IJTIHAD AND TAQLID IN THE DEVELOPMENT OF ISLAMIC JURISPRUDENCE

BY

HAMZAH ADESOLA DAWOOD

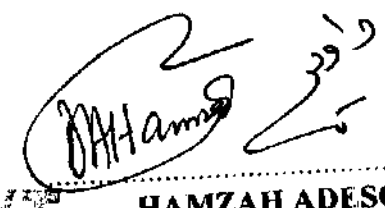
BEING A THESIS SUBMITTED TO THE POST GRADUATE SCHOOL AHMADU BELLO UNIVERSITY. ZARIA IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF MASTER OF LAW (LLM)

DEPARTMENT OF ISLAMIC LAW FACULTY OF LAW INSTITUTE OF ADMINISTRATION AHMADU BELLO UNIVERSITY, ZARIA.

AUGUST 2000

DECLARATION

I hereby declare that this project has been produced by me. It has not been presented on any previous application for a higher degree. All quotations are indicated in the foot-notes and sources of information are duly acknowledged by means of references.



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This thesis entitled IJTIHAD AND TAQLID IN THE DEVELOPMENT OF ISLAMIC JURISPRUDENCE by **Hamzah Adesola Dawood** meets the regulation governing the award of master of Law (LLM) of Ahmadu Bello University, Zaria, Nigeria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

TO ALL SINCERE MUJTAHIDUN OF
THE PAST, PRESENT AND FUTURE
WHO (BY THEIR DINT OF IJTIHAD) THE
WORLD CONTINUES TO SEE
DYNAMISM IN THE ISLAMIC
JURISPRUDENCE

ACKNOWLEDGEMENT

All praise is due to Allah - the Creator and Law-giver. He guides man to His path and endows him with power of intellect so as to exercise freedom of choice between right and wrong. In the course of writing thesis of this nature, it is usual to receive assistance from various people of good-will. The assistance may be in form of inspiration, moral or material supports. Due to lack of space, these people of good-will cannot be adequately thanked in a page or two of the work as it is commonly done. Suffice to pray to Allah to thank each and every individual or group who have contributed to the success of this Ijtihad.

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I wish also to express my special thanks to my wife, **Zulfah Oyepeju Hamzah** and my children, **Sulaimon** and **Asma Hamzah** for their patience and support.

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I pray that Allah reward my late father and mother, **Alhaji Hamzah Onaopepo Adio** and **Madam Asma' Arinlade Ajogbe** with Al-Janat (Paradise) for their parental care over me.

Finally, I wish to state that I am solely responsible for all shortcomings and errors in this thesis. Allah is the law of absolute perfection. May he forgive me and my fellow brothers and sisters in Islam of all our omissions and commissions.

HAMZAH ADESOLA DAWOOD.

(29 August, 2000 A.D.)

(29 Jumada –al- Ulla, 1421 A.H.)

A B S T R A C T S

Islamic jurisprudence underlies the conception that all phenomena of existence are a Unity. Its control lies solely and absolutely with One and Only Supreme Being - Allah. By His Divine choice and benevolence, He made man His Vicegerent on earth In consequence, all phenomena of existence are made subservient to man by virtue of Trust conferred on him. In this regard, the entire affairs of man are determinate by Allah's rules with some latitude of freewill. These rules regulate on one hand, the relationship between man and his Creator - Allah and on the other hand, the relationship between man and his fellow human beings and other phenomena of existence.

In the final analysis, the peace and success or otherwise of this world rest squarely on how he is able to recognize, appreciate and implement I hose divine rules. And, of course, the sum-total of these will form an integral part of evidence for or against him in determining his eventual end, Hell-fire or Paradise, as the case may be Hence, Allah sent messages of guidance to mankind through the chosen messengers and prophets (May the peace and blessings of Allah be upon them all).

Prophet Mohammed (SAW.) came to bring into conclusion the messages of Allah by the medium of the Divine Revelation - the Qur'an and the empirical demonstration of his Sunnah. The two constitute the Inner Chamber of Law. To enter this Inner Chamber, one has to go through its door-gate known as ljtihad. In essence, ljtihad constitutes the only gate to the Inner Chamber of the Islamic Law.

Islamic Law is not only dynamic but, also relevant at all time and place. It cannot be otherwise. The Prophet of Islam himself had not only opened the door of

Ijtihad but had also permitted and trained his Companions to use their mental ability to understand and discover the intention of the Law-giver, Allah and His Messenger, Muhammad. This is necessary especially in matters where the Qur'an and Sunnah are silent or unclear on such matters.

Unfortunately however, at the penultimate of its golden age, that was the fifth period of development of the Islamic jurisprudence, Ijtihad was kept in abeyance. It was replaced with an 'artificial tool' - the Taqlid. Thus, Ijtihad, the gate of the Inner Chamber opened by the Prophet himself, 'was declared closed'; and in retrospect, Taqlid was introduced. It later turned to be a path blind imitation, controversy and stagnation. As a result, the jurists and their students are at a crossroad, unable to properly find relevance of the law to the ever-current challenges of the world. This trend had somehow put the Ummah of Islam in vicious circle.

If the law is understood, appreciated, fully and properly implemented, even in spite of differences of opinion, which, in any case, are inevitable, Muslims are poised to lead the world to success through the dynamism and relevance of the law, which are to be discovered by the means of Ijtihad. It is in view of this that the topic of this thesis, namely: Ijtihad and Taqlid in The Development of The Islamic Jurisprudence has been chosen.

In chapter I of the thesis it is intended to discuss the meaning and all-embracing characteristics of Islam and the unique concept of its law, the Shari'ah.

In chapter II it is intended to examine the primary sources of the Islamic law namely, Qur'an and Sunnah and the other secondary sources.

In chapter III attention will be focused on the concept and scope of Ijtihad as well as Mujtahidun and their qualifications.

Chapter IV takes a look at the genesis of Ijtihad from the time of the Prophet (S.A.W.) and its gradual development, the emergence of the 'closure of door of Ijtihad' and its consequences, as well as the contemporary development in the Islamic Jurisprudence.

In chapter VI, a critical look is taken into the Maqasid (objectives) of the Shari'ah.

Chapter VII, which is the concluding chapter, assesses the application of Ijtihad to the contemporary world challenges.

ABBREVIATIONS

b.	-	Ibn (meaning the son of)
e.g.	-	for example
etc.	-	et cetra (lat. usually shortened to etc) and other things; and so on. (Hornsy, A.S. (1974).Oxford Advanced Dictionary of Current English, Oxford University Press.
Ibid	-	Ibidem (lat) meaning in the same book.
i.e.	-	Which is to say (Hornby, A.S. (1974 Oxford Advanced Dictionary of Centre English, Oxford University press.
n.d.	-	No date
s.a.w.	-	Sallahl Lahu 'Alayhi Wasallam, meaning (May the blessing and peace of Allah be upon him)
s.w.t.	-	Subhanahu Wa Ta 'ala, meaning: The glorifies and exalted one.
viz.	-	(Lat Videlicet, usu spoken as namely) that is to say; namely (Honsdy, A.S. (1974) Oxford Advanced Dictionary of Current English, Oxford University Press.

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GLOSSARY

A

Adl:	Justice
Ahd (Hadith):	Hadith reported by a single person or by odd individual from the Prophet.
Ahdith:	Is the plural of hadith which means the reported speech of Prophet Muhammed (S.A.W.)
Ahl-Hadith:	Scholars who are strict in the interpretation of Qur'an and Sunnah.
Ahl Al-Hil Wal 'Aqd:	People who are invested with power to give final say in the affairs of the community.
Alh-Ra'y:	Scholars who are libera in their interpretation of Qur'an and Sunnah
Al-'Illah:	Effective cause which is an attribute of Asl.
Aimat:	Is plural of Imam which means leader of Muslims or a person who leads in prayer
Ahkam Al-Hakimin:	Best of Judges
Al-Baqaa':	Perpetuity
Al-Thabit:	Unchangeability
Asl:	Original case (an element of Qiyas, which is a source of Islamic Law
Ayat:	A verse of the Holy Qur'an or a divine sign.

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B

Batil:	Void
Bid'ah:	Innovation which is contrary to the rules of Shari'ah

D

Daf'al-Darar:	Prevention of harm
Da'if:	Hadith with inherent defect in its chain of transmitters or in its textual contents
Dallalah:	Contention deducible from the use of some specific words in the text of Qur'an and Sunnah.

F

Fari':	New case on which a Shari'ah ruling is required under the system of Qiyas - it is an element of the system
Fasad:	Corruption
Fasid:	Irregular and voidable
Fatawi:	Plural of fatwa which mean a legal verdict
Fuqaha:	Plural of faqih which means a jurist

G

Ghayr muttasil:	Hadith in which chain of transmission is broken and incomplete.

H

Haj:	Pilgrimage to the house of Allah (the Ka'aba)
Hajiyyat:	The Needs

Halaal:	Permissible or lawful thing
Hanbali:	School of Islamic Jurisprudence founded by Iman Abu Abdullah Ahmad b. Hanbali.
Hanafi:	School of Islamic Jurisprudence founded by Imam Abu Hanifa Nu'man b. Thabit.
Haram:	Unlawful thing
Hasan:	Hadith that include narrators of third, forth, fifth and sixth categories of Muhadithin.
Haqiqi:	Words used in their literal senses
Haqiqiyyah (Maslah):	Genuine interest: a requirement for application of Haqiqiyyah masalih-mursalah. Hagigi

I

Ibadaat:	Devotional activities or acts of worship
Ibarah (Al-Nass):	The structure of a legal text which is constituted from its vocabularies, clauses and sentences.
Ijma':	Principle of deduction of law by consensus of scholars and a source of Islamic Law next to the Holy Qur'an and Sunnah.
Ijtihad:	Efforts by Muslim jurists to deduce rules of the Shari'ah from their detailed evidence in the sources.
Isharah:	Sign or mark signaling the order in which the texts of nas are placed.
Isnad:	Chain of narrators or transmitters in a Hadith

Istishab (Barahat Al-Asliyah):	Presumption of continuity, or presuming continuation of the status quo ante
Iqtidah (nas):	Inference derivable from a particular nas of the Qur'an and Sunnah.

K

Khafi:	Hidden, for instance text of the Qur'an or Sunnah with hidden meanings
Khawarij:	'Protestant Group' that considered the acceptance of the arbitration between Ali and Muhawiyal as a blunder on the past of Ali.
Kinnayah:	Words used in metaphorical sense

M

Madhab:	(Plural is madhahib). It means school of Islamic Jurisprudence.
Madhab Al-Sahabi:	Conducts or way of life of the companions and juristic views.
Majazi:	Words used in their figurative senses.
Majlis:	Meeting place or a Assembly of jurists or legislators.
Malik Al-Mulk:	King of all Kingdom or Possessor of all powers.
Malik Al-Nnas:	Lord of mankind.
Maliki:	School of Islamic Jurisprudence founded by Iman Malik b. Anas Al-Asbahi.
Mandub:	Recommendable
Mashhur	Hadith reported by indefinite number of people.
Maqasidul-Shari'ah:	Objectives of Shari'ah (singular maqsad)

Ma'aqul:	Acceptable to the people of sound intellect (another requirement of Masalih Al-Mursalah)
Maslahah:	Exigency or interest.
Masalih Mursalah:	Benefit, interest, a principle of Islamic Law Established by Iman Malik.
Maslah Wahmiyyah:	Spurious Maslaha
Mu'amalat	Civil transactions
Mu'awwal	Words or clauses or expressions of several interpretations
Mubah:	Not obligatory nor unlawful (liberty or option to choose) or indifference.
Mufassar:	"Explained" Sentence within its own context to explain the message it is conveying
Muhkam:	'Prospespicous' word which is very definite and conveys absolute ruling on a particular subject-matter.
Mujmal:	Sentences which are capable of a number of interpretations as certain words in those sentences possess several meanings.
Mijtahid:	A jurist who is qualified to exercise Ijtihad.
Mukallaf:	One who has attained age of puberty, responsible for his actions and is bound by the law.
Mursal:	One of categories of Ghayr Muttasil Hadith, i.e. a Hadith whose chain of transmission is broken and incomplete.
Mutasabih:	Words that are allegorical, ambiguous and difficult in nature.

Muttasil	Hadith whose complete chain of transmission from the last narrator is linked all the way back to the Prophet (in the science of Hadith).
N	
Nasikh-Wa Mansukh:	Theory of abrogation (in the science of Qur'an and Hadith).
Q	
Qiyas:	Analogy (which is one of the sources of Islamic Law)
R	
Raf'al Darar:	Removal of Hardship
S	
Saddudh-Dhari'ah:	Blocking the means or precautionary measure to prevent the commission of evil.
Sahih:	Valid or Hadith transmitted by the companion, Tabiun and Tabi Tabiun. It has continuous Isnard.
Salaf:	Venerable predecessors of the Muslim scholars
Sarih:	Words whose meaning is evident
Shafi'yyah:	School of Islamic Jurispoudence founded by Iman Muhammad b. Idris Al-Shafi'.
Shari'ah:	The Islamic Law
T	
Tabi'un:	The followers of the companions of the Prophet (S.A.W) i.e. generation after them.
Tahsiniyyat:	The Complimentary.

Taqwa:	The fear of God.
Tayyamam:	Dry ablution.
U	
'Ulama (Singular Alim):	Muslim Scholars
Ummah:	Islamic Community
'Urf or 'Aadah:	Custom or acceptable practice of the people.
Usul Al-Fiqh:	The principles of Islamic Jurisprudence.
W	
Wahabi:	A movement for rejuvenation of Islamic practices founded by Iman Muhammad b. Abdul Wahab
Wajib:	Obligatory.
Z	
Zahir	Obvious : Verses of the Holy Qur'an with clear meaning.
Zakat:	Legal alms to certain recipients as specified in the Holy Qur'an; one of the pillars of Islam.
Zanni	Verses of the Holy Qur'an with speculative meaning.

INTRODUCTION

1.1 Islam: A Religion And A Way of Life

Islam in the anal of history is the last and greatest of all religions and systems that came before it. It came with attributes and qualities of all-inclusiveness and all-embracing characteristics. Thus, it brought about outstanding and monumental experiences, which had revolutionized the world and changed the destinies of nations.

'Islam' is an Arabic word, which literally connotes submission, surrender, and obedience. It also connotes 'peace' which signifies entering into peace. A *Muslim is one who makes his peace with God and man. In other words, 'one can* achieve real peace of body and of mind only through submission and obedience to Allah. Such a life of obedience brings in peace of the heart and establishes real peace in the society at large.' [1]

The advent of Islam had brought about radical transformation and new significance to the hitherto concept of religion. Before it, religion had been known to be a collection of dogma, which must be accepted in order to escape heavenly damnation. But, Islam came and represented religion as 'a science based on the universal experience of humanity. It is not this or that nation that becomes the favorite of God and the recipient of Divine Revelation; on the contrary, revelation is recognized as a necessary factor in the evolution of man; hence, while in its crudest form, it is the universal experience of humanity in its highest, that of

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[1] Maududi, S.A.A. (1960) Towards Understanding Islam, OSMOA Publication, p.2

prophetical revelation, it has been a Divine gift bestowed upon all nations of the world'.[2]

Therefore, 'Islam' is an attributive title. Whosoever possesses this attribute, may he belong to any race, community, country or clan, and is a Muslim. According to the Qur'an, among every people and in all ages there have been good and righteous people who possessed this attribute - and all of them were and are Muslims. [3]

In Islam, the totality of religious doctrines had been divinely made to be 'the basis of action for the development of man to higher stages of life.'[4] Contrary to the established principle in the missionary assignment of the Prophets and Messengers, a division had been drawn between secular and religious affairs so much so that one was not allowed to juxtapose with other. By the advent of Islam however, the purport of religion was not confined to the things spiritual but was allowed to be the guiding principle towards the path of advancement and civilization in all aspects of human endeavors. This accounts for the reason why the two primary sources of Islamic Law - the Holy Qur'an and the Sunnah of the Prophet deal extensively with a vast variety of subjects, which affect human life, individually and collectively. The two provide details not only in matter of devotion, with the rules of ritual worship of the Creator, with the medium with which man could attain communion with Him but, also provide richer details on the problems of the world and all the phenomena around man. For example, Islam caters for matters relating to human relations, social and political affairs. In respect of personal institutions such as marriage, divorce and inheritance, Islam provides clear guidelines. In the management of wealth, the relations of labor and capital,

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[2] Muhammad, A. (1986), The Religion of Islam, Taj Company, New Delhi, p.5.
[3] Maududi, A.A. (1960) Towards Understanding Islam, OSMOA Publication, p.1
[4] Muhammad, Ali, Ibid.

national finance, debts and contract, it lays down rules and regulations. In the administration of justice, military organization, peace and war, international relations, Islam casts specific paradigm. The effectiveness of all these are determined by the recognition Islam gives to the Sovereignty of Allah as the Originator of all things including governance of the state and enactment of Law.

In a nutshell, Islam is a revolt against all anthropomorphic implications in the realm of faith. In the point of view of the Muslims, religion is not entirely a private affair between man and God. Nevertheless, with privacy, the individual is ruled by a code of law, which is binding on all, without establishing any kind of sanctity in a man or a class of man.[5] Thus, Islam is a complete way of life. It is the embodiment of Divine Guidance for all fields of human life, may they be private or public, political or economic, social or cultural, moral or legal and judicial. Islam is an all-embracing ideology and the problem that besets the Muslims world, which has only recently emerged from political slavery, is of translating this ideology into practice and of reconstructing its socio-political life in accordance with it. [6]

1.2. Sovereignty and Legislative Policy in Islam

John Austin said that superiority styled sovereignty, and the independent political society that sovereignty implies, is distinguished from other superiority, and from other society by some marks or characters like to say that the bulk of the given society are in a habit of obedience or submission to a determinate and common superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. And secondly, that certain

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[5] Qadri, A.A. (1986), Islamic Jurisprudence in the Modern World, Taj Company, New Delhi, p. 271
[6] Maududi, Abul A'ala, (n.d.), Islamic Law and Constitution, p.1

individual, or certain body of individuals, is not in a habit of obedience to a determinate human superior. [7]

He went further to say that the notions of Sovereignty and independent political society may be expressed concisely thus – "if a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent" – "(the basis of Sovereignty is thus the fact of obedience)". To that determinate superior, the other members of the society are subject: or on that determinate superior, the other members towards that determinate superior are a state of subjection, or a state of dependence. The mutual relation, that subsists between that superior and them, may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection. Austin assumes that such habitual submission must result in unlimited legal sovereignty. [8]

The Austinian postulate of sovereignty discussed above shows how West conceives or perhaps misconceives the entire notion of man's existence in relation to the Creator and other members or His creation. Thus, some Muslims scholars have observed and rightly said that the political philosophers have tried to place the cap of sovereignty on man - a being for whom it was never intended and whom it can therefore never fit. Islam, far from this erroneous notion came with specific and clear dictum. It holds that God is the Creator of the universe. He is the sustainer of all creatures and Ruler over everything. It is His Will that prevails in the cosmos all around. As all creation is His, His Command should be established

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[7] Hamstead, L.L. (1979), Introduction to Jurisprudence, Stevens & Sons (London), p. 233.
[8] Ibid p.234.

and obeyed in man's society. He is the real Sovereign and His Will should rein Supreme as the Law.[9]

In Islam, sovereignty belongs to God and the attributes of His Sovereignty can be best ascertained from His names. For instance, Rabb-ul-'Alamin; Malik-al-Mulk; Malik al-Nas; Khairul Hakimin; Malik al-Quddus; Ahkam al-Hakimin are among other many attributes that have direct bearing upon the political aspects. [10] This Islamic notion of sovereignty is supported by some verses of the Qur'an. For example, in the conversation between Prophet Yusuf (May the peace and blessings of Allah be on him) and his mate in the prison yard, he said: "my two companions of the prison! (I ask you): are many lords differing among themselves better, or the one Allah, Supreme and Irresistible? If not Him, ye worship nothing but names, which ye have named, ye and your fathers, - for which Allah hath sent you no authority: The Command is For None But Allah: He Hath commanded that ye worship none but Him: that is the right religion, but most men understand not." (Qur'an 12: 39) [11]

It can be understood from the above verses that 'the only reality is God. Authority can come from Him alone. It is only for Him to command. And He has distinctly commanded you to worship none other than Him. That is the only religion that is right, - that has stood and will stand and endure forever. He has revealed it at all time by His Messengers and by His signs. If men fail to understand, it is their own fault.' [12]

In Hindu religion, it is believed that God retired after creating the universe. Islam rejects this belief and asserts that the Creator has not severed His connection

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[9] Maududi, S.A.A. (1960), The Islamic Law and Constitution, p.166.
[10] Qadri, A.A., (n.d.), Islamic Jurisprudence in The Modern World, Taj Company, New Delhi, p.269.
[11] Abdullah, Y.A. (n.d.) The Holy Qur'an, Translation and Commentary, Islamabad, p. 564
[12] Abdullah, Y.A. (n.d.) The Holy Qur'an, Translation and Commentary, Islamabad, p. 564

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with the universe after having created it. He still controls it and provides for its maintenance. He controls its every aspects. All authority and all power rest in His hands. From the smallest particle of dust to the gigantic nebulae everything is subservient to His Will and obey His Commands. The destiny of this entire creation is dependent upon Him.[13]

Another verse of Qur'an says: "Verily, your Lord is Allah Who created the heavens and the earth in six days, then mounted He the Throne. He covereth the night with the day, which is in haste to follow it, and hath made the sun and the moon and the stars subservient by His command. Verily, His is all creation and His is the Command (the Law). Blessed be Allah, the Lord of the Worlds." (Qur'an 7: 54) [14] Opinion differs as to the exact interpretation of the words: 'istawa 'alal 'arsh' (mounted He the Throne). Be that as it may, the real import and significance of 'mounting of the Throne' is that God is not the mere Creator of the Universe, He is also its Ruler and Governor.[15]

The Qur'an further states that: "Blessed is He Who sent down the Criterion to His servant, that it may be an admonition to all creatures. He to Whom belongs the dominion (sovereignty) of the Heaven and the earth; no son Has He begotten, nor has He a partner in His dominion: It is He Who created all things, and ordered them in due proportions" (Qur'an 25: 1 - 2) [16] The word 'Mulk' in this verse indicated the connotation of supremacy, sovereignty, and Kingship. According to this verse therefore, Allah alone is the Governor, King and Ruler of the entire

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[13] Maududi, S.A.A. (1969), Islamic Law and Constitution, Taj Company, New Delhi, p.169
[14] Abdullah Y.A. (1977), The Holy Qur'an Translation and Commentary, Islamabad.
[15] Maududi, S.A.A. Islamic Law and Constitution, Ibid. p. 169.
[16] Abdullah, Y.A. Ibid.

universe and no one else shares even a shred of His authority. He is the absolute Sovereign. [17]

In the light of the above, the ultimate legislative authority belongs to Allah Almighty alone and no one can be associated with Him in the exercise of this authority. The Law-giver is Almighty Allah as He has given and originated the Shari'ah. [18]Thus, He is the Ruler and the Issuant of the law, and He is the Supreme Legislator, in the sense that He makes the Law. The mission of the Prophet (upon him be peace) was to deliver the law of the Shari'ah; and the function of the mujtahidun is to derive law from the sources in which it is indicated, i.e. the Qur'an and Sunnah. [19]

Having examined the concept of Sovereignty as far as Islamic legislation is concerned, it becomes necessary to bring into focus the doctrine of legitimacy. According to the Shari'ah, the Nation, or Ummah does not possess the right to issue law and regulations that conflict with the Shari'ah. In fact, if the Ummah were to enact such conflicting legislation, then all such laws would be null and void; so that no one would be required to act in accordance with them under any circumstances.[20] In a comparative sense, the Islamic system differs from all man-made political systems, which declare that the nation is the sources of all authority, and then endowed it with the right of legislation in all aspects of life so that it is the nation, which makes its own fundamental laws according to its own particular method. In Islam, the role of the Legislative authority or arm is to bring the Laws of Allah into the vogue, reassert its supremacy and ensure that the Shari'ah is the legislative enactment of the people. The executive authority or arm in the Islamic

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[17] Maududi, S.A.A. Ibid. p.171.
[18] Hassan, H.H. (1989), Da'wah Highlight, Da'wah Academy, Islamabad, IIU, vol. IV Issue No. 7 p.6.
[19] Hassan, H.H. Ibid. p.5
[20] Ibid.

system, on the other hand, is essentially to ensure the implementation of the Shari'ah for those who follow it among the residents of the Islamic state, owing either to their faith in Islam, or to their desire for the protection it provides. Thus, the Islamic state does not require of its subjects any new sort of legal encumbrance, but rather they implement what their faith requires of them. The Muslim, owing to his belief in Allah, is a follower of the Shari'ah; he is certain that it is the Truth outside of which there is no truth, and that it is the embodiment of justice outside of which there is no justice. One of the cardinal requirements of his faith is that he submits to the ruling of Allah in every matter on which he and another may disagree; and he does so without finding any rancor in his heart towards the Shari'ah ruling, even if it seems to be contrary to his own wishes. The Muslim must accept the judgment and obediently carry it out because, in truth, its implementations will count as a good deed for the Muslim and will be a form of worship for which he may be rewarded.[21]

In the event of the Muslim's failure to carry out this responsibility, then the executive authority shall compel him to carry out his obligation and fulfill his covenant with Allah. Accordingly, the role of the representatives of the Islamic State, the Khalifah, his deputy, and members of his cabinet, the Governors, the Judges, and the Law enforcement agencies and other civil servants is, in essence, the defense of the faith and the administration of the worldly affairs of members of Ummah. [22]

Much as the above discuss represents an attempt to shed some light on the conception of sovereignty in Islam and the legal control mechanism in an Islamic state, it raises yet a question as to the actual nature of Law in Islam. Can it be said

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[21] Ibid. p.7.
[22] Ibid. p.7.

that since the sovereignty belongs to Allah Who possesses the attributes inter alia, of perpetuity (Al-Baqaa) and Unchangeability (Al-Thabit) any Law emanating from such Transcendental Supreme Being will also wear the same color of the same attributes? In other words, can the Law of Islam be said to be immutable and static?

1.3. Dynamic Nature of Law In Islam

Due to difficulty of definition, there is no specific answer to the question: "What is Law" ? For example, the Oxford English Dictionary defines Law as 'the body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects'. However, attempts had been made to define law in terms of functional and notional point of view. For instance, Law has been defined in its widest sense to include any rule of an action, that is to say, any standard or pattern to which actions (whether the acts of rational agents, or the operations of nature) are, or ought to be conformed.[23] Hobbes holds that 'a Law is an obligatory rule of conduct. The commands of him or them that have coercive power.' Austin says that 'a Law is a rule of conduct imposed and enforced by the Sovereign.' Blackstone however, maintained that a rule of law made on a pre-existing custom exists as positive law apart from the legislator or judge, and Maine pointed out that there is law in primitive societies. Savigny regarded law as itself subject of evolution and as no arbitrary expression of the will of the Law-giver. Ihering found the end of law in the 'delimitation of interests' and Vinogradoff saw law as 'a set of rules imposed

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[23] Salmond, (197), Jurisprudence, Sweet and Maxwell, London, 7th Ed. p.19.

and enforced by a society with the regard to the attribution and exercise of power over persons and things.' [24]

To the Teleological Schools, law is the product of reason and is intimately related to the notion of purpose; [25]that is to say that the ultimate goal of law is 'justice' which is regarded as the supreme end of law in its practical manifestation. Justice is simply and universally known to be the upholding of rights, and punishment of wrongs, by the Law but it is not so simply analyzed by philosophers who make a distinction between natural and conventional justice.

Notwithstanding the uncertainty beclouding the definition of Law and the ambiguous nature of what constitutes 'justice', legal philosophy, in both classical and contemporary periods, is all out to search for a system of law most suitable to the attainment of 'absolute justice'. Alas! legal philosophy had not been able to achieve this objective. The reason being that its entire efforts had always been channeled through the human spectrum and its focus had always been through lens of empirical spectroscope.

As earlier stated, the sovereignty and authority of Law making lies with Allah solely and absolutely. This actually forms the corner-stone of the Islamic Legislation, which makes Law a unique phenomenon as far as Islam is concerned. Allah, the Law-maker and the Law-giver, is the Perfect Being, so is His Law and cannot be otherwise, for in that case, it would amount to ascribing defect to Allah, which is impossible.[26] Also, Allah is known to be Omnipotent, Omniscient, and Omnipresent, hence His Law is all-pervading and comprehensive. 'He is the First and the Last, He is the Manifest and Immanent and He is the Knower of all things,

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[24] Burke, John (1976), Osborn's Concise Law Dictionary, Sweet and Maxwell, London. 6th Ed. p.196.
[25] Muslehudden, M. (1986), Philosophy of Islamic Law and The Orientalists, Taj Company, New Delhi, p.18.
[26] Ibid. p.58.

His Law is, therefore, universal and for all time, particularly because it takes into its sweep not only this world but, also the next[27] so that man will be guided towards success and escape damnation.

Anxious to get the benefit of this natural legislative guidance, the non-Muslim Jurists usually make abortive attempts by giving tacit approval to the system through their theoretical discuss. For example, it was argued that 'the tendency to derive normative rules from physical or natural laws, or to analyze or define them in terms of physical qualities or phenomena, has long been a pervasive one. Thus, many of the attempts to base positive law on an immutably established natural law governing the universe have involved an attempt to link normative rules directly with what are really conjectural hypothesis of a factual character (i.e. in the nature of physical laws). But, long ago Hume pointed out the fallacy of trying, as he put it, to derive 'ought' from 'is' and that a normative statement could not be inferred from a purely factual one.[28] It is aptly accurate to say therefore, that the 'divine (Islamic) Law' has combined in itself, not only what law 'is' but also what law 'ought' to be. In a nutshell, the inherent combination of 'is' and 'ought' in the Islamic legal system makes it embodiment of both law and morals.

It is noteworthy to conclude this chapter by quoting comment made by Jackson, a non-Muslim jurists on the dynamic and universal nature of Islamic Law. He says: It (Islamic Law) contemplates one community of the faithful, though they may be of various tribes and in widely separated locations. Religion, not nationalism or geography is the proper cohesive force. The state itself is subordinate to the Qur'an, which leaves little room for additional legislation, none for criticism or dissent. This world is viewed as but the vestibule to another and a

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[27] Ibid. p.58.
[28] Hampstead, L.L. (1979), Introduction to Jurisprudence, Sweet and Maxwell, (London) 4th Ed. p.11.

better one for the faithful, and the Qur'an lays down rules of behavior towards others, and towards society to assure a safe transition. It is not possible to separate political or juristic theories from the teachings of the Prophet, which establish rules of conduct concerning religion, domestic, social and political life. This results in a law of duties rather than of rights, of moral obligation binding on the individual, from which no earthly authority can relieve him, and which he disobeys at peril of his future life'. [29]

The combined effect of the above dictum is to prove and reassert that Law as far as Islam is concerned, is dynamic. Its application is not limited by passages of times or geographical boundaries. Much as it was applicable and desirable in the classical ages, much as it is applicable and desirable in the contemporary period. Similarly, its desirability and applicability to individual and collective Muslims are not subjective affairs. It has relevance to various customs and cultures in the stone ages and contemporary science and technology age.

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[29] Muslihudeen, M. (1986), Philosophy of Islamic Law and the Orientalists p.8 quoting Jackson, in his forward to 'Law in the Middle East' pp. 6-7 as quoted by Muslihudeen, *supra*.

Chapter 2

SOURCES OF THE LAW

2.1. Sources as basis of validity for law

All rules of law have sources. Sources provide evidence of validity to every rules of law and legislation. It is requisite that the law should postulate one course or more first causes whose operation is ultimate, and whose authority is underived. In other words, there must be found in every legal system certain ultimate principles, from which all others are derived, but which are themselves self-existent.

In Islam, as stated in the introductory chapter, sovereignty belongs to Allah alone and to that extent; the authority of Law-making rests squarely with Him. However, Allah being the Sovereign Has delegated His Sovereignty to the Ummah - the Muslim Community for purpose of world affairs[1] from generation to generation in view of the ever-current human advancement and development. Thus, the difference between the notion of law being the creation of the sanctioning power and that of the sanctioning power as the creation of law does not have jurisprudential recognition in the Usul Al-Fiqh of Islam.

Since 'the political ideal of Islam consists of the creation of a people born of a free fusion of all races and nationalities', and since 'the general principle of the law of Islam rests on human nature, not on the peculiarities of a particular people,[2] Law and politics therefore is not a democracy in the Western sense of the term; it is the rule of God for the perfection of humanity.[3] It is on this basis, Sayyed Iqbal repudiates secular Western democracy and positively maintains that so long as the so-called democracy, the wretched nationalism, and the degraded imperialism have not crumbled into dust, so long as men have not demonstrated by their action the belief that the entire mankind is one family and so long as the distinctions of race, color and nationality have not been completely swept away, we will not be able to lead to a happy life, and the fine ideals of liberty, equality and fraternity will never be realized.'

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[1] Qadri, A.A. (1986), Islamic Jurisprudence in Modern World, Taj Company, p.137.
[2] Sayyed, A.W. (1964), Thought and Reflection of Iqbal, Sheikh Muhammad Ashraf, Lahore, p.60.
[3] Farooqi, H.A. (1965), Iqbal Concept of State, Studies in Iqbal's Thought Arts, p.735.

The point is that Allah is the Grundnorm. This fundamental fact underlies the concept that 'the Muslim Commonwealth is based on the absolute equality of all Muslims in the eye of the law. Liberty in Islam is thus the natural right of every member of the state, who, believing in one God and the Prophet, works for the realization of the Islamic social ideal - the supreme power of sovereignty enjoyed by the head of the state is limited by the Sovereignty of God. The Shari'ah, a code of ethical and religious laws, manifests the will of God and so forms the basis of all the law of the Muslim State.'[4]

The Holy Qur'an is the fundamental basis upon which other sources of the law depend. Thus, it declares: '..... and We have sent down to thee the Book explaining all things, a Guide, a Mercy, and Glad Tidings to Muslim'[5] 'All things' here according to some Mufasiurun implies in reference to every basic principle necessary for the spiritual welfare of man. Since also, the Qur'an contains in most cases Mujmal that requires detailed explanation, then the practices of the Prophet otherwise known as Sunnah or Hadith provides such detailed explanation. Consequently, Sunnah or Hadith stands next to the Holy Qur'an as another source of law in Islam.

It is therefore erroneous to argue as Western critics like Brinkman did when he said: "if Qur'an explains everything and is a guidance, what need is there for the Sunnah.' Joseph Schacth, another western critics, unfortunately devoted his entire academic career to this erroneous contention. He fruitlessly argues in some of his writings on Islamic law that the Sunnah is a later development, which could not form or be considered as a source of the Islamic Law. The combined effects of the Qur'an and Sunnah constitute what was referred to as the 'Inner Chamber of Law."[6] Each of these two main sources provides basis for other sources that will be discussed shortly.

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[4] Ibid. p.375
[5] Abdullah, Y.A., (197), The Holy Qur'an, Translation and Commentary. Islamabad. Ibid.
[6] Supra p.1.

Sources are Qur'an, Sunnah, 'Ijma and Qiyas. The list is not exhaustive, there are other sources of Muslim Law[7] some of which considered to belong to second category of sources happened to be by-products of Ijtihad exercises that had been carried out during developmental growth of the Islamic jurisprudence. For instance, Abu Hanifah recognizes what is called Istihsan, commonly translated as "preference" as a source of law. Its root-meaning is "a desire for beauty (husn) or symmetry". Anwar A. Qadri has thus described it as the doctrine for the removal of discrepancies or inequities in the law, contending that elegantia juris would perhaps be a better translation.[8] Imam Malik on the other hand, introduced another source called Istislah or Masalihah otherwise known as Public Policy. The ultimate goal of the two legal innovations is much the same viz. to meet the requirements of everyday life and advisability.

In his juristic attempt to establish reconciliation between these two principles of Islamic jurisprudence, Imam Shafi'i propounded the theory of Istishab, meaning legal presumption. According to this principle, a practice once proved to be widespread among people may be presumed to enjoy acceptance to both classical and contemporary legal practices. Anwar A. Qadri observes that it had a logical connection with Maliki's insistence on the custom of Madinah without any difference.[9]

Each of the sources in the secondary category namely, from Ijma' to Istishab has connecting root in one way or the other with the Qur'an and the Sunnah and each of them is believed to be a part of the logical consequence of the Divine revelation. Thus, the system as a whole, and no part of it more than any other, is a system of equity: a set of principles invested with a higher sacredness than those of the original law, and demanding application independently of the consent of any external body.[10]

Having highlighted the sources of Islamic Law, it becomes pertinent to bring into focus the surrounding circumstances of each source in order to be able to appreciate their respective jurisprudential value vis-à-vis the development of Ijtihad and Taqlid.

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[7] Wali Ullah, M. (1986), Muslim Jurisprudence and the Qur'anic Law of Crime, Taj Company, New Delhi, p.5,

[8] Qadri, A.A. (1980), Islamic Jurisprudence in Modern World, Taj Company, New Delhi p.175
[9] Ibid. p.175.
[10] Ibid. p.176.

2.2. The Qur'an

The Qur'an conveys the Divine Message of the Sovereign Law-Giver - Allah revealed to Prophet Muhammad (S.A.W.) in Arabic language, explaining in clear terms those rules that lead to successes of man both here and the Hereafter [11] Scholars are unanimous on the fact that the Qur'an is an evidence for or against Muslim, male or female because it is the book of Allah revealed as guide for him or her. This has been confirmed by virtue of its miraculous nature[12] Thus, the Qur'an for the Muslim is the revelation of God and the Book in which His messages to man are contained. It is the Word of God revealed to the Prophet through the Archangel Gabriel. The Prophet was therefore the instrument chosen by God for the revelation of His Word; of His Book of which both the spirit and the letter, the content and the form, are Divine. Not only the content and meaning comes from God but also the container and form which are thus an integral aspect of the revelation.[13]

The Prophet was the Megaphone through whom the verbal dialects of the Divine Will was expressed and communicated in the language understood by Mukallaf of both man and jinn. 'The unlettered nature of the Prophet demonstrates how the human recipient is completely passive before the Divine. Were this purity and virginity of the soul not to exist, the Divine word would become in a sense tainted with purely human knowledge and not be presented to mankind in its pristine purity. The Prophet was purely passive in the face of the revelation he received from God. He added nothing to this revelation himself. He did not write a book but conveyed the Sacred Book to mankind.'[14] The Prophet of Allah was commanded while in Makkah to explain the sacred nature of the Qur'an, and that due to its unique status and its divinity; it is beyond human power to produce something similar to it.[15] Attesting to this point, the Qur'an states: "Say: If the whole of mankind and Jinns were to gather together to produce the like of this Qur'an, they could not produce the like thereof, even if they

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[11] Ali, H. (1976), Usul Al-Tashri'il Islam, Dar Al-Maarif, Cairo, p.17.
[12] Ibid. p.17.
[13] Hossein, N.S., (n.d.), Ideals and Realities of Islam, p.42.
[14] Ibid. p. 44.
[15] Ibid, p. 176.

back up each other with help and support."[16] Commenting on this verse, Yusuf Ali says: "The proof of the Qur'an is its own beauty and nature, and circumstances in which it was promulgated. The world is challenged to produce a Book like it and has not produced one. It is the only revealed Book whose text stands pure and uncorrupted today. Similar challenges are contained in Qur'an 2:23; 10:38; and 11:13.[17]

The quality of absolute authenticity of the Qur'an accounts for the uniqueness of the Law of Islam. Unlike for example the Torah, the Gospel and other divine books, which were received by their respective Prophets in the form of ideas, which later they expressed in their own words. Therefore, those books do not have "inimitability" (I'jaz). Inimitability is restricted to the Qur'an.[18]

According to Professor Ali Hasaba-Allah, the authenticity of the Qur'an is absolute because it is an authority heard and transferred to us in succession from one generation to the other; communicated verbally and in writing in every epoch of history by a group believed not to be in collusion with each other in perpetration of lies contrary to the principle of authenticity and uprightness of similar group before them who did not disagree in anything that detract from its message, or decrease from its authority and its fundamentals on account of their tribal difference, or their geographical locations. This had been the trend through the succeeding generations in terms of system of conviction, which although we do not see but much believe in respect of historical events, cities, kingdoms and leaders etc.[19]

The words of the Book are divided into: (a) Khass or special words, (b) Amm or common or collective names, such as "people" (c) Mushtarik or words having several significance, e.g. the Arabic word 'ayn' which may mean an eye, a fountain or the sun, (d) Mu'awwal or words which have several significance possible. For example, the word in nahr in Qur'an 108: 2 which ordinarily means "slay" possesses some technical

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[16] Abdullah, Y.A. (1977), The Holy Qur'an, Translation and Commentary, Islamabad, Ibid.
[17] Abdullah, Y.A. (1977), The Holy Qur'an, Translation and Commentary, Islamabad, p.720 Commentary No. 2289
[18] Qadr, A.A. (1986), Islamic Jurisprudence in the Modern World, Taj Company, p.176.
[19] Hasaba-Allah, A. (1976) Usul Al-Tashri'il Islam, Dar Al-Maarif, Cairo, p. 20

meanings: To Abu Hanifah, it means sacrifice but, to Imam Shafi'i it means placing hands on the breast in prayer.[20]

Under the theory of linguistic principle, jurists divide the legal texts of apparent meaning into four categories. They include, Al-Zahir, Al-Nass, Al-Mufassar and Al-Muhkam.[21]

1. Al-Zahir: It is defined as "a legal text, which denotes its intendment, by its own structure without reference to any external element. Notwithstanding, this understood intendment is not the primary objective of its structure. Meanwhile, the text accommodates interpretation.[22] It means that the intendment of any legal text can be understood without reference to any syntactical indictium. For example, in Qur'an 2: 275, which says that: "But Allah hath permitted trade and forbidden usury". The intendment of the legal text is clear. It validates every type of trade and inhibits every type of usury.
2. Al-Nass is defined as "a legal text which denotes to its primary intendment by its own structure without reference to any outside element and it accommodates interpretation an abrogation during the time of revelation."[23] For example Qur'an 59: 7 which states that "So take what the Messenger assigns to you, and deny yourselves that which he withholds from you" provides an evidence of obligation of obedience to the Messenger of Allah (SAW) in the assignment or denial of the booty to the Muslims. And this is initial intent of the text.[24]
3. Al-Mufassar is defined as "a legal text, which denotes to its primary intendment explicitly and gives no room for any other interpretation."[25] It is a kind of structural text which is explicit in meaning and which negates any intention of another meaning.[26] For example, Allah enjoins the observance of obligatory prayer

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[20] Qadri. A.A. Ibid p. 180

[21] Khalaf, A. (1968) Ilm Usul Al-Fiqh, Al-Dar Al-Kuwaitiyyah, Kuwait, p. 161 as quoted by Zubair, A.Q. (1997) The Art of Interpretation of Rules in The Shari'ah, Al-Madinah Heritage Publications, Lagos, p. 79.

[22] Khalaf, p. 181, as quoted by Zubair, p. 80/

[23] Hasaba-Allah, A. (1985), Usul Al-Tashrihi Islam, Dar Al-Maarif, p. 267.

[24] Zubair, A.Q., ibid. p. 84

[25] Id Al-Mahlawi, (1341 AH) Tashil Al-Wusul Ila Ilm Al-Usul, Halabi Press, Cairo, p.65 as quoted by Zubair, A.Q. ibid. p. 90.

[26] Zubair, A.Q. ibid. p. 91.

and payment of Zakat in Qur'an 2: 110 thus: "And be steadfast in prayer and regular in charity". This verse negates any other legal intendment.

4. Al-Muhkam is defined as "a text that denotes to its intendment which cannot be abrogated or changed by its structure in a way that gives no room for any other interpretation."[27] Under Al-Muhkam rule, there is no room for either abrogation during the time of neither revelation nor interpretation after the cease of revelation. This is due to the fact that the text provides for either one of the fundamental pillars of the din which could not abrogated like the worship of Allah, and faith in the Messengers and Book of Allah, or it is one of the major etiquette which do not change by change of time and circumstances, like kindness to parents and justice. It may also be a subsidiary rule of law but because the Law-Giver Has indicated in its structure that it would remain forever, so it is.[28] For example, Qur'an 24: 4 says: "And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; And reject their evidence ever after, for such men are wicked transgressors." The underlined words in this verse indicate that the divine ruling here is final and could not be subjected to any interpretation or abrogation. The stands forever and thus become Muhkam.[29]

As part of their Ijtihad to discover the intendment of the Law-Giver, jurists also laid down rules governing those texts whose meaning are not apparent and not easily discernible. They include, Al-Khafy, Al-Mushkil, Al-Mujmil and Al-Mutashabih.

1. Al-Khafy is defined as "a word which has explicit indication to its meaning but in conforming to this meaning, there are some units of etymology in its syntax which are shrouded in obscurity and ambiguity which requires some degree of exertion and reflection if those ambiguity are to be removed. Thus, the word is khafy in relation to each of these unit."[30] The linguistic units, which are ambiguous, cannot be understood directly and easily from the word without a reference to an

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[27] Abu-Zahrah, (n.d.) Usul Al-Fiqh, Dar Al-Fikr Al-Arabi, Cairo, p. 96.
[28] Zubair, A.Q. ibid. p. 97.
[29] Zubair, A.Q. ibid.
[30] Hasava-Allah, A. (1985) Usul Al-Tashri Al-Islami, Dar Al-Ma'arif, Cairo, pp. 253-254.

extraneous element that is capable of removing the obscurity.[31] For example, the word Al-Sariq is apparent in meaning when referring to someone who took secretly a property of another person under normal and usual circumstances of keeping such property. However, the word becomes ambiguous when this particular meaning is considered with some units of etymology. Like for instance, the word Al-Nashal; which means pickpocket, i.e. a person who takes property of another person who is awake but by a special and tricky way. Such that the act of taking is carried out in an expertise manner. The special description given to this type of person makes him different from the 'ordinary thief' because he carries out this act by a trick that outwits an awaking person. Thus, he is given different description. Muslim jurists argue that if this person can be described as 'sariq', his hand should be amputated as provided in Qur'an 5: 38. Otherwise, he should be punished under Al-Ta'zir i.e. unspecified punishment attainable through Ijtihad. Jurists are however unanimous that he should be punished by amputation, for this act is more prone to the illah, i.e. ratio decidendi, than that of a thief. [32]

2. Al-Mushkil is "a word which does not indicate by its structure the intended meaning. Rather, it is necessary to refer to an external syntactical indicium which explains the intent of the word, and which attainable by research and exertion."[33] The obscurity in the Mushkil is from the word as an entity itself. It is literally used for more than one meaning. It thus, becomes very difficult to understand its intended meaning from the structure of the text itself without reference to an outside element. Also, if the word contains in the text as understood contradicts the understood meaning of the same word in another text.[34] For example, Qur'an 2: 228 says: "Divorced women shall wait concerning themselves for three monthly periods..." The word in the text is Quru' is a plural form of Qur' and it is used in Arabic philology for purity after menses or menstruation itself. Thus, the question of which of the two meanings is intended arises.

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[31] Zubair, A.Q. ibid. p.106.
[32] Khalaf, A. Ibid. p. 191 as quoted by Zubair, A.Q. at p. 107.
[33] Abu Zagragm N, (1958) Usul Al-Fiqhi, Dar Al-Fikr Al-Arabi, Cairo, p. 100.
[34] Zubair, A.Q. ibid., p.109.

Imam Shafi'i and some Muslim jurists maintained that the word Al-Quru' in the text means Al-Tuhri i.e. purity after the menses. But Hanafi jurists and some other averred that the word means menses.

3. Al-Mujmal is "a word which does not indicate by its structure the intended meaning and there is no syntactical indicium or circumstantial expression or phrase to explain it and the cause of its obscurity is literal and not accidental."[35] For example, the word "Halu'" in Qur'an 70: 19-21 is considered Mujmal, had the Law-Giver not explained the word in the subsequent phrases of the verse in question. He says: "Truly, man was created "Halu'an" (very impatient); Fretful when evil touches him; and niggardly when good reaches him."
4. Al-Mutashabih is "a word which by its structure does not denote the intended meaning and there is not syntactical indicium or circumstantial expression or phrase to explain it."[36] The words of this nature are found in the other texts of the Qur'an and Sunnah e.g. Qur'an 48: 10 where Allah says: "The Hand of Allah is over their Hands"; Qur'an 11: 37: "Build the ship under Our eyes and by Our inspiration."

The words in the above quoted verses cannot be interpreted literally and linguistically, as Allah cannot be described with features that are known with human. Allah is free from similitude of His creatures.

The Salaf (i.e. the venerable jurists of the past) contended that Allah has reserved the intent of their meaning to Himself while the Khalaf (i.e. the jurists of the later time) argued that any verse whose apparent meaning may bring impossibility in the Shari'ah should be interpreted from the apparent meaning to another meaning which the text can accommodate even though it may be in metaphorical usage. Thus, they interpreted the all the words in the above quoted verses to dissilate them from similitude if creatures. The word Al-Yad us interpreted to mean power of Allah, Al-Ayn is interpreted to stand for Divine auspices and care."[37]

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[35] 'Ala' Al-Din, (1974) Kashf Al-Asrar An Usul Fiqh Al-Islam Al-Bazdawi, Dar Al-Kitab Al-Arabi, Beirut, vol. I p.54.
[36] Abu Zahrah, ibid. p.105.
[37] Zubair, A.Q, pp. 125-126.

The Usulists (Muslim jurists) generally, and specialists in linguistic principles (Al-Qawaid Al-Lugawiyah) attach greater importance to understanding and discovering the intendment of legal texts.[38] To that effect, they laid down another principle, which requires that the understanding of the legal text is not limited or restricted to its literal expression of wording and letter. Rather, it extends to its indications, denotations and connotations. Therefore, everything understood through these means should be considered as one of the intendment of the text for which it stands as an evidence and proof of law and necessitates its application.[39] The four means introduced under this principle include the following as well:

1. Ibarat Al-Nass: It is defined as "the structure of a legal text which is constituted from its vocabularies, clauses and sentences."[40] It also connotes the meaning, which comes to mind instantly from its structure, and which is also intended e.g. "But Allah hath permitted trade and forbidden usury." (Qur'an 2: 275)

This text is said to denote two apparent meanings, namely, a) that the act of trade or sales is dissimilar to the act of usury and b) the rule of law related to the act of trade is permission while the act of usury is prohibition.[41]

2. Isharah Al-Nass: It is defined as "what is understood from the indication of a text which neither instantly understood from its wording nor initially intended from its structure but its understanding is connected with the initial meaning of the text by way of necessity and not through the structure of the nass.

The intendment of the legal text here is discovered by means of necessity, as this necessity is so obvious and apparent that it requires only a minimum degree of Ijtihad.[420] For instance, Qur'an 2:233 states that: "But he, the father shall bear the cost of their food and clothing on equitable terms." The initial meaning and intendment of this verse is to the effect that the cost of feeding and clothing of the mothers is a responsibility upon the fathers. But, by the means of Isharat Al-Nass, it

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[38] Zubair, A.Q. (1997) The Art of Interpretation of Rules in The Shari'ah, Al-Madinah Heritage Publications, Lagos p.32.
[39] Ibid. p.33 quoting Khalaf, A. (1968) Ilm Usul Al-Fiqh, Al-Dar Al-Kuwaitiyyah, Kuwait, p. 143.
[40] Abu Zahra, ibid. p.110.
[41] Zubair, A.Q. ibid. p.34.
[420] Zubair, A.Q. ibid. p. 35.

is understood from the verse that (i) that the father alone, has the obligation to provide maintenance for his child, for the latter belongs to the former and nobody else; (ii) that if the father is a tribe of Quraysh, for example, and the mother is from another tribe, the child will be ascribed to Quraysh and not to his/her mother's. (iii) That the father has the right, when he is in need, to take justly from the property of his son without any consideration, because his sons belongs to him. Thus, what belongs to the son belongs to him.

3. Dalalat Al-Nas: It is defined as "what is understood from the spirit and logic of a legal text."[43] It means that when, due to a particular ratio legis which forms the basis of a case is proven by a structure of a legal text, and there is another case which has similar ratio legis like the former, or the ration legis is more preponderant in the later case than the former, and if this similarity is understood without any reference to *Ijtihad* or analogy, it should be accepted literally that the legal text covers both the two cases.[44] For example, the text of Qur'an 17:23 which provides that "Say not to them 'Fie' meaning that a son should not say 'fie' to his parents. It also means that the son should not be contemptuous to his parents, not only by words of mouth, but also by action such as beating or insulting or cursing them. The common ratio legis between the two instances is contempt.[45]

4. Iqtidha' Al-Nass: It is defined as "a meaning without which the legal text is rendered improper."[46] This goes to explain that there is no expressed word in the structure of the text, which is indicative of the meaning; rather, the validity of the meaning of the text depends on it.[47] For instance, where the Prophet was quoted to have said: "Verily Allah wipe out from my Ummah mistake, forgetfulness and whatever they are coerced to do (i.e. forgiven).[48] The text here denotes that "the

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[43] Khalaf, pp. 161-152.
[44] 'Id Al-Mahlawi, (1341 AH) ibid. p.102.
[45] Zubair, A.Q. ibid p. 44
[46] Abu Zahra p. 113.
[47] Zubair, A.Q. ibid. p. 47.
[48] Ibn Maja, Talaq 16.

liability of mistake, forgetfulness and coerced act are removed from my Ummah."[49]

The combined effects of the above snap-shot discussion on the Holy Qur'an as the first primary source of Islamic Law, goes to re-assert the contention that the Qur'an itself contains abundant evidence pointing to the fact that it (the Qur'an) is inherent with natural mechanism for exercise of Ijtihad in order for every generation of Muslims to discover it. Afterall, it has been established that it is a Living Scripture. It therefore follows that it will continue to be discovered by the means of Ijtihad methods as laid down by the Jurists of generations after the Prophet; and of course, those methods were results of the efforts of the Muslim jurists over the millennium carried out in the light of the Qur'an itself and the Sunnah of the Prophet.

2.3 The Sunnah

Literally, Sunnah means way, custom, habit or manner. When it is used as an adjunct to the Prophet (S.A.W.) in linguistic or technical senses, it means what emanates from the Prophet in words, action and whatever he has tacitly approved.[50] To scholars of science of Hadith, Sunnah refers to all that is narrated from the Prophet, his act, his sayings and whatever he has tacitly approved. It also includes all the reports, which describes his physical attributes and character. To scholars of Islamic jurisprudence however, Sunnah refers to a source of the Shari'ah and a legal proof next to the Qur'an but, to scholars of theology, Sunnah refers to a Shari'ah value, which falls under the general category of Mandub.[51]

Hadith, on the other hand, ordinarily means a narrative, communication or news consisting of the factual account of an event.[52] Hadith and Sunnah collectively, connote similar and the same legal concept but, in the critical lens of the Muslim Jurists, they carry some degree of difference - if Hadith really means a report representing an account of what happened, Sunnah means a practice or custom. The former differs from the latter in the sense that it is a narration of the conduct of the

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[49] Zubair, A.Q. ibid. p.47.
[50] Hasaba-Allah, A. Ibid.p. 35.
[51] Kamali, M. H. (1989), Principle of Islamic Jurisprudence, p.
[52] Ibid.

Prophet whereas the latter is the example or the law that is deduced from the former. Be that as it may, the two produce the same effects in theological, social and legal circumstances.

Consequently, Sunnah is one of the fundamental principles of religion that has binding force on every believing Mukallaf. In the Qur'an, Allah enjoins obedience to the Prophet, making such obedience concomitant to the belief in Allah. Relevant references to this point include where Allah says: "So take what the Apostle assigns to you and deny yourselves that which he withholds from you: and fear Allah; for Allah is strict in punishment." (Qur'an 50: 7)[53] It also says: "But no, by thy Lord, they can have no (real) faith, until they make thee judge in all disputes between them, and find in their souls no resistance against thy decisions, but accept them with fullest conviction." "O ye who believe! Obey Allah, and obey the Apostle, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His apostle."(Qur'an 4: 65) [54] Also, "It is not fitting for a believer, man or women, when a matter has been decided by Allah and His Apostle, to have any option about their decision if anyone disobeys Allah and His Apostle, he is indeed on a clearly wrong path." (Qur'an 33:36)[55]

Sunnah therefore, is the second source of the Islamic Law after the Qur'an. The two combined together represent the primary sources of the law. But, unlike the Qur'an whose words are recognized as sacred word used for religious worships, the words of Sunnah are not so used. Thus, Sunnah serves as commentary and explanation for the Book, and there is no doubt that the explanation is next to what is being explained. [56]

Imam Ahmad was once asked why Sunnah is being referred to as complementary to the Book, he answered by saying that: what a frank statement a person can make? Surely, Qur'an is in need of Sunnah more than Sunnah is in need of Qur'an" [57]

2.3.1 Early Muslim Adversaries of Hadith

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[53] Abdullah, Y.A. (1977), The Holy Qur'an, Translation and Commentary. Ibid.
[54] Abdullah, Y.A. (1977), The Holy Qur'an, Translation and Commentary. Ibid.
[55] Abdullah, Y.A. (1977), The Holy Qur'an, Translation and Commentary. Ibid.
[56] Hasaba-Allah, A. Ibid p. 37
[57] Hasaba-Allah, A. Ibid

Despite the unique position of Hadith as the next to the Holy Qur'an as primary sources of authority in Islam, there had been anti-Hadith movement, which so effectively, opposed the validity of the Sunnah. This movement had gone to the extent of preparing the Muslims for the idea that the whole mass of Hadith together with the isnad is only a faked attempt to put the practice of the late Umayyad epoch under the aegis of the Prophet (S.A.W.).[58] Even though, it is an indisputable fact that no one remains in the fold of Islam and at the same time to reject the authority and the binding-force of the Sunnah, yet the opponents of this basic norm had launched their anti-Sunnah movement since the period of the Companions either with or without appreciating the gravity of this negative and dangerous trend. Those who were unknowingly adverse to the Sunnah during the period of the Companions or successors felt that the Qur'an alone could serve all the objectives of Islam without the support of the Sunnah. However, as soon as this group of people was reminded of the gravity of their erroneous conception, they quickly came to their senses and reversed unflinchingly to the fold of Islam. [59]

The anti-Hadith group emerged at the time of fitnah, i.e. at the time the first civil war broke out among the Muslims, Othman b. 'Afan and 'Ali b. Abu Talib were assassinated. The adversaries of Hadith were in various groups and sects. Likewise their anti-Hadith stand took different dimensions. For instance, while some disputed the authority of the Sunnah in toto, some other disputed Sunnah due to the alleged faulty method of transmission or doubtful authenticity of content of some Ahaadith. There were three major sects known with this conception at the early period of the crisis. They include, a) Al-Khawarij, b) Al-Shi'ah and c) Al-Mu'tazillah.

2.3.2. Contemporary Muslim Adversaries of Hadith

The Muslim adversaries of Hadith in the contemporary time were said to have appeared in the Middle East, India and Pakistan and more particularly during the period of Sheikh Muhammad 'Abduh who was the founder of Egyptian modernist school. He was born in 1849. He became the Mufti of Egypt in 1899 and held this post till his death in

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[58] Zubair, A.Q. (1995) The Sunnah Between Its Adherents and Adversaries, Al-Madinah Heritage Publications, Lagos p.v.
[59] Ibid. P. 84.

1909.[60] He was reported to have made statements in which he appeared to have recognized only the authority of the Holy Qur'an. Other scholars in his group include Dr. Tawfiq Sidiqi, and Rashid Rida.

This set of disputant of Sunnah was followed by another set of modern writers who were better described as orientalists. They were scholars who were in search of cheap fame among their oriental masters. They tried to associate themselves with the established scholars of important centers of Islamic learning like Al-Azhar. For instance, Ahmad Amin attacked the authority of the Sunnah. He disputed the ability, skill of, and method used by the venerable scholars of Hadith in establishing the authenticity of Hadith. Other scholars in this camp include, Ismail Adnan, Taha Husain, Muhammad Husain Haykal and Abu Rayyah who took the banner of this group after Ahmad Amin. He wrote a book entitled: "Adwa' 'ala Al-Sunnah al-Muhammadiyyah but he failed to champion this course as he could not advance fresh argument beside that of his predecessor, Rashid Rida in support of their anti-Sunnah campaign.[61]

Col. Mu'ammar Al-Qadhafi, the President of the People Republic of Libya was also reported to have rejected the Sunnah in toto by some statements he was quoted to have made. For instance, he has described the usual words of blessing 'Sala 'Alahi Wa Salam', meaning 'May Allah bless and preserve the Prophet' usually ushered by the Muslims after mentioning the name of the Prophet as a part of remnants of the infidelity.[62]

Similarly, Muslim adversaries of Sunnah who emerged in India and Pakistan sub-continent include, Jarage Ali and Mirza Ghulam Ahmad who proclaimed himself 'prophet' and condemned all Hadith on Jihad. Others include, Ahmad Khan, Abd-Allah Al-Jakr Al-Way, Ahmad-din Al-Amr Tasri etc. [63]

There were also anti-Hadith elements that emerged in West Africa sub-region. They were however seen as people of no substance as they did not possess qualification that could put them in the class of real Mujtahiddun. In Ibadan, Nigeria, for instance, one

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[60] Zubair, A.Q. ibid. p.121.
[61] Zubair, A.Q. ibid. p. 103.
[62] Al-Radd Al-Shafi 'ala muftarayat al-Qadhafi, Muslim World League, Makkah, (1402H) p. 92 as quoted by Zubair, A.Q. ibid. p. 123.
[63] A'zam (1981) Dirasatun fi Al-Hadith Al-Nabawi, Saudi Press, Riyadh, p.29.

Abdur Rahman Ali formed a group know to be committed only to Qur'an. Meaning that they did not accept the authority of Sunnah. They were referred to as "Shangiliti", meaning "adhering only to the text of the Holy Qur'an." He was a formal disciple of Sheikh Abdul Salaam Bamidele who was known for his strict adherence to Sunnah including weak Ahaadith. He revolted against his master and formed his own 'Protestant group', which perhaps, according to some sources was based on a personal grudge between him and his master.

2.3.3. Oriental Adversaries of the Sunnah

The orientalists began study in Islam with a purpose of writing Islamic history. According to William A. Graham two objectives were set for this purpose, namely, a) to use the Hadith as a source for obtaining data about the life of Muhammad and the origins of the Muslim Community up to early Umayyad times; and b) to mine the Hadith for materials from the second and third centuries of Islam in particular.[64] These objectives explain why the orientalists such as William Muir, Alloys Sprenger, Alfred Von Krmer and Theodore Noldeke have reached negative results in the course of their academic work on Islam generally and the science of Hadith in particular. Ignaz Goldziher was first man in the camp of the oriental adversaries of the Sunnah to attempt to prove through his research work into the Hadith that 'the Ahaadith have much to tell us about second and third centuries of Islamic intellectual history but only a small amount about first century of Islam.[65]

A. J. Wensinck in theological Hadith and Joseph Schacht in legal Hadith followed suit of Goldziher and alleged to pin down the main period of Hadith forgery. [66] In his effort to debunk the Muslim and non-Muslim orientalists' attack on Sunnah, Professor Muhammad Mustafa Azami of the King Saud University in Riyadh has thoroughly

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[64] The place of Hadith in Islam, (1975) proceedings of the seminar on Hadith, 1200th Anniversary of Imam Bukhari, Chicago, Illinois p. 28.
[65] Muslim Creed: Its Genesis and Historical Development, (1932) Frank Class & Co. Ltd. Leiden as quoted by Zubair, A. Q. Ibid at p.145.
[66] Zubair, A.Q. ibid.

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[64] The place of Hadith in Islam, (1975) proceedings of the seminar on Hadith, 1200th Anniversary of Imam Bukhari, Chicago, Illinois p. 28.
[65] Muslim Creed: Its Genesis and Historical Development, (1932) Frank Class & Co. Ltd. Leiden as quoted by Zubair, A. Q. Ibid at p.145.
[66] Zubair, A.Q. ibid.

stripped the veneer of respectability surrounding Schact's book titled: "The Origins of Muhammadan Jurisprudence" .[67]

2.3.4. Middle course position on the validity of Hadith

Maintaining a kind of what can be described as a middle-course approach on controversy generated by the western orientalists on Hadith, Mir Wali Ullah in his book said: "This part of our subject is both delicate and difficult. There are people who would like to make us believe that a Hadith is so powerful an authority that it may abrogate an ordinance promulgated by the Qur'an itself. On the other extreme there are those who would say that Hadith is no authority on any point of Law at all. "We come now to the question of the compilation of the voluminous Hadith collections which we have with us today. When and under what circumstances this work was taken in hand is an important and interesting study. Throughout the first century of the Hijrah era and the first quarter of the second century no attempt to collect Hadith in book forms seems to have been made." [68]

The point he is trying to make is that much as Sunnah constitutes a valid source of the Shariah, certain human factors have reared their ugly heads in forms of fabrication, interpolation and distortion into it. Thus, calling into question the authenticity of certain Ahaadith particularly when one considers the uncountable number of Ahaadith claimed to be reported from the Prophet. In his efforts to decipher the causes of this unfortunate situation, Mir Walihullah, quoting Ibn Hajar 'Ashqalani with approval highlighted the following factors:

(a) Faithlessness in the garb of Islam, like that of the

Zanadiqah, i.e. a group of heretic faction, who, owing to their hatred for Islam, fabricated Hadith, which discredited Islam in the view of its followers.[69]

(b) Extreme ignorance of some over-pious people;

(c) Sectarian prejudices;

(d) Selfishness of certain rulers and magnates, and

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[67] Masood, A. (1988), Refutation of Schact's Anti-Hadith view, A. Monograph of the Center for Islamic Legal Studies, A.B.U. Zaria p.2.
[68] Muslim Jurisprudence and the Quranic Law of Crimes, ibid. pp. 16-19.
[69] Kamali, M.H. ibid., p.84.

(e) Love of notoriety .[70]

Be that as it may, Quranic evidence leaves nobody in doubt that Sunnah had been a recognized fundamental source of Islamic legal system no matter the mischief of the western critics because 'once Sunnah is disregarded every adventurer can have a field day in putting any fanciful interpretation on the Holy Qur'an and thereby lead to disintegration of Islam may Allah forbid.

Some Quranic authorities supporting and establishing the authority of Sunnah were earlier cited in this chapter, there is good number of Ahaadith establishing the historical reality of Sunnah since the life-time of the Prophet. For instance, the famous Hadith of Mua'dh bin Jabal when he was appointed as the Chief Judge of Yemen. The Prophet asked him: "How will you decide when a question arises ? He replied: according to the Book of Allah. "And if you do not find the answer in the Book of Allah? "Then according to the Sunnah of the Messenger of Allah....."

It was reported from Anas bin Malik and Zaid bin Thabit (May Allah be pleased with them) that the Messenger of Allah May the peace and blessings of Allah be upon him addressed them in the Khaif Mosque in Minnah and said: "Allah makes flourishing a man who hears my speech, memorize it and comprehend it, and communicates it to those who did not hear it. Listen, how many bearers of knowledge who do not really have knowledge of jurisprudence; and how many bearers of knowledge who benefit those who are more knowledgeable than him."

It was also reported by Imam Ahmad and others that they reported it from Abi Najihi Al-Irbadhi bin Sariyat Salma (May Allah be pleased with them) that he said that the Prophet (S.A.W.) preached a sermon that gripped hearts with apprehension; and made eyes to shed tears. So we said: "O! Messenger of Allah, your sermon sounded like a farewell admonition, if so, admonish us more: the Prophet responded by saying: I admonish you to fear Allah, listen and obey Him. Even if a slave-man is made a ruler over you, certainly whoever among you lives would witness a lot of disagreement or discrepancies. Hold fast to my Sunnah and the Sunnah of my rightly-guided successors ....."

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[70] Muslim Jurisprudence and the Quranic Law of Crimes, ibid. p. 25

These and other similar Ahaadith go to establish the fact that notwithstanding the unfortunate historical experiences Hadith had undergone, it had been since the life-time of the Prophet himself recognized as a fundamental source of Law in Islam. Its position had been and will ever remain sacred.

In order to be able to fulfill the sacred responsibility expected of it, Hadith had been subjected to certain tests. The Imams and Jurists of the past had done a lot through the exercise of Ijtihad in separating grain from chaff. A number of strict rules were laid down, at the head of which stands the Prophet's saying, itself a tradition: "Convey to other persons none of my words except those which ye know of a surety. Verily, he who purposely represents my word wrongly will find a place for himself no where but in fire." [71]

In enforcing this rule, it was made a requirement that the narrator of a tradition must also repeat its Isnad, chain of authorities, like for instance: "I heard from X who heard from Y and so on, until the chain reaches the Prophet himself. It is also a requirement according to this rule that each transmitter in this Isnad must have been well known for his or her uprightness and retentive memory. It is observed however, that despite meticulous characteristic of this rule, it could not prevent a vast number of manifestly false traditions becoming current; 'so men set themselves to the work of collecting and sifting the great mass of traditions that had begun to work untold evil in the second century of Islam. This group of Mujtahidun is referred to as Muhaddithun or "Collectors of Traditions". [72]

Classification of Sunnah

In their efforts to separate the authentic from inauthentic Hadith, scholars embarked on grading and classification of Hadith. The Hadith is firstly graded into two, namely, maqbul (i.e. accepted) and Mardud (i.e. rejected).[73] The accepted ones are classified into two namely, sahih (i.e. authentic) and hasan (i.e. agreeable).[74] These two are further classified into two namely, sahih li dhatih (i.e. authentic by itself) and sahih li

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[71] Sarhi Al-Bukhari, 1348 H. Cairo, 11, 153; also, Sahih Muslim, viii 229.
[72] Ibid. p. 191.
[73] Al-Suyuti, (n.d.), Al-Laali Al-Masnn'ah, p.346 as quoted by Zubair, A.Q. (1995), The Sunnah Between Its Adherents and Adversaries, Al-Madinah Heritage Publications, Lagos p.72.
[74] Ibid. p. 72.

ghairih (i.e. authentic due to the availability of other hadith supporting it; hasan li dhatih (i.e. agreeable by itself) and hasan li ghairih (i.e. agreeable due to the availability of other hadith supporting it.[75] Hasan li ghairihi is considered a weak hadith and it requires strength by other ahaadith dealing with the same subject or problem before it can be accepted as an evidence in law.[76]

Da'if: There are inherent weaknesses in the chain of transmitters of the Da'if or in its textual contents, thus it is known to be weak. Also, the narrators of such Hadiths do not possess the qualifications required in Sahih or Hasan Hadiths.

Ahaadith Mardudah (i.e. rejected traditions) are classified into two namely, a) a rejected Hadith that may be accepted if it acquires strength from another Hadith; b) a rejected Hadith that cannot be accepted at all. [77]

The discontinuity of isnad is known as al-saqt. There are various ways by which this discontinuity occurs and for many reasons. But, the fact that the unmentioned narrator cannot be subjected to examination of the probity or the disparagement is a factor capable of weakening the authenticity of his narration.

The Hadiths under this classification include, i) Al-Mu'alaq, (i.e the Hadith that one or more narrators are omitted from the beginning of its chain, ii) Al-Mursal (i.e. the Hadith that one narrator is omitted from the end of its chain like a Tabi'i, i.e. successor narrating from the Prophet (S.A.W.), iii) Al-Mu'dah (i.e. the Hadith that two or more narrators are omitted successively from its chain, iv) Al-Munqati' (i.e. the Hadith that one or more narrators are omitted interruptedly and v) Al-Mudalas, i.e. Hadith narrated by a transmitter from an authority who he met but from whom he did not learn that particular Hadith but had learned it from someone else going through that authority. [78]

Aside from necessity of Ijtihad on the part of Scholars of Hadith in separating the grain from the chaff, there is also a great latitude of Ijtihad on their part to discover the actual meaning of those Hadiths that have successfully passed their test of authenticity and reliability. Consequently therefore, Sunnah, the second segment of the primary source

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[75] Ibid. p. 72.
[76] Murad, A. and Al-'Abbad (n.d.) min atyab al-manh fi ilm al-mustalah; Islamic University Publication, Madinah, pp.13-18.
[77] Zubair, A.Q. ibid.
[78] Zubair, A.Q. pp. 76-77.

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of the Shari'ah is a commentary or explanation to the first segment which itself require a great deal of Ijtihad as earlier discussed. In other words, Ijtihad is inherent in the Sunnah as well.

Position of Ijtihad as a source

In line with the model adopted in this work, the two primary sources of the Islamic Law – Qur'an and Sunnah represent the Inner Chamber of Law. Ijtihad stands as the key to this inner chamber, while the other secondary sources of law namely, Ijma', Qiyas, Istihsan, Istislah and Istishab (all combined) represent the tool of the Mujtahidun in their legislative and scholarly activities in the Inner Chamber of Law. And, of course, the ultimate objective of Mujtahidun exercises is to discover the right path that leads to the successes of this world and the hereafter through the instrumentality of the Law.

In the light of this model therefore, Ijtihad can be categorized into two - The Individual or Personal Ijtihad; and the Collective Ijtihad.[79] Ijtihad as a concept and the main theme of this work will be examined in the next Chapter. Meanwhile, a cursory look will be taken at the other sources of Law that represent the tools of Mujtahidun in their activities as jurists.

2.4. Ijma'

Ijma' belongs to the group of sources of law that do not share directly with Qur'an and Sunnah the features of direct divine revelation. Yet, it occupies an important position on the lists of the secondary sources of law. Like any other concept, Ijma' has been clouded in problem of definition. All attempts to define what is Ijma' have not been free from complex implications. For instance, it has been defined as "the consensus of the Mujtahidun of the Muslim Community of the period following the demise of the Holy Prophet (S.A.W.) on any legal matter."[80] Certain observations were made in the light of the above definition. One of them was the question of competence for participation in Ijma'. It was further observed that Ijma' was identified in the early

centuries of Islam with the Ijma' of the community at large, and the Ijma' of the Scholars remained all along a disputed question. [81]

Further attempt in this direction is the examination of definition as expressed by Jurists of classical period. According to Ahmad Hasan, Ijma' was defined as agreement of an assembly of scholars on a certain matter by action or by abandonment. [82] Al-Ghazali gives his own definition as agreement of the community of Muhammad (S.A.W.) on a religious point. [83]

Al-Amidi in his al-Ihkam fi 'Usul Al-Ahkam summed up all the definitions proffered by Jurists as follows:

(1) "Agreement of all the people of binding and loosing who belong to the community of Muhammad (S.A.W.), in a certain period of time, on a rule about a certain incidence".

(2) "Agreement of all those who are legally responsible and belong to the community of Muhammad (S.A.W.) in a certain age, on a rule about a certain incidence".

The former definition is applicable in situation where the masses are excluded but where they are included the latter definition is applicable.

Al-Amidi breaks the various definitions into five component parts namely, agreement; people invested with the power to make a final say on matters that affect the community; membership of the Prophet's community; period of time; and moot questions. The word agreement includes consensus by silence. The term 'Ahl Hil Wal Aqd' (people are invested with power to have final say in the affairs of the community). This expression indicates unanimous agreement of the Jurists including the agreement of the masses. The condition of the 'membership of the Muslim Community' implies exclusion of those who belong to other communities. The phrase 'in a certain period' means the existing community. And finally, the phrase 'on a rule

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[81] Ahmad, H. (1984), The Doctrine of Ijma' in Islam, IRI, Islamabad, Pak. P. 72.

[82] Abul-Husayn, A.B (1964), Kitab Al-Mu'tamad, (Damascurs: Institute of Francis de Dames, p. 457.

[83] Al-Ghazali, Mustafa, (1937), Cairo: Al-Maktabah Al- Tijariyah Al-Kubura p.110.

about a certain incidence' included positive and negative aspects of consensus, and rules about rational and legal question. [84]

As stated about, the first problem with theory of Ijma' is the problem of definition. Definitions of both classical and contemporary periods carry a number of implications, which are common to all. Chief among these implications is the fact that membership of Ijma' and agreement coming out of brain-storming Ijtihad precludes the personality and perhaps the awareness of laymen of the community. Secondly, by reference to the Mujtahidun of any period, it is meant a specific period in which there exists a specific number of Mujtahidun at the time when an incident occurs. There seems to be a clear paradox between the philosophy and the official definition of Ijma'. Be that as it may, the validity of Ijma' is not in doubt as a source of Law in Islam. Jurists are unanimous that Ijma' is a legal proof and compliance with it is binding with exception of Jurists of Shi'ites, Kharijites and some rules of Mu'tazilites. [85]

2.4.1. Proof of Ijma'

Proof of Ijma' has been found in the Qur'an, Sunnah and Qiyas. However, some scholars are of the view that the Quranic verses often quoted to justify Ijma could not decisively represent proofs of Ijma' authority. Sunnah on the other hand has been adduced copiously in its support. The Hadith authority constitutes an evidence according to the Jurists, more explicit and potent than the Quranic verses.[86] Ahmad Hasan observes that Ijma was legalized first on the basis of Hadith and later on the basis of the Qur'an.[87]

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[84] Al-Amidi, (1914), Al-Ihkam fi Usul Al-Ahkam, Cairo: Matba' Al-Ma'arif I, pp. 280-282.
[85] Hasaba-Allah, A., Ibid. p. 112.
[86] Al-Ghazali, Al-Mustafa (1937), Cairo, I. Pp. 111-112.
[87] Ibid. p. 37.

2.4.2. Qur'an Proof of Ijma'

"O ye who believe ! Obey Allah, and obey the Apostle and those in charge with authority among you" [88] The requirement of obedience to Allah to His Messenger and those in charge of affairs is clear. 'It is suggested that this Ayah lends support to the infallibility of Ijma'; for Allah cannot command obedience to any one who is liable to committing errors. [89]

Similarly, the verse which states: "And whoever opposes the Apostle after the right path has been shown clearly to him and follows other than the believers' way, We shall keep him in the path he has chosen."

Quranic commentators observe that: "the way of believers" in this Ayah is in reference to their agreement and the way that they have chosen to their consensus. Therefore, compliance with the way of the community is binding and departure from it is forbidden. [90] Also, "Ye are the best of people evolved for mankind, enjoining what is right, forbidden what is wrong and believing in Allah" (Qur'an 3:110)[91] If the Qur'an endorses some of the striking merits of the Muslim Ummah, it is appropriate to argue that: "Had the community been capable of agreeing on an error, the Qur'an would not have acknowledged it in such express and clear approval.

There are other verses on the proof of authority of Ijma'. However, Jurists look at those verses from different angles. While some hold that these verses are apparent indication (Zawahir) none of which amounts to a clear nass on the subject of Ijma, some other hold that the Ayat may give rise to a probability (Zanni) but, that they do not impart positive knowledge. [92]

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[88] Abdullah, Y. A. (1977), The Holy Qur'an, Translation and Commentary, Islamabad, Fn. 1693.
[89] Kamali, M.A. Ibid.
[90] Ibid.
[91] Abdullah, Y.A. The Holy Qur'an, Translation and Commentary, Ibid.
[92] Kamali, M.H. ibid.

2.4.3. Sunnah Proof of Ijma'

Hadith authority on Ijma' include, the following:"My community shall never agree on an error", "God will not let my community agree upon an error", " I pray to Allah (In the High) not to allow my community to agree on error and my prayer was answered", "The hand of God is with the community (its safety) is not endangered by isolated opposition."

Some Scholars argue that the word 'Ummah' in the above Hadiths means the overwhelming majority of Muslims. Others hold the view that the word 'Jama'h is in reference to the Scholars of the community only. Another group of scholars say that the word 'Ummah' refers only to the Companions who are the founding fathers of the Muslim Community. Al-Shafi'i holds that the word 'Ummah' refers to the whole of the Muslim Community and not a particular section thereof.

Al-Ghazali and Al-Amidi observe that the Hadiths convey positive knowledge and that the infallibility of Ummah is sustained by their collective weight. Ahmad Hasan observes that the Hadiths are inconclusive proofs of Ijma'. According to him, all of them emphasize unity and integration - some are predictive and other circumstantial. He further argues that they may mean Ijma' or something else; and to him the argument that they provide the authority for Ijma' is definitely subjective.[93]

Kamali, in what appears as a decisive stand holds that in spite of the doubts and uncertainties in the Nussus, the majority of scholars have concluded that the consensus of all the Mujtahidun on a particular ruling is a sure indication that the word of truth has prevailed over their difference. He goes further to assert that this rational argument in support of Ijma' has been further advanced to the effect that consensus upon a Shari'ah ruling is bound to be founded on sound Ijtihad. And, in exercising such Ijtihad, the

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[93] Ibid.

Mujtahid is normally guided by certain rules and guidelines; and of course, Ijtihad is usually an act of interpretation of the Nass, or of a rational extension of ruling. If therefore, Ijtihad is founded on sound authority in the instance, then, the unanimous consensus of all the Mujtahidun on a subject-matter is an indication that there is evidence in the Shari'ah to sustain their consensus. Thus, Ijma' account for its own authority and validity. [94]

Sa'id ibn al-Musayyab reported a Hadith, which he said, was transmitted from Ali bin Abu Talib (May Allah be pleased with both of them) that he (Ali) said: :I said O ! Prophet of Allah, matters in respect of which there was no revelation in the Qur'an and has not passed through the consideration of your Sunnah would be befalling us, what should we do? He said: "Bring together the Scholars or he said the Worshippers from among the faithful, make such group of Scholars a Consultative (or Legislative) Council on such matters."[95]

Commenting on this Hadith, Professor Ali Hasabal Lah, quoting from 'Ilam Al-Muwaqi'in (pp. 73 - 74) with approval said that even if it is argued that this Hadith was foreign to Imam Malik collection, its meaning is in perfect harmony, because it is a call to a collective decision in matter of great importance supported by the Nass of the Qur'an which urges on adoption of such method. The Prophet and his Companions after him did actually act on that.

Al-Tibrani' reported similar Hadith in his Al-Zawaid Al-Aosat collection. According to his report, 'the scholars' were preferable to 'the worshippers' as contained in other reports; because the intention to bring scholars together on a matter that touches on people's affairs connotes the exercise of opinion of knowledgeable individuals and

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[94] Ibid.
[95] Ibid.

not mere worshippers who in most cases may not be sufficiently knowledgeable enough to discuss such matters. [96]

2.4.4. Requirements of Ijma'

The exercise of Ijtihad of the Jurists at a particular point in time and on a subject-matter produces certain Shari'ah rulings as long as it is a unanimous agreement of such Jurists. This implies that such unanimity is correct and authoritative. But, on condition that it fulfills specific requirements, which include the following:

(a) There should be a number of Mujtahidun available when a particular subject-matter arises for Ijma' consideration.

(b) Complete agreement. This is an important element for validity of Ijma'. Majority of Jurists agree on this. According to them, all Mujtahidun, regardless of their locality, race, color and school of following, must reach a consensus on a judicial opinion at the time an issue arises for expert consideration. The presence of a dissenting view even by a small minority precludes the possibility of Ijma'. [97] There should be no element of disagreement as this may raise the probability of an error. The presence of a dissenting opinion gives room for jeopardy of one side being in error; whereas Ijma' is supposed to be a decisive proof which must be founded on certitude.

(c) The unanimous view of the Mujtahidun must be exerted by express illustration of opinion on a particular subject-matter, oral or in writing. It should be by Fatwah either in form of co-incidental consensus or consensus reached in an assembly of scholars.

(d) (d) It appears that Jurists are unanimous that it is the Ijma' of Fuqaha alone which is taken into account. Such Fuqah must not be known to have actively invited people to bid'a.

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[96] Hasaba-Allah, A. (1989), Usul Tashri' Islam, Dar Al-Maarif, Cairo, p. 82.
[97] Kamali, M.H., ibid.

The above represents the definition and guiding principles of Ijma'. But, it is in the light of the same Ijma' that a number of Jurists have expressed doubt and reservation over its feasibility. Thus, a number of unanswered questions arises. For one thing, to ascertain the consensus of the Scholars on any matter appears to be practically impossible as then unanimous agreement on what they say and what they eat at a particular point in time. Secondly, it may be possible to find out the broad outline of the Jurists unanimity, but, it is impossible to ascertain their agreement in such a way to impart positive knowledge more especially when the Mujtahidun would be located in distant and varied geographical locations of the world. Certainly, to have access to all of them and to obtain their views is going to be above pragmatic attempt despite the advanced communication system of the modern age of technology. Another question waiting for an answer is the yardstick for measuring qualification of each participating Mujtahidun in the Ijma' exercise, so that a non Mujtahidun will be easily identified and separated from the qualified Mujtahidun. Lack of such universally acceptable yardstick or criteria causes serious poser.

In the light of the above, Jurists take different stands in addition to expressing doubt and reservation. For instance, Al Shafi' Jurists confine the occurrence of Ijma' to the obligatory duties only, Zahiris and Imam Ahmad bin Hanbali meant that Ijma exists only in reference to the consensus of the Companions considered to be founding fathers of Ijtihad in Islam. In his usual Medinese characteristic, Imam Malik confines Ijma' to the consensus agreement of the people of Medinah. Shi'ah Imamiyah in their exclusive and well known attitude, recognize only the agreement of Ahl Al Bayt.[xxx]

[xxx] Ibid

Against the backdrop of this uncertain situation, Ijma' continues to be recognized as potent force to be reckoned with (as an important source of Law) in the Islamic Jurisprudence. Ijma' scored its first practical point shortly after the demise of the Prophet (S.A.W.) when the Muslim Community in Madinah was faced with the problem of how to select or elect a successor to the Prophet. It was a crisis. But, Ijma' came as a saving grace in resolving the crisis. The application of Ijma' at that point in time, presented the Muslims to the world as a matured community and a potential force with a leadership direction and of course a force to be reckoned with. Abu Bakr was finally appointed through the consensus agreement (Ijma') of members of the community as the First Successor to the Prophet. Since then, Ijma' had become a legislative and policy factor to play crucial role in the life of the Muslims. And, in actual fact, it reflects the natural evolution and acceptance of ideas in the life of the human community as a whole and the Muslim Ummah in particular.

Classification of Ijma'

Ijma' has been classified into two:

a) Explicit Ijma'. Here, every Mujtahidun express his opinion either verbally or by action.

b) Tacit Ijma'. Here, some of the Mujtahidun at a particular point in time proffered opinion on a subject-matter in relation to an event, but the rest of Mujtahidun remain silent.

2.5. Qiyas

Qiyas has been defined as a process of deduction by which the law of a text is applied to cases, which, though not covered by the language, are governed by reason of

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the text. [99] Professor Ali Hasaba-Allah proffered a more technical definition. He says: "It is an association of new cases (not mentioned) with the effective causes ('Illah) of the original cases (Asl) in the legislation of the Text by applying the original cases (Asl) to the new cases (Fari').[100] Muhammad Hashmi Kamali 'describes' it as the extension of a Shari'ah value from the original case, or Asl, to a new case, Fari' because the latter has the same effective cause as the former. [101]

The above definitions and similar ones point to the same direction, namely that by virtue of the commonalty of the effective cause, or Illah, between the original case and the case that the application of Qiyas is justified. [102] It should be noted that Qiyas goes beyond the orbit of interpretation in which the intention is to examine and to make clear the meaning of words or sentence of verses of the Qur'an. The emphasis in the Qiyas is on discerning a common cause between two cases, which is not expressly mentioned in the language of the text. It is therefore a means to discover and perhaps to develop the existing law. [103]

2.5.1. Proof of Qiyas

Arguments have been advanced in favor and against validity of Qiyas like Ijma'. Abdul Wahab Khalaf says that Qiyas is the first method to which a Mujtahid resort to in formulating rule on issues where there is no specific nass (or text). He added that Qiyas is the clearest and strongest method of formulating rules.[104]

The opponent of Qiyas argued that the Qur'an and Sunnah provide sufficient legislation without need to depend on personal opinion or any similar method. They quoted references from Qur'an and Sunnah in support of their argument. For example,

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[99] Qadri, A.A. Islamic Jurisprudence in the Modern World, p. 209 quoting Sadru-sh-Shari'ah p.302; Mukhtasar, II, 204; Jamiu Ul-Jawami IV 1.
[100] Kamali, M.H. ibdi. P. 124.
[101] Kamali, M.H. ibdi.
[102] Ibid.
[103] Ibid.
[104] Khalaf, A.w. (1970) Masadir Al-Tashri' Al-Islami Fi Ma La Nassa Fihi, p. 19

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In a Hadith, the prophet was quoted to have said: "My Ummah would be divided into seventy-one groups, the most misleading of the groups are those who engage in exercising their personal opinion in matters of faith. They would forbid what Allah permits, and they would make lawful what Allah forbids.[108]

Those who support on the other hand argued that Qur'an and Sunnah are dynamic in nature; that it is true texts of the Qur'an and Sunnah are decisive and final, but they will continue to be relevant and applicable to human problems which are numerous and varied by time and space through the mechanism of Ijtihad of which Qiyas is one of its arms. In support of their argument, they quoted the following verses of the Qur'an: "Do they no travel through the earth and see what was the end of those before them? They were more numerous than these and superior in strength and in the traces (they have left) in the land: yet all that they accomplished was of no profit to them." (Qur'an 50 : 82)[109] "I find not in the message received by me by inspiration any (meat)

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[104] Khalaf, A.w. (1970) Masadir Al-Tashri' Al-Islami Fi Ma La Nassa Fihi, p. 19
[105] Abdullah, Y.A. The Holy Qur'an, Translastion and Commentary, Ibid.
[106] Abdullah, Y.A. The Holy Qur'an, Translastion and Commentary, Ibid.
[107] Abdullah, Y.A. The Holy Qur'an, Translastion and Commentary, Ibid.
[108] Hasaba-Allah, Ibid. quoting Ilam Al-Muwaqin at p. 104
[109] Abdullah, Y.A., The Holy Qur'an, Translation and Commentary ibid.

forbidden to be eaten by one who wishes to eat it, unless it be dead meat; or blood poured forth, or the flesh of swine, - for it is an abomination" (Qur'an 6 : 145)[110] . In this verse, Allah prohibits dead animal, blood poured forth, and the flesh of swine because each of those items is abomination. In other words, they are filth devoid of fitness for human health. "The similitude of those who were charged with the (obligation of the) Mosaic Law, but who subsequently failed in those (obligations), is that of a donkey which carries huge tones (but understands them not)." [111] The Qiyas in this verse is that knowledge is useless to a person if he does not allow such knowledge to reflect in his words and actions. The proven Qiyas therefore is that a Learned man who does not put into practice the knowledge he has acquired is like a donkey, which carries heavy load of books but does not know the content or value of such load.

2.5.2. Sunnah Proof of Qiyas

The direct Sunnah authority to the validity of Qiyas is that famous Hadith of Mu'adh ibn Jabal. According to this Hadith, when Mu'adh ibn Jabal was appointed the Chief Judge of Yemen, He was asked by the Prophet: how would you judge in matters that would be brought before you? He replied: "I would judge according to the Book of Allah; he said: if you could not find ruling in the Book of Allah, what would you do? He said, according to the Sunnah of the Prophet of Allah. The Prophet said: if you cannot find ruling in the Sunnah what would you do? He said: I would exert myself to form an opinion and I would not fall short. The Prophet then patted him on the breast saying: "Praise to Allah Who has disposed His Messenger's Messenger to something with which the Messenger is pleased."[112]

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[110] Abdullah, Y.A., The Holy Qur'an, Translation and Commentary ibid.
[111] Abdullah, Y.A., The Holy Qur'an, Translation and Commentary ibid.
[112] Tirmidhi, Abu Dawood and Darimi.

2.5.3. Elements of Qiyas

The elements of Qiyas are four:

(1) Asl: refers to the original case on which ruling is given in the text and analogy seeks to extend it to a new case.

(2) Far': refers to the new case on which a ruling is required.

(3) 'Illa: refers to the effective cause which is an attribute of the Asl and it is found to be in common between the original and cause and the new case.

(4) Hukm: refers to the rule governing the original case, which is to be extended to the new case.

Kamali gives an example of where the Qur'an says: "O! ye who believe, intoxication and gambling (dedication of) stones, and (divination by) arrows, are abomination, of Satan's handiwork eschew such abomination that ye may prosper." (Qur'an 5:90)[113] According to him, if the prohibition of intoxicant in this verse is to be extended by Qiyas (analogy) to substances such as Narcotics, dangerous drugs etc., the application of the above four elements will graphically be as follows:

Asl	Far'	'Illa	Hukm
Wine drinking	Taking drugs	Intoxicating effects	Prohibition

Professor Ali Hasaba-Allah cited example of where Qur'an says: "O ye who believe ! when the call is proclaimed to prayer on Friday (the Day of Assembly), hasten earnestly to the remembrance of Allah, and leave off business (and traffic): that is best for you if you but knew." According to him, the verse indicated that other worldly activities apart from commercial activities are also prohibited during the time of Friday congregational prayer. [114]

Other secondary sources of law include:

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[113] Abdullah, Y.A, The Holy Qur'an, Translation and Commentary, ibid.
[114] Usul Al-Tashrihi Al-Islami, ibid p. 126

2.6. Al-Istihsan

The principle of Al-Istihsan is translated as "preference" or the Hanafi School advocated "Equity". Technically, it denotes the abandonment of the opinion in favor of different opinions supported by stronger evidence. Such a departure from analogy may find proof from the authority of Sunnah or Ijma' or it may assume a status of another analytical deduction hidden in nature.[115]

Proponents of Al-Istihsan argue that the deep meaning of this principle is "a desire for beauty" or symmetry for removal of discrepancies or inequities in law. They further argue that man needs variety in his nature, by reason of changing demands of the society; and in order to fit the law into rules of equity, justice and kindness, it is essential that there should be no rigidity in Law.[116] They quoted, in support of their argument, Qur'an where it says: "Allah desires you ease and good and not hardship....." (Qur'an 2:185)[117] "Those who listen to the word and follow the best (meaning) in it." (Qur'an 39:18)[118] "Thy people to hold fast by the best in the precepts." (Qur'an 7:145)[119]

Quoting from the Sunnah, they cited example of the incident when the Prophet sent Ali ibn Abi Talib and Mua'dh ibn Jabal as representatives of the Islamic Government in Madinah to Yemen. Among instructions given to them was that they should uphold the principle of equity in dispensing the people's affairs and that they should not be too rigid. [120]

Interestingly, Ibn Qayyim who was one of the leading exponents of Ijtihad gave stiff resistance to the doctrine of Istihsan. He argued that there is nothing in the law that

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[115] Qadri, A.A., Islamic Jurisprudence in the Modern World, p. 222 quoting Sadru-Us-Shari'ah Kitab Al-Tahqiq at p. 493
[116] Ibid,.
[117] Abdullah, Y.A., The Holy Qur'an Translation and Commentary, Ibid.
[118] Abdullah, Y.A., The Holy Qur'an Translation and Commentary, Ibid.
[119] Abdullah, Y.A., The Holy Qur'an Translation and Commentary, Ibid.
[120] Ibid.

runs counter to Qiyas and perhaps what may be seen as contradicting analogy is either such analogy is fundamentally faulty or that the principle upon which the Qiyas is based could not be found in the Nass of Qur'an or Sunnah. (121)

Shafi'i out rightly rejected doctrine of Istihsan, arguing that whoever practices it, engages himself in law-making exercise.(122)

Dr. Muhammad Muslihuddin did not support Imam Abu Hanifa the proponent of this doctrine. He maintains that the doctrine holds no water, saying that it jettisons Qiyas, which was acted upon by Khulafa Rashidun. He mentioned examples of sale of non-existing goods and contract for manufacture and sale of goods like boat at a future date, and concluded that if the motive behind the introduction of this principle was prompted by necessity and need, in order to mitigate hardship, the Prophet himself held these cases permissible under the Rule of Necessity and Need, and why not adopt the same rule instead of Istihsan, he asked. (123)

2.7. Al-Istishab

Al-Istishab: Literally, it means escorting or companionship. For instance, it can be said that: "I travel in company of my book or friend." But technically, it denotes facts or rules whose existence or non-existence as proven in the past are presumed to remain so for lack of evidence to establish any change.(124) For example, trade by batter for exchange of commodities between people, if there is no specific rule prohibiting such transaction it is considered permissible.(125)

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(121) Muslihudin, M. Philosophy of Islamic Law and the Orientalists, p.151; quoting Ibn Qayyim, 'Ilam, Vol. I p. 335; Ibn Taymiyya, Majmu'at Vol. 2 p. 218.
(122) Muslihudin, M. Philosophy of Islamic Law and the Orientalists; quoting Ghazali, Mustafa, Vol. I p. 137.
(123) Muslihudin, M. Philosophy of Islamic Law and the Orientalists, at p. 155.
(124) Khalaf, A.W. (1970) Masadir Al-Tashri'I Al-Islami (Dar Al-Qalam) p. 151.
(125) Hasaba-Allah, A. Usul Al-Tashri' Al-Islami, ibid. p. 198.

Istishab is a principle propounded by Imam Shafi'. It had a logical connection with Maliki Istislah and Hanafi Istihsan. It is not really a substantive law, rather, it is a legal format to be applied in evidence. Abu Hanifa was said to have admitted the principle only to refute an

assertion, that is, an instrument of defense instead of establishing a new claim. Imam Shafi' on the other hand applied it both way - as a substantive Law and as a principle of evidence.

Maxims of Istishab are summarized as follow:

(a) Presumption of original freedom from liability;

(b) The continuity of a legally established fact until the contrary is proved;

(c) Presumption of generality until a limitation is placed. [126]

Mahamassani explains that the Mejelle of the Othman Civil Code adopted the principle of Istishab especially as enunciated in the maxims cited above. [127]

2.8 Al-Masalih Al-Mursalah

Maslah in a simple legal terminology means interest or benefit. It is a word in singular form. Its plural form is Masalih. Majority of writers agree that when it is qualified with Mursalah, it then connotes unrestricted public interest "in the sense of not having been regulated by the Law-giver and no textual authority can be found on its validity or otherwise."[128] Thus, we have 'Al-Maslah Al-Mursala'.

The underlined concept behind Maslah is that Shari'ah stands for social utility, and its function is to promote benefit and prevent evil.[129] Mustafa Al-Ghazali went further to widen the scope by saying that Maslaha consists of consideration, which secure benefit or prevent harm but are, in harmony with the ultimate good of the Shari'ah.

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[126] Qadri, A.A. ibid, quoting Suyuti, (1936) Al-Ashbah Wa Al-Nazair, Cairo,
[127] Falsafat Al-Tashri' Al-Islami, pp.90-91.
[128] Per Khallaf, Ilm, p. 84 as quoted by Kamali, H..M. ibid at p. 388.
[129] Muslihudin, M. Philosophy of Islamic Law and the Orientalists, p.156.

These goals consists of protecting the five essential values, namely, religion, life, intellect, lineage and property. (130)

In comparative sense, McDonald holds that Maslaha corresponds with utility, while Abdul Rahim argues that it is similar to juristic equity or preference known as Istihsan.

Imam Malik was the founding father of this principle. Jurists of Hambali and Malik schools hold that all the recipes of the Qur'an and Sunnah focus on some useful purpose. The useful purpose here include, the five values (daruri); merely expedient necessity (ijarah); and useful purpose which serves as end like the promotion of good morals. (131)

Maliki Jurists make classification of Maslaha, which is almost to the above. They include, Masalih Mutabara, Masalih Mulgah and Masalih Mursala. Maliki Jurists would allow a deduction of law to be based on general consideration for public good. But, it would seem that many followers of other schools like the Hanafi Jurists consider the doctrine to be too vague and general. (132)

Imam Malik holds that the Companions had validated the doctrine and had formulated the rules of Shari'ah on its basis; and that it is compatible with the aims of the Law-giver. Therefore, what He has validated should be given legislative approval and to do otherwise would amount to neglecting the objectives of the Law-giver. He argues that refusal to accord Maslaha legal approval is likely to bring about hardship to the people; hardship, which prima facie should be prevented.

Maslah is divided into three:

a) Haqiqyyah: It must be genuine. Mere suspicion or plausibility based on assumption that a particular legislative enactment will be a benefit without ascertaining its justification is not enough for its application. A reasonable probability must be

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(130) 'Ilm Al-Usul, (1937), Cairo I, pp. 139-144.
(131) Qadri, A.A., Ibid, quoting Shawkani, (1357H) Risalat Al-Qawl Al-Mufid Cairo.
(132) Schact. Muhammadan Jurisprudence.

established such that the benefit of enacting a law outweighs the harm that may flow from such enactment. For example, abolition of the husband's right of Talaq and vesting it entirely in a court of law.[133]

b) It must be general such that it secures benefit or prevents harm in people's interest as a whole and not to a particular person or group or persons.

c) It must not be in conflict with a principle or value which is established by the Qur'an, Sunnah and Ijma'.

d) The Maslaha must be rational (Ma'qulah) and acceptable to the people of sound intellect.

e) It must prevent or remove hardship from the people which is the express purpose of the verse of the Qur'an which states "Allah doth not wish to place you in difficulty to make you clean and to complete His favor upon you that you may be grateful."[134]

Kamali, citing Abu Zahran mentioned an example of a contention that Maslaha in modern times would require the legislation of usury (riba) on account of the change in the circumstance in which it is practiced, and also the view that riba, in the way it is practiced in modern banking system does not fall under the Quranic prohibition. Kamali however noted that these altogether come into conflict with the clear Nass of *the Qur'an and therefore negates the whole concept of Maslaha.*

Like the operative differentials between Istislah, Qiyas and Istihsan, and the possible relationship that sometimes exists between them, it seems that Maslaha Mursalah and Qiyas have a common feature in that both are applicable to cases on which there is no decisive ruling from the Qur'an and Sunnah in spite of this common feature, a significant difference between the two is that the benefit or interest derivable from Qiyas has root in an indication or a recipe provided by the Law-giver and a

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[133] Khallaf, A.W. (1350H.) Al-Siyasat Al-Shariyah, Cairo, p. 105.
[134] Abdullah, Y.A. ibid.

particular Illah (the effective cause) is identifiable to justify the analogy to the text. But, the benefit or interest which is the subject-matter of justification through Maslah Mursalah has not precise basis in the established rule of law. In other words, the former is the extension of a ruling found in the Nass, whereas the latter stands on its own justification.

Perhaps this peculiar circumstance is a factor that has led the opponents of Maslaha principle to advance an argument against it. According to them, Shari'ah is all inclusive and there is no Maslah outside the Shari'ah itself. Leading among these opponents are the Zahiris and some Shafi'i jurists like al-Amidi and even a Maliki Jurist of Ibn al-Hajib caliber also joined the band-wagon. The basis of their argument is that Masalih could not likely (so to say) stand as a proof in its own right and to that extent, Masalih are all exclusively contained in the Nusus. Quoting Khallaf, Kamali puts it this way: "When the Shari'ah is totally silent on a matter, it is a sure sign that the Maslaha in question is no more than a spurious Maslaha (Maslaha Wahmiyyah) which is not a valid ground for legislation." [135]

Against this background however, the proponents of Maslaha namely, Malikis and Hambalis maintained that it is a valid authority as long as it fulfills the conditions which ensure its propriety. For example, Imam Ahmad b. Hambali and his disciples are reported to have applied Maslaha as ratio decidendi for a good number of their Fatawi. Thus, they have validated the death penalty of spies whose activity violated the public interest (Maslaha) of the Muslim Community.

Imam Maliki who was the leading exponent has given some far-reaching justification for the doctrine in the following instances,

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[135] Kamali, M.H. Principle of Islamic Jurisprudence, ibid. p. 351.

1) Validation of pledging of bay'ah (oath of allegiance) to the Mafdul, that is the lesser of the two qualified candidates for the office of Imam. The Maslah in this instance is to promote mutual love and cooperation and to prevent bad-blood hatred and conflicts in the interest of the community.

2) In the time of economic recession, Imam Malik might impose additional taxes on the wealthy people in the society so as to meet the urgent needs of the government.

There are other complementary sources which include, 'Urf, Saddal-dhara'i, Fathal-Dhara'i, Madhab Al-Salaf and Madhab al Sahabi.[136]

2.9. Madhab al-Sahabi

From historical records the members of family, and the Companions who lived with the Prophet copied his habits and conducts, including the Rightly Guided Caliphs, Wives of the Prophet, leading Companions such as Abdullah b. Mas'ood, Abdullah b. Omar, Abdullah b. Zubair, Anas b. Malik, Abu Hurarira and others. The sayings and conducts of such respected personalities which serve as patterns for individual or legal reasoning or Qiyas are considered legal proof in their own right. This is because they are accepted to be direct copies of the practices of Qur'an and Sunnah.[137]

2.10. Madhab al-Salaf

The Successors of the Companions followed them up to the third generation; after which the Acknowledged Learned and Pious Jurists of history followed the list. According to Sadru-Us-Shari'ah, the Sunnah of the Companions is by unanimous opinion or Ijma binding on points where no opposition is made by Muslims, their Sunnah is not binding on points of their disagreement till there is an Ijma'; and their opinions are not binding regarding points which may be established by Qiyas. The same would perhaps apply to the legal recommendations of the Madhab Ahal Al-Salaf.

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[136] Al-Tawhid. (1408H), Vol. V Nos. 3 and 4, Rajab-Dhul Hijjah, p. 179.
[137] Qadri. A.A. Ibid., p. 227.

2.11. 'Urf, or 'Adah

Literally, it means custom, which conveys a sense 'to know' in legal connotation it means a practice of the people. During the period of the Prophet, certain customs were prevalent among the people. It was both such customs were given approval or were not abrogated by the Qur'an and Sunnah (coupled with Divine Silence) amounted to a recognition on the point of their validity, thus, became acceptable legal norms and value.

Secondly, those other customs and practices which came to the vogue after the period of the Prophet were given justification along with other essential conditions on the authority of the laid-down legal maxim that: "what else the people in general consider to be good is so in the eye of Allah." [138]

Custom is classified into two: 'Amm or Khas. Each of the two may be in accordance with or in opposition to the sources of primary and secondary degrees or perhaps to the Nass occurring in recognized books of the Schools or Zahir al-Riwayah. If a custom accords with the Nass of the Law, it will enjoy legal approval and will be considered as acceptable practice. Where, on the other hand, a custom is directly in opposition to the Nass of the Qur'an such that following it would amount to rejection of the fundamental law, then the custom is considered repugnant and should be set aside. But, where the opposition is not absolute, or where the custom opposes only a Qiyas rule deducted from the text, preference is given to the custom provided it is general in nature. For example, by the rule of Qiyas, Ististhnah, i.e. entering a bath without specifying the duration of staying therein is held to be Fasid; but where it is customarily

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[138] Hidayah, 177-8; Fath Al-Qari, VI. 65; Taqi Amini as cited ibid at p. 227.

held not to be so, that customary position will be preferred to the Qiyas ruling. However, if the custom is not general in nature, it will be set aside.[139]

Other sources include, Saddu-Dhara'i i.e. blocking the means and Fathul-Dhara'i i.e. opening the means. The former is applicable to check the excesses in legislation in the sense that the Mujtahidun are restricted to the primary sources while the latter is applicable to remove hardship by allowing the application of sources in the secondary degree so that the particular subject-matter or situation will be taken care of by the law. For instance, the application of Istihsan or Maslaha Mursalah.

The trend of development taken by the sources is an evidence that Shari'ah is dynamic in nature. It is complete scheme that accommodates developments embracing social order which take into its sweep not only this world but also the next. It gives room for all the departments of life and thus provides directives. Therefore, so long the Holy Qur'an and Sunnah remain the sources of the Law, so long the Mujtahiddun would continue to exercise Ijtihad in discovering or rediscovering the Law

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[139] Ibid. p.228.

HISTORICAL ORIGIN OF IJTIHAD

3. 1. Introduction

Qur'an and Sunnah are the primary sources of Law in Islam. But, the larger part of the Qur'anic legislation consists of general principles, laying down general guidelines on almost every major topics of Islamic Law. Sunnah, on the other hand, consists of rules that merely confirm and reiterate the Qur'an, in which case the rules in question originate from the Qur'an and are merely corroborated by the Sunnah. It also consists of rulings on which the Qur'an is silent in which case the ruling in question originates in the Sunnah itself. The need arises as to discovering the true meaning of the two. Ijtihad then serves as a means of interpreting the two. It is therefore regarded as the most important sources next to the Qur'an and Sunnah. [1]It is true that the divine revelation and prophetic legislation have been brought to a close with the demise of the Prophet, but, it is also a fact that Ijtihad continues to be an effective means of interpreting the divine revelation thereby serving as a merger between it and the changing circumstance of the Ummah in its quest for the ultimate justice and egalitarianism. Ijtihad is thus, an eye-opener to the dynamism and are relevance of the divine revelation and the practical examples of the Prophet. Ijtihad exercises consist of inference (Istinbat) that amounts to a probability (Zann). It thus excludes the extraction of a ruling from a clear text. It also excludes the discovery of a Hukm by asking a learned person or by consulting the relevant literature without the exercise of one's own opinion and judgment.[2] In other words, Ijtihad is an exercise in formulating an opinion in regard to a Hukm Shara'i.

[1] Kamali M.H. (1989) Principle of Islamic Jurisprudence, Pelanduk Publication (M) Sdn. Bhd. p. 402
[2] Ibid. p.404.

It is significant to note that the presence of an element of speculation in Ijtihad implies that the result arrived at is probably correct but possibility of it being erroneous is not excluded.[3] It is also significant to note that in matters where the Shari'ah rulings are decisive, such matters are excluded from the scope of Ijtihad For instance, the clear nussus concerning the principles of Tawhid, the Prophethood of Muhammad (S.A.W.) Saom (fasting), Zakat (Almsgiving) and Haj (Pilgrimage). Also, the prescribed penalties (hudu). But, in matters that are authentic but speculative in meaning, or those which are of doubtful authenticity, but definitive in meaning and in matters that are speculative in respect of both proof and meaning, Ijtihad validly operates. The question then arises as to whether or not the Prophet whose conducts and practices constitute the second source of the law exercised Ijtihad. In other words, whether all the prophetic decisions should be regarded as divinely inspired or they share the attributes of Ijtihad.?

It appears as if the Jurists are in agreement on the point that the Prophet really exercised Ijtihad in matters that concerned temporal and military affairs. But, they disagreed on whether his rulings in Shara'i matters could be considered as Ijtihad. Scholars like the Ash'aris, the Mu'tazilites, Hanbalis and Shafi'is have held that all the rulings of the Prophet consist of divine revelation and that none would occur in the form of Ijtihad. Majority of Jurists however, are of the view that the Prophet practiced Ijtihad just as he was divinely allowed to do so. This is based on the premise that there are numerous verses of the Qur'an where the Prophet is invited along with the rest of the believers to meditate over the Qur'an and to study and think about the creation.

3.2. Ijtihad During The Lifetime of the Prophet

Al-Shawkani in his Irshad says that the Qur'an gives us clear indications that Ijtihad was permissible for the Prophet and that he (the Prophet) was capable of making

errors. The other Jurists who share the same view argues that any error the Prophet might have made has been rectified by the Prophet himself or through subsequent revelation. As an illustration of this point, they cited the incident of where the Qur'an says: "It is not proper for the Prophet to take prisoners (of war) until he has subdued everyone in the earth" (Qur'an 8 : 67).[4] Here, the argued, the Prophet was said to have been reproached for his errors. This verse relates to the case of the captives of the Badr War. According to record, seventy person from the Makkan Soldiers were taken prisoners in the battle. Before taking decisions, the Prophet first consulted Abu Bakr who suggested that they should be set free against ransom, whereas Omar b. al-Khattab was of the opinion that they should be killed outright. The Prophet accepted Abu Bakr suggestion. Revelation of the above verse came afterwards disapproving decision to take ransom from the captives.

Another example of the Prophet's Ijtihad is in reference to the exemption he (the Prophet) granted prior to investigating the matter, to those who did not participate in the battle of Tabuk. This action to some commentators such as Yusuf Ali appears from military point of view 'too liberal'. According to him, the Prophet was actuated by motives of kindness as well as policy - kindness, because, in the urgency of the moment, he did not wish any one who had a real excuse to be refused exemption; and policy, because, if any one did not come with hearty good-will, he would be a burden instead of a help to the army. The policy was justified, because in fact 30,000 men or more followed him. But that did not in any way justify the slackers, and in a review of the position, the slackers and hypocrites are justly condemned.[5] Reference to this point is contained in Qur'an where it says: "God give thee grace ! Why Didst thou grant them exemption until those who told the truth were seen by thee in a clear light, and thou

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[4] Abdullah, Y.A., The Holy Qur'an, Translation and Commentary, Ibid.
[5] Abdullah, Y.A. (1977), The Holy Qur'an, Translation and Commentary, p. 454.

hadst proved the liars? Imam Razi does not understand the expression ""Afa Allah 'Anka" to mean God gives thee forgiveness, rather an exclamation. Be that as it may, the purports of the verse show that prior to its revelation, the Prophet exercised Ijtihad. Another example of the Prophet's Ijtihad is the one on the Quranic injunction that prohibits the marriage of a woman and her daughter; and two sisters at the same time. Having listed the women prohibited in marriage among others, the verse concluded by saying that: "Any woman beside these are permissible for you (in marriage)" [6]

In analogy to these two types of prohibited marriages, the Prophet prohibits marriage with a woman and her Aunt; and a woman and her mother's sister at the same time, because such marriages would produced similar effects as those of combination of a woman and her daughter; and two sisters in marriage at the same time. The Prophet was reported to have said: "Surely, if you do that, you have cut your family tie". Sunnah further corroborates the contention that the Prophet practiced Ijtihad. According to one Hadith, the Prophet was reported to have said: "When I do not received a revelation (wahy), I adjudicate among you on the basis of my opinion (ra'y). [7]

3.3. Ijtihad of the Companions in the life-time of the Prophet

Majority of Jurists agree that the Companions have, on numerous occasions, practiced Ijtihad both in the presence of the Prophet and when he was absent. The Hadith of Mu'adh bin Jabal serves as a clear authority on this. In this Hadith, the Prophet gave approval to Mua'dh to resort to Ijtihad in his absence (i.e. in Yemen). Ibn Hazm was of the view that Ijtihad of the Companions could only be valid in matters other than the halal and haram. Al-Amidi and Ibn Hajib on their part observed that the

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[6] Abdullah, Y.A. (1977). The Holy Qur'an, Translation and Commentary, Ibid.
[7] Abu Dawood, Sunan, (n.d.) (Hasan's Trans.) III, 1017, Hadith N 3578.

Ijtihad of the Companions is only speculative and does not establish definitive ruling.[8] Other Companions who exercised Ijtihad in the life-time of the Prophet include: Abu Bakr; Sa'ad b. Mu'adh; 'Amr b. Al'Ass and Abu Musa al-Ash'ari. [9] Ijtihad of the Companions finds further support in the Hadith. It is reported in a Hadith that the Prophet authorized 'Amr b. al-'Ass to adjudicate in some disputes and he asked the Prophet thus: "Do I render Ijtihad while you are present?" To this, the Prophet replied: "Yes. If you are right in your judgment, you earn two rewards, but if you err, only one." It is also related in another report that Sa'd b. Mu'adh rendered a judgment concerning the Jews of Banu Qurayzah in the presence of the Prophet and he approved of it.

Al-Gazali has expressed some reservation as to the validity of Ijtihad in the presence of the Prophet, as he considers that, unless the Prophet granted a permission, Ijtihad in his presence would be discourteous. As an illustration of Ijtihad of the Companion in the life-time of the Prophet, it was reported that when two Companions were on a journey, and it was time for prayer, there was no water for them to perform ablution. As a result, they performed Tayyamam instead. But, after a short-while, they got water. One of them performed ablution and repeated the prayer. The other did not repeat his prayer. They came and reported the matter to the Prophet who said to the one who repeated his prayer: "You earned double reward"; and to the second Companion: "You have acted according to the Sunnah" or according to the rule.

In another occasion, a group of Companions among who were Omar and Mu'adh, each of who were in need of ritual bath. But, water was not available for this purpose. Omar and Mu'adh exercised Ijtihad, Mu'adh adopted the analogy of cleanliness of sand with that of water and thus rolled his body in the sand and prayed.

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[8] Kamali, M.H. (1989) Principles of Islamic Jurisprudence, Pelenduk Publication. p. 484
[9] Al-Shawkani, Irshad p. 259 as quoted by Kamali H.M. Ibid. p. 484.

Omar did not do that but delayed his prayer. When the matter was brought to the notice of the Prophet, he pointed out that the Qiyas of Mu'adh was faulty because, he turned away from the Nass of the Qur'an which provides that: "And rub therewith you faces and hands" (Qur'an 5 : 6)[10] The Prophet explained further that: it would have been enough for you (Mu'adh) to rub the face and the hand, meaning that Tayyamam was enough substitute for ritual bath (when there is no water). Omar understood from the Prophet's explanation that Tayyamam removes both small and big dirties in the body,[11] hence the Qur'an says that: "But if ye are ill, or ye have been in contact with women, and ye find no water, then take for yourselves clean sand or earth" (Qur'an 5 : 6.) [12] These instances show clearly that the Companions used to exercise Ijtihad in the presence of the Prophet who sometimes approved such Ijtihad or counseled it. [13]

3.4. Ijtihad During the period of The Rightly-guided Caliphs

Shortly after the demise of the Prophet, the immediate matter that called for solution was the appointment of a person to succeed the Prophet. He did not appoint any one to succeed himself through the expressed statement of his Hadith. Who would succeed the Prophet was thus a big question. In all probability, Ijtihad for the first time (after the era of the Prophet) occurred among the Companions in the city of Madinah on political affairs of the Ummah.

A few eminent responsible persons between the Muhajirun and the Ansar elected Abu Bakr, and ultimately it was ratified by entire membership of the community. This first Ijtihad was based on the analogy (Qiyas) that even though the Prophet had never expressly mentioned Abu Bakr to succeed him, but he had on a good number of occasions asked Abu Bakr to lead the people in prayer in his absence. One

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[10] Abdullah, Y.A. (1977). The Holy Qur'an, Translation and Commentary, Ibid.
[11] Sharafudeen A.A. (1969) Tarikh Tashrik Islam, p. 53.
[12] Abdullah, Y.A. (1977). The Holy Qur'an, Translation and Commentary, Ibid.
[13] Ilam Al-Muwaqi'in. Al-Munirat Publication Dept. p. 177.

would have had an impression that this Ijtihad amounted to Ijma' but, this is not the case especially with some Scholars like Ahmad Hasan who is of the view that this was not Ijma' in its real and technical sense.[14] It was later that this election was justified on the basis of Ijma. Omar was fully conscious of the fact that Abu Bakr was not elected with the unanimous consent of the community. Be that as it may, the fact remains that an Ijtihad took place.

During the reign of Abu Bakr as Caliph, whenever a matter came to him, he would find solution in the Qur'an if he found ruling there to, he would decide the matter accordingly. If he could not find ruling in the Qur'an, he would look into the Sunnah, if he found ruling in the Sunnah, he would judge accordingly. If he could not find ruling in the Sunnah, he would call together the Leaders (Scholars) among the people and seek their advice on such matter. If they reached consensus on the matter, he would act accordingly. Omar followed the same pattern of legislation and adjudication. If he could not find solution to matters in the Qur'an and Sunnah, he would make inquiry as to whether or not there had been ruling of his Predecessor (Abu Bakr) on the matter. If there were, he would judge accordingly otherwise, he would gather the Leaders (Scholars) among the people. If they agree on a point about the matter, he would judge accordingly. [15] The attitude of both Abu Bakr and Omar conformed with the directives given by the Prophet as contained in the Hadith reported by Sayyid b. Masayib who inquired from the Prophet that 'matters should be coming to us, about which the Qur'an is silent neither your Sunnah was specific about', the Prophet answered by saying: "bring together the Scholars from among the faithfully, make such group of Scholars a

[14] Hassan, A. (1970) The Early Development of Islamic Jurisprudence, I.R.I. Publication. pp .156-57.
[15] Sharafadeen A.A. (1969), Tarikh Al-Tashrikh Al-Islam, p. 65.

consultative (or legislative) council on such matters. Do not decide on a ruling by opinion of an individual". [16]

3. 4.1. Ijtihad of Caliph Abu Bakr

During the caliphate of Abu Bakr, a number of tribes refused to pay Zakat to the state. He considered their action a serious affront to the state authority. He decided to fight war with them in order to preserve the state of religion as it stood during the Prophet's time. Omar and some other Companions however, viewed the situation from a different angle. As the people were neo-Muslims, they were of the view that they should be treated with leniency. Omar was reported to have remarked: "how do you fight with the people while the Prophet has said: I have been commanded to fight with the people until they utter 'there is no God but Allah'. When they utter this credo, they save their lives and property from me except for what is due to it". Disagreeing with Omar, Abu Bakr was reported to have responded by saying: "By God, I shall fight with a man who separates what the Prophet had united". [17]

Omar seemingly intended to protect the community from disintegration, and wanted to carry along those persons who refused to pay Zakat. But to Abu Bakr, putting the community on a solid basis and following the practice as a deterioration of religion (naqs-filddin). Omar changed his stand and ultimately agreed with Abu Bakr. Abu Bakr engaged battle with these tribes and brought them to submission.[18] From this incident, it can be concluded that in the early days of Islam, ideological integration was emphasized even at the cost of some Muslim tribes. And this was achieved through adherence to the model practice [19] of Abu Bakr Ijtihad.

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[16] Translation adopted as contained in this work, supra.
[17] Al-Bukhare, (1908). Al- Jam'al Al-Sahih, Leiden, IV. P.421.
[18] Ibn Kathir, (1932), Al-Bidayah Wal- Nihaya, Cairo, Matba'ah al-Sa'd Sa'adah VI. P. 311.
[19] Hasan A. (1978), The Doctrine of Ijma' in Islam, I.R.I., Pakistan, p. 2.

In another instance, during the course of the Yamamat war, many leading Hufaz (Quranic memorizers) lost their life at the battlefront. Omar and some other important Companions observed that there was need to compile the Qur'an to save it so that a greater part of it would not get lost. Abu Bakr's reaction was that, 'do we do what the Messenger of Allah did not do' and Omar replied by saying that: "I swear by Allah, this is good". Omar insisted in reminding Abu Bakr on this issue until Allah opened the mind of the latter to agree with Omar's proposition.[20] Thus, Abu Bakr appointed Said b. Thabit for the compilation of the Holy Qur'an. Ordinarily, there was no express instruction in either the Qur'an or Sunnah that the Book should be compiled, but, through the Ijtihad of the Companion, Abu Bakr and Omar being major actors, were able to arrive at the decision to produce a copy of Qur'an which remained since then (30 A.H.; 630 A.D.) a monumental document in the entire history of mankind.

3.4.2. Ijtihad of Caliph Omar

The reign of Caliph Omar witnessed many conquests and dynamic changes. As a result, new situations arose and old customs changed. This development accounted for several changes in some of the Fatawa and rules prevalent during the period of the Prophet and Caliph Abu Bakr. Caliph Omar faced the new situations firmly and resolutely and did not shrink from overruling old interpretations of the texts, if Shari'ah policy or the interests of the Muslims made that imperative.[21] As a result, this period recorded significant Ijtihad exercises among which are the following:

a. Qur'an provides: "The alms are only for the poor and the needy and those who collect them and for those whose hearts are to be reconciled, and to free the captives and the debtors, and for the cause of God and the wayfarers, a duty imposed by God".

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[20] Mahamassani S. (1961) Falsafat Al-Tashri' Fi Al-Islam, Netherland p. 110.
[21] Ibid.

(Qur'an 9:60) [22] "Those whose hearts were to be reconciled" in this verse refers to the group of wayfarers whom the Prophet included among the recipients of the proceeds of alms to win them over for Islam on account of their weak faith or in order to avoid their mischief or because of the high esteem in which the tribe held them. [23] Despite this express provision in the above-quoted verse of the Holy Qur'an, Caliph Omar stopped payments to this group. He turned them away saying: "These were payments from the Prophet to you in order to win you over for Islam. Now, God has given power to Islam and made your support unnecessary. So, you either remain faithful to Islam or the sword will be the arbiter between us".[24] He went further by saying that: "We do not pay anyone anything for embracing Islam. He who wished to believe, let him believe, and he who chooses to remain infidel, let him do so". [25] Omar's Ijtihad in this case was to the effect that the text was based upon the needs of the Islamic Mission and the urgency of securing support for it. However, as Islam had gained in strength, the reason for this text ceased, whereupon Omar supplanted the rule of the text upon which it was based.[26]

b. Fornication: According to the majority of Jurists, one hundred lashes of the whip and exile for one year, is the punishment for unmarried fornicators. It was reported that the Sunnah establishes this punishment by exile.[27] However, when Omar sent Rabi'ah b. Umayyah on exile and the latter joined the Byzatines, Omar exercised his Ijtihad and modified this policy. To that effect, he declared: "I shall never send anyone to exile again". The ratio of this Ijtihad to suspend the rule, though contained in

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[22] Abdullah, Y.A. (1977), The Holy Qur'an, Translation and Commentary, Ibid.
[23] Ibn Hammam, Fath, II, 14-15 and Ibn Qudamah (Shams) Sharh, II 696 ff
[24] Ibn Hammam, Fath, as quoted by Mahmassani Ibid. p. 111.
[25] As reported by Bayhaqi see Nawawi, Majmu' VI, 197.
[26] Mahamassani, S., Falsafat Al-Tashrihi Al-Islami, Ibid.
[27] Shawkani, Nayl VII, 73 ff.

express text of Nass of Hadith, was born out of his intention to make sure that no Muslims would desert to the enemy.[28]

c. Disposition of Slave Mothers by Sale: The disposition by sale of slave mothers otherwise referred to, as Ummahat al-Awlad is another instance. These are those slave girls who gave birth to children as a result of intercourse with their masters. Their sale was permissible during the days of Prophet, and the Caliph Abu Bakr. Omar, however, prohibited their sale saying: "Our blood has been mixed with their blood".

d. Divorce by Repudiation. In the days of the Prophet and Caliph Abu Bakr and first part of Omar's reign, if a person repudiated his wife three times in one sitting, this was regarded as the equivalent of one declaration of divorce only But during the later part of Omar's caliphate the policy was changed. The triple declaration was considered equivalent to three separate declarations, which in effect make the repudiation irrevocable. The ratio of Omar's Ijtihad was based on his observation that the people were using the declaration lightly and irresponsibly, hence, he wanted to punish this laxity and to deter them from resorting to this bad habit.[29]

3.4.3. Ijtihad of Othman b. Afan

Caliph Othman b. Affan ruled over the Muslim caliphate for about 12 years. During his tenure in office as Caliph, the Arab and Islamic territory expanded in Asia and Africa.[30] Consequent to some developments that took place during his reign, several Ijtihad took place as well. However, one of the major Ijhtihad of his reign was the that the Qur'an was collected in one unified version and reading, then copies were sent out to all the provinces. This was against the background of no specific direction to that effect from either the Qur'an itself or Sunnah. At this period, there were

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[28] Mahmassani S. Falsafat, Ibid.
[29] Mahamassani, S. (1961) Falsafat, Brill Leiden, p. 112.
[30] Rahim, A. (1987), Islamic History, Academy Press Ltd., Lagos p. 8

different ways of reading, which in some instances contradicted the Arabic grammatical rules. As a result, the tendency was to distort the meaning of verses of the Qur'an.

Caliph Othman is also memorable for the establishment of the Arab Navy. To repel the Roman invasions, he felt the need of a navy. So he built a naval base through which he fought successfully against the Roman invaders.[31] There is no doubt that the running of this naval administration required certain rules and regulations that must have been enacted in accordance with the rulings of the Qur'an and Sunnah, through the instrumentality of Ijtihad.

3. 4.4. Ijtihad of Ali b. Abu Talib

Caliph Ali b. Abu Talib succeeded Caliph Othman b. Affan in a tragic circumstances that surrounded the death of the later. He followed the ideal of Abu Bakr and Omar. At the time of appointing him as Caliph, he opposed the idea of hereditary leadership. In his sermon No.174, he stated that: "O people! He who is the most powerful of all and who knows the book of God best of all deserves the Caliphate.[32]

Due to unfortunate political turmoil, which developed during the reign of his predecessor and which lingered on for the whole period of his regime and after that, Ijtihad witnessed stagnation. People belonging to opposing camps engaged in searching for authority in the sources of the law to support their position especially from the Hadith of the Prophet (S.A.W.). In spite of this unfortunate situation, Caliph Ali, maintained the Islamic legal system and its application in its pristine form.

Ijtihad of Omar bin Abdul Aziz

During the time of the Prophet, and the Caliphs Abu Bakr and Omar gifts were accepted from the citizens, but, Omar b. Abdul Aziz, during his reign refused gifts and considered their acceptance unsavory and indiscernible from bribery. He declared: "A

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[31] Rahim, A. ibid. p. 87.S

[32] Mohy-Ud-din, A. (1980) Ali, The Superman, Ashraf Printing Press, Lahore p. 152.

gift in the days of the Prophet was gift; nowadays, it is a bribe". The ratio here was to the effect that due to widespread of corruption and bribery at the time, the Caliph had to ban acceptance of such gift. Our journey so far into the historical antecedent of the Islamic legal system generally and Ijtihad as a concept of legal development in particular show adaptability and relevance of the Shari'ah to changing circumstances of time and places. It was the same progressive posture of the law that gave birth to the rise of various Schools of Thought at the later stage of its development. This period of the four rightly-guided Caliph marked the end of the second period in the history of Islamic Jurisprudence which had so far been recognized as embodiment of positive growth and vitality. That of Young Companions and the Tabi'in followed the period.

Political Division and Its Aftermath Impact on Ijtihad

Following the gruesome murder of Othman b. Affan who was the Caliph after Omar, and the consequent power-struggle that ushered in the Caliphate of Ali b. Abu Talib, the Muslims became divided. Initially, it was a sharp political division. But, later, it metamorphosed into theological division as well. From this turbulent political division, emerged the following groups:

a. Khawariji: This was a 'Protestant Group' who believed that they were on the path of truth. They considered the acceptance of the idea of Arbitration between Ali and Muhawiyah as a blunder on the part of Ali. Also, the arbitration itself to them was doubtful concept. And, since they were on the path of truth, truth and doubt could not be reconciled. Their slogan was: "Judgment Belongs to Allah".

They did not accept Hadith transmitted by Companions who did not belong to them or share their sentiment. They disbelieved Othman because to them, he did not follow the path of Abu Bakr and Omar. They disbelieved Ali, Muhawiyah, Abu Musa Al-Ashhari, Amr b. Al-As for their participation in the arbitration.

b. Shi'ah: Shi'ah claimed that 'Ali had a more legitimate claim to the Caliphate because he belonged to the family of the Prophet and was both cousin and son-in-law. They alleged that the Prophet had willed that Ali succeeded him. As this group sided (tashayya'a) with Ali, they were thus called the Shi'ah (partisans) of the Imam Ali. The main objective of the Shi'ah was to restore the Caliphate to the family of the Prophet, at first from the Orthodox, and later from the 'Ummayyad and 'Abbasid Caliphs. The Shi'ah is also divided into the following groups:

i) Imamiyah,

ii) Zaydiyah and

iii) Ismai'liyah Each of these sub-sects has its own principle and doctrine.

c. Ahl Sunnah Wal Jama': This group are known to be maintaining a neutral position between the two groups

(discussed above). They accept the Caliphate of the four Rightly-guided Caliphs, Abu Bakr, Omar, Othman and 'Ali.

3.5. Stagnation of Ijtihad

Ijtihad witnessed stagnation during the period of the last two Caliphs, namely, Caliphs Othman b. Affan and Ali b. Abu Talib. Similarly, stagnation of Ijtihad repeated itself during the fifth period of development of the Islamic jurisprudence. At the period of the last two Rightly-guided Caliphs, the prevailing political turbulence had grievous and serious consequences on the growth and development of Ijtihad thereby resulting in its stagnation. As stated above, what appeared initially to be sharp political division had led to theological division. This was more pronounced in the acceptance or rejection of Hadiths. Each group, had its own attitude to a particular Hadith depending on who transmitted such Hadith and what grouped he belonged to. Apart from this stagnation, Ijtihad also witnessed a kind of peculiar innovation in the sense that most of

it were in contradiction to the spirit and letter of the established principle of Qur'an and Sunnah on legislation. Ijtihad witnessed stagnation at the fifth period of its development. This was a period known as "period of stagnation" (Al-Daor Al-Taqlid). During the golden period of the four Imams (Asrul Aimat), Muslims have been divided into theological groups. Thus, their followers became contented with what their various Imams have done in their previous Ijtihad activities. They followed only their religious and legal opinions (Fatawah). They failed to make further efforts to source the law from the Qur'an and Sunnah as those Imams did in their times. According to some scholars, they have got to a point where opinions of those Imams have become binding laws. Certain factors led to this unfortunate situation. Chiefs among them were that there had been division on point of views among the previous Imams, lingering effects of political division in the Islamic world, lack of intellectual freedom particularly among judges who were compelled by circumstance, to be loyal to the authorities that had appointed them to office, and also the problem of moral decadence. It was during this period that certain groups emerged. They include,

a) Ahl Hadith and Ahl Ra'y: Ahl-Hadith people were based in Hijaz and Ahl Ra'y people were based in Iraq. What accounted for this development was that the Hijaz was the home of Sunnah. The Hadiths, the saying of the Companions and Fatwa were abundant there. The life-style in Hijaz did not witness significant changes from what it used to be in the past.

b) Fabricators of Hadith: In an attempt to justify their fundamental teachings each group was formulating and distorting the meanings of Nass of the Qur'an in support of its group. In some instances, they fabricated Hadiths in support of their points of view, putting such Hadiths in the mouth of the Prophet. According to Sharafuddin, Shi'ah

group were guiltier of fabrication of Hadith to justify their political stand than any other group.[33]

c) Promoters of tribal interests: There was also another group that fabricated Hadith for promotion of their tribal interests. For example, Asha'ubiyun fabricated Hadiths, which include the following: "When Allah was angry he sent revelation in Arabic language, but when He was delighted, He sent revelation in Persian language". There will be in my community a man who shall be called Abu Hanifa Nu'uman, he will be the light of my community. "There will be in my community a man who shall be called: Muhammad b. Idris, he will be more harmful to my community than Iblis".

d) Fable Tellers and Sermonizers: There were fable tellers at this period that used to tell fables to charge the emotion of the people to the point of weeping. They composed tales from their imagination and related them to the Prophet. Hadiths fabricated by this group include, 'whoever raises up his hand in prayer, vitiates his prayer', 'whoever says that Qur'an was created has become unbeliever'. Whenever they were reminded of the Prophet Hadith which warned against this act, which states: "Whoever fabricates lie against me deliberately, let him take his position in the hell-fire, their reply would be that they were fabricating Hadiths in favor of the Prophet". Their real motive of doing this was that they might have connection with the leaders and people at the corridor of power.[34]

3.5.1. Ijtihad activities of this period

Despite the rampant negative tendencies in this period, Ijtihad activities took place. For instance, many people engaged in the art of memorizing Qur'an. Secondly, it was at this period that the Caliph Omar b. Abdul Aziz muted the ideal of compilation of Hadith when he wrote a letter to Abu Bakr b. Muhammad b. Amr b. Hazim in

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[33] Sharafuddin, A.A. (1969) Tarikh Al-Tarshrihi Al-Islami, Cairo, p. 120.
[34] Sharafuddin, A.A, ibid.

Medinah asking him to write down the Hadith of the Prophet because he was concerned about the falling standard of knowledge and disappearance of knowledgeable individuals. Another report says that he wrote to the people in the area calling their attention to the Hadith of the Prophet and asking them to compile them together.[35]

3.6. Golden Period of Ijtihad

This period is known as the period of Imams and Mujtahidun.[36] It began in the second century of Hijrah and extended to the middle of fourth century of Hijrah. Also, during this period, the Caliphate authority had shifted from Ummayad dynasty to the Abbasid dynasty. Immediately after the Tabi'in (the followers), many Jurists and various schools of Islamic jurisprudence appeared. While some of these schools went into oblivion with death of their leaders and followers, other endured and spread steadily. With the emergence of the Abbasid state (in the 8th century A.D.), the science of jurisprudence flourished and attained its golden age, for in that period the four Sunni schools namely, Hanafite, Shafi'ite, Malikite, and Hanbalite schools of Law became widespread, traditions were collected, commentaries of the Qur'an were written and the science of sources was compiled.[37]

It will be recalled that during the political upheaval that characterized the period of the last two Rightly-guided Caliphs, Othman and Ali, political and theological divisions emerged. One of these divisions was the Ahal-Hadith, which was based in Hijaz and Ahl Ra'y, which was based in Iraq. This division extended even to this golden period of Ijtihad. In general, Jurists were divided into two important groups. One was the group of the people of opinion in Iraq led by Abu Hanifah al-Nu'man, and the other was the group of people of Tradition in Hijaz led by Malik b. Anas. The latter was popular for its meticulous adherence to the Sunnah of the Prophet and its antipathy

[35] Khudar Bik, M. (1967) Tarikh Al-Tashri' Al Islami, Darul Fikr, p. 124.
[36] Sharafudeen A.A. (1969) Tarikh Tashrik Islam, ibid. p. 134.
[37] Mahamassani S. (1961) Falsafat Al-Tashri' Fi Al-Islam, Netherland, ibid. p. 17.

to opinion and interpretation. What accounted for this was simply that the Hijaz territory was the birth-place of the Sunnah and the home-base of the Companions. The Jurists of Hijaz therefore were better versed in its tenets than those in other lands. Moreover, the people of Hijaz were still leading a simple life, almost original and of course nomadic. Consequently, Fatwas derived from Shari'ah texts and from the consensus of Jurists were adequate for the settlement of disputes. No need was felt for recourse to the broader fields of deduction and interpretation.[38]

The former however were living in a more advanced civilization with all accompanying social problems of the cities. Secondly, due to the remoteness from the center of knowledge of traditions and the likely vulnerability of those traditions to distortion in cause of their transmission, the Jurists of Iraq rarely used the traditions. As a result, they applied reason and opinion, or resorted to an interpretation using analogy and equity in jurisdictional matter.[39]

It should be noted that in spite of the dichotomy, which existed between the Imams of the various schools, many students of one Imam used to migrate to other provinces and contact other Imams and their disciples. These activities brought about exchange of ideas through debates and arguments and to a large extent enhanced the standard of their Ijtihad. The result was tremendous. Because, it brought about a new orientation of reconciliation of views and integration of the school of traditions with the school of opinion. This development led to the emergence of moderate and middle-of-the-road Imams and disciples as evidenced by the new Shafi'i School and by the Fatwas of Abu Yusuf Al-Tahawi and others.[40]

"Thus we discern in the Hanafi books many traditions of the Prophet that had not been accepted by the People of Traditions, while we find in the Schools of the People of

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[38] Muhamassani S. (1961) Falsafat Al-Tashri' Fi Al-Islam, Ibid. p. 18.
[39] Ibid. p. 18.
[40] Ibid. p. 18.

Traditions an appreciable recourse to interpretation, such as the acceptance of al-Masalih al-Mursalah (public interest) as a source of law among the Malikis or the apparent rational approach of the neo-Hanbali school in the person of Ibn Taymiyah and Ibn Qaym al-Jawziyah".[41] Other Ijtihad and scholarly events that took place during this period include the following:

3.6.1. Exchange of Ideas between Imam Malik and Laith b. Sa'ad:

In spite of distance between Madinah, the seat of Imam Malik and Egypt the seat of Imam Laith, there had been exchange of views between the two on Ijma' of people of Madinah. Imam Malik in a letter written to his counterpart in Egypt observed that there was no reason why one should disagree with the stand of people of Medinah since it was the place where the revelation took place, it was there the Prophet declared what is hallal, Hallal and what is haram, Haram. The Prophet used to teach people the messages of revelation in Medinah, and the people listened to him and followed his teachings.

In his reply to the letter, Imam Laith agreed with him but, highlighted some of the issues that constituted the reason for differences of opinion among the people of Medinah and others among the Companions and the followers who have left the abode of Hijrah (Medinah) to other distant places of the Muslims. The issues include among others:

a. Combination of Salat in raining night and

b. Expiation for false oath and oath of the plaintiff.[42]

3.6.2 Compilation of Sunnah into book form

It will be recalled that the Prophet prevented the companions from compilation of the Sunnah in an official manner that would resemble the Qur'an, but be permitted

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[41] Ibid. pp. 18-19

[42] Sharafudeen A.A. (1969) Tarikh Tashrik Islam, ibid. pp. 139-140.

some companions to compile the Sunnah in a special dispensation For example, when Abu Shah al-Yamani told the Prophet that he had heard a Hadith of the Prophet during the conquest of Makkah, he then asked the Prophet to write the Hadith for him. Responding, the Prophet said: "Write (Hadith) for Abi Shah".

He also permitted some other companions to compile Hadith under special dispensation. These Companions included, Abdallah Amr b. Ass.[43] For the periods of the four Orthodox Caliphs and greater parts of the Ummayyad Dynasty till 100 years of Hijrah, the Hadith remained un-compiled in a recognized form. It was during this period that Omar b. Abdal Azeez thought about the need for the compilation of Hadith because the fear of mixing it with Qur'an was no long feasible and moreover, the Qur'an had been compiled in book form and had been circulated among the Muslims. To that effect, he wrote letter to important Jurists like Abu Bakr b. Amr b. Hazm and also to Muhammad b. Shiab Al-Zahri. This attempt marked the beginning of efforts towards compilation of book of Hadith at the beginning of the second century of Hijrah. A good number of Muslims have made effort towards the same objective without instruction of Caliph Omar b. Abdul Azeez. However, the first recognized compilation of book of Hadith came from Imam Malik b. Annas in his Mu'atah. He undertook this assignment from the instruction of Caliph Mansur Al-Abbasy, who had wanted to make the Mu'atah a uniform code of Islamic Shari'ah for the Muslims but, Imam Malik rejected the ideal saying that the Companions after the demise of the Prophet spread to different parts of Islamic worlds and all of them followed what was good for them from what they learnt from the Prophet and all of them were on the right path.[44] Later, Imam Ahmad b. Hanbali came and compiled his book called Al-Musnad. He compiled the Sunnah on the basis of Transmission.

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[43] Ibid. p. 150.
[44] Shanafudeen A.A. (1969) Tarikh Tashrik Islam, ibid. p. 150.

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3.6.3. Compilation of Books on Jurisprudence

During this period, the Islamic authority had become expanded and in terms of territory and civilization. This expansion had called for more Ijtihad in the area of legislation and administration. As a result, the role of Mujtahidun became more and more necessary. Thus, deliberate efforts were made to have better understanding of the Nass and method of deriving law where there was no explicit provisions from the Nass.

The Fatwas of Mujtahidun of this period were not mere legislative decisions, but decisions backed up with authority and proof. This had made jurisprudence and its principles a separate discipline of a universal outlook dealing with matters of new development alien to the system. The Mujtahidun therefore, compiled those voluminous works into books which had since become books of reference for Muslim Jurists and students till the present time.

3.6.4. Roles of Caliphate in Ijtihad Development

The role played by the Caliphate in the growth of Ijtihad in this period was remarkable. For example, when Caliph Abu Ja'afar Al-Mansoor went on pilgrimage to Medinah, he asked Imam Malik to write a book that would maintain a balance between the harsh positions of Ibn Omar and soft positions of Ibn Abbas. Imam Malik accepted and wrote a book titled: Mu'ata' Also, when Mahd Abbasy was on pilgrimage to Medinah, and heard about the book Mu'ata', he ordered that a sum of five thousand Dinar be paid to Imam as gift and one thousand Dinar to his students. Assigning Responsibility to Scholars

In addition to moral and financial incentives to Mujtahidun of the period, assigning responsibility to them also encouraged them. It was reported that Caliph Haroon Rashid wrote to the Chief Judge - Abu Yusuf asking him to write a Treaty on administration of public treasury. He complied with this request, and wrote a book on

Taxation with the title: "Fundamental Principle of Islam on Income and Expenditure". An introduction to this treaty showed that the book was handwork of a Scholar who was conversant with his responsibility. It also showed that an upright Caliph could not accept such treaty.

Emergence of Schools of Islamic Jurisprudence During the Period

It is pertinent at this juncture to discuss briefly some of important figures and their institutions in the Ijtihad activities of this golden period especially the four Imams and their schools of thought.

Hanafi School: Hanafi School of Law was established in Kufa under the leadership of its founder, Imam Abu Hanifah Nu'man b. Thabit. He was born in Kufah in the year 80A.H. He studied Jurisprudence under the tutorship of Sheikh Hammad b. Abu Sulayman. By his training he possessed an unusual ability to use the rules of reason and logic in the application of Shari'ah rules to practical matters of life and to broaden those rules by means of analogy and equity (Qiyas and Istihsan). Thus, his School was recognized as the School of People of Opinion (Ahl al-Ra'y). He is reported to have once said: "If I do not find my answers in the Book of Allah or in the Traditions of the Prophet, I would seek the views of the Prophet's Companions from whose opinion I would not deviate to the opinions of others". But, when it comes to Ibrahim al-Sha'bi, Ibn Sirin, Al-Hasan, 'Ata and Sai'd Ibn Jubyr, well, they are people who had resorted to independent interpretation and I would do likewise'.[45]

At the tail end of Ummayad Caliphate, Ibn Hubayr, the Governor of Iraq offered Abu Hanifah the post of Judge but, he declined it and for so doing, he was beaten. During the Abbasid Dynasty too, Abu Ja'afar offered him post of a judge but he refused again. For this refusal, he served a prison term until his death in the year 150 A.H. He

[45] Mahamassani S. (1961) Falsafat Al-Tashri' Fi Al-Islam, Ibid. p. 120 quoting Ibn 'Abd al-Bari, p. 143.

belonged to the group of Jurists who were convinced that acceptance of government post would lead to catastrophe and would imperil both religion and dignity.[46] Abu Hanifa was very strict in the study of Hadith. He would accept only a few, the genuineness of which he had established beyond doubt.

Abu Al-Mu'ayyad Mohammad b. Mahmood Al-Khawarizmi compiled in one volume a book entitled: "Jami' Al-Masnad". It was a 15 works of traditions carrying the authority of Abu Hanifah. His pupils transmitted his works in Jurisprudence. They include, Abu Yusuf Zafar b. Al-Hudhayl; Muhammad Al-Shaybani and Al-Hasan Ibn Ziyad Al-Lu'lui. Through these four personalities, the Hanafi School spread to fame, particularly through Abu Yusuf and Muhammad known as the Two Imams and the Two Companions. During the Caliphate of Haroon Al-Rashid, Abu Yusuf Ya'qoob Al-Ansari became the Chief Justice of Abbasid Kingdom. He used that opportunity to propagate the School of Hanafi Madhab in a practical way.

Imam Muhammad Ibn Al-Hasan Al-Shaybani undertook the recording of Jurisprudence of the Hanafi School. He was credited for that monumental achievement. His collections include, Zahir Al-Riwayah or Book of Primary Questions; Al-Nawadir (Rare Problems). There are also six books of the first type: Al-Mabsut, Al-Jami' Al-Kabir, Al-Jami' Al-Saghir, Al-Siyar Al-Kabir, Al-Sujar Al-Saghir and Al-Ziyadat. These six books have been compiled into one volume known as Al-Kafi by Abu Al-Fadl Al-Marwazi, otherwise known as Al-Hakim Al-Shahid. The collection was later annotated in a book called Al-Mabsut consisting of 30 volumes by Imam Muhammad b. Ahmad Al-Sarakhsi.

Apart from Zahir Al-Riwayah and Al-Nawadir, there are other books of Fatwas and cases in which later generations of Jurists unable to find precedents in earlier

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[46] Ibid. p. 20.

works, did their own interpretation. For example, Al-Nawazil by Abu Al-Layth Nasr Al-Samarqandi.

Other generation of Jurists who were staunch followers of Hanafi School included Abu Al-Hasan Al-Karkhi, Abu Bakr Al-Kasani author of Bada'i' Al-Sana'i, fi Tartib Al-Shara'i; Burhan Al-din 'Ali Al-Marghinani author of Al-Hidaya which consists of four volumes and is ranked as one of the most authoritative book in Hanafi School of law.

Hanafi School of law spread and was predominant in Iraq during the Abbasid Caliphate. It was also the official school of the Othoman State from which the Majallah was formulated. It is still the official school of Fatwas in those countries that were formerly colonies of Othoman Empire. These include Egypt, Syria and Lebanon. In matters of religion, Hanafi School is predominant in Turkey. It is also popularly accepted in Balkans, the Caucuses, Afghanistan, Pakistan, Turkistan, India and China.

Maliki School: Maliki School developed in Hijaz. It was known as the School of the people of Hijaz or the People of Medinah. It owes its origin to 'Omar b. Al-Khattab, his son 'Abdullah Zayd b. Thabit, Abbas and A'isha, the wife of the Prophet.[47] The School was later represented by some renown Jurists such as Sa'id b. Al-Musayyab, 'Urwah b. Zubayr, Al-Qasim b. Muhammad, Abu Bakr b. Abdar Rahmon, Sulaimon b. Yasar, Kharizah b. Zayd and Obaydullah b. Abdullah.

Imam Malik b. Anas Al-Asbahi was Medinah's most accomplished man of knowledge who was the founder of the School after whom the School was named. He was born in 95 A.H. (713 A.D.). He lived his entire life in Medinah. Imam Malik taught Imam Shafi' who was quoted to have said: "Malik is my teacher and from him I obtained my knowledge. If traditions carry the authority of Malik, then hold on to

[47] Ibid. p. 24.

them".[48] Imam Malik was a courageous Jurist who used to express his views without fear of authority. In an instance, Ja'afar b. Sulaiman gave order that he should be whipped for an opinion attributed to him that bay'a (allegiance to the Caliphate) would be illegal if obtained by duress.[49] In his days as a student, he learnt Jurisprudence from Rabi'ah b, Abdar Rahman, known as the Rabi'ah of opinion. He also studied the Hadith under several number of scholars such as Nafi' of Ibn Omar, Al-Zuhri, Abu Al-Zinad, and Yahya b. Sa'id al-Ansari. He used to cite traditions on their authority and on the authority of other followers and generations succeeding them, until he became an authority on tradition and Jurisprudence.[50]

Imam Malik wrote al-Muwatta on traditions. The book was arranged according to the topics of jurisprudence. Commenting on this book, Al-Shafi'i once said: "No book on earth after the Book of Allah is more accurate than the book of Malik".[51] His approach to interpretation of Shari'ah was reliance on the Qur'an and Sunnah. He would accept those traditions which he believed were authentic even though the tradition is an Ahad Hadith. He used to depend also on the practices of the people of Madinah and on the saying of the Companions. But, in the absence of clear texts he would have recourse to analogy. One other important Ijtihad of Imam Malik is the introduction of the principle of Al-Masalih Al-Mursala (Public Interest). The main focus of this principle is to consider the reasonable meaning which conforms with public interest and the intent of the Shari'ah, and then formulate a rule that such meaning requires.[52]

Students of Imam Malik included, Imam Muhammad b. Al-Hasan Al-Shaybani Al-Hanafi and Imam Al-Shafi'i. Among his disciples were, Yahya Al-Laith, Asad b.

[48] Suyuti, Tanwir I, pp. 1-10.
[49] Ibn Qutaybah, Imamah,11, 156.
[50] Mahamassani S. (1961) Falsafat Al-Tashri' Fi Al-Islam, Leiden Brill, p. 25.
[51] Suyuti, Tanwir, p.6.
[52] Mahamassani S. (1961) Falsafat Al-Tashri' Fi Al-Islam, Leiden Brill, ibid. p. 88.

Al-Furat Al-Tunis and others. These notable students and followers of Imam Malik succeeded by another generation of famous Jurists such as Ibn Rushd (the grandson) and Ibn Al-Arabi, Abu Al-Qasim b. Jazzi and Sidi Khalil, the author of the famous Al-Mukhtasar. The most popular book of reference in Imam Malik School was Al-Mudawwanah, compiled by Asa b. Al-Furat and later edited and arranged by Sahnun who published it under the name Al-Mudawwanah Al-Kubra.[53]

Malik School of law enjoins followership in Medinah from where it was spread throughout the Hijaz and is still predominant among the inhabitants of Morocco, Algeria, Tunisia and Tripoli Tania. It also spread in Upper Egypt, Sudan, Bahrain, Kuwait, West Africa and other parts of the Islamic world.

Shafi'i School: Imam Muhammad Ibn Idris Al-Shafi'i of the Quraisy tribe was the founder of Shafi'i School of law. He was born in Gaza in the year 150 A.H. (767 A.D.) and died in Egypt in the year 204 A.H. (819 A.D.). In his quest for knowledge, he traveled wide to places like Hijaz where he was student of Imam Malik, Badiyah (the desert), Yemen, Egypt and Iraq. Although in the early part of his academic endeavor, he was a follower of Malik and the Muhadithun, but, due to his exposure to different ideas following his wide journey in pursuance of knowledge, he began a school of his own known as the Iraqi, or the earlier School. Having retreated from some of his utterances he came to be know as the Egyptian, or his new School.[54]

Imam Shafi'i possessed qualities of proficiency in linguistic matters, jurisprudence and tradition, practical experience and excellent cultural orientation. These qualities enabled him to integrate the Schools of opinion with the School of Traditions; the result was a compromise between the Hanafi and the Maliki Schools. He would accept the four sources of law - the Qur'an, the Sunnah, Ijma', and Qiyas.

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[53] Ibid. p. 26.
[54] Ibid. p. 27.

He would also accept Istidlal. However, he rejected what the Hanafi School called Istihsan and what Maliki School called Al-Masalih Al-Mursalah. In the field of Ijtihad, he was noted for the following achievements:

1. He was the first to compile the Usul Al-Fiqh,

2. He wrote in a systematic way on the origin of jurisprudence in his famous treatise called Al-Risalah,

3. The most important work of Imam Shafi'i was his book called Al-Umm. The book falls into seven volumes and was written in a scientific and dialectical form by his pupil Al-Rabi b. Sulaiman. Al-Umm deals with various aspects of jurisprudence including transactions, religious observance, penal matters and the law of marriage, and

4. He is the author of Ikhtilaf Al-Hadith reported by his pupil Al-Rabi and Musnad Al-Imam Shafi'. Students of Imam Shafi'i included, Ahmad b. Hanbali, Dawood Al-Zahiri, Abu Thawr Al-Baghdadi and Abu Ja'afar b. Jarir Al-Tabari.

Egypt was the headquarters of Shafi'i School. It also remains predominant among the people of Palestine and Jordan, Syria and Lebanon (particularly in the city of Beirut), Iraq, Hijaz, Pakistan, India, Indo China, Java, and Yemen.[55]

Hanbali School: Imam Abu Abdullah Ahmad b. Hanbali was the founder of Hanbali School. He was born in Baghdad in the year 164 A.H. (780 A.D.) and died there in 241 A.H. (855 A.D.)

Like his master, Imam Shafi'i, Imam Hanbali traveled widely in search of knowledge. Among places he visited were: Syria, Hijaz, Yemen, Kufa and Basrah.

His Achievement: He succeeded in compiling a major work consisting of a large collection of traditions entitled Musnad Al-Imam Ahmad. It comprises of six volumes containing more than 40,000 Hadiths. Imam Hanbali was recognized for his tenacious

[55] Mahamassani S. (1961) Falsafat Al-Tashri' Fi Al-Islam, Leiden Brill, ibid. p. 29.

stand on the strict application of Qur'an and Sunnah. Thus, he was opposed to opinion (Ra'y). This was true to such an extent that some prefer to included him among the Traditionists (Muhaddithun) rather than among the Jurist qualified to use independent reasoning (Mujtahidun). This opinion was rejected in some quarters on the simple reason that Hanbali School is considered among the four original Sunni Schools of jurisprudence having independent system of its own as well as characteristic principles in the science of the origins and the branches of the law. Moreover, his school was based on five main sources of law, namely, the Qur'an, Sunnah, Fatwas of the Companions, if there was nothing to contradict them, the saying of certain companions when they were consistent with the Qur'an and Sunnah, and finally reasoning by analogy (Qiyas) whenever it was necessary.[56] Imam Hanbali was firm in his faith. This accounted for his rejection of the theory of creation of Qur'an. During the Caliphate of Al-Walid, he was invited to accept this theory. He refused. And for this uncompromising attitude, he was persecuted, beaten and imprisoned.

Among followers of Imam Ahmad b. Hanbali were: Muwaffaq Al-Din b. Qudamah, the author of one of the scholastic books of Islamic Jurisprudence, Al-Mughni. Shams Al-Din b. Qudamah Al-Maqadisi, the author of Al-Sarhi Al-Kabir, a commentary on the Mughni; Taqiy Al-Din Ahmad b. Taymiyyah, the author of the famous Fatwa and other well-know works; and Abu Abdullah b. Bakr Al-Zar'i, the Damascene, better known as Ibn Qaym Al-Jawziyah who was also the author of very well known books.[57]

Extinct Sunni Schools:

Some schools of Islamic jurisprudence had become extinct due either to loss of records about their founders or that their followership had seized to continue or that they have

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[56] Ibid. Falsafat p. 32.
[57] Sharafuddin, A.A. (1969), Tarikh Al-Tashri' Al-Islami, Cairo, p. 171.

gone to oblivion due to political or sociological reasons.[58] The schools include the following:

Al-Aozai School: Abi Abdul Rahmon Ibn Muhammad Al-Aozai Al-Dimshqi founded it. He was born in Damascus but lived at later part of his life in Beirut. He died in the year 157 A. H. He was a learned man of his time. He opposed the principle of Qiyas. He was quoted to have said: "If an Hadith is transmitted from the Prophet, no one should say something else as such Hadith must have come from Allah".[59]

Al-Thaori School: Al-Thaori school was founded by Sufyan b. Said Al-Thaori Al-Kufi (96 - 161 A.H.). He was a specialist in the science of Hadith and a Mujtahid as well. His school did not attract much follwership as a result, the school went to extinction after a short of period of time.[60]

Al- Laith School: The school was established by the Egyptian born scholar Al-Laith b. Saad. He was a great scholar. His school did not flourish in Egypt where Malik and Shafi'i schools were popular.

Dhahiri School: The school was founded by Abu Sulaiman Darad b. Ali Al-Asfahani. He was an ardent follower of Al-Shafi'i but, after a while, he found his own independent school of Islamic jurisprudence. He depended strictly on literary and apparent meaning of the Holy Qur'an and Hadith. He rejected all other methods of interpretations such as Qiyas and Istihsan and other sources through which other scholars interpret the Qur'an and Hadith. According to him, the basic laws are the Qur'an, Sunnah and Ijma of the Companions. However, whenever he was compelled to look for ruling on a matter beyond the scope of his Dhahiri method of understanding the basic sources, he chose opinion and tagged it as 'guide'.

[58] Sharafuddin, A.A. (1969), Tarikh Al-Tashri' Al-Islami, Cairo, Ibid.
[59] Sharafuddin, A.A. (1969), Tarikh Al-Tashri' Al-Islami, Cairo, Ibid.

[60] Sharafuddin, A.A. (1969), Tarikh Al-Tashri' Al-Islami, Cairo, Ibid

Ali . Said b. Hazm Al-Andalus has promoted this school after him and wrote several books on the school. Prominent among the books are: *Al-Mahali Fil Al-Fiqh; Al-Ihkam Fi Usul Al-Ahkam*. Ibn Hazm was popular for his hard line approach especially while he was discussing other schools of thought. His hard-line approach was explicit in all his writing.[61]

Al-Tabari School: Al-Tabari school was founded by Abu Jaafar Muhammad b. Jarir Al-Tabari. He was an erudite scholar of his time. He specialized in the science of Hadith and Quranic exegesis. He was also an historian and was versed in Arabic grammar, poem, literature and jurisprudence. He learnt jurisprudence of Al-Shafi'i school from Al-Rabi b. Sulaimon in Egypt and some other scholars in Baghdad. He also learnt Malik School of Islamic jurisprudence from Bani Abdul Hakam and other important scholars.

In spite of his extensive search for knowledge, he did not align himself with any of the existing school of Islamic jurisprudence. He rather founded his own independent school. He was a prolific writer. He wrote books on history and Quranic commentary popularly referred to as Tafsir Al-Tabari.

6.7. Mujtahidun of contemporary Islamic movements

After a long period of Taqlid, which had permanently put Ijtihad at standstill, many innovations have been introduced into the practice of Islam, which were opposed to the laid down principle of the religion. In reaction to this unfortunate development, some Mujtahidun who could not be clearly defined as founders of schools of Islamic jurisprudence emerged in some parts of the Islamic world between 7th and 19th centuries. They are better known as Mujadid. Some of them arose in the Arabian

[61] Ibid.

Peninsula, other Arab worlds, Indian and Pakistan sub-continent, Africa and West Africa in particular.

Among these contemporary Mujadidun/Mujtahidun were Ibn Taimiyya who launched his campaign against the negative Taqlid and innovation in matters of religion. Ibn Qayyim Al-Jawziyah, one of his disciples succeeded him. Ibn Qayyim assimilated all his master's ideas and took extraordinary pains to revive the popularity of his works, but, at the same time he carved out for himself a separate identity.

Wahabi Movement: Following the path of his predecessors in Islamic rejuvenation movement Sheik Abdul Wahab emerged. The rejuvenation of the Hanbali School by Ibn Taymiya and his pupil Ibn Qayyim Al-Jawziyyah during the 7th and 8th centuries of Hijrah received new impetus during the 12th century of Hijrah (18th century A.D.) at the hands of Imam Muhammad b. Abdul Wahab Reform Movement in Najdi. By virtue of the victories of this movement, the Hanbali School spread anew through out the Peninsula, reaching its Zenith during the regime of His Majesty King Abdul Azeez Al-Saud (first half of the 20th century). Presently, it is the school recognized official in the Kingdom of Saudi Arabia with large followership in Arabian Peninsula, Palestine, Syria, Iraq and other part of the world.

The founder of this movement was born in the town of 'Uyaynah in Najd in the year 115 A.H. and died in the year 206 A.H. He wrote numerous essays through which he propagated his beliefs. Among these essays were: *Risalat Al-Qawahid Al-Arba'*, *Kitab Kashf Al-Shubuhat and Kitab Masa'il Al-Jahiliyah*.

His life was characterized with struggle, sacrifice and persecution in the cause of spreading his teachings and ideals. Among the principle of his teaching were:

a - a return to the religious spirit of the forefathers who, for the basic principles of their religion, referred to the Qur'an and the authentic Sunnah of the Prophet.

b- Fight against the blind imitation that: "had killed among the Islamic people serious thought ..... and the spirit of independence ..... and had extinguished the flame of activity".

c- He opposed all religious deviation such as the sanctification of doomed buildings, the worship of tombs, the performance of the drummers, flute players and dervish dances who made a mockery of God's sayings, as well as similar activities which were not in consonance with the true spirit of Islam and which were akin to the paganism of the pre-Islamic era.

Sheikh Uthman Dan Fodio: Sheikh Othman bin Fodio (1754-1817) was known as a Mujadid and Mujtahid. He was born in Maratta in Kwonni in December 1754. His ancestors came from Futa Toroin Senegal.[62]

Shari'ah got the real boost after the establishment of Sokoto Caliphate by Othman Dan Fodi who himself was a great jurist. The central theme of his jihad was the establishment of Shari'ah in Nigeria and to reform the Ummah.

He wrote many books on Islam including *Irshat al-Ummah* and *Tauqif al-Muslimin 'ala Hukm Madhahib al-Mujtahidin*. In this book, Dan Fodio extensively discussed his view of the four schools of Islamic jurisprudence. According to him, the religion of Islam is simple and thus, Muslims should emulate the Prophet of Islam and his companions in adopting the easiest method of performing their religious duties in connection with some issues on which the Shari'ah has no clear statement.[63]

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[62] Abdurrahman. I.D. (1984), Islam in Nigeria, Gaskiya Corporation Ltd., Zaria p. 34 quoting Abdullah Ibn Fudi, Idah Al-Nusukh, edited by M. Hiskett in Bulletin of the School of Oriental and African Studies, Vol. XIX, 1957, pp. 551-559.

[63] Abdurrahman. I.D. (1984), Islam in Nigeria, Gaskiya Corporation Ltd., Zaria p. 205.

Chapter 4

PRINCIPLE OF IJTIHAD AND QUALIFICATION OF MUJTAHI

4.1. Definition of Ijtihad

Ijtihad literally means exerting effort or exhausting power for purposes of performing an act and achieving a goal.[64] In technical sense however, it means the exercise of one's opinion in deducing law from the Nass of the Qur'an, Sunnah and the Ijma' by way of Qiyas and other sources of law on points which are not definitely and directly determined by the two primary sources of law.[65]

According to Lexicographers, Ijtihad is derived from the word 'juhd', which means employment of effort or endeavor in performing a certain activity.[66] Ijtihad is also defined as effort and endeavor undertaken for attaining some objective. Thus, 'juhd' means employing one's complete strength, and 'jahd' means hardship and difficulty.[67]

Ibn Manzur Al-Misri holds that 'jahd' and 'juhd' mean power and strength saying that whereas 'jahd' means hardship and difficulty, 'juhd' gives the sense of power and strength confirming al-Farra's interpretation of the verse of the Holy Qur'an which says: "those who believe with him, strive and fight with their wealth" Qur'an 9:86 & 88

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[64] Ali, H.A., (1986), Usul Tashrii'l Islam, Dar Al-Maarif (Cairo), p 79.
[65] Mir, W.I., (1986), Muslim Jurisprudence and the Quranic Law of Crimes, Taj Company, New Delhi, p. 125
[66] Al- Tawhid, Journal of Islamic Thought and Culture, Vol. V. Nos. 3 & 4. p 182.
[67] Ibn al-Athir in his Al-Nihayah Vol. 1. p. 219 as cited Ibid.

[68] to the effect that 'jahd' in this Ayat is used in the sense of power and strength. He then emphasized that Ijtihad and Tajahud mean exertion of power and strength.[69]

Ahmad Al-Qayyum in his Al-Misbah Al-Munir[70] says that Juhd in the usage of the people of Hijaz and Jahd in the non-Hijaz usage means exerting one's strength and power, and it has been said that juhd means strength and jahd means toil and strain. He said as an example that 'he spent his strength and capacity to attain his goal and his ultimate objective'.[71]

Quoting al-Mawarid with approval, Ibn Abi Dhar'ah says that the literal meaning of Ijtihad is to undertake effort and endeavor in accomplishing something that requires strain and difficulty, and to this is related jihad al-nafs (the struggle against the carnal self) which involves labor and toil for winning the desired objective and goal.[72]

Muhammad Iqbal defines Ijtihad in socio-political and legal context by saying that 'with the political expansion of Islam systematic legal thought became an absolute necessity, and our early doctors of law, both of Arabian and non-Arabian descent, worked ceaselessly until all the accumulated wealth of legal thought found a final expression in our recognized schools of law. These schools of law recognized three degrees of Ijtihad: 1) complete authority in legislation which is practically confined to the founders of the schools; 2) relative authority which is to be exercised within the limits of a particular school, and 3) special authority which relates to determining the law applicable to a particular case left undetermined by the founders'.[73] Anwar Ahmad Qadri proffered almost similar line of definition when he says: "Ijtihad has served as the medium for the deduction of rules from these sources and the means by which

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[68] Abdullah, Y.A. The Holy Qur'an, Translation and Commentary, Ibid.
[69] Lisanul Arabi, Vol. 3,p.133 as quoted Ibid.
[70] Vol.1.p.144,
[71] Al-Tawhid, Journal of Islamic Thought and Culture Vol.V, Nos. 3 & 4, p. 182.
[72] Ibid. p 183.
[73] Iqbal, Muhammad, (19), The Reconstruction of Religious Thought in Islam, pp.148-9.

transactions and social needs were provided the necessary flexibility. Thus, Ijtihad or interpretation is an essential element in the growth of the Shari'ah law"[74] Al-Amdi defines it in strict legal sense saying that Ijtihad means putting in effort and endeavor in order to reach presumption (zann) regarding one of the ahkam of the Shari'ah in such a manner that one feels that he can do nothing more.[75] In his Mukhtazar al-Usul, Ibn Hajib defines Ijtihad as making efforts to arrive at presumption of conjecture regarding a hukm of the Shari'ah.

Al-Ghazali quoting Fawatih al-Rahmat defines Ijtihad as effort of Faqih to derive a presumed hukm of the Shari'ah.[76] Ma'aroof Al-Dawalibi however defines it as exercise of ra'y which is not acceptable to all the 'Ulama, for if it is accepted by all, it would be called Ijma' (consensus), not Ijtihad. Therefore, Ijtihad is on a lower standing than Ijma'.[77]

Other definitions worth mentioning include that of Al-Gazalai Al-Shafi'i where he says: "Ijtihad is the effort (on the part of the Mujtahid) and employment of one's utmost powers to extract a command (hukm). This term is not used unless when it involves hardship and strain. Hence, it is said: 'He exerted himself to carry the milestone'. But it will not be said that 'He exerted himself to carry a grain of mustard seed'. But in common usage this word is specifically used for the effort made by the Mujtahid in the way of acquiring the knowledge of the ahkam of the Shari'ah. He went further by saying that 'Ijtihad in its complete sense is to make utmost effort in achieving a goal so that it is not possible for one to do anything more'.[78] Mohammed Bek also, defines

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[74] Qadri, A.A., (19), Islamic Jurisprudence in the Modern World, p251.
[75] Al-Amidi, Al-Ihkam Fi Usul al- Ahkam Vol.4. p218.
[76] Al-Mustafa Fi Usul al-Fiqh p. 55.
[77] Al-Madkhal Ila lim Usul al- Fiqh, p. 55
[78] Al-Mustafa fi Usul al-Fiqh Vol. II, p. 350.

Ijtihad as the utmost effort that a Faqih undertakes for extracting a hukm (of the Shari'ah) in such a manner that he feels that he has exhausted his capacity.[79]

Abdallah Shah Waliat Farooqi al-Dihlawi Al-Hanafi says: "Ijtihad means employment of effort and endeavor for the comprehension of the far'i ahkam of the Shari'ah from their elaborate adillah, which comprise, the Book, the Sunnah, Ijma and Qiyas.[80] Ijtihad is manifestation of the capacity for discovering the hujaj and addillah for deriving the ahkam of the Shari'ah and the practical obligations (al-wazaif al-amaliyyah), whether posited by the Shari'ah or affirmed by reason. It is also capacity by means of which a faqih becomes able to relate the minor premises with the major premises and thereby obtain a hukm of the Shari'ah or an answer to a practical obligation.[81]

4.1.2. Critique of definition of Ijtihad

Defining a concept is more difficult than describing it. The above definitions have been subjected to critical examination. According to a critique, a definition should be inclusive of all the members of the set and exclude all alien elements; many definitions of Ijtihad failed to do this. If by 'presumption' (Zann) featuring prominently in those definitions, it is meant something based on the Shari'ah or reason, they not inclusive of all there concerned instances. Because an evidence (dallil) relates to a hukm and derived from the Shari'ah or reason belongs to one of the following three kinds:

1. The argument creates presumption;
2. The argument creates certainty; and
3. The argument creates neither presumption nor certainty.

Those definitions deal with the first kind alone and leave out the remaining two, whereas a definition of Ijtihad should include the remaining two as well.

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[79] Usul al- Fiqh p. 357.
[80] Kitab al-Insaf fi Sabab al-Ikhtilaf
[81] Al-Tawhid, Ibid. p. 192.

Ijtihad - since we have supposed that they do not create presumption and in the light of the said definitions, Ijtihad means attainment of 'presumption'.[82]

The definitions are also considered imperfect and incomplete because the word 'wazaif' (literally means duties) needs to be added; besides having to deduce the ahkam of the Shari'ah, a Mujtahid is supposed to procure the practical (al-Usul al-Amaliyyah) and the rational rules (al-ahkam al-aqliyyah) such as Bara'ah, takhyir and Ihtiyat. Thus, the field of operation of Mujtahid includes the Ahkam of the Shari'ah as well as the Practical Rational Rules, whereas those definitions are not comprehensive enough.[83]

In Islamic Fiqh, valid Ijtihad means deriving the ahkam of the Shari'ah for emergent and contingent issues from the sources, not the exercise of one's subjective opinion and judgment. No individual even the Prophet (S.A.W.) may legislate laws by exercising personal judgment; for legislation is exclusively a Divine prerogative. In Shari'ah, there is a hukm for every issue, either as particular or a general law. As for those matters in which there is no express text, a Mujtahid can derive laws by applying to them the general laws of the Book or the Sunnah. Therefore, in emergent issues, a Mujtahid is required to discover an express Shari'ah text, and whenever he is unable to discover such a proof or express text, he has to secure an 'apparent' hukm (al-Hukm al-Zahiri) for the Mukallaf from such Practical Rules.[84]

4.1.3 Scope of Ijtihad

The whole essence of Ijtihad is not to replace the law as decreed by the Law-giver with man-made Law, rather, it is essentially to escalate the in-depth of the Shari'ah in order to promote its understanding and practices and also to inject dynamism into it by keeping it in conformity with the fundamental guidance of the Islamic system and abreast of ever changing conditions of the world. Consequently, the Law is expected to

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[82] Jannati, M.I. (1408), Al-Tawihid, Quarterly Journal of Islamic Thought & Culture Vol. V Nos. 3 & 4.
[83] Ibid. p. 191.
[84] Ibid. p. 196.

maintain an appropriate degree of touch on all affairs that concern the existence of man and his environment together with his dealings with his Creator. Thus, a number of legal methodologies of Islam (as discussed under chapter I) acquired the legality and legitimacy through the instrumentality of Ijtihad, which gave them the force of Law. It is therefore a logical implication of the fact as earlier discussed that in an Islamic state, legislative functions vests in Allah and the only function left for the Muslims lies in their observance of the laws decreed by the Law-giver vouchsafed to the Mukalafun through the agency of Muhammad, the Arch-messenger of the Law-giver. In other words, Islam does not totally exclude human legislation; it only limits its scope and guides it on the right track. Human legislation, according to Islam, is and should be subjected to the Supremacy of the Divine imperative and within the limits prescribed by it.[85]

Ijtihad occupies a position next to the Qur'an and Sunnah in the hierarchy of sources. The only difference between Ijtihad and the two primary sources is that Ijtihad is a continuous process of human development whereas divine revelation and Prophetic legislation had been brought to the end by the demise of the Prophet (S.A.W.) who was the final Prophet of the Law-giver on the earth. Therefore, Ijtihad has become permanent instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community [86] If Ijtihad is capable of achieving harmony between revelation and reason, certainly, there would be essential unity in the Shari'ah system itself. [87]

Muhammad Iqbal, while discussing the episode of Mu'ad bin Jabal, who was appointed Judge of Yemen, says that 'the student of the history of Islam, however, is well aware that with the political expansion of Islam systematic legal thought became

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[85] Mawdudi, S.A.A., (19), Islamic State and Constitution, p.74.
[86] Kamali, A.A., Ibid. p. 462.
[87] Ibid.

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an absolute necessity, and our early doctors of law, both of Arabian and non-Arabian descent, worked ceaselessly until all the accumulated wealth of legal thought found a final expression in our recognized three degrees of Ijtihad: 1) Complete authority in legislation which is practically confined to the founders of the Schools, 2) relative authority which is to be exercised within the limits of a particular School, and 3) Special authority which relates to the determining of the law applicable to a particular case left undetermined by the founder.[88]

In the light of the above, the scope of Ijtihad is found within the confine of the Qur'an and Sunnah. The Ijtihad can thus be individual or collective.[89] It can therefore be said that Ijtihad is the co notational word for all other sources of Law beside the Qur'an and Sunnah; since those other sources in the secondary position are the products of ijtihad. For example, Ijma' is a collective Ijtihad. Professor Ali Hasaba-Allah's classification conforms to that. According to him, Ijma' is known as: "Al-Ijtihad Al-Jamai'" i.e. to say collective Ijtihad. He said, Ijma' is the exercise of Ijtihad in which the Mujtahidun agree on an opinion over a particular subject matter.

In the light of this, consensus of opinion analogy, juristic and other secondary sources of the law, all inter-related not only under the main theme of Ijtihad, but through it to the Qur'an and the Sunnah. A critical look at those secondary sources will reveal a kind of overlapping and concurrence between them due, simply to the formalistic character of these subdivisions of Ijtihad. Professor Hashim Kamali, illustrates this point by saying that a ruling of Ijma is often based on analogy, maslahah or istihsan,etc., despite it being designated as ijma. Similarly, qiyas and istihsan are closely related to one another in the sense that one of the two main varieties pf istrihsan consists of a selection

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[88] Iqbal. Muhammad, (19), The Reconstruction of Religious Thoughts in Islam, pp. 148-9.
[89] Hasaba-Allah, A H, Usul Al- Tashrihil Islam, p. 79.

between two analogies on the same issue.[90] By virtue of speculative nature of Ijtihad, as it consist of the formulation of an opinion in regards to a hukm shara'i, it implies that the end result arrived at is probably correct but the possibility of it being erroneous is not excluded. Zann in this regard is distinguished from ilm, which implies positive knowledge[91]. It should be noted therefore, that the detailed evidences in the Qur'an and the Sunnah are categorized into four namely, 1) Evidence which is decisive both in respect of authenticity and meaning; 2) Evidence which is authentic but speculative in meaning; 3). That which is of doubtful authenticity, but definite in meaning; and 4) Evidence which is speculative in respect of proof and meaning both. Ijtihad is not applicable to the first types of evidence, such as where the nas (text) of the Qur'an and Sunnah are explicit. Like for instance, the prescribed penalties (hudud). But Ijtihad is validly applicable to any of the remaining three types of evidences[92] Qiyas is a good example of Ijtihad. A Mujtahid can apply the methodology of Qiyas to arrive at a conclusion on a matter, which there is no direct ruling of the Qur'an and Sunnah. Interestingly however, the same Qiyas methodology can be applied by a group of Mujtahidun in the Ijma' exercises to arrive at a collective agreement. In this case, it will be said that the varieties of Ijtihad are at play. Perhaps for the avoidance of terminological confusion, Sayyed Abul A'la Mawdudi's description of the scope of Ijtihad becomes relevant. According to him, the scope takes four forms,[93] namely,

1 - Interpretation: In matters where Qur'an and Sunnah are categorical, no individual or group of Muslim can alter the specified rules and regulations expounded by the Nussus.

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[90] Kamali, M.H. Ibid. p. 464.

[91] Kamali, M.H. Ibid. p. 465.

[92] Kamali, M.H. Ibid. p. 466.

[93] Islamic Law and Constitution, pp. 75-6.

This, he argues, does not mean however that there is no scope left for the Ummah to legislate upon, it is only that human legislation in this regard lies in

a) Finding out the exact nature and extent of the law;

b) Determining its meaning and intent;

c) Exploring the applicable conditions for which it is intended and the way in which it is to be applied to;

d) Simplifying the law for easy application;

e) Ascertaining the limit of applicability or otherwise in case of exceptional circumstances.

II - Analogy: In matters where although no specific injunction have been laid down in the Law, but stipulations have been made in respect of an analogous situation, the function of Mujtahidun would be to apply such injunction, after a definitive comprehension and appreciation of the underlying reasons and causes to all those cases wherein corresponding causal connection actually exist and to exclude all such cases from their application where there is no connecting nexus.

III - Inference: There is another set of circumstances in respect of which no specific divine provision has been made, yet there are indications as to broad principles or a marked inkling of intention of the Law-giver as to what is to be encouraged and what is to be discouraged. The responsibility of the Mujtahid in such circumstances is to comprehend and appreciate those general principles of the Shari'ah and the aim of the Law-giver and express in clear term such laws about practical matters as established on these principles and satisfy the intention of the Law-giver.

IV Independent Legislation (by Using Qur'an and Sunnah as sources): There is another set of instances where the Shari'ah is totally silent. In these cases, there is neither direct divine provision nor beacon for corresponding instance so as to assist in drawing an

analogy or technical inference therefore. Scholars appear to be unanimous in holding that the silence by itself is an indication of the fact that the Law-giver has deliberately left such instances for human consideration and decision in line with their appropriate discretion and judgment as they would be arising from generation to generation. It follows that independent legislation can be resorted to in such instances but it must be strictly in consonance with the intrinsic spirit of Islam and its general principles. More importantly, such legislation should not be repugnant to the general legislative policy of the Shari'ah and must logically fit into the general system of the Islamic ideology.[94]

4.1.4. Scope of Ijtihad Operation

It is an established fact that the Holy Qur'an is a Living Scripture;[95] the corollary of this is that its Laws are dynamic. Unlike other legal systems, which constantly change in form and substance, Shari'ah is immutable but at the same time susceptible to steady growth and development. This characteristic makes the Islamic Law a unique system. It is ranked the best of all legal systems because it enjoys qualities of divinity, originality, superiority and immutability that no human-made law can enjoy.

It follows that it must be capable of being applicable to all matters. Qur'an is categorical about this fact when it says: ".....We have not neglected anything in the Book..."[96] Muslims therefore, believe that it touches virtually on all issues concerning spiritual and mundane affairs. It should be remembered that where the Nussus is silent on particular matter, it must have laid down a general principle or given an indication as the intention of the Lawgiver in respect of such matters. The evidence of Qur'an as a Living Scripture vindicates this belief. In effect, Ijtihad continues to be effective legal tools and the Mujtahidun themselves continue to ever busy. Contrary to the notion of closure of the door of Ijtihad, Muslims are naturally and steadily too are

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[94] Ibid.
[95] Supra p.12.
[96] Abdullah, Y.A., The Holy Qur'an, Translation and Commentary, Ibid.

preoccupied with finding solutions to new-development in their immediate and remote environments. In actual fact, they are not expected to sit akimbo in the face of challenges of life continually facing them. This explains the reason why in the recent past, efforts had been made by the contemporary Mujtahidun to find out the Quranic solution in respect of certain contemporary issues, which has been enigmatic in nature. For instance, the issues of abortion, family planning, child spacing method, test-tube baby, organ transplant and of the recent, the genetic cloning devises. In the sphere of commerce and economics, the issues of riba (usury) in the context of modern banking and insurance system constitute another area of attention of Ijtihad and Mujtahidun. Various Muslim international organizations such as the Muslim World in Makkah and host of others have made moves to explore the applicability of the Shari'ah into all these areas.

In essence, the scope of Ijtihad's operation transcends religious matters. It cuts across all human endeavors, political, economics, medical, social and of course theological affairs.

Mujtahidun and their Qualification:

Who is a Mujtahid?

A Mujtahid or a Faqih is a Scholar who knows the Divine ahkam through the means of reliable (mu'tabar) proofs (adillah) and sources (Manabi') and is capable of applying the rules to subject matter of the day. This ability does not materialize without Ijtihad, and without it no Faqih can exist. By practicing Ijtihad, a Mujtahid deduces the ahkam (laws) of the Shari'ah for issues and problems regarding which there is no specific express text (nass), by relying on legal sources and principles and by benefiting from the ideas of other Mujtahidun.[97] Ulema (scholars) were said to be the successors of

[97] Ibid. p.180.

Prophets[98]. Thus, he must be a Muslim since the law he is going to interprete requires knowledge and belief. He must be a competent person of sound mind with perpendicular character as Ijtihad is the main instrument of creativity and knowledge in Islam. A person who does not possess the ore-requisite of Ijtihad is disqualified and may not be competent to exercise Ijtihad[99]

While criticizing Muhammad Iqbal's view on Ijma', as permanent institution for the lack of organization in Islamic legislative activity, Ahmad Hasan says that Mujtahid is a person recognized by the community by virtue of his personal qualities and merits as known during his whole lifetime, and not through the election campaign or the award of certificates. No machinery is employed for the recognition of their qualities.[100] Historically, a Mujtahid or Faqih appears as not having the kind of specialization system as known in the modern world of 'Division of Labor'. In the Prophet's time, he administered the affairs of the people; and on strict legal matters, legal decision was his judicial responsibility. After his demise, the Orthodox Caliphs followed his footstep, acting on the Prophet authority and legacies. It should be noted that at this period, the act of legislative enactment was less subjective or controversial. But as time went by, Law became little by little the subject of controversy that required specialization in the arts of learning. At this point in time, jurisprudence assumed a full-fledged status of a separate science. In spite of this development, it had not been streamlined as a systematic discipline; thus, the Scholars attempted no recognized book of learning on this.

The period of Imam Abu Hanifa was a landmark in this regard. History has it that it was he who for the first time developed science of Usul Fiqh. According to Ibn

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[98] Ibn Majah, sunan, I, 81, Hadith no. 224; Al-Amidi, Ihkam. IV, 230, 234.
[99] Kamali, M.h. Ibid., 473.

[100] Doctrine of Ijma' in Islamic, p. 242.

Nadim's al-Fihrist, Imam Abu Hanifa wrote the following books: al-Fiqh al-Akbar; al-'Alim wal-Muta'lim; ar-Risalah written to Uthman; and Kitab Radd 'ala Al-Qadiriya; Musnad; some other works as mentioned by classical authorities: Kitab al-Ray; Ikhtilaf al-Sahabah; Kitab al-Sirri; Kitab al-Awsat Al-Jami'.[101] Before then, and for almost thirty years later, the Mufasirun, Muhadithun and Fuqaha used to learn and practice the science of religions and ah-Kam law by heart. These groups of learned scholars were known as Mujtahidun and highly respected.

The need to specialize in Law and possess the expertise qualification as a Mujtahid is often supported by a verse of the Holy Qur'an which says: "Nor should the believers all go forth together (on expedition), if a contingent remained behind, they should devote themselves to acquiring a deeper knowledge of their faith, and admonish the people when they return to them, so that they (may learn) to guard themselves against evil". Qur'an 9:122[102] According to Scholars the expression 'deeper knowledge of faith' in this verse to be a derivative of the expression 'liyatafaqahu fi Al-Deen' i.e. Fiqh which literally means 'Jurisprudence'. Here, as in other places, Jurisprudence means investigation into wider contexts of Law and examination of such question as: What are rights and duties? How are they used? How do they work? This is one aspect of the Quranic injunctions in the verse. The other aspect is the dispensation of justice.[103]

What then are the qualifications of a person known as Mujtahid ?

Scholars are unanimous that a Mujtahid must possess knowledge of science and must have attained excellent position in 1) the knowledge of the Qur'an and all that is related to it, a complete knowledge of Arabic literature, a profound acquaintance with the

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[101] Qadri . A.A. (19), Islamic Jurisprudence in the Modern World p. 109
[102] Abdullah, Y.A., The Holy Qur'an ,Translation, and Commentary, Ibid
[103] Zubair, A.Q. (1988), The Importance of Arabic Language in The Study of Shari'ah Islamic Law in Nigeria, Islamic Law in Nigeria, IPB, Lagos p. 203.

orders of the Qur'an and all their subdivisions, their relationship to each other and their connection with the orders of the Sunnah. He is expected to possess adequate knowledge of when and why each verses of the Qur'an were revealed, literal meanings of the words, the specialty or generality of each clause. He should be able to make clear the meaning of the 'obscure' passages or mutashabihat to discriminate between the literal and allegorical, the universal and the particular. Al-Shatibi emphasizes that since the opinion of the mujtahid is proof (hujjah) for a layman, this degree of authority necessitates direct access to the sources and full competence in Arabic.[104]

2) He must be versed in the science of Qur'an and the Hadith Tradition with their detail explanation.

3) He must have adequate knowledge of the Traditions or at least a good number of them; and must know their source, history, object and their connection with the laws of the Qur'an and even know by heart the most important traditions.

4) He must lead a pious and austere life.

5) He must possess profound knowledge of all science of Law and, be conversant with all schools of thoughts.[105]

Imam al-Shatibi lays down certain conditions that must be fulfilled before a person can be qualifies to be referred to as a Mujtahid: He says that 'a person qualifies for Ijtihad when he acquires two types of knowledge:

(i) That he should comprehend the general objectives of the Shari'ah (Maqasid al-Shari'ah) a condition, which necessarily implies the knowledge of the substance of Shari'ah.

(ii) The expertise and technical know-how of the process of legal deduction (Istibat) in the light of Shari'ah Knowledge.[106]

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[104] Kamali, M.H. Ibid. p.474.
[105] Tawhid, 553; Talwih, 555; Mulla Jiwan, Nuru-Anwar, 356 as quoted by Qodri, A.A, Ibid. p.256.

Language, as in any discipline, is an important tool of Ijtihad. All the original sources and references of the Shari'ah are documented in Arabic language. Thus, it becomes a pre-requisite for a Mujtahid to be well acquainted with Arabic language and all its sciences and linguistic technicalities. A Mujtahid who does not acquire the knowledge of Arabic places himself at the mercy of translated materials, which might be of secondary value. The point is not that non-Arabist cannot exercise Ijtihad at all, but definitely, a Mujtahid of this type may not be able to lay claim to originality in his Ijtihad exercise. His position is worse than a Muqalid, (an Imitator), for he is already handicapped in his field of study. Qur'an says: "We sent not an apostle except (to teach) in the language of his (own) people, in order to make (things) clear to them".[107] This verse has been given various interpretations. However, the cardinal point in the verse is the importance attached to language. The language of Qur'an is Arabic in which it was revealed and which was the language of the Prophet of Islam (S.A.W.). Therefore, the understanding of rules of law from the Qur'an and Sunnah can only be derived if stylistic peculiarities of Arabic language, its lexical meanings and structures are understood. Not only because Shari'ah is articulated in this language but its logic is also controlled by it. This is what inspired Scholars of Usul al-Fiqh to examine the structure and usage of the Arabic. Their findings formed the basis of the regulations of philologists of this language to comprehend the legal texts of Shari'ah. These are called the linguistic principle in the science of Usul al-Fiqh.[108]

Sayyed Abul A'la Mawdudi on his part expresses the view that "no healthy Ijtihad is possible unless our Law-makers are equipped with the following qualifications:

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[106] Shatibi, Al-Muwafaqat Fi Usul al-Ahkam, p.57.
[107] Qur'an 14:4.
[108] Zubair, A.Q., Ibid. p. 204.

I) Faith in the Shari'ah and conviction of its truthfulness; a sincere intention to follow it; absence of any desire to act independently of it; and the will to derive inspiration and acquire all objectives, principles and value from it and not from any other source.

II) A proper knowledge of the Arabic language, its grammar and literature because the Qur'an has been revealed in this language and the means of ascertaining the Sunnah also depends upon this medium.

III) Such knowledge and insight in the teachings of the Qur'an and the Sunnah as would enable one not only to be conversant with the details of Islamic injunctions and their application in actual practice but fully to appreciate the basic principles of the Shari'ah and its objectives. One should know, on the one hand, the Shari'ah's overall reform scheme from human life and, on the other hand, the exact place each aspect of life within the framework of this comprehensive scheme, the lines on which the Shari'ah desires to mould human life and society and the objectives underlying it. In other words, such knowledge of the Qur'an and the Sunnah is the sine qua non of Ijtihad as would enable one to grasp the kernel of the Shari'ah.

(IV) Acquaintance with the contributions of the earlier Jurists and thinkers (Mujtahidun) of Islam. This is necessary not merely for the sake of ensuring continuity in the evolution of law. Of course, it is not, and should not be, the purpose of Ijtihad that every generation may necessarily destroy or discard what previous generations have built and thus try to build the whole structure afresh.

(V) Acquaintance with problems and conditions of our times - the new problems of life to which an answer is sought and the new conditions in which the principles and injunctions of the Shari'ah are to be applied. A correct appreciation of the current problem is extremely essential for the proper exercise of Ijtihad.

(VI) Commendable character and conduct according to the Islamic ethical standard. Absence of this virtue is bound to affect adversely the quantum of public trust in the legislators. A law made by the Ijtihad of unworthy individuals, devoid of good moral character is not likely to inspire respect and confidence in Muslim people.[109]

He is apt to remark that 'the above description of the essential qualifications does not entail that any one undertaking Ijtihad should produce a certificate before the commencement of his assignment that he is fully possessed of them. Rather the idea is merely to show that a healthy development of Islamic Law on proper line through Ijtihad is possible only if the system of legal training and education starts producing learned men of such caliber and qualification.[110]

Discussing the importance of the above requirements, Imam al-Shatibi says that the entire spectrum of Shari'ah system has been worked out to serve the interest of mankind. The criterion as to what constitutes an interest of man has also been furnished. It has not been left to the discretion of human beings because their Masalih i.e. interest, are varying and conflicting. If therefore, a Muslim promotes his knowledge in Islam to such a level of comprehending the Shari'ah objectives with regard to its principal provisions and detailed rules; he is said to have obtained an attribute by virtue of which he would become the vicegerent of the Prophet (S.A.W.) in educating the people, passing verdicts (fatwa) to them and judging among Muslims in accordance with what has obtained to him from the knowledge of Shari'ah. Secondly, a person cannot attain the standard of grasping the Shari'ah objectives without mastering the knowledge of the substance.[111]

Scholars are in agreement that mujtahid is bound by the result of his own Ijtihad. Once he has based his ruling on a particular issue on the text of Qur'an and Sunnah, he may

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[109] Islamic Law and Constitution, pp. 77-8.
[110] Ibid.
[111] Ibid. p.57.

not imitate other mujitahids on the same subject matter irrespective of whether they agree with him or not. He is bound by the result of his Ijtihad. This command, which he must observe.[112]

The proof (hujjiyyah) of Ijtihad

Ijtihad derives its validity from the Qur'an, the Sunnah and the dictate of reason ('aql).[113] It appears however, that the Sunnah is more specific in validating Ijtihad than the other two. The often quoted Hadith and has consistently relied on it in proving the validity of Ijtihad, the claim that it is a mursal (i.e. a Hadith whose chain of narration is broken at the point when the name of the Companion who heard it from the prophet is not mentioned) is of no account or effect.[114]

Another Hadith is where the Prophet was quoted to have said that: "When a judge exercises Ijtihad, and gives a right judgment, he will still have earned one reward"[115] Other Hadith include, "Strive and endeavor (Ijtahidu) for everyone is ordained to accomplish that which he is created for". "When God favors one of his servants, He enables him to acquire knowledge (tafaqquh) in religion". "Scholars are the successors of Prophets"..

There are numerous verses of the Qur'an quoted to validate Iijtihad, but all of them are in the nature of probability (zawzhir). Leading among these verse is Qur'an 9:122, which says that: "if a contingent from each division (of the believers) devote themselves to the people……". Commitment and devotion to the study of religion in a cardinal principle of Ijtihad, which is expected to be a continuous exercise in the life of the Muslim community. Although pursuit of Knowledge is a task of every individual,

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[112] Kamali, M.H.Ibid., 468
[113] Kamali, M.H. Ibid., p. 471.
[114] Ibid.
[115] Abu Dawood, Sunnan, III, 1013, Hadith N0. 3567.

attaining erudition (tafaqquh) in matters of religion is of paramount importance for those who occupy the position of light-bearers for the community.[116]

Comparative examination of Ijtihad

Under British, American and other legal systems, sources of law include, Acts of Parliament or House of Representatives (as the case may be) consisting of Constitution and Statutory Enactment, Precedent, and Interpretation. This legislative characteristic has made the law under those systems a product of human artic-fact. It follows that both the sourcing and decipherment of such law as anthropoid kind of exercise. It therefore means that Ijtihad under these legal systems is strictly human affairs. But, in a comparative sense, it is the 'interpretation' aspect that appears to be having similar bearing with the concept of Ijtihad of Islam. As stated above, Ijtihad was defined as an exercise of putting in efforts and endeavor in order to reach presumption (Zann) regarding one of the ahkam of the Shari'ah in such a manner that one feels that he can do nothing more.[117]

Under those systems, when Parliament or House of Representative passes an Act, the words of the Act are authoritative and binding. It is only these words that have passed through the legal machinery of law-making (not law-giving), and individual members of Parliament cannot be put into the witness-box to supplement or interpret what has been formally enacted. Hence the words of an Act carry a sort of disembodied or dehumanized meaning: not necessarily the meaning intended by any actual person in particular, but the meaning that is conventionally attached to such words.[118]

The need arises as to methods of making efforts to discovering the real meaning of such Law. Certain rules were adopted in this direction. They include: i) the rule of construction, which requires that regard should be had to the context. Here the English

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[116] Kamali, M.H. Ibid., p.472.
[117] Supra p.12.
[118] Williams, G. (19), Learning The Law, p.89.

'Mujtahid' may look not only at the rest of the section in which the word appears, but also at the statute as a whole, and at earlier legislation dealing with the same subject-matter. It is referred to (in the Latin maxim) as Noscitur a Socilis. ii) Interpretation in the light of Policy, otherwise known as 'Fringe Meaning', connoting that the words used, though they have a central core of meaning which is relatively fixed, have a fringe of uncertainty when applied to the infinitely variable facts of experience.[119] Glanville gives example that the general notion of a 'building' is clear, but a Judge may not find it easy to decide whether a temporary wooden hut, or a wall, or a text, is a 'building'. He then argues that in problems like this, the process of interpretation is indistinguishable from legislation: the Judge is, whether he likes it or not, a legislator. For, if he decides that the wooden hut is a building, he is in effect adding an interpretation clause to the statute, which gives 'building' an extended application; whereas if he decides that the hut is not a building, he adds a clause to the statute, which gives it a narrower meaning. The words of the statute, as they stand, do not give an answer to the question before the judge: and the question is therefore legislative rather than interpretative. This simple truth is rarely perceived or admitted; almost always the judge pretends to get his solution out of the words of the Act, though he may confess in so doing to be guided by its general policy.[120]

iii) Literal Rule: this is where the provisions of the statute is to be applied literally, however absurd the consequence it will be for Parliament to put the absurdity right. iv) Golden Rule: the interpretation here is liberal. Words are modified to prevent absurdity. It should be noted that the rules in (iii) and (iv) are not fixed rules binding on the court, but rather, modes of approach. (v) Mischief Rules: this rule was established

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[119] Ibid. p. 90.
[120] Ibid. p. 92.

in the case of Heydon. [121] According to this rule, Judges look at the Common Law before the Act, and the mischief in the common Law that the statute was intended to remedy; the Act is then to be construed in such a way as to suppress the mischief and advance the remedy.[122]

It is noteworthy to quote Glanville William where he says: "Although the Judge is supposed to adopt an impersonal attitude to statutes, he is but human and his decision will sometimes be colored by whether he approves of the legislation or not".[123]

The above quotation goes to show a world of difference that exists between the Islamic Law and the concept of Ijtihad vis-à-vis other legal systems especially the British 'Common Law'. For example, unlike the Islamic Law which in substance and form are divine and guided against human wishes and caprices even in the sphere of 'interpretation' in which a Mujtahid is given freedom to exercise his profane intellect, yet, such freedom is not unrestricted by a Central Control of the Divine mechanism established in the Qur'an and Sunnah, the two primary sources of the Law.

On the one hand, the making of the law by virtue of Act of Parliament, Statutory Enactment, Precedents and on the other hand, the Interpretation with all its rules (discussed above), are all together the product of human invention. Under the Islamic system, the Law is rooted in the Divine Wisdom and the same Divine Wisdom guides its interpretation. In effect, while the Islamic Law is immutable and at the same time dynamic and progressive, Law, under other system are mutable and prone to manipulation, distortion, stagnation and confusion.

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[121] (1584) 76 E.R. at 638
[122] William, Glanville Ibid. p. 94.
[123] Ibid. p. 95.

Chapter 5

TAQLID

5.1. Definition of Taqlid

Taqlid is the antonym of Ijtihad. It comes from the word 'qol-lada which literally means to imitate, copy or mimic.[124] In technical sense, it means canonical imitation of legal opinion of a person by another person. It has been defined in various ways by various Jurists of Usul Fiqh. For example, it has been defined as 'acceptance of a statement by a person without relying on any authority'. Some Jurists define it as 'acceptance of a statement of a person without proof'. Abu El-Ma'ali El-Juwayny defines it as 'following an opinion by a person without proof and without relying on any (fore-) knowledge'.[125] Another scholar defines it as 'servile acceptance of another's opinion without evidence and accordingly, everybody who is not a Mujtahid is a Muqalid'.[126] Some other Jurists hold that the term Taqlid applies on to act of a Mujtahid who follows the opinion of another Mujtahid.[127] Some Jurists observe that it would not be a case of imitation to follow the view of the Prophet. According to them, the Ahl-Al-Hadith believes that Taqlid is only applicable in the case of a person who follows opinion of another person to determine a point of fact. It follows that when a layman applies to a Mujtahid for clarification on a point of law, this action will not amount to Taqlid.[128]

5.2. Proof of Taqlid

In view of the above definitions, can there be proofs of Qur'an and Sunnah in support of Taqlid? Scholars have sought to find proofs for Taqlid from Qur'an and

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[124] Dar-Al-Majani, (1994), Al-Majani Arabic-English Dictionary, p.294.
[125] Treaty, (1416), No. 191 on Fatwa by Saudi Council of Senior Islamic Scholars.
[126] Qadri, A. (1986), Islamic Jurisprudence in Modern World, New Delhi, p. 260.
[127] Ibid.
[128] Ibid.

Sunnah. However, it appears that textual proof of Taqlid cannot be said to be conclusive. Proofs of Taqlid from Qur'an include, the following:

a) "And before thee also the Apostle We sent were but men, to whom we granted inspiration: if ye realize this not, ask of those who possess the Message" Qur'an 16:43.[129]

b) "Show us the straight path, the path of those whom Thou has favored; not the path of those who earn Thine anger nor of those who go astray" Qur'an 1:5-7.[130]

Anwar Ahmad Qadri quoted the above verses as basis for the concept of Taqlid. He argues that the model provided by the Prophet and the ways adopted by the Companions adequately point out the use of Taqlid in accordance with the spirit of Islam.[131] He argued further that the reason of the foundation of the Sunni Schools lay in the historical causes and use of Taqlid. According to him, different protests were made against the concept of Taqlid by the Traditionalists; the Wahhabiyah and others without understanding the genius of the law and the use of precedents in human development.

c) "Those were the (Prophets) who received Allah's guidance.Copy the guidance they received" Qur'an 6:90.[132]

d) "Ye have indeed in the Apostle of Allah a beautiful pattern of (conduct)" Qur'an 33:21.[133]

All the above quoted verses are just clear indication (Zawahir), none of which can be held to be a conclusive Nass on the subject of Taqlid.

They emphasize obedience to the Prophet of the past and present, but none of them speak of copying of opinion of a particular Scholar or Madhab. Therefore, the

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[129] Abdullah, Y.A. (1977), The Holy Qur'an, Translation and Commentary
[130] Abdullah, Y.A. Translation, Ibid
[131] Qadri, A. Ibid. p. 260.
[132] Abdullah, Y.A. Translation, Ibid.
[133] Abdullah, Y.A. Translation, Ibid.

argument that they are proof of Taqlid is certainly subjective. It should be observed that none of the Prophet spoke of a ruling according to his opinion. Qur'an testifies to this fact when it states that: "Your Companion is neither astray nor being misled, nor does he say (aught) of (his own) desire" Qur'an 53:23.[134]

The closest among these Quranic proofs is where it is stated that: "O ye who believe! Obey Allah, and obey the Apostle, and those charged with authority among you" Qur'an. [135]'Iul Amr' in this verse has been interpreted to mean either those charged with authority or responsibility or decision, or the settlement of affairs. According to Yusuf Ali, all ultimate authority rests in God. Men of God derive their authority from Him'.[136] Therefore, Ulul-Amr is applicable to Scholars of various Schools of thought. Notwithstanding this closeness of this verse, it cannot be said to be a decisive proof of Taqlid as understood in the context of Islamic jurisprudence.

e) "Ask those who know if ye know not".[137]

f) "It is not fitting for a believer, man or woman when a matter has been decided by Allah and His Apostle, to have any option about their decision" Qur'an 33:36.[138]

g) "Say: "If ye do love Allah, follow me: Allah will love you, and forgive you your sins: for Allah is oft-forgiving, Most Merciful" Qur'an 3:31.[139]

Much as those verses appear to be proof of Taqlid, some Jurists would argue that they may give rise to a probability (Zann) but, that they do not import positive knowledge as far as Taqlid is concerned. It may be concluded therefore, that they

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[134] Abdullah, Y.A. Translation, Ibid.

[135] Abdullah, Y.A. Translation, Ibid.

[136] Abdullah, Y.A.(1977), The Holy.

[137] Abdullah, Y.A. Translation, Ibid.
[138] Abdullah, Y.A. Translation, Ibid.
[139] Abdullah, Y.A. Translation, Ibid.

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convey a general meaning and they should not be restricted to a particular point of view.

Hadith Proof of Taqlid include the following:

a) Abu Hurairat reported the Prophet to have said: "Whatever I declared prohibited for you keep away from them, whatever I command you to do, comply with them as much as you can; certainly, the causes of destruction for the generation before you were their inordinate questions and opposition to their Prophets".[140]

b) Abu Najih Al-Arbadi reported in one of the farewell speeches of the Prophet (S.A.W.) .....You should all hold strict to my Sunnah and the Sunnah of My Rightly Guided Successors".[141]

The two Hadiths emphasize the point that obedience to the Prophets and leadership of the Ummah especially after the demise of the Prophet. The former went further to counsel against excessive questions especially questions that are frivolous which in most instance rose as excuses for not complying with the established principle. None of the Hadiths could be said to be direct authority on Taqlid.

Be that as it may, Jurists are unanimous in holding that Taqlid is not absolutely antithetical to the rule of Shari'ah nor is it ominous to the development of the Islamic jurisprudence provided it is applied in accordance with certain laid down principles as enunciated by Jurists over the period of Islamic law development.

5.3. Historic Development of Taqlid

Taqlid was a principle introduced as a turning point and a departure from hitherto development of the Islamic Law. It would be recalled that by the fourth century of Islam, various Schools of thought have emerged. Each school had its own followers

[140] Ezzeddin, I., & Denys, J.D. (1976) Hadith No. 9., The Holy Koran Publishing House, Syria. P.48.
[141] Ezzeddin, I., & Denys, J.D. (1976) Hadith No. 9., The Holy Koran Publishing House, Syria. P.94.

who exhibited fanatical commitment to their opinions and standing firmly on such opinion. Consequently, the exercise of Ijtihad began to witness absolute stagnation; followers of each school adhering to doctrines of their Imams and inviting people to such doctrine. This fanaticism became endemic so much so that those followers came between the people and shifting from one school to the other. As a result, people began to depart from original source of Shari'ah viz., the Book of Allah and the Sunnah of His Prophet. They engaged their time in studying speeches of Imams and their legal opinions they had left behind; expatiating on their fundamentals until they came to a point where the Shari'ah was recognized as pronouncements of those Imams. El-Karkhi one of the Scholars of Hanafi School of Law for example, once said: "If you see a verse of the Qur'an or a Hadith of the Prophet running counter to the stand point of our Companion, know that such verse or Hadith had become extinct or abrogated.[142]

5.3.1. Factors accounting for Emergence of Taqlid

Some factors were accountable for the emergence of Taqlid.[143] *Chief among them* are:

i) Meekness and indifference: Due to the fact that the existing schools of thought have compiled their legal opinions in book forms, people became indifferent, relaxed and meek to engage in further research into the Islamic Law. They felt that the Jurists of the past have provided legal solutions to many matters and other things that emanated from them. Therefore, they felt that there was no need for further research and intellectual exercise.

ii) Disunity and weakness of the Caliphate: The division in the Abbasid Caliphate and its consequent weakness constituted a great cause of the decline of intellectual renaissance in this period. It will be recalled that the Abbasid Caliphate in the fourth

[142] Sharafuddin, A.A., (1969), Tarikh Al-Tashikh Al-Islami, Cairo, p. 174.
[143] Ibid. pp. 174-175.

period encouraged intellectual activities among scholars by allowing them to move closer to the seat of power. But for a number of factors that accounted for the collapse of the Abbasid Caliphate, and which led to the fallen zeal and vigor in the Ijtihad activities, stagnating at the position left behind by the Scholars in the fourth period. That is to say the period when Books on Law were first compiled.

iii) Lack of Intellectual Freedom: Lack of intellectual freedom to exercise Ijtihad was prevalent at this period. Apart from the fact that people were restricted to choose whom to follow among the Mujtahidun, they were also required to adopt a particular school recognized by the government of the day in arriving at decision on cases before them. As a result, the spirit of intellectual development became stagnant and the culture of 'imitation' grew rapidly.

iv) Closure of the Door of Ijtihad: Door of Ijtihad was declared closed by Scholars at this period. The reason for this action was connected to influx of many people (who were not qualified and competent) into practicing the exercise of Ijtihad. These groups of people had been engaging themselves in expressing legal opinion on issues basing such opinion of personal views. Consequently, the scholars were compelled to slam the door on them in order to put the situation under check. They convened the assembly of Jurists where it was decided to short the door of Ijtihad.

In the early time of Islam, Mujtahidun were usually appointed Judges without compelling them to adjudicate according to a particular opinion. The position remained like that until when Abu Yusuf was appointed as the Chief Justice who used to consult no other opinion except that of Hanafi school. This unfortunate trend persisted until later part of the fourth century of Islam. At this period, the Abbasid Caliphate had become weak and Judges who later took charge of leadership had lost confidence in the status quo and even disassociated themselves from this dangerous trend. As a result,

anarchy spread in the sphere of jurisprudence; different decisions were taken in cases that were similar within the same jurisdiction in spite of the fact that the same Shari'ah was the basis of such different decisions. This deterioration of the Islamic Jurisprudence gave Scholars of the day serious concern.

By the closure of the door of Ijtihad, there was no significant progress in the system in the last part of the Fourth Century except that judicial decisions were restricted to the opinion of the previous Jurists and Imams. Thus, the Jurists at this period became 'Imitators' rather than 'Initiators' totally abandoning research into the principle of Shari'ah and sourcing law there from.

5.3.2. Position of Jurists on Taqlid

In the golden period of Islamic jurisprudence, intellectual studies flourished through the activities of Imam, Jurists and their students. Their opinion and decisions had been compiled together as books of reference. Unfortunately however, the Scholars of later period departed from this path of Ijtihad and started to propagate the opinion of their Imams with a view to make such opinions triumph over that of their opponents.[144]

Historically, the intellectual Imams were not responsible for the concept of Taqlid which later became the order of the day after that progressive era of learning and Ijtihad activities because they were known for their belief in research works and used to give encouragement and support for it. They usually urged people to seek for proof of every subject matter[145] in their area of learning. For example:

Imam Abu Hanifa forbade Fatwa (i.e. expression of legal opinion) by a person who does not have proof of authority. He was quoted to have said: "It is not permissible for one who does not know my authority to express opinion on my speech". Neither did he consider his view superior nor did he see anything wrong with opposing his view. He

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[144] Sharafuddin A.A., Ibid. p.176.
[145] Ibid. p. 176.

reiterated by saying that "this is the opinion of El-Nu'man bin Thabit, this is opinion we could express, if any one comes with better opinion, such other opinion deserve to be preferred".[146]

Abu Yusuf: has also said that it is not lawful for a person to quote from our opinion until he knows the source of our authority.[147]

Imam Malik: He always reiterated that every Mujtahid has a choice of adopting some of his speech or reject some and not everything that emanate from Mujtahid are correct. Where there is a stronger proof, it is necessary to depart and even defer from an earlier proof of Mujtahidun. He was reported to have said: "there is no one whose speech is absolutely acceptable except the Messenger of Allah, May the peace and blessing of Allah be upon him".[148]

Imam Shafi'i: He has openly emphasized the need to give preference to proof over opinion. If Hadith is authentic, it is incumbent to uphold it and reject personal view which runs counter to it. He said: "If Hadith is authentic, it is my Madhab (doctrine)". "If my speech runs counter to Hadith, abide and act by the Hadith and throw away my speech".[149]

He had likened an 'imitator' to a firewood man who collects firewood in the bush at night without realizing that he was carrying a venomous serpent along with it. He was quoted to have said: "The similitude of a person who seeks knowledge without proof is like a person who collects firewood in the night without realizing that he was carrying with it, a venomous serpent that can bite him".[150]

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[146] Ibid. p 176.
[147] Ibid. p 176.

[148] Ibid. p 176.

[149] Ibid. p 177 quoting 'Iiam Al-Muwaqi'in at pp. 203-4.

[150] Ibid. p. 177.

Imam Shafi' was talking to Imam Ahmad thus: "O ye Abu Abdullah! You are more versed in the science of Hadith than me, if there is authentic Hadith, teach me even if it requires me to travel to Sham, or Kufa or Basra".[151]

Imam Ahmad b. Hanbali: He was not less committed like the previous Imams in calling for Ijtihad and discouraging the act of imitation. He used to say: "Do not imitate me, and do not imitate Imam Malik or Aosai' or Nakhai or any other Imam, but derive the law from where they derived it - namely, the Qur'an and Sunnah". It is not desirable for a person to express legal opinion except he is knowledgeable about the sayings of Jurists and their doctrine.

According to him, if Imams of later time had followed the path of those before them, juristic history would have scored tremendous goals and jurisprudence would have attained a pinnacle of development; many problems challenging the Muslims would have been solved, and they would have been able to give it its legitimate status.[152]

In spite of emergence of Taqlid in this period, one of the fortunate things that happened in this period was the healthy idea and progressive thoughts introduced and undertaken by Ibn Taymiyah and his disciple Ibn Qaym. The duo Jurists showed determination and commitment to stamp out stagnation and to bring religion back to its former reputation.[29]

Ibn Qaym's position on Taqlid:

Ibn Qaym devoted his energy in campaigning for freedom of thought and avoidance of conservatism. In order to achieve this objective, he waged war against Taqlid, and invited people to ijtihad.

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[151] Ibid. p.177.
[152] Ibid. p 179. quoting Muhammad Al-Khudar in his Tarikh Al-Tashri'i Al-Islami. P 325

There was nothing like Taqlid in the period of the Prophet nor in the period of the Companions and the Tabi'un and generations that followed the Tabi'un. Taqlid started to spread since the fourth century Hijrah after the Schools of thoughts of Imams had become well-established in various towns; and for each schools there were supporters and followers who worked tirelessly on Spreading the opinion of their Imams. The first group of Scholars from among the followers of the Imams followed their footstep, but those that came after them were divided into two groups, namely: those who were fanatical about School of thought and those who were satisfied with the act of Taqlid (imitation).

This new development had reached an advanced stage until the period of Ibn Qaym who discovered that people had been under the control and influence of Taqlid, intellectually and scholarly; so much so that the Scholars paid little attention to reviewing the legal opinions of previous Imams. Rather they were holding tenaciously to those opinions even where such opinions contradicted those of the Companions of the Prophet. In their excessive imitation (Taqlid), they made the Fatwa of the Imams the standard to which they make reference and subject the Nass of Qur'an, Sunnah and Fatwah of the Companions; and only that, which agreed with those opinions, was acceptable to them while those that contradicted them were rejected. Thus, Abul Hassan Ubaid Lah Al-Karkhi says: "All verses of Qur'an that contradict the stand-point of our Companions should be considered abrogated.... ditto for Hadith"[153]

One example of fanatical preference of opinions of an Imam over the others was the extent to which Al-Alusi had gone in showing preference for the opinion of Imam Abu Hanifah over the word Al-Quru' to mean Al-Hayd i.e. to say the 'menstrual period of a woman. Al-Alusi said: "the leaders of Hanafi School hold that the meaning of 'Al-

[153] Sharafuddin A.A. Ibid. p. 179, quoting Khudari Bik, Tarikh also at p.325.

Qur' is women's menstrual period as narrated by Ibn Abbas, Mujahid, Qatadat, Al-Hasan, Ikrimat, Amr b. Dinar and Jan. He then refused to accept the proof of the Shafi' School which holds that the meaning of the word Al-Qur' is the 'state of purity' after women's menstrual period. This is a clear illustration of fanatical support for one opinion over the others, which persisted till the period of Al-Alusi who died in the year 1270 A.H.[154]

This extreme Taqlid (imitation) was abnormal. The acceptable position was that the legal opinions of Imams supposed to have been flown from the Qur'an, the Sunnah and the opinion of the Companions and not the other way round.

They have also gone to the extreme when they declared that: "when a case came to the Chief Judge or Judge, it was not right for him to refer such case to the Qur'an, Sunnah or the saying of the Companions but, to the authority expressed by the Jurists the trial Judge was imitating and following who he had made a standard over the Qur'an and Sunnah, whatever conformed with his opinion he followed and whatever did not, he rejected. If he did that, he has resisted departure from the legal point and judgment.[155]

Ibn Qaym observed with concern this unfortunate departure from the Qur'an and Sunnah and initiated action to fight against Taqlid (imitation). Thus, he started to call for intellectual liberty, freedom from the clutches of Taqlid and strict adherence to the Qur'an and Sunnah as much as practicable otherwise by exercising Ijtihad on matters. He then went further to explain the nullity of Taqlid (imitation) as explained in the guideline of the Companions as contained in the research works. [156]

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[154] Ibid. p. 179.
[155] Ibid.
[156] Ibid. p. 180.

5.4. Variety of Taqlid

1. The Prohibited Taqlid (imitation): According to Ibn Qaym, there are three types of prohibited Taqlid. They include, a) departure from what Allah has revealed and refusal to refer matters to it feeling satisfied with imitating forefathers. b) Imitation of a person who the imitator does not know whether or not he is qualified to be imitated. c) Imitation of a person after the truth has been established and the proof has become clear; this rendering the view of the person being imitated weak or wrong.

Ibn Qaym held that all these types of Taqlid (imitation) were unanimously held by the predecessors and the four Imams to be dangerous and prohibited.

2. Permissible Taqlid

Imitation of one who practices teachings of Qur'an: Imitation of a person who strive to follow Allah's revelation and in the process copies a person who is more knowledgeable than him in understanding the texts, such imitation is commendable. Example of this of imitation was contained in a report transmitted from Imam Shafi;' in which he imitated Omar when the latter said: "for every Y Hyena killed while hunting in the state of Ihram, a camel should be sacrificed"; I said it imitating Omar' and also when he said: "Certainly, the grandfather will share with brothers (in the inheritance of his grandson) he then stated that: "I have just quoted Zaid". Imam Shafi' was also reported to have copied Imam Malik in his traditional adherence to the practice of the people of Madinah.[157] It should be noted that the Imams copied from simple and easy theorems and did not do anything to deviate from Qur'an and Sunnah.

Ibn Qaym observes that there is another type of Taqlid: namely, the compulsory Taqlid.[158]

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[157] Ibid. p. 180, quoting 'Iiam Al-Muwaqi'in at p.143.
[158] Ibid. p. 181.

3. Compulsory Taqlid: It is an imitation of the most knowledgeable person provided such person does not mislead against the Qur'an and Sunnah like the examples of Imam Shafi' quoted above.

5.5 Distinction between Imitation and Following:

According to Abu Abdullah b. Khawaz, Taqlid in legal parlance means 'return to a statement made by a person without authority'. Shaokani mentions some definitions among which is 'acceptance without argument of an opinion not supported by proof'. The definition excludes the imitation of the Prophet, the Chief Justice, Eyewitness and Consensus of Jurists. Imitating any of these would not be considered Taqlid because according to Shaokani, there is no significant difference between these groups of informers.

If it is compulsory that a person should imitate any of the Imams such a person should not be an Imitator according to Abu Abdullah. He was of the view that the Imam being imitated has authority on what he says therefore; the Imitator is not really imitating him but his authority. Shaokani however, defers. He argued that the person is an imitator because he acts according to the saying of the Imams without any authority of his own (Knowledge).

Sharafuddin appears to be in agreement with Abu Abdullah's view. He reasoned that many people would definitely be in need to follow the footstep of their Imams in matters of their faith; their followership could not be regarded as imitation.[159]

The act of 'following' on the other hand is the practice of that which has been conclusively proven by the authority and for which the matter has been convinced of. 'Following' is in conformity with the Shari'ah whereas 'imitation' is against the law.[160]

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[159] Ibid. p. 182
[160] Ibid. p. 182

5.6 Opinion of Contemporary Scholars on Taqlid:

The Council of Senior Muslim Scholars of the Kingdom of Saudi Arabia under their President, Sheikh Abdul Azeez bin Baz, examined the issue of Taqlid in its Fatwah No. 11296 dated 18/8/1408 A.H. The council classified Taqlid into four categories.

i) Imitation of knowledgeable Scholars: Imitating other scholars by a person who possesses qualification of Ijtihad after the truth has become clear to him, with the established proof from the authority of the Prophet (May the peace and blessings of Allah be upon him) to such truth. But this kind of Taqlid is not permissible for a person who disagree with other scholars on the basis of (the fact) which has come to him; the fact which is a proof of the unanimous agreement (of majority of scholars).

2. Tentative Imitation: It is an imitation of other Mujtahidun or Scholars by a person who himself possesses the qualification of Ijtihad until he is able to arrive at a legal decision through his own Ijtihad effort. But according to Shafi' and Ahmad Schools and the Jama'at, this kind of Taqlid is not permissible. This view is preferable because of his ability to arrive at a legal decision by himself. Moreover, he is legally charged with the task of Ijtihad exercise to know his legal responsibility in accordance with the saying of Allah that: "Fear Allah as much as you can', and for which it has been reported to have said: "Whenever I command you on an affair, comply with it as much as you can".

3. Imitation of a layman: Imitating a qualified Mujtahid by a person who is incapable of researching and sourcing the law from the texts of Qur'an and Sunnah. This is permissible Taqlid which conforms with Allah Saying that: "Allah does not impose on a soul something that is beyond his capacity" and where He says: "Ask those who remember if ye know not' and some other similar texts of the Qur'an which

remove blame and protect the Mukalaf from fumbling about the rules of Law and making statement about the Law-giver without knowledge.

4. Fanatical Imitation: It is fanatical imitation of leaders, chiefs and judges and forefathers who contradicted the Shari'ah of Islam. In other words, imitating such people out of inordinate love and honor for them. This is a kind of imitation absolutely forbidden by the consensus of Scholars. The condemnation of this kind of Taqlid has come in the light of texts of Qur'an and Sunnah which include the following:

i) "When it is said to them: 'Follow what Allah hath revealed: They say: Nay! we shall follow the ways of our fathers. What! even though their fathers were void of wisdom and guidance?" Qur'an 2:178 [161]

ii) "But no, by thy Lord, they can have no (real) faith, until they make thee judge in all disputes between them, and find in their souls no resistance against thy decisions, but accept them with the fullest conviction" Qur'an 4:65 [162]

iii) "It is not fitting for a believer man or woman when a matter has been decided by Allah and His Apostle to have any option about their decision" Qur'an 33:36.[163]

iv) "Then let those beware who withstand the Apostle's order let some trial befall them, or a grievous penalty be inflicted on them" Qur'an 24:63. [164]

v) "Say: If ye do love Allah, follow me: Allah will love you and forgive you your sins: for Allah is oft forgiving, Most Merciful".[165]

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[161] Abdullah, Y.A., The Holy Qur'an, Translation and Commentary, Ibid.

[162] Abdullah, Y.A.'S Translation.
[163] Abdullah, Y.A.'S Translation.

[164] Abdullah, Y.A.'S Translation.

[165] Abdullah, Y.A.'S Translation.

vi) "Verily Allah has cursed the unbelievers and prepared for them a blazing fire - to dwell therein for ever: no protection will they find, nor helper. The day that their faces will be turned upside down in the fire, they will say: "Woe to us! Would that we had obeyed Allah and obeyed the Apostle! And they would say: "Our Lord! We obeyed our Chiefs and our great ones and they misled us as to the (right) path "Our Lord! Give them double penalty and curse them with a very great curse"!

Some people claim that Taqlid amounts to absolute disbelief, immorality and polytheism. They attribute disbelief and error to the four Imams. What is the ruling on this claim on this claim which had been attributed to Scholars of the two Holy Mosques in Saudi Arabia and Kuwait?

Not every Taqlid amounts to absolute disbelief or immorality or polytheism. But, the correct view is that there are rules regarding it as contained ion the earlier discussion.

None of the four Imams invited anyone to his School of Jurisprudence and none is fanatical about his opinion. Also, none of them oblige people to the practice of their Madhab or any particular Madhab. But, all of them used to call people to practice the teachings of Qur'an and Sunnah (May Allah be pleased with them all). They used to explain the text of theology, and expatiate on its fundamentals and amplify those fundamental rules. They also used to give legal opinion on questions with evidence from Qur'an and Sunnah without imposing their opinions or that of other Scholars on their students and others. Instead they criticized the imposition of opinion on any body. They used to encourage people to crack their brain on legal matters and to properly examine a particular opinion where such opinion appeared to contradict the authentic Hadith; saying that: "if a Hadith is authentic, that is my doctrine and it is compulsory on the Muslim to strive to know the truth by himself if he can, then, ask for the help of

Allah and seek assistance from the wealth of experience left behind by the previous Muslim Scholars. They should also strive towards the path that will make it easy for them to understand the texts of the Law and compliance with it.

But, for one who is unable to understand the rules from their legal indication or who is unable to extract legislation from the fundamental rules, due to certain disability, should consult as much as possible the trustworthy Scholars of Shari'ah with hope to understand the truth. This is in accordance with Allah's injunction where He says: "Ask those who remember if ye know not'. It is also important that in his quest to know, he should investigate and be convinced that the Scholars to be consulted are a trustworthy person recognized to be knowledgeable and righteous.

It is clear from the above legal statement that the four Imams were free from what has been ascribed to them such as disbelief, error, falsehood and false accusation. There is no one among the Scholars of the Two Holy Mosques in Makkah and Madinah or any one among the entire League of Scholars of the Kingdom of Saudi Arabia for that matter who has abused the Jurists of Maliki, Hanafi, Shafi'i and Hanbali schools or any other from among the Muslim Jurists. There is not one despising them. Instead, they are venerated and respected for what they had achieved in the field of learning and spread of Islam.

A contemporary scholar has also considered Taqlid as a necessity, equating it with precedent, a legal source in the Western legal system. He argues that Taqlid serves as basis and authority of layman[166]. According to him, the reason for founding of Sunni Schools lay in the historical courses and use of Taqlid. The Traditionalists, the Wahabiyyah and others made different protests against the concept of Taqlid without understanding the genius of the law and the use of precedents in human civilization.

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[166] Anwar, A.Q. (1986), Islamic Jurisprudence in the Modern World. New Delhi, p. 261.

The doctrine possesses the basis and authority and the layman is guided by the learned in order to base his action upon the opinions of the noted personalities. It has a similarity in human civilization and, being unavoidable, is needed in the field of modes of conduct for legal advice and religious guidance for the common man similar to the role of Lawyer in society.[167]

He further argues that the lowest position and scale in the hierarchy of intellectual freedom is occupied by the 'ammis'[168] or ignorant. They naturally possess fewer rights than even the Muqalids. While the Muqalids can refer to the law books and ascertain the views of the doctors, the ammis do not even posses the minimum knowledge required, and are to apply to the Muqalids or the Mujtahids in cases of doubt on a point. The process by which the mass of the ignorant are instructed in law is called ifta' which means the act of answering a question concerning a point of law.[169] This writer humbly submits that the principle of precedence under the English Common Law system was not in conformity with the Shari'ah. This is because, the principle of precedence under the English legal system amount to blind imitation which was not allowed by the Shari'ah of Islam. For instance, under the English judical system which Nigeria follows, any decision taken by the higher courts in their hierarchical arrangement have binding forces on the lower courts. If the Nigerian Supreme Court takes a decision on a case, that the decision becomes law. All lower courts, beginning from the Court of Appeal down to the lowest court in the country were bound by such Supreme Court decision. This is a blind imitation as experiences have shown that the Supreme Court itself has overruled itself after several years after discovering its mistakes, which have been by virtues of statute made mandatory on the lower courts before such mistakes were discovered and reversed.

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[167] Ibid. p. 261.
[168] Ammis is perhaps the plural form of Ummiyu.
[169] Ibid.

Sheikh Yusuf Qardawi's view on Taqlid: Sheikh Yusuf Qardawi, an Egyptian scholar based in Kuwait is one of the renown living scholars respected for his in-depth knowledge of the shari'ah. He rejected Taqlid. According to him, Taqlid was not acceptable saying that it was not in line with the principle of Shari'ah. He argued that it was the Prophet (S.A.W.) himself who opened the door of Ijtihad. And up till the time of death, there was no authority that revealed that he declared such door closed. [170]

5.7 Scholars' views on Taqlid

Taqlid marked a turning point in the historical progression of Islamic law, which had, began since the time of the Prophet (May the peace and blessings of Allah be upon him). As could be seen, it emerged as a response to the unfortunate situation, which writer arose shortly after the Golden Period of Islamic Jurisprudence. The later opinions that developed against and in favor of Taqlid could as a matter of fact be considered as a kind of Ijtihad in the same direction. Therefore, the 'closure of the door of Ijtihad' remains as ever an enigmatic. This was because several questions had arisen from this unwarranted closure. For instance, who closed the door? For what purpose the door was closed? When and who will re-open the door? These, among others were relevant questions arising from the historical landmark of the closure. But who care to answer these questions? Contemporary Muslims are being faced with many contemporary challenges that required their prompt and timely action without need to wait for answering question that arose from unwarranted action taken by some people.

The point is that the Muslims are part and parcels of the modern global village. Like their counterparts of other faiths and systems, they could not afford waiting for someone to reopen the door of Ijtihad before exercising one as they were being challenged by various issues of their contemporary time. They could not be indifferent

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[170] Qardawi, Y. (1983), *Shariat Al-Islam*, (Al-Maktab Al-Islam) p.77

to those issues. While they must meet up with their divine responsibilities, they must as well respond to their mundane callings. Each of these has to be carried out within the framework of the Qur'an and Sunnah, which are the primary sources of their law. Could it be said that the 'closure' had any impact in the sense of it?

Blood transfusion, organ transplant, test-tube baby, family planning, lately genetic cloning, nuclear armament and disarmament, transitional economic policy, human right issues, membership and authority of the United Nation Organization were among contemporary issues facing the Muslim Scholars. From time, they have been responding to these issues. Whether their responses were adequate or not is another question entirely.

Taqlid can thus be said to be another concept which was later discovered in the process of legal development and which must be considered and regulated in the light of the Qur'an and Sunnah. While it cannot be said to be absolutely acceptable it cannot be absolutely rejected.

The various opinions expressed by Jurists of both classical and contemporary periods as discussed above are to the effect that a middle course can be found and adopted on the issues of Taqlid. Perhaps Taqlid can be discovered to have some positive elements. It can be assets rather than liability to the Islamic Jurisprudence. Allah knows the best.

Chapter 6

NEED TO KNOW OBJECTIVES OF THE SHARI'AH (MAQASID AL-SHARI'AH)

6.1. Introduction

It is important that for the Mujtahidin who from time to time would engage themselves in the exercise of Ijtihad to know the objectives of the Shari'ah. Without adequate knowledge of the objectives of Shari'ah, Mujtahidun could not be able to appreciate the end result of their exercises. These objectives (maqasid) of the Shari'ah consist of the masalih, or considerations of public interest. The most important masalih are those, which the Law-giver has Himself identified and must be given priority over others. Thus, striving to safeguard the five values, namely of life, religion, intellect, lineage and property are the recognized objectives of the Law-giver. These, according to scholars of Fiqh are the essentials (daruriyat) of the masalih and as such they are distinguished from the needs (hajiyyat) and complementary (tahsiniyyat). The Mujtahidun must understand the general maxim of the principle of the law as regard for instance, the removal of hardship (raf' al-haraj), that certainty must prevail over doubt as well as others rules and guidelines that could assist to avoid rigid approach while ahkam are being applied for ruling on matters of public interests. [171] Secondly, the much-desired legal reconstruction through the mechanism of Ijtihad and determined application of the law in its entirety continue to be elusive. This is because the objective of Shari'ah (Maqasid al-Shari'ah) has not been fully appreciated. It is the starting-point in the quest for re-establishment of the Islamic framework after the long history of stagnation brought about by Taqlid.

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[171] Kamali, M.H. (1989), Principle of Islamic Jurisprudence, Pedaduk, p. 476.

6.2. Effects of Taqlid on Maqasid Al-Shari'ah

Taqlid, as a phenomenon that was introduced to check excesses of those who dabbled into the acts of Ijtihad without the pre-requisite knowledge and experience, had thrown spanner in the wheel of progress. It arrested the continuity of Ijtihad.[172] But now, the Muslim World has started to realize the haphazard nature and damaging consequences of stagnation, which was followed by colonization, and the eventual westernization of Islamic territories and orientation. They are becoming more and more aware of the need to renew their links with their own heritage and find their own solution to the issues, which concern them by returning to the Shari'ah, which is the most tangible part of that heritage.[173] However, as much as this positive development is essential, it is as much desirable to go back to the drawing board to re-evaluate and appreciate the objective of Shari'ah.

6.3. Qur'an references to Maqasid Al-Shari'ah

It is for that reason that the Qur'an has brought into focus the vivid description of the objectives in a number of Ayat. For instance, "I have not created the Jinn and the Man except to worship me" (Qur'an 51: 56)[174]. The word 'worship' is all embracing. It is not restricted to rituals, but, extended to all human positive action. In Islam, every human positive action is regarded as act of ibadah -worship. Thus, all positive action of a Muslim, spiritual or mundane amounts to act of 'ibadah that attracts rewards. Unfortunately however, the concept of 'ibadah has been restricted and for that reason,

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[172] Kamali, M.H.(1989), Sources, Nature and Objectives of Shari'ah, The Islamic Quaterly of the Islamic Culture Center Vol. XXXIII, No.4 p. 231.
[173] Ibid.
[174] Abdullah, Y.A. (1977), The Holy Qur'an, Translation and Commentary, Ibid.

all the 'ibadah activities in the contemporary Muslim World carry only the implication of rituality. If law, politics and economy are geared towards the 'ibadah, it follows that they will be devoid of human manipulation and distortion since, Allah has laid down general principles to direct human intellect on almost all those matters.

Secondly, the Qur'an says: "O mankind, a direction has come to you from Allah, it is a healing for the ailments in your hearts and it is guidance and mercy for the believers" Qur'an 10:57 [175] The message of this Ayat goes beyond racial and geographical barriers that seek to draw distinction between humanity hence the call "O mankind". This is corroborated by another Ayat where it is stated that "We have not sent you except as a mercy to mankind" Qur'an 21:107[176]. The verse is an affirmation that the Prophet and his mission are packages of mercy bestowed on mankind and all creatures of Allah on earth.

Muhammad Hashim Kamali in reference to I'lam of Ibn Qayyim al-Jawziyyah did an extensive examination of these two verses as they concern the objectives of Shari'ah. According to them, "mercy" is perhaps a poor translation of Rahmah which conveys compassion, kindness, good-will and beneficence. The Shari'ah aims at safeguarding people's interest in this world and the next; "In its entirety, it is justice, mercy and wisdom". In order to attain these objectives, the Shari'ah identifies three areas, which constitutes the component parts of Rahma, namely, educating individual, establishment of justice and realization of benefit (maslahah) for the people.

Individual is at the central point in the scheme of Shari'ah. Reforming the individual therefore, is a great task that must be accomplished. Islam is certain that by reforming the believer, he becomes inspired with faith and all qualities of being

[175] Abdullah, Y.A. Translation Ibid
[176] Abdullah, Y.A. Translation Ibid

trustworthy and righteous which are the necessary qualities that can propel him towards achieving the ultimate goals of existence.

6.4. Achieving Maqasid Al-Shari'ah Through the five pillars of Islam

Devotional activities ('ibadat) are packages of the Islamic educational schemes designed to reform the believer to enable him to play the roles expected of him in his community and to refine his behavior so that he will not constitute danger to others. The totality of these acts therefore represents a direct course to purifying his heart and psychology from negative tendencies such as immorality, self-centeredness and unguided pursuit of materialism.[177] Specific examples illustrate the inherent reformation of those acts of 'ibadah. The declaration of Sha'adah is the gateway to the fold of Islam. It bears a great influence on the behavior of the believer. As soon as he declares the testimony and allows it to be deep-rooted in his heart, he develops the instinct of discipline and consciousness. Every deed and utterances are subjected to personal scrutiny to ensure that they conform to the standard laid down by the Creator. He no longer does or utters something for his own personal ego but for the sake of the Creator - Allah. He does not require the presence of law-enforcement agent or any mortal imperative command before he threads the path of the righteous and the law-abiding citizens. Neither does he expect any reward for being obedient nor for any humanitarian services he renders. There is no retiring age in serving his Creator and community. The overall effect of this positive development of the individual is sanity for the entire community and eventual progress and human civilization.

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[177] Kamali,M.H. Ibid. p.225

Salah, the ritual prayer carries similar significance. Thus, the Qur'an says: "Surely, prayer keeps one away from indecency and evil, and certainly the remembrance of God is the greatest (form of devotion)" (Qur'an 29 : 44)[178] Salah entails mental and physical exercises which produce perfection in man and draws him closer to Allah. During the course of performance of Salah, the faithful pays maximum attention curtailing his freedom to do or say something extraneous that can vitiate the validity of his prayer. He is conscious of the presence of Allah ever though he could not see Him physically. Thus, putting himself to a total submission to His will.

Suratul Fatiahat, the opening chapter of the Holy Qur'an is the least that must be recited in any ritual prayer. The pronoun "We" is used throughout the chapter. This is an indication that prayer, nay, all acts of rituals in Islam affect the well being of both the individual and the entire community. The prayer is timed to inculcate punctuality, while facing the same Qiblah direction during prayer even though the Qur'an clearly states that: "Whichever direction you turn, there is the fact of God" Qur'an 2 : 115[179] is a social discipline for all to face one direction. For turning to any direction one may wish, causes in discipline and confusion. Imagine the scene if everybody in the congregation is facing different directions [180]

Saom, the ritual fast in the month of Ramadhan also carries a lot of educative significance. It trains the believers to be able to adapt to any circumstances they find themselves. It is also a leveler between the haves and have-nots, thereby training the former to have similar experience as the latter, thus, promoting mutual love and spirit of brotherhood.

Zakat, another fundamental principle of Islam, is an economic decimal to check the excess of capital accumulation in the hand of few with consequence of sharing the

[178] Abdullah, Y.A. The Holy Qur'an translation, Ibid.
[179] Abdullah, Y.A. The Holy Qur'an translation, Ibid.
[180] Kamali, M.H. Ibid. p. 226

wealth of the community among all and sundry. Thus, bridging the gaps between social classes of the society.

Hajj, is an institution that demonstrates to a believer that he is a member of the commonwealth nations of Islam irrespective of his status in the society. It reminds him of his root which emanates from a single pair of Adam and Awah. He can see for himself while at the gathering of Muslims from all over geographical locations of the world, that, although he is a bona fide member and part and parcel of the universal congregation, yet he is an infinitesimal entity. What required of him therefore, is to submit to the One who is the Reality of existence in the struggle for human progress and egalitarianism.

6.5. Justice ('adl)

Justice occupies a central position in the scheme of Shari'ah such that all acts, both spiritual and mundane are geared towards achieving justice. It goes beyond the official and regulatory justice conventionally known in the other systems. The Shari'ah makes justice part and parcel of faith, character and personality of its adherents with a view to establish justice not only in its corrective and retributive sense, but also in the sense of distributive justice, thereby achieving balance benefits and opportunities in the community. [181]

Qur'an contains abundant provisions on the principle of justice. For instance, it states that: "Surely, God enjoins justice and doing good to others (ihsan)" (Qur'an 16 : 90)[182] placing "justice" side by side with "ihsan" in this Ayat signifies placing priority of equity and fairness over and above rigidity in the administration of justice. Rigidity, which in most instances, is a by-product of linguistic confines and technicality of

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[181] Kamali, M.H. Ibid. 9, 226.
[182] Abdullah, Y.A. The Holy Qur'an translation, Ibid.

interpretation of legal text. Therefore, dispensation of justice must not be in vacuum. It must be in the spirit of equity and good faith. [183]

In another instance, the Qur'an says: " We sent Our Messengers and revealed the Book through them so as to establish justice among people" (Qur'an 5 : 25)[184] Universality of justice is emphasized here. It is the common decimal among all the revealed religions and it is of central important to all prophetic missions. 'The Book of God and the Shari'ah have thus been revealed to provide valid criteria for justice so that justice is not distorted by ignorance and bias". [185]

Other relevant Qur'anic authorities on justice include:

1 "And when you speak (make sure that you) speak with justice" (Qur'an 6: 152) [186]

2 "O believers! Stand out firmly for justice as witness to God, even if it to be against yourself, your parents and relatives and whether it be against rich or poor" (Qur'an 4: 135) [187]

3 "And let no hatred of a people divert you from the path of justice. Be just as it is closest to excellence in piety (taqwa)" (Qur'an 5: 9) [188]

While commenting on those Qur'anic verses on justice, Ibn Qayyim al-Jawziyyah goes a step further. He observed that justice must be followed and upheld wherever it is found, within or outside the declared provisions of the law: Justice is the supreme goal and objective of Islam. God has sent scriptures and messengers in order to establish

[183] Kamali, H.H. Ibid. 227.

[184] Abdullah, Y.A. The Holy Qur'an translation, Ibid
[185] Saidi Abu Habbib in his Dirasa fi Minhaj al-Islam al-Siyasi, Beirut, Mu'assasat al-Risalah, p. 749.
[186] Abdullah, Y.A. The Holy Qur'an translation, Ibid

[187] Abdullah, Y.A. The Holy Qur'an translation, Ibid
[188] Abdullah, Y.A. The Holy Qur'an translation, Ibid

justice among people. Where there are signs, which indicate the path to justice, it is in accordance with the law of God to aim towards it. Hence "any path that leads to justice and fairness is an integral part of the religion and never contrary to it". [189]

What Ibn Qayyim is saying is that even if nothing could be found in the Shari'ah to show the direction towards justice, it should still be attempted and that the result of such effort would always be in harmony with the Shari'ah. [190]

Justice in Islam has universal application such that it must be applied no matter who is involved. For instance where a Muslim and a non-Muslim are involved in a matter, justice must be applied regardless of their religious inclination.

Qur'an says: "God forbids you not to do good and be just to those who have fought you over your faith nor have evicted you from your homes God loves those who establish justice" (Qur'an 60: 8) [191]

In his Tafsir al-Tabari, Ibn Jarir al-Tabari said the ruling of this Ayah has wider application. It is applicable to all nations and followers of all faith and indeed to the whole of mankind.[192] Similarly, Sayyed Qutb after examining all the relevant Ayats on justice, made an important deduction to the effect that justice is an inherent right of all human beings under the Shari'ah. [193]

A vital conclusion has been drawn by Professor Hashmi Kamali when he said: "It would thus appear that injustice is abhorrent to the letter and spirits of the Qur'an. There may be some rules of Fiqh, which were once formulated in a different set of historical conditions and may now be deemed to be unjust. Our attitude toward such anomalies should, in my opinion, be guided by Ibn Qayyim al-Jawziyyah's penetrating

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[189] Ibn Qayyim Al-Jawziyya, Al-Turuq Al-Hakimiyyah fi Al-Sayasah Al-Shari'yyah, Cairo, Mu'assasah Al-Arabiyyah fi Al-Tiba'ah 1380/1961 p. 16 as quoted by Kamali H.M. at p. 227.
[190] *Kamali, M.H. Ibid.* 227
[191] Abdullah, Y.A., The Holy Qur'an , Translation, Ibid.
[192] Yaqub Ibn Jarir, Tafsir Al-Tabari, (1400/1980) Beeirut, Dar Al-Ma'rifah XXVIII, p. 43 5th edition.
[193] *Sayyid, Qutb (1397/1977), Fi Zilal Al-Qur'an 5th edition II,p. 689.*

assessment, which I quoted earlier that such rules do not belong to the Shari'ah even if they are shown to be a part of it. They should therefore be revised through Ijtihad in the light of the broad objectives of Shari'ah and the prevailing interest of society." [194]

6.6. Consideration of Public Interest (Maslah)

The ultimate goal of the law is to lead to the path of success and happiness for the people in both here and the Hereafter. Shari'ah, in its entire ramification is set to secure a benefit for mankind or to protect them against vices. Maslah occupies an important position in the legal framework that al-Shatibi was emphatic to declare that it is the only overriding objectives of Shari'ah. It thus, possesses all mechanism that is beneficial in the administration of justice and act of Ibadat. He went further by saying that God instituted the Shari'ah for the benefit of mankind both in this world and in the next. This is the primary objective of the Law-giver and a unifying factor, which can be seen, in all of the detailed rulings of the Shari'ah. [195] Some disagree with the details of al-Shatibi standpoint. All the same, the Ulama are unanimous in that there is no hukum in the entire Shari'ah system that does not seek to protect a genuine Maslahah, that Shari'ah in all its ramification aims at Maslah and that of its prohibitions are designed so as to prevent vices and corruption (mafasadah) in different degrees.[196] By this unanimity, the basic outline of Shatibi concept of the Maqasid Shari'ah appeared to have been upheld.

It was for the purpose of achieving the Maslah that rules of Wajib, Mandub and Mubah were established, hence the target of realizing benefit of (maslahah) and the reprehensible (makruh) and the forbidden (haram) are geared towards prevention of corruption and evil (mafasid). And where there is conflict between those rules, due to

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[194] Kamali, H.M. Ibid. p.228.
[195] Al-Shatibi, Al-Muwafaqat fi Usul Al-Shari'ah, Abu Zahrah, Usul, p. 297.
[196] Kamali, M.H. Ibid. p.228.

the circumstances of their enforcement, priority should be given to that which obtains the higher maslah.

Professor Hashmi Kamali quoting 'Abd al-Salam in his Qawaid cited two examples. According to him, to rescue a drowning man, takes priority over performance of obligatory prayer. Similarly, if the act of rescuing necessitates breaking of obligatory fasting, then this is permissible.[197]

The entire concept of Maslah as earlier stated is to achieve gain, the pleasure of God, to prevent vices and corruption, to promote benefit and civilization of both individuals and society at large. Thus, emphasizing the need for individual to be useful members of his community, so much so that hard work and lawful earning, supporting one's family, and even the pursuit and dissemination of knowledge are all equated with acts of 'ibadah (worship). Conversely, even an act of devotion, which amounts to an attempt or adopted as a means to escape useful work and contribution to society losses much of its spiritual merit. [198]

Masalih are divided into three, viz.: the essentials (daruriyyat), the needs (Hajiyyat) and the complementary (tahsiniyyat).

(i) The Essentials (daruriyyat) These are five essential components of corporate existence of individuals and society. They are so indispensable that their neglect leads to total disruption and chaos. They include: value of life, faith, intellect, property and lineage.

It is imperative that these five values must be jealously protected by the individual and government.

(ii) The Needs (hajiyyat): This is the value component, which supplement the five essentials. Its neglect leads only to hardship but not total disruption of normal life. For

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[197] Abd Al-Salaam, Qawai'd, J. 66 as quoted by Kamali M.H.Ibid
[198] Kamali, M.H. quoting Madkur, Madkhal, p. 13 Ibid. p. 229

instance, banning profiteering (ihtikar), or sale of alcohol so as to prevent its consumption and concessions that the Shari'ah has granted in regard to 'ibadat for the traveler and the sick ones. [199]

(iii) The Complementary (tahsiniyyat): It is a Maslah component that refers to interests whose realization leads to improvement and the attainment of that which is desirable. For example, cleanliness, avoidance of extravagances, necessary steps should be taken to prevent proliferation of false claims in the judicial proceedings.

6.7. Validity of Masalih

Like any other evolving legal principle, certain ingredients are pre-requisite for Masalih to be valid. They are that:

a- It must be genuine (haqiqiyyah). Shari'ah is not frivolous in its theory and practice and as such it only protects the genuine Masalih, which are usually concerned with the protection of the five essential values discussed above. Anything which runs counter to them amounts to corruption or Mafsadah the prevention of which also amounts to Maslahah. [200] To that extent, protecting the faith necessitates stopping rebellion (fitnah) and promotion of heresy and also guaranteeing freedom of belief as enunciated by Qur'an that 'there shall be no compulsion in religion' Qur'an 2: 256 [201] In another instance, safeguarding the right to live amounts to guaranteeing certain basic freedom such as freedom to work, freedom of speech and freedom of association among others. Protection of intellects means promotion of learning and prevention of negative tendencies that corrupt the individual and make him a liability to the society. Safeguarding the purity of lineage includes family care, providing conducive environment for the children care and upbringing. While protecting property include,

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[199] Abu Zahran, Usul, p.220 as quoted by Kamali, Ibid.
[200] Al-Ghazali, Mustafa, I, 139-40 as quoted by Kamali, Ibid.
[201] Abdullah, Y.A., The Holy Qur'an, Translation, Ibid.

right of ownership, facilitating fair trade and lawful exchange of goods and services in the society. [202]

b- Masalih must be in reference to the public interest whose validity is independent of relative convenience and utility to a particular individual. [203] Al-Shatibi argues that it has to be so because the Shari'ah is eternal and timeless in its validity and application. Therefore, the interest, which it intends to protect, must be objective and must possess universal attributes. It must not be relative and subjective in its characteristics. When a Maslah is determined by these subjective characteristics, it becomes anomalous and can be in conflict with other sets of Masalih. [204]

C- Masalih must be rational and identifiable by human intellect, experience and custom especially Masalih al-duniya. These are the Masalih that have to do with human day-today activities even without reference to the Shari'ah. The Shari'ah, as must be noted, only protects a set of criteria and guidelines so as to prevent confusion between personal prejudice and Maslahah. "This is however not the case regarding the Masalih and Mafasid pertaining to the Hereafter, and those of the Masalih which combine the benefits of this world and the next for these can be identified by the Shari'ah." [205]

6.8 Raf' al-haraj and Daf' al-darar

These are two principles of Shari'ah are germane to the general concept of Maslahah. The former stands for removal of hardship while the latter stands for prevention of harm. They are products of Ijtihad of scholars supported by the Nass of Qur'an and Sunnah. For example, Qur'an says: "God never intended to make religion a

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[202] Abu Zaharan, Usul, p.25.
[203] Kamali, H.M. Ibid. p. 30
[204] Mas'ud, Islamic Legend Philosophy, pp. 233-34
[205] Abd Al-Salam, Qawaid, pp.1,5,&10 as quoted by Kamali, H.M. Ibid.

means of inflicting hardship" (Qur'an 22:78)[206] In another relevant reference, the Qur'an says: "God never intends to impose hardship on you" (Qur'an 5 : 6)[207] and in affirmative tone, it says: "God intends to make things easy for you" (Qur'an 4 : 28)[208]

The three Quranic references are corroborated by the Prophetic Hadith where for instance, the Prophet's widow was reported to have said concerning the Prophet, that 'He did not choose but the easier of two alternatives so long as it did not amount to sin." [209] The philosophy of this Hadith was reflected in Article 17 of the Majallah al-Ahkam where it was expressed in a legal maxim that "hardship begets facility." [210]

Another important Hadith in this regard is where the Prophet was quoted to have said: "Haram shall neither be inflicted nor reciprocated in Islam.[211] Some scholars hold that the substance of this Hadith serves as the foundation of Maslahah concept while some even maintain that it provides Nass on Maslahah. Majallah in its well-known legal style adopted the Hadith by creating a legal maxim out of it. The maxim runs thus: "the prevention of evil takes priority over the attraction of benefit", "the darar must be eliminated", and that "a particular darar may be tolerated if it were to prevent a general darar." [212]

In conclusion, Ijtihad is the most effective tools in rediscovering the Maqasid of Shari'ah. Therefore, the contemporary scholars have to hold the bull by the horn in rejuvenating the spirit of dynamism in the Shari'ah by optimum application of Ijtihad. Members of the Muslim Ummah are tired of retrogressive standstill caused by Taqlid and except a pragmatic action are taken by the Islamic Jurists, the value system of Islam

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[206] Abdullah, Y.A., The Holy Qur'an, Translation, Ibid.
[207] Abdullah, Y.A., Translation, Ibid.
[208] Abdullah, Y.A., Translation, Ibid.
[209] Muslim Al-Nishaburi, Mukhtasar Sahih Muslim ed. Nasr Al-Din Al-Albani, 4th Edition Beirut, Al-Maktab Al-Islami, 1402/1982 p.412 Hadth No. 1546.
[210] Mahamassani, Philosophy pp.233-34
[211] Ibn Maja, (1401/1981) Sunnan Ibn Majah, Istanbul, Cagri Yayinlari, II, Hadith No. 2340 at p.784.
[212] Abu Zahrah, Usul, p. 302; Madkur,Madkhal,p. 116; at Sabuni, Al-Madkhal al-Fiqh, p.398 If. Kamali, Ibid.p.231

will remain utopia contrary to the legacy left by the Prophet, the Caliphs, the Tabi' and Tabi' Tabi'in and the Imams and various Mujadids of the past generations.

Chapter 7

CONCLUSION

7.1. Summary

Ijtihad is the most important source of the Shari'ah next to the Qur'an and the Sunnah. The underlined difference between the former and the latter is the fact that Ijtihad is a continuous process of development whereas divine revelation and Prophetic legislation have ceased with the demise of the Prophet. [213] But, after the introduction of Taqlid by scholars in the 5th period of development of the Islamic Jurisprudence, the culture of Ijtihad was put in a state of stagnation. Although, the scholars who were responsible for the closure had good intention, since their action was aimed at checking excesses and influx of unqualified and incompetent people who began to dabble into Ijtihad without the pre-requisite knowledge. But, their sincere action had later turned counterproductive to the development of the law.

Taqlid in its simple and straightforward definition is not bad after all. It connotes 'following'. 'Following' in human historical antecedent is natural. But, it becomes bad when it is imposed in order to restrict and confine human intellect to a particular opinion or school of thought. In this sense, it amounts to compelling people to live their 'present in the past'. This might contradict the natural design of the Law-giver as programmed in the natural cause of revelation to the Prophets.

Consequently, the condition in which Ijtihad used to be practiced by the Ulema of the early periods is no longer the same. Apart from the historical arrest that had put Ijtihad at standstill, various Islamic Governments have systematically replaced Ijtihad with statutory enactments. This amounts to further restrictions on Ijtihad. [214] Governments of most of the contemporary Muslim countries have not been according

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[213] Kamali, M.H. (1989), Principle of Islamic Jurisprudence, Pelanduk, p. 463
[214] Kamali, M.H. Ibid. p. 495.

the mujtahid adequate recognition that would enable him to play the roles expected of him, as many of their constitutions are totally silent on Ijtihad. [215]

7.2. Observation

There is no doubt that the Islamic legal system is dynamic. The principle of the Shari'ah was based on divine revelation, which is immutable. Yet, the law remains undoubtedly flexible, dynamic and progressive by virtue of Ijtihad mechanism. Similarly, at any given time, the Ummah of Islam is divinely blessed. What Muslims lack is leadership, sense of commitment, and sincere determination to implement the law. For instance, a comparison between the efforts of the colonialists and the modern day Muslims in promoting their ideal and belief, culture and legal system, shows that Muslims efforts cannot match that of their colonial Christian counterpart. They have successfully spread their faith, culture and law in many part of the world including the Muslim territories.

It is a well-known fact that in the early period of Islamic jurisprudence, scholars were independent. They were not fanatical about a particular school, rather, they held strictly to the text of Qur'an and Sunnah from where they used to deduce the law. It was not matter whether or not such Ijtihad conform to conclusion of the earlier scholars. [216]

7. 3. Ijtihad and Modern Challenges

The contemporary Muslim World is facing the most critical challenges of history not only in defending itself against foreign domination and influence - which is now a thing of the past, but also against hunger, disease, illiteracy, civil wars, political instability and more seriously relegation of the Islamic value to the background either deliberately or by share inertia. The present state of underdevelopment is not due to

[215] Ibid
[216] Nadiyah, S.A. (1985), Al-Ijtihad Fi Al-Islam. Al-Risalat Foundation, Beirut, p. 218.

lack of adequate capital formation as some people tend to believe but due to lack of necessary courage to go back to the Islamic heritage. After all, historical evidence has clearly shown how pragmatic the Islamic system was during the periods of the Holy Prophet (S.W.A.), the rightly guided Caliphs, the Tabi'un and Tabi'u Tabi'n and lately the golden periods of Imams.

The Muslim World is now finding it difficult to initiate actions leading to even the modern development impetus such as the endeavor and sacrifice that gave birth to the Renaissance, the Reformation, and the Industrial and French revolutions, the same impetus that finally laid the foundation of the present sustained development in Europe.

Taha J. al-'Alwani has rightly put it, "the Muslim Ummah can no longer present itself as having a unique culture, system or values, personality or anything else which makes a civilization distinct from all others, for large-scale borrowing from the West has undermined and distorted all of its inimitable features. It is now a travesty of its former self, and can only manage to perpetuate itself through the production of religious specialists whose academic background is limited to the personal laws of Islam alone."[217]

Many Muslims erroneously blamed Islam and its institutions for their defeat, and soon began to emulate their conquerors. Other however differed contending that the Muslim Ummah experienced these disasters because it had become alienated from the eternal truths of Islam. The latter school of thought emphasized that what was required was a return to the true Islam and not its wholesale rejection in favor of alien institutions and ideologies. According to them, the most fundamental and effective tool in this regard is Ijtihad to be able to incorporate those situations, which perhaps appear novel to their value system into the Shari'ah principle. Thus, much energy is required in

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[217] Al-Alwani, Taha J., (1991) Taqlid and Ijtihad, The American Journal of Islamic Social Sciences p. 129

scholarship and conceptual thinking, in seeking to understand humanity's place in the divine scheme of existence and what is expected of it, and how this knowledge might be applied by Muslims as they struggle to bring themselves and their societies into conformity with the will of Allah. [218]

7.4. Suggestions

Ijtihad is not only a saving grace, it is also an important legal means by which the present Muslim Ummah can face the challenges of modern time as historical evidence is to the effect that the Ummah only entered its current crisis after Ijtihad fell into disuse and was gradually replaced with taqlid.[219] But, for Ijtihad to serve as a reform mechanism a proper appraisal of certain factors has to be carried out. It is in the light of this that the following suggestions are made:

Islamization of knowledge

Intellectual reformation is sine qua none to the quest for advancement through Ijtihad. Knowledge in its entire facets has to be scrutinized in the light of Shari'ah. The challenge is enormous especially in the area of scientific and general knowledge. Nonetheless, the challenges have to be faced with courage, determination and visionary approach. This will go a long way in solving the problems of disorientation that has distorted the conception of knowledge in the contemporary time. A methodology with Islamic orientation is of utmost importance that will make it possible to replace the western influence, which is prevalent in the contemporary time. It is an exercise that involves the establishment of a unique framework of knowledge, defining the sources of knowledge and the rules, which govern their use, and initiating a critical review of all facets of both the Western and the Islamic methodologies. This will widen the scope of

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[218] Al-Alwani, Taha J. Ibid.
[219] Al-Alwani, Taha J. Ibid.p 130.

choice such that 'grain shall be separated from chaff' and transformation can be done where necessary. [220]

Yamine Bouguenaya observation in this regard throws more light when he states that: "the essential distinction between the approaches of earthly i.e. materialist science and true science, which confirms revelation, i.e. Islamic science, lies in their respective goals. For earthly science and philosophy, the purpose of studying beings and natural phenomena is to gather information about them in order to control and employ them. The purpose of life for a materialist scientist is to increase production and profit in order to find riches and enjoyment. The aim of Islamic science, which is the aim of the Qur'an, however, is to make known the Creator with all His Beautiful Names and to confirm the main goals of the Qur'an, i.e. divine unity, resurrection and prophethood. Materialist science examines beings for themselves, for their mundane benefits and for the enjoyment they procure. It studies their characteristics in detail but attaches no importance to their meaning. In contrast the Qur'an speaks briefly of the nature of beings and their superficial and material characteristics, but mentions in detail their worshipful duties; i.e. how and in what respect they point to their Maker's Names, and their obedience to the Divine Commands pertaining to creation, the commands of 'Be and it is.' Materialist science describes beings, their relationships and properties but it does not touch on their meaning at all. In the words of J. Needleman: "The universe of scientism is a world devoid of consciousness and purposefulness... In science, it is possible to describe a great painting such as the Mona Lisa solely in terms of the laws of chemistry and light refraction without considering even that it is a picture of a woman and without intuiting the intention of the artist which led him to arrange the pigments in this way and no other." Substitute any created being e.g. 'man' for the

[220] Al-Alwani, Taha J. Ibid.p. 131

'Mona Lisa' and you have a fairly accurate description of the attitude of modern science towards meaning in the cosmos.

Indeed, is the universe or anything in it, e.g., man, any less meaningful than the Mona Lisa? J. Needleman goes on to say: "Then, we shall have to say that our scientists resemble the standard caricature of the nit-picking scholar who believes that by counting, say, the number of active verbal forms in the Aramaic Gospels he has actually taken a step toward understanding the message of the New Testament." [221]

Islamization of knowledge is of fundamental importance if the Ummah is going to deal squarely with the prevailing circumstances. Although, it might appear as if the task is difficult and even impossible but, by going back to the Islamic legacy, the task becomes easy. The Islamic legacy provides a framework for organizing the rules relevant to the sources of knowledge and methodology of marking out the relationship between them. This assertion is far from being an exaggeration but, it is a reassertion of the fact that the Mujtahidun of Islam in the classical period had achieved a landmark in the field of knowledge and what was left behind can provide the necessary framework in this dispensation.

Ijtihad Revival:

The intellectual rigidity found among Muslims who postulated the closure of the door of Ijtihad and the subsequent opening of the way for Taqlid was an attempt to project this as symptomatic of the entire Ummah's mentality. [222] Regular Ijtihad has not been practiced for centuries, despite its very rare use by individual fuqaha. Modern researches of the early period show that Ijma' in pre-Shafi'i period was an on-going process, liable to be changed with the change of conditions. It exercised a check against the fallibility of the new content, which emerged in the wake of Ijtihad-Ijma'

[221] Yamine Bouguenaya (Mermer) 1995, Islamization of Knowledge: A Paradigm Shift, Muslim Education Quarterly Vol. 12 No. 4 1995 pp 7-8.
[222] Al-Alwani, Taha J. Ibid.p. 134.

activity. With the cessation of original thinking in law and suspension of the activity of Ijtihad, it became inert by degrees, and ultimately a custodian of tradition. But, it can be utilized for the benefit of Muslim society by taking it back to its original conception. [223]

The relevance of Ijtihad in the contemporary time cannot be over-emphasized. A myriad of issues that are affecting the life of Muslims at both individual and societal levels call for revival of Ijtihad exercise. Qiyas for instance, is an important source to evaluate many local issues by the local Ulama. It was reported that "Omar wrote a letter to 'Abd Allah b. Qays and asked him to be very careful in his judgment because it was a sacred job. He said: try again and again to understand the problem properly, if it is doubtful and not clearly stated in the Holy Book and the Sunnah of the Prophet. Try to know it by thoughts, examples and parables. Use analogy and then put your trust in what you find to be the nearest to the divine commandment and most resembling the truth." [224]

It must be acknowledged that there are instances of Qiyas exercise at some local levels but, apparently their number is insignificant and not properly recorded to the extent that they had no appreciable impact on the life of the Muslims. Perhaps this was due to unorthodox approach or they were too informal.

As earlier stated in this chapter, the challenges facing the contemporary Muslims are enormous. The need for Muslims to brace up to the challenges is so obvious that require no assertion. Unfortunately however, the Muslims continue to be insensitive to their situation. In most instances, they allow themselves to be carried away by neighbors' attractions and glamour.

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[223] Ahmad, Hasan (1976), The Doctrine of Ijma' in Islam, Islamic Reasearch Institute, Islamabad, Pakistan p. 261.
[224] Muhammad Satiq (1984), The Meaning of Ra'y and Nature of its Usage in Islamic Law, Islamic Studies Quarterly Journal of IRI, Vol.XXIII, p.26.

The spirit of Ijtihad has to be revived in more serious way with determination to shape the Muslim life in accordance with the divine imperative not only in matters of rituals but in all matters of human endeavors.

Re-evaluation of Role of Scholars:

"Scholars are the heirs of the Prophets', Prophet Muhammad (S.A.W.) was quoted to have said. By virtue of their training as authorities in Qur'an and Sunnah, they are capable of providing solutions to societal problems, be it religious or temporal by exercising Ijtihad. On one hand, they were the Ummah's fundamental guarantee that its leaders would not lead it astray. Thus, they not only played role of policy makers, they also provide checks against excesses and licentiousness in the society. Thus, the Qur'an says: "let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: they are the ones to attain felicity." (Qur'an 2: 104) [225]

In a sense, these people were the equivalent of such major contemporary institutions as the Congress and the Senator, and performed the check and balance function of a federal judiciary system vis-à-vis the government's executive and legislative wings. Moreover, their voice was always a moral force for enjoining good and forbidding evil. [226]

Scholars as Politicians

Temporal and religious matters according to Islam are governed by the same and only Shari'ah. To a Muslim therefore, life cannot be compartmentalized into spiritual and mundane. This Islamic position has charged the scholars with political responsibility but in the light of Shari'ah. Truly speaking, total practicalization of Islamic system could be very hard if not impossible where political system is not

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[225] Abdullah, Y.A. The Holy Qur'an, Translation and Commentary, Ibid.
[226] Al-Alwani, Taha, (1991), American Journal of Islamic Social Sciences, p. 136

designed in accordance with the Shari'ah and not directed by qualified and God-fearing scholars of Islam. This explains why contemporary Muslims around the world have found it extremely difficult to practice Islam as in those classical periods. For a total and effective exercise of Ijtihad and for practical implementation of its results, political leadership has to be under control of knowledgeable, God-fearing and active Muslim scholars. Where political power and dispensation are controlled by a system other than Islam, the exercise of Ijtihad is likely to be restricted to religious matters. That explains why the Shari'ah as a legal system of various Muslim communities around the world has been curtailed within the scope of religious and personal Muslim matters.

Scholars as Judicial Officers

Scholars were known to be officers in the temple of justice who were charged with responsibility of overseeing the judicial system free from corruption and influence, protection of the Ummah's rights vis-à-vis its rulers. Misuse of power, transgressing limits and oppressing the less-privileged ones were to be checked and monitored by the Scholars through judicial machinery.

The Ummah has always seen scholars as protection of the Ummah and its rights. And so when it seems that the scholars have stopped playing these roles, the consequence was to bring upon the Ummah many problems and disasters, it is only logical for the average Muslim to blame all misfortunes on the Scholars. It does not appear unreasonable for them to assume that the scholars' inability to perform Ijtihad lies at the root of all the Ummah's current backwardness, lack of contribution to contemporary humanity, and its middle methodology. [227]

Scholars as social scientists

Even in the classical time, scholars' role was beyond missionary activities. It involved educational and social functions. These all-round roles of scholars in those periods required specialization. Scholars' role as a social scientist has been relegated to the background so much so that many of them in various Muslim communities play insignificant part in this regard. What is required now is only for the modern Islamic institutions dealing with educational, research, public management, supervisory, or moral-advisory matters to incorporate these functions into their policy system. Through that method, the prospective scholars of Islam would have the orientation of religious leaders and social workers and social responsibility of the Muslims would be adequately catered for.

The Goals of Islam

Contemporary Muslims must appreciated the goals of Islam, namely that Islam, much as it stands to reform the individuals, it is also a system that stands to establish right policy for its adherents, be it political, economic, educational and social. It is a whole system that cannot be segmented. The moment a part is adopted and the other part is neglected, the system is rendered ineffective. This explains why the present situation of Muslims is so deplorable that they cannot initiate move to effect changes. The other important part of Islamic system had been neglected for too long a time. This had allowed detesters of Islam to infiltrate the rank and files of Muslim Ummah. They succeeded in implanting secularism into their mentality so much so that anyone who claims that Islam provides better option is looked upon as an 'extremist' or being 'irrational'. This mentality has to be reformed and redirected for reappraisal of Islamic system in the Muslim psyche. In other words, Muslims have to appreciate the goal of Islam, which ultimately is aimed at dictating the cause that leads to successes of life here and the Hereafter. And of course, other guidance of Allah is the guidance.

That is why the exercise of Ijtihad has to reflect in all facet of human endeavors, politics, science, technology, medicine, social and international relations. Unless this is done, Islam wills continued to be looked upon as a utopia by those who are not privileged to know and have a grasp of its teachings and objectives.

Making the secondary sources of the Shari'ah relevant

Secondary sources of law including Ijma' and Qiyas have to be made more relevant and practical to situations of contemporary Muslims. They have been subjected to too much of theoretical criticism and controversy making them difficult for practical application. Specific emphasis should be placed on Ijma' in this regard. This is due to the fact that Ijma' is a doctrine that has played a fundamental and significant role in conserving the past heritage and formation of institutions in Islam. It has served as a unifying force, like some parallel institutions in other religions system. According to Ahmad Hasan, "it engendered unity and solidarity in the whole system of law, dogma and rituals. Creating unity in diversity was the principal function of Ijma' in the medieval times. And probably for this purpose this principle, though forward-looking and progressive in its early stages, was theorized in a retrospective manner and it went a long way towards the fulfillment of this objective.[228] A number of issues have to be critically examined namely, that, classical theory of Ijma has to be subjected to critical re-appraisal as it presents Ijma' as a purely informal activity of the scholars in their private and individual capacity with no definite organization and specific procedure. Secondly, classical theory is content to describe certain qualifications for the competence of Ijma'; it does not identify the persons in who these qualifications were actually found and who could be considered competent for it in its true sense.[229] Another contentious issue is the question of 'total agreement' of scholars while the

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[228] Ahmad, Hasan (1976) The Doctrine of Ijma' in Islam, IRI< p. 260.
[229] Ahmad, Hasan Ibid. p. 258.

unanimous agreement of the community is confined to the essentials of religion. Whereas in practical term, public opinion ignore the agreement of the scholars in some instances. The scholars themselves are not oblivious of this fact. Ahmad Hasan observed further that allegiance to a single authority, a chief characteristic of the medieval period, was replaced by allegiance to the public will. Hence the modern mind is not convinced of the classical definition of Ijma' which shows the hierarchy of the scholars in Islam. Modernists according to him seek to employ it as a 'tool of reform'. Influenced by the universal democratic trend in thinking, they identify public opinion, public will, opinion of the intellectual elite of the society, and the enactment of representative assemblies of the Muslim countries with the Ijma' of the community. There are of course people who take it only as a unifying and conserving authority. They see little hope of reform through Ijma' in view of its classical definition.[230] Observing obstacles confronting Muslims on the issue of Ijma', Ahmad Hasan suggested a kind of solution. He said: "In the present political situation, the division of Muslim community into a number of national states has created fresh problems for the formation of Ijma." There are problems, which are of purely religious nature that require the assent of the universal community. Others relate to a local situation obtaining in a particular Muslim country. What should be the procedure of reaching Ijma' on both these types of questions? We are of opinion that questions of universal nature may be discussed on international level in a meeting of experts who represent different Muslim countries. The consensus arising out of their deliberations may form a tentative Ijma' of a functional nature. It will be regarded as permanent when confirmed by the universal community. As to the Ijma' on questions of parochial nature, the specialists or elite of the society, as the case may be, of a particular Muslim country

[230] Ahmad, Hasan Ibid. p. 260.

may form a consensus, by their mutual discussion, say in a national assembly, which will be of a temporary nature. This can be confirmed or rejected in course of time by the will of the local community. It is worthy of remark that both types of Ijma' local and universal, will function as a temporary measure, subject to the acceptance or rejection by the universal community in the long run. [231]

Similary other sources including, Qiyas, 'Urf, Maslaha Mursala etc. are to be made relevant with a view to making them playing positive roles in the life of the Muslim. It is not enough to discuss them beautifully on the pages of paper, until they are properly applied for the benefit of all. For this step to be successful, certain steps must be taken into consideration.

Organization and Commitment

'No one plans to fail but, people fail to plan' is a common parlance. Any proposal to make Ijtihad effective has to be properly planned and meticulously executed. Even during the time of Prophet Muhammad (S.W.A.), organization was regarded as a policy in spite of defines revelation. That was why different functions were assigned to different people according to their knowledge, ability and specialization. There were those who specialized in memorization of the Holy Qur'an while there were those who specialized in documentation of revelation. There were those who specialized in military organization. This historical fact points to the need for modern Muslims to properly organize themselves in order to be able to face the challenges before them. Moreover for any system to work effectively in the present age of computer and technology, it must be properly organized. The corollary of organization is

[231] Ahmad Hasan Ibid. p. 261

commitment. No planning and organization can yield result without committed effort for its execution.

Various Muslim bodies have organized seminars, conferences and enlightened forums; resolutions were adopted at those forums. But everything began and ended there and then. There had never been follow up actions. And in few instances where there were follow-up actions, the actions were inadequate.

Needs to respect differences

Certain problems which have historical root must be properly examined and solved for Ijtihad to be feasible progressive and development oriented. They may look like human problems, which cannot be solved by human approach. But, it must be admitted that they are not peculiar to the Muslims alone. If non-Muslims can manage those problems and forge ahead, why Muslims cannot do the same. The stack reality, which many Muslims particularly the scholars do not want to accept, is that we are bound to differ on certain issues. Difference of opinion is the beauty of free and objective society. Unfortunately however, this has not been the case with the Muslims. A slightest disagreement by one scholar on a point of law is enough for another scholar to declare his brother 'infidel'. There were instances where such disagreement even led to killing. It is not intended to do an exposition of this ugly experiences but it sufficed to site example of Muslims in Spain. Muslims ruled this part of the world for centuries. But, while the enemies were planning to overrun and capture the Spain from the Muslim rulers, the Muslim scholars were busy engaging themselves arguing on whether Angels (Malaika) were males or females. The argument was so hot that led to killing each other. As a result, Muslims became divided and weak. The enemies found it easy to penetrate them and thus captured the Spain. Up till now, Spain remained the territory of those who did not want to see Islamic rule on earth and until Muslims could get their

heart together, it is not sure that this land which is rapidly going satanic could be regained by the contemporary divided Muslims. Not until recent past, Muslims have killed themselves on the issue of pre-destination.

Could it be imagined that Muslims could kill each other on the type of Salat a group were supplicating on the Prophet - Salat ul Fatih in this instance? While at the same time, their Christian counterparts were bringing the evangelization programs to their doorsteps. We may not agree on all issues, but we must be prepared to tolerate one another when we disagree on those issues. This is very important for Ijtihad to be feasible.

Muslim Unity

Muslims are united and they would remain so for ever. This unity is found in those fundamental principles that bind them together. Islam excels other religions or systems in this regard. The five pillars of Islam are the fundamental unparalleled unifying platforms. Whatever be the Muslims disagreement, they profess the same Kalimat Sha'adah, they pray five times daily, all fast in the month of Ramadhan, there is no disagreement on Zakat principle even if it has been neglected for whatever reason and all perform pilgrimage to Makkah and Madinah annually whatever school of thoughts they belonged to. Muslims have one Prophet, One Qur'an and one Qiblah. As long as all these remain pristine, Muslims will continue to be united.

Problem lies where they allow some trivial issues to divide them. And as soon as they are able to overcome such trivial issues, they are bound to become strong force as they were before. On those trivial issues Muslims should learn to leave final decision to Allah. If they cultivate this habit, they can then move forward to organize themselves at local, national and world levels. Through this approach, they can elect leaders at their respective local levels leading to electing leaders at international level. If this is

done, it will be easy to coordinate Ijtihad activities for positive result. It will be easy to back up Ijtihad resolutions with bureaucratic policy, judicial enforcement and world respect.

Fear of God

Muslim orgy experiences of the past like the present ones were found to be man-made. This is an indication that most of the problems were created out of lack of fear of God. It might be due to some interest, personal, group, tribal, economic or political or all of them together. The Prophet of Allah and his companion implemented the revealed revelation sincerely with fear of God without reservation for any primordial interest. Similarly, the rightly guided Caliphs and the Imams followed their examples. That was why Islamic system was successful. That was why it was implemented to cater for all and not for a group elites and ruling class.

Islamic policy failed to succeed in the contemporary world due to lack of fear of God among the policy makers and executors. Primordial interests were placed over and above that of Islam, either for personal reason, or tribal reason. This explains why it was very easy to implant nationalism in the Muslim psyche. The result has been disastrous.

In a nutshell, Muslims have to go back to their past heritage to see how Islamic system worked and prepare to make necessary sacrifices required for its success. It is then Ijtihad will be feasible, and it is then success will be made out of it like in the past.

BIBLOGRAPHY

A

1. Abdullah, Y.A, (1979) The Holy Qur'an, Translation and Commentary, Islamebad,.
2. Abdur-Rahman, I.D., (1984) Islam in Nigeria, Zaria.
3. Abu-Husayn, A.B., (1964) Kitabl Al- Mu'tamad, Damascus.
4. Abdul Wahab, A.K., Al-Siyasat Al-Shariyah, Cairo, 1350 H.
5. Ahmad, H., (1984) The Doctrine of Ijma in Islam, Islamabad.
6. Ali, H., (1976) Usul Al-Tashrihil Islam, Egypt.
7. Ali, M., (1986) The Religion of Islam, New Delhi.
8. Al-Bukhare, (1908) Al-Jam'ah Al-Sahin, Leiden.
9. Aamid, (1914) Al-Ihkan fi Usul al-Ahkam, Cairo.
10. Al-Ghazali,(1937) M., Al-Maktaba Al-Tyariyah Al-Kubra, Cairo.
11. Alwani,T.J., Taqlid and Ijtihad, The American Journall of Islamic Social Sciences, U.S.A.
12. Al-Tawhid, (1408) Vol. V, Nos. 3 and 4, Rajab-Dhul – Hyjah.

B

13. Burke, J., (1976) Osborn's Concise Dictionary, London.

D

14. Dar-Al-Majani, Al-Majani,(1994) Arabic-English Dictionary, Beirut.

E

15. Ezzedin, I & Denys, J.D.,(1976) Translation of Arbain Ahaadith, Syria.

F

16. Farooqi,H.A., (1965) Iqbal concept of state, studies in Iqbal's Thought Arts.

H

17. Hamstead, L.L.,(1979) Introduction to Jurisprudence, London.
18. Hasan, A., (1970) The Early Development of Islamic Jurisprudence, Palustan.
19. Hasan, H.H. (1989) D'awah Highlights, Islamabad.
20. Hossein, N.S., Ideal and Realities of Islam, (N.D.)

I

21. Ibn Kathir, (1939) Al-Bidayah Wal-Nihaya, Cairo.
22. Ibn Maja, (1981) Sunnan Ibn Majah, Istanbul.
23. Ibn Qayyum, A., (1961) Al-Turuq Al-Hakimiyyal Fi al-Siyasah al-Shariyyah, Cairo.
24. Iqba, M., The Reconstruction of Religious Thoughts in Islam.

J

25. Jannati: M.I., (1408) Al-Tawid Quarterly Journal of Islamic Thought and Culture, London.

K

26. Kamal, M.H., (1989) principle of Islamic Jurisprudence, Malaysia.
27. Khudar Bik, M., (1967) Tarikh Al-Tashri'I Al-Islam, Darul Fikr.

M

28. Mahamassani, S., (1961) Falsafat Al-Tashiri'I Al-Islam, Netherland.
29. Masood, A., (1988) Reputation of Schact Anti-Hadith view, A Monograph of the center for Islamic legal Studies, Zaria.
30. Mawdudi, S.A.A., (1960) Towards Understanding Islam.
31. Mawdudi, S.A., (1986) Islamic Law and Constitution, New Delhi.
32. Muhammad, S., (1984) The Meaning of Ra'y and Nature of its Usage in Islamic Law, Islamic Studies Quarterly Journal of IRI, Pakistan.
33. Mir, W.U., (1986) Muslim Jurisprudence and the Qur'anic Law of Crime, New Delhi.
34. Mohy-ud-din, A., (1980) Ali The Superman, Lahore.
35. Muslim, A.N., (1982) Mukhtabar Sahih muslim, Beirut.
36. Muslihudden, M., (1986) Philosophy of Islamic Law and the Orientalists, New Delhi.

N

37. Nadiya, S.A., (1985) Al-Ijtihad Fill Islam, Beirut.

Q

38. Qodri, A.A., (1986) Islamic Jurisprudence in the Modern World, New Delhi.
39. Qardawi, Y., (1983) Shariat Al-islam.

R

40. Rahimi A., (1987) Islamic History, Lagos.

S

41. Sahih al-Bukhair and Sahih Muslim,Cairo, 1348
42. Salmond, (1977) Jurisprudence, London.
43. Sharafuddeen, A.A., (1969) Tarikh Tashri'L Islam.
44. Sayyed. A.W., (1964) Thought and Reflection of Iqbal, Lahore.

T

45. Treaty No. 191, Fatawa of Council of Senior Islamic Scholars in Saudi Arabia. 1416.

W

46. Williams, G. Learning The Law.

Y

47. Yaqub., J., (1980)Tafsir al-Tabari, Beriut.