of disagreement and controversy.22

(3) The hukm must be rational in the sense that the human intellect is capable of understanding the reason or the cause of its enactment, or that the ‘illah is clearly given in the text itself. For example, the effective cause of prohibitions such as those issued against gambling and misappropriating the property of another is easily discernible. But when ad hukm cannot be so understood, as in the case of the number of prostrations in salah, or the quantity of zakāh, it may not form the basis of analogical deduction. Ritual performances, or ‘ibādāt, on the whole, are not the proper subject of qiyās simply because their effective causes cannot be ascertained by the human intellect. Although the general purpose of ‘ibādāt is often understandable, this is not
sufficient for the purpose of analogy. Since the specific causes (al-
'īlāl al-juz'īyāh) of 'ibādāt are only known to Almighty God, no analogy
can be based upon them.

All the rational ahkām (al-ahkām al-ma‘qūlah), that is laws whose
causes are perceivable by human intellect, constitute the proper basis of
qiyyās. According to Imām Abū Ḥanīfah, who represents the majority
opinion, all the nusūs of Shari‘ah are rational and their causes can be
ascertained except where it is indicated that they fall under the rubric
'ibādāt. The Zāhiris and ‘Uthmān al-Bāṭtī, a contemporary of Abū
Ḥanīfah, have, on the other hand, held that the effective causes of
the nusūs cannot be ascertained without an indication in the nusūs
themselves. This view clearly discourages enquiry into the causes of
the rules of Shari‘ah and advises total conformity to them without any
search for justification or rationale.*3 'We do not deny', writes Ibn
Hazm, 'that God has assigned certain causes to some of His laws, but we
say this only when there is a nass to confirm it.' He then goes on to
quote a hadith of the Prophet to the effect that 'the greatest wrongdoer
in Islam is one who asks about something which is not forbidden,
and it is then forbidden because of his questioning.'

İbn Hazm continues: 'We firmly deny that all the ahkām of Shari‘ah
can be explained and rationalised in terms of causes. Almighty God
enacts a law as He wills.' The question of 'how and why' does not
and must not be applied to His will. Hence it is improper for anyone
to enquire, in the absence of a clear text, into the causes of divine
laws. Anyone who poses questions and searches for the causes of God’s
injunctions 'defies Almighty God and commits a transgression',*4 for
he will be acting contrary to the purport of the Qur‘ān where God
describes Himself saying, 'He cannot be questioned for His acts, but
they will be questioned for theirs' (al-Anbiyā’, 21:23).

It is thus known, Ibn Hazm concludes, that causes of any kind do not
apply to the acts and words of God, for justification and ta‘līl is the
work of one who is weak and compelled (muḍṭar), and God is above
all this. ²⁵
The issue of causation acquires a special significance in the context of divinely-ordained laws, simply because revelation was discontinued with the demise of the Prophet, who is no longer present to explain and identify the causes of the revealed laws. The Muslim jurists, like other believing Muslims, have shown a natural reluctance to be too presumptuous in their efforts to identify the causes of divine laws. But the issue does not pose itself in the same way regarding secular or man-made law. The norm in regard to modern laws is that they all have identifiable causes that can be ascertained with reasonable certainty. As such, analogical deduction in the context of modern law is a relatively easier proposition. But there are certain restrictions which discourage a liberal recourse to analogy even in modern law. For one thing, the operation of analogy in modern law is confined to civil law. In the area of crimes, the constitutional principle of legality discourages the analogical extension of the text. It should be further noted that owing to extensive reliance on statutory legislation, there is no crime and no punishment in the absence of a statutory text that clearly defines the offence or the penalty in question. Crimes and penalties are thus to be governed by the text of the law and not by the analogical extension of the text. It will thus be noted that owing to the prevalence of statutory legislation in modern legal systems, the need for recourse to analogy has been proportionately diminished. This in turn explains why qiyās tends to play a more prominent role in the Shari'ah than in modern law.

But in Shari'ah law too, as we shall later elaborate, there are restrictions on the operation of qiyās in regard to crime and penalties. The qādi, as a result, may not draw analogies between, for example, wine-drinking and hashish owing to the similar effects that the might have on the human intellect. Nor may the crime of zinā be made the basis of analogy so as to apply its penalty to similar cases.26

(4) The fourth requirement concerning the hukm is that it must not be confined to an exceptional situation or to a particular state of affairs. Qiyās is essentially designed to extend the normal, not the exceptional, rules of the law. Thus when the Prophet admitted the testimony of Khuzaymah alone to be equivalent to that of two witnesses, he did so by way of an exception. The precedent in this case is therefore not extendable by analogy.27 Some of the rulings of the Qur'ān which relate exclusively to the Prophet, such as polygamy beyond the maximum of four, or the prohibition in regard to marriage for the widows of the Prophet (al-Ahzāb, 33:53), are similarly not extendable by analogy. The legal norms on these matters have been
laid down in the Qur'an, which enacts the minimum number of
witness at two, the maximum for polygamy at four, and allows a
widow to remarry after the expiry of the waiting period of 'iddah.

(5) And lastly, the law of the text must not represent a departure
from the general rules of qiyas in the first place. For example, travel-
ling during Ramadān is the cause of a concession that exonerates the
traveller from the duty of fasting. The concession is an exception to
the general rule that requires everyone to observe the fast. It may
therefore not form the basis of an analogy in regard to other types
of hardship. Similarly, the concession granted in wudu' (ablution) in
regard to wiping over boots represents a departure from the
general rule which requires washing the feet. The exception in this
case is not extendable by way of analogy to similar cases such as socks.

But according to the Shafi'is, when the 'illah of a ruling can be
clearly identified, analogy may be based on it even if the ruling was
exceptional in the first place. For example, the transaction of 'arāyā,
or the sale of fresh dates on the tree in exchange for dry dates, is
exceptionally permitted by hadith, notwithstanding the somewhat
usurious nature of this transaction: the rules of ribā forbid the
exchange of identical commodities of unequal quantity. The 'illah of
this permissibility is to fulfil the need of the owner of unripe dates
for the dried variety. By way of analogy, the Shafi'is have validated
the exchange of grapes for raisins on the basis of a similar need. The
Hanafis have however disagreed, as the ruling of 'arāyā is exceptional
in the first place.28

III. The New Case (Far'c)

The far'c is an incident or a case whose ruling is sought by recourse
to analogy. The far' must fulfil the following three conditions.

(1) The new case must not be covered by the text or ijma', for in
the presence of a ruling in these sources, there will be no need for
recourse to qiyas. However, some Hanafi and Mālikī jurists have at
times resorted to qiyas even in cases where a ruling could be found
in the sources. But they have done so only where the ruling in ques-
tion was of a speculative type, such as a solitary hadith. We shall have
occasion to elaborate on this point later.

(2) The effective cause of analogy must be applicable to the new
case in the same way as to the original case. Should there be no
uniformity, or substantial equality between them, the analogy is tech-
nically called qiyas ma'al far'iq, or 'qiyas with a discrepancy', which is
invalid. If, for example, the ‘illah of the prohibition of wine is intoxication, then a beverage that only causes a lapse of memory would differ from wine in respect of the application of the ‘illah, and this would render the analogy invalid.39

To give another example, according to the Hanafis, a sane and adult woman is competent to conclude a contract of marriage on her own behalf. They have inferred this by analogy to the Qur'anic ruling (al-Nisā’, 4:6) which entitles her to enter business transaction of her own free will. The majority of jurists, however, disagree, as they consider the analogy in question to be qiyās with a discrepancy. Marriage differs from other transactions; business transactions are personal matters, but marriage concerns the family and the social status of the parents and guardians. Hence an analogy between marriage and other transactions is unjustified.30

(3) The application of qiyās to a new case must not result in altering the law of the text, as this would mean overruling the text by means of qiyās which is ultra vires. An example of this is the case of false accusation (qadhf) which by an express nass (sūra al-Nūr, 24:4) constitutes a permanent bar to the acceptance of one’s testimony. Al-Shafi’ī has, however, drawn an analogy between false accusation and other grave sins (kaba‘ir): a person who is punished for a grave sin may be heard as a witness after repentance. In the case of false accusation, too, repentance should remove the bar to the admission of testimony. To this the Hanafis have replied that an analogy of this kind would overrule the law of the text which forever proscribes the testimony of a false accuser.31

On a similar note, the validity of the contract of salam has been established in a hadith which defines it as the advance sale of an article to be delivered at a fixed rate. But when the Shafi’is hold that such a contract is lawful even if no date is fixed for delivery, they are charged with introducing a change in the law of the text.32

IV. The Effective Cause (‘Illah)

This is perhaps the most important of all the requirements of qiyās. The ‘illah has been variously defined by the ‘ulamā’ of usūl. According to the majority, it is an attribute of the asl which is constant and evident and bears a proper (munāsib) relationship to the law of the text (hukm). It may be a fact, a circumstance, or a consideration which the Lawgiver has contemplated in issuing a hukm. In the words of usul, the ‘illah is alternatively referred to as manāṭ al-hukm (i.e. the
cause of hukm), the sign of the hukm (amārah al-hukm) and sabah.33 Some 'ulamā' have attached numerous conditions to the ‘illah, but most of these are controversial and may be summarised in the following five.34

(1) According to the majority of ‘ulamā’, the ‘illah must be a constant attribute (mundabit) which is applicable to all cases without being affected by differences of persons, time, place and circumstances. The Mālikis and the Ḥanbalis, however, do not agree with this requirement as they maintain that the ‘illah need not be constant, and that it is sufficient if the ‘illah bears a proper or reasonable relationship to the hukm. The difference between the two views is that the majority distinguish the effective cause from the objective (hikmah) of the law and preclude the latter from the scope of the ‘illah.35

The ‘illah is constant if it applies to all cases regardless of circumstantial changes. To give an example, according to the rules of pre-emption (shuf*), the joint, or neighbouring, owner of a real property has priority in buying the property whenever his partner or his neighbour wishes to sell it. The ‘illah in pre-emption is joint ownership itself, whereas the hikmah of this rule is to protect the partner/ neighbour against possible harm that may arise from sale to a third party. Now the harm that the Lawgiver intends to prevent may materialise or it may not. As such, the hikmah is not constant and may therefore not constitute the ‘illah of pre-emption. Hence the ‘illah in pre-emption is joint ownership itself, which unlike the hikmah is permanent and unchangeable, as it does not fluctuate with such changes in circumstances.

The majority view maintains that the rules of Sharī'ah are founded on their causes (‘ilal), not in their objectives (hikam). From this, it would follow that a hukm shar'ī is present whenever its ‘illah is present even if its ‘illah is not, and a hukm shar'ī is absent in the absence of its ‘illah even if its hikmah is present. The jurist and the judge must therefore enforce the law whenever its ‘illah is known to exist regardless of its hikmah. Hence it will be a mistake for a judge to entitle to the right of pre-emption a person who is neither a partner nor a neighbouring owner on the mere assumption that he may be harmed by the sale of the property to a certain purchaser.*6

The Mālikis and the Ḥanbalis, on the other hand, do not draw any distinction between the ‘illah and the hikmah. In their view, the hikmah aims to attract an evident benefit or preventing an evident harm, and this is the ultimate objective of the law. When, for example, the law allows the sick not to observe the fast, the hikmah is the prevention of hardship to them. Likewise the hikmah of retaliation
(qisās) in deliberate homicide, or of the hadd penalty in theft, is to protect the lives and properties of the people. Since the realisation of benefit (maslahah) and prevention of harm (mafsadah) is the basic purpose of all the rules of Shari‘ah, it would be proper to base an analogy on the hikmah.

Qiyās that is founded on maslahah, or qiyās al-maslahī, according to Ibn Rushd, is a more versatile giyas, which is why it is also known as qiyās al-mursal, in that it follows the dictates of maslahah as a general objective of the Shari‘ah, even at the expenses of some vagueness in the specifics of the ‘illah and asl. Among modern writers, Hasan Ṭūrābī considers this to be a preferable qiyās, as it is not burdened by the technicalities of ‘illah; and he refers to it interchangeably as al-ijmālī, that is, open or versatile analogy.

The Hanafis and the Shafi‘is, however, maintain that ‘illah must be both evident and constant. In their view the ‘illah secures the hikmah most of the time but not always. Their objection to the hikmah being the basis of analogy is that the hikmah of the law is often a hidden quality that cannot be detected by the senses, and this would in turn render the construction of analogy upon it unfeasible. The hikmah is also variable according to circumstances, and this adds further to the difficulty of basing analogy on it. The hikmah, in other words, is neither constant nor well-defined, and may not be relied upon as a basis of analogy.

To give an example, the permission granted to travellers to break the fast while travelling is to relieve them from hardship. This is the hikmah of this ruling. But since hardship is a hidden phenomenon and often varies according to persons and circumstances, it may not constitute the effective cause of an analogy. The concession is therefore attached to travelling itself which is the ‘illah regardless of the degree of hardship that it may cause to individual travellers.

To give another example, the ‘illah in the prohibition of passing a red traffic light is the appearance of the red light itself. The hikmah is to prevent irregularities and accidents. Anyone who passes a red light is committing an offence even if no accident is caused as a result. The ‘illah and hikmah can as such exist independently of one another, the latter being less easily ascertainable than the former. On a similar note, the ‘illah in awarding a law degree is passing one’s final examinations and obtaining the necessary marks therein. The hikmah may be the acquisition of a certain standard of knowledge in the disciplines concerned. Now it is necessary that university degrees are awarded on a constant and reliable basis, which is passing the exams. The
acquisition of legal knowledge often, but not always, goes hand in hand with the ability to pass exams, but this by itself is not as readily ascertainable as the exam results are.

(2) As already stated, the effective cause on which an analogy is based must also be evident (zāhir). Hidden phenomena such as intention, goodwill, consent, etc., which are not clearly ascertainable may not constitute the 'illah of an analogy. The general rule is that the 'illah must be definite and perceptible to the senses. For example, since the consent of parties to a contract is imperceptible in its nature, the law proceeds upon the act of offer and acceptance. Similarly the 'illah in establishing the paternity of a child is matrimonial cohabitation (qiyyām farāsh al-zaujiyyah) or acknowledgement of paternity (iqrār), both of which are external phenomena and susceptible to evidence and proof. Since conception through conjugal relations between spouses is not an obvious phenomenon, it may not form the 'illah of paternity. On a similar note, the law adopts as the 'illah of legal majority, not the attainment of intellectual maturity, but the completion of a certain age, which is evident and susceptible to proof.

(3) The third condition of 'illah is that it must be a proper attribute (al-wasf al-mundsib) in that it bears a proper and reasonable relationship to the law of the text (hukm). This relationship is mundsib when it serves to achieve the objective (hikmah) of the Lawgiver, which is to benefit the people and to protect them against harm. For example, killing is a proper ground on which to exclude an heir from inheritance. For the basis of succession is the tie of kinship which relates the heir to the deceased, which is severed and nullified by killing. Similarly, the intoxicating effect of wine is the proper cause of its prohibition. An attribute that does not bear a proper relationship to the hukm does not qualify as an 'illah.

(4) The 'illah must be 'transient' (muta‘addī), that is, an objective quality which is transferable to other cases. For analogy cannot be constructed on an 'illah which is confined to the original case only. As the Hanafis explain, the very essence of 'illah, as much as that of qiyyās in general, is its capability of extension to new cases, which means that the 'illah must be a transferable attribute. Travelling, for example, is the 'illah of a concession in connection with fasting. As such, it is an 'illah which is confined to the asl and cannot be applied in the same way to other devotional acts (‘ibādāt). Similarly, if we were to confine the 'illah in the prohibition of intoxicants to wine derived from grapes, we would be precluding all the other varieties of intoxicants from the scope of the prohibition. Transferability (ta‘diyyah)
of the effective cause is not, however, required by the Shafi'is, who have validated qiyas on the basis of an ‘illah that is confined to the original case (i.e. ‘illah qasirah). The Shafi’is (and the Hanafi jurist Ibn al-Humam) have argued that ta’diyah is not a requirement of the ‘illah: when the ‘illah is confined to the original case, it is probable that the lawgiver had intended it as such. The probability may not be ignored merely for the lack of ta’diyah. It is a requirement which is intellectually conceived without due regard for the precise terms of the law itself. The Shafi’is have further argued that the utility of the ‘illah is not to be sought solely in its transferability. There is thus no inherent objection to the possibility of an ‘illah being confined to the original case. The ‘ulama’ are, however, in agreement that textually prescribed causes must be accepted as they are regardless of whether they are inherently transient or not.

The requirement of ta’diyah would imply that the ‘illah of analogy must be an abstract quality and not a concrete activity or object. To illustrate this, we may again refer to the foregoing examples. Travelling, which is a concession in connection with fasting, is a concrete activity, whereas intoxication is an abstract quality that is not confined in its application. Similarly, in the hadith regarding usury (riba’), the ‘illah of its ruling, which prohibits quantitative excess in the sale of six specified articles, is the quality of such articles being saleable by the measurement of weight or capacity and not their particular species. The hadith thus provides that ‘gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt must be equal for equal, hand to hand’. Transactions in these commodities must, in other words, be without excess on either side and delivery shall be immediate, otherwise the transaction will amount to usury, which is forbidden. The ‘illah of this prohibition is none of the concrete objects that are specified but an attribute or a concept that applies to all, namely their saleability by capacity or weight.42

(5) Finally, the effective cause must not be an attribute that runs counter to, or seeks to alter, the law of the text. To illustrate this we may refer to the story of a Maliki judge who was asked by an Abbasid ruler about the penance (kaffarah) of having conjugal relations during daytime in Ramadaan. The judge responded that the kaffarah in this
case was sixty days of fasting. This answer was incorrect as it sought to introduce a change in the text of the hadith which enacted the kaffārah to be freeing a slave, or sixty days of fasting, or feeding sixty poor persons. The fatwā given by the judge sought to change this order of priority on the dubious assumption that freeing a slave (or feeding sixty persons) was an easy matter for a ruler and he should therefore be required to observe the fasting instead. The ʿillah of the penance in this case is held to be the breaking of the fast itself and not any disrespect to the sanctity of Ramadān, nor having sexual intercourse with one’s wife. The fatwā here was in line with the position taken by Imām Mālik in so far as it was held that the purpose of kaffārah was to inflict hardship. This was the underlying ʿillah of that fatwā, which was admittedly appropriate (mundsib) to the ruling it contained, but it was invalid simply because the Lawgiver had overruled it by granting a choice in the kaffārah of fasting. The Mālikī school is also in agreement with other leading schools regarding the element of choice in the kaffārah of fasting. To give another example, suppose that someone issues a fatwā which entitles the daughter to an equal share of inheritance with the son, based on the specious ʿillah that they are equal in respect of blood tie to the deceased. Equality in blood tie (qarābah) may seem an appropriate basis for ʿillah in inheritance, but since the Lawgiver has overruled it by virtue of a clear text, the fatwā would be invalid simply because it seeks to alter the law of the text.

Our next discussion concerning the ʿillah relates to the question of how the ʿillah can be identified. Are there any methods that the jurists may utilise in his search for the correct cause or rationale of a given law?

IV.1 Identification of the ʿIllah

The effective cause of a ruling may be clearly stated, or suggested by indications in the nasṣ, or it may be determined by consensus. When the ʿillah is expressly identified in the text, there remains no room for disagreement. Differences of opinion arise only in cases where the ʿillah is not identified in the sources. An example of an ʿillah that is expressly stated in the text occurs in sūra al-Nisā’ (4:43): ‘O you believers! Do not approach salah while you are drunk.’
This ayah was revealed prior to the general prohibition of wine-drinking in sura al-Ma'idah (5:93), but it provides, nevertheless, a clear reference to intoxication, which is also confirmed by the hadith ‘Every intoxicant is khamr and every khamr is forbidden’.\textsuperscript{44}

\textit{كل مسكر خمر وكل خمر حرام.}

In another place, the Qur'an explains the effective cause of its ruling on the distribution of one-fifth of war booty to the poor and the needy ‘so that the wealth does not accumulate in the hands of the rich’ (al-Hasr, 59:7).

\textit{إِنَّمَا جَعَلَ الْأَذْنَ لَأَجِلَّ الْبَصَرِ.}

Instances are also found in the hadith where the text itself identifies the rationale of its ruling. Thus the effective cause of asking for permission when entering a private dwelling is stated in the hadith which says, ‘Permission is required for the sake of what your sight may fall on [and which you are not permitted to see]’.

\textit{السارق والسارقة فاقطعوا أيديهما}

The 'illah of asking for permission is thus to protect the privacy of the home against intrusion.\textsuperscript{45} In these examples, the occurrence of certain Arabic expression such as kay-lâ (so as not to), li-ajil (because of), etc., are associated with the concept of ratiocination (ta'\textsuperscript{il}l) and provide definite indications of the 'illah of a given ruling.\textsuperscript{46}

Alternatively, the text that indicates the 'illah may be manifest na\textsuperscript{s} (al-na\textsuperscript{s} al-z\textsuperscript{a}h\textsuperscript{ir}) which is in the nature of a probability, or an allusion (al-im\textsuperscript{a} wa'l-\textsuperscript{i}sh\textsuperscript{a}rah). Indications of this type are also understood from the language of the text and the use of certain Arabic particles such as li, fa, bi, anna and inna, which are known to be associated with ta\textsuperscript{il}l. For example, in the Qur'\textsuperscript{a}nic text (al-Ma'idah, 5:38): ‘As to the thieves, male and female, cut off [fa-q\textsuperscript{a}ta\textsuperscript{'}i] their hands’.

Theft itself is the cause of the punishment. Instances of this type are also found in sura al-Nur (24:2 and 4) regarding the punishment of adultery and false accusation respectively. In Sura al-Nisâ’ (4:34) we find another example as follows: ‘As for women whose rebellion
you fear, admonish them and leave them alone in their beds, and physically punish them.'

In this text, *nushūz* is the effective cause of the punishment. The writers on *uşūl* give numerous examples of instances where the Qur'ān provides an indication, however indirect, as to the ‘*illah* of its ruling.

The text of a *hadith* may allude to the ‘*illah* of its ruling. There is, for example, a *hadith* stating that the saliva of cats is clean ‘for they are usually around in the homes’.

Their domesticity, in other words, is the effective cause of the concession. Thus, by way of analogy, all domestic animals would be considered clean, unless it is indicated otherwise. And lastly, in the *hadith* providing that, ‘The judge who is in a state of anger may not adjudicate’

anger itself is the ‘*illah* of the prohibition. By analogy, the Companions have extended the ruling of this *hadith* to anything that resembles anger in its effect, such as extreme hunger or depression.

Sometimes the word *sabab* is used as a substitute for ‘*illah*. Although *sabab* is synonymous with ‘*illah* and many writers have used it as such, *sabab* is normally reserved for devotional acts (‘*ibādāt*) whose rationale is not perceptible to the human intellect. The text may sometimes provide an indication as to its *sabab*. Thus we find that *sūra* al-İsra’ (17:78) enjoins the believers to ‘perform the *salāh* from the setting of the sun until the dark of night’

and the *sabab* (cause) of *salāh* is the time when the *salāh* is due. Since the cause of the ruling in this text is not discernable to human intellect, it is referred to as *sabab*, but not as an ‘*illah*. From this distinction, it would appear that every ‘*illah* is at the same time a *sabab*, but not every *sabab* is necessarily an ‘*illah*.

Next, the effective cause of a ruling may be established by consen-
An example of this is the priority of full brothers over half-brothers in inheritance, the ‘illah of which is held to be the former’s superior tie with the mother. This ruling of ijma’ has subsequently formed the basis of an analogy according to which the germane brother is also given priority over the consanguine brother in respect of guardianship (wilāyah). Ijma’ has also determined the ‘illah of the father’s right of guardianship over the property of his minor child to be the minority of the child. Once again this right has, by analogy, been acknowledged for the grandfather. No ijma’ can, however, be claimed to exist in regard to the ‘illah of the father’s right of guardianship over the property of his minor daughter. While the majority of ‘ulama’ consider the ‘illah in this case to be minority, for the Shafi’is, the ‘illah in ijbar is virginity. The right of ijbar thus terminates upon loss of virginity even if the girl is still a minor.

When the ‘illah is neither stated nor alluded to in the text, then the only way to identify it is through ijtihād. The jurist thus takes into consideration the attributes of the original case, and only that attribute which is considered to be proper (munāṣib) is identified as the ‘illah. For example, in the hadith referred to above concerning the penance of conjugal relations during daytime in Ramadan, it is not precisely known whether the ‘illah of penance is the breaking of the fast (iftar), or sexual intercourse. Although intercourse with one’s wife is lawful, it may be that in this context it is regarded as a form of contempt for the sanctity of Ramadan. But it is equally reasonable to say that intercourse in this context is no different to other forms of iftar, in which case it is the iftar itself that is the ‘illah of the penance.\textsuperscript{54} The method of reasoning which the mujtahid employs in such cases is called tanqih al-manāt, or isolating the ‘illah, which is to be distinguished from two other methods referred to as takhrīj al-manāt (extracting the ‘illah) and tahqīq al-manāt (ascertaining the ‘illah) respectively. This process of enquiry is roughly equivalent to what is referred to by some ‘ulamā’ of usūl as al-sīd wa’l-taqsim, or elimination of the improper, and assignment of the proper, ‘illah to the hukm.

Tanqīh al-manāt implies that a ruling may have more than one cause, and the mujtahid has to identify the one that is proper (munāṣib), as was the case in the foregoing examples. Literally, tanqīh means ‘connecting the new case to the original case by eliminating the discrepancy between them’ (ilḥāq al-far’ bi’l-asl bi-ilgha’ al-fariq).\textsuperscript{55}

Tanqīh al-manāt is thus mainly concerned with identifying the correct ‘illah from a range of attributes that are indicated in the text. In this sense, tanqīh al-manāt is almost exclusively concerned with the
textually indicated ‘illa and the mujathid ascertains the most appro-
priate of the various alternatives. To give an example, we may refer
to the hadith in which a bedouin came to the Prophet and said: ‘I had
deliberate conjugal relations with my wife in daytime in Ramadân.
Then the Prophet said to him, “Manumit a slave.”’

The text here indicates several possibilities to identify the ‘illa, some
of which are not appropriate to the ruling it contains. The fact, for
example, that he was a bedouin is not relevant to the hukm, nor the fact
that he had intercourse with his wife (not with a stranger, that is). The
effective ‘illa is, therefore, deliberate intercourse in the daytime of
the fasting month and this is the only cause for the expiation (kaffarah)
that is prescribed in the hadith. When the mujtahid has isolated this as
the effective cause, he has completed the procedure that is involved
in tanqîh al-manât.56

Extracting the ‘illa, or takhrîj al manât, is in fact the starting point
in the enquiry into the identification of ‘illa, and often precedes tanqîh
al-manât. In all cases where the text or ijmae does not identify the
effective cause, the jurist extracts it by looking at the relevant causes
via the process of ijtihad. He may identify more than one cause, in
which case he has completed one step involved in takhrîj al-manât and
must move on to the next stage, which is to isolate the proper cause.
To illustrate this, the prohibition of usury (riba’) in wheat and five
other articles is laid down in the hadith. When the jurist seeks to draw
an analogy between wheat and raisins — to determine for example
whether one should apply the tax of one-tenth by analogy to raisins
— the ‘illa may be any of the following: that both of them sustain
life; that they are edible; that they are both grown in the soil; or that
they are sold by measure. Thus far the jurist has completed the first
step, namely extracting the ‘illa. But then he proceeds to eliminate
some of these by recourse to tanqîh al-manât. The first ‘illa is elimi-
nated because salt, which is one of the six articles, does not sustain
life; the second is also eliminated because gold and silver are not edible;
and so is the third as neither salt nor precious metals are grown in the
soil. The ‘illa is therefore the last attribute, which belongs to all the
specified items in the hadith of riba’. The difference between the two
stages of reasoning is that in takhrîj al-manât, the jurist is dealing with
a situation where the ‘illah is not identified, whereas in tanqih al-
manât, more than one cause has been identified and his task is to select
the proper ‘illah.57

Ascertaining the ‘illah, or tahqiq al-manât, follows the two preceding
stages of investigation in that it consists of ascertaining the presence
of an ‘illah in individual cases. For the purpose of drawing an analogy
between wine and a herbal drink, for example, the investigation that
leads to the conclusion that the substance in question has the intoxicat-
ing quality in common with wine is in the nature of tahqiq al-manât.
Similarly, in the case of drawing an analogy between a thief and a
pickpocket, the investigation as to whether or not the latter falls under
the definition of theft is in the nature of tahqiq al-manât. Finding
proof, in other words, that the given ‘illah in the asl which is already
extracted and isolated, whether textually indicated or arrived at
through inference and ijtihâd, is present also in the far‘, is in the nature
of tahqiq al-manât. To give another example, suppose that two disput-
ing parties agree that the ‘illah of the prohibition of ribâ in barley is
that it sustains life, but they are in doubt about whether this quality
is also present in figs. When they are able to confirm by necessary
evidence that figs also possess the same quality, their investigation will
have been made in the nature of tahqiq al-manât.58

To illustrate all three steps at issue, we refer again to the hadith in
which a bedouin Arab came to the Prophet in Medina and confessed
that he had had deliberate conjugal relations with his wife during the
day in Ramadan. The Prophet then ordered him to pay the specified
kaffârah (expiation) for his violation. The text of this hadith does not
clarify the precise ‘illah for the expiation. Was it because the incident
took place in the holy month of Ramadan, or in Medina, or because
the perpetrator was an Arab or a bedouin, or because the actual ‘illah
was none of these and the kaffârah was imposed simply because of the
deliberate breaking of the fast? By the time the mujtahid has explored
these various possibilities in order to identify the precise ‘illah, he has
completed the step involved in takhrij al-manât. Then, finally, the
investigation into whether sexual activity, like eating food, satisfies
a bodily desire, and therefore resembles eating and drinking in
relationship to fasting, is in the nature of tahqiq al-manât.59

V. Varieties of Qiyâs

From the viewpoint of the strength or weakness of the ‘illah, the
Shâfi‘i jurists have divided qiyâs into three types.
(1) ‘Analogy of the superior’ (qiyās al-awla). The effective cause in this qiyās is more evident in the new case than the original case, which is why it is called qiyās al-awla. For example, we may refer to the Qur’anic text in sūra al-Isrā’ (17:23) which provides regarding parents: ‘Say not to them “Fie” nor repulse them, but address them in dignified terms.’

By analogy it may be deduced that the prohibition against lashing or beating them is even more obvious than verbal abuse. Similarly, the penance (kaффārah) for unintentional killing is, by way of analogy, applicable to intentional killing as the transgression that entails the kaффārah is even more evident in the latter. This is the Shāfi‘ī’s view, but the Hanafis do not consider the first example to be a variety of qiyās but a mere implication of the text (dalālah al-nass) which falls within the scope of interpretation rather than analogy. Likewise, the Hanafis do not require kaффārah for deliberate killing, a ruling that has been determined on grounds of interpretation rather than qiyās.⁶⁰

(2) ‘Analogy of equals’ (qiyās al-musawi). The ‘illah in this type of qiyās is equally effective in both the new and the original cases, as is the ruling that is deduced by analogy. We may illustrate this by reference to the Qur’ān (al-Nisā’, 4:2), which forbids ‘devouring the property of orphans’. By analogy, it is concluded that all other forms of destruction and mismanagement which lead to the loss of such property are equally forbidden. But this is once again regarded by the Hanafis to fall within the scope of interpretation rather than analogy. To give another example, according to a hadīth, a container which is licked by a dog must be washed seven times.

The Shāfi‘ī extend the same ruling by analogy to a container licked by swine. The Hanafis, however, do not allow this hadīth in the first place.⁶¹

(3) ‘Analogy of the inferior’ (qiyās al-adnā). The effective cause in this form of qiyās is less clearly effective in the new case than in the original. Hence it is not quite so obvious whether the new case falls under the same ruling that applies to the original case. For example, the rules of ribā prohibit the exchange of wheat and other specified commodities unless the two amounts are equal and delivery is
immediate. By analogy this rule is extended to apples, since both wheat and apples are edible (according to Shāfi‘ī jurists) and measurable (according to Hanafi jurists). But the ‘illah of this qiyās is weaker in regard to apples which, unlike wheat, are not a staple food.62

This type of qiyās is unanimously accepted as qiyās proper but, as stated earlier, the Hanafis and some Zāhirīs consider the first two varieties to fall within the meaning of the text. It would appear that the Hanafis apply the term ‘qiyās’ only to that type of deduction which involves a measure of ijtihad. The first two varieties are too direct for the Hanafis to be considered instances of qiyās.63

Qiyās has been further divided into two types, namely ‘obvious analogy’ (qiyās jali) and ‘hidden analogy’ (qiyās khafī). This is mainly a Hanafi division. In the former, the equation between the asl and far‘ is obvious and the discrepancy between them is removed by clear evidence. An example of this is the equation the ‘ulamā‘ have drawn between the male and the female slave with regard to the rules of manumission. Thus if two persons jointly own a slave and one of them sets the slave free to the extent of his own share, it is the duty of the imam to pay the other part-owner his share and release the slave. This ruling is explicit regarding the male slave, but by an ‘obvious analogy’ the same rule is applied to the female slave. The discrepancy of gender in this case is of no consequence in regard to their manumission.64

The ‘hidden analogy’ (qiyas khafī) differs from the ‘obvious analogy’ in that the removal of discrepancy between the asl and the far‘ is by means of a prohibition (zann). Shawkānī illustrates this with a reference to the two varieties of wine, namely nabīdah and khamr. The former is obtained from dates and the latter from grapes. The rule of prohibition is analogically extended to nabīdah despite some discrepancy that might exist between the two.65 Another example of qiyās khafī is the extension, by the majority of the ‘ulamā‘ (except the Hanafis), of the prescribed penalty of zina to sodomy, despite the measure of discrepancy known to exist between the two cases. And finally, the foregoing analysis would suggest that qiyās khafī and qiyās al-adnā are substantially concurrent.

VI. Proof (Hujjīyyah) of Qiyās

Notwithstanding the absence of a clear authority for qiyās in the Qur’ān, the ‘ulamā‘ of the four Sunni schools and the Zaydī Shi‘ah have validated qiyās and quoted several Qur’ānic passages in support of their views. Thus, a reference is made to sūra al-Nisā‘ (4:59) which
reads, in an address to the believers, ‘Should you dispute over something, refer it to God and to the Messenger, if you do believe in God.’

The proponents of qiyās have reasoned that a dispute can only be referred to God and to the Prophet by following the signs and indications that we find in the Qurʾān and the Sunnah. One way of achieving this is to identify the rationale of the ahkām and apply them to disputed matters, and this is precisely what qiyās is all about. The same line of reasoning has been advanced with regard to a text in sura al-Nisa’ (4:150) which proclaims: ‘We have sent to you the Book with the Truth so that you may judge people by means of what God has shown you.’

A judgement may thus be based on the guidance that God has clearly given or on that which bears close similarity to it. The Qurʾān often indicates the rationale of its laws either explicitly or by reference to its objectives. The rationale of retaliation, for example, is to protect life, and this is clearly stated in the text (al-Baqarah, 2:79). Likewise, the rationale of zakāh is to prevent the concentration of wealth in a few hands, which is clearly stated in the Qurʾān (al-Hashr, 59:7). Elsewhere in the Qurʾān, we read in a reference to the permissibility of tayammum (ablution with sand in the absence of water) that ‘God does not intend to impose hardship on you’ (al-Māʾidah, 5:6).

In all these instances, the Qurʾān provides clear indications that call for recourse to qiyās. In the absence of a clear ruling in the text, qiyās must still be utilized as a means of achieving the general objectives of the Lawgiver. It is thus concluded that the indication of causes and objectives, similitudes and contrasts, would be meaningless if they were not observed and followed as a guide for conduct in the determination of the ahkām.

The proponents of qiyās have further quoted, in support of their
views, a verse in sura al-Hashr (59:2) which enjoins: ‘Consider, O you possessors of eyes!’

فأعتروا يا أولي الأنصار

‘Consideration’ in this context means attention to similitudes and comparisons between similar things. Two other ayat that are variously quoted by the ‘ulama’ occur in sura al-Nazi‘at, that ‘there is a lesson in this for one who fears’ (79:26);

إن في ذلك لعبرة لمن يخشى

and in Al-‘Imrân (3:13) which tells us that ‘in their narratives there was a lesson for those who possessed vision’.

إن في ذلك لعبرة لأولي الأنصار

There are two types of indication in the Sunnah to which the proponents of qiyyās have referred:

(1) Qiyyās is a form of ijtihād, which is expressly validated in the hadith of Mu‘adh ibn Jabal. It is reported that the Prophet asked Mu‘adh, upon the latter’s departure as judge to the Yemen, questions in answer to which Mu‘adh told the Prophet that he would resort to his own ijtihād in the event that he failed to find guidance in the Qur’an and the Sunnah, and the Prophet was pleased with this reply. Since the hadith does not specify any form of reasoning in particular, analogical reasoning falls within the meaning of this hadith.69

لما أراد الرسول صلى الله عليه وسلم - أن يبعث
معاذ بن جبل إلى اليمن ، قال له:
كيف تقضي إذا عرض لك القضاء ؟ قال: أقضي بكتاب الله ،
فإن لم أجد فيسنة رسول الله ، فإن لم أجد أجتهد برأي ولا آلو .
فضرب رسول الله على صدره وقال : الحمد لله الذي وفق
رسول الله إلى ما يرضي رسول الله .
(2) The Sunnah provides evidence that the Prophet resorted to analogical reasoning on occasions when he did not receive a revelation on a particular matter. On one such occasion, a woman called Khath'amiyyah came to him and said that her father had died without performing the hajj. Would it benefit him if she performed the hajj on her father’s behalf? The Prophet asked her: ‘Supposing your father had a debt to pay and you pay it on his behalf, would this benefit him?’ To this her reply was in the affirmative, and the Prophet said, ‘The debt owed to God merits even greater consideration.’

It is also reported that ‘Umar ibn al-Khattab asked the Prophet whether kissing vitiates the fast during Ramadan. The Prophet asked him in return: ‘What if you gargle with water while fasting?’ ‘Umar replied that this did not matter. The Prophet then told him that ‘the answer to your first question is the same’.

The Companions are said to have reached a consensus on the validity of qiyās. We find, for example, that the first caliph, Abi Bakr, drew an analogy between father and grandfather in respect of their entitlements in inheritance. Similarly, ‘Umar ibn al-Khaṭṭāb is on record as having ordered Abū Mūsā al-Ash‘arī ‘to ascertain the similitudes for purposes of analogy’. Furthermore, the Companions pledged their fealty (bay‘ah) to Abī Bakr on the strength of the analogy that ‘Umar drew between two forms of leadership: ‘Umar asked the Companions, ‘Will you not be satisfied, as regards worldly affairs, with the man with whom the Prophet was satisfied as regards religious affairs?’ And they agreed with ‘Umar, notwithstanding the fact that the issue of succession was one of the utmost importance. Again, when the Companions held a council to determine the punishment of wine-drinking, ‘Ali ibn Abī Ṭalib suggested that the penalty of false accusation should be applied to the wine drinker, reasoning by way of analogy: ‘When a person gets drunk, he raves and when he raves, he accuses falsely.’ It is thus concluded that qiyās is validated by the Qur‘ān, the Sunnah and the ijma of the Companions.
VII. The Argument against the Qiyās

This has been advanced mainly by the Zāhirī school and some Muʿtazilah, including their leader, Ibrāhīm al-Nazzām. The leading Zāhirī jurist, Ibn Ḥazm, is the most outspoken against qiyās. The main points of his argument may be summarised as follows:

(1) The rules of the Shari'ah are conveyed in the form of commands and prohibitions. There are also the intermediate categories of ‘recommended’ (mandūh) and ‘reprehensible’ (mākrūh), which are essentially two varieties of mubah (permissible). There are thus only three types of aḥkām: command, prohibition and permissibility. Should there be no clear text in respect of any matter, then it falls under the principles of ibāhah (permissibility) which is established in the Qur’ān. Commands and prohibitions are determined by the clear authority of the Qur’ān, the Sunnah or ijma, in whose absence nothing else can determine an obligatory or prohibitory injunction, and the matters will automatically fall into the category of mubah. There is thus no room for analogy in the determination of the aḥkām.

(2) The supporters of analogy, according to Ibn Ḥazm, proceed on the assumption that the Shari'ah fails to provide a nass for every matter, an assumption which is contrary to the explicit provisions of the Qur’ān. Ibn Ḥazm goes on to quote the following to this effect: ‘We have neglected nothing in the Book’ (al-Anām, 6:38) and ‘We revealed the Book as an explanation for everything’ (al-Nahl, 16:89).

In yet another passage, we read in the Qur’ān: ‘This day, I perfected your religion for you, and completed my favour upon you’ (al-Mā’idah, 5:3).

Since the aḥkām of the lawgiver are all-inclusive and provide complete guidance for all events, our only duty is to discover and implement them. To consider qiyās to be an additional proof is tantamount to
an acknowledgement that the Qurʾān fails to provide complete guidance.\(^77\)

(3) Qiyās derives its justification from an ‘illah which is common to both the original and the new case. The ‘illah is either indicated in the text, in which case the ruling is derived from the text itself and qiyās is redundant; or alternatively, where the ‘illah is not indicated, there is no way of knowing it for certain; qiyās therefore rests on conjecture, which must not be allowed to form the basis of a legal ruling. This is, according to Ibn Ḥazm, the purport of the Qurʾānic āyāh (al-Najm, 53:28) which proclaims that ‘conjecture avails nothing against the truth’.

Identifying the ‘illah in qiyās is an exercise in speculation, whereas the Qurʾān enjoins us to ‘pursue not that of which you have no knowledge’ (al-Isrā’, 17:36).\(^78\)

(4) And lastly, Ibn Ḥazm holds that qiyās is clearly forbidden in the Qurʾān.\(^79\) Thus we read in sūra al-Hujarat (49:1): ‘O you believers! Do not press forward before God and His Messenger, and fear God’

Which means that the believers must avoid legislating on matters on which the Lawgiver has chosen to remain silent. The same point is conveyed in the hadith where the Prophet ordered the believers:

Ask me not about matters that I have not raised. Nations before you were faced with destruction because of excessive questioning and disputations with their prophets. When I command you to do something, do it to the extent you can, and avoid what I have forbidden.\(^80\)
Thus in regard to matters on which the *nass* is silent, it is not proper for a Muslim to take the initiative in issuing a *hukm*, for he is ordered not to do so. *Qiyas* therefore violates the express terms of the Qur’ān and the *Sunnah*.

To sum up, Ibn Hazm’s argument is based on two main points, one of which is that the *nusus* of the Qur’ān and the *Sunnah* provide for all events, and the other is that *qiyas* is an unnecessary addition to the *nusus*. Regarding the first point, the majority of ‘ulamā’ hold the view that the *nusus* do admittedly cover all events, either explicitly or through indirect indications. However, the Zāhirīs rely only on the explicit *nusus* and not on these indirect indications. The majority, on the other hand, go beyond the confines of literalism and validate *qiyas* in the light of the general objectives of the *Shari’ah*. For the majority, *qiyas* is not an addition or a superimposition on the *nusus*, but their logical extension. Hence the Zāhirī argument that *qiyas* violates the integrity of the *nusus* is devoid of substance.

With reference to some of the Qur’ānic passages that the opponents of *qiyas* have quoted, especially on the use of speculative evidence in law, it is contended that the *āyāt* in question forbid recourse to speculation (*zann*) in matters of belief only. As for the practical rules of *fiqh*, most of them partake of *zann*, and a great deal of the *nusus* are themselves speculative in their purport and implication (*zann* al-*dalalah*). But this does not necessarily mean that action upon them must be suspended. On the contrary, a measure of diversity and variation in the practical rules of the *Shari’ah* is not only tolerated, it is considered a sign of the bounty of Almighty God, and the essence of flexibility in the *Shari’ah*.

In principle, the Shi‘ah Imāmiyyah do not recognise the validity of *qiyas*, as they maintain that *qiyas* is pure conjecture which must be avoided. In addition, the Qur’ān, the *Sunnah* and the rulings of the imams, according to the Shi‘ī ‘ulamā’, provide sufficient guidance for conduct, and any reference to analogy is unnecessary and unwarranted. This is definitely the view of the Akhbarī branch of the Twelver Shi‘ah, whose refutation of *qiyas* closely resembles that of the Zāhirīs. But the Usūlī branch of the Shi‘ah validate action upon certain varieties of *qiyas*, namely *qiyas* whose *‘illah* is explicitly stated in the text (*qiyas mansūs al-‘illah*), analogy of the superior (*qiyas al-aulā*) and obvious analogy (*qiyas jali*). These varieties of *qiyas*, in their view, are not mere speculations; they either fall within the meaning of the text or else constitute a strong probability (*al-zann al-qawī*) which may be adopted as a guide for conduct. But they
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validate this through recourse to ijtihād and ‘aqīl rather than to qiyās per se.\(^{84}\)

VIII. Qiyās in Penalties

The ‘ulamā‘ of the various schools have discussed the application of qiyās to juridical, theological, linguistic, rational and customary matters, but the main question that needs to be discussed here is the application of analogy in regard to prescribed penalties (hudūd) and penances (kaffārāt).

The majority of ‘ulamā‘ do not draw any distinction in this respect, and maintain the view that qiyās is applicable to hudūd and kaffārāt in the same way as it is to other rules of the Shari‘ah. This is explained by reference to the Qur‘ānic passages and the hadith that are quoted in support of qiyās, which are all worded in absolute terms, none drawing any distinction in regard to penalties: and since the evidence in the sources does not impose any restriction on qiyās, it is therefore applicable in all spheres of the Shari‘ah.\(^{85}\) An example of qiyās in regard to the hudūd is the application of the punishment of theft to the nabbāsh, or thief who steals the shroud of the dead, as the common ‘illah between them is taking away the property of another without his knowledge. A hadith has also been quoted in support of this ruling.\(^{86}\) Similarly, the majority of the ‘ulamā‘ (excluding the Hanafis) have drawn an analogy between zinā and sodomy, and apply the hadd of the former by analogy to the latter.\(^{87}\)

The Hanafis are in agreement with the majority to the extent that qiyās may validly operate in regard to ta‘zīr penalties, but they have disagreed with the application of qiyās to the prescribed penalties and kaffārāt. They would not, for example, approve of an analogy between abusive words (sabb) and false accusation (qadhf), nor would they extend the hadd of zinā by analogy to other sexual offences. These, according to the Hanafis, may be penalised under ta‘zīr but not by analogy with the hudūd. The main reason that the Hanafis have given is that qiyās is founded on the ‘illah, whose identification in regard to the hudūd involves a measure of speculation and doubt. There is a hadith that provides: ‘Drop the hudūd in case of doubt as far as possible. If there is a way out, then clear the way, for in penalties, if the imam makes an error on the side of leniency, it is better than making an error on the side of severity.’\(^{88}\)
It is thus concluded that any level of doubt is ascertaining the ‘illah of hadd penalties must prevent their analogical extension to similar cases.\textsuperscript{89}

As stated above, the majority validate the application of qiyās in regard to kaffārāt. Thus the analogy between the two forms of breaking the fast (iftār), namely deliberate eating during the month of Ramadān and breaking the fast by having sexual intercourse, would extend the kaffārāh of the latter to the former. Similarly, the majority have validated the analogy between deliberate killing and unintentional killing for the purposes of kaffārāh. The Qur’ān only prescribes a kaffārāh for erroneous killing, and this is extended by analogy to deliberate homicide. The common ‘illah between them is the killing of another human being. If kaffārāh is required in erroneous killing, then by way of superior analogy (qiyās al-awld) the ‘illah is even more evident in the case of a deliberate killing. Both are therefore liable to the payment of kaffārāh, which is releasing a slave, or two months fasting, or feeding sixty persons. The Hanafis are once again in disagreement with the majority on this, as they maintain that, for the purposes of analogy, the kaffārāh resembles the hadd. Since doubt cannot be totally eliminated in the identification of their effective causes, kaffārāt may not be extended by means of analogy.\textsuperscript{90}

Notwithstanding the fact that the jurists have disagreed on the application of qiyās in penalties, it will be noted that the ‘ulamā’ have on the whole discouraged recourse to qiyās in the field of criminal law. Consequently, there is very little actual qiyās to be found in this field. This is also the case in modern law, which discourages analogy in respect of penalties. The position is somewhat different in regard to civil transactions (mu’amalāt), in which qiyās is generally permitted.\textsuperscript{91}

IX. Conflicts between Naṣṣ and Qiyās

Since the ‘illah in analogy is a general attribute that applies to all similar cases, there arises the possibility of qiyās coming into conflict with the nusūs. The question to be asked is how such a conflict should
be removed. Responding to this question, the ‘ulamā’ have held to different views, which may be summarised as follows:

1) According to Imām Shāfi‘ī, Ahmad Ibn Ḥanbal and one view which is attributed to Abū Ḥanīfah, whenever there is a nass on a matter, qiyās is absolutely redundant. Qiyās is only applicable when no explicit ruling can be found in the sources. Since recourse to qiyās in the presence of nass is ultra vires in the first place, the question of a conflict arising between the nass and qiyās is therefore of no relevance.

2) The second view, which is mainly held by the Mālikīs, also precludes the possibility of a conflict between qiyās and a clear text, but does not dismiss the possibility of a conflict arising between a speculative text and qiyās. Analogy could, according to this view, come into conflict with the ‘āmm of the Qur’ān and the solitary hadith.

The Hanafīs have maintained that the ‘āmm is definitive in implication (qaṭ‘i al-dalālah), whereas qiyās is speculative. As a rule, a speculative item cannot qualify a definitive one, which would mean that qiyās does not specify the ‘āmm of the Qur’ān. The only situation where the Hanafīs envisage a conflict between qiyās and the ‘āmm of the Qur’ān is where the ‘illah of qiyās is stated in a clear nass. For in this case, a conflict between the ‘āmm of the Qur’ān and qiyās would be that of one qaṭ‘i with another. However, for the most part qiyās is speculative evidence, and as such may not specify the ‘āmm of the Qur’ān. But once the ‘āmm is specified, on whatever grounds, then it becomes speculative itself, at least in respect of that part which remains unspecified. After the first instance of specification (takhsīs), in other words, the ‘āmm becomes speculative, and is then open to further specification by means of qiyās. For example, the word bay‘ (sale) in the Qur’ānic text stating that ‘God has permitted sale and prohibited usury’ (al-Baqarah, 2:275)

is ‘āmm, but has been qualified by solitary hadith which prohibit certain types of sale. Once the text has been so specified, it remains open to further specification by means of qiyās.

This was the Hanafi view of conflict between a general text and qiyās. But the Mālikīs, who represent the majority view, consider the ‘āmm of the Qur’ān to be speculative in the first place. The possibility is therefore not ruled out, according to the majority, of a conflict
arising between the naṣṣ and the qiyāṣ. In such an event, the majority would apply the rule that one speculative principle may be specified by another. Based on this analysis, qiyāṣ, according to most of the jurists, may specify the ‘āmm of the Qur’ān and the Sunnah.94

As for the conflict between qiyāṣ and a solitary hadith, it is recorded that Imām Shāfī‘i, Ibn Ḥanbal and Abū Ḥanīfah do not give priority to qiyāṣ over such a hadith. An example of this is the vitiation of ablution (wudu’) by loud laughter during the performance of salah, which is the accepted rule of the Hanafi school despite its being contrary to qiyāṣ. Since the rule here is based on the authority of a solitary hadith, the latter has been given priority over qiyāṣ, for qiyāṣ would only require vitiation of the salah, not the wudu’.

Although the three imams are in agreement on the principle of giving priority to solitary hadith over qiyāṣ, regarding this particular hadith, only the Hanafis have upheld it. The majority, including Imām Shāfī‘i, consider it to be mursal and do not act on it.

Additionally, there are other views on the subject which merit brief attention. Abū al-Ḥusayn al-巴基, for example, divided qiyāṣ into four types, as follows:

(1) Qiyāṣ which is founded on a decisive naṣṣ, that is, when the original case and the effective cause are both stated in the naṣṣ. This type of qiyāṣ takes priority over a solitary hadith.

(2) Qiyāṣ which is founded on speculative evidence, that is, when the asl is a speculative text and the ‘illah is determined through logical deduction (istinbāt). This type of qiyāṣ is inferior to a solitary hadith and the latter takes priority over it. Al-Baṣrī has claimed an ijmā’ on both one and two above.

(3) Qiyāṣ in which both the asl and the ‘illah are founded on speculative nuṣūṣ, in which case it is no more than a speculative form of evidence and, should it conflict with a solitary hadith, the latter takes priority. On this point, al-Baṣrī quotes Imām al-Shāfī‘i in support of his own view.

(4) Qiyāṣ in which the ‘illah is determined through istinbāt but whose asl is a clear text of the Qur’ān or mutawātir hadith. This type of qiyāṣ is stronger than two and three above, and the ‘ulamā’ have differed on whether it should take priority over a solitary hadith.95
The Mālikis, and some Ḥanbali ‘ulamā’, are of the view that in the event of a conflict between a solitary hadith and qiyās, if the latter can be substantiated by another principle or asl of the Shari‘ah, then it will take priority over a solitary hadith. If, for example, the ‘illah of qiyās is ‘removal of hardship’, which is substantiated by several texts, then it will add to the weight of qiyās, and the latter will take priority over a solitary hadith. For this kind of evidence is itself an indication that the hadith in question is weak in respect of authenticity.° Similarly, some Ḥanafīs have maintained that when a solitary hadith, which is in conflict with qiyās, is supported by another qiyās, then it must be given priority over the conflicting qiyās. This is also the view that Ibn al-‘Arabī has attributed to Imām Mālik, who is quoted to the effect that whenever a solitary hadith is supported by another principle, then it must take priority over qiyās. But if no such support is forthcoming, the solitary hadith must be abandoned. For example, the following hadith has been found to be in conflict with another principle: ‘When a dog licks a container, wash it seven times, one of which should be with clean sand.’

It is suggested that this solitary hadith is in conflict with the permissibility of eating the flesh of game that has been fetched by a hunting dog. The game is still lawful for consumption, notwithstanding its having come into contact with the dog’s saliva. There is, on the other hand, no other principle that could be quoted in support of either of the two rulings, so qiyās takes priority over the solitary hadith. Our second example is of a solitary hadith that is in conflict with one principle but stands in accord with another. This is the hadith of ‘arāya, which provides that ‘the Prophet (upon whom be peace) permitted the sale of dates on the palm tree for its equivalent in dry dates’. This is permitted despite its being in conflict with the rules of ribā’. However, the permissibility in this case is supported by the principle of daf‘ al-haraj or ‘removal of hardship’ in that the transaction of ‘arāya was permitted in response to a need and, as such, it
takes priority over the *qiyaṣ* which might bring it under the rules of *ribā*.

Conclusion

*Qiyaṣ* has always been seen as the main vehicle of *ijtihaād*, so much so that Imam al-Shafi‘i considered *qiyaṣ* and *ijtihaād* as two words with the same meaning. A substantive principle of *usūl-al-fiqh*, *qiyaṣ* really ranks third among the hierarchy of proofs next to the Qur‘ān and the Sunnah. *Ijma‘*, although given third place in the hierarchy of proofs, is basically a procedural, rather than substantive, principle and, important as it is, it has no methodological juristic corpus of its own. The history of early Islamic juristic thought is closely aligned with analogical reasoning, with the obvious purpose of extending the letter and spirit of the text to all cases that fall within its broader purpose and rationale. We also note, however, that *qiyaṣ* saw its heyday in earlier times when the scope was wide open for legal development. But since *qiyaṣ* is tied to the text, it is not an interminable source and the scope for its application has been progressively narrowed, and new developments through *qiyaṣ* have become increasingly limited. There are a few cases or examples of *qiyaṣ* in the works either of *fiqh* or *usūl al-fiqh*. Modern textbooks on *usūl* often reproduce and repeat the same examples that were known to the ‘ulama‘ of earlier centuries. This may partly explain why the conventional methodology of *qiyaṣ* has come under criticism for being too restrictive to serve the purpose of reconstruction and *ijtihaād* in modern times. *Qiyaṣ* should, as a matter of principle, be attempted only when no ruling concerning a new issue can be found in a clear text. *Qiyaṣ* is therefore expected to extend the law to new territories and serve as a vehicle for enhancing and enriching the existing law. Ṭurābi has observed that ‘the conventional *qiyaṣ* [al-*qiyaṣ* al-*taqlīdī*] is a restrictive form of analogy which is supplementary to interpretation and sheds light only in clarifying some aspects of the ahkām’. In the context of contemporary jurisprudence, *qiyaṣ* that holds the promise of enrichment, Ṭurābi adds, is the natural and original *qiyaṣ* (al-*qiyaṣ* al-*fitrī al-hurr) which is free of the difficult conditions that were appended to it, initially by the Greeks and subsequently by Muslim jurists, in order to ensure stability in the development of the *Shari‘ah*. Abū Sulaymān has observed that *qiyaṣ* in areas of social interaction should be broad and comprehensive. ‘A long loss of time and a radical change of place may leave little practical room for the method of partial and case to case *qiyaṣ*.’ We need to depart from
the pedanticism of conventional qiyās to one which is ‘systematic, conceptual, abstract and comprehensive’.

The mujtahid and judge would naturally need to exercise caution in the construction and application of qiyās. The jurist normally ascertains the ratio legis of an existing law which is then extended by analogy to a new problem. The process involved here resembles that of the common law doctrine stare decisis. The judge distinguishes the ratio decidendi of an existing judicial decision in reference to a new case and, once it is established that the two cases have the same ratio in common, the ruling of the earlier decision is analogically extended to the new case. The idea of ratio legis in the civil law system, and of ratio decidendi in common law, is substantially the same as that of the ‘illah (and its broader equivalent, the hikmah) in Islamic jurisprudence. With regard to the identification of ‘illah in qiyās the precedent of the Companions and the leading imams is unequivocal on the point that the norm in regard to ta’lil (ratiocination) is maslālah, from which ta’lil derives its basic argument. It was only at a later stage that the jurists of the Hanafi and Shafi‘i schools departed from the maslālah-based ta’lil, known as hikmah, toward the more technical concept of ‘illah. But, even so, the ‘illah was still largely based on maslālah, albeit that ‘illah stipulated certain conditions, namely that the maslālah in question should be constant (mundābit) so that it did not change with changes of circumstance. The ‘illah was also to rely on maslālah that was evident (zāhir) and not a hidden factor that could not be ascertained by the senses. Al-Ghazālī thus noted that it is the maslālah that determines the hukm but, since it could be hidden factor, ‘illah was proposed as a substitute, for the latter only relied on the manifest attributes of that maslālah. Al-Shāṭibi attempted to equate the two concepts of ‘illah and hikmah by saying that ‘illah consisted of nothing other than the rationale and benefit (al-hikmah wa’l-masālih) that lay at the root of the laws (ahkām) of Shari‘ah. Hence ‘the ‘illah is identical with the maslālah and it does not merely represent a manifest attribute of maslālah: we therefore disregard the notion of the ‘illah being constant and evident’.

It is indeed the hikmah itself in which the ‘illah is rooted, such as lapse of intellect, which is the hikmah in the prohibition of wine-drinking, and this is reflected in intoxication, the latter being the ‘illah of the same prohibition. The Mālikīs and Hanbalis who validated hikmah as the basis of qiyās did not require the hikmah to be constant and evident, provided that it consisted of a proper attribute (wasf munāsib) and was in harmony with the objectives of the Lawgiver.
Hikmah is thus a more open concept than 'illah and is a direct embodiment of the rationale and objective of a particular hukm on which an analogy may validly be founded.

The fact remains, however, that the jurists of the post-classical period (muta'akkhkhûrûn) went far in the direction of adding to the technicalities of 'illah in qiyâs. The result of this was that qiyâs itself lost its grounding in maslahah, and its original vision and purpose grasping the maslahah of the people became subject to the exercise of specious reasoning.\(^{105}\) We note yet another irregularity in the application of qiyâs in that the jurists of the post-classical period showed a tendency to declare many things, including transactions that served popular needs, prohibited on grounds merely of doubtful qiyâs. This somewhat facile application of qiyâs stood in contrast with the Qur'ânic principle of ra'f al-haraj (removal of hardship) and its declaration that 'what is forbidden to you has been clearly explained' (al-An'âm, 6:119)

\[\text{وقد فصل لكم ما حرم عليكم}\]

and also the legal maxim which declares that 'permissibility is the normal state of things'. A careful observance of these guidelines surely suggests that liberal use of qiyâs in regard to prohibition is not advisable.\(^{106}\)

We note that in all this, it is the judge/jurist whose attitude and vision in the application of qiyâs is the more important determinant of the contribution judgements can make to the enrichment of Shari'ah. Parviz Owsia has ascertained the utility of qiyâs in judicial decision-making and compared it to some of its parallel concepts in modern law. It is thus noted that the search in the civil law system for ratio legis, and under common law system for ratio decidendi, or under an Islamic system for the underlying rationale (hikmah or manfah) of a rule, may all discharge similar functions, depending, of course, on the basic approach one is inclined to take. They cause, under a restrictive vision, the rigidity of the law, but conversely they serve, with a visionary outlook, the flexibility and adaptability of the law.\(^{107}\) The skill and insight of the judge in determining the ratio of a case is once again highlighted by another observer who stated that the ratio of a case is neither found in the reason given in the judge's opinion nor in the rule of law set forth in that opinion, nor even by a consideration of all ascertainable facts. Rather, the ratio is to be found by reference to the facts that the judge has treated as material and the decision that is based on those facts.\(^{108}\)
The following three stages of enquiry are involved in the construction of an analogy: (1) perception of relevant likeness between the factual issues as defined by the court in a previous case; (2) determination of the ratio decidendi of the previous case; (3) the decision to apply the ruling of the previous case to the present case. It is then suggested that the first of these three steps is essentially psychological, and therefore not entirely governed by the elements in the legal system. Wisdom and application of ‘good sense’, rather than a mechanical or fixed set of logical rules, is recommended in the determination of ratio decidendi. It thus appears that the fears of rigidity and the concern over strict adherence to precedent is ever-present in constructing an analogy in both Islamic law and Western jurisprudence. The concern here was vividly voiced by Lord Gardener who declared in 1966, while representing the Lords of Appeal in ordinary, that ‘their Lordships regard the use of precedent as an indispensable foundation...they recognise nevertheless that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.

The broad purpose of this message is applicable to qiyās, which is the nearest equivalent in Islamic law to the common law doctrine of judicial precedent. It is ironic to note, however, that Islamic law does not recognise judicial precedent as a binding proof precisely because of its restrictive effect on ijtihād. The integrity of ijtihād was deemed to be liable to compromise if judicial precedent were to carry a binding force on the lower courts. The ruling of one judge or mujtahid essentially carries the same authority as that of another. But the rigidity that the Muslim jurist tried to avoid in this instance was visited upon him through the imposition of burdensome technicalities on qiyās. The correct advice in both instances is surely to avoid rigid conformity to precedent at the expense of losing sight of the broad purpose and objective of the law.

NOTES

1. Āmīdī, Ihkām, III, 183.
2. Ghāzālī, Mustasfā, II, 54.
7. Abú Dâwûd, Sunan (Hasan’s trans.), II, 556, hadith no. 2075; Tabrizi, Mîshkât, II, 940, hadith no. 3144; Mûsâ, Aḥkâm, p. 45.
8. For these and other examples see al-Zarqâ, al-Madkhal, I, pp. 71ff.
9. Āmdî, Iḥkâm, III, 186.
10. Aghnîdâs, Muhammedan Theories, p. 49.
11. Āmdî (Iḥkâm, III, 193) is however of the view that the result of qiyâs, that is the ruling which is to be applied to the new case (i.e. hukm al-far’), should not be included in the essential requirements (arkan) of qiyâs. For the hukm is only arrived at at the end of the process; it should therefore not be a rukn. Isnâwî has, on the other hand, included the hukm al-far’ among the essentials of qiyâs. The disagreement is perhaps mainly theoretical as the hukm of the new case is, for all intents and purposes, identical with the hukm of the original case. Zuhayr, Usâl, IV, 58–59.
15. Abû Zahrah, Usâl, p. 128.
18. Ghazâlî, Mūsâfîr, II, 87.
20. Since al-Zarqâ’s work is not available to me, my knowledge of his view is confined to the extent that he is quoted by Nour, ‘Qiyâs’, 29.
24. Ibn Ḥazm, Iḥkâm, VIII, 102; Mûsîm, Saḥîh, I, 423, hadith no. 3600.
27. The relevant hadîth reads: ‘If Khuzaymah testifies for anyone, that is sufficient as a proof.’ Ghazâlî, Mūsâfîr, II, 88; Abû Dâwûd, Sunan, III, 1024, hadith no. 3600.
28. Mûsîm, Saḥîh, p. 247, hadith no. 920; Sha’bân, Usâl, p. 130.
32. Bukhârî, Saḥîh (Istanbul edn.), III, 44 (Kitâb al-salam, hadith no. 3); Sarakhshî (Usâl, p. 152) writes: ‘The Prophet forbade the sale of an object which does not exist at the time of the sale but permitted salâm as an exception. Salâm is valid on condition that the time of delivery is stipulated and that the parties are able to meet the conditions of their agreement.’ See also Abdur Rahîm, Jurisprudence, p. 145.
33. Shawkâni, Iḥrâd, p. 207; Abû Zahrah, Usâl, p. 188.
34. Note for example, Shawkâni (Iḥrâd, pp. 207–208) who has listed twenty-four conditions for the ‘illah whereas the Mâlikî jurist, Ibn Ḥajîb has recorded only eleven.
35. Khallâf, ‘Ilm, 64; Abû Zahrah, Usâl, p. 188.
37. Abû Zahrah, Usâl, p. 188.
42. Muslim, Sahih, p. 375, hadith no. 920; Ghazali, Mustasfa, II, 98; Khudari, Usūl, p. 320; Abū Zahrah, Usūl, p. 190; Abdur Rahim, Jurisprudence, pp. 151–52.
43. Abū Zahrah, Usūl, p. 187, 190, 194; Sha’bān, Usūl, p. 127.
44. Abū Dāwūd, Sunan, III, 1043, hadith no. 3672.
45. Muslim, Sahih, p. 375, hadith no. 1424; Ghazali, Mustasfa, II, 74; Ibn Hazm, Ikhām, VIII, 91; Abū Zahrah, Usūl, p. 193. There are also passages in the Qur’ān on the subject of isti’dhan, or asking permission before entering a private home. Note, for example, sura al-Nūr (24:27) which enjoins: ‘O you believers, do not enter houses other than your own unless you act politely and greet their occupants.’
46. Shawkani lists a number of other expressions such as li-alla, min ajli, la’allahā kadha, bi-sabab kadha, etc., all of which are associated with the idea of explaining the causes (Irshād, p. 211).
47. Imām Mālik has by analogy extended the same penalties to a husband who ill-treats his wife. He must first be admonished; if he continues, he must continue paying the wife her maintenance but she is not required to obey him; finally, he may be subjected to physical punishment. See Abū Zahrah, Usūl, p. 193.
48. Note, for example, sura al-Baqarah (2:222) concerning conjugal relations with one’s wife during her menstruation, which are to be avoided. The text indicates menstruation to be the ‘illah of its ruling. Shawkāni (Irshād, pp. 211–213) provides an exhaustive list of the particles of ta’lil with their illustrations from the Qur‘ān and the hadith.
49. Abū Dāwūd, Sunan, III, 1018, hadith no. 3582; Ghazālī, Mustasfa, II, 75; Shawkāni, Irshād, pp. 210–12.
50. Sha’bān, Usūl, p. 151.
53. Nawawi, Minhāj (Howard’s trans.), p. 284.
55. Shawkāni, Irshād, pp. 221–22; Abū Zahrah, Usūl, p. 194.
60. Abū Zahrah, Usūl, p. 195.
61. Muslim, Sahih, p. 41, hadith no. 119; Ibn Hazm, Ikhām, VII, 54–55; Abū Zahrah, Usūl, p. 195–96; Zuhayr, Usūl, IV, 44.
62. Zuhayr, Usūl, IV, 44.
63. Zuhayr, Usūl, IV, 44–45; Nour, ‘Qiyās’ 24–45.
64. Shawkāni, Irshād, p. 222; Ibn Qayyim, Flām, I, 178; Zuhayr, Usūl, IV, 45.
65. Ibid.
67. Ghazalī, Mustasfa, II, 64; Shātibī, Muwāfaqāt, III, 217; Ibn Qayyim, Flām, I, 198.
68. Abū Zahrah, Usil, p. 176.
69. Abū Dāwūd, Sunan (Hasan's trans.), III, 109, hadith 1038; Khallâf, 'Ilm, p. 56
70. Ghazâlî, Mustasfâ, 64; Shawkânî, Ishâd, p. 212; Ibn Qayyim, Flâm, I, 200
71. Ibn Hazm, Ikhâm, VII, 100; Ibn Qayyim, Flâm, I, 200.
72. Ibn Hazm, Ikhâm, VII, 147; Abū Zahrah, Usil, p. 177.
74. Shawkânî, Ishâd, p. 223; Abū Zahrah, Usil, p. 177.
75. Two of the Qur'anic dâyât that validate idâbah are as follows: 'It is He who has created for you all things that are on earth' (al-Baqarah, 2:29); and 'O you believers! Make not unlawful the good things which God has made lawful to you' (al-Ma'idah, 5:90).
76. Abû Zahrah, Usil, p. 177.
77. Ibid., VIII, 18.
78. Ibid., VIII, 9.
79. Ibid.
80. Ibid., VIII, 15.
82. Khallâf, 'Ilm, p. 79.
84.
85. Zuhayr, Usil, IV, 51; Abû Zahrah, Usil, p. 205.
86. The following hadîth is recorded in Abû Dāwûd (Sunan, III, 1229, hadith no. 4393): 'The hand of one who rifles the grave should be amputated, as he has entered the house of the deceased.'
87. Shawkânî, Ishâd, p. 222.
88. Tabrizi, Mishkat, II, 1061, hadith no. 3570; Abû Yusuf, Kitâb al-Kharaj, p. 152; Ibn Qayyim, Flâm, I, 209.
89. Abû Zahrah, Usil, p. 205.
90. Zuhayr, Usil, IV, 51.
92. Ibid., p. 200.
93. Ibid., pp. 201–202.
94. Ibid., p. 203.
95. Bukhârî, Sahih (Istanbul edn.), I, 51 (Kitâb al-wudâ', hadith no. 34); Khîn, Athâr, p. 403.
96. Baṣrî, Mu'tamad, II, 162–164.
97. Abû Zahrah, Usil, p. 204.
100. Turâbî, Taqidd, p. 24.
101. Abu Sulayman, Methodology, p. 84.
103. Ghazâlî, Mustasfâ, II, 310.
104. Shâṭîbî, Muwafaqat, I, 265.
106. Ibid., p. 165.
CHAPTER TEN

Revealed Laws Preceding the Shari'ah of Islam

In principle, all divinely revealed laws emanate from one and the same source, namely, Almighty God and, as such, they convey a basic message that is common to them all. The essence of belief in the oneness of God and the need for divine authority and guidance to regulate human conduct and the values of morality and justice constitute the common purpose and substance of all divine religions. This essential unity is confirmed in more than one place in the Qur'ān, which proclaims in an address to the Holy Prophet: ‘He has established for you the same religion as that which He enjoined upon Noah, and We revealed to you that which We enjoined on Abraham, Moses and Jesus, namely, that you should remain steadfast in religion and be not divided therein’ (al-Shūrā, 42:13).

More specifically, in a reference to the Torah, the Qur'ān confirms its authority as a source of inspiration and guidance: ‘We revealed the Torah in which there is guidance [huda] and light; and prophets who submitted to God’s will have judged the Jews by the standards thereof’ (al-Mā‘idah, 5:44).
It is thus observed that Muhammad, being one of the prophets, is bound by the guidance that is found in the Torah. Further confirmation of the basic harmony of the divinely revealed laws can be found in the Qur'anic ayah which, in a reference to the previous prophets, directs the Prophet of Islam to follow their guidance: 'Those are the ones to whom God has given guidance, so follow their guidance (al-An'am 6:90).

Basing themselves on these and similar proclamations in the Qur'an, the 'ulama' are unanimous that all the revealed religions are different manifestations of an essential unity. This is, of course, not to say that there are no differences between them. Since each one of the revealed religions was addressed to different nations at different points of time, they each have distinctive features that set them apart from the rest. In the area of halāl and harām, for example, the rules that are laid down by different religions are not identical. Similarly, in the sphere of devotional practices and the rituals of worship, they differ from one another even if the essence of worship is the same. The Shari'ah of Islam has retained many of the previous laws, while it has in the meantime abrogated or suspended others. For example, the law of retaliation (qisāṣ) and some of the hadd penalties that were prescribed in the Torah have also been prescribed in the Qur'an.

The general rule to be stated here is however that, notwithstanding their validity in principle, laws that were revealed before the advent of Islam are not applicable to the Muslims. This is especially so with regard to the practical rules of Shari'ah, that is, the aḥkām, in which the Shari'ah of Islam is self-contained. The jurists are also in agreement to the effect that the laws of the previous religions are not to be sought in any source other than that of the Shari'ah of Islam itself. For the rules of other religions do not constitute a binding proof as far as the Muslims are concerned. The Shari'ah, in other words, is the exclusive source of all law for the Muslims.

In view of the ambivalent character of the evidence on this subject, however, the question arises as to the nature of the principle that is to be upheld: whether to regard the laws preceding the Shari'ah of Islam as valid unless they are specifically abrogated by the Shari'ah, or whether
to regard them as basically nullified unless they are specifically upheld. In response to this, it is said that laws that were introduced in the previous scriptures but which are not upheld by the Shari'ah, and no ruling is found on them in the Qur'an or the Sunnah, are not, according to general agreement, applicable to the Muslims. The correct rule regarding the enforcement of the laws of the previous revelations is that they are not to be applied to the followers of Islam unless they are specifically upheld by the Shari'ah.

Once again, the question arises as to whether the foregoing statement is in harmony with the Qur'anic proclamations that were quoted above. The general response given to this is that the Prophet of Islam was ordered to follow the previous revelations as a source of guidance only in regard to the essence of the faith, that is, belief in God and monotheism. It has thus been pointed out that the word hudâ (guidance) in the second ãyah, and hudâhum (their guidance) in the third ãyah quoted above only mean tawhîd, or belief in the oneness of God, which is undoubtedly the norm in the Shari'ah of Islam. Their guidance cannot be upheld in the face of clear evidence that some of their laws have been abrogated. The reference is therefore to that aspect of guidance that is common to both Islam and the previous religions, namely tawhîd. It has been further suggested that the reference to ‘prophets’ in the second ãyah above is confined, as the text itself suggests, to the prophets of Banû Isrâ’il, and the Prophet Muhammad is not one of them.

The Qur'an on many occasions refers to the rules of previous revelations on specific issues, but the manner in which these references occur is not uniform. The Qur'an alludes to such laws in the following three forms:

(1) The Qur'an (or the Sunnah) may refer to a ruling of the previous revelation and simultaneously make it obligatory on the Muslims, in which case there remains no doubt that the ruling so upheld becomes an integral part of the Shari'ah of Islam. An example of this is the Qur'anic text on the duty of fasting which provides: ‘O believers, fasting is prescribed for you as it was prescribed for those who came before you’ (al-Baqarah, 2:183).

(2) The Qur'an (or the Sunnah) may refer to a ruling of the previous revelation and simultaneously make it obligatory on the Muslims, in which case there remains no doubt that the ruling so upheld becomes an integral part of the Shari'ah of Islam. An example of this is the Qur'anic text on the duty of fasting which provides: ‘O believers, fasting is prescribed for you as it was prescribed for those who came before you’ (al-Baqarah, 2:183).

(3) The Qur'an (or the Sunnah) may refer to a ruling of the previous revelation and simultaneously make it obligatory on the Muslims, in which case there remains no doubt that the ruling so upheld becomes an integral part of the Shari'ah of Islam. An example of this is the Qur'anic text on the duty of fasting which provides: ‘O believers, fasting is prescribed for you as it was prescribed for those who came before you’ (al-Baqarah, 2:183).

To give a similar example in the Sunnah, which confirms the ruling
of a previous religion, we may refer to the *hadith* that makes sacrifice by slaughtering animals lawful for Muslims. The believers are thus instructed to ‘give sacrifice, for it is the tradition of your ancestor, Abraham, peace be upon him’.5

ضحوا فإنه سنة أبيكم إبراهيم عليه السلام.

(2) The Qur'an or the Sunnah may refer to a ruling of the previous revelation but at the same time abrogate and suspend it, in which case the ruling in question is to be abandoned and discontinued. An example of this can be found in the Qur'an where a reference is made to the prohibition of certain varieties of food to the Jews, while at the same time the prohibitions are lifted from the Muslims. The text thus provides: ‘And to the Jews We forbade every animal having claws and of oxen and sheep, We forbade the fat’ (al-An'am, 6:146).

 وعلى الذين هادوا حرمنا كل ذي ظفر ومن البقر والغنم حرمنا عليهم شحومهما

The second portion of this text clearly removes the prohibitions that were imposed on the Jews. For a similar example in the Sunnah, we may refer to the hadith concerning the legality of spoils of war where the Prophet has proclaimed: ‘Taking booty has been made lawful to me, but it was not lawful to anyone before me.’6

أحلت لي الغنائم ولم تحل لأحد من قبلني.

Likewise, the expiation (*kaffarah*) for sins was not acceptable under the Torah; and when a garment became unclean, the unclean portion had to be cut out according to the rules of Judaism. But these restrictions were lifted so that the *Shari'ah* of Islam validated expiation for sins, and clothes can be cleaned by merely washing them with clean water.7

(3) The Qur'an or the Sunnah may refer to a ruling of a previous revelation without clarifying the position as to whether it should be abandoned or upheld. Unlike the first two eventualities, on which there is little disagreement among jurists, the present situation has given rise to wider differences of opinion. To give an example, we read in the Qur'an, in a reference to the law of retaliation that was
enacted in the Torah: 'We ordained therein for them life for life, eye for eye, nose for nose, tooth for tooth and wounds equal for equal' (al-Mā'idah, 5:48).

وَكَبِنَا عَلَيْهِمْ فِي هَذَا أنَّ النَّفْسَ بِالنَّفْسِ وَالْأَعْنَابَ بِالْأَعْنَابِ

Here there is no clarification as to whether the same law has to be observed by the Muslims. In yet another passage in the same sura the Qur'ān stresses the enormity of murder in the following terms: 'We ordained for the children of Israel that anyone who slew a person, unless it be for murder or mischief in the land, it would be as if he slew the whole of mankind' (al-Mā'idah, 5:32).

وَكَبِنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُمْ مِنْ قَتَلُوا نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ

Once again, this āyah narrates a law of a previous revelation but does not specify whether this also constitutes a part of the Sharī'ah of Islam. The majority of Hanafi, Mālikī and Hanbali jurists as well as some Shāfi'i ones have held the view that the foregoing is a part of the Sharī'ah of Islam, and the mere fact that the Qur'ān refers to it is sufficient to make the law of retaliation binding on the Muslims. For the Lawgiver spoke of the law of the Torah to the Muslims and there is nothing in the Sharī'ah of Islam either to abrogate it or to warrant a departure from it. This is the law of God, which He narrated to us for purposes of adherence. It is on the basis of this conclusion that the Hanafis have validated the execution of a Muslim for murdering a non-Muslim (i.e. a dhimmi), and a man for murdering a woman, as they all fall within the meaning of the Qur'ānic phrase 'life for life'.9 There are some variant opinions on this, but even those who disagree with the Hanafi approach to this issue subscribe to the same principle that they find enunciated elsewhere in the Qur'ān. In particular, two āyat have been quoted, which proclaim, 'And the punishment of an evil is an evil like it' (al-Shūrā, 42:40);

وَحَزْءَةٌ سَيِّئَةٌ سِيِّئَةٌ مِثْلَهَا
and “Whoever acts aggressively against you, inflict injury on him according to the injury he has inflicted on you, and keep your duty to God (al-Baqarah, 2:194).

فمن اعتدى عليكم فاعتدوا عليه مثل ما اعتدى عليكم واتقوا الله

It is thus concluded that these āyāt provide sufficient evidence in support of the law of retaliation even without any reference to previous revelations.

The majority of the Shafi`is, the Ash`arites and the Mu’tazilah have maintained the view that since Islam abrogated the previous laws, they are no longer applicable to the Muslims; and hence these laws do not constitute a part of the Shi‘ah of Islam unless they are specifically validated and confirmed. They maintain that the Shi‘ah norm regarding the laws of the previous religions is ‘particularity’ (khusūs), which means that they are followed only when specifically upheld; whereas the norm with regard to the Shi‘ah itself is generality (“umiim) in that it is generally applied as it has abrogated all the previous scriptures.9 This restriction is necessitated in view of the fact that the previous religions have not been correctly transmitted to us and have undergone considerable distortion.10 The proponents of this view have quoted in support the Qur’anic text which declares, in a reference to different nations and communities: ‘For every one of you We have ordained a divine law and an open road’ (al-Ma‘idah, 5:48).

لكل جعلنا منكم شريعة ومنهاجا

Thus it is suggested that every nation has a Shi‘ah of its own, and therefore the laws that were revealed before Islam are not binding on this ummah. Further evidence for this view has been sought in the hadith of Mu‘adh ibn Jabal which indicates only three sources for the Shi‘ah, namely the Qur‘ān, the Sunnah and ijtimā‘.11 The fact that this hadith has made no reference to previous revelations must mean that they are not a source of law for the followers of Islam. This last point has, however, been disputed in that when Mu‘adh referred to the Qur‘ān, it was sufficient, as the Qur‘ān itself contains numerous references to other revealed scriptures. Furthermore it is well-known that the Prophet did not resort to the Torah and Injil in order to find the rulings of particular issues, especially at times when he postponed
matters in anticipation of divine revelation. This would obviously imply that the Prophet did not regard the previous laws as binding on his own community.  

The correct view is that of the majority, which maintains that the Shari'ah of Islam only abrogates rules that are disagreeable to its teachings. The Qur’ān, on the whole, confirms the Torah and the Injil and, whenever a ruling of the previous scriptures is quoted without abrogation, it becomes an integral part of the Shari'ah of Islam. Finally, it may be added, as Abū Zahrah has pointed out, that disagreement among jurists on the authority or otherwise of the previous revelations is of little practical consequence, as the Shariah of Islam is generally self-contained and its laws are clearly identified. With regard to retaliation, for example, notwithstanding the differences of opinion among the jurists as to the precise import of the Qur’ānic references to this subject, the issue is resolved, once and for all, by the Sunnah which contains clear instructions on retaliation and leaves no doubt that it is an integral part of the Shari'ah of Islam.

NOTES

5. Tabrīzī, Mishkāt, I, 466, hadith no. 1476; Badrān, Uṣūl, p. 235.
6. Muslim, Sahih, p. 301, hadith no. 1137; Badrān, Uṣūl, p. 234.
10. Abdur Rahim, Jurisprudence, p. 70.
11. Abū Dāwūd, Sunan (Hasan’s trans.), III, 1019, hadith no. 3585.
12. Ghazālī, Mustaṣfā, I, 133. The only exception that is cited in this connection is when the Prophet referred to the Torah on the stoning of Jews for adultery. But this was only to show, as Ghazālī explains, that stoning (rajm) was not against their religion, and not because the Prophet regarded the Torah as a source of law.
CHAPTER ELEVEN

The Fatwā of a Companion

The Sunni ‘ulamā’ are in agreement that the consensus (ijmā’) of the Companions of the Prophet is a binding proof, and represents the most authoritative form of ijmā’. The question arises, however, as to whether the saying or fatwā of a single Companion should also be recognised as a proof and given precedence over evidences such as qiyyās, or the fatwās of other mujtahids. A number of leading jurists from various schools have answered this question in the affirmative, and have held the view that the fatwā of a Companion is a proof (hujjah) that must be followed. Their argument is that following the demise of the Prophet, the leadership of the Muslim community fell upon their shoulders, and a number of learned Companions, with their intimate knowledge of the Qur’ān and the teachings of the Prophet, were able to formulate fatwās and issue decisions on a wide range of issues. The direct access to the Prophet that the Companions enjoyed during his lifetime, and their knowledge of the problems and circumstances surrounding the revelation of the Qur’ān, known as the asbāb al-nuzūl, put them in a unique position to formulate ijtihād and to issue fatwās on the problems they encountered. Some ‘ulamā’ and transmitters of hadith have even equated the fatwā of a Companion with the Sunnah of the Prophet. The most learned Companions, especially the four Rightly-Guided Caliphs, are particularly noted for their contributions and the impact they made in the determination of the detailed rules of fiqh regarding the issues that confronted them. This is perhaps attested by the fact that the views of the Companions were occasionally upheld and confirmed by the Qur’ān. Reference may be made in this context to the Qur’ānic āyah that was revealed concerning the
treatment that was to be accorded to the prisoners of war following
the battle of Badr. This āyāh (al-Anfāl, 8:67) is known to have con-
formed the view that Ḫūr ḫāṭṭāb had earlier expressed on
the issue. The question arises, nevertheless, as to whether the fatwā of
a Companion should be regarded as a proof of Shari'ah or a mere ijtihād
that may or may not be accepted by the subsequent generations of
mujtahidūn and the rest of the community as a whole. No uniform
response has been given to this question but, before we attempt to
explore the different responses that the 'ulamā' have given, it will be
useful to identify who exactly a Companion is:

According to the majority (jumhūr) of 'ulamā', anyone who met the
Prophet while believing in him, even for a moment, and died as a
believer, is a Companion (ṣahābī) regardless of whether he or she
narrated any ḥadīth from the Prophet or not. Others have held that the
very word ṣahābī, which derives from suhbah, that is 'companionship',
implies continuity of contact with the Prophet and narration of ḥadīth
from him. It is thus maintained that one or the other of these
criteria, namely prolonged company, or frequent narration of ḥadīth,
must be fulfilled in order to qualify a person as a ṣahābī.3 Some
observers have made a reference to custom ('urf) in determining the
duration of contact with the Prophet which may qualify a Companion.
This criterion would, in turn, overrule some of the variant views to
the effect that a ṣahābī is a person who has kept the company of
the Prophet for specified periods such as one or two years, or that
he participated with the Prophet in at least one of the battles.4
But notwithstanding the literal implications of the word ʿṣahābī', the
majority view is to be preferred, namely that continuity or duration
of contact with the Prophet is not a requirement. Some 'ulamā' have
held that the encounter with the Prophet must have occurred at a
time when the person had attained the age of majority, but this too
is a weak opinion as it would exclude many who met the Prophet
and narrated ḥadīth from him and attained the age of majority only
after his death. Similarly, actual eye-witnessing is not required, as
there were persons among the Companions, like Ibn Umm Maktūm,
who were blind but were still regarded as ṣahābī.

The fact of being a Companion may be established by means of
continuous testimony, or tawātur, which is the case with regard to the
most prominent Companions such as the khulafā' rashidūn and many
others. The status of ṣahābī may even be established by a reputation
that falls short of amounting to tawātur. Similarly, it may be established
by the affirmation of another well-known Companion. According
to some ‘ulamā’, including al-Bāqillānī, we may also accept the Companions own affirmation in evidence, as they are all deemed to be upright (‘udūl), and this precludes the attribution of lying to them. There is, however, a difference of opinion on this point. The preferred view is that reference should be made to corroborating evidence, which may affirm or refute a person’s claim concerning himself. This precaution is taken with a view to preventing false allegations and the admittance of self-styled individuals into the ranks of the Companions.5

The saying of a Companion, referred to both as qawl al-ṣahabī and fatwā al-ṣahabī, normally means an opinion that the Companion had arrived at by way of ijtihād. It may be a saying, a considered opinion (fatwā) or a judicial decision that the Companion had taken on a matter in the absence of a ruling in the Qur’ān, Sunnah and ijma’. For in the face of a ruling in these sources, the fatwā of a Companion would not be the first authority on that matter. If the fatwā is related to the Qur’ān and Sunnah, then it must be on a point that is not self-evident in the source. There would, in other words, be a gap in our understanding of the matter at issue had the Companion not expressed an opinion on it.6

As stated earlier, there is no disagreement among the jurists on the fact that the saying of a Companion is a proof that commands obedience when it is not opposed by other Companions. Rulings on which the Companions were known to be in agreement are binding. An example of this is the grandmother’s share of one-sixth in inheritance on which the Companions have agreed, and it represents their authoritative ijma’. The ‘ulamā’ are, however, in disagreement with regard to rulings that are based on opinion (ra’i) and ijtihād, and in regard to matters on which the Companions differed among themselves.7

There is general agreement among the ‘ulamā’ of usūl on the point that the ruling of one Companion is not a binding proof over another, regardless of whether the ruling in question was issued by one of the caliphs, a judge or a leading mujtahid among their number, for the Companions were allowed to disagree with one another in matters of ijtihād. Had the ruling of one Companion been a proof over another, disagreement among them would not have been tolerated. But as already noted, the ‘ulamā’ of usūl have differed as to whether the ruling of a Companion constitutes a proof as regards the successors (tābi‘īn) and the succeeding generations of mujtahids.8 There are three views on this, which may be summarised as follows:

(1) That the fatwā of a Companion is a proof absolutely, and takes
priority over *qiَyās* regardless of whether it is in agreement with the *qiَyās* in question or otherwise. This is the view of Imam Mālik, one of the two views of Imam Shāfī‘i, one of the two views of Imam Ahmad ibn Ḥanbal and of some Hanafi jurists. The proponents of this view have referred to the Qur’ānic text which provides in a reference to the Companions: ‘The first and foremost among the Emigrants and Helpers and those who followed them in good deeds, God is well-pleased with them, as they are with Him’ (al-Tawbah, 9:100).

In this text, God has praised ‘those who followed the Companions’. It is suggested that this manner of praise for those who followed the opinion and judgment of the Companions warrants the conclusion that everyone should do the same. The fatwā of a saḥābi, in other words, is a proof of Shari`ah. Another Qur’ānic *āyah* that is quoted by the proponents of this view also occurs in the form of a commendation, as it reads in an address to the Companions: ‘You are the best community that has been raised for mankind; you enjoin right and you forbid evil’ (Al ‘Imrān, 3:110).

Their active and rigorous involvement in the propagation of Islam under the leadership of the Prophet is the main feature of the *amr bi‘l-ma‘nūf* (enjoining right) that the Companions pursued. The Qur’ān praises them as ‘the best community’ and as such their example commands authority and respect. It has, however, been suggested that the Qur’ānic references to the Companions are all in the plural, which implies that their individual views do not necessarily constitute a proof. But in response to this, it is argued that the Qur’ān establishes their uprightness (*‘adālah*) as individuals, and those who follow them in good deeds have been praised because they followed their opinion and judgement both as individuals and groups. It is further pointed out that those who followed the Companions are praised because they followed the personal opinion of the Companions, and
not because the latter themselves followed the Qur'ān and Sunnah. If this were to be the case, then the Qur'ānic praise would be of no special significance as it would apply to everyone who followed the Qur'ān and Sunnah, whether a Companion or otherwise. If there is any point, in other words, in praising those who followed the Companions, then it must be because they followed the personal views of the Companions. It is thus concluded that following the fatwā of the Companions is obligatory, otherwise the Qur'ān would not praise those who followed it in such terms. The proponents of this view have also referred to several hadīth, one of which provides: 'My Companions are like stars; whoever you follow will lead you to the right path.'

Another hadīth that is also quoted frequently in this context reads: 'Honour my Companions, for they are the best among you, and then those who follow them and then the next generation, and then lying will proliferate after that.'

It is thus argued that according to these hadīth, following the way of the Companions is equated with correct guidance, which implies that their sayings, teachings and fatwās constitute a proof that commands adherence.

It is, however, contended that these hadīth refer to the dignified status of the Companions in general, and are not categorical to the effect that their decisions must be followed. In addition, since these hadīth are conveyed in absolute terms in that they identify all the Companions as a source of guidance, it is possible that the Prophet had meant only those who transmitted hadīth and disseminated Prophetic teachings, in which case the reference would be to the authority of the Prophet himself. The Companions in this sense would be viewed as mere transmitters and propagators of the Sunnah of the Prophet. Furthermore, the foregoing references to the Companions, as al-Ghazālī points out, are in the nature of praise, which indicates their piety and propriety of conduct in the eyes of God, but does not render adherence to their views an obligation. Al-Ghazālī also quotes
a number of other hadith in which the Prophet praises individual Companions by name, each of which consists of commendation and praise; they do not necessarily mean that the sayings of those Companions are a binding proof (hujjah).

(2) The second view is that the ijtihād of a Companion is not a proof and does not bind the succeeding generations of mujtahidūn or anyone else. This view is held by the Ash‘arites, the Mu‘tazilah, Imam Ahmad ibn Hanbal (according to one of his two views), and the Ḥanafī jurist Abū al-Ḥasan al-Karkhī. The proponents of this view have quoted in support the Qur’ānic āyah (al-Ḥashr, 59:2) which states: ‘Consider, O you who have vision.’

It is argued that this āyah makes ijtihād the obligation of everyone who is competent to exercise it, and makes no distinction between the mujtahid who is a Companion or anyone else. What is obligatory is ijtihād itself, not adhering to the ijtihād of anyone in particular. This āyah also indicates that the mujtahid must rely directly on the sources and not imitate anyone, including the Companions. The proponents of this view also refer to the ijma‘ of the Companions, referred to above, to the effect that the views of one mujtahid among them did not bind the rest of the Companions. Al-Ghazālī and al-Āmidī both consider this to be the preferred view, saying that those who have held otherwise have resorted to evidence that is generally weak. Al-Shawkānī has also held that the fatwa of a Companion is not a proof, as he explains that the ummah is required to follow the Qur’ān and Sunnah. The Sharī‘ah only renders the Sunnah of the Prophet binding on the believers, and no other individual, whether a Companion or otherwise, has been accorded a status similar to that of the Prophet. Abū Zahrah has, however, criticised al-Shawkānī’s conclusion, and explains that when we say that the saying of a Companion is an authoritative proof, it does not mean that we create a rival to the Prophet. On the contrary, the Companions were most diligent in observing the Qur’ān and Sunnah, and it is because of this and their closeness to the Prophet that their fatwā carries greater authority than that of the generality of other mujtahidūn.

(3) The third view, which is attributed to Abū Ḥanīfah, is that the ruling of the Companion is a proof when it is in conflict with qiyās but not when it agrees with qiyās. The explanation for this is that when the ruling of a saḥābī conflicts with qiyās, it is usually for a reason,
and the fact that the Companion has given a ruling against it is an
indication of the weakness of the giyas; hence the view of the
Companion is to be preferred. In the event where the ruling of the
Companion agrees with qiyas, it merely concurs with a proof on
which the qiyas is founded in the first place. The ruling of the
Companion is therefore not a separate authority.\textsuperscript{18}

There is yet another view which maintains that only the rulings of
the four Rightly-Guided Caliphs command authority. This view quotes
in support the hadith in which the Prophet ordered the believers:
'You are to follow my Sunnah and the Sunnah of the khulafā’ rāshidūn
after me'.

This is even further narrowed down, according to another hadith, to
include the first two caliphs only. The hadith in question reads:
'Among those who succeed me, follow Abū Bakr and 'Umar'.

The authenticity of this second hadith has, however, been called into
question, and in any case, it is suggested that the purpose of these
hadith is to merely praise the loyalty and devotion of these luminaries
of Islam, and to commend their excellence of conduct.\textsuperscript{19}

Imam Shāfi‘i is on record as having stated that he followed the
fatwā of a Companion in the absence of a ruling in the Qur'ān, Sunnah
and ijma’. Al-Shāfi‘i’s view on this point is, however, somewhat
ambivalent, which is perhaps why it has been variously interpreted
by the jurists. In a conversation with al-Rabi‘, al-Shāfi‘i stated: ‘We
find that the ‘ulamā’ have sometimes followed the fatwā of a
Companion and have abandoned it at other times; and even those
who have followed it are not consistent in doing so.’ At this point the
interlocutor asks the Imam, ‘What should I turn to, then?’ To this
al-Shāfi‘i replies: ‘I follow the ruling of the Companion when I find
nothing in the Qur’ān, Sunnah or ijma’, or anything which carries
through the implications of these sources.’ Al-Shāfi‘i has further
stated that he prefers the rulings of the first three caliphs over those
of the other Companions, but that when the Companions are in
disagreement, we should look into their reasons and also try to
ascertain the view that might have been adopted by the majority of
the Companions. Furthermore, when the ruling of the Companion
is in agreement with qiyás, then that qiyás, according to al-Shafi‘ī, is given priority over a variant qiyás which is not so supported.  

Imam Abū Ḥanīfah is also on record as having said, ‘When I find nothing in the Book of God and the Sunnah of the Prophet, I resort to the saying of the Companions. I may follow the ruling which appeals to me and abandon that which does not, but I do not abandon their views altogether and do not give preference to others over them.’ It thus appears that Abū Ḥanīfah would give priority to the ruling of a Companion over qiyás, and although he does not consider it a binding proof, it is obvious that he regards the fatwā of a saḥābi to be preferable to the ijtihād of others.

Imam Ahmad ibn Hanbal has distinguished the fatwās of Companions into two types, one being a fatwā that is not opposed by any other Companion, or where no variant ijtihād has been advanced on the same issue. Ibn Hanbal regards this variety of fatwā as authoritative. An example of this is the admissibility of the testimony of slaves, on which the Imam has followed the fatwā of the Companion, Anas ibn Mālik. Ibn Ḥanbal is quoted to the effect that he had not known of anyone who rejected the testimony of a slave; it is therefore admissible. The second variety of fatwā that Ibn Hanbal distinguishes is one on which the Companions disagreed, and issued two or three different rulings concerning the same problem. In this situation, Imam Ibn Ḥanbal considers them all to be valid and equally authoritative, unless it is known that the khulāfā’ rāshidūn adopted one in preference to the others, in which case the Imam would do likewise. An example of such disagreement is the case of the allotment of a share in inheritance to full brothers during the life of the father’s father. According to Abū Bakr, the father’s father in this case is accounted like the father who would in turn exclude the full brothers altogether. Zayd ibn Thābit, on the other hand, counted the father’s father as one of the brothers and would give him a minimum of one-third, whereas ‘Alī ibn Abī Ṭalib counted the father’s father as one of the brothers whose entitlement must not be less than one-sixth. Imam Ibn Hanbal is reported to have accepted all the three views as equally valid, for they each reflect the light and guidance that their authors received from the Prophet, and they all merit priority over the ijtihād of others.

The Ḥanbalī scholar Ibn Qayyim al-Jawziyyah quotes Imam al-Shafi‘ī as having said, ‘It is better for us to follow the ra’y of a Companion rather than our own opinion.’ Ibn al-Qayyim accepts this without reservation, and produces evidence in its support. He
then continues to explain that the fatwa of a Companion may fall into one of six categories. Firstly, it may be based on what the Companion might have heard from the Prophet. Ibn al-Qayyim explains that the Companions knew more about the teachings of the Prophet than what has come down to us in the form of hadith narrated by the Companions. Note, for example, that Abī Bakr al-Siddīq transmitted no more than one hundred hadith from the Prophet, notwithstanding the fact that he was deeply knowledgeable of the Sunnah and was closely associated with the Prophet not only after the Prophetic mission began, but even before this time. Secondly, the fatwa of a Companion may be based on what he might have heard from a fellow Companion. Thirdly, it may be based on his own understanding of the Qurʾān in such a way that the matter would not be obvious to us had the Companion not issued a fatwa on it. Fourthly, the Companion may have based his view on the collective agreement of the Companions, although we have received it through one Companion only. Fifthly, the fatwa of a Companion may be based on the learned opinion and general knowledge that he acquired through long-standing association with the Prophet and fellow Companions. And sixthly, the fatwa of a Companion may be based on an understanding of his that is not a result of direct observation but of information that he received indirectly, and it is possible that his opinion is incorrect, in which case his fatwa is not a proof and need not be followed by others.

And lastly, it will be noted that Imam Mālik has not only upheld the fatwās of Companions but has almost equated it with the Sunnah of the Prophet. This is borne out by the fact, as already stated in our discussion of the Sunnah, that in his Muwatta’, he has recorded over 1,700 hadith, of which over half are the sayings and fatwās of Companions.

On a similar note, Abī Zahrah has reached the conclusion that the four imams of jurisprudence have all, in principle, upheld and followed the fatwās of Companions and all considered them to be authoritative, although some of their followers have held views which differ with those of their leading Imams. The author then quotes al-Shawkānī at some length to the effect that the fatwa of a Companion is not a proof. Having quoted al-Shawkānī, Abū Zahrah refutes his view by saying that it is ‘not free of exaggeration’. Abū Zahrah then quotes Ibn Qayyim’s view on this matter, which we have already discussed, and supports it to the effect that the fatwā of a Companion is authoritative. But it is obvious from the tenor of his
discussion and the nature of the subject as a whole that the fatwā of a Companion is a speculative proof only. Although the leading imams of jurisprudence are in agreement on the point that the fatwā of a Companion is authoritative, none has categorically stated that it is a binding proof. Nonetheless, the four leading Imams consider the fatwā of a Companion to be a persuasive source of guidance in that it carries a measure of authority which merits careful consideration, and commands priority over the ijtihād of other mujtahīdūn.

NOTES

2. Ghazālī, Mustasfā, I, 136.
3. Shawkānī, Irshād, p. 70.
8. Āmīdī, Iḥkām, IV, 149; Shawkānī, Irshād, p. 243.
11. Tabrizī, Mishkāt, III, 1695, hadith no. 6001 and 6003; Ghazālī, Mustasfā, I, 136; Āmīdī, Iḥkām, IV, 152.
15. Ghazālī, Mustasfā, I, 135; Āmīdī, Iḥkām, IV, 149.
16. Shawkānī, Irshād, p. 214
17. Ābū Zahrah, Uṣūl, p. 172; Ismā’īl, Adillah, p. 299.
19. Ibn Mājah, Sunan, I, 37, hadith no. 97; Ghazālī, Mustasfā, I, 135; Āmīdī, Iḥkām, IV, 152.
24. We have already given a brief outline of Ābū Zahrah’s critique of al-Shawkānī.
25. Ābū Zahrah, Uṣūl, p. 171.
CHAPTER TWELVE

Istihsān (Equity in Islamic Law)

The title I have chosen for this chapter draws an obvious parallel between equity and istihsān which should be explained, for the two are not identical, although they bear a close similarity to one another. 'Equity' is a Western legal concept that is grounded in the idea of fairness and conscience, and derives legitimacy from a belief in natural rights or justice beyond positive law.1 Istihsān in Islamic law, and equity in Western law, are both inspired by the principle of fairness and conscience, and both authorise departure from a rule of positive law when its enforcement leads to unfair results. The main difference between them is, however, to be sought in the overall reliance of equity on the concept of natural law, and of istihsān on the underlying values and principles of the Shari‘ah. But this difference need not be overemphasised if one bears in mind the convergence of values between the Shari‘ah and natural law. Notwithstanding their different approaches to the question of right and wrong, for example, the values upheld by natural law and the divine law of Islam are substantially concurrent. Briefly, both assume that right and wrong are not a matter of relative convenience for the individual, but derive from an eternally valid standard that is ultimately independent of human cognizance and adherence. But natural law differs from divine law in its assumption that right and wrong are inherent in nature.2 From an Islamic perspective, right and wrong are determined, not by reference to the 'nature of things', but because God has determined them as such. The Shari‘ah is an embodiment of the will of God, the Lord of the universe and the supreme arbiter of values. If equity is defined as a law of nature superior to all other legal rules, written or
Istihsan literally means ‘to approve or to deem something prefer-
otherwise, then this is obviously not what is meant by istihsan. Istihsan
does not recognise the superiority of any other law over the divine
revelation, and the solutions it offers are for the most part based on
principles that are upheld by divine law. Unlike equity, which is
found on the recognition of a superior law, istihsan does not seek
to constitute an independent authority beyond the Shari’ah. Istihsan,
in other words, is an integral part of the Shari’ah, and differs with
equity in that the latter recognises a natural law apart from, and
essentially superior to, positive law.3

While discussing the general theory of istihsan, this chapter
also draws attention to two main issues concerning this subject.
One of these is whether or not istihsan is a form of analogical reason-
ing: is it to be regarded as a variety of qiyas or does it deserve to stand
as a principle of equity in its own right? The other issue to be raised
is the controversy over the validity of istihsan, which started with
al-Shafi‘i’s unambiguous rejection of this principle. A glance at the
existing literature shows how the ‘ulama’ are preoccupied with the
polemics of istihsan and have differed on almost every aspect of the
subject. I shall therefore start with a general characterisation of
istihsan, and then discuss the authority that is quoted in its support.
This will be followed by a brief account of the related concepts of
ra’y and qiyas. The discussion will end with an account of the contro-
versy over istihsan and a conclusion where I have tried to see the
issues in a fresh light, with a view to developing a perspective on
istihsan.

Istihsan is an important branch of ijtihad, and has played a promi-
nent role in the adaptation of Islamic law to the changing needs of
society. It has provided Islamic law with the necessary means with
which to encourage flexibility and growth. Notwithstanding the
measure of juristic technicality that seems to have been injected into
an originally simple idea, istihsan remains basically flexible, and can be
used for a variety of purposes, as will be discussed later. Yet because
of its essential flexibility, the jurists have discouraged an over-reliance
on istihsan lest it result in the suspension of the injunctions of the
Shari’ah and become a means of circumventing its general principles.
Istihsan has thus become the subject of much controversy among our
jurists. Whereas the Hanafi, Mālikī and Ḥanbalī jurists have validated
istihsan as a subsidiary source of law, the Shafi‘i, Zāhiri and Shi‘i
‘ulama’ have rejected it altogether and refused to give it any credence
in their formulation of the legal theory of usūl al-fiqh.4

Istihsan literally means ‘to approve or to deem something prefer-
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able’. It is a derivation from hasuna, which means being good or beautiful. In its juristic sense, istihsān is a method of exercising personal opinion in order to avoid any rigidity and unfairness that might result from the literal enforcement of the existing law. ‘Juristic preference’ is a fitting description of istihsān, as it involves setting aside an established analogy in favour of an alternative ruling that serves the ideals of justice and public interest in a better way.

Enforcing the existing law may prove to be detrimental in certain situations, and a departure from it may be the only way of attaining a fair solution to a particular problem. The jurist who resorts to istihsān may find the law to be either too general or too specific and inflexible. In both cases, istihsān may offer a means of avoiding hardship and generating a solution that is harmonious with the higher objectives of the Shari‘ah. It has been suggested that the ruling of the second caliph, ‘Umar ibn al-Khattāb, not to enforce the hadd penalty of the amputation of the hand for theft during a widespread famine, the ban he imposed on the sale of slave-mothers (ummahāt al-awlād), and marriage with kitābiyahs in certain cases, were all instances of istihsān; for ‘Umar set aside the established law in these cases on grounds of public interest, equity and justice.

Istihsān essentially consists of giving priority to maslahah over the ruling of qiyās in the event of a conflict arising between them. This is the essence of the Mālikī istihsān, which consists of a recourse to unrestricted reasoning (al-istidlal al-mursal) that is given priority over qiyās, in the event where qiyās violates maslahah. The general objectives of the Shari‘ah must, in other words, take priority over the ruling of a particular qiyās.

The Hanafi jurist al-Sarakhsi (d. 483 AH) considers istihsān to be a method of seeking facility and ease in legal injunctions. It involves a departure from qiyās in favour of a ruling that dispels hardship and brings about ease to the people. ‘Avoidance of hardship [raf‘ al-haraj]’ al-Sarakhsi adds, ‘is a cardinal principle of religion which is enunciated in the Qur‘ān, where we read, in an address to the believers, that “God intends facility for you, and He does not want to put you in hardship” (al-Baqarah 2:185)’.

Al-Sarakhsi substantiates this further by quoting the hadith that reads: ‘The best of your religion is that which brings ease to the people.’
Al-Khūḍārī has rightly explained that in their search for solutions to problems, the Companions and Successors resorted in the first place to the Qurʾān and the normative example of the Prophet. But when they found no answer in these sources, they exercised their personal opinion (raʾy), which they formulated in the light of the general principles and objectives of the Sharīʿah. This is illustrated, for example, in the judgement of ʿUmar ibn al-Khaṭṭāb in the case of Muḥammad ibn Maslamah. The caliph was approached by Ibn Maslamah’s neighbour who asked for permission to extend a water canal through Ibn Maslamah’s property, and he was granted the request on the ground that no harm was likely to come to Ibn Maslamah, whereas extending a water canal was to the manifest benefit of his neighbour.  

It thus appears that istiḥsān is essentially a form of raʾy that gives preference to the best of the various solutions that may exist for a particular problem. In this sense, istiḥsān is an integral part of Islamic jurisprudence and indeed of many other areas of human knowledge. Hence it is not surprising to note Imam Mālik’s observation that ‘istiḥsān represents nine-tenths of human knowledge’. While quoting this view, Abū Zahrah adds that when Mālik made this remark, he was apparently including the broad concept of maslahah within the purview of istiḥsān, ‘for it is maslahah which accounts for the larger part of the nine-tenths’.  

Evidence suggests that the Companions and Successors were not literalists who would seek a specific authority in the revealed sources for every legal opinion (fatwā) they issued. On the contrary, their rulings were often based on their understanding of the general spirit and purpose of the Shariʿah, and not necessarily on the narrow and literal meaning of its principles. Istiḥsān has been formulated in this spirit; it is the antidote to literalism and takes a broad view of the law which must serve, not frustrate, the ideals of fairness and justice.

To give an example, oral testimony is the standard form of evidence in Islamic law on which a consensus (ijmāʿ) can be claimed to exist. This normally requires two upright (ʿadl) witnesses unless the law provides otherwise (the proof of zinā, for instance, requires four witnesses). The number of witnesses required in these cases is prescribed in the Qurʾān, but the rule that testimony should be given orally is determined by consensus. Muslim jurists have insisted on oral
testimony and have given it priority over other methods of proof, including confession and documentary evidence. In their view, the direct and personal testimony of a witness who speaks before the judge with no intermediary is the most reliable means of discovering the truth. The question arises, however, whether one should still insist on oral testimony at a time when other methods such as photography, sound recording, laboratory analyses, etc. offer at least equally, if not more, reliable methods of establishing facts. Here we have, I think, a case for a recourse to istihsan that would give preference to these new and often more reliable means of proof. It would mean departing from the established rules of evidence in favour of an alternative ruling that is justified in light of new circumstances. The rationale of this istihsan would be that the law requires evidence in order to establish the truth, and not the oral testimony for its own sake. If this is the real spirit of the law, then recourse to istihsan would seem to offer a better way to uphold that spirit.

The jurists are not in agreement on a precise definition for istihsan. The Hanafis have, on the whole, adopted Abü al-Hasan al-Karkhi’s (d. 340 AH) definition, which they consider accurate and comprehensive. Istihsan is accordingly a principle that authorises departure from an established precedent in favour of a different ruling for a reason stronger than the one obtained in that precedent. While quoting this, al-Sarakhsi adds that the precedent set aside by istihsan normally consists of an established analogy that may be abandoned in favour of a superior proof, that is, the Qur’ān, the Sunnah, necessity (darūrah), or a stronger qiyās.

The Hanbali definition of istihsan also seeks to relate istihsan closely to the Qur’ān and the Sunnah. Thus according to Ibn Taymiyyah, istihsan is the abandonment of one legal norm (hukm) for another that is considered better on the basis of the Qur’ān, Sunnah or consensus.

Notwithstanding the fact that the Maliki jurists lay greater emphasis on istislah (consideration of public interest) and are not significantly concerned with istihsan, they have in principle validated istihsan. But the Mālikīs view istihsan as a broad doctrine, somewhat similar to istislah, which is less stringently confined to the Qur’ān and Sunnah than the Hanafis and Ḥanbalīs would have it. Thus according to Ibn al-’Arabi, ‘istihsan is to abandon exceptionally what is required by the law because applying the existing law would lead to a departure from some of its own objectives.’ Ibn al-’Arabi points out that the essence of istihsan is to act on ‘the stronger of two indications [dalilayn].’
Whereas the majority of ‘ulamā’ would hold to *qiyyās* when it is attacked on grounds of rigidity, Mālik and Abū Ḥanīfah departed from *qiyyās*, or specified the general in *qiyyās*, on grounds of *maslahah* and other indications.12

There are certain differences in the terms of these definitions which will hopefully become clearer as our discussion proceeds. But it appears that departure from an existing precedent on grounds of more compelling reasons is a feature of *istiḥsān* that is common to all the foregoing definitions. According to Abū Zahrah, the Ḥanafis have adopted al-Karkhi’s definition because it embraces the essence of *istiḥsān* in all of its various forms. The essence of *istiḥsān*, Abī Zahrah adds, is to formulate a decision that sets aside an established analogy for a reason that justifies such a departure and seeks to uphold a higher value of the Shari‘ah.13 The departure to an alternative ruling in *istiḥsān* may be from an apparent analogy (*qiyyās jali*) to a hidden analogy (*qiyyās khafi*), or to a ruling that is given in the *nass* (i.e. the Qur‘ān or the Sunnah), consensus, custom or public interest.

There is no direct authority for *istiḥsān*, either in the Qur‘ān or in the Sunnah, but the jurists have quoted both in their arguments for it. The opponents of *istiḥsān* have, on the other hand, argued that *istiḥsān* amounts to a deviation from the principles of the Shari‘ah. It is an idle exercise in human preferences which only detracts from our duty to rely exclusively on divine revelation. Both sides have quoted the Qur‘ān and the Sunnah in support of their arguments. They were able to do so partly because the Qur‘ānic āyāt they have quoted are on the whole open to various interpretations.

The Ḥanafī jurists have mainly quoted two Qur‘ānic āyāt, both of which employ a derivation of the root word ḥasuna, and enjoin the believers to follow the best of what they hear and receive. They are as follows:

Those who listen to the word and follow the best of it (al-Zumar, 39:18).

And follow the best of what has been sent down to you from your Lord (al-Zumar, 39:55).

Qaww (lit. ‘word’ or ‘speech’) in the first āyah could mean either the
word of God, or any other speech. If it means the former, which is more likely, then the question arises as to whether one should distinguish between the words of God which are *ahsan* (the best) as opposed to those which are merely *hasan* (good). Some commentators have suggested that the reference here is to a higher course of conduct. The Qurʾān, in other words, distinguishes a superior course of conduct from that which may be considered as ordinary. Punishing the wrongdoer, for example, is the normal course enjoined by the Shariʿah, but forgiveness may at times be preferable (*ahsan*) and would thus represent the higher course of conduct. The basic concept of istiḥsān, in other words, can be seen in the Qurʾān, although not in its technical form, which the ‘ulamāʾ of jurisprudence have developed.¹⁴

The following two *hadith* have also been quoted in support of istiḥsān:

*What the Muslims deem to be good is good in the sight of God.*¹⁵

 않을 ولا ضرار في الإسلام.

Al-Sarakhsi has elaborated in his *Uṣūl*¹⁷ that listening to the words of God and following them to the best of one’s ability can mean two things to a jurist: firstly, to exert oneself by way of *ijtihād* and the best that *raʾy* can achieve in understanding those parts of the Qurʾān that have been left open to the exercise of *raʾy*. This is the case, for example, with regard to determining the quantity of the gift of consolation (*mutʿah*), which the Qurʾān itself has not specified but merely stated that ‘a fair gift is due from those who wish to do what is right’ (al-Baqarah, 2:241).

*Mutʿah* should therefore be determined in line with the financial capability and means at one’s disposal, provided that it conforms to the Qurʾānic stipulation of *biʿl maʿrāf* (fair, equitable). What is required in this *āyah*, al-Sarakhsi added, is to exercise one’s best judgement that is based on the predominance of *raʾy*, which is what is involved in istiḥsān. In another place the Qurʾān lays down the obligation in...
respect of the maintenance and clothing of children, to be provided
by the father in manner that is decent and fair (bi'l-ma'rif) (al-Baqarah,
2:233). But once again the text here does not specify quantities. There
is little doubt, al-Sarakhsi added, about the substance of this variety of
istihsan and the jurists are generally in agreement with it. I may hasten
to add here that this is, in fact, one of the two main varieties of istihsan
that al-Jassas (d. 370 AH) had earlier identified as ‘the determination
of the quantitative aspects of textual rulings which is for the mujtahid
to specify’ (ithbāt al-maqādir al-mawkūlah ilā ijtihādinā). The other
variety of istihsan that al-Jassas has discussed concerns the abandon-
ment of qiyās for an alternative ruling that is deemed to be preferable.
The āyah under discussion, namely ‘to listen to the word and follow
the best of it’, al-Sarakhsi wrote, could also be understood in reference
to the underlying proof of qiyās. The proof (dalil) that conflicts with
an obvious qiyās but is then discovered, after consideration and deeper
thought, to be the stronger evidence, and provides a better under-
standing of the Shari‘ah and a preferable course of action. This is what
lies at the centre of juristic istihsan, the intellectual effort, that is, to
distinguish between the stronger evidence and that which is merely
plausible, in reference to a particular hukm.

The critics of istihsan have argued, however, that none of the fore-
going provide a definite authority in support of this doctrine. Regarding
the first of the two āyāt, for example, Amidi points out that it merely
praises those who follow the best of what they hear. There is no
indication in this āyah to render adherence to the ‘best speech’ an
obligation. Nor does the second āyah bind one to search for the best
in revelation: if there is an injunction in the revealed sources, it will
bind the individual regardless of whether it is the best of the revela-
tion or otherwise. 18 As for the Tradition, ‘What the Muslims deem
good is good in the sight of God’, both al-Ghazālī and Amidi have
observed that, if anything, this provides the authority for consensus
(ijmā‘). There is nothing in this Tradition to suggest, and indeed it
would be arbitrary to say so, that what the Muslim individual deems
good is also good in the sight of God. 19 The critics of istihsan have
further suggested that this doctrine was initially introduced by Hanafi
jurists in response to certain urgent situations. The Hanafis then tried
to justify themselves by quoting the Qur’ān and the hadith ex-post
facto. The Qur’ānic foundation of istihsan, in other words, is weak,
and no explicit authority for it can be found in the Sunnah either. 20

The historical origins of istihsan can clearly be traced back to the
Companions, especially the decision of the Caliph ʿUmar ibn al-
Khattāb to postpone the prescribed punishment for theft during the year of the famine, evidently on the grounds that applying the normal rules under such conditions would fail to obtain justice and may even amount to oppression. The Caliph is also on record as having made two different decisions concerning a case of inheritance, known as al-mushtarakah (discussed below), the second of which set aside the normal rules of inheritance and provided a solution that seemed equitable and just under the circumstances. The facts of these decisions leaves little doubt as to the historical origins of istihsān, and yet we often read in many reputable texts of usūl al-fiqh the attribution of istihsān to Imam Ḥanīfah and his disciple al-Shaybahī. This may be understood to be referring mainly to the technical development of istihsān. Although ʿUmar ibn al-Khattāb actually exercised the basic notion and idea of istihsān, he probably did not use the term, nor did he attempt to identify what he did as a proof or principle of usūl al-fiqh.

The word istihsān appears to have been used, even before Imam Ḥanīfah, by an early Umayyad jurist, Iyās ibn Muʿāwiyyah (d. 122 AH). He is on record as having given the following instruction: ‘Use qiyās as a basis of judgement insofar as it is beneficial to the people, but when it leads to undesirable results, then use juristic preference [faṣtaḥsini].’ This clearly indicates that even before Abū Ḥanīfah, istihsān was known as a principle by which to correct the irregularities of qiyās. Ibn al-Muqaffāʾ (d. 137 AH), a state secretary of the early Abbasid period, observed that discretion cannot be precluded in the adjudication of matters that are not regulated in the textual sources. To attain justice and fairness in accordance with the spirit of the Qurʾān and the Sunnah, it is necessary to exercise discretion. Ibn al-Muqaffāʾ declared that unreserved adherence to qiyās sometimes led to injustice and it was in such instances that a certain degree of flexibility was advisable: ‘Qiyās is only an evidence that should be applied for good results ... but when it leads to unfairness and injustice, one must abandon it; for the objective of the law is not adherence to qiyās as such, but to judge according to what is good and appropriate.’

I. Raʾy, Qiyās and Istihsān

Istihsān is closely related to both raʾy and analogical reasoning. As already stated, istihsān usually involves a departure from qiyās in the first place, and then the departure in question often means giving preference to one qiyās over another. Broadly speaking, qiyās is the logical extension of an original ruling of the Qurʾān, the Sunnah (or
even *ijma*') to a similar case for which no direct ruling can be found in these sources. *Qiyās* in this way extends the *ratio legis* of divine revelation through the exercise of human reasoning. There is, in other words, a rationalist component to *qiyās* which consists, in the most part, of recourse to personal opinion (*ra'y*). This is also true of *istihsān*, which relies even more heavily on *ra'y*. It is this rationalist tendency verging on personal opinion in both *qiyās* and *istihsān* that has been the main target of criticism by al-Shafi‘i and others. Thus the controversy over the validity of *istihsān* is essentially similar to that encountered with regard to *qiyās*. However, because of its closer identity with the Qur’ān and the Sunnah, *qiyās* has gained wider acceptance as a principle of jurisprudence. But even so, *qiyās* and *istihsān* are both considered to be expressive of rationalist tendencies in a system of law that must keep a close identity with its origins in divine revelation. In the centre of this controversy lies the question of the validity or otherwise of recourse to personal opinion (*ra'y*) in the development of the *Shari'ah*.

From an historical vantage point, it will be noted that in their recourse to personal opinion, the Companions were careful not to exercise *ra'y* at the expense of the Sunnah. This concern over possible violation of the Sunnah was greater in those days when the *hadith* had not yet been compiled nor consolidated. With the territorial expansion of the Islamic domain under the Umayyads, and the dispersal of jurists and Companions who were learned in the *hadith*, direct access to them became increasingly difficult. Fear of isolating the Sunnah led the jurists to lay down certain rules which restricted free recourse to *ra'y*. In order to be valid, the jurists ruled, *ra'y* must derive its authority from the *Shari'ah* principles that are enunciated in the Qur’ān and the Sunnah. This was the genesis of *qiyās*, which was initially a disciplined form of *ra'y*. However, the exercise of this relatively liberal form of *ra'y* during the formative stages of jurisprudence had already led to considerable disagreement among the *fuqaha*'. Those who called for a close adherence to the *hadith*, namely the *ahl al-hadith*, mainly resided in the holy cities of Mecca and Medina. The *ahl al-hadith* regarded the Sunnah as supplementary to the Qur’ān. They insisted on strict adherence to the Sunnah, which, in their view, was a basic requirement of the faith. Acceptance of the faith, they argued, must be on a dogmatic basis without referring to the rationale or causes (*ta'līl*) of its ordinances. They were, in other words, literalists who denied the mujtahid the liberty to resort to the basic rationale of the *Shari'ah* rules. Whenever they failed to find explicit authority in the
sources concerning a particular problem, they chose to remain silent and avoided recourse to ra’y; this they considered to be the essence of piety and unquestioning submission to God.

The fuqahā’ of Iraq, on the other hand, resorted more liberally to personal opinion, which is why they are known as ahl al-ra’y. In their view, the Sharī’ah was in harmony with the dictates of reason. Hence they had little hesitation in referring, during their search for solutions to legal problems, to both the letter and the spirit of the Sharī’ah ordinances. The ahl al-ra’y are thus known for their frequent resort to analogical reasoning and istihsān.

As will be shown in the following pages, istihsān reflects an attempt on the part of the fuqahā’ to regulate the free exercise of ra’y in matters of law and religion. Any restrictions imposed on istihsān, such as that which sought to turn istihsān into a technical formula, were basically designed to tilt the balance, in the continuous debate about the use of ra’y versus literalism, in favour of the latter. Yet those who saw istihsān as a predominantly rationalist doctrine had reservations about subjecting it to restrictions that eroded its rationalist content and rendered it a mere subdivision of qiyās.

Although the classical theory of usul al-fiqh tacitly recognised that in some cases analogical reasoning might entail injustice and that it was then permissible to resort to istihsān, this was, however, not to be regarded as ‘giving human reason a sovereign role’. Istihsān and maṣlaḥah were to be applied strictly in the absence of a specific ruling in the Qur’ān or the Sunnah.73

II. Qiyās Jalī, Qiyās Khaft and Istihsān

Qiyās jalī, or ‘obvious analogy’, is straightforward qiyās that is easily intelligible to the mind. An oft-quoted example of this is the analogy between wine and another intoxicant, say a herbal drink, both of which have in common the effective cause (‘illah) of being intoxicating. Hence the prohibition concerning wine is analogically extended to the intoxicant in question. But qiyās khafti, or ‘hidden analogy’, is a more subtle form of analogy in the sense that it is not obvious to the naked eye but is intelligible only through reflection and deeper thought. Qiyās khafti, which is also called istihsān or qiyās mustahsan (preferred qiyās) is stronger and more effective in repelling hardship than qiyās jalī, presumably because it is arrived at not through the superficial observation of similitudes, but through deeper reflection and analysis.
According to the majority of jurists, *istihsān* consists of a departure from *qiyyās jāli* to *qiyyās khaţī*. When the jurist is faced with a problem for which no ruling can be found in a definitive text (*nās‘*), he may search for a precedent and try to find a solution by means of analogy. His search for alternatives may reveal two different solutions, one of which is based on an obvious analogy and the other on a hidden analogy. If there is a conflict between the two, then the former must be rejected in favour of the latter. For the hidden analogy is considered to be more effective, and therefore preferable to the obvious analogy. This is one form of *istihsān*. But there is another type of *istihsān* which mainly consists of making an exception to a general rule of the existing law when the jurist is convinced that justice and equity will be better served by making such an exception. The jurist might have reached this decision as a result of his personal *ijtihād*, or the exception may have already been authorised by any of the following: *nās‘*, *ijmā‘*, approved custom, necessity (*darūrah*) or considerations of public interest (*māsālahah*). These will be illustrated in the examples that follow. The examples chosen will also show more clearly the role that *istihsān* has played in the development of *fiqh*.

(1) To give an example of *istihsān* that consists of a departure from *qiyyās jāli* to *qiyyās khaţī*, it may be noted that under Ḥanafī law, the *waqf* (charitable endowment) of cultivated land includes the transfer of all the ancillary rights that are attached to the property, such as the right of water (*haqq al-shurb*), right of passage (*haqq al-murîr*) and the right of flow (*haqq al-masîl*), even if these are not explicitly mentioned in the instrument of *waqf*. This ruling is based on *qiyyās khaţī* (or *istihsān*), as I shall presently explain. It is a rule of the Islamic law of contract, including the contract of sale, that the object of contract must be clearly identified in detail. What is not specified in the contract, in other words, is not included therein. Now if we draw a direct analogy (i.e. *qiyyās jāli*) between sale and *waqf* — as both involve the transfer of ownership — we must conclude that the attached rights can only be included in the *waqf* if they are explicitly identified. It is, however, argued that such an analogy would lead to inequitable results: the *waqf* of cultivated lands, without its ancillary rights, would frustrate the basic purpose of *waqf*, which is to facilitate the use of the property for charitable purposes. To avoid hardship, a recourse to an alternative analogy, namely to *qiyyās khaţī*, is therefore warranted. The hidden analogy in this case is to draw a parallel, not with the contract of sale, but with the contract of lease (*ijārah*). For both of these involve a transfer of usufruct (*intiţā‘*). Since usufruct is the essential purpose
of ijarah, this contract is valid, on the authority of a hadith, even without a clear reference to the usufruct. This alternative analogy with ijarah would enable us to say that waqf can be validly concluded even if it does not specify the attached rights to the property in detail.

To give another example, supposing A buys a house in a single transaction from B and C at a price of £40,000 payable in instalments. A pays the first instalment of £2,000 to B assuming that B will hand over C’s portion to him. But before this happens, B loses the £2,000 and the question arises as to who should suffer the loss. By applying qiyas jali, B and C should share the loss. For B received the money on behalf of the partnership and not for himself alone. Their position in sharing the loss, in other words, is analogous to their status as partners in the first place. But by applying istihsan, only B, who received the money, suffers the loss, for C, although a partner, was basically under no obligation to obtain his portion of the £2,000 from B. It was only his right/privilege, and he would be at the liberty to waive it. C’s portion of the 2,000 pounds would consequently become a part of the remainder of the price (or the debt) that A owed to both. Only B is therefore to suffer the loss. The solution is based on the subtle analogy that one who is under no obligation should not have to pay any compensation either.

In a mortgage transaction, the mortgagee is liable to compensate for the loss of the mortgaged property in his possession. But in the case where the creditor-mortgagee has absolved the debtor-mortgagor of the obligation of repaying the loan, he is not held liable to compensate for the loss of the mortgaged property. The reason is that a trustee is not liable for the loss of the property in his custody unless he is at fault or negligent. Supposing the above-mentioned creditor had not waived his claim to the sum lent to the mortgagor, all he would have to bear would be to absolve the mortgagor from the obligation of repayment. Should one then punish him for his act of generosity absolving the mortgagor of the obligation to repay the loan, or would it be preferable to treat this case as analogous to that of a trustee? Here is a subtle analogy that is resorted to in order to avoid the grave injustice that would result from the strict application of obvious analogy.

(2) The second variety of istihsan consists of making an exception to a general rule of the existing law, which is why some writers have called this type ‘exceptional istihsan’ (istihsan istithna’t), as opposed to ‘analogical istihsan’ (istihsan qiyasî) – the latter consisting of a departure from one qiyas to another. Of these two, exceptional istihsan is
considered to be the stronger, for it derives support from another recognized source, especially when this is the Qur'an or the Sunnah. The scholars of various schools are generally in agreement on the validity of the istihsan for which authority can be found in the primary sources, but they have disputed istihsan that is based on qiyas khafi alone. In fact the whole controversy over istihsan focuses on this latter form of istihsan. But more to the point, the authority for an exceptional istihsan may be given either in the nass, or in one of the other recognized proofs, namely consensus (ijma'), necessity (darirah), custom ('urf or 'adah) and public interest (maslahah). We shall illustrate each of these separately, as follows:

(a) An example of the exceptional istihsan that is based in the nass of the Qur'an is its ruling on bequests to relatives: ‘It is prescribed that when death approaches any of you, if he leaves any assets, that he makes a bequest to parents and relatives’ (al-Baqarah 2:180).

This Qur'anic provision represents an exception to a general principle of the Shari'ah, namely that a bequest is basically not valid: since bequest regulates the division of the estate after the death of the testator, the latter is not allowed to accelerate this process. A bequest made during the lifetime of the testator is thus tantamount to interference in the rights of the heirs after the testator’s death, which is unlawful. However, the Qur'an permits bequest as an exception to the general rule, that is by way of an exceptional istihsan. It sets aside the general principle in favour of an exception which aims for a fair distribution of wealth in the family, especially in cases where a relative is destitute and yet is excluded from inheritance in the presence of other heirs.

(b) Exceptional istihsan that is based on the Sunnah may be illustrated with reference to the contract of ijarah (lease or hire). According to a general rule of the Shari'ah law of contract, an object that does not exist at the time of contract may not be sold. However, ijarah has been validated despite its being the sale of the usufruct (i.e. in exchange for rent) which is usually non-existent at the moment the contract is concluded. Analogy would thus invalidate ijarah, but istihsan exceptionally validates it on the authority of the Sunnah (and ijma'), proofs that are stronger than analogy and justify a departure from it.

Similarly, the option of cancellation (khiyar al-sharf) represents an
exceptional *istihsān* that is authorised by the Sunnah. It is employed when a person buys an object on condition that he may revoke the contract within the next three days or so. This kind of stipulation amounts to a departure from the general rule of the Shari'ah law of contract, which is that a contract becomes binding upon its conclusion. An exception to this rule has however been made by way of *istihsān* which is based on the hadith: ‘When you agree on the terms of a sale, you may say: it is not binding and I have an option for three days.’

(c) To illustrate exceptional *istihsān* that is authorised by *ijmāʿ*, we may refer to *istiṣnaʿ*, or the contract for the manufacture of goods. Recourse to this form of *istihsān* is made when someone places an order with a craftsman for certain goods to be made at a price that is determined at the time of the contract. *Istihsān* validates this transaction despite the fact that the object of the contract is non-existent at the time the order is placed. This form of *istihsān* closely resembles that which is authorised by custom, as will later be discussed.

(d) An example of exceptional *istihsān* that is based on necessity (*darūrah*) is the method adopted for the purification of polluted wells. If a well, or a pond for that matter, is contaminated by impure substances, its water may not be used for ablution. It will be noted, however, that the water in the well cannot be purified by removing that part which is impure — and it cannot be poured out either, for it is in continuous contact with the water which flows into the well. The solution has been found through *istihsān*, which provides that contaminated wells can be purified by removing a certain number, say a hundred, of buckets of water from the well (the exact number is determined with reference to the type and intensity of pollution). *Istihsān* in this case is validated by reason of necessity and prevention of hardship to the people.

In a similar vein, strict analogy requires that witnesses, in order to be admissible, must in all cases be *ʿadl*, that is, upright and irreproachable. For judicial decisions must be founded on truth, and this is facilitated by the testimony of just witnesses. However, if the *qādī* happens to be in a place where *ʿadl* witnesses cannot be found, then it is his duty, by virtue of *istihsān*, to admit witnesses who are
not totally reliable so that the rights of the people can be protected. Similarly, with regard to the qādi, the general rule requires that he be a mujtahid, but a non-mujtahid may be appointed as a qādi where no mujtahid can be found for this office.

The Ḥanafi jurists have frequently resorted to this variety of istiḥsān in the area of property law, especially regarding the unauthorised use of the property of another person because of necessity and prevention of harm. For example: (1) It is permissible for the father or the son, in the event of one of them falling ill, to buy out of his property what may be necessary, such as food and medicine, without obtaining prior permission. (2) On a similar note, a travelling companion may spend out of the property of his co-traveller who has fallen ill what may be necessary to help the latter without his prior permission. (3) The indigent father who is in need of financial support is normally not allowed to interfere with the property of his adult son, in the absence of the latter, simply because the father’s right of guardianship terminates upon the son’s attainment of the legal age. Imam Abū Ḥanīfah has however held, by way of istiḥsān, that the father may sell only the moveable, but not the real, property of his adult son for his basic needs. The two disciples of the Imam, namely Abū Yūsuf and al-Shaybānī have, however, disagreed with their Imam. In all of these examples the permission of the right-bearer is taken for granted on account of necessity and maslahah.

(e) To illustrate exceptional istiḥsān that is authorised by custom, we may refer to the waqf of moveable goods. Since waqf, by definition, is the endowment of property on a permanent basis, and moveable goods are subject to destruction and loss, they are therefore not to be assigned in waqf. This general rule has, however, been set aside by the Hanafi jurists, who have validated the waqf of moveables such as books, tools and weapons on grounds of its acceptance by popular custom. Similarly, a strict analogy would require that the object of sale be accurately defined and quantified. However, popular custom has departed from this rule in the case of entry to public baths where the users are charged a fixed price without any agreement on the amount of water they use or the duration of their stay. Another example is bay’ al-ta’āti, or sale by way of ‘give and take’, where the general rule that offer and acceptance must be verbally expressed is not applied owing to customary practice.

(f) And finally, to illustrate istiḥsān that is founded on considerations of public interest (maslahah) we may refer to the responsibility of a trustee (amin) for the loss of the goods that he receives in his custody.
The general rule here is that the trustee is not responsible for loss or damage to such property unless it can be attributed to his personal fault or negligence (taqṣīr). Hence a tailor, a shoemaker or a craftsman is not accountable for the loss of goods in his custody should they be stolen or destroyed by fire. But the jurists, including Abū Yūsuf and al-Shaybānī, have set aside the general rule in this case and have held, by way of istiḥsān, the trustee to be responsible for such losses, unless the loss in question is caused by a calamity, such as fire or flood, which is totally beyond his control. This istiḥsān has been justified on grounds of public interest so that trustees and tradesmen may exercise greater care in safeguarding people's property.

For another example of maslahah-based istiḥsān, we refer to a case of inheritance, known as al-muṣṭarākāh (‘the apportioned’), which took place during the time of the Caliph ʿUmar ibn al-Khaṭṭāb. A woman died leaving behind a full brother and two half-brothers, her mother and her husband. The normal rules of inheritance would entitle the full brother to one-third, the husband to one-half, the mother to one-sixth and nothing would be left for the half-brothers who are in the category of ḍarū’ī (residuaries) and take a share only after the recipients of Qur’ānīic shares have taken theirs. The case was brought to the attention of the Caliph who ruled by way of istiḥsān that the half-brothers should share the one-third with the full brothers. A number of prominent Companions, including ʿAlī ibn ʿAbd Allāh ibn Masʿūd, held the view that the normal rules of inheritance should apply. Report also has it that the Caliph ʿUmar too was initially persuaded to follow the normal rules until the half-brothers protested and said: ‘Suppose that our father were a donkey [himār], did we not still have the same mother as the deceased?’ – which is why the case is also known as al-himariyyah (‘the donkey’ case). It is said that ʿAlī’s solution was based on qiyās whereas ʿUmar’s solution was based on istiḥsān and this was deemed to be more equitable and in harmony with considerations of maslahah.*}

III. The Ḥanafi-Shafiʿī Controversy over Istiḥsān

Al-Shafiʿī has raised serious objections against istiḥsān, which he considers to be a form of pleasure-seeking (taladhaddudh wa-hawa) and arbitrary law-making in religion’. A Muslim must obey God and His Messenger at all times, and follow injunctions that are enshrined in the clear texts (muṣūṣ). Should there arise any problem or difference of opinion, it must be resolved with reference to the Qur’ān and the
Sunnah. In support of this, al-Shāfi‘ī quotes the Qur’ānic nasṣ in sūra al-Nisā’ (4:59): ‘Should you dispute over a matter among yourselves, refer it to God and His Messenger, if you do believe in God and the Last Day.’

Al-Shāfi‘ī continues on the same page: anyone who rules or gives a fatwā on the basis of a nasṣ or on the basis of ijtihād that relies on an analogy to the nasṣ has fulfilled his duty and has complied with the command of the Lawgiver. But anyone who prefers that which neither God nor His Messenger has commanded or approved, his preference will be acceptable neither to God nor to the Prophet. Istiḥsān involves, according to al-Shāfi‘ī, personal opinion, discretion and the inclination of the individual jurist, an exercise that is not in harmony with the Qur’ānic āyah that reads: ‘Does man think that he will be left without guidance?’ (al-Qiyāmah, 75:36).

Commentators are in agreement that sudā in this āyah means a state of lawlessness in which the individual is not subject to any rules, commands or prohibitions. With this meaning in mind, Imam Shafi‘ī observes: if every judge and every muftī ruled according to their own inclinations, one can imagine that self-indulgence and chaos would afflict the life of the community. Unlike qiyyās, whose propriety can be tested by the methodology to which it must conform, istiḥsān is not regulated as such. Since istiḥsān consists neither of nasṣ nor of an analogy to nasṣ, it is ultra vires and must therefore be avoided.37

In response to this critique, the Ḥanafis have asserted that istiḥsān is not an arbitrary exercise in personal preference. It is a form of qiyyās (viz., qiyyās khafi‘), and is no less authoritative than qiyyās. Thus it is implied that, contrary to allegations of the Shafi‘ī jurists, istiḥsān is not an independent source of law, but a branch of qiyyās that has a firm grounding in the Shari‘ah. If this argument is accepted, it would imply that istiḥsān must be subjected to the same rules that are applicable to qiyyās, and would therefore lose its status as a juristic principle in its own right. The scope and flexibility of istiḥsān would consequently be restricted as it would mean changing istiḥsān from a predominantly
equitable doctrine into a form of analogical reasoning. This would confine *istihsān* only to matters on which a parallel ruling could be found in the primary sources. Having said this, however, it is doubtful whether *istihsān* is really just another form of *qiyās*.

Ahmad Hasan has observed that *istihsān* is more general than *qiyās khaft*, as the former embraces a wider scope and can apply to matters beyond the confines of the latter. Aghnides has similarly held that *istihsān* is a new principle which goes beyond the scope of *qiyās*, whether or not this is openly admitted to be the case:

Aghnides goes on to suggest that when the Shafi’i jurists attacked *istihsān* on the grounds that it meant a setting aside of the revealed texts, the disciples of Abū Ḥanifah felt themselves forced to show that this was not the case. Hence they put forward the contention that *istihsān* was nothing but another kind of *qiyās*. According to another observer, the attempt to bring *istihsān* within the sphere of *qiyās* is unjustified, for ‘it really lies outside of this narrow sphere and must therefore be recognised as a special form of deduction’.

Al-Ghazali has criticised *istihsān* on different grounds. He has observed that the jurists of the Shafi’i school have recognised the validity of *istihsān* that is based on an indication (*dalīl*) from the Qur’ān or Sunnah. When there exists a *dalīl* of this kind, then the case at hand would be governed not by *istihsān* but directly by the provision of the Qur’ān or Sunnah itself. Furthermore, al-Ghazali is critical of Abū Ḥanifah for his departure, in a number of cases, from a sound *hadith* in favour of *qiyās* or *istihsān*. Finally, al-Ghazali rejects *istihsān* that is based on popular custom, for custom by itself is not a source of law. He observes that approved customs are often justified with reference, not to *istihsān*, but to other proofs. While referring to the example of entry to a public bath for a fixed price without quantifying the consumption of water, al-Ghazali asks: ‘How is it known that the community adopted this practice by virtue of *istihsān*? Is it not true that this was the custom during the time of the Prophet, in which case it becomes a tacitly approved Sunnah [Sunnah tagrīriyyah] so as to prevent hardship to the people?’

Another Shafi’i jurist, al-Āmidī, has stated that notwithstanding his
explicit denunciation of *istihsān*, al-Shāfi‘ī himself resorted to *istihsān*. Al-Shāfi‘ī has been quoted as having used a derivation of *istihsān* on several occasions, including the ruling in which he said, ‘I approve [astahsinu] of mut‘ah [gift of consolation] to be 30 dirhams’; and ‘I approve [astahsinu] of the proof of pre-emption [shuf’] to be three days’ (following the date when the sale of the property in question came to the knowledge of the claimant). Al-Amidi thus draws the conclusion that ‘there is no disagreement on the essence of *istihsān* between the two schools’, which obviously means that their differences amount to no more than semantic differences over words.

The Mālikī jurist al-Shāṭibī has held that *istihsān* does not mean the pursuit of one’s desires; on the contrary, a jurist who understands *istihsān* has a profound understanding of the intention of the Lawgiver. When the jurist discovers that a strict application of analogy to a new problem leads to loss of *maslahah* and possibly to an evil (*mafsadah*), he must set aside *qiyyās* and resort to *istihsān*.

While discussing the controversy over *istihsān*, another observer, Shaykh al-Khudari, writes that anyone who is familiar with the works of the ‘ulamā’ of jurisprudence would agree that Abī Hanīfah and his disciples are not alone in their reliance on *istihsān*. All jurists have resorted to *istihsān* in one form or another, and a reader of the various juristic schools of thought is bound to come across opinions that are founded on it.

This view finds further support from Yūsuf Mūsā, who has tersely observed that juristic differences over *istihsān* essentially amount to no more than arguments over words, for the *fuqahā* of every major school have invariably resorted to *istihsān* in one form or another.

If this is accepted, then one naturally wonders as to the causes that might explain the controversy in question. Al-Taftāzānī has observed that neither of the two sides of the controversy over *istihsān* have understood one another, and that the whole debate is due to a misunderstanding. Those who argue in favour of *istihsān* have perceived this principle differently to those who have argued against it. Had *istihsān* been properly understood, al-Taftāzānī adds, its basic validity would never have been disputed.

Al-Taftāzānī’s assessment has been widely endorsed by modern writers on the subject, including Khallāf, Abū Zahrah and Yūsuf Mūsā. In Khallāf’s opinion, the essential validity of *istihsān* is undeniable, for it enables a departure from the apparent or the general rule of law to a variant ruling that warrants such a departure. Every judge and jurist must consider the circumstances of an individual case, and occasion-
ally decide not to apply a certain rule, or to make an exception, as he considers this to be required by maslahah and justice.49 And lastly, Abū Zahrah observes that ‘one exception apart, none of al-Shāfi‘ī’s criticisms are relevant to the Hanafi conception of istihsān’. The one exception that may bear out some of al-Shāfi‘ī’s criticisms is istihsān that is authorised by custom. For custom is not a recognised source of law and is, in any case, not sufficiently authoritative to warrant a departure from qiyās.50

IV. Istihsān and Particularisation (Takhsīs)

Another controversy has arisen over whether or not istihsān is in the nature of takhsīs. There are two aspects to this discussion, one of which addresses the question of whether istihsān is tantamount to specifying a general rule (hukm) of Sharī‘ah, or a ruling of qiyās, in connection with a certain issue; and the other is an extension of the same point, but this time in reference to specifying the effective cause (‘illah) and through it the hukm rather than specifying the hukm directly without a particular reference to the ‘illah. The Mālikīs have described istihsān as acting on particular benefit (maslahah juz‘iyyah) vis-à-vis a general principle by way of making an exceptional concession. This process resembles that of takhsīs al-‘umūm, or specifying a general text in order to uphold the spirit and purpose of that text. By resorting to istihsān, in other words, we are basically concerned with a better understanding of a general principle of Sharī‘ah and its proper implementation with reference to particular issues. Both Imams Abū Ḥanīfah and Mālik saw istihsān as the case where the application of qiyās in a particular instance departed from its own effective cause. While both Imams saw istihsān as a form of takhsīs, the main difference between their respective approaches may be said to be that Imam Mālik took a broader view of both takhsīs and istihsān, by opening up their scope to the requirements of maslahah, and specified a general text by reference to maslahah. Imam Abū Ḥanīfah would, on the other hand, do so if this was upheld by a Companion.51

The Hanbali scholar Ibn Taymiyyah saw istihsān as a kind of particularisation of ‘illah where the cause of the original hukm – which is being abandoned – is present but the hukm of that ‘illah is absent due to an obstacle. According to Ibn Taymiyyah, when the ‘illah is rational and when the mujtahid can understand it, then it may be either completely rejected or modified so as to accommodate certain new cases which can be distinguished from the original case. It is in
this way that Ibn Taymiyyah considered *istihsân* to be in the nature of *takhsîs al-‘illah*, either through the modification of the ‘*illah* or through its total nullification.

The opponents of *istihsân* have, on the other hand, asserted that *istihsân* violates one of the basic norms of rationality and law by isolating the ‘*illah* from its *hukm*, or when it makes an exception to the ruling (*hukm*) of a case despite the presence of its effective cause (‘*illah*). Stated simply, *takhsîs al-‘illah* means the existence of a cause and the absence or suspension of its relevant ruling due to an obstacle. The Ḥanafis have disagreed and replied that *istihsân* is not in the nature of *takhsîs al-‘illah*; *istihsân* is a kind of *qiyyâs*. When we apply *istihsân*, the rule of law is established if the cause of that rule exists; in the event that the cause does not exist, the rule too does not exist.52 Ġadr al-Shari‘ah has categorically stated that *istihsân* is not in the nature of *takhsîs al-‘illah*, despite the assertion of many to the contrary. This is because abandoning a *qiyyâs* for a stronger evidence is not *takhsîs al-‘illah*. Thus the absence of a *hukm* in the case of *istihsân* is precisely due to the absence of an ‘*illah*, and not particularisation thereof. This is illustrated by reference to the oft-quoted example of permissibility for human consumption of the leftovers of birds of prey, as opposed to the leftovers of predatory animals, which is prohibited, simply because the ‘*illah* of its prohibition, namely eating or drinking with the tongue, is present in the case of predators, but is absent in the case of birds of prey. *Qiyyâs* in this case would extend the prohibition from the case of predatory animals to birds of prey, but *istihsân* would exclude the latter from the scope of that prohibition because of the absence of the effective cause.53 Al-Sarakhsi has strongly criticised those who validated the particularisation of ‘*illah*. In his *Uṣūl*, he wrote a chapter bearing the title ‘Explaining the Corrupt View that Validates *Takhsîs* of the Shari‘i Causes – Fasl fi Bayân Fasād al-Qawl bi-Jawāz al-*Takhsîs* fi‘l-*Ilal al-Shar‘iyyah’ and said that the approved position of our predecessors was that *takhsîs al-‘illah* was impermissible. Those who validate this logical incongruity, Sarakhsi added, are saying, in effect, that a *hukm* of Shari‘ah may be applied to some cases and may be suspended in other similar cases, while the ‘*illah* is present in both cases, and what they say is totally corrupt and indefensible.54

**Conclusion**

The attempt to link *istihsân* with *qiyyâs* has involved tortuous reasoning which somehow remains less than convincing. One way to
resolve some of the juristic differences on this issue may be to go back to the origin of *istihsān* and recapture the meaning that was given to it by Abū Hanīfah and the early *ʿulāmāʾ* of jurisprudence. On this point there is evidence to suggest that Abū Hanīfah (d. 150 AH) did not conceive of *istihsān* as an analogical form of reasoning. About half a century later, when al-Shāfīʿi wrote his *Risālah* and *Kitāb al-Umm*, there was still little sign of a link between *istihsān* and *qiyyās*. Al-Shāfīʿi is, in fact, completely silent on this point. Had al-Shāfīʿi (d. 204 AH) known that *istihsān* was a variety of *qiyyās*, one can imagine that he might have softened his stand with regard to it. Originally *istihsān* was conceived in a wider and relatively simple form which was close to its literal meaning and free of the complexities that were subsequently woven into it. One is here reminded of Imam Malik’s characteristic statement that designates *istihsān* as nine-tenths of human knowledge, a statement which grasps the true essence of *istihsān* as a method of finding better and more equitable alternatives to existing problems both within and beyond the confines of analogical reasoning. *Istihsān* is basically antithetic to *qiyyās* and not a part of it. It enables the jurist to escape from strict conformity to the rules of *qiyyās* when such conformity is likely to lead to unfair results. *Istihsān* was originally formulated not as another variety of *qiyyās*, but as a doctrine that liberated the jurist from the strait-jacket of *qiyyās*, especially where conformity to *qiyyās* clashed with the higher objectives of the *Shariʿah*.

It is well to remember that much of the juristic controversy over *istihsān* developed under the pressure of conformity to the strict requirements of the legal theory once it was finally formulated by al-Shāfīʿi and gradually accepted by others. The thrust of al-Shāfīʿi’s effort in formulating the legal theory of the *usul* was to define the role of reason vis-à-vis the revelation. Al-Shāfīʿi confined the scope of human reasoning in law to analogy alone. In his well-known statement concerning *ijtihād* and *qiyyās*, especially where al-Shāfīʿi considered the two to be synonymous, one hardly fails to notice the attempt to confine the use of human reasoning to *qiyyās* alone: ‘On all matters touching the life of a Muslim there is either a binding decision or an indication as to the right answer. If there is a decision, it should be followed; if there is no indication as to the right answer, it should be sought by *ijtihād*, and *ijtihād* is *qiyyās*.’ In this statement, al-Shāfīʿi reflected the dominant mood of his time. From that point onward, any injection of rationalist principles into the legal theory of the *usul* had to seek justification through *qiyyās*, which was the only channel through which a measure of support could be
obtained for *istihsān*. In order to justify *istihsān* within the confines of the legal theory, it was initially equated with *qiyyās* and eventually came to be designated a sub-division of it.

The next issue over which the *fuqahā’* have disagreed is whether an *istihsān* founded in the Qur’ān, Sunnah or *ijma* should be called *istihsān* at all. In cases where a hadith authorises departure from an existing analogy in favour of an alternative ruling, then all that one needs in order to authorise the departure in question is the hadith itself. It would therefore seem redundant to apply the word *istihsān* to this form of departure from the rules of *qiyyās*. Whenever a ruling can be found in the Qur’ān (or the Sunnah), the jurist is obliged to follow it and should, basically, have no choice of resorting to *qiyyās* or to *istihsān*. If the Qur’ān provides the choice of an alternative ruling that seems preferable, then the alternative in question is still a Qur’ānic rule — not *istihsān*.

It would appear that the *fuqahā’* initially used the term *istihsān* close to its literal sense, which is to ‘prefer’ or to deem something preferable. The literal meaning of *istihsān* was naturally free of the restrictions that were later evolved by the *fuqahā’*. A measure of confusion between the literal and technical meanings of *istihsān* probably existed ever since it acquired a technical meaning in the usage of the jurists. This distinction between the literal and juristic meanings of *istihsān* might help explain why some ‘ulamā’ have applied *istihsān* to the rulings of the Qur’ān, the Sunnah, and *ijma*. When we say that the Qur’ān, by way of *istihsān*, permitted bequests to be made during the lifetime of the testator, we are surely not using *istihsān* in its technical/juristic sense — that is, giving preference to one *qiyyās* over another or making an exception to an existing legal norm — but merely saying that the Qur’ān preferred one of the two conceivable solutions in that particular case. When the Qur’ān authorises bequests, then one might say that it has established a legal norm in its own right regardless as to whether it can be described as an exception to another norm or not. To regard this Qur’ānic ruling as an *istihsān* can only be true if *istihsān* is used in its literal sense, for, as a principle of jurisprudence, *istihsān* can add nothing to the authority of the Qur’ān and the Sunnah. Although one might be able to find the genesis of *istihsān* in the Qur’ān, this would have nothing to do with the notion of constructing *istihsān* as an alternative to, or a technique of escape from, *qiyyās*. Furthermore, to read *istihsān* into the lines of the Qur’ān would seem superfluous in the face of the legal theory of the *usūl* that there is no room for rationalist doctrines such as *istihsān* in the event that a ruling
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can be found in the nusūṣ. Notwithstanding the fact that many observers have considered Abū al-Ḥasan al-Karkhi’s definition to be the most acceptable, my enquiry leads to the conclusion that the Maliki approach to istiḥsān and Ibn al-‘Arabi’s definition of it, is wider in scope, and probably closest to the original conception of istiḥsān, for it does not seek to establish a link between istiḥsān and qiyās.

Istiḥsān has undoubtedly played a significant role in the development of Islamic law, a role that is sometimes ranked even higher than that of qiyās. Notwithstanding a measure of reticence on the part of the ‘ulamā’ to highlight the role of istiḥsān, in reality it features most prominently in bridging the gap between law and social realities by enabling the jurist to pay individual attention to circumstances and the peculiarities of particular problems. But for reasons that have already been explained, the fuqahā’ have exercised restraint in the use of istiḥsān, which, as a result, has not been utilised to the maximum of its potential. Hence, it is not surprising to note that a certain gap between theory and practice has developed in Islamic law. The potentials of istiḥsān could hardly be translated into reality unless istiḥsān is stripped of its unwarranted accretions. The only consideration that needs to be closely observed in istiḥsān is whether there is a more compelling reason to warrant a departure from an existing law. The reason that justifies resort to istiḥsān must not only be valid in Shari‘ah but must serve a higher objective of it and must therefore be given preference over the existing law that is deemed unfair. Since istiḥsān enables a choice between alternative solutions, it assesses the relative merits and demerits of each of the alternatives. The existing law is always the base on which an alternative is devised through istiḥsān. In this sense, istiḥsān offers considerable potential for innovation and for imaginative solutions to legal problems. The aim in istiḥsān is not merely to find a solution to a particular problem but to find a better solution than the one that already exists. It therefore calls for a higher level of analysis and refinement, which must in essence transcend the existing law and analogy.

The potential for new alternatives in istiḥsān would thus be considerably restricted if it were to be subjected to the requirements of qiyās. The two are essentially designed for different purposes and each must be allowed to function in its best capacity. Analogy essentially extends the logic of the Qur’an and the Sunnah, whereas istiḥsān is designed to tackle the irregularities of qiyās. Thus it would seem methodologically incorrect to amalgamate the two into a single formula.

Istiḥsān has admittedly not played a noticeable role in the legal and
judicial practices of our times. It has, as it were, remained in the realm of controversy, which may partly be explained by the dominance of the phenomenon of taqlid in shaping the attitude of lawyers and judges towards istihsan. Only the rulings of the jurists of the past have been upheld on istihsan, and even this has not been totally free of hesitation. Muslim rulers and judges have made little or no use of istihsan either in developing existing law or in the day-to-day administration of justice. This is patently unjustified, especially in view of the eminent suitability of istihsan in the search for fair and equitable solutions.

Istihsan can best be used as a method by which to improve the existing law, to strip it of impractical and undesirable elements and to refine it by means of making necessary exceptions. Istihsan, in other words, generally operates within the confines of the legal status quo and does not seek a radical change in the existing law, although it has considerable potential to effect innovation and refinement.

Judges and lawyers are generally reluctant to depart from the existing law, or to make exceptions to it, even in the face of evidence that a departure would be in the interests of fairness and justice. Their reluctance is often due to the reticence in the law as to precisely what role the judge has to play in such a situation. Judges are normally expected to enforce the law at all costs, and often have little choice in the matter regardless of the circumstances or results. Alternatively, it may be that the judges are, in fact, doing this — departing from the law when it seems patently unfair — without openly acknowledging what they are doing. In any case, it would seem advisable for the legislature to explicitly authorise the judge to resort to istihsan when he considers this to be the only way of achieving a fair solution in a case under consideration. In this way, istihsan would hopefully find a place in the day-to-day administration of justice and would consequently encourage flexibility and fairness in law and judicial practice. Judicial decisions would, in turn, influence legislation and contribute to attaining a more refined and equitable legal order. A clear and well-defined role for istihsan would hopefully mark a new opening in the evolutionary process of Islamic law.

NOTES

1. Osborn's Concise Law Dictionary, on p. 124, defines equity as follows: 'Primarily fairness or natural justice. A fresh body of rules by the side of the original law, founded on distinct principles, and claiming to supersede the law in virtue of a superior sanctity
inherent in those principles. Equity is the body of rules formulated and administered by the Court of Chancery to supplement the rules and procedure of the Common Law.'

2. For a discussion see Kerr, Islamic Reform, p. 57.


4. For details see Şabûni, Madkhal, pp. 119ff.

5. Umm al-walad is a female slave who has borne a child to her master, and who is consequently free at his death. A kitâbiyyah is a woman who is a follower of a revealed religion, namely Christianity and Judaism.


7. Sarakhsi, Mabsût, X, 145; Ibn Hanbal, Musnad, V, 22.


10. Sarakhsi, Mabsût, X, 145.

11. Ibn Taymiyyah, Mas'alah al-Istihsân, p. 446.


15. Âmîdi (Ihkâm, I, 214) considers this to be a hadîth but it is more likely to be a saying of the prominent companion, 'Abd Allah ibn Mas'ûd; see also Şâfi'i, Fiṣâm, II, 319.


18. Âmîdi, Ikhâm, IV, 159.


22. For further on qiyyâs see Kamali, 'Qiyyâs (Analogy)' in The Encyclopedia of Religion, XII, pp. 128ff.


24. Sha'bân, Usûl, p. 100.

25. Khallâf, 'Ilm, p. 82; Nabhâni, Muqaddimah, p. 67.

26. Note the use of these terms e.g. in Şâbûni, Madkhal, p. 123.

27. Thus the Maliki jurist Ibn al-Hajib classifies istihsân into three categories of accepted (naqûbûl), rejected (mardîd) and uncertain (mataraddid), adding that istihsân which is based on stronger grounds is acceptable to all. But istihsân which can find no support in the nasr, ijma' or qiyyâs is generally disputed. See Ibn al-Hajib, Mukhtasar, II, 485.

28. Cf. Mûsâ, Madkhal, p. 197; Khallâf, 'Ilm, p. 82. For hadîth that validate various types of ijârah (land, labour, animals, etc.) see Ibn Rushd, Bidâyâh, II, 220-1.

30. See Abū Zahrah, Uṣūl, p. 211.
32. Cf. Şābūnī, Madkhāl, p. 221.
33. Ibid., p. 221.
34. Shāṭībī, Fīṣām, II, 318.
37. Ibid., VII, 271.
39. Aghnides, Muhammadan Theories, p. 73.
41. Ghazālī, Mustasfā, I, 137.
42. Ghazālī criticises Abū Ḥanīfah’s ruling with regard, for example, to implementing the punishment of ḍinā‘ on the testimony of four witnesses, each of whom point at a different corner of the room where ḍinā‘ is alleged to have taken place. This is a case, according to Ghazālī, of doubt (shubha) in the proof of ḍinā‘ which would prevent the enforcement of the hadd penalty. For according to a ḥadīth, ḥudūd are to be dropped in all cases of doubt. Abū Ḥanīfah’s ruling is based on istiḥsān, apparently on the grounds that disbelieving the Muslims (takdhib al-muslimin) is reprehensible. Ghazālī regards Abū Ḥanīfah’s ruling as whimsical and a form of istiḥsān that should not be followed (Mustasfā, I, 139).
43. Ibid., II, 138.
44. Āmīdī, Iḥkām, IV, 157.
46. Khuḍārī, Tārīkh, p. 201.
47. Mūsā, Madkhal, p. 198.
48. Taftazānī, Talwīh, p. 82. It is not certain whether Taftazānī was a Ḥanāfī or a Shāfī‘ī. In a bibliographical notation on Taftazānī, it is stated that he is sometimes considered himself a Ḥanafī and sometimes a Shāfī‘ī. See al-Mawṣī‘ah al-Fiqhiyyah, I, 344.
51. Cf. Shāṭībī, Muwāfqaṭ, IV, 208; Mīqa, al-Ra‘y, p. 401 and 426.
53. Sadr al-Shārī‘ah, al-Tawdīḥ, III, 10; Mawsī‘ah, IV, 46; Hasan, Analogical Reasoning, p. 422.
56. Joseph Schacht has devoted a chapter to the subject, entitled ‘Theory and Practice’ where he elaborates on how the gap between the law and social realities has widened. See Introduction to Islamic Law, pp. 76–86.
CHAPTER THIRTEEN

**Maṣlaḥah Mursalah (Considerations of Public Interest)**

Literally, maṣlaḥah means ‘benefit’ or ‘interest’. When it is qualified as maṣlaḥah mursalah, however, it refers to unrestricted public interest in the sense of its not having been regulated by the Lawgiver insofar as no textual authority can be found on its validity or otherwise.\(^1\) It is synonymous with ʿistīlāḥ, and is occasionally referred to as maṣlaḥah muṣlaḥah on account of its being undefined by the established rules of the Shariʿah. For al-Ghazālī, maṣlaḥah consists of considerations which secure a benefit or prevent a harm but which are, simultaneously, harmonious with the objectives (maqāṣid) of the Shariʿah. These objectives, the same author adds, consist of protecting the five ‘essential values’, namely religion, life, intellect, lineage and property. Any measure that secures these values falls within the scope of maṣlaḥah, and anything which violates them is mafsada (‘evil’), and preventing the latter is also maṣlaḥah.\(^2\) More technically, maṣlaḥah mursalah is defined as a consideration that is proper and harmonious (wasf munāsib mulā′īmi) with the objectives of the Lawgiver; it secures a benefit or prevents a harm; and the Shariʿah provides no indication as to its validity or otherwise.\(^3\) The Companions, for example, decided to issue currency, to establish prisons, and to impose tax (kharāj) on agricultural lands in the conquered territories despite the fact that no textual authority could be found in favour of this.\(^4\) The ʿulamāʾ are in agreement that ʿistīlāḥ is not a proof in respect of devotional matters (ʿibādāt) and the specific injunctions of the Shariʿah (muqaddarāt). Thus the nusūṣ regarding prescribed penalties (ḥudūd) and penances (kaffārāt),

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the fixed entitlements in inheritance (farā'id), the specified periods of 'iddah that divorced women must observe, and such other ahkām as are clear and decisive fall outside the scope of istislah. Since the precise values and causes of 'ibādāt cannot be ascertained by the human intellect, ijtihād, be it in the form of istislah, juristic preference (istihsān) or qiyyās, does not apply to them. Furthermore, with regard to 'ibādāt and other clear injunctions, the believer is duty-bound to follow them as they are. But outside these areas, the majority of 'ulamā' have validated reliance on istislah as a proof of Shari'ah in its own right.5

Istislah derives its validity from the norm that the basic purpose of legislation (tashri') in Islam is to secure the welfare of the people by promoting their benefit or by protecting them against harm. The ways and means that bring benefit to the people are virtually endless. The masāliḥ (pl. of maslahah), in other words, can neither be enumerated nor predicted in advance as they change according to time and circumstance.6 To enact a law may be beneficial at one time and harmful at another; and even at one and the same time, it may be beneficial under certain conditions, but prove to be harmful in other circumstances. The ruler and the mujtahid must therefore be able to act in pursuit of the masāliḥ as and when these present themselves.7

The majority of 'ulamā' maintain that istislah is a proper ground for legislation. When the maslahah is identified and the mujtahid does not find an explicit ruling in the nusāṣ, he must act in its pursuit by taking the necessary steps to secure it. This is justified by saying that God's purpose in revealing the Shari'ah is to promote man's welfare and to prevent corruption in the earth. This is, as al-Shatibi points out, the purport of the Qur'ānic āyah in sura al-Anbiya' (21:107) where the purpose of the prophethood of Muḥammad is described in the following terms: ‘We have not sent you but as a mercy for all creatures.’

In another passage, the Qur'ān describes itself, saying: ‘O mankind, a direction has come to you from your Lord, a healing for the ailments in your hearts’ (Yūnus, 10:57).

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 revelation of religion, saying that it is not within His intentions to make religion a means of imposing hardship (al-Ḥājj, 22:78). This is confirmed elsewhere in sūra al-Māʾidah (5:6) where we read, in more general terms, that ‘God never intends to impose hardship upon people.’

These are some of the Qurʾānic objectives that embrace the essence of maslahah; they are permanent in character and would be frustrated if they were to be subjected to the kind of restrictions that the opponents of maslahah have proposed. We shall discuss the views of the opponents of maslahah in fuller detail later; suffice it here to point out that their argument amounts to a proposition that the general objectives of the Qurʾān can only be implemented, in regard to particular cases, if there is another nass available in their support. This would seem to amount to an unwarranted restriction on the general objectives of the Lawgiver as these are expounded in the Qurʾān.

The ‘ulamāʾ have quoted a number of hādīth that authorise acting upon maslahah, although none is in the nature of a clear nass on the subject. Particular attention is given, in this context, to the hadīth stating that ‘no harm shall be inflicted or reciprocated in Islam’.9

The substance of this hadīth is upheld in a number of other hādīth, and it is argued that this hadīth encompasses the essence of maslahah in all its varieties.10 Najm al-Dīn al-Ṭūfī, a Hanbali jurist (d. 716 AH), has gone so far as to maintain, as we shall further elaborate, that this hadīth provides a decisive nass on istislah. The widow of the Prophet, ‘Āʾishah, is reported to have said that ‘the Prophet only chose the easier of two alternatives, so long as it did not amount to a sin’.11

According to another hadīth, the Prophet 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’.12
This would seem to grant Muslims the liberty to pursue their benefits and to commit themselves to that end provided that this does not amount to a violation of the explicit commands and prohibitions of the Shari'ah. In yet another hadith, the Prophet is quoted to have said: ‘God loves to see that His concessions [rukhs] are observed, just as He loves to see that His strict laws ['aza'im] are obeyed.’

This would confirm the doctrine that no unnecessary rigour in the enforcement of the ahkâm 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 masâlih. The rigorous approach that the Zâhiri 'ulamâ' have taken in regard to maslahah, as will later be discussed, tends to oppose the purport of this hadith.

Technically, however, the concept of maslahah mursalah does not apply to the rulings of the Prophet. When there is a Prophetic ruling in favour of a maslahah, it becomes part of the established law, and hence no longer a maslahah mursalah. Historically, the notion of maslahah mursalah originated in the practice of the Companions. This is, of course, not to say that the Prophet did not rule in favour of maslahah, but merely to point out that as a principle of jurisprudence, maslahah mursalah does not apply to the rulings of the Sunnah.

The practice of the Companions, the Successors and the leading mujtahidiin of the past tends to suggest that they enacted laws and took measures in pursuance of maslahah despite the lack of textual authority to validate it. The Caliph Abû Bakr, for example, collected and compiled the scattered records of the Qur'ân in a single volume; he also waged war on those who refused to pay the zakâh; and he nominated 'Umar to succeed him. Similarly, 'Umar ibn al-Khaṭṭâb held his officials accountable for the wealth they had accumulated in abuse of public office and expropriated such wealth. He also poured away milk to which water had been added as a punishment to deter dishonesty in trade. Furthermore, 'Umar ibn al-Khaṭṭâb suspended the execution of the prescribed punishment for theft in a year of famine, and approved of the views of the Companions to execute a group of criminals for the murder of one person. These decisions were taken despite the
clear ruling of the Qur’ān concerning retaliation (qisās), which is ‘life for life’, and the Qur’ānic text on the amputation of the hand, which is not qualified in any way whatsoever. But the Caliph ‘Umar’s decision concerning qisās was based on the rationale that the lives of the people would be exposed to aggression if participants in murder were exempted from qisās. Public interest thus dictated the application of qisās to all who took part in murdering a single individual. Furthermore, the third Caliph, ‘Uthmān, distributed the authenticated Qur’ān and destroyed all the variant versions of the text. He also validated the right to inheritance of a woman whose husband had divorced her in order to be disinherited. The fourth Caliph, ‘Alī, is also on record as having held craftsmen and traders responsible for the loss of goods that were placed in their custody. This he considered to be for the maslahah of the people so that traders would take greater care in safeguarding people’s property. In a similar vein, the ‘ulamā’ of the various schools have validated the interdiction of the ignorant physician, the clowning muftī and the bankrupt trickster on grounds of preventing harm to the people. The Mālikīs have also authorised detention and tā’zīr for want of evidence of a person who is accused of a crime. In all these instances, the ‘ulamā’ have aimed at securing the maslahah mursalah by following a Shari’ah-oriented policy (siyasah shar’iyyah), which is largely concurrent with the dictates of maslahah. As Ibn Qayyim has observed, siyasah shar’iyyah comprises all measures that bring the people close to wellbeing [salāh] and move them further away from corruption [fasād], even if no authority is found for them in divine revelation and the Sunnah of the Prophet.

The main support for istislah as a proof and basis of legislation (tashri’) comes from Imam Malik, who has given the following reasons in its favour. (1) The Companions have validated it and have formulated the rules of Shari’ah on its basis. (2) When the maslahah is compatible with the objectives of the Lawgiver (maqāṣid al-shari‘) or falls within the genus or category of what the Lawgiver has expressly validated, it must be upheld, for neglecting it under such circumstances is tantamount to neglecting the objectives of the Lawgiver, which is to be avoided. Hence, maslahah as such is a norm of the Shari’ah in its own right; it is by no means extraneous to the Shari’ah but an integral part of it. (3) When maslahah is of the genus of the approved masālih and is not upheld, the likely result is the infliction of hardship on the people, which must be prevented.
I. Types of Maṣlaḥah

The maṣāliḥ in general are divided into three types, namely, the ‘essentials’ (darūriyyāt), the ‘complementary’ (hājiyyāt) and the ‘embellishments’ (tahsiniyyāt). The Shari'ah in all its parts aims at the realisation of one or the other of these maṣāliḥ. The ‘essential’ maṣāliḥ are those on which the lives of people depend, and whose neglect leads to total disruption and chaos. They consist of the five essential values (al-darūriyyāt al-khamsah) namely religion, life, intellect, lineage and property. These must not only be promoted but also protected against any real or unexpected threat that undermines their safety. To uphold the faith would thus require observance of the prescribed forms of 'ibādāt, whereas the safety of life and intellect is secured by obtaining lawful means of sustenance as well as the enforcement of penalties which the Shari'ah has provided so as to protect them against destruction and loss.

The hājiyyāt are on the whole supplementary to the five essential values, and refer to interests whose neglect leads to hardship in the life of the community although not to its collapse. Thus in the area of 'ibādāt the concessions (rukhas) that the Shari'ah has granted to the sick and to the traveller, permitting them not to observe the fast and to shorten the salāh, are aimed at preventing hardship. Similarly, the basic permissibility (ibāhah) regarding the enjoyment of victuals and hunting is complementary to the main objectives of protecting life and intellect.

Certain interests are likely to be evaluated differently when they are seen from the viewpoint of the individual or the community respectively. An example of this is sale, which is an essential interest when it is seen from the viewpoint of the community as a whole, but it is likely to be downgraded to the second category of interests, that is, hājiyyāt, when it is seen from the viewpoint of a particular individual. Al-Shāṭibi has similarly observed that a certain act may be mubah from the viewpoint of individual interest, but may be elevated to mandūb, or even wājib, in respect of the community as a whole. Although the 'ulamā' have identified the essential interests as five, and according to a minority view as six, thus adding honour (al-'ird) to the list, this identification must remain open-ended, just as is the case with the maṣāliḥ as a whole. Nowadays, we may be inclined to include such things as economic development, employment and protecting the environment among the essential or complementary interests, depending on the priority they may command in a particular country.
or under a given set of circumstances. The lawful government and the ʿīlī al-amr should have the authority to identify and declare them as such, and then take the necessary measures for their realisation.

The ‘embellishments’ (taḥṣīniyyāt, also known as kāmilīyyāt) denote interests whose realisation leads to improvement and the attainment of that which is desirable. Thus the observance of cleanliness in personal appearance and ībādāt, moral virtues, avoiding extravagance in consumption and moderation in the enforcement of penalties fall within the scope of taḥṣīniyyāt.

It will be noted that the unrestricted maṣlahah does not represent a specific category of its own in the foregoing classification, for the obvious reason that it could fall into any of the three types of maṣāliḥ. Should it be the case that the realisation of maṣlahah mursalah is sine qua non to an essential maṣlahah, then the former becomes a part of the latter. Likewise, if maṣlahah mursalah happens to be a means to attaining one of the second classes of maṣāliḥ, then it would itself fall into that category, and so on. Furthermore, we may briefly add here the point that al-Shāṭibī has discussed at some length, that the maṣāliḥ are all relative (nisbi, idāfī) and as such, all the varieties of maṣlahah, including the essential maṣāliḥ, partake of a measure of hardship and even mafsadah. Since there is no absolute maṣlahah as such, the determination of value in any type of maṣlahah is based on the preponderance of benefit that accrues from it, provided that the benefit in question is in harmony with the objectives of the Lawgiver.

From the viewpoint of the availability or otherwise of a textual authority in its favour, maṣlahah is further divided into three types. First, there is maṣlahah that the Lawgiver has expressly upheld, and enacted a law for its realisation. This is called al-maṣlahah al-muʿtabarah, or accredited maṣlahah, such as protecting life by enacting the law of retaliation (qiṣās), 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 offences constitutes a proper ground (wASF munāṣib) for the punishment in question. The validity of maṣlahah in these cases is definitive and no longer open to debate. The ‘uLamāʾ are in agreement that promoting and protecting such values constitutes a proper ground for legislation. The fact that the Lawgiver has upheld them is tantamount to His permission and approval of all measures, including legislation, that aim at their realisation.

But the maṣāliḥ that have been validated after divine revelation came to an end fall into the second class, namely the maṣlahah mursalah.
This too consists of a proper attribute (wasf munāsib) to justify the necessary legislation, but since the Lawgiver has neither upheld nor nullified it, it constitutes maslahāh of the second rank. For example, in recent times, the maslahāh that prompted legislation in many Muslim countries, which provided that the claim of marriage or of ownership in real property, can only be proved by means of an official document, has not been explicitly validated by the Shari‘ah. The law on these points has thus upheld the unrestricted maslahāh; more specifically, it is designed to prevent a mafsadah, which is the prevalence of perjury (shahādah al-zūr) in the proof of these claims.24

The third variety of maslaḥāh is the discredited maslaḥāh, or maslaḥāh mulghā, which the Lawgiver has nullified either explicitly or by an indication that can be found in the Shari‘ah. The ‘ulamā’ are in agreement that legislation in the pursuance of such interests is invalid and no judicial decree may be issued in their favour. An example of this would be an attempt to give the son and the daughter an equal share in inheritance on the assumption that this will secure a public interest. But since there is a clear nasṣ in the Qur‘ān (al-Nisā‘, 4:11) that assigns to the son double the portion of the daughter, the apparent maslaḥāh in this case is clearly nullified (malghā).25

To summarise, when the Shari‘ah provides an indication, whether direct or implicit, on the validity of a maslaḥāh, it falls under the accredited masāliḥ. The opposite of this is maslaḥāh mulghā, which is overruled by a similar indication in the sources. The unrestricted maslaḥāh applies to all other cases that are neither validated nor nullified by the Shari‘ah.

II. Conditions (Shurūf) of Maslaḥah Mursalah

The following conditions must be fulfilled in order to validate reliance on maslaḥah mursalah. These conditions are designed to ensure that maslaḥah does not become an instrument of arbitrary desire or individual bias in legislation.

1. The maslaḥah must be genuine (haqiqiyah), as opposed to a plausible maslaḥah (maslaḥah wahmiyyah) which is not a proper ground for legislation. A mere suspicion or specious conjecture (tawahhum) that a certain act of legislation will be beneficial, without ascertaining the necessary balance between its possible benefits and harms, is not sufficient. There must, in other words, be a reasonable probability that the benefits of enacting a hukm in the pursuance of maslaḥah outweigh the harms that might result from it. An example of a specious
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maslahah, according to Khallaf, would be to abolish the husband’s right of talaq by vesting it entirely in a court of law.°

Genuine maslah are those that aim to protect the five essential values noted above. Protecting the faith, for example, necessitates the prevention of sedition (fitnah) and of the propagation of heresy. It also means safeguarding freedom of belief in accordance with the Qur’anic principle that ‘there shall be no compulsion in religion’ (al-Baqarah, 2:256).

Similarly, safeguarding the right to live includes protecting the means which facilitate an honourable life such as the freedom to work, freedom of speech and freedom to travel. Protecting the intellect ('aql) necessitates the promotion of learning and safeguards against calamities that corrupt the individual and make him a burden to society. Furthermore, safeguarding the purity of lineage (nasl) entails protection of the family and creation of a favourable environment for the care and custody of children. And lastly, the protection of property requires defending the right of ownership. It also means facilitating fair trade and the lawful exchange of goods and services in the community.°

(2) The second condition is that the maslahah must be general (kulliyyah) in that it secures benefit, or prevents harm, to the people as a whole and not to a particular person or group of persons. This means that enacting a hukm on grounds of istislah must hope to realise a benefit yielded to the largest possible number of people. It is not maslahah if it secures the interest of a few individuals regardless of their social and political status. The whole concept of maslahah derives its validity from the idea that it secures the welfare of the people at large.°

(3) Lastly, the maslahah must not be in conflict with a principle or value that is upheld by nass or ijma’. Hence the argument, for example, that maslahah in modern times would require the legalisation of usury (riba’) on account of the change in the circumstances in which it is practised, comes into conflict with the clear nass of the Qur’ân. The view that riba in the way it is practised in modern banking does not fall under the Qur’anic prohibition, as Abû Zahrah points out, violates the nass and therefore negates the whole concept of maslahah.°

Imam Malik has added two other conditions to the foregoing, one of which is that the maslahah must be rational (ma’qulah) and acceptable to people of sound intellect. The other condition is that it must
prevent or remove hardship from the people, which is the express purpose of the Qur’anic āyah in sūra al-Mā’idah (5:6) quoted above.\[^{30}\]

Furthermore, according to al-Ghazālī, maslahah, in order to be valid, must be essential (al-maslahah al-darūriyyah). To illustrate this, al-Ghazālī gives the example of when unbelievers in the battlefield take a group of Muslims as hostages. If the situation is such that the safety of all the Muslims and their victory necessitates the death of the hostages, then al-Ghazālī permits this in the name of al-maslahah al-darūriyyah.\[^{31}\] However, the weakness of al-Ghazālī’s argument appears to be that the intended maslahah in this example entails the killing of innocent Muslims, and the Shari’ah provides no indication to validate this.\[^{32}\]

### III. Al-Ṭūfī’s View of Maslahah Mursalah

Whereas the majority of jurists do not allow recourse to istislah in the presence of a textual ruling, a prominent Hanbali jurist, Najm al-Dīn al-Ṭūfī, stands out for his view, which authorises recourse to maslahah with or without the existence of naṣṣ. In a treatise entitled al-Masāliḥ al-Mursalah, which is a commentary on the hadith that ‘no harm shall be inflicted or reciprocated in Islam’, al-Ṭūfī argues that this hadith provides a clear naṣṣ in favour of maslahah. It enshrines the first and most important principle of Shariah and enables maslahah to take precedence over all other considerations. Al-Ṭūfī precludes devotional matters, and specific injunctions such as the prescribed penalties, from the scope of maslahah. In regard to these matters, the law can only be established by the naṣṣ and ijmā’. If the naṣṣ and ijmā’ endorse one another on ‘ibādāt, the proof is decisive and must be followed. Should there be a conflict of authority between the naṣṣ and ijmā’, 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 ijmā’ should take priority over other indications.\[^{33}\]

As for transactions and temporal affairs (ahkām al-mu’amalāt wa al-siyāsīyyāt al-dunyawiyyah), al-Ṭūfī maintains that if the text and other proofs of Shari’ah happen to conform to the maslahah of the people in a particular case, they should be applied forthwith; but if they oppose it, then maslahah should take precedence over them. The conflict is really not between the naṣṣ and maslahah, but between one naṣṣ and another, the latter being the hadith of la darar wa la dirār fī l-Islām.\[^{34}\] One must therefore not fail to act upon that text which materialises the maslahah. This process would amount to restricting
the application of one \textit{nass} by reason of another \textit{nass} and not to a suspension or abrogation thereof. It is a process of specification (\textit{takhsīs}) and explanation (\textit{bayān}), just as the \textit{Sunnah} is sometimes given preference over the Qur'ān by way of clarifying the text of the Qur'ān.\textsuperscript{35}

In the areas of transactions and governmental affairs, al-Ṭūfī adds, \textit{maslahah} constitutes the goal whereas the other proofs are like the means; the end must take precedence over the means. The rules of \textit{Sharī'ah} on these matters have been enacted in order to secure the \textit{masalih} of the people, and therefore when there is a conflict between a \textit{maslahah} and \textit{nass}, the \textit{ḥadith la ḍarar wa la ḍirār} clearly dictates that the former must take priority.\textsuperscript{36} In short, al-Ṭūfī’s doctrine, as Mahmassānī has observed, amounts to saying after each ruling of the text, ‘Provided public interest does not require otherwise’.\textsuperscript{37}

IV. Differences between \textit{Istīlāh}, Analogy and \textit{Istihsān}

In his effort to determine the \textit{sharī'ī} ruling on a particular issue, the jurist must refer to the Qur'ān, the \textit{Sunnah} and \textit{ijmā‘}. In the absence of any ruling in these sources, he must attempt \textit{qiyyās} by identifying a common ‘\textit{illah}’ between a ruling of the text and the issue for which a solution is required. However, if the solution arrived at through \textit{qiyyās} leads to hardship or unfair results, he may depart from it in favour of an alternative analogy in which the ‘\textit{illah}, although less obvious, is conducive to obtaining a preferable solution. The alternative analogy is a preferable \textit{qiyyās}, or \textit{istihsān}. In the event, however, that no analogy can be applied, the jurist may resort to \textit{maslahah mursalah} and formulate a ruling which, in his opinion, serves a useful purpose or prevents a harm that may otherwise occur.\textsuperscript{38}

It thus appears that \textit{maslahah mursalah} and \textit{qiyyās} have a feature in common in that both are applicable to cases in which there is no clear ruling available in the \textit{musūs} or \textit{ijmā‘}. They also resemble one another in the sense that the benefit that is secured by recourse to them is based on a probability, or \textit{zann}, either in the form of an ‘\textit{illah}’ in the case of \textit{qiyyās}, or of a rational consideration that secures a benefit in the case of \textit{maslahah mursalah}. However, \textit{qiyyās} and \textit{maslahah} differ from one another in certain respects. The benefit that is secured by \textit{qiyyās} is founded on an indication from the Lawgiver, and a specific ‘\textit{illah}’ is identified to justify the analogy to the \textit{nass}. But the benefit sought through \textit{maslahah mursalah} has no specific basis in established law, whether in favour or against. \textit{Maslahah mursalah} in other words
stands on its own justification, whereas qiyyās is the extension of a ruling that already exists.

This explanation also serves to clarify the main difference between maṣlaḥah and istiḥsān. A ruling which is based on maṣlaḥah mursalah is original in the sense that it does not follow, or represent a departure from, an existing precedent. As for istiḥsān, it only applies to cases for which a precedent is available (usually in the form of qiyyās), but istiḥsān seeks a departure from it in favour of an alternative ruling. This alternative may take the form of a hidden analogy (qiyyās khafi) or of an exception to a ruling of the existing law, each representing a variation of istiḥsān.39

V. The Polemics over Maṣlaḥah

The main point in the argument advanced by the opponents of istiṣlāḥ is that the Shari’ah takes full cognizance of all maṣāliḥ; it is all-inclusive and there is no maṣlaḥah outside the Shari’ah itself. This is the view of the Zāhirīs and some Shāfīʿīs like al-Āmīdī, and the Mālikī jurist Ibn al-Hājib, who do not recognise maṣlaḥah as a proof in its own right. They maintain that the maṣāliḥ are all exclusively contained in the nusūṣ. When the Shari’ah is totally silent on a matter, this is a sure sign that the maṣāliḥ in question is no more than a specious maṣlaḥah (maṣlaḥah wahmiyyah) that is not a valid ground for legislation.40

The Ḥanafīs and the Shāfīʿīs have, on the other hand, adopted a relatively more flexible stance, maintaining that the maṣāliḥ are either validated in the explicit nusūṣ, or indicated in the rationale (ʿillah) of a given text, or even in the general objectives of the Lawgiver. Only in the presence of a textual indication can maṣlaḥah constitute a valid ground for legislation. The identification of the causes (ʿʿillat) and objectives, according to this view, entails the kind of enquiry into the ʿillah that is required in qiyyās. The main difference between this view and that of the Zāhirīs is that the former validates maṣlaḥah on the basis of the rationale and the objective of the Shari’ah even in the absence of a specific nass. Both these views are founded on the argument that if maṣlaḥah is not guided by the values upheld in the nusūṣ, there is a danger of confusing maṣlaḥah with arbitrary desires, which might lead to corruption and mafsadah. Experience has shown that this has frequently occurred at the behest of rulers and governors who have justified their personal wishes in the name of maṣlaḥah. The way to avoid this is indicated in the Qur’ān in sūra al-Qiyāmah (75:36), where we read: ‘Does man think that he has been left without guidance?’
The *maslahah* must therefore be guided by the values that the Lawgiver has upheld. Hence there is no *maslahah* unless it is corroborated by an indication in the Shari'ah. While commenting on *istihsān*, Imam Ghazālī writes: ‘We know that the *masālih* must always follow the *sharī‘* indications; *istihsān* is not guided by such indications and therefore amounts to no more than a whimsical opinion’. As for *maslahah mursalah*, al-Ghazālī maintains that when it is not approved by the Lawgiver, it is like *istihsān*. Al-Ghazālī recognises the ‘accredited’ *maslahah*, that is, when the *maslahah* is indicated in the *nass*. He also approves of *maslahah mursalah* when it is based in definite necessity, that is, *maslahah ḍarūriyyah*. In the absence of a definite necessity, al-Ghazālī maintains that *maslahah* is not valid. Consequently, al-Ghazālī does not approve of the remaining two classes of the *masālih*, namely the complementary (*ḥājiyyāt*), and the embellishments (*tahsiniyyāt*). By making the stipulation that the *maslahah*, in order to be valid, must be founded on definite necessity, however, al-Ghazālī is no longer speaking of *maslahah mursalah*, but of necessity (ḍarūrah), which is a different matter altogether and governed by a different set of rules. It thus appears that this view only validates the type of *maslahah* that is referred to as *maslahah mu‘tabarah*.

The opponents of *istišlah* further add that to accept *istišlah* as an independent proof of Shari‘ah would lead to disparity, even chaos, in the *ahkām*. The *ḥalāl* and *ḥarām* would be held to be applicable in some places or to some persons and not to others. This would not only violate the permanent and timeless validity of the Shari‘ah but would open the door to corruption.

As already stated, the Hanafis and the Shafi‘is do not accept *istišlah* as an independent proof. Al-Shafi‘i approves of *maslahah* only within the general scope of *qiyyās*; whereas Abū Hanīfah validates it as a variety of *istihsān*. This would explain why the Shafi‘is and the Hanafis are both silent on the conditions of *maslahah*, as they treat the subject under *qiyyās* and *istihsān* respectively. They have explained their position as follows: should there be an authority for *maslahah* in the *nass*, that is, if *maslahah* is one of the accredited *masālih*, then it will automatically fall within the scope of *qiyyās*. In the event where no such authority can be found in the *nass*, it is *maslahah malghā* and is of no account. But it would be incorrect to say that there is a category of *maslahah* beyond the scope of the *nass* and analogy to the
to maintain that masla\text{h}ah mursalah is a proof would amount to saying that the nus\text{s} of the Qur\’\text{a}n and the Sunnah are incomplete. The opponents of istislah have further argued that the Lawgiver has validated certain mas\text{h}ali\text{h} and overruled others. In between there remains the masla\text{h}ah mursalah, which belongs to neither. It is therefore equally open to the possibility of being regarded as valid (mu\text{t}abarah) or invalid (malgh\text{h}) Since there is no certainty as to its validity, no legislation may be based on it, for law must be founded in certainty, not doubt.

In response to this, it is argued that the Lawgiver has proscribed certain mas\text{h}ali\text{h} not because there is no benefit in them but mainly because of their conflict with other superior mas\text{h}ali\text{h}, or because they lead to greater evil. None of these considerations would apply to masla\text{h}ah mursalah, for the benefit in it outweighs its possible harm. It should be borne in mind that the mas\text{h}ali\text{h} which the Lawgiver has expressly overruled (i.e. mas\text{h}ali\text{h} malgh\text{h}) are few compared to those that are upheld. When we have a case of masla\text{h}ah mursalah on which no clear authority may be found in the sources, and they appear to be beneficial, they are more likely to belong to the part that is more extensive and preponderant (kathir al-\text{gh}dlib), rather than to that which is limited and rare (qalil al-n\text{d}ir).47

The Z\text{\dh}iri\text{s} do not admit speculative evidence of any kind as a proof of Shari\text{a}h. They have invalidated even qi\text{y}\text{\=as}, let alone masla\text{h}ah, on the grounds that qi\text{y}\text{\=as} partakes of speculation. The rules of Shari\text{a}h must be founded in certainty, and this is only true of the clear injunctions of the Qur\’\text{a}n, Sunnah and ijma\text{c}. Anything other than these is mere speculation, which should be avoided. As for the reports that the Companions issued fatw\text{\={a}}s on the basis of their own ra\text{y} which might have partaken in masla\text{h}ah, Ibn Hazm is categorical in saying that ‘these reports do not bind anyone’.49 Thus it would follow that the Z\text{\dh}iri\text{s} do not accept masla\text{h}ah mursalah which they consider to be founded in personal opinion (ra\text{y}).50

The M\text{\={a}}lik\text{\={i}}s and the Hanbal\text{\={i}}s have, on the other hand, held that masla\text{h}ah mursalah is authoritative and that all that is needed to validate action upon it is to fulfil the conditions that ensure its propriety. When these conditions are met, masla\text{h}ah becomes an integral part of the objectives of the Lawgiver even in the absence of a particular na\text{s}. Ahmad ibn Hanbal and his disciples are known to have based many of their fatw\text{\={a}}s on masla\text{h}ah, which they have upheld as a proof of Shari\text{a}h and an instrument of protecting the faith, securing justice, and preventing mafsadah. They have thus validated the death penalty for
spies whose activity violates the *maslahah* of the Muslim community. The Ḥanbalīs have also validated, on grounds of *maslahah*, the death penalty for propagators of heresy when protecting the *maslahah* of the community requires this. But in all this, the Ḥanbalīs, like the Mālikīs, insist that the necessary conditions of *maslahah* must be fulfilled. *Maslahah* must pursue the valid objectives of the *Shari‘ah* and the dictates of sound intellect, acting upon which fulfils a useful purpose, or serves to prevent harm to the people. Some of the more far-reaching instances of *maslahah* in the Malīkī doctrine may be summarised as follows: (1) Imam Mālik validated the pledging of *bay‘ah* (oath of allegiance) to the *mafdūl*, that is the lesser of the two qualified candidates for the office of the imam, so as to prevent disorder and chaos afflicting the life of the community. (2) When the Public Treasury (*bayt al-mdl*) runs out of funds, the imam may levy additional taxes on the wealthy so as to meet the urgent needs of the government without which injustice and sedition (*fitnah*) may become rampant. (3) In the event where all the means of earning a lawful living are made inaccessible to a Muslim, he is in a situation where he cannot escape to another place, and the only way for him to earn a living is to engage in unlawful occupations; he may do so but only to the extent that is necessary.

**Conclusion**

Despite their different approaches to *maslahah*, the leading ‘ulamā’ of the four Sunni schools are in agreement, in principle, that all genuine *maslahah* that do not conflict with the objectives (*maqāsid*) of the Lawgiver must be upheld. This is the conclusion that both Khallāf and Abū Zahrah have drawn from their investigations. The Shāfi‘ī and Ḥanafī approach to *maslahah* is essentially the same as that of the Mālikī and Ḥanbali schools, with the only difference being that the former have attempted to establish a common ground between *maslahah* and the *qiyyās* that has an identifiable ‘illah. Some Mālikī jurists, including Shihāb al-Dīn al-Qarāfī have observed that all the jurists are essentially in agreement on the concept and validity of *maslahah mursalah*. They only differ on points of procedure: while some would adopt it directly, others would do so by bringing the *maslahah* within the purview of *qiyyās.* But Imam Mālik’s concept of *maslahah* is the most far-reaching of the four Sunni schools. Since *maslahah* must always be harmonious with the objectives of the Lawgiver, it is a norm by itself. *Maslahah mursalah* as such specifies the general (*‘āmm*)
of the Qur'an, just as the 'āmm of the Qur'an may be specified by qiyās. In the event of conflict between a genuine maslahah and a solitary hadith, the former takes priority over the latter. The changing conditions of life never cease to generate new interests. If legislation were to be confined to the values that the Lawgiver has expressly decreed, the Shari'ah would inevitably fall short of meeting the masālih of the community. To close the door of maslahah would be tantamount to enforcing stagnation, and imposing unnecessary restrictions on the capacity of the Shari'ah to accommodate social change. 'Abd al-Wahhāb Khallāf is right in his assessment that any claim to the effect that the nusūṣ of the Shari'ah are all-inclusive and cater for all eventualities is simply not true. The same author goes on to say: 'There is no doubt that some of the masālih have neither been upheld nor indicated by the Shari'ah in specific terms.'

As for the concern that the opponents of maslahah mursalah have expressed that validating this doctrine would enable arbitrary and self-seeking interests to find their way under the banner of maslahah, they only need to be reminded that a careful observance of the conditions that are attached to maslahah will ensure that only the genuine interests of the people that are in harmony with the objectives of the Shari'ah would qualify. This concern is admittedly valid, but is one that cannot be confined to maslahah alone. Arbitrariness and the pursuit of self-seeking interests have never been totally eliminated in any society, under any legal system. It is a permanent threat that must be carefully checked and minimised to the extent that this is possible. But this very purpose will be defeated if legislation on grounds of istislah were to be denied validity. The attempt to combat the evil of arbitrary indulgence that shakes the banner of maslahah would surely have greater prospects of success if the mujtahid and the imam were able to enact the necessary legislation on grounds of preventing harm to society. Consequently the argument that the opponents of maslahah have advanced would appear to be specious and self-defeating.

NOTES

1. Khallāf, 'Ilm, p. 84; Badrān, Uṣūl, p. 209.
2. Ghazālī, Mustasfā, I, 139–40.
4. Khallāf, 'Ilm, p. 84.
7. Khalūf, ‘Īlm, P. 84; Badrān, Uṣūl, p. 211.
8. Cf. Shāṭiḥī, Muwafaqāt, II, 3; Muṣṭafā Zayd, Maṣlahah, p. 25.
11. Muslim, Saḥīḥ, p. 411, hadith no. 1546.
12. Ābū Dāwūd, Sunan (Hasan’s trans.), III, 1020, hadith no. 3587.
13. Ibn Qayyim, Flām, II, 242; Muṣṭafā Zayd, Maṣlahah, p. 120.
15. Ibn Qayyim, Flām, I, 185; Ābū Zahrah, Uṣūl, pp. 122–3; Muṣṭafā Zayd, Maṣlahah, p. 52.
18. Ibn Qayyim, Tūnq, p. 16.
27. Ābū Zahrah, Uṣūl, p. 220.
29. Ābū Zahrah, Uṣūl, p. 219; Badrān, Uṣūl, p. 215.
33. Tūfī, Maṣāliḥ, p. 139.
34. Ibid., p. 141; Muṣṭafā Zayd, Maṣlahah, pp. 238–240. This book is entirely devoted to an exposition of Tūfī’s doctrine of maṣlahah.
35. Cf. Muṣṭafā Zayd, Maṣlahah, p. 121; Ābū Zahrah, Uṣūl, p. 223. A discussion of Tūfī’s doctrine can also be found in Kerr, Islamic Reform, pp. 97ff.
36. Tūfī, Maṣāliḥ, p. 141; Muṣṭafā Zayd, Maṣlahah, p. 131–2.
37. Mahmassānī, Falsāfah al-Tashri’, p. 117. This author also quotes Shaykh Muṣṭafā al-Ghalaḥiyyīn in support of his own view.
40. Khalūf, ‘Īlm, p. 88; Badrān, Uṣūl, p. 213.
41. Ābū Zahrah, Uṣūl, pp. 221, 224; Khalūf, ‘Īlm, p. 88; Badrān, Uṣūl, p. 213.
42. Ghazālī, Mustaṣfā, I, 138.
43. Ibid., I, 139–40.
44. Cf. Badrān, Uṣūl, p. 211.
46. Ābū Zahrah, Uṣūl, p. 222; Muṣṭafā Zayd, Maṣlahah, p. 61; Badrān, Uṣūl, p. 213.
47. Badrān, Usūl, p. 214.
49. Ibid., VI, 40.
51. Ibid., p. 60.
52. Shāṭībī, Iṭīṣām, II, 303.
53. Ibid., II, 295.
54. Ibid., II, 300.
As a noun derived from its Arabic root 'arafa (to know), 'urf literally means 'that which is known'. In its primary sense, it is the known as opposed to the unknown, the familiar and customary as opposed to the unfamiliar and strange. 'Urf and 'adah are largely synonymous, and the majority of 'ulamā' have used them as such. Some observers have, however, distinguished the two, holding that 'adah means repetition or recurrent practice, and can be used with regard to both individuals and groups. We refer, for example, to the habits of individuals as their personal 'adah. But 'urf is not used in this capacity: we do not refer to the personal habits of individuals as their 'urf. It is the collective practice of a large number of people that is normally denoted by the word 'urf. The habits of a few or even a substantial minority within a group do not constitute 'urf.¹

'Urf is defined as 'recurring practices that 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 of prejudice and corruption are excluded from the definition of 'urf.² 'Urf and its derivative, ma'rif, occur in the Qur'ān, and it is the latter of the two that occurs more frequently. Ma'rif, which literally means 'known' is, in its Qur'ānic usage, equated with good, while its opposite, the munkar or 'strange', is equated with evil. It is mainly in this sense that 'urf and ma'rif seem to have been used in the Qur'ān. The commentators have generally interpreted ma'rif in the Qur'ān as denoting faith in God and His Messenger, and adherence to God's injunctions. Thus the standard
commentary on the Qur’anic phrase ta’mirina bi al-ma’ruf wa tanhauma ‘an al-munkar (Al ‘Imran, 3:110) given by the exegetes is that ‘you enjoin belief in God and in His Messenger and enforce His laws, and you forbid disbelief and indulgence in the harām’. The same interpretation is given to the term ‘urf in the text that occurs in sura al-A’raf (7:199): ‘Keep to forgiveness, enjoin ‘urf and turn away from the ignorant.’

According to the exegetes, ‘urf in this context means fear of God and the observance of His commands and prohibitions. But occasionally, ma’ruf in the Qur’ān occurs in the sense of good conduct, kindness and justice, especially when the term is applied to a particular situation. It is only when ‘urf or ma’ruf is ordered generally without reference to a particular matter, situation or problem that it carries the meaning of adhering to God’s injunctions. The reason for the position taken by the exegetes becomes apparent if one bears in mind Islam’s perspective on good and evil (husn wa-qubh) which are, in principle, determined by divine revelation. Thus when God ordered the promotion of ma’ruf, He could not have meant the good that reason or custom decrees to be such, but what He enjoins. This would also explain why ‘urf in the sense of custom is not given prominence in the legal theory of the usul al-fiqh, although it carries some authority, as we shall presently explain.

Custom that does not contravene the principles of Shari‘h is valid and authoritative; it must be observed and upheld by a court of law. According to a legal maxim recorded by the Shafi‘i jurist al-Suyūti in his well-known work, al-Ashbah wa al-Naza‘ir, ‘what is proven by ‘urf is like that which is proven by a shar‘i proof’. This legal maxim is also recorded by the Hanafi jurist al-Sarakhsi, and was subsequently adopted in the Ottoman Mujallah which provides that custom, whether general or specific, is enforceable and constitutes a basis for judicial decisions. The Mujallah has recorded a number of legal maxims on ‘urf, which include the following:

Custom is a proof (Art. 36)

The usage of people is a proof that must be acted upon (Art. 37)
What is accepted by ource is like a stipulated condition (Art. 33).

The 'ulamā‘ have generally accepted ource as a valid criterion for the purposes of interpreting the Qur‘ān. To give an example, the Qur’ānic commentators have referred to ource in determining the precise amount of maintenance a husband must provide for his wife. This is the subject of sūra al-Talaq (65:7) which provides: ‘Let those who possess means pay according to their means.’

In this āyah, the Qur‘ān 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 Qur‘ān only specifies that this is the duty of the father, but leaves the quantum of maintenance to be determined by reference to custom (bi‘l-ma‘nif) (al-Baqarah, 2:233). The Shari‘ah has, in principle, accredited approved custom as a valid ground in the determination of its rules relating to halāl and harām. This is in turn reflected in the practice of the fuqahā‘, who have adopted ource, whether general or specific, as a valid criterion in the determination of the ahkām of Shari‘ah. The rules of fiqh that are based in juristic opinion (ra‘y) or in speculative analogy and ijtihād 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 ijtihādī rules of fiqh are, for the most part, changeable with changes of time and circumstance. To deny social change due recognition in the determination of the rules of fiqh would amount to exposing the people to hardship, which the Shari‘ah forbids. Sometimes even the same mujtahid has changed his previous ijtihād with a view to bringing it into harmony with prevailing custom. It is well-known, for example, that Imam al-Shāfi‘i 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.7

Customs that were prevalent during the lifetime of the Prophet and were not expressly overruled by him are held to have received his tacit approval and have become part of what is known as Sunnah taqririyah. Pre-Islamic Arabian custom which was thus approved by the Prophet was later upheld by the Companions, who often referred to it through statements such as ‘We used to do such-and-such while the Prophet was alive’.8 Islam has thus retained many pre-Islamic Arabian customs while it has at the same time overruled the oppressive and corrupt practices of that society. Islam also attempted to amend and regulate some of the Arab customary laws with a view to bringing them into line with the principles of the Shari‘ah. The reverse of this is also true in the sense that pre-Islamic customs of Arabia influenced the Shari‘ah in its formative stages of development. Even in the area of the verbal and actual Sunnah, there are instances where Arabian custom has been upheld and incorporated within the Sunnah of the Prophet. An example of this is the rulings of the Sunnah concerning the liability of the kinsmen of an offender (i.e. the ‘āqilah) for the payment of blood money, or diyah. Similarly, the Sunnah that regulates certain transactions such as mortgage (rahn), advance sale (salam) and the requirement of equality (kafā‘ah) in marriage have their roots in the pre-Islamic custom of the Arabs. There are also vestiges of pre-Islamic custom in the area of inheritance, such as the significance that the rules of inheritance attach to the male line of relationship, known as the ‘asabah. As for the post-Islamic custom of Arabian society, Imam Mālik has gone so far as to equate the ‘amal ahl al-madinah, that is the customary practice of the people of Medina, with ijmā‘. This type of ‘amal (lit. ‘practice’) constitutes a source of law in the absence of an explicit ruling in the Qur’an and Sunnah. Custom has also found its way into the Shari‘ah through juristic preference (istihsān) and considerations of public interest (maslāḥah). And of course, ijmā‘ itself has to a large extent served as a vehicle for assimilating customary rules that were in harmony with the Shari‘ah, or were based in necessity (darūrah), into the general body of the Shari‘ah.9

I. The Conditions of Valid ‘Urf

In addition to being reasonable and acceptable to people of sound nature, ‘urf, in order to be authoritative, must fulfil the following requirements.
(1) ‘Uṣf must represent a common and recurrent phenomenon. The practice of a few individuals or of a limited number of people within a large community will not be authoritative, nor will a usage of this nature be upheld as the basis of a judicial decision in Shari‘ah courts. The substance of this condition is incorporated in the Majallah al-Ahkām al-‘Adliyyah, where it is provided that ‘effect is only given to custom which is of regular occurrence’ (Art. 14). To give an example, when a person buys a house or a car, the question as to what is to be included in either of these is largely determined by custom, if this is not otherwise specified in the terms of the agreement. More specifically, one would need to refer to the common practice among estate agents or car dealers respectively. But if no custom can be established as such, or there are disparate practices of various sorts, no custom can be said to exist and no judicial order may be based on it. Custom, in order to be upheld, must not only be consistent but also dominant in the sense that it is observed in all or most of the cases to which it could apply. If it is observed only in some cases but not in others, it is not authoritative. Similarly, if there are two distinct customary practices on one and the same matter, the one that is dominant is to be upheld. If, for example, a sale is concluded in a city where two or three currencies are commonly accepted and the contract in question does not specify any, the one that is the more dominant and common will be deemed to apply.\(^{10}\)

(2) Custom must also be in existence at the time a transaction is concluded. In contracts and commercial transactions, effect is given only to customs which are prevalent at the time the transaction is concluded, and not to customs of subsequent origin. This condition is particularly relevant to the interpretation of documents, which are to be understood in the light of the custom that prevailed at the time they were written. Consequently, a rule of custom which is prevalent at the time the interpretation is attempted will not be relevant if it only became prevalent after the document was concluded. For it is generally assumed that documents which are not self-evident and require clarification can only convey concepts that were common at the time they were written.\(^{11}\)

(3) Custom must not contravene the clear stipulation of an agreement. The general rule is that contractual agreements prevail over custom, and recourse to custom is only valid in the absence of an agreement. Since contractual agreements are stronger than custom, should there arise a conflict between them it will normally be determined in favour of the former. If for example the prevailing custom
in regard to the provision of dower (mahr) in marriage requires the payment of one-half at the time of the conclusion of the contract and the remainder at a later date, but the contract clearly stipulates the prompt payment of the whole of the dower, the rule of custom will be of no account in the face of this stipulation. For custom is only to be invoked when no clear text can be found to determine the terms of a particular dispute; and whenever a clear text is in existence, recourse to custom will be out of the question. To give another example: the costs of formal registration in the sale of real property are customarily payable by the purchaser. But if there is a stipulation in the contract that specifically requires the vendor to bear those costs, then the custom will be of no account and the purchaser will not be required to pay the costs of registration.

(4) Lastly, custom must not violate the nass, that is, the definitive principle of the law. The opposition of custom to nass may either be absolute or partial. If it is the former, there is no doubt that custom must be set aside. Examples of such conflicts are encountered in the Bedouin practice of disinheriting the female heirs, or the practice of usury (ribā') and wine-drinking. The fact that these are widely practised is of no consequence, as in each case there is a prohibitory nass, or a command that always takes priority, and no concession or allowance is made for the practice in question. But if the conflict between custom and text is not absolute in that the custom opposes only certain aspects of the text, then custom is allowed to act as a limiting factor on the text. The contract of istisna', that is, the order for the manufacture of goods at an agreed price, may serve as an example here. According to a hadith, 'the Prophet prohibited the sale of non-existing objects but he permitted salam [i.e. advance sale in which the price is determined but delivery postponed].'

This hadith is general in that it applies to all varieties of sale in which the object of sale is not present at the time of contract. Salam was exceptionally permitted as it was deemed to be of benefit to the people. The general prohibition in this hadith would equally apply to istisna' as in this case too the object of sale is non-existent at the time of contract. But since istisna' was commonly practised among people of all ages, the fuqahā' have validated it on grounds of general custom. The conflict between istisna' and the ruling of the hadith is not absolute, because the hadith has explicitly validated salam. If realisation
of benefit to the people was the main ground of the concession that has been granted in respect of salam, then istisnā° presents a similar case. Consequently, the custom concerning istisnā° is allowed to operate as a limiting factor on the textual ruling of the hadith in that the hadith is qualified by the custom concerning istisnā°.

Another example where a general text is qualified by custom is when a person is appointed to act as agent (wakil) for another in respect of concluding a particular contract such as sale or marriage. The agent's power to conclude the contract, although not limited by the terms of his appointment, is nevertheless qualified by the prevalent custom. In the matter of sale, for example, the expected price that represents the fair market price will be upheld, and the currency of the locality will be accepted in exchange. According to a hadith, the Prophet is said to have forbidden conditional sale, that is, sale with conditions that may not be in agreement with the nature of this contract. An example of this would be when A sells his car to B for 1,000 dollars on condition that B sells his house to A for 5,000 dollars. The hadith quoted to this effect provides that the Prophet 'forbade sale coupled with a condition'.

However, the majority of Hanafi and Maliki jurists have validated conditions that are accepted by the people at large and which represent standard custom. Here again the general prohibition is retained, but only conditions that are adopted by 'urf are upheld; the general terms of the hadith are, in other words, qualified by custom.14

It would be useful in this connection to distinguish 'urf from ijma°, for they have much in common with one another, which is why they are sometimes confused. But despite their similarities, there are substantial differences between 'urf and ijma° which may be summarised as follows:

(1) 'Urf materialises by the agreement of all, or the majority of, the people, and its existence is not affected by the exception or disagreement of a few individuals. Ijma°, on the other hand, requires for its conclusion the consensus of all the mujtahidūn of the period or the generation in which it materialises. Disagreement and dissension has no place in ijma°, and any level of disagreement among the mujtahidūn invalidates ijma°.

(2) Custom does not depend on the agreement of the mujtahidūn, but must be accepted by the majority of the people, including the
mujtahidūn. The laymen have, on the other hand, no say in ījmāʾ on juridical matters, which require only the participation of the learned members of the community.

(3) The rules of ‘urf are changeable, and a custom may in the course of time give way to another custom or may simply disappear with a change of circumstance. But this is not the case with ījmāʾ. Once an ījmāʾ is concluded, it precludes fresh ījtihād on the same issue and is not open to abrogation or amendments. ‘Urf on the other hand leaves open the possibility of fresh ījtihād, and a ruling of ījtihād that is founded on ‘urf may be changed even if the ‘urf in which it originates does not.

(4) Lastly, ‘urf requires an element of continuity in that it can only materialise if it exists over a period of time. Ījmāʾ can, on the other hand, come into existence whenever the mujtahidūn reach a unanimous agreement which, in principle, requires no continuity for its conclusion.15

II. Types of Custom

Custom is initially divided into two types, namely, verbal (qawli) and actual (fi’li). Verbal ‘urf consists of the general agreement of the people on the usage and meaning of words deployed for purposes other than their literal meaning. As a result of such agreement, the customary meaning tends to become dominant and the original or literal meaning is reduced to the status of an exception. There are many examples in the Qur’ān and Sunnah of words that have been used for a meaning other than their literal one, which were as a result commonly accepted by popular usage. Words such as salah, zakāh and hajj have been used in the Qur’ān for purposes other than their literal meanings, and this usage eventually became dominant to the extent that the literal meaning of these words was consigned to obscurity. The verbal custom concerning the use of these words thus originated in the Qur’ān and was subsequently accepted by popular custom. We also find instances of divergences between the literal and the customary meanings of words in the Qur’ān where the literal meaning is applied regardless of the customary meaning. The word walad, for example, is used in the Qur’ān in its literal sense, that is, ‘offspring’ whether a son or daughter (note sūra al-Nisā’, 4:11), but in its popular usage walad is used only for sons. Another example is laḥm, that is, meat, which in its Qur’ānic usage includes fish, but in its customary usage is applied only to meat other than fish. Whenever words of this nature, that is, words that have acquired a different
meaning in customary usage, occur in contracts, oaths and commercial transactions, their customary meaning will prevail. For example, when a person takes an oath that he will never ‘set foot’ in so-and-so’s house, what is meant by this expression is the customary meaning, namely, actually entering the house. In this sense, the person will have broken the oath if he enters the house while never ‘setting foot’, such as by entering the house while mounted. But if he only technically sets his foot in the house without entering it, he will not be liable to expiation (kaффarah) for breaking his oath.16

Actual ‘urf consists of commonly recurrent practices that are accepted by the people. An example of actual ‘urf is the give-and-take sale, or bay‘ al-ta‘āti, which is normally concluded without utterances of offer and acceptance. Similarly, customary rules regarding the payment of dower in marriage may require a certain amount to be paid at the time of contract and the rest at a later date. The validity of this type of custom is endorsed by the legal maxim that reads: ‘What is accepted by ‘urf is tantamount to a stipulated agreement [al-ma‘ruf ‘urfan ka‘l-mashrūṭ shartan]’. Consequently, actual ‘urf is to be upheld and applied in the absence of an agreement to the contrary.

‘Urf, whether actual or verbal, is once again divided into the two types of general and special: al-‘urf al-‘amm and al-‘urf al-khāṣṣ respectively. A general ‘urf is one which is prevalent everywhere and on which the people agree regardless of the passage of time. A typical example of this is bay‘ al-ta‘āti to which reference has already been made. Similarly, the customary practice of charging a fixed price for entry to public baths is another example of general ‘urf, which is anomalous with the strict requirements of sale (as it entails consuming an unknown quantity of water) but the people have accepted it and it is therefore valid. It will be further noted that in their formulation of the doctrine of istihsān, the Hanafi jurists have validated departure from a ruling of qiyās in favour of general ‘urf. This has already been elaborated in the chapter on istihsān.17

‘Special custom’ is ‘urf that is prevalent in a particular locality, profession or trade. By its very nature, it is not a requirement of this type of ‘urf that it be accepted by people everywhere. According to the preferred view of the Hanafi school, special ‘urf does not qualify the general provisions of the nass, although some Hanafi jurists have held otherwise. Consequently, this type of ‘urf is entirely ignored when it is found to be in conflict with the nass. The general rule to be stated here is that the ahkām of Shari‘ah pertaining to the authority of ‘urf only contemplate the provisions of general ‘urf. A ruling of qiyās,
especially *qiyyās* whose effective cause is not expressly stated in the *nass*, that is, *qiyyās ghayr mansūs al-illāh*, may be abandoned in favour of a general *'urf*, but will prevail if it conflicts with special *'urf*. A number of prominent ‘ulamā’ have, however, given the *fatwā* that special *'urf* should command the same authority as general *'urf* in this respect. The reason why general *'urf* is given priority over *qiyyās* is that the former is indicative of the people’s need, whose disregard may amount to an imposition of hardship on them. Some Ḥanafī jurists like Ibn al-Humām have taught that *'urf* in this situation commands an authority equivalent to that of *ijmā‘*, and that as such it must be given priority over *qiyyās*. It is perhaps relevant here to add that Abū Ḥanīfah’s disciple, al-Shaybānī, validated the sale of honeybees and silkworms as this was commonly practised during his time despite the analogical ruling that Abū Ḥanīfah had given against it on the grounds that they did not amount to a valuable commodity (*māl*). Furthermore, the ‘ulamā’ have recorded the view that since *'urf* is given priority over *qiyyās* in spite of the fact that *qiyyās* originates in the *nusūs* of the Qur’ān and Sunnah, it will a fortiori be preferred over considerations of public interest (*maslahah*) that are not rooted in the *nusūs*. Having said this, however, it would seem that cases of conflict between general *'urf* and *maslahah* would be rather rare. For *'urf* by definition must be sound and reasonable, and these considerations tend to bring *'urf* close to *maslahah*. For after all, *'urf* and *maslahah*, each in their respective capacities, serve as a means for the realisation of public welfare and the prevention of hardship to people.

And lastly, from the viewpoint of its conformity or otherwise with the *Shari‘ah*, custom is once again divided into the two types of approved or valid custom (*al-‘urf al-sāḥīh*) and disapproved custom (*al-‘urf al-fāsid*). As is indicated in the terms of these expressions, the approved *‘urf* is one which is observed by the people at large without there being any indication in the *Shari‘ah* that it contravenes any of its principles. The disapproved custom is also practised by the people but there is evidence to show that it is repugnant to the principles of *Shari‘ah*. We have already referred to the Bedouin practice of disinheriting female relatives and the prevalence of *riba‘* which, although commonly practised, are both in clear violation of the *Shari‘ah*, and as such represent examples of *al-‘urf al-fāsid*.

III. The Proof (*Hujjiyyah*) of *‘Urf*

Although the ‘ulamā’ have attempted to locate textual authority for *‘urf* in the Qur’ān, their attempt has not been free of difficulties. To
begin with, reference is usually made to the Qur’ānic text in sūra al-Hajj (22:78) which provides: ‘God has not laid upon you any hardship in religion.’

This is obviously not a direct authority on the subject, but it is argued that ignoring the prevailing ʻurf that does not conflict with the nusūṣ of Shari‘ah is likely to lead to inflicting hardship on the people, which must be avoided. The next āyah that is quoted in support of ʻurf occurs in sūra al-A‘raf (7:199), but although this has a direct reference to ʻurf, difficulties have been encountered in identifying it as its main authority. This āyah, to which a reference has already been made, enjoins the Prophet to ‘keep to forgiveness, and enjoin ʻurf, and turn away from the ignorant’.

According to the Maliki jurist Shihāb al-Dīn al-Qarāfī, this āyah is explicit and provides a clear authority for ʻurf. According to this view, ʻurf is clearly upheld in the Qur’ān as a proof of Shari‘ah and is an integral part of it. The generality of ‘ulamā’, however, maintain the view that the reference to ʻurf in this āyah is to the literal meaning of the word, that is, to the familiar and good, and not to custom as such. But then it is added, bearing in mind that approved custom is normally upheld by people of sound nature and intellect, that the Qur’ānic concept of ʻurf comes close to the technical meaning of this word. The literal or the Qur’ānic meaning of ʻurf, in other words, corroborates its technical meaning and the two usages of the word are in essential harmony with one another. The commentators, however, further add that since the word ʻurf in this āyah can mean many things, including ‘profession of the faith’, ‘that which the people consider good’, and of course ‘that which is familiar and known’, as well as ʻurf in the sense of custom, it cannot be quoted as a textual authority for custom as such. Among the indirect evidence in support of ʻurf, the ‘ulamā’ have also quoted the following saying of the prominent Companion, ‘Abd Allāh ibn Mas‘ūd, that ‘what the Muslims deem to be good is good in the sight of God’.

ما رأى المسلمون حسنًا فهو حسن عند اللَّهِ
Although many scholars have considered this to be a *hadith* from the Prophet, it is more likely, as al-Shatibi points out, to be a saying of 'Abd Allāh ibn Mas'ūd.¹ The critics have, however, suggested that this *hadith* refers to the approval of 'al-*muslimiin*', that is, all the Muslims, whereas 'urf varies from place to place, and the approval of all Muslims in its favour cannot be taken for granted. In response to this, it has been further suggested that 'muslimūn' in this context only denotes those among them who possess sound intellect and judgment, and not necessarily every individual member of the Muslim community.²²

The upshot of this whole debate over the authoritativeness of 'urf seems to be that, notwithstanding the significant role it has played in the development of the Shari'ah, it is not an independent proof in its own right. The reluctance of the 'ulama' to recognise '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* that 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 *fatwās* that the later 'ulama' 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 *fatwā* 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.³³

The issue has perhaps 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 organisation. The accelerated pace of social change in modern times is likely to further undermine the stability of social customs and organisations. The increased mobility of the individual in terms of socio-economic status, massive urbanisation, the unprecedented shift of populations to major urban centres, and so forth, tend to interfere with the stability and continuity of 'urf.

Another factor that merits attention in this context is the development of statutory legislation as an instrument of government in modern times. The attempt to codify the law into self-contained statutes has to some extent reduced the need to rely on social custom as the basis of decision-making. But even so, it would be far from accurate to say that custom has ceased to play an important role both
as a source of law and a basis of judicial decision-making. This is perhaps evident from the general reference to custom as a supplementary source of law in the civil codes of many Islamic countries of today. The typical style of reference to custom in such statutes appears to be that custom is authoritative in the absence of a provision in the statute concerning a particular dispute.

The fuqahā’ of the later ages (muta’akhkhiriin) are on record as having changed the rulings of the earlier jurists that were based in custom, owing to subsequent changes in the custom itself. The examples given below will show that the jurists have on the whole accepted ‘urf not only as a valid basis of ijtihad but also as the key indicator of the need for legal reform:

(1) Under the rules of fiqh, a man who causes harm to another by giving him false information is not responsible for the damage he has caused. The rule of fiqh that applies to such cases is that the mubāshir, that is the one who acted directly, is responsible for the losses. However, owing to the spread of dishonesty and corruption, the later fuqahā’ have validated a departure from this rule in favour of holding the false reporter responsible for the losses caused.24

(2) According to Imam Abū Hanīfah, when the qādī personally trusts the reliability of a witness who testifies before him, there is no need for recourse to cross-examination or tazkiyah. This ruling is based on the hadith stating that ‘Muslims are ‘udāl [i.e. upright and trustworthy] in relationship to one another’.

Abū Hanīfah’s ruling was obviously deemed appropriate for the time in which it was formulated. But the experiences of later times aroused concern about dishonesty and lying on the part of witnesses. It was consequently considered necessary to take precautions so as to prevent perjury, and the ‘ulamā’ reached the opinion that tazkiyah should be applied as a standard practice to all witnesses. Abū Hanīfah’s disciples are reported to have given a fatwā in favour of making tazkiyah a regular judicial practice. Consequently, tazkiyah was held to be a condition for admitting the testimony of witnesses, and a ruling was formulated to the effect that no testimony without tazkiyah could constitute the basis of a court decision.25

(3) According to the accepted rule of the Hanafi school, which is attributed to Abū Hanīfah himself, no-one was allowed to charge any fees for teaching the Qur’ān or the principles of the faith. For teach-
ing these subjects was held to be a form of worship (‘ibādah) and no reward for it was to be expected from anyone other than God. But subsequent experience showed that some people were reluctant to teach the Qur‘ān, and an incentive by way of remuneration was considered necessary in order to encourage the teaching of Islam. Consequently, the fuqahā’ gave a fatwā in favour of charging fees for teaching the Qur‘ān.26

(4) Among the rules of figh that have tended to ‘change with the change of custom’, there is one concerning the determination of the age by which a missing person (mafsqūd) is to be declared dead. According to the generally accepted view, the missing person must not be declared dead until he reaches the age at which his contemporaries would normally be expected to die. Consequently the jurists of the Ḥanafi school have variously determined this age at seventy, ninety and one hundred, and their respective rulings have taken into consideration the changes of experience and conditions that prevailed at the time the new rulings were formulated.27

(5) And lastly, in the area of transactions, the concept of al-ghabn al-fahish, that is radical discrepancy between the market price of a commodity and the actual price charged to the customer, is determined with reference to ‘urf. To ascertain what margin of discrepancy in a particular transaction amounts to al-ghabn al-fahish is determined by reference to the practice among tradesmen and people who are engaged in similar transactions. Since these practices are liable to change, the changes are in turn reflected in the determination of what might amount to al-ghabn al-fahish.28

NOTES

5. The Mejelle (Tyser’s trans.), art. 36; Abi Zahrah, Usul, p. 216; Mahmassani, Falsafah, p. 131.
7. Abi Zahrah, Usul, p. 217; Aghnides, Muhammadan Theories, p. 82.
13. Bukhari, Sahih, III, 44 (Kitāb al-Salam, hadith nos. 1–3); Badrān, Usūl, p. 121.
17. Abū Zahrah, Usūl, p. 217; Sābūnī, Madkhal, p. 138; Aghnides, Muhammadan Theories, p. 81.
21. Shāṭibī, Fīṣām, II, 319. Mahmassāni (Falsafah, p. 77) has also reached the conclusion that this is the saying of ‘Abd Allāh ibn Mas‘ūd, but Āmidtī (Ihkām, I, 214) has quoted it as a hadith.
27. Sābūnī, Madkhal, p. 145.
28. Ibid.
CHAPTER FIFTEEN

Istīḥāb (Presumption of Continuity)

Literally, istīḥāb means ‘escorting’ or ‘companionship’. Technically, istīḥāb denotes a rational proof that may be employed in the absence of other indications; specifically, those facts or rules of law and reason, whose existence or non-existence had been proven in the past, and which are presumed to remain so for lack of evidence to establish any change. The technical meaning of istīḥāb relates to its literal meaning in the sense that the past ‘accompanies’ the present without any interruption or change. Istīḥāb is validated by the Shafi’i school, the Hanbalis, the Zahiris and the Shi’ah Imamiyyah, but the Hanafis, the Malikis and the mutakallimūn, including Abū al-Husayn al-Basri, do not consider it a proof in its own right. The opponents of istīḥāb are of the view that establishing the existence of a fact in the past is no proof of its continued existence. The continued existence of the original state is still in need of proof in the same way as the claim that seeks to establish that the original condition has changed.

For the Shafi’is and the Hanbalis, istīḥāb denotes ‘continuation of that which is proven and negation of that which had not existed’. Istīḥāb, in other words, presumes the continuation of both the positive and the negative until the contrary is established by evidence. In its positive sense, istīḥāb requires, for example, that once a contract of sale (or of marriage for that matter) 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 Shari‘ah 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 istishâb. However, if the law only validates a contract on a temporary basis, such as lease and hire (ijarah), then istishâb cannot presume its continuity on a permanent basis. The contract will continue to operate within the specified period and terminate when the period expires.

Istishâb also presumes the continuation of the negative. For example, A purchases a hunting dog from B with the proviso that it has been trained to hunt, but then A claims that the dog is untrained. A's claim will be acceptable under istishâb unless there is evidence to the contrary, for istishâb maintains the natural state of things, which in the case of animals is the absence of training.

Presumption of continuity under istishâb is different from the continued validity of a rule of law in a particular case. The false accuser, for example, may never be admitted as a witness, a rule which is laid down in a clear Qur'anic text (al-Nûr, 24:5). The permanent validity of the hukm in this case is established by the legal text, which is in no need of any presumption. Istishâb only applies when no other evidence is available, which is obviously not the case when there is a clear text that could be invoked.

Since istishâb 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 Sharî'ah. Hence when istishâb comes into conflict with another proof, the latter takes priority. As it is, istishâb is the last ground of fatwâ: when the jurist is asked about the ruling of a particular case, he must first search for a solution in the Qur'ân, the Sunnah, consensus of opinion and qiyâs. If a solution is still wanting, he may resort to istishâb in either its positive or negative capacities. Should there be doubt about 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. Thus with regard to facts and situations that are known to have been present or absent in the past, istishâb presumes its non-existence until the claim is proven by evidence. But if someone claims that he has cleared and paid the debt he owed to another, istishâb will presume the opposite of the claim until evidence shows otherwise. In the case of a missing person, for example, the nature of the situation is such that no other proof of Sharî'ah could be employed to determine the question of his life or death. Since the main feature of the doubt concerning a missing person is the possi-
bility of his death, *istiṣḥāb* will presume that he is still alive. But in
the event of an unsubstantiated claim, when for example A claims
that B owes him a sum of money, the doubt here is concerned with
the proof of the existence of a debt, which will be presumed 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 *istiṣḥāb* is also
guided by the general norms of the *Sharī‘ah*. The legal norm concern-
ing foods, drinks and clothes, for example, is permissibility (*ibāhah*).
When a question arises as to the legality of a particular kind of
beverage or food, and there is no other evidence to determine its
value, recourse may be had to *istiṣḥāb*, which will presume that it is
permissible. But when the norm in regard to something is prohibi-
tion, such as cohabitation between members of the opposite sex, the
presumption will be one of prohibition, unless there is evidence to
prove its legality.

*istiṣḥāb* is supported by both *sharī‘ī* and rational (*‘aqīlī*) 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 that had not
existed will probably remain so until the contrary is proved. When
reasonable men (*‘uqālā‘*) and men who comply with the accepted norms
of society (*ahl al-‘urf*) have known of the existence or non-existence
of something, as al-Āmīdī observes, from that point onwards they
tend to formulate their judgements on the basis of what they know,
until they are assured by their own observation or evidence that there
is a change.° Reason also tells us not to accept claims unsubstantiated
by evidence that suggest a change in a *status quo* which is otherwise
expected to continue. Hence a mere claim that a just person (*‘ādil*)
has become a profligate (*fāsiq*) will be of no account, and the person
will be presumed to be *‘ādil* until the contrary is established. Similarly,
when a student is admitted and registered for a degree course, his
status as a student remains unchanged until there is evidence to suggest
that this is no longer the case. But until then there is no need for him
to prove his status every week or every month.

To presume the continuity of something that might have been
present or absent in the past, as al-Āmīdī points out, is equivalent to
a *zann*, which is valid evidence in juridical (*sharī‘ī*) matters, and action
upon it is justified.° The rules of *Sharī‘ah* continue to remain valid
until there is a change in the law or in the subject to which it is
applied. The law, for example, has forbidden the consumption of wine, a ruling which will remain in force until there is a state of emergency or the wine loses its intoxicating quality, such as by being changed into vinegar.

I. Varieties of Istishāb

From the viewpoint of the nature of the conditions that are presumed to continue, *istiṣḥāb* is divided into four types as follows:

1. Presumption of original absence (*istiṣḥāb al-'adam al-asli*), which means that a fact or rule of law that 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, for example by attaining majority or obtaining educational qualifications respectively. Similarly if A, who is a trading partner to B, claims that he has made no profit, the presumption of absence will be in A’s favour unless B can prove otherwise. Another area that is determined by the presumption of original absence is the original freedom from liability, or the presumption of innocence, which will be separately discussed later.¹⁰

2. Presumption of original presence (*istiṣḥāb al-wujūd al-asli*). This variety of *istiṣḥāb* takes for granted the presence or existence of that which is indicated by the law or reason. For example, when A is known to be indebted to B, A is presumed such until it is proved that he has paid the debt or was acquitted of it. Provided that B’s loan to A is proven in the first place as a fact, this is sufficient to give rise to the presumption of its continuity and B need not prove the continuity of the loan in question every day of the month. Similarly, under 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, *istiṣḥāb* presumes the presence of a liability or a right until an indication to the contrary is found. The ‘ulama’ are in agreement on the validity of this type of *istiṣḥāb*, which must prevail until the contrary is proved.¹¹

3. *Istiṣḥāb al-hukm*, or *istiṣḥāb* which presumes the continuity of the general rules and principles of the law. As earlier stated, *istiṣḥāb* is not only concerned with the presumption of facts but also with the established rules and principles of the law. *Istiṣḥāb* thus takes for granted the continued validity of the provisions of the *Shari‘ah* in
regard to permissibility and prohibition (halāl and harām). When there is a ruling in the law, whether prohibitory or permissive, it will be presumed to continue until the contrary is proved. But when there is no such ruling available, recourse will be had to the principle of *ibāhah*, which is the general norm of *Shari‘ah* law concerning a matter that is deemed beneficial and free of evil consequences. Hence when the law is silent on a matter and it is not repugnant to reason, it will be presumed to be permissible. This is the majority view, although some Mu‘tazilah have held a variant opinion, which is that the general norm in *Shari‘ah* is prohibition unless there is an indication to the contrary. The principle of permissibility (*ibāhah*) originates in the Qur‘ān, in particular those of its passages which subjugate the earth and its resources to the welfare of man. Thus we read in sūra al-Baqarah (2: 29): ‘It is He who has created for you all that is in the earth’

وَهُوَ الَّذِي خَلَقَ لَكُمْ مَا فِي الْأَرْضِ جَمِيعًا

and in sūra al-Jāthiyah (45:13): ‘God has subjugated to you all that is in the heavens and in the earth.’

وَسَخَرْ لَكُمْ مَا فِي السَّمَوَاتِ وَمَا فِي الْأَرْضِ

These Qur‘ānic declarations take for granted that man should be able to utilise the resources of the world around him to his advantage, which is another way of saying that he is generally permitted to act in the direction of securing his benefits unless he has been expressly prohibited. Hence all objects, legal acts, contracts and exchange of goods and services that are beneficial to human beings are lawful on grounds of original *ibāhah*. But when the legal norm in regard to something is prohibition, then *istiṣḥāb* presumes its continuity until there is evidence to suggest that it is no longer prohibited.

(4) *Istiṣḥāb al-wasf*, or continuity of attributes, such as presuming clean water (purity being an attribute) to remain so until the contrary is established to be the case (for example through a change in its colour or taste). Similarly, when a person makes an ablution to perform the *salāh*, the attribute of ritual purity (*tahārah*) is presumed to continue until it is vitiated. A mere doubt that it might have been vitiated is not sufficient to nullify *tahārah*. By the same token, a guarantor (*kāfī al-kafālah* being a juridical attribute) remains responsible for the debt of which he is guarantor until he or the debtor pays it, or the creditor acquits him from payment.
The jurists are in agreement on the validity, in principle, of the first three types of istishāb, although they have differed on their detailed implementation, as we shall presently discuss. As for the fourth type of istishāb, which relates to attributes, whether new or well-established, this is a subject on which the jurists have disagreed. The Shāfi‘ī and the Hanbali schools have upheld it absolutely, whereas the Hanafi and Mālikī schools accept it with reservations. The case of the missing person is discussed under this variety of istishāb, as the question is mainly concerned with the continuity of his life—life being the attribute. Since the missing person (mafqūd) was alive at the time when he disappeared, he is presumed to be alive unless there is proof that he has died. He is therefore entitled, under the Shāfi‘ī and Hanbali doctrines, to inherit from a relative who dies while he is still a missing person. But no-one is entitled to inherit from him for the obvious reason that he is presumed alive. Yet under the Hanafi and Mālikī law, the missing person neither inherits from others nor can others inherit from him. The Hanafis and Mālikis accept istishāb al-wasf only as a means of defence, that is, to defend the continued existence of an attribute, but not as a means of proving new rights and new attributes. Istishāb cannot therefore be used as a means of acquiring new rights for the missing person, but can be used in order to protect all his existing rights. To use a common expression, istishāb can only be used as a shield, not as a sword. If, for example, the missing person had owned property at the time of his disappearance, he continues to be the owner. Similarly, his marital rights are presumed to continue, just as he remains responsible for discharging his obligations until his death is established by evidence or by a judicial decree. But as long as he remains a missing person, he will not be given a share in inheritance or bequest, although a share will be reserved for him until the facts of his life or death are established. If he is declared dead, the reserved share will be distributed among the other heirs on the assumption that he was dead at the time of the death of his relative. Upon declaration of his death his own estate will be distributed among his heirs as of the time the court declares him dead. This is the position under the Hanafi and Mālikī schools, which maintain that although the mafqūd is presumed to be alive, this is only a presumption, not a fact, and may therefore not be used as a basis for the creation of new rights.¹⁴ The question may arise: why can his heirs not inherit from the mafqūd? If nothing is certain, perhaps his heirs could be assigned their shares, or the shares may be reserved in their names until the facts are known. In response to this, the Hanafis invoke the principle of ‘original absence’,

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¹⁴ The question may arise: why can his heirs not inherit from the mafqūd? If nothing is certain, perhaps his heirs could be assigned their shares, or the shares may be reserved in their names until the facts are known. In response to this, the Hanafis invoke the principle of ‘original absence’,
which means here that a right to inheritance is originally absent and will be presumed so until there is positive proof that it has materialised.\textsuperscript{15}

The Shafi’is and the Hanbalis have, on the other hand, validated \textit{istishâb} in both its defensive (\textit{li-daf‘}) and affirmative (\textit{li-kasb}) capacities, that is, both as a shield and as a sword. Hence the \textit{mafqûd} is presumed to be alive in the same way as he was at the time of his disappearance right up to the time when he is declared dead. The \textit{mafqûd} is not only entitled to retain all his rights but can acquire new rights such as gifts, inheritance and bequests.\textsuperscript{16}

It thus appears that the jurists are in disagreement, not necessarily on the principle, but on the detailed application of \textit{istishâb}. The Hanafis and Mâlikâs who accept \textit{istishâb} on a restricted basis have argued that the existence of something in the past cannot prove that it continues to exist. They have further pointed out that an over-reliance on \textit{istishâb} is likely to open the door to uncertainty, even conflict, in the determination of \textit{ahkâm}. The main area of juristic disagreement in this connection is the identification of what exactly the original state that is presumed to continue by means of \textit{istishâb} might be. This is a question that permeates the application of \textit{istishâb} in its various capacities, which is perhaps why the Hanbali scholar Ibn al-Qayyim al-Jawziyya is critical of over-reliance on \textit{istishâb} and of those who have employed it more extensively than they should.\textsuperscript{17} The following illustrations, which are given in the context of legal maxims that originate in \textit{istishâb}, also serve to show how the ‘ulamâ’ have differed on the application of this doctrine to various issues. Some of the well-known legal maxims that are founded in \textit{istishâb} may be outlined as follows.

\begin{enumerate}
\item Certainty may not be disproved by doubt (\textit{al-yaqîn la yazîl bi‘l-shakk}). For example, when someone is known to be sane, he will be presumed such until it is established that he has become insane. The presumption can only be set aside by certainty, not by a mere doubt. Similarly, when a person eats in the early morning during Ramadan while in doubt as to the time of dawn, his fast remains intact and no belated performance (\textit{qadâ}) is necessary by way of compensation. To identify the two elements of the maxim under discussion, namely the certainty and doubt in this example, night represents certainty whereas daybreak is the state of doubt, and the former prevails over the latter. However, the same rule would lead us to a totally different result if it were applied to the situation of a person who ends his fast late in the day in Ramadan while in doubt as to the occurrence of sunset. In this case, his fast is vitiated and a belated performance would be
\end{enumerate}
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required in compensation. For the certainty that prevails here is the
daytime, which is presumed to continue, while the onset of night is
in doubt. To say that certainty prevails over doubt in this case means
that the fast has been terminated during the day, which is held to be
the prevailing state of certainty. 18

To illustrate some of the difficulties that are encountered in the
implementation of the maxim under discussion, we may give in
example the case of a person who repudiates his wife by *talāq* but is
in doubt as to the precise terms of his pronouncement: whether it
amounted to a single or a triple *talāq*. According to the majority of
jurists, only a single *talāq* takes place, which means that the husband
is still entitled to revocation (*raj'ah*) and may resume normal marital
relations. Imam Mālik has, on the other hand, held that a triple
*talāq* takes place which would preclude the right to revocation. The
difference between the majority opinion and that of Imam Mālik
arises from the variant interpretations that they give to the question
of certainty and doubt. The majority view presumes the marriage to
be the state of certainty which would continue until its dissolution is
established by evidence. The doubt in this case is the pronouncement
of *talāq*. The doubtful *talāq*, according to the majority, may not be
allowed to disprove a certain fact. The marriage is certain and the
*talāq* is doubtful, hence the former is presumed to continue.

Imam Mālik, on the other hand, considers the occurrence of a
divorce to be the certainty in this case. What is in doubt is the
husband’s right to the revocation of the *talāq*. As for determining
the precise number of *talāqs*, which is crucial to the question of
revocation, Imam Mālik holds that the right to revocation cannot
be established by a mere doubt. Hence the husband has no right to
revocation, which means that the divorce is final. 19

While the majority of jurists consider marriage to be the certain
factor in this case, for Imam Mālik it is the actual pronouncement of
*talāq*, regardless of the form it might have taken, which represents the
state of certainty and the basis on which istishāb must operate. While
commenting on these differences, both Ibn al-Qayyim al-Jawziyya
and Abū Zahrah have considered the majority decision to be preferable.
The marriage in this case must therefore not be allowed to be
disproved by a doubtful *talāq*. 20

To give yet another example: when a man repudiates one of his
two wives, but is not certain as to which one, according to the
Mālikis the certain fact is that a *talāq* has been pronounced, while the
uncertainty in this case is the identity of the divorcee. Both are
divorced on grounds of *istiṣḥāb*, which establishes that certainty must prevail over doubt. For the majority of ‘ulamā’, however, the certain fact is that the man has two wives, in other words, the existence of a valid marriage in respect of both. The doubt concerning the identity of the divorcee must not be allowed to disprove the state of certainty, namely the marriage. Hence neither of the two are divorced. Once again the juristic disagreement in this case arises from the different perception of the ‘ulamā’ in identifying the state of certainty on which the rules of *istiṣḥāb* must operate.

(2) Presumption of generality until the general is subjected to limitation is another maxim that originates in *istiṣḥāb*. The general (‘āmm) must therefore remain ‘āmm in its application until it is qualified in some way.

Just as a general text remains general until it is specified, so is the validity of that text, which is presumed to continue until it is abrogated. This would mean that a legal text remains valid and must be implemented as such unless it is abrogated or replaced by another text. While discussing the maxim under discussion, al-Shawkānī records the variant view held by some ‘ulamā’ to the effect that the rule of law in these situations is established through the interpretation of words and not by the application of *istiṣḥāb*. To say that a text is general or specified, or that a text remains valid and has not been abrogated, is thus determined on grounds of interpretation of words and not by the application of *istiṣḥāb*. For example, the Qur’ānic rule which assigns to the male a double share of the female in inheritance (al-Nisā’, 4:11) is general and would have remained so if it were not qualified by the hadith that ‘the killer does not inherit’.

Similarly, the practical Sunnah concerning the direction of the qiblah remained in force until it was abrogated by the Qur’ānic injunction in sūra al-Baqarah (2:144), which changed the qiblah from Jerusalem to the Ka’bah. This is all obvious so far, and perhaps al-Shawkānī is right in saying that there is no need for a recourse to *istiṣḥāb* in these cases. What *istiṣḥāb* might tell us in this context may be that in the event where there is doubt as to whether the general in the law has been qualified by some other enactment, or when there is doubt as to whether the law on a certain point has been abrogated or not, *istiṣḥāb* would presume the absence of specification and abrogation until the contrary is established by evidence.
(3) Presumption of original freedom from liability (barā‘ah al-dhimmah al-āshliyyah), which 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 ḥajj pilgrimage more than once in his lifetime or to perform a sixth ṣalāh in one day, because the Shari‘ah imposes no such liability. Similarly, no one is liable to punishment until his guilt is established through lawful evidence. However, the detailed implementation of this principle too has given rise to disagreement between the Shafi‘i and Hanafi jurists. To give an example, A claims that B owes him fifty dollars and B denies it. The question may arise as to whether a settlement (ṣulh) after denial is lawful in this case. The Hanafis have answered this in the affirmative, but the Shafi‘is have held that a settlement after denial is not permissible. The Shafi‘is argue that since prior to the settlement B denied the claim, the principle of original freedom from liability would thus apply to him, which means that he would bear no liability at all. As such it would be unlawful for A to take anything from B. The settlement is therefore null and void. The Hanafis have argued, on the other hand, that B’s non-liability after the claim is not inviolable. The claim, in other words, interferes with the operation of the principle under discussion. B can no longer be definitely held to be free of liability; this being so, a settlement is permissible in the interests of preventing hostility between the parties.

(4) Permissibility is the original state of things (al-āsl fi al-ashyā’ al-ibahah). We have already discussed the principle of ibāhah, which is a branch of the doctrine of istišāb. To recapitulate, all matters that the Shari‘ah has not regulated to the contrary remain permissible. They will be presumed so unless the contrary is proved to be the case. The one exception to the application of ibāhah is relationships between members of the opposite sex, where the basic norm is prohibition unless it is legalised by marriage. The Hanbalis have given ibāhah greater prominence, in that they validate it as a basis of commitment (iltizām) unless there is a text to the contrary. Under the Hanbali doctrine, the norm in ‘ibādāt is that they are void (ḥāṣil) unless there is an explicit command to validate them. But the norm in regard to transactions and contracts is that they are valid unless there is a naṣṣ to the contrary. To give an example, under the Hanbali doctrine of ibahah, prospective spouses are at liberty to enter stipulations in their marriage contract, including a condition that the husband must remain monogamous. The Hanbalis are alone in their ruling on this point,
as the majority of jurists have considered such a condition to amount to a superimposition on the legality of polygamy in the Shari'ah. The provisions of the Shari'ah must, according to the majority, not be circumvented in this way. The Lawgiver has permitted polygamy and it is not for the individual to overrule it. The Hanbalis have argued, on the other hand, that the objectives of the Lawgiver in regard to marriage are satisfied by monogamy. As it is, polygamy is a permissible, not a requirement, and there is no nasş to indicate that the spouses could not stipulate against it. The stipulation is therefore valid and the spouses are committed to abide by it.

Conclusion

Istishâb is not an independent proof or a method of juristic deduction in its own right, but mainly functions as a means of implementing an existing indication (dâlîl) whose validity and continued relevance are established by the rules of istishâb. This might explain why the 'ulamâ’ have regarded istishâb as the last ground of fatwâ, and one that does not command priority over other indications. The Mâlikis have relied very little on it as they are known for their extensive reliance on other proofs, both revealed and rational, in the development of the rules of Shari'ah; so much so that they have had little use for istishâb. This is also true of the Hanafi school of law, which has only rarely invoked istishâb as a ground for the determination of legal rules. Istishâb is applicable either in the absence of other proofs or as a means of establishing the relevance of applying an existing proof. It is interesting to note in this connection the fact that istishâb is more extensively applied by those who are particularly strict in their acceptance of other rational proofs. Thus we find that the opponents of qiyyâs, such as the Zâhirîs and the Akhbârî branch of the Shi’ah Imamiyyah, have relied on it most, and have determined the ahkâm on its basis in almost all instances where the majority have applied qiyyâs. Similarly, the Shâfî’is, who reject istihsân, have relied more frequently on istishâb than the Hanafis and the Mâlikis. In almost all cases where the Hanafis and Mâlikis have applied istihsân or custom (‘urf), the Shâfî’is have resorted to istishâb.\(^{28}\)

Istishâb is often described as a principle of evidence, as it is mainly concerned with the establishment or rebuttal of facts, and as such it is of greater relevance to the rules of evidence. The application of istishâb 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 Shari'ah 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 istişāb 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 iḥāḥah, which is an essential component of the principle of legality, also known as the principle of the rule of law. This feature of istishāb 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.

I shall end this chapter by summarising a reformist opinion concerning istishāb. In his booklet entitled Tajdid Uṣūl al-Fiqh al-Islāmī, Hasan Turābī highlights the significance of istishāb and calls for a fresh approach to be taken to this doctrine. The author explains that istishāb has the potential to incorporate within its scope the concept of natural justice and the approved customs and mores of society.

According to Turābī, istishāb derives its basic validity from the belief that Islam did not aim at establishing a new life on earth in all of its dimensions and details, nor did it aim at nullifying and replacing all the mores and customs of Arabian society. The Prophet did not take an attitude of opposition to everything that he encountered, but accepted and allowed the bulk of the existing social values and sought to reverse or replace only those that were oppressive and unacceptable. We also find in the Qur'ān references to amr bi al-'urf, or acting in accordance with the prevailing custom, unless it has been specifically nullified or amended by the Shari'ah of Islam. Similarly, when the Qur'ān calls for the implementation of justice, beneficence (iḥsān) and fairness in the determination of disputes, it refers, among other things, to the basic principles of justice that are upheld by humanity at large and the good conscience of decent individuals. Life on earth is thus a cumulative construct of moral and religious teachings, aided and abetted by enlightened human nature, which seeks to rectify what it deems to be wrong, unjust and undesirable. The Shari'ah has also left many things unregulated and, when this is the case, human action in regard to them may be guided by good conscience and the general teachings of divine revelation. This is the substance, as Turābī explains, of the juridical doctrine of istishāb. In its material part, istishāb declares permissibility to be the basic norm in Shari'ah; that people are deemed to be free of liability unless the law has determined otherwise; and that human beings may utilise everything on the earth for their benefit
unless they are forbidden by the law. It thus appears that *istishāb*, as a proof of *Shari‘ah*, merits greater prominence and recognition than we find to be the case in the classical formulations of this doctrine. 

NOTES

5. Ibid.
20. Ibid.
Dhari'ah (pl. dharā'ī) is a word synonymous with wasilah, which signifies the means to obtaining a certain end, while sadd literally means ‘blocking’. Sadd al-dhara'i thus implies blocking the means to an expected end that is likely to materialise if the means towards it is not obstructed. Blocking the means must necessarily be understood to imply blocking the means to evil, not to something good. Although the literal meaning of sadd al-dhara'i might suggest otherwise, in its juridical application, the concept of sadd al-dhara'i also extends to ‘opening the means to beneficence’. But as a doctrine of jurisprudence, it is the former meaning, that is, blocking the means to evil, that characterises sadd al-dhara'i. The latter meaning of this expression is not particularly highlighted in the classical expositions of the doctrine, presumably because opening the means to beneficence is the true purpose and function of the Shari'ah as a whole and as such is not peculiar to sadd al-dhara'i.

When the means and the end are both directed toward beneficence and maslahah, and are not explicitly regulated by a clear injunction (nass), the matter is likely to fall within the ambit of qiyyās, maslahah, or istihsān, etc. Similarly, when both the means and the end are directed towards evil, the issue is likely to be governed by the general rules of Shari'ah, and a recourse to sadd al-dhara'i would seem out of place. Based on this analysis, it appears that as a principle of jurisprudence, sadd al-dhara'i applies when there is a discrepancy between the means and the end on the good-neutral–evil scale of values. A typical case for the application of sadd al-dhara'i would thus arise when a lawful means is expected to lead to an unlawful result, or when a lawful means
that normally leads to a lawful result is used to procure an unlawful end.

Both the means and the end may be good or evil, physical or moral, and they may be visible or otherwise, and the two need not necessarily be present simultaneously. For example, *khalwah*, or illicit privacy between members of the opposite sexes, is unlawful because it constitutes a means to *zina* whether or not it actually leads to it. All sexual overtures that are expected to lead to *zina* are similarly forbidden by virtue of the certainty or likelihood that the conduct in question would lead to *zina*. *Dhara'i* may also consist of the omission of a certain conduct such as trade and commercial transactions during the time of the Friday congregational prayer. The means that obstruct the said prayer, in other words, must be blocked, that is, by abandoning trade at the specified time.

The whole concept of *sadd al-dhara'i* is founded in the idea of preventing an evil before it actually materialises. It is therefore not always necessary that the result should actually take place. It is rather the objective expectation that a means is likely to lead to an evil result that renders the means in question unlawful even without the realisation of the expected result. This is the case in both the examples given above: *khalwah* is thus unlawful even without actually leading to *zina*, and trading during the time of the Friday prayer is unlawful whether or not it actually hinders the latter. Furthermore, since *sadd al-dhara'i* basically aims to prevent an evil before its occurrence, the question of the intention to procure a particular result cannot be a reliable basis for assessing the means that lead to that result. Abu Zahrah has aptly observed that the nature and value of the means is determined by looking at the purpose that it pursues, regardless of whether the latter is intended or otherwise. When a particular act is deemed to lead to a certain result, whether good or evil, it is held to be the means toward that end. The question of the intention of the perpetrator is, as such, not relevant to the objective determination of the value of the means. It is rather the expected result that determines the value of the means. If the result is expected to be good and praiseworthy, so will be the means towards it, and if it is expected to be blameworthy the same will apply to the means regardless of the intention of the perpetrator, or the actual realisation of the result itself. This is, for example, borne out by the Qur'anic text that forbids the Muslims from insulting idol-worshippers, notwithstanding the inherent enormity of idol-worshipping or the actual intention behind it. The text thus proceeds: 'And insult not the associators lest

The means to an evil is thus obstructed by putting a ban on insulting idol-worshippers, a conduct which might otherwise have been permissible and even praiseworthy, as it would mean denunciation of falsehood and firmness of faith on the part of the believer. Thus a means which is intrinsically praiseworthy leads to an evil result, and acquires the value of the latter. Furthermore, the prohibition in this example is founded on the likelihood that the associators will insult God as a result. It is, in other words, the expected result that is taken into account. Whether the latter actually materialises or not is beside the point: insulting the idols and their worshippers is thus forbidden regardless of the actual result that such conduct may lead to. Similarly, the intention to bring about a particular result is irrelevant to the prohibition under discussion. Insulting idol-worshippers is thus forbidden even when a Muslim does not intend to bring about the expected result, that is, an insult to God; his intention may be good or bad, in either case, insulting the idols and their worshippers is forbidden since it is, on an objective basis, most likely to provoke the expected result.

The doctrine of sadd al-dhara’i’ accords with the basic objectives of the Lawgiver. Hence the general rule regarding the value of the means in relationship to the end is that the former acquires the value of the latter. Al-Shatibi has aptly observed that the Lawgiver has legalised certain forms of conduct and prohibited others in accordance with the benefit or harm that they lead to. When a particular act or form of conduct brings about a result that is contrary to the objectives of the Lawgiver, then the latter will be held to prevail over the former. If the means, in other words, violate the basic purpose of the Shari‘ah, they must be blocked. The laws of Shari‘ah are for the most part distinguishable in regard to their objectives (maqāṣid) and the means that procure or obstruct those objectives. The means are generally viewed in the light of the ends they are expected to obtain, and it is logically the latter that prevail over the former in that the means follow their ends, not vice versa. Normally the means to wājib become wājib and the means to harām become harām. Means may at times lead to both a good and an evil, in which case if the evil (mafsadah) is either equal to or greater than the benefit (maṣlāhah), the former will prevail over the latter. This is according to the general principle that
‘preventing an evil takes priority over securing a benefit’. Sadd al-dhara‘i’ thus becomes a principle of jurisprudence and a method of deducing the juridical ruling (hukm shar‘i) on a certain issue or type of conduct that may not have been regulated in the existing law but whose ruling can be deduced through the application of this principle.

In addition to the Qur’anic ayah (al-An‘am, 6:108) on the prohibition of insulting idols as referred to above, the ‘ulamā‘ have quoted as an authority for sadd al-dhara‘i’ the Qur’anic passage in sura al-Baqarah (2:104), as follows: ‘O believers! Address not the Prophet by the word ‘ra‘iná’, but address him respectfully and listen to him.’

The reason for this prohibition was that the word ‘ra‘iná’, being a homonym, had two meanings, one of which was ‘please look at us’ or ‘attend to us’, while with a slight twist the same word would mean ‘our shepherd’. The Jews used to insult the Prophet with it, and in order to block the means to such abuse, the Muslims were forbidden from using that form of address for the Prophet despite their good intentions and the fact that the word under discussion was not inherently abusive.

Authority is also found for the principle of sadd al-dhara‘i’ in the Sunnah, especially the ruling in which the Prophet forbade a creditor from taking a gift from his debtor lest it became a means to usury and the gift a substitute for ribá’. The Prophet also forbade the killing of hypocrites (al-mundfiqin) and people who were known to have betrayed the Muslim community during battles. It was feared that killing such people would become a means to evil, namely, of giving rise to a rumour that ‘Muḥammad kills his own Companions’, which would, in turn, provide the enemy with an excuse to undermine the unity of the Muslim community. Consequently the Prophet put a ban on killing the mundfiqin. On a similar note, the Prophet suspended enforcement of the hadd penalty for theft during battles so as to avoid defection to enemy forces. It was for this reason, namely to block the means to an evil, that the army commanders were ordered not to enforce the prescribed penalties during military engagements.

The leading Companions are also known to have entitled to inheritance the divorced woman whom her husband had irrevocably divorced during his death-illness (marād al-maut) in order to exclude her from inheritance. This was forbidden by the Companions so that a divorce of this kind would not become a means to abuse. It is also
reported that during the time of the Caliph ʿUmar ibn al-Khaṭṭāb, one of his officials, Hudhayfa, married a Jewish woman in al-Madāʾin. The Caliph wrote to him saying that he should divorce her. Hudhayfa then asked the Caliph if the marriage was unlawful. To this the Caliph replied that it was not, but that his example might be followed by others who would be lured by the beauty of the women of ʾahl al-dhimmah. The Caliph thus forbade something that the Qurʾān had declared lawful so as to block the means to an evil as he perceived it at the time. It might be interesting to add here that Ibn Qayyim al-Jawziyya records at least seventy-seven instances and rulings of the learned Companions and the subsequent generations of ʿulamāʾ in which they resorted to sadd al-dharaʿiʾī so as to block the means that led to evil.7

The ʿulamāʾ are, however, in disagreement over the validity of sadd al-dharaʿiʾī. The Ḥanafī and Shafiʿī jurists do not recognise it as a principle of jurisprudence in its own right, on the grounds that the necessary ruling regarding the means can be derived by recourse to other principles such as qiyās, and the Ḥanafī doctrines of istiḥsān and ʿurf. But the Mālikī and Ḥanbalī jurists have validated sadd al-dharaʿiʾī as a proof of Shariah in its own right. Despite the different approaches that the ʿulamāʾ have taken to this doctrine, the Mālikī jurist al-Shatibi has reached the conclusion that the ʿulamāʾ of various schools are essentially in agreement about the conceptual validity of sadd al-dharaʿiʾī but have differed in its detailed application. Their differences relate mainly to the grounds that may be held to constitute the means to something else, and also to the extent to which the concept of sadd al-dharaʿiʾī can be validly applied.8 Abū Zahrah has reached essentially the same conclusion by observing that the Shafiʿī and Ḥanafī jurists are for the most part in agreement with their Mālikī and Ḥanbalī counterparts, and that they differ only in regard to some issues.9 The following classification of sadd al-dharaʿiʾī may cast light on the consensus, as well as some of the areas in which the ʿulamāʾ are in disagreement, regarding the application of this doctrine. It is perhaps well to remember at this point that notwithstanding the application of sadd al-dharaʿiʾī in respect of opening the means to beneficence (maṣlahah), it is usually the prevention of evil (mafsadah) that acquires greater prominence in the discussion of this principle.

From the viewpoint of the degree of probability or otherwise that a means is expected to lead to an evil end, the ʿulamāʾ of ʿusūl have divided the dharaʿiʾī into four types.

(1) Means that definitely lead to evil, such as digging a deep pit
next to the entrance to a public place that is not lit at night, so that anyone who enters the door is very likely to fall into it. Based on the near-certainty of the expected result of injuring others, the means that lead to that result are equally forbidden. The ‘ulamā‘ of all schools are, in principle, unanimous on the prohibition of this type of dhari‘ah and a consensus (ijmā‘) is said to have been reached on this point.\(^\text{10}\) Having said this, however, it should be added that the jurists have envisaged two possible eventualities. Firstly, the dhari‘ah may consist of an unlawful act of transgression in the first place, as was the case in the foregoing example, in which case the perpetrator is held to be responsible for any loss or damage that might be caused, as by digging a pit in a place where he has no right or authority to do so. Secondly, the dhari‘ah may consist of an act that is basically lawful, in which case the ‘ulamā‘ have disagreed about the question of responsibility. If, for example, someone digs a water well in his own house but so close to the wall of his neighbour that the wall collapses as a result, the act here is held to be basically lawful as it consists of the exercise of the right of ownership, which is said to be irreconcilable with the idea of liability for damages. According to a variant view, however, the perpetrator is liable for damages. This ruling draws support from the principle, already referred to, that preventing an evil takes priority over securing a benefit.\(^\text{11}\)

(2) The second type of means is that which is most likely (i.e. on the basis of al-zann al-ghālib) to lead to evil and is rarely, if ever, expected to lead to a benefit. An example of this would be selling weapons during warfare or selling grapes to a wine maker. Although al-Shāṭibī has noted that these transactions are invalid according to the consensus (ijmā‘) of the ‘ulamā‘, both Abū Zahrah and Badrān have noted that it is only the Mālikī and Ḥanbalī ‘ulamā‘ who have considered these transactions to be forbidden (harām), as they are most likely to lead to evil notwithstanding the absence of certain knowledge that this will always be the case. In their opinion, a dominant probability or zann is generally accepted as a valid basis for the ahkām of Shari‘ah. Consequently when there is a strong likelihood that certain means will lead to an evil, the means may be declared forbidden on the basis of this probability alone.\(^\text{12}\)

(3) The third of the four types of means under discussion is that which frequently leads to evil, but in which there is no certainty, or even a dominant probability, that this will always be the case. An example of this would be a sale that is used as a means to procuring usury (riba‘). These types of sales, generally known as buyū‘ al-ājāl
Sadd al-Dhara'i' (Blocking the Means)

(Deferred sales), in which either the delivery of the object of sale, or the payment of its price, is deferred to a later date, would all tend to fall into this category of means. If, for example, A sells a garment for ten rials to B with the price being payable in six months' time, and A then buys the same garment from B for eight rials with the price being payable immediately, this transaction in effect amounts to a loan of eight rials to B on which he pays an interest of two rials after six months. There is a dominant probability that this sale will lead to riba' although there is an element of uncertainty in that it might not, which is why the 'ulamā' have disagreed on the validity or otherwise of this type of transaction. Imam Malik and Ahmad ibn Hanbal have held that the means which are likely to lead to usury are unlawful (harām) and must be obstructed. They have acknowledged the possibility that a deferred sale may not actually lead to riba'; they also take cognizance of the basic norm in regard to sale, which is legality, and yet they have ruled, on grounds of caution (ihtiyāt), that sales that are likely to lead to riba are unlawful. The mere possibility that riba may not actually materialise is of no account and, although sale is generally lawful, this basic legality is of no consequence if it is expected to procure an evil. Furthermore, preventing the latter must be given priority over any possible benefit that the sale in question might entail.

The Imams Abū Hanīfah and al-Shafi'i have, on the other hand, ruled that unless it definitely leads to evil, the basic legality of sale must be held to prevail. Sale is basically lawful in all its varieties, deferred or otherwise, and in the absence of either positive knowledge ('ilm) or of a dominant zann that a sale will lead to riba', a mere frequency of occurrence should not be allowed to override the original legality of sale. The preferred view, however, is that of the Mālikī and Ḥanbālī schools, for there is evidence in the Sunnah to the effect that original permissibility may be overruled in the face of a likelihood (or customary practice), even without definite evidence that it might open the way to evil.13

The 'ulamā' have similarly differed over the validity or otherwise of a marriage that is concluded with the intention of merely satisfying one's sexual desire without a life-long commitment. Imam Malik considers this to be invalid (bāṭil), as acts, according to this view, are to be judged by the intention behind them, and since the norm in marriage is permanence, the absence of an intention to that effect vitiates the nikāh. The main thrust of this view is to prevent the likely abuse that the marriage in question is likely to lead to. Imam al-Shafi'i has on the other hand held that the nikāh is valid so long as there is
nothing in the contract to vitiate it. The Shari’ah, according to this view, cannot operate on the hidden intentions of people but only on tangible facts that are susceptible to proof. Whether the nikah in this case is a means to abuse is a matter for the conscience of the individual, and not the positive application of the law. The ‘ulamā’ are, on the other hand, all in agreement on the prohibition of illicit privacy (khalwah) which is founded in the likelihood, though not amounting to positive proof, that it might lead to adultery.

Another, similar instance in which the jurists have invoked the principle of sadd al-dhara’i’ is the ruling, disputed by some, that close relatives may neither act as witnesses nor as judges in each others’ disputes. Likewise, a judge may not adjudicate a dispute on the basis of his personal knowledge of facts without the formal presentation of evidence, lest it lead to prejudice in favour or against one of the parties. The principle involved here is that such activities might constitute the means to an evil end, namely a miscarriage of justice, and are therefore to be avoided. The Hanafis on the other hand maintain, particularly in reference to adjudication on the basis of personal knowledge, that it is lawful. Some ‘ulamā’ have also held the view that testimony by a relative may in fact facilitate justice and may not lead to evil, especially if relations testify against each other, which is why the ‘ulamā’ of various schools have allowed the testimony of father or son, or of spouses, against one another, but not in favour. The jurists have thus disagreed about the application of sadd al-dhara’i’ to particular issues and the extent to which it may be validly applied to different situations.

(4) The last of the four varieties of means are those that are rarely expected to lead to evil and are most likely to lead to a benefit. An example of this would be to dig a water well in a place where it is not likely to cause injury or harm to anyone, or speaking a word of truth to a tyrannical ruler, or growing certain varieties of fruits, such as grapes, on one’s own property. In all of these, as in many other matters, there is a possibility that a mafsadah might be caused as a result. In the case of growing grapes, for example, it is possible that the fruit may be fermented into wine, but a mere possibility of this kind is overlooked in view of the stronger likelihood of the benefit that it would otherwise achieve. The ‘ulamā’ are generally in agree-
ment on the permissibility of this type of means. The basic norm in regard to acts and transactions that would fall into this category of means is permissibility, and no-one may be prevented from attempting them on account of the mere possibility that they may lead to a mafsadah. On a similar note, no-one may be prevented from giving testimony in judicial disputes, nor may anyone be obstructed from telling the truth to a tyrannical ruler because of a mere possibility that this might give rise to a mafsadah.®

The foregoing discussion of sadd al-dhara'ī has primarily been concerned with means that led to an unlawful end. There was, in other words, no attempt to change the harām into halāl: whenever there was a likelihood that a lawful means led to an unlawful end, the means itself became unlawful. But the application of sadd al-dhara'ī also covers the eventuality where a harām may be turned into halāl or mubah if this is likely to prevent a greater evil. A lesser evil is, in other words, tolerated in order to prevent a greater one. To give an example: it is permissible to seek the release of Muslim prisoners of war in exchange for the payment of a monetary ransom. To give money to the war ing enemy is basically unlawful as it adds strength to the enemy, which is generally harmful. But it is permitted here as it achieves the freedom of Muslim prisoners, which would in turn add to the strength of the Muslim forces. This ruling is based in the principle of sadd al-dhara'ī, and consists of opening, rather than blocking, the means to the desired benefit. On a similar note, it is permissible for the Muslim community to pay the enemy so as to prevent the latter from inflicting harm on the Muslims, but only when the Muslim community is otherwise powerless to defend itself. Furthermore, the 'ulamā' have generally held that giving bribes is permissible if this is the only way to prevent oppression, and the victim is otherwise unable to defend himself. To this the Hanbali and Mālikī jurists have added the proviso that giving bribes is only permissible as a means of defending one's proven rights but not if the right in question is disputed.¹⁹

Notwithstanding the essential validity of sadd al-dhara'ī as a principle of Shari'ah, over-reliance on it is not recommended. The 'ulamā' have cautioned that an excessive use of this principle may render the lawful (mubah) or even the praiseworthy (mandūb) and the obligatory (wājib) unlawful, which should not be encouraged. An example of this would be when an upright person refuses to take custody of the property of the orphan, or of waqf property, for the pious motive of avoiding the possibility of incurring a sin. A refusal of this nature would seem to over-emphasise the significance of the means that
might lead to evil. With regard to the guardianship of the property of orphans, the Qur'an offers some guidance in that it permits mixing their property with that of the guardian as a matter of trust, a conclusion that is drawn from the text where we read in a reference to the orphans: 'If you mix their affairs with yours, they are your brethren, but God knows the wrong-doer from the upright' (al-Baqarah, 2:220).

While discussing the caution of the 'ulama' against over-reliance on sadd al-dhara'i', Abū Zahrah quotes the renowned Mālikī jurist Ibn al-ʿArabī to the effect that the application of this principle should be regulated so as to ensure propriety and moderation in its use. Abū Zahrah then concurs with Ibn al-ʿArabī to the effect that if an evil is to be prevented by blocking the means towards it, one must ascertain that the evil in question is mansūḥ 'alayh, that is, one that has been ruled upon as such in the Qur'an or the Sunnah. Similarly, when a benefit is to be facilitated by opening the means to it, the propriety of the benefit must be sustainable by analogy with a halāl mansūḥ (that which has been declared lawful in the nass). But Abū Zahrah is careful to add that these conditions remain in the nature of an opinion and are not required in the accepted Mālikī exposition of this doctrine.

And finally, with regard to the guardianship of property and trust in the foregoing example, it is suggested that the harm that is likely to arise from the refusal of an upright person to undertake it is likely to be greater than that which might arise from undertaking it. If the orphans were to be neglected for fear of opening the means to misuse of trust, or if no-one gave testimony for fear of indulging in lying, then surely this would itself become a means to greater evil and should therefore be avoided.

We might end our discussion of sadd al-dhara'i' by distinguishing the means from the preliminary (muqaddimah), although the two can at times coincide and overlap. Briefly, a 'preliminary' consists of something that is necessary for obtaining the result that it aims for, in the sense that the latter cannot materialise without the former. For instance, ablation (wudū') is a preliminary to salah and the latter cannot be performed without the former. But a means to something does not stand in the same relationship to its end. Although the means is normally expected to lead to the end it contemplates, the latter may also be obtained through some other means. The end, in other words, is not exclusively dependent on the means. To give an example: travelling
in order to commit theft is a preliminary to the theft that is aimed for but not a means to it. Travelling, which might consist of riding a train in a certain direction, is basically neutral and cannot, on an objective basis, be said to constitute a means to theft. But *taḥlīl*, that is an intervening marriage concluded in order to legalise remarriage between a divorced couple, is a means to the proposed marriage but not a preliminary to it, as the latter is not exclusively dependent on *taḥlīl* and can, for example, follow a normal intervening marriage. Similarly, seductive overtures between members of the opposite sexes are a means, but not a preliminary, to adultery, as the latter can materialise even without such overtures. Sexual overtures can only constitute a preliminary to *ẓinā* when they actually lead to it.

The other difference to note between the means and the preliminary for our purposes, is, as already indicated, that the former is usually evaluated and declared unlawful on an objective basis even without the realisation of its expected end. The preliminary to an act, on the other hand, is of little value without the actual occurrence of the act of which it becomes a part. The relationship between preliminary and its result is subjective in the sense that it can only be evaluated in the light of the completed or the intended result. Walking in the direction of a mosque to perform the Friday prayers, for example, can only acquire the value of the *wājib* if it actually leads to the performance of the prayers, not otherwise.²¹

It thus appears that *sadd al-dhara‘ī* not only aims to block the means to evil but, in an affirmative sense, it is predicated on upholding the basic objectives (maqāṣid) of Shari‘ah, especially the *maṣlāḥah*. It is founded on the rationale that the laws of Shari‘ah aim to realise certain objectives just as they also seek to prevent corruption and evil. These are the basic goals of Shari‘ah, which must not be frustrated or overruled through a mere change of tactics or the adoption of plausible stratagems. When there is such a threat, *sadd al-dhara‘ī* is one way by which the ūlā al-amr and the mujtahid may vindicate the basic objectives of the law by closing the door to manipulation and abuse. The fact that the Mālikī school became the chief exponent of this doctrine is due, to a large extent, to the parallel recognition by this school of *maṣlāḥah* as an independent source. The Mālikī doctrine of *sadd al-dhara‘ī*, in other words, derived much of its rigour from the parallel emphasis that this *madhhab* has placed on *maṣlāḥah*. Since *sadd al-dhara‘ī* is rooted in the realisation of genuine *maṣlāḥah*, the Mālikī school was able to give this doctrine a degree of prominence that the other schools were not in a position to give.
Notwithstanding the inherent strength of sadd al-dhara’i in preventing manipulation and abuse, Abū Zahrah has warned against over-reliance on it, for this is equally likely to lead to abuse in that one who indulges in sadd al-dhara’i maybe inclined to impinge on the basic liberties of people and clamp down on what may be permissible (mubah), recommended (mandīf) or even obligatory (wājib) for fear of preventing another abuse.

A brief note is also in order as to the distinction between legal stratagems (al-hiyal) and sadd al-dhara’i. The main difference between these two is that a legal stratagem (hilah) is specifically intended, and it is usually utilised as a means of dodging the law by recourse to methods that may give the appearance of legality. The purpose is to circumvent the law by recourse to specious methods, such as avoiding the payment of zakāh by making a gift of one’s property at the time the zakāh becomes payable. Giving a gift is lawful, but here it is used as a means of dodging the zakāh. The main differences between sadd al-dhara’i and hilah may be summarised as follows. (1) Unlike the sadd al-dhara’i, which normally blocks the way to an evil end, hilah opens the way to an evil end by circumventing the rules of Shari’ah. Methods that are used to bring about a lawful result are thus not included in hilah but may well fall under sadd al-dhara’i. (2) The role of the intention of the perpetrator is significant in hilah. The question of intention is, on the other hand, not a determinant factor in sadd al-dhara’i. (3) Sadd al-dhara’i is a wider concept than hilah, as there is a certain degree of objectivity and openness in the former that is lacking in the latter. Hilah is evaluated and determined in reference to the intention of its perpetrator, whereas sadd al-dhara’i looks at the expected result and consequences of conduct on an objective basis. This element of objectivity tends to make sadd al-dhara’i more susceptible to the prevailing customs and realities of society. Having said this, however, there may be cases in which the distinction between the two situations may not be clear and hilah and dhara’ah may consequently overlap.

NOTES

3. Ibid., IV, 195; Badrīn, Uṣūl, p. 242.
5. Shatibi, 

6. Abū Zahrah, 

7. Ibn Qayyim, 

8. Shatibi, 

9. Abū Zahrah, 

10. Abū Zahrah, 

11. Abū Zahrah, 

12. Abū Zahrah, 

13. Shatibi, 

14. Isma'il, 

15. Abū Zahrah, 

16. Badrān, 

17. Shalabi, 

18. Shatibi, 

19. Abū Zahrah, 

20. Ibid., p. 233. 


23. Shatibi, IV, 201; Miqa, p. 455.
CHAPTER SEVENTEEN

Hukm Shar'i (Law or Value of Shariah)

Literally, hukm means ‘to prove’ or ‘to eliminate something in respect of another’. For example, when it is said that this house belongs to A, it means that A’s ownership is proven in respect of that house. It also means that ownership of that house by another person is nullified. A hukm can be rational ('aqil), such as $1 + 1 = 2$, or perceptible to the senses (hisbi), or it can be shar'i, such as the obligation to perform the five daily prayers. The ‘ulama’ of usul define hukm shar'i as a locution or communication from the Lawgiver concerning the conduct of the mukallaf (person in full possession of his faculties) which consists of a demand, an option or an enactment. A demand (talab or iqtida’) is usually communicated in the form of either a command or a prohibition. The former demands that the mukallaf do something, whereas the latter requires him to avoid doing something. A demand may either be binding, which leaves the mukallaf with no choice but to conform, or may not be binding. When a demand to do or not to do something is established by definitive proof (dalil qaf‘i), it is referred to as wajib or harām respectively. Such is the majority view, but according to the Hanafi jurists, if the text that conveys such a demand is not definitive in its meaning (dalalah) or authenticity (thubūt), it is wājib; if it is definitive in both respects, it is farḍ. As for the demand to avoid doing something, the Hanafīs maintain that if it is based on definitive proof in terms of both meaning and authenticity, it is harām, otherwise it is makkir tahrimī. When a demand is not utterly emphatic and leaves the individual with an element of choice it is known as mandūb
The option (takhyir), on the other hand, is a variety of hukm shar'i that leaves the individual at liberty either to do or avoid doing something. A hukm of this kind is commonly known as mubah (permissible). An enactment, or wad', is neither a demand nor an option, but an objective exposition of the law which enacts something as a cause (sabab) or a condition (shart) of obtaining something else; or it may be conveyed in the form of a hindrance (mdni') that might operate as an obstacle against obtaining it.

To give some examples, the Qur'anic command that exhorts the believers to ‘fulfil your contracts’ (al-Ma'idah, 5:1)

is a speech of the Lawgiver addressed to the mukallaf that consists of a particular demand. A demand addressed to the mukallaf conveying a prohibition may be illustrated by reference to the Qur'anic text which provides: ‘O you believers, let not some people ridicule others, for it is possible that the latter are better than the former’ (al-Hujurat, 49:11).

To illustrate a hukm that conveys an option, we refer to the Qur'anic text that permits the believers to ‘hunt when you have come out of the state of ihram’ (al-Ma'idah, 5:2).

Another Qur'anic text that consists of an option occurs in sūra al-Baqarah (2:229) which provides: ‘If you fear that they [i.e. the spouses] would be unable to observe the limits set by God, then there would be no sin for either of them if she gives a consideration for her freedom.’

The married couple are thus given the choice to incur a divorce by mutual consent, known as khul', if they so wish, but they are under
no obligation if they do not. Another form of option that occurs in the Qur’ān may be illustrated with reference to the expiation (kaffārah) of erroneous killing. The perpetrator has here been given the choice to either set a slave free, or feed sixty destitutes, or fast for two consecutive months (al-Nīsā’, 4:92). The following hadith also conveys a ḥukm in which the individual is given a choice. The hadith reads: ‘If any of you sees something evil, he should set it right by his hand; if he is unable to do so, then by his tongue; and if he is unable to do even that, then within his heart – but this is the weakest form of faith.’

Here the choice is given according to the ability of the mukallaf and the circumstances that might influence his decision. Lastly, to illustrate a ḥukm that consists of an enactment (wād’ī) we may refer to the hadith which provides that ‘the killer does not inherit’.

This is a speech of the Lawgiver concerning the conduct of the mukallaf which is neither a demand nor an option but an objective ruling of the law that envisages a certain eventuality.

The ‘ulama’ of usūl have differed with the fuqahā’ in regard to the identification of ḥukm sharī‘. To refer back to the first example where we quoted the Qur’ān concerning the fulfilment of contracts, according to the ‘ulamā’ of usūl, the text itself, that is, the demand that is conveyed in the text, represents the ḥukm sharī‘. However, according to the fuqahā’, it is the effect of that demand, namely the obligation (wujūb) that it conveys, which embodies the ḥukm sharī‘. To give another example, the Qur’ānic prohibition that provides in an address to the believers: ‘Do not commit adultery’ (al-Īsār, 17:32)

is itself the embodiment of the ḥukm sharī‘, according to the ‘ulamā’ of usūl. But according to the fuqahā’, it is the effect of the demand in this āyah, namely the prohibition (tahrīm) which represents the ḥukm sharī‘. Similarly, the Qur’ānic text in respect of the permissibility of
hunting which we earlier quoted is itself the embodiment of the *hukm shari* according to the *ulamā‘* of *usūl*, but it is the effect of that text, namely the permissibility (*ihābah*) that is the *hukm* according to the *fiqhā‘*. Having explained this difference of perspective between the *ulamā‘* of *usūl* and the *fiqhā‘*, it will be noted, however, that it is of no practical consequence concerning the rulings of the Shari‘ah, in that the two aspects of *hukm* that they highlight are to all intents and purposes concurrent.4

*Hukm shari* is divided into the two main varieties of *al-hukm al-taklifi* (defining law) and *al-hukm al-wadī‘* (declaratory law). The former consists of a demand or an option, whereas the latter consists of an enactment only. ‘Defining law’ is a fitting description of *al-hukm al-taklifi*, as it mainly defines the extent of man’s liberty of action. *Al-hukm al-wadī‘* is rendered ‘declaratory law’, as this type of *hukm* mainly declares the legal relationship between the cause (*sabab*) and its effect (*musabbab*), or between the condition (*shart*) and its object (*mashrū‘*).5 Defining law may thus be described as a locution or communication from the Lawgiver which demands the *mukallaf* to do something or forbids him from doing something, or gives him an option between the two. This type of *hukm* occurs in the well-known five categories of *wājib* (obligatory), *mandūb* (recommended), *hārām* (forbidden), *mākrūh* (abominable) and *mubāh* (permissible). Declaratory law is also subdivided into the five categories of *sabab* (cause), *shart* (condition), *māni‘* (hindrance), *al-‘azīmah* (strict law) as opposed to *al-rukhsah* (concessionary law), and *sāhih* (valid) as opposed to *bātīl* (null and void).6 We shall presently discuss the various sub-divisions of *hukm*.

I. Defining Law (*al-Hukm al-Taklifi*)

As stated above, ‘defining law’ is a locution or communication from the Lawgiver addressed to the *mukallaf* which consists of a demand or of an option; it occurs in the five varieties of *wājib*, *mandūb*, *hārām*, *mākrūh* and *mubāh*. We shall discuss each of these separately, as follows.

I.1 The Obligatory (*Wājib, Fard*)

For the majority of *ulamā‘*, *wājib* and *fard* are synonymous, and both convey an imperative and binding demand of the Lawgiver addressed to the *mukallaf* in respect of doing something. Acting upon something *wājib* leads to reward, while omitting it leads to punishment in
this world or in the hereafter. The Hanafis have, however, drawn a distinction between wājib and fard. An act is thus obligatory in the first degree, that is, fard, when the command to do it is conveyed in a clear and definitive text of the Qurān or Sunnah. But if the command to do something is established in a speculative (zanni) authority, such as an āhād hadith, the act will be obligatory in the second degree (wājib). The obligatory commands to perform the salāh and the hajj, and to obey one's parents are thus classified under fard, as they are each established in a definitive text of the Qurān. But the obligation to recite sûra al-Fātiḥah in salāh, or to perform salāt al-witr, that is, the three units of prayers which conclude the late evening prayers (salāt al-'isha'), are on the other hand classified as wājib, as they are both established in the authority of hadith whose authenticity is not completely free of doubt. A Muslim is bound to do acts which are obligatory either in the first or in the second degree; if he does them, he secures reward and spiritual merit, but if he wilfully neglects them, he makes himself liable to punishment. The difference between the two classes of obligations, according to the vast majority of the jurists, including the Hanafis, is that the person who refuses to believe in the binding nature of a command established by definitive proof becomes an unbeliever, but not if he disputes the authority of an obligatory command of the second degree, although he becomes a transgressor. Thus to neglect one's obligation to support one's wife, children and poor parents amounts to a sin but not to infidelity.  

Another consequence of the distinction between fard and wājib is that when the former is neglected in an act required by the Shari'ah, the act as a whole becomes null and void (bātīl). If, for example, a person leaves out the bowing (ruku') or prostration (sajdah) in obligatory prayers, the whole of the prayer becomes null and void. But if he leaves out the recitation of al-Fātiḥah, the salāh is basically valid, albeit deficient. This is the Hanafi view, but according to the majority the salāh is null and void in both cases. However, the difference between the Hanafis and the majority in this respect is regarded as one of form rather than substance, in that the consequences of their disagreement are negligible on the whole. Al-Ghazālī is representative of the majority opinion, including that of the Shafi'is, when he writes: 'As far as we are concerned, there is no difference between fard and wājib; the two terms are synonymous. According to the Hanafis, fard is based on definitive authority but wājib is founded in speculative proof. Once again, we do not deny the division of wājib into definitive and speculative (maqūl wa-maznūn), and there is no
Wajib is sub-divided into at least three varieties, the first of which is its division into personal ('ayni) and collective (kafa'i). Wajib 'ayni is addressed to every individual sui juris and cannot, in principle, be performed for or on behalf of another person. Examples of wajib (or fard) 'ayni are salah, hajj, zakah, fulfilment of contracts and obedience to one's parents. Wajib kafa'i consists of obligations that are addressed to the community as a whole. If only some members of the community perform them, the law is satisfied and the rest of the community is absolved of it. For example, the duty to participate in jihād (holy struggle), funeral prayers, the hisbah (promotion of good and prevention of evil), building hospitals, extinguishing fires, giving testimony and serving as a judge, etc., are all collective obligations on the community, and are thus wajib (or fard) kafa'i. Thus when a person dies leaving no property to meet the cost of his burial, it is the wajib kafa'i of the community to provide it and to give him a decent burial. Only some members of the community may actually contribute toward the cost, but the duty is nevertheless discharged from the whole of the community. The merit (thawab), however, only attaches to those who have actually taken part in discharging the wajib kafa'i.

There is some disagreement on whether the duty in a wajib kafa'i is individually directed to all members of the Muslim community or to a group of them only. The jumhūr position on this is that the original address (khitāb) is to all individuals without any reference to such things as the ability and qualifications of the prospective participants.

The collective obligation sometimes changes into a personal obligation. This is, for example, the case with regard to ijtihad, which is a wajib kafa'i, although when the enemy attacks and besieges a locality, it becomes the personal duty of every resident to defend it. Similarly, when there is only one mujtahid in a city, it becomes his personal duty to carry out ijtihad.

From the viewpoint of the time of its performance, wajib is also divided into wajib muwaqqat (or muqayyad), that is, wajib which is contingent on a time-limit, and wajib muṣlaq, that is, 'absolute wajib', which is free of such a limitation. Fasting and the obligatory salah are examples of contingent wajib, as they must each be observed within specified time limits. But performing the ḥajj or the payment of an expiation (kaffārah) are not subject to such restrictions and are therefore absolute wajib. Provided that one performs the ḥajj once during one's lifetime and pays the kaffārah at any time before one dies, the
duty is discharged. Furthermore, the absolute wājib is called absolute because there is no time-limit on its performance and it may be fulfilled every time whenever the occasion arises. This is, for example, the case regarding one's duty to obey one's parents, or the obligation to carry out hisbah, namely, to promote good and to prevent of evil as and when the occasion arises.

Wājib muwaqqat is sub-divided into flexible (muwassa'), inflexible (mudayyaq) and twin-faceted (dhū shabhayn). There are time limits in all of these but there is some flexibility, in the case of muwassa', where a duty is performed within a time-frame. The midday prayer (salāt al-zuhr), for example, may be performed any time from the beginning to the end of its time segment. This flexibility is not available, however, in the wājib mudayyaq, such as the fasting of Ramadān, which is inflexible not only in terms of the beginning and the end of fasting, but also in that no other variety of fasting may be observed in the month of Ramadān. In the case of wājib muwassa', and the example we gave of salāt al-zuhr, the position is once again flexible in that other forms of salāh may be performed within the time period of zuhr. The twin-faceted wājib, or dhū shabhayn, is so-called because it has an aspect in common with the muwassa' in that it can be performed any time during the months of hajj, that is, Shawwāl and Dhu'l-Hijjah. But it is mudayyaq in that only one hajj can be performed on specific days, such as the wuqūf which is on the ninth day of Dhu'l-Hijjah. Another aspect in common with muwassa' in this case is that one performs either the obligatory hajj, or a superegatory hajj, during particular months.

A consequence of this division is that wājib muwaqqat materialises only when the time is due for it; it may neither be hastened nor delayed, but within the given time limits the mukallaf has a measure of flexibility. Furthermore, to fulfil a contingent wājib, it is necessary that the mukallaf have the specific intention (niyyah) to discharge it.

Lastly, the wājib is divided into quantified wājib (wājib muhaddad) and unquantified wājib (wājib ghayr muhaddad). An example of the former is salāh, zakāh, payment of the price (thaman) by the purchaser in a sale transaction, and payment of rent in accordance with the terms of a tenancy agreement, all of which are quantified. Similarly, enforcement of the prescribed penalties (hudud) falls under the rubric of wājib muhaddad in the sense that the hadd penalties are all specified in terms of quantity. The unquantified wājib may be illustrated by reference to one's duty to support one's close relatives, charity to the poor, feeding the hungry, paying a dower (mahr) to one's wife, the
length of standing (qiyaًm), bowing and prostration in salah, wiping
the head in ablution (wu'du') and quantifying the ta'zir penalties for
offences that are punishable but in regard to which the Lawgiver has
not quantified the punishment. (It is for the judge to quantify the
punishment in the light of the individual circumstances of the offender
and the offence.) Consequently, the mukallaf, whether the individual
believer, the qadi or the imam, enjoys the flexibility to determine the
quantitative aspect of the unquantified wajib himself.13

A consequence of this division is that if the quantified wajib is not
discharged within the given time-limit, it constitutes a liability on the
person (dhimmah) of the individual, as in the case of unpaid zakâh or
an unpaid debt. Failure to discharge a wajib ghayr muhaddad, on the
other hand, does not result in personal liability.

A question arises with regard to the value of the excessive portion
in the supererogation of quantified wajib. The question is whether an
over-fulfilment of this type becomes a part of the wajib itself. There
are two main views on this, one of which maintains that excessive
performance in quantified wajib also becomes a part of the wajib. But
the preferred view is that any addition to the minimal requirement
becomes mandib only, for no punishment can be imposed for a failure
to perform anything in addition to the minimum required.14

And lastly, from the viewpoint of its fulfilment, the wajib is divided
into mu'ayyan (specified) and mukhayyar (optional). The demand to
perform the former is concerned with a specific act, such as prayer and
zakah, which leaves the mukallaf with no option to perform another
act instead. All the five obligatory duties, known as the five pillars,
consist of specified wajib. Another example would be to return a
borrowed or usurped item to its owner. The optional wajib is one in
which the demand is concerned with the performance of an unspeci-
fied act out of a limited number of alternatives, such as the obligation
to expiate the breaking of an oath. The mukallaf is given the choice
to do one of four things, namely, feed ten indigent persons, cloth
them, free a slave or fast three days (cf. al-Ma'idah, 5:89). Sometimes
the option is between unequal things, such as between a wajib and a
mandib, in which case the latter course is preferred. According to a
Qur'anic injunction (al-Baqarah, 2:280), if the debtor is in dire straits,
he must be granted a respite (wajib), but it is recommended (mandib)
that the debt is waived as charity.15

It would be inaccurate to say that a means to a wajib is also a wajib,
or that a necessary ingredient of wajib is also wajib in every case. For
such a view would tend to ignore the personal capacity of the mukallaf,
especially if the latter is unable to do what is required of him, in the event, for example, when the Friday congregational prayer cannot be held for lack of a large number of people in a locality. It would be more accurate to say that when the means to wājib consist of an act that is within the capacity of the mukallaf then that act is also wājib upon him.\textsuperscript{16}

The distinction between wājib and mandūb is, broadly speaking, based on the idea that ignoring the wājib entails punishment (‘iqāb) while ignoring the mandūb does not. The distinction between hārām and mākrūh is based on a similar criterion: if doing something is punishable, it is hārām, otherwise it is mākrūh. This is generally correct, but one must add the proviso that punishment is not a necessary requirement of a binding obligation, or wujuj. In addition, as Imām Ghazālī points out, the element of punishment, whether in this world or in the Hereafter, is not a certainty. Whereas in its positive sense the wājib is normally enforceable in this world, and might also lead to a tangible advantage or reward, the spiritual punishment for its neglect is, however, awaited and postponed to the hereafter. Hence the threat of punishment is not a necessary requirement of wājib. When God Almighty renders an act obligatory upon people without mentioning a punishment for its omission, the act so demanded is still wājib.\textsuperscript{17}

A wājib may be discharged within its prescribed time, that is, by way of adā’, or by way of belated performance (qaḍā’), or even a repeated but better performance, that is i‘ādah. Timely performance (adā’) may either be perfect (adā’ kāmil), which is the ideal performance of an act in due regard of its essence and attributes, or it may be imperfect (adā’ qasīr) which falls short of some attributes. An example of the former is to perform an obligatory salah in congregation, and of the latter is to perform it individually. Adā’ kāmil is a perfect performance whereas adā’ qasīr is defective and should, whenever possible, be compensated for; however, the obligation is fulfilled and the person does not incur a sin. Belated performance (qaḍā’) is also of two kinds, namely, complete restitution (qaḍā’ kāmil) and restitution that is incomplete. The former occurs in respect of duties that can be measured and quantified, and the latter when the original obligation is restituted in substance but not in form. An example of the latter is when the monetary value of a duty, instead of the original substance, is given as a substitute. In the case of restitution or i‘ādah, the original duty is fulfilled yet owing to some defect, or even in the absence of defect, it is repeated for greater merit. A person may, for example, have performed the salah individually, but repeats the same by performing
it in congregation, or he remembers that he had made an error in its original performance.

I.2 Mandūb (Recommended)

*Mandūb* denotes a demand from the Lawgiver which asks the mukallaf to do something that is, however, not binding on the latter. To comply with the demand earns the mukallaf spiritual reward (*thawāb*), but no punishment is inflicted for failure to perform. Creating a charitable endowment (*waqf*), for example, giving alms to the poor, fasting on days outside Ramaḍān, attending the sick, etc., are duties of this kind. *Mandūb* is variously known as *Sunnah*, *mustahabb* and *nafl*, which are all here synonymous and covered by the same definition.¹⁸ If it is an act which the Prophet performed on some occasions but omitted on others, it is called *Sunnah*. There are two types of *Sunnah*, namely *Sunnah mu‘akkadah* (the emphatic *Sunnah*, also known as *Sunnah al-hudā*), and *Sunnah ghayr mu‘akkadah*, or supererogatory *Sunnah*. The call to congregational prayers (i.e. the *adhan*), attending congregational prayers and gargling as a part of the ablution (*wudū‘*) are examples of the former, whereas non-obligatory charity, and supererogatory prayers preceding the obligatory salah in early and late afternoon (i.e. *zuhr* and ‘*āsr*) are examples of supererogatory *Sunnah*. Performing the emphatic *Sunnah* leads to spiritual reward from Almighty God while its neglect is merely blameworthy but not punishable. However, if the entire population of a locality agree to abandon the emphatic *Sunnah*, they are to be fought for contempt of the *Sunnah*. To perform the supererogatory *Sunnah*, on the other hand, leads to spiritual reward while neglecting it is not blameworthy. There is a third variety of *Sunnah* known as *Sunnah al-zawa‘id*, or *mandūb al-zawa‘id*, which mainly refers to the acts and conduct performed by the Prophet as a human being, such as his style of dress and choice of food, etc., whose omission is neither abominable nor blameworthy. This is basically a Ḥanafi classification. The other madhāhib have not classified the *mandūb* which, to them, is variously known as *Sunnah*, *nāfi‘lah*, *mustahabb*, *iḥsān*, *faḍilah* and *tatawwu‘*. According to the Ṣafī‘is, if the Prophet performed an act regularly, it is called *Sunnah*, but if he performed it only once or twice, it is called *mustahabb*. It is *tatawwu‘*, on the other hand, if someone does a voluntary act of benefit without following a particular precedent. These are acts of religious merit over and above the *Sunnah* and *mustahabb*. The Mālikī perception of *Sunnah* and *mustahabb* (also
known as *raghāʿib*) is similar to that of the Shāfiʿis. A slight difference may be noted, however, in the Mālikī concept of *nawāfīl*, which is almost the same as *tataw.small* but, to the Mālikīs, it means acts of religious merit according to the general rules of *Shariʿah* on which the Prophet has given no specific instruction.

The Hanbalīs have not differed significantly with the rest in the designation of these concepts, except perhaps by using additional terms such as *taʿah*, *qurbah* and *ihsān*, which they use almost synonymously with *mandūb*.

Al-Shāṭibī has observed that in a general sense the *mandūb* serves as an aid to the *wājib*, either in the capacity of a prelude (*muqaddimah*) or as a reminiscent (*tidhkār*) to *wājib*. It may belong to the genus of the *wājib*, such as supererogatory prayer, fasting, alms-giving and *hajj*, or it may not belong to the genus of *wājib*, such as cleanliness of the body and clothes, hastening in opening the fast and delaying the *suhūr* meal, or refraining from idle talk while fasting.

*Mandiib* often occurs in the Qur’ān in the form of a command which is then accompanied by indications to suggest that the command is only intended to convey a recommendation. An example of this is the Qur’ānic command requiring that the giving and taking of period loans must be set down in writing (al-Baqarah, 2:283). But the subsequent portion of the same passage provides that ‘if any of you deposits something with another, then let the trustee [faithfully] discharge his trust’.

This passage implies that if the creditor trusts the debtor, they may forego the requirement of documentation. Another example of a command that only denotes a recommendation is the Qur’ānic provision regarding slaves, where the text provides, ‘And if any of your slaves seek their release from you in writing, set them free if you know any good in them’ (al-Nīrā, 24:33).

The last portion of this text indicates an element of choice which renders the command therein *mandūb*. But in the absence of such accompanying evidence in the text itself, the Qur’ānic command is
sometimes assessed as *mandūb* by reference to the general principles of the *Shari’ah*.

Sometimes the *mandūb* is conveyed in persuasive language rather than as a command *per se*. An example of this is the hadith which states: ‘Whoever makes an ablution for the Friday prayers, it is good, but if he takes a bath, it is better.’

A question arises in this connection as to whether the *mandūb* remains a *mandūb* once it has been started, or becomes obligatory of continuation until it is completed. The Hanafis have held that once the *mandūb* is commenced, it turns into an obligation and must be completed. For example, when a person starts a supererogatory fast, according to this view, it is obligatory that he complete it, and failure to do so renders him liable to the duty of belated performance (*qadā’*). But according to the Shafi’is, whose view here is generally preferred, the *mandūb* is never turned into *wājib* and always remains a *mandūb*, thereby leaving the person who has started it with the choice of discontinuing it whenever he wishes. There is thus no duty of belated performance (*qadā’*) on account of failure to complete a *mandūb*.

I.3 *Harām* (Forbidden)

According to the majority of *‘ulamā’, harām* (also known as *mahzhūr*) is a binding demand of the Lawgiver in respect of abandoning something, which may be founded in a definitive or a speculative proof. Committing the *harām* is punishable and omitting it is rewarded. But according to the Hanafis, *harām* is a binding demand to abandon something that is established in definitive proof; if the demand is founded in speculative evidence, it constitutes a *makrūh tahrimi*, but not *harām*. The former resembles the latter in that committing both is punished and omitting them is rewarded. But the two differ from one another insofar as the wilful denial of the *harām* leads to infidelity, which is not the case with regard to *makrūh tahrimi*.

The textual evidence for *harām* occurs in a variety of forms, which may be summarised as follows. Firstly, the text may clearly use the word *harām* or any of its derivatives. For example, the Qur’ānic text
which provides, ‘Forbidden to you are the dead carcass, blood and pork and that which has been dedicated to other than God’ (al-Mā‘īdah, 5:3)

and ‘God has permitted sale and prohibited usury’ (al-Baqarah, 2:275).

Similarly, the hadith that provides, ‘Everything belonging to a Muslim is forbidden to his fellow Muslims: his blood, his property and his honour’.23

Secondly, harām may be conveyed in other prohibitory terms which require the avoidance of a certain form of conduct. For example, there is the Qur‘ānic text stating: ‘Slay not the life that God has made sacrosanct, save in the course of justice’ (al-An‘ām, 6:151);

and ‘Devour not one another’s property in defiance of the law’ (al-Baqarah, 2:188).

Thirdly, harām may be communicated in the form of a command to avoid a certain form of conduct. For example: there is the Qur‘ānic text providing that wine-drinking and gambling are works of the devil and then orders the believers to ‘avoid it’ (al-Mā‘īdah, 5:90).

Fourthly, harām may be communicated through expressions such as ‘it is not permissible’ or ‘it is unlawful’ in a context that is indicative of total prohibition. For example, the Qur‘ānic text proclaiming that ‘it is not permissible for you to inherit women against their will’ (al-Nisā‘, 4:19),

or the hadith which provides, ‘It is unlawful for a Muslim to take the property of another Muslim without his consent’.24
Fifthly, *harām* is also identified by the enactment of a punishment for a certain form of conduct. There are many instances of this in the Qurʾān and Sunnah. The *ḥudūd* penalties are the most obvious examples of this variety of *harām*. As is implied by its name, the *ḥadd* penalty is specific in reference to both the quantity of punishment and the type of conduct it penalises. Alternatively, the text that communicates *tahrīm* may only consist of an emphatic condemnation of a certain act without specifying the penalty for it as such. Thus the Qurʾān prohibits devouring the property of orphans by denouncing it in the following terms: ‘Those who eat up the property of orphans swallow fire into their own bodies’ (al-ʾNisāʾ, 4:10).

Harām is divided into two types: (1) *harām li-dhātih* or ‘that which is forbidden for its own sake’, such as theft, murder, adultery, marrying a close relative and performing *ṣalāh* without an ablution, all of which are forbidden for their inherent enormity; and (2) *harām li-ghayrih*, or ‘that which is forbidden because of something else’. An act may have been originally lawful but made unlawful owing to the presence of certain circumstances. For example: a marriage that is contracted for the sole purpose of *tahlīl*, that is, in order to legalise another intended marriage, performing *ṣalāh* in stolen clothes, and making an offer of betrothal to a woman who is already betrothed to another man. In each of these examples, the act involved is originally lawful but has become *harām* owing to the attending circumstances. A consequence of this distinction between the two varieties of *harām* is that *harām li-dhātih*, such as marriage to one’s sister or the sale of dead carcasses, is null and void *ab initio* (*batīl*), whereas violating a prohibition that is imposed owing to an extraneous factor is *fāsid* (irregular) but not *bāṭil*, and as such may fulfil its intended legal purpose. A marriage which is contracted for the purpose of *tahlīl* is clearly forbidden, but it validly takes place nevertheless. Similarly, a contract of sale which is concluded at the time of the Friday prayer is *harām li-ghayrih* and is forbidden. But according to the majority of ‘ulamāʾ the sale takes place nevertheless, with the exception of the Ḥanbalīs and Ṣāḥīris, who regard such a sale as *bāṭil*.

Even the
majority, however, have considered the ownership accruing upon such a sale undesirable (al-milk al-khabithah) as it violates the prohibitory terms of the Qur'ān.

Another consequence of this distinction is that ḥāram li-dhātih is not permissible save in cases of dire necessity (darūrah) of a kind which threatens the safety of the ‘five principles’ of life, religion, intellect, lineage and property. In this way, uttering a word of infidelity, or drinking wine, is only permitted when it saves life. Ḥāram li-ghayrih, on the other hand, is permissible not only in cases of absolute necessity but also when it prevents hardship. Thus a physician is permitted to look at the private parts of a patient even in the case of illnesses that do not constitute an immediate threat to life.26

Another criterion for distinguishing the two varieties of ḥāram mentioned by some ‘ulamā’ is that ḥāram li-ghayrih consists of an act that leads to ḥāram li-dhātih. In this way, looking at the private parts of another person is forbidden because it can lead to zīnā, which is ḥāram itself. Similarly, marrying two sisters simultaneously is ḥāram because it leads to the severance of ties of kinship (qaf al-arḥām), which is ḥāram itself.27

And lastly, in response to the question of whether an act that is ḥāram can be combined with one that is intended to seek closeness (qurbah) to God Most High, it is suggested that the ḥāram overrides the qurbah. Fasting on the day of ‘īd, for example, is an act of qurbah, but is ḥāram on that particular day. In this case the fast is vitiated and the prohibitory element in it overrides the element of qurbah.

I.4 Ṝakīrū (Abominable)

Makrūh is a demand of the Lawgiver that requires the mukallaf to avoid something, but not in strictly prohibitory terms. Makrūh is the opposite of mandūb, which means that neglecting the mandūb amounts to makrūh. Since makrūh does not constitute a binding law, we merely say that omitting something which is makrūh is preferable to committing it. The perpetrator of something makrūh is not liable to punishment and, according to the majority of ‘ulamā’, he does not incur moral blame either. The Ḥanafis are in agreement with the majority view in respect of only one of the two varieties of makrūh, namely makrūh tanzīhī, but not in regard to makrūh tahrimī. The latter, according to the Ḥanafis, entails moral blame but no punishment. The ‘ulamā’ are all in agreement that anyone who avoids the makrūh merits praise and gains closeness to God.28
The textual authority for makrūh may consist of a reference to something that is specifically identified as makrūh, or may be so identified by words that may convey an equivalent meaning. The word makrūh occurs in its literal sense in the following Qur'ānic passage: ‘All of these are evil and abomination in the sight of your Lord’ (al-İsra’, 17:38).

The reference here is to a number of things, including walking on the earth with insolence, taking a stand on a matter without adequate knowledge, failure to give due measurement and weight and failure to keep one’s promise. Another example of makrūh in the Qur’ān is premature questioning, as indicated in the following āyah: ‘O you who believe, ask not questions about things which, if made clear to you, may trouble you. But if you ask about them when the Qur’ān is being revealed, they will be explained to you.’ (al-Mā’idah, 5:101)

The ruling ‘ask not questions’ is conveyed in the language of a prohibition, but since the latter part of the āyah permits asking questions, the prohibition is changed into a mere makrūh. This is also confirmed by another āyah which clearly permits asking questions: ‘Ask those who know, if you know not yourselves’ (al-Nahl, 16:43).

We also read in another Qur’ānic āyah: ‘And seek not the bad to give in charity when you would not take it for yourselves save with disdain’ (al-Baqarah, 2:267).

The text here implies disapproval (karāhah) of giving defective things in charity such as one would not accept from others. There is a hadith, for example, in which the Prophet discouraged any prayers at midday
until the decline of the sun with the exception of Friday. The actual word used in the hadith is that the Prophet disliked (kariha al-nabi) prayers at that particular time.\(^{39}\)

We also read in another hadith recorded by al-Bukhārī that ‘idle talk, excessive questioning and extravagance have all been disapproved of’.\(^{39}\)

An equivalent term to *makrūh* occurs, for example, in the hadith which reads: ‘The most abominable of permissible things in the sight of God is divorce’.\(^{30}\)

*Makrūh* may also be conveyed in the form of a prohibition but in language that only indicates reprehensibility. An example of this is the aforementioned Qur’ānic text which states, in an address directed to the believers, ‘O you who believe, ask not questions about things which, if made clear to you, would trouble you. But if you ask about them when the Qur’ān is being revealed, then they will be explained to you’ (al-Mā’idah, 5:101).

An example of this style of communication in the *hadith* is as follows: ‘Leave that of which you are doubtful in favour of that which you do not doubt.’\(^{31}\)

*Makrūh* is the lowest degree of prohibition (*tahrīm*), and in this sense is used as a convenient category for matters that fall between *halāl* and *harām*, that is, matters which are definitely discouraged but where the evidence to establish them as *harām* is less than certain.\(^{32}\)

As already noted, the Hanafis have divided *makrūh* into the two types of *makrūh tanzīhi* and *makrūh tahrīmi*. The former is considered
abominable for purposes of keeping pure such as avoiding raw onion and garlic just before going to congregational prayers, or neglecting salāt al-nafl, that is, supererogatory prayers preceding, for example, the salāt al-zuhr (early afternoon prayers). This kind of makrūḥ is nearer to mubah than to harām. Its commission is not punished, but its omission is rewarded. The Hanafi description of makrūḥ tanziḥi is the same as that which the majority of ‘ulamā’ have given to makrūḥ in general. The majority of ‘ulamā’ have characterised the value of makrūḥ to be that ‘committing it is not punishable but omitting it is praiseworthy’. Makrūḥ tahrimī or ‘abominable to the degree of prohibition’ is, on the other hand, nearer to harām. An act is harām when its prohibition is decreed in definitive terms, otherwise it is makrūḥ tahrimī. An example of makrūḥ tahrimī is the wearing of gold jewellery and silk garments for men, which are forbidden by an āḥād (solitary) hadīth. While referring to these two items, the hadīth provides: ‘These are forbidden to the men of my community but are lawful to their women.’

Similarly, it is makrūḥ tahrimī for a person to offer to buy something for which another person has already made an offer. There is a hadīth that forbids this kind of purchase in the same way as it forbids making an offer of engagement to a woman who is already betrothed to another man.

Since both of the foregoing hadīth are āḥād whose authenticity is not devoid of doubt, the prohibition therein is reduced from harām to makrūḥ tahrimī.

The difference between the Hanafis and the majority of ‘ulamā’ relates to the nature of the evidence on which the makrūḥ is founded. When a prohibition is conveyed in an imperative demand of the Lawgiver but there is some doubt in its authenticity or meaning, the majority of ‘ulamā’ classify it as harām, whereas the Hanafis classify it as makrūḥ tahrimī. The Hanafi position in regard to the division of makrūḥ into these two types is essentially similar to their approach in regard to drawing a distinction between fard and wajib.
in emphatic or imperative terms. Committing makrūh tanzīḥī does not lead to punishment or moral blame, yet it does amount to neglecting that which is best and meritorious, such as consuming horse meat at a time of war when horses are in short supply, or making ablution with water left over by a cat or a meat-eating bird, and also to abandon Sunnah mu’akkadah and mandāb.

I.5 Mubah (Permissible)

Mubah (also referred to as ḥalāl and jā’iz) is defined as communication from the Lawgiver concerning the conduct of the mukallaf that gives him the option to do or not do something. The Lawgiver’s communication may be in the form of a clear nass, such as the Qur’ānic text providing, in a reference to foodstuffs, that ‘this day all things good and pure have been made lawful to you’ (al-Mā’idah, 5:5).

Alternatively the text may state that the mukallaf will not incur a sin, blame or liability if he wishes to act in a certain way. Concerning the permissibility of betrothal, for example, the Qur’ān states, ‘There is no blame on you if you make an offer of betrothal to a woman’ (al-Baqarah, 2:233).

Similarly, committing a sinful act out of sheer necessity is permissible on the authority of the Qur’ān, which provides, ‘If someone is compelled by necessity without wilful disobedience or transgression, then he is guiltless’ (al-Baqarah, 2:173).

Sometimes a command in the Qur’ān may only amount to permissibility when the nature of the conduct in question or other relevant evidence indicates that this is the case. An example of this is the text that orders worshippers to ‘scatter in the earth’ once they have completed the Friday prayers (al-Jumu’ah, 62:10). Although the believers have been ordered to ‘scatter in the earth’, the nature of this command and the type of activity to which it relates suggest that it conveys permissibility only.
In the event where the law provides no ruling to specify the value of a certain form of conduct, then according to the doctrine of istishāb al-asl (presumption of continuity), permissibility (ibāhah) remains the original state that is presumed to continue. The authority for this presumption is found in the Qur'ānic text which provides, in an address to mankind, that God Almighty 'has created everything in the earth for your benefit' (al-Baqarah, 2:29).

By implication, it is understood that the benefit in question cannot materialise unless 'everything in the earth' is made mubah for mankind to use and to utilise in the first place.

Mubah has been divided into three types. The first is mubah that does not entail any harm to the individual whether he acts upon it or not, such as eating, hunting or walking in the fresh air. The second type of mubah is that whose commission does not harm the individual, although it is essentially forbidden. Included in this category are the prohibited acts that the Lawgiver has made permissible on account of necessity, such as uttering words of unbelief under duress, or eating the flesh of a dead carcass to save one's life. The third variety of mubah is not really mubah per se; it is included under mubah for lack of a better alternative. This category of mubah, also known as 'auf (forgiven), consists of things that were practised at one time but were then prohibited with the proviso that those who indulged in them before the prohibition are exonerated. The Qur'ān thus prohibits marriage with certain relatives, and the text then continues to make an exception for such marriages that might have occurred in the past (al-Nisā’, 4:22). Similarly, wine-drinking was not prohibited until the Prophet's migration to Medina, and fell under the category of mubah until the revelation of the āyah in sūra al-Mā’idah (5:90) which imposed a total ban on it.37

It would be incorrect, as al-Ghazālī explains, to apply the term mubah to the acts of a child, an insane person, or an animal, nor would it be correct to call the acts of God mubah. Acts and events that took place prior to the advent of Islam are not to be called mubah either. 'As far as we are concerned, our position regarding them is one of abandonment [tark]', which obviously means that such activities are not to be evaluated at all. Mubah proper, al-Ghazālī adds, is established in the express permission of Almighty God which renders the commission or omission of an act permissible either in religious terms.
or in respect of a possible benefit or harm that may accrue from it in this world.\textsuperscript{38} The ‘ulama’ of usul definitely consider mubah to be a hukm shar\textsuperscript{i}, although including it under al-hukm al-takl\textsuperscript{i}f is on the basis of mere probability as there is essentially no liability [taklif] in mubah. The ‘ulama’ of all schools have consistently included mubah as one of the five varieties of defining law. The Hanafis have only differed with the majority with regard to the sub-divisions of wajib and makr\textsuperscript{\textperiodcentered}ah as already explained, but not with regard to mubah. Mubah is once again divided into four types.

(1) Acts that are mubah on the individual level but wajib for the community as a whole. For example, eating, drinking and marriage are mubah for the individual, but total abstinence from them is forbidden and they become obligations on the collective level. Similarly, the choice of profession and employment is mubah for individuals, but the community as a whole is under obligation to ensure the survival of certain types of industry and trade.

(2) Acts that are mubah on the individual level but are mand\textsuperscript{\textperiodcentered}ub on the collective level. Living in good style, eating the best food and wearing elegant clothes, for example, are mand\textsuperscript{\textperiodcentered}ub, but it is mubah for a rich individual nevertheless to lead a simple life. Yet it is desirable (mand\textsuperscript{\textperiodcentered}ub) that wealthy people in general should live in an appropriate style.

(3) Acts that are mubah on an occasional basis but forbidden (har\textsuperscript{\textperiodcentered}am) if pursued on a regular and habitual basis. For example, gossiping, swearing or harshness to one’s child are mubah, but they become har\textsuperscript{\textperiodcentered}am if practised regularly.

(4) Some acts, although originally mubah, become makr\textsuperscript{\textperiodcentered}ub with habitual performance. Playing chess or music, for example, or playing with pigeons, are mubah, but they become makr\textsuperscript{\textperiodcentered}ub if one spends a considerable amount of time on such things.

A single act may fall into one or more of these categories, depending on the circumstances in which it is attempted. Marriage, for example, may become obligatory upon a Muslim who has the necessary means and feels assured that he will fall into sin without it. It may, on the other hand, be mand\textsuperscript{\textperiodcentered}ub if he has the financial means and yet does not see himself on the verge of committing sin without marriage. And then marriage is makr\textsuperscript{\textperiodcentered}ub for one who fears being oppressive and unjust to his wife, and eventually har\textsuperscript{\textperiodcentered}am if one is certain that this will be the case.\textsuperscript{39} Bearing in mind the sub-division of wajib and makr\textsuperscript{\textperiodcentered}ub that the Hanafis have added to al-hukm al-takl\textsuperscript{i}f, the Hanafis thus
classify the latter into seven types, whereas the majority divide it into five varieties only.

II. Declaratory Law (al-Hukm al-Wad'i)

‘Declaratory law’ is defined as communication from the Lawgiver which enacts something into a cause (sabab), a condition (shart) or a hindrance (mâni‘) to something else. This may be illustrated by reference to the Qur’ânic text regarding the punishment of adultery, which causes the act of adultery itself to be the cause of its punishment (al-Baqarah, 2:24). An example of the declaratory law which consists of a condition is the Qur’ânic text on the pilgrimage of hajj: ‘Pilgrimage is a duty owed to God by people who can manage to make the journey’ (Al ‘Imrân, 3:97).

Both of the foregoing texts, in fact, consist of a defining law and a declaratory law side by side. The defining law in the first text is the ruling that the adulterer must be punished with a hundred lashes, and in the second text it is the duty of the hajj pilgrimage itself. The declaratory law in the first text is the cause, and in the second, it is the condition that must be present if the law of the text is to be implemented. The second of the two texts thus enacts the ability of the individual to make the journey into a condition for performing the pilgrimage. A more explicit example of a declaratory law is the hadith stating that ‘there is no nikâh without two witnesses’.40

The presence of two witnesses is thus rendered a condition for a valid marriage. And lastly, an example of a declaratory law consisting of a hindrance is the hadith providing that ‘there shall be no bequest to an heir’41 which obviously enacts the tie of kinship between the testator and the legatee into a hindrance to bequest. Similarly, the hadith that lays down the rule that ‘the killer shall not inherit’
renders killing a hindrance to inheritance.42

The execution of the defining law is normally within the capacity of the mukallaf. The demands, for example, addressed to the mukallaf concerning prayers and zakāh are both within his means. Declaratory law may, on the other hand, be within or beyond the capacity of the mukallaf. For instance, the arrival of a particular time of day which is the cause (sabab) of salāh is beyond the means and capacity of the worshipper.43

The function of declaratory law is explanatory in relation to defining law, in that the former explains the component elements of the latter. Declaratory law thus informs us whether certain facts or events are the cause, condition or hindrance in relationship to defining law. It is, for example, by means of declaratory law that we know offer and acceptance in a contract of sale to be the cause of the buyer’s ownership, that divorce causes the extinction of marital rights and obligations, and that the death of a person is the cause of the right of the heir to his inheritance. Similarly, it is by means of a declaratory law that we know intellectual maturity to be the condition of voluntary disposition of property in gift (hibah) and charitable endowment (waqf).44

The basic notion of dividing the rules of Shari‘ah into taklīfī and wad‘ī is also applicable to modern western law. When we read in the rent act, for example, a clause that requires the tenant to pay the rent in accordance with the tenancy contract, this is a hukm taklīfī which consists of a command. Similarly, when there is a clause which requires the tenant not to use the premises for commercial purposes, this is a demand consisting of a prohibition. And if there is a clause to the effect that the tenant may sublet the property, this is an option that the tenant may or may not wish to exercise. Needless to say, any aspect of such provisions may be subjected to such conditions or hindrances as the contracting parties may wish to stipulate.45

As noted above, declaratory law is divided into five varieties. The first three of these, namely, cause, condition and hindrance, have already been discussed to some extent. Two other varieties that are added to these are the ‘azīmah (strict law) as opposed to rukhsāh (concessionary law), and valid (ṣahiḥ) as opposed to invalid (bāṭil). To include the first three under al-hukm al-wad‘ī is obvious from the very definition of the latter. But classifying the last two divisions under al-hukm al-wad‘ī may need a brief explanation. It is well to point out in this connection
that almost every concession that the Lawgiver has granted to the individual is based on certain causes which must be present if the concession is to be utilised. The Lawgiver, for example, enacts travelling, illness or removal of hardship into the cause of a concession in regard to, say, fasting or salah, which is why ‘azimah and rukhsah are classified under al-hukm al-wad'i. Having said this, we note that many ‘ulamā’ of usūl have differed and classified ‘azimah and rukhsah under hukm taklīfī. In classifying sahih and bātīl as subdivisions of declaratory law, it will be further noted that a hukm is valid when the conditions of its validity are fulfilled, and is invalid if these conditions are not met. In short, since the last two divisions are basically concerned with causes and conditions, they are included under the class of declaratory law. We shall now proceed to discuss each of the five varieties of al-hukm al-wad'i separately, as follows.

II.1 Cause (Sabab)

A sabab is defined as an attribute that is evident and constant (wasf zāhir wa-mundābat) and which the Lawgiver has identified as the indicator of a hukm in such a way that its presence necessitates the presence of the hukm and its absence means that the hukm is also absent. A sabab may be an act that is within the power of the mukallaf, such as murder and theft in their status as the causes of retaliation (qiṣās) and a hadd penalty respectively. Alternatively, the sabab may be beyond the control of the mukallaf, such as minority being the cause of guardianship over the person and property of a minor. When the sabab is present, whether it is within or beyond the control of the mukallaf, its effect (i.e. the musabbab) is automatically present even if the mukallaf had not intended it to be. For example, when a man divorces his wife by a revocable talaq, he is entitled to resume marital relations with her even if he openly denies himself that right. Similarly, when a man enters into a contract of marriage, he is obligated to provide dower and maintenance for his wife even if he explicitly stipulates the opposite in their contract. For once the Lawgiver identifies something as a cause, the effect of that cause comes about by virtue of the Lawgiver’s decree regardless of whether the mukallaf intended it to be so or not.

The presence of a sabab necessitates the presence of a hukm, whether or not the sabab is harmonious (munāsib) with the hukm, although some ‘ulamā’ of usūl draw a distinction between sabab and ‘illah on this very basis. Sabab is thus reserved for a cause that is not harmonious with
the *hukm*, whereas a cause that is in harmony with its *hukm* is known as an ‘*illah*. To illustrate this point, murder is the ‘*illah* of the law of retaliation and so is travelling, which is the ‘*illah* of concession not to observe the fast of Ramadān. In both cases the ‘*illah* is harmonious with its *hukm*. But when we say that the decline of the sun is the cause (sabab) of the forenoon prayer, or that sighting the moon of Ramadān is the sabab of fasting, we cannot ascertain the harmony of the cause with the *hukm*. There is also a difference between ‘*illah*, sabab and *hikmah* in that *hikmah* refers to the benefit that is obtained from, or a harm that is prevented by, a particular *hukm*. *Hikmah* is also not an indicator of the *hukm* in all situations in that the presence or absence of the one does not necessarily have the same consequence for the other. *Sabab* is then of two kinds: one of which is a sabab that is within the capacity of the mukallaf, such as travelling being the sabab/‘illah of breaking the fast; and one that is beyond the control of the mukallaf, such as the decline of the sun being the sabab of the forenoon prayer.

II.2 Condition (*Shart*)

A *shart* is defined as an evident and constant attribute whose absence necessitates the absence of the *hukm* but whose presence does not automatically bring about its object (*mashrūt*). For example, the presence of a valid marriage is a precondition of divorce, but this does not mean that when there is a valid marriage, it must lead to divorce. Similarly, the ablution (*wudū‘*) is a necessary condition of *ṣalāḥ*, but the presence of *wudū‘* does not necessitate *ṣalāḥ*. A condition normally complements the cause and gives it its full effect. Killing is, for example, the cause of retaliation; however, this is on condition that it is deliberate and hostile. The contract of marriage legalises/causes sexual enjoyment between the spouses; however, this is on condition that two witnesses testify to the marriage. The legal consequences of a contract are not fully realised without the fulfilment of its necessary conditions. A condition may be laid down by the Lawgiver, or by the mukallaf. Whenever the former enacts a condition, it is referred to as *shart shar‘ī*, or ‘legal condition’, but if it is a condition stipulated by the mukallaf, it is referred to as *shart ja‘lī*, or ‘improvised condition’. An example of the former is witnesses in a marriage contract, and of the latter, the case when spouses stipulate in their marriage contract the condition that they will reside in a particular locality. A *shart* may be attached either to the *hukm* or to the cause of the *hukm*. An
example of the former is the condition that legal alms (zakāh) falls
due upon the expiry of one year. The absence or non-fulfilment of
this shart means that the hukm, or the obligation of zakāh, is also absent.
Similarly, it is a condition of valid sale that the seller is able to deliver
the subject-matter of the sale and the absence of this condition directly
invalidates the sale. An example of the shart that is attached to the
cause of the hukm rather than the hukm itself is the condition that
killing must be deliberate in order to constitute the valid cause of
retaliation. In this example, killing is the cause of retaliation and the
condition that it must be intentional is attached to the cause rather
than to the hukm directly. A command becomes effective by the
presence of its cause (sabab) and it becomes binding by the fulfilment
of its condition. A command, in other words, is not enforceable
before its condition is fulfilled.

Shart also differs from rukn (pillar, essential requirement) in that the
latter partakes of the essence of a thing. This would mean that the
law, or hukm, could not exist in the absence of its rukn. When the
whole or even a part of the rukn is absent, the hukm collapses com-
pletely, with the result that the latter becomes null and void (bātil).
A shart, on the other hand, does not partake of the essence of a hukm,
although it is a complementary part of it. Bowing and prostration
(rukū and sajdah), for example, are each an essential requirement
(rukūn) of salah and partake of the very essence of salah, but ablution
is a condition of salah as it is an attribute whose absence disrupts the
salah but which does not partake of its essence.48

II.3 Hindrance (Māni')

A māni' is defined as an act or an attribute whose presence either
nullifies the hukm or the cause of the hukm. In either case, the result
is the same, namely, that the presence of the māni' means the absence
of the hukm. For example, difference of religion and killing, are both
obstacles to inheritance between a legal heir and his deceased relative,
despite the fact that there may exist a valid tie of kinship (qarābah)
between them: when the obstacle is present, the hukm, which is
inheritance, is absent.

From the viewpoint of its effect on the cause (sabab) or on the hukm
itself, the māni' is divided into two types. First, the māni' which affects
the cause in the sense that its presence nullifies the cause. An example
of this is the indebtedness of a person who is liable to the payment
of zakāh. The fact of his being in debt hinders the cause of zakāh,
which is ownership of property. A person who is in debt to the extent of insolvency is no longer considered, for purposes of zakāh, to be owning any property at all. Thus when the cause is nullified, the hukm itself, which is the duty to pay zakāh, is also nullified. Secondly, there is the hinderance which affects the hukm. The presence of this type of hinderance nullifies the hukm directly, even if the cause and the condition are both present. An example of this is paternity, which hinders retaliation: if a father kills his son, he is not liable to retaliation although he may be punished otherwise. Paternity thus hinders retaliation according to the majority of ṭulamā’ (except Imam Mālik) despite the presence of the cause of retaliation, which is killing, and its condition, which is hostility and the intention to kill. Imam Mālik has held, on the other hand, that the father may be retaliated against for the deliberate killing of his offspring. 49

The mukallaf is under duty to observe the provisions of the law pertaining to sabab, shart and mani’. There are certain restrictions that the law imposes, in the area of contracts, for example, on the liberty of the parties to insert conditions and stipulations into the terms of a given contract. Broadly speaking, a condition should not violate the essence of a contract, nor should it seek to circumvent the basic purpose of an act. To sell a book on condition that is not read, or sell it when one is not able to deliver it, are the sorts of conditions that go against the purpose and essence of sale. The madhāhib have differed on the extent of the liberty that the individual enjoys in the area of contracts and stipulations and the Ḥanbalī school is the most liberal on this subject.

We also note with regard to mani’ that it is not permissible for the mukallaf to create deliberate impediments so as to circumvent the commands of the Shari‘ah. The subject here is once again somewhat controversial and falls under what is known as hiyal (legal stratagems), most of which are suspect, although there may be some that serve a legitimate purpose. A man who is liable to zakāh should not, for example, make a gift of his property to his wife before the lapse of the year and then take it back from her after the expiry of the year, all with the purpose of avoiding the payment of zakāh.

II.4 Strict Law (‘Azīmah) and Concessionary Law (Rukḥsah)

A law, or hukm, is an ‘azīmah when its rigour is primary and unabated, without reference to any attenuating circumstances that may soften
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its original force or even entirely suspend it. It is, in other words, a law as the Lawgiver had intended it in the first place. For example, salah, zakah, the hajj, jihād, etc., which God has enjoined upon all competent individuals, are classified under 'azīmah. A law, or hukm, is a rukhsah, by contrast, when it is considered in conjunction with attenuating circumstances. Whereas 'azīmah is the law in its normal state, rukhsah embodies the exceptions, if any, that the Lawgiver has granted with a view to bringing facility and ease in difficult circumstances. Thus the law that grants a concession to travellers to break the fast during Ramadan is an exception to the norm that requires everyone to fast. The concessionary law in this case is valid only for the duration of travelling, after which the 'azīmah must be complied with again. Similarly, if a Muslim is compelled to renounce his faith, he is permitted to do so even though the strict law would require him to persist in his faith until death. The excuse in this case is founded in the right of the person to life, and is clearly granted in the Qur'ān (al-Nahl, 16:106), which allows the utterance of words of infidelity under duress. Strict law may consist of either commands or prohibitions. Thus the prohibition of murder, theft, adultery, wine-drinking, etc., are all instances of 'azīmah in the Qur'ān.°°

'Azīmah is a command of the Lawgiver that binds the mukallaf, while rukhsah embodies a concession in respect of that command. The two are interrelated in that rukhsah can only exist when there is 'azīmah in the first place. God Almighty has not made, for example, fasting in the month of Shawwāl (the month following Ramadan) obligatory upon Muslims. This is not a concession, as no obligation exists in the first place. Similarly, the normal state of ibāhah regarding food and drink is not rukhsah, whereas the permission to eat prohibited meat in certain circumstances is rukhsah. It would also be incorrect to call the permissibility of tayammum (i.e. dry ablution with clean earth or sand) in the absence of water a rukhsah: when there is no water it is not possible to make an ablution proper (wudū') in the first place. But tayammum is a rukhsah if it is a substitute for wudū' when the weather is extremely cold. The point is that in rukhsah the individual must be able to take an alternative course of action.°°

Rukhsah occurs in any of four varieties. Firstly, in the form of permitting a prohibited act on grounds of necessity, such as eating the flesh of a carcass, and drinking wine at the point of starvation or extreme thirst. Secondly, rukhsah may occur in the form of omitting a wājib when conformity to that wājib causes hardship, such as the concession granted to the traveller to shorten the quadruple salah, or
not to observe the fasting of Ramadān. Thirdly, in the area of transactions, rukhsah occurs in the form of validating contracts that would normally be disallowed. For example, lease and hire (ijārah), advance sale (salam) and order for the manufacture of goods (istišnā') are all anomalous, as the object of contract therein is non-existent at the time of contract, but they have been exceptionally permitted in order to accommodate the public need for such transactions. And lastly, rukhsah occurs in the form of concessions to the Muslim ummah from certain rigorous laws that were imposed under previous revelations. For example, zakāh to the extent of one-quarter of one’s property, the non-permissibility of salah outside a mosque, and the illegality of taking booty (i.e. ghanimah), which were imposed on people under previous religions, have been removed by the Shari‘ah of Islam.

II.5 Valid, Irregular and Void (Ṣahīh, Fāsid, Bāṭil)

These are Shari‘ah values that describe and evaluate legal acts incurred by the mukallaf. To evaluate an act according to these criteria depends on whether or not the act in question fulfils the essential requirements (arkan) and conditions (shurūt) that the Shari‘ah has laid down for it, and whether or not there exist any obstacles to hinder its proper conclusion. For example, salah is a shar‘ī act and is regarded as valid when it fulfils all the essential requirements and conditions that the Shari‘ah has provided in this regard. Conversely, salah becomes void when any of its essential requirements and conditions are lacking. Similarly, a contract is described as valid when it fulfils all its necessary requirements and where there is nothing to hinder its conclusion; otherwise it is void. When salah is performed according to its requirements, it fulfils the wājib, otherwise the wājib remains unfulfilled. A valid contract gives rise to all its legal consequences whereas a void contract fails to satisfy its legal purpose.

The ‘ulamā‘ are in agreement that acts of devotion (ibādāt) can either be valid or void, in the sense that there is no intermediate category in between. Legal acts are valid when they fulfil all the requirements pertaining to the essential requirements (arkan), causes, conditions and hindrances, and are void when any of these is lacking or deficient. An act of devotion that is void is non-existent ab initio and of no consequence whatsoever. The majority of ‘ulamā‘ have maintained a similar view with regard to transactions, namely, that a transaction is valid when it is complete in all respects. Only a valid contract of sale, for example, can give rise to its legal consequences, namely, the
transfer of ownership of the object of sale to the buyer and establishing the vendor's ownership over its price (thaman). A contract is void when it is deficient in respect of any of its requirements, although the Hanafis are in disagreement with the majority regarding the precise nature of this deficiency. The majority of ‘ulama‘ maintain that invalidity is a monolithic concept in that there are no shades and degrees of invalidity. An act or transaction is either valid or void, and there is nothing in between. According to this view, fāsid and bātīl are two words with the same meaning, whether in reference to devotional matters or to civil transactions. Likewise, to the majority it makes no difference whether the deficiency in a contract affects an essential element (rukni), such as the sale of a dead carcass, or a condition, such as sale for an unspecified price; both are void and non-existent ab initio.

The Hanafis have, however, distinguished an intermediate category between the valid and void, namely the fāsid. When the deficiency in a contract affects an essential requirement (rukni), the contract is null and void and fulfils no legal purpose. If, however, the deficiency in a contract only affects a condition, the contract is fāsid but not void. A fāsid contract, although deficient in some respects, is still a contract and entails some of its legal consequences, but not all. Thus a fāsid contract of sale establishes the purchaser's ownership over the object of sale when he has taken possession thereof, but does not entitle the purchaser to the usufruct (intifa'). Similarly, in the case of an irregular contract of marriage, such as one without witnesses, the spouses or the qādi must either remove the deficiency or dissolve the marriage, even if the marriage has been consummated. If the deficiency is known before consummation, the consummation is unlawful. But the wife is still entitled to the dower (mahr) and must observe the waiting period of ‘iddah upon dissolution of marriage. The offspring of a fāsid marriage is legitimate, but the wife is not entitled to maintenance, and no right of inheritance between the spouses can proceed from such a marriage.

The Hanafis describe the fāsid as something that is essentially lawful (mashrī') but is deficient in respect of an attribute (wasf) as opposed to the bātīl which is unlawful (ghayr mashrī') on account of its deficiency in regard to both essence (asl) and attribute. The Hanafi approach to the fāsid is also grounded in the idea that the deficiency that affects the attribute but not the essence of a transaction can often be removed and rectified. If, for example, a contract of sale is concluded without assigning a specified price, it is possible to specify the price (thaman)
after the conclusion of the contract and thus rectify the irregularity at a later time, that is, as soon as it is known to exist or as soon as possible.3

III. The Pillars (Arkān) of Ḥukm Sharīʿī

The ḥukm sharīʿī, that is, the law or value of Sharīʿah, consists of three essential components. First of all, the ḥukm must have been authorised by the hākim, that is, the Lawgiver; it must also have a subject-matter which is referred to as mahkūm fih; and then an audience, namely, the mahkūm ʿalayh, who must be capable of understanding or at least of receiving the ḥukm. We shall treat each of these under a separate heading, as follows.

III.1 The Lawgiver (Hākim)

The ‘ulama’ are unanimous that the source of all law in Islam is God Most High, whose will and command is known to the mukallaf either directly through divine revelation, or indirectly by means of inference, deduction and ijtihād. The Qurʾān repeatedly tells us that ‘the prerogative of command belongs to God alone’ (Al ʿImrān, 6:57).

إن الحكم إلا لله

We read in another text: ‘And it behoves not a believing man or woman, when God and his Messenger have decided on a matter, to have any option above their decision’ (al-Ahzāb, 33:36).

واما كان مؤمن ولا مؤمنة إذا قضى الله ورسوله أمرًا

ان يكون لهم الخبيرة من أميرهم

Law and justice in the Muslim community must derive their validity and substance from the principles and values that the Lawgiver has sanctioned. This is the purport of the Qurʾānic text in sūra al-Māʿīdah (5:45 and 5:49) which declares as unbelievers those who refuse to accept the authority of the divine law. Even the Prophet does not partake of the prerogative of command, as his command, or that of the ruler, the imam, the master or the father for that matter, does not constitute binding authority in its own right; instead, obedience to
such individuals is founded in the command of the Lawgiver. Neither is human intellect, or ‘aql, alone, a source of law in its own right.\textsuperscript{34}

The ‘ulamā’ are in disagreement, however, as to the way in which the will or the hukm of the Lawgiver regarding the conduct of the mukallaf is to be known and identified. Can we know it by means of our intellectual faculty without the aid and mediation of messengers and scriptures, or is the human intellect incapable of ascertaining the law without divine guidance? A similar question arises concerning harmony and concordance between reason and revelation, in that when the human intellect determines that something is good (hasan) or evil (gabih), is it imperative that the hukm of the Lawgiver should be identical with the dictates of reason? In response to these questions, the ‘ulamā’ have advanced three different views, which are as follows.

Firstly, the Ash‘arites, namely the followers of Abu’l-Hasan al-Ash‘ari (d. 314 AH), maintain that it is not possible for human intellect to determine what is good and evil in the conduct of the mukallaf, or to identify the hukm of the Lawgiver concerning the conduct of the mukallaf, without the aid of divine guidance. For human reasoning and judgment are liable to err. While an act may be evaluated by one person as good, another person may say the opposite. We normally say, for example, that honesty is good, but when it is likely to cause the death of an innocent person in the hands of a tyrant, it may be regarded as evil. It is therefore not for the human intellect to determine the values of things, and we cannot say that what the ‘401 deems to be good is necessarily good in the sight of God, or that what it considers evil is also evil in His sight. The Ash‘arites thus maintain that right and wrong are not determined by reference to the nature of things, or our perception thereof, but are determined by God. This is because things are not good and evil by their nature. How can, then, the human intellect be expected to perceive that which is non-existent in the state of nature? When the Lawgiver permits or demands an act, we know that it is right/good, and when He forbids an act, it is certain that the act in question is wrong/evil. Hence the criterion of right and wrong is shar‘, not ‘aql. According to this view, which is held by the majority of ‘ulamā’, what the law commands is good and what it forbids is evil. This view accords with what is known as the principle of the rule of law (also known as the principle of legality) which establishes that a man is not required to do something or to avoid doing it unless the law has been communicated to him in advance. No one is either rewarded for an act or punished for an omission unless he knows its status by means of a clear communication.
Thus when a person happens to be living in total isolation and has never received the message of the Lawgiver, he is not a mukallaf and deserves neither reward nor punishment. This view quotes in support the Qur'anic proclamation: ‘And We never punish until We send a messenger’ (al-Isra’, 17:15)

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which indicates that reward and punishment are based on the revealed law, not the human intellect. Elsewhere in the Qur'an, we also read, in a reference to the purpose of divine revelation, ‘So that after the coming of messengers, mankind would have no plea against God’ (al-Nisâ’, 4:165).

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In yet another place the Qur'an affirms that punishment is imposed only after the people are duly warned but not before: in a reference to the disbelievers, the Qur'an thus proclaims: ‘Had We inflicted on them a penalty before this [revelation], they would have said: Our Lord! If only you had sent us a messenger, we would have followed your signs’ (Tâ-Hâ, 20:134).

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The Ash'arites maintain the view that the commands of the Lawgiver relate to the conduct of the mukallaf only after the advent of Islam and that prior to this event there is no basis for obligation. Infidelity (kufr) is not harâm, nor is faith (imân) wâjib before the revelation actually declares it so.\(^5\)

Secondly, the Mu'tazilah, that is the followers of Ibrâhîm al-Nazzâm, have held the view that human intellect can identify the law of God regarding the conduct of the mukallaf even without the mediation of scriptures and messengers. The sharî only removes the curtain from what the ‘aql itself can perceive, and in essence the former is identical with the latter. The intellect (‘aql) can identify the good and evil in human conduct by reference to its benefit and harm. God's law concerning the conduct of the mukallaf is not only identifiable by the human intellect but is also identical with the dictates of the human
intellect. God only asks the mukallaf to do what is beneficial and forbids him from doing what is harmful. Whatever the 'aql sees as good or right, is also good in the sight of God, and vice versa. A person who acts against the requirement of reason may therefore be punished and one who acts in harmony with it may be rewarded. In this way, a person who has received no communication from the Lawgiver can still be considered a mukallaf and be held responsible on the basis of reason, and his punishment or reward can be determined accordingly. The Mu'azilah assert that it is impossible for God to command something that is inherently evil or to prohibit something that is intrinsically good, which obviously means that shar' and 'aql are always in agreement with one another.°°

The Mu'tazilah thus maintain that good and evil are inherent in the nature of things and the Qur'an confirms this: for example, God 'permits them the pure things and forbids them [from consuming] what is unclean' (al-A'raf, 7:157).

This implies that things were clean or unclean even before the revelation of the Qur'an, and that they did not acquire these qualities after their permissibility or prohibition. Similarly, when God Most High informed us that wine and gambling were unclean (rijsun) or that adultery was evil (fahishatun), the same qualities were present in them even before the text declared them as such. The Mu'tazilah position here is generally acceded, and so is their view regarding the ability of the human intellect to perceive the good and evil in things. But this is only true, as Ibn Qayyim al-Jawziyya has observed, in a general sense, while the Shar'ah provides the details. Human reason can thus usually perceive the good and evil in things, such as perceiving the beauty of justice, but is unable to determine whether this or that specific act is just or unjust without the aid of shar'. Human reason is thus incapable of providing specific and detailed guidance in all matters. When it is said that human reason can detect good and evil, this does not mean a total and absolute capacity, in the sense that it is liable to err and may be incorrect in its evaluation.

Al-Ghazālī is critical of the Mu'azilah view for its propensity to turn the determination of good and evil into a totally relative proposition. When an act is agreeable to one person and disagreeable to another, it is good from the viewpoint of the former and evil from that of the latter. Such a relativistic and circumstantial approach to good and evil
is totally unacceptable. The Shari'ah does not and cannot operate on this basis. Instead, the Shari'ah evaluates the acts and conduct of the mukallaf on an objective plane regardless of whether they agree or disagree with particular interests. When the Lawgiver commands an act, or when He praises it, it is praiseworthy and good in all cases. Al-Shawkānī is also critical of the Mu'tazili view, and highlights some of its weaknesses by saying that certain areas of human conduct are not amenable to rational evaluation. It is true that 'aql can determine the value, say, of truth and falsehood, as truth is beneficial and lying is harmful. 'Aql can also discern the value of saving the life of a drowning or of a starving man, yet it cannot determine the virtue of fasting on the last day of Ramadān or the enormity of fasting on the day that follows it. The good and evil in this case can only be determined by shar', not by 'aql. Most of the 'ibādāt, including salah and the pilgrimage of hajj, fall into this category. The human intellect may be able to perceive a value in them only because of a benevolence and grace (huff) therein which prevents obscenity and corruption; but 'aql alone is unable to assess the precise value of 'ibādāt.

The Mu'tazili approach to the question of right and wrong embodies a utilitarian approach to jurisprudence in the sense that a good law is that which brings the greatest benefit to the largest number. Right and wrong are evaluated from the viewpoint of the benefit and harm that they entail to the person who acts upon it and to others. Acts that do not relate to this context are simply regarded as of no consequence; they are branded as 'abath, that is, totally 'in vain'.

Thirdly, the Māturidis, namely the followers of Abū Manṣūr al-Māturīdī (d. 333 AH) have suggested a middle course, which is adopted by the Hanafīs and considered to be the most acceptable. According to this view, right and wrong in the conduct of the mukallaf can indeed be ascertained and evaluated by the human intellect. But this does not necessarily mean that the law of God in regard to such conduct is always identical with the dictates of 'aql, for human intellect is liable to err. The knowledge of right and wrong must therefore be based on divine communication. This view basically combines the two foregoing opinions, but tends to lean more toward the Ash'arites in that the responsibility of the mukallaf is to be determined not with reference to the dictates of human reason but on the basis of the law as the Lawgiver has communicated it. 'Aql is capable of discerning good and evil, but this evaluation does not constitute the basis of reward and punishment, which is a matter solely determined by the Lawgiver. Whatever the Lawgiver has commanded is right, and merits
reward, and whatever He has forbidden is wrong and its perpetrator is liable to punishment. This view also agrees with that of the Muʿtazilah to the extent of its recognition that the inherent values of things are discernible by human intellect, which can perceive and detect values in the nature of things. The Māturidis, however, differ with the Muʿtazilah in that they hold that no reward or punishment can be granted on the basis of 'aql alone.\\

III.2 The Subject-Matter of Ḥukm (al-Mahkūm Fih)

Mahkūm fih denotes the acts, rights and obligations of the mukallaf that constitute the subject-matter of a command, prohibition or permissibility. When the ruling of the Lawgiver occurs in the forms of either Ḥājīb or Ṣamāḥ, in either case the individual is required to act in some way. Similarly, when the Ḥukm of the Lawgiver consists of a prohibition (tahrīm) or abomination (karāḥah), it is once again concerned with the conduct of the mukallaf. In sum, all commands and prohibitions are concerned with the acts and conduct of the mukallaf.

When the demand of the Lawgiver occurs in the form of a defining law (al-Ḥukm al-Taklīfī) such as fasting, jihād, the payment of zakāh, etc., the subject-matter of the Ḥukm is the act of the mukallaf. Similarly, when the demand of the Lawgiver occurs in the form of declaratory law (al-Ḥukm al-Wadīʿī), such as ablution (wudūʿ) being a condition of ṣalāh, or sale which is the cause (sabab) of ownership, or killing which is a hindrance (māniʿ) to inheritance, the subject-matter of the Ḥukm in all these consists of the act of the mukallaf. Occasionally, the mahkūm fih does not consist of the conduct of the individual, but even then it is related to it. For example, the arrival of Ramaḍān which is the cause (sabab) of fasting is not an act of the individual, but is related to the latter in the sense that the effect (musabbab) of that cause, namely the fasting, consists of the act of the mukallaf. In order to constitute the subject-matter of a Ḥukm, the following three conditions must apply.

(1) The individual must know the nature of the conduct so that he can perform what is required of him or refrain from that which is forbidden. An ambivalent text or a locution that does not impart this knowledge cannot constitute the basis of either a command or a prohibition. The ambivalent (mujmal) text of the Qurʾān concerning ṣalāh, zakāh and ḥajj, for example, did not obligate anyone until these matters were explained and clarified by the Prophet. The manner in which these obligations were to be discharged was also explained in
precise terms. Furthermore, the ‘ulamā’ are in agreement that the necessary instruction or explanations must not be delayed and must be given in the time when they are needed, otherwise they will fail to provide the basis of obligation (taklīf).

When we say that the individual must know the nature of the act he is required to do, this means that it should be possible for him to obtain such knowledge. Hence when a person is in full possession of his capacities and it is possible for him to learn the law, he is presumed to know his legal obligations. The law is therefore applied to him, and his ignorance of the rules of Shari‘ah is no excuse, for if actual knowledge by the individual were to be a requirement of the law, it would be very difficult to prove such knowledge in all cases of violation. It is therefore sufficient to ensure that the individual can acquire knowledge of the Shari‘ah either directly or by asking those who have such knowledge.

(2) The act that the individual is required to do must be within his capability, or, in the case of a prohibition, be within his capability to avoid. No law may thus demand something that is beyond the capacity of the individual. The principle here is clearly stated in the Qur‘ān, which declares that ‘God does not obligate a living soul beyond the limits of his capacity’ (al-Baqarah, 2:286)

لا يكلف الله نفسه إلا وسعها

and that ‘God puts no burden on any person beyond what He has given him’ (al-Talaq, 65:7).

لا يكلف الله نفسه إلا ما آتاها

An act may be conceptually unfeasible, such as asking a person to be awake and asleep at the same time, or asking him to do and not to do something simultaneously. Likewise, an act may be physically impossible, such as ordering a person to fly without the necessary means. No one may be required to do the impossible, and it makes no difference whether the act is impossible by its nature or whether it is beyond the capacity of the individual in view of his particular conditions.®

A corollary of this rule is that no person may be obligated to act on behalf of another person or to stop another competent individual from acting, for this would be tantamount to asking a person to do the impossible. No one may therefore be legally obligated to pay the zakāh on behalf of his brother, or to perform the salah on behalf of
his father, or to prevent his neighbour from committing theft. All that one mukallaf may be lawfully expected to do in such situations is to give good advice (nasihah) as part of his general duty to promote good and to prevent evil to the extent that this is possible for him as a law-abiding citizen.

Similarly, no-one may be obligated to do or not to do something in regard to which he has no choice, such as asking someone to act against his natural and biological functions. Thus when we read in the hadith a command asking the Muslims to ‘avoid anger [lā taghdāb]’, although the manifest (zāhir) terms of this hadith demands avoidance of a natural phenomenon, what it really means is that the adverse consequences of uncontrolled anger which might lead to taking the law into one’s own hands must be avoided. To give another example, the Qur’ān orders the believers ‘not to despair over matters that have passed you by, nor to exult over the favours that are bestowed upon you’ (al-Hadid, 57:23).

Pleasure and despair are natural phenomena, and as such they are basically beyond the individual’s control. What is really meant here is that one should avoid the consequences of despair such as violence against oneself or another person, and ensure that joy and happiness do not lead to arrogance and contemptuous behaviour. There is, of course, some hardship involved in all obligations. The kind of hardship that people can tolerate without prejudice or injury is not the aim. It is intolerable hardship that the Shari‘ah does not impose. The Shari‘ah, for instance, forbids continuous fasting (sa‘um al-wişāl), or staying up all night for worship. Furthermore, the Shari‘ah has granted certain concessions with a view to preventing hardship to individuals, and it is strongly recommended that they be utilised. This is the purport of the reminder contained in the hadith that ‘God loves to see that His concessions are taken advantage of, just as He hates to see the commission of a sin.’

In another hadith we read an address to the believers, where they are asked to ‘fulfil your duties to the extent of your ability’.
which obviously means that legal obligations are only operative within the limits of one's capacity.

A *hukm shar'i* may sometimes impose unusual hardship on the individual, such as the fulfilment of certain collective obligations like *jihād* (holy struggle) and *hisbah*, that is, the promotion of good and prevention of evil, under adverse conditions. *Jihād*, which requires the sacrifice of one's life, is undoubtedly onerous in the extreme, but it is deemed necessary and warranted in view of the values that are upheld and defended thereby.

(3) Lastly, the demand to act or not to act must originate in an authoritative source that can command the obedience of the *mukallaf*. This would mean that the *hukm* must emanate from God or His Messenger. It is mainly due to this requirement that the proof or evidence in which the law is founded must be identified and explained. Consequently, we find that in their juristic expositions, the *fuqahā'* normally explain the evidential basis (*hujiyyah*) of the rules of *Sharī'ah* that they expound, especially rules which are aimed at regulating the conduct of the *mukallaf*.

The next topic that needs to be discussed under the subject-matter of *hukm* is the division of rights into the two categories of *haqq Allāh* and *haqq al-'abd*.

The acts of the *mukallaf* may consist of either a right of God (*haqq Allāh*) or a right of man (*haqq al-'abd*), or of a combination of both. The right of God is called so not because it is of any benefit to God, but because it is beneficial to the community at large and not merely to a particular individual. It is, in other words, a public right and differs from the right of man, or private right, in that its enforcement is a duty of the state. The enforcement of a private right, on the other hand, is up to the person whose right has been infringed, and who may or may not wish to demand its enforcement. The 'ulamā' have further classified these rights into four main categories, which are as follows.

Firstly, acts that exclusively consist of the right of God, such as acts of devotion and worship, including *salāh* and *jihād*, which are the pillars of religion and are necessary for the establishment of an Islamic order. These, which are often referred to as *huqūq Allāh al-khālīsah*, or 'pure Rights of God', occur in eight varieties:

(a) Rights of God which consist exclusively of worship, such as professing the faith (imān), *salāh*, *zakāh*, the pilgrimage and *jihād*.

(b) Rights which consist of both worship and financial liability (*ma'ūnāh*), such as charity given on the occasion of 'īd al-fitr, marking the end of Ramaḍān.
Rights in which financial liability is greater than worship, like the tithe that is levied on agricultural crops.

Rights of God which consist of financial liability but have a propensity toward punishment, such as the imposition of kharāj tax on land in the conquered territories.

Rights which consist of punishment only, like the hudūd, that is, the prescribed penalties for theft and adultery, and so forth.

Rights which consist of minor punishment ('uqūbah qāširah), such as excluding the murderer from the inheritance of his victim. This is called 'uqūbah qāširah on account of the fact that it inflicts only a financial loss.

Punishments which lean toward worship', such as the penances (kaffārāt).

Exclusive rights, in the sense that they consist of rights alone and are not necessarily addressed to the mukallaf, such as the community right to mineral wealth or to the spoils of war (ghanā'īm).

Secondly, acts that exclusively consist of the rights of men, such as the right to enforce a contract, or the right to compensation for loss, the purchaser's right to own the object he has purchased, the vendor's right to own the price paid to him, the right of pre-emption (shuf') and so on. To enforce such rights is entirely at the disposal of the individual concerned; he may demand them or waive them, even without any consideration.

Thirdly, acts in which the rights of the community and those of individuals are combined, while of the two the former preponderate. The right to punish a slanderer (qādhif) belongs, according to the Ḥanafīs, to this class by reason of the attack made on the honour of one of its members. Since the right of God is dominant in qadhf, the victim of this offence (i.e. the maqādhif) cannot exonerate the offender from punishment. The Shāfī'īs have, however, held the contrary view by saying that qadhf is an exclusive right of man and that the person so defamed is entitled to exonerate the defamer. All acts that aim to protect human life, intellect and property fall into this category. To implement consultation (shūrā) in public affairs is one example, or the right of the individual in respect of bay'ah in electing the head of state. According to the Mālikī jurist al-Qarāfī, all rights in Islam partake of the right of God in the exclusive sense that there is no right whatsoever without the haqq Allāh constituting a part thereof. Thus when a person buys a house, he exercises his private right in so far as it benefits him, but the transaction partakes of the right of God in so far as the buyer is liable to pay the purchase price. The basic criterion of
The distinction between the right of God and the right of man is whether it can be exempted by the individual or not. Thus the vendor is able to exonerate the purchaser from paying the price, and a wife is able to exonerate her husband from paying her a dower (mahr), but the individual cannot exonerate anyone from obligatory prayers, or from the payment of zakah.\(^7\)

Fourthly, there are matters in which public and private rights are combined but where the latter preponderate. Retaliation (qisas) and blood-money (diyāh) of any kind, whether for life or for grievous injury, fall into this category of rights. The community is entitled to punish such violations, but the right of the heirs in retaliation and in diyāh for erroneous killing, and the right of the victim in respect of diyāh for injuries, is preponderant in view of the grievance and loss that they suffer as a result. The guardian (wali) of the deceased, in the case of qisas, is entitled to pardon the offender or to accept compensation from him. But the state, which represents the community, is still entitled to punish the offender through a ta'zir punishment even if he is pardoned by the relatives of the deceased.\(^7\)

III.3 Legal Capacity (Ahliyyah)

Being the last of the three pillars (arkan) of hukm shar'ī this section is exclusively concerned with the legal capacity of the mahkūm 'alāyih, that is, the person to whom the hukm is addressed, and it looks into the question of whether he is capable of understanding the demand that is addressed to him and whether he comprehends the grounds of his responsibility (taklīf). Since the possession of the mental faculty of 'aql is the basic criterion of taklīf, the law concerns itself with the circumstances that affect the sanity and capacity of the individual, such as minority, insanity, duress, intoxication, interdiction (hajr) and mistake.

Legal capacity is primarily divided into two types: the capacity to receive rights and obligations, referred to as ahliyyah al-wu'ūjūb, and the capacity for the active exercise of rights and obligations, which is referred to as ahliyyah al-adā'. The former may be described as 'receptive legal capacity', and the latter as 'active legal capacity'.\(^7\)

Every person is endowed with legal capacity of one kind or another. Receptive legal capacity is the ability of the individual to receive rights and obligations on a limited scale, whereas active legal capacity enables him to fulfil rights and discharge obligations, to effect valid acts and transactions and to bear full responsibility towards God and his
fellow human beings. The criterion of the existence of receptive legal capacity is life itself, whereas the criterion of active legal capacity is maturity of intellect. Receptive legal capacity is vested in every human being, competent or otherwise: an insane person, a foetus in the womb, a minor and a foolish person (safith), whether in good health or in illness — all possess legal capacity by virtue of their dignity as human beings.\

Active legal capacity is only acquired upon attaining a certain level of intellectual maturity and competence. Only a person who understands his acts and his words is competent to conclude a contract, discharge an obligation, or be punished for violating the law. Active legal capacity, which is the basis of responsibility (taklif) is founded on the capacity of the mind to understand and to discern. But since intelligence and discernment are hidden qualities that are not readily apparent to the senses, the law has linked personal responsibility with the attainment of the age of majority (bulūgh), which is an obvious phenomenon and can be established by factual evidence. However, it is the intellectual faculty of the individual rather than age as such which determines his legal capacity. This is why an adult who is insane, or an adult of any age who is asleep, is not held responsible for his conduct. The principle here is clearly stated in the hadith stating that: ‘The pen is lifted from three persons: the one who is asleep until he wakes; the child until he attains puberty; and the insane person until he regains sanity.’

Receptive legal capacity may either be ‘deficient’ or ‘complete’. The receptive legal capacity of a child in the womb is incomplete in the sense that it can only receive certain rights, such as inheritance and bequest, but cannot bear any obligation toward others. Receptive legal capacity is complete when a person can both have rights and bear obligations. This type of legal capacity is acquired by every human being as of the moment of birth. During its infancy and later stages of childhood, a child is capable of discharging, albeit through his guardian, certain obligations in respect, for example, of maintenance, liability for loss (damān) and payment for services rendered to him.

As for the active legal capacity, three possible situations are envisaged. First, a person may be totally lacking in active legal capacity, as in the
case of a child during infancy or an insane person of any age. Since neither is endowed with the faculty of intellect, no legal consequences accrue from their words and acts. When a child or a madman kills someone or destroys the property of another person, they can only be held liable with reference to their property, but not to their persons. They cannot be subjected, for example, to retaliation or to any other type of punishment.

Secondly, a person may be partially lacking in active legal capacity. Thus a discerning child (al-ṣābiʿ al-mumayyīz), that is, a child between seven and fifteen years of age, or a mentally disabled person (maʿīth) who is neither insane nor totally lacking in intellect but whose intellect is defective and weak, possess a legal capacity that is deficient. Both possess an active legal capacity which is incomplete and partial.²⁵ The discerning child and the mentally disabled person are capable only of concluding acts and transactions that are totally to their benefit, such as accepting a gift or charity, even without the permission of their guardians. But if the transaction in question is totally disadvantageous to them, such as giving a gift or making a will, or pronouncing a divorce, these are not valid at all even if their guardians happen to approve of them. As for transactions which partake of both benefit and loss, they are valid but only with the permission of the guardian (wali), otherwise they are null and void.

Thirdly, active legal capacity is complete upon the attainment of intellectual maturity. Hence every major person who has acquired this ability is presumed to possess active legal capacity unless there is evidence to show that he or she is deficient of intellect or insane.

Persons who are fully competent may sometimes be put under interdiction (hajr) with a view to protecting the rights of others. A person may be interdicted by means of a judicial order which might restrict his powers to conclude certain transactions. A debtor may thus be interdicted so that the rights of his creditors may be protected.

A person in his death-illness (marāḍ al-mawt) is also deficient of legal capacity, as severe illness and fear of imminent death affect the physical and mental faculties of the individual. But ordinary illness and other conditions that do not impair the intellectual capacity of a person have no bearing on his active legal capacity. This is partly why Imam Abū Ḥanīfah has differed with the majority of jurists by holding the view that foolishness (safāḥah), indebtedness and carelessness (ghaflah) do not affect the active legal capacity of a person. Abū Ḥanīfah refuses to accept these as proper grounds of interdiction, as in his view the benefit of interdiction in these cases is far outweighed by its possible harm.
NOTES

1. Ghazâlî, Mustasfâ, I, 41; Shawkâni, Ishâd, p. 6; Khallâf, 'Ilm, p. 100.
2. Muslim, Sahih, p. 16; hadith no. 34.
4. Khallâf, 'Ilm, p. 100; Khudârî, Usûl, p. 18; Abû 'Id, Mabâhîth, p. 58.
7. Abû 'Id, Mabâhîth, p. 63; Qâsim, Usûl, p. 216; Abdur Rahîm, Jurisprudence, p. 197.
8. Abû Zahrah, Usûl, pp. 23–4; Abû 'Id, Mabâhîth, p. 63.
9. Ghazâlî, Mustasfâ, I, 42.
10. Khallâf, 'Ilm, p. 109; Qâsim, Usûl, p. 208; Abû 'Id, Mabâhîth, p. 69.

11. The Mu‘tazilah have held the view that a flexibility of this kind negates the whole concept of wâjib, as in their view wâjib precludes the element of choice altogether. But the majority of ‘ulamâ‘ refute this by saying that there is no necessary contradiction in dividing the wâjib into wâjib muwaqfat and wâjib mu‘laq. For details see Ghazâlî, Mustasfâ, I, 43–4.

14. Ghazâlî, Mustasfâ, I, 47.
17. Ghazâlî, Mustasfâ, I, 42.
18. Ghazâlî, Mustasfâ, I, 42; Khallâf, 'Ilm, p. 112; Abdur Rahîm, Jurisprudence, p. 197.
19. Abû 'Id, Mabâhîth, p. 71; Khudârî, Usûl, p. 46.
20. Tabrîzî, Mishkât, I, 168; hadith no. 540.
21. Ghazâlî, Mustasfâ, I, 48; Abû 'Id, Mabâhîth, pp. 72–4; Qâsim, Usûl, p. 322.
22. Qâsim, Usûl, p. 225; Badrân, Usûl, p. 274; Abû 'Ubayd, Mabâhîth, p. 82.
23. Muslim, Sahih, p. 473; hadith no. 1775.
25. Khallâf, 'Ilm, p. 113; Abû Zahrah, Usûl, p. 34; Abû 'Id, Mabâhîth, pp. 70ff.
27. Abû Zahrah, Usûl, p. 34.
28. Badrân, Usûl, p. 274; Abû 'Ubayd, Mabâhîth, p. 82; Abû Zahrah, Usûl, p. 36.
29. Tabrîzî, Mishkât, I, 330, hadith no. 1047.
30. Ibid., II, 978, hadith no. 3280; Abû 'Id, Mabâhîth, p. 80.
31. Tabrîzî, Mishkât, II, 845, hadith no. 2773.
32. Qâsim, Usûl, p. 225.
33. Abû Dâwûd, Sunan, III, 1133, hadith no. 4046.
34. Ibid., II, 556, hadith no. 2075.
35. Abû 'Id, Mabâhîth, pp. 80–2; Khallâf, 'Ilm, p. 116; Aghnîdes, Muhammadan Theories, p. 89.
37. Abû 'Id, Mabâhîth, pp. 84–8.
38. Ghazâlî, Mustasfâ, I, 42.
40. Abū Dāwūd, Sunan, II, 557, hadith no. 2078.
41. Abū Dāwūd, Sunan, II, 808, hadith no. 2864.
42. Shāfi‘ī, Risalah, p. 80; I. Mājah, Sunan, II, 913, hadith no. 2735.
43. Khallāf, ‘Ilm, p. 102; Abū ʿId, Mabāḥith, p. 60.
44. Abdur Rahim, Jurisprudence, p. 62.
46. Qāsim, Usūl, p. 228; Abū ʿId, Mabāḥith, p. 105.
47. Shawkānī, Irshād, p. 6; Khallāf, ‘Ilm, p. 118; Abū ʿId, Mabāḥith, p. 92.
49. Khallāf, ‘Ilm, p. 120; Abū ʿId, Mabāḥith, p. 101.
50. Aghnides, Muhammedan Theories, pp. 85ff; Abū ʿId, Mabāḥith, p. 104.
52. Abū Zahrah, Usūl, p. 50; Abū ʿId, Mabāḥith, pp. 106–12.
53. Abū Zahrah, Usūl, pp. 51–2; Abū ʿId, Mabāḥith, pp. 103–4; Qāsim, Usūl, pp. 236–8.
54. Ghazālī, Mustaṣfā, I, 53; Abū Zahrah, Usūl, p. 54.
56. Ghazālī, Mustaṣfā, I, 36; Khallāf, ‘Ilm, p. 98; Abū ʿId, Mabāḥith, p. 121.
58. Shawkānī, Irshād, p. 7.
59. Ghazālī, Mustaṣfā, I, 36.
62. Knowledge in this context means understanding the nature of a command or a prohibition by the individual to the extent that he can act upon it. It does not mean affirmation of the mind (taṣdīq), for if this were to be a requirement, the unbelievers would have been excluded from the meaning of mukallaf, which they are not. See Shawkānī, Irshād, p. 11.
64. Ibn Ḥanbal, Musnad, II, 108.
65. Muslim, Sahih, p. 104, hadith no. 378.
66. Cf. Abū ʿId, Mabāḥith, p. 139.
68. Khallāf, ‘Ilm, p. 128; Abū ʿId, Mabāḥith, p. 128.
70. Ibid., p. 181.
71. Abū Zahrah, Usūl, p. 257; Abū ʿId, Mabāḥith, p. 145.
74. Tabrizī, Mishkāt, II, 980, hadith no. 3287.
75. An idiot (maʿtīh) is a person who is markedly defective of understanding. A foolish and reckless person (ṣaḥīḥ) is also regarded as being of defective legal capacity to a lesser degree than the maʿtīh. Cf. Abdur Rahim, Jurisprudence, p. 240.
CHAPTER EIGHTEEN

Conflict of Evidences

Conflict (taʿārdud) occurs when each of two evidences of equal strength requires the opposite of the other. This means that if one of them affirms something, the other negates it at the same time and place. A conflict is thus not expected to arise between two evidences of unequal strength as, in this case, the stronger of the two evidences will naturally prevail. Thus a genuine conflict cannot arise between a definitive (qaṭī) and a speculative (zanni) evidence, nor could there be a conflict between the nass and ijmaʿ, or between ijmaʿ and qiyas, as some of these are stronger than others and will prevail over them. A conflict may, however, be encountered between two texts of the Qurʾān, or between two rulings of hadith, or between a Qurʾānic āyah and a mutawātir hadith, or between two non-mutawātir hadith, or between two rulings of qiyāṣ. When there is a conflict between two Qurʾānic āyāt, or between one hadith and a pair of hadith, or between one qiyāṣ and a pair of analogies, it is a case of conflict between equals, because strength does not consist in number, and consequently a single āyah, hadith or qiyāṣ is not necessarily set aside to make room for the pair. The strength of two conflicting evidences is determined by reference to the evidence itself or to the extraneous/additional factors that might tip the balance in favour of the one over the other. For example, of the two conflicting solitary or aḥād hadith, the one that is narrated by a faqih is considered to be stronger than that which is narrated by a non-faqih.

Conflicts can only arise between two evidences that cannot be reconciled, in the sense that the subject-matter of one cannot be distinguished from the other, nor can they be so distinguished in respect
of the time of their application. There are, for example, three different rulings in the Qur'an on wine-drinking, but since they were each revealed one after the other, and not simultaneously, there is consequently no case of conflict between them. Similarly, if investigation reveals that each of two apparently conflicting rules can be applied to the same issue under a different set of circumstances, then once again there will be no conflict.

A genuine conflict can arise between two speculative (zanni) evidences, but not between definitive (qaf'i) proofs. In this way, all cases of conflict between the definitive rulings of the Qur'an and Sunnah are deemed to be instances of apparent, not genuine, conflict. Furthermore, the 'ulama' have maintained the view that a genuine conflict between two āyāt or two aḥādīth, or between an āyah and a hadīth, does not arise; whenever a conflict is observed between these proofs, it is deemed to be only apparent and lacking in reality and substance. For the all-pervasive wisdom of the Lawgiver cannot countenance the enactment of contradictory laws. It is the mujtahid who is deemed unable to envision the purpose and intention of the Lawgiver in its entirety, and who may therefore find cases of apparent conflict in the divinely-revealed law. Only in cases of evident abrogation (naskh), which are largely identified and determined by the Prophet himself, could it be said that a genuine conflict had existed between the rulings of divine revelation. When there is a case of apparent conflict between the rulings of the nusūs, one must try to discover the objective of the Lawgiver and remove the conflict in the light of that objective. Indeed, the rules of reconciliation and preference proceed on the assumption that no genuine conflict can exist in the divine laws; hence it becomes necessary to reconcile them or to prefer one over the other. This would mean that either both or at least one of the evidences at issue can be retained and implemented. The mujtahid must therefore try to reconcile them as far as possible, but if he reaches the conclusion that they cannot be reconciled, then he must attempt to prefer one over the other. If the attempt at reconciliation and preference fails, then one must ascertain whether recourse can be had to abrogation, which should be considered as the last resort. But when abrogation also fails to offer a way out of the problem, then action must be suspended altogether and both of the conflicting texts are abandoned.

A case of conflict between the nusūs and ijma, or between two rulings of the latter, is inconceivable for the obvious reason that no ijma can be concluded if it is contrary to the Qur'an and Sunnah in the first place. Should a conflict arise between two analogies or proofs
other than the *nusūṣ* and *ijmā‘*, and neither can be given preference over the other and they cannot be reconciled, both must be suspended. Abrogation in this case does not offer an alternative course of action. For abrogation is basically confined to the definitive rulings of the Qur‘ān and Sunnah; it is irrelevant to *ijmā‘* and can be of little help in cases of conflict between speculative evidences.

Among the many instances of abrogation that the *'ulamā‘* have identified in the Qur‘ān, we may refer to only two; but in both cases a closer analysis will show that the conflict at issue is not genuine. Our first illustration is concerned with the precise duration of the waiting period (*'iddah*) of widows. According to one of the two *āyāt* on this subject (al-Baqarah, 2:234), the widow must observe a *'iddah* of four months and ten days following the death of her husband. This *āyah* consists of a general provision that applies to every widow regardless of whether she is pregnant or not at the time her husband dies. But elsewhere in the Qur‘ān, there is another ruling concerning the *'iddah* of pregnant women. This *āyah* (al-Ṭalāq, 65:4) also conveys a general ruling to the effect that the *'iddah* of pregnant women continues until the delivery of the child. This ruling also applies to a pregnant widow, who must wait until the termination of her pregnancy. Thus a pregnant woman whose husband dies and who gives birth to a child on the same day would have completed her *'iddah* according to the second of the two rulings, whereas she must, under the first ruling, still wait for four months and ten days. The two texts thus appear to be in conflict regarding the *'iddah* of a pregnant widow.

For a second illustration of an apparent conflict in the Qur‘ān, we refer to the two texts concerning the validity of making a bequest to one’s relatives. This is explicitly permitted in sura al-Baqarah (2:180) which provides: ‘It is prescribed, when death approaches any of you, if he leaves any assets, that he makes a bequest to his parents and relatives.’

This ruling is deemed to have been abrogated by another text (al-Nisā‘, 4:11) which prescribes for each of the close relatives a share in inheritance. This share is obviously determined, not by the will of the testator, but by the will of God. The two texts thus appear to be in conflict, but the conflict is not genuine as they can be reconciled, and both can be implemented under different circumstances. The first of
the two rulings may, for example, be reserved for a situation where
the parents of the testator are barred from inheritance by a disability
such as difference of religion. Since the parents in this case would be
excluded from the scope of the second āyāh, the conflict would conse-
quently not arise and there would be no case for abrogation. The same
approach can be taken regarding the foregoing āyāt on the waiting
period of widows. Whereas the first of the two texts prescribed the
‘iddah of widows to be four months and ten days, the second enacted
the ‘iddah of pregnant women until the termination of pregnancy. The
two texts could be reconciled if widows were to observe whichever of
the two periods were the longer. If the pregnant widow delivers her
child before the expiry of four months and ten days following the death
of her husband, then she should wait until this period expires. But if
she waits four months and ten days and has still not delivered the child,
then her ‘iddah should continue until the birth of the child. Thus the
apparent conflict between the āyāt under discussion is removed by
recourse to specification (takhṣīs): the second āyāh in this case specifies
the general ruling of the first insofar as it concerns pregnant widows.⁴

The majority of madhāhib, excluding the Hanafis, thus apply a four-
tiered procedure that begins with reconciliation and harmonising (al-
jamʿ waʾl-taufiq), whereby both evidences are reconciled and retained.
The process that is applied here is known as differentiation (al-tanwīr)
and it means reconciling the general with the specific, the absolute
with the qualified, and the literal with the metaphorical; or applying
methods of interpretation in such a way that each is applied in its
respective capacity and scope without any attempt to overrule either.
If reconciliation proves to be unfeasible, then recourse will be had to
preference (al-tarjih), in which case, as already indicated, only one of
the two evidences is retained in preference to the other. Tarjih may
also be based on the value that is conveyed by one or the other of
the evidences. In this way prohibition is preferred to permissibility
and the affirmative is preferred to the negative (or vice versa, according
to some ‘ulamāʾ). Tarjih may also be based on extraneous evidence,
such as support that may be obtained for one of the evidences from
another source such as the Qurʾān or ijmaʾ. The third step is to resort
to abrogation (naskh) when tarjih proves unfeasible. Naskh can only
apply when the conflicting evidences are equal in all respects, in
which case the latest in time abrogates the earlier. And lastly, when all
three steps prove unfeasible, recourse may be had to suspension of
both evidences (taṣāquṭ al-dalilayn), which means that no action is
taken on either.
The Hanafis differ with the majority only on the order in which the four steps are taken. The Hanafi order thus begins with naskh, which is followed by reconciliation, then tarjih, and lastly suspension of both evidences (although some Hanafis resort to tarjih before reconciliation). Two of these steps, namely reconciliation and preference, will be explained in further detail below.

To reconcile two evidences, both of which are general (‘āmm), one may distinguish the scope and subject-matter of their application from one another by recourse to allegorical interpretation (ta’wil). Supposing there were two conflicting orders on salah, one providing that ‘salah is obligatory on my ummah’ and the other that ‘salah is not obligatory on my ummah’, to reconcile these two, one may assume the first to have contemplated the adult and competent members of the community and the second the minors and lunatics. If this is not possible, then the two rulings may be distinguished in regard to the times of their respective application, or they might be assumed to have each envisaged a different set of circumstances. It is possible that one or both of the two rulings are in the nature of a manifest (zāhir) provision and may thus be open to ta’wil. The zāhir may be given an interpretation other than that of its obvious meaning so as to avoid a clash. This may be illustrated by the two apparently conflicting hadith on the subject of testimony. In the first of the two reports, the Prophet is quoted to have addressed an audience as follows: ‘Should I inform you who makes the best of witnesses?’ To this, the audience responded, ‘Yes, O Messenger of God’, and the Prophet said, ‘It is one who gives testimony before he is requested to do so.’

ألا أخبركم بخير الشهد؟ قالوا بل يأ رسول الله قال:

الذي يأتي بشهادته قبل أن يسأله.

However, according to another hadith, the Prophet said: ‘The best generation is the one in which I live, then the generation after that and then the next one, but after that there will be people who will give testimony although they are not invited to give it.’

خير القرنين ثم الذين يلونهم ثم الذين يلونهم، ثم إن بعدهم قوما يشهدون ولا يستشهدون.

Thus the first hadith recommends something that the second seems to
discourage. The best form of testimony in the first hadith is unsolicited testimony, whereas this is frowned upon in the second. Since neither of the two hadith have specified a particular context, it is suggested by way of ta'wil that the first hadith contemplates the rights of God (huqūq Allāh) whereas the second hadith contemplates the rights of men (huqūq al-‘ibād). In this way, the apparent conflict between the two texts is removed through an allegorical interpretation.

Allegorical interpretations may offer a solution even in cases where two conflicting orders are both specific (khāṣṣ). Recourse to ta'wil in this case would once again serve the purpose of distinguishing the subject-matter and scope of each of the two conflicting orders. For example, if Ahmad issues two orders to his employee, one of which tells the latter to ‘pay 1,000 dinars to Zayd’ and the other says ‘do not pay 1,000 dinars to Zayd’, then if circumstances would so permit, the first order may be assumed to have contemplated normal relations between Zayd and Ahmad while the second had envisaged a hostile situation between the two parties.

In the event where one of the two conflicting rulings is general (‘āmm) and the other specific (khāṣṣ), they can be reconciled by excepting the latter from the scope of the former through a procedure which is known as takhṣīs al-‘Amm, that is, ‘specifying a part of the general’. This would once again mean that each of the two rulings applied separately from one another to a different subject-matter, and both can remain operative. Similarly, a text may be absolute in its wording and appear to be in conflict with another text. They could be reconciled and the conflict between them removed if one of them is so interpreted as to limit and qualify the absolute terms of the other. Examples to illustrate these and other methods of interpretation can be found in the separate chapter of this work devoted to the rules of interpretation.

Should the attempt at reconciliation fail, the next step in resolving a conflict, as stated above, is to give preference to one over the other. Investigation may reveal that one of the two texts is supported by stronger evidence, in which case we are basically dealing with two texts of unequal strength. To prefer the one over the other in this case may even amount to a form of clarification or explanation of one by the other. Inequality in strength may be in content (matn) or in proof of authenticity (riwāyah). The former is concerned with the clarity or otherwise of the language of the text, and the latter with the historical reliability of the transmitters. Preference on the basis of content would require that the literal is preferred to the metaphorical,
the clear (ṣarih) to the implicit (kināyah), the explicit meaning (ʿibārah al-nass) to the allusive meaning (ishārah al-nass), and the latter is preferred to the inferred meaning of the text (dalalah al-nass). Similarly, words that convey greater clarity are to be preferred to those that are less clear. Thus the muḥkam (perspicuous) will be preferred to the muṭfassār (unequivocal), the latter to the nass (explicit) and the nass to the zāhir (manifest). Among unclear words, the khāfī (obscure) takes priority over the mushkiṣ (difficult), the latter over the mujmal (ambivalent) and the mujmal over the mutashābih (intricate), in an order of priority which again has been stated elsewhere under the rules of interpretation.

Inequality in respect of transmission is mainly concerned with the hadith: when, for example, the mutawātīr is compared to the mashhīr, the former is preferred to the latter. Similarly the mashhir takes priority over the solitary (āḥād) hadith, and the report of a transmitter who is a faqīh is preferred to the report of a transmitter who is not. Reports by persons who are known to be retentive of memory take priority over those transmitted by persons whose retentiveness is uncertain. On a similar note, hadith that are transmitted by leading Companions are given preference to those transmitted by Companions who are less well known for their prominence and continuity of contact with the Prophet. Similarly, a hadith that is reported by a large number of reporters is preferred to one reported by a smaller number; and one reported by an upright person among the Sunnīs is preferred to one reported by a follower of a heterodox sect. And then, a report by one who embraced Islam earlier is preferred to one compiled by a late-comer to the faith. A hadith transmitted by an adult who also received it while an adult, is preferred to one that was received during childhood. Any element of doubt, for instance concerning the name and identity of a reporter, his retentiveness of memory and whether he delivered the hadith during full or impaired mental capacity, will be counted among the factors that determine the strength of a hadith. The Mālikīs on the other hand prefer a hadith that is in agreement with the practice of the people of Medina over one that is not. Similarly, the report of a transmitter who is directly involved in an incident is preferable to other reports. Thus the hadith that is reported by the Prophet’s wife Maymūnah to the effect that the Prophet married her while both of them were hālāl, that is, outside the sacred state of ihrām for the hajj ceremonies, is preferred to that of Ibn ʿAbbās to the effect that the Prophet married Maymūnah while he was in the sacred state of ihrām. In this way, a hadith that is supported by a more reliable
chain of transmission is preferred to a hadith that is weak in its proof of authenticity.

At times the mujtahid may be confronted with a situation where each of the two conflicting hadith is stronger in respect of some of these factors but weaker in regard to others, in which case it is for the mujtahid to assess and determine the overall strength or weakness of the hadith according to his own ijtihād.

The 'ulama' of hadith are in agreement that a hadith reported by all the six imams of hadith, namely al-Bukhārī, Muslim, Abū Dawūd, al-Nasā’ī, al-Tirmidhī and Ibn Mājah, takes priority over that which might have been reported by only some and not all of these authorities. Among hadith that are not reported by all the six authorities, those that are reported by the first two are preferred, and if one of the two conflicting hadith is reported by al-Bukhārī and the other by Muslim, the former is preferred to the latter. A hadith with a shorter chain of transmitters is preferred to one with a longer chain of isnād. This is because the one with the fewer number of transmitters is closer to its source and more reliable. Similarly, reports of a transmitter who knows Arabic well is preferable to those whose transmitter has poor knowledge of Arabic. And then, a report by a transmitter who is not involved in sectarian disputes is preferred to the one who is. The ‘ulama’ of hadith also consider a hadith that was pronounced in Medina preferable to the ones that were pronounced in Mecca. Also a report that conveys its purpose directly is preferred to one that is indirect. An eloquent and well-constructed report is preferred to one which is poorly structured; this is because the prophetic language is distinguished for its clarity and eloquence.11

Another rule of preference, as noted above, is that affirmative evidence takes priority over negative. This is because affirmation is more indicative of superior knowledge. This may be illustrated by the two rulings of hadith concerning the right of a slave-woman to a divorce upon her release from slavery. It is reported that a slave woman by the name of Barirah was owned by ‘A’ishah and was married to another slave, Mughith. ‘A’ishah set her free, and she wanted to be separated from Mughith, who was still a slave. The case was brought to the attention of the Prophet, who gave Barirah the choice either to remain married to Mughith or be separated. But a second report on the same subject informs us that Barirah’s husband was a free man when she was emancipated. The two reports are thus conflicting with regard to the status of the husband. But since it is known for certain that Mughith was originally a slave, and there is no dispute about this,
the report that negates this original state is therefore ignored in view of the general rule that affirmative evidence, that is, evidence which affirms continuation of the original state takes priority over that which negates it. The jurists have consequently held that when a slave woman is set free while married to a slave, she will have the choice of repudiating or retaining the marriage. If the husband is a free man, she will have no such choice according to Mālik, Shāfi‘ī and the majority of scholars. Abū Ḥanīfah, however, maintains that she will have the option even when her husband is a free man.12

Among two conflicting hadith, the one that explains its own effective cause (‘illah) or occasion for its ruling is preferred to the one that may contain the same ruling but is silent as to its ‘illah. A hadith is likewise preferred if it contains additional elements to the one that does not. This is because including additional information implies superior knowledge. The addition may be in respect of words or the actual ruling. Thus the hadith which tells us that the Prophet performed the ‘id prayer with seven takbir (that is, saying ‘Allāhu akbar’) is preferred to the one telling us that that he uttered only four takbir. In regard to penalties, a hadith that omits a punishment is to be preferred to the one that imposes one. This is in order to comply with the Qur’ānic declaration that ‘God does not intend to impose hardship upon people’ (al-Baqarah, 2:185).

This position resembles another rule of preference, which is that a hadith which affirms the original principles of non-liability (al-barā‘ah al-asliyyah) is preferred to the one that negates it. Note, for example, the conflict between the two hadith, one of which declares: ‘Whoever touches his sexual organ must refresh his ablution’

من مسّ ذكره فليتوضأ.

and the other in which the Prophet is reported to have said concerning the same that ‘it is only a part of your body’

إن هو إلا بضعة منك.

The latter hadith is preferred as it confirms original non-liability. Moreover, a hadith that is followed by the ‘ulama’ of Medina or the four leading Imams is preferred to one that has not commanded such following.13
Another rule of preference, as already indicated, is that prohibition
takes priority over permissibility. Thus if there are two conflicting
rules of equal strength on the same issue, one prohibitory and the
other permissive, the former will take priority over the latter. Having
said this, however, it is possible that the mujtahid may depart from
this rule and instead apply that which brings ease in preference to the
one that entails hardship. If the attempt at reconciling two conflicting
texts, or at preferring one over the other, have both failed, recourse may be had to abrogation.
This will necessitate an enquiry into the occasions of revelation (ashbāh
al-nuzūl), the relevant materials in the Sunnah, and the chronological
order between the two texts. If this also proves unfeasible, then action
must be suspended on both and the mujtahid may resort to inferior
evidences in order to determine the ruling on the issue. Thus if the
conflict happens to be between two rulings of the Qur'ān, he may
depart from both and determine the matter with reference to the
Sunnah. Should there be a conflict between two rulings of the Sunnah,
then the mujtahid may refer, in descending order, to the fatwā of Com-
panions, and failing that, the issue may be determined on grounds of
qiyyās. However, if the mujtahid fails to find a ruling in any of the lower
categories of proofs, then he may resort to the general norms of Sharī'ah
that may be applicable to the case. These may be illustrated in the fol-
lowing example. A conflict is encountered between the two rulings of
Qur'ān concerning the recitation of the portions of the Qur'ān in con-
gregational prayer. The question that needs to be answered is whether
in a congregational salah, the congregation member, that is the muqtadi,
is required to recite the sūra al-Fāṭihah after the imam, or whether he
should remain silent. Two conflicting answers can be derived for this
question from the Qur'ān. The first of the two āyāt under discussion
provides: ‘And when the Qur'ān is being read, listen to it attentively
and pay heed, so that you may receive mercy’ (al-A‘rāf, 7: 204).

وإذا قرئ القرآن فاستمعوا له وأنصتوا لعلكم ترحمون

It would appear that the muqtadi according to this āyah, should remain
silent when the imam recites the Qur'ān. However, according to
another āyah, everyone, that is both the imam and the muqtadi, is
ordered to ‘read whatever is easy for you of the Qur'ān’ (al-Muzammil,
73:20).
Although neither of the two texts make a particular reference to *ṣalāḥ*, they appear nevertheless to be in conflict with regard to the position of the *muqtadi*. There is no additional evidence available to enable the preference of one over the other; action is therefore suspended on both and the issue is determined with reference to the *Sunnah*. It is thus reported that on one occasion when the Prophet led the *ṣalāḥ*, he asked the members of the congregation whether they recited the *Qurān* with him, and having heard their answers, he instructed them not to recite the *Qurān* behind the *imām*. But there still remains a measure of inconsistency even in the *ḥadīth* that are reported on this point, which would explain why the jurists have also differed on it: *Abū Ḥanīfah, Mālik, Ibn Ḥanbal and al-Shāfiʿī* (according to his former view which he revised later) have held that it is not necessary to recite al-Fātihah behind the *imām* in those prayers in which he recites the *Qurān* aloud, but that when the *imām* recites quietly, the worshippers should recite al-Fātihah. The later Hanafi jurists have, however, held the view that it is not necessary for the worshipper to recite the *Qurān* behind the *imām* in either case.¹⁵

In the event where an issue cannot be determined by reference to the *Sunnah*, the *mujtahid* may resort to the *fatwā* of a Companion, and failing that, to *qiyyās*. There is, for example, an apparent conflict between the two reports concerning the way that the Prophet performed the *ṣalāt al-kusūf*, that is, prayer offered on the occasion of a solar eclipse. According to one of the reports, the Prophet offered two units (i.e. two *rakʿahs*) of *ṣalāh*, each consisting of two bowings (*ruki*) and two prostrations (*sajdah*). But according to another report, each of the two units contained four bowings and four prostrations. There is yet another report that each of the two *rakʿahs* contained three bowings and three prostrations.¹⁶ The conflicting contents of these reports can neither be reconciled, nor can one be given preference over the other. Hence action is suspended on all and the matter is determined on grounds of *qiyyās*. In this case, since *ṣalāt al-kusūf* is a variety of *ṣalāh*, the normal rules of *ṣalāh* are applied to it. Since all obligatory *ṣalāh*, without any variation, contains one bowing and two prostrations, this is also by way of analogy extended to *ṣalāt al-kusūf*.¹⁷

In the event of a conflict occurring between two analogies, if they cannot be reconciled with one another, then one of them must be given preference. The *qiyyās* whose effective cause (ʿ*illah*) is stated in
an explicit text is to be preferred to the one whose ‘illah has been derived through inference (istikbāt). Similarly, a qiyās whose ‘illah is founded in an allusive text (ishārah al-nass) takes priority over qiyās whose ‘illah is merely a proper or reasonable attribute derived through inference and ijtihād. When the ‘illah of qiyās is explicitly stated in the nass or when the result of qiyās is upheld by ijmā, no conflict is expected to arise. In the unlikely event where the mujtahid constructs an analogy on the basis of an inferred effective cause (‘illah mustanbatah) while the ‘illah is explicitly stated in the nass, and he reaches a divergent result, it is put down to his ignorance of the nass, and the result that he has reached will be ignored.  

A conflict may well arise between two analogies that are both founded on an inferred ‘illah, since this type of ‘illah involves a measure of speculative reasoning and ijtihād. Two mujtahidūn may thus arrive at different conclusions with regard to the identification of an ‘illah. This is, for example, the case regarding the ‘illah of compulsory guardianship (wilāyah al-ijbār) in the marriage of a minor girl. Imam Abū Hanīfah considers the ‘illah of the guardian’s power of ijbar in marriage to be the minority of the ward, whereas Imam al-Shāfi‘ī considers the ‘illah to be her virginity. This difference of ijtihād would in turn give rise to analogies whose results diverge from one another depending on which of the two effective causes they are based on. However, differences of this nature are tolerated and neither of the two Imams have attempted to discourage diversity in ijtihād. In the event where neither of the two conflicting analogies can be preferred to the other, it is for the mujtahid to choose the one that seems good to him even if there is no basis for such a preference other than his own personal opinion.  

If none of the foregoing methods can be applied in order to determine the ruling on an issue, then the mujtahid may take any of the following three courses of action: to choose whichever of the two evidences that seems good to him; abandon acting on both, which is known as al-wakf, or tasāqit al-dalilayn; and lastly, base his decision on the original norms of the Shari‘ah. This would be done on the assumption that no specific indication could be found in the Shari‘ah on the case. An example of this is to determine the ruling of the Shari‘ah that might have to be applied to a hermaphrodite whose gender, whether male or female, cannot be determined and where neither side could be preferred to the other. A recourse to the original norms in this case means that the issue remains where it was in the first place. Since neither of the two possibilities can be preferred to the other,
action will be based on one side or the other, not because of any evidence to warrant such a preference but as a precautionary measure when the circumstances may indicate such a course of action. Thus in some situations, in the distribution of shares in inheritance, for example, the hermaphrodite will be presumed a male, while he will be presumed a female in other situations as considerations of caution and prevention of possible harm to him may suggest.\(^{20}\)

In making such decisions, it is essential that the mujtahid does not act against the general principles and spirit of the Shari'ah. When he weighs the merits and demerits of conflicting evidences, he must never lose sight of the basic objectives of the Lawgiver.

NOTES

1. Badrān, Uṣūl, p. 461; Khudārī, Uṣūl, p. 359; Aghnīdes, Muhammadan Theories, p. 66.
4. Abū Zahrah, Uṣūl, p. 245; Badrān, Uṣūl, p. 467; Khallāf, 'Ilm, p. 23.
7. Tabrizī, Mishkat, III, 1695, hadith no. 6001.
15. Abū Dāwūd, Sunan, II, 211, hadith no. 825 and footnote no. 373; Badrān, Uṣūl, pp. 468–9.
17. Badrān, Uṣūl, p. 469.
Ijtihād is the most important source of Islamic law next to the Qurʾān and the Sunnah. The main difference between ijtihād and the revealed sources of the Shariʿah lies in the fact that ijtihād is a continuous process of development whereas divine revelation and prophetic legislation discontinued after the demise of the Prophet. In this sense, ijtihād continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community in its aspirations to attain justice, salvation and truth.

Since ijtihād derives its validity from divine revelation, its propriety is measured by its harmony with the Qurʾān and the Sunnah. The sources of Islamic law are therefore essentially monolithic, and the commonly accepted division of the roots of jurisprudence into the primary and secondary is somewhat formal rather than real. The essential unity of the Shariʿah lies in the degree of harmony that is achieved between revelation and reason. Ijtihād is the principal instrument of maintaining this harmony. The various roots of Islamic law that feature next to the Qurʾān and the Sunnah are all manifestations of ijtihād, albeit with differences that are largely procedural in character. In this way, consensus of opinion, analogy, juristic preference, considerations of public interest (maslahah), etc., are all interrelated not only under the main heading of ijtihād, but through it to the Qurʾān and the Sunnah. It is partly due to the formalistic character of these sub-divisions that they are often found to be overlapping and concurrent. Thus a ruling of ijmaʿ is often based on analogy, maslahah or istihsān, and so on, despite its being designated as ijmaʿ. Similarly, qiyās and istihsān are closely related to one another in the sense that one of
the two main varieties of *istihsân* consists of a selection between two analogies on the same issue. The difference between *maslahah* and *istihsân* is largely procedural, for they are essentially the same, the one being reflective of the Mâliki and the other of the Hanafi approach to *ijtihād*. It is thus evident that all the non-revealed proofs of *Shari'ah* are an embodiment of the single phenomenon of *ijtihād*. I present this chapter as our last in the substantive themes on this work partly to acknowledge that *ijtihād* is the end result of *uşûl al-ḥiqâh* and a cardinal objective of studying this discipline.

Being a derivation from the root word *jahada*, *ijtihād* literally means striving, or self-exertion in any activity that entails a measure of hardship. It would thus be in order to use *jahada* in respect of one who carries a heavy load, but not so if he carries only a light weight. Juridically, however, *ijtihād* mainly consists not of physical, but of intellectual exertion on the part of the jurist. *Ijtihād* is defined as the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of *Shari'ah* from their detailed evidence in the sources. Some ‘ulamā’ have defined *ijtihād* as the application by a jurist of all his faculties either in inferring the rules of *Shari'ah* from their sources, or in implementing such rules and applying them to particular issues. *Ijtihād* essentially consists of an inference (*istinbāţ*) that amounts to a probability (*zann*), thereby excluding the extraction of a ruling from a clear text. It also excludes the discovery of a *ḥukm* by asking a learned person or by consulting the relevant literature without the exercise of one’s own opinion and judgement. Thus a person who knows the rules of *Shari'ah* in detail but is unable to exercise his judgement in the inference of the *ḥukm* directly from their sources is not a *mujtahid*. *Ijtihād*, in other words, consists of the formulation of an opinion in regard to a *ḥukm shari'ī*. The presence of an element of speculation in *ijtihād* implies that the result arrived at is probably correct, while the possibility of its being erroneous is not excluded. *Zann* in this context is distinguished from *ʿilm*, which implies positive knowledge. Since the decisive rules of *Shari'ah* impart positive knowledge, they are excluded from the scope of *ijtihād*. Also essential to the meaning of *ijtihād* is the concept that the endeavour of the jurist involves a total expenditure of effort in such a manner that the jurist feels an inability to exert himself further. If the *mujtahid* has failed to discover the evidence which he was capable of discovering, his opinion is void. And lastly, the definition of *ijtihād* is explicit on the point that only a jurist (*faqīh*) may practice *ijtihād*. This is explained by the requirements of *ijtihād*, namely the qualifications that must be
fulfilled for attainment to the rank of mujtahid. When these requirements are met, it is inevitable that the mujtahid must also be a faqih. Thus the definition of ijtihad precludes self-exertion by a layman in the inference of ahkām.6

The subject of ijtihad must be a question of Shari'ah; more specifically, ijtihad is concerned with the practical rules of Shari'ah which usually regulate the conduct of those to whom they apply (i.e. the mukallaf). This would preclude from the scope of ijtihad purely intellectual ('aqli) and customary ('urfi) issues, or matters that are perceptible to the senses (hissi) and do not involve the inference of a hukm shar'i from the evidence present in the sources. Thus ijtihad may not be exercised in regard to such issues as the creation of the universe, the existence of a Creator, the sending of prophets, and so forth, because there is only one correct view in regard to these matters, and anyone who differs from it is wrong. Similarly, one may not exercise ijtihād on matters such as the obligatory status of the pillars of the faith, or the prohibition of murder, theft and adultery. For these are evident truths of the Shari'ah which are determined in the explicit statements of the texts.7

The detailed evidences found in the Qur'an and the Sunnah are divided into four types, as follows: (1) evidence which is decisive both in respect of authenticity and meaning; (2) evidence which is authentic but speculative in meaning; (3) that which is of doubtful authenticity, but definite in meaning; (4) evidence which is speculative in respect both of authenticity and meaning. Ijtihad does not apply to the first of the foregoing categories, such as the clear nusūs concerning the prohibition of adultery and theft. But ijtihad can validly operate in regard to any of the remaining three types of evidence, as the following illustrations will show.

An example of ijtihād concerning evidence which is definite of proof but speculative of meaning is the Qur'ānic text in sūra al-Baqarah (2:228): ‘The divorced women must observe three courses [qurū’] upon themselves.’

There is no doubt concerning the authenticity of this text, as the Qur'ān is authentic throughout. However, its meaning, in particular the precise meaning of the word qurū’, is open to speculation. Qurū’ is a homonym meaning both ‘menstruation’ and ‘the clean periods between menstruation’. Whereas Imam Abū Hanifah and Ibn Hanbal
have adopted the former, Imam Shafi‘i and Malik have adopted the latter meaning, and their respective ijtihad leads them to correspondingly different results.8

Ijtihad in regard to the third variety of evidence relates mainly to hadith material, which may have a definitive meaning but whose authenticity is open to doubt. To give an example, the hadith which provides in regard to zakah on camels that ‘a goat is to be levied on every five camels’ has a clear meaning, which is why the jurists are in agreement that there is no zakah on less than five camels. But since this is a solitary hadith, its authenticity remains speculative. Ijtihad concerning it may take the form of an investigation into the authenticity of its transmission and the reliability of its narrators, matters on which the jurists are not unanimous due to the different criteria that they apply. Should the differences of ijtihad and the rulings so arrived at conflict to the point that no reliance can be placed on any, they are all to be abandoned and no obligation may be established on their basis.9

To give an example of ijtihad concerning evidence that is speculative in both authenticity and meaning, we may refer to the hadith that provides: ‘There is no salah [lā șalāta] without the recitation of sūra al-Fātihah.’ Being a solitary hadith, its authenticity is not proven with certainty. Similarly, it is open to different interpretations in the sense that it could mean either that șalāh without the Fātihah is invalid, or that it is merely incomplete. The Hanafis have held the latter, whereas the Shafi‘is have adopted the former meaning of the hadith.

I. The Value (Hukm) of Ijtihad

Legal theory in all its parts derives its validity from the revealed sources. It is partly for this reason and partly for the reason of man’s duty to worship his Creator that the practice of ijtihad is a religious duty. The ‘ulamā‘ are in agreement that ijtihad is the collective obligation (fard kafâ‘i) of all qualified jurists in the event where an issue arises but no urgency is encountered regarding its ruling. The duty remains
unfulfilled until it is performed by at least one mujtahid. If a question is addressed to two mujtahidūn, or to two judges for that matter, and one of them exerts himself to formulate a response, the other is absolved of his duty. But ijtihād becomes a personal obligation (wājib or fard ʿaynī) of the qualified mujtahid in urgent cases, that is, when there is fear that the cause of justice or truth may be lost if ijtihād is not immediately attempted. This is particularly the case when no other qualified person can be found to attempt ijtihād. With regard to the mujtahid himself, ijtihād is wājib ʿaynī: he must practice ijtihād in order to find the ruling for an issue that affects him personally. This is so because imitation (taqlīd) is forbidden to a mujtahid who is capable of deducing the hukm directly from the sources. Should there be no urgency in ijtihād, or in the event where other mujtahids are available, then the duty remains as a fard kafāʾi only. Furthermore, ijtihād is recommended (mandāb) in all cases where no particular issue has been referred to the mujtahid, or when it is attempted in the absence of an issue by way of theoretical construction at the initiative of the jurist himself. And finally, ijtihād is forbidden (ḥaram) when it contradicts the decisive rules of the Qurʾān, the Sunnah and a definite ijmāʿ.

The ʿulāmāʾ of usūl are in agreement that the mujtahid is bound by the result of his own ijtihād. Once he has deduced the ruling on a particular issue, and it is founded in his true conviction and belief, he may not imitate other mujtahidūn on that matter regardless of whether they agree with him or otherwise; for the mujtahid, the conclusion that he reaches is tantamount to a divine command that he must observe. It is therefore unlawful for him to abandon it or to follow anyone else in respect of it. But if he has not rendered his own ijtihād on an issue that is not urgent, and he has time to investigate, then, according to some ʿulāmāʾ, he may imitate other mujtahidūn. However, the preferred view is that he must avoid taqlīd, even of one who might be more learned than him. Only a ʿāmmī (ignorant person) who is incapable of ijtihād is allowed to follow the opinion of others. This is considered to be the purport of the Qurʾānic command, addressed to all those who have the capacity and knowledge, to exert themselves in the cause of justice and truth (al-Hashr, 59:2). Elsewhere we read in the Qurʾān (Muḥammad, 47:24): 'Will they not meditate on the Qurʾān, or do they have locks on their hearts?'
The same conclusion is sustained by another Qur’ānic passage, in sūra al-Nisā’ (4:59) where the text requires the judgement of all disputes to be referred to God and to His Messenger. These and many similar āyāt in the Qur’ān lend support to the conclusion that it is the duty of the learned to study and investigate the Qur’ān and the teachings of the Prophet. The correct meaning of the manifest directives (zawāhir) of the Qur’ān is also understood from the practice of the Companions, who used to investigate matters, and each would formulate his own ijtihād, in which case they would not imitate anyone else. The mujtahid is thus the authority (hujjah) for himself. His is the duty to provide guidance to those who do not know, but he himself must remain in close contact with the sources. This is also the purport of another Qur’ānic āyah which enjoins those who do not possess knowledge: ‘Then ask those who have knowledge [ahl al-dhikr] if you yourselves do not know’ (al-Nahl, 16: 43).

Thus only those who do not know may seek guidance from others, not those who have the ability and knowledge to deduce the correct answer themselves. The ahl al-dhikr in this āyah refers to the ‘ulamā’, regardless of whether they actually know the correct ruling of an issue or not, provided they have the capacity to investigate and find out.

When a mujtahid exerts himself and derives the ruling on a particular issue on the basis of probability, but after a period of time changes his opinion on the same issue, he may set aside or change his initial ruling if this will only affect him personally. For example, when he enters a contract of marriage with a woman without the consent of her guardian (wali) and later changes his opinion on the validity of such a marriage, he must annul the nikāh. But if his ijtihād affects others, when, for example, he acts as a judge and issues a decision on the basis of his own ijtihād and then changes his views, he may not, according to the majority of ‘ulamā’, set aside his earlier decision. For if one ruling of ijtihād could be set aside by another, then the latter must be equally subject to reversal, and this would lead to uncertainty and loss of credibility in the āhkām. It is reported that ‘Umar ibn al-Khaṭṭāb adjudicated a case, known as Hajariyyah, in which a deceased woman was survived by her husband, mother, two consanguine and two uterine brothers. ‘Umar ibn al-Khaṭṭāb entitled all the brothers to a share in one-third of the estate, but was told by one of the parties
that the previous year, he ('Umar) had not entitled all the brothers to share the portion of one-third. To this the caliph replied, 'That was my decision then, but today I have decided it differently.' Thus the Caliph 'Umar upheld both his decisions and did not allow his latter decision to affect the validity of the former.' Similarly, the decision of one judge may not be set aside by another merely because the latter happens to have a different opinion on the matter. It is reported that a man whose case was adjudicated by 'Ali and Zayd informed 'Umar ibn al-Khattab of their decision, to which the latter replied that he would have ruled differently if he were the judge. To this the man replied, 'Then why don't you, as you are the Caliph?' 'Umar ibn al-Khattab replied that had it been a matter of applying the Qur'an or the Sunnah, he would have intervened, but since the decision was based in ra'y, they were all equal in this respect. Since in matters of juristic opinion no-one can be certain that a particular view is wrong, the view that has already been embodied in a judicial decree has a greater claim to validity than the opposite view. The position is, however, different if the initial decision is found to be in violation of the law, in which case it must be set aside. This is the purport of the ruling of 'Umar ibn al-Khattab, which he conveyed in his well-known letter to Abū Mūsā al-Ash'arī as follows: 'And let not a judgement that you have rendered yesterday, and then upon reconsideration you find that it was wrong, deter you from returning to truth. For truth is timeless and returning to truth is better than continuing in falsehood.'

II. The Proof (Hujjiyyah) of Ijtihād

Ijtihād is validated by the Qur'an, the Sunnah and the dictates of reason ('aql). Of the first two, the Sunnah is more specific in validating ijtihād. The hadith of Mu‘ādh ibn Jabal, as al-Ghazālī points out, provides a clear authority for ijtihād. The same author adds that the claim that this hadith is mursal (i.e. a hadith whose chain of narration is broken at the point when the name of the Companion who heard it from the Prophet is not mentioned) is of no account, for the ummah has accepted it and has consistently relied on it; no further dispute about its authenticity is therefore warranted. According to another hadith, 'When a judge exercises ijtihād and gives a right judgement, he will have two rewards, but if he errs in his judgement, he will still have earned one reward.'
This hadith implies that regardless of its results, ijtihad never partakes of sin. When the necessary requirements of ijtihad are present, the result is always meritorious and never blameworthy. In another hadith, the Prophet is reported to have said: ‘Strive and endeavour [ijtahidi], for everyone is ordained to accomplish that which he is created for.’

There is also the hadith which reads: “When God favours one of His servants, He enables him to acquire knowledge [tafaqquh] in religion.”

The ‘ulama’ of usul have also quoted in this connection two other hadith, one of which makes the pursuit of knowledge an obligation of every Muslim, man or woman:

and the other declares the ‘ulamâ to be the successors of the Prophets.

The relevance of the last two hadith to ijtihad is borne out by the fact that ijtihad is the main instrument of creativity and knowledge in Islam. The numerous Qur’anic ayat that relate to ijtihad are all in the nature of probabilities (zawâhir). All the Qur’anic ayât that the ‘ulamâ’ have quoted in support of giyâs can also be quoted in support of ijtihad. In addition, we read, in sura al-Tawbah (9:122): ‘Let a contingent from each division of them devote themselves to the study of religion and warn their people.’
Devotion to the study of religion is the essence of ijtihād, which should be a continuous feature of the life of the community. Although the pursuit of knowledge is a duty on every individual, attaining tafaqquh, or ‘erudition in religious disciplines’, is necessary for those who guide the community and warn them against deviation and ignorance.

On a similar note, we read in sura al-‘Ankabūt (29:69): ‘And those who strive [wāl-ladhihīa jāhadīū] in Our cause, We will certainly guide them in Our paths.’

It is interesting that in this āyah the word subulanā (‘Our paths’) occurs in the plural form, which might suggest that there are numerous paths toward the truth, which are all open to those who exert themselves in its pursuit. Furthermore, we read in sura al-Nisā’ (4:59): ‘If you dispute over something, then refer it to God and to the Messenger.’

The implementation of this āyah would necessitate knowledge of the Qur’ān, the Sunnah and the objectives (maqāsid) of the Lawgiver on whose basis disputed matters could be adjudicated and resolved.

The Companions practised ijtihād, and their consensus is claimed in support of it. In their search for solutions to disputed matters, they would base their judgement on the Qur’ān and the Sunnah, but if they failed to find the necessary guidance therein, they would resort to ijtihād. The fact that the Companions resorted to ijtihād in the absence of a nasṣ is established by continuous testimony (tawātur).

The rational argument in support of ijtihād is to be sought in the fact that while the nasṣ of Shari‘ah 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 ijtihād.

III. The Conditions (Shurūf) of Ijtihād

A mujtahid must be a Muslim and a competent person of sound mind who has attained a level of intellectual competence that enables him to form an independent judgement. In his capacity as a successor to the Prophet, the mujtahid performs a religious duty, and his verdict is
a proof (hujjah) to those who follow him; he must therefore be a Muslim and be knowledgeable in the various disciplines of religious learning. A person who fails to meet one or more of the requirements of ijtihad is disqualified and may not exercise ijtihad. The requirements that are discussed below relate to ijtihad in its unrestricted form, often referred to as ijtihad fi'l-shar', as opposed to those varieties of ijtihad that are confined to a particular school, or to particular issues within the confines of a given madhhab.

The earliest complete account of the qualifications of a mujtahid is given in Abu'l-Ḥusayn al-Bāṣrī's al-Mu'tamad fi Uṣūl al-Fiqh. The broad outline of al-Bāṣrī's exposition was later accepted, with minor changes, by al-Shirāzī (d. 1083 AD), al-Ghazālī and al-Āmīdī (d. 1234 AD). This does not mean that the requirements of ijtihad received no attention from the 'ulamā' who lived before al-Bāṣrī. But it was from then onwards that they were consistently adopted by the 'ulamā' of usul and became a standard feature of ijtihad. These requirements are as follows.

(1) A knowledge of Arabic to the extent that enables the scholar to enjoy a correct understanding of the Qur'ān and the Sunnah. A complete command of and erudition in Arabic is not a requirement, but the mujtahid must know the nuances of the language and be able to comprehend the sources accurately and deduce the ahkām from them with a high level of competence. Al-Shatibī, however, lays greater emphasis on the knowledge of Arabic: a person who possesses only an average knowledge of Arabic cannot aim at the highest level of attainment in ijtihad. The language of the Qur'ān and the Sunnah is the key to their comprehension and the ijtihad of anyone who is deficient in this respect is unacceptable. The same author adds: since the opinion of the mujtahid is a proof (hujjah) for a layman, this degree of authority necessitates direct access to the sources and full competence in Arabic.

(2) The mujtahid must also be knowledgeable in the Qur'ān and the Sunnah, the Meccan and the Medinan contents of the Qur'ān, the occasions of its revelation (asbāb al-nuzūl) and the incidences of abrogation therein. More specifically, he must have a full grasp of the legal contents, or the āyāt al-ahkām, but not necessarily of the narratives and parables of the Qur'ān and its passages relating to the hereafter. According to some 'ulamā', including al-Ghazālī, Ibn al-'Arabī and Abū Bakr al-Rāzī, the legal āyāt of the Qur'ān that the mujtahid must know amount to about five hundred. Al-Shawkānī, however, observes that a specification of this kind cannot be definitive.
For a mujtahid may infer a legal rule from the narratives and parables that are found in the Qur'ān. The knowledge of āyāt al-ahkām includes knowledge of the related commentaries (tafāṣīr) with special reference to the Sunnah and the views of the Companions. Al-Qurṭūbī’s Tafsīr al-Qurṭūbī and the Ahkām al-Qur’ān of Abū Bakr ‘Alī al-‘Uṣṣās are particularly recommended.

(3) Next, the mujtahid must possess an adequate knowledge of the Sunnah, especially that part of it that relates to the subject of his ijtihād. This is the view of those who admit the divisibility (tajzi’ah) of ijtihād (for which see below), but if ijtihād is deemed to be indivisible, then the mujtahid must be knowledgeable of the Sunnah as a whole, especially with reference to the ahkām texts, often referred to as ahādhith al-ahkām. He must know the incidences of abrogation in the Sunnah, the general and the specific, (āmm and khas), the absolute and the qualified (mutlaq and muqayyad), and the reliability or otherwise of the narrators of hadith. It is not necessary to commit to memory the ahādhith al-ahkām or the names of their narrators, but he must know where to find the hadith when he needs to refer to them, and be able to distinguish the reliable from the weak and the authentic from the spurious. Imam Ghazālī points out that an adequate familiarity with the ahādhith al-ahkām, such as those found in Sunan Abū Dāwūd, Sunan al-Bayhaqī, or the Musnad of Ibn Ḥanbal, would suffice. According to another view, which is attributed to Ahmad ibn Ḥanbal, the ahādhith al-ahkām are likely to number in the region of 1,200. The legal hadith have been collected in various works, including the one by Ibn Daqīq al-‘Id (d. 702 AH) which included 1,471 hadith.

(4) The mujtahid must also know the substance of the furū‘ works and the points on which there is an ijma‘. He should be able to verify the consensus of the Companions, the Successors and the leading Imams and mujtahidūn of the past so that he is guarded against the possibility of issuing an opinion contrary to such an ijma‘. It would be rare, al-Shawkānī observes, for anyone who has attained the rank of a mujtahid not to be aware of the issues on which there is conclusive ijma‘. By implication, the mujtahid must also be aware of the opposing views, as it is said, ‘The most learned of people is also one who is most knowledgeable of the differences among people’. In their expositions of the qualifications of a mujtahid, the ‘ulamā’ of usūl place special emphasis on the knowledge of qiyās. The Qur’ān and the Sunnah, on the whole, do not completely specify the law as it might be stated in a juristic manual, but contain general rulings and indications as to the causes of such rulings. The mujtahid is thus
enabled to have recourse to analogical deduction in order to discover the ruling for an unprecedented case. An adequate knowledge of the rules and procedures of qiyyās is thus essential for the mujtahid. Imam Shafi'i has gone so far as to equate ijtihād with qiyyās. Analogy, in other words, is the main bastion of ijtihād, even if the two are not identical. Al-Ghazālī has observed that notwithstanding the claim by some 'ulamā' that qiyyās and ijtihād are identical and coextensive, ijtihād is wider than qiyyās as it comprises methods of reasoning other than analogy.38

(6) Furthermore, the mujtahid should know the objectives (maqāṣid) of the Sharī'ah, which consist of the mašālih (considerations of public interest). The most important mašālih are those that the Lawgiver has Himself identified and which must be given priority over others. Thus the protection of the ‘Five Principles’, namely of life, religion, intellect, lineage and property, are the recognised objectives of the Lawgiver. These are the essentials (darūriyyāt) of the mašālih and as such they are distinguished from the complementary (hājiyyāt) and the embellishments (tahsiniyyāt). The mujtahid must also know the general maxims of fiqh such as the removal of hardship (raf' al-haraj), that certainty must prevail over doubt, and other such principles that are designed to prevent rigidity in the aḥkām. He must be able to distinguish the genuine mašālih from those that might be inspired by whimsical desires, and be able to achieve a correct balance between values.39

Al-Shāṭibī summarises all the foregoing requirements of ijtihād under two main headings, one of which is the adequate grasp of the objectives of the Sharī'ah, while the other is the knowledge of the sources and methods of deduction. The first of these is fundamental, and the second serves as an instrument of achieving the first.40

It is further suggested in this connection that the mujtahid must be capable of distinguishing strength and weakness in reasoning and evidence. This requirement has prompted some 'ulamā' to say that the mujtahid should have a knowledge of logic (mantiq). But this is not strictly a requirement. For logic as a discipline had not even developed during the time of the Companions, but this did not detract from their ability to practice ijtihād.41

And finally, the mujtahid must be an upright (‘ādil) person who refrains from committing sins and whose judgement the people can trust. His sincerity must be beyond question and untainted with self-seeking interests. For ijtihād is a sacred trust, and anyone who is tainted with heresy and self-indulgence is unworthy of it.42 These are
the conditions of independent ijtihād, but a mujtahid on particular issues need only know all the relevant information concerning those issues and may, at least according to those who admit the ‘divisibility’ of ijtihād, practice ijtihād in respect of them. His lack of knowledge in matters unrelated to the issues concerned does not prejudice his competence for ijtihād.43

Some observers have suggested that the practice of ijtihād was abandoned partly because the qualifications required for its practice were made ‘so immaculate and rigorous and were set so high that they were humanly impossible of fulfilment’.44 This is, however, an implausible supposition that has been advanced mainly by the proponents of taqlid with a view to discouraging the practice of ijtihād. As for the actual conditions, Abdur Rahim (with many others) has aptly observed that ‘the qualifications required of a mujtahid would seem to be extremely moderate, and there can be no warrant for supposing that men of the present day are unfitted to acquire such qualifications’.45 There is little evidence to prove that fulfilling the necessary conditions of ijtihād was beyond the reach of the ‘ulamā’ of later periods. On the contrary, as one observer has pointed out, ‘the total knowledge required on the part of the jurist enabled many to undertake ijtihād in one area of the law or another’.46 Their task was further facilitated by the legal theory, in particular the hadith that absolves the mujtahid who commits an error from the charge of sin, and even entitles him to a spiritual reward. Furthermore, the recognition in the legal theory of the divisibility of ijtihād, as we shall presently discuss, enabled the specialist in particular areas of the Shari’ah to practice ijtihād even if he was not equally knowledgeable in all its other disciplines.

IV. The Divisibility of Ijtihād

The question to be discussed here is whether a person who is learned on a particular subject is qualified to practice ijtihād in that area, or whether he is required to qualify as a full mujtahid first in order to be able to carry out ijtihād at all. The majority of ‘ulamā’ have held the view that once a person has fulfilled the necessary conditions of ijtihād, he is qualified to practice it in all areas of the Shari’ah. According to this view, the intellectual ability and competence of a mujtahid cannot be divided into compartments. Ijtihād, in other words, is indivisible, and we cannot say that a person is a mujtahid in the area of matrimonial law and an imitator (muqallid) in regard to devotional matters.
"ibadāt") or vice-versa. To say this would be tantamount to a contradiction in terms, as ijtiḥād and taqlīd cannot be combined in one and the same person. The majority view is based on the analysis that ijtiḥād, for the most part, consists of formulating an opinion, or zānīn, concerning a rule of the Shari'ah. A zānīn of this type occurs only to a fully qualified mujtahid who has attained the necessary level of intellectual competence. It is further argued that all the branches of the Shari'ah are interrelated, and ignorance in one may lead to an error or misjudgement in another. The majority view is further supported by the argument that once a person has attained the rank of mujtahid, he is no longer permitted to follow others in matters where he can exercise ijtiḥād himself. Among the majority there are some 'ulamā' who have allowed an exception to the indivisibility of ijtiḥād. This is the area of inheritance, which is considered to be self-contained as a discipline of Shari'ah law and independent of the knowledge of the other branches. Hence a jurist who is only knowledgeable in this field may practice ijtiḥād in isolation from the other branches of fiqh.

Some Mālikī, Ḥanbāli and Zāhirī 'ulamā' have, however, held the view that ijtiḥād is divisible. Hence when a person is learned in a particular area of the Shari'ah, he may practice ijtiḥād in that area only. This will in no way violate any of the accepted principles of ijtiḥād. There is similarly no objection, according to this view, to the possibility of a person being both a mujtahid and a muqallid at the same time. Thus a mujtahid may confine the scope of his ijtiḥād to the area of his specialisation. This has, in fact, been the case with many of the prominent imams, who have, on occasions, admitted their lack of knowledge in regard to particular issues. Imam Mālik is said to have admitted in regard to thirty-six issues at least that he did not know the right answer. In spite of this, there is no doubt concerning Mālik's competence as a fully-fledged mujtahid.

The view that ijtiḥād is divisible is supported by a number of prominent 'ulamā', including Abu'l-Husayn al-Bāṣrī, al-Ghazālī, Ibn al-Humām, Ibn Taymiyyah, his disciple Ibn al-Qayyim and al-Shawkānī. Al-Ghazālī thus observes that a person may be particularly learned in qiyās and be able to practice ijtiḥād in the form of analogy even if he is not an expert on hadīth. According to the proponents of this view, if knowledge of all the disciplines of Shari'ah were to be a requirement, most 'ulamā' would fail to meet it and it would impose a heavy restriction on ijtiḥād. Al-Shawkānī, Badrān and al-Kassāb have all observed that this is the preferable of the two views. One
might add here that in modern times, in view of the sheer bulk of information and the more rapid pace of its growth, specialisation in any major area of knowledge would seem to hold the key to originality and creative ijtihad. The divisibility of ijtihad would thus seem to be in greater harmony with the conditions of research in modern times. By way of a postscript, one might also remark that the classification of mujtahids into various ranks, such as mujtahids in a particular school or on particular issues, takes for granted the idea that ijtihad is divisible.

V. Procedure of Ijtihad

Since ijtihad occurs in a variety of forms, such as qiyās, istihsān, maslahah mursalah, and so on, each of these is regulated by its own rules. There is, in other words, no uniform procedure for ijtihad as such. The ‘ulama’ have nevertheless suggested that in practising ijtihad, the jurist must first of all look at the nusūṣ of the Qurʾān and the hadith, which must be given priority over all other evidences. Should there be no nāṣṣ on the matter, then he may resort to the manifest text (zāhir) of the Qurʾān and hadith and interpret it while applying the rules pertaining to the general (ʿāmm) and specific (khāṣṣ), the absolute and the qualified, and so forth, as the case may be. Should there be no manifest text on the subject in the Qurʾān and the verbal Sunnah, the mujtahid may resort to the actual (fiʿlī) and tacitly approved (taqrīrī) Sunnah. Failing this, he must find out if there is a ruling of ijmaʿ or qiyās available on the problem in the works of the renowned jurists. In the absence of any guidance in these works, he may attempt an original ijtihad along the lines of qiyās. This would entail a recourse to the Qurʾān, the hadith or ijmaʿ for a precedent that has an ʿillah identical to that of the farʿ (i.e. the case for which a solution is required). When this is identified, he is to apply the principles of qiyās in order to deduce the necessary ruling. In the absence of a textual basis on which an analogy can be founded, the mujtahid may resort to any of the recognised methods of ijtihad such as istihsān, maslahah mursalah, istiḥāb, etc., and derive a solution while applying the rules that ensure the proper implementation of these doctrines.52

The foregoing procedure has essentially been formulated by al-Shāfiʿī, who is noted to have observed the following. When an incident occurs, the mujtahid must first check the nusūṣ of the Qurʾān, but if he finds none, he must refer to mutawātir hadith and then to solitary hadith. If the necessary guidance is still not forthcoming,
he should postpone recourse to qiyas until he has looked into the manifest (zahir) text of the Qur'an. If he finds a manifest text that is general, he will need to find out if it can be specified by means of hadith or qiyas. But if he finds nothing that will specify the manifest text, he may apply the latter as it stands. Should he fail to find a manifest text in the Qur'an or the Sunnah, he must look into the madhahib. If he finds a consensus among them, he applies it, otherwise he resorts to qiyas, but in doing so, he must pay more attention to the general principles of the Shari'ah than to its subsidiary detail. If he does not find this possible, and all else fails, then he may apply the principle of original absence of liability (al-bara'ah al-asliyyah). All this must be in full cognisance of the rules that apply to the conflict of evidences (al-ta'āruḍ bayn al-adillah), which means that the mujtahid should know the methods deployed in reconciling such conflicts, or even eliminating one in favour of the other, should this prove to be necessary. The ruling so arrived at may be that the matter is obligatory (wajib), forbidden (harām), reprehensible (ma'nūh) or recommended (ma'ndūb).

From the viewpoint of its procedure, ijtihād may occur in any of the following four varieties. Firstly, there is the form of a juridical analogy (qiyas) which is founded on an effective cause ('illah). The second variety of ijtihād consists of a probability (zann) without the presence of any 'illah, such as practising ijtihād in regard to ascertaining the time of salah or the direction of the qiblah. The third type of ijtihād consists of the interpretation of the source materials and the deduction of ahkām from existing evidence. This type of ijtihād is called ijtihād bayāni, or 'explanatory ijtihād', which takes priority over 'analogical ijtihād', or ijtihād qiyās. The fourth variety of ijtihād, referred to as ijtihād istislahi, is based on maslahah and seeks to deduce the ahkām in pursuance of the spirit and purpose of the Shari'ah, which may take the form of istislah, juristic preference (istihsān), the obstruction of means (sad al-dhara'i'), or some other technique. Imam Shafi'i accepts only the first type, namely analogical ijtihād, but for the majority of 'ulamā', ijtihād is not confined to qiyās and may take the form of any of the foregoing varieties.

VI. The Ijtihād of the Prophet and his Companions

The question to be discussed here is whether all the rulings of the Prophet should be regarded as having been divinely inspired or whether they also partake of ijtihād. The 'ulamā' are generally in agreement that the Prophet practised ijtihād in temporal and military
affairs, but they have differed as to whether his rulings in šarī‘i matters could properly fall under the rubric of ijtihād. According to the Ash‘aris, the Mu‘tazilah, Ibn Hazm al-Zāhirī and some Ḥanbalī and Šāfī‘ī ‘ulamā’, the Qur‘ān provides clear evidence that every speech of the Prophet partakes of wahy. A specific reference is thus made to sūra al-Najm (53:3) which provides: ‘He says nothing of his own desire, it is nothing other than revelation [wahy] sent down to him.’

This āyah is quite categorical on the point that the Prophet is guided by divine revelation and that all his utterances are to be seen in this light. This would mean that all the rulings of the Prophet consist of divine revelation and that none would occur in the form of ijtihād.  

The minority view on this subject overrules the claim to the practice of ijtihād by the Prophet and maintains that if it were true that the Prophet practised ijtihād, then disagreeing with his views would be permissible. For it is a characteristic of ijtihād to allow disagreement and opposition. Opposing the Prophet is, however, clearly forbidden, and obedience to him is a Qur‘ānic duty upon every Muslim (al-Nisā‘, 4:14 and 59).

There is yet a third opinion on this point which, owing to the conflicting nature of the evidence, advises total suspension. This view is attributed to al-Shāfi‘ī and upheld by al-Baqillānī and al-Ghazālī. Al-Shawkānī, however, rejects it by saying that the Qur‘ān gives us clear indications not only to the effect that ijtihād was permissible for
the Prophet but also that he was capable of making errors. Nonetheless, the ‘ulamā’ who have maintained this view add that such an error is not sustained, meaning that any error the Prophet might have made was rectified by the Prophet himself or through subsequent revelation. Thus we find passages in the Qurʾān which reproach the Prophet for his errors. To give an example, a text in sūra al-Anfal (8:67) provides: ‘It is not proper for the Prophet to take prisoners [of war] until he has subdued everyone in the earth.’

This āyah was revealed concerning the captives of the battle of Badr. It is reported that seventy persons from the enemy side were taken prisoner in the battle. The Prophet first consulted Abū Bakr, who suggested that they should be released against a ransom, whereas ‘Umar ibn al-Khaṭṭāb held the view that they should be killed. The Prophet approved of Abū Bakr’s view but then the āyah was revealed which disapproved of taking ransom from the captives. Elsewhere, in sūra al-Tawbah (9:43), in an address to the Prophet, the text provides: ‘God granted you pardon, but why did you permit them to do so before it became clear to you who was telling the truth?’ This āyah was revealed in regard to the exemption that the Prophet granted, prior to investigating the matter, to those who did not participate in the battle of Tabūk. These and similar passages in the Qurʾān indicate that the Prophet had on occasions acted on his own ijtihād. For had he acted in pursuance of a divine command, there would have been no occasion for a reprimand or the granting of divine pardon for his mistakes.

The majority view that the Prophet resorted to ijtihād finds further support in the Sunnah. Thus, according to one hadith, the Prophet is reported to have said, ‘When I do not receive a revelation [wahy], I adjudicate among you on the basis of my opinion.’

The next point to be raised in this connection is whether ijtihād was lawful for the Companions during the lifetime of the Prophet. Once again the majority of ‘ulamā’ have held that it was lawful, regardless of whether it took place in the presence of the Prophet or in his absence. The ‘ulamā’ have, however, differed on the details. Ibn Ḥazm held that such ijtihād is valid in matters other than the ḥalāl and harām,
whereas al-Āmīdī and Ibn al-Ḥājib have observed that it is only speculative and does not establish a definitive ruling. There are still others who have held that *ijtihād* was lawful for the Companions only if it took place in the presence of the Prophet, with his permission, or if the Prophet had approved of it in some way. Those who invalidate *ijtihād* for the Companions during the lifetime of the Prophet maintain that the Companions had access to the Prophet in order to obtain the necessary authority, which would be decisive and final. If one is able to obtain a decisive ruling on a juridical matter, *ijtihād*, which is a merely speculative exercise, is unlawful. This view is, however, considered to be weak, as it takes for granted ready access to the Prophet; it also discounts the possibility that certain decisions had to be made by the Companions without delay. The correct view is therefore that of the majority, which is supported by the fact that the Companions did, on numerous occasions, practice *ijtihād* both in the presence of the Prophet and in his absence. The hadith of Mu‘ādh ibn Jabal is quoted as clear authority that the Prophet authorised Mu‘ādh to resort to *ijtihād* in his absence (i.e. in the Yemen). Numerous other names are quoted, including those of ‘Abd al-Rahmān ibn ‘Abd al-Malik, Sa‘d ibn Mu‘ādh, ‘Amr ibn al-‘Ās and Abū Mūsā al-Ashtar, who delivered *ijtihād* in the absence of the Prophet. It is also reported in a hadith that when the Prophet authorised ‘Amr ibn al-‘Ās to adjudicate in some disputes, he asked the Prophet, ‘Shall I render *ijtihād* while you are present?’ To this the Prophet replied, ‘Yes. If you are right in your judgement, you earn two rewards, but if you err, only one.’ It is similarly reported that Sa‘d ibn Mu‘ādh rendered a judgement concerning the Jews of Banū Qurayzah in the presence of the Prophet, and that he approved of it.

VII. The Truth and Fallacy of *Ijtihād*

The jurists have differed on whether every mujtahid can be assumed to be right in his conclusions, or whether only one of several solutions to a particular problem may be regarded as true to the exclusion of all others. At the root of this question lies the uncertainty over the unity or plurality of truth in *ijtihād*. Has Almighty God predetermined a specific solution to every issue, which alone may be regarded as right? If the answer to this is in the affirmative, then it will follow that there is only one correct solution to any juridical problem and that all others are erroneous. This would in turn beg the question of whether it is at all possible for the mujtahid to commit a sin by render-
ing an erroneous ijtihād. In the face of the ḥadīth that promises a spiritual reward to every mujtahid regardless of the accuracy of his conclusions, added to which is the fact that he is performing a sacred duty, is it theoretically possible for a mujtahid to commit a sin?

The ‘ulamā’ are in agreement that in regard to the essentials of dogma, such as the oneness of God (tawḥīd), His attributes, the truth of the prophethood of Muḥammad, the hereafter, and so on, there is only one truth and anyone, whether a mujtahid or otherwise, who takes a different view automatically renounces Islam.°°

With regard to juridical or shārī matters, the majority of ‘ulamā’, including the Ashʿarīs and the Muʿtazilah, recognise two types.

(1) Juridical matters that are determined by a clear and definitive text, such as the obligatoriness of ṣalāḥ and other pillars of the faith, the prohibition of theft, adultery, and so on. In regard to these matters, once again, there is only one truth with which the mujtahid may not differ. Anyone who takes an exception to these commits a sin, and according to some, even heresy and disbelief.

(2) Shārī matters on which no decisive ruling is found in the sources. There is much disagreement on this. The Ashʿarīs and the Muʿtazilah have held the view that ijtihād in regard to such matters is always meritorious and partakes of truth regardless of the nature of the results. But according to the four leading imams and many other ‘ulamā’, only one of the several opposing views on a particular issue may be said to be correct. For it is impossible to say that one and the same thing at the same time regarding the same person could be both lawful and unlawful.°° This view has quoted in support the Qurʾānic text where in reference to the two judgements of David and Solomon on one and the same issue, God validated only one. The text runs:

And when David and Solomon both passed judgement on the field where some people’s sheep had strayed to pasture there at night, We acted as Witnesses for their decision. We made Solomon understand it. To each We gave discretion and knowledge. (al-Anbiya’, 21:78–79)
If there could be more than one correct solution to a juridical problem, then this āyah would have upheld the judgements both of David and Solomon. It is thus suggested that this āyah confirms the unitary character of truth in *ijtiḥād*. Furthermore, when one looks at the practice of the Companions, it will be obvious that not only did they admit the possibility of error in their own judgements but that they also criticised one another. If all of them were to be right in their *ijtiḥād*, there would be no point in their criticising one another or in admitting the possibility of error in their own *ijtiḥād*. To give an example, the Caliph Abū Bakr is reported to have said in regard to the issue of *kalālah* (i.e. when the deceased leaves no parent or child to inherit him): ‘I decided the question of *kalālah* according to my opinion. If it is correct, it is an inspiration from God; if it is wrong, then the error is mine and Satan’s.’ It is further reported that when ‘Umar ibn al-Khaṭṭāb adjudicated a case, one of the parties to the dispute who was present at the time said, ‘By God this is the truth.’ To this the Caliph replied that he did not know whether he had attained the truth, but that he had spared no effort in striving to do so. The ḥadīth and the practice of the Companions on *ijtiḥād* clearly entertain the possibility of error in *ijtiḥād*. A mujtahīd may be right or may have erred, but in either case, his effort is commendable and worthy of reward.

The opposite view, which is a minority opinion, maintains that there is no pre-determined truth in regard to *ijtiḥādi* matters. Almighty God has not determined one particular solution as truth to the exclusion of all others. The result of *ijtiḥād* may thus vary and several verdicts may be regarded as truth on their merit. This view quotes in support the same Qur’ānic text, quoted above, which in its latter part refers to David and Solomon with the words: ‘To each We gave discretion and knowledge.’ Had either of them committed an error, God would not have praised them thus. It is thus implied that both were right, and that every mujtahīd attains the truth in his own way. It is further argued that had there been only one truth in regard to a particular issue, the mujtahīd would not have been bound by the result of his own *ijtiḥād*. His duty to follow his own *ijtiḥād* to the exclusion of anyone else’s suggests that every mujtahīd attains the truth. This view seeks further support in the rule of Shari’ah which authorises the imam or the mujtahīd to appoint as judge another mujtahīd who may differ with him in *ijtiḥād*. This was, for example, the case when Abū Bakr appointed Zayd ibn Thābit as a judge while it was common knowledge among the Companions that Zayd had differed with Abū
Bakr on many issues. Had a difference of opinion in *ijtihād* matters amounted to divergence from truth and indulgence in error, Abū Bakr would not have appointed Zayd to judicial office. And lastly, the proponents of this view have referred to the hadīth that reads: ‘My Companions are like stars; any one of them that you follow will lead you to the right path.’

Had there been any substance to the idea that truth is unitary, the Prophet would have specified adherence only to those of his Companions who attained to it.⁷⁰

These differences may be resolved, as the majority of ‘*ulama’* suggest, in the light of the celebrated hadīth, which we quote again: ‘When a judge renders *ijtihād* and gives a right judgement, he will have two rewards, but if he errs, he will still have earned one reward.’ This hadīth clearly shows that the *mujtahid* is either right (musib) or in error (mukhti’), that some *mujtahidūn* attain the truth while others do not; but that sin attaches to neither as they are both rewarded for their efforts. Hence anyone who maintains that there are as many truths as there are *mujtahidūn* is clearly out of line with the purport of this hadīth. If every *mujtahid* were supposed to be right, then the division of *mujtahidūn* into two types in this hadīth would have no meaning.⁷¹

VIII. Classification and Restrictions

In their drive to impose restrictions on *ijtihād*, the ‘*ulama’* of *uṣūl* of the fifth/eleventh century and the subsequent period classified *ijtihād* into several categories. Initially it was divided into two types: firstly, *ijtihād* that aims to deduce the law from the evidence in the sources, often referred to as ‘independent *ijtihād’; and secondly, *ijtihād* that is concerned mainly with the elaboration and implementation of the law within the confines of a particular school, known as ‘limited *ijtihād’.* During the first two and a half centuries of Islam, there was never any attempt to deny a scholar the right to find his own solutions to legal problems. It was only at a later period that the question of who was qualified to practice *ijtihād* was raised. From about the middle of the third/ninth century, the idea began to gain currency that only the great scholars of the past had enjoyed the right to practice *ijtihād.*⁷²

This was the beginning of what came to be known as the ‘closure of the gate of *ijtihād’.* Before the fifth/eleventh century, no trace may
be found of any attempt to classify ijtihād into categories of excellence. Al-Ghazālī was the first to divide ijtihād into two categories, as noted above.73 This division was later developed into five, and eventually into seven classes. While representing the prevailing opinion of his time, al-Ghazālī admitted that independent mujtahidūn were already extinct.74 About two centuries later, the number of the ranks of mujtahidūn reached five, and by the tenth/sixteenth century seven ranks were distinguished, while from the sixth/twelfth century onwards jurists are said to belong to only the last two categories on the scale of seven.75 This is as follows.

(1) Full mujtahid (mujtahid fi'l-shar'). This rank is assigned to those who fulfilled all the requirements of ijtihād. They deduced the aḥkām from the evidence in the sources, and in so doing were not restricted by the rules of a particular madhhab. The learned among the Companions, and the leading jurists of the succeeding generation, like Sa‘īd ibn al-Musayyib and Ibrāhīm al-Nakha‘ī, the leading Imams of the four schools, the leading Imams of the Shi‘ah, Muḥammad al-Bāqir and his son Ja‘far al-Ṣādiq, al-Awzā‘ī and many others were identified as independent mujtahidūn. It is by the authority of these that consensus of opinion, analogy, juristic preference, maslahah mursalah, etc., were formulated and established as the secondary proofs of Shari‘ah.76 Although Abū Yūsuf and al-Shaybānī are usually subsumed under the second rank, Abī Zahrah, who has written extensively on the lives and works of the leading ‘ulama’, regards them as full mujtahidūn. The criteria of distinguishing the first from the second class of mujtahidūn is originality and independent thought. If this is deemed to be the case, the mere fact that a mujtahid has concurred with the opinion of another is immaterial in the determination of his rank. For many of the leading mujtahidūn are known to have concurred with the views of other ‘ulamā’. For example, it is known that Abū Hanīfah on many occasions agreed with and followed the views of his teacher, Ibrāhīm al-Nakha‘ī, but this was only because he was convinced of the accuracy of his reasoning, and not out of imitation for its own sake.77

The question arises whether this type of ijtihād is still open or came to an end with the so-called closure of the gate of ijtihād. With the exception of the Hanbalis, who maintain that ijtihād in all of its forms remains open, the ‘ulamā’ of the other three schools have on the whole acceded to the view that independent ijtihād has discontinued.78 Another related question that has been extensively debated by the ‘ulamā’ is whether the idea of the total extinction of mujtahidūn at any given period or generation is at all acceptable from the viewpoint of
To say that ijtihād is a wājib, whether 'aynī or kafā'ī, takes it for granted that it may never be discontinued. This is also the implication of another hadith which provides that 'a section of my ummah will continue to be on the right path; they will be the dominant force and they will not be vanquished till the Day of Resurrection'.

Since the successful pursuit of truth is not possible without knowledge, the survival of mujtahīdīn in any given age ('aṣr) is therefore sustained by this hadith. Furthermore, according to some 'ulamā', the duty to perform ijtihād is not fulfilled by means of limited ijtihād or by practising the delivery of fatwā alone. According to the Ḥanbalīs, the claim that ijtihād has discontinued is to be utterly rejected. Ijtihād is not only open, but no period may be without a mujtahid. The Shi'āh Imamiyyah have held the same view. The Shi'āh, however, follow their recognised imams, in whose absence they may exercise ijtihād on condition that they adhere, both in principle and in detail, to the rulings of the Imams. In the absence of any ruling by the Imams, the Shi'āh recognise 'aql as a proof following the Qur'ān, the Sunnah, and the rulings of their Imams. And finally, it may be said that the notion of the discontinuation of ijtihād would appear to be in conflict with some of the important doctrines of Shari'ah. The theory of ijma' for example, and the elaborate procedures relating to qiyās, all proceed on the assumption that they are the living proofs of the law and presume the existence of mujtahīdīn in every age.

(2) Mujtahīdīn within the school. These are jurists who expounded the law within the confines of a particular school while adhering to the principles laid down by their Imams. Among the prominent names

doctrine. Could the Shari'ah entertain such a possibility and maintain its own continuation, both at the same time? The majority of the 'ulamā' of usūl, including al-Āmīdī, Ibn al-Ḥājib, Ibn al-Humām, Ibn al-Subkī and Zakariyyā al-Anṣārī have answered this question in the affirmative, whereas the Ḥanbalīs have held otherwise. The Ḥanbalīs have argued that ijtihād is an obligatory duty of the Muslim community, whose total abandonment would amount to an agreement on deviation/error which is precluded by the hadith which states that 'My community shall never agree on an error.'

لَا تجتمع أممٍ على الضالة.
that feature in this category are Zufar ibn al-Hudhayl, Hasan ibn Ziyād in the Ḥanafī school; Ismā'il ibn Yaḥyā al-Muzānī, ‘Uthman Taqī al-Dīn ibn al-Ṣalāḥ and Jalāl al-Dīn al-Suyūṭī in the Shāfī‘ī; Ibn ʻAbd al-Barr and Abū Bakr ibn al-ʻArābī in the Mālikī, and Ibn Taymiyyah and his disciple Ibn Qayyim al-Jawziyyah in the Ḥanbālī schools. It is observed that although these ‘ulāmā‘ all followed the doctrines of their respective schools, nevertheless they did not consider themselves bound to follow their masters in the implementation of the general principles or in arguments concerning particular issues. This is borne out by the fact that they have held opinions that were opposed to those of their leading Imams.∗

(3) Mujtahidūn on particular issues. These are jurists who were competent to elucidate and apply the law in particular cases which were not settled by the jurists of the first and second ranks. They did not oppose the leading mujtahidūn and generally followed the established principles of their schools. Their main preoccupation was to elaborate the law on fresh points that were not clearly determined by the higher authorities. Scholars like Abu'l-Ḥasan al-Karkhī and Abū Ja‘far al-Ṭahāwī in the Ḥanafī school, Abū al-Ṭālī al-Marwāzī and Abū ʻIshāq al-Shirāzī in the Shāfī‘ī, Abū Bakr al-Abhari, in the Mālikī and ‘Amr ibn Ḥusayn al-Khiraqī in the Ḥanbalī schools have been placed in this category.

All the preceding three classes were designated as mujtahidūn, but the remaining four classes of ‘ulāmā‘, as described below have been classified as imitators.∗

(4) The so-called asḥāb al-takhrij, who did not deduce the aḥkām but were well conversant in doctrine and were able to indicate which view was preferable in cases of ambiguity, or regarding suitability to prevailing conditions.∗

(5) The asḥāb al-tarjih are those who were competent to make comparisons and distinguish the correct (ṣaḥīḥ), the preferred (rājih, arjih) and the agreed upon (muṭi‘a biḥa) views from the weak ones. Authors like ʻAla‘ al-Dīn al-Kāsānī and Burhān al-Dīn al-Marghinānī of the Ḥanafī school, Muḥyī al-Dīn al-Nawawī of the Shāfī‘ī, Ibn Rushd al-Qūṭubī of the Mālikī and Muwaffaq al-Dīn ibn Qudāmah of the Ḥanbalī schools and their equals have been placed in this category.∗

(6) The so-called asḥāb al-tāshīḥ: those who could distinguish between the manifest (zāhir al-riwāyāh) and the rare and obscure (al-nawādir) views of the schools of their following. Textbook writers whose works are in use in the various madhāhib are said to fall into this category.∗
It will be noted here that the previous three categories are somewhat overlapping and could be unified under one category to comprise all those who drew comparisons and evaluated the strengths and weaknesses of the existing views.

(7) And finally the muqallidun, or the ‘imitators’, who lack the abilities of the above and comprise all who do not fall into any of the preceding classes. It is said concerning them: ‘They do not distinguish between the lean and the fat, right and left, but get together whatever they find, like the one who gathers wood in the dark of the night.’

While referring to this classification, Aghnides is probably right in observing that ‘it implies a gratuitous assumption that the latter mujtahidiin could not show greater independence of thought’. The restrictions that were imposed on ijtihād and the ensuing phenomenon of the ‘closing of its gate’ are, in the most part, an historical development that could find little if any support in the legal theory of ijtihād. Similarly, the notion that the ‘ulamā’, at around the beginning of the fourth century, reached such an immutable consensus of opinion that further ijtihād was unnecessary is ill-conceived and untenable. The mendacity of such a claim is attested by the rejection on the part of numerous ‘ulamā’, including those of the Ḥanbali school and the Shi‘ah Imamiyyah, of the validity of such a consensus.

An early influence in the direction of a return to original ijtihād was the Ḥanbali jurist-theologian Ibn Taymiyyah, and his disciples, who inspired the renewed call for the practice of ijtihād, especially on the part of the Wahhabi and the Salafiyyah movements in the Hijaz. Authors throughout the Muslim world have begun to criticise taqlid and advocate the continued validity of ijtihād as a divinely prescribed legal principle. A number of most prominent ‘ulamā’, including Shāh Wali Allāh, Muḥammad ibn Ismā‘īl al-Ṣan‘ā‘nī, Muḥammad ibn ‘Alī al-Shawkānī and Ibn ‘Alī al-Sanūsī led the call for the revival of ijtihād. The nineteenth century Salafiyyah movement in the Hijaz advocated the renovation of Islam in the light of modern conditions and the total rejection of taqlid.

Al-Shawkānī (d. 1839 AD) vehemently denies the claim that independent mujtahidīn have become extinct, a claim that smacks of ‘crass ignorance and is utterly to be rejected’. The same author goes on to name a number of prominent ‘ulamā’ who have achieved the highest rank of erudition in Shari‘ah. Among the Shafi‘is, for example, at least six such ‘ulamā’ can be named who have fulfilled, in an uninterrupted chain of scholarship, all the requirements of ijtihād. These
are ‘Izz al-Din ibn ‘Abd al-Salām and his disciple, Ibn Daqīq al-‘Īd, then the latter’s disciple Muḥammad ibn Sayyid al-Nās, then his disciple Zayn al-Dīn al-‘Irāqī, his disciple Ibn Ḥajar al-‘Aṣqalānī, and his disciple, Jalāl al-Dīn al-Suyūṭī. That they were all full mujtahidūn is attested by the calibre of their works and the significant contributions they have made to the Shari‘ah. The first two of these are particularly prominent. In his well-recognised juristic work, al-Bahr al-Muhīt, Muḥammad ibn ‘Abd Allāh al-Zarkāshī has acknowledged that they had both attained the rank of mujtahid. ‘It is utter nonsense’ writes al-Shawkānī, ‘to say that God Almighty bestowed the capacity for knowledge and ijtihād on the bygone generations of ‘ulamā’ but denied it to the later generations.’ What the proponents of taqlīd are saying to us is that we must know the Qur‘ān and the Sunnah through the words of other men while we still have the guidance in our hands. Praise be to God, this is the greatest lie and there is no reason in the world to vindicate it.”

Iqbal Lahori considers the alleged closure of the gate of ijtihād to be ‘a pure fiction’ suggested partly by the crystallisation of legal thought in Islam and partly by that intellectual laziness that, especially in periods of spiritual decay, turns great thinkers into idols. Iqbal continues: if some of the later doctors have upheld this fiction, ‘modern Islam is not bound by this voluntary surrender of intellectual independence’.

Abū Zahrārah is equally critical of the alleged closure of the door of ijtihād. How could anyone be right in closing the door that God Almighty has opened for the exertion of the human intellect? Anyone who has advanced this claim could surely have no convincing argument to prove it. Abū Zahrārah continues: the fact that ijtihād has not been actively pursued has had the chilling effect of moving the people further away from the sources of the Shari‘ah. The tide of taqlīd has carried some so far as to say that there is no further need to interpret the Qur‘ān and hadīth now that the door of ijtihād is closed. In Abū Zahrārah’s phrase, ‘nothing is further from the truth, and we seek refuge in God from such excesses’.

Conclusion

The conditions under which ijtihād was formerly practised by the ‘ulamā’ of the early periods are no longer what they were. 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 ijtihād. The fact that the law of the land in the majority
of Islamic countries has been confined to the statute book, and the parallel development whereby the role of interpreting the statute has also been assigned to the courts of law, has had, all in all, a discouraging effect on *ijtihād*. The *mujtahid* is given no recognised status, nor is he required to play a definite role in legislation or the administration of justice in the courts. This is confirmed by the fact that many modern constitutions in present-day Muslim countries are totally silent on *ijtihād*. It was this total neglect of *ijtihād* that prompted Iqbal Lahori to propose, in his well-known work *The Reconstruction of Religious Thought in Islam*, that the only way to utilise both *ijmā* and *ijtihād* (which he refers to as the 'principle of movement') into the fabric of modern government is to institutionalise *ijtihād* by making it an integral feature of the legislative function of the state.  

Essentially the same view has been put forward by al-Ṭamāwī, who points out that *ijtihād* by individuals in the manner that was practised by the fuqahā' of the past is no longer suitable to modern conditions. The revival of *ijtihād* in our times would necessitate efforts that 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. Al-Ṭamāwī further recommends the setting up of a council of qualified *mujtahidūn* to advise in the preparation and approval of statutory law so as to ensure its harmony with *Sharī'ah* principles.  

This is, of course, not to say that the traditional forms of learning in the *Sharī'ah* disciplines, or of the practice of *ijtihād*, are obsolete. On the contrary, the contribution that the 'ulamā' and scholars can make, in their individual capacities, to the incessant search for better solutions and more refined alternatives should never be underestimated. It is further hoped that, for its part, government will also play a positive role in preserving the best heritage of the traditional modes of learning, and encourage the 'ulamā' to enhance their contribution to law and development. Universities and the legal professions in many Islamic countries are currently committed to the training of lawyers and barristers in the modern law stream. To initiate a comprehensive and well-defined programme of education for prospective *mujtahidūn*, which would combine training in both the traditional and modern legal disciplines, would not seem to be beyond the combined capabilities of universities and legal professions possessed of long-standing experience in Islamic legal education.
Furthermore, in a Shari'ah-oriented government it would seem desirable that the range of selection to senior advisory, educational and judicial posts would include the qualified mujtahidūn. This would hopefully provide the basis for healthy competition and incentives for high performance among the candidates, and help to create a definite role for them in the various spheres of government.

Two reform measures need to be taken in order to make ijtihād a viable proposition. Firstly, ijtihād in modern times needs collective endeavour so as to combine the skill and contribution not only of the scholars of Shari'ah, but of experts in various disciplines. This is because a total mastery of all the relevant skills that are important to contemporary society is difficult for any one individual to attain. We need to combine ijtihād with the Qur'ānic principle of consultation (shūrā) and make ijtihād a consultative process. The second point to be proposed concerning ijtihād is related to the first in that ijtihād has in the past been seen as a juristic concept and remained the first preserve of the jurist (mujtahid). This might have been due to the fact that the Shari'ah dominated nearly all other fields of Islamic scholarship. But ijtihād in the sense of self-exertion is a method of finding solutions to new issues in light of the guidance of wahy. It is in this sense a wider proposition that may be exercised by scholars of Shari'ah as well as experts in other disciplines, provided that the person who attempts it acquires mastery of the relevant data, especially in the Qur'ān and the Sunnah, pertaining to his subject.

The non-revealed sources of Shari'ah, such as general consensus, analogical reasoning and juristic preference, are all sub-varieties of ijtihād. They serve the purpose, each in their respective capacity, to relate the general principles of Shari'ah to new issues. These are nearly all rationalist doctrines that enable the qualified scholar to find fair and reasonable solutions to problems as they arise. The detailed methods and procedures that each of these doctrines proposes are founded on the premise that the law of Islam was not given and delivered all at once. The idea, in other words, that the law must evolve and keep abreast with social reality lies at the root of ijtihād and all its subdivisions. Some of the doctrines of usūl, such as maṣlaḥah, istiṣḥāb and istiḥsān, hold great potential for diversifying the substance of ijtihād. Yet the conventional usūl has subjected most of these to a variety of conditions which tends to suppress their originality and potential. These can now be utilised perhaps each as a means of injecting fresh impetus into ijtihād in order to enhance the adaptability of law to social reality. One way of doing this would be an explicit recognition
of doctrines such as *maslahah* and *istihsân* and the ways they can be utilised in contemporary legislative and judicial processes. We note, for example, that *maslahah* relates more meaningfully to legislation, while *istihsân* involves making necessary exceptions and refinements in the existing law and may therefore relate better to the process of adjudication, although the potential contribution of *istihsân* to legislation and reforming certain aspects of the Shari'ah may also be realised.

**NOTES**

1. Islahi (*Islamic Law*, p. 109) has thus aptly stated: 'There are three prominent and fundamental sources of Islamic Law: the Holy Qur'an, the Sunnah of the Holy Prophet and *istihsâd*.'


3. Abû Zahrah, *Usûl*, p. 301


18. Ibid.


Ghazālī, Mustasfa, II, 102; Abū Zahrah, Usūl, p. 30.

Shāṭibi, Muwāfaqa, IV, 6.

Ghazālī, Mustasfa, II, 101.

Shawkānī, Irshād, pp. 250–1; Abū Zahrah, Usūl, p. 304; Zuhayr, Usūl, IV, 226.

Shawkānī, Irshād, pp. 251ff; Abū Zahrah, Usūl, p. 304.

Ghazālī, Mustasfa, II, 101; Shawkānī, Irshād, p. 251; Ahqār, Tarikh, p. 233.

Ghazālī, Mustasfa, II, 101; Shawkānī, Irshād, p. 251; Ghazālī, Mustasfa, II, 101; Abū Zahrah, Usūl, p. 305.

Ghazālī, Mustasfa, II, 54; Shawkānī, Irshād, p. 252; Abū Zahrah, Usūl, p. 306.

Shawkānī, Irshād, p. 252; Abū Zahrah, Usūl, p. 307; Badrān, Usūl, p. 208.

Shāṭibi, Muwāfaqa, IV, 56; Abū Zahrah, Usūl, p. 307.

Abū Zahrah, Usūl, pp. 308–9; Ghazālī (Mustasfa, II, 103) considers a knowledge of Arabic, hadith and usūl al-fiqh to be essential to ijtihād. However, the requirement concerning the knowledge of usūl would seem to be repetitive in view of the separate conditions that the mujtahid must fulfill, such as the knowledge of qiyās and other such requirements which fall under the subject of usūl.


Shawkānī, Irshād, p. 254; Abū Zahrah, Usūl, p. 318; Badrān, Usūl, p. 486.

Āmīdī, Iḥkām, IV, 204; Shawkānī, Irshād, p. 255.

Kassāb, Aḍwa’, p. 96.

Shawkānī, Irshād, p. 255; Abū Zahrah, Usūl, p. 318; Badrān, Usūl, p. 486.

Ghazālī, Mustasfa, II, 103; Shawkānī, Irshād, p. 255; Badrān, Usūl, p. 486.


Shāṭibi, Risālah, pp. 201–2; Shawkānī, Irshād, p. 258.


Shawkānī, Irshād, p. 155.

Ibid. p. 236; Zuhayr, Usūl, IV, 227.

Shawkānī, Irshād, p. 256; Ghazālī, Mustasfa, II, 104.

Kassāb, Aḍwa’, p. 61.

Shawkānī, Irshād, p. 256; Ghazālī, Mustasfa, II, 104; Kassāb, Aḍwa’, p. 61.

Abū Dāwūd, Sunan (Hasan’s trans.), III, 1017, hadith no. 3578; Kassāb, Aḍwa’, p. 58. For other hādhīth on this point see Shawkānī, Irshād, p. 256.

Shawkānī, Irshād, p. 257; Zuhayr, Usūl, IV, 234.

Ghazālī, Mustasfa, II, 104.

Shawkānī, Irshād, p. 257; Zuhayr, Usūl, IV, 237.

Shawkānī, Irshād, p. 257; Kassāb, Aḍwa’, p. 80. Ghazālī has however expressed some reservations about the validity of ijtihād in the presence of the Prophet, as he considers that unless the Prophet granted permission, ijtihād in his presence would be discourteous (Mustasfa, II, 104).

Shawkānī, Irshād, p. 259.

Ibid., pp. 160–1; Zuhayr, Usūl, IV, 238.

Āmīdī, Iḥkām, IV, 187; Ibn Qayyim, Ilm, I, 177.


70. Shawkānī, Irshād, p. 262; Amidi, Ihkām, IV, 152; Zuhayr, Usūl, IV, 241.


73. Hallaq, ‘Gate of Ijtihad’, p. 18.

74. While quoting Ghazālī’s statement, Shawkānī (Irshād, p. 253) considers it of questionable validity, and adds that Ghazālī almost contradicted himself when he said that he did not follow Shāfi‘i in all of his opinions.

75. A more detailed account of the historical developments concerning the classification of ijtihād can be found in Hallaq, ‘Gate of Ijtihad’, p. 80ff.


77. Ibid.

78. While stating the position of the three Sunni schools on the point, Abū Zahrah (Usūl, p. 311) adds that this is not definite as, for example, some Hanafis have considered Kamāl al-Dīn ibn al-Humām as a mujtahid of the first class.

79. Muslim, Sahih, p. 290, hadith no. 1095; Shawkānī, Irshād, p. 253; Ghazālī, Mustasfā‘, I, 111.

80. Ibid.

81. Abū Zahrah, Usūl, p. 312; Kassāb, Adwā‘, p. 112.


84. Abū Zahrah, Usūl, p. 314; Kassāb, Adwā‘, p. 40; Aghnides, Muhammadan Theories, p. 95; Mawsū‘ah Jamāl, I, 253 and VII, 387.

85. Abū Zahrah, Usūl, p. 315; Kassāb, Adwā‘, p. 40; Aghnides, Muhammadan Theories, p. 96.

86. Ibid.

87. Ibid.

88. Abū Zahrah, Usūl, p. 316.

89. Aghnides, Muhammadan Theories, p. 96.


91. Further details on developments in the Hijāz and in the Indian Subcontinent can be found in Fazlur Rahman, Islam, pp. 197ff; Enayat, Modern Islamic Political Thought, pp. 63ff.


93. Iqbal, Reconstruction, p. 178.


A New Scheme for *Uṣūl al-フィqh*

*Uṣūl al-フィqh* is one of the most distinctive areas of Islamic learning, a ‘mother’ discipline in *Sharī‘ah*, and a genuine manifestation of Islamic thought and scholarship throughout its long history of development. Its pervasive influence on almost all other branches of Islamic learning has consistently placed *Uṣūl al-フィqh* at the head of the academic and educational curricula of Islam. However, owing to a variety of factors, *Uṣūl al-フィqh* is no longer capable of serving the goals for which it was originally designed and developed. *Uṣūl al-フィqh* has often been described as a theoretical discipline that has lost touch with the realities of social change, and its effectiveness in stimulating *ijtihād* on new issues has been increasingly called into question.

As we note, the doctrines and methods of *Uṣūl al-フィqh*, such as *ʾijmā‘*, *qiyās*, *istihsān* and *istiṣlah*, are conspicuously absent in the legislative and judicial decision-making processes of contemporary Muslim countries. This chapter enquires into the reasons behind the gap that has increasingly isolated *Uṣūl al-フィqh* from statutory legislation, and then proposes an umbrella scheme with a view to bridging the gap between the theory and practice of this discipline. Specific issues pertaining to the various doctrines of *Uṣūl al-フィqh*, including *ijtihād*, *ʾijmā‘*, *qiyās*, *istihsān* and *istiṣlah*, have already been identified and discussed in the relevant chapters of this book, together with reform proposals that seek to improve the inner working and methodology of these doctrines. I have discussed reform proposals concerning these doctrines in my concluding remarks to the various chapters. I take the opportunity now to examine the general scheme of *Uṣūl al-フィqh* and explore the possibilities of greater consolidation and coherence between its various parts. The
changes I discuss in the following pages also seek to enhance the utility and relevance of the discipline to statutory legislation. I shall, at the outset, draw attention to issues regarding the theoretical orientations of usūl al-fiqh, and the role of the time-space factor in its methodology; I shall then expound upon a new scheme for its reorganisation and reform.

I. Theoretical Orientations of Usūl al-Fiqh

Usūl al-fiqh is often described as a theoretical, rather than empirical, discipline, which is studied more for its own sake than as a means by which to develop the law in relation to new issues. This is one of the problems of the legal theory of usūl, which took a turning for the worse with the domination of taqlid around the fourth/tenth century. With the so-called closure of the door of ijtihād, the ‘ulamā’ resorted less and less to the sources of Shari’ah for finding solutions to problems. Instead of addressing social issues and attempting to find new solutions, the ‘ulamā’ of later ages (al-muta’akhkhirin) occupied themselves mainly with the elaboration, annotation, abridgement, summaries and glossaries of the works of their predecessors. At first, ijtihād was discouraged. Then in the fifth/eleventh and sixth/twelfth centuries, scholars were restricted to tarjih, or giving preference to the opinion of one imam or another on questions of figh. However, tarjih was also discouraged and scholars were restricted to choosing between rulings within a single madhhab. In this way “the door to independent legal thought was shut and then barred.” With the development of a gap between legal theory and practice, there then came a stage where usūl al-fiqh began to be used as a means by which to justify taqlid. Imitators studied the usūl and utilised its methodology in order to defend their unquestioning conformity to the established doctrines of the past. Unwarranted references to the general consensus, or ijma’, of the ‘ulamā’ of the past over one ruling or another proliferated, and often minor and relatively obscure opinions were elevated to the rank of ijma’.2 The methodology of usūl, which was primarily designed to regulate and encourage ijtihād, was then used for purposes that were alien to its original intention.

A certain lag between the theory and practice of a discipline is admittedly not unexpected. Theoretical articulation often follows practical development. It is not surprising, therefore, to note that usūl al-fiqh had a certain degree of theoretical orientation even during the era of ijtihād. The question has thus arisen, and debated in many a
reputable text of usūl, as to which came into being first, fiqh or usūl al-fiqh, the law itself or the theory and sources of law? One of the two opposing answers to this question has it that fiqh could not have developed without its sources, and this would mean that usūl al-fiqh preceded fiqh. But it seems more likely that fiqh preceded usūl al-fiqh. Fiqh began to develop during the lifetime of the Prophet, at a time when there was no urgent need for a methodology, and this situation continued unchanged during the period of the Companions. Important developments in usūl occurred only during the second/eighth and early third/ninth centuries. As one observer commented, 'usūl al-fiqh was a retrospective construct...Indications are that usūl al-fiqh was a manner of systematising positive law that had already been arrived at largely as a result of local and other needs without necessary recourse to the sources. The theoretical orientation of usūl persisted even after it was articulated and refined. In historical terms, the articulation of the doctrines of usūl took place around the early third century, that is, in the last third of the three centuries of ijtihād. Thus, the main purpose for which the theory was supposed to be utilised, namely, to regulate ijtihād, was soon beginning to decline. Furthermore, many of the doctrines of usūl remained controversial and were increasingly subjected to technicalities and stipulations that tended to erode their effectiveness. The increased complexity of doctrines such as qiyās and istihsān, and conditions such as unanimity and universal consensus as a prerequisite of ijmār were bound to affect the practical utility of these doctrines. The legal theory that al-Shafī‘ī articulated in his Risālah was not burdened with technicality and regimentation of the kind that were subsequently webbed into it by the proponents of taqlīd. These later additions were in turn not so much motivated by the ideal of accommodating social changes as by the concern to preserve the heritage and traditions of the past. Some of the complexities of Hellenistic thought and logic found their way into usūl al-fiqh and moved it further away from the realities of social life. There is little doubt that some of the doctrines of usūl such as ijmār and qiyās were partly designed to encourage stability and curb the influence of foreign traditions into the corpus juris of Islam. Evidence also suggests that the development of usūl was influenced by the rift over legitimacy between the ‘ulamā‘ and rulers. While the ‘ulamā‘ refused to acknowledge to the rulers the authority to legislate and interpret the Shari‘ah, the rulers denied the ‘ulamā‘ a share in political power. The fact, for example, that Imam al-Shafī‘ī wrote so strongly against istihsān and
equated it with caprice and arbitrary tampering with Shari‘ah was
designed partly to deny the political rulers the opportunity to circum-
vent the nusūs and ijma‘ on grounds of political expediency and
preference.

Abu Sulayman has spoken of the lack of empiricism in the works
of the ‘ulamā‘ and their reliance on ‘deduction from the Islamic
texts as their main method in acquiring knowledge...and not much
attention was paid to developing systematic rational knowledge
pertaining to law and social structure.’ He then states that in regard
to other subjects, such as medicine, mathematics and geography,
Muslim scholars relied on text and reason. They were empirical,
experimental and applied both induction and deduction. However,
this was not the case in conventional usūl, which was ‘developed in
response to the needs of maintaining the classical social system of
the dynastic period.’ With the emergence of the rapidly changing
industrial society ‘the classical frame of analysis is no longer workable
or acceptable.’

The gap between theory and practice grew wider as a result of the
fact that usūl al-fiqh was developed, like the rest of Islamic law, by
private jurists who worked in isolation from government. The ‘ulamā‘
were not involved in the practicalities of government and their rela-
tions with government authorities were often less than amicable. Juristic
doctrines were often advanced and elaborated without involving
government policy. Note, for example, that nearly all the instances
of ijma‘ that are cited in the textbooks refer to the consensus of ‘ulamā‘
and private jurists, there being hardly a single record of a government-
sponsored assembly of the learned to have acted as a vehicle of ijma‘
or even of ijma‘ in which the government played a visible role. For
their part, the government authorities seem to have condoned and
encouraged taqlīd as this meant that leadership and initiative in both
political and legal spheres rested with the government in power. The
‘ulamā‘ were consequently left to their own devices to utilise and
even modify the legal theory so as to suit the requirements of taqlīd.

The early ‘ulamā‘ denied the increasingly secular Umayyad rulers
the legitimacy to legislate or to interpret the law, and the rift became
more visible under the Abbasids who did not allow the ‘ulamā‘ a share
in political power. Thus the struggle over legitimacy had ‘a serious
negative influence in changing the sound psychological and rational
environment created by the Prophet and which had dominated
earlier periods.’ The rulers strove to enhance the role and authority
of reason over the texts, as this would give them freedom in the
sphere of legislation, but the 'ulamā' were keen to deny them that very freedom. It was against this background that they articulated the methodology of *uşūl* in order to minimise abuse of power by the rulers and their liberty with the *Shari'ah*. Imam al-Shāfi‘î's attempt, for example, to equate *ijtihād* with *qiyyās* as two terms with the same meaning was clearly indicative of a purpose to minimise the role of independent reasoning in the development of *Shari'ah*. The wider scope of reasoning was thus to be reduced to only one form, that is, analogical reasoning. The result was a certain ‘distortion of issues, arbitrariness and spread of spurious materials within the fabric of *uşūl al-fiqh*.”

The 'ulamā'’s assertion that there was no further need for original *ijtihād* (i.e. the closure of the door of *ijtihād*) was prompted by the struggle for legitimacy, and this was a step that could only have been taken in an atmosphere of despondency at a time when Islamic thought and scholarship had lost enthusiasm for originality and renewal. It seems that the problem of legitimacy persisted, and helped to alienate the ‘ulamā’ from the political leaders in Muslim societies. The pattern that has prevailed during the era of nationalism and constitutional government is also one of isolation between the ‘ulamā and government, although for different reasons. It now appears that the popular vote, rather than the approval of the ‘ulamā, is seen as a legitimising force in politics. The advent of constitutionalism and government under the rule of law brought with it the hegemony of statutory legislation, which has largely dominated legal and judicial practice in Muslim societies. The government and its legislative branch tend to act as the sole repository of legislative power. The ‘ulamā have no recognised role in legislation, and the role and relevance of *uşūl* to the applied law of the land appears to have become even more uncertain and remote.

II. The Time-Space Factor

The legal theory of *uşūl* falls short of integrating the time-space factor into the fabric of its methodology. This is also a *taqlīd*-related phenomenon and is reflective of an influence that fails to comply with the Qur’ānic teachings on rational enquiry and pragmatism in finding effective solutions to problems. One can vividly see the role of the time-space factor in the early history of the Qur’ān when we compare its Meccan and Medinan portions. The Qur’ān took into account the prevailing conditions of Arabian society, which were reflected not
only in the substantive laws that it introduced in each phase, but also in the occasions of its revelation (asbab al-nuzūl), the form and style of its language, the intensity of its appeal and the psychology of its discourse.

The fact that the Qurʾān was revealed gradually over a period of twenty-three years is itself testimony to its regard for changes of circumstances in the life of the nascent community. God Most High revealed His message to the people with consideration of their capacity for receiving it and the realities with which they were surrounded in Mecca and Medina respectively. We note, for example, that Muslims were not allowed to fight with non-Muslims when they were a minority in Mecca, but were later allowed to do so when they formed a community and government of their own in Medina; when in Medina, the Qurʾān initially instructed peaceful relations with the Jews, but then envisaged a different scenario when relations with the Jews became increasingly hostile.

The time-space factor is also the principal cause behind the incidence of abrogation (naskh) in the Qurʾān and Sunnah. Naskh is by and large a Medinan phenomenon that occurred as a result of the changes the Muslim community experienced following the Prophet’s migration to Medina. Certain rules were introduced at an early stage of the advent of Islam at a time when Muslims were a minority in a dominantly non-Muslim environment. Later, when they acquired sovereign authority, some of the earlier laws were abrogated and replaced by new legislation.

In a section entitled ‘The Danger of Too-Literal an Interpretation of the Sunnah’, al-ʿAlwānī has highlighted the ‘dictionary-based culture’ that prevailed over the climate of Islamic scholarship and gave rise to a ‘literalist approach which relied heavily on dictionary-oriented interpretation’, at the total neglect of ‘the time-space factor, thus lending strength to factors which impeded the renaissance of the ummah’. This was a departure from the spirit of the Prophetic Sunnah, which was a living reality and guide for daily life and took full cognisance of the prevailing conditions. The confusion became apparent with the onset of a mentality that ‘the exact circumstances which brought about a hadith, could be repeated many times, which is impossible in real life’.

The failure in classical jurisprudence to admit the time-space factor into the fabric of its methodology of interpretation and ijtihād has added to the problem of the authenticity of Sunnah. When a certain circumstantial instruction of the Prophet is taken to be the embodiment
of a permanent Sunnah, it is no longer enough to verify the basic outline and message of the reported Sunnah, but the precise wording as well; and this is extremely difficult. Neglect of the time-space factor in the treatment of Sunnah has added to the problem of its authenticity, especially when the hadith is read without proper consideration and understanding of the effect of space-time on concrete situations. Abu Sulayman has observed that simple and direct deductions from specific textual materials ‘without properly accounting for changes involving the space-time element of the early Muslim period is a retrogressive step’. We may refer, for illustration, to the debate over the purpose and import of the Qur’anic text stating that a smaller number of Muslim warriors would overcome, by dint of their commitment, perseverance and sacrifice, a larger number of enemy soldiers (see Al-Anfāl, 8:66). Commentators have focused attention entirely on the numbers involved and are preoccupied with questions of whether or not it is permissible to flee from battle if the enemy forces are less than double, and so on. The debate here ignores the point, mentioned by Imam Mālik, that strength or weakness is not necessarily a question of numbers but of power, state of readiness and equipment. To relate the purport of this passage to warfare in a different time and place, one would surely need to depart from the particularities of the text and highlight instead its general purpose. It is concern for literalism at the expense of empiricism that has led many a devout Muslim to insist on adhering to the letter of the hadith, for instance, in the giving of foodgrains in zakāt al-fitr (charity given on the occasion of ‘id, marking the end of Ramaḍān). The text has admittedly not mentioned that the monetary equivalent of a staple grain may also be given on this occasion. The ruling of the hadith was obviously suitable for its own time, bearing in mind the uncertainty of food supplies in the market place of Medina, but that situation has evidently changed. Al-'Alwānī has written of his personal experience, in this connection, when he addressed a gathering and said that zakāt al-fitr may, under contemporary conditions, be paid in its cash equivalent in accordance with today’s living standards. He then writes: ‘My explanation made some people extremely angry and one faqīh came the next day to the mosque with quantities of barley and corn and a measuring cup and started giving out to people in an effort to prove that you can literally implement the Prophet’s instructions today.’ The beginning of the fasting month of Ramaḍān is signified, as the Qur’ān provides, by the sighting of the new moon. This was, of course, the most reliable method that could be achieved in the early
days of Islam. But the sighting of the new moon with the naked eye would seem to be unnecessary if the beginning and end of Ramaḍān could be established with the aid of scientific methods. To insist, therefore, on a literal enforcement of the text while turning a blind eye to new technological means would not only amount to hardship (haraj), under certain circumstances at least, but would also defy the essence of Qur’anic teaching on rational enquiry and empirical truth. ‘It is just not possible today’ as al-‘Alwānī rightly observes ‘to impose proposals and ideas put forward in Medina by Imam Mālik and his contemporaries fourteen hundred years ago.’ To ignore subsequent developments in human sciences, modern commerce and economics is likely to result in poverty and hardship and would therefore contravene the general objectives of the Qur’ān and Sunnah.

Ignoring the role of time-space in the understanding of the Qur’ān has also encouraged a certain tendency toward fragmentation and neglect of the internal structure of its values. To say, for example, that the verse of the sword ‘And wage war on all the idolaters as they wage war on all of you’ (al-Tawbah, 9:36)

وفاقلتوا المشركين كافة كما يقاتلونكم كافة

has abrogated the Qur’ānic address that validates peaceful relations with non-Muslims ‘who fight you not for [your] faith nor drive you out of your home’ (al-Mumtahinah, 60:8)

الذين لم يقاتلونكم في الدين ولم يخرجوكم من دياركم

is not only neglectful of the time-space factor, but totally unwarranted. The claim does not end with this, but goes on to maintain that the verse of the sword has abrogated over one hundred verses in the Qur’ān which advocated a wide range of moral values including mercy, forgiveness, peace, fair treatment and tolerance towards non-Muslims. To invoke naskh in such terms might have served a purpose at a time when Muslims were the dominant military and political power on earth, but such an approach, questionable as it was, could hardly be said to be acceptable under a totally different set of circumstances today.

III. Uṣūl al-Fiqh Revisited

Our main concern here is to propose an alternative scheme that can inject pragmatism into the fabric of an otherwise theoretical discipline
that cannot effectively relate to the realities of law and government in modern times. The alternative that is proposed must seek to strike a balance between the need for continuity and preservation of a valuable heritage and a determined and purposeful move in order to change the existing impasse regarding *uṣūl al-fiqh*.

There are two areas where improvements could be made in conventional *uṣūl al-fiqh*. We note, on the one hand, that the methodology of *uṣūl* has not integrated the Qur'ānic principle of consultation into its doctrines and procedures. The second shortcoming of *uṣūl al-fiqh*, not unrelated to the first, is its detachment from the practicalities of government, and its near-total reliance on private *ijtihād* by individual jurists. Here we note once again that the Qur'ānic dictum of obedience to those who are in charge of community affairs, the *ūlū al-amr*, has not received due attention in the conventional legal theory. Despite the unmistakable reference of the *ūlū al-amr* to government, jurists and commentators have tended to ignore this and have instead considered the ‘*ulamā‘’ to be the principal or even the only frame of reference in the understanding of this term. The ‘*ulamā‘’ of *uṣūl* were obviously content with a somewhat one-sided interpretation of the Qur'ān in that the theory they developed was such that it could, from beginning to end, be operated by the ‘*ulamā‘’ without the involvement of the government in power and in total isolation from it. This aspect of legal theory is conspicuous in the conventional expositions of *ijmā‘*, which is defined as ‘the unanimous agreement of the mujtahidūn of the Muslim community at any period of time following the demise of the Prophet Muḥammad on any matter.’

It is remarkable that the definition of *ijmā‘* is oblivious of both of the Qur'ānic concepts of *shūrā* and *ūlū al-amr*, especially in reference to the government and the role it might reasonably be expected to play in consultation and in taking charge of community affairs. *Ijmā‘* was defined so that the ‘*ulamā‘’ could in theory conclude it and make it binding on the government without either consulting or seeking the consent of government authorities. We are aware, on the other hand, that *ijmā‘* represents the single most important concept in the legal theory of *uṣūl*, which offers the potential of making the whole of the legal theory pragmatic and viable. *Ijmā‘* should naturally involve consultation among the broad spectrum of the *ūlū al-amr*, and ensure collective decision-making through participation and involvement of both the government and the ‘*ulamā‘’ and of virtually everyone who can contribute to its objectives.

Jamāl al-Dīn ‘Atiyyah has suggested a new scheme for con-
A New Scheme for Usul al-fiqh

vontional usul al-fiqh in which he proposes to divide the sources of Shari'ah into the five main headings of: (1) the transmitted proofs, which include the Qur'an, Sunnah and revealed laws preceding the Shari'ah of Islam; (2) ordinances of the ulu al-amr, which includes ijma and ijtihad; (3) the existing conditions or status quo, insofar as it is harmonious with the preceding two categories, and this includes custom ('urf) and the presumption of continuity (istiṣḥāb); (4) rationality ('aql) in areas where full juridical ijtihād may not be necessary (the day-to-day rulings of government departments, for example, that seek to ensure good management of affairs may be based on rationality alone); (5) original absence of liability (al-bara'ah al-asliyyah), which presumes permissibility and freedom from liability as the basic norm of Shari'ah in respect of things, acts and transactions that have not been expressly prohibited.*4

The broad outline of this scheme is acceptable, notwithstanding certain reservations that I shall presently explain. 'Atiyyah has himself stated that the scheme he has proposed, especially in its reference to the transmitted proofs, relies almost totally on conventional usul al-fiqh. In the second heading, 'Atiyyah's scheme proposes a revised structure for ijma and ijtihād. These are undoubtedly among the most important themes of the methodology of usul al-fiqh, and bringing them both under the umbrella of the ordinances of ulu al-amr offers the advantage of linking this classification directly to the Qur'an, on the one hand, and taking an affirmative stance on government participation in the conclusion of ijtihād and ijma on the other. I shall presently return to 'Atiyyah's views, but here I note a relevant observation from Hasan Turābī who states that the decline of ijtihād was partly due to the decline in shūrā and then proposes that the state and the ulu al-amr should take every step to make shūrā an integral part of decision-making processes. The public and the media can also play a role in stimulating participation, consultation and debate until a consensus emerges and the majority makes its voice known. Turābī adds that 'decisions which are made through shūrā are then ratified by the ulu al-amr and implemented as juridical ijma [ijma tashri'ī] or the ordinances of government [amr hukumi].'*5

The third heading in 'Atiyyah's proposed scheme consolidates under one category the two recognised proofs of usul al-fiqh, namely, istiṣḥāb and custom, and tends to attach to it a degree of prominence that they were not given in their conventional expositions. A mere difference of emphasis in the scholastic doctrines of the madhāhib, such as the Ḥanafī and Shafi'i emphasis on custom and istiṣḥāb...
respectively, is not enough to underscore the importance of social custom in the development of Shari'ah. ‘Atiyyah’s treatment of custom and istiṣḥāb consolidates these two logically related themes, gives them greater prominence, and thereby tries to inject pragmatism into the rubric of the legal theory.

I have hitherto commented on the first three parts of ‘Atiyyah’s five-point scheme and I am of the view that the remaining two headings in that scheme, namely rationality, and original non-liability, are superfluous and should therefore be omitted. This means that we would have consolidated the entire range of topics in conventional uṣūl al-fiqh under the three headings of transmitted proofs, the ordinances of ʿulū al-amr and valid status quo. The second of these, namely, the ordinances of ʿulū al-amr, is comprehensive, bearing in mind that the broad concept of ijtihad subsumes a whole range of topics such as qiyās, istiḥsān, sadd al-dhara‘i‘, which, however, featured somewhat atomistically in conventional uṣūl al-fiqh, each as a separate chapter rather than an integrated theme of a unified whole. This list of ijtihad-related topics could, of course, be extended to istiṣḥāb which may be seen as another sub-variety of ijtihad, and yet it is justified to treat istiṣḥāb, or presumption of continuity, under the valid status quo in the proposed scheme. For istiṣḥāb is grounded in the idea of presuming the continued validity of existing facts and situations unless there is evidence to suggest otherwise. Even if we include istiṣḥāb under the general concept of ijtihad, it would only come, as per conventional legal theory, at the very end of the list of rational proofs, as it is generally regarded to be the weakest of all proofs, which is why it is known in the conventional uṣūl as the last ground of fatwā (ākhir madār al-fatwā). To classify istiṣḥāb under valid status quo would thus appear to be acceptable, as it is not likely to feature prominently under the category of ijtihād and ʾijmā‘, and it seems more coherent to classify it under one heading with custom (ʿurf).

There is one topic in the conventional proofs of uṣūl al-fiqh which ‘Atiyyah has not mentioned, namely, the fatwā of a Companion. Notwithstanding some disagreement on its authority as a proof, I propose that the fatwā of a Companion should be included in the main category of transmitted proofs, for we may otherwise find no place in the legal theory for the outstanding contributions of Companions like ‘Umar ibn al-Khaṭṭāb, ‘Abd Allāh ibn Mas‘ūd and many others. Most of the important rulings of the leading Companions were perhaps eventually adopted under the broad concept of ʾijmā‘, yet there remains a fairly rich legacy of rulings on which they have recorded different
As I stated earlier, the remaining two categories in ‘Atiyyah’s proposed scheme, namely, rationality (‘aql) and original non-liability (barā‘ah al-ašliyyah), seem somewhat unnecessary and controversial, for they add but little to its preceding three categories. We note, for example, that rationality could be subsumed under the broad concept of ijtihād or under any of its sub-varieties such analogy, juristic preference and mašlahah. These are all rationalist doctrines and if we were to open a separate category for rationality, it would be difficult to decide where to place such other concepts as mašlahah and istihsān, under rationality or ijtihād. Furthermore, creating a new category of proof in the name of ‘aql is bound to raise questions as to the nature of the relationship between revelation and reason. Opening a new chapter under ‘aql can only be justified if ‘Atiyyah had clearly articulated the respective roles of ‘aql and wahy, which he has not. Since the broad outline of ‘Atiyyah’s proposed scheme is in conformity with the basic order of priorities that are upheld in conventional usūl al-fiqh, opening a new chapter in the name of rationality would not only interfere with the other parts of the proposed scheme, but is also inherently ambiguous and unjustified.

As for the proposed recognition of al-bara‘ah al-ašliyyah as a source or proof of Shari‘ah, it will be noted once again that this is subsumed, in conventional usūl al-fiqh, under the presumption of continuity, or istišāb, and it is as such a presumption, not a proof. Original non-liability presumes in reference, for example, to the accusation of crime that the accused person is innocent, or in reference to civil litigation, that there is no liability, unless the contrary is proven in each case.

Istišāb in this context presumes the normal or original state of things, that is non-liability, which should prevail unless there is evidence to suggest otherwise. Since this is only a presumption, it is a weak ground for decision-making and it does not, in any case, present a case for it to be recognised as a source or proof of Shari‘ah in its own right. I therefore propose that this too should be subsumed under the third heading of ‘Atiyyah’s proposed scheme, namely, the valid status quo. I have in sum proposed a consolidation of ‘Atiyyah’s five-point scheme into three and submitted that the remaining two headings are somewhat repetitive and need not be included.
NOTES

8. Ibid., p. 83.
9. Ibid., p. 84.
11. Ibid., p. 16.
12. Ibid., p. 18.
14. Cf. Shāṭibī, Muwafaqāt, III, 244; Aḥmad Amin, Fājr al-Īslām, p. 231.
15. The number of daily prayers, for example, was initially fixed at two, but was later increased to five, and the initially charitable and undefined character of zakah in the Meccan period was later given the force and precision of positive law. For more examples see Shāṭibī, Muwafaqāt, III, 63; Badrān, Uṣūl, p. 148.
17. Ibid.
18. Cf. Abu Sulayman, Islamic Methodology, p. 34.
19. Ibid., p. 70.
20. Ibid., pp. 72ff.
The preceding chapter highlighted the close relationship between the textual sources of Shari'ah and the methodology of usul al-fiqh. This was followed by comments on literalism versus empiricism in the legal theory of usul and how the reformist trend now looks to the maqasid al-Shari'ah, that is, the objectives of Shari'ah, in order to make up for some of the weaknesses of the conventional methodology of usul al-fiqh. The present chapter attempts to take some of these points to their logical conclusion and takes a closer look at the relationship of the maqasid with the usul.

One of the main objectives of usul al-fiqh is to provide a set of guidelines to ensure that ra'y plays a supportive role to the values of wahy. This is true of all the familiar doctrines of usul al-fiqh which seek, each in their individual capacity, to utilise the source evidence of the Qur'an and Sunnah and extend their message to a variety of different situations. The inner dynamics of the Qur'an and Sunnah can be visualised in their emphasis on justice, equality and truth, on commanding good and forbidding evil, on the promotion of benefit and prevention of harm, on charity and compassion, on fraternity and co-operation among the tribes and nations of the world, on consultation and government under the rule of law, and so forth. This is clearly not a static agenda and it is broad enough to provide scope for perpetual refinement. If we see the Shari'ah in the light of these objectives, then usul al-fiqh provide us with procedural devices and formulae for their realisation.

It is equally evident that the methodology of usul al-fiqh would have little meaning and purpose if the Shari'ah were meant to be a fixed and unchangeable entity. Usul al-fiqh is predicated on the idea of development and growth, and functions as a vehicle of accommodation and compromise between the normative values of Shari'ah and the practicalities of social change. Usul al-fiqh translates this
basic outlook into workable formulae that often aim to establish an equilibrium of values. To speak of istiṣlāḥ, or considerations of public interest, for example, is to articulate an acceptable formula that strikes a balance between diverging, even conflicting, interests of continuity and change, of those of the individual and society, of freedom and responsibility, of moral virtue and materialist gain, and so forth. It is therefore neither the change as such, nor continuity alone, nor any of these other values we have mentioned that could be said to be, in an exclusive and absolute sense, the valid objective of usūl al-fiqh. It is rather the manner of reconciling these and achieving a balanced accommodation and equilibrium that often constitutes the valid objective of the methodology of usūl al-fiqh.

The persistent quest that we observe, in almost every chapter of usūl al-fiqh for textual proof of particular doctrines, and for conditions to attend their valid application, that the purpose of all this is to ensure conformity with the dictates of ṭahār. Be it ījmāʿ or qiyyās or any other doctrine, two sets of questions are usually raised, one of which seeks to ascertain the evidential basis, or ḥujjīyyah, of that doctrine in the textual sources, and the other seeks to identify the proper conditions that would ensure a controlled and methodical application of the formula in question. Both of these requirements are predicated on the desire that rationalist doctrines are applied within the given value structure of the Qur‘ān and Sunnah.

On a similar note, to stipulate that maṣlahah or istiḥsān is a proof only when it is not in conflict with a clear text is obviously to preclude from the ambit of usūl al-fiqh a formula or a method that is alien to the textually approved values.

But then to read among the conditions of qiyyās, ījmāʿ, istiḥsān, etc., that these formulae can only be invoked in the absence of a clear ruling in the textual sources over the issue at hand is another way of saying that these methodological formulae are basically designed to address new situations and to find solutions to unprecedented issues. This also means that usūl al-fiqh is the methodology of accommodating social change within the given value framework of Islam. Neither usūl al-fiqh nor ījtihād would fulfil their desired objectives if they did not entertain novel situations and the idea of developing the law in the light of the changing needs of society.

The onset of literalism and regimentation in the juristic tradition of Islam evidently marked a departure from the more versatile and pragmatic outlook that is upheld in the sources of Shari‘ah and the precedent of the leading Companions. Instead of perceiving the
words of a given text as the carrier and vehicle of a certain value, the advocates of literalism began to pay more attention to the words of the text at the expense, sometimes, of its purpose, which often amounted to a neglect of prevailing reality and empirical truth. To insist on the actual sighting of the moon in order to ascertain the beginning or end of Ramadān, for example, and to say that only the actual foodgrains or livestock and not its monetary value is payable in zakāh, amounts to a kind of empty literalism that can hardly be sustained by a comprehensive reading of the text. Instead of taking a holistic approach to the reading of the text, literalism began to alienate the language of the text from the broader objectives of Shari‘ah. Being the main ally of taqlīd, literalism tended to dominate, in varying degrees and contexts the sciences of tafsīr, fiqh and ḥadīth and had serious repercussions for ijtiḥād.

There is now a renewed emphasis on the goals and objectives of Shari‘ah, the maqāsid al-shari‘ah, with the express purpose of departing from the strictures of literalism in the direction of a goal-oriented and comprehensive understanding of the text. This shift of emphasis is obviously designed to restore the balance between the letter and spirit of the text that was once present in the early phases of the development of usūl, but was subsequently disturbed and remained in a state of disequilibrium throughout the centuries of taqlīd. Usūl al-fiqh provided an effective mechanism for ijtiḥād during the early period but became increasingly weak until both ijtiḥād and usūl al-fiqh came to a standstill. Usūl al-fiqh changed direction and its resources began to be utilised in the service of conformity and taqlīd. Imitation substituted originality, and literalism offered a comforting escape from the unpalatable reality of alienation that the ‘ulama‘ experienced as a result of strained relations with the ruling authorities.

The fresh emphasis on the maqāsid that we are now witnessing is evidently a step in the direction of opening up the outlook and horizon of usūl al-fiqh and releasing it from the rigidities of literalism and imitation, but it does not signify a move, as it were, to abandon usūl al-fiqh altogether. The new emphasis on the maqāsid may be the harbinger of a series of detailed changes in the various parts of usūl al-fiqh as the reformist movement gains greater momentum and support. The new trend is also indicative of the desire to rejuvenate ijtiḥād, for the revival of ijtiḥād still remains a largely unfulfilled objective, even after almost a century since the days of al-Afghānī and ‘Abduh, whose clarion call for the revival of ijtiḥād and a return to the sources of Islam turned a new page in the history of this movement. The
Islamic resurgence of the 1970s and 1980s has hitherto mainly consisted of a demand in which the Muslim masses have expressed dissatisfaction over the alienation of their heritage, and domination of Western institutions in their societies. This demand has yet to be translated into specific formulae for reform.

A revised and reformed usūl al-fiqh has been the focus of attention in recent decades in the activities, not only of the American-based International Institute of Islamic Thought, but of frequent seminars and conferences by institutions of higher learning in the Muslim world. One of the clear messages has been to underscore the stifling effects of literalism and imitation and invite attention to the higher objectives, or the maqāṣid, of Shari'ah. The advocates of reform have warned against the temptation of reading the usūl for its own sake, and stressed the need to see the usūl al-fiqh in its original light, which is to stimulate ijtihād and provide a vehicle for its proper implementation.

To this I might add a reminder of the temptation of moving to the other extreme and to think that the maqāṣid could by themselves satisfy the reformist demand without the aid of the methodological tools of usūl al-fiqh. For the maqāṣid of Shari'ah are nothing other than a statement of the goals and objectives of Shari'ah, such as maslahah, justice, and protection of a set of values including religion, life, intellect, family and property. Important as they undoubtedly are, the maqāṣid of Shari'ah do not provide a methodology or operational formulae of their own, that is, independently of usūl al-fiqh. The conventional usūl is, on the other hand, rich with methodology and procedural directives for ijtiḥād. Hence a substantive merger between the usūl and the maqāṣid will prove naturally complementary and appealing. An open-ended pursuit of the maqāṣid could give rise to the kind of controversy that history has witnessed between the Ahl al-Ra'y and Ahl al-Hadīth. To pay attention to the maqāṣid is otherwise more than warranted as it marks a new beginning for a goal-oriented methodology and opens up the horizons of ijtiḥād.

Thanks to the strictures of literalism, conventional usūl has not achieved a balanced fusion between the letter and the spirit of Shari'ah. The 'ulamā' of usūl did not pay individual attention to the maqāṣid and tended to subsume them in their study of such other themes as ratiocination (ta'ilīl), that is identification of the effective cause ('illah), hikmah (rationale and philosophy) of the law, and also, of course, qiyyās and maslahah, the last of which is in itself one of the recognised maqāṣid. There were also differences of orientation to these ideas among the madhāhib, some of which viewed 'illah, hikmah and maslahah
more technically than others. Broadly speaking, however, the *maqāṣid al-Shari‘ah* as a distinctive chapter and discipline of *Shari‘ah* only received exclusive attention in the works of al-Shāṭi’ī in the eighth century Hijrah, that is, almost five centuries after the development of the science of *uṣūl al-fiqh*.

Six more centuries have elapsed since the days of al-Shāṭi’ī and it is only now that we note a decisive trend toward substantive integration of the *maqāṣid* within the fabric of *uṣūl al-fiqh*. The effort now to give greater prominence to the *maqāṣid* should enable us to discard a ruling, say, of *qiyās* or of *fatwā* and *ijtihād*, if it is in disharmony with the overriding goals of *Shari‘ah*, even if it appears to be technically sound and in conformity with prescribed procedures. This would mean that the rulings of *ijtihād* are made subservient to the higher objectives of the law and are consequently abandoned in the event of conflict with them.

The fact that we now propose to entrust the Muslim representative assembly and *uṣūl al-amr* with the role of being the main repository of *ijtihād* and *ijmā‘* is itself a move in the direction of the *maqāṣid*. This would be one of the most important steps, and would remove the conventional duality between the *Shari‘ah* and statutory law, and hopefully bring coherence to law and government in Muslim societies. Although this is not a new subject and we know the emphasis that is laid in the textual sources of Islam on the unity and integration of the *ummah*, yet no one has, to the best of my knowledge, discussed this in conjunction with the *maqāṣid* of *Shari‘ah*. Despite the emphatic tone of the Qur‘ān and *ḥadīth* on unity and solidarity, it is somewhat disillusioning to find that Muslim history is dominated by duality and separation. Bifurcation and duality in legal practice and education has become even more pronounced in the present age. To split the Muslim community between the two opposing camps of ‘ulamā‘ and *umara‘*, or between the *Shari‘ah* and secular/statutory law, is one of the obvious instances of the neglect of the *maqāṣid* of *Shari‘ah* and the spirit of unity in the *ummah*. This also goes to show that the *maqāṣid*, like the *uṣūl*, are changeable – in line, that is, with the circumstances of society and time. The welfare state, economic development and scientific research, to name but a few, are some of the new themes that should perhaps be added to the list of the *maqāṣid*. The conventional identification of the essential *maqāṣid* into five or six headings is evidently not enough and should be revised and supplemented in conformity with new developments and demands of the contemporary age.

Some of the imbalances we have discussed concerning *uṣūl al-fiqh*
in general, and its various doctrines in particular, are evidently related to the alienation of ‘ulamā’ and government and the exclusion largely of the former from the latter. The emerging gap between the theory and practice of ḥudūd was subsequently endorsed, in modern times, by the prevalence of statutory legislation, which has largely replaced ḥudūd, and has become a component part and instrument of the nation-state. Ḥudūd and ījmā‘, which were the main instruments of legislation in conventional ḥudūd al-fiqh no longer play the same role in statutory legislation and have been marginalised as a result. There is now a tension between the proposed methodology of ḥudūd and the prevailing model of statutory legislation. But even so, the tension that we note here still falls short of total alienation between the Shari‘ah and modern law. For if we were to see ḥudūd as a methodology of research, and ījmā‘ as legislation by consensus, then neither of these are totally alien to modern legislative processes.

A great deal of statutory legislation that is in place in almost every Muslim country can in a substantive sense be subsumed under one or the other of the existing doctrines of ḥudūd al-fiqh, be it maslahah, or istihsān or istiṣḥāb, or the general principles and guidelines of the Qur’ān and Sunnah. But since there is no recognised procedure under the prevailing constitutions to utilise the methodology and resources of ḥudūd al-fiqh, the continuity and relevance of that heritage has become increasingly uncertain. Unless there is adjustment on both sides, a certain opening up, that is, of the constitutional processes, on the one hand, and reform in some of the substantive doctrines of ḥudūd al-fiqh on the other, the desired solutions to the problem of alienation of ḥudūd al-fiqh and its integration into the fabric of modern government are not likely to materialise.

We have also seen evidence, throughout the decades of Islamic revivalism and its aftermath in the latter part of this century, that Muslim communities and leaders have become increasingly aware of the need to establish closer links with their own heritage. Greater awareness along these lines will make the utility and relevance of ḥudūd al-fiqh to the legislative processes of government increasingly obvious.

As I have elaborated in a previous chapter on ījmā‘, much can be done to bridge the gap between the theory and practice of ḥudūd al-fiqh if we can integrate ḥudūd and ījmā‘ into the working of the Muslim legislative assembly and ʿulū al-amr. To merge ījmā‘ and ḥudūd into a collective and consultative endeavour will hopefully contribute to a more balanced perspective on legal construction and a move away
from the dry literalism that was driven by an underlayer of tension between the ‘ulamā’ and government.

The departure from a literalist to a goal-oriented jurisprudence is also expected to inject a greater degree of empiricism and flexibility into it that will help to bring the law closer to social reality. The observed reality needs, therefore, to be translated into the wider logic and rationale of the textual injunctions of the Qur’ān and Sunnah; for the Qur’ān (and the Sunnah) has itself unfolded its message in response to, and in contemplation of, the then prevailing conditions of Arabian society. The attending reality was often taken as a springboard and starting point for building a vision of the future. The frequent Qur’ānic invitation to rational enquiry, observation and investigation, attention to the laws of causation, learning from the lessons of history and the experiences of by-gone nations, attention to real-life events, the asbāb al-nuzūl and the realism that is evident in the graduality (tanjim, tadarruj) of the revelation of the Qur’ān over a period of time should, all in all, have been enough to give usūl al-fiqh a strong, even indelible, grounding in empiricism. But this dimension of the original teachings of the Qur’ān, and the pragmatism that is so characteristic of the Sunnah of the Prophet and his Companions, was neglected in the subsequent development of Islamic jurisprudence.

The change of direction that subsequently took place as a result of the tenacious hold of taqlīd made the Shari‘ah increasingly detached from the realities of life in the community. Ijtihād, which was essentially designed to keep the law abreast with the changing conditions of society and reflect the realities of time-space into the fabric of the law, was subjected to severe restrictions and this resulted in its eventual decline. Even the most characteristically empirical doctrines of usūl al-fiqh, such as custom (‘urf), presumption of continuity (istiṣhāḥ) and maslahah, failed to serve the purpose for which they were originally designed. They were given a low profile to begin with, and were eventually marginalised vis-à-vis the rising tides of literalism. Instead of becoming an ardent observer of social reality and change, and devising adequate responses for them, the Muslim jurist of the era of taqlīd often denounced social change in the name of aberration from normative guidance, became increasingly dogmatic and gave non-ijtihādi responses to issues that required initiative and bold responses along the lines of ijtihād. The centuries of taqlīd that followed led to the widening of the gap between the theory and practice of usūl, so much so that it was no longer capable of responding to the more accelerated pace of change that was stimulated by advances in industry, technology and science.
To acknowledge change as we observe it and respond to it is one aspect of empiricism that is of concern mainly to *ijtihād* on the detailed issues of *fiqh*. Another aspect of empiricism is to see the methodology of *uşūl al-fiqh* itself as liable to adjustment, development and change. Many of the doctrines of *uşūl* are themselves a product of *ijtihād*, some of which have been supported by *ijmāʿ*; but most are subject to a disagreement among the *madhāhib*. The methods that are so proposed should naturally be changeable in line with observation and empirical reality. If our experience at the end of the 20th century shows, for example, that our concept of *ijtihād* should be changed so as to embrace the widely observed phenomenon of statutory legislation, or the procedure for *ijmāʿ* and *qiyyās* should be revised and changed in line with prevailing conditions, then this should be acceded, and a refusal to do so will be contrary to empirical truth. If we arrive, on the other hand, at the conclusion that a new method or procedure will be more suitable to accommodate unprecedented developments, then one should equally be open to the idea of adding new methods and new chapters to *uşūl al-fiqh*. In the same way, one should also be open to the prospects of discarding certain parts, or existing elements, of *uşūl al-fiqh* which no longer serve a useful purpose, provided that the endeavour is still in keeping with the correct guidelines of *ijtihād*.

In sum, this book is for the most part devoted to an exposition of the science of *uşūl al-fiqh* as it is found in its reliable sources. I have also taken the opportunity to convey an awareness, especially in the present edition, of the problematics of *uşūl al-fiqh* that have become the subject of deliberation and debate in recent times. Issues relating to the individual doctrines of *uşūl* have been addressed in the relevant parts of this book as and when chosen doctrines are discussed. I have made suggestions for possible adjustments, and discussed reform proposals that Muslim scholars have advanced in recent times. The proposals I have discussed generally look to the ways and means by which the individual doctrines of *uşūl al-fiqh* can be utilised in the legislative and judicial processes of contemporary government.

The last chapter in this book expounded a new scheme for *uşūl al-fiqh* and suggested a reorganisation of its methodology with a view to enhancing internal coherence and consolidation in this discipline. The revised scheme of *uşūl al-fiqh* is also hoped to bridge the gap that has developed between *Sharīʿah* and statutory law, and ultimately to achieve a substantive integration between them. This will, in all probability, involve a gradual process of preparation that might
culminate in constitutional reform; but once achieved, it will equip the Muslim legislature with a diverse and resourceful methodology, and place the Muslim government in a position to expect greater public support for its programmes.

The proposed new scheme for *usūl al-fiqh* promises to go a long way to overcome the shortcomings of conventional legal theory, especially in relationship to *ijtihād* and *ijmāʿ*, the two most versatile and yet dormant doctrines of *usūl* that have yet to be utilised as instruments of legislative consolidation and reform. The new scheme proposes to subsume them both under the ordinances of the *ūlū al-amr*, a Qur’ānic formula that combines authority with consultation, the expertise of the leading ‘ulamā’ with that of the scholars in other disciplines, and encourage participation, originality and consensus within the fabric of a lawfully-elected government. This scheme combines the interests of both continuity and change in a revised, yet essentially unchanged, *usūl al-fiqh*, and takes it to its logical conclusion.
Glossary

'adl: justice, upright and just.
'adālah: justice, uprightness of character.
adillah (pl. of dalīl): proofs, evidences, indications.
āhād: solitary hadīth, report by a single person or by odd individuals.
ahkām (pl. of hukm): laws, values and ordinances.
ahliyyah: legal capacity.
ahliyyah al-adā': active legal capacity that can incur rights as well as obligations.
ahliyyah al-unjūb: receptive legal capacity which is good for receiving but cannot incur obligations.
'amal: act, practice, precedent.
'amm: general, unspecified.
amr (pl. awāmir, umūr): command, matter, affair.
aql: intellect, rationality, reason.
aknān (pl. of rukn): pillars, essential requirements.
asl: root, origin, source.
athar: lit. impact, trace, vestige; also deeds and precedents of the Companions of the Prophet.
āyah (pl. āyāt): lit. sign, indication; a section of the Qur’ānic text often referred to as a ‘verse’.
'azīmah: strict or unmodified law which remains in its original rigour due to the absence of mitigating factors.
bātil: null and void.
bayān: explanation, clarification.
dalālah: meaning, implication.
dalālah al-nass: inferred or implied meaning of a given text.
dalīl: proof, indication, evidence.
fāqīh (pl. fuqahā‘): jurist, one who is learned in fiqh.
far': lit. a branch or a sub-division, and (in the context of qiyyās) a new
case.

fard: obligatory, obligation.

fard 'ayn: personal obligation.

fard kafa'i: collective obligation.

fasid: corrupt, void; deficient (as opposed to bati', which is null and void).

furü (pl. of far'): branches or subsidiaries, such as in furü al-fiqh, that is, the 'branches of fiqh', as opposed to its roots and sources (usul al-fiqh).

hadd (pl. hudud): lit. limit, prescribed penalty.

hadith: narratives and reports of the deeds and sayings of the Prophet.

hajj: the once-in-a-lifetime obligation of pilgrimage to the holy Ka'bah.

haqq Allāh: right of God, or public right.

haqq al-'abd (also haqq al-adami'): right of man, or private right.

hijrah: the Prophet's migration from Mecca to Medina, signifying the beginning of the Islamic calendar.

hirābah: highway robbery.

hisbah: lit. computation or checking, but commonly used in reference to what is known as amr bi'l-ma'ruf wa-nahy 'an al-munkar, that is, 'promotion of good and prevention of evil'.

hujiyyah: producing the necessary proof/authority to validate a rule or concept.

hukm (pl. ahkām) as in hukm shar'i: law, value, or ruling of Shari'ah.

al-hukm al-taklifi: defining law, law that defines rights and obligations.

al-hukm al-wad'ī: declaratory law, that is, law which regulates the proper implementation of al-hukm al-taklifi, such as by expounding the conditions, exceptions and qualifications thereof.

'ibarah al-nass: explicit meaning of a given text which is borne out by its words.

'iddah: the waiting period following dissolution of marriage by death or divorce.

iffār: breaking the fast.

ijmā': consensus of opinion.

ijtihad: lit. 'exertion', and technically the effort a jurist makes in order to deduce the law, which is not self-evident, from its sources.

ikhtilaf: juristic disagreement.

'illah: effective cause, or ratio legis, of a particular ruling.

iqtiḍā' al-nass: the required meaning of a given text.
ishārah al-nās: an alluded meaning that can be detected in a given text.

‘ismah: infallibility, immunity from making errors.

istihsan: to deem something good, juristic preference.

istiṣḥāb: presumption of continuity, or presuming continuation of the status quo ante.

istiṣlāḥ: consideration of public interest.

istiṭnabāt: inference, deducing a somewhat hidden meaning from a given text.

jihād: holy struggle.

jumhūr: dominant majority.

kaffārah (pl. kaffārāt): penance, expiation.

kalām: lit. speech, but often used as abbreviation for ‘ilm al-kalām, that is, ‘theology’ and dogmatics.

karāhah (or karāhiyyah): abhorrence, abomination.

khabar: news, report; also a synonym for hadith.

khāfi: hidden, obscure; also refers to a category of unclear words.

khas: specific, a word or a text which conveys a specific meaning.

al-khulāfā al-rashidūn: the Rightly-Guided Caliphs; the first four Caliphs of Islam.

kitābiyyah: female follower of a non-Islamic revelation.

madhhab (pl. madhāhib): juristic/theological school.

mafsūd: a missing person of unknown whereabouts.

mafshū f al-mukhālafah: divergent meaning, an interpretation that diverges from the obvious meaning of a given text.

majāz: metaphorical, figurative.

mahrūm: abominable, reprehensible.

mandīb: commendable.

mānī: hindrance, obstacle.

mansūkh: abrogated, repealed.

maqāsid: (pl. of maqṣūd): goals and objectives.

maslāhah: considerations of public interest.

mawdūʿ (pl. mawdūʿāt): fabricated, forged.

mubāḥ: permissible.

mufassar: explained, clarified.

muḥārābah: highway robbery.

muḥkam: perspicuous, a word or a text conveying a firm and unequivocal meaning.

muṣjma: ambivalent, ambiguous, referring to a category of unclear words.
mujtahid (pl. mujtahidūn): legist competent to formulate independent tradition based opinions in legal or theological matters.
mukallaf: a competent person who is in full possession of his faculties.
mukhtasar: abridgement, summary, esp. of juristic manuals composed for mnemonic and teaching purposes.
munāsib: appropriate, in harmony with the basic purpose of the law.
muqayyad: confined, qualified.
mursal: ‘discontinued’ or ‘disconnected’ hadith, esp. at the level of a Companion.
mushkil: difficult; also refers to a category of unclear words.
mushtarak: homonym, a word or phrase imparting more than one meaning.
musnad: hadith with a continuous chain of transmitters.
mutashābih: intricate, unintelligible, referring to a word or a text whose meaning is totally unclear.
muṭlaq: absolute, unqualified.

nahy: prohibition.
naqli: transmitted, as e.g., in ‘transmitted proofs’ which are to be distinguished from ‘rational proofs’.
nāsīkh: the abrogator, as opposed to the mansūkh (abrogated).
naṣkh: abrogation, repeal.
nāṣṣ: a clear injunction, an explicit textual ruling.
nikāh: marriage contract.
nuṣūṣ (pl. of nass): clear textual rulings.

qadhf: slanderous accusation.
gādhis: slanderous accuser.
gādi: judge.
qaf‘ī: definitive, decisive, free of speculative content.
qisās: just retaliation.
rajm: stoning to death.
riwāyah: narration, transmission.
rūkhshah: concession or concessionary law, that is, law which is modified due to the presence of mitigating factors.
rūkun: pillar, essential ingredient.

sabab (pl. ashāb): cause, means of obtaining something.
saḥīh: valid, authentic.
salāh: obligatory prayers.
sanad: basis, proof, authority.
sharī (pl. shurūt): condition.
shūrā: consultation.
shurb: wine-drinking.
tā’diyah: transferability.
tahlil: an intervening marriage contracted for the sole purpose of legalising remarriage between a divorced couple.
tahrīm: prohibition, or rendering something into ḥaram.
takhsīṣ: specifying the general.
takhyir: right to choose.
taklīf: liability, obligation.
talāq: divorce initiated by the husband.
ta’līl: ratiocination, search for the effective cause of a ruling.
taqiyyah: concealment of one’s views to escape persecution.
taqlid: imitation, following the views and opinions of others.
tashrī’: legislation.
tawdū’tur: continuous recurrence, continuous testimony.
tawīl: allegorical interpretation.
tayammum: ablution with clean sand/earth in the event where no water can be found.
ta’zīr: deterrence, discretionary penalty determined by the qādi.
tazkiyah: compurgation, testing the reliability of a witness, cross-examination.
tha‘man: the purchase price.
ūlū al-amr: persons in authority and in charge of community affairs.
ummah: the faith-community of Islam.
usūl al-qānūn: modern jurisprudence.
wahy: divine revelation.
wājib: obligatory, often synonymous with fard.
wājib ‘aynī: personal obligation.
wājib kafā‘ī: collective obligation of the entire community.
wali: guardian.
waqf: charitable endowment.
wāṣf (pl. wāṣf): quality, attribute, adjective.
wilāyah (also walāyah): authority, guardianship (of minors and lunatics).
wudu’: ablution with clean water.
wujūb: obligation, rendering something obligatory.
zāhir: manifest, apparent.
zann: speculation, doubt, conjecture.
zanni: speculative, doubtful.
zinā: adultery, fornication.


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Prof Mohammad Hashim Kamali was Professor of Law at the International Islamic University, Malaysia, where he taught Islamic law and jurisprudence for over twenty years. He is, at present, Chairman of the International Institute of Advanced Islamic Studies (IAIS) Malaysia. Among his other titles are *Principles of Islamic Jurisprudence* and *Islamic Commercial Law*. 