A STUDY OF THE DEVELOPMENT OF REFORMIST IJTIHĀD
AND SOME OF ITS APPLICATIONS IN
THE TWENTIETH CENTURY

BY

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BI ISM ALLĀH AL-RAḥMĀN AL-RAḥĪM

IN THE NAME OF GOD, THE BENEFICIENT, THE MERCIFUL
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This study is an attempt to explain the necessity of *ijtihād* (i.e., the jurists' effort to deduce the rules of the *shari'a* or Islamic law) for the purpose of reforming Muslim society and adjusting it to the modern world.

The study deals first of all with some theoretical issues of *ijtihād* as usually discussed by Muslim jurists in the science of *usūl al-fiqh* (lit: principles of jurisprudence). This is followed by tracing the development of *ijtihād* in the history of Islam since the time of Prophet Muhammad to the present day.

The decadence of the Muslim intellectual activities in later periods and the subsequent prevalence of *taqlīd* or blind imitation in religious matters which has ever since taken place in their community are discussed, together with the detrimental consequences which this situation has produced. Criticism of *taqlīd* by certain scholars and their efforts to liberate the Muslims from its shackles are also brought into focus.
The Muslims' intellectual resurgence and their effort to regain their position by means of reactivating *ijtiḥād* in the modern age are also examined. Some instances of *ijtiḥādic* endeavours regarding issues in different aspects of modern life are analysed. The need for certain methods to be utilized for the purpose of reformation is also explained. Some suggestions are finally made for the promotion of this goal.
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
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<td>A. Da’ud</td>
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<td>Musaw. c Abd al-Salam, 'Abd al-Halim and Taj al-Din Ibn Taymiyya</td>
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<td>Abu Husayn al-Basîrî, al-Mu'tamad fi Usul al-Fiqh</td>
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<td>Muwâf.</td>
<td>al-Shâ'tibî, al-Muwâfaqât fi Usul al-Sharî 'a</td>
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<td>Nasâ'I</td>
<td>al-Nasâ'I, Sunan al-Nasâ'I bi Sharh al-Suyûtî</td>
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<td>Nihâyat.</td>
<td>al-Isnawi, Nihayat al-Sul fi Sharh Minhâj Usul li al-Raydawi</td>
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<td>Q.</td>
<td>al-Qur'ân (after Q., first figure shows the number of sura and second shows the verse, e.g., Q. II, 46.</td>
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<td>Radd.</td>
<td>al-Suyûtî, al-Raddu 'alâ Manakhlad ila al-Ard wa Jahil ann al-Itihâd fi Kull 'Asr Fard</td>
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<td>Rawd</td>
<td>Ibn Qudâma, Rawd al-Nâzîr wa Jannat al-Manâzîr</td>
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Tanwir
al-Suyūṭī, *Tanwir al-Hawālik 'alā Muwatta Malik*

Umm
al-Shāfi‘ī, *al-Umm*
A NOTE ON TRANSLITERATION
AND THE TRANSLATION OF THE QUR'ĀN

A. Transliteration

The present study follows the system of transliteration of the United States Library of Congress as outlined in the Cataloguing Service Bulletin No. 49, November 1958. The transliterated Arabic words have been underlined.

B. Translation of the Qur'ān

In translating verses of the Qur'ān, the writer relies generally on two widely circulated translations, i.e., Abdullah Yusuf Ali's the Meaning of the Glorious Qur'ān, (London, 1983) and Marmaduke Pickthall's the Meaning of the Glorious Qur'ān, (Delhi, n. d.). However, slight modifications have sometimes been made where considered appropriate.
INTRODUCTION

1. The Necessity of I'tihād in The Modern World

I'tihād has been regarded as very important in adapting the shari'ah, or the Islamic law, to ever-changing situation. Although Islam was born in the simple environment of the nomadic life of Arabia, it did not take long before it reached other parts of the world where it had to face numerous problems and unprecedented issues that had arisen in different societies and nations. It was I'tihād by which new incidents and cases were linked with the shari'ah, which helped to stop these problems. Even those who hold that the gate of I'tihād has already been closed have not denied its necessary and essential role in Islam. Their objection has often been focussed on those who venture to claim the right to practise I'tihād, by disputing their competence and scoffing at their efficiency in fulfilling such a task.

The 'ulamā', or the Muslim religious scholars, throughout Islamic history have dwelt on various aspects of I'tihād including the question of the availability of mujtahids in every period. Such issues have been tackled particularly in the books of usul al-figh (the principles of jurisprudence) or
tārikh al-tashrīf (Islamic legal history) or in somewhat partial and specific manner, in certain journals and magazines.

However, the above discussions have mostly revolved around the theoretical issues of *ijtihād* or its applications in Islamic legal history, especially during its early stages. With the exception of the legislative aspects, detailed accounts have seldom been undertaken to explain the relationship between *ijtihād* and the various aspects of the lives of Muslims as well as to investigate its role in the reformation and development of their society. However, the stagnation of *ijtihād* which took place throughout the medieval period of Islamic history was indeed disastrous not only to the legislative and juridical conditions of the Muslims but also to social, political, cultural and other aspects of their lives. This testifies to the fact that the progress or backwardness of a nation is influenced by its intellectual environment, and in the Muslims' case this has been manifested primarily in their scholars' capability in exercising *ijtihād*.

It is common knowledge that since Ataturk's revolution in Turkey which overthrew the Ottoman *Khilāfa* at the beginning of this century, some Muslim
leaders have tried eagerly to follow Modern Turkey in adopting the secular pattern of reformation and development. On the other hand, other Muslims, while realising that they cannot be idle about new developments that are taking place in the ever-changing modern world, have endeavoured to give Islamic answers and solutions to various new incidents and contracts in order to prevent the lives of Muslims from being separated from the sharif'a.

The present study is an attempt to examine the necessity of itihād as one of the fundamental sources of Islamic jurisprudence and its role in the reformation of the Muslim community, especially in the twentieth century. In doing this, it is important to trace the evolution of itihādic rejuvenation in this modern time and its connection with reformist efforts in various fields in the lives of Muslims and then explain the methods that are considered effective and should be necessarily utilized by the 'ulamā' in employing itihād for the sake of reformation.

II. Previous 'Ulamā' Who Contributed to the Subject

This study is based particularly on certain essential works on the subject which have been contributed by several previous 'ulamā'. In the
following section, some light will be thrown on the lives and the main ideas of those eminent mentors whose works are followed by later fellow-scholars and which will be frequently referred to in the present study:

1. **Abū al-Husayn al-Baṣrī** (d. 436 A.H.)

Abū al-Ḥusayn Muḥammad b. ʿAlī b. ʿAlī b. al-Tayyib al-Baṣrī al-Muʿtazīlī was one of the exponents of the Muʿtazilite doctrines. Although from Baṣra, he lived and taught in Baghdad where he had a great study circle.¹

He wrote several works in the science of *usūl al-fiqh* or the principles of jurisprudence, one which still survives, is *al-Muʿtamad fi usūl al-Fiqh*. Later al-Rāzī was to rely on it in composing his own work, *al-Maḥṣūl* which is another important work in the field. Although *al-Muʿtamad* is considered to represent Muʿtazilite views and arguments, it also records the views and arguments of other scholars of *usūl al-fiqh* with elaborate analyses and criticism.² Despite the fact that the author tries to relate certain topics with some Muʿtazilite theological doctrines such as *tahāsin*, *taqbiḥ* and *wujūb al-aslah*
(God is bound to do what is best for men), he employs his own *ittihād* by which he overrode Mu'tazilite views in certain issues.

2. **Imam al-Haramayn** (419 - 478 A.H.)

His name is 'Abd al-Malik b. 'Abd Allah b. Yusuf b. Muḥammad b. 'Abd Allah b. Ḥayūya who was known by the surname Abū al-Ma‘āli al-Juwaynī and was born in a village called Juwayn, Nishapur. He studied jurisprudence and *usūl al-fiqh* under his father and Abū al-Qāsim al-Asfaraynī al-Iṣkāf.

When factious conflicts broke out between Mu'tazilite and Ash'arite followers, he left Nishapur and lived for the time being in Baghdad, Isfahān and other places. He then moved to Ḥijāz where he lived for four years during which he taught, wrote and delivered legal opinions. He also led congregational prayers in both of the Holy Mosques of Mecca and Medina; by virtue of which he obtained his nickname, **Imām al-Haramayn**.

At one time al-Juwaynī was an Ash'arite, but he eventually turned to the method of *Salaf*. 
One of al-Juwaynî's contributions to usûl al-fiqh is al-Burhân, which is an important work in the history of the principles of jurisprudence. Its importance lies in the fact that it preserves for us the relevant views of those scholars whose written works are no longer available. In this book one can find, for instance, the views of Qâdi Abû Bakr al-Baqillânî, Ibn Fîrak, Abû Bakr al-Ash'ârî, Qâdi 'Abd al-Jabbâr and other scholars that had been recorded in their treaties, but these treaties have not yet been discovered. Perhaps it is the first book of usûl al-fiqh after al-Shâfi‘î's al-Risâla that was written by a Sunnite scholar according to the dialectical method.

3 Abu Ḥâmid al-Ghazâlî (450 - 505 A.H.)

The well-known Abû Ḥâmid Muḥammad b. Muḥammad b. Ahmad al-Ghazâlî was a Shâfi‘îte jurist. He was a student of Imâm al-Ḥaramayn al-Juwaynî. By the age of thirty four he was appointed by Niẓâm al-Mulk (the Minister of Mâlik Shâh) as a professor at Niẓâmiyya University at Baghdad. However, his inner struggle forced him to give up the teaching vocation and his worldly possessions and withdraw into a life of asceticism and solitary contemplation.
Al-Ghazālī wrote many books on a wide variety of subjects. His famous works in Islamic jurisprudence are al-Wasīt, al-Basīt, al-Waifīz and al-Khalāṣa. In usūl al-fiqh he wrote al-Mustasfā, al-Mankhūl and Shifā' al-‘Alīf.

His popular book in usūl al-fiqh, al-Mustasfā min ʿIlm al-Usūl was written just a year before his death. This work of al-Ghazālī is still considered as one of the four outstanding contributions on the subject; the other three being al-Muʿtamad of Abū Ḥusayn al-Baṣrī, al-Burhān of al-Juwaynī and al-ʿAhd of Qāḍī ʿAbd al-Jabbār.

The importance of al-Mustasfā is actually due to the fact that it is the last work of al-Ghazālī in usūl al-fiqh, therefore it represents his final views in this area. His concern was more for meanings than for words. Hence he disregarded a lot of verbal disputes of the scholars of usūl al-fiqh and their literal arguments which according to him did not serve any purpose. Additionally, al-Mustasfā contains a complete record of the views of Qāḍī (Abū Bakr) al-Bāqillānī who is considered among the Muslim theologians as the master of legal theorists (Imam al-Uṣūliyyīn). Al-Ghazālī recorded al-Bāqillānī's views and discussed them in all issues of usūl al-fiqh in
the same way as Abū al-Ḥusayn al-Baṣrī with regard to the views of Qāḍī ʿAbd al-Jabbār. Without such an effort of al-Ghazālī, al-Baṣrī’s views would not have been accessible to us today.¹⁴

4. Fakhr al-Dīn al-Rāzī (544 - 606 A.H.)

Abū ʿAbd Allāh Muḥammad b. ʿUmar b. al-Ḥusayn b. al-Ḥasan b. ʿAlī al-Taymī al-Bakrī who was called Fakhr al-Dīn al-Rāzī¹⁵ was another important Muslim scholar of usūl al-fiqh.

Al-Rāzī’s academic tastes were versatile. He was a jurist, an eminent legal theorist (usūlī), a great theologian, an outstanding Qur’ānic commentator, a philosopher, a philologist, a grammarian, a poet, an orator and an educator.¹⁶ He contributed many useful works in different branches of knowledge. Al-Mahṣūl ff ʿilm Usūl al-Fiqh is regarded as the most important book by al-Rāzī on usūl al-fiqh. Some writers even consider it as the most important work on the subject due to the fact that it contains the fruits of major works that had been written before it.¹⁷
5. Ibn Qudāma (541 – 620 A.H.)

Abū ‘Abd Allāh b. Aḥmad b. Muḥammad b. Qudāma b. Miqdām b. Naṣr b. ‘Abd Allāh al-Muqaddasi was a great scholar whose knowledge comprehended many subjects including the Qur’ān, ḥadīth, jurisprudence, usūl al-figh, inheritance, mathematics, etc.

He came to Damascus in the company of his family at the age of ten after the conquest of Jerusalem by the Crusaders. There he studied the Qur’ān and other branches of learning with his own father and became a disciple of Abū al-Makārim b. Hilāl, Abū al-Ma‘ālif b. Ṣābir and other teachers. He moved to Baghdad in 561 A.H. where he studied shortly under ‘Abd al-Qādir al-Jīlānī and after the latter’s death he accompanied Abū al-Fatḥ Ibn al-Manfī from whom he learned comparative jurisprudence and usūl al-figh. On his return to Damascus, he devoted himself to writing his famous book al-Mughnī which is a monumental work in Islamic jurisprudence. Although Ibn Qudāma prefers the Ḥanbalite views in most cases, he does not show any fanaticism by belittling other scholars’ opinions, concealing anything of their evidences or defaming them. The first distinctive character of al-Mughnī is that its author outlines the views of the Muslim jurists along with their evidences on major issues, so
that one does not need to refer to various sources of the juridical schools as one also can dispense with the books of sunna and āthār in order to know the views of the sahāba and tābiʿīn as well as on the agreed and disagreed issues. 21

His Rawd al-Nāẓir wa Jannat al-Manāẓir is one of the authoritative works in usūl al-fiqh. In it he outlines major issues of the subject, summarizes different views on them and then explains his own stance. 22


Abū al-Ḥasan ‘Alī b. Abī ‘Alī b. Muḥammad b. Sālim al-Tāghlībī, was a (Muslim) jurist as well as a theologian and was called al-Āmedi.

Originally a Ḥanbalite adherent, he came to Baghdad where he studied jurisprudence under a Ḥanbalite teacher, Abū al-Fath Naṣr b. Fītyān. However he eventually shifted to the Shāfiʿite school. He went to Cairo where he engaged himself in teaching and gained many students. His popularity, however, stirred the envy of a group of local jurists who accused him of adopting heretical beliefs and upholding the ideology of the philosophers. When al-
Amidi learned that a plot was being made against him, he fled secretly to Syria where he eventually died.

Al-Amidi had many important works amongst which are al-Ihkām fī Usūl al-Ahkām, Muntahā al-Sūl fī al-Usūl, Manā'ih al-Qarā'īh, Rumūz al-Kunūz, Daqā'iq al-Akhbār, Lubāb al-Albāb and others. In al-Ihkām fī Usūl al-Ahkām he summarizes the four previous fundamental books of Usūl al-fiqh and therefore it has been regarded as one of the important sources on the subject.

7. Ibn Qayyim al-Jawziyya (691 - 751 A.H.)

Muḥammad b. Aḥbār b. Ayyūb b. Sa'd b. Ḥurayz al-Zarʿī al-Dimashqi was well-versed in tafsīr, theology, hadīth, jurisprudence, usūl al-fiqh, Arabic, dialectics and other sciences. He studied under several teachers amongst whom was Ibn Taymiyya who had a strong influence on him. However, there are cases in which Ibn Qayyim differs from his mentor. He was one of those scholars who advocated the abolition of taqlīd or blind imitation in religion. Although he was a Ḥanbalite jurist, he often departed from the usual opinions of his school and introduced new opinions after making a comparative study between the established school.
Ibn Qayyim suffered persecution several times and was imprisoned along with Ibn Taymiyya in the Cairo gaol (the Qal‘a), but in a separate cell and was freed only after the latter’s death. The reason was his objection to the popular practice of visiting the shrine of Prophet Abraham. He was an encyclopedic savant and a prolific author whose contributions cover a wide variety of subjects. His famous works included Tahzib Sunan Abī Dā‘ūd, Madārij al-Sālikīn, Zād al-Ma‘ād, Miftāḥ Dār al-Sa‘āda, ‘Uddat al-Ṣābirīn, I‘lām al-Muwāqqī‘īn ‘an Rabb al-‘Ālamīn, etc. I‘lām al-Muwāqqī‘īn is a meticulous work on various juridical aspects, especially concerning the methods that were employed by early Muslim scholars in deducing the rules of the shari‘a in different circumstances.

6. Abū Ishāq al-Shāṭibi (d. 790)

Abū Ishāq Ibrāhīm b. Mūsā b. Muḥammad al-Lakhmī al-Gharnātī al-Shāṭibi (attributed to Shāṭiba or Jativa) was an Andalusian jurist, Qur’ānic commentator and philologist. He grew up in Granada and acquired his entire training in this city which was the capital of the Naṣrī Kingdom. Al-Shāṭibi’s youth coincided with the reign of Sūlṭān Muḥammad V, al-Ghāni bī Allāh, a glorious period in the history of Granada. Al-Shāṭibi’s training in fiqh (Islamic jurisprudence)
was almost entirely completed with Abū Sa‘īd Ibn Lubb to whom he owed much, but entered with him into controversy on a number of issues. 31

Al-Shāṭībī was one of those pious ‘ulamā’ who insisted on following the sunna (the Prophet’s tradition) and avoiding practising any bid‘a or heresy. 32 He even waged a relentless war against heretical practices, such as making du‘ā’ or invocation after the prayers in congregational form, 33 hanging costly chandeliers in mosques, 34 etc. In his ijtihādic endeavours, particularly in two of his famous books, al-I‘tīsām and al-Muwāfaqat fi Usūl al-Shari‘a, al-Shāṭībī depends much on al-Maṣālih al-Mursala. 35 For instance, he sees that it is lawful (for the state) to collect kharāj (land tax) from the people, even in their difficult situation, if the public treasury does not have sufficient funds to spend on public services. 36

9. Al-Shawkānī (1172 - 1250 A.H.)

Muḥammad b. ‘Alī b. Muḥammad b. ‘Abd Allāh al-Shawkānī al-Ṣan‘ānī was brought up in Ṣan‘ā (Sana) and received his first education under the guardianship of his own father. Then he began to make every effort in searching for knowledge and he learnt the Qurʾān,
Islamic jurisprudence and other branches of knowledge from a group of teachers amongst whom were 'Abd al-Rahmān b. Qāsim al-Madā'īnī, Aḥmad b. Muḥammad al-Ḥarāzī and many others. He learnt Islamic jurisprudence according to the Zaydite school in which he demonstrated his skill, wrote many books and delivered legal opinions. He also studied hadīth until he reached a level that enabled him to throw off the shackles of taqlīd and exercise his own ijtihād.

Al-Shawkānī was one of those 'ulamā' who deemed taqlīd as unlawful in Islam for which purpose he wrote an epistle under the title al-Qawl al-Mufīd fi Ḥukm al-Taqlīd (A Beneficial Statement on the Rule of Taqlīd). This writing aroused a sensational response in Yemen, particularly in its capital, Sān‘ā. In theology, al-Shawkānī was an adherent of Salafism, i.e. the trend that had been adopted by his pious forefathers.

Al-Shawkānī contributed many important works in different disciplines. His compilation of hadīth, Nayl al-Awtār: Sharḥ Muntaqā al-Akhbār min Abādīth Sayyid al-Akhyār is one of the well-known publication on the subject.37 His Irshād al-Fuhūl is regarded as one of the authoritative works on usūl al-fiqh.
III. The Objective and the Scope of the Study

This study aims particularly to demonstrate two important facts: (i) The sharī'a for the Muslims is applicable to every place and time. (ii) The possibility of (exercising) ijtihād in this modern time and its necessity for the reformation and development of the Muslim community.

Apart from the introduction, this work is divided into seven chapters. Each chapter deals with specific issues within an integrated framework.

This study will firstly deal with some issues of ijtihād in usūl al-fiqh. Only those issues that have close relevance to the specific objective of the study will be discussed. Some other ijtihādic aspects in the science which are considered irrelevant or semi-relevant to this objective, will purposely be omitted.

The discussion will then be focussed on ijtihād in the Islamic legal history, where its evolution and development will be traced from the Prophet's days until it began to dwindle after the period of the a'immā. The different methods of ijtihād that were utilized in every period will be commented upon during the course of the discussion.
In dealing with the question of taqlid there will be a discussion of several important matters such as the alleged closing of the gate of ijtihad, the 'ulamā'‘s condemnation of taqlid and the kinds of taqlid which are allowed and prohibited.

An attempt will be made to relate ijtihad with the Islamic reformation in the modern world. Western penetration, particularly into the Muslim legal code will also be dealt with in order to see its impact on the mental attitudes and social life of Muslims. This will be followed by an account of various reformist movements that have taken place in many parts of the Muslim world during recent years.

The discussion will then dwell on the methods of ijtihad that should be utilized by the contemporary mujtahids for the purpose of reforming their society. Primary concern, however, will be given to maslaha or public interest. Other necessary requirements of ijtihad in its relationship with the modern world will also be suggested in order to make it more effective and fruitful.

An analytical study on ijtihādic endeavours in the twentieth century will also be carried out. For this
purpose, several recent issues in economics, politics and social life will be singled out and discussed.
NOTES

INTRODUCTION


6 Muṣṭâfâ Ḥîlimî and Fu‘ād ‘Abd al-Munîm, ibid., p. 12.


8 Ibn Khallikân, op. cit., IV, p. 216.

9 Tâj al-Dîn al-Subkî, op. cit., VI, p. 196.


14 'Abd al-Wahhab Abū Sulaymān, ibid., pp. 326 - 327.


17 Ibid., pp. 53 - 54.


19 Ibid., p. 3.

20 Ibid., pp. 3 - 4.


22 See Rawd., I, p. 15.


25 Ibid., pp. w.

26 Ibid., p. ḥ.

27 Ibid., p. ṭ.

28 Ibid., pp. y - ff.


31 See ibid., p. 100, Ahmad Bābā, op. cit., p. 47.

32 Ahmad Bābā, ibid., p. 47.

34 See *ibid.*, II, p. 241.


37 Summarized from a biographical sketch of al-Shawkānī in *Nayl al-Awtār*, I, pp. b - z.
CHAPTER I

SOME ASPECTS OF IJTIHÄD IN USÜL AL-FIQH

I. DEFINITION OF IJTIHÄD

The word *ijtihäd* comes from the root-word *la-ha-da*, *val-ha-du*, *la-hd* and *juhd*, which literally means effort and ability (*al-täqa*, *al-wus*') and it is said that it means hardship or difficulty. *Ijtihäd* may be understood as exerting one's ability, strength or effort vigorously or laboriously in search of something. *Ijahada fi al-amr* means he exerted unsparingly his power or ability in the pursuit of the affair. The word is applied only to the kind of task which needs great effort as in lifting heavy stone, but not, for instance, in picking mustard seeds. It is clear that this literal meaning of *ijtihäd* is general, denoting every task which needs great effort whether it is physical or mental.

As a conventional term, various definitions of *ijtihäd* have been given by the Muslim jurists. These discrepancies stem from disagreement about the type or status of legal rules which have been achieved through *ijtihäd* itself; whether they are ultimate rules or presumptive rules. This phenomenon can be found in
their definitions. For instance, al-Ghazâli and Ibn Qudâma consider that these *ijtihâdic* legal rules are ultimate and decisive and for this, such expression as *fi ṭalab al-‘ilm bi ahkâm al-shari‘a* (in searching for knowledge of the rules of the *shari‘a*) has been used.

In contrast with this, Ibn al-Ḥajib and al-Ämidî, for instance, give to the legal rule of *ijtihâd* a hypothetical status (*zann*)⁴, while there are other groups of jurists who do not give clear definitions as to whether these rules are decisive or hypothetical.

The question of the status of these *ijtihâdic* legal rules is not fundamental, because whether they are decisive or hypothetical, it has been agreed by a great majority of jurists that they have binding authority upon all Muslims.

In fact, it is difficult to get an accurate and comprehensive definition of *ijtihâd*. Even definitions given by eminent Muslim jurists are not void of deficiencies. Hence, each definition given by any jurist has been criticized by later colleagues. Some of these definitions have been criticized because they include strange elements which are irrelevant to the essence of *ijtihâd*, in other words, they are not really part of the definition, while some have been condemned for repeating the same implications.
A few illustrative examples indicate the problem. Al-Ghazālī's definition which says that *iḥtiḥād* is the jurist's exertion of his effort in searching for knowledge about Islamic legal rules to the extent that he feels that he has become incapable of further effort. Such a definition, of course, does not exclude theological or ideological rules; for we know that the *ṣaḥīḥ* rules comprise both ideological and practical aspects. Apart from this defect, such a definition contains repetition because the expression of "*badhl al-muṭṭahid wusṭahū*" (jurist's exertion of his effort) implies the same meaning of "*bi ḥayth yahiss min nafsih bi al-ʿaiz an mazīd al-ṭalab*" (to the extent that he feels that he becomes incapable of further effort). Al-ʿĀmidī's definition also fell into the same defect of repeating similar meaning.

The definition of *iḥtiḥād* according to al-Shirāzi, al-Bayḍawī and several other jurists is the exertion of effort in obtaining *ṣaḥīḥ* rules. Beside containing the same defects as in the previous definition of al-Ghazālī, i.e. it does not exclude the ideological rules, this definition has another defect in the sense that it includes efforts by non-jurists including philologists and others, while in reality *iḥtiḥād* deals only with juridical works.
The definition given by al-Rāzi which is also followed by al-Shawkāni is somewhat general and has the defective element of repetition when it states that *iṭīḥād* according to the Muslim jurists is exertion of effort in searching for what is not blameworthy (*fīmā lā yahquh lawm*) to the extent of exhaustion.10 Obviously that the expression of "what is not blameworthy" has a general meaning, for it comprehends issues other than juridical issues as long as an erroneous researcher in those issues cannot be blamed. The expression of "*istifrāgh al-wusī*" (exertion of efforts to the exhaustion) has unnecessarily been repeated in the definition.

Al-Subki's definition which says that "*iṭīḥād* is a jurist's exertion of his effort to obtain hypothetical legal rule"11 is also not precise as it includes other legal rules beside the rules of the *shari'ā*.

However, despite the technical defects which these definitions might appear to have and despite their apparent differences in words and expression, it is not difficult for any researcher to discern the true nature of *iṭīḥād* as meant by those jurists in their definitions.
Perhaps the most representative and comprehensive definition of *ijtihād* is a definition mentioned by al-Shawkānī which states that: "*ijtihād* is the exertion of utmost effort in obtaining *sharīʿa* practical rules through the method of deduction." Analysing this definition, al-Shawkānī says that the exertion of utmost effort automatically precludes anything less than that, because this expression means that one feels that one has become incapable of further searching. The *sharīʿa* (*sharīʿi*) rules exclude philological, intellectual or sensory rules, because anyone who exerts his effort to achieve something of these aspects is not technically called a *muṣṭahād*. Quite similar to this, any effort utilized to obtain scientific rules is not termed as *ijtihād* in the juridical sense; although it can be called so from a theological point of view. The expression "through the method of deduction" excludes those rules obtained from understanding the explicit meaning of textual sources or those obtained by memorizing certain things or by information given by a jurist or by finding them in juridical publication. Although all these can be termed as *ijtihād* in a philological sense, technically they cannot be called so. The word "jurist" has been added in some definitions to exclude any other efforts rather than
those exerted by the jurists.\footnote{15} Perhaps this word is not necessary in a definition of \textit{i}jtih\text{"a}d, because one cannot be considered as a jurist (\textit{faq\text{"a}}\textit{h}) in the precise and exact sense of the word until one has really practiced \textit{i}jtih\text{"a}d.\footnote{16}

However, in order to get the exact nature and overall feature of \textit{i}jtih\text{"a}d, it is not enough to rely on definitions alone; although they have some importance. What is more important in this respect is to study in detail the growth and development of \textit{i}jtih\text{"a}d in its various aspects. This will be the task of the present thesis; although particular attention will be given to its application in the twentieth century.

II. SCOPE OF IJTIH\text{"A}D

\begin{quote}
Abū al-Ḥusayn al-Bagri observes that, the \textit{i}jtih\text{"a}d issues are those rules of the shari\text{"a} which have been disputed by the jurist.\footnote{17} A similar meaning can be attributed to al-Shirāzī when he says: \textit{"Ijtih\text{"a}d is allowed only in the cases in which the jurists have their disagreement with two or more opinions."}\footnote{18} But this notion is described as weak by al-Shawkānī, because disputation is allowed only in \textit{i}jtih\text{"a}dic issues. If we know that an issue becomes \textit{i}jtih\text{"a}dic
because it has been disputed, this would create a circular argument.19

According to al-Āmidī, the scopes of *ittihād* are the rules of the *shari'a* which have hypothetical provision,20 or in other words, *ittihād* can be invested only on those rules of the *shari'a* which do not have definite provisions.21 This is to exclude pure intellectual rules22 as well as theological issues which are not meant in this context. It is also does not involve any rule of the *shari'a* which has definite provision, such as the obligatory rule of the five daily prayers, fasting during the Islamic month of Ramadān, *zakāt* (almsgiving) and all that has been agreed as being explicit rules of the *shari'a* due to clear and definite provisions. *Ittihād* cannot be operated in such issues and incidents and thus anyone who disagrees about them is regarded as sinful,23 or even charged as a disbeliever by certain jurists, because this means that he has disapproved of God and His Prophet.24 Al-Shāfi'i rightly remarks that, if a certain rule is mentioned clearly in the Qur'ān or in the Prophet's tradition, it is unlawful to be disputed by everyone who recognizes it.25

In fact, to say that the scope of *ittihād* is the rules of the *shari'a* which have hypothetical
provisions is inaccurate, because there are also some rules of the shari'a which are not indicated definitely or hypothetically by the text as will be explained later.

In order to understand the scope of ijtihad, it would be helpful to note that the textual provisions are classified into four classifications. First, the provision which has definite authenticity and definite (legal) significance (qat'i al-thubût wa al-dalāla). Second, the provision which has definite authenticity but hypothetical significance (qat'i al-thubût wa zanni al-dalāl). Third, which has hypothetical authenticity and significance (zanni al-thubût wa al-dalāla). And fourth, that which has hypothetical authenticity but definite significance (zanni al-thubût wa al-dalāla).

Bearing in mind these classifications of textual provisions, we can see that ijtihad can be operated in the following areas:

1. In cases where their provisions have hypothetical authenticity and hypothetical (legal) significance. In such cases ijtihad is directed firstly to examine the authenticity of the chain of transmission and the way through which it becomes available to us. On the
other hand, *i'tihād* is also directed at the significance of the evidence for the required rule in order to know whether this significance is strong or weak, general or particular and so on. An example of this sort of cases is a hadīth in which the Prophet is reported to have said: "The prayer of someone who does not recite al-Fātihā (the opening chapter of the Qur'ān) is not considered as void." This hadīth has assumed authenticity, because it is an isolated hadīth (which has been transmitted by a small number of transmitters only) and it has also an assumed legal significance, because it can be interpreted in many different meanings. It might mean the denial of validity or it might also mean the denial of perfection. Hence, this provision has become an object of jurists' *i'tihād*. According to the Ḥanafite jurists, the hadīth means the denial of perfection, so the prayer of anyone who does not recite al-Fātihā is considered as valid by them. Whereas the Shāfī'ite jurists, on the opposite side, conceive that this hadīth means the denial of validity, and accordingly, regard the prayer of any person who does not recite al-Fātihā as invalid.

2. In the cases where their provisions have definite authenticity but hypothetical legal significance. This is applied to both of the Qur'ān and the *sunnā*.
iiithād in this category is limited only in the aspect of the indication of provision and within the textual scope. For instance, in the Qur'ānic verse which says: "Divorced women shall wait concerning themselves, for three monthly periods." This provision certainly has definite authenticity as do all Qur'ānic verses, but it has hypothetical legal significance, because the word "'ūr̮" has a double meaning; i.e. purity and menstruation. Hence, the legal significance to either one of the meanings is only of hypothetical. That is why disagreement amongst the jurists has taken place. Mālik and Shāfi‘i shared the views of ‘Abd Allāh ibn Mas‘ūd and ‘Umar ibn al-Khaṭṭāb that the word "'ūr̮" here signifies "menstruation", so a divorced woman according to them has to wait for three of her monthly periods before she is allowed to remarry. But ‘Ā’ishah, Zayd b. Thābit and Ibn ‘Umar understood this word to mean "purity". Accordingly, the waiting period or ǧidda for a divorced woman is three times from her purification from her monthly menstruation. Later, Abu Ḥanifa and Ahmad b. Ḥanbal joined ‘Ā’ishah and Zayd as this issue.

3. In cases where provisions have hypothetical authenticity and definite legal significance, the application of iiithād is restricted only to the
sunna and its aim is to find out the ways through which certain legal provision have been obtained, to ascertain the degree of reliability of its chain of transmission (asānīd) and to examine the credibility of its transmitters. Each one of these subjects has different legal rules due to the differences in the views of the mu'tahids about them. An example can be cited to illustrate how ijtihād can be applied to this sort of case: A hadīth has been transmitted by Anas b. Mālik in which the Prophet says that "zakāt of every five camels is a sheep." This hadīth has hypothetical authenticity, because it is an isolated hadīth, but it has definite legal significance in the sense that it contains a particular word. For this reason the jurists have agreed that the minimum number of camels liable to zakāt payment is five.

4. Lastly, to repeat what has already been mentioned above, ijtihād also deals with the cases or incidents where legal provisions are not available in the shari'ah texts or in the consensus of the jurists and also in those cases where legal rules are necessarily known in Islam (mā yu'lam min al-dīn bi' al-darūra). This is what is termed as ijtihād by personal judgement (al-ijtihād bi al-ra'y). The function of the mu'tahid here is to seek legal rules by employing the method of analogy (qiṣāṣ), juridical equity (al-
istihsān), custom (al-‘urf), public interest (al-masālih al-mursala) and other methods about which the jurists have different views. Therefore, the scope of itihād in this section is much wider than the previous sections. In fact, this type of itihād has enriched the Islamic juridical heritage in various schools of jurisprudence; both Sunnite and Shi‘ite.

These are the areas which have formed the parameters of itihād throughout the history of Islamic law. Therefore, itihād does not happen in either one of the following situations: First, it does not happen in cases in which textual provision has definite authenticity and legal significance such as the obligatory nature of the five daily prayers, fasting during the month of Ramadān, pilgrimage to Mecca, the prohibition of adultery, murder, theft and other matters where their legal rules are necessarily known in Islam. Itihād cannot also be invested also on the punishments fixed by the Qur‘ān as in the punishment of theft, adultery and slanderous allegation of adultery. This is because each of these cases has certain textual provisions which have definite authenticity and definite legal significance.

The second situation in which itihād does not work is when the consensus of the jurists has been
achieved in any case in any period and this consensus has been narrated by a great number of authoritative transmitters, or even by a few of them according to some jurists.

Originally, before the jurists agreed to decide on a certain legal rule for any case or incident whose provision cannot be found explicitly expressed in the texts, the gate of ijtihad is left open for any mujtahid to make his effort in searching for a relevant rule. But once the jurists have agreed upon a certain rule in a certain case or event, this rule becomes binding on all Muslims.

III. TYPES OF MUJTAHID

Mujtahids are traditionally divided into two different types: the independent mujtahid (al-mujtahid al-mustaqil) and the dependent mujtahid (al-mujtahid ghayr al-mustaqil).

The independent mujtahid who is also called the absolute mujtahid (al-mujtahid al-mutlaq) is the one who has developed for himself the foundations of his juridical activities without trying to imitate any prevailing school. In other words, he can deduce the practical legal rules out of its detailed
evidences or legal provisions without following any juridical eponym."

This independent mu'tahid has his own legal principles which he has developed for himself and has constantly employed ʿiṭiḥād in order to reach certain rules on derivative problems. This is, as al-Ghazālī rightly observes, really a formidable job which the Muslims since the time of the Companions have had to rely upon. Therefore, this independent mu'tahid is required to fulfil high qualifications which we have discussed earlier.

It is interesting to note the view of Ibn al-Ṣalāḥ (d. 643 A. H.) that this type of independent mu'tahid has disappeared for a long period and only the limited or dependent type of mu'tahid is available nowadays. Some scholars have gone even further and claimed that this type of mu'tahid became extinct after the period of the Companions. For instance, al-Shāfiʿī himself says that his opinion in ʿajā'il case had been borrowed from ʿAṭā'. This, however, should not be understood, as meaning that the gate of ʿiṭiḥād has been closed as will be discussed later.
The second type of mu'tahid, i.e. dependent or limited mu'tahid, is categorized into four categories according to the four following situations:

First: When a jurist does not imitate his juridical leader in his technique or method of ijtihad and fatwa (legal opinion). But rather he has developed and used his own method, although he may have invoked his master's school and maintained a lot of his ideas which he considered as true and preferable to other ideas. According to Ibn Badrān and al-Suyūtī, the companions of Malik, Ahmad b. Ḥanbal, Dā'ūd al-Ẓahirī and most Ḥanafite jurists have used the method of al-Shafī'ī in their juridical endeavours, not in the sense of imitating him, but because they found that the method of ijtihad and analogy is the most correct and accurate one. This has been endorsed by Abū 'Alt al-Sanjī when saying: "We have followed al-Shafī'ī and preferred him to others because we have found his opinions are the most correct and are fairer than others. This does not mean that we imitate him."

Second: When a mu'tahid clings to the school of his juridical leader, but has still been independent in discovering legal evidence to support his school. Although he may use his effort in deducing some
unprecedented legal rules, he would never exceed the principles laid down by the eponym of a certain school. A muttahid in this category should be an expert in the art of usul al-fiqh, but may be less knowledgeable about some i'tihādic instruments such as the Prophet’s traditions or linguistic competence. In practising his legal career he would rely upon the evidences put forward by his master and would regard them as the foundations of legal deduction as the independent muttahid would do with the textual provisions of the shari‘a. This is the type of muttahid about whom the Mālikites say that no period would be without.\textsuperscript{51}

The third category of the limited muttahid is the one who does not have his own method of i'tihād but understands human psychology (faqīh al-nafs). He learns the legal opinions of his master, knows its evidences for them and gives his support to his school by defending it against its opponents. However, despite all these activities, he does not reach the status of those in the above categories; whether due to his shortcomings in memorizing the school’s legal opinions or due to his inadequate knowledge of the art of usul al-fiqh, or due to his shortcomings in mastering any branch of knowledge which is a necessary instrument of i'tihād. According to Ibn al-
Salāḥ, this stage is the stage of the juridical authors until the end of the fifth century of the Islamic era.\textsuperscript{52}

The fourth and the last category of the limited or dependent 	extit{muqtaḥid} is the one who memorizes his school opinions and understands the simple and complicated cases, but he is not competent to decide the evidences for them. His legal opinions would rely entirely on the legal evidences provided by his master or on the opinions of other 	extit{muqtaḥids} within his own school. In any circumstance he would not deduce legal rules of cases which are not known to him, rather he would weigh between various narrations and give his preferences by using the tools of preference (\textit{tārīf}) provided by 	extit{muqtaḥids} of the previous category.

These are the four different categories of dependent 	extit{muqtaḥid} according to their different situations with regard to juridical abilities. In summarizing these categories al-Suyūṭī says that the first category is the absolute mujtahid (\textit{muqtaḥid mutlaq}) who is not independent (\textit{ghayar mustaṣīl}). He does not imitate his master although he uses the latter's method of \textit{iṣṭiḥād}. The second is called the derivative mujtahid (\textit{muqtaḥid al-takhrij}). The third is the mujtahid of preference (\textit{muqtaḥid al-tārīf}) and
the fourth one is the muitahid of legal opinion (muitahid al-fitya).

There are five categories of muitahid altogether including the independent category. These are the types of learned men who are entitled to give their legal opinions about Islamic juridical rules.

IV. PRE-CONDITIONS OF IJTIHĀD

Perhaps it would be useful to note that some of these pre-conditions are essential conditions which are intrinsic to the nature of ijtihād, whereas some other pre-conditions are more suitably regarded as general pre-conditions only; for they do not deal directly with ijtihād which means that they cannot be exploited by a muitahid as instruments in achieving his juridical goal.

A. The General Pre-Conditions

First: Puberty

This pre-condition is imperative because anybody who has not attained the stage of maturity may not take part in this juridical activity due to his mental deficiency, besides, a person at this early stage of
life is not bound to observe what a mature person would observe. Perhaps for this reason Imām al-Ḥaramayn al-Juwaynī says that a view of a young child is not reliable although he might attain a degree which is required for ijtihād.55

Al-Suyūṭī narrates a view of Abū Manṣūr al-Tamīmī from which we can conclude that a man after attaining mental maturity would become capable of distinguishing between what is beneficial and what is harmful and he would also become capable of reasoning the unknown from the known. Thus, he is logically and religiously eligible to exercise ijtihād regardless of his puberty. However, he is not obliged to perform this task before attaining maturity.56 But in a few preceding passages, al-Suyūṭī narrates a contradictory opinion to this by Ibn Burhān which says that an agreement has been achieved that a young child's opinion cannot be considered as valid in Sharī'a affairs, and so it must be neglected.57

The second view would appear the more reasonable, particularly as such a child is not obliged to undertake some of the more onerous religious duties.
Second: Mentally Sound

A muitahid must be a wise man without any mental defect such as madness, idiocy and stupidity. In fact, such a pre-condition is axiomatic because nobody would dare to imagine that any person of this category would come forward to declare himself as an independent muitahid whose main task in life is to search amid all the difficulties and complexities of the legal rules of the shari'ah.

Third: Understanding Psychology

This condition has been regarded by Imam al-Ḥaramayn as a muitahid's capital which cannot be acquired by seeking knowledge. If a muitahid possesses this capital by natural talent, this would be advantageous for it is not obtainable by memorizing what has been read in books.

Fourth: Faith and Piety

Stipulating faith and piety as a pre-condition for ijtihād is really something logical because a muitahid is one whose main job is to find out the rules of the shari'ah. Therefore, it cannot be expected that a disbeliever would carry out such a job. Perhaps for
this reason, certain Muslim jurists maintain that the first pre-condition which should be stipulated for a muitahid is that he should recognize the existence of God and His eternal attributes as he should believe in the Prophet and the revelation which he conveyed.

However, a question may arise regarding this pre-condition, i.e.: Should a muitahid be a knowledgeable person about the detailed items in theology (‘ilm al-kalām)? To this, al-Ghazālī gives a negative answer and argues, "There was no one amongst the sahāba and the tabi‘īn who was as expert in this scholastic knowledge... and even if we try to imagine that there was a person who was a complete muqallid (imitator) in his belief in the Prophet and in the fundamental principles of the Islamic faith, his itiḥād would still be something permissible."

Al-Āmīdī supports this notion by drawing the conclusion: "It is not stipulated that muitahid should be as knowledgeable in detailed theological issues as their eminent masters."

According to al-Shawkānī, this is the view of the great majority of the Muslim jurists.
It is clearly impossible that a disbeliever can operate as a *muftahid* in a way acceptable to Muslims. It is similarly natural to expect a *muftahid* to be a pious person because, as al-Ghazālī maintains, "A sinner's saying cannot be trusted and relied upon."\(^6\) Piety ensures that any opinion pertaining to the *Sharīʿa* cannot be expressed at random because it is an opinion about God's rule or about His religion. A *mufti* is one who represents the Prophet's teachings and replaces him in carrying out his religious responsibilities in juridical aspect.\(^5\) This is why a great and respectable jurist like Mālik b. Anas, when he was asked to give his legal opinions in forty juridical cases, gave the answer to only five of them.\(^4\) In fact, taking a glance at the biographies of those eminent jurists would be enough to give any researcher a firm impression of their piety and moral character.

B. The Essential Pre-Condition

Beside the above general pre-conditions, there are several pre-conditions which the jurists have put forward as essential for a *muftahid*:
First: Mastering the Arabic Language

The importance of this pre-condition is so obvious and logical because as al-Rāzī rightly remarks that: "our religion has been revealed in Arabic and it cannot be grasped without mastering the speech of the Arabs." It goes without saying that acquiring sufficient knowledge in Arabic grammar, its science of morphology and rhetoric in their various aspects and branches are imperative in order to understand the meanings of the Qur'ān and the sunna. For those who were born and brought up in a pure Arabic environment without outside influences, this talent can be instinctively acquired as was the case of the Arabs in those days when they lived in isolation from the outside world. However, in an ordinary situation, of course this should be acquired by learning from an expert or by reading authoritative works in this science.

This ideal requirement is simplified by many scholars to a reasonable degree. al-Ghazālī, for instance, mentions various aspects of linguistic demands expected of a mujtahid, but he also gives some extenuating circumstances when he says that it is not required for a mujtahid to be at the level where he knows the whole language and understands the grammar.
in depth. What is needed is only for him to have the knowledge of Arabic to a degree which has relevance to the Qur'an and the sunna, so that he can understand the points of speech and the real or exact meanings.

So, we can convincingly say that a person is considered as having fulfilled this condition if he has sufficient knowledge about the principles of the Arabic language in such a way that he feels that he has to attained a level where he can easily find more information when he needs to understand the texts.

Al-Āmidī also agrees with al-Ghazālī that a mutilahid should not be required to attain a linguistic capability to the degree of specialization when he said:

"It is not stipulated that he should be like al-Aṣma‘ī in his linguistic capability or as Sibawayh in his grammatically mastery. It would be sufficient if he could attain the degree that he can understand what has traditionally been used by the Arab in their dialogues."

An ironical comment in this respect is made by al-Isnawi when he says:

"one can argue that this pre-condition is not necessary since a mutilahid also is required to be a knowledgeable person about the Qur'an and the sunna which naturally
The first thing which impresses the readers of al-Shaṭībi's view on this matter is that a mujtahid should gain qualifications in Arabic language to the extent where he becomes similar to experts like Khalil, Sibawayh, al-Akhfash, al-Mazini and the like. However, later the readers find that al-Shaṭībi reduces this high standard when he says, "It is not demanded that a mujtahid reaches to the same level as al-Khalil and al-Mubarrad." He continues to demonstrate this attitude by saying that what he really means is that, "a mujtahid should understand the language to the extent that a nomadic Arab (al-Ārabi) does." It is agreed that al-Ārabi does not have detailed knowledge about the linguistic arts as do experts and specialists.

We may agree with the latter's opinion of al-Shaṭībi that to be a mujtahid in the Shari'ā should not necessarily be a mujtahid in the Arabic language. At least two reasons can be advanced here to support this idea. First, in order to be an expert in this particular art, one should devote one's whole life or a major portion of it to this area of specialization alone, and naturally this cannot be expected from a
person who wants to give his full service to the sharia as a muitahid. He would use the art and techniques of linguistics only as a tool to achieve his legal purpose. Second, there are adequate linguistic works available for consultation, thus if a muitahid faces any philological problem, he can easily refer to these works to find a satisfactory solution.

Al-Shawkānī also does not consider this pre-condition as a difficult burden when he mentions:

"What is needed (as fulfilling this condition here is only that when a person is capable of copying it out from the references written by those experts in this particular field; especially when these have been simplified and arranged in alphabetical order in encyclopaedic form which make them accessible to every researcher."73

Second: Knowing the Qur'ān

Almost all of the Muslim jurists agree that this pre-condition is the most fundamental and indispensable for any muitahid. Al-Shāfi‘ī states in his al-Risāla:

"Nobody can exercise analogical reasoning except the one who could gain the instrument which is needed to be used in analogy, i.e. the knowledge about the science of the book of God including its injunctions, its moral teachings, its science of abrogating (nāsīkh) and abrogated (mansūkh), its general (fāmm) and particular (khāss) and its instructions."74
According to Imām al-Ḥaramayn, to understand the Qur'ān, a muṭtaḥid should not rely upon what he can understand out of its language alone. This is because most of the Qur'ānic commentaries have been received through narrations. On the other hand, he should also not rely solely upon what has been transmitted in books or publications. Hence, he should acquire for himself a genuine knowledge about it as well as acquire necessary knowledge about the science of abrogating and abrogated.\footnote{77}

The significance of this pre-condition is so obvious and can be easily understood because the Qur'ān is the most fundamental source of Islam. It is impossible for anybody to attain authoritative and credible status in Islamic law without gaining a strong grounding in the Qur'ān.

But a question which usually arises at this juncture is how far someone is required to fulfil this pre-condition to be eligible to claim the right of istiḥād for himself. Here al-Ghazālī, after affirming that the Book of God is the principle source of which sufficient knowledge is imperative, says:

"It is not required (for a muṭtaḥid) to know the whole Qur'ān, but only those verses pertaining to legal rules are required, and these are estimated to be about five hundred verses and it is not stipulated that he
should memorize them, but it would be enough if he could recognize their places in such a way that would be able to find any relevant provision when needed." 78

Al-Shirāzī seems to agree with al-Ghazālī in this when he observes, "What is required from a mujtahid is just to know those provisions related to legal rules and those which explain the lawful and unlawful, but not stories, parables, exhortations and reports." 79

This view is also supported by al-Rāzī who remarks that a mujtahid is required to know only about five hundred legal provisions in the Qur'ān. 80

According to al-Shawkānī, to make such a restriction on legal verses of the Qur'ān to about five hundred verses is inaccurate and rather arbitrary, because the Qur'ānic provisions from which legal rules can be deduced are available in abundance and far exceed this estimation, as whoever is endowed with the real power of understanding and complete contemplation can deduce legal rules even from such verses which apparently deal with stories and parables. 81
Furthermore, this restriction can create another problem, especially in differentiating legal provisions from other verses, because this differentiation would be impossible without knowing the whole Qur'ān. Probably due to this reason al-Qayrawānī quotes that al-Shāfi‘ī has stipulated that a mu'tahid should memorize the whole Qur'ān. 82

Beside recognizing legal provisions in the Qur'ān, the mu'tahid's knowledge should also comprise several other relevant requirements:

(a) Knowing the circumstances under which the Qur'ān was revealed. Naturally this pre-condition is indispensable for gaining appropriate understanding of the text due to their close relationship. According to al-Āmidī, having knowledge about the circumstances under which the Qur'ān was revealed (asbāb al-nuzūl) is an imperative pre-condition for anybody who wants to understand the Qur'ān. In knowing these circumstances of revelation, one can clearly discern the meanings and objectives of the verse concerned. Some jurists consider having knowledge about the Meccan and Medinan verses as one of the fundamental pre-conditions for mu'tahid. 83 It would appear that such knowledge is necessary in order to know the earlier and the later revelations. Yet perhaps such
knowledge is not a great advantage with regard to the legal rules in which a mujahid invests his work. This is because most of the legal verses were revealed in Medina. Thus knowing about Meccan and Medinan verses has little, if anything, to do with the legal rules.

(b) To know about the abrogating (näsikh) and abrogated (mansūkh) verses is one of the important items in order to understand the Qur'ān, especially pertaining to the legal rules. As we can see in the sunna (the Prophet's tradition), during the early years of Islam the Muslims faced Jerusalem in their prayers, and this changed a few years later when they were ordered to turn to the Ka'ba in Mecca. This event has been recorded clearly in the tradition literature, and the Qur'ān also gives its indication to it. This implies that the legal rule about the former practice had been abrogated and was substituted by the latter.

The vast majority of the Muslim jurists consider that the inheritance provisions in the Qur'ān abrogated the bequeathing system which is prescribed in two Qur'ānic verses.
Al-Suyūtī claims that there are about twenty one Qur'ānic verses which have been abrogated. However, according to Abū Zahra, profound reflection shows that the abrogated verses could be reconciled and this means that no abrogation has taken place in those verses.

The Qur'ānic legal rules can be classified into several classifications as follows:

(a) Legal rules relating to Islamic theology such as belief in God, His messengers, the Day of Resurrection and other theological doctrines.

(b) Legal rules relating to the purification of human soul and its educational methods including explanation about good conduct which should be nourished and about bad behaviour which must be avoided.

(c) Legal rules relating to the sayings and actions of mature man (for whom the observance of the religious precepts is obligatory), beside the two previous categories. These are the practical legal rules (al-aḥkām al-‘amaliyya) which can be divided into two sections: the first section is related to the ritualistic action (ṣibādāt), (i.e. those actions which thread the relationship between man and the
Creator), and the second section concerns the social transactions (mu'āmalāt) which regulate the relationship between man and his fellow human beings. These include all issues of general and particular laws. 89

The Qur'ānic legal rules have been sometimes given in a general way, laying down the main principles which shape the bases for the structure of the detailed application. Sometimes they have been given in a summary form which needs further detailed clarification as in the case of the commands of prayer and zakāt, and on some other occasions they have been described in detail as in the case of divorce, the share of inheritance, the revealed criminal punishments and the likes.

All these are essential to the independent mujtahid.

Third: Knowing Legal Traditions

A mujtahid is also required to gain sufficient knowledge of ahadīth al-ahkām or the Prophetic legal traditions. However, he does not necessarily memorize the whole of these ahadīth, although it would be preferable if he could do so. Instead, he must be
capable of referring to them when making his legal deduction, and this would be possible by knowing their place in authoritative texts.°°

As in the case with the Qur'ān, knowing the legal tradition also includes knowing about the circumstances in which a certain hadith was said or done by the Prophet as it includes knowledge about the abrogating and the abrogated. Acquiring all of this knowledge is important, because the legal traditions of the Prophet are complementary to those of the Qur'ān, or they are elucidations of those of the Qur'ān. According to al-Shāṭibi, nothing can be found in the sunna whose meaning is not indicated in general or in detail in the Qur'ān.°°

The position of the sunna as one of the sources of Islamic legislation is second only to the Qur'ān. This means that a muitahid has to look for his legal opinion firstly in the Qur'ān, but if he does not find any solution in the Qur'ān, he has to turn immediately to the sunna.°° This view has been embodied in a hadith in which it is reported that the Prophet asked Muʿādh b. Jabal, by which source he would give his (legal) decision when he was appointed as a governor to Yemen. In his reply he mentioned the sunna just second to the Qur'ān, and this attitude of Muʿādh
found its approval from the Prophet who, as reported, praised Mu‘ādh for his sound opinion.93

There are four ways by which the sunna plays the role of elucidating the Qur'ān in connection with legal rules:94

First, it clarifies its ambiguities, elaborates its summary expressions, particularises its generalities and differentiates between the abrogating and abrogated verses in the view of the great majority of the jurists who agree that the abrogations have really taken place in some of the Qur'ānic legal rules.

For example, the basic obligation of salāt (prayer) is mentioned in the Qur'ān without explaining further details about its procedures and provisions. The obligation of zakāt is also mentioned generally in the Qur'ān without detailing or elaborating the ways of collecting it and from what sources it should be taken and so forth. However, the sunna comes to give clarification in detail and clearer explanations in all these injunctions. About the generality in the Qur'ānic statements which the sunna comes to give its particularization, al-Shāfi‘ī considers the hadith which says: "do not marry a woman together with her
paternal or maternal aunt" as a particularization to the Qur'anic verse which says: "It is made lawful for you to marry other women than these (certain women whom a man is prohibited from marrying due to the close kinship)."

Second, the sunna gives additional obligations to those legal rules whose principles have already been asserted explicitly in the Qur'ān. An instance of this is the case of liʿān, whose principle is fixed clearly in the Qur'ān, but the sunna comes to confirm it by its decision to separate the partners.

The third type of the legal rules of the sunna are those rules that give certain limitations to the absolute rules in the Qur'ān, e.g., cutting off the thief's hand from the wrist, or such rules as those which give some exemption for marine dead meat from the rest of dead meat which are forbidden to the Muslims.

The fourth way by which the sunna can be an auxiliary instrument to the Qur'ān with regard to the legal rules is where it brings about legal rules which have not been provided by the Qur'ānic text. An example which has often been cited in this case is a hadith in which the Prophet prohibits the Muslims from
eating domestic donkeys, and also what has been reported that he prohibits them from eating every wild animal which has canine teeth and every kind of bird which has claws, about all of which the Qur'ān is silent.\(^{101}\) This is because the *sunna* has its own independent authority in deciding Islamic legal rules beside the Qur'ān. There is a well-known *hadīth* in which it is reported that the Prophet says that, "Verily I have been conferred the Qur'ān and something else which has the same authority as the Qur'ān (in resolving legal rules)."\(^{102}\)

According to Ibn al-‘Arabī, there are about three thousand *ahādīth* from which legal rule can be derived.\(^{103}\)

However, it should always be borne in mind, as has been mentioned earlier, that the position of the *sunna* as one of the authoritative sources of Islamic legal rules, must be placed in the second rank, which implies that a *mu'tahid* has to look in the Qur'ān first before turning to the *sunna* for his juridical endeavours.

Furthermore, al-Ghazālī considers that having knowledge about *al-īrāh wa al-ta‘dīl* (invalidating and justifying) and *ahwāl al-ri‘āl* (the transmitters'
personal characters), i.e. two sciences of the criticism of hadith transmitters, is the supplementary condition for an independent muitahid. Logically speaking, this condition seems impossible to be fulfilled, especially so much time has passed. Al-Rāzi's suggests as modification that it would enough to rely on great collectors of the ahādīth as al-Bukhārī, Muslim and the likes, about whose credibility the (Islamic) critics have agreed.

Knowing the legal ahādīth also means knowing their chain of transmission and their classification into tawātur (well established traditions), shuhra (famous or well-known traditions) and āhād (isolated traditions which has been transmitted by small number of transmitters only).

Fourth: The Nature of Consensus

This is another branch of knowledge which a muitahid must acquire, so that he will not give a legal opinion which contradicts what has already been agreed by the jurists. In this respect he should not give his legal opinion except when it is in conformity with that which has been given by previous scholars, or when he has ascertained that the legal issue in which he is giving his legal opinion is most likely to
be a new issue which has never been tackled and discussed by previous jurists.

The agreement achieved by all Muslim jurists on a certain Islamic legal rule in any age after the death of the Prophet Muhammad is called the consensus (iimā'). It is considered by the vast majority of them as the third authoritative source of the sharī'a after the Qur'ān and the sunna. As remarked by al-Khaṭīb al-Baghdādi, "If the jurists of certain period agreed about certain legal rule of something, this agreement becomes binding upon the Muslims." Imam al-'Iṣlamayn adds that "This is what has been seen as appropriate by various authoritative groups of different juridical schools."

The vital position of the iimā' in the Islamic legal system is indisputable because most of the legal rules in the Qur'ān and the sunna can be interpreted in various ways due to presumptive indications. But by unanimous agreements of the jurists, only certain rules should be accepted and implemented by the Muslim community.

The validity of the iimā' as one of the essential sources of the sharī'a has been taken from the Qur'ān and the sunna. One of the significant Qur'ānic
provisions which has often been quoted in this respect is a verse which says that, "If anyone contends with the Prophet after guidance has been plainly conveyed to him and follows a path other than that becoming to men of faith, We shall leave him in the path he has chosen and cast him into hell, what an evil refuge?" 

The way that this Qur'anic provision implies the authority of the consensus is that it joins together opposition to the Prophet and following other than the believer's path in a single warning, which means that following such a path is prohibited just as opposition to the Prophet has been prohibited.

With regard to the sunna, there are several hadith from which can be concluded that the authority of the consensus is one of the sources of the shari'a. Amongst these hadith are: "My community will never agree on error," and "What has been seen as plausible by the Muslim is surely plausible also in God's sight, and what has been considered as evil by the faithful is surely evil also in God's sight," and "God's hand (His blessing) is with the community."

In addition, there are also a number of hadith which give warning to the Muslims against deviating
from what has been agreed upon by the community. Al-Shāfi‘ī maintains that the Prophet's command to the Muslims to adhere to their community is something which has been used as argument that the consensus is something binding. But in order to be recognized as an authoritative source of the *shari'a* from which legal rules can be derived, the jurists' consensus must be based on valid evidences, because to give an opinion in any religious matter without basing it on textual evidence or provision is really an erroneous deed. And as has been understood from the above-mentioned *ahādīth*, the Muslim community cannot agree on error. Furthermore, the Muslim masses are the followers of *mu'tahids* in their religious affairs. If *mu'tahids* fell into error, the masses would fall into the same fate, and this situation is denied by the above traditional texts.

Perhaps an objection would arise here that if textual provision is required for consensus, then what advantages could be expected from it for legal purpose? Here we find Ibn al-Ḥājib al-Mālikī gives an answer by saying that: "The advantages of the consensus will still exist in the manner that it would
stop further research on the same incident as well as it would prevent dispute around it."""

There are two kinds of consensus: explicit consensus (al-i'ίmā' al-sarīh) and silent consensus (al-i'ίmā' al-sukūtī). The former, which has been accepted by a great majority of the Muslim jurists, would take place when all of the jurists have unanimously and explicitly expressed their agreement on a legal rule of a certain case, while the latter, which has been accepted as valid consensus by quite a number of the Muslim jurists, but has been disputed by several others, would occur when only some of them have given their views on a certain event or case, but the rest of them have not demonstrated their opinions whether by recognizing the rule or rejecting it; although everyone of them is aware of the view taken by their colleagues.

However, the agreement which is considered as the valid consensus here is the juridical agreement achieved by everyone of those qualified in this particular field of knowledge and, as al-Bayḍāwī says, "Any view which has been expressed in this matter by anyone rather than a qualified jurist cannot be regarded as having valid evidence, and any opinion without valid evidence is regarded as error.""
Having knowledge about the consensus of the jurists implicitly includes knowledge about their disputes and disagreements. This knowledge will benefit a mujtahid in his efforts in searching for legal rules about events or cases which have been disputed and not been agreed on by other jurists, and accordingly will enable him to give his own legal opinion. Al-Shâṭibi reports from several prominent Muslim jurists their insistence that this condition is essential and imperative for anyone who would like to be involved in the Islamic profession. Even the Żahirite jurist, Ibn Ḥazm, agrees with this condition and transmits opinions of several eminent jurists confirming this viewpoint. Amongst others, there are Saʿīd b. Jubayr, Mālik, Aḥmad b. Hanbal and others.

Fifth: The Science of Usūl al-Fiqh

Having sufficient knowledge of usūl al-fiqh (lit: principles of jurisprudence), is one of the pre-conditions stipulated for a mujtahid according to some Muslim scholars. The viewpoint of these scholars in stipulating this pre-condition is not difficult to see, i.e. because the whole research of a mujtahid involves seeking the legal rules from the provisions of the sharīʿa and the ways in which these provisions lead to rules, whether directly or indirectly,
explicitly or implicitly. This knowledge includes general principles of Islamic jurisprudence, its evidences and the ways of utilizing it. In this regard, the muitahid has to know the concept of istihbān (discretionary rule), al-māsālih al-mursala (permissible public interest), al-ʿurf (custom) and other evidences in which the scholars have different point of views. By gaining wide knowledge in all of these aspects of usūl al-fiqh, he will be able to form his own opinions and decisions on whether he will consider these evidences as the true and reliable proof on which decisions can be built or not.

Historically, this subject is one of those subjects in Islam which did not exist during the Prophet's time and for many decades after his death. The early Muslims did not need this kind of knowledge, because as Ibn Khaldūn argues, "To grasp the meanings from the words did not require anything more than the philological talent which they already had by nature." Some of them knew most of the regulations that are required particularly for finding the legal rules. They also did not feel that it was necessary to learn about the art of the asānid (the chain of transmission) of the sunna due to the nearness of time.
Nevertheless, after the deaths of the early generations, when the all branches of knowledge were becoming more involved, the Muslim jurists and mujtahids felt that acquiring these laws and principles was something imperative and necessary. So they developed the independent science which has to be known as usuli al-fiqh.

In fact, one cannot be considered as knowledgeable in the Qur'an and the sunna without mastering this science, because in order to understand both sources, one should know, for instance, that a certain textual command implies the obligatory demand, and that there are particular and general forms in the texts which each have specific conditions in their indication towards the legal rules, and other juridical principles and regulations. This science, as al-Shawkani states, is the basis and main pillar of ijtihad upon which its whole structure has been built, and the mujtahid should examine every case and issue in order to reach the right decision. By doing so, he would be able easily to relate the derived cases to the fundamental one. But if he does not have a strong grounding in this science, he would have faced difficulty and confusion in his task.¹²⁸
However a mu'tahid does not need to know in detail about jurisprudence itself, because these detailed issues have been produced by the mu'tahid, and they are the legal theories which he has achieved after exercising his right of ijtihād. If so, they cannot be stipulated as a pre-condition of ijtihād. 129

Sixth: The Objective of the Shār'ā

A mu'tahid also should be a very knowledgeable person about the objective of the Shari'ā in every issue and topic. 130 He must understand that these objectives have been built on consideration of human interest. These (permissible) human interests which are called "al-maṣāliḥ al-mursala" (lit: untied interests) in fact are a new type of public interest that did not exist at the time of the Prophet and which are not therefore mentioned in the Qur'ān or in the sunna. In other words, they are matters which are for the benefit of the community (pro bono publico) and are not specifically defined in the texts. 131 The importance of al-maṣāliḥ al-mursala as a vital source of the legislation of the shari'ā can be easily discerned, because human interests constantly emerge. If the the rules of the shari'ā concerning these new and ever-developing public interests were not legislated for, and if the shari'ā
restricted its scope of legislation to the texts only, most of these public interests would have been suspended and the sharī'ah would not have adjusted itself to the development of society and its interests. 132

In view of the importance of this topic in Islamic legislation for the benefit of humankind at large and the Muslim community in particular, al-Shāṭībī devotes a whole volume of his four volumes al-Muwāfaqāt in discussing it alone, 133 as he also deals with it in detail in his al-I'tisām. 134

As Ibn al-Qayyim observes:

"Knowing this objective has a very great advantage, whereas the ignorance of it has caused many cases of misunderstanding about the sharī'ah, which makes it a difficult and tiring task to carry out and a heavy burden to bear. In its true nature, the sharī'ah comes to put human interests as its main and foremost priority. In fact the structure of the sharī'ah has been constructed on wisdom and on the interests of humankind, both for this temporal life and the life to come." 135

This has been testified by the Muslim jurists after studying the rules of the sharī'ah. The Qur'ān itself indicates this fact on several occasions such as: "We sent thee not, but as Mercy for all creatures." 136 And the foundations of mercy are
attracting beneficence to human beings and avoiding harm to them. The same objective has been demonstrated in other places from which it can be inferred that God does not like to impose difficult duties and an unbearable burden on man.

To get a clearer vision of this, it should be understood that, according to the Islamic point of view, human interests are divided into three categories: essential, needed and additional or non-essential. The principles of all of these categories are laid down by the Qur'ān, while the sunna has added details and given them proper interpretations and sufficient explanations.

A situation of essential interests refers to a person's striving to safeguard his religion, life, property, mind or offspring from perdition. A need refers to what is necessary for the attainment of good life. Non-essentials within this context are "decoration or amelioration".

All of the Islamic legal rules are moving around this broad circle. Thus, the development of Islamic jurisprudence has never ceased after the Prophet's period where legal rules were absolutely decided by revelation, but it has constantly expanded and
explored new dimensions. When the Muslims confronted by the issue of *al-khilāfa* which occurred immediately after the Prophet's death, they faced it from the view-point of *maslaha*. Thus, they chose Abū Bakr because the Prophet had agreed to him leading the public prayer which is one of the fundamental requirements of the religion. They considered also that they ought to accept him as their leader in worldly matters which are less important than the religious ones. They took a similar attitude when they agreed to accept the suggestion of compiling the Qur'ānic manuscripts into one volume during the reign of Abū Bakr. It would be worthwhile observing that in this particular event, they gave the reason for this project that it contained a "benevolent factor" for their religion and community, and this means that benevolence in itself is required in Islam regardless of whether it has been provided by the text or not. The Muslims have emulated these examples of their predecessors and have adopted this method although they have different views in conceiving and appreciating it, or in widening or narrowing its scope.

However, it should be remembered that human interests that are recognized here are the real interests which will benefit the whole society. It is
not self-interest or limited kind of interest which will restrict its advantage to some people only, while neglecting others. Therefore, it should be discerned in the light of the norm of *maṣlaḥa* in the *shariʿa* and according to its consideration, not according to the individuals' tests or desires, because these would differ from one person to another, from one situation to another situation and from one time to another time. The same thing could be advantageous to one person and detrimental to another due to difference of aims and purpose.

Furthermore, it must be also in harmony with the spirit of the *shariʿa* and not in conflict with any of its sources.

**Seventh: The Original Exemption**

This condition which is known in Arabic as ""al-barā'a al-aṣliyya" has been stipulated by al-Ghazālī, al-Shīrāzī, Ibn Qudāma, al-Subki and several other Muslim jurists. It implies that a *muftahid* should know that any rule of the *shariʿa* has only been determined by the textual sources and therefore nothing can be regarded as obedience to the *shariʿa* order without being based on its provisions. Al-Ghazālī and al-Rāzī call this pre-condition as
"rational evidence", while some other jurists refer to it as "the continuity of the original absence of any legal rule" (al-istishāb al-‘adam), or "the continuity of the original condition of the mind" (istishāb hāl al-‘aql).

Failing to find any legal provision in the textual sources, the jurists would resort to this principle.

All rules of the shari‘a have been primarily referred to the text. Nevertheless, the human mind can show the negation of any rule of the shari‘a in certain incident as long as the textual sources are silent. This is because the role of human mind is not to legislate the rules of the shari‘a, but to discover them.

An example of the juridical application of al-barā‘a al-asliyya is al-Shāfi‘i’s opinion that the witr prayer is not obligatory. When he was asked about the proof of his opinion, al-Shāfi‘I maintained, "The shari‘a is the only way through which we can obtain the obligatory rule of this prayer. I have attempted to find the evidence of the obligatory rule of this prayer in the sources of the shari‘a, but I have failed."
Another example can be taken from Ibn Qudama about "the sixth prayer". According to him, the texts have indicated the obligatory rule of the five daily prayer for every Muslim. The sixth prayer is not therefore an obligatory duty upon the Muslims. And the existence of this negative rule is not because it has been fixed explicitly by the texts, but it is due to the original absence of any rule.\footnote{153}

However, this condition should not be regarded as separate condition\footnote{154} since it has been unanimously agreed that an efficient mujtahid would not give his legal opinions (fat\textsuperscript{a}w\textsuperscript{a}) without basing them directly or indirectly on the provisions of the shar\textsuperscript{f}\textsuperscript{a}. In fact, having a strong grounding in the Qur\textsuperscript{a}n, the sunna and the im\textsuperscript{a}m\textsuperscript{a} seems to be sufficient in this matter without the addition of what is called as the original exemption as a separate pre-condition.

V. THE TECHNIQUES OF IJTIH\textsuperscript{AD}

There are three techniques of ijtih\textsuperscript{ad} and all are equal in importance with regard to their roles in finding out the rules of the shar\textsuperscript{f}\textsuperscript{a}. These
techniques are the explanatory technique, the analogical technique and the reformist technique.

A. The Explanatory Technique (Itihād Bayānī)

What we mean by this technique is the exertion of mu'tahid's efforts to acquire the precise rules of the sharī'a from the texts. In order to reach certain legal opinion, a mu’tahid should first of all direct his attention towards the textual sources, because any rule of the sharī'a can be obtained, directly or indirectly, explicitly or implicitly, only from its texts. If the required legal rule has been found explicitly expressed in the Qur'ān or in the sunna, he would rely entirely upon it without any hesitation. This means that all his enquiries regarding legal rule in certain case have been completely answered.

Nevertheless, not all of the rules of the Sharī'a can be found to be explicitly expressed in the text, similarly, not all of the sunna have been transmitted with the same degree of authority. Hence, a high standard of scholastic expertise is needed to examine the texts from various aspects in order to identify the significance or indication of every relevant provision; whether it is general or particular, absolute or conditional and so on.
A careful study should be undertaken, particularly in respect of the textual words, to know whether they have real or metaphorical meanings and whether they indicate the explicit meaning (mantuq) or implicit meanings (mafhum) and so forth.

B. Analogical Technique (Ittihad Qiyas)

In this technique, a mu'tahid attempts to associate a derivative incident (faris) which has no provision in the texts with an original one (asl) which has a textual provision in order to decide the common basis of rule which exists in both of them.

There are three relevant terms that should be given due concern in this connection in order to understand the mu'tahid's efforts in searching for the rules of the shari'a by the analogical method. These terms are: tahqiq al-manat (verification of the basis of the rule), tanqih al-manat (refinement of the basis of the rule) and takhrir al-manat (deduction of the basis of the rule).

Tahqiq al-manat is a kind of ittihad which aims to verify the basis of the rule of law already known by the text or by the consensus (asl) in derivative law
so that the legal rule of the former case would consequently be applied to the latter one.

For example, in the case of killing game while performing the pilgrimage, the Qur'ân says:

"O you who believe, kill not game while in Sacred Precincts or in pilgrim garb. If any of you doth so intentionally, the atonement is (offering of) a domestic animal equivalent to the one he killed."

This Qur'ânic verse asserts clearly that atonement should be made for killing game while performing pilgrimage in Mecca, i.e. a domestic animal which resembles the slain game. To offer this atonement on the basis of equivalence is known from the textual provision as well as from the jurists consensus, and this is what is called "manāt al-hukm" or the basis of the rule, i.e. the obligation of atonement by the pilgrim in this case. But what kind of domestic animal can be considered as equivalent to the slain game is a matter to be decided or verified by ijtihād, for instance, a cow for a slain wild donkey.

Another example is the application of "justice" as mentioned in the Qur'ân: "And for witness, two persons from among you endowed with justice." Although the meaning of justice in the perspective of
the sharī'a is already known to us,\textsuperscript{163} we need to specify or verify as to whom this quality should be appropriately ascribed.\textsuperscript{164} The basis of the rule in this case, i.e. justice, is known to all of us by the texts and by the consensus, so there is no need to derive it. But it is difficult to realize it with certainty as to whom it applies and as to whom it does not. Here the mujtahid should exercise his ijtihād in verifying the existence of certain bases of rule in certain cases or incidents.\textsuperscript{165}

Tangīh al-manāt (refinement of the basis of the rule) means to refine or purge the true basis of the rule from invalid elements which have blended with it, so as to differentiate between both kinds of the basis of the rule.\textsuperscript{166}

An example can be cited from what has been transmitted: A nomadic man came to the Prophet, admitting that he had committed sexual intercourse with his wife during the day-time of the fasting month.\textsuperscript{167} On hearing of this incident, the Prophet ordered him to emancipate a slave.\textsuperscript{168} In this case, the mujtahid has to refine the basis of the rule from its irrelevant or invalid elements (e.g. nomadic quality of the man) which might be related to it. Besides, he has to generalize it to any mukallaf
rather to restrict it to a particular type of individual. Furthermore, it might be wrongly comprehended that the basis of the rule is applicable to the fasting month of that particular year only, but this consideration must be put aside as invalid and a generalization should be made to any similar incident taking place in every Ramadān. 169

The third and the last type of the muqtaḥīd’s efforts in searching for legal basis is "takhri fi al-manāt" (deduction of the basis of the rule). This way of īltihād is practiced when a legal rule of certain case has been mentioned in the text without explaining the basis of the rule. For instance, the prohibition of wine and usury have been provided in the text, but the basis of the rules has not been mentioned in the same place where that legal provision appeared. Hence, we have to deduce them by using our reason and we say that the basis of the rule in the prohibition of wine is intoxication and we make our generalization in this legal rule to every intoxicating element by applying analogical method. Similarly with the case of usury, we say that the basis of the rule in its prohibition in the case of wheat is its esculent nature. Accordingly, we give similar legal rule to rice and dried grapes by method of analogical reasoning. This is a kind of īltihād by analogical
technique\textsuperscript{173} which has been disputed by various juridical schools and absolutely rejected by the Zāhirites, the Shi‘ites and certain groups of the Mu‘tazilites.\textsuperscript{174}

C. Reformist Technique (Iitihād Istiślāhī)

In this technique the mujtahid tries to find out the rules of the sharī‘a in new cases or incidents by applying the general principles of the sharī‘a such as acquiring beneficial factors (jalb al-maṣlaḥa), avoiding harmful factors (dāf‘ al-mafāsid), the invalidation of legal fiction (sadd al-dhara‘ī‘), juridical equity (al-istiḥsān) and public interests (al-maṣāliḥ al-mursala).\textsuperscript{175}

Iitihād for the purpose of reformation is the most productive method of Islamic legislation regarding cases which do not have textual provisions. It has a great capacity for presenting legislation in order to accommodate human developments and to fulfil their various necessities and interests. However, Iitihād in this area needs precautions, especially in discerning the real interest and avoiding falling into the trap of following one's desires.
Taking public interest as the real objective of the sharī'ah, a mujtahid can employ his efforts in searching for the rules of the sharī'ah in various cases and events which are not available in the textual sources.

If this technique of ijtihād is applied properly by the qualified scholars, there is no doubt that Islamic jurisprudence will be able to cater for new situations.

Naturally human reason plays a conspicuous role in this reformist technique of ijtihād, since the texts are limited and the developments of human societies continue throughout successive generations. Ijtihād should not be restricted to explaining the meaning of the texts only, although nobody can deny the importance of this explanatory technique as has been discussed above. But this does not exclude the search for juridical solutions by employing one's intellectual efforts in order to achieve common welfare and public interests. This is why al-Ghazālī considers Islamic jurisprudence and its legal theories (usūl al-fiqh) as the noblest science when he maintains that

"the most honourable science is the one in which human reason has inherently mixed with revelation and where opinion and text"
co-exist side by side. Islamic jurisprudence and its legal theories are amongst this category when they harmonize between the shari'a and human mind. They have never taken any decision out of pure human reason which cannot be accepted by the shari'a as they have never been constructed on the basis of mere imitation which cannot be confirmed by the human mind.\textsuperscript{176}

With this understanding of the nature of ittihād by personal reasoning, al-Ghazālī expresses his acceptance of the principle of "al-istishāb\textsuperscript{177}" which reconciles the shari'a with the human mind. The same implication is stressed by al-Shawkānī who says:

"Ittihād by personal reasoning as can be employed by deducing evidence from the Qur'ān and the sunna, could also be employed by relying upon the original exemption, or original indifference (of any legal rule)....or by relying upon public interests or precaution."\textsuperscript{178}

VI. THE LEGAL STATUS OF ITTIHĀD

According to the jurists, the legal status of ittihād is variable according to a variety of circumstances; sometimes it is an individual obligation (fard ʿayn), sometimes it is a collective obligation (fard kifāya). On some occasions it is a recommended matter (sunna / mandūb) and on some other occasions it is a forbidden thing (harām).\textsuperscript{179}
Let us now examine the different legal status of *Itihād* in its different circumstances:

**First:** *Itihād* is an individual obligation, i.e., it is a duty on every Muslim who has the capability of exercising it if a *mu'tahid* feels that he would miss the opportunity of giving the right legal opinion of the *shari'ah*. In this circumstance, it is incumbent on this *mu'tahid* to immediately employ his effort to investigate legal evidences in order to find out the Islamic legal rule pertaining to the relevant incident. If he does not give his legal opinion in such a situation, he is regarded sinful. This is concerning cases raised by other persons. For cases or events which he himself has faced, it is also incumbent on him as an individual duty due to the fact that a *mu'tahid* is not allowed to follow the legal opinions of other persons.

**Second:** *Itihād* is a collective obligation, when one of the capable jurists gives his legal opinion about the relevant case or event and all the others are discharged from the obligation. But if none of them comes forward to give his legal opinion about that case or event, it is considered that the sin of this shortcoming or negligence would fall on all of them. This rule is applied also to a case
which has been raised by two mu'tahids, if one of them gives his legal opinion about it, they both would be regarded as free from being sinful, but if neither gives his legal opinion, it is considered that the sin would fall on them both.

The third circumstance is where ijtihād is recommended. This happens when a legal opinion on a certain case or event has been given before its occurrence or before any problem arose about it. It is recommended that the jurists presume unprecedented incidents or cases and try to anticipate their legal rules as has been done by the Hanafite jurists. These cases have been known as the "hypothetical cases" in Islamic jurisprudence.

Fourth: Ijtihād is forbidden when it is in conflict contrast with the ultimate textual provision or with the jurists' consensus as has been indicated earlier. A mu'tahid is regarded as sinful if he exercises ijtihād in such cases if he knows that his legal opinions are against clear textual provisions or against the jurists' consensus.
VII. CORRECT AND INCORRECT IJTIHĀD

The jumhūr hold the view that in theological matters only one certain ijtihād can be correct. For this reason, they maintain that the muitahid who reaches the correct ijtihād in this respect is rewarded, but the others are sinful.¹⁸⁰

A similar rule is applied to certain juridical issues that have definite rules and are necessarily known in Islam such as the obligatory rule of five daily prayers, the prohibition of murder, adultery, theft and so forth...

As has been mentioned earlier, ijtihād cannot be operated in all of these areas and every Muslim has to accept the rules of the šarī'a in such issues.

However, concerning the juridical issues which have presumptive rules and which are the subject of ijtihād, the Muslim jurists have different opinions about whether the correct ijtihād here is only one ijtihād or more than one. The source of this disagreement is a question of whether God had laid down a certain legal rule regarding a certain case before a muitahid has declared his ijtihādic decision,
so that it would be the same rule as was discovered by the *muṭṭahid*.

According to al-Ashʿarī, al-Ghazālī, al-Bāqillānī and the Muʿtazilite jurists,181 God had not laid down any legal rule before the *muṭṭahid* decided it. This means that what they regarded as true in a *muṭṭahid*'s speculation is really the true rule of God. Therefore, every *muṭṭahid* is right because he has already done his duty!182

On the other hand, according to the vast majority of the jurists, God had already laid down a certain legal rule before a *muṭṭahid* employed his *iṭṭihād*, and only this is the right rule. If a *muṭṭahid* happened to discover this divine rule, he has gained the right rule and his *iṭṭihād* is correct. But if he did not find that rule, this means he is wrong or misled and his *iṭṭihād* is incorrect although he is not sinful because of this mistake. However the correct *muṭṭahid* attains a double reward, one for his correctness and another one for his *iṭṭihād*, whereas the wrong *muṭṭahid* only gets one reward for the effort which he had given in looking for the rule.183 This view has been attributed to the eponyms of the four Sunnite schools184 and according to some writers, this is the only view al-Shāfʿī held.185
Those who uphold this later opinion have had recourse to several evidences taken from the Qur'an, *sunna* and the consensus of the jurists.  

A. *A Qur'ānic Evidence*

The first evidence which has often been used in espousing this opinion is the Qur'ānic verse which states:

"And remember David and Solomon, when they gave judgement in the matter of the field into which the sheep of certain people had strayed by night. We did witness their judgement. To Solomon We inspired the (right) understanding."

The way of argumentation based on this verse is that it bestows upon Solomon rather than David, the right judgement (in this incident) and therefore it indicates a misconception of David about it, otherwise this particularization would be meaningless. This is evidence of the unity of God's rule in this case where the correct *itiḥād* is only one. Al-Ghazālī rejects the validity of this evidence as follows:

First: This verdict of David and Solomon cannot be considered as an *itiḥādic* decision, because some scholars see that the prophets' *itiḥād* as mentally or religiously impossible, and some of them even go
further in this respect by denying that prophets commit any error. Therefore, how can error in this case be ascribed to David? And from which source do we know that he said that out of his personal ijtihad?

This objection has been replied to by the argument that both messengers' judgements were really based on their ijtihad and did not come from revelation, because if David's had come from revelation, Solomon have had no right to reject it, as David also would have had no right to withdraw his judgement to agree with Solomon viewpoint. So it is clear that prophets were allowed to practise ijtihad, and that they might fall into errors in their ijtihad.189

Second: The opponent also tries to refute this evidence in another way by saying that this Qur'anic verse contradicts the above argument since it continues to say: "...and to each (of both prophets) We gave wisdom and knowledge." There is no doubt that what is false and in error cannot be regarded as wise judgement and knowledge. Judgement of anyone who judges matters not in accordance with what God has revealed cannot be considered as God's judgement, and it also cannot be interpreted as the judgement and knowledge which has been conferred by Him; especially in terms of high praise.190
The answer to this objection is that the above expression does not mean that both prophets were given judgement and knowledge in this particular incident itself, but it might mean that they were given knowledge about ways of *ijtihād* and methods of judgement in general. Any error that might occur in a certain case cannot be interpreted as denial of this fact.

Third: The last objection to the above evidence is that, perhaps both prophets were allowed to invest their *ijtihād* in that particular case and they did really utilize it and both were right. But later, a revelation was sent down approving Solomon's *ijtihād* which became the right judgement by that divine approval. But because this revelation was sent down onto Solomon alone, it is attributed to him only and not to David. Therefore, this right judgement has been known by God's revelation and not through the exercising of *ijtihād*.

The answer to this argument can be found in itself as it is clear that al-Ghazālī has indirectly admitted that revelation was sent down approving Solomon's *ijtihād* which means that his judgement was the right one.
B. Evidence From the Sunna

There are a number of ahadith have been used by the jumhur to consolidate their stance; one of which is what has been narrated by ʿAmr b. al-ʿĀṣ and Abu Hurayra in which the Prophet says, "When a person in authority judges on a case with right judgement he gains double reward, but if he judges with a wrong judgement he gains only one reward."193

This shows that jihatd may be right as it may be wrong. And this leads to the conclusion that the right jihatd is only so, because if there maybe more than one right jihatd, every mujtahid must be right and each one must be given the same reward, and this contradicts the above hadith.

The opponents reject this evidence by arguing that the wrong can be envisaged only if the case concerned has textual provision or juridical consensus or analogy which are not identified by a mujtahid. This is not actually what has been disputed about in this regard. The objection here is only about the mujtahid's error in finding the right legal rule out of pure conjecture.195
This objection can be refuted down by affirming that the meaning of the above hadith is general and comprehends all ittihāds irrespective of the availability of any evidence or not. Therefore, to particularize it with the existence of the text, the consensus or analogy is indeed an arbitrary decision and thus, such an argument is not valid.¹⁹⁶

C. Evidences From Consensus

The jumhūr who maintain that the right ittihād is only one ittihād also justify their stance by relying on several cases supported by the consensus of the sahāba; amongst others is Abū Bakr's saying in the case of al-kalāla.¹⁹⁷ "I give my decision about al-kalāla out of my personal opinion. If I am right it is from God, but if I am wrong it is from Satan: Al-kalāla means the heirs except father and son."¹⁹⁸

Once, a writer wrote a letter on behalf of 'Umar (b. al-Khaṭṭāb), saying, "This is what God has inspired 'Umar to see..." 'Umar disapproved this expression and ordered his assistant to rub it out and rewrite in its place, "This is what 'Umar has seen. If it is wrong, it is 'Umar's own fault."¹⁹⁹
Once when 'Umar made an attempt to codify an enactment in matrimonial affairs against the excessive price of a dowry, a woman protested and reminded him about a certain Qur'anic verse. 'Umar could do nothing but said, "The woman is right and 'Umar is wrong." 

All these evidences demonstrate the fact that only one ijtihād is correct.

Al-Ghazālī, however, refutes these evidences by arguing that they said such expressions just out of their humbleness and self-humiliation.

D. Rational Evidence

The jumhūr have also used a rational evidences in their argument; one of which suggests that to say that all muttahids are right would lead up to a confusing result. For instance, when a disagreement between two muttahids arises regarding the positive and negative of the lawful and unlawful aspects of a certain case, two contradictory legal rules have to be brought together, and this is unacceptable.
The Second Group's Evidences

Those who support the view that all mujtahids are right in their ijtihadic endeavours have tried to justify their stance by using several evidences as follows:

A. The Qur'anic Evidence

The previous Qur'anic provision itself which states: "...and to each (of David and Solomon) We gave judgement and knowledge." According to them, if either prophet was wrong, this would not have been God's judgement and knowledge as it was. Hence, it is obviously that every mujtahid is right.

This argument has been answered by the argument that the above Qur'anic verse indicates only the fact that each one of the prophets was given judgement and knowledge. And this indefinite expression cannot be generalized to include that particular case. The true interpretation may be that both were given right judgement and knowledge about the ways of inferring legal rules as well as methods of deduction. 204-
B. Evidence From the Sunna

The Prophet is reported to have said, "My Companions resemble the guiding stars. Whoever you followed amongst them, you would gain guidance." Their argumentation concerning this hadith is that if there is anyone of the sahāba who can be wrong, the Prophet would have not said that guidance could be gained by following each one of them, because, as everybody knows, their legal opinions are different.

The answer is that, although the hadith can be generalized to all of the Prophet's Companions, it cannot be generalized to what should be followed from them, because the generality in terms of individuals does not necessarily mean the generality in terms of situation (of ideas, actions, etc.). However, following (which leads up to gaining guidance) can be interpreted as following them in their narration from the Prophet and not in their i'īthāds and personal views.

C. Evidence From the Consensus

For instance, the sahāba agreed to admit the differences in their i'īthāds by being tolerant to each other. Moreover, the pious khulafā' used to
recruit candidates for judicial posts even though they realized that their judgements differed from their own. If any error could be imagined in *ijtihād,* the *sahāba* would never tolerate it as they did not tolerate the attitude of those rebellious tribes who had refused to pay zakāt during the reign of Abu Bakr. 207

The *jumhūrī*’s answer to this evidence is that the *sahāba* did not protest over the *ijtihādic* differences because the wrong in such a domain cannot be clearly identified. Besides, he will be rewarded even though he has been wrong in his endeavours. The wrong which should be reproached and cannot be tolerated is that which can be certainly identified. Thus the above evidence is irrelevant to our purpose. 208

D. Rational Evidence

They say that, if only one certain *ijtihādic* rule is correct in every case, God would have certainly fixed a definite evidence in order to avoid any error or confusion and to prevent any objection. This is what has usually been noted in every ordinance of the *shari‘a* as has been mentioned in the Qur‘ān:

"...apostles who gave good news as well as warning, so that mankind, after (the co
ming) of the apostles, should have no plea against God."

... And:

"We did not send an apostle but (to teach) in the language of his own people, in order to make (things) clear to them."

This evidence is rejected by the jumhūr on the grounds that it is based on God having the obligation to preserve human interests in His decision. However, proponents of this view argue that if we accepted that human interests have been preserved in the rules of the sharī'a, nothing can stop the attainment of these interests by searching for legal rules out of their hypothetical evidences. If these interests are not clearly visible, nothing can stop them from being achieved in the legal rules inferred by ijtihād.

VII. THE ABSENCE OF A MUJTAHID IN CERTAIN PERIODS

The question of whether a certain period can be devoid of any mujtahid is another controversial issue on which the Muslim jurists have different views. The majority of them are in favour of the idea that a certain period may be devoid of any mujtahid. Some of them have gone so far as to say that there has been no mujtahid after the fourth century. A.H. But a number of them have maintained that no period could be
devoid of a mujtahid. This latter view has been mainly ascribed to the Hanbalite school of jurisprudence, but some writers observe that this is also the opinion of certain Shafi'ite jurists such as Abū Ishāq al-Asfārāyīnī al-Zubayrī. Certain Mālikite jurists are also said to have adopted the same view.

It should be noted that even some of the supporters of the former view do not completely reject the latter view; although they insist on maintaining that the independent type of mujtahids have totally vanished after al-Shafi'ī's period.

A. The Evidence of the First Group

(1) The assumption that a certain period may be devoid of a mujtahid is not impossible.

(2) The Prophet is reported to have said:

"God will not take away knowledge by stripping it directly from His slave, but He will do this causing scholars die, till no scholar remains, people will take ignorant persons to be their leaders. When the latter were asked to give their opinions (about religion), they will give them (out of ignorance), and by this way they will deviate (from the right path) and mislead their followers."
But using this hadith as an evidence in this issue has been rejected by the opponents who argue that it can be interpreted that what has been foretold by the Prophet in this hadith is actually about something which will take place after the appearance of the portents of the Last Day. It does not include what is supposed to take place before that period.\textsuperscript{220}

(3) The Prophet is reported to have said, "Islam was strange at its beginning and will become strange again as it was. Blessing (of God) be upon those strangers."\textsuperscript{221}

This hadith is mentioned by al-Āmīdī amongst those evidences which he uses to approve his stance.\textsuperscript{222} Perhaps this hadith is meant to indicates, in this context, the gradual extinction of the ‘ulamā’, till no mujtahid would be available any longer in certain periods.

This evidence can also be refuted by interpreting it as meaning that the scarcity of scholars and mujtahids as foretold in this hadith might happen at the beginning of the signs of the Last Day.\textsuperscript{223}

(4) Another textual evidence which has often be used to justify the claim that mujtahids can cease to
exist in certain period, is a hadith which is transmitted by Abū Sa'īd al-Khudrī in which the Prophet says, "Verily you will follow the ways of those who preceded you inch by inch and step by step. Even if they enter in the hole of lizard, you will do the same... ."

In this hadith the Prophet informs the Companions that a certain period will come where the Muslims will abandon the teachings of their religion and its way of life and follow the ways of other peoples. This implicitly comprises all Islamic teachings, including ijtihād.

Perhaps this evidence can be rejected by arguing that it describes the general conditions which will befall the Muslim community without specifically explaining the absence of ijtihād in certain periods.

B. The Evidence of the Second Group

(1) A hadith is transmitted that the Prophet has said: "A group of my community will constantly gain the upper hand in upholding the truth... until God's command comes (on the Day of Judgement)."
In this hadith the Prophet foretells that a group of his followers will gain the upper hand in their struggle for the cause of establishing the Islamic dominance upon the earth. It is natural that gaining the upper hand in this task needs a set of moral qualities such as perseverance and bravery in declaring what is considered as truth in addition to knowledge and understanding of religion which cannot be acquired except through the exercising of ijtihād. Only extraordinary persons can gather for themselves these moral qualities in their fulness, and such persons are necessarily mualahids. This shows clearly that no period can be absolutely void of any mualhid, otherwise, the Prophet did not foretell the truth.227

(2) A hadith in which the Prophet says that: "The scholars are the heirs of the prophets."228 It is clear that scholars do not inherit any property from the prophets, but knowledge as the same hadith continues to confirm that: "...we the prophets cannot be inherited from in terms of money but only knowledge." This shows that scholars will constantly be available in every period and amongst them are those whose knowledge will reach the stage which will enable them to exercise ijtihād.
(3) To get a comprehensive understanding in religion as well as to exercise *fitnah* in it is a collective obligation. This means that the whole community would become sinful if they agree to renounce this obligation. Hence, if the absence of *mujtahid* in a certain period is possible, it means that all the Muslims in that period have agreed with the erroneous and misleading situation, which is unacceptable. 229

Al-Āmidī tries to reply to this evidence by claiming that seeking wide knowledge in religion as well as exercising *fitnah* is not a collective obligation in all periods, because the mass can rely on the *fitnah* of previous generations! 230

(4) *Fitnah* is the way through which the rules of the *shari‘a* can be recognized. If a certain period does not have any *mujtahid*, this would lead to the suspension and interruption of the *shari‘a*, and this is against the above mentioned textual provisions. 231

Ibn Badrān argues, "Those who maintain the possibility of the absence of *mujtahid* in certain period have taken themselves as the criterion by which they judge all the scholars of the community. This make them imagine that no one would reach the high
standard of knowledge as they have achieved as though the grace of God was limited and circulated for those who lived in the four early centuries only whereupon it became exhausted and nothing has been left for later generations! 232

IX. PARTIAL IJTIHĀD

Is it permissible for a person to invest ijtihād in some particular issues only? This is another question to which the Muslim jurists have given different answers. In usūl al-fiqh, this question is known as "taqīyat al-ijtihād" (separation / division of ijtihād).

According to the great majority of the jurists, this partial ijtihād is something permissible. 233 Here are some of their arguments in justifying this view:

(1) If a person can collect all the evidences related to a certain juridical field or issue, he has certainly acquired a full knowledge about the rule of the shari‘a in that particular field or issue. 234 If ijtihād is indivisible, such a person cannot be regarded as a muttahid, but he is regarded as such. 235
(2) A hadith is narrated that the Prophet has said, "Consult your heart even though the muftis have given you their legal opinions."

It is understood from this hadith (as has been argued) that the Prophet orders a muhtahid to give preference to his own ijtihad over any other person's ijtihad. There is no doubt that this right is bestowed on any person capable of employing ijtihad, i.e., a muhtahid, otherwise how could the Prophet give his order to a common man to consult himself and ignore the opinions of the scholars?

(3) There is also another hadith in which the Prophet is narrated to have said, "Give up what is doubtful for what is not doubtful."

This shows that a legal rule that has been achieved through ijtihad should be relied upon. If a person imitates another person in a case whose evidence he knows, this means he gives up an certain thing for a doubtful one, because imitation is nothing but following the opinion of an other person without knowing his evidence.

(4) If ijtihad is something indivisible, a muhtahid should be knowledgeable of all cases. This
contradicts the fact that many múttahids do not give their responses to some questions put forward to them, but nobody has disputed that they are múttahids.

However, there are several jurists who disagree with the above view, but maintain that ijtihād is indivisible. Their main argument is that anyone who does not know about evidences of all juridical fields and cases does not reach the level at which he can presume that he can give legal opinion from correct evidence. This is owing to the probability of the availability of relevant evidence in other place unaccessible to him. As remarked by Ibn Qayyim:

"The relationship clearly appears between issues regarding marriage, divorce and gidda and issues regarding inheritance as there is also a clear relationship between issues regarding ijtihād, hudūd and some other judicial and juridical issues."
NOTES

CHAPTER: I


3 See Mustas., loc. cit.


6 Several words have been used by the Muslim jurists to express the mental exertion such as badhl al-ihdā, badhl al- ṭāqa, istifrāgh al-wuṣū, istifrāgh al-maiḥūd, etc.

7 Mustas., loc. cit.

8 See Iḥkām Am., p. 204.

9 Lumaʾ, p. 75, Nihāyat., p. 524.


12 Irshād., p. 250, in Arabic it is badhl al-wusū fi nayl huqm sharīʿa amalī bi ṭariq al-istinbāt.

13 For this reason, the expression can be regarded as replacing the word "hypothetical" in some definition. See, e.g. al-Subkī's definition above, p.

14 Irshād., p. 250.

15 See e.g., the previous definition of al-Subkī and Ibn al-Ḥājib's definition in al-Mukhtasar al-Muntahā al-Uṣūlī, printed with al-Taftāzānī's and al-Jurjānī's commentaries, II, p. 289.

16 In its general meaning, the word "jurist" has been used for everyone who has capability to know the rules of the Sharīʿa; although his juridical capacit
do not reach the stage which enables him to practise *Itihād*.

17 Mu'tamad, II, p. 397.

18 Luma', p. 76.

19 Irshād, op. cit., p. 253.

20 Ihkām Ām., p. 221.

21 Mustas., p. 354, Mahṣūl., p. 39.

22 The pure intellectual rules are those which have been decided by human reason before trying to seek them in the decisions of the *Sharī'a* such as to decide about the existence of God, His attributes, the messengership of prophets, revelation, the Resurrection, etc.

23 Mustas., p. 354 and 358.

24 Luma', p. 76.

25 Risāla, p. 471.


28 For details about juridical disagreement pertaining this case, see Muṣṭafā Sa'id al-Khān, *Athār al-Ikhtilāf fī al-Qawā'id al-Uṣūliyya fī Ikhtilāf al-Fugahā',* (Beirut, 1402/1982), pp. 275 and 277.

29 Q. II, 288.


31 See Risāla, pp. 562 - 564.

32 For further detailed discussion on this subject, see e.g., Muṣṭafā Sa'id al-Khān, op. cit., pp. 72 - 80, see also Muhammad Abū Zahra, *Fī Tārīkh al-Madhāhib al-Fiqhiyya,* (Cairo, n.d.), p. 26.


35 Anyone interested in this field is recommended to consult Fathi al-Darini, al-Manahii al-Ushniyya fi al-Ijtihad bi al-Ra'y fi al-Tashri' al-Islami, (Damascus, 1395/1975).

36 Muhammad Salam Madkur, op. cit., p. 31.


38 Ikham Am., p. 336, Irshad, pp. 89 and 90.


40 The definition of muitahid can be known automatically from the definition of ijtihad itself (see above p.), i.e., "A jurist who exerts his effort in searching for practical rules of the shari'a through the method of deduction.


42 According to al-Suyuti, the absolute muitahid is more general than the independent muitahid, because some absolute muitahids are not really independent in their method of ijtihad; although they could fulfill all the pre-conditions of ijtihad. See Radd., loc. cit.

43 Ibid, loc. cit.

44 Munkhtul, p. 462.


46 I'lam, p. 212.


49 Radd., p. 114.

50 Abu Zahra, op. cit., p. 314.

51 Madk. H., p. 376.
57. Ibid., p. 159.
60. Ihkâm Âm., IV, p. 219.
63. Irshâd, p. 252.
64. Mankhûl, p. 463.
65. Ihkâm Âm., IV, p. 244.
69. Ihkâm Âm., IV, p. 220.
70. Niha'ay, pp. 551 - 552.
71. Muwaf., IV, p. 115.
72. Ibid., p. 116.
73. Irshâd, p. 251.
75 It should be noted that al-Shāfi‘ī considers that analogical reasoning is synonymous to *ittihād* or one of its methods.

76 *Risāla*, pp. 509 - 510.

77 *Burhān*, II, loc. cit.

78 *Mustaqīm*, II, pp. 350 - 351.

79 *Luma‘*, p. 74.

80 *Mahsūl*, IV, p. 33.

81 *Nihāyat*, p. 200.

82 *Ihkām Ām*, III, p. 347.


85 See Q. II, 142.

86 See ibid., II, 180 and 182.


90 *Mustaqīm*, II, p. 351.

91 *Muwāfīq*, IV, p. 12, see also *Risāla*, p. 88.

92 *Muwāfīq*, IV, pp. 7 - 8.


95 *Risāla*, p. 227.

96 *Li‘ān*: The oath expressed by either husband or wife in accusing his or her partner of committing adultery.
97 See Q. XXIV, 6 - 9.


99 Bukh., VII, p. 287.

100 See Q. V, 3, and see also Muslim, XIII, pp. 84 - 90, Tirmidh., I, pp. 87 - 88, Nasə'ı, VII, pp. 207 - 209.


102 Abu Da'ud, IV, p. 200.

103 Irshād, p. 251.

104 Mustas, II, p. 352.

105 Mahsūl, II, part 3, pp. 35 - 36, see also Nihāyat, IV, p. 553.

106 Nihāyat, p. 549.

107 Irshād, p. 71.

108 See e.g. Mustas, I, p. 713, Mu'tamad, II, p. 27, Madk., H., p. 281.


110 Burhān, II, p. 675. Al-Āmidī mentions that the authority of the consensus as one of the legal sources of the shari'a has been disputed by the Shi'ītes, the Khawārij and al-Naẓẓām, one of the Muʿtazilite jurists. But a careful study of his "al-Ihkām has shown that in another place he gives us the impression that what has been ascribed to al-Naẓẓām about his refusal to recognize the consensus as one of the sources of the shari'a is, as a matter of fact, a mere confusion. (See Ihkām Ām., I, pp. 280 - 281). Al-Āmidī himself defends the authority of the consensus. (pp. 286 - 287).

111 Q. IV, 15.

It should be noted here that even Ibn Ḥazm, a Zāhīrite, agrees with this view. (See Ihkām Hz., IV, p. 495).

This should be understood in its correct way by taking certain conditions into consideration, especially the sense of religious and social responsibility, sincerity, far-sightedness, etc..


Aḥmad b. Ḥanbal and most of the Ḥanafite jurists have accepted silent consensus as a valid and authoritative consensus and it is said that this is also al-Shāfiʿī’s stance, whereas al-Baydāwī and several other jurists do not recognize this kind of consensus. (See Sha'bān Muḥammad Ismāʿīl, op. cit., II, pp. 282 – 283).

Iṣḥād, p. 84.

Sha'bān Muḥammad Ismāʿīl, op. cit., II, p. 284.


See Ihkām Hz., V, p. 882.

See e.g. Maḥsūl, II, part 3, p. 36, Burḥān, II, 1332.


Iṣḥād, p. 252.

Mustas., II, p. 353.

Al-Shāṭibī considers that understanding these objectives of the sharifica is the most fundamental
condition for a mueetahid, but according to Professor 'Abd Allah Darraz who edited al-Shatibi's work (al-Muwafaqat fi Usul al-Sharfa), none of the other famous works in usul al-fiqh agree with this view. See Professor Darraz's comment on this matter in Muwaf., IV, p. 105.

131 This is only the general meaning of al-maslaha. The jurists' definition of al-maslaha will be given in chapter five.


133 See vol. II of the above work.


135 Islâm, III, p. 3.


137 See Q. V, 6 and XXII, 78.


139 Muwaf., IV, p. 27.


141 'Abd Allâh Darrâz's comment on al-Shatibi's view about this in Muwaf., IV, p. 106.

142 Literal meaning is "the original innocence".

143 Mustas., I, pp. 217 - 220.

144 Luma', p. 216.

145 Rawd., I, pp. 389 - 392

146 Jam' Jawami', II, p. 282.

147 See Mustas., II, p. 351, Mahshûl, II, part 3, p. 34.

150 See *luma*., p. 216.

151 A prayer with an odd number of *raka'at* which is usually performed by pious believers before going to bed at night.


154 For a detailed explanation of this matter, see Abu Zahra, *Usool al-Fiqh*, under subtitle "al-Istihhab", pp. 234 - 239.


157 Mustas., II, pp. 230 - 234, Muwaf., IV, pp. 89 - 99, Rawd., II, pp. 229 - 234. Please note that we are not going to give a detailed account regarding this matter, because our purpose here is not to deal with it as a separate topic, but rather to throw some lights on the technique of *ijtihad* as briefly as possible. For further detailed explanation please refer to all works indicated above.

158 All of these types of *ijtihad* deal with the textual provisions and do not include *ijtihad* by other methods which will be explained later.

159 Muwaf., IV, p. 90, see also Professor Darrâz's comment at the foot-note of the same place.

160 Q. V, 95.


162 Q. LXV, 2.

163 The word "justice" (*adl*) in Islamic law usually means a quality which motivates someone to be committed to piety and honourable conduct.
164 See other examples in Rawd., II, pp. 330 - 331.

165 Muwaf., IV, p. 90.


167 The Muslims are prohibited from committing any sexual activity during the day-time of the fasting month (Ramaḍān). However, one is not subject to expiatory penalty if one does so after breaking his fast. Sexual activity between married couples during night-time in Ramaḍān is permitted absolutely as normal. See Q. II, 187, Abū Da‘ūd, II, p. 240, Bukh., III, p. 73, Muslim, VII, pp. 224 - 228, Tirmidh., IV, pp. 248 - 249.

168 In fact there are several alternatives in expiatory penalty for this wrong deed. In successive order they are emancipating slave, fasting continuously for two months and feeding sixty needy members of the community.


170 See e. g., Q. II, 275, III, 130, V, 90, 91.

171 A hadith is narrated by ‘Ubdā ibn Sāmīt that the Prophet has said: "Gold with gold, silver with silver, wheat with wheat, barley with barley, salt with salt, exchanging of which should be made at an equal rate..." (See Abū Da‘ūd, XII, p. 338, Muslim, XI, pp. 14 - 15, cf. Bukh., III, pp. 152 - 156. The Muslim jurists have derived from this hadith that exchanging of these six articles at an unequal rate in business transaction is considered as usury which is prohibited in Islam. But different reasons have been given as the basis of the rule for their prohibition. In the case of wheat, for instance, al-Shāfi‘ī says that the reason is its esculent nature, while according to Mālik, because wheat is preservable food. Ḥanafite jurists explain that exchanging of these articles by such a way is prohibited because of inequality. See ʿAbd al-Raḥmān al-Jazīrī, Kitāb al-Fiqh ʿalā al-Madhāhib al-Arba‘a, II, (Cairo, 1970), pp. 249 - 251.


173 Muwaf., II, and Professor Darraz’s comment, p. 96 (foot-note).
175 See Muwaf., IV, pp. 195 - 211.
176 Mustas', I, p. 3.

177 Al-Istishâb, i.e., the continuity of the original rule of something affirmatively or negatively. Ibn Qayyim al-Jawziyya divides al-Istishâb into three divisions: Istishâb al-barâ'a al-asliyya (the continuity of the original exemption), istishâb al-wasf al-muthabbit li al-hukm al-sharî'î (the continuity of the affirmative rule of the sharî'î until it can be proved otherwise, and istihâb hukm al-Imâm fi ma'âl al-nizâ'î (the continuity of the rule of the consensus in disputed issue. For detailed discussion, see Mu'âmm, I, pp. 339 - 344.


181 Some writers even attribute this opinion to Malik, Abû' Hanîfa and al-Shâfi'î. See Mu'âmm, p. 371, Luma', p. 76.


This Qur'ānic verse refers to a story of a farmer and shepherd who came to King David disputing over a case in which the former accused the latter of being negligent of taking care of his goats till they had eaten up his entire plantation. David gave his verdict by giving the goats to the farmer. On their way home, both met Solomon who asked them about his father's judgement on the disputed case. On hearing their reply, Solomon remarked that if he had been requested to give his judgement in such a case, he would have given a different verdict. When David heard about Solomon's remark, he called his son to the royal court and asked him about his judgement in such a case. Solomon explained to his father that his judgement is that he would have given the goats to the farmer to be under his ownership for one year period during which he would be entitled to utilize their milk, wool and offsprings until the next season of cultivation, when the plantation would get back to its normal condition, then the properties would be returned to their original owner as they had been before the incident took place. See Ibn Kāthīr, Tafsīr al-Qur'ān al-zeichām, III, (Cairo, ), p. 185 - 186, Aḥmad Muṣṭafā al-Marāqī, Tafsīr al-Marāqī, IXX, (Cairo, 1394/1974), p. 57.

Q. XXI, 78 - 79.

ʿAbd al-ʿAzīz al-Bukhārī, op. cit., IV, p. 22.


Ihkām Ām., IV, pp. 247 - 264.

Al-Sayyid ʿAbd al-Laṭīf Kassāb, Aqwā' Hawla Qadiyyat al-İtiḥād, p. 100.


Ihkām Ām., IV, p. 250.

See al-Shawkānī's discussion on this evidence in Irshād, pp. 261 - 262.

Al-Kalāla: Its literal meaning is "encirclement" and as a technical term it signifies heirs of a person except his father and son.
198 Ihlām, I, p. 82.
199 Ibid., I, p. 39 and 54.
200 See Q. IV, 20.
202 Mustas., II, p. 357.
203 See Ihkām Ām., IV, p. 254.
204 Ibid., IV, p. 262.
206 Ihkām Ām., IV, p. 262.
207 Ibid., IV, p. 259.
208 Ibid., IV, p. 262.
209 Q. IV, 165.
210 Ibid., XIV, 4.
211 Ihkām Ām., 263.
213 Madk. H., p. 386.
215 See Amir Bādishā, ibid., loc. cit.
218 al-Ihkām Ām., IV, p. 313.


222 See Ihkām Ām., IV, p. 314.

223 See Radd., p. 109.


225 Perhaps the above evidence is considered irrelevant to the subject matter, so that no jurist has bothered to reply it.

226 Abū Dā'ūd, IV, p. 98, Bukh., IX, p. 181, Muslim, XII, pp. 65 - 68, Tirmidh., IX, pp. 73 - 74.


229 Ihkām Ām., IV, p. 314, see also Amir Bādīshā, op. cit., IV, p. 241.


231 Ihkām Ām., IV, p. 314.


235 Irshād, p. 255.


238 See ʿAbd al-Latīf Kassāb, Adwāʾ ʿalā Qadiyyat al-İtīḥād, p. 94.


241 See e. g., supra, p.

242 Irşād, p. 255.


244 İlām, IV, p. 216.
CHAPTER II

IITIĦÄD IN ISLAMIC LEGAL HISTORY

The purpose of this chapter is to examine the evolution of ītīḥād in Islamic legal history. In this, more attention will be given to the application of ītīḥād. However, there will be some attempt to review the conceptual side of ītīḥād in order to put the discussion in its proper context.

Traditionally, the development of Islamic jurisprudence has been divided into six phases:

1. The legislative phase, commencing from the Prophet's ministry or bi’tha to his death in 11th year A. H.

2. The first juridical phase which was in the period of the Guided Caliphs (11th - 40th A. H.).

3. The phase which was in the period of junior sahāba and senior tābi‘īn (successors) which ended at the beginning of the second century of hijra.
4. The phase which commenced from the second century up to the middle of the fourth century of hijra.

5. The phase which commenced from the middle of the fourth century of hijra up to the conquest of Baghdad by the Tartars in 606 A. H.

6. The phase since the fall of Baghdad up to the present time.

**IJTIHĀD IN THE LEGISLATIVE PHASE**

1. **The Prophet’s Ijtihād**

Almost all of the Meccan verses of the Qur’ān do not pay attention to the legislative aspects in personal status, or civil or criminal issues. They are confined to explaining the principles of the Islamic creed (usūl al-dīn) and calling upon people to believe, encouraging them towards the constructive moral values and discouraging them from bad conducts and so on... Even the ritualistic acts such as ṣalāt (prayer) and zakāt (almsgiving), although promulgated during the Meccan period, are only given their detailed explanations during the Medinan period. Legislation in personal status as well as in civil and
criminal affairs were introduced only after the Prophet's migration to Medina. The Qur'anic chapters which most manifest this type of legislations are al-Baqara and al-Nisā'. The reason for legislation coming later are because the principles of the Islamic creed (usūl al-dīn) had logically to be given priority over legal principles (usūl al-ahkām). Moreover, the law of the state was established only after the migration; as during the Meccan period the Prophet had only a few followers.

Although it is often claimed that the Qur'anic legal verses cover all aspects of human life, they usually give very concise principles and general guidelines. Sometimes their legal indications are even vaguer. It was the Prophet who gave detailed explanations and definite interpretations by his sayings and deeds.

Despite the fact that a small number of the jurists maintain that the Prophet did not exercise ijtihād because he could reach the right decision in any issue through revelation, the vast majority agree that he did do so in cases and issues about which the Qur'ān does not give any decision. The disagreement is only about certain types of ijtihād; where the jurists can be divided into several groups as follows:
The first group are those jurists who see that the Prophet was entitled to exercise *ittihād* only in worldly matters such as warfare, public administration and their likes. It is said that agreement had also been achieved about this. The second group are those who do not give a decisive view. Perhaps al-Shāfī‘ī is one of those who can be included in this group as he has not given his preference for any view when mentioning different views in this regard. The third group which was represented mainly by Abū ‘Alī al-Jubbā‘ī and his son Abū Ḥāshim, completely rejected the very idea of the Prophet's *ittihād* in the Islamic legal affairs. Lastly there are several outstanding figures who hold the view that the Prophet was able to exercise *ittihād* in all unrevealed issues including religious and legal issues. According to them, it is confirmed by the Qur‘ān and the *sunna*. However, the Ḥanafite jurists only accept this idea when there has been an adequate span of time to wait for revelation.

Many arguments are advanced by each of the above groups in justifying its stand. The arguments of the third and the fourth groups have often attracted particular attention, because they have cohesive relevance to the fundamental question of whether the
Prophet was entitled to practise *ītihād* in religious and legal issues or not.

The arguments of those who refuse *in toto* to acknowledge the idea of the Prophet's *ītihād* can be outlined as follows:

1. A Qur'ānic verse which says, "And he (the Prophet) does not speak out of (his own) desire, it is not but revelation sent down to him."12

According to them, this verse indicates that whatever the Prophet has said, has been said in terms of revelation, whereas *ītihād* is not revelation. Hence, it is wrong to describe any legal rule which has been decided by the Prophet as having an *ītihādic* nature or origin. The basic argument rest on the verse having a general meaning which encompasses everything spoken by the Prophet.

There are two counter-arguments to this:

First: The above verse does not have a general meaning which is applicable to all of the Prophet's sayings because, the verse was revealed to dismiss the disbelievers' accusation that the Qur'ān had been fabricated by the Prophet himself and had not been
revealed to him. Thus the true interpretation of the verse should be that the Qur'ān is not something which has been said by the Prophet out of his own desire, but rather it had been revealed to him.

Second: The Prophet's *ijtihād*ic decision cannot be said to be based on desire, because it stemmed indirectly from the revelation which had ordered him to exercise *ijtihād* and follow the results which it produced.13

2. If the Prophet was able to exercise *ijtihād* in the *shari'ā*, he would not have delayed replying to some questions put to him since it would have been an obligation on him to give the definite rule of the *shari'ā* in any matter about which he was asked. In fact, the Prophet delayed replying to such questions as, for instance, in the cases of *zihār*14 and *liqān*15 until a revelation was sent down to explain their legal rule.16

The counter-argument is that the Prophet's delay in giving his replies to such questions was due to his expectation of the revelation, or perhaps he needed a longer time to ponder the cases, or because they did not require urgent answers, or he did not find
suitable Qur'anic provisions on which he could base his analogy.\textsuperscript{17}

The following examples from the life of the Prophet will show clearly that the Prophet's \textit{ijtihāds} have covered sacred as well as temporal affairs. On the other hand, they also will give a strong impression that these \textit{ijtihāds} have not always been correct:

I. When the Prophet first came to Medina, its farmers used to fructify the date palms. When he inquired about this practice, it was explained that it had been practised for a long time. The Prophet advised them to desist from such a practice, so they dutifully followed his advice. However, in due course, the palm trees went barren and bore no dates. When he was told about this, the Prophet admitted "I am but a man, if I command you to do something about your religion (which stems from revelation) you must obey me, but if I command you to do something out of my own opinion, you should understand that I am but a human being."\textsuperscript{18} According to another report he said that "You are more knowledgeable about your worldly affairs."\textsuperscript{19}
Here, we can see clearly that the Prophet exercised ḫitḥād in a worldly affair by making his own opinion and obviously the ḫitḥād was wrong.

II. Once, when 'Umar came to him in dismay for kissing his wife while he was fasting, the Prophet said: "Do you not see (what would be the result) if you rinsed water in your mouth while you are fasting?"20 Here the Prophet exercised ḫitḥād by making analogy between kissing and rinsing water in mouth in order to show that neither has any effect in invalidating one's fasting.

III. It is reported that a woman of Juhayna came to the Prophet and asked, "My mother had made a vow (to God) that she shall perform the pilgrimage, but died before fulfilling her vow, can I fulfil it on her behalf?" The Prophet replied, "Yes, you can perform the pilgrimage on behalf of your mother, do you not see if your mother had been in debt, you are obliged to pay it for her? So pay (fulfil) her vow to God, for He is more eligible to be loyal to."21

In this hadith the Prophet has once more invested his ḫitḥād by using analogical reasoning, i.e., between a vow which has been made to God and debt which has been borrowed from another human being.
IV. Once the Prophet is reported to have said to some persons who came to seek his arbitration, "I am but a man, and now you have come to seek my arbitration on something you have disputed about. Perhaps some of you are astute in advancing better arguments than others, and I will base my arbitration on what I have heard. If I judge by giving something to someone at the expense of his brother's right, he should not accept it, for that means nothing but I have cut for him a piece of fire."22

Obviously here the Prophet could not be sure of the correctness of his arbitration since it was a mere ijtihad by making a personal opinion based on the arguments he had heard from both sides in concerned.

V. 'A'isha reported that the Prophet said to her, "Do you not see that when your people re-built the ka'ba, they fell short of the foundation which had been laid down by Abraham?" I inquired, "O the Prophet of God, then why do you not complete it on that foundation?" He replied that, "If your people had not been newly converted to Islam from infidelity, I would certainly have done that."23

This hadith means that the Prophet wished to demolish the Ka'ba which had been erected by the
Quraysh and re-construct it on the foundation of Abraham, but he refrained from doing so for he feared that it would cause havoc amongst his people. By this attitude the Prophet aimed at avoiding the imminent harmful condition. And this shows, beyond any doubt, that he made such a decision out of his own ijtihad, because if he was commanded by God to do that, he would certainly have fulfilled that command without fearing what might result.  

VI. On another occasion, the Prophet is reported to have said: "If I could foresee (the result of something) as I can see it now, I would not have brought an animal for sacrifice." There is no doubt that sacrificial animals during the pilgrimage is a rule of the shari'a and the Prophet's expression as such indicates that it had been introduced as a religious ritual during the pilgrimage by mere opinion.

VII. Another example is the report that the Prophet had said that, "If I were not afraid of causing difficulty to my community, I would have ordered them to clean their teeth every time when they stand for prayer." In this hadith the Prophet makes his ijtihad by personal reasoning in preferring a certain condition to another.
These ahādīth seem to indicate support for the view that the Prophet could exercise ijtihād. This view held by the jumhūr is also supported by several Qur'ānic verses:

1. "Have your reflection then, o ye with eyes (to see)!"" This is a general command to all those who have the power to use their minds, especially the Prophet himself.  

2. "We have sent down to thee the book in truth, that thou mightest judge between men as guided by God.  God's guidance for the Prophet's judgement includes all kinds of judgements regardless of whether they have been based directly on the Qur'ānic provisions or they have been achieved through mental endeavours which is ijtihād.  

3. "And consult them in affairs (of moment)." Consultation is favoured in matters which should be decided by the way of ijtihād, not about matters which are judged according to revelation.  

4. "It is not fitting for an Apostle that he should have prisoners of war until he has thoroughly subdued the land..." This verse revealed about those who were captured in the battle of Badr whom the
Prophet freed for ransom after he had consulted his Companions. It rebuked the Prophet for choosing this policy and leaving aside ‘Umar’s advice to kill the prisoners. When this verse was revealed, the Prophet said, "If the penalty of God has been rained down upon us, nobody would has escaped it except ‘Umar." There is no doubt that this erroneous decision of the Prophet was taken by ḥiṣn, not by revelation.

The above textual provisions seem to prove that the Prophet exercised ḥiṣn in all cases which were not decided by the revelation; whether worldly or religious. They also demonstrate that the Prophet could sometimes fall into erroneous ḥiṣn.

The erroneous ḥiṣn of the Prophet which were not corrected by the revelation, such as in choosing the strategic place for battlefield and fructifying the date palms were apparently matters related neither to the Islamic principles nor to the Islamic legislative matters. The same thing can be said of the judicial cases, for these were not actually the legislative matters; but rather the implementation of revealed principles in by the shari‘a. Al-Ghazālī goes as far as to say that it is most likely that the Prophet never employed ḥiṣn in matters of principles at all.
Therefore, the Prophet's *ijtihād* cannot be considered as legislation of the *shari'a*, because the only original source of legislation in Islam is the revelation.41 However, any *ijtihād* of the Prophet which has been confirmed by the revelation is categorized as a part of it. Ibn Ḥazm emphasized this point when he said, "If the Prophet had legislated something which had not revealed to him, this would have meant that he had made an alteration to the religion according to his own whim."42 In the same vein he went on to say, "If he (the Prophet) made obligatory something in the religion without basing it on revelation, this would have meant that he had innovated something against God."43

**Method of the Prophet's *Ijtihād***

The Prophet did not need to exercise *ijtihād* in order to define the real meaning of any textual provision simply because the Qur'ān was revealed to him and he was assigned to convey and elucidate them properly.44 Likewise the *ijtihād* by giving preference of certain provision to another one in the seemingly contradictory cases was not also the domain of his *ijtihād*, because such a contradiction would have appeared only due to the shortcoming of a *muitahid*’s comprehension of the matters. The Prophet who was
endowed with the comprehensive understanding could not fail in such a situation.

Analogy, i.e. rationalization of the textual (Qur'anic) provision by joining together the revealed cases with unrevealed ones was, in fact, the domain of the Prophet's *ijtihād*. The Hanafite jurists even restricts the Prophet's *ijtihād* to the analogical method. This view is clearly expressed by a several of them. For instance, al-Anṣārī says, "It is evident that *ijtihād* was really employed by the Prophet and analogy was the sole method which he was entitled (to employ)." The same point is emphasised by Ibn Humām when he says: "the favourable view (in this matter) is that the Prophet was enjoined to wait for the revelation as long as it was expected (to be sent down unto him) and as long as he did not feel that the case would be lost and then he (was enjoined) to employ *ijtihād* which was in his right confined (only) to analogy." However, the vast majority of the jurists are of the view that *ijtihād* was practised by the Prophet whether by analogy or other methods, and this view seems the most favourable view as has been clearly seen in the aforementioned examples of the Prophet's *ijtihāds*. 
There is some disagreement among Muslim jurists on this topic. Certain jurists deny that the sahāba were permitted to exercise *ijtiḥād* during the life of the Prophet. Their primary argument is that those who lived during that period obtained the rule of the shari'a by referring directly to the Qur'ān or the Prophet.

On the other hand, the majority of the jurists held the view that the sahāba were permitted to exercise *ijtiḥād* in that prophetic era. However, some consider that it is permitted for the judges and governors only to exercise *ijtiḥād* when they were at a distance from the Prophet, whereas others hold that it is permitted absolutely regardless whether they were in the presence of the Prophet or were away from him. The strong evidences seem to confirm this latter view, and also that this permission was not limited to certain stratum only, but prevailed among all strata of society.

This view is exemplified in a famous hadith in which the Prophet is narrated to have asked Mu‘ādh b. Jabal when he was about to send him as his envoy to Yemen: "By what source will you base your judgements?"
His reply was, "If I cannot find the rule of the shari‘a in the Qur’ān and the sunna, I will use my judgement." On hearing this the Prophet immediately remarked, "You are right."

The following examples would perhaps display the above truth in its clearer depiction:

1. It is narrated that the Prophet was appointed Sa‘d b. Mu‘ādh to give judgement in the case of Banī Qurayṣa. The latter judged that their men should be killed and their wives and children should be taken enslaved. This judgement was afterwards approved by the Prophet who said, "You have really judged according to the judgement of God..."

2. The Prophet also is reported to have requested ‘Amr b. al-‘Āṣ to give his judgement in a case which had been disputed about by two persons. The latter who was apparently astonished by this unexpected request, inquired, "Is it possible for me to make my ijtihād in your presence?" The Prophet replied, "If you employ your ijtihād rightly you will gain ten rewards, but if you do it wrongly you will gain only one reward."
3. Once, two of the Sahaba went out for a trip. When the time of prayer comes, they could find no water for their ablution, so they prayed without it. When later they found the water, one of the two repeated his prayer, while his friend did not do so. The Prophet approved both actions when he said to the latter, "You followed the sunna rightly and your prayer was valid". And to the former he said, "You gain your reward twice."

4. It is reported that when the Prophet returned (to Medina) from the battle of al-Ahzab and before he could take off his battle-dress, he was ordered by God to attack up Banif Qurayza. The Prophet immediately addressed his Companions that, "No one of you would perform his 'Asr prayer except at the (village of) Banif Qurayza. The troops departed speedily, but one faction had their prayer on the way and interpreted the Prophet's order that he had wanted them to be quick in their journey, whereas others did not pray until they reached the destination. When they sought judgement to the Prophet, he rebuked neither of them."

5. When 'Ali b. Abi Taliib was in Yemen, three men came to him requesting his arbitration in their dispute over a boy whom each of them claimed as his
son. 'Ali settled this case by ballot and gave the boy to the winner. Nevertheless, he ordered him to pay two-thirds of compensation to the other two men. The Prophet laughed on hearing this because 'Ali had treated this case as resembling the case of causing damage to a shared ownership, where the one who caused injury to a slave which he shared with two other partners must pay two-thirds of the price to them.

6. Another famous arbitration of 'Ali b. Abi Ṭālib during the life of the Prophet was in the case of zubya (pit). It is narrated that a pit for a lion was dug by certain tribesmen of Yemen. A large number of people were gathered around its bank (to watch the lion) and started to push each other. When one of them was about to fall into the hole, he clutched at another man who fell with him. The latter in his turn pulled a third, and the same action was done by the third to a fourth. Consequently four men altogether were killed. When this case was brought before 'Ali, he imposed blood-money on all of the tribesmen who were crowded around the pit which would be distributed amongst (the families of) the victims as follows: a quarter to the first, one-third to the second, a half to the third and a full payment to the fourth. The reason of this inequality is quite interesting! The first victim was given a quarter of the compensation
because his death was caused by the pushing of the crowd, but by causing three other men to fall with him, he decreased three quarters of his original share. The second person got one-third of the total compensation because he was pulled down to die by the first, but two-thirds of his share had to be reduced because of causing two other persons to fall on him. The third man was given a half share for he was brought down to die by the second, but because he also caused the death of another man, a half of his original compensation was deducted. The fourth man deserved the full share because he was seized to die by the third man only. When this case was brought up to the Prophet later, he confirmed 'Ali's judgement.

This event suggests that 'Ali b. Abi Talib employed *ištihād* by using analogical reasoning whereby he regarded the above case as resembling a case where a person has caused damage to a certain property which he shared with other persons. In such a case he would decrease his own right by the equivalent amount of damage he had caused.

In another hadīth, Umm 'Atiyya reported, "The Prophet came to us on the death of his daughter" and said, "Wash her thoroughly three or five times or more if you see it appropriate with water and (water
which has been mixed up with) lotus, and make the last wash with (water of) camphor..."⁵⁵ Here the Prophet has directed the ladies to make their own *ijtihad* about how many times the body should be washed, "as they see it appropriate."

The above incidents indicate that the *sahāba* were given permission to practise *ijtihad* during the life of the Prophet whether in his presence or when they were apart from him. These incidents also suggest that *ijtihad* was commonly practised in that era by various sectors of the Muslim community and was not a privilege of the governors and judges as has been claimed by certain jurists.⁶⁶

However, it seems likely that that the *sahāba* were entitled to employ *ijtihad* only in two situations: First, in the presence of the Prophet when they were authorized to do so,⁶⁷ and second, in his absence if they felt that the case would lapse without using it.⁶⁸

It is important to emphasise the Islamic view that any *ijtihādīc* decision which was achieved during the Prophet's life, once confirmed as correct by the revelation or the Prophet himself,⁶⁹ becomes permanent legal rule of the *sharīʿah*. It is to make
sure that their ittiḥāds had been approved by the Prophet that the sahāba always referred back to him. This fact is apparently misunderstood by some jurists. This means that the revelation was the sole authoritative source of legislation in this prophetic period to which all ittiḥāds of the sahāba and their juridical ideas could be finally referred.

**ITTIḤĀD IN THE PERIOD OF THE GUIDED CALIPHS**

The relationship between the Prophet and his Companions was very intimate. No barrier separated them. He was accompanied by them at most times whether at home or on a journey. Therefore, they could constantly observe his actions and listen to his speeches and sayings. In this way, they also became aware of the circumstances of the revelation and its causes.

However, the Prophet could not always be with the sahāba. During the last illness of the Prophet and after his death, disagreements began to appear. These disagreements can be summarized as follows:

1. It is narrated that, when the illness of the Prophet became aggravated, he said to his companions, "Bring me an ink-well and a (sheet of) paper, so I
will write for you a message (through which guidance) you will never be misled after me." But 'Umar remarked, "The Prophet is overcome by pain, the Book of God will be enough for us." This remark created a clamorous situation which brought the Prophet to retort, "Leave me alone, it is not appropriate to quarrel in front of me." 71

2. Disagreement then appeared again on the death of the Prophet when 'Umar in hysterical manner declared that Muḥammad had not died but had been elevated by God to heaven as in the case of Jesus. 72 But it was Abū Bakr who brought this chaotic situation back to normal by reminding them about the human nature of the Prophet to which truth a certain Qur'ānic verse which he quoted attests. 73

3. The place where the Prophet's corpse should be buried was another object of the sahāba disagreement. Each of the Meccans and the Medinans demanded the right to bury it in their own home-land. Besides, there was also a certain group who suggested that it should be buried in Jerusalem. However, this dispute was eventually settled when a hadith was mentioned which says that "prophets should be buried where their deaths have taken place." 74
4. The question of political leadership (al-imāma) has been one of the greatest problems throughout the Islamic history. The solution attempted by the Muslims in the first century of hijra was decided in a special meeting at the Saqīfa Bant Sā'ida. The Anṣār who proposed that two separate leaders should be appointed for each of the Meccans and the Medinans were finally hushed by Abū Bakr who mentioned a relevant hadīth in which the Prophet says that "the leaders should be (appointed) from the tribe of Quraysh." 

5. Immediately after Abū Bakr was elected as the khalīfa, he had to face the problem of ridda (apostasy) in which certain tribes had refused to pay zakāt; although they continued to recognize themselves as Muslims and carried on their daily prayers. Some of the saḥāba hesitated to accept Abū Bakr's resolution to declare war on the tribes, especially when 'Umar had mentioned a hadīth which says, "I (the Prophet) have been enjoined to fight people until they testify that there is no God but (the true) God, and when they have made such a testimony, their blood and properties will be protected except when they have encroached upon its rights." However, Abū Bakr finally convinced them about the validity of his
stance by stressing that zakāt was actually the right of property. 76

There were a lot of other unprecedented problems which confronted the sahāba in that period for which no solutions could be traced which were explicitly expressed in the texts. Meanwhile, Muslims during this period gained a large expansion of territory including Persia, Syria, Egypt and North Africa. 77 Thus the Muslims began to mix with various nations which had ancient cultural heritages. In such a situation, it was incumbent on the sahāba to exert their reasoning faculties and employ ijtihād to know the rules of the shari'ah for new cases. 78 In this way, ijtihād emerged necessarily as another fundamental source of Islamic legislation.

As has already been mentioned, during his lifetime, the Prophet encouraged the sahāba to employ ijtihād in various situations. The Guided Caliphs who came after him continued to give the same encouragements to the governors and judges. An example of this is the report of Shurayh that ‘Umar b. al-Khaṭṭāb said to him, “Judge according to what is evident to you from the judgement of the Prophet. If you do not know all judgements of the Prophet, you should judge according to what has been agreed upon by
the people (the 'ulamā'). And if you do not know anything about the Prophet's sunna and no one has preceded you in judging such a case, you can give judgement with your own opinion or you can postpone it (until you can consult others about it)."7

Another instance is a message of ʿUmar b. al-Khaṭṭāb to Abū Mūsā al-Ashʿarī which says: "Try to understand rightly any case that may be put forward to you about which rule you cannot find in the the Qur'ān and the sunna, then make your own analogies on matters that you have. Recognize the similar cases, then give your judgements in such a way that you see it as what is most recommended by God and what most resembles true judgement..."8

Ibn Qayyim commends direction of ʿUmar by saying, "This is a noble message which has been accepted by the 'ulamā' on which foundation they have erected the principles of rule and witness. It is ought to be reflected on and observed profoundly, especially by judges and muftis."9

In fact the period of the sahāba was the period in which the rules of the sharīʿa were interpreted and the gate of legal induction in the cases which have no textual provisions was opened. Many legal opinions
were produced by the learned sahāba through their interpretations of legal provisions in the Qur'ān and the sunna which have been considered as legislative references. A considerable number of the legal rules which have no textual evidences were also introduced and have been regarded as the bases of ijtihād and legal induction."

The sahāba who bore this legal responsibility and to whom the Muslim referred, were those who engaged in the legislative authority in that period and were the successors of the Prophet in this realm. This status was gained by them due to their long companionship with the Prophet and they were also aware the circumstances of the revelation and the sunna.

The Sahāba's Methods of Ijtihād

There were different methods of ijtihād adopted by the sahāba. Some of them confined their ijtihād to their understanding of the Qur'ān and the sunna only, while others employed ijtihād by personal reasoning if no provision was available in the text. Others used the analogical method and there were also some sahāba who resorted to the method of maslaha.
When they faced any unprecedented incident, they would try to search for its legal rule first of all in the Qur'ân to which all their disputes and differences of opinion would finally be referred.

For instance, when the Muslims had conquered the rural areas of Iraq and Persia, the sahâba had different views regarding distribution of the land amongst the soldiers who participated in that conquest. 'Umar who was then the head of state refused to accept the case had any relevance to the general meaning of the Qur'ânic verse which says, "And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to God and the Apostle, and to near relatives, orphans, the needy and wayfarer" because, according to him, this verse concerns only movable property. Furthermore, 'Umar felt that if all of the land had been distributed, future generations would have been deprived of it, and its revenue was needed also to be spent on defence and protection of the state. But the soldiers were not satisfied with this argument and insisted on their demand. After three days of argument, 'Umar eventually found a Qur'ânic provision which substantiated his stance, i. e., "What God has bestowed on His Apostle (and taken away) from the people of the township, belongs to God, to His Apostle
and to kindred and orphans, the needy and the wayfarer, in order that it may not make a circuit between the wealth amongst you..." When he (‘Umar) recited this verse before the soldiers, all of them agreed with him.

If they failed to find any Qur’ânic provision which could be relied upon for the case, they would turn to the sunna. In this circumstance, their leader would inquire if there was anyone in the community who could remember any hadith in relation to that particular issue according to which the religious opinion about the new case would be decided.

Maymûn b. Mahrân narrated that when a disputed case was brought before Abû Bakr, he would first of all look in the Book of God. If he could find a relevant provision, he would judge on its basis. If he could not find anything in the Qur’ân, he turned to the sunna of the Prophet and would do the same again. But if he failed also to find any answer in the sunna, he would come out to ask the Muslims if anyone of them knew about the Prophet’s judgement in such a case. Perhaps a group of people would stand up and proclaim that they knew certain judgement had been passed by the Prophet in a similar case and the Caliph then would judge accordingly. On failing again to find his
answer by this way, he would summon and consult the Muslim chiefs and 'ulamā‘ and would abide by their agreement. This practice was also followed by 'Umar later.

A practical example of the point can be seen in the case of a maternal grand-mother who came to Abū Bakr requesting her inherited share from her late grand-son whose mother had also died. Knowing nothing about the case, Abū Bakr inquired if there was anyone who had any knowledge about it. When al-Mughīra b. Shu‘ba said that he remembered a similar case in which the Prophet had given a sixth portion, the Caliph asked for a witness. And when Muḥammad b. Maslama stood up and testified to that claim, Abū Bakr gave the same share to the old lady.

If they could not find anything in the Qurʾān and the sunna, they would exert their personal opinions and exercise ijtihād, following the Prophet's approval of Mu‘ādh b. Jabal when the latter said that he would unhesitatingly exercise ijtihād if the rule of the sharī‘a could not be traced in the texts.

According to Muḥammad al-Khiḍarī, exerting personal opinion in this respect is no more than making analogy when he says, "Issues might have
arisen before the *sahāba* about which they could not
find any provision in the Qur'ān or the *sunnah*, and at
that moment they would resort to analogy which they
termed as personal opinion.°°

But Muhammad Abu Zahra emphasises that the
personal opinion which was known amongst the *sahāba*
encompassed analogy as well as *ijtiḥād* by *mašlaḥa* in
cases which have no textual provision.°° And this is
the manner of the *sahāba*'s *ijtiḥād* as described by Ibn
Qayyim when he says, "They exercised (*ijtiḥād*) after
a process of reflection and contemplation which aims
to seek the right decision out of the seemingly
contradictory indications."°° And 'Alī Sayis adds,
"The *sahāba*’s *ijtiḥād* included analogy (*qiyyās*),
the original exemption (*al-barā'a al-ašliyya*), equity
or juridical preference (*al-istiḥsān*), invalidation of
legal fiction (*sadd al-dhara'i*) and unrestricted
interests (*al-mašālih al-mursala*).°° All of these
types of *ijtiḥād* were known amongst them as personal
opinion (*al-ra'īy*), since these other words were not
yet defined in the specific meanings in their
period.°° Al-Shawkānī also indicates this point when
he says, "*IJtiḥād* by personal reasoning as can be
employed by deriving legal indications from the Qur'ān
and the *sunnah*; it can be employed as well by relying
upon the original exemption, or by the original
indifference, or by relying on public interest or on precaution (al-ihtiyāt)."

However, there were many of the sahāba who did not like referring religious matters to personal opinion in order to prevent ignorant people from intruding into this field. But it is clear that the personal opinion which they denounced was not of the same category. It was rather following desire in giving one's opinion in religious matters without basing it on any valid principle, or opinion which clearly contradicts any textual provision, or talking about the religion out of mere conjecture.

‘Umar b. al-Khaṭṭāb was one of the sahāba who exercised ijtihād in a considerable number of legal cases. This seems a natural phenomenon as he was confronted by a great many of legal problems which had never been encountered by his predecessor. It was during his period that many territories were conquered by the Muslims and accordingly many civilized nations entered into the Islamic state. In such circumstances, ‘Umar was obliged to launch various economic, political and cultural legislations. By so doing he set up a paradigm for the jurists in later periods.
However, *ittihād* also became one of the fundamental causes for disagreements among the *sahāba* in many cases. As al-Shāṭibī has remarked:

"God has predestined according to His wisdom that the derivative cases of this religion would be exposed to different views and conjecture and we are sure that disagreement did really take place amongst the *sahāba* and their successors and (by so doing) they opened up the gate of *ittihād* and the permissible disagreement in it for the community."

Abū Zahra observes that, by their *ittihādic* efforts and disagreements in understanding the *sharī'a*, the *sahāba* benefited their succeeding generations in two ways: First, they pioneered the correct way of *ittihād* and proved that disagreement in searching for the truth would not necessarily split the unity (of the community) as long as it has been based on sincerity. On the contrary, it would sharpen mental skill. Second, they (the *sahāba*) left behind them a generous juridical legacy which stimulates research and impedes stagnation.

Many cases of the *sahāba's* disagreements in personal opinion have been reported. Here are some of them:
1. **Grandfather's or Father's Sharing Inheritance With Brothers and Sisters**

According to Abū Bakr, a grandfather or a father excludes brothers and sisters (on both paternal and maternal sides) from inheriting anything which means that they cannot inherit anything if a grandfather or a father is still alive. Whereas ‘Umar, after consulting the learned Sahaba, gave a grandfather or a father the same share as brothers; but with the condition that his share should not less than one-third (of the total bequest).\(^1\)

2. **Divorce in the Last Illness**

Another case was about divorce in the last illness. It is reported that ‘Abd al-Rahmān b. ‘Awf divorced his wife in his last illness. ‘Uthmān b. Affān gave the woman her share of the inheritance after her 'idda (waiting period) had expired. But in another similar case, it is reported that when Shurayh wrote to ‘Umar b. al-Khaṭṭāb inquiring about a man who divorced his wife in his last illness, ‘Umar gave his opinion that she was entitled to get her share of inheritance as long as she was in her 'idda, but could not get it after the period was over. Thus, after they had agreed that the sick person's divorce does
not terminate the marital contract which give eligibility for inheritance, 'Umar set the ḫidda as the time limit for that inheritance, whereas 'Uthmān did not make any time limit. There are no textual provisions which could be referred to in this case.  

3. **Declaring Triple Divorce With One Articulation**

In principle, divorces should be declared separately at different times according to the Qur'ānic direction which says that:

"A divorce is only permissible twice, after which the couple should either hold together on equitable terms or separate with kindness..."  

The reason behind this separation of divorce in different times is to give sufficient opportunity to the husband to ponder on his actions concerning his marital partnership which the shari'ā prefers to continue. But the shari'ā has another rule about the triple divorce in which the Qur'ān says that:

"If a husband divorces his wife irrevocably, he cannot, after that, remarry her until after she has married another husband..."  

This is the Qur'ānic direction in the divorce case. But what would be the result if a husband who
did not pay any heed to this warning and made the hasty action of divorcing his wife with the triple divorce in a single articulation? There is no any Qur'ānic verse which speaks about the joining three divorces simultaneously in one articulation or on the same occasion; although it is mentioned in the sunna that 'Abd Yazīd Abū Rukāna divorced his wife with the triple divorce on the same occasion and was regretful about what he had done. When the Prophet asked him about the way with which he divorced her, he said, "Three." The Prophet asked him again, "Did you say it on the same occasion?" He said, "Yes!". The Prophet then told him that only one divorce had been counted and said: "If you want, you can return to her."

However, during the period of 'Umar, the Second Caliph, people became contemptuous of divorce where cases of declaring triple divorce with one articulation were much reported. 'Umar thought that it was necessary for the benefit of the public interest to inflict severe punishment on those who treated the Book of God in a playful manner and divorced their wives in such a way which is not in accordance with the regulation of the sharī'ah. So 'Umar gave to this type of divorce the rule of three divorces by which the husband cannot return to his
wife until after she has been married and divorced by another man. ¹¹²

Here the Caliph used his right to practise ittihād in order to make people return to the sharī'a as well as to prevent those who might use force in marital quarrels with their wives. Some of the learned sahāba, however, disagreed with ʿUmar in this matter and counted the simultaneous triple divorce as one divorce only. Amongst them were ʿAlī b. Abī Ṭālib, ʿAbd al-Rahmān b. ʿAwf and al-Zubayr b. al-ʿAwwām. ¹¹³

There are many other examples of the sahāba's disagreements in personal opinion which have been reported in their history. However, the above-mentioned examples are sufficient to demonstrate the fact which have already been indicated that this disagreement emanated from their exercise of ittihād which was based on an understanding of the textual provisions and their goals as well as an understanding of the circumstances of incidents in the light of the general objectives of the sharī'a which aim to serve the interests of the community. On the other hand, if these disagreements had not taken place then, later generations might have hesitated to employ their own ittihād for fear of disagreed opinions. This would
have deprived them and their community from many advantageous effects.

In sum, this phase was characterized by an almost untrammeled freedom of juristic reasoning in the solution of problems not specifically regulated by divine revelation. When new circumstances posed new problems, these were answered on the basis simply of what seemed the most proper solution to the individual judge or jurist concerned. In the expression of his personal opinion known as raʾy, the individual was free to take into account any factor he deemed relevant.114

Some Examples of the Sahāba's Ijtihād

1. There was an incident in which a man married a woman, but he had not given her dowry and had never slept with her until he died. When the woman's case was raised before ʿAbd Allāh b. Masʿūd, he said, "I will say about it out of my own opinion, if it is right, it is from God. I see she is entitled to get her dowry as her fellow women, no more and no less, and she is also obliged to wait during her ḥidda period. At that moment, Maʿqīl b. Simān al-Ashjaʾ stood up and said, "The Prophet had judged with the same judgement of yours about a woman of ours called
Barwa‘ bint Wāsiq."  ‘Abd Allāh b. Mas‘ūd was delighted to hear that his judgement had been in conformity with that of the Prophet.

2. When a message was sent to ‘Umar concerning a murder case in which a boy had been killed by his step-mother and her partner, ‘Umar hesitated at first to pass his judgement until ‘Ali b. Abī Ṭālib said, "O commander of the faithful! Do you not see, If several people had jointly stolen a certain quantity, where each one took a certain portion of it, would you have cut off (the hands of) all of them?" ‘Umar replied, "Yes!" and sent a message to his governor saying, "Execute both (of the culprits) and if the whole population of Ṣan‘ā’ had collectively committed the murder, I will execute all of them."

3. It is narrated that ‘Umar b. al-Khaṭṭāb was asked about the rule of the sharī‘a on a case whereby a person had caused a woman to have a miscarriage. Not knowing anything about any judgement of the Prophet in such a case, ‘Umar inquired from the sahāba if there is anyone who had ever heard any judgement of the Prophet on such a case? A man called Ḥamal b. Mālik b. al-Nabigha stood up and declared, "Once when I was beside my (two) wives, one of them struck the other with a stick until the latter
experienced miscarriage. The Prophet judged (this case by ordering the wrong-doer to emancipate) a slave. On hearing this, 'Umar said, "I almost judged this case with my own opinion."  

4. It is narrated that 'Umar was approached by a man who told him that 'Ali b. Abi Talib and Zayd b. Thabit had judged a dispute which took place between him and another person, with a certain judgement. 'Umar said: "If I were to judge in such a case, my judgement would have differed (from what had been judged by 'Ali and Zayd)." The man asked, "What will prevent you from that?" 'Umar retorted, "If I could refer your case to the Qur'an or the sunna, I would have done so, but I can only refer it to my own opinion which has the same (level of authority) with that of 'Ali and Zayd and cannot dissolve their judgement."  

5. Al-Bukhari transmits that, once 'Umar went out to Syria (with the Muslim soldiers). When he arrived at Sargha, he was approached by Abu 'Ubayda and other military leaders, who notified him of the outbreak of an epidemic in Syria. On this news 'Umar immediately consulted the armies. But when he resolved to bring back the armies to Medina, Abu 'Ubayda said to him, "Do you want to escape the
decree of God?" ‘Umar retorted, "I would have liked someone else rather than you to have asked such a question. Of course we try to escape a divine decree to another divine decree. Do you not see if your camels had stopped in a certain valley which has two different pastures; one of which is fertile and the other is barren. Do you not see if you chose the fertile pasture for your flock, you chose it in accordance with God's decree, and likewise, if you chose the barren one?" ‘Abd al-Rahmān b. ‘Awf who appeared on the scene, joined the discussion by saying that he had heard a hadith of the Prophet in such a matter which says, "If you hear about an epidemic in a certain land, you should not enter it. But if you are already in the land, you should not go out to escape it." ‘Umar praised God and departed for home.120

6. When Ḥudhayfa b. al-Yamān had married a Jewish woman in al-Madā'īn (between Kūfa and Baṣra)121 ‘Umar wrote to him that he should divorce her. This order was given by ‘Umar not because the Muslims are prohibited from marrying women of the People of the Book.122 But the Caliph's order was based on maṣlaḥa.123 Perhaps the Muslims will follow Ḥudhayfa's example and will (prefer to) marry Dhimmi women rather than Muslim women because of their
beauty, and this would cause havoc amongst the Muslim women.

7. ‘Umar b. al-Khaṭṭāb consulted the Muslims on the legal penalty of alcoholic drink. ‘Ali b. Abī Ṭālib said that the drunken would speak irrationally whereby he will invent false accusation (of unchastity). Thus the legal rule of such an offence¹²⁴ should be applied to the case of alcoholic drink. So ‘Umar fixed the same penalty.¹²⁵

In this case, ‘Ali b. Abī Ṭālib employed ʿitihād by making analogy between alcoholic drink and inventing false accusation (of unchastity). The aim of such an ʿitihād is to prevent a detrimental factor in the society. Intoxicants have been prohibited in Islam by the texts,¹²⁶ but no definite punishment has been provided in the texts. It is transmitted in the sunna that when a drunken had been brought to the Prophet, he just ordered his Companions to flog him indefinitely. So some of them hit him with hand, some struck with shoes and some with cloth.¹²⁷ The number of flogging also was not standardized. In the period of the Prophet and Abū Bakr it was forty, but in ‘Umar’s period it was increased to eighty.¹²⁸
8. ‘Ikrima reported that ‘Abd Allāh b. ‘Abbās had sent him to Zayd b. Thābit asking about the shares of inheritance involving a husband and parents. Zayd said that husband gets a half, mother gets one-third of the rest and father gets the remainder. ‘Ikrima inquired whether Zayd had taken this decision from the Qur’ān or from his own opinion? He replied: "I just give my own opinion."\footnote{129}

It seems that in his answer, Zayd has relied on his understanding of a Qur’ānic injunction: "If there are no children and parents are the (only) heirs, the mother has a third\footnote{130} and: "In what your wives leave, your share is a half if they leave no child."\footnote{131}

**IJTIHĀD IN THE PERIOD OF THE JUNIOR SAHĀBA AND SENIOR TĀBIʿĪN**

The generation which succeeded the sahāba is called the tābiʿīn.\footnote{132} Many eminent jurists arose amongst this generation who were known for their ijtihāds and fatāwā (legal decisions). The great legal standing of the tābiʿīn was attested to by some of the sahāba themselves. For instance, ‘Abd Allāh b. ‘Abbās gave his appreciation of ‘Aṭā’, the tābiʿī jurist of Mecca by addressing the Meccans: "O the
people of Mecca! Why should you come and converge on me, while ‘Aṭā‘ already lives amongst you?" 133 ‘Abd Allāh b. `Umar acknowledged Sa‘īd b. al-Musayyib, one of the prominent jurists of Medina during that period, as one of those who were experts in the Islamic legal affairs, when he said: "Sa‘īd b. al-Musayyib is one of the (real) muftīs." 134

The Sahāba's Influence on the Tābi‘īn

The sahāba's influence on the tābi‘īn is something natural since those jurists were the direct disciples of the learned sahāba and gained their religious knowledge from them.

It is reported that in the reign of ‘Umar, many of the learned sahāba were detained in Medina, perhaps for certain political and administrative reasons; besides the Caliph himself wanted to benefit from their ideas and knowledge. But when ‘Uthmān b. ‘Affān succeeded ‘Umar as the Third Caliph, he changed this policy and the learned sahāba were allowed to leave Medina. 135 Although some of them took this opportunity and emigrated to different provinces to spread their knowledge, some preferred to remain in Medina for one reason or another. Ibn Qayyim throws some light in this matter by observing: "The religion
and Islamic jurisprudence were spread in the community through the companions of Ibn Mas'ūd, the companions of Zayd b. Thābit, the companions of 'Abd Allāh b. 'Umar and the companions of 'Abd Allāh b. 'Abbās. The population of Medina gained their (religious) knowledge from the companions of Zayd b. Thābit and 'Abd Allāh b. 'Umar, whereas the Iraqi people gained theirs from the companions of 'Abd Allāh b. Mas'ūd." **136**

The separate teachings of the sahāba in different parts of the Islamic state soon evolved to the emergence of different schools of jurisprudence in various provinces. About this phenomenon, Shāh Wali Allāh al-Dehlawi observes, "Everyone of the tābiʿīn gained their knowledge from the sahāba and collected whatever they could of their disagreements and preferred some opinions to some others.... By this way, every scholar of the tābiʿīn formed his own school of jurisprudence and every province had its independent teachers or juridical leaders. Saʿīd b. al-Musayyib and Sālim b. 'Abd Allāh b. 'Umar were at Medina and they were succeeded later by al-Zuhri and Yaḥyā b. Saʿīd b. Rabīʿa b. 'Abd al-Rahmān, 'Āṣa' b. Abī Rabāḥ at Mecca, Ibrāhīm b. Nakhaʿī and al-Shaʿbī at Kūfa, Ḥasan al-Baṣrī at Baṣra, Ṭawūs b. Kaysān in Yemen and Makhūl in Syria." **137**
It may be due to their discipleship of the learned sahāba that the tābi‘īn’s method of iltihād seemed to remain just the same as that of their predecessors. They even seem to have constructed their iltihāds on the sahāba’s iltihāds. They also referred to their consensus and preferred some of their opinions to some others.

It seems that this attitude was adopted by a large number of their jurists as Muḥammad Abū Zahra observes that any sahāba’s consensus – where various ideas were unified or converged on a certain point of view after being discussed – was taken as hujja (religious evidence) by the vast majority of the tābi‘īn jurists with the exception of the Kharijite and Shi‘ite sects. The Zāhirite jurists followed the majority in this respect. The tābi‘īn usually seem to choose the opinions of their own mentors and rarely choose others’ opinions. 138

However, this led gradually to many disagreements between the tābi‘īn about which Shāh Wali Allāh al-Dehlawi comments in Huftat Allāh al-Baligha: “When they (the sahāba) had dispersed in every country where everyone of them had become the emulated model in one aspect or another, there were a great deal of problems and incidents happened which took place for
which their religious opinions were required. Everyone of them gave his answer out of his memory (of the Prophet's teachings and fatāwā) or deduction. But if he could not memorize or deduce anything suitable for the (relevant) question, he would employ ijtihād by exerting his own opinion and would try to acknowledge the reasons for which the Prophet had based the legal rules of the texts. And whenever he discovered these reasons, he would decide the rule of the sharī'a without any hesitation... Thus, various disagreements took place between them.  

The Tābi‘īn’s Role in the Juridical Development

The sahāba had bequeathed two things to their successors; the traditions of the Prophet which they had transmitted and the juridical decisions made by their ijtihādic efforts. Accordingly, the tābi‘īn’s functions in the juridical realm can be classified into two following functions:

First, collecting the sunna of the Prophet as well as the sayings and ijtihāds of the sahāba. Second, investing their own ijtihāds in the cases about which the sahāba had never expressed their opinions and have no textual provisions. In their ijtihāds, however,
they never deviated from the method which had been laid down by the sahāba.⁴⁴⁶

3. Madrasat al-Hadith and Madrasat al-Ra’y

Nevertheless, these two functions evolved gradually into two different juridical trends which were known as Madrasat al-Hadith (the School of Tradition) and Madrasat al-Ra’y (the School of Personal Opinion). The former prevailed in Ḥijāz whereas the latter had Iraq as its stronghold.⁴⁴⁷ This dichotomy was only relative matter and was based on the general features of both schools; for each school actually had taken certain degree of the sunna and the personal opinion.

The discrepancy between these two different schools was not because one of them resorted to the sunna in its arguments and the other did not, but this discrepancy was visible in two aspects: First, in the degree to which they employed personal opinion, and second, in expansion of hypothetical cases in the area of personal opinion. Concerning the first aspect, the representative of Madrasat al-Hadith confined their juridical endeavours to the scope of textual provisions and their direct meanings and did not incline to use their personal opinions unless
absolutely necessary. Perhaps some of them would abstain entirely from giving a religious decision in any case about which no textual provision was available. The partisans of Madrasat al-Ra'y on the contrary, did not hesitate to employ *ijtihad* by personal opinion as long as no provision was available in the Qur'an and the *sunna*.

With regard to the second difference, the traditionalists did not bother themselves about deriving cases, presuming hypothetical incidents and trying to find their legal rules. So that their jurisprudence was of the kind in which they did not give their religious views except in what they took to be the real or actual cases and on the bases of the texts. The rationalists on the other hand, beside deducing the rules of the *shari'a* about the real issues, consider hypothetical cases and tried to find legal rules for them by personal opinion.

Muḥammad al-Khuḍarī summarizes the differences between the two schools in the following words:

"The traditionalists confined themselves to the explicit meanings of texts without investigating into their (legal) reasons and used very little personal opinions, whereas the rationalists examined the legal reasons of the texts and related some cases with others and never refrained from using
personal opinion if no textual provisions had been found."

As has been said earlier, many sahābahad exercised 'itihād by personal opinion. 'Umar was the most typical one in this respect. 'Abd Allāh b. Mas'ud adopted the same trend when staying in Iraq.

It seems that the rationalists were not satisfied with the literal meaning of the texts, but tried to understand them according to the spirit of the sharī'a. Muḥammad al-Khūḍarī explains this fact by saying that:

"Ibrāhīm al-Nakha'i and other Iraqi jurists as well as certain Medinan jurists of the same trend, also based their fatāwā on the Qur'ān and the sunna. But besides, they also understood that there must be human benefits (maṣāliḥ) which the sharī'a aims to acquire behind its legislations. So they ought to consider these benefits and take them as the bases of legal deduction for the cases whose rules cannot be found in the Qur'ān and the sunna. Their righteous predecessors had already preceded them in adopting such an attitude when the sahāba had exerted analogical reasoning in a lot of cases that had been put forward for them whose rules they had not found in the texts. The (religious) decision that they had given then had not been based on anything but considering these interests."
First: The influence of 'Abd Allāh b. Mas'ūd who had used personal opinion.

Second: As has been suggested by Ibn Khaldūn, hadīth was comparatively scarce in Iraq, because most of its transmitters were in Ḥijāz.¹⁴⁶

Third: Iraq was a civilized territory which had much been influenced by the Persian and the Greek civilizations, and this circumstance created a lot of problems which required legislation. Such a territory was, of course, not comparable to any nomadic society.¹⁴⁷

Fourth: Iraq was also the native place of the Shī'ite and Khārijite communities where the authenticity of ahādīth had to be carefully examined because of fabrication out of political antagonism. This caused the Iraqi 'ulama' to reduce their activities in transmitting ahādīth for fear of being involved in such a fabrication. And due to the scarcity of ahādīth which could be relied upon, they were obliged to recourse to their personal opinions in searching for the legal solutions of the cases about which no textual provisions were available.¹⁴⁸
In short, both schools were well established in the period of the tābi‘īn and each had gained a lot of disciples and supporters who were firmly convinced of its superiority to its rival. Sa‘īd (b. al-Musayyib) and his companions considered that the ʿulamā’ of Mecca and Medina (Ahl al-Haramayn) were the most knowledgeable men in jurisprudence and thus had the sources of their juridical thoughts from the fatāwā of ʿAbd Allāh b. ʿUmar, ʿĀʾisha and Ibn ʿAbbās together with legal decisions of the Medinan judges.... Whereas, on the other side, Ibrāhīm (al-Nakha‘ī) regarded ʿAbd Allāh b. Mas‘ūd and his companions as the most qualified persons in jurisprudence...., so that their juridical thoughts were derived from the fatāwā of ʿAbd Allāh b. Mas‘ūd in addition to the legal decisions and fatāwā of ʿAlī, Shurayḥ and other judges of Kūfa."

IJTIHĀD FROM THE SECOND CENTURY TO THE MIDDLE OF THE FOURTH CENTURY OF HIJRA

The generation of the tābi‘īn was followed by the generation of their successors who was known as tābi‘ al-tābi‘īn. In fact, Islamic jurisprudence reached its zenith in this period which witnessed the achievements in juridical development in such a tremendous way that it is not comparable with any other period in the
Islamic legal history. It was as the result of this activity that various Islamic schools of jurisprudence came into being. Some of these schools, later have ceased to exist, but some have survived and continue to exist to the present day. It should be noted that the jurists of this period were the disciples of those of previous generation (the tābi'īn). For instance, the teachers of Abū Ḥanīfa, the founder of the Ḥanafite school were Ibrāhīm al-Nakha'ī, al-Sha'bī, Ḥammād b. Abī Sulaymān, ‘Atā‘ b. Abī Rabāh and other jurists of the tābi'īn. Similarly, Mālik, the eponym of the Mālikite school, gained his knowledge from Sālim b. ‘Abd Allāh b. ‘Umar, Nāfi‘, the seven jurists of Medina and their students.

Furthermore, as the result of juridical writings and polemic which seemed to be a common phenomenon in that period, the ijtihādic methods became more systematic and more mature.

I. THE METHOD OF ABū ḤANĪFA

As has already been indicated, the Iraqi city, Kūfa, during the period of tābi'īn, emerged as the centre of religious and philosophical learning. It also became rival of Medina in juridical studies.
Although it did not reach the same level as Medina in the field of *'ilm al-\-ithār*, i.e., the knowledge relating to the tradition of the Prophet and his Companions, it made great progress in the field of deriving the rules of the *sharī'a* from the texts as well as exerting analogy to give the similar rules of revealed cases to unrevealed ones. Such was the atmosphere in which Abū Ḥanīfa lived when he studied jurisprudence.¹⁵⁴

In his study, Abū Ḥanīfa gave particular attention to four kinds of knowledge: the jurisprudence of ʿUmar which was conceived as having been constructed on *maslaha*, the jurisprudence of ʿAlī which was held to have been built on deduction and on seeking the real objectives of the *sharī'a*, the knowledge of Ibn Masʿūd which was considered to have been based on derivation and, lastly, the knowledge of Ibn ʿAbbās which was understood to have been derived from the Qur'ānic science and its jurisprudence.¹⁵⁵

A profound study of Abū Ḥanīfa's jurisprudence shows that he was greatly influenced by all of the above backgrounds and environments. Hence, in carrying out his researches and studies, he concentrate on looking for the essence of everything and tried to recognize the legal reasons and
objectives behind every textual provision. His method in searching the rules of the shari' a are summarized by words attributed to him:

"I would firstly rely upon the Book of God as long as I could do so. If I do not find my answers in the Book of God, I would see in the authentic sunna of the Prophet. If I do not find them again, I would seek the views of the Prophet's Companions from whose opinions I would not deviate to the opinions of others. But when it comes to Ibrāhīm (al-Nakha'ī), al-Sha' bī, Ibn Sīrīn, al-Ḥasan, 'Aṭā' and Sa'īd b. Jubayr (and he names several others)......, let everybody knows that they were men who employed their own ijtihād and I would do likewise."  

1. The Qurʾān

Relying upon the Qurʾān and the Prophet's sunna is something natural to be expected from any Muslim jurist. There is no one of the Muslim jurists who would disagree about the reliability of the Qurʾān. Disagreements have revolved only around understanding the meanings of its words and verses.

2. The Sunna

With regard to the Prophet's sunna, Abū Ḥanīfa is said to have relied only on the mutawātira (well established) and the māshhūra (famous) kinds of it. He also depended on the ahād kind of the sunna (which
has a few transmitters), but on certain condition, i.e., it had been transmitted by the credible transmitters, it does not contravene the famous or well-known sunna and it has not been rejected by anyone of the sahāba and the tābi‘īn. He might even prefer a hadīth of unknown transmitters (rivāyat al-majhūl) to analogy on the same conditions.

3. The Consensus of the Sahāba

Abū Ḥanīfa also depends on the consensus of the sahāba. But if they disagreed about any case, he would choose the nearest views to the Qur‘ān and the sunna and renounce the others. In this regard he is reported to have said that:

"No one has the right to give his own opinion (about a case) which contradicts the Book of God or the sunna of the Prophet or the consensus of his Companions.... But any case in which they disagreed, we would select amongst their views the nearest to the Book of God or to the sunna of the Prophet."

If he does not find the required rule of the shari‘a in the Qur‘ān or in the sunna or in the deeds and sayings of the sahāba, he would employ his own ijtihād and leave aside the the views of the tābi‘īn. This is because the sahāba did not express their views in most cases except by basing them on what they had heard from the Prophet, whereas the tābi‘īn, on the
contrary, would give their own views and (as such) he was entitled himself to share with them the right to exercise *ijtihād* by personal opinion. 

4. **Analogy**

He relies upon analogical method by investigating reasons behind textual provisions in order to relate new emerging cases with those available in the text. He examines the legal rules which he has found and presumes various hypothetical incidents in order to apply to them the legal causes which have already known to him. This is what has been termed as "hypothetical jurisprudence" (*al-fiqh al-tagādiri*). 

5. **Al-Istihsān**

Apart from what have already been mentioned, Abū Ḥanīfa was also known for his dependence on *al-istihsān* (juridical equity) and *al-ʿurf* (juridical custom). He bases the former method on certain provisions of the texts such as, "Those who listen to the word and follow the best (meaning of it)," and "Whatever the Muslims consider as plausible also in God's sight," and several other provisions. However, a close study shows that this is not of the same kind of *al-istihsān* which has been rejected by
the vast majority of the Muslim jurists (jumhūr) and vehemently criticized by al-Shāfi‘ī and several other jurists,¹⁶⁶ about which al-Shāfi‘ī is reported to have said, "Whoever used the method of al-istihsān, has actually invented the rule of the shari‘a"¹⁶⁷. What al-Shāfi‘ī means here is al-istihsān in the sense of following desires in deciding that rules, a new which has been unequivocally rejected by all Muslim jurists. Al-Shāfi‘ī’s criticism emanates from a misunderstanding of the concept of al-istihsān itself as meant by its exponents,¹⁶⁸ for he himself indirectly recognizes its validity when he explains his concept of analogy. According to him, analogy can be employed about two things: First, about something which has a similar meaning as the original case where analogies would not differ (between one and another). Second, about something which has many similarities in meaning to that of the original case. In this kind the derivative case should be associated with what is the most appropriate to it and most resembles it. Perhaps the jurists have different analogies in this category.¹⁶⁹ This is actually a form of al-istihsān which is turning from the apparent legal rule obtained through direct analogical reasoning to another legal rule which contradicts it¹⁷⁰ by virtue of being in the interest of society.
There are three reasonable causes for which *al-istihsán* should be used in legal deduction: First, it has been confirmed by experience that the application of legal rule which has been achieved through direct analogy is not advantageous in some partial cases, so another reason has to be sought. Searching for the rule of the *sharī'a* by such a way is called "the hidden analogy" (*al-qiyāṣ al-khafi*). Second, the legal rule which has been achieved through direct analogy has some times to be put aside because it contradicts a certain textual provision. And third, one can have recourse to *al-istihsán* when the direct analogical rule differs from the consensus of the jurists (*ijmāʿ*) or their custom (*al-ʿurf*). 171

6. *Al-ʿurf* or the Juridical Custom

*Al-ʿurf* is another source of Abu Ḥanifa's jurisprudence. It is referred to any Muslim practice (*aʿmāl al-Muslimīn*) which has no origin from the Qur'ān, the *sunna*, or the *sahāba*. In order to be recognized as a juridical source, an ʿurf should not contradict any provision of the texts. 172 The approved ʿurf, as has been indicated above, is preferred to analogy.

It seems that Abu Ḥanifa was much influenced by
his commercial career in relying upon al-istihsān and al-‘urf in his legal endeavours. The commercial custom (al-‘urf al-tiārī) is considered as one of the permanent etiquette in business, while al-istihsān is based on an observation that the (direct) analogy sometimes leads to disadvantageous transactions which do not comply with the commercial interests and custom.

It seems clear that Abū Ḥanīfa was one of the muitahide who developed his own techniques in seeking the rules of the shari‘a. Moreover, Abū Ḥanīfa also tried to reconcile between reason and the texts. This principle is explained by one of his disciples, Muḥammad b. al-Ḥasan who is reported as saying, "Following hadīth will never be sound without (accompanying it by) personal opinion and following personal opinion alone will never be right without (referring it to) hadīth. And our companions are those who rely truly upon the sunna and personal opinion." By exerting personal opinion and by seeking reasons and suitable causes behind them, the rule of the shari‘a could be referred to a certain principle and arranged accordingly. By this way, Islamic jurisprudence emerged as an independent science which
has its own bases and principles after it had consisted of being scattered cases. Such a method is so advantageous that most of those who had confined their juridical efforts to the scope of the narrated sunna only and had feared to base them on personal opinion, could not avoid having recourse to it under the names of analogy and public interests... 176

2. THE METHOD OF MĀLIK 177

In his ittiḥād, Mālik gives priority to the Book of God over al-āthār 176 which he preferred to analogical reasoning and personal consideration. However, he would renounce any tradition which had not been transmitted by the reliable transmitters or (any tradition) which contradicted what was practised by the population of Medina. Mālik also does not like to indulge himself in hypothetical legal problems. In fact, he prefers following the sunna and did not like innovation. 179 Mālik generally tends to the trend of the Ḥijāzian school in restricting his legal endeavours to the tradition alone and refusing to elaborate them by assuming hypothetical incidents. Thus his method of ittiḥād can be summarized as follows:
1. **The Qur'ān**

He relies on the explicit and immediate meanings of the Qur'ānic provisions as long as he does not find any evidence of the *shāfi‘ī* which requires otherwise. He also infers the rules of the *shāfi‘ī* through the real meanings (māfhum al-muwafqa)\(^{180}\) and the opposite meanings (māfhum al-mukhālafa) of the texts.\(^{181}\) He furthermore considers the legal causes in order to give the same rules to other cases which have similar characteristics.\(^{182}\) Thus, he deduces the legal rules from the Qur'ān by understanding its provisions explicitly or implicitly, directly or indirectly.\(^{183}\)

2. **The Sunna**

If Mālik cannot find his answer in the Qur'ān, he will turn to the *mutawātira* and the *mashhūra* types of the *sunna*.\(^{184}\) In this respect, he is known for his caution, as Sufyān b. ‘Uyayna, another outstanding jurist of Ḥijāz observes, “Only the well authorized *ahādīth* would be accepted by Mālik and he will never narrate any *hadīth* except (the one he had received) from a reliable person.”\(^{185}\) However, he also relies on *ahād* or isolated *hadīth*, but some jurists conclude that he regards this type of *hadīth* as less
authoritative compared to the 'amal ahl al-madinah (the practice of the people of Medina) and to analogy as will be explain bellow.

3. The Practice of the Medinan People

This practice is classified into two classifications: First, their practice of matters which they received through transmitted channel. For instance, their transmission concerning the using of mudd (a dry measure) and sād (a certain cubic measure) and about fixing certain places such as the places of the pulpit, the rawda and the Prophet's grave (all are in his mosque) and also about the daily religious practices such as announcing adhān (call to prayer) at high places and (announcing it) before dawn and so forth... All of these practices are considered as religious authoritative sources which have been made obligatory in Malik's view point.

The second category of the Medinan people's practice is regarding matters which were achieved through the ijtihādī efforts. This practice has three following types:

First, The practice which is not considered as one of the religious authoritative sources by Malik or
anyone of his companions and cannot be used in preferring one evidence to another.

Second, The unauthoritative practice, but it can be used for preference between two contradictory evidences.

Third, The authoritative practice, but it differs from the practice which has been received through transmission\textsuperscript{187} in the sense that any disagreement to it is not forbidden.\textsuperscript{188}

However, it should always be borne in mind that the authoritative practice of the Medinan people is, according to Ibn Taymiyya, the agreement of the best generation. It is agreed that this has nothing to do with any generation who came after them.\textsuperscript{189} And indeed the practice of the Medinan people about matters which they received through transmission is agreed by all Muslims as an authoritative source.\textsuperscript{190} Malik prefers the practice of the Medinan people to analogy and to isolated hadith (khabar al-wāhid) and regarded it as more reliable than them, for it is to him tantamount to their narration from the Prophet himself in the sense that they inherited it from their predecessors through successive generations.\textsuperscript{191}
4. Fatāwā al-Sahāba

Mālik considers the religious opinions of the sahāba as ahādīth which should be followed because the sahāba, according to him, would never give any opinion (in any religious matter) without basing it on what they had understood from the Prophet's traditions. A true fatwā of a learned sahāba would be admitted and preferred to analogy if it does not contradict an authoritative and hadīth.

5. Isolated Hadīth and Analogy

Mālik's use of these two sources to another seems inconsistent. According to some reports, he prefers al-mursal and al-munqati types of ahādīth and the sayings of the sahāba to analogical reasoning, but in some other case, he is reported as omitting the isolated hadīth in favour of analogy and al-maṣlaḥa. Perhaps he relies upon the isolated hadīth in certain occasions and uses analogy or al-maṣlaḥa in certain other occasions according to divisional considerations.

6. Al-Istīḥsān and Al-Maṣlaḥa

In Mālik view-point, al-istīḥsān seems a kind of
al-maṣlaḥa. This is why he is reported to have said: "Al-istiḥsān covers nine-tenth of the (religious) knowledge" because al-istiḥsān is nothing but preferring a rule which has been based on human interest (ḥukm al-maṣlaḥa) to another rule which has been deduced by analogical reasoning.206 There are quite a lot of cases in which Malik resorts to istiḥsān, such as insurance on property against any loss or damage by craftsmen or manufacturers, forcing owners of baking ovens, grinding tools or watering places to charge equal fees to all customers and so on. However, Malik does not depend on this method as widely as the Ḥanafites do.201 Another kind of al-maṣlaḥa is called al-maṣlaḥa al-mursala (pl: al-maṣāliḥ al-mursala) which means matters which are in the public interest and which are not specifically defined in the shariʿa. Malik relies extensively upon al-maṣlaḥa in his juridical works.212

7. Sadd al-Dhārāʾīʿ

Another method of Malik's jurisprudence is sadd al-dhārāʾīʿ, i.e., the invalidation of legal fiction. It implies that whatever leads to a forbidding consequence is forbidden and whatever leads to a lawful consequence is lawful, whatever brings about
interest (of the society) is demanded and whatever helps to produce detrimental factor is forbidden.  

3. **Al-Shafi'i's Method**

In his magnum opus, *al-Umm*, al-Shafi'i sketches his method of deducing the rule of the shari'a as follows:

Islamic legal knowledge has different hierarchies: First, the Qur'an and the authentic sunna. Second, the juridical consensus in matters which are not provided by the Qur'an and the sunna. Third, the individual views of the Prophet's sahāba about which none of them disagreed. Fourth, the disagreement of the sahāba. Fifth, analogical reasoning with other (authoritative) sources. As long as the required solution is obtainable in the Qur'an or the sunna, no any other source should be relied on in this respect. Legal knowledge should be taken according to its hierarchical sequence.  

1. **The Qur'an and the Sunna**

Needless to say that, like other Muslim jurists, al-Shafi'i considers the Book of God as the supreme source of the shari'a which cannot be superseded by
any other source, while the legal status of the sunna is only subordinate to that of the Qur'an. 206

But it is important to note that al-Shafi'i places the Qur'an and the sunna in the same hierarchy because the term "revelation" signifies both of them in the sense that the latter comes to explain the former, to elaborate its generalities and to illuminate its obscurities. 207 Perhaps due to this attachment to both sources, al-Shafi'i regards the acceptance of one of them as being the same as the acceptance of the other. 208 And perhaps for this reason also his doctrine of abrogation differs from that of the earlier scholars, 209 for it is based on the principle that the Qur'an can only be abrogated by the Qur'an and the sunna only by the sunna. The sunna cannot abrogate the Qur'an because its function is to interpret the Qur'an, not to contradict it. Equally the Qur'an cannot abrogate the sunna because to recognize such a possibility would be to nullify the explanatory role of the sunna. 210

Al-Shafi'i's attitude towards the sunna can be understood from his own following words:

"Every sunna which has been transmitted by a reliable transmitter as projected back to the Prophet is an authoritative sunna and can be rejected only if another authoritative sunna contradicts it. If it is a case of repeal of a former ordinance by a later, the later is
the one which to be accepted. If nothing is known about a repeal, the more reliable of the two sunna is to be followed. If both are equally reliable, the one which is more in keeping with the Qur'an and the remaining undisputed parts of the sunna is to be chosen."

2. Ijmāʿ or Juridical Consensus

Regarding ʿijmāʿ or juridical consensus, al-Shāfiʿī argues that there could be only one valid consensus; that of entire Muslim community, it is not restricted to the scholars of a particular locality only. He furthermore emphasises that any juridical consensus should be based on the textual provision or the analogical reasoning when he says, "The Muslim community as a whole could never agree upon anything contrary to the Qurʾān, the sunna or analogy." However, the most authoritative consensus in his view is the sahāba's consensus because, according to him, they would not agree on something which contradicts the Prophet's sunna, for instance, their consensus on ʿUmar's attitude of not distributing the conquered land between the victorious soldiers.

3. The Views of the Sahāba

Another of al-Shāfiʿī's sources of juridical endeavour is eqwal al-sahāba or the sahāba's views.
which he has divided into three divisions:

First, their agreed views in certain cases, as the above-mentioned example of their agreement in leaving the conquered land to its indigenous owners. This category comes within the general significance of *ijmāʿ* which is religiously binding as has already been discussed above.

Second, any view of anyone of the *sahāba* (in a certain case), where no other view has been reported about it from within their community.²¹⁸

Third, their disagreement concerning any issue where al-Shāfiʿi would choose the nearest view to the Qurʿān, the *sunnah* or the *ijmāʿ*, or the one which can be supported by a stronger analogy.²¹⁹ However, in this case, al-Shāfiʿi would prefer the opinions of Abū Bakr, ʿUmar and ʿUthmān to other opinions for, according to his argument, the leader's view is binding on the people, and such a view is more popular than any other view of one or several other other jurists.²²⁰

4. *Analogy (Al-Qiyāṣ)*

Al-Shāfiʿi's brought a much more systematic
approach to analogy which had been employed in a somewhat disorderly manner by his predecessors. In fact, analogical reasoning is a particular form of *fitnah* which covers a variety of mental processes. His definition of analogy, as can be observed in a great number of examples given by him, complies with that of other jurists; i.e., joining together a case whose legal rule has not been provided by the texts with another case which has textual provision because of their common legal cause. Clarifying his opinion on this matter, al-Shafi'i says:

"If the rule of the *shari'a* about a case (which a Muslim has come across) has no indication (in the Qur'an, the *sunnah* or the *ijma*), he should seek it by (employing) *fitnah*, which is nothing but reasoning by analogy."  

As has already been discussed, al-Shafi'i rejects the methods of *al-istihsan* and *al-maṣlaḥa al-mursala* because, according to him, they have arbitrarily diverted from the text without being properly controlled.

4. **THE METHOD OF AHMAD B. HANBAL**

Being a juridical student of al-Shafi'i, Ahmad b. Ḥanbal's method of *fitnah* is approximately similar to that of his teacher. It is based mainly on the
five following sources:

1. **Textual Provision**

   If he can find a textual provision (in a certain case), he will give his opinion in accordance with it without turning to anything which contravenes it. Therefore he does not give any consideration to 'Umar's disagreement in the case of *al-mabtūta* for the authentic hadith which has been narrated by Fāṭima bint Qays, and also in the case of *al-tayammum* for (committing) sexual intercourse, because there is a hadith narrated by ‘Ammār b. Yāsir. There is no tradition (of any community), personal opinion, analogy and the saying of the *sahāba* that he prefers to the authentic hadith. He takes the same stance towards an opinion about which no disagreement is known to him and has been considered as consensus even though it has been preferred to the authentic hadith by many jurists. He disapproves of such a claim of consensus and does not see its preference to the authentic hadith as justifiable.

2. **The View of the *Sahāba***

   If he can find any opinion of any *sahābi* (sing. of *sahāba*) and he does not know anyone of their community
who has disagreed with it, he will not reject it. However, he does not term it as the consensus, but cautiously expresses that, "I do not know what has made him (the sahaba) saying such a thing" or other similar expression. Ibn Hanbal would never regard any practice (of any community), personal opinion or analogy as preferable to this kind of the view of the sahaba. 234

3. The Disagreement of the Sahaba

In the disagreement of the sahaba, he will choose the nearest view to the Qur'an and the sunna, but will not go beyond what they have said. If he cannot identify the view which most agrees with the Qur'an or the sunna, he will mention the disagreed views as they are without decisively choosing anyone of them. 235 Any selecting between two different views of the sahaba should only be done on the basis of recognized evidence. 236

4. Al-Hadith al-Mursal and al-Hadith al-Da'if

Ahmad b. Hanbal will accept the mursal and the da'if types of sahadith and will favour them to analogy if he finds that they have not been rejected by anything in the concerned issue. 237 Nevertheless, the
da‘if hadith, according to him, is not the invalid (bā'īl) or disapproved (munkar) hadith, but it is probably a tradition which can be relied upon as are the authentic or sahih category. According to Ibn Qayyim, none of the a‘imma (the founders of the four Sunnite schools) disagrees with Ibn Ḥanbal in this notion; for each of them prefers the da‘if hadith to analogical reasoning. 238

5. Analogy and Sadd al-Dhara‘i‘ī

If Ahmad b. Ḥanbal does not find his goal in the above sources, he will turn to analogical reasoning, but he will only resort to it in the case of emergency. 239 It is narrated that Ibn Ḥanbal has said that employing analogical reasoning is indispensable and the sahāba did utilize it. 240 It should be noted that the Ḥanbalite jurists consider al-maṣālih al-mursala as a kind of analogical reasoning in the sense that it is based on the real interests of the society that are drawn from the texts as a whole. 241 Ibn Ḥanbal accepts this principle because he considers that the sahāba did utilize it. This attitude is typically demonstrated by his opinions on al-siyāsa al-shar‘iyya (Islamic polity) in which he determines certain penalties which are not provided by the texts. Some instances of the point is the expulsion of
obscene and immoral persons to a place where the society can be protected from their vices, inflicting more severe punishment on the case of drinking wine during the day-time of the holy month of Ramaḍān and so on... 

Apart from the above-mentioned sources, Ibn Ḥanbal also relies on the principle of sadd al-dhard'i. For instance, his opinion regarding the obligatory blood-money on a person who had prevented anyone from food or drink until he died of starvation! Ibn Ḥanbal also prohibits the sale of weapons in civil strife and their sale to robbers, or the sale of grapes to wine-drinkers... 

Obviously the Ḥanbalite jurists have played an enormous part in the development of iḥtiḥād and its continuity. This is something natural to be expected from them because, as has been discussed earlier, they are the people who maintain the view that no period should be without muṭṭahid. 

6. Al-İstishāb

The Ḥanbalite jurists also take al-İstishāb as another authoritative source of jurisprudence, especially in the aspects of contract and (economic)
transaction, but only when the textual provisions, the sayings of the sahāba and their religious opinions are not available.  

IJTIHĀD AFTER THE PERIOD OF THE A'IMMA

It is claimed that after Muḥammad b. Jarīr al-Ṭabarī who died in 310 A. H., there was no one else of the ʿulamāʾ who managed to qualify himself as an independent muftahid who could deduce the rules of the sharīʿa from its sources independently without being confined to the opinions of any imām.

However it seem more appropriate to maintain that the ʿulamāʾ who were qualified to practise ijtihād were still available during this period, but the prevalence of dominant schools and the public confidence in them, made it difficult for other ʿulamāʾ to establish new schools and call people to them. So the jurists who aspired to practise ijtihād could only venture to carry out this task within the purview of anyone of those dominant schools.

Nevertheless, the ʿulamāʾ in this period continued to make a contribution in to the Islamic jurisprudence by the collection of athār (the traditions of the Prophet and the sahāba), preferring some narrations to
others (\textit{tari\'ifh}), explaining legal causes (of the legal rules) and deriving various partial cases by using the same principles and foundations which the \textit{a' imma} had used to base their legal opinions. Besides, they also delivered their own \textit{fat\'awa} in a lot of cases that had not been tackled by those \textit{a' imma}. Their task therefore, was to complement the schools of their masters.\footnote{9}

\textbf{Conclusion}

In the foregoing discussion we have traced the development of the Islamic jurisprudence since the Prophet's days until it began to decline after attaining its highest stage during the period of the \textit{a' imma} and the emergence of the juridical schools. Our discussion has shown that \textit{iitih\=ad} played a vital role in that development as it was a necessary tool to cope with the ever-changing situations.

With the expansion of Islam, the Muslim community became more and more complicated as a result of their interaction with several nations that belonged to previous civilizations. Here Muslim leaders and scholars found themselves obliged to practise \textit{iitih\=ad}
by using various methods in order to bring all incidents and issues with the scope of Islamic law. In this way Islamic jurisprudence reached its most flourishing stage between the second century and the fourth century of hijra; after which it began to decline and it was followed by the long period of mental indolence as will be discussed in the next chapter.
NOTES

CHAPTER: II


2 See Q. VI, 38, XVI, 89.

3 See ibid., XVI, 44 and 64.

4 Irshād, p. 255.

5 Ibid., p. 256.

6 Ihkām Ām., IV, p. 222.

7 Irshād, p. 255.


11 Q. LIII, 3 and 6.

12 This very answer is applicable also to several other arguments of the opponents, who use other Qur’ānic verse that have a similar significance. See Ihkām Ām., IV, p. 223, Ihkām Hz.

13 Zihār: A pre-Islamic form of divorce, consisting in the words of repudiation; “You are to me like my mother’s back (ant ‘alayya ka ḥahr ummi).

14 See note 96 above.


17 Muslim, XV, p. 117.
19 It should be noted that there are three ways by which a person can choose to enter into the state of conscription for pilgrimage. The first way is called "haîl al-ífrâd" in which he would perform the haîl first whereupon he would do the ibrâ'hîm as a separate ritual. The second way is "haîl al-qîrân" in which he would perform the haîl and ibrâ'hîm simultaneously, and the third way is haîl al-tamattû' in which he would perform the ibrâ'hîm first, break the state of conscription and then return to it to perform the haîl. See 'Abd al-Rahmân al-Jazîri, Kitâb al-Madhâhib al-Mughilâl, Cairo, 1970, pp. 688. The above hadîth indicates the fact that the haîl al-tamattû' is the most preferable type of haîl to which the Prophet wished if he could have done himself. But he could not do so because he had already brought an animal for sacrifice on the tenth day of Dhu al-Hijja, according to the Islamic calendar, and when he reached a certain place in the sacred precinct of Mecca. See ibid., pp. 697-698. However, due to a long duration in which his companions had to wait since their arrival at Mecca for the period of haîl, the Prophet ordered those who had not brought the sacrificial animal with them to change the haîl al-qîrân which they had intended to perform originally to haîl al-tamattû' by passing through certain ceremonies such as ṭawâf (circumambulation of the Ka'ba), sa'î (running slugishly seven times between the mounts Safâ and Marwa) and shaving or curtailing hairs to mark the end of the ritual (ibrâ'hîm) and to perform their haîl later on. The Prophet's act of bringing the animal for sacrifice as such was evidently based on his ijtihâd in a ritualistic affair about which the revelation had not been sent down to him. See Ibn Qâyyim al-Jawziyya, Zâd al-Majâs, II,

27 'A'ṣâd al-Milla wa al-Dîn, op. cit., p. 29.


29 Q. LIX, 2.

30 İhkâm Ām., IV, pp. 222 - 223.

31 Q. IV, 105.

32 İhkâm Ām., IV, p. 223.

33 Q. III, 159.

34 İhkâm Ām., IV, loc. cit.

35 Q. VIII, 67.


38 See Muḥammad Abû Zahra, Fi Târikh al-Madhâhib al-Fiqhiyya, p. 10.

39 Ibid., p. 11.

40 Mankhûl, p. 468.

41 This only means that jîtîhâd is not an independent source of the Islamic legislation, but rather it is a kind of indirect revelation.

42 İhkâm Hz., V, p. 702.

43 Ibid., p. 703.

197

See The Qur'anic indications to this, e.g., XVII, 106, XXIV, 192 - 194, LXXV, 16 - 19.

Nādīa Sharīf al-‘Umarī, op. cit., p. 201.


Amīr Bādīshā, op. cit., IV, p. 183


The unanimous agreement has been achieved amongst the jurists about the permissibility of ittiḥād after the death of the Prophet.

Iḥkām Ām., IV, p. 235, al-Shirāzī, al-Tabshīra, p. 519.

See Iḥkām Ām., IV, p. 237.

Iḥkām Ām., IV, p. 235, Iḥrād, p. 256.

See Iḥkām Ām., IV, pp. 235 - 236.


Abū Dāʾūd, I, pp. 93 - 94, Nasāʾī, I, p. 172, see also Iḥlām, I, p. 204.

See Bukhārī, V, pp. 242 - 243.


Iḥlām, II, p. 58.


I. e., Zaynab, see al-Suyūṭī's comment on this matter in Nasāʾī, IV, (foot-note), p. 28.

Nasāʾī, IV, pp. 28, 29, 31 and 32.

67 Mustaq., p. 354, Nihāyt., IV, 539.

68 See Nihāyat., IV, p. 541.

69 Any decision taken by the ijtihamic effort in this period, as long as it has not been rejected by the revelation, is considered as indirect or implicit revealed decision.


71 Bukh., VI, pp. 29 – 30.


73 See Q. III, 144.

74 Ibn Hishām, op. cit., IV, p. 263.

75 Bukhārī, IX, pp. 111 – 112, see also Muslim, XII, pp. 199 – 200, Tirmidh., IX, p. 72.


79 ʿIklām, I, p. 62, see also al-Khaṭīb al-Baghḍādī, al-Fih wa al-Mutafqqīḥūn, II, p. 166.

80 Ibid., II, p. 86.

81 Ibid., loc. cit.


83 Ibid., pp. 31 – 32.


85 Ibid., p. 15.
86 Q. VIII, 41.
87 Ibid., LIX, 7.
89 Muḥammad Abū Zahra, Ibid., p. 16.
90 Iṣlām, I, p. 62.
92 Muḥammad Abū Zahra, Fi Tārīkh al-Madhāhib al-Fiqhiyya, p. 16.
93 Evidence has however indicated that the collective ijtihād was more prevalent in most cases and was preferred by the saḥāba to personal ijtihād.
95 Muḥammad Abū Zahra, Tārīkh al-Madhāhib al-Fiqhiyya, p. 17.
96 Iṣlām, I, p. 66.
100 Muḥammad al-Khūḍarī, op. cit., p. 88.
101 Iṣlām, I, p. 67.
102 Ibid., p. 68.
103 Ahmad Amin, Fair al-Islām, (Cairo, 1965), p. 238.

106 Muḥammad Abû Zahra, Fi Tārīkh al-Madhâhib al- Fiqhiyya, p. 28.


109 Q. II, 229.

110 Ibid., II, 230.

111 ʿIclâm, III, p. 33.

112 See ibid., pp. 35 - 36.

113 Ibid., III, p. 34.


118 ʿIclâm, I, p. 65.

119 A place near Yarmuk.


121 Beside Ḥudhayfa, there were several other sahâba who married women of the book such as ʿUthmân b. ʿAffān and ʿAlī b. ʿAbayd Allāh. The former married a Christian woman called Nāʿila, while the latter married a Jewish woman. See Abû Bakr al-Jaṣṣās, Ṭabd al-Qurʿān, I, p. 333.

122 See Q. V, 5.

124 See Q. XXIV, 4.
126 See Q. V, 90 and 91.
128 See Iḥkām Hz., VII, p. 1013.
130 Q. IV, 11.
131 Ibid., IV, 12.
132 This title has its Qur'ānic origin, see Q. IX, 100.
135 Abū Zahra, Fī Tārikh al-Madhāhib al-Fiqhīyya, p. 32.
136 I'lam, I, p. 21.
140 Muḥammad Abū Zahra, Fī Tārikh al-Madhāhib al-Islāmiyya, p. 31.
141 See ibid., pp. 35 - 36.
143 'Abd al-Karīm Zaydān, ibid., p. 138.
144 Muḥammad al-Khīḍarī, op. cit., p. 108.
\textsuperscript{145} Muḥammad al-Khūṭarī, \textit{ibid.}, p. 109.


\textsuperscript{147} Aḥmad Amīn, \textit{op. cit.}, p. 241.

\textsuperscript{148} See Manāʿī al-Qaṭṭān, \textit{op. cit.}, p. 308.

\textsuperscript{149} Shāh Wālī Allāh al-Dehlawī, \textit{op. cit.}, I, p. 144.


\textsuperscript{152} See Muḥammad Abū Zahra, \textit{Fi Tārīkh al-Madhāhib al-Fiqhiyya}, p. 42.

\textsuperscript{153} Abū Ḥanīfa Al-Nuʿmān b. Thābit b. Zātā (80 - 150 A. H.), one of the great Muslim theologians and jurists and the eponym of the Ḥanafite school. He was born in Kūfa. His grandfather, Zātā is said to have been brought as a slave from Kābūl to Kūfa and set free by a member of the Arabian tribe of Taym Allāh b. Thaʿlabā. He is considered by some as a tābiʿī basing this consideration on a report that at the age of sixteen he did see Anas b. Mālik, a renowned Companion of the Prophet. But some attribute him to the generation of tābiʿī-al-tābiʿīn. He received his training in Islamic jurisprudence and uṣūl al-fiqh particularly from Ḥammād b. Sulaymān. Abū Ḥanīfa had many great disciples who played important roles in developing his school and consolidating it, notably the Judge Abū Yūsuf (113 - 182 A. H.) and Muḥammad b. al-Ḥasan al-Shaybānī (123 - 189 A. H.). See al-Khaṭīb al-Baghdādī, \textit{Tārīkh Baghhdād}, XIII, pp. 323 - 335, Ibn Khallikān, \textit{Wafayāt al-Aʿyān}, V, pp. 405 - 415, \textit{The Encyclopaedia of Islam}, I, (Leiden, 2nd edition), pp. 123 - 124, see also al-Muwaqqāt b. Aḥmad al-Makkī, \textit{Manāqīb Abī Ḥanīfa} (Beirut, 1401 - 1981).

155 Ibid., pp. 149 - 150.

156 See ibid., p. 152.


161 See Muhamad Abū Zahra, Fi Tarikh al-Madhahib al-Fiqhiyya, p. 176.

162 Ibid., p. 177.

163 Q. XXXIX, 18.

164 This is actually not a hadith as usually claimed by some writers, but is a maxim of Ibn Mas‘ūd. See Ibn Ḥanbal, V, p. 211.

165 Rawd, I, p. 409.

166 See Umm, VII, pp. 294 - 304, Risāla, pp. 25, 503 - 504, see also Mustas, I, pp. 274 - 279.

167 Mustas, I, p. 274.


169 Risāla, p. 479.

170 This definition is given by Muhamad Abū Zahra, see his book Tarikh al-Madhahib al-Fiqhiyya, p. 177. However, various definitions have been given to al-istihsān which has a proximate meaning of "equity" (of a statute) in the English legal system, see John B Saunders, Mozley & Whiteley's Law Dictionary, (London, 1977), p. 120. Nevertheless, most of these definitions are not representative, for they normally indicate its objective or the outcome of its application. See e. g., definitions by al-Sarakhsi in al-Mabsūt, I, p. 145. Muhamad Yusuf Mūsā, of the Azhar in Egypt,
observes that after a careful study, al-istihsān can be defined as "prefering an evidence (of the sharī‘a) to another evidence which contradicts it by using a recognized preference of the sharī‘a. See his book, Tārikh al-Fiqh al-Islāmī, II, p. 134. This definition seems less specific than the above definition of Abū Zahra, for it includes the explicit textual evidences which should actually be excluded.

171 See Muḥammad Abū Zahra, Fi Tārikh al-Madhāhib al-‘ighīyya, p. 177.

172 See ibid., pp. 177 - 178.

173 Abū Ḥanīfa was also a successful business-man who divided his times between commercial, juridical and ritualistic activities.

174 See ibid., p. 18.


178 Al-āthār is another term which is usually used for the Prophetic tradition. It is actually more general than hadith or sunna, for it includes, in addition to these two categories, the deeds and sayings of the sahāba.

179 Ibn Farḥūn, op. cit., (Cairo, 1350 A. H.), p. 16.

180 Maḥfūm al-muwāfaqā means the real purport of any expression (fahwā‘ al-kalām) rather than its
immediate meaning. E. g., a Qur'anic verse which says that: "Those who unjustly eat up the property of orphans, eat up a fire into their own bodies..." (Q. IV, 10). This verse should properly be understood as a prohibition of wasting the orphans' properties.

181 Mafhûm al-mukhâlafa means a legal rule which has been deduced from understanding the opposite meaning of the texts. E. g., a hadîth which says that: "Zakât should be taken on the freely grazing livestoks" (Fi al-Sâ'îma zakât). The legal rule which is understood from it is no zakât is taken on the stall-fed animals although Mâlik brought other evidence to testify that it was obligatory.

182 E. g., disgraceful or dirty is the legal cause behind the prohibition of eating dead meat, poured out blood and the flesh of swine (see Q. VI, 145). So Mâlik gave the same rule to any similar object.


184 Ibid., p. 233.

185 Al-Zurqânî, Sharh 'alâ Muwâṭṭa' Mâlik, I, (Cairo, 1355/1926), p. 3.


187 See first classification above.

188 I'lam, IV, pp. 391 - 392.


190 Ibid., p. 306.

191 Muḥammad ʿAlî al-Sâyîs, op. cit., p. 123.


193 This method is exceedingly criticized by al-Ghazâlî in Mustas with mainly because the sahâba were not infallible. See vol. I, p. 260 - 274.

194 Muḥammad ʿAlî al-Sâyîs, op. cit., p. 124.
195 Al-mursal: Any hadith which is directly attributed to the Prophet or to anyone of his Companion by any transmitter who was not contemporary with them, without mentioning any sahāba through whom the hadith had previously been transmitted. Some examples of this type of ahadith have been mentioned by al-Ghazālī in Mutāṣ. According to al-Ghazālī, these ahadith have been accepted by the vast majority of the jurists, including Mālik and Abū Ḥanīfa, but has been rejected by al-Shāfīʿī and some others. See Mutāṣ., I, p. 169.

196 Al-maqṭūʿ: Any hadith with an interrupted chain of transmission which is reported directly by a tābiʿī or a transmitter of later generations.

197 Iṣlām, I, p. 32.

198 Abū Zahra, Fi Tārīkh al-Madhāhib al-Fiqhiyya, p. 234.


200 See e. g., ʿAbd al-Wahhāb Khallāf, Maqādir al-Taqhīf, al-Islāmī fīmā lā Naṣṣa fīh, p. 77 - 78.


202 See e. g., Ihkām Ām., IV, p. 216.


204 Abū ʿAbd Allāh Muḥammad b. Idrīṣ b. al-ʿAbbās b. ʿUthmān b. Shāfīʿ al-Ḥāshimī al-Muṭṭalibī (150 - 204 A. H.), one of the prominent Muslim jurists, the "architect" of usūl al-fiqh and the eponym of the Shāfīʿite school of jurisprudence. He was born in Ghazza, but was brought up by his mother in Mecca. During this early stage of his age, al-Shāfīʿī had already completed his memorization of the Qurʾān whereupon he began to learn Islamic jurisprudence and other subjects under the guardianship of several Meccan ʿulamāʾ. He then came to Medina where he became a student of Mālik whose al-Muwaṭṭaʾ he had already learnt by heart. After that al-Shāfīʿī travelled to Yemen and then to Iraq where he was engaged in a series of juridical polemics with an eminent disciple of Abū Ḥanīfa, Muḥammad b. al-Ḥasan al-Shaybānī. He then moved to Egypt where he founded his new school (al-madhhab al-īnadīd) as embodied in his magnum opus al-Umm. Important figures in the Shāfīʿite school...

205 Umm. VII, (Beirut, n. d.), p. 265.

206 See Risāla, p. 106.

207 See ibid., pp. 91 - 92, see also Muḥammad Abū Zahra, Fi Tārīkh al-Madhāhib al-Fiqhiyya, p. 275.

208 See e. g., Risāla, pp. 22, 32, 33, 84, 104, 105, passim.


210 Ibid., p. 58 and for al-Shaftī’s own discussion on this question, see Risāla, pp. 106 - 117.


212 See Risāla, pp. 403, 472, 475 - 476.

213 See ibid., pp. 534 - 535.

214 Ibid., p. 476.

215 Ibid., p. 472, see also Umm. VII, p. 299.


217 Cf., Ibn Qudāma, Rawd, I, p. 403.


219 Muḥammad Abū Zahra, ibid., p. 284.

220 Umm., VII, p. 265.

221 See N. J. Coulson, op. cit., p. 60.

‘Alī al-Sāyis, p. 126.

Išlām, I, p. 29.

Al-mabtūta: A woman fully divorced under the terms of three-fold formula for divorce.

See Muslim, X, pp. 94 – 107.

Al-tayammum: Another ritual of purification by using clean sand or earth which is advocated for the Muslims as alternative of water in case of its scarcity or non-existence. See Q. IV, 43.

See Bukh., I, pp. 151, 152, 153, Muslim, IV, pp. 60 – 62.

Išlām, I, pp. 29 – 30.

Cf., Ibn Taymiyya, Maḥmūd Fatāwā, XX, p. 573.


Ibid., p. 31.

237 I'lam, p. 31.

238 Ibid., I, loc. cit.

239 Ibid., I, p. 32.


241 Ibid., p. 362.


244 See supra, ch., I, p. 94.

245 See supra, ch., I, p. 70.


247 Muḥammad ʿAlī al-Sāyīs, p. 129.

248 Muḥammad al-Khidari, op. cit., p. 238.

249 Muḥammad ʿAlī al-Sāyīs, p. 129.
CHAPTER III

TAQLİD AND ITS IMPACT

The Meaning of Taqlid

The word taqlid comes from qalladahā qilādatan which means, he has put a necklace upon her neck. Taqlid al-budun means putting marks or symbols on animals, so that they would be easily recognized as those to be sacrificed. However, the word when used in jurisprudence has a meaning like "following". Al-Ghazâlî defines it as, Accepting an opinion without (knowing) its (authoritative) evidence, (qabûl qaṣl bilā hui. ia). Others define it as, Practising (religion) by following the sayings of others without (basing it on) authoritative evidence (al-ṣamâl bi qaṣl al-shayr min shayr hui. a mulzima).

Was the Gate of Ištihâd Closed?

As has already been indicated in the previous chapter, the years between the second century and the middle of the fourth century of the hijra, were the golden era of the Islamic jurisprudence. However, gradually taqlid or intellectual imitation had crept in. Intellectual activity slowly gave way to
stagnation. This phenomenon has been analyzed by many thinkers, Muslims and non-Muslims alike, in its various aspects. However, there is some need to identify the exact nature of the forbidden type of taqlid and distinguish it from that which is permitted. The negative impacts of taqlid on Islam and the Muslims must also be explained in addition to investigating their causes. However, to identify clearly the changing condition which has taken place in the Islamic jurisprudence, it is crucial to know at the very outset the history of its emergence. Professor Schacht is one of several orientalists who have analyzed this historical metamorphosis in the following words:

"By the beginning of the fourth century of the hijra (about A. D. 900), however, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law and that all future activities would have to be confined to the explanation, application, and at most, interpretation of the doctrine as it had been laid down once and for all. This 'closing of the door of 'ilthad', as it was called, amounted to the demand for taklid, a term which had originally denoted the kind of reference to Companions of the Prophet that had been customary in ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities."
Professor Anderson seems to agree with this view when he observes, "About the end of the third/ninth century, it was commonly accepted that the gate of ijtihad had become closed and that all later jurists were mughallids."  

The same conclusion has been reached by H. A. R. Gibb who asserts unequivocally that the early Muslim scholars held that the gate "was closed, never again to be reopened."  

A contemporary Muslim Professor in Law, Şubhi Maṭḥmaṣānī, however, gives a later time for this development when he remarks that:

"This flourishing of jurisprudence, however, took a downward trend towards the end of the 'Abbaside period. After the fall of Baghdad in the hand of Hulāgū Khan in the middle of the 7th century A. H. (13th century A. D.) the Sunni jurists reached a consensus of opinion on 'closing of the door of ijtihād' for fear of persecution. They further agreed that the four Sunni schools were sufficient. The Arab civilization declined gradually and rigidity enveloped all phases of life. This inevitably resulted in the prevalence of imitation and the cessation of ijtihād in jurisprudence and in an abundance of superstitions which remained for a period of time as a symbol of decline and obscurity."

The above-mentioned factors which contributed to the deterioration of ijtihād and the emergence of
taqlid are probably insufficient to explain such a tremendous change. Additional causes should necessarily be sought to make the conclusion more convincing. Thus Professor Schacht observes that this freedom to exercise one's judgement independently was progressively restricted by several factors, such as the achievement of local, and later of general, consensus, the formation of groups or circles within the ancient schools of law, the subjection of unfettered opinion to the increasingly strict discipline of systematic reasoning, and last but not least, the appearance of numerous traditions which embodied in authoritative form what had originally been nothing more than private opinions. ¹⁰

This view does not seem to be so prevalent the Muslim intellectual circle. There are some thinkers who look at the event with positive eyes. The following word of Professor Yūsuf al-Qaraḍāwī suggest a more optimistic view:

"Fortunately, this closing (of the gate of ijtihād) was declared only when ijtihād had reached its acme after approximately four centuries had passed away. During that period, juridical cases were already recorded together with their detailed evidences according to a variety of views and trends, while the science of usūl al-fiqh was also written down which defined the (nature, scope, etc.) of the principle and derivative matters. Many jurists furthermore tried to presume hypothetical cases for which they assigned certain rules of the shari'a as an attempt to anticipate the incidents in case of their occurrence in any
time and at any place... And in such an abundance of original and derivative juridical ideas, many people felt that no more ijtihād would be required. Other factors, such as over-admiration of the predecessors' legacies, inferiority complex and fear of impostors who might spoil the shari'ah by following desires and creating deception, contributed to the acknowledgement of the closing of the gate of ijtihād, although this was disagreed and objected to by some people."

Yet Professor al-Qaraqūšī does agree that succumbing to taqlīd had a bad effect on Muslims when he says that:

"Such an attitude was no doubt a disastrous element which hindered the continuous growth and development of the Islamic jurisprudence, which it might have been expected to achieve had the gate of ijtihād been constantly opened as it had been in the early centuries."\(^1\)\(^2\)

However, to suggest that a consensus of opinion was reached on the closing of the gate of ijtihād at the end of the third century of hijra or at any period is an inaccurate or an exaggerated accusation, because not all of the Muslim jurists of the fourth century of hijra agreed on the complete imitation to any juridical school. There were those who relied upon hadith and āthār, or upon what had overwhelmingly been accepted of the sahāba's and tābi‘in's sayings. If these sayings were not satisfactory, due to their contradiction or obscurity, they referred to the views of preceding jurists and chose the most reliable one.
And there were also certain people among them who were capable of deducing the rules of the *shari'a* from ambiguous textual provisions and exercising *ijtiham* within certain established schools.\(^1\)

Perhaps due to the fact that they held similar views, they belonged to the established schools. Moreover, only those who were capable of exercising *ijtiham* were entitled to the posts of judges and muftis.\(^2\)

Evidence shows that the third and the fourth centuries *muqtahids*, whether independent or affiliated to legal schools, have expressed original views on law. Ibn Surayj (d. 316/918), Ṭabarī (d. 310/922), Ibn Khuzayma (d. 311/923) and Ibn Mundhir (d. 316/928) are perfect examples of the independent type.

According to the eight/fourteenth century lawyer Subki, these four *muqtahids*, though originally Shāfi'iites, have diverged from the rulings of Shāfi'i, and as is known, Ṭabarī went further to establish his own school of law.\(^3\) Of Ibn al-Mundhir, Subki remarks: "He was a *muqtahid* who followed no one (*wa kāna muqtahidan lā yuqallid ahadan*). Subki also considered Ibn Surayj as the renovator of the fourth/tenth century.\(^4\)
In later period also there were certain jurists who did exercise *ijtihād*, whether independently or within the established schools. Jurists like Imām al-Ḥaramayn (d. 479 A. H.), Abū Bakr Ibn al-ʿArabī (d. 543 A. H.), Ibn Qudāma (d. 620 A. H.), ʿIzz al-Dīn b. ʿAbd al-Salām (d. 660 A. H.), Ibn Taymiyya (d. 723 A. H.), Ibn Qayyim al-Jawziyya (d. 751 A. H.) and many others, although were usually associated with certain schools, their juridical views, as can be seen in their own writings, were never fettered by the common views of their affiliated schools.

As stated by Tāj al-Dīn al-Subkī, Imām al-Ḥaramayn was not bound to al-Ashʿarī or al-Shāfīʿī, but expressed (his religious opinions) according to his own *ijtihād.*

In *Tārīkh al-Huffāẓ*, al-Dhahabī describes Abū Bakr Ibn al-ʿArabī, one of the Malikite scholars, as an absolute *muhātir.*

Referring to Ibn Qudāma, Muḥammad Rashīd Riḍā says that he used to base his *fatāwā* on the evidences of the *sharīʿa* and practised *ijtihād.*

Ibn Kathīr says that ʿIzz al-Dīn b. ʿAbd al-Salām was not confined to any certain school, but his
juridical endeavours were wider and he delivered religious opinions according to his own *ittihād*.  

Taqī al-Dīn Ibn Taymiyya has been described by many as one who was qualified to exercise *ittihād*.  

About his disciple, Ibn Qayyim al-Jawziyya, Tāhā ʿAbd al-Raʿuf, who edited his famous work, *Iklām al-Muwaggīʿin*, says that although he was originally a Ḥanbalite jurist, he frequently deviated from the Ḥanbalites and inferred new juridical opinions after undertaking a comparative study of the established juridical views.... and he had definite and unshaken opinions regarding certain issues in which he disagreed with all juridical schools.

In his book, *al-Radd ʿalā Man Akhlad ʾilā al-Ard*, al-Suyūṭī mentions several other scholars who have been acknowledged by many as being capable of exercising *ittihād*, among whom were Taqī al-Dīn al-Subkī, his son Tāj al-Dīn al-Subkī, Jamāl al-Dīn al-Isnawai, Shams al-Dīn b. Yūṣuf al-Qunawi, Sirāj al-Dīn al-Balqīnī, Majd al-Dīn al-Shirāzī and others.

Al-Suyūṭī himself (d. 911 A. H.) claimed that he, himself fulfilled the required qualification of an absolute multahid although this has been rejected by
some scholars. To prove the validity of this claim, he mentioned various legal cases about which he had explained his own views.

Although he was brought up in the Ḥanafite environment as the great majority of the Indian Muslims, Shāh Wali Allāh al-Dehlawī was never confined to the parochial sectarian outlook. His differences with Ḥanafite doctrines can be noticed in his work, Huṣn-Allāh al-Bālígha. One example would perhaps be representative, his view that no one should use a large quantity of gold for ornamental purpose, whether by man or woman. On the other hand, vast majority of the jurists are of the view that women are absolutely permitted to have gold for ornament.

Therefore, it can be said with certainty that the above idea which suggests that the consensus was reached about the end of the third/ninth century on the closure of the gate of ijtihād is indefensible.

Professor Schacht seems to be aware of some inaccuracies in the standard account about this subject, as he observes, "The rule of tākĪl did not impose itself without opposition. In later generations also there were scholars who held that there would always be muṭtahid in existence, or who
were inclined to claim for themselves that they fulfilled the incredibly high demands which the theory had, by then, laid down as a qualification for *ītiḥād*.

Apart from conformity in ideas, perhaps the desire to ensure that their views would be willingly accepted by the society was another factor which made the many jurists of later periods merge into the dominant schools. This is because when these schools were developed, adherents of each school could easily accept the ideas advocated by the *ʿulamāʾ* within their own circle, no matter what difference might occur between the new ideas and the old one. This "disguising" tendency was not invented by later generations, because Abū Yūsuf (d. 182 A. H.) the famous disciple of Abū Ḥanīfa, for instance, had already set a precedent for it. Although he had many differences with his master, he never established his own school.

Abū Zahra, one of the contemporary Muslim scholars who enjoys high respect among Muslim intellectuals, explains the views of the four *Sunnite* schools about the question of the closing of the gate of *ītiḥād* as follows:
The Shafi‘ites, the majority of the Hanafites and many other jurists did close the gate of the absolute *ijtihād* (al-*ijtihād al-muṭlaq*). The Mālikites jurists also deem the possibility of disappearance of this kind of *ijtihād* from a certain period, although they insist on maintaining that no period should be void completely of the mutaḥidis within the juridical schools (muṭaḥid fi al-madhābih). The Ḥanbalites' view on the contrary, suggest overwhelmingly that the absence of any mutaḥid in any period is something impossible.\(^{31}\)

Abū Zahra eventually defines his own stance in this matter by saying:

"We have made up our mind to agree with the Ḥanbalites that it is not right that a period can be void of any mutaḥid who can accomplish all the pre-conditions of the absolute *ijtihād*,... and we do not know if there is anyone who is permitted to close the door which has been opened by God for human minds. If there is anyone who dare to say such a thing, which we do not know, on what evidence did he base it, and why should he deprive others of the right to which he has authorized himself? This closing has furthermore alienated the Muslims from the original sources of Islam... so much so that it motivates some of those who have been extremely influenced by *taqlīd* to make such a conclusion that after this closing, the Qur‘ān and the *sunna* can no longer be interpreted."\(^{32}\)

**The Jurists' Condemnation of Taqlīd**

A considerable number of jurists throughout the Islamic history have come forward to condemn *taqlīd* and declare its invalidity. The most notable among them are Abū ʿUmar Yūsuf Ibn ʿAbd al-Barr al-Qurṭubi, the Zahirite jurist Ibn Ḥazm, Ibn Taymiyya, Ibn Qayyim
al-Jawziyya and al-Shawkānī. The earliest account of taqlid which has come to our acquaintance is that of Ibn ʿAbd al-Barr in his Ḥamāt Bayān al-ʿIlm wa Faḍlih. Ibn Ḥazm has devoted a chapter of nearly a hundred pages of his al-Iḥkām fī Usūl al-Aḥkām to discussing this issue from various aspects. Ibn Taymiyya also contributed a very wide and significant discussion on the subject in his al-Fatāwa and so did his disciple Ibn Qayyim in Iʿlām al-Muwāqqiqīn. Al-Shawkānī’s dealing with the problem of taqlid in Irshād al-Fuhūl is concise and comprehensive, but he deals with it in a more detailed and specific study in his less popular work, al-Qawl al-Mufrd fī Adillat al-Iḥtiḥād wa al-Taqlid.\(^3\) The arguments which have been used to invalidate taqlid in these accounts are similar to each other. Perhaps this overlapping is due to the fact that some of them have been influenced by some others.

The most fervent Zāhirite jurist, Ibn Ḥazm demands that the imitators give him (an example of) a single man during the periods of the sahāba, the ṭābiʿīn, and the ṭābiʿ al-ṭābiʿīn who imitated a certain scholar in all his sayings and never disagreed with him in anything. He warns, “If the imitators cannot give us any example of this, they ought to convince themselves
that they have invented something in religion that had never been done before by anyone."

One of the many Qur'anic verses which is utilized by Ibn Ḥazm in this respect is:

"The parable of those who take other than God for their protectors (awliyā') is that of the spider who builds (to itself) a house; but truly the flimsiest of houses is the spider's house." 35

Commenting on this verse, Ibn Ḥazm says that anybody who has taken an other man as his religious leader (imām) would compare the sayings of God and His messenger to that of his imām. If they comply with it he would accept them, if not he would renounce the sayings of God and His messenger and follow the opinion of his imām. This means he has taken (for himself) a protector other than God and included himself in the general meaning of the above verse. 36

In his work, al-Muhallā, Ibn Ḥazm launches into the same attack against taqlīd. On one occasion he says, "Whosoever claimed that the common people should imitate a mufti, has actually made a false claim which has never been confirmed by any evidence of the Qur'ān, the sunna, the consensus or analogy. Evidence has come conversely to nullify such a claim. God blames those people who said, 'We obeyed our
chiefs and our great ones, and they misled us to the right path. '37 And *itiḥād* means nothing but the exertion of one's effort in searching for the (legal rules) of the religion which has been enjoined by God on His servants".'38

He goes on to say, "The *mugallid* (the imitator) is a rebellious sinner and the *multahid* will be rewarded."'39

In Ibn Ḥazm's view, *itiḥād* seems an obligation on every Muslim regardless of his intellectual status, although the word *itiḥād* takes a rather different and peculiar connotation with regard to disqualified person. This can be realized from his following words:

"It is unlawful for anyone to imitate a dead or living man, but it is everyone's duty to exercise *itiḥād* according to his own capability... An ignoramus is required to enquire from the most knowledgeable person at his place about religion... When the required religious opinion is given he should ask, is it the saying of God and His messenger? If the answer is "yes" he should believe it and act accordingly. But if the muftī replies that it is no more than his own personal opinion or analogical reasoning, or it is the saying of a saḥāba or tābiī or a jurist..., he is not allowed to accept it, but he should ask another man."'40

Ibn ‘Abd al-Barr transmits a hadīth in which the Prophet says, "I fear for my community after my death..."
of three (harmful factors), the scholar's slip, the tyrant's rule and following desire."

Commenting on this hadith, Ibn Qayyim say, "There is no doubt that taqlid is the (real) reason behind this fear, without which this fear is baseless." This can be confirmed by what has been said by a sahāba, Tamīm al-Darī, "Beware of the scholar's slip." When queried by 'Umar b. al-Khaṭṭāb about what he meant by this expression, he explained, "The scholar's slip would be followed by the people, and then the scholar might repent (to God of his slip), but the people would continue to follow his saying." This is because a scholar does not have an infallible nature and therefore sometimes his slip cannot be avoided. Hence, not all of what he has said should be (blindly) accepted and placed at the infallible status. And this imitation which has been condemned and regarded as unlawful by every learned Muslim is actually the source of discord and a catastrophe for the imitators themselves.

Therefore, there is no excuse what so ever for any qualified jurist imitating others, but on the contrary, if he has formed an opinion of his own on a particular question, he is forbidden from following, in preference, the legal opinion of another jurist to
the contrary. Even if a man who does not possess the qualifications as a jurist but is a learned person in the law (‘ālim) who holds a certain view on a particular question, he ought to act upon it, though the contrary view may have been sanctioned by a (certain) jurist.45

Perhaps considering the difficult conditions which are required of a mu'tahid, one might imagine that ijtihād is a task which is too difficult to be carried out by less qualified person. But Ibn Taymiyya observes that ijtihād is not an inseparable entity. A man can exercise ijtihād in a certain (juridical) aspect or case without being able to exercise it in another aspect or case. Every person is entitled to exercise it according to his own capacity.46 This implies, as maintained by many jurists, that the same person can be a mu'tahid or a mufti in some incidents and a follower in some others.47

IV. The Qur'ānic Verses Which Have Been Used to Reject Taqlīd

In their rejection of taqlīd, the Muslim ‘ulemā and reformers have used many Qur'ānic verses, some of which are as the belows:
"They take their priests and their anchorites to be their lords in derogation of God." 48

Al-Ḥudhayfa b. al-Yamān and ʿAbd Allāh b. ʿAbbās have construed this verse to refer to those religious leaders in their decisions about what is lawful and unlawful. 49 This corresponds with the Prophet's own interpretation which he gave when ʿAdī b. Ḥātim, who was then a Christian, came to him along with a group of his tribesmen to solemnize their conversion to Islam. 50

"Nay! they say, 'We found our fathers following a certain religion and we do guide ourselves by their footsteps.' Just in the same way, whenever We sent a warner before thee to any people, the wealthy ones among them said, 'We found our fathers following a certain religion and we will certainly follow in their footsteps.' " 51

This means that no evidence upon which they could rely in defending their polytheistic belief except imitating the religion which had traditionally been practiced by their fathers and ancestors after whose footsteps they were following. 52

"Behold! he (Abraham) said to his father and his people, 'what are these images to which you are (so assiduously) devoted?' They said, 'we found our fathers worshipping them.' " 53
Here again the Qur'ān demonstrates the habit of imitators who did not spend the least effort to seek evidence with which they might prove the correctness of their practice, but blindly imitate what they have inherited from the generation which preceded them. Commenting on this verse, Muṣṭafā al-Marāghī remarks, "Taqlīd is indeed the walking-stick which would be used by the weak to lean on and the string to which the drowned would grasp." 

"Then would those who are followed clear themselves of those who follow (them): They would see the penalty, and all relations between them would be cut off. And those who followed would say, 'If only we had once more chance, we would clear ourselves of them, as they have cleared themselves of us.' Thus will God show them (the fruit of) their deeds as (nothing but) regrets, nor will there be a way for them out of the fire."

Ibn Ḥazm interprets this verse as referring to those learned men who have been imitated by their people after having prohibited them to do so and urged them to free themselves from them in this world and in hereafter. 

"And they would say, 'Our Lord! We obeyed our chiefs and our great ones, and they misled us to the (right) path.'"

The stories of the masses who have easily been cheated and misled by some corrupted and irresponsible
religious, political and intellectual leaders are noticeable in almost every period of human history. This Qur'ānic verse warns that imitating those leaders without investigating the real nature and direction of their leadership might cause grievous harm to the imitators.  

The above Qur'ānic verses have been utilized by Muslim scholars and reformers to invalidate taqlid in order to eradicate its roots from society.

V. The A'īmma's Prohibition of Imitating Them

The founders of the prevalent juridical schools which became prevalent, are also claimed to have prohibited people from imitating them in all of their opinions. Abū Ḥanīfa is narrated to have said, "This is my own view which is the best of what I could see. If anyone could bring forth a better view than it, we would accept it."  

Mālik is reported to have said "I am only an ordinary human being who may be right or wrong. Therefore please examine my opinion in the light of the Qur'ān and the sunna."
Al-Shāfi‘ī said, "If a hadith (can be proved as) authentic, you should turn my opinion down."62 And in the same vein he says, "The Prophet's hadith is more appropriate (to be followed) and do not imitate me."63

Aḥmad b. Ḥanbal urged, "Do not imitate me, Mālik, al-Shāfi‘ī or Sufyān al-Thawrī, but learn (the religion) as we have done."64 He also said, "Do not imitate people in (the matters of) your religion."65

Nevertheless, in spite of the efforts which have been undertaken to eliminate taqlid, it still exists.

VI. The Justification of Taqlid

In an attempt to define their stance, the upholders of taqlid have exploited certain Qur'ānic verses, several ahādīth and the traditions of the sahāba. Ibn Ḥazm, however, rejects this attempt describing those who are using these evidences to justify taqlid as being confused.66 This approach has been followed by al-Shawkānī who selects several of these evidences and briefly discusses them.67 The followings are the main evidences which have been exploited in justifying taqlid and Ibn Ḥazm's replies:

"Follow the religion of Abraham, the same in faith."68
Here the supporters of taqlid have failed to perceive its real nature, which is following any person whom God does not enjoin us to follow. Although following the Prophet Abraham is enjoined by God, it does not imply any obligation to follow Malik, Abu Hanifa, al-Shafi'i, and other people.

“Obey God, and obey the Apostle and those charged with authority among you.”

This verse should actually be used to nullify taqlid and not to justify it, because we are ordered by God to obey the people of knowledge in what they have transmitted of the sunna of the Prophet and not in other matters.

“If ye realize this not, ask of those who possess the message.”

Here God orders us to ask the 'ulama' to tell us about the knowledge of the Qur'an and the sunna that they have, not for them to legislate for us the religion which God does not authorize, out of their corrupted opinions and deceptive conjectures.

"Should not the believers all go forth together. If a contingent from every expedition remained behind, they could devote themselves to studies in religion and make the people aware when they return to them, that thus they may learn to guard themselves against evil."
This verse cannot be used in favour of *taqlid*, because God has never enjoined us to accept outright what has been said by the warner. But He enjoins us to accept their knowledge which they have obtained from the Prophet to whom God revealed the religion and not to accept what they have innovated or added in the religion from themselves.  

"Keep firm to my traditions and the traditions of the Guided Caliphs after me."  

Following those caliphs should be in what they have transmitted from the Prophet on which they have agreed, not in what have been achieved by their own minds which are not certain about the true rules of God and His Messenger. This is because disagreements sometimes occurred between those caliphs and there is no way to avoid the dilemma of falling in contradictions other than only accepting what has been agreed upon by them.  

"My companions resembles the (guiding) stars. Anyone of them have you followed, you would gain guidance."  

Ibn Ḥazm refutes this hadith by accusing it of being fabricated, because some of its transmitters were unknown and some were unreliable. He, furthermore maintains that it is impossible that the
Prophet has ordered Muslims to follow everything that the sahāba said, because the same thing had sometimes been seen as lawful by some of them and unlawful by others. One of several examples which have been mentioned by Ibn Ḥazm to indicate this contradiction is the case of selling crops in its unripened stage which is lawful according to ‘Umar and unlawful according to some other sahāba.**

The traditions of the sahāba which have been utilized to vindicate taqlid are, inter alia, what has been claimed of ‘Umar expressing his shyness (before God) about disagreeing with Abū Bakr,**¹ and ‘Abd Allāh b. Mas‘ūd discarded his own opinion in favour of ‘Umar’s.**²

These claims have been rejected by recalling their well-known disagreements in many cases. For instance, their disagreement in the distribution of the rural land of Iraq**³ about which we have had occasion to discuss earlier.**⁴ Ibn Mas‘ūd’s opinion differed from that of ‘Umar in the case of putting the hands on the knees in prayer.**⁵

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In order to get a clearer view of the subject, two different matters should be dwelt on: First, we have to differentiate between the prohibited kinds of taqlīd and that which is permissible. The latter is more appropriately termed as "following" rather than taqlīd. Secondly, we have to look carefully at the case of taqlīd by the common people who do not have the qualifications to employ their own īttihād.

VII. Taqlīd and Īttibāʿ

Regarding the first question, a demarcating line should be made to separate between taqlīd and īttibāʿ. Taqlīd according to the shariʿa, which is forbidden, is referring to a saying (or opinion) without accompanying it with any evidence, whereas īttibāʿ (the conscious following) is something which has been done with evidence. Īttibāʿ in religious matters is allowed, whereas taqlīd is forbidden. Therefore, in order to transfer oneself from the domain of taqlīd to the domain of īttibāʿ, one should try to acquire the evidence of the shariʿa in any religious matter which one wants to practise, because as has been agreed by the `ulamā', as long as a case is not clearly and convincingly perceived, it cannot be considered as knowledge, but it is a mere conjecture which is not sufficient for finding the truth. Thus the Qurʾān
gives a warning about the result of such habit:

"And pursue not that of which thou hast no knowledge; for every act of hearing, of the seeing, or of (feeling in) the heart, will be enquired into (on the Day of Reckoning)."

In the same vein, the Prophet is reported to have said: "Beware of conjecture, because it is the most deceitful speech."

Moreover, it is argued that, accepting an authentic tradition from the Prophet and (accepting) what has been enjoined by the Qur'an and (following) the consensus of the 'ulams is not considered as taqlid and should not be termed as such by anyone, because taqlid in its true meaning is accepting what has been said by anybody else rather than the Prophet without knowing its evidence.

Ibn al-Ḥājib expresses the same view when he says, "Referring to the Prophet and to the consensus of the 'ulams as well as a layman referring to mufta or a judge referring to a credible witness, are not considered as taqlid." Even Ibn Ḥazm agrees with this point of view when he remarks that "the one who follows the Prophet is not (considered as) a mugallid (imitator), because he has (already) fulfilled God's ordinance. But the real mugallid is the one who
follows other man rather than the Prophet in doing something that is not ordered by God." 

Likewise, al-Shafi'i, as it appears, does not consider asking for a legal opinion (istifta') and accepting the isolated tradition (khabar al-wahid) as taqlid.

VIII. Taqlid of the Ordinary People

As far as the taqlid of an ordinary person concerned, nearly all of the Muslim scholars regard it as permissible. Ibn 'Abd al-Barr highlights this point by saying, "All of these condemnations against taqlid are not, however, applied to the common people who should inevitably imitate the scholars in every incident which they faced due to their ignorance about religious evidence."

There is no disagreement among the scholars that an ordinary person (ammar) is bound to imitate the learned men and actually this is the class of people to whom the Qur'an refers when it says, "If ye realize this not, ask of those who possess the knowledge." As the jurists have agreed that the blind man should imitate other man upon whom he can depend if he feels doubtful about the direction of
the qibla, they have also agreed that a person ignorant in any religious matter should imitate a knowledgeable one."

Giving his opinion in this issue, al-Ghazālī argues, "It is a duty of ordinary people to ask for legal opinions and to follow the 'ulamā' because it is agreed that the sahāba did deliver fatāwā to the ordinary people without asking them to acquire (the qualification of) ijtihād. Moreover, to make such a demand, would lead to the destruction to humanity and civilization."'

Al-Āmidī is another jurist who has the same attitude concerning the taqlīd of ordinary people. In his al-Ihmām, he states, "The ordinary person and anyone who does not have the ijtihādic (or juridical) qualifications, even though he may procure some knowledge which is essential for ijtihād, should follow the guidance of mujtahids and accept their opinions. This is according to the most precise and recognized juridical view."' He adds, "The Qur'ānic verse which says, 'We found our fathers following a certain religion and we do guide ourselves by their foot-steps' should be interpreted as being directed towards the one who attains the ijtihādic qualification."' This means that it is the laymen's
duty to imitate others due to their inability to exercise their own *ijtihād* to recognize the rules of the *shari'a*, unlike the *muṭṭahid* who is capable of utilizing his mind in seeking those rules.¹⁰¹

According to Ibn al-Ḥājib, anyone who is not qualified to exercise *ijtihād* is bound to imitate another person whether he is an ordinary man or a man who has some knowledge which is required for *ijtihād*. This is because the Qur'ānic verse which says, "If ye realize this not, ask of those who possess the knowledge", includes anyone who does not have the knowledge. The *ʻulamā’* themselves were asking for religious opinions (from others) besides delivering them. Nobody protested against them, so that it can be understood as their consensus.¹⁰³

Therefore, since the period of the *ṣaḥāba* up to the emergence of the four *Sunnite* schools, people were following anyone of the *ʻulamā’* without there being any complaint by anybody.¹⁰⁴

Some *ʻulamā’* even go further and suggest that it is not appropriate for the layman to ask the *muftī* about the authoritative evidence of the religious opinion which he (the *muftī*) has delivered, nor should he query his opinion.¹⁰⁵ This differs from Ibn Ḥazm's
view and also what has been advocated by Imām al-Ḥaramayn that the mugallid is required to examine the person whom he is following; if he can give right answer for all questions, he can be followed, but if wrong answers are given for all or some questions, he should not be followed.106

Obviously, this condition is unacceptable, because, as Imām al-Ḥaramayn himself observes, the uneducated Arabs used to ask the mujtahids among the sahāba without examining them.107

It is furthermore ridiculous, because it is impossible for such an examination to be raised by the common people to the muftis or the learned men. Such an examination cannot be carried out except by a person who has gained the religious knowledge to the same degree as that of the mufti who has been asked the question.

Ibn Qayyim, in his criticism of taqlid, also has similar attitude. His rigorous objection is obviously concentrated only against those who accept the opinions of men when textual provisions are available, or against those who refuse to accept those provisions in favour of the sayings of their imitated person. In fact, Ibn Qayyim is not alone in this outlook, it is
shared by all the prominent scholars because the taqlid which they hold as permissible is only that of the ordinary people who are not acquainted with the textual provisions and the method of deducing legal rules from them. However, when these provisions are available, the learned and the ordinary people are equally obliged to follow them.  

Ibn Qayyim finally remarks that God has enjoined His servants to obey Him as far as possible. But if anyone is unable to recognize the rule of the sharī'ah, he is allowed to imitate others. In strengthening his view, Ibn Qayyim borrows several textual evidences which have been mentioned by Ibn ‘Abd al-Barr.

It is clear from Ibn Qayyim's statements that he does not make ijtihād obligatory for every person as he does not make taqlid also every person's duty, but he observes, as his teacher Ibn Taymiyya had previously done, that a Muslim has to obey God to the maximum of his effort, and if he is not capable of practising ijtihād, he should resort to taqlid which is in such a condition a permissible matter.

Perhaps, it would be advantageous to mention in this connection, that the ordinary person's taqlid does not in any way have any effect in lessening his
religious faith. The a'imma of the four Sunnite schools as well as the Muslim theologians, with the exception of al-Ash'arî, all agree on the adequacy of the muqallid's religious belief. This view is based on the belief that the Prophet accepted the faith of everyone even of the children; although it was not naturally the result of a mindful consideration."

Thus, what has been reported of the a'imma prohibiting other people from imitating them should be understood in the context as imitating in cases where textual provisions are available and the legal rules can be deduced from them.

Therefore, the polemic which has frequently been raised within the Muslim world around the question of affiliating to certain juridical school or not (al-Madhhabiyya aw al-lâmadhhabiyya) is, as a matter of fact, the polemic about a pseudo-problem which is not of much significance, because the real problem for the Muslim community, in this context, has not stemmed from following juridical schools, but has been caused rather by fanaticism toward anyone of them.
IX. The Consequences of Taqlid

The assertion that the gate of *ijtihād* has never been closed in any period of Islamic history does not, however, deny the indisputable fact that the Muslim world has undergone the period of indolence and stagnation during which *taqlid* has prevailed with its various negative consequences. Here are some of these consequences:

1. Juridical Fanaticism

One of the harmful outcomes of *taqlid* is fanaticism in favour or against a certain juridical school. Such a fanaticism is not actually a new phenomenon. Some of its manifestations have been recorded by many scholars in earlier days. Al-Ghazālī, for instance, speaks about the common people who were not only adamant about the religious views which they had received, but unreservedly abused fellow-Muslims who did not agree with them. According to al-Ghazālī, this fanatical attitude was not restricted to the masses, but was due to arrogance and rivalry of the jurists themselves.113

An example of this kind of fanaticism can be cited from what has been said by one of the Ḥanafite jurist,
Abū al-Ḥasan al-Karkhī, in his juridical epistle, "Every (Qur'ānic) verse which contradicts the views of our colleagues should be considered as abrogated or subject to a preferred alternative. However it may be better to be considered as *al-ta'wil* (the allegorical interpretation)\textsuperscript{114} as a way of reconciliation."\textsuperscript{115}

This means that al-Karkhī judges the texts according to the views of the Hanafite jurists, so that the relevant provisions have to be considered as abrogated or subject to preferred alternatives, or they have to be interpreted in such a way that suits the established views of the Hanafite jurists. Such an attitude could be produced only by the sort of mentality which believes that truth is entirely confined to the views of the scholars of his own school.

If al-Karkhī adopted such an attitude towards the Qur'ān and the *sunna*, could he be expected to take a tolerant manner towards the views of other jurists which contravene the sayings of the jurists of his own school?

The same stand of al-Karkhī can clearly be seen when he outlines the juridical method, "Whenever an incident took place about which no answer and
similarity that can be traced in the books of our colleagues, the researcher has to derive its answer either from the Qur'ān or the sunna or other sources..."116

Obviously that al-Karkhī suggests in this passage that a seeker of the rule of the sharī'a should first of all refer to the Ḥanafite books. If he can find the required rule in these books, he should not search for it in any other source, but should follow it. Only when he fails to find the needed answer can he turn to the Qur'ān, the sunna and other sources. Beside insisting on his notion of confining the ultimate truth in the Ḥanafite juridical writings, he also regards them as the first source to which one should refer in searching for the rule of the sharī'a, preceding even the Qur'ān and the sunna.

This trend came to pervade Muslim society. In our modern age, a lot of examples can be cited which verify the fact that this element still exists. In his introduction to Ibn Qudāma's magnum opus al-Mughnī, Sayyid Muḥammad Rashīd Riḍā, for instance, reports several incidents which took place at the end of nineteenth century and the beginning of this twentieth century. In one of these incidents, an Afghan Muslim of the Ḥanafite school struck another
man who was standing by his side in a congregational prayer because he had heard the latter reciting al-
Fātiha.

Another story is about a man who broke the index-finger of somebody else in a prayer because he had raised it during the tashahhud. Riḍā furthermore reports a story which happened in Tripoli, Lebanon, where a group of the Shāfi‘īite followers had approached the Grand Muftī who was the head of the ‘ulamā‘ and had requested him to divide the mosques between them and the Ḥanafites. The reason was, they had been allegedly branded as dhimmīs by a certain Ḥanafite jurist who had based his judgement on a disputed case which was then widely circulated, namely the invalidation of the marriage between a Ḥanafite man and a Shāfi‘īite woman, because her religious faith had been doubtful because of a Shāfi‘īite theological doctrine which permits a Muslim to say that "I am faithful if God so wishes" (ānā mu‘min in shā’ Allāh).

A similar attitude has been adopted by the Shāfi‘īite towards the followers of other schools. It is narrated, for instance, that some of the Shāfi‘īite followers were once asked about the rule of the shari‘a concerning food-stuff in which a drop of wine
had fallen. Their answer was that it should be thrown to a dog or to a Ḥanafite.\textsuperscript{120}

Another classical example of this outlook can be observed in the writings of an eminent Shāfi‘ite exponent, Ibn Ḥajār al-‘Asqalānī, who has arbitrarily presumed that the Ḥanafite follower who has not recited al-Fāṭiha during prayer is sinful,\textsuperscript{121} because the Shāfi‘ite school regards the prayer of anyone who does not recite al-Fāṭiha as being null.

A contemporary instance of this attitude has been narrated by Shaykh ‘Abd al-Jalīl ‘Īsā about an incident which took place at a big mosque in Cairo, where a very respectable ālīm who held an important post in the state declined to join a congregational prayer behind an appointed īmām who was a Shāfi‘ite follower.\textsuperscript{122}

Such manifestations sometimes turned into real strife. For instance, Ibn Kathīr narrated that an Egyptian ruler, al-Malik al-Afḍal Ibn Ṣalāḥ al-Dīn, determined in the same year when his death took place, 595 A. H., to drive the Ḥanbalites from his country. He also wanted to write to his brothers in other countries asking them to take the same decision.\textsuperscript{123}
More destructive than this was an incident which happened in the Iranian city of Isfahān as described by Yaqūt al-Ḥamawi, "... Destruction spread through every part of it due to many conflicts and fanaticism between the Ṣafāwī 'ites and Ḥanafī 'ites. Fighting broke out constantly between the two parties. When one party triumphed over the other, the latter's belongings were plundered, burnt and destroyed..."¹²

2. Exaggeration in Glorifying the A'imma

Perhaps, this manifestation is closely attached to the previous one, or it is one of its consequences. It is natural to be expected that a follower of a certain jurist will express his admiration for his mentor in one way or another. But some imitators have transformed this admiration into a kind of personality cult by interweaving legendary stories around their imitated a'īmma. Some of the admirers of Abū Ḥanīfa, for instance, narrate that their imām used to pray the five daily prayers with one ablution only in the course of forty-five years,¹²⁵ and he used to recite the whole Qur'ān in one raka'a only... and completed (reciting) it seventy thousand times in his death-bed!¹²⁶
One of the Ḥanbalite bigots states that a look from Aḥmad b. Ḥanbal is tantamount to one year of devotional acts.127 It is narrated also that during his (popular) trial, all his garments was removed from him except the trouser. Being severely lashed, his trouser got loosed about which he could not help but moved his lips (to recite certain prayer). Suddenly a couple of hands emerged from beneath him and re-fastened the trouser!128 Another implausible tale about Aḥmad b. Ḥanbal is what has been reported that ten thousand Jews, Christians and Magians were converted (to Islam) on the day of his death.129

3. Intellectual Stagnation and the Religious Men Ignorance

Another negative outcome of ṭaqālīd is that it hinders the imitator from utilizing his intellectual faculty independently. This leads, subsequently, to the waning of creative talent. All that he could venture to do is just to repeat and elaborate the previous works in such a redundant and monotonous way. This intellectual impotence characterized the works of the Muslim writers for many medieval centuries which were used as the educational texts throughout the world of Islam. Describing this phenomenon, Professor Fazlur Rahman says that a major development that
adversely affected the quality of learning in the later medieval centuries of Islam was the replacement of the original texts of theology, philosophy, jurisprudence, and such, as materials for high instruction with commentaries and super commentaries. The process of studying commentaries resulted in the preoccupation with hair-splitting detail to the exclusion of the basic problems of a subject. Disputation (jadal) became the most fashionable procedure of "winning a point" and almost a substitute for a genuine intellectual effort at raising and grappling with the real issues in a field. 130

Muḥammad al-Khiḍari also describes the same view by saying that itihād during that period turned into a peculiar type distinguished for its tendency of gathering many issues together in a few words, so much so that the subjects became semi-mysteries as if they were written to be memorized rather than to be understood. 131

Al-Azhar University in Cairo which has often been considered as the most popular centre for Islamic learning in the Muslim world can be taken as our typical example in this respect. The spirit which has dominated instruction in this university for centuries has been severely traditional. The chief object of
the education which it imparts is not research and investigation for the purpose of improving the state of the sciences taught, but rather the transmission of these sciences as they were handed down by the early fathers of the faith, without change or deviation. It has only remained, therefore, for subsequent generations to elaborate and explain what the forefathers have laid down.\(^{132}\)

Various attempts have been made from time to time to reform both the curriculum and methods of study of al-Azhar, but always with indifferent success.\(^{133}\) Evidently these attempts to introduce a new spirit into al-Azhar only aroused contempt and opposition within that ancient institution.\(^{134}\)

The prominent Egyptian scholar and reformer, Muḥammad ‘Abduh, made a serious attempt to introduce an overall scheme of reformation of the Azhar in 1312 A. H./1895 C. E., during the reign of ‘Abbās Ḥilmi.\(^{135}\) The curriculum was one of the aspects which ‘Abduh gave particular attention in his plan for reformation of al-Azhar to which he added several modern subjects such as arithmetic, algebra, history of Islam, grammatical studies and the elements of geometry and geography.\(^{136}\)
This was nipped in the bud when reactionary forces gained the upper hand and the favourable attitude of the Khedive was changed into one of determined opposition to all (‘Abduh’s) proposed reform. Subsequently Muḥammad ‘Abduh himself, despairing of success, resigned from the Administrative Committee which had been formed for this purpose.137

The adherence of the Azharite ‘ulamā’ to the traditional methods of instruction and their unwillingness to accept any attempt to bring about reformation within their institution in response to the modern challenges and requirements have shown clearly that taqlīd has left its impact in their minds.

X. Taqlīd According to the Contemporary Muslim thinkers

The concern which some Muslim thinkers have suffered from the prevalence of taqlīd and intellectual deterioration which has come to their community can be vividly seen in the following words of one of them:

"Muslims, universally, had grown inert both mentally and spiritually... The 15th century was the last to reveal any real intellectual life among the followers of Islam... In the 16th century, the indolence of mind, slavish
pedantry and blind imitation became complete. One does not find even one in a hundred among the 'ulamā' of the last four centuries who may, with justice, be called a genius or who may have produced anything to set beside the bold and noble intellectual activities of earlier centuries. 

According to those thinkers, this phenomenon has come to pass in the history of the Muslim people against their own will. For Muḥammad ‘Abduh, this has occurred by the encouragement of the ignorant rulers and under their protection in order to serve their own interest. 

Aḥmad Amīn gives clearer expression of this attitude in various occasions. In Fayḍ al-Khāṭîr he maintains that:

"The closing of the gate of ġiṭḥād was never decided in any meeting of our 'ulamā', but was only as a result of psychological and sociological situation, i.e., the Tartar invasion on Baghdad and their brutal treatments of the Muslim community. In such a desperate condition, those 'ulamā' could not be expected to aspire to do more than to preserve the juridical heritage of the a'imma. And this has been termed as "the closing of the gate of ġiṭḥād" which we now want to re-open." 

In his another work, Yawm al-İslām, he bluntly blames this "mental slumber" as being responsible of the present backwardness of the Muslim people. He says that the Muslims have suffered from incapability
as a result of their own decision to close the gate of *ijtihād*, for this implies that there is no one in the community who can fulfil the *ijtihādic* pre-conditions just as no one can be expected to fulfil them in the future. This decision has been maintained by some imitators because of a lack of confidence in their own capability and a mistrust in others.¹⁴¹

He goes on to say that those who closed the gate of *ijtihād* or opened it limitedly, have caused Muslims serious harm and petrified rigidity. Religion will never be able to survive in the course of centuries without having flexible characteristics.¹⁴²

Refusing to acknowledge the closing of the gate of *ijtihād* as an imperative stage in Islamic legal development, the great Muslim thinker and poet, Muhammad Iqbal, observes that:

"The closing of the door of *ijtihād* is pure fiction suggested partly by the crystallization of legal thought in Islam, and partly by that intellectual laziness which, especially in the period of spiritual decay, turns great thinkers into idols. If some of later doctors have upheld this fiction, modern Islam is not bound by this voluntary surrender of intellectual independence."¹⁴³
Conclusion

The 'ulamā' never ceased to employ *ītīhād* in almost all periods of the Islamic history. But Islamic jurisprudence began to decay after the fourth century of hijra and the wave of *taqlīd* began to occupy the Muslims' mind. *Taqlīd* is actually unjustifiable in Islam. But in spite of strong condemnation by certain 'ulamā', it prevailed in the Muslim community for many centuries. Even in our modern time, Muslim scholars and thinkers have been taking great pain to liberate their people from the yoke of *taqlīd* and to call for the 'ulamā' to regenerate *ītīhād* in order to bring their religion and society to cope with the modern world.
CHAPTER: III


2 Ibn Manṣūr, Lisān al-ʿArab, III, (Cairo, 1300 A. H.), article gallad, p. 369.

3 I. e., the Qurʾān, the sunna, the juridical consensus and analogy.


6 J. Schacht, An Introduction to Islamic Law, pp. 70 - 71.


10 J. Schacht, op. cit., p. 70.


12 Ibid, loc. cit


16 Ibid, II, p. 126.

17 See ibid., III, p. 102, see also Shams al-Dīn al-Dhahabī, Tadhkiraṭ al-Huffāz, III, (Hyderābād,


19 See vol. IV, p. 1296.


23 ʿIʿlām, I, p. ḥ.


26 See *ibid.*, pp. 20 - 23.

27 See Ḥujjat Allāh al-Bāligha, II, p. 190.

28 The well-known view in this respect is that men are prohibited outright from using gold by way of ornament, whilst women are allowed to use a small portion of this precious metal for the ornamental purpose. However, nothing has been agreed upon as the norm which differentiates the allowed quantity from the disallowed quantity. It seems that this is left to the convention.


30 See *ibid.*, pp. 44 45.


33 Printed in Cairo in 1347 A. H.

34 *Ihkām Hz.*, VI, pp. 857 - 858.

35 Q. XXIX, 41.

36 *Ihkām Hz.*, VI, p. 841.
256

37 Q. XXXIII, 67.
39 Ibid., I, p. 70.
40 Ibid., p. 66.

42 Ibid., II, p. 192.
44 Ibid., p. 192.

48 Q. IX, 31.

51 Q. XLIII, 22, 23.

53 Q. XXI, 52, 53.
54 Ahmad Muṣṭafā al-Marāghī, Tafsīr al-Marāghī, XVII, p. 44.
55 Q. II, 166, 167.
57 Q. XXXIII, 67.
58 See Ihkām Hz., VI, p. 842.


63 'Abd al-Ra'ûmân b. Abi 'âsîm al-Râzî, Âdâb al-Shâfi'i wa Manâqibuh, (Cairo, 1372/1953), pp. 68, 93.

64 Iżlâm, II, p. 201, Shâh Wali Allâh al-Dehlawi, op. cit., loc. cit.

65 Iżlâm, II, p. 211.

66 See Ihkâm Hz., VI, pp. 793 794.

67 See al-Shawkânî, al-Qawl al-Mufîd, pp. 3 - 12.

68 Q. III, 95.

69 Ihkâm Hz., IV, p. 801.

70 Q. IV, 59.

71 Ibn Ḥazm's interpretation of "ûlûm al-amîr" as people of knowledge is a matter of dispute. Ibn Kathîr suggests the true meaning of the word here is those (within the Muslim community) who have been entrusted in safeguarding and fulfilling their affairs either they are rulers, military leaders, judges, etc., whose commands the Muslims are obliged to obey as long as they are in conformity with the Islamic tenets. See Ibn Kathîr, Tafsîr al-Qur'ân al-‘Azîm, I, pp. 516 - 518.

72 Ihkâm Hz., IV, p. 808.

73 Q. XXI, 7.

74 Ihkâm Hz., IV, p. 838.

75 Q. IX, 112.

76 Ihkâm Hz., IV, p. 836.


78 See Ihkâm Hz., IV, pp. 805 - 806.

See *Ihkām Hz.*, pp. 810 - 811.

Ibid., pp. 798, 845.

Ibid., p. 794.

Ibid., p. 798.

See supra, ch., II, pp. 143 - 144.

*Ihkām Hz.*, p. 794.

Ibn 'Abd al-Barr, *op. cit.*, II, p. 117.


Q. XVII, 36.

Bukh. VIII, p. 35, Muslim, XVI, p. 118.


There are certain regulations regarding delivering religious opinion (*iftā‘*) and requesting it (*istīftā‘*) on which we are not intending to dwell here. One work on this subject is "*Sirāt al-Fatwā wa al-Muftī wa al-Mustāftī*", by Ahmad b. Ḥamdān al-Ḥarrānī, ed. Muḥammad Nāsir al-Dīn al-Albānī, published in Beirut and Damascus, 1980.


Q. XVI, 43, XXI, 7.


100 *Ihkām Ām.*, p. 310.


102 Q. XVI, 43, XXI, 7.


105 Ibn Taymiyya, *Musawā*, p. 554

106 See *Burhān*, II, pp. 1241 1242.


109 See, *Jāmi‘ Bayān al-Ilm wa Fadlīh*, pp. 133 150, it seems that discussions about the blameworthiness of taqālīd by Ibn Qayyim in *Iṣlām* and al-Shawkānī in *Radd* have been taken much from this earlier work of Ibn ‘Abd al-Barr.


112 One of the most recent examples of this kind of argument took place between Dr. Muḥammad Sa‘īd Ramaḍān al-Būṭī and a group of Muslim scholars headed by Shaykh Nāṣir al-Albānī. Dr. al-Būṭī eventually published a book entitled *“al-Lāmadhhabīyya Akhtar Bid‘a Tuhaddid al-Shari‘a al-Islāmiyya”* (Disaffiliating Attitude, the Most Dangerous Invention Which Threatens the shari‘a) in response to another book known as *“Bid‘at al-Ta‘ассub al-Madhhabī”* (The Invention of the Juridical Fanaticism) by a less known writer, Muḥammad ‘Ayyād ‘Abbāsī whom has allegedly been inspired by Shaykh al-Albānī.

A kind of interpretation which diverts the meaning of a certain textual provision from its direct and immediate meaning for a certain reason.

Abū Ḥasan al-Karkhī, Risālat al-Karkhī, printed along with al-Dabūsī’s Taṣīs al-Nāṣar, (Cairo, 1st edition), p. 84.

Ibid., p. 86.

On the different views of the four Sunnite schools regarding this question, see ‘Abd al-Rahmān al-Jazīrī, Kitāb al-Fiqh ‘alā al-Madhāhib al-Ārba’a, I, pp. 228 - 230.

Tashahhud: The worshiper’s recitation of certain invocation while in quḍūd or sitting posture in prayer.


This is probably a sarcastic hint to a classical indictment against the Ḥanafite school permitting an intoxicant drink. See al-Khaṭīb al-Baghdādī, Tārīkh Baghdād, XIII, p. 201.


Ibid., p. 354.

See ʿĀḥmad b. Ḥanbal’s biography in al-Musnad, ed. ʿĀḥmad Shākir, I, p. 102.


136 See *ibid.*, p. 75.

137 See Muḥammad Rashīd Riḍā, *al-Manār*, VII, pp. 235, 236, see also *ibid.*, p. 78.


140 Aḥmad Amin, *Fayḍ al-Khāṭir*, IX, (Cairo, 2nd. den.), p. 100.

141 Aḥmad Amin, *Yawm al-Īslām*, (Cairo, 1952?), p. 190.


CHAPTER IV

IJTIHĀD AND REFORMATION OF
THE MUSLIM SOCIETY IN THE MODERN WORLD

1. The Challenges of the Modern World

The empirical method which Western scholars have followed in their research and learning since the age of enlightenment has brought about a tremendous change in science and technology which has, in turn, spurred on the advance of economic, industrial, political and social life of the Western nations. The Muslims have suddenly felt that they have been left far behind in the civilizational competition. Some of them have called their people to assimilate indiscriminately Western civilization to their live and to bring about similar change, whether good or bad. On the other hand, other Muslims have demanded the total rejection of Western civilization and called upon their people to go back to the early period of Islam from where they should seek the model of the ideal society that they hope to re-mould.

However, certain Muslim thinkers, who may conveniently called reformers, have shown a selective tendency, i.e., to select from the West whatever they
considered as constructive and beneficial for the Muslim community. They follow a hadith in which the Prophet is reported to have said: "Wisdom is the believer's lost property, wherever he may find it, he should regain it." In order to reform the present situation of the Muslims as well as to adjust their religion to the civilized world, those reformers have constantly advocate the reactivation of ijtihād. In doing so, they reject completely the notion which suggests that ijtihād cannot be employed by the contemporary ulamā'. They stress that the exercise of ijtihād in our time is much easier than the time of the a'īmda, because many Qur'ānic exegesis and the collected sunna have been published, so that long journeys to Egypt, Andalusia and Hijāz may be replaced by studying books. In addition, modern civilization has presented the Muslims with a multitude of divisional cases. New transactions have usually varied from those of the old ones. Therefore, they argue that, as long as the Muslims do not face these new issues by exercising the absolute ijtihād, they will remain backward in this life.

For those thinkers, the abundant juridical heritage which the Muslims have inherited from their ancestors cannot guarantee their success in coping with new developments. This is because the previous
jurists and 'ulamā', as remarked by Abū al-‘Ālā Mawdūdī, were not more than human-beings and had the same means of acquiring knowledge as those accessible to all men. No revelation was sent down to them, but they exploited their own intellectual ability and mental perception to explore the Book of God and the sunna. The itiḥāds of earlier scholars nonetheless, can be used as guidance, but should not to be taken directly as sources (of the religion). Any itiḥād cannot be regarded as a permanent law and a binding principle, because human thought and knowledge are forever limited within the bounds of time.  

They consider that the Muslims have to accept that the world has gone through tremendous changes. Admitting this, Mawdūdī remarks:

"Ideas, inclinations and theories in this world have undergone great change. Similar phenomena have taken place in modern issues and affairs. The 'ulamā' still imagine as if they are living in the same milieu as five or six centuries ago... They have remained immobile and unaffected by modern progress, heedless of new problems and issues of this life. They have not only been trying to hinder their people from adjusting themselves to the new age, but also pulling them back to the past instead of pushing them to the future.... How can it be for a community which lives in and deals with this world, yet is still unaffected by its new ideas and issues?"
Mawdūdi maintains that blind imitation of the preceding mufassirīn and muhaddithīn and taking the ijtihāds of the previous jurists and theologians as a permanent and unchanging law are the real causes that interrupted the progress of Islam and forced it into retrogression instead of moving forward.6 He furthermore argues:

"This reactionary attitude of the ʿulamāʾ has stired a certain faction within the Muslim community itself to revolt against religion and accuse it of being the greatest obstacle which stands in the face of development."7

Therefore, they argue that intelligent and persistent efforts are urgently needed by Islam today to find out juridical solutions in international, constitutional and administrative fields and to deal with new developments in financial, commercial, professional and other sectors.8 The Muslims will never be able to exercise their leadership in public life and to prove their fitness, and their religion effectiveness to serve for the benefit of this world, unless they exert themselves to the utmost in these domains.9

However, those thinkers agree that ijtihād cannot be carried out haphazardly. In order to avoid confusion and disarray, the door should not be opened
for any pretender who might create disorder and spoil the goal. Only certain kinds of mujtahids are needed; the kinds that possess precise and profound understanding of Islam and civilization and are thus able to apply this understanding to the religion, while taking reason and public interest into consideration.  

Understanding the religion only is not adequate to insure the success of ijtihād in this modern age, because understanding modern civilization also is equally important. History has proved that successful reformers like Jamāl al-Dīn al-Afghānī, Muḥammad ʿAbduh, Madḥat Pashā and Amīr ʿAlī, succeeded in their reforming tasks to the same degree as their understanding of modern civilization. But a reformer like Muḥammad b. ʿAbd al-Wahhāb was left behind, his doctrines did not spread widely and only suited the Arabian Peninsula, because he understood only Islam but did not understand other facets of life.

Moreover, the exercise of ijtihād in this modern time does not mean relying completely upon human mind or blind imitation of foreigners, but it means rather exercising it by qualified scholars who understand simultaneously the objectives of Islam and the objectives of western civilization and base the
Islamic rules regarding lawful and unlawful matters on this understanding. 12

Due to the intricate situation which has been induced by modern life, perhaps, individual *ijtihād* is no longer effective in searching for legal solutions in the time of ours. Collective *ijtihād* or *ijmāʿ* is perhaps more necessary and more practicable for this purpose. Especially, as Iqbal says, the pressure of new world forces and the political experience of European nations are impressing on the mind of modern Islam the value and the possibilities of the idea of *ijmāʿ*. 13

Hence, Iqbal believes that the transfer of the power of *ijtihād* from individual scholars to a Muslim legislative assembly is essential in order to restore the Islamic legal system and to enable it to play its vital role in these modern times. 14

Political intervention seems to be responsible for the vanishing of this collective *ijtihād* in Islamic history. Expounding his view in this regard, Iqbal says:

"Possibly its transformation into a permanent legislative institution was contrary to the political interests of the kind of absolute monarchy that grew up in Islam immediately after the fourth Caliph. It was, I think,
favourable to the interest of the Omayyad and the 'Abbaside Caliphs to leave the power of *itiḥād* to individual *muttaḥide* rather than encourage the formation of a permanent assembly which might become too powerful for them."

He goes on to suggest that the *ʿulamāʾ* should form a vital part of a Muslim legislative assembly, helping and guiding free discussion on questions relating to law. The only effective remedy for the possibilities of erroneous interpretations is to reform the present system of legal education in Muḥammadan countries, to extend its spheres, to combine it with an intelligent study of modern jurisprudence.

II. The Negative Attitude of Sayyid Quṭb

The late Sayyid Quṭb, one of the most popular Muslim scholars in this century, has a somewhat peculiar idea regarding the question of re-emphasising *itiḥād* in the contemporary world, when he rejects any attempt to exercise *itiḥād* in order to present Islamic juridical solutions for the contemporary problems. This attitude is clearly visible in two of his books, *Maʿālim ʿl-Tartīb* (Milestones) and *al-Islām wa Mushkilāt al-Haḍāra* (Islam and the Problems of Civilization).
According to Sayyid Qutb, any attempt to introduce Islamic legislative and juridical rules in this contemporary society, which is un-Islamic for not taking Islam as its way of life, is not in any way a serious effort and inappropriate to the earnest spirit of Islam and to the realistic nature of its method.18

He proceeds to argue that any attempt to promote and develop Islamic jurisprudence in a situation which does not fundamentally recognize the sovereignty of Islam is actually nothing more than a process of sowing seeds in the wind.19

It is illogical to look for Islamic solutions for any un-Islamic society which has had its problems because it has not recognized the sovereignty of Islam; or because it abandoned Islam if it ever recognized it before.20

In Sayyid Qutb's vision, Islamic jurisprudence is something inseparable from the *shari'a* as the latter also is inseparable from Islamic *aqīda*, for jurisprudence, *shari'a*, *aqīda* and system of life have formed the integrated parts in Islamic weltanschauung.21 The true Islamic society is the one that accepts Islam for its way of life, that allows Islam to govern all its spheres of life and calls for
Islamic solutions for its problems after surrendering itself completely to Islamic rules.22

Abū Bakr, ʿUmar, ʿAlī, Ibn ʿUmar, Ibn ʿAbbās, Mālik, Abū Ḥanīfa, Aḥmad b. Ḥanbal, al-Shāfiʿī... Ibn Taymiyya, Ibn Qayyim, ʿIzz al-Dīn b. ʿAbd al-Salām and their likes, could deduce Islamic rules because firstly, they were living in an Islamic society which submitted all of its affairs to be ruled only by Islam and accepted Islam alone as its way of life. Secondly, they were practising Islamic āqīda and its way in their own personal lives... They were facing problems and searching for their solutions in the light of their Islamic experience. Thus they fulfilled both of the fundamental pre-requisites for the establishment of the Islamic jurisprudence and its evolution to face ever-developing situations, beside, of course, their accomplishment in the iltihādic qualifications.23

Sayyid Quṭb, in order to show respect for Islam and its seriousness, rejects the act of consulting Islam in any problem which has been faced by the present societies. He considers those who come forward for such a consultation and those who give their answer to it as equally jokers! Islam would
aptly be consulted when it becomes the only way of life, i.e. on the establishment of Islamic society.24

A review of the opinions of Muslim writers since the day of Muḥammad ‘Abduh, may reveal that Sayyid Quṭb is the only Muslim thinker, in this modern age, who has adopted such an attitude towards Islamic jurisprudence and its revivalism. All other Muslim thinkers and scholars have attempted to display the beauty of Islamic system and its ability to solve the problems of contemporary society in a satisfactory way. All of them agree to and call for the exercise of *ijtihād* in order to find Islamic solutions to contemporary problems.

The late ‘Abd al-Qādir ‘Awda25 is one of those scholars who have striven to explain the vitality of Islam and its viability in this modern age. His ideas about Islamic jurisprudence and the ‘ulamā’'s roles in its revivalism are in complete contrast to those of Sayyid Quṭb. In his preface to his booklet, *al-İslām bayn Jahl Abnā’ih wa ‘Aţz ‘Ulamā’ih* (Islam Between Its Ignorant Followers and Incapable Scholars), he suggests that the best service a Muslim can render to his brethren is to educate them in Islamic jurisprudence and to reveal to them those precepts which they do not know.26
In another place he criticizes those who received a sound Islamic education and who are bent on restoring the lost treasure of Islam for spending most of their time in performing their rituals of worship or preaching to others. He suggests that had they enlightened their Muslim brothers about their abandoned jurisprudence and reminded them of their alien laws which contradicted the legislative and juridical decisions of Islam, they would have done well for themselves and for their religion. 27

Although the desired Islamic society is not available nowadays, nothing should impede Muslim jurists from coming forward and exercising *i*tihād in order to explain the rules of the *shari‘a* in certain economic, social and political issues which have been practised by present societies, because most of the new emerging cases and problems are actually the result of social development and modern technological progress. They are therefore the problems of modern societies, whether they are Islamic or not. Hence, Islam is required to put forward its solutions to, and remedies for, these problems.

So, consulting Islam about the problems which have been faced by the contemporary societies is not ridiculing or disdaining Islam. Some people are
requesting Islamic rules in order to decide their own stance towards modern transactions such as banking, insurance, sharing cooperation, zakât, etc. Some would like to know about the characteristics of the desired Islamic society and so forth.

III. Westernization of the Muslim Legal Code

The absence of *ījtihādic* activities during these later centuries has created a vacuum. Western influence in this respect seemed unavoidable in order to fill the gap and to meet the legal requirements of the Muslim societies.

Close contact between the West and the East during colonial era was naturally the main factor of the infiltration of western thought into the Muslim world. Replacement of the *shariʿa* by positive law was perhaps one of the obvious phenomena of this infiltration. In the case of Ottoman Empire, the *Tanzimât* reform which took place between 1839 and 1876 was the first example of this large-scale reception of European law. This happened in many steps. The criminal field which includes *qisas* (the law of equality) and *hudud* punishments for adultery, slanderous allegations of unchastity, theft, intoxication, apostasy, revolt against legitimate Islamic authority and high-way
robbery laid down by the *shari'a* was the first target of this legal westernization of the law when the *shari'a* was superseded by the Penal Code of 1858 which was a translation of the French Penal Code, except that it included death penalty for apostasy.\textsuperscript{30} The effect of this law in all of the Muslim countries, which were by then under the Ottoman domination, was one section of Islamic jurisprudence ceased operation.\textsuperscript{31}

In civil transactions, the Ottomans, nonetheless, still implemented Islamic jurisprudence according to the Hanafite school, and these were composed, as will be seen later, in what has been known as "*Majalle-i Ahkâm-i 'adliye*, or the Corpus of Juridical Rules, and were practised by all countries of the Ottoman Empires.\textsuperscript{32}

Meanwhile, Egypt, which attained its juridical independence within the Ottoman Empire in 1874, did not adopt the *majalle* rules, but the Khedive Isma'\textsuperscript{3}il Pâshâ ordered the translation of the French "Code of Napoleon" and applied it in his territory.\textsuperscript{34} This included Penal, Commercial and Maritime Codes.\textsuperscript{35}

As a result of these initial steps taken during the Ottoman period, laws of European origin today form
a vital and integral part of the legal systems of most Middle Eastern countries. 36

Since the completion of the French conquest in 1850, the Muslim population of Algeria has been subject to exactly the same codes of criminal and civil law as have been currently in force in France. Dutch public and penal laws were similarly imported into Indonesia from the nineteenth century onwards. 37

In the Malayan Peninsula, Islamic law was submitted to the forms and process of the English judicial system which re-defined 38 and, in some cases substantially altered Muslim principles. 39 The only area of legal code where the sharI' a is being practised now is "personal laws" which are judicially defined exceptions to the general law for the population which was and is English law. 40

In 1862, the Indian penal code - a codification, for export, of English criminal law - and the code of Criminal Procedure came into force to supersede what remained of the Islamic criminal law. Civil law, meanwhile, had become increasingly anglicised for British judges, and Indian judges trained in English law, inevitably resorted to the introduction of English rules as a result of both their desire for
uniformity in the law applicable to a very mixed population and the general difficulty they experienced in properly ascertaining the terms of Islamic law from the authoritative Arabic texts. 41

Substantially the same position came to prevail in the Sudan about this time under the Anglo-Egyptian condominium. 42 Ottoman Law was ousted in favour of that principle of "justice, equity and good conscience". However, in matters of family law, on the other hand, a whole series of reforms have been effected in the Sudan in recent years much along the line of those adopted in Egypt. 43

The Muslim territories of Morocco, Tunisia and Northern Nigeria preserved their traditional system of Islamic law virtually intact until very recent time. Only in the last few years has French law been directly adopted in these countries, for example in the Criminal Code promulgated in Morocco in 1954, in the Code of Commerce (1960), Civil and Commercial Procedure (1960) and Maritime Commerce (1962) enacted in Tunisia. 44

In Northern Nigeria, a new Penal Code was promulgated in 1959 and followed by a Code of Criminal Procedure in 1960. 45
Only the Arabian Peninsula remained generally immune from the influence of European laws. Here in Saudi Arabia, the Yemen, the Aden Protectorate and the Hadramaut and the various principalities of the Persian Gulf, traditional Islamic law has remained the fundamental law up to the present day. 46

Islamic jurisprudence in personal status has, however, persistently been practised throughout the Muslim world where special courts have been set up for this purpose. 47 This aspect has never been violated except in the form of merging it with the Civil Court in Egypt, 48 although it continue to have its own domain. 49

IV. Harbingers of New Legal Activities

1. Majalle-i Ahkām-i 'Adlyye

The Islamization of the Ottoman Turks was an event of far-reaching importance in the history of Islamic law. Having entered Islam recently, and being free from the restraints of history, they took Islam more seriously than those peoples who had professed it for a long time. 50 In Bernard Lewis's words, from its foundation until its fall the Ottoman Empire was a state dedicated to the advancement or defence of the
power and faith of Islam. It was the Ottoman administration which summoned a group of eminent ‘ulamā’ and ordered them to codify the civil code which should be derived from the Islamic jurisprudence, even from unestablished schools as long as their rules would be in conformity with the spirit of the time. Responding to the summons, the ‘ulamā’ had their assembly in 1286 A. H., where they codified the law which has been known as "Majalle-i Ahkām-i ‘Adliyye" and came into force in 1293 A. H. (1877 C. E.).

Although the Majalle or Majalla (as pronounced in Arabic and which will be the term used henceforth) according to Professor Schacht, was not used in the tribunals of the qādis as long as they existed in Turkey, it was, no doubt, one of the harbingers which at least pioneered the rudimentary efforts in re-activating ijtihād for the purpose of reconciling the sharī‘a with modern requirements. It is necessary therefore to shed some light on the Majalla with regard to its general characteristics, its contents and also its position in the modern Islamic legal activities.

Majalle-i Ahkām-i ‘Adliyye which means the Corpus of Juridical Rules had roughly the following items:
1. Introduction which defines the science of jurisprudence, its divisions and explains about juridical principles.

2. Chapters of various social transactions and every chapter has been preceded by the relevant juridical terms.

3. The Majalla contains sixteen books or articles.

4. Its juridical rules have been arranged in the form of short articles and (every article) has been restricted to a certain viewpoint only.

5. It's comprises of 1,851 articles.

6. Official enforcement was decreed to begin on 26th Shabban, 1293 A. H. (1877 C. E.).

7. Seven jurists participated in drafting it. 

The books or articles pertaining to the civil transaction which the Majalla comprehends are as follows: the Book of Sale, the Book of Hire, the Book of Guarantee or Suretyship, the Book on Transfer of Debt, the Book on Pledge and Mortgages, the Book on Deposit and Trusts, the Book of Gift, the Book of...
Wrongful Appropriation and Destruction, the Book of Interdiction, Constraint and Pre-emption, the Book on Joint Ownership or Partnership, the Book of Agency, the Book on Settlement and Release, the Book on Admissions, the Book on Actions, the Book of Evidence and Administration of Oath, and finally, the Book on the Administration of Justice by the Courts.\(^6\)

The Majalla was mainly derived from the book of Zāhir al-Riwaya in the Ḥanafite school (Written by Muḥammad b. al-Ḥasan). In case of conflict between the view of the Great Imām (Abū Ḥanīfa) and his companions, the Majalla adopted those opinions which conform to the needs of the age and public interests. In a few other cases the Majalla abandoned the views of Zāhir al-Riwaya and had recourse to other works (including views of the jurists of other schools).\(^6\)

Contrary to other compilations of Islamic jurisprudence, the Majalla did not go into questions of religious observances or penal matters; its scope was restricted to the rules of law in Civil Transactions.\(^7\)
2. Other Legal Activities

Following a lot of public complaints about attachment of the Sharī'a Court to the Ḥanafite school, the Egyptian government introduced the law No. 25 of 1920 C. E., which contained some rules in personal status which were not in conformity with the school of Abū Ḥanifa, but did not deviate from the scope of the four dominant Sunnite schools.⁵⁶

A further advance was achieved when enactment No. 25 of 1929 C. E. was promulgated which contained some rules in personal status which, while contradicting not only the Ḥanafite school, but also the rest of the four dominant schools, did not go beyond the limit of the Islamic schools.

In 1936, the third step was taken when prominent 'ulamā' and legal experts were gathered together and ordered to introduce a comprehensive civil code which comprised personal status, waqf (religious endowment), inheritance, bequest, etc., on the condition that it would not attach to any certain school, but would choose juridical views which are the most compatible with the public interests and social development. This (comprehensive) civil code was promulgated and
became the official law of the state until the present days. 59

V. Wider Ijtihādic Endeavours

Those legal activities which, to certain extent, succeeded in revitalizing the "moribund" sherīʿa in many Muslim countries, were not however, sufficient, despite their contribution to the regeneration of ijtihād, to reform the decadent state of the Muslim societies in response to the needs of modern age.

These legal ijtihāds were still restricted to the selective method by which the previous juridical views were selected, especially those of the dominant schools, whereas the required ijtihād should venture to go beyond that. This has gradually taken place in many parts of the Muslim world especially since the second half of the last century.

1. The Wahhābiyya

It should always be borne in mind that when one makes an attempt to study any Islamic reformist movement in any period of Islamic history, one must not fail to note its connection with preceding movements. The Islamic reformist movements in the
modern time, whose initiative has usually attributed to Jamāl al-Dīn al-Afghānī and Muḥammad ‘Abduh, have, as a matter of fact, a close connection with previous movements particularly the Wahhābiyya which was founded in Arabia about two centuries ago by Muḥammad Ibn ʿAbd al-Wahhāb (1115 - 1206 A. H. / 1703 - 1791 C. E.). In his missionary efforts and reformist teachings, Muḥammad Ibn ʿAbd al-Wahhāb was, in turn, much influenced by Ibn Taymiyya; that great Muslim scholar and reformer of the seventh century of hijra, who in spite of his Ḥanbalite origin, saw that no Muslim is obliged to imitate any ālim in person just as he is not obliged as well to stick to what he has been told by anyone except the Prophet. 60

Although, according to Professor Schacht, Ibn Taymiyya did not claim ijtihād for himself, he was able to reject taqlīd, to interpret the Qurʾān and the traditions from the Prophet afresh and to arrive at novel conclusions concerning many of the institutions of Islamic law. 61

Apparently, Muḥammad Ibn ʿAbd al-Wahhāb was conversant with Ibn Taymiyya's thought through his study of the Ḥanbalite jurisprudence which had brought him to indulge in studying his books and writings. Hence, Ibn Taymiyya could be regarded as his mentor.
and intellectual guide who gave him inspiration for his *i'tiḥād* and reformation.\(^2\)

The pivot of Muḥammad Ibn ʿAbd al-Wahhāb's reformist effort was *tawḥīd* or the concept of the Oneness of God which was, as he noticed in his time, tarnished and contaminated.\(^3\) This *tawḥīd*, beside bearing its original and immediate implication of believing in One Creator and Sustainer of the universe, to whom only our prayer and religious observances should be directed, connotes that God alone is the Source of legislation.\(^4\) This implies that we are not bound by any saying of the *mutakallimūn* regarding theological belief and by any view of the jurists regarding the lawful and unlawful or nature of anything.\(^5\)

Muḥammad Ibn ʿAbd al-Wahhāb was not concerned with the material life of the Muslim people, but turned directly to *aqīda* (creed) and spirit which he considered as the foundation or the "heart" that would affect everything else in its soundness or otherwise.\(^6\)

The Wahhābism gained its momentum and was accelerated when its founder succeeded in influencing
Prince Muhammad Ibn Sa'Qd in the Nejd. The Prince pledged to support the Wahhābite movement and disseminate it throughout Arabia by preaching and, if necessary, by using force. 67

Although in a political sense the Wahhābite movement was crushed, 68 in its ideal aspect, in the challenge which it flung out to the contamination of pure Islamic monotheism by the infiltration of animistic practices and pantheistic notion, Wahhābism had a solutary and revitalizing effect, which spread little by little over the whole Muslim World. 69

The Kingdom of Saudi Arabia today is the living upholder of Wahhābism, or at least it claims to be so. 70

2. The Sanūsiyya

Another reformist movement which gave serious attention to re-shaping the Muslim mind was the Sanūsiyya in Southern Libya and equatorial Africa. Its founder, Muḥammad Ibn 'Ali al-Sanūsī (1202 - 1276 A. H / 1787 - 1859 C. E.), from whom the organization had its name, travelled several times to Mecca and resided there for years during which he studied Islamic jurisprudence and Sufism under several
'ulamā'. He also became acquainted there with Wahhabiyya to which influenced him; so that he began to propagate later similar ideas in Cyrenaica. 72

The Sanusiyya was popular and considered as unique for its educational and spiritual training centres known as zawāyā (sing: zāwiya) which were scattered along the Libyan borders. 73

In his book entitled ṭqāz al-Wasnān, al-Sanusi speaks about, inter alia, the obligation of following the Qur'ān and the sunna and preferring both to any opinion of the jurists. 74 He also calls for the exercise of ittiḥād and denounces taqlīd. He maintains that God and His Prophet have never made it obligatory for anyone to attach himself to any juridical school and from there imitate a certain ḫām only. He even considered attachment to the four established schools as an innovation (bid‘a) upon which no one of the a‘imma has agreed. 75

Politically the movement had its impacts in the form of resistance against western colonialism during the first half of the nineteenth century and also in establishing the modern State of Libya. 76
3. Jamāl al-Dīn al-Afghānī

The credit for the Islamic resurgence in the modern world is, however, due primarily to al-Sayyid Jamāl al-Dīn al-Afghānī (1254 - 1314 A. H. / 1839 - 1897 C. E.) who managed to awaken the Muslims from their long lethargy.

One of his cherished objectives was to establish a united Islamic government which will uphold the doctrines of Islam. But when he realized that the political authority of the Muslim community could not be controlled by a single leader, he was content only with advocating their solidarity in the sense that each one of the Muslim countries should take the Qur'ān as their guide and should take the principles of justice and mutual consultation (shūrā) as the basis of their governmental policies for which implementation they had to choose the most capable men among themselves.

All al-Afghānī's life was spent in searching for a Muslim ruler with whom he could work for the regeneration of Islam. Unfortunately he was disappointed by those rulers who were reluctant to use their power in the service of Islam, but were willing
only to see that he would rally Muslim sentiment behind their thrones. 79

Al-Afghānī considered that this state of deterioration of the Islamic world has been caused mainly by five following factors: First, fatalism (<i>jabr</i>) and misunderstanding of the doctrine of predestination (<i>al-qadā' wa al-qadar</i>) which have turned the Muslims away from being serious. Second, alien teachings which were successfully instilled by sacrilegious plots into Islam in the third and the fourth centuries, by which the Muslims' strength was weakened and their unity was torn asunder. Third, the sophistry which regarded the truths as illusions. Fourth, the fabricated <i>ahādith</i> which poisoned the spirit of work and pride and slacken the ambition. And fifth, shortcoming in educating the masses and in instructing them the principles of the religion. 80

In his relentless efforts to revive the intellectual vitality of the Muslim people, al-Afghānī maintained that the door of <i>ijtihād</i> had never been closed and asked: On which text the closing of the gate of <i>ijtihād</i> has been based? Is there any <i>imām</i> who ever said that none of the Muslims should exercise <i>ijtihād</i> after me in order to understand the religion? He goes on to observe that the Qur'ān was not revealed
but to be understood. So, anyone conversant with Arabic language, having intelligence, knowing the āra of the pious ancestors, the methods of ḥimās, knowing which of the rules can be inferred directly from the texts and which of them can be obtained through analogical method and knowing also the authentic ahādīth, is entitled to examine the Qur'ān from where he can deduce the legal rules as he can also obtain them from authentic ahādīth and through analogy. 81

Rendering the a'imma their due merits, al-Afghānī nevertheless adds that those a'imma employed īṭīḥād as best as they could do, but this should not make us imagine that they were acquainted with all the secrets of the Qur'ān or that they managed to write them down in their books. Despite their knowledge and despite their īṭīḥād and juridical inquiries, these were but a drop of the knowledge that the Qur'ān and the authentic ahādīth contain. 82

For al-Afghānī, it is a duty as well as a right for men to apply the principles of the Qur'ān anew to the problems of their time. To refuse to do this is to be guilty of stagnation (jumūd) or imitation (taqlīd), and these are enemies of true Islam. 83
4. Muhammad 'Abduh

Perhaps the most fertile land for al-Afghānī's ideas was Egypt where he managed to attract many ambitious and energetic young men as his disciples. After he had left Egypt, these disciples continued to put forward his reformist ideas in Egyptian life. The most prominent among them was Muḥammad 'Abduh (1266 - 1323 A. H. / 1849 - 1905 C. E.) who during his exile after the failure of the 'Urābī Revolution, joined his teacher in Paris where both organized a secret society of Muslims pledged to work for the unity and reform of Islam and published al-‘Urwa al-Wuthqā (Indissoluble Tie) as the organization mouthpiece.

However, al-Afghānī and 'Abduh were two distinct characters. While the former had a revolutionary temperament, the latter held that the education was the most effective way.

Generally, Muḥammad 'Abduh's reformist struggles had a three-pronged objective: Religious reform and liberating the Muslims' minds from the yoke of taqīd, linguistic reform which aimed to transcend the feeble and pedantic style which had been prevalent by that time, and political reform which he eventually he abandoned because of many obstacles that he had
encountered in its way from imperialists and despotic rulers."

With regard to the religious reform, 'Abduh laid down his objectives when he stated that by this he meant liberating religious thought from the shackle of taqlīd and understanding the religion according to the way that had been adopted by the ancestors before disagreements appeared, and acquiring religious knowledge from its primary sources."

'Abduh was, no doubt, dismayed by the condition of the Muslims' minds in his days when stagnation and taqlīd were spread everywhere. The supporters of stagnation had attributed the "sacred" characteristic of the religion to the thought of the dark period so much so that they had denied any thinking or ijtihād about it...."

Even al-Azhar, which is the most respectable Islamic institution for high learning in the Muslim world was not exception in this regard. The stagnation which was witnessed by this institution reached to the point where it could only recognize Islam in its gloomy version of the dark ages which had been embodied in the texts, commentaries and verbal elucidations. It took a hostile stance towards modern
sciences and refused to incorporate into its curriculum subjects such as logic, arithmetic, geography and history. Even the sciences developed and studied by earlier Muslim scholars, such as philosophy, astronomy, optics, mineralogy, medicine, music and zoology, were not included in its curriculum. 92

Muhammad 'Abduh spent a lot of efforts to reform this ancient institution 93 with regard to its administration, financial, scholarship, hygiene, etc. 94

Perhaps due to his firm conviction of the paramount position of human intelligence on one hand, and his abhorrence of taqlid on the other hand, 'Abduh suggested that those who wanted to interpret the Qur'ān should expel all the views of previous mufassirin and equip themselves only with knowledge of Arabic language, the circumstances of revelation, the Prophet's sīra, and the history of the world and nations upon which the Qur'ān has touched. This is because, in 'Abduh's opinion, the interpretations of those mufassirin were connected with the intellectual level and the degree of knowledge that they attained and was available in their intellectual atmospheres.
Hence, our minds should not necessarily cease at the point where they reached. 95

Never yielding to taqlid, Muḥammad ʿAbdūh did exercise ijtihād himself in various cases, especially when he became the Grand Muftī of Egypt.

5. Muḥammad Rashīd Riḍā

Muḥammad ʿAbdūh's ideas and reformist message were continued by many of his colleagues and disciples; the most outstanding of them was al-Shaykh Muḥammad Rashīd Riḍā who founded the popular journal, al-Manār (the Light-House) under ʿAbdūh's auspices. Through this influential journal, ʿAbdūh's ideas were spread out to a large number of readers within and without Egypt during his life and after his death. The last issue of the journal was published at the end of Rabiʿ al-Thānī, 1354 A. H. (1935 C. E.) 96

Other standing testimonies to Riḍā's earnest dedication to ʿAbdūh's ideas and teachings are his three volumes Tārīkh al-Ustāz al-Imām and his incomplete Qurʾānic commentary, Tafsīr al-Manār (twelve volumes). He also published al-Wahy al-Muḥammadi which could be described as a compendium of his views concerning various major religious issues.
It is mainly devoted to proving the truth of the Qur'ān, explaining its message and to refuting its enemies' arguments.

Riḍā's ardent stance in favour of ijtihād and against taqlīd is well-known, especially to the Muslim intellectual circles. In Riḍā's opinion, taqlīd and stagnation are not only inappropriate for the animated and intelligent human being,95 but also a crime against their innate, mind and conscience.96

6. Ahmad Muṣṭafā al-Marāghī

Muḥammad ‘Abduh had very few students from al-Azhar compared to those from outside it. The most notable among them was al-Shaykh Ahmad Muṣṭafā al-Marāghī (1881 – 1945)99 who was chosen by ‘Abduh himself as a judge in the Sudan and became the chief of the sharī‘a Supreme Court in 1923 and Shaykh al-Azhar in 1928.100

Al-Marāghī's remarkable scholarly contribution is a voluminous Qur'ānic commentary that bears his name, Tafsīr al-Marāghī in which his teacher's influence is clearly seen. Thus, his method of interpreting the Qur'ān does not resemble the "arbitrary" method which was traditionally followed by previous mufassirūn, but
is rather a contemporary method marked with preciseness and simplicity. This reflects the attitude of al-Marāḡī and his rational outlook towards religion. It is not surprising that he made a drastic amendments to the Egyptian Family Law by which it was no longer restricted to the Hanafite school as it had previously been, but based rather on selected views from various schools which suited the time and the place. He furthermore called for the exercise of *ʿiṭḥād* because the opinions of the predecessors in derivative cases are not identical with the revelation, but no more than the opinions that they thought could bring about *māṣlahah* in their particular period. In our days, *māṣlahah* was probably different. Al-Marāḡī also called to *ṭagrib al-Madhāhib*, i.e., reconciling various schools of jurisprudence and sectarian groups for which he had discussed with some Shiʿite leaders and met the Ismāʿīlī Aḥā Khan on 11th February, 1938.

Although al-Marāḡī does not seem to have practised *ʿiṭḥād* very much, his contribution in paving the way for re-exercising of *ʿiṭḥād* is evident. Consequently, efforts of al-Afghānī, ʿAbduh, Riḍā and al-Marāḡī have produced their fruits when several enlightened *ʿulamāʾ* have come forward to
give their views in various modern issues as we will see later.

7. 'Alī 'Abd al-Rāziq and Khālid Muḥammad Khālid

Perhaps it is necessary at this juncture to comment on the ḥijāḥīḍic attempts of two famous scholars from al- Azhar, Shaykh 'Alī 'Abd al-Rāziq and Shaykh Khālid Muḥammad Khālid which aroused an almost unprecedented uproar in the rank of the Muslim intellectuals, especially in Egypt. The former, who had studied for a time at Oxford and had been a Magistrate in an Egyptian sharī'a Court, published a book entitled al-Islām wa Uṣūl al-Hukm (Islam and the Bases of Political Authority) in 1925, in which he asserts that Islam is merely a religion but not a state (al-Islām Din ̀la Dawla)104 and the authority exercise by the Prophet had been a purely spiritual, having its source in the free, sincere and entire submission of the heart, whereas the authority of a political ruler is material which relies entirely upon the enforced submission of the body. The former aims to guide mankind towards God, whereas the latter aims to conduct the interests of the worldly life. The former is the religious leadership and the latter is the political leadership.105
Several Qur'anic verses have been utilized in consolidating this idea, such as:

"Remind them, for thou art but one who reminds. Thou art not at all a ward over them. But if any turns and rejects God, God will punish him with a mighty punishment." 106

"And We have revealed the Scripture unto thee only that thou mayst explain unto them that wherein they differ, and (as) a guidance and a mercy for a people who believe." 107

"But if ye reject (the Message), so did nations before you, The Messenger is only to convey." 108

The above political ideas of 'Ali 'Abd al-Râziq created a clamorous situation in the religious atmosphere of the Muslim world, especially Egypt, culminating in the author's trial before Hay'at Kibâr al-'Ulamâ' (the Board of the Great Muslim Scholars) and his expulsion from the 'ulamâ' community and the governmental profession on 22nd Muḥarram, 1344 (12th August, 1925). 109 The polemic around the book has incessantly echoed through successive generations until the present day.

Khâlid Muḥammad Khâlid's book, Min Hunâ Nabda' (From Here We Start) created another similar sensation.
As 'Ali 'Abd al-Rażiq, Khālid Muḥammad Khālid does not believe in the validity and necessity of the "Religious State". He observes that today we have been hearing a demand that we should go back to the religion, but to which religion do they call for?

He goes on to explain that there is a sort of devastating priesthood handed down to us from early generations. By using religious camouflage, this priesthood has been trying to exploit the people's loyalty to the religion and zealously squirting out its annihilative poisons; favouring for economic and social reaction, defending poverty, ignorance and sickness.¹¹⁰

In another place he remarks bluntly that we have seen the failure of religious theocratic government and therefore, we think that striving to re-establish it would mean a retreat to a suppressive autocracy!¹¹¹ In his view, religious government has now become an historical institution whose purpose have already been used up. It has no role to play in modern history.¹¹²

However, in 1981, Shaykh Khālid Muḥammad Khālid published a new book entitled al-Dawla fi al-Islām in which he withdraws his previous view on the Islamic state. He otherwise admits that the "wrong view-
point" which he previously had, was actually caused by strong impression of his readings on theocratic governments of Medieval Europe which exploited Christianity to strengthen their status quo and whereupon subjugated the masses to their own interests.\textsuperscript{113}

\section*{VI. Reformist Movements in Other Muslim Countries}

\subsection*{1. In Algeria}

The mission of al-Manār was echoed in many parts of the world of Islam where its party received support from like-minded groups, especially in North-West Africa, India and Malay Archipelago. In Algeria, an "Association of Algerian āli‘amā’\textsuperscript{114}" was organized to spread their doctrines, especially through the journal al-Shihāb (the Meteor), published in Arabic at Constantine under the direction of ʿAbd al-Ḥamīd Benbādis.\textsuperscript{115} In addition to printed and oral propaganda, the Algerians also set out to revive and multiply the elementary Qur'ānic schools in all parts of the country as a means of influencing the rising generation.\textsuperscript{116}
Benbâdis described taqlîd and narrow-mindedness as the intellectual maladies which have befallen Muslim society of later generations. Disputatious methods in theology and the doctrine of tawâkul, or reliance on fate, advocated by certain sufî orders were held responsible for such a deterioration.  

2. In Indonesia and Malaysia

In Indonesia and Malaya, al-Manâr's impact could be observed in many Islamic periodicals and other publications which emerged particularly during the prewar period. Perhaps al-Imâm (published in Singapore) and al-Munîr (published in Padang, Western Sumatra) are the best representatives of this impact. Both periodicals were widely circulated among the Muslim intelligentsia in the Malay Archipelago.

The first issue of al-Imâm (the Leader/the Guide) was published on 1st Jumâdâ al-Åkhir, 1324 A. H. (July, 1906) under the editorial of Shaykh Ţâhir Jalâl al-Dîn, a former Azharite student who was famous for his knowledge of astronomy. Shaykh Ţâhir was not only a constant subscribers to al-Manâr, but also he became one of the close friends of Muḥammad Rashîd Riḍâ.
Al-Manār itself refers to this particular contact. Rashīd Riḍā in his obituary of Sayyid Muḥammad b. Aqīl b. Yaḥyā mentions that a group together with the above Sayyid established a press and a magazine by the name of al-Imām "and he wrote to me to say that the aim of the magazine is to publicise the reformist aim of al-Manār in the Malay language and that they rely chiefly on what they translate from al-Manār."¹²¹

The fact that Al-Imām's had similar objectives to those of al-Manār became absolutely clear when it stated in its 12th issue, "Al-Imām is a mortal enemy of all sorts of bidʿa (religious innovations), superstitions, imitations and alien customs which intrude into the religion."¹²²

One of the typical instances of al-Manār's influence on al-Imām was the latter's attitude on ribā as conveyed in its 11th issue, which was obviously a translation of what had been published in the former.¹²³

Al-Munīr (the Enlightening), the other influential Islamic journal, was founded by several ʿulamā' of Western Sumatra on 1st April, 1911. It was intended to replace al-Imām¹²⁴ which had been forced to
terminate its publication by the beginning of 1909 C. E., due to financial problems.\textsuperscript{125}

The influence of al-Manār is also found in another powerful religious organization in Indonesia called Persatuan Islam (Muslim Unity) which was abbreviated to Persis. One of its important figures, Ahmad Hasan, when living in Singapore during his early years, came into contact with al-Manār, al-Īmām and al-Munīr.\textsuperscript{126}

Persis itself published Pembela Islam,\textsuperscript{127} al-Fatāwā, al-Liṣān and al-Taqwā as its periodicals which dealt with various religious questions.\textsuperscript{128}

It is furthermore said that Kijahi Ḥadji Ahmad Dahlan, the founder of the most popular Muslim organization in Java, al-Muhammadiyya was also in regular contact with al-ʻUrwa al-Wuthqā and al-Manār,\textsuperscript{129} although this does not necessarily mean that his reformist ideas and efforts had solely been influenced by these Middle Eastern journals.\textsuperscript{130}

Compared to that in Indonesia, the process of Islamic renovation in Malaysia appeared to be sluggish. This may be owing to the conservative and hesitant nature of the Malay society which has often made them less responsive to any drastic change.\textsuperscript{131}
Moreover, this renovative attempt has frequently revolved around trivial matters such as the question of "usulli" rather than substantial ones. The only Malay state which showed an enthusiastic response for this new call is Perlis, that smallest Malay state at the northern part of the Peninsula which can be regarded as the Kaum Muda (renovatists) stronghold.

However, the new Muslim generation in Malaysia have gradually shown a more sympathetic attitude towards renovative and reformist movements. The call for religious revitalization, has begun to gain ground in the country.

3. In the Sub-Continent of India

Turning to India, we have already seen that Šah Wali Allah al-Dehlawi, despite his Ḥanafite origin, had never confined himself to one juridical school only, but had managed to develop an inter-juridical eclectism by recommending that on any point of doctrine or ritual, a Muslim could follow the ruling of anyone of the four principle juridical schools, and that he founded a tradition of religious scholarship and a school which was to influence religious thought in Muslim India, fundamentalist and traditional as well as modernistic for the next three centuries.
In addition, Muḥammad Ḳiqbal's aforementioned ideas on *iḥtiḥād* also served as the guide.\(^{135}\)

Later, in nineteenth century, the *Ahl-i-Hadith* (the Followers of the Prophetic Tradition) was developed. Although its members may vigorously deny any connection with the Wahhābite movement, the spirit and the aims of this group appear to be identical with those of the Najd reformer. The organization was no doubt of earnest dedication since it had its own journals, schools and mosques. It was older than *al-Manār* group and more radical in its rejection of *ijmāʿ* and the decisions of the four orthodox schools.\(^{134}\) Its doctrines were based entirely on the Qur'ān and the authoritative tradition (*ahādīth saḥīḥah*) and its tenets gave clear expression to the zeal which seeks to go back to first principles and restore the original simplicity of faith and practice.\(^{137}\) Its view of *iḥtiḥād* was that every Muslim of sufficient ability can draw his own conclusion from the Qur'ān and the *ḥadīth*.\(^{136}\)

In fact, since the day of al-Dehlawī up to the present day, various movements have appeared in the religious scene of Indian Islam; each has engaged diligently in the efforts of restoring the vitality of Islam according to its own belief and perception.
However, some of these movements have had the tendency of developing their own tradition of classical scholarship which did not pay serious attention to the question of re-vitalization of *ijtihād* as an imperative instrument in reforming the present decadence of the Muslim community. The religious seminary of Deoband founded by Muḥammad Qāsim Nānotawī in 1867, can perhaps be classified in this classification. This may be one of the reasons why the first generation from Aligarh scoffed at the teachers of the Deoband whom they regarded as a survival of the Medieval past. Although the Aligarh University itself had its own shortcomings and negative tendencies as will be discussed shortly. Similarly the case of *Jamā'at al-Tablīgh*, though influential in its missionary endeavours, cannot be expected to contribute any significant service in *ijtihādīc* field because of the lack of intellectual competence.

From the fundamentalist camp, perhaps *Nadwat al-Ulama* (Assembly of Islamic Scholars) in Lucknow and *Jamā'at-i-Islāmī* (Islamic Group) deserved particular attention for their work for Islamic resurgence in the modern world. The former was founded by Muḥammad Shibli Nu'mānī in 1894, and had as the objectives the advancement and reform of Islamic scholarship, the
suppression of controversial quibbles among the ʿulamā', social reform without involvement in active politics, the propagation of the Islamic faith and the establishment of a department of theological legislation (iftā'). Its current head, Abū al-Ḥasan ʿAlī al-Nadwi, is a devout preacher of Islam and one of the most reputed Muslim scholars who is held in high esteem by the entire world of Islam. He has written in Arabic and Urdu on various subjects related to Islam and the Muslim people.

Abū al-Ḥasan ʿAlī al-Nadwi has never rejected the established juridical schools, but he has often criticized the stagnant condition of the Muslim mind. In one of his most popular works, Islam and the World, he cautiously analyses the causes of the Muslim decadence in the later centuries. One of these causes is, of course, the intellectual sterility which prevails over the entire Muslim world.

Jamāʿat-i-Islāmī was founded in 1941 by Abū al-ʿĀlā Mawdūdī, who also became its first leader until his death in 1979. It is actually a religious as well as a political organization which has its branches in almost every important city and town throughout Pakistan. Having been a political party, the Jamāʿat has become involved in and
influence on many national events in Pakistan including shaping the country's policies. For instance, in 1951 it took the initiative in formulating certain principles to be incorporated into the new constitution of the Islamic Republic of Pakistan which was promulgated in March 1956. The Jamā'at's greatest asset is its large and comprehensive literature and Mawdūdi himself, although self-educated, wrote more than a hundred books and pamphlets on various aspects of Islam. Although, according to Professor Fazlur Rahman, he was by no means an accurate or a profound scholar and wrote at great speed and with resultant superficiality in order to feed his eager young readers, he, undoubtedly, succeeded in presenting a lot of social and political solutions based on the Islamic weltanschauung, accompanied with scientific data. His book entitled "Islam and Birth Control" (published in 1962) is perhaps typical in this respect. In it he attempts to present his arguments against contraception and other means of birth control with the support of evidences. Mawdūdi's religious thought is based exclusively on the Qur'ān, but he often compromises by accepting the importance of classical hadith as a basic source of law.
Modernism in Indian Islam was initiated by Sir Sayyid Āḥmad Khan (1817 - 1898) whose role in India had much in common with that of Muḥammad ʿAbduh after the latter had separated from his teacher, Jamāl al-Dīn al-Afghānī, and returned to Egypt from his exile. Both of them saw that reformation must begin with mental reform through education, character building and liberal attitude towards religion. Political independence will surely follow as the consequence. Independence will be meaningless for the ignorant or the foolish; because it can stand only on knowledge, both sacred and profane.\(^1\)

Painfully Sayyid Āḥmad Khan saw the hopelessness of his people's attitude towards modern life where the conservative mawlāvis had led them to boycott the Western institutions which were rapidly taking root and flourishing everywhere.\(^1\) The result was that, for many decades Muslims in India fell farther and farther behind their Hindu compatriots in matter of education.\(^1\)

Thus, on his return to India from visiting England in 1869, where he had spent much time studying the educational system and facilities of the country,\(^1\) he determined to launch an overall reformation\(^1\) of the conditions of his people and to strive against
ignorance and inertia with every possible means. He wanted to persuade the Muslims to accept modern civilization and utilize its scientific and technological inventions for the improvement of their own lives. He also strive to reconcile Islam with modern civilization, because he argued that Islam is intrinsically rational, accommodating to intellectual judgements and not hostile to scientific achievements.

Having all this in view, he founded the Aligarh College in 1881 which became a university in 1920. He had a vision of an Indian Muslim Oxford which should train young men of character and capacity in all that is best in Occidental and Oriental learning.

However, Sayyid Aḥmad Khan's dream to refertilize Islamic thought and create a new science of theology vibrant with a new and potent Islamic message, was doomed to failure from the very start. Sayyid Aḥmad himself described the early products of Aligarh as "Satans" while certain other thinkers expressed their observations on the alumni's lack of originality and usefulness to their societies. Muḥammad Shibī Nuʿmānī with whom Sayyid Aḥmad Khan had cooperated closely in the establishment of Aligarh, eventually
broke with him and in 1894 helped established Nadwat al-‘Ulama’ which has already been discussed.

In fact, the religious outlook of Sayyid Aḥmad Khan itself was one of the contributing factors of this failure. He did not only hold the idea that the Qur'ān should be interpreted in the light of conscience and rationalism, but he went on to declare that the Qur'ān was revealed in meanings only and not in words. Such a view aroused the anger of the ‘ulama’ and the public against him. Perhaps this is why he was forced by the community pressure to leave the teaching of religion to men brought from Deoband.

Of the four sources of law, according to Sunnite jurisprudence, Sayyid Aḥmad Khan relied almost entirely on the Qur'ān. He and his associate, Chirāgh ʿAlī, doubted the authenticity of much of the classical hadīth and recommended a thorough scientific and rationalistic investigation of the existing corpus of hadīth before it was relied upon as a source of law. Sayyid Aḥmad Khan rejected the principle of ʿilmāʾ as a source of law, meaning by this the consensus of the classical jurists.
Regarding his social reform, he especially challenged the ideas that dining with Christian was unlawful, that the purdah was necessary for women, and that it was not necessary to educate them.

After Sayyid Aḥmad's death, the modernist movement in India was continued by his comrades, namely Chirāgh ‘Alī and Sayyid Amīr ‘Alī.

VII. Juridical Assemblies and Islamic Research

In a meeting of Rāḥīṭat al-‘Ālam al-Islāmī (the Muslim World League) which was held in Mecca in 1384 A. H. (1964 C. E.), Professor Muṣṭafā al-Zarqā’ (from Jordan) presented a proposal in which he stresses that, in order to revitalize Islamic jurisprudence, there must be recourse to collective jītiḥād in lieu of individual one. This can be done by establishing a "juridical assembly" constituting prominent Muslim jurists who comprehend both the sharī'a and modern knowledge and have shown good conduct and piety. Reliable and religiously trustworthy specialists in economics, sociology, law, medicine, etc., should also be included in the assembly on whose skills and expertise the jurists would depend concerning technological matters.
The above proposal was accepted by the League and as the result, an Islamic Juridical Assembly was introduced in Mecca where it has regular meetings to discuss various important topics relevant to the contemporary life.\(^{166}\)

Al-Azhar in Cairo also established its own juridical assembly known as Majma' al-Buhūth al-Islāmiyya (the Islamic Research Academy) with more or less the same objectives as its Meccan sister and had its first conference in 1964.\(^{167}\)

The Algerian Ministry of Religious Affairs has also taken significant share in this task and has, since 1967, summoned Muslim scholars from almost all Muslim countries to al-Multaqā li al-Fikr al-Islāmi (Meetings of Islamic Thought) which have been being held annually in Algeria.

Outside the Islamic world, there are also certain organizations seeking to promote and serve research in Islamic Studies throughout the world. There is, for instance, the International Institute of Islamic Thought, Pensylvania, U.S.A., whose objective is to stimulate Islamic Scholars to think out the problems of thought and life pertinent to Muslims in modern world. The Islamic Foundation, Leicester, United
Kingdom is another organization devoted to Islamic research and publication.

VIII. Juridical Encyclopaedias

Several projects to produce juridical encyclopaedias have been carried out by certain academic institutions and governments' agencies in Middle East, notably the Faculty of Sharia in Damascus, the Supreme Council for Islamic Affairs in Cairo, and the Ministry of Awqaf and Islamic Affairs in Kuwait.

Such efforts indicate that there is much enthusiasm for an Islamic intellectual revivalism.

IX. Conclusion

The Muslims generally have awakened from their long medieval slumber and began to struggle hard to catch up with modern world. They have begun to realize that in order to regain their prestigious position in this challenging time, they need to liberate themselves intellectually from the yoke of taqlid as they have striven to liberate themselves politically from
foreign hegemony. Thus, serious efforts have been being launched to re-vitalize j̣iṯīḥāḍ especially since the beginning of this twentieth century by certain individuals and organizations. It is interesting to note that j̣iṯīḥāḍ has been undertaken collectively in the forms of juridical assemblies and other collective projects.
NOTES

CHAPTER: IV

1 Tāhā Husayn, Mustaqbal al-Thaqāfa fi Miṣr, (Cairo, 1944?), p. 41.


3 Aḥmad Amin, Yaum al-Islām, p. 191.


5 Ibid., p. 208.


7 Ibid., p. 211.


9 Ibid., p. 138.

10 Aḥmad Amin, Yaum al-Islām, p. 122.

11 Ibid., p. 194.

12 Ibid., p. 191.


15 Ibid., p. 173.

16 Ibid., p. 176.

17 Sayyid Quṭb: An author of several books, the most popular of which is his Qur'ānic commentary, Fī Zilāl al-Qur'ān (seven volumes). He was an active member of the well-known Islamic organization, al-Ikhwān al-Muslimūn (Muslim Brotherhood) and was hung in February, 1966 for alleged involvement in a plot to overthrow the Egyptian authority.

18 Sayyid Quṭb, al-Islām wa Mushkilāt al-Ḥadāra, (Beirut, 1403/1983), p. 188.

19 Ibid., p. 189.
20 Ibid., loc. cit.
21 Ibid., pp. 192 - 193.
22 Ibid., pp. 193 - 194.
23 Ibid., pp. 194 - 195.
24 Ibid., p. 196.
25 'Abd al-Qādīr 'Awda: A renowned Egyptian legal expert and another active member of al-İkhwân al-Muslimûn who was hung by the Egyptian authority in 1958. His well-known book, al-Tashri' al-Inâ'i fi al-İslâm (Islamic Criminal Law), (2 volumes) is one of the outstanding works on the subject.
27 Ibid., p. 65.
28 Tanzîmât (from the Arabic word tanzîm which basically meant to organize) was the term used of a whole succession of reforms in Ottoman Empire starting in 1839. See N. Anderson, Law Reform in the Muslim World, (foot-note), p. 15.
31 The Arabian Peninsula is an exceptional in this respect where hudûd are applied completely up to the present time.
33 J. Schacht, ibid., p. 93.
34 Mannâ' al-Qaṭṭân, op. cit., p. 417, see also N. Anderson, op. cit., p. 13.
35 See N. J. Coulson, op. cit., p. 152.
36 Ibid., loc. cit.
British political and legal intervention in Malay states commenced in 1874 with the well-known Pankor Treaty, in which the advice of a British Resident must be asked and acted upon by the Malay Sultan of Perak on all questions other than those touching Malay religion and custom. The initial impetus for this intervention had, however, come from the establishment of Singapore in 1819. See Barbara Watson Andaya and Leonard Y. Andaya, *A History of Malaysia* (London, 1982), pp. 154 - 155.


N. J. Coulson, *ibid.*, *loc. cit.*


Similar step were taken by Libya in the wake of the September coup d'état, 1969.


J. Schacht, *op. cit.*, p. 89.


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See J. Schacht, *op. cit.*, p. 92. Professor Schacht seems excessive when he concludes for this reason that the *Majalla* was not an Islamic, but a secular code! Cf. Şubhî Maḥmaṣānî, *Falsafat al-Tashrî‘ fî al-İslām*, (Beirut, 1980), p. 100.

The *Majalla* committee was under the chairmanship of Ahmâd Cevdet Pasha, director of the Bureau of Legislation. Other members were Ahmâd Khülûşî and Ahmâd Hîlî, members of the Bureau of Legislation, Muḥammad Amin al-Jundî and Sayf al-Dîn, members of the State Consultative Council; Sâyyîd Khâlîf, inspector of Waqfîs and Shaykh Muḥammad ‘Alî al-Dîn Ibn ‘Abîdîn (of Damascus). However, the composition of the committee changed in the course of its existence by additions and replacements. See Şubhî Maḥmaṣānî, *Ibid.*, p. 93.


Şubhî Maḥmaṣānî, *op. cit.*, p. 44.


See Q. XLII, 21.


After the Sa‘ûdis (the Wahhâbîs) had begun to expend their influence and penetrated into some other countries outside their original cradle of Arabia, such as Oman, Southern Yemen and reached Central Iraq and outskirts of Damascus, an order was issued from
the Ottoman Headquarters during the reign of Sultan Mahmūd to the Egyptian ruler, Muḥammad ʿAlī to meet the Saʿūdīs and drive them back to their native land. The Egyptian expedition led by Muḥammad ʿAlī's son, Ibrāhīm Pasha accomplished this task and defeated the Saʿūdīs in 1818. See Muḥammad al-Bahl, al-Fikr al-Islāmī fi Taṭawwūruh, (Beirut, 1971), pp. 78 - 79.


70 Certain Muslim critics have given their observations about many shortcomings on the part of the Saʿūdī Authority in this respect. Anyone interested in this question is advised to refer to Muḥammad al-Bahl, op. cit., pp. 88 - 90.


72 Aḥmad Amīn, Zuʿamāʾ al-Islāh, p. 23.

73 See Muhammad al-Bahl, op. cit., pp. 95 - 96.

74 See ibid., p. 100.

75 Ibid., p. 101.

76 Ibid., p. 110.


78 Aḥmad Amīn, Zuʿamāʾ al-Islāh, p. 90.


80 Aḥmad Amīn, Zuʿamāʾ al-Islāh, p. 89. About al-Afghānī's view on doctrine of predestination and its positive impacts on Muslim’s mind and life, see Albert Hourani, ibid., p. 123.


82 Ibid., p. 260.

83 Albert Hourani, op. cit., p. 127.

84 Jamāl al-Dīn al-Afghānī's first arrival in Egypt was a transient visit in his way to Istanbul in the beginning of 1870 C. E., where he stayed forty days. He returned to it in the beginning of March,

85 Albert Hourani, ibid., p. 109.

86 Ibid., p. 134.


91 Muḥammad ʿAmāra, ibid., p. 41.

92 Ibid., pp. 42 - 43.


94 Muḥammad ʿAbduh’s reformist proposal to the Khedive ʿAbbās Ḥilmi was directed to three institutions; al- Azhar, the Awqāf and the Şarī'a Court. These were out of the British interference for their purely religious nature. See Aḥmad Amin, Zuʿamāʿ al-İslāh, pp. 342 - 343, ʿAbd al-Ḥalīm al-Jundī, ibid., p. 76.


96 Ibid., p. 267, Albert Hourani, op. cit., p. 266.


98 See ibid., p. 253.

99 Other famous Azharite students of Muḥammad ʿAbduh wereʿAbd al-ʿAzīz Jawīsh (1876 - 1929), Muṣṭafā ʿAbd al-Rāziq (d. 1947) and his brother ṬAllīʿAbd al-Rāziq (1888 - 1966).
100 See 'Abd al-Mun'im al-Nimr, op. cit., p. 297.

101 See Aḥmad Muṣṭafā al-Marāghf, Tafsīr al-

102 'Abd al-Mun'im al-Nimr, op. cit., p. 298.

103 Shaykh al-Marāghf wrote an important article on Iḥtiḥād and Islamic legal principles entitled Buhūth fi al-Shari'īa, which is unfortunately inaccessible to the present writer.

104 See 'Alī 'Abd al-Rāziq, al-Islām wa Usūl al-
Hukm, ed. Muḥammad 'Amāra, (Beirut, 1972), p. 154, see also Albert Hourani op. cit., p. 183, Muḥammad al-Bahi, al-Fikr al-Islāmi al-Ḥadīth wa ẓilatuh bi al-
Istīmār al-Charbī, p. 232.

105 'Alī 'Abd al-Rāziq, ibid., p. 157. On the political environment which had stimulated and surrounded the publication of this book, see pp. 7 - 14, see also Albert Hourani, op. cit., pp. 182 - 192.


107 Ibid., XVI, 64.

108 Ibid., XXIX, 18. To get a balanced vision, see other Qur'ānic verses which have the opposite implication, e. g., IV, 105, V, 49, XLII, 15.


110 Khālid Muḥammad Khālid, Min Hunā Nabda', (Beirut, 1974), p. 50. Apparently, the author has been much inspired in this respect by H. G. Wells's book, An Outline of History to which he repeatedly referred. See pp. 51, 53, 54, 57, 72...

111 Ibid., 169.

112 Ibid., p. 174.

113 See Khālid Muḥammad Khālid, al-Dawla fi al-

114 Established in May 1931 under the chairmanship of a popular Algerian ʿālim, 'Abd al-Ḥāmid Benbādis (1889 - 1940). For details of the association's objectives and activities, see Maḥmūd Qāsim, al-Imām 'Abd al-
Ḥāmid Benbādis, al-Za'im al-Rūḥī li Ḥarb al-Tahrīr al-


122 HAMKA, *op. cit.*, p. 94.


130 On Muḥammadiyya movement and its founder's biography and activities, see Deliar Noer, *op. cit.*, pp. 73 – 83.

131 This applies only to their response to the Islamic reform according to *al-Manār's* pattern as it has occasionally been echoed by its upholders in Malaya (now Malaysia) since the early days of the twentieth century. If the wind of Islamic revivalism in Malaysia today is, as it seems, stronger than in Indonesia, this has been inspired more by the contemporary Islamic revivalist movements in some other parts of the Muslim world, mainly the Middle-
Eastern al-Ikhwan al-Muslimûn (the Muslim Brotherhood) and the Indo-Pakistani Jamā'at-i Islāmī.

132 "Usalî": Expressing one's intention aloud at the beginning of prayer which has been practised by the Kaum Tua (the Traditionalists), but rejected as an innovative matter (bid'ah) by the Kaum Muda (the Renovatists).

133 See supra, ch. III, p. 218.


135 See supra, p. 267.


138 Aziz Ahmad, op. cit., p. 11. The spirit of reform that gave birth to Ahl-i-Hadîth was productive of still another sect known as Ahl-i-Qur'ân, founded in 1902, which rejects not only all traditional theology and all the legal requirements of the four schools of canon law, but even the ijma' of the companions of the Prophet and insists that the Qur'an alone is sufficient for guidance. See Murray T. Titus, op. cit., pp. 189 - 190.


140 Ibid., p. 78.


142 This is the English translation of its Arabic origin entitled "Mâdhî Khasîr al-Âlam bi Inhîbât al-Muslimîn" (What the World Has Suffered from the Decline of the Muslims).


145 Ibid., p. 341.
See *ibid.*, p. 275. This constitution, however, was annulled by President Iskandar Mirza on 7th October, 1958 and Mawdūdī eventually managed to publish a collection of his speeches and articles under the title of *Islamic Law and Constitution*. See, *ibid.*, p. 276.


See Aziz Ahmad, *op. cit.*, p. 11.


The faithful were warned that the end of such education was sure and certain infidelity and those who attend such schools, or permitted their sons to do so, would be regarded as apostates.


Sayyid Aḥmad Khan could not appreciate reformist attempts undertaken by several *ʻulamā’* before him simply because they had concentrated on insignificant matters. For instance, in 1840, Ḥājjī Shārī'at Allāh had launched a reformist movement (in Bengal known as *Farā‘idī* movement) whose primary concern was that the *Jum‘a* prayer which in British India is invalid because it is an enemy territory (*Dār al-Harb*). Certain other movements gave their priority to such trivial questions as visiting shrines and seeking intercession with *awliyā’*, etc. See *Aḥmad Amīn, Zu'āmā' al-Islāh*, p. 136.


*Aḥmad Amīn, Zu'āmā' al-Islāh*, p. 141.
143 Fazlur Rahman, op. cit., p. 56.
144 Aziz Ahmad, op. cit., p. 13.
146 Mannaʿ al-Qaṭṭān, op. cit., pp. 421 - 422.
147 Ibid., p. 422.
148 Ibid., p. 428.
149 Ibid., p. 432.
150 Ibid., p. 435.
CHAPTER V

THE REFORMIST IJTIHĀD AND ITS APPLICATION IN
TWENTIETH CENTURY – METHODS AND REQUIREMENTS

1. The Objective of the Sharī‘a

It has been argued by many Muslim scholars that a thorough investigation of the rules of the sharī‘a will reveal the fact that the general objective behind the establishing of tashrī‘ or Islamic legislation is to preserve human survival and to assure the continuity of human interests. The Qur‘ān itself hints to this general objective of the sharī‘a on various occasions, some of which are:

"I desire naught save reform as far as I am able." 2

From this verse it may be understood that God had ordered His Messenger (Shu‘ayb) to desire reformation (of his people’s conditions) to the best of his ability.

"And Moses said unto his brother Aron, act for me amongst my people. Do right and follow not the way of those who do mischief." 3

"Lo! Pharaoh exalted himself in the earth and broke up its people into sections. He oppressed a group amongst them, killing their
sons and sparing their women. Lo! he was of those who work corruption."

Thus it may be understood that all characters which have been ascribed to the Pharaoh were of the corrupted and reprehensible characters and Moses was sent to rescue the children of Israel from the Pharaoh's corruption. Corruption here does not mean infidelity, but it means wicked or mischievous deeds, because the children of Israel had never followed the Pharaoh in his infidelity.

"... and wrong not mankind in their goods and do not mischief on the earth after the fair ordering."*

"... and do not evil, making mischief in the earth."*

Moreover, islāh (reformation) that the shari‘a wishes to introduce (as has been indicated in the above Qur’ānic verses and their likes) is not restricted to the rightness of (religious) belief and action only as might be presumed, but it is the rightness which encompasses all affairs of the public life. When the Qur’ān states, for instance, that...

"... and when he turneth away (from thee), his effort in the land is to spread mischief therein and destroy the crops and the cattle."*

*Loc. Cit.
... it informs men that the warned wickedness here is to destroy the creatures in this world, because no one should deem that God has created this universe and has put down its law of survival as just for fun. Thus the Qur'ān says:

"Did ye then think that We had created you in jest..."°

If the world order had not been intended by the Law Giver, He would not have introduced legislations which are aimed to prevent people from mischievous deeds, such as qisāṣ for guilty of murder, amputation in the case of theft, certain punishments for other crimes, as He also would not have allowed taking clean and good things for sustenances and adornment.

Such textual evidences are arguments in favour of the belief that acquiring advantages and avoiding injuries are the requirements of the sharī'ah, so this may be regarded as one of its universal principles. Such an objective is termed in Islamic jurisprudence maslaha (pl. masālih). Understanding this objective properly would help a mu'tahid to carry out his task in this modern age as the mu'tahids in previous times benefited from it.
II. The Definition of Maṣlaḥa

In defining maṣlaḥa, al-Ghazālī observes that originally it was "acquiring benefit and preventing injury" (*ja`l manfa`a wa daf` ma`darrā*), but he goes on to say that this was not his purpose because what he meant by maṣlaḥa was actually preserving the "five universals" (*al-kulliyāt al-khamsa*) which the sharīʿa aims to preserve; i.e. religion, soul, reason, offspring (family) and property. Therefore, whatever contributes to safeguard these five universals is maṣlaḥa and whatever causes them to be missed is mafsada.¹¹

However, it should always be borne in mind in this respect that the human mind cannot be relied on to decide alone whether something is maṣlaḥa or mafsada, because something maybe considered as beneficial by man, but yet maybe detrimental according to the sharīʿa. Maṣlaḥa also cannot be measured by individual norms, because, as we have indicated before, these would differ with different persons and situations.¹² Further, man has often been deluded by his own desire which might conceal detrimental factors under various camouflages.¹³
For this reason al-Ghazālī insists in differentiating between human purposes and the sharīʿa objectives and decides that the latter should be considered as the real maslahā of the sharīʿa; though they might sometimes contradict the former.  

The concept of maslahā implies that the rules that have been decided by the (sharīʿa) texts will, sooner or later, bring advantageous results to man. If a definite rule has been mentioned in the texts for a certain case, this rule should be obeyed, although the jurist might have presumed that maslahā might occur in another rule. But if no definite rule has been mentioned in the texts for a particular case, the jurist is obliged to look for this rule, but should not go beyond the spirit of the texts. His function here is to find out a rule which may bring forth any kind of interest which the textual rules have come to preserve.  

III. The Categories of Maslahā

It is important to repeat here in greater detail what has already been mentioned in the first chapter that, human interests or masāliḥ in the sharīʿa perspective have been categorized into three categories: Masāliḥ darūriyya (essential interests),
masālih ḥāfiyya (necessary interests) and masālih tahsiniyya (supplementary interests).  

Māsālih darūriyya are those interests which are related to safeguarding the five aforementioned universals which are considered as essential for man in the sense that human life cannot be sustained at a reasonable standard without protecting them.  

According to al-Ghazālī, it is impossible for any religion or legislation which aims to reform human societies to neglect these fundamental elements. Thus, he observes, no disagreement has been found between all the prophetic missions (ṣharīʿiyya) regarding the prohibition of apostasy, murder, fornication, theft and drinking intoxicants.  

According to al-Shāṭibī, these universals are definitely known to us not because they have been provided by the texts, but they are known to us due to their conformity to the sharīʿa which is substantiated by a set of evidences in various places. With regard to safeguarding of life, for instance, we see the sharīʿa prohibits murder, qiṣāṣ is advocated for a killer, while he is threatened with severe punishment in hereafter; likewise, a person is obliged to
save his life from death by starvation by eating dead meat. 19

The rules of the shari'a concerning al-masāliḥ al-
hājiyya are not intended to protect the five above-
mentioned universals, but rather to avoid hardships
and difficulties and to facilitate the achievement of
those universals. For instance, the permission of
various contracts which are needed by men such as
muzāra'a (agricultural sharecropping), mosāqa
sharecropping contract over the lease of plantation
for certain period), 20 salām (advance sale), 21
guaranteeing individual and religious freedom, 22
permission of hunting game for food, 23 prohibition of
plunder and usurpation 24 and prohibition of drinking
even a small quantity of intoxicants... 25

The masāliḥ al-tahsīniyya referred to those
interests which do not serve to attain the five
universals, but they are aimed rather to ameliorate
and facilitate an easier life, 26 or to create some
sort of dignity and prestige and to protect the five
universals. 27 An example of this category is the
prohibition of deception and swindling in a business
transaction 28 which would not have caused any harm to
the property itself, but nonetheless prevented
true information 29 from being gained about its real
condition. Another example is the prohibition on women from going out to the street in a seductive manner. Such a rule is intended to preserve the honourable and the respectable condition of women and to avoid humiliation and disgrace to them.

These ameliorations are embodied in aspects of ritual, customary life and social transaction. In ritual, they can be observed in, among other things, the rule of removing dirt, smartening up oneself and volunteering to do supererogatory deeds, etc. In customary life they are visible, for instance, in the etiquette of eating and drinking, in avoiding dirty food or drinks and in taking food without extravagance or stinginess. They are also represented in some transactional rules such as the prohibition of selling dirty goods and surplus water and of women from being directly involved in the marriage contract, etc.

IV. Al-Masāliḥ al-Mursala

There is a specific kind of maslaha which is called al-maslaha al-mursala (pl. al-masāliḥ al-mursala). Literally it means untied or unrestricted maslaha. It is the interest which is in conformity to the objectives of the shari'a, but there is no
particular evidence from the texts which testifies whether it must be recognized or excluded. If a thing has been testified as a recognized *maṣlaḥa* by a certain textual evidence, it would become a *shari'a maṣlaḥa* which has been included within the context of *nass* or *qiyyas*. On the other hand, if (something) has been testified as an excluded *maṣlaḥa* by particular textual evidence, it has been classified among the *mafāsid* or injurious things which have been excluded by the *shari'a* provision; to practise it means to contradict the objectives of the *shari'a*.

Different views have been given by the Muslim jurists with regard to the validity of *al-maṣāliḥ al-mursala* as one of the Islamic legal bases. It has been rejected by Dāʿūd the Ṣāhirite jurist. Also al-ʿQāṭī al-Baqillānī and some other jurists have rejected any *maṣlaḥa al-mursala* as long as it has not been supported by an original principle (the Qur'ān, the *sunnah*, the *ijmāʿ* or analogy). But it has been accepted by Malik who has, without reservation, based Islamic legal rules on it. *Al-Maṣlaḥa al-mursala* which does not have the original evidence as its basis has been relied upon by al-Ṣāḥīfī and most of the Ḥanafite jurists, but on the condition of its nearness to permanent principles. Al-Ghazālī does not recognize *al-maṣlaḥa al-mursala* of the *tahsiniyya*.
category but inclines to accept the darūriyya. However, with regard to the hāliyya category he seems inconsistent. While in Shifā' al-‘Alī he agrees to recognize it, in al-Mustasfā he rejects it. Al-Juwaynī (Imām al-Ḥaramayn) shows the same hesitation in his book, al-Burhān.

According to Shaykh Muḥammad al-Ṭāhir ‘Āshūr, Muslim scholars should not hesitate to rely on al-maṣlaḥa al-mursala as one of the legal bases of the shari'a. If they can accept qiyyās (analogy), there is no reason why they cannot accept al-maṣlaḥa al-mursala as well. Qiyyās is actually no more than a process of reasoning to link up a particular case whose rule has not yet been known in the shari'a with another case which already has its rule in the shari'a because of the common legal cause in both. Due to the scarcity of the textual legal causes, only a presumptive maṣlaḥa can be obtained through such a process. Al-Maṣlaḥa al-mursala is another form of reasoning which aims to link up a universal maṣlaḥa of a case whose rule has not yet been known with another universal which has already been recognized in the shari'a after investigating definite or almost definite evidences of the shari'a. It is therefore appropriate to recognize it as one of the legal bases of the shari'a.
Shaykh Āshūr then expresses his surprise at the hesitant attitude of Imām al-Ḥaramayn and al-Ghazālī in accepting this method. In his opinion, the 'ulamā' should not only search for the interests of their community in the rules which have been provided or are associated with them through analogy, but should also make their effort to find the interests which have not been obtained in the texts or through the analogical process.  

The Shaykh furthermore claims that the juridical consensus during the periods of the sahāba and their successors were based mostly on al-masālih al-mursala and were very seldom based on a provision of the texts. This is why ijmā' has been considered independently as the third source of the sharī'ah. If ijmā' had been based on the texts, it would have been associated with the Qur'ān and the sunna. The collection of the Qur'ānic script during Abū Bakr's period, fixing eighty lashes in the case of drinking wine since 'Umar's days, his refusal to distribute the Iraqi rural land among the Muslim conquering soldiers and recording the Prophet's hadith during the period of 'Umar b. 'Abd al-'Azīz, are some glaring instances of the point.
V. Legal Reasoning

An examination of the evidences in the Qur'an and the authentic sunna should indicate that the rules of the shari'a are based on reasons and causes which aim at the interests of society and individuals. But the manner of the reasons given for those rules takes a variety of forms in the Qur'an and the sunna. Some jurists, particularly the Ash'arites and the Zahirites have disputed that the rules of the shari'a should necessarily be based on reason, although all of them agreed that no rule has been legislated by Islam which does not bear maslaha for man, by aiming to preserve the five universals.

However, one can easily notice that the causes of the rules are explicitly and directly mentioned in many places of the texts. Sometimes the Qur'an and the sunna even explain plainly the masālih of the enjoined rules or the mafāsid of the forbidden rules. Here are some examples:

(a) "What God has bestowed on His Apostle (and taken away) from the people of the township, belong to God, Apostle and to kindred and orphans, the needy and wayfarer; in order that it may not (merely) make a circuit between the wealthy among you...."

(b) "... then when Zayd had dissolved (his marriage) with her, with the necessary formality, We give her unto thee in marriage, so that (henceforth) there may be no..."
difficulty to the believers in (the matter of) marriage with the wives of their adopted sons when the latter have dissolved with the necessary formality (their marriage) with them."  

(c) "O ye who believe! Intoxicants and gambling, (dedication of) stones and divining arrows are only an infamy of Satan's handiwork. Leave it aside in order that ye may prosper. Satan seeketh only to cast among you enmity and hatred by means of intoxicants and gambling and hinder you from the remembrance of God and from (His) worship..."  

(d) "O ye who believe! Enter not houses of other than your own, until ye have asked permission and saluted those in them. If ye find none in the house, enter not until permission is given to you. If ye are asked to go back, go back; that makes for greater purity for yourselves..."  

(e) It is reported that 'Abd Allāh b. Amr had indulged extremely in his 'ibāda when he used to fast every day and perform voluntary worships every night, presuming that by doing so he would gain God's pleasure. But when this reached the Prophet, he disapproved of such an extremism by saying, "If you continue to do that, you will weaken your eye-sight and weary your body..."  

(f) It is reported also that Mu‘ādh b. Jabal had prolonged his recitation (of the Qur'ān) when leading a (congregational) prayer... When the Prophet had been informed of this, he rebuked it and said, "O people (those who had prolonged their congregational prayers)! You have discouraged (people from prayer). Whoever leads people in prayer, he must be quick, because among them are the sick, the weak and those who have works..."  

(g) In another hadith, the Prophet is reported to have said, "O ye young men! Anyone of you who can afford the cost of marriage, he should marry, because marriage will help him to lower his gaze and fortify his modesty. But any incapable person should resort to fasting in which he can find his (sexual) relief."
In the above examples, the distribution of al-fay' (booty), the permission of the Prophet's marriage to the widow of his adopted son, the prohibition of intoxicants and gambling, asking permission to enter others' houses, prohibition of extremism in ritualistic devotion, prohibition of prolonging congregational worship and the advocacy of marriage for the young men with the means and fasting for those without the means among them..., all have been justified in such a way that make them more acceptable to the human mind.

These divine and prophetic indications guided the sahāba and their successors to make efforts to identify the rules of the sharī'ah. And in their light also the investigating scholars have found that whether the rule of the sharī'ah exists or not depends on its legal cause (al-hukm yadūr ma'a 'illatih wuqūdan wa 'adaman), so much so that, some have perceived this as a general regulation that is applicable to all rules of the sharī'ah, including those provided by the texts.

VI. Al-Ṭūfī's Theory of Maṣlaḥa

Najm al-Dīn al-Ṭūfī (d. 716 A.H.) is said to have adopted the most extreme view in this regard, so
much so that *maslaha* supersedes, in his view, the explicit textual provision.

*Maslaha* in its *shari'a* term, he says, is the cause which leads to the objective of the Law Giver. Certain Qur'ānic verses have been claimed by al-Ṭūfī as outlining this objective; they are:

"O mankind! There hath come unto you an exhortation from your Lord, a healing for the (disease) which is in the breasts (hearts), a guidance and a mercy for believers. Say: In the bounty of God and in His mercy, therein let them rejoice. It is better than what they hoard." 61

According to al-Ṭūfī, these two Qur'ānic verses indicate to that the *shari'a* has really taken the *maslaha* of men into consideration, and this can be observed from the following ways:

First: The *shari'a* gives its attention to exhort them which meant preventing them from failing and showing them the right path.

Second: The Qur'ān describes itself as "a healing" for the diseases in the breasts, such as doubt etc.

Third: It also describes itself as a guidance.
Fourth: It is also a mercy.

Fifth: These are attributed to God's bounty and mercy.

Sixth: God has enjoined them to rejoice themselves at these all of which is tantamount to congratulation.

Seventh: It says that it is better than what they hoard.

Al-Tūfī proceeds to argue that no sensible man would have any doubt that God has taken the interests of His creatures into account, whether in their creation or in their lives. In the former case, God has created them from nothing in such a way that enables them to obtain their interests in this life. This is summarized in a Qur'ānic verse which states:

"O man! What hath made thee careless concerning thy Lord, the Most Beneficent? Who created thee, fashioned thee and proportioned thee into whatever form He wills, does He put thee together?"

And in another verse it says:

"... He Who gave unto everything its nature, then guided it aright."
Regarding the interests in their lives, God has provided for them the means of earning subsistence and enjoying life, for which purpose He has created the heavens and the earth and that which is between them. This is expressed in certain Qur'anic verses such as:

"He it is Who created for you all that is in the earth."\(^6\)

"And (He it is Who) hath made of service unto you whatever is in the heavens and whatever is in the earth; it is all from Him."\(^7\)

Quite detailed expressions for this have been given in some other Qur'anic verses.\(^8\)

Therefore, al-Ṭūfī goes on to mention that it is impossible that God would neglect their interests in the rules of the shari'ā which are more important and to which more attention should be paid. Besides, they are also related to their worldly interests, because they aim to protect their property, blood and dignity; without which life would be meaningless. Hence maslaha cannot be ignored in any way. If it conforms to the text, the juridical consensus and other shari'ā evidence, it should be applied outright, but if it contravenes any of them, it should be given precedence over them through the process of particularization (takhsīs) and elucidation (bayān).\(^9\)
The consideration of public interests (ri'āyat al-maṣālih) should be given precedence over the texts and the consensus for the following reasons:

First: All those who reject ijmā' have been basing their rejection on the consideration of public interests, so it is an object of conformity, whereas ijmā' is an object of controversy. Thus, relying on what has been agreed upon is better than relying on what has been opposed.

Second: The texts are variant and they contradict each other. Thus they lead to the reprehensible divergence in juridical decisions, whereas the consideration of public interests is an actual fact in its very nature. Therefore, it is better to be followed....

Third: It is known that the texts have been superseded by the public interests and other similar considerations in certain cases. For instance, in the case of tayammum, Ibn Mas'ud superseded the texts and ijmā' by maslaha of precaution in 'ibāda.

Also, when the Prophet said, as reported, to his companions after the battle of Abzāb that they should not perform their 'Asr prayer except at the village of
Banî Qurayza, some of them performed it before arriving the destination and justified their action by saying, "The Prophet did not mean that literal application from us." The Prophet is similarly reported to have said to his wife (‘Ā’ishah): "If your people are not newly converted to Islam, I would demolish the Ka‘ba and reconstruct it on the foundation of Abraham." This implies that reconstructing of the Ka‘ba on the foundation which had been laid by Prophet Abraham is an obligatory rule, but it was omitted for the sake of the public interests.

Another example is what has been narrated that once the Prophet sent Abū Bakr to proclaim: "Whosoever pronounced that 'there is no god save (the One) God' he shall enter paradise." But the latter was prevented from doing so by ‘Umar, because he said that this would lead them to rely solely upon such pronouncement.

The pivot around which al-Ṭūfī’s theory of maṣlaḥa revolves is a hadith in which the Prophet is reported to have said, "Do not inflict injury nor repay one injury with another." (lā darar wa lā dirār) which implies the denial of injuries and malicious elements
in the *shari'a*. This denial should be generally applied to all rules of the *shari'a* except on what has been excluded by recognized evidence. This means that the requirement of this *hadith* should take precedence over all other evidence of the *shari'a*. Particularizing them with it would repulse injuries and obtain *maṣlaḥa*, because by accepting this *hadith* and rejecting some other evidences of the *shari'a*, which might presumably induce injuries, we actually apply the requirement of both evidences simultaneously. Without doing so we would suspend one of both, which is this *hadith*. Implementing the requirement of textual evidence by way of bringing them into association with each other is, no doubt, better than suspending some of them.77

However, the above theory leads the conclusion that the assumption that some evidence of the *shari'a* might bear injurious elements. This, in turn contradicts al-Ṭūfī's statement which suggests that human interests are the bases of the *shari'a* legislation.

Perhaps the most vulnerable part of al-Ṭūfī's theory of *maṣlaḥa*, which has aroused most objections, is his opinion that "if the text and *ijmāʿ* have been contravened by *maṣlaḥa*, the latter's consideration
should be given precedence through the way of particularization and elucidation of the texts."

VII. Criticism on Al-Ṭūfī's Theory of Mašlaḥa

A criticism on al-Ṭūfī's theory of mašlaḥa comes from a well-known contemporary Syrian scholar, Muḥammad Saʿīd Ramaḍān al-Būṭī in his book, Dawābiṭ al-Mašlaḥa. This criticism can be summarized as follows:

First: The above theory has been based on an impossible assumption, i.e., the contravention of mašlaḥa to the texts or ijmāʿ. Al-Ṭūfī himself unintentionally acknowledges this fact when he interprets a Qur'ānīc verse in order to explain that the scripture contains doctrines and rulings for the interests of man.

Second: The consideration of mašāliḥ, in its true nature, is not actually an independent evidence which is completely separate from the texts, but it is a universal concept (ma'na kulli) which has been derived from the rules for partial cases of the sharīʿa (iṣlaḥāt al-ahkām) which have been fundamentally based on the texts. Therefore, how can mašlaḥa contradict the texts?
Third: In an attempt to support his idea that maslaha is more authoritative than imam, al-Ṭūfī argues that those who have rejected imam have agreed on accepting the consideration of masālih! But their agreement that the shari‘a has been constructed on the foundation of masālih does not necessarily mean that they have also agreed that the maslaha should take precedence over imam or nusus.

Moreover, al-Ṭūfī unintentionally contradicts himself when he tries in above statement to diminish imam beside maslaha by imam itself. The statement implies that imam is less authoritative than the consideration of maslaha because the latter has been agreed upon by imam, whereas the former has not been agreed upon!

Fourth: Al-Ṭūfī falls into even greater confusion when he tries to substantiate his argument that maslaha should be preferred to the texts because of contradictory nature of the latter. He derives such an idea from disagreements which have taken place between the a‘imma and the fuqahā which have in turn stemmed from the texts. In fact, no relevance is found between both phenomena, because the alleged disagreements have actually occurred in terms of understanding the texts and in interpreting their true
meanings. They have not originated from the contradiction between the texts themselves as was argued by al-Ṭūfī. 5

Perhaps al-Ṭūfī's theory of maslaha would have gained more support from the Muslim intelligentsia if his expression of the idea that maslaha should take precedence over the texts and 'ilmā' had been phrased differently. Perhaps there would have been no objection if al-Ṭūfī had put this way: "To reconcile between the texts and maslaha in case of their seemingly contradiction", for "reconciliation" is a word capable of accommodating what al-Ṭūfī means by the above disputed expression.

On the other hand, although al-Ṭūfī's theory of maslaha has certain defects and weaknesses and thus has exposed to criticism, it is indeniable that the texts have sometimes been superseded by the consideration of maslaha. However, some clarification is needed here in order to evade misapprehension.

In fact, as 'Abd al-Mun'im al-Nimr observes, al-Ṭūfī did not invent an unprecedented theory in this respect, because it could be argued that it had been practised since the days of the sahāba. Only his explicit expression about it was perhaps something
new; because sometimes people become accustomed to seeing or doing things but are reluctant to express them openly.86

The following examples will perhaps sufficiently illuminate this fact:

1. The Strayed Camel

The Prophet is reported to have prohibited the taking possession of strayed camel87 and the sahāba's consensus during the periods of Abū Bakr and 'Umar conformed with this sunna. But 'Uthmān and 'Āli in later periods defied both sources by taking possession of the animal.88

2. The Triple Divorce

The triple divorce with one utterance was counted as one divorce only during the Prophet's days. The sahāba, during the period of Abū Bakr and the early years of 'Umar's reign, had their consensus accordingly. But 'Umar decided to make it three which overrode the Prophet's sunna and the previous ilmā'. In our days, the Egyptian Family Law, for instance, has returned to the first view.
3. **The Craftsmen’s Guaranty**

A juridical agreement was reached not to demand craftsmen to guarantee property entrusted to them. This was based on a hadith which says, "No guarantee (should be imposed) on an entrusted person (lā damān ala mu’taman)". But this consensus was altered and guaranty has been imposed on them since the days of ‘Ali who said, "Only by this way people’s welfare can be secured" (lā yaṣluh al-nās illā dhāk.

4. **Recording the Sunna**

Abū Sa‘īd al-Khudrī has narrated a hadith in which the Prophet says, "Do not write anything from me accept the Qur’ān, and whoever wrote from me rather than the Qur’ān he should wipe it out." But an initiative was officially taken to record the sunna in the reign of the Umayyad Caliph, ʿUmar b. ʿAbd al-ʿAzīz which contradicted the above prohibition of the Prophet.

A more detailed examination of these incidents may throw more light on the problem.

1. In keeping with the Prophet’s sunna, strayed camels during the periods of Abū Bakr and ʿUmar were
left alone without being taken by anybody until they were found by their owners. But later, when people failed to maintain the standards of morality which their ancestors had previously had, 'Uthmān and 'Alī permitted the animals to be taken and kept for their owners. 'Uthmān ordered them to be sold and the price was given to their owners,' while 'Alī wanted them to be kept and fed by public treasury until their owners came to collect them.'

2. As we have already seen that during 'Umar's days, people became contemptuous of divorce where cases of declaring triple divorce simultaneously were much reported, violating by this manner God's rule which enjoins that divorces should be made separately in different occasions.' Hence 'Umar thought that it was in the interests of the Muslims in his days, severe punishment should be inflicted on those transgressors by giving to this type of divorce the rule of three separate divorces. This is, as Ibn Qayyim observes, an instance where a *fatwā* changed with the changing of time. And the *sahāba* agreed with 'Umar in this attitude because they learnt that this was a beneficial policy to discipline the people.'

3. In the early period of the Islamic history, the craftsmen were honest people, therefore, they could be
believed if they told that the entrusted property had been lost or damaged without any negligence on their part. But in later period, this people’s standards of behaviour deteriorated generally and craftsmen began to make false claims that the articles deposited with them had been lost or damaged without their own fault. Therefore, it was necessary to adopt a suitable policy against this new development in order to safeguard people’s rights from the craftsmen’s misdeeds. So we see that ‘Ali decided to require guaranty from them as long as they could not prove that the cause of loss or damage had been out of their power.’

4. In his book, *al-Sunna wa Makānatuhā fī al-Tashrī‘ al-Islāmi*, Professor Muṣṭafā al-Sibā‘ī investigates the hadith in which the Prophet is reported to have prohibited the recording of the *sunna*. According to him, the prohibition only meant “the official recording” of the *sunna*, for several reasons, mainly to devote the utmost effort to recording the Qur‘ān, especially in the scarcity of writers and literal instruments during that period and to evade confusion between the Qur‘ān and the *sunna* which might have occurred particularly due to the variety and primitiveness of writing materials such as bone, palm leaves, leather, etc... When these reasons for caution vanished in later period, ‘Umar b. ‘Abd al-
‘Azīz ordered the recording of ahādīth lest they would perish with the death of those who memorized them.\textsuperscript{100} This does not mean that the Umayyad Caliph encroached the Prophet’s command in the above hadīth, but he actually looked into its real objective by considering its accompanying circumstances and perceived that the hadīth had dealt only with a temporary situation which no longer existed after the Qur’ān had been written and memorized and the previous fear for its being muddled with the sunna had already vanished.\textsuperscript{101}

Perhaps the real reason behind the hesitant attitude of some ʿulamāʾ in accepting al-maṣāliḥ al-mursala as a legal base is fear of the misapplication of this principle by which the texts would be violated just to satisfy men’s desires or for them to acquire personal interests. But, as ʿAbd al-Munʿīm al-Nimr remarks, misapplication of good principles and intentions has always been and will always be practised by dishonourable men, but we should not suspend these good principles merely for this reason.\textsuperscript{102} On the contrary, it is our duty to discover the truth, to protect and uphold it; because concealing the truth for fear of misuse means we
have eradicated it as ignoble men have done by distorting it.103

The same fear already seems to have bothered previous 'ulamā' which urged them to impose certain limits and regulations for maslaha, particularly by tying it to the condition of acquiring the aforementioned objectives of the sharī'a.

VIII. General Regulations of Maslaha

In order to assure that the objective of maslaha can be achieved without any deviation or misuse, the jurists found themselves obliged to tie up the required maslaha with the general objectives of the sharī'a. This implies that those limits have to be taken from the Qur'ān and the sunna and also from the jātihāds of the Prophet, the Companions and the tābi'īn.

The objective of maslaha could be preserved either by emphasising the positive factors or by preventing the negative factors. Whatever contributes to this objective and prevent harmful elements, is considered as maslaha.104 Therefore, al-Ghazālī has judiciously defined maslaha as "acquiring benefit and preventing injury."

105
This is actually the basis of *i*tihād from its early days as a vehicle for clarifying the rules of the *sharī'a*. This was also the pivot on which the *i*tihād of the Prophet and those who came after him have been revolved.\textsuperscript{106} So the *sharī'a* has defined the recognized *maslahah* with the aforementioned five universals and their subsequent elements which are considered as the objectives of the *sharī'a*.

If a person is confronted by two or more of these objectives, he is obliged to sacrifice the lesser objective in order to achieve the better. For instance, soul and property are two fundamental elements which the *sharī'a* has come to preserved. But one may has to sacrifice both of them for the sake of preserving the religion and its state. Thus striving with one's life and wealth and sacrificing them for the sake of strengthening the religion and its followers are religious duties. This is what al-Ṭūfī means by the clashing of *masālih*.\textsuperscript{107} It should be understood that what is meant by "the religion" here is its essence or entity, not its derivative rules which may be abandoned and sacrificed for the cause of safeguarding life and property, such as the permission of eating or drinking forbidden substances in order to save one's life from perishing from hunger, or the permission to perform the ritual of slaughtering an...
animal at the rear if the ordinary way of slaughter (as prescribed by the shari‘a) cannot be undertaken, for the sake of preserving property.

At this juncture, there is a question of how these objectives can be known. Here 'Izz al-Din b. 'Abd al-Salam remarks that the maslaha which combines both this world and hereafter (masālih al-dārayn) and their causes cannot be known except through the shari‘a. Any answer should be sought in the evidence of the shari‘a itself.

He goes on to say that most of worldly benefits and evils are known through intuitive power, experiment, experience and intelligent conjectures. One has to consult one's mind in order to recognize beneficial and detrimental things and to identify the efficient cause for the rules of the shari‘a ('illat al-ahkām). Hardly any rule can be excluded from this mental perception except those which God has singled out as ritualistic matters for His servants.

However, he does not mean by this that human mind is allowed to roam aimlessly. It has to be controlled by permanent principles and values defined by the shari‘a itself.
It should be noted that absolute advantage as well as absolute injury are rarely to be found. This makes it sometimes difficult for us to discern the demarcating line between advantageous elements and detrimental elements. ‘Izz al-Dīn b. ‘Abd al-Salām indicates this when he says, "The pure masālih are very scarce, for even the human basic needs such as food and accommodation cannot be obtained by most people except by hard work and yet after obtaining them they have been accompanied by injuries and disease."¹¹⁰

An illustrative example of this phenomenon is the case of preventing a sick person from giving to any person more than one-third of his property. This is an infringement upon his rights, but it is a maslaha for his heirs. Hence, priority is given to their rights over the sick person's rights.¹¹¹

‘Izz al-Dīn b. ‘Abd al-Salām also remarks that preferring a more advantageous thing to a less one (taqdim al-aṣlah fa al-aṣlah) and avoiding a more harmful thing to a less harmful one has actually been fixed in human nature. Thus, nobody would prefer a less advantageous thing to a more advantageous one except an ignorant person who does not recognize the virtue of the latter or a wicked person who pretends to ignore the difference between the two levels.¹¹²
Al-Shāṭībi also seems to have adopted the same idea in this respect when he indicates in al-Muwāfaqāt that μασάλη is connected with this worldly life are understood according to their preponderance. If μασλά are the more probable in something, it is understood as the conventional μασλά and if the opposite is the more probable, it is understood otherwise as the conventional μασάδα. This is why the Qurʾān acknowledges that intoxicant and gambling also have certain advantageous effects when it says: "They ask thee concerning wine and gambling. Say 'in both is great sin and (some) utility for men, but the sin of them is greater than their usefulness.'" But such a utility is not recognized as μασλά because if they were so, they would have been permitted or made obligatory.

IX. The Attitude of the Sahāba on Maṣlaha

The Companions of the Prophet do not seem to have been so rigid in their opinions as to discard whatever they had found at other nations. On the contrary, they took, even from those whom had militarily been defeated, what they considered as suitable for the interest of the community in various administrative
and governmental aspects. They took from them the regulation of dating letters and events with which zakāt and taxes were levied. They also took from them the system of administrative offices (dawāwīn) such as the office of land tax, the office of booty, the office of muḥāhidīn (fighters), etc. But they dismissed what did not conform to the principles of their religion such as distinguishing the ruling class with certain social and economic privileges and exempting them from certain legal requirements.115

The principle of the shari‘a upon which the Guided Caliphs seem to have relied was that, if there are two contradictory interests, we would choose the preponderant one. Likewise, if we are obliged to choose between two harmful things, we would choose the lesser one.116

Differences in outlook and attitude sometimes occurred among them, but they regarded these as natural phenomena of the intellectual freedom which they enjoyed.

Abū Bakr and 'Umar adopted different policies regarding the distribution of revenues to the Muslims in their times. Abū Bakr gave the same shares to all Muhāṣirīn and Anṣār and did not give any consideration
to their seniority which he left to God alone; whereas 'Umar did not make this distribution equal between them, because he considered that those who had fought with the Prophet should not be treated as equal to those who had fought against him, and those who had embraced Islam on the wake of the conquest of Mecca should not get equal shares as those Muhājirīn and Anṣār who had preceded them into Islam, and the fighters of Badr should be given priority over those who came after them.\textsuperscript{117}

The rulers are free to adopt whatever policy of this kind which they regard as appropriate, on the condition that they consider maslaha in collecting and distributing revenues.\textsuperscript{118}

Hudūd which are the sharī'ā punishments clearly defined in the texts were sternly applied by the Guided Caliphs after trying to avoid any doubt in the case. However they differed in applying them as the contemporary judges have done about the application of the positive law. Regarding the criminal offences which their hudūd are not defined in the texts, the punishments were estimated according to the degree of the crimes. The crime against individual rights, for instance, is not similar to the crime against the rights of society such as the violation on property.
In this respect, judges were given the freedom of estimating the punishment. This kind of judgements are called ta‘zīr.’

The Changing of a Fatwā with the Changing of Circumstances

This principle, if exploited properly, can benefit Islam and the Muslim community in many ways. The survival of Islam and its ability to cope with an ever-changing world seems dependent on the effective and successful implementation of this method. This means that by exploiting this method properly, people's interests (masālih) can be substantially secured.

Ibn Qayyim al-Jawziyya states:

"A fatwā should change with the change in times, places, conditions and customs.... Ignorance of this fact has resulted in grievous injustice to the sharī‘a and has caused many difficulties, hardships and sheer impossibility."²⁰

But to apply this method is actually a subtle ijtihādic task which requires perspicacity in order to discover what is beneficial for the community and what is detrimental to it. Without such perspicacity, the
application of this method might bring about disarray in the legislative and juridical system.¹²¹

In order to facilitate the application of this method as well as to avoid any misconception of it, particular attention should be given at least to two types of the rules of the shari'a: the rules which are based on ephemeral needs and the rules which are based on past customs.

(a) The Rules Which Are Based on Ephemeral Needs

Some of the ijtihādic derivative rules have been based on temporary interests which are changeable with the change of times and circumstances. When Islam became strong and powerful during his period, 'Umar b. al-Khaṭṭāb deprived those new converts to Islam from their portion of zakāt which has been made obligatory by the texts.¹²² This, however, does not imply that 'Umar abrogated or suspended the Qur'ānic rule, but he applied the spirit of the texts and did not confine his attention to its immediate meaning only. He considered that those converts had been given their portion due to certain circumstances only which had necessitated such a gift, i. e. to win or reconcile their hearts when Islam had been weak. But after this circumstance changed and Islam became powerful,
depriving them from such a gift is actually the real implementation of the texts and in accordance with their requirements.\textsuperscript{123}

A careful study of the Islamic juridical heritage will prove that a lot of rules were introduced to face certain ephemeral circumstances only and should not be applied beyond their limits. An instance at hand is differentiating the Dhimmis from the Muslims in terms of dress following a tradition which has been transmitted from 'Umar b. al-Khaṭṭāb or 'Umar b. 'Abd al-'Azīz. The visible reason here is that such differentiation was necessary when the Muslims intermingled with the Dhimmis in order not to treat both communities in the same way. Perhaps an unknown Dhimmi died in the street and was mistakenly prayed for according to the Islamic funereal ceremony and buried in the Muslim grave-yard;\textsuperscript{124} a treatment which he, his family and the Muslims equally dislike.

However, in our time, such differentiation between adherents of various religions within the same state is not something desirable, besides, identification can be achieved in our time by an easier and better mean than differentiation in dress, i.e. by identity card which explains, inter alia, the religion of its
bearer beside his name, nationality and other items, which are sufficient for the required purpose. 125

(b) The Rules Which Has Been Based on Past Customs

Some other juridical rules have been based on certain customs or situations which existed in the days of the a'limma or their followers and these have changed. So there is no reason why these outmoded rules should be applied without the possibility of replacing them with more suitable rules.

The famous Malikite jurist, Shihāb al-Dīn al-Qarāfī and the Ḥanbalite Ibn Qayyim give a useful guideline to anyone involved in juridical profession as follows:

"Follow whatever the custom has changed and leave whatever it has dropped, do not be stagnant at what has been transmitted in books throughout your life. If a stranger comes to enquire you about a fatwā, do not compel him to adopt the custom of your own country, but ask him instead about the custom of his country and give your fatwā accordingly... Stagnation at transmitted views which have been based on previous ijtihāds is rather misleading in the religion and ignorance about the purpose of the 'ulamā' and the pious ancestors." 126

Ibn Qayyim make the following comment:

"Whoever delivers a fatwā to the people by basing it merely on what has been transmitted in books, without considering the differences of their customs, times, places and circumstances, is actually misled and
misleads others. In this way he commits a more grievous crime than a physician who treats people of different countries, customs, times and temperaments with what he has read in a certain medical book." 127

Ibn Qayyim himself gives special attention to this subject and thoroughly discusses it in *Islām al-Muwaggi‘īn* under the subtitle *Taghayyur al-Fatwā bi Ḥasab Taghayyur al-Azmīna wa al-Amkīna wa al-Ahwāl wa al-Bi‘āt wa al-‘Awā‘id* (The Changing of Fatwā According to the Changing of Times, Places, Situations, Environments and Customs). The followings are some of the many examples as mentioned and discussed by Ibn Qayyim on this subject:

1. **Prohibition of Amputating the Hand During Military Expedition**

Abū Da‘ūd has narrated that the Prophet prohibited amputating the thief’s hand during military expedition,126 for fear that he would defect to enemy,129 even though this punishment has been enjoined by God.130 It seems that this "legal delay" has also been applied to other offences which are subject to the *shari‘a* punishment in ordinary circumstance.131 This change of rules in these particular situations, as Ibn Qayyim observes, is due to certain acceptable *maslāha*.132
2. The Abrogation of the Punishment for Theft Caused by Starvation

It has been related that 'Umar b. al-Khaṭṭāb did not apply the hadd in the year of majā'a (starvation) during his reign as he also pardoned some servants of Ḥātib b. Abī Balta'a who had stolen a camel when 'Umar learnt that they had had to undergo forced labour because of starvation. This legal delay was based on the consideration that one might be forced into such an action as a result of the circumstances, not because of criminal motivation. This is, at least, a dubious case in which the application of hudūd must be avoided.

3. Šadqāt al-Fitr

The Prophet ordered that šadqāt al-fitr, i.e. almsgiving at the end of the fasting month, should be fixed at a šā' (a certain cubic measure) of barley or dried grape or cheese; because these were the prevalent foodstuffs for the inhabitants of Medina during the Prophet's time. Different kinds of foodstuffs might be taken in the same quantity from the populations of other countries or places such as corn, rice, fig or other grains. Even if they have their foodstuffs from elements other than grains such
as, for instance, milk, meat or fish, they should give their *sadqat al-fitr* in the same kinds on which they have fed themselves. This is according to the vast majority of the 'ulamā' because the purpose of this almsgiving is to help needy persons in the feast day out of local produce.¹³⁶

4. Triple Divorce with One Utterance

It is reported by Muslim that triple divorce with one articulation was counted as only one articulation for the purposes of divorce during the periods of the Prophet and Abū Bakr and also during the first two years of 'Umar's rule. However, the latter made this type of divorce equivalent to three articulations when he saw that people had become hasty in something which they should be careful.¹³⁷

In fact, the examples of changing *fatwās* and rules with regard to positive legal matters are beyond calculation. Later, Ḥanafite jurists have observed that previous jurists, particularly the founders of the four Sunnite schools had based a lot of their *fatwās* upon customs prevalent in their days inasmuch as if those customs had been different, their *fatwās* would have been different as well. Thus, later jurists sanctioned *fatwās* seemingly inconsistent with
earlier provisions in books known as *Zāhir al-Riwāya* if changing customs necessitated such departure.\(^{13}\)

It is well-known that al-Shāfi‘ī discarded his old Iraqi school and replaced it with his new Egyptian school under the influence of social circumstances in the different lands.

Therefore, it seems reasonable that modern *‘ulamā‘* should review some rules which adhered to previous customs and circumstances in the light of the requirements of modern life.

Among other examples of these rules as given by Professor Yūsuf al-Qaraḍāwī is the refusal to accept as a witness someone who eats in the street or uncovers his head when walking in it or shaves off his beard. Should such a rule be rigidly applied in modern times, or should it simply be regarded as particular for a certain time and environment only? According to Professor al-Qaraḍāwī, the latter is correct.\(^{13}\)

 XII. The Attitude Towards the Texts

Regarding the texts, the following should be noted:
First: Most nuṣūṣ have provided general principles. Only in some aspects, such as the ʿibādāt and family affairs, have detailed rules been mentioned, because major changes do not generally take place in these areas.

Second: Most of the nuṣūṣ have presumptive meanings which accommodate more than one interpretation and accept more than one viewpoint. This is applicable equally to the Qur'ān and the sunna, although most of the latter have presumptive authenticity too which means they have been transmitted by a few transmitters only (ahādīth āhād).

To use a geographical term, there are two different territories of the texts which a multahid has to face: the closed territory where ittihād cannot be undertaken whether by making alteration to the meanings of the texts, giving preponderance over them or weakening them. This is the territory of al-qat‘iyyāt where the rules have been firmly and clearly mentioned by the texts that have definite authenticity (i.e., the Qur'ān, the sunna al-mutawātira) and definite legal significance. This includes the obligatory rules of ᵇalāt, fasting in the month of Ramadān, zakāt and hajj and the prohibition of wine,
fornication, usury and other similar rules which have been stated in the texts that have firm, clear and unambiguous meanings (muhkamāt), on which juridical consensus has been established.\textsuperscript{141}

Second: The open territory which is the territory of the presumptive texts. With regard to legal significance, this presumption is applied equally to the Qur'ān and the sunna. However, with regard to authenticity, it is applied only to the sunna. The door here is wide open for ḥādhāh, firstly to examine the authenticity of the texts and secondly to understand and interpret them and derive legal rules from them.\textsuperscript{142}

In order to understand rightly the texts which have presumptive legal significance, particularly ahādīth, the following should be taken into consideration:

1. Some ahādīth were based on temporary legal cause only where their rules might become ineffective with the disappearance of the cause.

2. Some ahādīth have been based on certain previous custom which changed afterwards.
3. Some ahādīth have general requirements on all mukallafīn (those charged with religious responsibilities) and some have requirements which were restricted to a particular group of people in a particular place.

4. There are some ahādīth whose rules were restricted to a particular incidents only and some have general and permanent legislation.

5. Some ahādīth were done or said by the Prophet out of his leading position (al-imāma) and some were said or done by him to convey religious teachings (al-fatwā wa al-tablīgh). 143

Let us now examine each one of the above categories of nuṣūs:

1. Ahādīth Which Were Based on Ephemeral Situation

Some Prophetic traditions, although authentic in sanad (chain of transmitters) would appear after investigation to be based on consideration of particular temporary situations only to secure certain masāliḥ or to avoid certain mafāsid. When these situations changed and their legal cause vanished, the rules which were produced by those nuṣūs should
logically become ineffective, because whether the rule exists or not depends on its legal cause. The following examples will perhaps illustrate this fact:

(a) 'Abd Allah b. 'Abbās has narrated a hadith in which the Prophet says, "A woman is not allowed to travel unless accompanied by a close relative."144

The legal cause behind this prohibition is fear for the woman's safety when travelling alone or in the company of a stranger (ajnabi), in a time when people used to travel on camels, mules and donkeys, crossing uninhibited deserts and distant areas.

But when the situation has changed, so that people travel by aeroplanes or trains which carry hundreds of passengers, a woman can safely travel alone and the shari'a does not object to her making such a journey. This cannot be regarded as overriding the above hadith, but on the contrary, this might be supported by another hadith in which the Prophet is reported to have said, "A woman in a camel-litter is about to go out from 'al-Ḥira', travelling to the Ka'ba without being accompanied by her husband."145

It is not surprising that a woman is allowed by some a'imma to go to pilgrimage without being
accompanied by a close relative if she is in the company of reliable group of women or a trusted woman friend. Some other jurists even go as far as to say that a woman is allowed to travel alone if the way is peaceful.\(^1\)\(^6\)

(b) It is narrated that the Prophet has said: "Leaders should be appointed from the Quraysh."\(^1\)\(^7\) According to Ibn Khaldūn's interpretation, in saying this, the Prophet considered the moral strength and the tribal solidarity of the Quraysh in his days on which, in Ibn Khaldun's view, caliphate, or kingship, was erected. Ibn Khaldūn furthermore maintains that when membership of Quraysh was stipulated, it was done in order to avoid a power struggle between the Arabs because of the tribal solidarity and supremacy that the Quraysh had. In the light of the fact that the sharī'ā does not restrict its rules to a particular generation, period or nation, this was just the question of efficiency. Therefore, the legal cause which is intended behind the condition of the membership of Quraysh is that the one who looks after the Muslims' affairs must come from a strong and united tribe.\(^1\)\(^8\)

In fact, the sahāba themselves omitted practising some ahādīth when they realized that these ahādīth had
dealt with certain situation in the Prophetic period which had changed afterwards.

2. **Ahādīth Which Were Based on Previous Custom**

This category can be joined to the first one. It signifies that some *nusūs* were based on ephemeral custom which was prevalent during the Prophet’s time. Later, this custom has already changed and therefore, its purpose should be looked for instead of its literal meaning. An instance of this point is a *hadith* in which the Prophet is reported to have said: "Wheat with wheat, barley with barley, dates with dates, salt with salt, the exchanging of which should be made in an equal measure (*kaylan bi kayl*), while regarding gold and silver he said that their exchanging should be made in an equal weight (*waznan bi`wazn).*"*1*"

On the basis of this *hadith*, Abū Ḥanīfa saw that wheat, barley, dates and salt should be permanently exchanged in measure, as long as their quantitative disparity which has been prohibited in a number of *ahādīth* is in measure. However, Abū Yūsuf, the great disciple of Abū Ḥanīfa, disagreed his teacher’s view and considered that the exchanging of those commodities in measure or weight were based entirely
on custom. If the custom has changed where wheat, barley, dates and salt have been sold in weight, as in our time, we are obliged to exercise our transactions according to the new custom.\(^5\)

3. **Ahādīth General in Form But with a Particular Implication**

There are some Prophetic traditions which appear to have general meanings, but in fact they have been addressed to a particular group of people only. They have not been intended to be applied generally to all men in all places and situations. An example of this type of ahādīth is the Prophet's order to face towards the east or the west when relieving oneself.\(^1\)

This hadīth has not been addressed to everybody, but only to the population of Medina and those who are of the same direction in order that they do not face or turn their backs towards the south where the Kaʿba is.\(^2\) This fact is explained by Ibn Qayyim in Zād al-Maʿād.\(^3\)

But, as observed by Ibn Ḥajar al-ʿAsqalānī, some people have wrongly generalized this hadīth, because the population of Egypt, Libya or North-West Africa, for instance, would practise the very act which has
been prohibited by the hadith if they face towards the east when relieving themselves.  

4. **Ahādīth Whose Rules Were Restricted to Particular Incidents**

The rule of a hadith which was intended for a certain incident should remain only for that incident and its like. Such a rule should not be taken as a basis of general and permanent legislation as long as there is not any concomitant circumstance that justifies such a generalization.

For instance, the Prophet's refusal to price commodities when asked to by some sahāba due to high cost in his time, saying, "God is the One Who fixes the price as He is the One Who limits and enlarges (His servants' livelihood) and I hope to meet God without bearing injustice to anyone." Some 'ulama' understood that this hadith implies that pricing is absolutely forbidden in any situation, even though the context of the hadith itself shows that people in that time were experiencing high prices according to the law of supply and demand, not as a result of businessmen's manipulation.
But the above hadith is no longer applicable when society has changed and the market price has often been manipulated by traders. In such a situation, pricing is not at all forbidden and no injustice should be feared. On the contrary, leaving the masses as the easy prey of those greedy traders is actually the real injustice which should be avoided. In fact, such a pricing was permitted by the jurists of the tabi'ın and this has been accepted by the Malikites and some of the Hanbalites. This notion has also been adopted by Ibn Taymiyya and his disciple, Ibn Qayyim al-Jawziyya and has been considered as a principle by which the state establishes justice and protects people's rights.

5. Ahadith Which Were Said or Done By the Prophet As A Leader

There are certain ahadith which were said or done by the Prophet out of his position as a leader and not as a Messenger from God. Perhaps the first man who managed to distinguish between both categories was the eminent Malikite jurist, Shihāb al-Dīn al-Qarāfī, who states in his book, al-Furūq, "Whatever the Prophet said or did by way of conveyance (from God), it should be taken as a general rule (which is to be applied) on
all men forever. But anything that was carried out by the Prophet in his capacity of leader, should not be practised without being authorized by the leader, because such activity was required by the leading position of the Prophet and not by his task of conveying the message." This category includes the Prophet's conduct regarding warlike affairs, military mobilization, distribution of booty, peace treaty, etc.

However, there has been a dispute among the 'ulamā' as to which category certain textual rules should be included in. For instance, a hadīth in which the Prophet is reported to have said, "Whoever cultivated virgin land, it is his." Was this hadīth expressed by the Prophet for the purpose of delivering religious opinion, so everyone who has developed virgin land is entitled to take it into his possession, or did the Prophet say this hadīth out of his position as a leader of the Muslim community, so that nobody has the right to cultivate the land without being authorized by the leader. The latter view, according to Malik and al-Shāfi‘I, is preferable.
XI. Al-Istihsān

Some jurists incorporate al-istihsān or juridical equity within the scope of al-masālih al-mursala. It is, as has already been defined, turning from the apparent legal rule which has been achieved through direct analogical reasoning to another legal rule which contradicts it. Some define it briefly as preferring unrestricted or free reasoning to analogy taqdim al-istidlāl al-mursal 'alā al-qiyās). This implies that if a jurist find that qiyās or analogy would produce a certain legal rule for an incident, but by giving another rule, it would help to gain maslaha which can be included under any kind of those masālih which have generally testified by the texts, he would give that rule which can bring forth the maslaha and reject the analogy.

As has also been mentioned above, al-istihsān has been regarded by the vast majority of the Muslim jurists, including Abū Ḥanīfa, Mālik and their companions, as one of the sources of legislation on which they have based their ijtihāds about a great deal of incidents whose rules are not available in the texts. In fact, al-istihsān is aimed at broadening the scope of the tashrīf and it is a source that enables a muftahid to achieve some masālih that cannot
be obtained through analogy and general principles of jurisprudence.148

For example, a man set apart a piece of agricultural land for public endowment without stating in the contract the rights of expressing opinion, disposal and transit. According to the explicit and immediate analogy, these rights are not included in the endowment unless they have been stated in the contract. But al-qiyās al-khafi (hidden or implicit analogy) requires that such rights be automatically included in the endowment of the land even though there is no provision regarding them. This is what has actually been decided by Abū Ḥanīfa and his colleagues.149

It seems appropriate that a mujtahid should turn away from employing analogy for maslaha if a rule which has been produced by an analogy has caused a maslaha to be missed or has brought about a mafsada, simply because the attainment of human interests is the real objective of the sharīʿa.

XII. Sadd al-Dharaʿī
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Another advantageous method for reform which might be used by mujtahids today is sadd al-dharaʿī, i. e.,
invalidation of legal fiction. Some jurists include this kind of ittiḥād under al-masāliḥ al-mursala. This method implies that if an action which is being undertaken originally for a maslahah, would incur detrimental result equivalent to or more than that maslahah, the jurists would give their fatwā to prevent such an action. The juridical principle which has been upheld by the jurists in this regard is "avoiding injuries is preferred to acquiring interests" (dar' al-mafāsid muqaddam 'alsā jāb al-masāliḥ). This is because any objective can only be secured through means which must be an inseparable cause for it. This implies that every means takes the rule of its objective. If the means leads to a maslahah, it takes the obligatory or permissible rule of the maslahah. On the other hand, if the means leads to an injury, it takes the forbidden or disapproved rule of the injury. Al-Qarāfī indicates this point by stating that as the means should be closed, it should also be opened. As the means to a forbidden thing is forbidden, the means to an obligatory thing is also obligatory.

For instance, the Qur'ān says:

"Revile not those unto whom they pray beside God lest they wrongfully revile God through ignorance."
So insulting the polytheists' deities is forbidden by the Qur'an, although this is intended to defend God and humiliate those deities, because this would be taken as a mean of insulting God.\textsuperscript{175} The Qur'an also prohibits commercial activities when the call for jum'a prayer has been announced\textsuperscript{176} for fear that these activities would be a mean of negligence from attending the prayer.\textsuperscript{177}

By now, it is clear that sadd al-dhar'ai is one of the methods of ijtihād by which the rules of the shari'a can be derived from various incidents. Therefore, it cannot be ignored by mu'tahids especially in this modern age where a great deal of unprecedented cases have emerged in various spheres of life and require urgent solutions from the 'ulamā'.

XIII. Scientific Discoveries

The methods of ijtihād which were utilized by the Prophet, the sahāba and the a'imma as well as the juridical principles which were introduced by previous jurists are actually the milestones for the twentieth century mu'tahids. However, they should also give due consideration to new scientific discoveries which were not known in the times of previous jurists. As the fatwa or legal opinions should change with the
changing of magālih of customs and circumstances, they should also change according to these scientific discoveries, otherwise Islamic jurisprudence will remain stagnant and incapable of facing new problems. Let us take the following example to illustrate this point:

Basing themselves on what they heard from women and people in their days, some a'imma said that the maximum period of pregnancy is two years, while some said it is three years, others said four, five, six or seven years!¹⁷⁶

Should such a fatwā be blindly accepted merely because it was said by those a'imma in spite of what has been proved otherwise by modern science?

Similarly, when there occurs in juridical books such cases as a wife who was left by her husband immediately after the matrimonial ceremony and he never associated with her, or a woman who was married to a man by delegation and the couple never met each other..., then when the wife gave birth after due course of pregnancy, the child is attributed to the absent husband, because possibly he is a man of wilāya or khatwa!¹⁷⁹
It would seem that such a ridiculous rule is a sign of naivety, and that Islamic jurisprudence should be based only on reality; especially in a time when moral standards have deteriorated.\textsuperscript{100}

XIV. The Collective \textit{Itiḥād}

Perhaps the most effective type of \textit{itiḥād} in our days is the collective one. Perhaps there was some prophetic instruction in this respect from what has been narrated by Saʿīd b. al-Musayyib from 'Alī b. Abī Ṭalib who inquired from the Prophet, "O Prophet of God! What should we do regarding an incident about which nothing has been revealed in the Qurʿān and no \textit{sunna} has come from you?" The Prophet answered, "Gather the knowledgeable persons among the believers and conduct the matter by mutual consultation between them and do not decide (anything) about it by individual opinion."\textsuperscript{101}

This kind of \textit{itiḥād} also was practised during the \textit{sahāba}'s period, some examples of which has already been mentioned and discussed in the second chapter.\textsuperscript{102}

Modern life with its multifarious complexities and intricate transactions can hardly be handled by an individual endeavours. Hence, the involvement of
different expertise and specializations in this task seems indispensable. Muslim scholars are fully aware of the importance and effectiveness of the collective *ijtihād* in the present time. Hence, one of the resolutions reached in the first conference of the Academy of Islamic Research which was held in Cairo in Shawwāl 1383 / March 1964 is that the Qur'ān and the *sunna* are the fundamental sources of the *sharī'a* from which the rules can be deduced by everyone who has fulfilled the pre-requisites of *ijtihād*. And the proper way of attaining *masālih* and facing the ever-emerging incidents is to select the rules from the juridical schools. If they are not available in this way, the collective *ijtihād* within *madhāhib* should be employed. But if this does not suffice for the purpose, absolute collective *ijtihād* should be practised. The Academy will provide facilities for the collective *ijtihād* of both kinds when they are required.

However, in organizing this collective *ijtihād*, the following guidelines ought to be carefully observed:

1. This *ijtihād* should not be directed to "justify" the status quo by arbitrarily giving the *sharī'a* approval to it, or by wrong interpretation.
2. The gate of *ijtihād* should be opened only for those experts whose juridical qualifications and moral and religious qualities are testified by a knowledgeable quarter and whose scholastic capabilities are generally recognized.

3. This *ijtihād* must be exercised in the form of juridical assembly where ideas and views will be discussed thoroughly and examined closely. The unanimous consensus or the view of the majority will decide the final rule.

4. This juridical assembly should be at an international level and free from any influence and interference of any ruling authority. Any qualified *ʿalim* should not be excluded on political or geographical consideration; neither any pretender nor any hypocrite would be included on the same consideration.

5. Experts and specialists in various disciplines of knowledge should also be included in the assembly for reference and consultation with regard to their specializations. This is actually a Qurʾānic injunction when it states that: "Ask the knowledgeable person if ye know not."
6. The views which have been accepted by the assembly should be made binding in general social issues by official decrees. Perhaps this requirement can also be referred to a Qur'anic injunction expressed in some verses such as, "O ye who believe! Obey God, and obey the Messenger and those of you who are in authority" and "... If they had referred it to the Messenger and such of them as are in authority, those among them who are able to think out of the matter, would have known it."
CHAPTER: V

1 It seems that al-Shāṭībī has devoted the whole second volume of his al-Muwāfqaṭ to dealing with the objective of the sharī'ah. Extensive account of the subject can also be found in 'Izz al-Dīn b. 'Abd al-Salām's Qawā'id al-Ahkām fi Masālih al-Anām, (2 vols.) and Ibn Qayyim's I'tlām al-Muwaqqīt, especially volume three. One of the recent works which dwells on the subject is Magāsid al-Sharī'ah by Shaykh Muḥammad al-Ṭāhir b. Ṭāhir, the Ex-Grand Muftī of Tunisia.

2 Q. XI, 88.

3 Ibid., VII, 142.

4 Ibid., XXVIII, 4.


6 Q. VII, 85.

7 Ibid., II, 60, VII, 74, XI, 85, XXVI, 183, XXIX, 36.

8 Ibid., II, 205.

9 Ibid., XXIII, 115

10 See Muḥammad al-Ṭāhir b. Ṭāhir, op. cit., p. 64.

11 Mustas., I, pp. 286 - 287.

12 See supra, ch., I, p. 69.

13 For instance, to bury newborn girls, to deprive females from inheritance and to kill other person in lieu of murderer (in homicidal punishment), are considered by the Arabs in pre-Islamic era as maslahah. Likewise, a creditor was allowed under the Roman Law to enslave his debtor, and no one within the Roman Empire deemed such a treatment as harmful. Again, in 1925, females younger sons and other cognate relatives of the deceased were granted their rights in inheritance shares by the British Law after they had been deprived of it for ten centuries, because this deprivation as might had been thought by then, would bring about maslahah. See Ḥusayn Ḥāmid Ḥassān,
Abū Ja'far narrated that all the emigrants in Medina used to cultivate the land (for the Anṣār) on the condition of having one-third or one-fourth of the yield. 'Āli, Sa‘īd b. Mālik, ‘Abd Allāh b. Mas‘ūd, ‘Umar b. ‘Abd al-‘Azīz, al-Qāsim, ‘Urwa and the families of Abū Bakr, of ‘Umar and of ‘Ali and Ibn Sirīn, cultivated the land on the basis of having a portion of the yield.

'Abd Allāh b. ‘Umar narrated that the Prophet concluded a contract with the people of Khaybar to utilize the land on the condition that half the product of the fruits or vegetation would be their share. The Prophet used to give his wives one hundred wasas each, eighty wasas of dates and twenty wasas of barley. When ‘Umar became the Caliph, he gave the wives of the Prophet the option of either having the land and water as their shares, or carrying on the previous practice. Some of them, including A‘īsha, chose the land and some chose the wasas. Bukh., III, pp. 211 - 212, Muslim, X, pp. 208 - 212.

Ibn ‘Abbās narrated that when the Prophet came to Medina, (he found that) people used to pay in advance the price of fruits to be delivered within one or two years... The Prophet said, "Whoever pays money in advance for dates (to be delivered later) should pay it for known specified weight and measure (of the dates)." Bukh., III, p. 175, Muslim, XI, pp. 41 - 42, Ibn Ḥanbal, III, pp. 263, 288.

Individual freedom was outlined comprehensively by the Prophet in a famous address in his farewell pilgrimage. See Muslim, VIII, pp. 182 - 184. On religious freedom see e. g., Q. II, 265.

See Q., V, 2, 96.

Muslim, XI, pp. 48 - 50.
26 Mustaṣṣ, I, p. 290.
27 Muhammad Abū Zahra, Usūl al-Fīqh, p. 295.
29 Muhammad Abū Zahra, Usūl al-Fīqh, p. 296.
30 See Q. XXIV, 31.
31 Muhammad Abū Zahra, Usūl al-Fīqh, p. 296.
33 See Q. II, 222, LXXIV, 5.
34 See ibid., VII, 31 – 32.
35 See, for instance, ibid., XVII, 79. It should be noted that any good act which can benefit oneself or others is included in the sunna or recommended category by which the doer is being promised to be rewarded in the Hereafter. see Muslim, VII, pp. 91 – 100.

36 For instance, mentioning God's name before eating or drinking, using the right hand, starting with what is adjacent to oneself, etc. See Muslim, XIII, pp. 187 – 193.
38 See ibid., VI, 141, VII, 31, XVII, 29, XXV, 67.
39 I.e., dirty matters according to the sharī'ah such as wine, swine, blood, dung, etc. For details, see ‘Abd al-Rahmān al-Jazīrī, Kitāb al-Fīqh 'alā al-Madhāhib al-Arba'ah, II, (Cairo, n. d.), pp. 231 – 232.
41 Ibn Maja, I, pp. 605 – 606.
42 It is called untied maṣūlaha because the sharī'ah has not attached a certain rule to it and there is no similar case that already has a certain rule from which an analogy can be drawn. However, it is not
meant in this context as completely free from any textual provision as might be suggested by its literal meaning, but it is used merely as a technical term to differentiate \textit{al-masālīh al-mursala} from \textit{gīyās}. Sometimes it is called \textit{al-īstilāh} which means searching for the better (\textit{ṭalāb al-maṣlaḥa}).

\textit{43 Al-masālīh al-mulā'ima li maqāsid al-sharīʿ wa lā yashhad lahā ašl bi al-īṭībār aw al-īlghā.}


\textit{45 Al-Shāṭibī, \textit{ibid.}, III, pp. 282 - 283.}

\textit{46 Burḥān, II, pp. 930 - 936.}

\textit{47 Muḥammad al-Ṭāhir b. ʾĀshūr, \textit{op. cit.}, p. 83.}

\textit{48 See \textit{ibid.}, pp. 83 - 84.}

\textit{49 See \textit{ibid.}, p. 85.}

\textit{50 Muḥammad Muṣṭafā Shalābī dwells widely on this question in his book entitled \textit{Tāʾīl al-Aḥkām}.}

\textit{51 Muḥammad Abū Zahra, \textit{Uṣūl al-Fiqh}, p. 294.}


\textit{53 \textit{Q. LIX}, 7.}

\textit{54 \textit{Ibid.}, XXXIII, 37.}

\textit{55 \textit{Q. V}, 90 - 91.}

\textit{56 \textit{Ibid.}, XXIV, 27 - 28.}

\textit{57 Muslim, VIII, p. 46, see also Bukh., III, pp. 87 - 88.}

\textit{58 Abū Daʿūd, I, pp. 210 - 211, Bukh., I, PP. 283 - 285, Muslim, IV, pp. 181 - 185; Nasāʿī, II, p. 94.}

\textit{59 Muslim, IX, pp. 172, 175, Nasāʿī, VI, pp. 56 - 58.}

61 Q. X, 57, 58.


64 Q. LXXXII, 6, 7 and 8.

65 Ibid., XX, 50.

66 Ibid., II, 29.

67 Ibid., XLV, 13.

68 See e. g., ibid., LXXX, 24–32, LXXXVIII, 6–16.


70 Muṣṭafā Zayd, ibid., p. 35 (appendix), ‘Abd al-Wahhāb Khallāf, ibid., p. 129.


72 ‘Abd Allāh b. Mas‘ūd saw that a man who had ḥaḍāba (sexual relations or a wet dream) and could not find water for purification, should not clean himself by the way of ṭavammum. When Abū Mūsā argued this view by mentioning a Qur’ānic verse in sura al-Mā‘īdah (see Q. V, 6), Ibn Mas‘ūd retorted, "If ṭavammum is allowed for them as in the verse, they would have misapplied it just for the coldness of water." See Muslim, IV, pp. 60–61.

73 See supra, ch., II, p. 133.

74 See Bukh., V, p. 243, cf. Muslim, XII, p. 97.

75 Muslim, IX, p. 88, see also Tirmīdī, IV, pp. 104–105.


See Ibn Ḥanbal, IV, p. 310.


The same criticism is made by Ḥusayn Ḥāmid Ḥassān in his book, Nazariyyat al-Maṣlaḥa fi al-Fiqh al-Islāmi, see pp. 548 - 568.


See ibid., p. 211.

See ibid., loc. cit.

See ibid., pp. 211 - 212.

See ibid., pp. 212 - 213.


Reported by Al-Bayhaqī in his sunan as quoted by al-Suyūṭī in al-Jamiʿ al-Ṣaghir, II, p. 203, see also Ibn Mājā, II, p. 802.

See al-Shāṭibī, al-Īʿtisām, II, pp. 292 - 293.

Muslim, XVIII, p. 129.


See supra, ch., II, pp. 151 - 152.

See Q. II, 228 - 229.

Islam, III, p. 36.

Professor Muṣṭafā al-Sibā'ī: One of the most respectable contemporary Muslim scholars and the former leader of al-Ikhwān al-Muslimūn organization in Syria. An author of several famous books, some of which are Ishtirākiyyat al-Islām, al-Ishtishrāq wa al-Mushtashriqūn, al-Sunna wa Makānatuhā fī al-Tashrī' al-Islāmi, al-Mar'a bayn al-Fiqh wa al-Qānūn and others.

Muṣṭafā al-Sibā'ī, al-Sunna wa Makānatuhā, p. 59 - 61.

Yūsuf al-Qaraḍāwī, Sharī'at al-Islām, pp. 143 - 144.


Ibid., p. 129.

Ibid., p. 114.

See supra, p. 329.


Ibid., I, loc. cit.

Ibid., I, p. 7.

See numerous examples of this phenomenon in Ibid., I, pp. 98 - 123.

Ibid., p. 7.

See Muwāf., I, pp. 196 - 197.

Q. II, 219.


Ibid., p. 22.


Ibid., p. 24.


See Q. IX, 60.


Abū Dā‘ūd, IV, p. 142.

*İlām*, III, p. 5.

See Q. V, 38.

‘Alqama has narrated that he and Ḥudhayfa b. al-Yamān were among the Muslim army in Roman territory. When al-Walīd b. ʿUqba who led the expedition had drunk wine, we wanted to apply the shari‘a punishment on him. But this was prevented by Ḥudhayfa who said, “Do you want to punish your leader while you are moving near to your enemy who are eager to defeat you?” Another incident happened during the battle of al-Qādisiyah between the Muslims and the Persians when a Muslim warrior known by the name of Abū Mahjān had drunk wine and was brought before the commander Sa‘d b. Abī Waqqās who refused to apply the shari‘a punishment on the offender and said, “By God!
Today I will not strike a man who has rendered great service to the Muslims."


133 Ibid., p. 10.

134 See ibid., p. 11.

135 Ma' ruf al-Dawali b, *op. cit., cit. loc.*


137 Ibid., p. 30.


140 Ibid., p. 136.

141 Ibid., p. 137.

142 Ibid., loc. cit.

143 See ibid., p. 139.


147 See Bukh., IX, pp. 111 – 112, see also Muslim, XII, pp. 199 – 200, Tirmidh., IX, p. 72.


149 See Bukh., III, pp. 152 – 155, Muslim, XI, pp. 8 – 19.


154 Ibn Hajar al-'Aqelani, al-Fath al-Bari, I, (Cairo, 1348), p. 397, see also p. 198.


160 Ibid., p. 207.


163 See supra, ch., II, p. 173


165 Husayn Hamid Hassan, op. cit., p. k.

166 'Abd al-Wahhab Khallaf, Masa'id al-Tashrif, p. 171.

167 Ibid., pp. 171 - 172.

168 This is because some juridical rules are assumed sometimes to be true, though it may be false for legal or social convenience.

169 Husayn Hamid Hassan, op. cit., loc. cit.

170 Ibid., loc. cit.

171 See Islâm, III, p. 135.

174 Q. VI, 108.
175 Ilam, III, p. 137.
176 See Q. LXII, 9.
177 Ilam, III, p. 138, for a lot of other instances of sadd al-dharar in the Qur'an and the sunna, see pp. 137 - 159.
179 See e. g., Ibn Abidin, Radd al-Muhtasar, III, pp. 550 - 551. A man of wilaya or khutwa is a holyman who is believed by some people to have some sort of supernatural power that enables him to do extraordinary things without using the normal means!
181 Ilam, I, p. 65.
186 Q. XVI, 43, XXI, 7.
188 Q. IV, 59.
189 Ibid., IV, 83.
CHAPTER VI

THE REFORMIST ITTIHĀD AND ITS APPLICATION
IN TWENTIETH CENTURY: AN ANALYTICAL STUDY

This chapter is aimed at estimating the 'ulamā' achievements in their ittihādic endeavours in this twentieth century. For this purpose, certain issues that have been emerging with regard to different aspects of modern life and have been being tackled by the 'ulamā' will be singled out and analysed. In the economic realm, the selected issues will be the profits of the post office savings bank, certificates of investment and insurance. In politics, discussion will be focussed on the institution of khilāfa (the Caliphate) and the Islamic political system and democracy. And in social aspect, the status of Muslim women in society will also be examined.

I. ITTIHĀD IN ECONOMICS

The importance of economy in human life is beyond dispute. Today every nation in this world gives a great deal of attention to economic development which is considered by many people as the criterion of progress and symbol of civilization.
Islamic world is now part of what is termed as the third world or the developing countries where economic backwardness forms one of the great problems.

Muslim scholars have begun to realize the importance of this aspect of human life, so that considerable research has been undertaken in recent years. This has eventually led to the emergence of Islamic Economics as an independent discipline. Beside individual endeavours, institutional efforts have also been undertaken in this respect such as the International Centre for Research in Islamic Economics at King ʿAbd al-ʿAzīz University, Jeddah.

However, the new transactional issues such as the profits of the post office savings bank, certificates of investment and insurance have evoked much disagreement and controversy among the Muslim scholars.

1. Iltihād on the Profits of the Post Office Savings Bank

Muhammad ʿAbduh's View

According to ʿAbduh, a transaction, which has as its end a sale and which is not for the purpose of
lending to the needy, is not included in the category of exploiting the hardship of the needy. It is obvious that the postal administration is one of the wealthy governmental agencies, nevertheless it utilizes the deposited property in the savings bank whereby it can be used for the benefit of depositors, workers, postal employees and the government, in such a way that no one will harm others.

*Shaltūṭ's View-Point*

The late Shaykh Maḥmūd Shaltūṭ who was once the Shaykh of al-Azhar held that the profit which is disbursed by the postal administration to depositors in the savings bank is something lawful. This opinion is expressed in his *al-fatawā* when he says that:

"By applying the regulations of the *shari'a* and the true juridical principles on the issue, I think this kind of transaction is lawful and not forbidden, because the deposited property is not a loan which has been lent by its owner to the savings bank as the latter has not borrowed it from the former. But it is the owner himself who has advanced it willingly to the postal administration, requesting the latter to accept it. The owner is aware that the postal administration will utilize the deposited property for commercial purpose where the risk of loss or recession is rare if not completely absent."
Evidently the Shaykh based this *fatwa* on the interests of people and the state. He says:

"In depositing his property in the saving bank, the owner intends first of all to protect it from loss and to accustom himself to saving and economizing. Secondly, he desires to help the postal administration to increase its capital by which it will be able to widen the scope of its operation; so that it will gain a lot of profits which will benefit the workers as well as the officials, while its surplus profits can be of benefit to the government."³

Shaykh Shaltót, regard such a transaction as a kind of co-operation which should be encouraged. So he goes on to argue that:

"Accustoming oneself to saving and economizing and assisting the governmental agency is actually a good and admirable attitude which deserves encouragement. If, for the purpose of this encouragement, the agency assigns a certain amount of its profits and tenders it to the depositor, this is no doubt a kind of co-operative transaction which is equally beneficial to the depositor, the workers and the government. No suspicion of injustice or exploitation to anybody occurs alongside this advantage."⁴

The shaykh does not see the profit that is given by the bank to the depositor as identical to the conventional *ribā*. He asserts that:

"This kind of transaction with its manner and circumstances and with its guarantee of profits was not known to our previous *fugahā* when they studied co-operation, classified it and stipulated certain conditions for it...."
Thus, it is clear that the above-mentioned profit is not the interest of loan so as to be regarded as usury. It is not also a benefit gained from a loan as to be forbidden. But it is (no more than) an encouragement towards saving and co-operation which is allowed by the shari'ah.5

Of course nobody is entitled to make lawful the usury which has been made unlawful by the texts. But it should be understood that the reason behind its prohibition was that it brought injustice as mentioned by the Qur'ān, "... ye wrong not and ye shall not be wronged."6 This is visible especially in ribā fāhish or the multiplied usury as the Jews and the polytheists of Medina used to practise. The Qur'ān unambiguously prohibits this usury when it says, "O ye who believe! Devour not usury, doubling and multiplied, but fear God, that ye may (really) prosper."

However, the interest of the deposited property which is received by depositor from bank is still considered as usury by some 'ulamā' regardless of whatever percentage it might be. Both sides (the payer and the receiver) are deemed guilty and equally accountable for violating the prohibition if this has been done voluntarily. However, if one is compelled
by necessity and does not find other way rather than borrowing from bank which deals with usury, one is allowed in such a circumstance to borrow with interest, because this is in accordance with the shari‘a principle which says that "injury is removed" (al-darar yuzal) and "necessities make forbidden things allowable." (al-darorat tubih al-mahzorat).

On the other hand, nobody can deny the fact that saving per se is encouraged by Islam. This can be understood from a number of ahadith. For instance, the Prophet is reported to have said, "Being economical is a half of livelihood," "... That you leave your children wealthy is better than that you leave them poor, whereby they will beg people for their living." One can only leave his children wealthy by saving for them.

In contrast, some people lead anarchic lives which they justify by arguing that they are applying the doctrine of "tawakkul" (trust in God) which is required by the religion. This attitude seems to stem from misunderstanding of the doctrine itself. A glance at the Prophet’s sira will show clearly that he stored foodstuffs for a year and that did not contravene his strong and profound faith in God and His assistance.
Therefore, saving good in right and proper manner, does not contradict the precept of Islam. On the contrary, the followers of Islam should give their full attention and should even compete between each other in this laudable goal, because competition in this field is regarded as a sort of co-operation for the common wellbeing and the communal prosperity as prescribed in the Qur'ān itself: "Help ye one another unto righteousness and pious duty and help not one another unto sin and transgression."  

If the savings bank in its present condition grants profits to depositors for the deposited property according to its own way, this does not mean that it is the only possible way for saving property. There are other systems where property can be deposited without interests, so that those who are not satisfied with the present way of saving property or hesitate to accept the profits offered by the savings bank now, can willingly follow.

It should be understood that the savings bank does not belong to any individual or to any certain group or class or even to the state. But it belongs actually to the society. If the profits of the deposited property are left by depositors because they prefer other ways, this means that indirectly they do
help each other unto righteousness and for the communal wellbeing, because this form of saving will be transformed indirectly into various services and reformations which will benefit both the depositors and other people."

2. Ittihad on Government Certificates of Investment

Similarly, the certificate of investment, which is a new device for saving property, is actually a multi-purposed scheme which aims to encourage saving, to prevent extravagant use of property for personal consumption and to help the government in carrying out projects to serve the people in addition to its own budget, etc. It does not produce any harmful result, either to individuals or to the government who utilizes the property for national projects and tenders certain amount of the profits for individuals as an encouragement.

In the seventh conference of the Academy of Islamic Research of al-Azhar which was held in Shawwal 1392 A. H./ September 1972 C. E., two of the senior Azharite 'ulama', the Mālikite Shaykh Yāsīn Suwaylim and the Ḥanafite Shaykh 'Alī al-Khaṭīf, presented their researches on the profits of savings banks and government certificates of investment in which they
substantiated their views on the lawfulness of the profits gained from both schemes.

The results which were reached by Shaykh Suwaylim from his study are as follows:

1. Receiving profits which have been obtained from the government certificates of investment and the deposits in savings banks are permissible in the shari'a. Either the process of investment which leads to these profits is regarded as tacit permission (al-maskūt ʿanhu) or as a kind of loan or its likes....

2. The derivation of the above rule has been based on the juridical principles in such a way that it cannot be rejected as mere suspicion which is not supported by the evidences of the shari'a.

3. The argument which says that the above profits are a kind of usury is not actually based on reality and on the established principles.

4. The view which holds that this transaction is invalid, is based on an ijtihādī condition which has been misapplied and therefore can jeopardize the interests of the Muslims and narrow the scope of their transactions.
Shaykh 'Ali al-Khafff presented his ijtihadic research on the rule of the sharī'a concerning government certificates of investment by applying general juridical principles and the basic rules of the sharī'a for transactions. After a detailed discussion, he came to the conclusion:

"This is actually a new kind of contract which has been invented in this modern time and men have the right to invent whatever contract they think can bring about maslahah for themselves. Thus, the contract, according to my view and ijtihad is a permissible contract." 16

Those who see that the profit of government certificates of investment as permissible in the sharī'a rejected the attribution of usury from it by arguing that the reason for which usury is prohibited is unapplicable in this context. Also, they decided that this contract is a new kind of transaction or a new form of profit-sharing partnership (mudāraba). In such a transaction, receiving fixed interest from the capital is unobjectionable, even though this would overrule any condition stipulated by previous jurists which based on their own ijtihad and not on the texts. 17

However, government certificates of investment actually differ from the conventional mudāraba due to
the fact that the deposited property is not invested in business but in various public services and utilities. It also differs from the mudāraba because its profit is fixed for the owner at a certain percentage of the capital, whereas the profit of the mudāraba is indefinite. Hence, this new transaction cannot be brought into relation with or compared with the mudāraba as if this is the only acceptable transaction, whereas other forms should be rejected, even though they bear maṣlaḥa for the people and facilitates their lives. In sum, the reason for the lawfulness of government certificates of investment, according to Shaykh ʿAli al-Khafīf, should be sought in and based on the principle of maṣlaḥa alone, not its similarity to any previous transaction.

3. Iltihād on Insurance

One of the most controversial issues in modern Islamic economic thought is the issue of insurance. The present form of insurance was not known during the early period of Islam. Therefore, the Muslim jurists in those days could not make any decision on it. The first Muslim jurist who discussed this subject was the eminent Ḥanafite jurist, Muḥammad Amin b. ʿUmar known as Ibn ʿAbīdīn (d. 1252 A. H./ 1836 C. E.) in his...
famous book "Radd al-Muhtār, Sharh Tanwīr al-Abṣār" which is known as "Hāshiat Ibn ʿAbidīn".

In this discussion, Ibn ʿAbidīn gives an example of a trader who rented a vehicle to carry his goods outside Muslim territory. Apart from the transport charges which were paid for this purpose, he also paid a certain payment to a person outside Islamic territory on the condition that the latter would ensure the safety of the trading property in case of its lose. Such a dealing was considered unlawful:

Insurance in its present form first entered the Muslim countries through foreign companies. Hence, it naturally evoked the Muslims' suspicion. As expected in many other "īttihādīc issues, " Muslim ʿulamā' have different ideas regarding insurance. Many of them are of the view that it is absolutely forbidden, while others deem it as utterly lawful. But there is also the third group of the ʿulamā who hold the middle outlook by differentiating its lawful category and forbidden category. Let us now follow the arguments of each group:
(a) The Objecting View

Shaykh Muḥammad Bukhayt al-Muṭṭi‘I, the former Grand Mufti of Egypt during the Ottoman regime is said to be the first Muslim ṣālim after Ibn ʿAbidīn who expressed his idea on the subject. He was one of those who uncompromisingly objected to insurance and regard it as strictly forbidden.

The result of a questionnaire in this regard, sent by a committee set up by Nadwat al-ʿUlamā', Lucknow, India, to the leading ʿulama' of the sub-continent of India, also shows that most of them are of the view that insurance is forbidden.

Perhaps, Professor Yusuf al-Qaraḍāwī can be included among those who reject the present form of insurance and regard it as incompatible with Islamic precepts. He observes that, in an insurance against misfortune, for instance, the company (the underwriter) would appropriate the whole amount which has been paid by the insured when the insured's property was safe, but would compensate only the agreed amount in the occurrence of damage. Such dealing contradicts the etiquette of commercial transaction and joint partnership.
Life insurance also contradicts business partnership because the compensation given to the heirs of the deceased is sometimes more than the paid instalments. But the insured will forfeit all the instalments he paid if he failed to continue paying the rest of them. Such at least is an invalid condition according to Islamic teaching.

Mutual consent between the parties involved is worthless in this regard as long as the contract does not stand on absolute justice, i.e., is not mixed with risk and injury. 25

Generally, the objection to the modern contract of insurance is based mainly on the following reasons:

1. It is a wagering contract.

2. It is mere gambling.

3. It is of an uncertain nature (gharar).

4. Life insurance is a device whereby an attempt is made to supersede the Will of God.

5. In life insurance, the amount of premium is indeterminate.
6. It deals with ribā (usury).^26

(b) The Middle View

Among those who consider that certain kinds of insurance are lawful and others unlawful or forbidden are the Egyptian scholar, Shaykh Muḥammad Abū Zahra, Shaykh ʿAbd Allāh b. Zayd, the Head of the Canonical Courts and Religious Affairs in Qaṭar, Shaykh Aḥmad al-Sharbāṣī, the Former Director of the Muslim Youth Association of Egypt and many other ʿulamā’.

Abū Zahra, for instance, differentiates between life insurance and motor insurance where he sees the former as forbidden for it is a kind of gambling and the latter one as permissible.27 Social security introduced by the state for workers or civil servants, etc..., is valid and permissible. It is a kind of social co-operation.28

This view is agreed by Shaykh ʿAbd Allāh b. Zayd who maintains that nothing is forbidden regarding insurance of cars except the indefiniteness of injuries which might be terrible or might not happen at all. But such indefiniteness is not taken into account as in other cases where of guarantee and the validity of the guarantee of unknown matters have been
mentioned by the previous fuqaha'. He furthermore argues that insurance on cars has become imperative nowadays insofar as most of the Arab countries refuse to grant driving license except for insured cars, and this helps to dismiss any doubt about the permissible status of this kind of insurance.

However, according to the Shaykh, life insurance is forbidden because it is seen as a new kind of invalid contract because of its resemblance, in essence and meaning, to gambling. This is due to the fact that the insured pays little premiums to gain a massive indefinite bonus in the future which he will probably miss as the consequence of failure to complete the required premiums.

According to Ahmad al-Sharbafi, insurance is forbidden if it is based on usury, especially because it bears the elements of anarchism and uncertainty where fraud is often committed against the insured, but massive profits are gained by the companies.

It should be noted at this juncture that the Islamic Jurisprudence Council of the Muslim World League, Mecca, considers all modern insurance transactions including life insurance and commercial insurance as contrary to Islamic teachings. The
Council, however, approves of co-operative insurance. \(^3\)

(c) The Pro View

Perhaps Shaykh Muḥammad ‘Abdūh was one of the earliest Muslim scholars in this century who expressed his opinion about insurance. In an Egyptian journal of Legal Profession (Majallat al-Muhāmā), No. 460, on 9th Ṣafar 1319 A. H., a fatwā is attributed to ‘Abdūh in which he declares that life insurance is a kind of sharikat al-mudāraba (business partnership) and therefore it is permissible in the shari‘a. \(^3\)

The late Shaykh Muḥammad Yūsuf Mūsā, another distinguished scholar of al-Azhar, may also be included among those who see that insurance is a lawful contract when he says that all types of insurance are a kind of co-operation and are helpful to the society. Life insurance is beneficial to the insured as well as to the insurance company and as such there is no harm according to the Islamic law if it is free from interest; that is the insured taking only what he has paid without any increase if he survives the period of insurance, or in case he dies, his heirs getting the compensation. This is lawful under Islamic law. \(^3\)
Professor Muḥammad Nejatullah Siddiqi at King ‘Abd al-‘Azīz University, Jeddah, also consider that insurance is not forbidden by the sharī‘a. In his view, insurance is based on the discovery of a useful social-scientific principle. Like other scientific discoveries, it is a blessing from God. To take advantage of it is not only desirable, it is indispensable for progress of civilization.37 According to Professor Siddiqi again, insurance has nothing to do with gambling which is prohibited by God. It is possible to organize insurance under an Islamic system in such a way that it is purified from all incompatible elements, and it is possible to organize insurance without interest.38

Muḥammad al-Bahl is another Muslim scholar who defends insurance and regards all types of its contracts as permissible in Islam. This conclusion is mainly derived from his careful discussion of the reasons or legal causes on which the Islamic legal rules of transaction are based. According to him, a contract is valid as long as it does not contain elements of fraud and injury.39 On the contrary, any contract which involves swindling or injurious elements is void and thus forbidden by the sharī‘a. Riba, for instance, is forbidden because it is injurious, i. e., injustice and exploitation of the
needs of a borrower, while sale of risk (bay‘al-gharar), i.e., the sale of something which is not present, is forbidden because of the possibility of fraud, which may be caused either by the indefinite condition of the sold object or by inability of the vendor to deliver it.

In the case of insurance, however, such swindling and injurious elements do not occur. The Insured person in the insurance of cars, for instance, is not wronged if he is not paid by insurance company from his premiums when no accident befalls him, because he agrees with this. He does not also wrong others when he is indemnified, on the occurrence of accident, more than what he had paid, because this bonus is agreed on by others in the "implicit" contract with him through the company (underwriter).

The same rule is applicable to life insurance, where all involved parties in the contract agree, via insurance company or government agency, to give a person at old age or when he is unable to work, a certain proportion every month or a certain lump sum, compatible to the instalments which were paid under his name during the period of insurance or work. The same is the case in the payment which is granted to the heirs of a deceased to help them to face the
circumstance of death. The insurance company is not wronged as well, simply because its business is operated according to mathematical calculations in such an accurate way that the risk of loss is very small."

Professor al-Bahi goes further and maintains that life insurance should be encouraged because, firstly it promotes a kind of good and constructive cooperation among a group of individuals and secondly, it is free from any injurious and coercive element."

Perhaps the most comprehensive discussion on insurance in the shari'a is that by Muṣṭafā Aḥmad al-Zarqā', Professor of Law and Islamic Jurisprudence at University of Jordan. In a juridical conference held in Damascus between 15 - 20 Shawwāl 1380 / 1 - 6 April 1961, Professor al-Zarqā' presented a paper on "Aqd al-Ta'min wa Mawqif al-Shari'a minh" (Insurance Contract and the Shari'a Attitude Towards It) and came to conclude that it is permissible in the shari'a."

Several years later, in the First International Conference of Islamic Economy at King 'Abd al-'Azīz University, Jeddah in 1396/1976, Professor al-Zarqā' presented another paper in which he discussed other aspects of insurance that had not been touched upon in
the previous paper. Here also he reached the same conclusion in favour of the lawful status of all types of insurance.

He eventually compiled both papers together with several other relevant articles that include arguments for and against insurance in a book entitled "Nizām al-Ta'mīn, Haqīqatuh wa al-Ra'y al-Shar'i fīh" (Insurance: Its Truth and the Shari'a View on It) which was first published in 1984.

Al-Zarqā' observes that disagreement among legal experts and fiqhā' on the question of insurance stems from the different concept of insurance adopted by both groups. In the view of legal experts, insurance is a system of co-operation and joint liability which leads to the lessening of the injurious consequences of risk and calamity. This is done by paying compensation to the victim from the premiums of those insured as a whole, whereby the above consequences can be dispersed among all of them instead of leaving it to be suffered by the victim alone.

According to them, the aim of Islamic social and economic legislation is to establish a society based on co-operation and reciprocal responsibility. Thus
the contract of insurance and its system do not contradict this aim of Islam.

On the other hand, insurance as conceived by the *fugahā* who prohibit it is a kind of gambling and wagering contract in which the insurance company gains permanent profit that is mixed with usury as an inseparable part of its operation.

Owing to this difference in basic outlook, it is natural that the decisions of both groups are also different.

As have been indicated above, insurance is a recently invented system about whose legal status the *'ulamā'* can only drive through *ithād*, so that different opinions are unavoidable. It is not the aim of this study to decide which side is correct on this issue. However, it is clear that insurance, as a modern transaction, can only be justified by employing *ithād* for the sake of reformation. In this regard, the argument of those who defend insurance, justify its legitimacy and reject the opponents' suspicions around it are quite interesting. Although these arguments have been disputed by many *'ulamā'* they
indicate a serious attempt by some Muslim thinkers to employ reformist *ijtihad* with regard to a modern problem. Therefore, it seems appropriate to give here the summary of some more arguments of the proponents which perhaps can help us to get a clearer picture of this *ijtihadic* attempt:

1. Insurance is not a kind of gambling because gambling is based on luck and thus it leads, as the Qur'an says, to "enmity and hatred and turns people away from remembrance of God and His worship." It also paralyzes intellectual and economic productivity. This has nothing to do with insurance which has been introduced on the basis of co-operation and joint-responsibility to lessen the suffering caused by an accident. Furthermore, insurance is a commutative contract which is beneficial to both sides in terms that the underwriter (the insurance company) gaining profit, while the insured acquires security before the occurrence of loss and compensation after its occurrence. Such a compensation is unobtainable in gambling as nothing is gained by the loser from the winner's profit.

2. Insurance is not a kind of wagering because the latter has no relation with the indemnification against the consequences of risk which jeopardize
economic activity. Also wagering does not grant security to anybody as in the contract of insurance."

3. Life insurance is not a device to override the power of God or to supersede His Will, for it does not guarantee the non-occurrence of an event, but just indemnifies the insured against the consequences of specific event or risk. It is actually a kind of co-operative movement to diminish the loss resulting from a certain event and is supported by the Qur'ānic verse which says, "Help ye one another unto righteousness and pious duty. But help not one another unto sin and transgression." Death is, no doubt, a calamity according to the Qur'ān and therefore, measures may be taken to lessen the seriousness of its consequences by mutual help and assistance.

4. Insurance does not contain any risky element (gharar). The real nature of gharar is pictured vividly in several ahādīth in which the Prophet forbids selling things that have indefinite results such as foetus in the womb of animal, fruits before their benefit is evident, foodstuff before the seller receives it, fish in vendor's net or wild animals in hunter's snare.
Evidently the prohibition of this kind of sale is due to its indefinite result, i.e., the seller is not sure that he will be able to deliver the goods for which he receives payments.

However, the speculative and risky element within natural limits can hardly be avoided in any human transaction. Thus we understand that the prohibited gharar is only the excessive or the repugnant kind of it where the contract becomes a mere gambling which relies on absolute luck in profit and loss.

The above criterion of gharar cannot be applied in any way to insurance. The probable element is available only in respect to the underwriter, since he is bound to compensate the insured if the defined risk takes place, but does not pay anything if such risk does not happen. Even this probability is only with regard to every insurance contract separately, not to the all the contracts run by the underwriter or to the insurance system per se, because the system has been set up on statistical basis which normally calculates the element of probability.

Yet even this probability does not exist in relation to the insured because the real objective of insurance is to provide security for the insured
against certain danger and this security is obtained by the insured at the very moment when the contract is registered and not conditional on the occurrence of the danger afterwards.\textsuperscript{58}

5. The indefiniteness in life insurance in the sense that the insured does not know how much the premiums he pays will amount to until his death is baseless. The Hanafite jurists, it is to be noted, make a distinction between the indefiniteness which leads to complications and renders the contract unenforceable and that which does not affect the enforcement. For instance, selling an indefinite sheep out of a herd is invalid, because this hinders the enforcement of the contract where the seller wants to surrender the minimum and the buyer wants to take the maximum. On the other hand, if a person has settled all his obligations towards someone else without identifying their quality and quantity, the settlement is valid for the reason that it does not create any misunderstanding. Likewise, indefinite premiums in life insurance are valid for the amount of each instalment when paid becomes known and so is the total amount of all instalments.\textsuperscript{59}

5. Insurance as a legal system does not necessarily deal with interest, because this is only a modus...
which is not an inseparable part of the system itself. Thus it should not affect our judgement on insurance as a legitimate system.

The juridical battle concerning insurance is still going on today and each group has been trying hard to justify its stance.

In fact, the maslaha of the Muslim community is the real objective which every group has been insisting to preserve. Those who defend insurance look at it as a useful scheme in which an individual’s properties and belongings can be safeguarded against loss and misfortune, while those who object it see it as a bait or a skilful trick to exploit people’s possessions.

The Islamic Break-Through

If the present contract of insurance and its operation is opposed to Islamic precept according to many Muslim scholars, this does not mean that Islam rejects the idea of insurance itself. It may be possible that insurance can be operated in other ways that do not contravene Islamic transactional principles and moral values.
The Islamic system, is supposed to insure its followers and those who are under its protection; whether through joint-responsibility by members of the society among themselves or through government and public treasury. The *shari'a* provides insurance for individuals against accidents as it also provides necessary assistance to overcome the consequences of death and calamity. The *al-gharimīn*'s share in *zakāt* funds is one of the sources which, according to some *mufassirīn*, can be exploited for this purpose.

On the practical side, the initiative to establish the Islamic Insurance Company on a co-operative basis was taken by the Faisal Islamic Bank of Sudan in 1979 and within a span of five years, several branches were also established in Saudi Arabia. With the exception of Life Insurance, there are various kinds of business dealt by the Company including Marine Cargo Insurance, Aviation, Fire & Burglary, Personal Accident and so on. There are two separate and distinct accounts maintained by the company: one a policy-holders' account and the other a share-holders' account. The policy-holders' accounts are created with all their contributions in consideration of insurance protection and debited claims. The surplus after the establishment of necessary reserves is distributed among the policyholders in proportion to their paid
II. IJTIHĀD IN POLITICS

Politics in Islam is an area which has not only witnessed prolonged and interminable disputes and controversies, but also blood-shed and civil strives.

In the twentieth century, political topics such as the relationship between Islam and state, the concept of Islamic political authority, the institution of khilāfa and its necessity, etc., are subjects on which hundreds of books and periodicals have been published.

The cause behind these disputes and controversies is hidden in the fact that the texts do not provide a clear-cut definition of the Islamic political structure, but lay down only its general features and broad characteristics by mentioning several principles which are required for its existence, such as shūrā (mutual consultation), justice, the rulers' responsibility, public rights, etc. Hence, the opportunity to exercise ijtihād in this field is indeed ample.
1. The Khilāfa in Islam

The Islamic political structure has conveniently been referred by many Muslim scholars to the institution of khilāfa (the caliphate) which was historically a long series of the successive governmental authorities commencing immediately after the death of Prophet Muḥammad until the ruin of the Ottoman Empire at the beginning of this twentieth century.

But what does the word "khilāfa" really mean?

It seems that those who have discussed the subject have visualized it from different stand-points and used the term to signify different meanings. Some of them have viewed the subject from its theoretical angle and hold that this institution is necessary in Islam as well as it is a religious requirement according to the consensus of the ‘ulamā’ from the early days of Islamic history.

The definitions of the khilāfa itself, as given by previous Muslim scholars have usually been utilized to consolidate this idea. For instance, al-Māwardī (d. 450 A. H.) defines it as, "The deputyship of the prophethood in safeguarding the religion and
administrating the world."** Similar to this is Ibn Khaldûn's definition which says, "The khilāfa is that to bring mankind to act with accordance to the regulations of the shari'a in their sacred and profane affairs..."**

Such an outlook seems to imply that the khilāfa is any system that implements the shari'a or, in other words, it is one which is committed to the shari'a.

On the other hand, there is another group of scholars who have seen the issue from its historical perspective. In certain periods this institution was represented in the form of Rightly Guided Khilāfa as in the periods of the First Four Caliphs and also in the period of 'Umar b. 'Abd al-‘Azīz. But in some other periods, it was no more than despotic monarchy which was characterized by tyrannical and coercive authority, even though the title of the khilāfa and its symbols were still used. This made one of those scholars describe it as a tragedy which has befallen Islam and the Muslims and a source of mischief and wickedness.**

The prolonged polemic around the Ottoman Caliphate is one of the recent examples which can be taken to
illustrate the scholars' confusion of the various meanings of the khilāfa.

Those who defended it had in their minds the following pictures of "the Sick Man of Europe":

(a) It was a ruling system that had its influence and authority on the Muslim community, surpassing geographical and national boundaries.

(b) It was a government that proclaimed its commitment to the shari'ā and tried its best to apply the rules of the shari'ā on the people.

(c) It was, at the end, the bastion that protected the Muslims against the European political, military and ideological onslaught.

On the other hand, those who tried to abolish it, or at least, did not see any great harm in its abolition were motivated by the notion that the Ottoman Caliphate in its last days was not any longer the true manifestation of the Islamic political philosophy. Shūrā, justice and ruler's responsibility towards the ruled had disappeared. There were also shortcomings on its part in social and ideological aspects. It was also incapable of filling the gaps
and safeguarding people's interests beside it had no ambitions in education and civilization. For these reasons the Caliphate was no longer capable of upholding the banner of Islam, speaking in its name and confronting various dangers which were threatening the Islamic nation. 70 Even some ardent defenders of the khilāfa acknowledge that the Ottoman Caliphate was not the khilāfa in the real sense of the word as required by Islam. 71

Therefore, there seems to be no rational reason for adhering to the literal edifice of the khilāfa, because what should be considered, as rightly maintained by the 'ulamā', is purposes and meanings, not words and structures. It should be noted in this connection that the term "khilāfa when it was first introduced during Abū Bakr's period, was just an expression of the successive Muslim ruling authorities after the Prophet. It was not in any way an expression of a political system with its complete features and decisive characteristic. This is why the method of nominating the head of state, which is one of the essential elements in any ruling system, was different and not conducted constantly in a definite manner throughout the reigns of the Four Pious Caliphs, let alone in the periods of those who came after them. 72
Acknowledging this fact, a contemporary Muslim author observes that the Islamic political structure which was established in the first era of Islam was actually not a part of the sharī'a, but it was rather an institution that was regarded by the Muslims as capable of fulfilling the requirements of life at their time. The Muslims in any society and in any period have the right to establish Islamic government in whatever form they deem suitable for their times and circumstances. If the first Islamic institutions of finance, military, administration, etc., were altered and modified by the Muslims according to the requirements of life, nothing stands in their way to make the same alteration and modification regarding the shape of government or the khilāfa. 73

So what should be done by the Muslims now is not to re-establish the khilāfa as it was in its last periods, but rather to restore its essence as required by the sharī'a behind the establishment of such a system. It should also be modernized to suit the developments of the modern world. 74
2. The Islamic Political System and Democracy

Apart from the issue of the khilāfa, there are several other fundamental issues which need to be studied by the Muslim scholars in order to find out suitable solutions which will secure benefits for Muslim community at large.

The political aspect of Islam is indeed a complicated one, especially with regard to the modern times where the world has become small and the relationship among nations has become interlocked. In such a situation, accuracy in *iṭithād* is extremely important, otherwise the consequence of erroneous or inaccurate *iṭithād* will be grievous.

Moreover, the diffusion of western ideologies and political thought has added, as it seems, to the obscurity and complication of the matter in such a manner that some writers think that the Islamic political structure is similar to one of those prevalent trends.

If the Islamic political structure has frequently been described by non-Muslim writers as theocratic, autocratic or even absolute monarchic, some contemporary Muslim writers tend to claim it as democratic.
This is probably because democracy is the most appealing system of politics in the modern age in addition to its similarity with some aspects in the Islamic polity, especially to the principle of **shūrā** without which a political authority cannot be defined as a truly Islamic one.

Muḥammad ʿAbduh and his disciple Muḥammad Rashīd Riḍā were strong advocates of democracy in their commentary on the Qurʾān (**Tafsīr al-Manār**) and in their articles in **al-Manār** monthly. Mawdūdī in the Indian-Pakistani Sub-Continent, first advocated that **shūrā** for the ruler was just to provide him with different opinions, which he has no obligation to follow whatever the number of its supporters may be. Later he (Mawdūdī) stated that **shūrā** should be binding on the ruler.76

Muslim jurists have laid down several requirements regarding **shūrā**77 based on the precedents in the periods of the Prophet and the Guided Caliphs. In brief they are as follows:

**First:** It is incumbent on Muslim rulers to consult the Muslims, because if the Prophet himself, who did not speak out of his own desire, was enjoined by God to consult his followers, it is more
appropriate that other Muslim rulers should be bound by the same injunction.

Second: Shura should be established within the framework of the general underlying principles in the Qur'an and the sunna. Hence, shura aims to seek the ever-changing interests of the Muslims but on the basis of the general and permanent principles on which Islam is built. This is actually a unique characteristic of the Islamic shura which distinguishes it completely from the parliamentary democracy.

Third: The required conditions for the participants of shura differ according to the different nature of the issues. (a) If the proposed issue is referred to an ijtihad for the purpose of identifying the lawful and unlawful rule of the shar'a, such issue cannot be tackled except by those who have acquired the pre-requisites of ijtihad. (b) In an issue which related to the choice of a caliph, the Muslims are categorized into two different categories: The first category constitutes a group of personages known as Ahl al-Hall wa al-'Aqd (lit: those who bind and loose) who must be capable of nominating a suitable candidate for the post of the caliphate; while the second category is the rest of the Muslims who will
give their bay'a or pledge of allegiance to the nominee. (c) If the proposed issue is not related to the above two aspects, every honest Muslim is entitled to participate in the shūrā. 78

These regulations, as has been indicated above, have been derived by the fuqahā' from precedents which took place during the periods of the Prophet and the Guided Caliphs because, there is no detailed and concrete instruction provided by Islam in this respect. 79 Thus, shūrā was carried out during those early periods of Islam in an disorganized manner inasmuch as no regulation was made regarding, for instance, the place, the participants, etc.. Normally it was performed in the mosque after congregational prayer and participated in by those who attended the prayer. For this reason, it is difficult to decide whether shūrā is binding or not. Logically, a caliph is bound to accept the opinion of the majority, but he is also allowed to rely on his personal discretion. An instance at hand is Abū Bakr's resolution to declare war against apostates in his reign which apparently overrode the agreement achieved by the Muslims. But leaving such a veto in the hand of a caliph may render the constitution valueless if the leadership is held by an unsuitable person. 80
With regard to democracy, it can be defined as:
"a form of government where the right of making
decisions is exercised by the people directly or
indirectly through representatives chosen by and
responsible to them."

Thus the starting point in the democratic system
is that the right to make political decisions rests
with the people. But since the whole people cannot be
gathered in one venue, they choose their
representatives to exercise the authority in their
names and for their interests through the process of
periodical free election. This is called "the
Representative Democracy."

Normally, in the present system of democracy, no
restriction is imposed on parliament in respect of
legislative function except for the few restrictions
which have been mentioned explicitly in the
constitution. However, in order to legislate
something, a parliament has to follow certain
procedure. For instance, it should gain popular
support from its members as well as the approval by
the head of state, etc.

Some Muslims decline to accept democracy because
they understand that in such a system, sovereignty is.
vested in the people, whereas according to Islam, such a power belongs to God alone since God is the Real Lawgiver and authority of absolute legislation is vested in Him.  

According to the Islamic political theory, the people's authority is not absolute as in a democratic system, but it is bound by the shari'a. Therefore it can only be exercised within this divine law which is contained in the Qur'ān and the sunna. If the will of the community is recognized in Islam, as one of legal sources, it is conceived that this will should be based, in one way or another, on the Qur'ān and the sunna. 

Thus, the Islamic government is not authorized, for instance, to decide the criteria of moral virtues and vices, as democracy might do, for such criteria have only been decided by the shari'a to which men should abide. This also implies that the Islamic government is not entitled to make any alteration to what has explicitly legislated by God in the shari'a. 

Another basic difference between democracy and the Islamic political system is that what is termed as "the people" in modern democracy are those who live in
a certain geographical boundary where they are joined together by the bounds of blood, race, language and custom. This means that democracy is associated with nationalistic notion. By contrast, the people in Islam originally are unified only by the same religious belief; which means that everyone who adopts Islam, irrespective of his race, colour or country, automatically becomes a member in the Islamic state; though this does not prevent the existence of regional or national circles within this universal framework for organizational purpose or for the purpose of achieving national interests which does not contradict the universal interests of the Muslim community.\textsuperscript{67}

Differences also appear in the objectives of both systems. Democracy has material and worldly objectives. It aims to secure happiness for a certain nation or people in this world by such things as increasing the wealth, raising salaries or to winning wars, whereas the political system of Islam, beside comprising these worldly goals has also spiritual objectives.\textsuperscript{68}

Theoretically, it is possible to maintain that Islam has its own system of government which differs, in one way or another, from other systems. But employing \textit{ijtihād} about a system from its theoretical
side only will be less fruitful due to the fact that
theory alone will not be able to produce an effective
solution to any problem that is being faced by a
community. The theoretical or conceptual side of any
system is actually the idealism that is being
cherished by its proponents and upholders, whereas its
application has always offered approximations to the
ideal concept. History has proven that the
application of a system has not just always failed to
achieve its ideal target, but has sometimes been
dverted from its original course to produce only the
adverse result. Such a phenomenon is noticeable in
every system including the "Islamic" khilāfa itself as
has been indicated above. So it would be better if
'ulamā'īn itīhād can be directed towards the
application of the Islamic political philosophy into
the real world.

Bitter memories about the past conditions that the
Muslims experienced under autocratic regimes may be
sufficient to drive away the wishful thinking from
their minds as, for example, to have "just autocratic
rulers". It should be noted that almost all Muslim
reformers have denounced autocracy, to the extent that
one of them has attributed to it all miseries that
have been suffered by men.
It would seem appropriate for Muslim people to share the experience of other communities, so that the Islamic political theory will be actualized in a more successful manner in the light of this joint-experience.

The democratic system came about by a process of trial and error. But experience that has been acquired through a long and consistent application of the system has often been useful to overcome its defects and defaults; so much so that improvements have been continuously made. Further, the advocates of democracy have opposed and have tried to avoid a parliamentary dictatorship or dictatorship of the political majority. 

Probably democracy is not the best political system that can be achieved by men, but comparatively it is the best among all the prevalent systems of government that are being operated in the contemporary world. And, comparatively also, it would seem to be the nearest system to the Islamic one, especially with regard to its policies of political equality, responsible government, individual freedom, and separation between legislative, judicial and executive authorities.
Regarding some aspects of democracy that might contradict the Islamic principles, they can be overcome by incorporating a provision in the constitution which states explicitly about the invalidity of any legislation that is incompatible with the general rules of the shari'a. It would be sufficient for this purpose to set up a council of distinguished 'ulamā' to whom all legislations must be referred before being passed by parliament.  

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III. IJTIHĀD ABOUT SOCIAL LIFE: THE STATUS OF MUSLIM WOMEN IN SOCIETY

There are a great many new issues that have emerged in the social life of the Muslim community in the modern age which have drawn the attention of the 'ulamā'. One of these issues is the social status of Muslim women and their role in society.

1. Women's Status in Islam

Woman has been elevated in Islam to a very prestigious position where she has enjoyed a lot of human rights that probably had not been secured for her in preceding civilizations.
The Qur'an states this fact clearly in the following verse:

"O mankind! Be careful of your duty to your Lord Who created you from a single soul and from it created its mate and from them twin hath spread abroad a multitude of men and women."\(^5\)

The same fact can also be understood from a hadith which says that, "Women are the counterparts of men."\(^6\)

Equality between both sexes is mentioned also unambiguously by the Qur'an in reference to reward of good actions and punishment of bad actions in hereafter life such as:

"Their Lord hath heard them (and He saith): Lo! I suffer not the work of any worker, male and female, to be lost. Ye proceed one from another."\(^7\)

And regarding matrimonial relationship, the Qur'an stresses that:

"The rights of the wives (with regard to their husbands) are equal to the (husbands') rights with regard to them."\(^8\)
The leadership of man in the family is due to the moral and material responsibilities that he is required to bear and should not be taken as a privilege. The Qur'ān is very clear in this respect when it states that:

"Men shall take full care of women with the bounties which God has bestowed more abundantly on the former than on the latter, and with what they spend out of their possessions (on women whom they are responsible for)."

The pagan Arabs in pre-Islamic era used to commit infanticide by burying alive their baby girls. This practice is depicted and condemned by the Qur'ān.

With the emergence of Islam this sad spectacle disappeared totally and was followed by a tremendous change in favour of women's dignity. Under the patronage of Islam woman was supposed to be treated in a respectful manner in every stage of her life. She is to be honoured during her childhood, then as a wife and during her old age. Bringing them up and educating them properly will lead someone to paradise. Matrimonial life should be based on mutual love and mercy, and treating wife with fair treatment is regarded as a part of the woman's rights.
that a husband is required to fulfil as a religious obligation. The Prophet is reported to have described the one who treats his wife excellently as the best believer, while a pious wife is described by him as the best pleasure for a husband in this world.

If a woman stayed married to her husband until his death, she also inherited part of his property. While her share was less than her children's, she was assured of being supported by her sons in widowhood. By the same line of reasoning, her inheritance from her father was half that of her brother's. Her husband supported her, whereas her brother had to support his wife.

Woman enjoys even more venerated position during her old age as prescribed in many Qur'ānic verses and ahādīth.

2. Woman's Position in Islamic History

Women played a conspicuous role in Islamic history. The services that some of them rendered to the cause of their religion and community have been recorded in Islamic history and have always been looked at with respect and pride.
The first person who believed the Prophet's claim of messengership and supported his struggle was his own wife, Khadija bt. Khuwaylid. It was her generous support and sympathy that always helped to relieve the difficult task of her husband and mitigate his grief for the opposition to his da'wa at that oppressive stage of Islamic history.¹⁰⁸

If Khadija gained her reputation as the first person who believed and supported the Prophet, Sumayya, mother of 'Ammār b. Yāsir has been recorded by Muslim historian as the first martyr in Islam.¹⁰⁹

There are a number of hadith which tell us unequivocally about the fact that Muslim women during the time of the Prophet took an active part on battle-fields especially by supplying water and nursing the injured fighters.¹¹⁰

Perhaps Nasība bt. Ka'ab who was also known as Umm 'Amīra al-Ânsāriyya can be taken as an example which shows clearly that Muslim women during the Prophetic era were really involved in various fields of public activity. Nasība was among the seventy-five Medinan people who gave their pledge of allegiance to the Prophet in al-Bay′a al-ʿAgaba.¹¹¹ She even entered directly into the battles of Uhud¹¹² and al-Yâmâma in
which she was badly wounded.\textsuperscript{113} Besides, she also narrated several *ahādīth.*\textsuperscript{114}

Of course in discussing such a subject, one cannot ignore the Prophet's young wife, 'Ā'isha who was probably the most prominent figure in this respect. She was one of those from whom the *sahāba* transmitted a considerable *ahādīth* and used to learn their religion.\textsuperscript{115} She also accompanied the Prophet in the battle of Uhud and in certain other military expeditions.\textsuperscript{116} 'Ā'isha's involvement in political and military affairs continued after the death her husband.\textsuperscript{117}

These instances of the Muslim women's participation in public life during the Prophet's era have been cited to show that the efforts to reform the deteriorating conditions of Muslim women are not being launched in this century without religious and historical bases. In fact, in later generations also evidence can still be sought to prove that many Muslim women played influential roles in public life. Khuzayrān, mother of the 'Abbāside famous Caliph, Hārūn al-Rashīd (786 – 809 A. H.), his shrewd wife, Zubayda\textsuperscript{118} and Shajarat al-Durr, the powerful slave-girl of al-Malik al-Ṣāliḥ of the Ayyūbide dynasty (13th century)\textsuperscript{119} are just a few of female
personalities whose names have been enshrined in Muslim history. It should be pointed out that such personalities should not be taken as the real representatives of the Islamic social norm because of big controversies that involved the lives of the royal families in those periods.

The Deterioration of the Status of Muslim Women

Islam cannot be held responsible for the deterioration of the status of Muslim women in the later periods, simply because the occurrence of such a phenomenon has not been the result of the implementation of its doctrines. Many Islamic social orders have been renounced by the followers of Islam for a long time. The general backwardness of the Muslim world in recent centuries has affected almost all spheres of their lives. Since they are an organic part of the decadent society, women are certainly not exceptional in this respect. On the contrary, they have been more vulnerable to this epidemic.

But sometimes Islam is wrongly forced to bear responsibility for a historical heritage that is alien to its nature. It is commonly known that sometimes custom and tradition supersede the religion in dominating the life of individuals and societies. In
matters concerning Muslim women, this phenomenon has appeared in many aspects. The harem system is indeed a glaring instance of such a phenomenon where female-folks were kept in homes in almost absolute seclusion from the outside world.

During the Ottoman era, sexual segregation was enforced in the cities with the convert’s zeal. The palaces segregated women in harems guarded by eunuchs. Edicts were issued periodically well into the nineteenth century, specifying the type of veil and garment to be worn by women outside their homes. Finally women were banned from certain shops and areas of the city, ostensibly to discourage prostitution. Nor were they permitted to walk or ride with men, not even with their fathers and sons.120

Ironically, some 'ulama' have tried to defend such a detrimental condition and deem it as an Islamic injunction on the subject.121 For this they have often quoted a Qur’anic verse in surat al-ahzab that was specifically addressed to the wives of the Prophet because of their special situation. This opinion will be discussed after.
Ijtihād to Reform the Condition of Muslim Women

Since woman form an integral part of society, their conditions must be included in the general programme of any social reformation. If the condition of women is ignored, such a reformation will be useless and will end in failure. Hence, in his reformist efforts, Muḥammad 'Abduh gives due attention to the conditions of Muslim women. According to 'Abduh, the degradation of Muslim women in the recent centuries lies partly in misunderstanding of the sharī'a attitude towards the relationship between man and woman and partly in application of alien doctrines that have wrongly been presumed to be the Islamic ones. 'Abduh holds that men's view towards women in reality as well as in certain family laws, can be considered as a reversion to the ignorant attitude from which women were already emancipated by Islam. 122

Interestingly, 'Abduh does not separate the problems of family from other problems that the Muslims have been facing, because a family, as he observes, is not but a brick in the whole building of the community. If families are sound, the community which has been built up from families, is also sound. The one who has no family has no community, because the sense of mutual sympathy and the spirit of co-
operation have reached their highest points in the relationship between parents and children and then between all relatives. Hence, a corrupted person who is useless to his family cannot be expected to be beneficial to other people.\textsuperscript{123}

However, 'Abduh's efforts to reform the condition of Muslim women were concentrated mostly on the conjugal relationship in family life; such as the rights and responsibilities of husband and wife, divorce, particularly in restricting the husband's right in it in order to avoid injurious consequences, the issues of polygamy, etc.\textsuperscript{124} In all of these spheres, 'Abduh's \textit{iijthādīc} endeavours are displayed.

A more drastic and comprehensive scheme to reform the conditions of Muslim women was advocated by one of 'Abduh's Egyptian disciples, Qāsim Amin (1865 - 1908) who published two books on the subject: \textit{Tahrīr al-Mar'a} (Woman Emancipation) and \textit{al-Mar'a al-Jadīda} (the New Woman).

Like 'Abduh, Amin sees that the degradation of Muslim people begins in the family. He argues that the real cause of decay is the disappearance of the social virtues, of "moral strength"; and the cause of that is ignorance of the true sciences from which
alone can be derived the laws of human happiness. The ignorance begins in the family. The relations of man and woman, of mother and child, are the basis of society; the virtues which exist in the family will exist in the nation. The work of women in society is to form the morals of the nation!" 

Amin urges that the position of women should be improved through education. But he does not suggest that women should be as highly educated as men, but at least they should have elementary schooling if they were to manage their households properly and play their part in society."

Speaking against the seclusion of women, Amin remarks that there is no doubt that seclusion is socially harmful; it prevents women from becoming "complete beings", for a woman is only complete "if she disposes of herself and enjoys the freedom granted by the shari'ah and by nature alike, and if her potentialities are developed to the highest degree." Seclusion is thus socially harmful, but it is also bad in itself. It rests on lack of trust. Men do not respect women, they shut them up because they do not regard them as entirely human: "Man has stripped woman of her human attributes and has
confined her to one office only, which is that he should enjoy her body."\textsuperscript{128}

In adopting such a drastic view, Qāsim Amin was probably motivated by the sense of inferiority which he might have regarding his own (Islamic) culture \textit{vis-à-vis} the modern Western one.\textsuperscript{129}

Amin's premise in this respect seems to conform to the principles for \textit{i}i\textit{tihād}. According to him, where there is no text or a text which can be interpreted in different ways, then one must choose among alternatives in the light of social welfare. In such cases, traditional rules and interpretations are not sacred; they are purely human customs embedded in religion, and they change from time to time and even from one Muslim People to another.\textsuperscript{130}

\textit{i}i\textit{tihād About the Role of Muslim Women in the Contemporary World}

As has been indicated above, those who try to restrict women's activities to the household duties cannot find any textual evidence to support their stance except the Qur'ānic verse, "And stay in your houses",\textsuperscript{131} ignoring the fact that the injunction is restricted only to the Prophet's wives for their
special situation which was indicated explicitly in the preceding verse: "O wives of the Prophet! You are not like any of the (other) women."

The generalization of such a command to encompass other women is also denied by an abundance of historical evidence, some of which have already been quoted above. The existence of other instructions in the verse that can commonly be applied to all Muslim women; such as the injunction to fear God, to be righteous, to offer prayers, to pay zakāt, etc., does not change the specific nature of the injunction as some might suggest, because these instructions are commonly prescribed in other places also (in the Qur'ān and the sunna) and can be taken here as more emphatic requirements on the Prophet's wives for the very reason of their special position.

As a natural consequence of such a view, a group of fugahā' have restricted women from all opportunities. She has been locked up in the house, hijāb has been imposed on her and she has only been able to practise her financial rights through a representative. Those fugahā' have furthermore presumed that the women's participating in battlefields has already been abrogated, in spite of the fact that Muslim women continued to take part in
Islamic conquests after the death of the Prophet. In justifying such a restriction, those fuqahā' resort to the principle of sadd al-dhargā'ī, i.e., in order to avoid temptation in our corrupted period! Such a restriction might be equally applied to men!

This attitude seems to arise out of the social and historical circumstances of certain Muslims at a certain period. Therefore, it should be attributed to that period without involving Islam in something which appears to be alien to its own nature.\textsuperscript{35}

This means that a mujtahid should always endeavour to sift out the true Islamic doctrines from historical accretions, otherwise an accurate ḥalāl can hardly be reached.

Another fundamental reason that has caused certain 'ulamā' to express their fear and caution about Muslim women's direct involvement in outside activities is what they have perceived as the negative consequences of the women's liberation movement in our time, especially in the West where this movement was pioneered.

One of these negative consequences is the dissolution of the family whereby many parents seem to have lost authority in directing their children. When
A family has been brought to ruin in this way, the youth are without proper guidance. This family's break-down are also seem to have been accompanied by what is termed as "the sexual revolution" which has led to a proliferation of pornography in literature, films and exhibitions.

In this connection, we should differentiate between Islam and oriental or occidental traditions. If the oriental tradition is always being accused by some modernist Muslim thinkers and other like-minded people of being responsible for the backwardness of women, there is no reason why the occidental tradition should be freed from responsibility for the moral degradation of women. In short, in quest of an Islamic rule, no other tradition need necessarily be adopted. With this in mind, perhaps the 'ulama' will be able to tackle this issue in a more rational way and will base their fiqh in such a case willingly on the maslaha of the Muslim people, for no community will prosper and attain its respectful position amongst the modern and civilized nations while a half of its population is paralyzed and totally dependent on the another half. This problem cannot be solved without considering the role of women in the society and their active participation in shouldering its multifarious functions and responsibilities.
This requirements of the modern age demand women's involvement in certain public works and activities. Take, for instance, the specialization in obstetrics and gynaecology. Muslim women's involvement in this field is very limited, while Muslim society is in great need of it. Male specialists in this field have often been regarded by faithful Muslims as an inappropriate. If the Muslim in such circumstances has recourse to juridical "justifications" such as al-
\[\text{dar\textsuperscript{f}ur\textsuperscript{at} tubih al-mahzur\textsuperscript{at}}\] (necessities make the forbidden things allowable) and \text{al-mashaqqa ta\textsuperscript{bil} al-tays\textsuperscript{fr}} (hardship begets facility), they are also aware that this is a temporary solution only, because the state of \text{dar\textsuperscript{f}ur\textsuperscript{a}} must be terminated as soon as it can be overcome. Muslims are obliged religiously to find their "way out" of this problem, otherwise the whole community will be accountable for this shortcoming. It would seem that there was no other way for the Muslims to fill this gap except by allowing their women to qualify themselves for this purpose and then participate directly in this important profession.

A Muslim woman is not prohibited by the shari'a from exercising public job if she needs to and if there is nothing that can spoil her conduct and chastity. Some fuqahā' have even maintained that Muslim woman is obliged to specialize in a public
profession if required by the community. A husband has no right to prevent his wife from going out to exercise a profession that she is required to fulfil in the society as fard al-kifāya

Another problem for Muslims arises at this juncture, i.e., the question of women's mixing with men, which is most likely necessitated by the professional atmosphere. Some people regard such a mixing as forbidden in Islam. But a close study of the texts in this case reveals that such an outlook is unfounded. What is forbidden by the shari'ā actually is the state of khalwa where one man and one woman, who are not a married couple but are within the category of relationship which allows them to marry, meet or stay together completely privately. But meetings between the two sexes are allowed as long as khalwa with its conditions is avoided.

However, this does not mean that people should necessarily be forced to apply something permissible in the shari'ā before preparing their social climate for this application. The permission for ordinary social intercourse between men and women, for example, does not mean that this should be immediately demanded in every environment and in every house. Some
societies may put certain restrictions on the mixing between different sexes, women's participation in public works or in politics, etc., for their own interest. However, people should understand that these are only the extraneous and ephemeral procedures. They are therefore not the permanent rules that people are bound to apply in every period and place, for such a permanent rule should be taken from the texts alone. Anything that has not been provided by the texts is exposed to our experiments without trying to make things lawful or unlawful according to our own judgement.

It seems that the Muslim world in general has begun to accept the Muslim women's role in society. Education is now accessible to every Muslim girl and woman in every Muslim country. Many of them have received higher education in various branches of knowledge and occupied various important professions in society. Al-Azhar University in Cairo also have set up a separate college for girls where education is being provided for them to the Ph. D level.

Muslim women can render a positive contribution to their society without necessarily spoiling their chastity or encroaching upon the principles of their religion.
Conclusion

The 'ulamā' have proved capable of employing *i*tihād in various unprecedented issues that have been posed by the civilized world of the twentieth century. In this chapter, several instances of their *i*tihāds in aspects of economy, politic and social life in this modern time have been chosen and discussed. Such issues have evoked controversial responses from the 'ulamā'. However, in their attempts to exercise *i*tihād about new issues, the 'ulamā' need to be able to identify the real nature of the topics; so as to give to them the correct judgement according to the recognized juridical principles and the real *maslaha* of the Muslim community.
NOTES

CHAPTER VI

1 Al-Manār vol. 1 (Muharram 1322 A. H.), pp. 28 - 29, as quoted in Fatḥī ʿUthmān, al-Fikr al-Islāmi wa al-Tatāwur, p. 400.


3 Ibid., pp. 351 - 352.

4 Ibid., p. 352.

5 Ibid., loc. cit.

6 Q. II, 279.

7 Ibid., III, 130.


9 Reported by al-Ṭabarānī as quoted in Al-Suyūṭī, al-Jāmiʿ al-Saghīr, I, p. 123.

10 Bukh., IV, p. 47.


12 Q. V, 2.

13 See Aḥmad al-Sharbāṣī, op. cit., I, pp. 296 - 297.


18 Ibid., pp. 332 - 333.

19 Ibid., p. 333.

20 Insurance or assurance is a contract by which one party, in consideration of a premium, engages to

21 Ahmad al-Sharbashi, op. cit., I, p. 298.


23 His view on this subject appeared in the Nile Press in Egypt in the year 1324 A. H. (1906 C. E.) in which he follows Ibn Abidin's argument and holds that the insurance contract is void because the insurance company or the foreign insurer take upon himself what is not binding upon him under Islamic law. See Moḥd. Muslehu’din, Insurance and Islamic Law, (New Delhi, 1969), p. 114.

24 See Ibid., pp. 112 - 125.


28 Abu Zahra's comment in Muṣṭafā al-Zarqa', Ibid., p. 67.


30 See ibid., p. 45.

31 Ibid., p. 66.

32 Ibid., p. 67.

33 As quoted in Muṣṭafā al-Zarqua', op. cit., p. 27.


36 Quoted in Muṣṭafā al-Zarqa', op. cit., 28.

38 Ibid., p. 12.


41 Ibid., p. 186.

42 Ibid., pp. 187 - 188.

43 Ibid., p. 188.

44 Ibid., p. 189.


46 Ibid., p. 31.

47 *Q. V*, 91.

48 Muṣṭafā al-Zarqā', *op. cit.*, p. 46.

49 Ibid., pp. 46 - 47.

50 *Q. V*, 2.

51 See *Q. V*, 106.


53 *Gharar* in the *sharī'a* context is that sale which after being legislated originally as a mean of exchange where the result and price are clearly defined, turns into a risk which is similar to gambling and wagering contract in terms that profit and loss are just accidental.


56 See *Bukh.*, III, pp. 142 - 143, Muslim, X, pp. 168 - 171.

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60 See Muṣṭafā al-Zarqā', op. cit., pp. 53 - 54.

61 This share is assigned originally for al-ghārimīn, i. e., those who are overburdened with debts contracted in good faith, which - through no fault of their own - they are subsequently unable to redeem.


64 For a detailed discussion on this issue, see Muḥammad Ḍiyā' al-Dīn al-Rayis, al-Īslām wa al-Khilāfa ff al-ʿAqr al-Ḥadīth, Cairo, 1972?), pp. 245 - 267.

65 Al-Mawardi, al-Ahkām al-Sultāniyya, p. 3.


69 Attention has to be drawn at this juncture to the fact that the Ottoman rulers were officially called the sultans and not the khulāfā' or the caliphs.

70 Ibid., loc. cit.

71 See Muḥammad Ḍiyā' al-Dīn al-Rayis, op. cit., p. 346.


74 Muḥammad Ḍiyā' al-Dīn al-Rayis, op. cit., p. 353.

75 It seems that the writers' failure to differentiate between the Islamic political structure as a concept and what has actually taken place in
Muslims' history is the main cause of these misconceptions. For details, see Muḥammad Ǧiyā' al-Dīn al-Rayis, Nāzariyyat al-Siyāsiyya al-Islāmiyya (Cairo, 1979), pp. 365 - 386.


77 On the textual origin of this principle, see Q. III, 159, XLII, 38.


79 Because this matter, as Muḥammad Rashīd Riḍā rightly points out, are variant according to different social circumstances. The rules (of shūrā) that applicable to the simple life of the Arab in that early period (of Islam) will be no longer suitable for other periods and communities. Hence, it was more judicious for the Prophet to leave this matter to be decided by people themselves according to whatever they see appropriate for their own circumstances. Secondly, if the Prophet laid down the rules of shūrā according to the temporary requirement of his time, people would have considered them as a religious matter which they would have tried to emulate in all periods and places..., because people were accustomed to take the Prophet's statements pertaining to worldly affairs also as religion in spite of his clear acknowledgement, "You are more knowledgeable about your worldly affairs" and anything related to your religion should be referred to me, but anything related to your worldly affairs (regarding which no revelation has been sent down), you are more knowledgeable about it." Tafṣīr al-Manār, VI, p. 201, see also vol. V, p. 188.


81 This is just a general definition of democracy for the term is actually used in several different senses. See e. g., Encyclopaedia Britanica, VII, (Chicago, 1969), p. 215.

82 Sulaymān Muḥammad al-Ṭamāwī, op. cit., p. 111.

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Ibid., loc. cit.

86 Ibid., loc. cit.


Ibid., p. 383.

89 This feeling is expressed by a Syrian Muslim reformer, 'Abd al-Rahmān al-Kawākibī (1848 - 1902) in his book "Tabā'i'ī al-Istibdād". See Muḥammad ʿAmāra, Tavārīḥ al-Yaqaṣ al-Islāmiyya al-Haditha, (Cairo, 1982), p. 206. For detailed account of al-Kawākibī's struggle against autocracy and his diagnoses of other maladies of the Muslim people, see Aḥmad Amin, Zuʿamā' al-Islāh, pp. 267 - 301.


92 See ibid., pp. 42 - 49.

93 Sulaymān al-Ṭamāwi, op. cit., p. 111.

94 For further details on the reformist principles that have been proclaimed by Islam with regard to women's conditions and also the subsequent results of the implementation of these principles, see e. g., Muṣṭafā al-Sibāʿī, al-Maʿām bāyhn al-Fīqh wa al-Qānūn, (Damascus, 1962), pp. 25 - 45.

95 Q. IV, 1.

96 Abū Daʿūd, I, p. 61, Tirmidh., I, p. 172.

97 Q. III, 195.

98 Ibid., II, 228.

99 Ibid., IV, 34.

100 See ibid., XVI, 58, 59.

102 See e. g., Q. XXX, 21.

103 See e. g., *ibid.*, II, 231, see also, II, 229, LXV, 2.


107 See e. g., Q. XVII, 23, 24, XLVI, 15, Bukh., VII, pp. 2 – 3, Muslim, XVI, p. 102.

108 Khadija's bountiful support and sacrifice for the Islamic cause was never forgotten by the Prophet himself, even after her death. See e. g., *R. Unuf.*, I, p. 277, Ibn al-Athīr, *Usūd al-Qāhiba ff Ma‘rifat al-Sāhība*, VI, (Beirut, 1970?), pp. 84 – 85.


110 See e. g., Bukh., IV, pp. 98 – 99, Muslim, XII, pp. 187 – 189.

111 Ibn Hīshām, *op. cit.*, pp. 188 – 189.


114 *Ibid.*, loc. cit., see also Ibn Ḥanbal,


116 It is narrated that when the Prophet wanted to set out to a military expedition, he used to choose one of his wives who would accompany him in this purpose by ballot. Perhaps one of the most glaring testimonies which shows ‘Ā’isha’s involvement in military affairs was the rumour fabricated by certain elements against her known as *Hadith al-Ifk*. This incident from which ‘Ā’isha was cleared by the revelation (See Q. XXIV, 11) took place in the wake of the military expedition of Banī al-Muṣṭaliq. See a lengthy *hadith* which dwells on this incident in Bukh., V, pp. 250 – 258 and see also Ibn Hīshām, *op. cit.*, IV, pp. 9 – 14.

117 It was ‘Ā’isha who led the civil-war of al-Jamal against ‘Ali b. Abī Ṭālib, although this conduct
evokes controversial responses among the 'ulamā'.
See al-Ṭabarî, Tārikh, IV, p. 174.
118 See Naila Minai, op. cit., pp. 31 - 43.
119 See e. g., ʿĀḥmad b. ʿAlī al-Maqrîzî, Kitāb al-
Muḥammad Muṣṭafâ Zayyāda, (Cairo, 1957), pp. 361 -
368.
120 Naila Minai, op. cit., p. 44.
121 See e. g., Abū al-ʿAlî Mawdūdî, Purdah and the
Status of Women in Islam, (Delhi, 1974), pp. 149 -
150.
122 Muḥammad ʿAmāra, al-Islâm wa al-Marʾa wa Raʾy
123 Ibid., p. 15.
124 See ibid., p. 19.
125 Qāsim Amin, al-Marʾa al-Jadīda, p. 122,
(Cairo, 1900), Albert Hourani, Arabic Thought in the
Liberal Age, p. 164.
126 Ibid., pp. 161 ff., Tahīr al-Marʾa (Second
127 Tahīr al-Marʾa, p. 85, Albert Hourani, op.
cit., p. 165.
128 Al-Marʾa, p. 47.
129 Maryam Jameelah, Islam and Modernism (Lahore,
130 Tahīr, pp. 6 - 18, 68.
131 Q. XXXIII, 33.
132 For a traditional interpretation of the verse
in this way, see e. g., Abū ʿAbd Allâh al-Qurṭubî, al-
179.
133 Q. XXXIII, 32.
134 See e. g., Abū al-ʿAlî Mawdūdî, Purdah and the
Status of Women in Women in Islam, pp. 149 - 151.
135 Muḥammad ʿUthmān, al-Fikr al-Islâmi wa
There are fourteen categories of women whom a man is forbidden to marry in Islam due to close kinship. See Q. IV, p. 23.

See e.g., Bukh., VII, p. 66.

Fathî 'Uthmân, al-Fikr al-Islāmi wa al-Tajawwur, pp. 222 - 223.
CONCLUSION OF THE STUDY

The main purpose of this study is to explain the necessity of *ijtihād* and its indispensability in Islamic law, especially for the reformation of Muslim society in the modern age.

The importance of *ijtihād* is due particularly to the fact that the texts have laid down only broad and general principles for legislation, so that incidents or cases whose rules have not been provided by the texts can be referred or related to those whose rules have already been provided by them.

There are two functions that should be played by reason in this respect: First, understanding the meanings of the texts and their objectives. Secondly, deducing legal rules of new incidents through various methods of *ijtihād*.

As a result, Muslim leaders and scholars have paid serious attention to *ijtihād* for the purpose of searching for the rules of God about incidents and cases that have not been explicitly available in the texts.
The Prophet himself seems to have exercised *i*tihād in various unrevealed incidents that occurred during his life either by analogical reasoning or *masla*ha. He also seems to have allowed and encouraged his companions (the *sahāba*) to practise it in his presence and absence, during his life-time and after his death. Beside their *i*tihād to understand the texts, the *sahāba* also used several other methods such as analogy, personal opinion, *masla*ha, etc., in order to solve a great deals of problems and incidents that took place during their period in accordance with the *sharī'a*. The jurists of the *tabiʿīn* followed the *sahāba* in this way and employed *i*tihād in various issues that had not been tackled by their predecessors. Two distinct schools of jurisprudence emerged during this period, i. e., the School of Tradition (*Madrasat al-Hadīth*) in Hijāz and the School of Personal Opinion (*Madrasat al-Raʿy*) in Iraq. Each actually took a certain portion of the texts and practised some sort of personal reasoning. The difference between both was only in degree.

Islamic jurisprudence flourished between the second century to the Middle of the fourth century of hijra, when the legal scholars not only tried to deal with all new cases and incidents that appeared, but went beyond the actual issues to deal also with the
hypothetical cases. Different methods of *ijtihād* were exploited by the Muslim jurists of that period including analogy, *qaw̱l al-ṣaḥābi*, *maṣāliḥ al-mursala*, *istiḥsān*, *istiṣḥāb*, etc. As a result of these immense efforts, a huge juridical heritage was produced on which later jurists through successive generations have been able to rely on to solve various legal issues.

However, these juridical activities began to decline after the fourth century of hijra when the *ʿulamā'* or the Muslim religious scholars yielded to *taqlīd* or blind imitation. The flourishing era of Islamic jurisprudence was substituted for a long period of lethargy and mental laziness. Such a state of affair engulfed the entire Muslim community for many centuries despite resistance by certain *ʿulamā'* who condemned the illegitimate use of *taqlīd* in Islam. Moreover, the followers of the dominant juridical schools, including their *ʿulamā'* in general, did not only imitate blindly all opinions of the founders of those schools or their disciples and treated them as the infallible scripture, but also they became fanatical and bigoted adherents of those schools. Such an attitude produced various detrimental consequences for the Muslim society. It helped to create intellectual stagnation and spread religious
ignorance within the community and prevented the Muslims from utilizing the ideas of the 'ulamā' in other schools. Even in this modern time, taqlid still pervades the Muslim umma. All Muslim reformers have been complained about the vices of taqlid from which they have been suffering.

However, this criticism of taqlid does not mean that the Muslims should ignore the massive juridical legacy that has been produced by their predecessors, because in whatever field of knowledge, later generations can never dispense with the works of those who preceded them. The 'ulamā' of the main schools have produced a great juridical heritage. Many of their views are still fresh and applicable today. Nonetheless, the fanaticism in favour or against anyone of those schools should be avoided.

It seems necessary, however, that the 'ulamā' should try to employ their own ijtihāds with regard to new-emerging issues and incidents and not consider that the gate of ijtihād has already been closed, or that they are no longer capable of practising ijtihād. Such an attitude leads to the blind imitation and deters the 'ulamā' from exploring the shari‘a and trying to solve new legal cases according to its principles. This, in turn, leads to the ignorance of
the Muslim people about the law of their religion relating to various problems and issues that have been taking place in the world. The natural result of such a situation is the isolation of the shari'a from the lives of Muslims because people may consider that the shari'a is no longer capable of supplying sufficient guidance for human life and offering effective solutions to their problems.

It seems appropriate that the right to employ *i*tihād should not be claimed by anyone who does not fulfil its required pre-conditions. Every branch of knowledge has its own experts who have devoted most of their lives to studying it. Only from them should information be sought about anything pertaining to their specialization. Therefore, anyone who does not specialize in Islamic law is not entitled to give his *fatwā* or legal opinion about anything in this field.

However, this should not be understood as to defend *taqlīd* and to deter qualified 'ulama' from investing *i*tihād about new incidents and issues. The result of that would be the suspension of the shari'a and eventually the Muslims would inevitably turn to other sources to seek guidance to solve legal problems.
Not all of Muslim jurists and their 'ulama' have succumbed to the wave of *taqlid* which has overwhelmed their society for many centuries. In every period of Islamic history, there have been a small number of them who have never abandoned *jihād* in order to bring various incidents and cases under the influence of the *sharī'a*. This has been particularly the case since the beginning of the twentieth century, when there have been energetic endeavours to reinvigorate *jihād* in order to cope with many challenges and problems of modern life.

The revivalist movement which began at first in the Middle East, spread to every corner of the Muslim world. This movement has been intensified and embodied in various international organizations such as the Islamic Research Academy at al-Azhar in Cairo, the Muslim World League Conference, Jeddah, International Institute of Islamic Thought, Pensylvania, U.S.A., The Islamic Foundation, Leicester, United Kingdom and other similar organizations. Besides, there are innumerable individual efforts which have been directed to the same goal.

The problems required to be solved by *jihād* concern the new issues which have arisen. Perhaps the Muslim scholars today are not required to employ any
more *ijtihād* in the ritualistic aspect of their religion. New cases have been emerging in political, economic and social aspects, therefore their solutions should be sought through *ijtihādic* endeavours by those experts. Otherwise, a lot of new legal cases will not be dealt with.

In exercising *ijtihād* about modern issues, Muslim *ʻulamāʾ* have to follow the same methods that were utilized by the Prophet, the *sahāba* and other early jurists. These methods have been explained and systematized accurately by the *ʻulamāʾ* of *usūl al-fiqh*. Special attention however should be paid to human interest or *maslahā*, for the sake of which the *sharpī'a* exists. This is particularly important with regard to the aspect of the *mutāmalāt* or social transactions in which safeguarding human interests is probably more conspicuous than in other aspects. This fact is emphasized by eminent jurists like al-Shāṭibī and Ibn Qayyīm in their books. It seems that most of the *ijtihāds* of the *sahāba*, particularly those of ʿUmar b. al-Khaṭṭāb, were based on *maslahā* and therefore can be taken as examples which the present *ʻulamāʾ* should emulate. General principles of the *sharpī'a* in this respect such as procuring ease and removing injury should be given due consideration.
Furthermore, a profound understanding of the texts or nuṣūqs is extremely important in order to grasp their exact meanings and objectives, so that they will not be misapplied. The qatʿiyāt type of the texts which have definite meanings should be distinguished from the presumptive type which accommodate more than one meaning and thus are subject to different interpretations. It is also very important to investigate the circumstances of the occurrence of the texts, particularly ahādīth. Certain ahādīth might be based on ephemeral situations, some might be based on customs which have already changed, some might be intended for a particular people only, others should be restricted to certain incidents or place only, etc. Such nuṣūqs should not be understood out of their contexts, or applied to different situations to produce awkward or inconvenient results if not detrimental ones.

It is also important to consider the scientific facts that were not known in the periods of previous jurists and aʾimma, so that their views regarding certain cases may not be accurate and need to be reviewed in the light of modern discoveries.

It also seems appropriate that, although individual ijtihād may still be employed by any
qualified fatih or Muslim scholar, priority should be
given to the collective ijtihād due to the intricate
nature of modern life where co-operation between
various specialists in different disciplines and
professions seems likely indispensable.

A new juridical movement has arisen in the Muslim
world now. The ‘ulamā’ have been trying hard to
employ ijtihād about various unprecedented issues that
have been posed by modern life. They have succeeded
in accomplishing this task to a certain extent, but
there are still a lot of things that they have to deal
with. Perhaps the ‘ulamā’ need to liberate themselves
from the heavy burden of historical accretion.
Bearing in mind that human interest or maslaha is the
real objective of the shari‘a, they should try
earnestly to search for this maslaha in their
ijtihādic endeavours. As long as this maslaha does
not contravene the explicit meanings of the authentic
texts, the ‘ulamā’ should base their ijtihāds on it
and then pronounce the result of those ijtihāds to be
implemented in the society for the benefit of Muslim
people in particular and other people in general.

It has been noted that the ‘ulamā’ s perception of
some contemporary issues has been sometimes inaccurate
and this has led to the wrong conclusion from them.
This inaccuracy has frequently been caused by failure to distinguish between a concept of something that has been put forward for discussion or *ijtihād* and its application which has sometimes been diverted from its original purpose or failed to achieve its objective.

In order to avoid such misconceptions, the ʿulamāʾ should be given the real and overall picture of the subject that will be presented for their discussion or *ijtihād*.

If *ijtihād* can be properly employed by the contemporary ʿulamāʾ, it will indeed be an effective tool in reforming the Muslim society in this twentieth century.
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