THE HISTORICAL DEVELOPMENT OF ISLAMIC LAW (FIQH) FROM THE REVELATION TO THE 7TH CENTURY AFTER HIJRAH

BY

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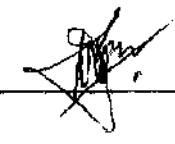
DECLARATION

I write to declare that this Thesis has been written by myself and it is the report of my own research work. It has not been presented in any previous application for the award of a higher degree. All direct quotations are distinguished by quotation marks and the sources are fully acknowledged by means of references.

SIGNATURE: 

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CERTIFICATION

This Thesis report titled "The Historical Development of Islamic Law (Fiqh) From The Revelation To The 7th Century After Hijrah" by Musa Muhammad Tukur meets the regulations for the award of the degree of the Doctor of Philosophy (Ph.D.) in Islamic Studies of the Ahmadu Bello University, Zaria, and is therefore approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to:

My ascendants and their collaterals

Myself and my wives

My descendants and their progeny

My collaterals and their issues.

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In the name of Allah, the Most Gracious, the Most Merciful. All praise be to Allah, the Lord of the Universe and may the peace and benediction of Allah be upon the seal of all prophets, Muhammad (S.A.W.), members of his family, companions, the followers and those who followed their path till the day of judgement. I am most grateful to Allah who gave me the strength to complete this research.

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ABSTRACT

This research has been on the Historical Development of Islamic Law from the period of the revelation to the 7th century after Hijra. In the introductory part of this research an attempt was made to examine the necessity of the need for laws to regulate the conduct of the society.

The research further analyzed the status of law within the Arabian Peninsula before the advent of Islam. The law during the Jahiiiyyah period was generally full of atrocities and confusions. This is because the law at that time did not take into consideration the plight of the weak, women and the oppressed.

However with the emergence of Islam, all the obnoxious customs and traditions were nullified and substituted with the laws of the SharTah. Islam therefore condemned and rejected in totality everything that contradicted it but accepted and approved such things that were in consonance with the tenants of the Sharia ah. Islam introduced some of such changes through a gradual and systematic approach in line with the Divine will.

The Shari'ah covers a complete code of faith and practice covering the whole aspect of mankind. Therefore the basic components of the Shari'ah consists of the Laws related to beliefs (Aqaid), moral acts or cultivation of good manners (Xkhlaq) and acts of worship (Ibadat) as well as transactions or contracts (Mu'amalat). Fiqh (Islamic Law) in particular deals with the laws related to'Ibadat and Mifamalat only hence it is one of the sub-branches of the Shari'ah as a whole.

The historical development of Islamic Law was studied in six different stages. The peculiarities and achievements of each stage were highlighted. The primary sources of the Shari'ah are: the Qur'an, Sunnah and Ijtihad either in the form oflima or Qiyas. In the course of the development of Islamic Law there emerged the opinionist and the traditionist trends of Ijtihad within the Muslim jurists, which eventually led to the formation of the different schools of law. And the four most recognized schools of law are the Ilanafi, Maliki, Shafi'i and Hanbali schools of Law. The sciences of Fiqh and Usui al-Fiqh were also documented at a later stage. The research further examined some significant legal terms used by the jurists in their analyses, which explained the rules of law (Xhkam al-Shar'iyyah), its fundamental objectives (Maqasid al-Sharia'ah) and therefore some sample cases were brought for the purpose of illustration to buttress the methodology adopted by the earlier jurists in learning the Shari'ah.

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ABBREVIATIONS

1.	A.D.	=	Anno Demino, After Death of Christ
2.	A.H.	=	After Hijrah (migration of the Prophet)
3.	B.H	=	Before Hijrah
4.	ed	=	Edited
5.	etc	=	and so forth
6.	i.e.	=	that is
7.	n.d.	=	No Date of Authorship
8.	R.A.	=	Radiyallāhu ʿAnhu (May Allah be pleased with him)
9.	S.A.W.	=	Ṣalla-Allāhu ʿalayhi wa Sallam (Peace and blessings o Allah be upon him)
10.	Tr.	=	Translated

TABLE OF TRANSLITERATION

Arabic letter	Name	Transcription
أ	Alif	a
ب	Ba	b
ت	Ta	t
ث	Tha	th
ج	Jim	j
ح	Ha	h
خ	Kha	kh
د	Dal	d
ذ	Dhal	dh
ر	Ra	r
ز	Zay	z
س	Sin	s
ش	Shin	sh
ص	Sad	ṣ
ض	Dad	ḍ
ط	Ta	ṭ
ظ	Za	ẓ
ع	Ayn	ʿ
غ	Ghayn	gh
ف	Fa	f
ق	Qaf	q
ك	Kaf	k
ل	Lam	l
م	Mim	m
ن	Nun	n
ه	Ha	h
و	Waw	w
ي	Ya	y

VOWELS

Arabic letters	Long Vowels	Short Vowels
آ	ā	a
عو	Ū	u
عي	ī	i

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND OF THE STUDY

This research is an attempt to critically examine the historical development of fiqh (Islamic Law) from the period of the revelation, which is known as the legislative period, to the period of its documentation after the fall of Baghdad in the seventh century after Hijrah[1]. This field of study seems to be generally neglected by the researchers in the Islamic Law especially in languages other than Arabic. The literal meaning of shariah implies the straight path that leads to a certain destination such as a watering place, a grazing land or simply a path to be followed. The jurists understood the term in the context of the Qur'an and Sunnah to imply the law of Allah which He enacted for the human beings with regard to their beliefs (ʿAqāʾid), moral conducts (Akhlāq), rituals (ʿIbādāt) as well as business transactions or contracts (Muʿāmalāt), to regulate their affairs in all spheres of life for the purpose of achieving success in this world and the hereafter.

The study of Islamic Law in institutions of higher learning and its official application in the court is seriously affected by the colonial and post colonial syndrome as rightly observed by Kumo in Rashid (1988).

> "The effect of neo-colonial psychology in the study of Islamic Law in our Universities and its application in our courts of law has been perhaps more profoundly negative than on any other aspect of our national life. Thus, we borrowed a leaf from the Universities of `the

> mother countries' and confined the study of Islamic Law to matters of 'personal status' leaving out all other subjects and thereby conforming to the correct position of Islamic Law as seen from the stand-point of the western intellectual circles...."

1.1 STATEMENT OF THE PROBLEM

It has been commonly observed that the scholars of Islamic Law who wrote books on jurisprudence, Sîrah and Arabic literature have made various references to Islamic Law and its history. However, what they have reported seems to be disconnected and lacks sufficient description of the manner and circumstances in which the jurists treated various issues of Islamic Law as well as how the law actually relates to the life of man at various levels of human relations. Therefore, what they reported left serious gaps and so it conditioned curious minds of dedicated intellectuals to raise several vital questions. The answers to such questions will enable contemporary jurists to understand how legal decisions were made in the past and how the previous jurists interpreted the text of the law as well as relating it to the over-all life of the Muslim society in general.

Furthermore, it is common knowledge that one of the major problems facing students of Islamic Law in most of the Nigerian Universities and other Institutions of higher learning is the non-availability of adequate authoritative and standard textbooks on Islamic Law especially in English Language hence the need for this research. Although there is vast literature related to the historical and theoretical development of Islamic Law in Arabic, the students'

proficiency in Arabic is generally so weak that they are mostly unable to derive maximum benefit from such books. Thus, one of the most dangerous consequences of this situation is that such students are forced to rely on many inferior and unqualitative books written by orientalists containing a distorted picture of Islamic Law.

According to Rashid (1988) the fact that such books were not often recommended by the teachers does not help much in reducing the desperate search for English materials by serious-minded students. Abdullah as in Rashid (1988) observed that, to some extent, the bulk of English materials used in teaching Islamic Law in the institutions of higher learning is not only defective but also destructive to the Shari'ah. This is because most of the early English materials were largely produced by non-Muslim authors or some Muslims who were no better than their non-Muslim counterparts, such as Goldziher, Schacht (1964), Anderson (1959), Coulson (1971), Fyzee 1967) and others.

Furthermore Doi in Rashid (1988) observed that most of the textbooks on Islamic law available in English found in the libraries have come either directly from the pens of unsympathetic orientalists or their brain washed Muslim disciples whose main concern is generally to distort and dent the image of Islam. Therefore, to use such books for teaching and learning Islamic Law is rather incompatible with the hopes and aspirations of the Muslim 'Ummah. It is hoped that this research when completed will go a long way in solving this glaring and outstanding problem.

As a matter of fact, the present researcher's little and relative experience with some of the M. Ed. Islamic Studies students in the Department of Education has revealed that post-graduate students with deficiency in Arabic language find it very difficult to comprehend the subject-matter of Islamic Law largely due to the lack of sufficient and standard English texts. It is therefore, necessary to produce enough standard studies on Islamic Law in a language commonly understood by everyone. Speaking for Nigeria, such a language could be English. These studies when completed shall be useful to students, teachers, researchers, lawyers, judges and even civil servants.

This study therefore attempts to answer the following research questions:

1. What are the different developmental stages that the fiqh underwent and what are their basic distinguishing features of legislation?
2. How did the sources of Islamic Law i.e. Qur'an, Sunnah and Qiyās relate to one another in matters of legal decisions during the period of the Prophet (SAW)?
3. Who were the prominent jurists who made remarkable contributions in the field of Islamic Law and what were the general characteristics of their decisions?
4. How did the schools of law (al-Madhāhib al-Fiqhīyyah) emerge?

5. What was the contribution of the political leaders to the application of the law and what was the effort of the common people in learning the law as well as submitting to its authority?

6. What led to the stage of `Fiqh stagnation' after it had reached an advanced stage of development?

7. What was the relationship between the collections of Hadīth compiled by prominent Hadīth scholars towards the end of the third century after Hijrah and the legal decisions passed by prominent leading jurists (Fuqaha) at the beginning of the century.

8. What was the style of approach followed by Imam Mālik and others in applying the principles of Islamic jurisprudence (Uṣūl al-Fiqh) in their legal decisions?

9. What are the recognised legal values of judgement (al-Aḥkām al-Sharʿīyyah) pertaining to acts of worship in relation to the Mukallaf (mature and sensible person)?

10. What are the basic aims and objectives of the Islamic Law (al-Maqāṣid al-Sharʿīyyah)

1.2 SIGNIFICANCE OF THE STUDY

The study of Fiqh (Islamic Law) with particular reference to its historical and theoretical development cannot be over-emphasised. In the first place, some of the distorted claims of the orientalists and their allies against Islamic Law will be brought to lime light together with clear proofs for their refutations.

For example, Schacht (1964) was of the view that Islamic Law was borrowed and had nothing to offer except the borrowed terms and institutions. He says: "The prohibition of taking interest is no doubt inspired by Muhammad's acquaintance with the Jewish doctrines and practices in Medina." He further asserted that the concept of Sunnah was introduced into the theory of Islamic Law at a much later period, presumably towards the end of the first century after Hijrah. He was also of the opinion that the system of Isnãd (chain of transmitters) used for the authentication of hadīth documents has no historical value. It was simply invented by those scholars who were falsely attributing their doctrines back to the earlier authorities: as such it is useful only as a means for dating forgeries. He concluded that hardly is there any legal tradition from the Prophet that can be considered authentic. In another place Scacht (1964) makes a claim that the "conventional picture (painted by Muslim Scholars of the origins of Islamic Law) concealed rather than revealed the truth and that the sketch by which I have tried to replace it comes nearer to reality."

Azami (1977) in trying to refute those unfounded claims of Scacht (1964) states that:

> "Scacht has apparently failed to consult some of the most relevant literature: he often misunderstands the texts he quotes: the examples he uses frequently contradict the point he is attempting to make: on occasions he quotes out of context; and most important he applies unscientific methodology for his research, thus drawing conclusions that are untenable when the evidence of the text as a whole is weighed."[(2)]

For instance, Scacht (1964) claims that the Umayyad Caliphs were the first who took the important step of appointing Islamic Judges (Qudāt) whereas in reality the Prophet (SAW) himself was reported to have appointed judges during his period to different towns and entrusted to them and the local governors the administration of justice. So also did the rightly guided caliphs after him and the name of fourteen (14) judges[3] have reached us.

Another example where Scacht clearly misunderstood the text relates to the Prophetic tradition that gives the parties to a sale the right of option as long as they have not separated but he said Imam Mālik and Rabī' have declared against it by saying. We have no fixed limit and no established practice for that. However, Ahmad (1392AH), in his research, has proved this opinion wrong because Imam Malik did not deny Khiyār al-Majlis, as such. In the chapter on Khiyār al-Majlis, Imam Mālik cited the tradition and made the comment; Wa laysa lihādha 'indanā hadd ma'rūf wala 'amr ma'mūlun bihī fīh (There is no limit known to us for the period of Khiyar and no established practice for that). He concludes that had Imam Malik thought of denying or rejecting the Khiyār al-Majlis itself, he would have said Laisa 'alayhi al-'amal 'indanā (There is no such a practice). These are some of the few derogatory remarks of Scacht (1964) with regard to Islamic Law. Therefore, textbooks of this nature cannot, in anyway, be expected to inspire students to appreciate Islamic Law since some of its basic concepts and fundamentals are being challenged by the authors.

Fyzee's (1967) Outlines of Mohammadan Law, is another common English textbook on Islamic Law written by an orientalist, who was an ardent follower of Scacht. He held the view that:

> "the Koran is responsible for the subjection of women in the Muslim world; the Koran is the word of God but its description of heaven and hell are mere poetic imagery; the surahs of the Koran enunciated in Mecca can be accepted as being divinely inspired but not all those given at Medina: and rituals like observing the fast of Ramaḍān and the five daily prayers, depending on outward observance, retard inner spiritual development."

Therefore, with this hostile attitude towards the Holy Qur'an, the fundamental source of Islamic Law, students are not expected to gain anything worth-while from such a book. This is because once the minds of the students are poisoned against the basic primary sources of the Sharī'ah, the Qur'ān and Sunnah, then they are certainly forced to develop a complete negative attitude to the Sharī'ah as a whole. Thus, Doi, as in Rashid (1988) concludes that the problem of the dearth of reading and teaching materials in the proper Islamic Law in English can hardly be over-emphasised and so, in order to solve the problem, it is necessary to prepare authentic standard works on Islamic law in English language. One of the resolutions adopted at the end of the Sokoto Workshop, on the problems and prospects of Islamic Law in Nigeria, with particular reference to the teaching materials states that:

> "This workshop fully recognises the urgent need of producing enough teaching materials on Islamic Law subjects in English and recommends that the faculties of law and departments of Islamic Studies where Islamic Law is presently taught should make individual and or joint

efforts to fill the need by producing monographs, translations, anthologies etc."

Secondly, in order to supplement efforts of individual authors and thereby solve the problem related to the shortage of teaching materials in Islamic Law, this workshop recommends the establishment of a translation bureau in every university offering Islamic Law for the purpose of translating classical Arabic textbooks on Islamic Law into English Language.

1.3 OBJECTIVES OF THE STUDY

The objectives of the present study which is the target point of the research are stated below:

a) To thoroughly examine the various developmental stages of Fiqh from its early days to the period of documentation.

b) To critically examine the sources of Islamic Law to discover how they relate to one another in matters of legal decision and application in the generation of the Prophet (SAW).

c) To investigate some of the conditions and factors that greatly influenced the development of Fiqh.

d) To analyse closely some of the factors that led to what some people regard as the period of 'Fiqh stagnation'.

e) To investigate what led to the formation of the schools of law (al-Madhāhib al-Fiqhiyyah).

f) To analyse the well known 'Akham al-Shar'iyyah (legal rules) and the Maqāsid al-Shari'ah (fundamental objectives of the Islamic Law).

h) To provide some suggestions and recommendations that could eliminate some of the basic problems associated with the study of Islamic Law in Nigeria, especially in the institutions of higher learning.

1.4 SCOPE OF THE STUDY

This refers to the area covered by the research. The historical and theoretical development of Islamic Law is a very wide area of study hence the scope of this research is limited to the period of its documentation after the fall of Baghdad in the seventh century after Hijrah.

1.5 LIMITATIONS OF THE STUDY

This research is ideally supposed to cover the development of Fiqh (Islamic Law) from its inception to the present time in order to provide its complete and comprehensive picture once and for all.

However, this area is practically impossible to be covered within the context of a single study hence the need to limit the study to the period of documentation.

END NOTES OF CHAPTER ONE

1. Hijrah (migration): refers to the removal of the Prophet (SAW) from Makka to Madina in the year 632AD and this period marked the beginning of the Islamic Calendar.

2. Masood, A. (1988) Refutation of Schachts' Anti-Hadith Views, a monograph of the Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria. P. 4.

3. The names of the fourteen judges are as follows: Abdullah b. Masʿūd, ʾAbū Musa al-ʾAshʿarī, ʾAlī b. Abī Ṭālib, ʿAmr b. al-Ass, ʿAmr, b. Hazm, ʿAttāb b. ʾAsīd, Ḍihya al-Kalbī, Hudhayfah b. Al-Yamān, Maʿqal b. Yasār al-Muzanī, Muʿādh b. Jabal, ʿUbay b. Kaʿb, Umar b. al-Khaṭṭāb, ʿUqbah b. ʿĀmir al-Juhanī and Zayd b. Thābit.

CHAPTER TWO

REVIEW OF RELATED LITERATURE

2.0. INTRODUCTION

Living in a community is a necessity for man-as rightly observed by Ibn Khaldūn (d. 1406 C.E.) in his book, the Muqaddimah[1]. This opinion of Ibn Khaldūn seem to be the most popular among sociologists that man is a social being by nature and social life is essential to him. This therefore indicates that the necessity for the existence of Laws for the regulation of the society become obvious, Mahmasānī (1961) observed that social life requires various transactions among individuals; it creates various relationships among them which include how to solve disputes that may emanate from such relationships. It becomes necessary, therefore, to have fundamental principles which define the rights of every individual in relation to the rights of others which could settle the disputes and complaints that may arise.

According to Zaydān (1982), it is impossible for an individual within the larger group to enjoy complete freedom without any restriction, this will certainly interfere with the freedom of others which will in turn lead to constant disagreements or disputes resulting in the collapse or weakening of the larger society. Therefore, there must be some guiding principles through which problems arising from disputes and disagreements could be amicably settled in order that an individual can live with minimum security. This can further pave

the way for the continuous survival of the larger society. These principles are the laws. Thus law and order is a necessary requirement for the survival of the society just as the society is a necessity for the individual. It is commonly observed that no society in the past or present has ever turned itself away from such laws through which they adjudicate affairs between themselves as individuals or groups so that things can go well.

Khudrī (1967) and Zaydān (1982) observed that the laws may sometimes be in the form of people's customs and traditions, sometimes in the form of command and interdiction emanating from a certain respectable personality such as the leader of a tribe or king and sometimes in the form of guidance and commands emanating from a certain body vested with the responsibility of formulating laws for the society (constitutional body). All these sets of laws fall under the category of man-made laws (al-Qānūn al-Waḍa'ī). On the other hand, there are other laws which do not emanate from human beings but from the Creator of the Universe and these are called Allah's made laws or the revealed laws.

The foundation behind the promulgation of the revealed laws is based on the wisdom of the Creator, the Mighty, the Exalted because the world and what it contains, both living and non-living are His creatures. Surely among the obligations that pertain to Allah's Mercy, Wisdom and Lordship is that He should provide for all creatures their needs in consonance with their nature that

can correct their behaviours and establish the objectives for which they were specifically created.

Man who is regarded as the best of all creatures according to the Qur'ān certainly needs guidance from his Creator concerning his relationship with Him and other creatures, so that he may know how to conduct his daily affairs and the principles guiding the conduct of the society at large. Therefore, it is impossible, considering the great wisdom of Allah, to leave man on his own without any proper guidance, and whoever thought along this line is clearly on a big error in this respect. Allah says in the Holy Qur'ān: "Do men think that they will be alone (free to do what they like) on saying. "We believe" and that they will not be tested?" (Ankabut 29:2).

2.1.1. THE SOCIAL AND ORGANISATIONAL STRUCTURE OF THE ARABS

According to Sharafuddīn (1969), whoever intends to study the historical development of Islamic Law has to make reference to the Arab's ways of life before the advent of Islam. The Arabs were generally used to nomadic life (Badāwah), full of atrocities and confusions. They were a people who very much respected tribal inclinations and were very proud of their ancestral geneology. They were also accustomed to wine drinking and gambling. However, some few among them lived a sedentary life (Haḍārah); they stayed in places that had some green oases such as Yemen, Yathrib (Madina) and Makka.

The nomadic Arabs to a large extent depended on the product of their animals for their livelihood. They also believed in raiding as a means of survival hence to them it was not an offence for a stronger tribe to attack a weaker one and to take their properties as booty as well as enslaving their women after defeating them. This form of life provided the bedouin Arabs with the best opportunity to master the art of physical combat and so, they became more courageous.

Another characteristic feature of the nomads according to Ibn Khaldūn (1958) was that they abstained from trading, farming and craft. They considered such things as very insignificant professions, which were not proper for them to patronise or practice, but they were well known for eloquence in poetry, speech, proverbs, metaphorical expressions as well as other aesthetics of the Arabic language. They were also gifted with accurate historical narrations, and, at the same time, they were said to have some knowledge of astrology and the sciences of the weather. They were able to acquire these through constant observations as a result of their constant travelling up and down for the sake of trading. The Qur'ān alluded to this phenomenon in relation to their travelling between Shām and Yemen for the purpose of trade.[2] The Arabs also resorted to stars for directional guidance when travelling in the night whether by sea or by land as the case may be.

Mahmasānī (1961) observed that the Arabs were composed of different tribes without any strong central authority to bind them together in a coherent

whole. As a matter of fact, their social structure was based on partisan tribal solidarity or clannishness established on the bases of blood relationship. Individual members of the tribe submitted to the leader willingly either because of blood affinity or due to some of his personal qualities such as kindness, courage or membership of the royal family.

Some of the effects of tribalism was that it made members proud of their ancestry and strongly supported their clansmen whether they were right or wrong. For instance, when a member of a particular tribe committed an offence against a member of another tribe, the tribe of the offender would try by all means to defend their member whether he was right or wrong, while the tribe of the offended would try to average their member, otherwise their silence would be regarded as weakness. The bond of tribalism was not only restricted to blood relationship but sometimes it included those enjoying patronage of the tribe on the basis of adoption, alliance, clientage or neighbourhood.

Sābiq (1971) and al-Jazā'irī (1976) observed that, as a result of too much inter-tribal fight, the Arabs magnified the position of the males while they belittled that of the females because the former could fight and defend the tribe against any aggression, patronise booty, maintain and boost the honour of the tribe whereas the latter might not probably play such roles by virtue of her physical structure. As a result of this, all categories of females were denied the right to inheritance.

2.1.2. THE ARAB CUSTOMARY LAWS AND THE ISLAMIC REFORMS

The Islamic Law recognises blood relationship as a valid ground for inheritance and explains in detail the entitlement of each heir. In this equitable distribution, women of all categories and minor children are given equal right of inheritance including foetus in the womb or neonate as long as it was delivered with life. The Shariàh also approves marital affinity as a ground of inheritance as well as emancipation in default of qualified blood relations. But the Shariàh on the other hand rejected all other forms of artificial bases through which the Arabs inherited from one another such as adoption, clientage etc. In addition, little girls were buried alive on flimsy excuses such as fear of poverty, perpetration of shameful acts, fear of being captured by other tribes, failure to get married etc.

The Qur'an addresses the Arabs pertaining to some of these abominable acts in the following words. "When the female (infant), buried alive, is questioned. For what crime she was killed." (Takwìr 81:8.9). In another place, the Qur'an reads:

> "When the news is brought to one of them, of (the birth of) a female (child) his face darkness and he is filled with inward grief! with shame does he hide himself from his people, because of the bad news he has had! Shall he retain it on (sufferance and) contempt, or bury it in the dust? Ah! what an evil (choice) they decide on?" (Nahl 16:58 - 59)

Finally, the Qur'an states openly: "Kill not your children for fear of want: we shall provide sustenance for them as well as for you. Verily the killing of them is a great sin" (Isrā' 17:31).

The religions that were practised within the Arabian Peninsula before the advent of Islam included Judaism, Christianity and idol worship. The number of Jews and Christians within the Arabian Peninsula was very small as compared to the idol worshippers. The idolators claimed that they did not worship the idols but only to serve as intermediaries between them and the real God. They also slaughtered animals to the idols in the name of spiritual sacrifice.

Notwithstanding, the pre-Islamic Arabs had some good qualities of human relations according to Zaydān (1982), such as generosity, courage, fulfillment of covenants, dislike of injustice and pride. They also cherished truthfulness, defending the right of neighbours, forgiveness and kindness to guests which they even considered as an obligation. In this regard, let us cite some few examples of the Jāhiliyyah customs related to marriage affairs approved by the Sharī'ah.

It is a common tradition that whenever a person was marrying out his daughter he should give her some words of advice that would make her relationship cordial with her husband and other members of his family. On one occasion a person was reported exhorting his daughter in the following word: "I enjoin you to live peacefully with each and every one. I warn you against

telling lies." It was equally reported that 'Asmā' bint Khārijah said to her daughter during her wedding ceremony:

> "Oh my daughter! Certainly you have gone out of the nest in which you were nurtured to a house which you do not know and a husband whom you are not conversant with. Therefore, serve him as his female servant, he too will serve you as your male servant: be his resting place so that he will be your supporting pillar: do not cause any damage to him so that he may become angry with you: do not be far away from him so as to forget you: if he comes closer to you move closer to him, if he keeps away from you move away from him: safeguard his hearing, vision and smelling, let him not hear anything from you except what is good: let him not see anything from you except what is beautiful and let him not smell anything from you except what is pleasant.(4)

The rules and regulations adopted by the Arabs in the governance of their social affairs in case of disputes and disagreements were based purely on customs and traditions of their forefathers. The Arabs during the Jāhiliyyah period had no single establishment charged with the responsibility of running the affairs of a judicial system. They used to report their disputes to the leader of the tribe or on some occasions to the magicians since they had no central body with the power of execution. However, the litigants concerned were not bound to raise their cases to either the leader of their communities or the magicians except with the consent of both the disputing parties. Sometimes when a certain judgement was passed, one of the parties might decide not to comply, and there was no serious penalty except that members of the community views such a behaviour with general dissatisfaction.

What we have described above was the social life of the Arabs before the advent of Islam. When Islam came it effected series of changes in their day

to day activities and established ways of life on a new course by eradicating the wrong doings and confirming the good ones.[5]

Islam strongly called on the Arabs to shun any form of tribalism. In this regard Allah says:

> "O mankind! We created you from a single (pair) of a male and a female and made you into nations and tribes, that ye may know each other (not that ye may despise each other). Verily, the most honoured of you in the sight of God is (he who is) the most righteous of you ....." (Hujrat 49:13).

The Prophet (SAW) was reported to have said: "Leave tribalism, certainly it is malodorous." The Prophet (SAW) explained to the Muslims the essence of grouping people into different nations and tribes which was for the sake of knowing one another but not for pride. He strengthened this assertion in both speech and practice. He clearly informed the Muslims that tribalism and fighting for its course meant going far away from Islam and going out of the Muslim community. He was reported to have said: "He is not among us who advocates for tribalism: he is not of us who fights in the course of tribalism: and he is not of us who died for the sake of tribalism."[7] He further explained that there was no distinction between people based on colour of skin or geographical locations referring to the origin of mankind in general as being the same.

The demolition of Jāhiliyyah therefore necessitated running away from dangerous practices associated with it, such as the popular slogans: "Help your brother whether he is right or wrong." Islam, on the other hand prohibited

helping one another on what is wrong or outrageous. Allah the Most High said:... Help ye one another in righteousness and piety, but help ye not one another in sin and rancor..." (Mā'idah 5:2). The Prophet (SAW) redefined the above (mentioned) Jāhilīyyah slogan saying: "Help your brother when he is cheating or being cheated." The companions said, "we know how to help him when he is being cheated but how do we help him when he is the one cheating?" The Prophet (SAW) replied: "Stop him from cheating, surely that is helping him."[8] Again, Islam substituted ancestral pride with mutual competition in the process of doing what is good. Allah, the Most High said: "... for this let those aspire, who have aspirations." (Mutaffifin 83:26).

Islam condemned the Jāhilīyyah customs of robbery, looting, raiding and transgression against people. In this respect, Allah says: "Do not transgress for surely Allah loves not those who transgressed." (Baqnarah 2:190). In the same manner, Islam strongly prohibited the custom of burying daughters alive saying that they deserved kind and fair treatment if not more than the males. The Sharīah generally considered the males and females the same in terms of command and interdiction. In the early days of Islam, the women made their allegiance to the Prophet (SAW) in almost a similar manner to that of the men.

Thus, the status of women was substantially raised up as they were no longer considered as chattels or second class citizens in the society since they were given generally equal rights with the men except in some areas on the basis of their peculiarities. For example the leadership role within the family is

accorded to the husband it is part and parcel of his responsibility to provide means of sustenance and to take care of the general welfare of the family concerning shelter, clothing, education, medical facilities etc, according to his income.(9)

Sharafuddin (1969) observed that the Arabs of the Jahiliyyah, period prohibited marriage to close blood relations such as the mother, daughter, sister, paternal and maternal aunts, brothers' and sisters' daughters which was also approved by the Shari'ah as stated in the Qur'an (Nisa' 4:23). In addition Islam prohibits a number of women based on suckling, marital affinity and combination at a time.(10)

According to Sabiq (1971) and Ibn Rushd (1969), Islam met a number of marriages in practice within the Arabian Peninsula but nullified all with the exception of one which was confirmed after some modifications. Some of the nullified ones were as follows:

1. Nikah al-Maqt (Marriage by inheritance). This was a form of marriage in which the eldest son inherited the wife or wives of his deceased father with the exception of his own mother whom he may decide to marry to someone else while he received the dowry. During the Jahiliyyah period, the eldest son usually married the widows of his father without any dowry talkless of seeking their consent and at the same time he had the right to prevent them from marrying other people until they died in which case he automatically inherited their property. Where the eldest son was not interested in marrying the widows

of the father, then such a right might be shifted to his remaining brothers based on age seniority, then to the other male relatives of the deceased in accordance with the principle of residuary procedures (ʿAṣabah). Islam prohibited this form of marriage and all other issues related to it.

2. Nikāh al-Shighār: This was another form of marriage in which a person married his daughter or ward to another person on the condition that the latter would in return marry his daughter or ward under his care to him without the payment of dowry between them.[11] Islam totally prohibited this form of marriage as the Prophet (SAW) was reported to have said: "There is no marriage of Shighār in Islam".[12]

3. Nikah al-Istibada' (service marriage): A person in the Jāhiliyyah period might decide to send his wife to go and have carnal affairs with someone while he himself completely abstained himself from having any conjugal affairs with her until the pregnancy from the other person became quite conspicuous. This is almost similar to that the veterinarians nowadays called artificial insemination.[13]

4. Nikāh al-ʾAkhdān (Lover's secret marriage): This was a form of marriage in which men less than ten (10) visited a lady and had affair with her until she became pregnant. After delivery the lady would summon all the participants in her affair and address them saying: "You know the outcome of your actions, now that I have delivered, the child belongs to you Mr. X and such a person had no right to object according to their custom and traditions.

5. Nikāḥ al-Bighāyah (Prostitution): It was another form of marriage where many people visited a lady (harlot) until she conceived. After the delivery all those who participated in her affair would be assembled before her while some specialists in the art of identifying people through physical resemblance would be called too. It was the responsibility of such specialists[11] to identify the biological father of the child based on their experiences and observations.

6. Nikāh al-Mut'ah. (Temporary marriage): This was a form of marriage where a person married a woman for a specific period of time for a fixed remuneration. This form of marriage in the Jāhilīyyah was initially allowed during the early days of Islam in case of dire necessity in the course of Jihād. Then the Prophet (SAW) categorically prohibited it once and for all. He was reported to have said during the conquest of Makka: "O people! I have formerly permitted you to have temporary marriage with women, surely, Allah has prohibited it up to the day of resurrection...."[15] The shi'ites up till now practise this form of marriage.

7. Marrying two sisters at a time: It was a common tradition during the Jāhilīyyah period for a person to marry two sisters at a time, Islam strongly condemned this practice because of the evils connected to it. This prohibition is contained in Sūrat al-Nisā' 4:22 - 23. The Prophet (SAW) was reported to have also said: "Do not combine any lady with her maternal or paternal aunt

under the same wedlock...."[14] But there is no harm if a person marries such relation one after parting with the first one or her death like in the case of Uthman b. Affan who married two daughters of the Prophet (SAW) one after the death of the other and this earned him the title Dhu al-Nūrayn. The Shi'ah Imāmiyyah, however, sanctioned this form of marriage once it was concluded with the consent of the blood related females.

8. Limitless Polygamy: The Arabs were also accustomed to a limitless polygamous form of marriage. Islam curtailed the number of wives that a Muslim can legally marry at a time to four only. It has been reported in an authentic hadīth that a man called Ghaylān b. Salmah al-Thaqafī accepted Islām while he had ten (10) wives under his care who also embraced the religion together with him. The Prophet (SAW) directed him to select four out of them and separate with the others and he complied accordingly.[18]

Islam permits the marriage of up to four wives at a time where and when a person is convinced of treating them with equal justice and fairness, otherwise he is advised to restrict himself to only one as clearly mentioned in the Qur'ān:

> "... if you fear that ye shall not be able to deal justly with the orphans, mary women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly (with them) then only one or (a captive) that your right hands possess that will be more suitable to prevent you from doing injustice." (Nisā'4:3).

The Arabs of the Jāhiliyyah period treated the adopted child in the same manner as the real child. The Sharī'ah however, disapproved of this custom and

refuted it in strong terms. The Qur'ān states: "... And He has not made your adopted sons your sons..." (Aḥzāb 33:4).

Another custom related to the issue of marriage during this period was that whenever a person married his daughter to someone, the dowry belonged to him but not to the lady involved. Islam openly disapproved of this act saying dowry is an entitlement of the women on marriage as clearly spelt out in the Qur'ān: "And give the women (on marriage) their dower as a free gift (Nisā' 4:4).

The Arabs before the advent of Islam had several ways of terminating their marriages. In the following discussion we are going to mention some of such customs and state what happened to them thereafter with the coming of Islam. The husband during the Jāhiliyyah period had the absolute power to divorce his wife any time and return her within the 'Iddah[19] period. He could repeat this on several occasions without any penalty. Through this method of divorce the husband had the absolute right to maltreat or punish his wife by putting her in abeyance, that is, not allowing her to marry someone else and at the same time he would not have any conjugal affair with her. Not only that, the husband had the right to prevent his divorced wife from marrying another person even after the expiration of the 'Iddah period.

In this respect it was reported that a man said to his wife: "By Allah, I will not divorce you from me and I will not have any conjugal relations with you forever." She asked: "How will this happen?" He answered: "I will

divorce you and return you any time your Iddah is about finishing." The lady went straight to A'isah (r.a.) and narrated the matter to her. The latter kept quiet until when the Prophet (SAW) arrived and she narrated the matter to him upon which he kept quiet too. Then soon the revelation came and clarified the issue to the advantage of the complainant.

The Shari'ah sanctioned the principle of divorce but did not leave it without regulatory guidance as it was the case in the Jahiliyyah period. It gave the husband the right to divorce up to two times after which the couples were warned either to stay amicably or else if there occurred another divorce then the husband had no right to return her until she completed the 'Iddah, was married by someone else and is divorced or the husband died after duly consummating the marriage. Then, she had to observe and complete the waiting period before they could remarry again if they so wished but with a fresh contract. This adjudication is contained in the Qur'an where it says: "A divorce is only permissible twice after that the parties should either hold together on equitable terms or separate with kindness ... So if a husband divorces his wife (irrevocably), he cannot after that remarry her until after she has married another husband and he has divorced her..." (Baqarah 2:229 - 230).

Part of the rationale behind the establishment of the laws of divorce is to provide an avenue through which couples could resolve their differences and reinstate their marital life especially where and when the divorce occurred without due consideration.

The Sharī'ah also condemned the Jāhiliyyah custom where the parents or guardians usually prevented their daughters or wards from going back to their former husbands. Allah, the Most High says in the Qur'ān: "When ye divorce women and they fulfill the term of their (Iddah) do not prevent them from marrying their (former) husbands if they usually agree on equitable terms...."(Baqarah 2:232).

Some of the ways through which the Arabs terminated their marriages according to Zaydān (1982) and Sabiq (1971) included the following:

1. Khul': The arabs were used to this form of divorce and its procedure was that the wife or her relatives would pay something to the husband before he could divorce her in consideration of what he had collected. Islam too has sanctioned this form of divorce and Muslim jurists such as al-Nafarāwī (1955) and Ibn Rushd (1969) have already explained its conditions and other things necessary for its validity.

2. 'Ilā': This refers to an instance where the husband takes an oath that he will not have conjugal relations with his wife. According to the Arab customary laws, 'Ilā' was considered a complete divorce after the expiration of the period of the vow (of continuance) which was one year or some times two years. Although Islām affirms 'Ilā' as a form of divorce, it restricted its duration to only four months, after which the divorce becomes effective if he the husband did not change his mind and the divorce is non-reversible according to some scholars but not so according to others.

3. Zihār: The Arabs considered this as another form of divorce. It was a situation where the husband said to his wife, you are to me like my mother. Islām vehemently condemned this injurious assimilation and instituted Kaffārah (atonement) on the part of the husband before he could resume any conjugal relations with his wife. In this regard Allah says: "If any man among you divorce their wives by Zihār (calling them mothers), they cannot be their mothers, none can be their mothers except those who give them birth....: (Mujādalah 58:2).

Zaydān (1982) observed that according to the Arab customs and traditions, a woman whose husband died must observe the 'Iddah period of a complete year before she could marry someone else. The Shariah confirmed the system of 'Iddah but introduced a number of reforms associated with its modalities. Thus, the 'Iddah period of divorced women who are capable of menstruation is three menstrual circles: three months for those who do not menstruate as a result of old or young age: four months and ten days for widows: and delivery for pregnant women whether divorced or widows; whereas no form of 'Iddah is required of a woman divorced before consummation, although she is entitled to half of the fixed dowry.

The Arabs used to leave wasiyyah[20] in favour of both heirs and non-heirs alike without any fixed minimum limit. The Sharīâh on the other hand restructured and re-defined some of the issues related to bequest. For example, the maximum limit was fixed at 1/3 of one's property and therefore whatever

exceeded 1/3 could only be approved with the consent of the heirs if they are legally competent to do so. The Shariah also sanctions that there is no bequest to an heir in line with a prophetic hadith.[21]

The pre-Islamic Arabs were used to several forms of Mu'amalat (transactions) such as partnership in business, pledge, sales etc. In this sub-section we are going to examine some of their customs and traditions relating to various contracts of inter-personal relationships, stating what the Shariah accepts or rejects accordingly.

1. Business Partnership: This was a well known institution among the Arabs. It has been reported that the Prophet (SAW) ran business partnership with Sa'ib b. al-Sa'ib.[22] before his Prophethood. Islam approved this form of business contract.

2. al-Mudarabah which is also called al-Qirad is a form of business transaction in which the owner of the capital advanced his money to the one who would run the business for a certain fixed percentage of the profit. Islam approves this type of business contract too.

3. Salam: It is a sale of immediate payment against future delivery. The Arabs practised this form of sale and when Islam came it affirmed it though with some modifications. It has been reported from Ibn Abbas that the Prophet (SAW) migrated to Madina and met the people there buying the fruits of a year or two paying promptly but they had to wait for a year or two before they could collect the fruits. Then, the Prophet (SAW) gave the ruling "whoever is going

to be engaged in a sale of Salam, let him specifically state the measure of weight or quantity of the items involved and the time of delivery.[23]

4. al-Qard (debt) and al-Riba (usury): The Arabs knew about debt but they gave it out for usury. They used to borrow from one another for a certain period of time for a fixed additional percentage. Sometime the borrower would be given the money which he was expected to pay at a specific time but when he was unable to pay, then he could seek for extension in which case the second party would not honour the request unless he accepted to pay with some additional percentage. As a matter of fact, the Arabs were accustomed to various forms of usurious transactions but the Shariâh instantly prohibited them, in all their ramifications because such practices were injurious to the poor. Allah, the Most High said: ".... But God hath permitted you trade and forbidden usury ..." (Baqarah 2:275). In another place Allah says: "O ye who believe! devour not usury, doubled and multiplied: but fear God that ye may really propser." (Âli 'Imrân 3:130). The Qur'ân further states: "O ye who believed! fear God, and give up what remains of your demand for usury if you are indeed believers. If ye do it not, take notice of war from God and His Apostle...." (Baqarah 2:278 - 279).

Another devastating effect of usury is that it restricts circulation of wealth to within the vicious circles of the wealthy people only to the detriment of the poor, whereas the Sharîâh maintain an economic principle which encourages wider circulation of wealth. The Islamic Law instructs the wealthy

individuals to give enough time to their debtors until they are able to settle the debts or to make it a charitable gift to them[24]. The Qur'an states: "If the debtor is in a difficulty, grant him time until it is easy for him to repay. But if ye remit it by way of charity, that is best for you if you only knew. (Baqarah (2:280).

5. al-Rahn (pledge):[25] The Arabs were used to this form of contract but Islam has added some new conditionalities for the benefit of both parties. The Prophet (SAW) was reported to have practised this form of business transaction with even the People of the Book.[26]

6. al-Bay' (sales): The Arabs were accustomed to different forms of sale. The Shari'ah confirmed the ones that fall in line with it while it rejected all others that were contrary to it. Some of the rejected forms of sale according to Zaydân (1982) Ibn Rushd (1969) Shawkani (n.d) and Qardawi (1985) include deals concluded by touching the commodity (Mulamasah), casting a mantle (Munâbazah) and casting pebbles to the item of the sale (Hasa) etc. The Prophet (SAW) was reported to have prohibited all such types of sale.

According to al-Shawkani (n.d), Bay'al-Najash (sales of deception) involve a deal where a person deliberately offers higher price for a particular object without any intention of buying it but simply to deceive others concerning its ideal price. The Prophet (SAW) forbids this type of sale.[27]

Another well known custom of the Jahiliyyah period was al-Gush (sales of deceit), a contract in which the seller adulterated the original item either by mixing the old with the new or the genuine with the spoiled ones without the

knowledge of the buyer. It can also take the shape of dyeing an old garment for example and selling it as a new piece of cloth. In this regard the Prophet (SAW) was reported to have said: "Whoever deceives us is not among us."[28]

Zaydān (1982), and al-Nafarāwī (1955) observed that the Arabs of the Jāhilīyyah period had their own ways of handling issues related to the law of retaliation, blood money and Qasāmah. In their own case they considered the entire tribe of the culprit as squarely responsible for any crime committed by one of its members. The Sharīah came and limited the crime to the criminal alone except in few cases where members of the tribe were expected to help him like in the payment of Diyyah incurred as a result of accidental homicide, which was to be paid within the period of three years. However, where the relatives of the deceased killed intentionally agreed to accept Diyyah then the culprit alone was to be responsible for such a payment so as to serve as a deterrent to others.

Sharafuddīn (1969), and Shawkani (n.d) state that the Arabs were used to Qasāmah, a system of oath taking in a situation where a dead person was found within a locality and no one new who killed him but there were certain circumstantial evidences indicating that he was killed by a member of such a locality. The relatives of the deceased had the right to demand fifty men from such an environment to take oath, each and every one of them saying that he was not the one who killed the deceased and he didn't know who killed him. After taking these oaths then all the residents of the environment would be

asked to pay blood money collectively to the relatives of the deceased. If they refused taking the oaths, they were to be detained until they did so or confessed guilty of the offence. The Prophet (SAW) confirmed this form of adjudication as contained in both Sahih al-Bukhari and Muslim. The Prophet (SAW) was reported to have passed a similar judgement when a companion among the helpers (Ansar) was found killed within a Jewish community but no one knew who killed him among them.

According to the customary law of the Arabs before Islam, it was the responsibility of the claimant to produce witness for the validity of his claim. But where such became practically impossible then it was left for the one who denied such an allegation to take an oath so as to free himself from the accusation of the former. The Shari'ah confirmed this laudable principle and in this respect the Prophet (SAW) was reported to have said: "It is the responsibility of the claimant to produce witness (for his claim) whereas taking oath lies upon the accused who denies the allegation."[29]

Sharafuddin (1969) and Qardawi (1985) observed that the Arabs claimed to have some knowledge of hidden things and also held to superstition beliefs and practices but the shari'ah openly rejected such claims. For instance, when a person intended to embark on something, then he would throw a stone at a bird, if the bird flew towards the right hand direction then he could go ahead and execute his plan, but if it flew to the left hand direction then he would postpone such an action because according to their belief there may be

no success in such an undertaking. The Arabs sometimes sought to know success through divination of arrow. It was a system in which they designed three arrows, labelling, the first one My Lord commanded me; the second one: My Lord has forbidden me; while the third one would be left blank without anything on it. So, if a person intended to do a certain act and he wished to know whether it was to his advantage or not he would throw the three arrows. If the first one came out then he could proceed and execute his plan. If the second one came out then he postponed his plan whereas if the third one came out then he would throw them all again until either the first or the second one came out. The shariah totally rejected this practice as clearly stated in the Qur'ān: "... (forbidden) also is the division by raffling with arrows...." (Ma'idah 5:4). The Qur'ān explicitly states that the only way through which certain hidden knowledge could be uncovered is through divine revelations.

Therefore, we can say that the Arab way of life described above necessitated the sending of a messenger among them to salvage the situation from total disarray with regards to beliefs, chaotic customs and traditions, so as to liberate the weak ones from the domination of the powerful. But Islamic Law retained and confirmed some of the Jahiliyyah customs and traditions that were in consonance with the universal objectives and principles of the religion while it denounced and rejected on the other hand anything that contradicted it.

2.2. *DEFINITION OF SHARIAH AND ITS SCOPE*

The word shariâh literally means the straight path or a way to be followed leading to a watering place. The first usage could be seen from the Qur'ānic verse where Allah says: "Then we put thee on the (right) way of religion, so follow you that (way) and follow not the desires of those who know not." ("Jāthiyah 45:18).

Technically, the word shariâh is used to connote what Allah has legislated as explained by the Prophet Muhammad (SAW). The laws have been called the shariâh for their resemblance to a watering place. This is because the shariâh in essence is the nourishment of the soul and a means of survival to human life in the same manner as the watering place is to human beings, animals and other living creatures.[30] In other words the shariâh refers to the various laws stipulated by Allah for his servants as contained in the Qur'an and the Sunnah of Prophet Muhammad (SAW) composed of his actions, speech and silent approvals. The Shariah came to the Prophet (SAW) through divine revelation or inspiration and he was charged with the responsibility of explaining it to the people. He conveyed the message of the Qur'ān to the Muslims and explained its contents as well. He elaborated things mentioned in the Qur'ān briefly, specified the application of laws related in general terms, and restricted the application of some laws mentioned unrestrictedly. The example of the first one could be seen in the Prophetic sayings and actions with regard to the correct performance of Hajj which was mentioned in the Qur'ān briefly.

The example of the second one could be understood from the Sunnah which prohibited the murderer from inheritance where the Prophet (SAW) said: "The murderer is not entitled to the inheritance of the deceased!"[31] The example of the third one could be understood from the Sunnah that restricts the amputation of the hand of a thief to the wrist but not to the elbow or shoulder, since the Qur'ān simply mentioned the hand without any specification." As to the thief male or female, cut off his or her hands, a punishment by way of example, from God for their crime....." (Mā'idah 5:4).

According to Taftazānī as in Khudrī (1967) the revelation to the Prophet Muhammad (SAW) is the Sharī'ah per excellence. The totality of God's commandments concerning the activities of man is squarely based on His wills bounded by no limit because He does whatever He wants and He cannot be questioned for His acts. Thus, the duty of mankind is to follow the Sharī'ah but not to judge it for causes or happenings through human intellect.

The knowledge of the Sharī'ah is essentially acquired either through Naqalīyyāt (transmitted) or Aqalīyyāt (human intellect). The former refers to the knowledge transmitted to mankind from the law-giver, Allah, through His messengers and Prophets while the latter refers to the knowledge obtained through the use of human intellect or reasoning.

The terms Sharī'ah, al-Dīn or Islām and Millah could be used interchangeable as synonyms. The word Islām is derived from the world aslama which literally means complete surrender to the will of God. It also

includes both internal and external submission to the will of the Almighty God. The Holy Qur'ān declares the only acceptable religion in the sight of Allah is Islam. (Āli Imran 3:19). In another place the Qur'ān states: "if anyone desires a religion other than Islam never will it be accepted of him and in the hereafter he will be in the ranks of those who have lost (all spiritual good)." (Āli Imran 3:85). Furthermore, the Qur'an reads: "... This day I have perfected your religion for you, completed my favour upon you, and have chosen for you Islam as your religion." (Mā'idah 5:3).

Mahmasānī (1961) observed that Islam was built upon the principle of freedom of choice as the Qur'ān says: "Let there be no compulsion in the religion. Truth stands out clear from error; whoever rejects evils and believes in God has grasped the most worthy hand-hold that never breaks..." (Baqarah 2:256). This is because compulsion and religion are incompatible with one another as the religion depends upon faith and will, which would be meaningless if assumed to have been obtained by the use of force. Qadri (1981) states that Islam is a complete code of life. The life of a Muslim consists of no dichotomy in what he has to do in secular transactions, social interactions, individual interest, national and international demands, nay in all relations of human endeavour, there is a complete direction contained in the institution which a Muslim has to follow. The name given to this whole system of Islam is called the Shariāh which led to the formation of series of sciences, highest in human learning and most pious for the next world.

In Islam, the term Shariâh is more than simply a law because according to the European culture, "Law" is a technical term applied to certain rules or orders which are enforced by the power of state or nation whereas Shariâh to the Muslims refers to the complete guidance that emanates from the Creator Allah covering all aspects of human life. Thus, Shariâh is a necessity for the Muslims to live a descent life as human beings destined to live as Allah's representatives on earth (Khalifatullah)! Doi (1984), observed that it was the right way that led mankind to success both here and the hereafter. It regulated the conduct of both the individual and the society in general. Its directives covered all aspects of human life as mentioned above such as rituals, personal character, moral conduct, family affairs, socio-political and economic affairs, national and international relations. In fact, it covered every aspects of human life to such an extent that human behaviour such as sleeping, eating, visiting toilets, manners of dressing etc are properly regulated by the precepts of the Shariâh. In this respect, Allah the Most High says: "..... Nothing have we omitted from the book for your guidance)...." (An'ām 6:38).

The directives of the Shari'âh reveal to us what is good and what is bad, beneficial and harmful to the individuals or the society at large. Similarly, the directives, cover human aspects regarded as virtues which the Muslims are expected to cultivate and encourage and on the other hand to suppress and guard against vices and evils.

The scope of the Sharī'ah therefore embraces a complete code of faith and practice. Hence it primarily consists of Aqā'id (beliefs) and A'māl (actions). In other words, it consists of the actions of the heart and limbs of the body, as opined by Ibn Khaldūn (1958). The major components of the Sharī'ah according to Khudrī (1967) and the majority of the Muslim writer's on the history of Islamic Law are as follows:

a) Laws related to 'Aqā'id (beliefs) such as belief in Allah, the last day, angels, messengers, revealed books, and Qadar (predestination) etc. This aspect of the law is studied under 'Usūl al-Dīn or 'Ilm al-Kalām or Fiqh al-Akbar, or 'Ilm al-Tawhīd wa al-Sifat.

b) Laws related to the cultivation of good manners or morality like the necessity for trustfulness, fulfillment of covenants, trustworthiness and prohibition of bad behaviour such as lying, deception, non-fulfillment of promise etc. The field of study dealing with this aspect of the law is called 'Ilm al-Akhlāq or al-Tasawwuf.

c) Laws related to 'Ibādāt (acts of worship) and Mu'āmalāt, such as Salāh (prayer), Sawm (fasting), Zakāt (alms giving), transactions or contracts such as sales, gifts, hire, business partnerships, bequests etc. This aspect of the law is studied under the field of Fiqh.[32]

2.2.1. DEFINITION OF FIQH AND ITS SCOPE

The term Fiqh, literally means or connotes understanding without any restriction in the same way as someone tries to discern the objectives of a

speaker from his speech. In this respect, Allah the Most High says: ".....But what hath come to these people, that they fail to understand a single fact?" (Nisa 4:78). Fiqh, Technically, refers to all the religious laws brought by the Shari`ah, whether they relate to issues of beliefs (ʿAqāʾid), moral acts (ʿAkhlāq), acts of worship (ʿIbādāt), or transactions (Muʿamalāt). Sharafuddīn (1969), and Zaydān (1982) observed that the Qur'an also uses the term Fiqh in relation to understanding the Islamic laws in general. The Most High said: "Nor should the believers all go forth together: If a contingent from every expedition remain behind, they could devote themselves to studies in the religion, and admonish the people when they return to them, that thus they (may learn) to guard themselves (against evil)." (Tawbah 9:122). The Prophet (SAW) was reported to have said: "Whoever Allah so desires with goodness, He would make him learned in the religion."[33]

However, when the study of different aspects of knowledge became more advanced and the scope became broadened, then all the branches of knowledge were given their proper and specific names. Although, the term Fiqh was formerly used to include matters of belief, moral acts, acts of worship and transactions later on the usage of the term was restricted to the understanding of laws relating to practical matters (Ibādāt and Muʿāmalāt) only to the exclusion of other things.

Sharīf al-Jarjānī the author of Taʿrīfāt defined Fiqh as the knowledge of Islamic laws dealing with practical matters from their detailed evidences, which

in other words is the knowledge derived through subjective opinion or independent decision in a legal question (Ijtihād). This form of knowledge requires careful consideration and discernment. Therefore, based on this definition, it is not proper to call Allah a jurist because nothing is hidden unto Him.

Later on, the meaning of Fiqh technically changed according to Zaydān (1982) and Mahmasānī (1961), to the science of the derived legal rules as acquired from their particular sources. For example, where Allah says: "Nor come nigh to adultery: for it is a shameful (deed) and an evil opening the road (to other evils)." (Isrā' 17:32). This is a detailed evidence which relates to the specific issue of Zinah, indicating its specific law, which is prohibition.

Therefore, the new definition of Fiqh clearly excludes the laws related to beliefs and moral acts. Hence it becomes limited to laws of practical nature only dealing with acts of worship and transactions or contracts as mentioned above. It is also clear from the above discussion that Fiqh is a branch among the branches of the Shari'ah and as such the scope of the latter is much wider than the former.

Thus, according to the Sunni scholars, the scope of Fiqh was primarily composed of two major elements that is 'Ibādāt and Mu'āmalāt. The former deals with religious observances mainly concerned with the affairs of the hereafter, such as the laws governing prayers, fasting, pilgrimage etc: while the latter is concerned with the affairs of this world pertaining to the laws

regulating the conducts between individuals or communities as the case may be. This basically includes all forms of contracts whether specific or general. This section is further sub-classified into:

a) Laws governing the establishment of the Muslim family structure dealing with issues related to the institution of marriage, divorce, legal period of retirement (Iddah), inheritance, child custody, guardianship, bequests etc. This branch of the study is presently known as the law of personal status (al-Ahwāl al-Shakhsiyyah).

b) Laws relating to monetary transactions either between individuals or communities such as the contract of sales, hire, labour, gift, pledge, loan, deposit, partnership, joint investment, surety, damages, banking and insurance etc. This is today called the law of transactions or company law (al-Qānūn al-Madanī).

c) Laws related to code of procedure which elaborates on the laws governing litigations, law suits, law of evidence, oath taking etc. This falls today under the law of Murāfa'āt.

d) Laws relating to non-Muslims (dhimmis) staying under the Islamic State. This part of the law is known as special laws.

e) Laws regulating the foreign affairs of an Islamic state with other nations during peace or war. This falls under the laws or international relations.

f) Laws governing the organisational structure of an Islamic state which define the rights of the individual within the state and the relationship between the rulers and the ruled as well as the system of appointing and deposing a political head where it becomes absolutely necessary. This falls within what is called today constitutional law.

g) Laws governing the income of the state and ways of disbursing the fund, wherein the Muslim jurists have already elaborated on the topics concerning the management of Zakāt, ghanimah, fay', kharāj etc. This falls under the laws of financial and industrial relationships within the economic sector of the state.

h) Laws dealing with the relationship between the individuals and the state with particular reference to crimes and their prescribed punishments. This aspect of the law deals with felonies and crimes, such as homicide, theft, fornication, wine drinking, defamation of character, and their prescribed punishments (hudūd), law of equality (Qiṣās) and lighter punishments (Ta'zīrāt). This section also includes issues related to claims and damages. This falls under what is called the criminal law (Hudūd wa al-Ta'zirāt).[34]

According to Sharafuddīn (1969) and Qardāwi (1985), there is no room for much speculation with regard to the first part of the subject matter of Fiqh, that is 'Ibādāt (acts of worship) unlike in the sphere of Mu'āmalāt (transaction). This is because the essence of offering emotional services is for one to gain

Allah's pleasure and closeness to Him. Thus, Allah can only be worshipped with what He has prescribed in the Sharī'ah. The Muslim jurists, therefore, conclude that acts of worship (rituals) cannot be arrived at through mental effort only or analogical deductions.

However, the sphere of Mu'āmalāt (contracts and transactions), on the other hand changes from one generation to another and so the precepts of the Sharī'ah simply addresses the major issues while the detailed practical implementation was left for the consideration of the jurists at the appropriate time; hence they formulated the principle like: "The basic assumption in matters related to the sphere of Mu'āmalāt is that everything is lawful except what contradicts the texts of the Sharīàh."(35)

Thus, it is true to say that laws governing many issues in this field to a large extent were based on Ijtihād, and therefore it is possible to have someone with a contrary opinion as long as it is arrived at through constructive reasoning or clear evidence, unlike in the sphere of the acts of worship pertaining to specific things that must be known by all Muslims which accommodate no contrary opinions.

2.3. THE DEVELOPMENTAL STAGES OF ISLAMIC LAW (FIQH)

Islamic Law (Fiqh) as already defined deals with the laws governing practical matters of the religion as contained in the Qur'ān and Sunnah. It also includes what the Muslim scholars among the companions. Tabi'ūn (followers), Tãbi' al-tābi'ūn (followers of the followers) and the leading jurists

(al-ʾA'immah al-Mujtahidūn) were able to arrive at on certain issues concerning things that have no clear text (naṣṣ) either in the Qur'ān or Sunnah. This is because the Muslim jurists generally did not fold their arms to new developments and happenings but they exerted their efforts and determined the Islamic stand on such issues through acceptable derivative procedures from the available texts, or analogical deductions based on similar previous happenings and sometimes they passed the decisions based on public interest (Maṣālih). However, it is only the qualified jurists who are capable of giving legal decisions (Fatawa) on new matters pertaining to religious issues because of their delicacy and importance.

Shafafuddīn (1969) observed that after some time, there emerged two camps within the circle of the jurists: One group restricted its interpretation of the precepts of the Sharī'ah to the available texts (nusus) only, its followers were known as the traditionists (Ahl al-Hadīth) while the other group went beyond the surface meaning of the texts to a much deeper sense and its adherents were called the opinionists (Aḥl al-raʾy). The jurists of these two distinct camps maintained different derivative procedures which eventually led to the growth and blooming of Fiqh. The different developmental stages which the Fiqh underwent, according to many writers on the historical development of Islamic Law are as follows:

a) The legislative period which started from the beginning of the Prophet's mission to his death in 632C.E.

b) The period of the rightly guided caliphs which started from the time when Abu Bakr became the leader of the Muslim community in 11AH to the end of the period of the four rightly guided caliphs in 40AH.

c) The period of the junior companions and the senior Tabi'in, which started from the time when Mu'awiyyah came to power in 41AH and continued upto the fall of the Umayyad dynasty in the first part of the second century after Hijrah.

d) The period of the leading jurists which started from the early part of the second century after Hijrah to the middle of the 4th Century after Hijrah.

e) The period of stagnation which started from the middle of the 4th Century after Hijrah to the downfall of the 'Abbāsid dynasty in 656A.H.

f) The period of resurgence which started from the fall of the 'Abbāsid dynasty in the 7th Century after Hijrah to the present day.[36]

2.3.1. THE FIRST DEVELOPMENTAL STAGE :

The Legislative Period

This age constitutes the first stage in the development of Islamic Law. It commenced with the beginning of the mission of the Prophet Muhammad (SAW) in 610 B. H. and came to an end with his death in 632 B. H. as indicated by Mahmasāni (1961), Khudri 1967), Qattān (1976), Sharafuddin (1969), and Qadri (1981). The various writers in the history of Islamic Law regarded this period as the most important stage of Fiqh as it served as the

foundation for the remaining periods that came after it. This is because the fundamental legislations were completed during this period. Fiqh, in this period was mainly that of Wahy (revelation). The precepts of the Sharī'ah were revealed to the Prophet (SAW) both in meaning and wording (al-Qur'ān) and sometimes in meaning only (al-Sunnah), which he explained to the people. Thus the basic source of Islamic Law is the revelation. Certainly, the Ijtihād of the Prophet (SAW) and that of the Sahābah all go back to the revelation as we are going to explain in due course.

2.3.1.1 LEGISLATION BEFORE HIJRAH

The Qur'ān is the Holy book that was revealed to Prophet Muhammad (SAW) in piecemeal. The first revelation came to him in the cave of Hira, where he used to seclude himself, on the seventeenth night of Ramadan, making him the seal of the Prophets while he was forty years old. The first revelation according to Suyūtī (n.d) and Qattān (1986) was Sūrah al-'Alaq, where Allah said "Proclaim! (or Read!) in the name of thy Lord and cherisher, who created. Created man out of a (mere) clot of congealed blood: Proclaim! And thy Lord is Most Bountiful. He who taught (the use of) the pen, taught man that which he knew not." (Alaq 96:1 - 5).

The Qur'an consists of one hundred and fourteen chapters beginning with Sūrah al-Fātihah ending with Sūrah al-Nās. The Prophet (SAW) was unlettered (Al-Ummī) because he had never learnt the art of reading or writing from any person, yet, he was able to transmit the knowledge of the new

revelations to the companions and after explaining it, he usually directed one of his scribes to record it on any available writing materials of the time such as leaves, woods, stones, bones etc. The Prophet (SAW) maintained competent scribes who recorded the revelations. Some of the scribes were engaged in this work for quite a long period while some of them participated in the task for a short period.[37] Zayd ﷺ. Thabit in particular was said to be the permanent scribe of the revelation and other related issues for which he was said to have no other assignment besides it. The materials upon which the revelation was recorded down were kept under the custody of the Prophet (SAW). It has also been reliably reported that most of the companions committed the revelation to their memories.

According to Khudrī (1967) and Qaṭṭan (1986), the revelation of the Qur'ān was completed in a period of twenty-two years, two months and twenty-two days. The revelation of the Holy Qur'ān fell within two distinct periods, that is the period before and after Hijrah, respectively. This refers to the first 13 years of the Prophet's stay at Makka and the revelations received at that time were termed Makkī, while revelations received at Madina after the migration were known as Madanī and this period lasted for about ten years.

In the opinion of Shāṭibī (n.d), Khuḍrī (1967), and Zaydān (1982), the Makkan and Madinan revelations have some distinctive features that distinguish one from the other. For example most of the Makkan chapters are short in nature as against the Madinan chapters which are generally longer.

Again, the Makkan revelations discussed extensively on matters related to beliefs (Âqîdah) but do not say much about the laws of practical matters except in a form of universal and general guiding principles, while the Madinan revelation concerns itself more with legislative aspects related to human obligations. The early Makkan revelations in particular explained clearly the stand of Islam on the different modes of worship that were widespread then within the Arabian Peninsula especially idol worshipping. The Arabs claimed that they worshiped such idols as intermediaries between them and the true God, since they believed Allah was the sole creator of the earth and heaven. The Qur'an openly challenged the idolators as to why they worshiped things that could neither bring any benefit not harm to them?

The Qurayshites refused to recognise the messengership of Muhammad (SAW) on the simple pretext that he was a human being like them. The Qur'ân reads: "What kept men back from belief when guidance came to them was nothing but this: they said: "Has God sent a man (like us) to the (His) Apostle?" (Isra 17:94). This assertion was clearly refuted with another Qur'anic verse saying this had been the established tradition. "And before thee also the Apostles we sent were but men to whom we granted inspiration: if you realise this not, ask of those who possess the message." (Nahl 16:43). Again when the Arabs asked why the Prophet (SAW) ate food and went to the markets, the Qur'an stated: "And they say what sort of an Apostle is this, who eats food and walks to the markets?..." (Furqân 25:7). The revelation strongly objected to this

claim saying" "And the apostles whom we sent before thee were all men who ate food and walked to the markets...." (Furqān 25:20).

The Makkan revelations further commands the believers to reflect upon the clear signs that confirm the great power of Allah. The verses also condemned strongly the Qurayshite's blind worship of their parents and forefathers. In this regard Allah says: "When it is said to them: Follow what God hath revealed. They say: Nay! we shall follow the ways of our fathers. What! even though their fathers were void of wisdom and guidance?" (Baqarah 2:170).

2.3.1.2 LEGISLATION AFTER HIJRAH

The Prophet (SAW) was instructed to migrate from Makka to Madina. This led to the formation of the first Islamic State in Madina formerly known as Yathrib, under the leadership of the Prophet (SAW). According to Sharafuddin (1967) and Zaydān (1982), during this period, there appeared the serious need for legislation concerning matters of practical nature, whether such related to the life of the individual in particular or the society at large. The Lawgiver, Allah, legislated rules governing acts of worship (ʿIbādāt), jihād, family affairs and its related issues. The revelation also addressed matters related to crimes and punishments as well as contracts of transactions (Muʿāmalāt) such as stating the relationship between the ruled and the rulers or the relationship between the Islamic State and non Muslim countries. The Madinan revelation further discussed the problems of the newly formed Islamic State such as the issues related to the interaction between the Muslims and the people of the

Book (Aḥl al-Kitāb) and the hypocrites (Munāfiqūn) who hid their unbelief and showed outward belief.

Khudrī (1967) observed that the legislative verses of the Holy Qur'ān were usually revealed to the Prophet (SAW) to provide solutions to certain questions raised by the Muslims or the non-Muslims. The situations or circumstances leading to the revelation of particular verses are known as Asbab al-Nuzūl, which are very important as far as the interpretation of the meaning of the Qur'ān is concerned as opined by all the experts of 'Ulum al-Qur'ān (Sciences of the Qur'ān) such as Imām al-Suyūṭī (n.d), Zarkashī (1958), Qaṭṭan (1986) etc, just to mention a few. Therefore, let us give some few examples to illustrate this point under discussion.

It has been reported that the Prophet (SAW) sent Marthad al-Ghanawī to Makka so as to bring out some weak Muslims to Madina. On his arrival a beautiful and wealthy polytheist woman came to him for an illicit intercourse which he rejected for fear of Allah. Then she requested if he could marry her to which he consented subject to the approval of the Prophet (SAW). When he came back to Madina, he narrated the matter to the Prophet (SAW) and requested his permission. Then, soon Allah revealed the following verse: "Do not marry unbelieving women (idolators), until they believe. A female slave who believes is better than an unbelieving woman even though she allure you. Nor marry (your girls) to unbelievers until they believe. A male slave who believes is better than an unbeliever even though he allure you..."(Baqarah 2:221).

Some of the laws revealed giving answers to certain questions asked include: "They ask thee concerning wine and gambling, say: In them is a great sin an some profit for men: but the sin is greater than the profit." (Baqarah 2:219). "They ask thee how much they are to spend say: "What is beyond your needs....." (Baqarah 2.219). They ask thee concerning women's courses, say: They are a hurt and a pollution: so keep away from women in their courses, and do not approach them until they are clean. But when they have purified themselves, ye may approach them in any manner, time, or place, ordained for you...." (Baqarah 2:222).

The Prophet (SAW) was reported to have sent Abdullah b. Jahsh as the leader of an expedition to ambush the Quraysh caravan in which there was 'Amr b. Abdullah al-Hadarami and three others. According to the narration of Khudri (1967) and Sharafuddin (1969) the Muslims managed to kill one of the Qurayshites and take the remaining two as captives as well as their properties as booty. The Arabs started condemning this act since the incident took place within the sacred months (al-ash-hur al-hurum).[38] However, the revelation rejected their claim saying: "They ask thee concerning fighting in the prohibited months, say: fighting therein is a grave (offence): but graver it is in the sight of God to prevent access to the path of God, to deny Him, to prevent access to the sacred mosque and drive out its members ...." (Baqarah 2.217).

Sometimes when an issue was brought before the Prophet (SAW) and it happened that he too did not know the correct legislative procedure governing

such a case, he would ask the complainant to exercise patience until there came a new revelation on the matter. For example when the widow of Sa'd B. al-Rabi came to the Prophet (SAW) complaining: "Oh messenger of Allah! these are the two daughters of Sa'd who died as a Shahid in the battle of Uhud when fighting together with you. Now his brother has taken all what he has left without giving anything to them and you know they cannot get married unless they have something". The Prophet (SAW) replied. "Allah will soon decide on the matter", after which the verses of inheritance were revealed: "God (thus) direct you as regards your children's (inheritance): to the male a portion equal to that of two females: it only daughters two or more, their share is two-thirds of the inheritance; if only one, her share is a half...." (Nisā'4:11).

Shawkānī (n.d) reported that the Prophet (SAW) was once asked concerning sea water and whether it was lawful to use it for ablution or not. Then, he replied: "Its water is pure and its carrion too is lawful."[39] Khudri (1967), observed that legislative verses revealed not connected with any incident or question are generally very few. In such cases the Law giver revealed them when it was timely for the legislation on the relevant issue because of imperative social need. Some of the laws that came under this nature of legislation: are the laws governing Shūrah, explanations pertaining to the specific amount of Zakāt to be paid by those who owned the Nisāb, some specific crimes and their prescribed punishments etc. However, sometimes the relevant law might not be revealed to the Prophet (SAW), hence he was left

with the option of exerting his own effort (Ijtihad) as had happened in the case of the captives of Badr.

2.3.1.3 SOME DISTINGUISHING FEATURES OF LEGISLATION DURING THIS PERIOD

The Islamic legislation was basically established during this period on the basis of looking after people's interest and aversion of evils. This is one of the greatest general principles followed by Islamic legislation. The Qur'ān has openly indicated that it was purposely revealed for the betterment of mankind hence the essence of having commands and interdictions (Awāmir wa Nawāhi). In this respect, the Qur'ān states: "For He commands them what is just and forbids them what is evil: He allows them as lawful what is good (and pure) and prohibits them from what is bad (and impure)...." (al-'a'rāf 7:157). Some of the basic distinguishing teachings of Islamic legislation during this period based on the above principles are as follows:

1. Gradual advancement of the Islamic law (al-Tadarruj fī al-Tashrī); The Law-giver followed the gradual advancement in the introduction of the Islamic legislation and therefore did not bring the whole set of laws at once. The Qur'ān was not revealed at once; so also the Sunnah did not emerge all at a time. In most cases the legislative verses were revealed as a result of certain questions posed to the Prophet (SAW) or to explain the Islamic laws governing the occurrence of an incident and sometimes the laws were revealed when the Law-giver felt it was timely for the introduction of such a law, as already mentioned

above. These factors combined together characterised the Islamic legislation with gradual advancement. This is why when the unbelievers asked: "Why is not the Qur'ân revealed at once?" They were replied: "Thus we revealed it in peacemeal, so that we may strengthen the prophet's heart thereby, and we have rehearsed it to him in slow, well arranged stages, gradually." (Furqân 35:32).

This gradual mode of revelation also made it lighter on the Muslims in terms of comprehension and practice as well as its linkage with time and conditions responsible for certain specific legislation. The gradual advancement in Islamic legislation could be further sub-classified according to Zaydân (1982) as follows:

a) **Periodic Advancement:** This refers to the fact that various laws were not revealed all at once and so some were revealed much earlier than others.

b) **Systematic Advancement:** The early Muslims were not required to do a lot of things at the beginning of the Islamic call but they were gradually introduced to many things little by little in a manner that the first one served as an introduction for the acceptance of the subsequent ones.

According to Sharafuddin (1969) the early revelations concentrated basically on issues related to beliefs (Aqa'id), messengerhood (Risalah), resurrection (al-Akhira) and recompense (Hisab), but when people became firmly established in the religion, then the rules of the lawful and the prohibited

(al-Halāl wa al-Harām) were introduced. A'isha, the mother of the faithful was reported to have said: "Among the first things revealed in the Qur'an were issues related to paradise and hell-fire until when people became fully established in the religion, then laws related to the lawful and the prohibited were revealed". She went on to say: "Had it been in the first place the law was revealed saying: Do not commit Zinah (adultery or fornication), probably people would have replied: We will never stop committing Zinah or had it been in the first place the law was revealed saying: Do not take alcoholic drinks, people would have reacted: we will never abstain from taking alcoholic drinks!

In this regard, let us cite the prohibition of alcoholic drinks which was done in this gradual manner. In the first place, the revelation explained the advantages and disadvantages of alcoholic drinks saying that the latter were greater than the former. In the second instance, the revelation stopped the Muslims from praying while in the state of intoxication. Then, finally the revelation came with a clear-cut prohibition of alcoholic drinks.

During the early days of Islam, when the Muslims were being persecuted for their religion they were not commanded to embark on physical Jihād because of their weak numerical strength but in contrast they were commanded to forgive and exercise patience towards their enemies and to refrain from fighting them. In this regard, Allah says: "Follow what you are taught by inspiration from thy Lord; There is no god but He. And turn aside from those who join gods with God." (An'ām 6:106). When the Muslims

became strong enough, the Law-giver, permitted them to fight their enemies and to defend themselves in the face of persecution and aggression. Finally, fighting later on became an obligation on the believers as clearly indicated in the following verses: "Fight in the cause of God those who fight you, but do not transgress the limits; for God loveth not the transgressors." (Baqarah 2:190). In another place, the Qur'ān reads: "And fight them on until there is no more Tumult or oppression, and there prevail justice and faith in God altogether, and everywhere....." (Anfāl 8:39).

c) The law was grdually promulgated by revealing the general principles, which were subsequently followed by detailed explanations. The Makkan revelations were generally characterised by universal statements whereas those of Madina were detailed and elaborate.[40]

2. **Removal of difficulties**. This is another principle upon which Islamic law was established. For example, fasting was made obligatory on people who are physically sound and not on a journey, while on the other hand whoever is sick or on a journey is allowed to break on condition that such number of days missed must be paid back later on. In this respect, Allah says:

> "O ye who believe! fasting is prescribed to you as it was prescribed to those before you that ye may learn self-restraint; fasting for a fixed number of days, but if any of you is ill, or on a journey, the prescribed number (of days) should be made up from days later....." (Baqarah 2:183-184).

Jihād, was made obligatory on the Muslims but the disabled and the sick people are exempted if they absent themselves from the battle field in line

with the Qur'anic verse: "It is no fault in the blind nor in one born lame, nor in one afflicted with illness....." (Nūr 24:61).

Prayer is made obligatory to be offered in a standing position. However, if for one reason or the other a person cannot do it in that manner, then he is allowed to offer it sitting or lying or by signs and gestures as the case may be. Again, ablution using water is made a pre-condition for the valid performance of Salāh (prayer) but where and when a person was unable to perform it either as a result of sickness or lack of water, then he is permitted to do dry ablution as contained in the Qur'ān:

> "O ye who believe! When ye prepare for prayer, wash your faces, and your hands (And arms) to the elbows; Rub your heads (with water); and (wash) your feet to the ankles. If ye are in a state of ceremonial impurity, Bathe your whole body. But if ye are ill, or on a journey or one of you cometh from offices of nature, or ye have been in contact with women and ye find no water, then take for yourselves clean sand or earth. And rub therewith your faces and hands, God doth not wish to place you in a difficulty, but to make you clean, and to complete His favour to you, that ye may be grateful." (Mā'idah 5:7).

Allah does not instruct His servants to perform any duty except what is within their capability, as clearly stated in the Qur'an: "On no soul doth God place a burden greater than it can bear....." (Baqarah 2:286). In the same way the Sharī'ah, commands a Muslim to maintain his wife or wives according to his means or earnings. "Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what God has given him. God puts no burden on any person beyond what he has given him...." (Ṭalāq 65:7).

Furthermore, there is no blame on anyone who is forced by necessity to utilise the prohibited things to save his life from destruction. "But if one is forced by necessity, without wilful disobedience nor transgressing due limits, then he is guiltless." (Baqarah 2: 173). This provision gave birth to one of the general principles of the Islamic law which says: "Necessity knows no bounds (al-Darurāt tubih al-Mahdhurāt).

This point under discussion is quite evident to any researcher in Islamic law because there are a number of clear texts indicating that the Law-giver intended to make things easy and light on the believers rather than placing difficulties and hardships on them in His legislation. In this regard. Allah says: ".....God intends every facility for you; He does not want to put you to difficulties....." (Baqarah 2:185). In another place, the Qur'an states: "God doth wish to lighten your (difficulties) for man was created (basically) weak (in flesh)." (Nisā'4:28). Again the Qur'ān states: ".....God doth not wish to place you in a difficulty, but to make you clean, and to complete his favour to you, that ye may be grateful." (Mā'idah 5:7).

There are many 'Ahādith in line with this principle. It has been reported that, whenever the Prophet (SAW) was given two alternative courses, he always opted for the simpler one, as long as such did not amount to an offence.[41] Again the Prophet (SAW) was reported to have said: "Make things easy and not difficult."[42] The Muslims are also allowed to offer Salāh (prayer) wherever they found themselves as long as the spot is clean but not necessarily

in the mosque because of the prophetic tradition which says: "The earth has been made a mosque for me, and its sands pure (for acts of worship)."[43]

3. **Qillat al-Taklīf** (Limitted burden): The legislation during this period also did not over burden the believers with heavy duties because doing so would have brought difficulty and unnecessary hardships to the people which the Sharī'ah aimed at removing. When a person is asked to do a few things impliedly he has less problems as against the person asked to do many things. This falls in line with the Qur'anic advice where Allah says: "O ye who believe! ask not questions about things which, if made plain to you, may cause you trouble but if you ask about things when the Qur'ān is being revealed, they will be made plain to you.... Some people before you did ask such questions, and on that account lost their faith." (Mā'idah 5:104-5). In another place, the Qur'an states: ".....Our Lord! condemn us not if we forget or fall into error; our Lord! lay not on us a burden like that which you didst lay on those before us, our Lord! lay not on us a burden greater than we have strength to bear. Blot out our sins, and grant us forgiveness. Have mercy on us. Thou art our protector; Help us against those who stand against faith." (Baqarah 2:286).

It has been reported that the Prophet (SAW) said: "Surely, Allah has prescribed certain things, do not neglect them, and He has set certain limits, do not transgress beyond them, and He has proscribed certain things, do not violate them; while He kept quiet on certain things deliberately as a mercy for you, therefore do not ask unnecessary questions about them."[44]

In another instance, when the Prophet (SAW) was asked concerning Hajj, whether it was obligatory for every Muslim to perform it annually, he replied: "If I said yes it would have been mandatory, leave me concerning anything that I kept quiet over it, no doubt some of the people who came before you were destroyed as a result of their numerous questions coupled with their disagreements with the prophets sent to them."[45]

4. Promotion of people's welfare (Tahqiq al-Maṣlahah): This is another basic principle upon which Islamic law was established. If one critically, looks at the Islamic legislative system, one will discover that all what the Law-giver Has legislated is for our benefit either individually or collectively. For example the acts of worship are meant to train the soul as well as to bring about strong bond of relationship between man and his creator in addition to what it brings pertaining to societal unity.

In the sphere of Mu'āmalāt (contracts and transactions), the Law-giver states certain laws through which the people can benefit from one another. Islam has simplified many things in the area of human transactions to the extent of allowing a person to sell certain items which he may not possess at a material moment while he receives the money promptly to solve his urgent needs, on the condition that he will surrender such items to the buyer at a stated time. This form of business transaction in Islam is known as bay' al-salam (sales of immediate payment against future delivery). Similarly where a person has some money but he has no time to run business with it so as to increase it he can

simply give it to someone who can run the business for them on the condition that they are going to share the profit on a certain agreed formula. In this manner, the two can derive some benefits for themselves and this form of business transaction is known as Mudárabah (partnership).

Therefore, Islamic law in a general term aims at protecting people's welfare individually and collectively. However, when there is a clash between individual's interest and that of the society at large, then the latter shall prevail. This principle is one of the many factors that contributed towards perpetuality and consolidation of Islamic law.

5. Abrogation (al-Naskh): This refers to the process of removing an earlier law and replacing it with a recent one. Certainly, the law of abrogation took place in Islamic legislation during the prophetic period only. The essence of abrogation is nothing more than looking after public interest as well as the removal of hardships and difficulties from the believers. Here are some few cases of abrogation during this period for the purpose of illustration.

a) Initially, the waiting period ('Iddah) for a widow was one complete year and it was an obligation on the husband to leave wills (waṣiyyah) in her respect concerning her feeding and shelter for that period. Allah, the Most High said: "Those of you who die and leave widows should bequeth for their widows a year's maintenance and residence....." (Baqarah 2:240). Then, the ʿIddah period was later on reduced to four months ten days only as the Qur'ān states: "If any of you die and leave

widows behind, they shall wait concerning themselves four months and ten days....." Baqarah 2:234).

b) In the early days of Islam, it was mandatory upon a Muslim to leave wasiyyah in respect of his parents and near relatives but this injunction was later on abrogated with the verses of inheritance specifying the shares of the parents and the near relatives. The Sunnah also came with a clear text strengthening the abrogation of this law, where the Prophet (SAW) was reported to have said: "Allah has prescribed the share of each entitled person (from the share of inheritance), and you should take note, there is no bequest to an heir."[46]

c) Formerly, the Prophet (SAW) prohibited the believers from visiting graveyards, but later on he said: "I had initially forbidden you to visit graveyards, but now you can visit them because they surely remind you of the hereafter."[47]

2.3.1.4 SOURCES OF LEGISLATION DURING THE LIFE TIME OF THE PROPHET (SAW) (MASADIR AL-TASHRI)

When Mu'adh b. Jabal was sent to Yemen as the governor, the Prophet (SAW) asked him: "How would you adjudicate cases brought to you?" He replied: "I will use the Book of Allah, Sunnah, and then my own Ijtihad". The Prophet (SAW) approved the answer of Muadh.[18] This report indicates that the sources of Islamic law are basically three and they are as follows according to Khudri (1967).

1. **The Qur'ān:**

The Qur'ān served as the principal source of legislation during the prophetic period. It was revealed by God for guidance to mankind. The Qur'ān is an evidence to itself on the trustfulness of the messengership of the Prophet (SAW) and it is a divine document upon which the Muslims turn to for solutions. Certainly, the Prophet (SAW) has delivered the message of the Qur'ān to the companions as directed. In this regard Allah says: "O Apostle! proclaim the (message) which hath been sent to thee from thy Lord. If thou didst not you wouldst not have fulfilled and proclaimed His mission...." (Mā'idah 5:67).

2. **Sunnah (Prophetic traditions):**

The Sunnah, is the second source of legislation, which is composed of the sayings, actions and tacit approval of the Prophet (SAW). It explains the Qur'ān as clearly prescribed in the duties of the Prophet (SAW). In this respect, Allah says: ".....And we have sent down unto thee (also) the message, that thou mayest explain clearly to men what is sent for them....." (Nahl 16:44). The prophetic explanation of the Qur'ān could take different shapes, such as:

a) Emphasizing what is already in the Qur'an such as the [3]Ahādith elaborating on the modalities of the daily prayers, fasting, Zakāt, Hajj; or traditions condemning Zinah, usury, homicide etc. For example, the Prophet (SAW) was reported to have said "Pray as you see me praying."[49] In another tradition, he says: "Learn the rites of Hajj from me."[50]

b) Sometimes the Sunnah may specify the application of certain laws that are mentioned in the Qur'ān without specification. For example, the Qur'ān after mentioning the prohibited women relations in terms of marriage states: ".....And except for these, all other women are lawful, provided ye seek (them in marriage) with gifts from your property....." (Nisa 4:23-24).

However, the Sunnah, prohibited the combination of any lady with her paternal or maternal aunt under the same husband at a time. The Prophet (SAW) was reported to have said: "Do not combine a lady under a wed-lock with either her paternal or maternal aunt, otherwise, you will break your bond of relationship."[51]

c) The Sunnah may sometimes limit the application of certain laws mentioned in the Qur'ān without any limitation. For example, the Qur'ān states: ".....And (again) circumambulate the Ancient House." (Hajj 22:29). This text (nass) does not specifically mention the issue of purification. The Sunnah, on the other hand states: "Circumambulation is like prayer except that Allah has permitted talking while performing it. Whoever has to speak then let him speak what is good."[52] This hadīth indicates that purification in the performance of Ṭawāf is obligatory just like in the case of Salāh (prayer).

d) The Sunnah sometimes comes with an entirely new law. The Prophet (SAW) was reported to have said: "Whoever killed an enemy in the battle field, is entitled to the arms and the clothes he was wearing."[53]

THE LEGAL BASIS OF SUNNAH

There are a number of Qur'anic verses openly indicating that the sunnah is a valid source of law. Here are some for the purpose of illustration: "O ye who believe! obey God and obey the Apostle....." (Nisā'4:59). "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....." (Nisā'4:65). "....then let those beware who withstand the Apostle's order lest some trial befall them, or a grievous penalty be inflicted on them." (Nūr 24:63). "It is not fitting for a believer, man or woman, when a matter has been decided by God and His Apostle to have any option about their decision....." (Ahzāb 33:36)."..... so take what the Apostle assigns to you, and deny yourselves that which he withholds from you....." (Hashr 59:7).

3. Ijtihād During the Prophetic Period and its effect on legislation:

Although we have already stated that Fiqh during the legislative period was purely that of revelation, yet it has been confirmed that the Prophet (SAW) exercised Ijtihād and permitted his followers to do the same. According to Qaṭṭān (1976), the Prophet (SAW) used his personal understanding on matters that can be known through trial and training related to practical life or through common experience such as things related to agriculture, medicine etc.

Therefore, he was sometimes right while sometimes he was not, as his decision was not based on the revelation. In this regard, the Prophet (SAW) was reported to have said, in connection with pollination of palm trees: ".....you (people) know best about matters related to your worldly affairs."[54]

In the same way, some issues on the other hand can be known through one's insight or personal effort based on specific circumstances and environment like the distribution of soldiers to perform certain specific roles in the battle field etc. In this regard the Prophet (SAW) was reported to have stationed his followers near some oases during the battle of Badr. Then, Habbàb b. al-Mundhir b. ʿAmr al-Jumüh came and said: "O messenger of Allah! are you commanded by Allah to stop here, in which case we have no right to move either forward or backward or is it your personal opinion?" This is because the conduct of war is based substantially on deception. He replied: "It is my own personal opinion". Habbàb suggested, "That is not the best place for us to camp, move ahead with us until we reach the closest place where our enemies get water. Then, we will camp there and destroy all the drinking places with the exception of one which we will maintain for our usage, so that we prevent the enemies from getting water". The Prophet (SAW) approved this suggestion and acted accordingly.[55]

However, other laws that emanated from the Prophet (SAW) pertaining to matters of beliefs, acts of warship, lawful, prohibition, good manners, distribution of booty, formation of contracts, settlement of disputes etc, all these

are regarded legislative ordinances because they are (mostly) based on revelation.

According to the majority of the Muslim scholars, the Prophet (SAW) exercised his own personal effort in deciding matters brought before him that had no precedent in the Qur'ān. If he happened to be right he would be confirmed otherwise the revelation would soon come and show him the alternative option. Some of the prophetic Ijtihād are as follows:

a) The Prophet (SAW) sought the opinion of the companions concerning the prisoners of Badr since he had not received any revelation on it. Abū Bakr suggested that they should be forgiven and asked to pay some monetary fine to ransome themselves, probably some of them might accept Islam. ʿUmar, on the other hand, suggested their execution on the ground that such an action might bring honour to Islam and prestige to the Muslims in general. The Prophet (SAW) accepted the opinion of Abū Bakr. The legislative verses on the matter came the following day indicating that the opinion of ʿUmar was the better option. However, the revelation did not nullify the decision already taken by the Prophet (SAW) based on his personal effort (Ijtihād). In this respect Allah says:

> "It is not fitting for an Apostle that he should have prisoners of war until he hath thoroughly subdued the land. Ye look for the temporal goods of this world; but God looketh to the hereafter; And God is exalted in might, wise. Had it not been for a previous ordainment from God, a severe penalty would have reached you for the ransom that ye took." (Anfal 8:67-69).

b) The Prophet (SAW) granted the request of the hypocrites who sought his permission to abstain themselves from the battle of Tabúk based on false claims. The revelation, later on came criticising his decision for lack of thorough verification. The Qur'ān states: "God give thee grace! Why didst you grant them exemption until those who told the truth were seen by thee in a clear light and thou hadst proved the liars?" (Tawbah 9:43).

c) In this regard we could also cite the case of Abdullah Ibn Umm Maktum who came to the Prophet (SAW) seeking for guidance but he turned his attention to a group of some influential members of Quraysh who in reality were not ready for guidance. Then, the revelation came showing its disapproval to his action. The Qur'ān reads: "(The prophet) frowned and turned away, because there came to him the blind man (interrupting). But what could tell thee, but that perchance he might grow (in spiritual understanding)?" (Abasa 80:1-3).

COMPANIONS' IJTIHĀD DURING THE PROPHETIC PERIOD

The Prophet (SAW) permitted the companions to use Ijtihād in his presence as well as when they were far away from him, according to Zaydān (1982), Qaṭṭān (1976), and Sharafuddīn (1969). As for the first one, he said to ʿAmr b. al-Āṣṣ: "Adjudicate this case! ʿAmr replied: Do I use my personal understanding in deciding the case in your presence? The Prophet (SAW) said: "Yes, if you happen to be right you have double reward but if you happen to be wrong then you have a single reward."[57]

Thus the Prophet (SAW) permitted the companions to use Ijtihād in solving some issues in his presence probably to serve as training so that they could use it effectively in his absence. He approved their Ijtihād when they were right and corrected them when they were wrong. Some form of Ijtihād condoucted by the Ṣaḥābah, during the prophetic period are as follows:

a) The famous ḥadith of Muʿādh b. Jabal in which the Prophet (SAW) sent him to Yemen as the governor already mentioned above clearly indicates his permission and confirmation of Ijtihād.

d) It has been reported that two companions embarked on a journey but they could not get water to perform ablution when it was time for prayer. So, they performed dry sand ablution (Tayammum) and offered the prayers (Ṣalāh). Later on they obtained water while it was still within the prayer time limit of the particular Ṣalāh performed with Tayammum. One of them performed ablution and repeated his prayer

but the other one did not. When the matter was narrated to the Prophet (SAW) he confirmed both of them. He said to the one who did not repeat his prayer: "You have got the Sunnah and the prayer you have performed is enough for you."[58] While he said to the one who repeated his prayer: "You have a double reward."[59]

c) When the Prophet (SAW) returned from the battle of Ahzāb, he directed the Muslims to fight the people of Banī Qurayzah, so he said to his companions: "None of you should perform Asr prayer until you reach the land of Banī Qurayzah!"[60] The companions proceeded as directed by the Prophet (SAW). Some of them stopped and offered their Asr prayer on the way when its time was due before reaching the target place, while some of them refused until they reached the destination even though it was after sunset. When the Prophet (SAW) was informed of the incident, he did not criticise any of the two parties.

d) It had been reported that a group of companions went on a journey and among them were 'Umar b. al-Khaṭṭāb and Mu'ādh b. Jabal who woke up in a state of impurity and there was no water with them. So, each one of them used his own Ijtihād. Mu'ādh made an analogy of dry purification from water purification hence he rolled himself on the sand after which he prayed. 'Umar on the other hand did not do that, but he delayed the prayer until he obtained the water and performed the ritual bath after which he prayed. When they came back from the journey,

they narrated the matter to the Prophet (SAW) upon which he explained the right line of action. He pointed out that the analogy of Mu'ãdh was wrong because it contradicted a text where Allah says: ".....And if ye find no water, then take for yourselves clean sand or earth, and rub therewith your faces and hands ....." (Ma'idah 5:6). He further explained to them the correct procedure in the performance of dry ablution (Tayammum) and finally said: "Sand purification removes major impurities as it removes minor impurities".

e) According to Sharafuddin (1969), it has been reported that when Ali (r.a.) was sent to Yemen as the governor, he adjudicated a certain case involving some people but they refused to accept his decision. So, they proceeded and presented the matter before the Prophet (SAW) for his decision. He simply said to them: "The way Ali (r.a.) had decided the case was alright."[61]

Therefore, this shows that the prophetic Ijtihad is subject to the approval of Wahy (revelation) since it is not a complete source of legislation independently on its own. On the other hand the Ijtihad of the Sahabah was based on the confirmation of the Prophet (SAW). If he confirmed it, then it became legislation for the Muslim Ummah, otherwise it is not.

2.3.1.5 DOCUMENTATION OF THE SHARIAH DURING THE LEGISLATIVE PERIOD

The prophet (saw) appointed some of his companions as scribes for the purpose of recording the revelation as mentioned earlier, yet some of the companions recorded the revelations for their personal use. The Prophet (SAW) died while the Qur'ān was fully preserved in the hearts of the believers in addition to its having been completely recorded on various writing materials but not compiled into a single volume.

However, according to Al-Khatīb (1989), the Prophet (SAW) did not appoint specific scribes for the sake of recording hadīth nor did he command for its recording. Instead he prohibited its writing initially for fear of mixing it with Qur'ān. In this regard he was reported to have said: "Do not write anything from me except the Qur'ān and whoever had written anything from me other than the Qur'ān, let him clean it off."[62]

Then, later on, the Prophet (SAW) permitted the companions to record down the hadīth and he said: "Write (from me) and there is no penalty." [63a] Thus, some of the companions recorded all what they heard from the Prophet (SAW) such as Abdullah b. 'Amr b. al-Āss while some of them entirely depended on their sharp and retentive memory such as 'Abū Hurayrah. Although, the sunnah was not substantially recorded during the prophetic period certainly it was preserved in the hearts of the Sahābah who passed such information to the later generation without any omission or commission.

Sharafuddīn (1969) observed that the legislative period ended without anything being officially documented pertaining to the science of Fiqh (Islamic Law).

2.3.2.D THE SECOND DEVELOPMENTAL STAGE: THE PERIOD OF THE RIGHTLY GUIDED CALIPHS

This period according to Khudri (1967) and Qaṭṭān (1976) started from the time 'Abū Bakr became the leader of the Muslim community in 11 A.H. after the death of the Prophet (SAW) to the end of the period of the four rightly guided caliphs in 40 A.H. When 'Abū Bakr, succeeded to the leadership throne of the Muslim community, some tribes within the Arabian Peninsula began to apostatise but due to his firmness and solid strength of the entire Muslim Ummah including both the Muhajirun and Ansar, the religion remained established. 'Abū Bakr sent some Muslim soldiers for the propagation of Islām to Iraq and Syria under the then Persian and Roman hold but he died in 13AH before seeing the fruits of his action. He was succeeded by 'Umar b. al-Khaṭṭāb as the second caliph.

The Islamic State expanded and some of the territories of the then two most powerful empires came under Islam. Thus new cities came into existence and a large number of non-Arabs embraced Islam. However, with these new developments, the Islamic State had to face a lot of problems such as the general administrations of the state, management of war booty, maintenance and the organisational structure of the army etc. 'Umar the second caliph was able to successfully find solution to these problems that arose during his reign.

The second Caliph was assassinated in 24AH and was succeeded by ʿUthmān b. ʿAffān as the third Caliph.

Mahmasānī (1961) observed that the Islamic State expanded further towards the east and the west under the reign of the third Caliph but he too was assassinated by a group of people and that marked the beginning of schism within the Muslim State. He was succeeded by ʿAli b. Abi Ṭalib as the fourth Caliph, who changed the capital of the Islamic State from Madina to Kufah. However, Muʿawiyyah the governor in Syria refused to recognise ʿAli as the rightful Caliph and he himself claimed to be the caliph. ʿAli the fourth caliph was also assassinated in 40AH. Finally the intricacies involved in all these series of episodes according to Khudri (1967) resulted into the division of the Islamic State to three political factions: The majority of the Muslim community (Jamāʿah) who recognised Muʿāwiyyah as the leader; the sectarians (shiʿa), who remained loyal to ʿAli and the Ahl al-Bayt and the secessionists (Khawārij) who condemned ʿUthmān, ʿAli and Muʿawiyyah. Therefore, by virtue of these divisions, the Islamic legal development came substantially under the impact of such political factions.

2.3.2.1 METHODS ADOPTED BY THE CALIPHS IN THE DERIVATION OF LAWS

Sharafuddīn (1969), observed that the study of Fiqh, had already started expanding and growing during the period of the rightly guided caliphs. This is because the learned scholars of this period were seriously confronted with so

many new happenings and developments which were not in existence during the period of the Prophet (SAW). Hence, they had to find solutions to such problems. They conducted Ijtihād using their understanding in the light of the general principles of the shari'ah, its fundamental concepts as well as its aims and objectives. Since Ijtihād is based on understanding, then naturally it must be accompanied with a lot of arguments and this was exactly what happened during this period.

The rightly guided caliphs followed the methodology prescribed by the Prophet (SAW) in their derivation of laws. The practice of the learned scholars among the Sahäbah was that whenever they were confronted with a new problem which required adjudication, they first of all resorted to the Qur'an, but if they could not find its law therein, they moved to the Sunnah, and if they could not find its law therein either then they turned to their opinion and passed the decision on the matter based on what they were able to arrive at through their Ijtihäd.

Sa'id b. al-Musayyib reported from 'Ali (r.a.) who said: "I said, O! messenger of Allah! certain things may later on occur that have no precedent in either the Qur'ān or Sunnah, then what are we going to do?" The Prophet (SAW) replied: "Bring such an issue to the circle of the learned men and deliberate on it amongst you, but do not decide it on the basis of a single man's opinion"([63b]).

According to Zaydān (1982), al-Baghwī reported from Maimūn b. Mahran saying whenever a new case was presented before 'Abu Bakr, the first caliph, he looked for its solution from the book of Allah, if he found the solution he would use it, otherwise he would turn to the Sunnah, or else he would consult people around him whether they were aware of any prophetic ruling on a similar case. Sometimes, some of the companions used to provide him with some useful information concerning the case in question which he consequently relied upon to pass the decision after being convinced of its reliability and authenticity. Where and when they unanimously agreed on a certain point of law concerning a particular case, he would decide it along that line but where they disagreed then he was free to pass the decision on what he felt was appropriate. However, the Ṣaḥābah resorted to opinion (ra'y) only if there was no clear text on the matter either from the Qur'ān or Sunnah. For instance, Imām Mālik narrated in the Muwatta that a certain grand-mother came to 'Abū Bakr seeking her share of inheritance. 'Abū Bakr told her he could not find a share for her neither in the Qur'ān nor Sunnah. Then he asked the people around him whether they had some information on the case. Al-Mughira replied, "I heard the messenger of Allah giving her one-sixth (1/6)". 'Abu Bakr said: "Do you have someone to corroborate your report?' There and then Muhammad b. Maslama testified the same thing. Then, finally 'Abu Bakr approved the one-sixth (1/6) to the complainant.

This according to Khudrī (1967) shows that the companions were very strict in the use of hadīth as a source for passing a legal decision. In this respect, it has been reported that once ʾUbay' narrated a certain hadīth to ʿUmar b. al-Khaṭṭāb, who said you must produce a witness upon what you have narrated. Ubay left 'Umar and luckly enough met a group of people among the ʾAnsār, who came and testified confirming the report of the former. ʿUmar then said: "I am not accusing you on anything but I simply wished to confirm it beyond any reasonable doubt".

In a related development it was also reported that ʾAbu Musā al-ʾAshʿari said the Taslīm three times at the door of ʿUmar without any reply, so he left. 'Umar (r.a.) sent someone to call him back and asked him, why did you leave?" He replied: "I heard the messenger of Allah saying: If anyone of you said the Taslim three times without a reply, let him go back".[64] 'Umar said: "You either bring witnesses concerning what you have said or I will give you some lashes". ʾAbū Mūsā came out very disturbed until he came along with some people who testified before the caliph confirming the report of the former.

In addition, Zaydān (1982) observed that any time Abu Bakr used his opinion (raʾy) in deciding a case he always said: "This is my own personal understanding, if it happened to be correct, then it is from Allah but if otherwise then it is from me and I seek Allah's forgiveness.

ʿUmar, the second caliph, was said to have adopted the same procedure in deciding new cases presented before him by resorting to the sources in the

following order: the Qur'ān, the Sunnah and the legal proceedings of his predecessor, Abu Bakr, the first caliph. If he could not find the solution from the above-mentioned sources, then he would not hesitate to solicit for the collective or individual opinion of the learned people concerning the matter at hand.

al-Jawzī (n.d.) states that the caliphs used to consult other companions on new matters brought before them and when they were satisfied with the advice given to them they used it in passing their decisions. For example, when a case in which a man was killed by the wife of his father and her friend was brought before Umar for adjudication, he became indecisive about killing two people for one because the Qur'ān says: "A life for life." (5:98). After some consultations, Ali said, "Oh Leader of the Faithful, if a group of people joined hands in stealing a slaughtered camel will you amputate their hands?" 'Umar replied in affirmative. Then, Ali said: "so also a group of people who participated in killing a person". Umar became fully convinced of this opinion and so, he wrote to his administrative officer directing him to execute the two culprits who jointly killed the deceased person.

Umar directed his judges and governors to follow the same procedures in deciding new cases brought to them. For example, when he appointed Shurayh as a judge for Kūfah, he wrote and addressed him in the following words:

> "If you find something in the book of Allah, use it in passing your decisions and do not turn to any other thing else. If some

> thing is brought to you which is not in the Qur'ān, decide it based on the sunnah. When there comes to you a case which is neither in the Qur'ān nor Sunnah, decide it on the basis of Ijmā'. If there comes to you a case which has no decision in either the Qur'an or Sunnah and none before you had ever commented on it, then if you so wish you can exert your own Ijtihād or else you postpone it and seek my advice which I think is better (for you). That is all".(65)

This report indicates that 'Umar permitted his judges to use individual opinion (Qiyās) due to their long distance from the central authority. 'Umar again felt seeking his advice was better because he was living in Madina surrounded with most of the learned companions whom he refused permission to travel outside so as to advise him on new matters presented before him. 'Umar (r.a.) also wrote to Abū Mūsā al-Ash'ari saying: "You should study cases that resemble one another and do analogy (Qiyās) of one from the other."

Khudrī (1967) reported that one of the scribes of 'Umar b. al-Khattāb once wrote: "This is what Allah sees and what 'Umar sees". 'Umar said to him: "What you have written is not correct. Simply write this is what 'Umar sees (pertaining to the case), if it happens to be wrong then it emanates from 'Umar."

It was reported that once 'Umar b. al-Khattāb came out for Shām, according to Sharafuddīn (1969). Then he was informed of the out-break of an epidemic and so he sought the opinion of the learned companions together with him on whether to proceed or retreat. They finally agreed, after some disagreements and advised him to retreat for fear of the out-break of the epidemic which he complied with.

Muhammad b. al-Hassan reported that Abū Hanīfah informed them from Hammād from 'Ibrahīm al-Nakha'i that a man married a lady without prescribing a dowry for her and he died before consummating the marriage. When Abdullah b. Mas'ūd was asked concerning her dowry, he replied: "She is entitled to the dowry of a lady of her equal status neither too high nor too low". After passing the decision, he lamented: If this decision happens to be correct, then it is from Allah but if it is wrong then it is from me and from the satan while Allah and His Apostle are completely free from it. Thereupon Ma'qal b. Sinān al-Ashja'i, one of the companions of the Prophet (SAW) said: By Allah! you have adjudicated the case in line with the adjudication of the Prophet (SAW) concerning the case of Barū bint Washiq al-Ashja'iyyah. Abdullah b. Mas'ūd became extremely delighted as his decision had fallen in line with that of the Prophet (SAW).' Ibn Mas'ūd passed the decision on the basis that death had the same legal effect with consummation. Therefore, since the latter necessitated payment of dowry, so also the former necessitated it too. This is the opinion adopted by the Hanafi and Hanbali schools of law.

However, 'Alī (r.a.) disagreed with the decision of 'Ibn Mas'ūd in the adjudication of this case saying: "She is entitled to inheritance and she has to observe Iddah but no dowry for her". He further, said: "The narration of a desert Arab from 'Ashja' cannot be taken in defiance to the Book of Allah". 'Alī (r.a.) took his decision in consideration of the fact that, had it been this woman was divorced under this condition, then certainly she was not entitled to any dowry

in line with the Qur'anic verse: "There is no blame on you if you divorce women before consummation or the fixation of their dowry; but bestow on them (a suitable gift), the wealthy according to his means and the poor according to his means....." (Baqarah 2:236).

Thus, he considered death as having the same legal effects with divorce. Again he went on to say, that it is possible to make analogy of death before consummation with items of sales that perished before the buyer takes possession of such items in which case the seller is not entitled to the agreed price. Ali refused to accept the report because of his strictness concerning the acceptance of hadith generally and secondly because in his opinion the report was not authentic. This was also the opinion of Zayd b. Thabit and Abdullah b. ʿAmr as they were not aware of the report in which the prophet (saw) gave Barūʿ bint Wāshiq the dowry of equal status (Mahr al-Mithl). And this was the opinion adopted by Imām Mālik and al-Shāfiʿi. Imam al-Shāfiʿi added: "I am not aware of any chain through which the report is correct but had it been it was correct, I would have adopted it". However, Hakīm, one of the scholars of hadīth, replied al-Shāfiʿī saying: Our teacher Abu Abdullah said: "If to say al-Shāfiʿī is present, certainly I would have stood up in the midst of people and announce publicly, surely this hadīth is authentic, therefore adopt it."[66]

Abdullah b. Masʿūd, according to Zaydān (1982), said:

> "Whenever a new case is brought before any one of you, let him adjudicate it based on what is in the Qur'an, if there is no answer to such a case, move to the Sunnah, if there is no answer there too, turn to the decision of the righteous people (Ijmāʿ), if there

is still no solution to the case don't hesitate to exert your Ijtihad. However, if one is not suitable for such a task then he should stand up and seek for knowledge without any shame".

On the other hand, the other two caliphs, Uthman and Ali, (may Allah be pleased with both of them) totally based their decisions upon the Qur'an, Sunnah, and the decisions of their predecessors, but when all these sources proved abortive they resorted to seeking the opinion of the companions on collective or individual bases.

2.3.2.3 SOME MAJOR EVENTS THAT TOOK PLACE DURING THIS PERIOD

The period of the rightly guided caliphs witnessed some major events which were properly handled, otherwise their negative effects would have caused serious damages to the entire Muslim Community. Some of the most significant events that took place during this period were as follows:

1. Among the new things that crept into the Muslim Ummah immediately after the death of the Prophet (SAW) was the refusal of a certain group of people to pay Zakāt, despite the fact that they professed Islam and established regular prayers. Abu Bakr, the first caliph, became inclined to the opinion of fighting them until they give out Zakat but Umar on the other hand did not favour this idea saying: "How do you fight them while the Prophet (SAW) said: "I have been commanded to fight the unbelievers until they confess there is nothing worthy of being worshipped except Allah. If they said that they have safeguarded their

blood and property from me except on the right of Islam".[67a] 'Abū Bakr said: Didn't he say: "except on the right of Islam?" Therefore, payment of Zakāt is part and parcel of the right of the religion; hence by Allah I will fight them to the last of my breath until they comply".

2. The compilation of the Qur'ān into one single volume was necessitated by the fact that many reciters (huffāz) of the Qur'ān were slain during the battle of Yamāmah (11-12AH) which was fought between the Muslims and those who apostatised from Islām. 'Umar initially suggested to 'Abū Bakr the need to compile the Qur'ān into one single volume for fear of losing some part of it with the death of those who memorised it. At first, 'Abū Bakr was not convinced of the idea because it was a new thing saying: "How can I do something which the Prophet (SAW) has not done himself?" Umar said to him: "This is a good idea and there is no harm in it, rather it is beneficial to Islam and the Muslims in general, despite the fact that it was not done during the period of the Prophet (SAW)". Umar continuously explained to him the rationale behind the idea until Allah (SWT) threw light of understanding into his heart, whereupon 'Abū Bakr saw the justification for undertaking the project which he then pursued with every sense of vigour and strength. Finally, he commanded Zayd b. Thābit who was also one of the scribes of the revelation to compile the Qur'ān and he did.[67b]

3. Khudrī (1967), observed that during the reign of Uthman b. Affān, the third caliph, there arose the need to standardise the compilation of the Qur'ān into one single acceptable dialect in order to wipe out some minor differences in the recitation that might have probably led to confusion and misunderstanding as well as disunity within the Muslim Ummah. The caliph directed all other copies of the holy Qur'ān to be burnt with the exception of the approved standard copy which he circulated in all the major cities of the then Muslim State.

2.3.2.3 SAMPLE CASES IN WHICH THE JURISTS OF THIS PERIOD DISAGREED AND THE SOURCES OF THEIR DISAGREEMENTS

Although the companions were agreed on the sources of the law as well as how to utilise them, yet there were some minor differences between them on some issues. The sources of differences could be traced back to the following factors according to Khudrī (1967), Sharafuddīn (1969), Zaydān (1982) and Qaṭṭān (1976):

1. Some times the differences of opinion might emerge as a result of differences in understanding the texts (Nuṣūs). For example, the meaning of some texts could only be hypothetical, since they were capable of accommodating more than one meaning, hence a valid ground for disagreement. The word Qur' or Qurū' as used in the Qur'ān

has a dual meaning of either period of cleanliness or the menstrual period. The Qur'ān states: "Divorced women shall wait concerning themselves for three Qurū'." (Baqarah 2:228).

The companions disagreed with regard to the real meaning of the word Qar'. 'Abū Bakr, 'Umar, 'Uthman, 'Ali, 'Ibn Mas'ud, 'Abu Musa al-Ash'ari, Ibn 'Abbās, Mu'ādh b. Jabal and a host of others were of the view that Qar' meant menstrual period. This was also the opinion upheld by 'Imām Abu Hanifah, his disciples and one of the two opinions expressed by 'Ibn Hanbal. The companions and the jurists mentioned above further strengthened their opinion with a prophetic saying: "Stop prayers during your monthly period."[68]

On the other hand, according to 'A'isha (r.a.), Zayd b. 'Thabit, Abdullah b. 'Umar and the seven[69] most famous jurists in Madina among the followers (Tabi'īn) were of the opinion that Qar' means period of cleanliness. 'This was also the view of 'Imām Mālik, Shāfi'ī and one of the two opinions expressed by 'Ibn Hanbal.

The implication of this disagreement lies in the fact that a divorced woman can only complete her 'Iddah, according to the first opinion after completing the third menstrual period whereas according to the second opinion, with the commencement of third menstrual period. Thus, these interpretations have serious consequences on the exact time when a divorced woman may complete her 'Iddah.

2. Sometimes the disagreement might have occured as a result different between the real and the figurative meaning of the wording of the text. For example, could the word ʾAbb (father) be used as a substitute to Jadd (grandfather) in every sense or is it used metaphorically only? The substitution of the word "father" for "grandfather" is used in the Qur'ān where Allah says: "And I follow the ways of my fathers, - Abraham, Isaac and Jacob; and never could we attribute any partners whatever to God: that (comes) of the grace of God to us and to mankind: yet most men are not grateful." (Yūsuf 12:38).

The companions disagreed on the usage, some of them understood it as the true state of affairs while others considered it figurative. The implication of this disagreement is that according to the first opinion, when a case of inheritance involved a grandfather and collaterals whether full or consanguine brothers, then, the grandfather excludes the collaterals completely in the same manner as does the father. This is the view of ʾAbū Bakr, ʿUmar, ʾIbn ʿAbbas, Ibn ʿUmar, ʾAbū Saʿīd al-Khudrī, Hudhayfah b. al-Yamān, ʾAbū Musa al-Ashʿarī and ʾAbū Hanīfah. But ʿUmar was later on reported to have changed his position after a serious debate with Zayd b. Thābit. Whereas, according to the second opinion, the grandfather does not exclude the male collaterals whether full or consanguine but he shares with them in the inheritance, considering their relationship to the deceased, which was basically the same. The proponents of

this opinion include Zayd b. Thābit, 'Ibn Mas'ud, 'Imām Mālik, Shāfi', Ibn Hanbal and 'Abu Yusuf, the disciple of 'Abu Hanifah.

However, it is generally agreed by the consensus of the Muslim jurists that the grandfather excludes completely the uterine brothers and sisters.

3. The differences may sometimes come as a result of a conflict between the surface meaning of more than one text. Allah the Most High says: "If any of you die and leave widows behind, they shall wait concerning themselves four months and ten days....." (Baqarah 2:234). In another place, the Qur'an reads: "For those who carry (life within their wombs) their period is until they deliver their burdens (Talaq 65:4)...."

This shows that non-pregnant widows ~~who~~ according to the first verse are to observe the 'Iddah period of four months and ten days; while according to the second verse, the divorced pregnant women complete their 'Iddah as soon as they delivered. Now what is going to be the 'Iddah period of pregnant widows? Are they to observe the 'Iddah period of four months and ten days or are they to wait until delivery? In this regard, the companions expressed two views: According to Ali (r.a.) and Ibn Abbas, a pregnant widow is to observe the 'Iddah of the longer period of the two, either delivery or four months and ten days as the case may be. This is also one of the two views attributed to the Maliki school of law. On the other hand, the 'Iddah period of a pregnant widow lasts until her delivery according to 'Umar b. al-khattāb, 'Ibn Mas'ud and the majority of the Muslim jurists. They said that, the verse in Sūrah al-Baqarah

was revealed first before that of al-Ṭalāq, hence the latter restricts the application of the former. This interpretation is strengthened with a report that Sa'ibah bint al-Härith al-Aslamiyyah delivered twenty-five days after the death of her husband and the Prophet (SAW) said to her: "Certainly, you have completed the prescribed 'Iddah, you can marry the husband of your choice."[70]

4. The Sahābah might sometimes have had differences of opinion on certain issues because some of them were aware of certain prophetic traditions while others were not, and this could consequently influence their legal decisions (fatwah). This is because during that time, the Sunnah was not officially and generally documented and so it was not *possible for an individual to memorize or know all the' ahadith of the* Prophet (SAW). Again the companions might disagree if some of them did not trust the reliability of the narrators of a particular hadith for one reason or the other.

In this regard, it was reported that 'Umar b. al-khattāb gave a legal decision stating: "A woman divorced three times is entitled to feeding and shelter". This is based on the Qur'anic verse where Allah says: ".....And if they carry (life in their wombs) then spend (your substance) on them until they deliver their burden....." (Ṭalāq 65:6). This verse necessitates feeding the pregnant women observing 'Iddah period which in most cases tends to be longer than that of other women. Therefore, the necessity of feeding other women observing 'Iddah becomes much more obvious. As for the shelter, the

Most High said: "And turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness....." (Ṭalaq 65:1). In another verse, the Qur'an reads: "Let the women live (in 'Iddah) in the same style as ye live according to your means....." (Ṭalaq 65:6). In addition, the Prophet (SAW) was reported to have said: "An irrevocably divorced woman is entitled to feeding and shelter."[71]

However, when 'Umar (r.a.) learnt of a report from Fāṭimah bint Qays saying her husband divorced her three times but the Prophet (SAW) did not ordain feeding and shelter to her, he lamented: "We will not forsake the book of our Lord and the Sunnah of our beloved Prophet because of a lady's report which I am not sure whether she has memorized it correctly or not". Thus, 'Umar rejected this report as he doubted its reliability, it was also rejected by 'Ā'isha (r.a.),[6] Usāmah b. Zayd and Sa'id b. al-Musayyib.

Another group of jurists were of the view that non-pregnant women observing 'Iddah were not entitled to feeding because the verse referred to pregnant women only and it did not indicate the inclusion of others based on the Mafhūm al-Mukhālafah[72a] of the text. However, they were of the view that all categories of women observing 'Iddah were entitled to shelter as contained in the verses quoted above.

4. The use of personal opinion (al-Ra'y) on matters that were not specifically mentioned in the Qur'ān and Sunnah was sometimes among the factors responsible for the disagreement between the companions.

Here are some cases for the purpose of illustration.

a) When Umar was informed of a person from Thaqaf who married a Quraysh lady within her 'Iddah period, he beat the husband, dissolved the marriage, put the dowry into the public treasury and said: Whoever married a woman during her Iddah period, if he has not consumated the marriage, such should be separated, while the woman is expected to complete the remaining 'Iddah from the former husband, after which the new husband could be a suitor if he so wishes. But where the new husband has already consumated the marriage, such should be annulled while she completes the remaining 'Iddah of the former husband, then observes the 'Iddah of the latter husband, after which the two could not marry one another forever. This is to serve as a punishment to the husband and a deterrent to others.

When 'Ali heard the decision of 'Umar on this case, he said: "May God have mercy upon the Leader of the Faithful! What connection has dowry to do with the Muslim public treasury? The culprits seem to be ignorant of the law, hence it is more appropriate for the Leader of the Faithful to return them to the right course". 'Alī disagreed with the decision of 'Umar on the permanent prohibition saying the two can still marry one another after the completion of the 'Iddah. Umar, on hearing the decision of Ali discarded his former opinion in preference to that of 'Alī. This is also the opinion adopted by Imam 'Abu Hanīfah and al-Shāfi'i whereas Imam Malik, al-Awza'i and al-Layth b. Sa'd still

upheld the first opinion of 'Umar because they were not convinced of why he changed his position.

b) ʾImām Muslim and Ahmad reported Ibn 'Abbās saying: Tripple divorce in a single statement was regarded as one during the period of the Prophet (SAW), the reign of ʾAbū Bakr and the first two years of ʿUmar b. al-Khattāb. ʿUmar observed that people were playing with the matter of divorce which invariably had a negative effect on the women as it put them into certain difficulties and hardships. After some consultations, ʿUmar passed a decision that whoever divorced his wife three times in one pronouncement, such would thenceforth be regarded as having the same legal effects with three pronouncements of divorce made at different occasions. Thus, he suspended the application of the reported Sunnah on this matter in consideration of the principle of Sadd al-Zarāʾi.[72b]

ʿAlī and ʾAbū Musā al-Ashʿarī, were however reported to have disagreed with the decision of ʿUmar on this case because they saw it as a means of preventing people from enjoying what was made lawful to them. They strongly stuck to the surface meaning of the text. In fact, there came a time after the period of ʿUmar, when the issue of a person marrying a woman with the intention of making her lawful to her former husband (tahlīl) became wide-spread within the Muslim ʿUmmah. Thus, when the Egyptian and Sudanese governments thought of providing solution to this problem, they had no alternative course than to advocate for the return to what obtained during the

prophet's time which recognised three pronouncements of divorce in a single statement as one revocable divorce.

c) Another issue on which the companions expressed different opinions pertains to the division of some material or financial grants among the Muslims. Abu Bakr, the first caliph distributed the grant among the Muslims equally without any preferential treatment. Then, it was said to him, "Oh the caliph! You have distributed the grant equally, why didn't you follow a certain criterion of preferential treatment?" He replied, "I am very much aware of what you have said, if not more than anyone of you, but that one pertains to reward for good deeds which purely rests with Allah whereas my actions relate to means of survival and equality in it is much better than differentiation". When 'Umar became the caliph, he changed the formula of the distribution and followed a certain criterion based on some preferential treatment taking into consideration one's contribution to the religion or his relationship to the Prophet (SAW) either by blood or marital affinity etc.

d) It has been reported that 'Abd al-Rahman b. 'Awf divorced his wife while he was in a state of illness but 'Uthman b. 'Affan counted her among the beneficiaries of his inheritance despite the fact that she had since completed the 'Iddah period. This decision was arrived at based on the principle of Sadd al-Zara'i', so that the divorced wife might not be denied the right of inheritance without a just cause. The Maliki jurists were of the view that such a divorced woman is entitled to the inheritance even if she is (now) married to someone else.

However, Shurayh, one of the great judges during the reign of Umar wrote to him seeking his advise in a case where a husband divorced his wife three times during his death illness. Umar replied, count her among his heirs, as long as she had not completed the 'Iddah period but on the contrary she is not entitled to anything once she had completed the waiting period.

e) Inheritance of the full brothers when in competition with the uterine brothers or sisters was another area of differences. In a situation where a person died leaving behind a husband, a mother, two or more uterine brothers or sisters and two full brothers, the calculation of their entitlement according to the principles of inheritance is as follows:

Husband	Mother	2 uterine brothers or sisters	2 Full brothers	
1/2	1/6	1/3	R	6
3	1	2	0	6

There are two ways of looking at this problem:

i) To allow the sharers to go with the entire estate while the full brothers, as agnates get nothing in line with the prophetic tradition: "Give the sharers their own shares and whatever remains goes to the nearest male agnate."[73]

ii) The full brothers to share the 1/3 together with the uterine brothers or sisters, discarding their relationship with the deceased through his father.

ʿAlī b. ʾAbī Ṭālib,ʾ Ubay b. Ka'b and ʾAbu Musà al-Ash'arī favoured the first opinion which was also adopted by ʾAbu Hanīfah,ʾ Ibn ʾAbī Layla,ʾ Ibn Hanbal, ʾAbū Thawr and Dāwūd al-Zahirī. A case similar to the above was presented before ʿUmar and he passed the decision (in the first place) without giving anything to the full brothers. At another time a similar case was again presented before him for adjudication. The full brothers when arguing with him for fear of his previous decisions said: "Suppose our father was a stone thrown into the river at least we are entitled to get something since we are related to the deceased through our mother". Finally, ʿUmar passed the decision in their favour and asked them to share the 1/3 together with the uterine brothers without any distinction by considering them as uterine brothers too. It was then said to ʿUmar, "But you gave nothing to the full brothers in a similar case brought to you previously". He replied: "That was what we adjudicated at that time but this is what we are adjudicating today with regard to the case". This is also the opinion of ʿUthmān b. ʿAffān, Zayd b. Thābit,ʾ Imām Mālik, al-Shāfiʿī and al-Thawrī.

6. The disagreement between the companions may be sometimes as a result of difference in point of reference. Let us cite some few examples for illustration.

a) **Divorce in respect of slaves:** According to 'Uthmān b. 'Affān and Zayd b. Thābit, a free born woman marrying a slave becomes irrevocably divorced after two pronouncements of divorce whereas 'Alī disagreed with

them saying that she did not become irrevocably divorced until after the third pronouncement of divorce. But in a situation where a slave woman happened to be the wife of a freeborn husband, then she automatically became irrevocably divorced after two pronouncements of divorce. Thus, the jurists in this case disagreed on the point where to consider the divorce: Is it from the side of the wife or the husband? According to the first opinion, the point of reference is the husband because he is the one who issues the pronouncements of the divorce while the second opinion considers the wife because the pronouncements of the divorce directly have legal effects on her.

b) **'Ilā' (vow of continence):** According to Ibn Mas'ūd whoever took a vow of continence against his wife that he was not going to have any affair with her, then after the expiration of the four months if he did not rescind his decision, she automatically became irrevocably divorced although the husband was free to be among the suitors if he so wished. Other jurists were of the view that after the expiration of the four months, then the husband had to decide whether to rescind his decision by having conjugal relations with her or to divorce her. Thus, the expiration of the period was not synonymous with divorce. In this respect, Allah the Most High says: "For those who take an oath for abstention from their wives, a waiting of four months is ordained: if they return, God is oft forgiving, Most Merciful. But if their intention is firm for divorce, God heareth and knoweth all things." (Baqarah 2:226-227).

7. Another factor responsible for the disagreements between the companions is the change in time and circumstances. Islamic law is instituted for the realization of important benefits. It is also dynamic hence it is suitable at all times whether in the past, present or future. However, some of the benefits are tied to specific times or circumstances and so it becomes appropriate for some of the laws to be re-examined with the change in time or circumstances. Here are some examples for illustration:

a) It has been reported that the Prophet (SAW) forbade people from taking possession of straying camels, as lost but found property. This was because during that time people were more conscious of their religious obligations and hardly could someone steal the property of another person. It was in the light of this that the Prophet (SAW) answered Zayd b. Khalid, when he asked him: "Could a straying camel be taken as a lost but found property?" The Prophet said: "What concerns you with it? It has its water and food, it reserves water and eats trees until its owner gets it."[74]

The status-quo remained the same during the period of the Prophet (SAW), the reign of Abu Bakr and 'Umar. But during the period of 'Uthman, the conditions had started changing and some people were no longer fully conscious of their religious obligations to the extent that some were stealing the property of others. Therefore, 'Uthman entertained some fears concerning the

issue of straying camels; if left alone they could fall into the hands of unreliable persons who would take them without returning them to the owner. So he suggested taking the lost camels but to be announced publicly, if the owner come, he would take it, otherwise it would be sold and the money would be kept under custody until the owner come, then he would receive the money.

When 'Alī became the caliph, he followed the procedure of 'Uthmān on this matter except that he did not favour the idea of selling the lost but found camels. Thus, he established a house for the keeping and maintaining of such camels from the Muslim public treasury (Bayt al-Mál), on moderate feeding until their owners turned up.

Surely, the actions of both 'Uthman and 'Ali could easily be traced back to the principle of public interest (Maslaha) which necessitated the promulgation of the law to suit their situations. Therefore, their actions did not in any way contradict the text of the prophetic hadith but instead they corresponded to it.

b) Suspension of the punishment for theft: 'Umar (r.a.) refused to amputate the hand of a thief brought to him during the year of famine. He was then seriously criticised by some youngstars for neglecting the prescribed punishment for theft. They further said: "This is a calculated attempt to destroy the precepts of the Shari'ah, little by little". The fact of the case was that during the reign of 'Umar there came a time when people were affected with serious poverty and hunger to such an extent that they had no alternative sometimes

than to steal so as to survive. Theft is an abominable offence because it is an aggression against someone's property and as such the punishment of hand amputation adequately corresponds to it. This is to serve as a forcible prevention and a deterrent to others against its perpetration. Despite all this, 'Umar suspended the implementation of the prescribed punishment for theft based on the effective cause (Illah al-hukum) of the case in line with the principle of "necessity knows no bound."

Ibn Hazm says: "Whoever found himself in a critical position with no option but either to steal so as to survive or to leave and die as a result of hunger, then he must take the first option or else if he refused and died in such a state, then he is responsible for killing himself which is also an offence in line with the Qur'anic verse where Allah says: "..... do not kill yourselves....." (14:29). Finally, it is interesting to note that the prescribed punishment of theft was still enforceable if and when the situation and circumstances prevailing during the period of 'Umar changed.

c) The share of Zakāt for those whose hearts are to be reconciled: This is one of the cases in which the non-Muslims accused 'Umar saying, he has dropped the share of Zakāt for those whose hearts were to be reconciled as categorically stated in the Qur'ān: where Allah says: "Alms are for the poor and the needy and those employed to administer the (funds); for those whose hearts are to be reconciled; for those in bondage and in debt; in the cause of God; and for the wayfarer...." (Tawbah 9:60).

The people whose hearts were to be reconciled are basically composed of two categories. The new converts whose faith is yet to be strong and the non-Muslims in whom there is hope for accepting Islam or their wickedness is being feared by the Muslim community. This is to provide some prestige to the new religion and the Muslim society at large. This law was promulgated when the Muslims were very weak and had little numerical strength. Thus, the aim of giving such category of people Zakāt is to strengthen the Muslim community physically and numerically.

The Prophet (SAW) implemented this law as prescribed, but 'Umar during his period opined that there was no need for giving Zakāt to such category of people since the rationale behind it was no longer there. This is because during the period of Umar, the Muslims had become strong and their number had substantially increased. Obviously, the Islamic State had become a force to be reckoned with. The condition, in which the Muslims found themselves was by its nature enough to strengthen the faith of the weak Muslims and to motivate the non-Muslims to accept Islām as well as to stop their wickedness from affecting the Muslim community. The case of these people was similar to that of the poor Muslims who received Zakat on the ground that they were poor. So, if they later on became rich, they could not be given Zakāt any more simply because they were no longer poor. 'Umar went on to say that if the Muslims could not get the poor and the destitute within themselves, then they could give Zakāt to those whose hearts were to be reconciled.

The action of 'Umar cannot be taken as an abrogation of the Qur'anic verse because this can never materialise except through revelation whereas in actual fact there is no revelation after the death of the Prophet Muhammad (SAW). Therefore, the precepts of the text remain valid for ever and become operational whenever there arises situations and circumstances for which it was established.

d) Non-Distribution of Booty: The law governing the distribution of booty has been clearly stated in the Qur'an as follows: One-Fifth (1/5) of it is to be spent for the sake of Allah, the messenger of Allah, the close relations, the orphans, the destitute and the wayfarers. The remaining four shares are to be distributed to the soldiers who participated in the battle. After the conquest of Iraq and Sham, during the period of 'Umar, the soldiers who participated in the battle wanted the land too, to be distributed to them according to the prescribed law of booty which was put into practice by the Prophet (SAW) in relation to the land obtained in Khaybar. Although 'Umar distributed the material booty brought from the conquest among the soldiers based on the prescribed formula, he decided to leave the land intact in the hands of those who owned it previously, so that what would be collected from such farmers annually could be used to maintain the soldiers guarding the territories of the Muslim State. The produce would also be used to look after the welfare of the orphans, destitute and wayfarers. He was initially opposed by many people, but he was able to convince them to accept his viewpoint. This is one of the decisions

taken by 'Umar based on public interest because one of the essence of Islamic legislation is to take care of people's welfare as well as to avert evils.

e) Marriage with Ahl al-Kitāb: Islamic law has permitted the Muslims to marry women from the people of the Book as contained in the verse where Allah says: "This day are (all) things good and pure made lawful unto you. The food of the people of the Book is lawful unto you and yours is lawful to them (Lawful to you in marriage) are (not only) chaste women who are believers, but chaste women among the people of the Book...." (Ma'ida 5:6).

This permission which started during the period of the prophet continued during the reign of Abu Bakr too. However, when 'Umar became the caliph, although he did not completely prohibit it he observed that marrying Muslim women is much better and more beneficial than marrying from the people of the Book, otherwise such can put the Muslim women into a dangerous position. Therefore, based on this ground, 'Umar stopped the Muslims from marrying women from the people of the Book. He gave an order that whoever was marrying a woman from among the people of the Book should separate himself from her. It happened that Hudhayfah b. al-Yaman was marrying a Jewish lady, so 'Umar wrote to him "Forsake her!" Hudhayfah replied: "Is it prohibited Oh Commander of the Faithful?" 'Umar wrote to him again: "It is better for you to make up your mind to leave her before you finish reading this letter. Certainly, I fear the Muslims may follow your footsteps and

prefer the women from the people of the Book due to their beauty or otherwise, which is enough to cause a serious problem to the Muslim women". The action of 'Umar cannot be regarded as a complete and permanent prohibition but a simple act carried out in the name of Maslahah or Sadd al-Zarā'i".

f) The artisans are to be responsible for any loss or damage of items put under their care. According to Islamic legislation whoever is given something to keep such as a trust is not supposed to be responsible for any loss or damage of the items involved in line with a prophetic tradition on the matter[75] and the same law applies to the one who borrowed something unless when there was clear negligence on his part. This law was put into practice during the period of the Prophet (SAW) because then many people were trustful and reliable. The artisans were not made responsible for any loss or damage of items under their care based on the spirits of the above tradition. Later on, the issue of religious consciousness started becoming weak in the minds of some people and they became no longer very trustworthy. Thus, the artisans had to be made responsible for any loss or damage of items placed under their care looking at the collective interest of the people. 'Ali (r.a.) was reported to have said: "There is nothing that can correct people except this;" otherwise the Muslims would be left at the mercy of the artisans.

Justice Shurayh also adopted the same opinion in his adjudications to the extent that he directed someone who allegedly claimed that his house caught fire to refund the lost items under his care. In addition, Justice Shurayh

said to him that: will you not demand payment from the other purse if his house caught fire? The two disciples of Abū Hanifah accepted this opinion while he (Abū Hanifah) disagreed with this decision except in case of clear negligence.

g) Discouraging the females from attending congregational prayers in the Mosques: The Prophet (SAW) permitted the females to attend religious services in the Mosques and to learn the precepts of the Shari'ah therein. Abū Hurayrah reported that the Prophet (SAW) said: "Do not prevent the female worshippers from attending congregational prayers in the Mosques but under no circumstances should they apply scent when going out."[76]

However, Ibn 'Umar reported from the Prophet (SAW) "Do not prevent your women from going to the Mosques but offering their prayers in their houses is better for them."[77] During the period of the Prophet (SAW), the companions were very much conscious of their religious obligations: hence the females at that time went out freely to perform their religious services as well as to learn the precepts of the Shari'ah therein without any problem. However, after the period of the Prophet (SAW), the minds of some people began to become less conscious of their religious obligations. Thus, the issue of females going out to attend religious services became so sensitive as it brought some evils to the society. The majority of the companions suggested that females should be discouraged from coming out to attend religious services in the public as a result of the change in the situation and circumstances. 'A'ishah (r.a.) was reported to have said: "Had the Prophet (SAW) lived to witness what the

women have introduced, certainly he would have prevented them from attending the Mosques for congregations in the same manner as the women of Banū Isrà'ilah were prevented". This is also the opinion of 'Umar b. al-Khattāb and Ibn Mas'ūd.

There were other companions on the other hand who upheld a different view sticking to the surface meaning of the text that permitted women to attend religious services in the public despite the change in time and circumstances. ʿAbdullah b.ʿUmar was one of the proponents of this view. In order to defend his position, he usually quoted the prophetic tradition: "Allow women to go out for congregational prayers in the night."[78] One day his son said to him: By Allah we will not allow the women to attend their religious services outside so as to perpetrate evils." Ibn Umar shouted upon him and became seriously angry saying: "I am saying the Prophet (SAW) said: Allow the women ..... and you are saying you will not allow them?

The son of Ibn Umar looked beyond the surface meaning of the text and the abuse of the opportunity given to the women therein which was also the opinion of his grandfather; whereas Abdullah b. Umar was more concerned with the total and complete compliance to the text by all means and he did not want to contravene it by all means.

h) Non-Execution of Hadd punishment in the land of the enemy: It has been reported that the Prophet (SAW) forbade the implementation of Hadd punishment for theft while on a journey or military expedition. Junādah b.

Umayyah reported: "We were together with Busra Ibn 'Artah in the sea when a thief called Masdar was brought for stealing a she camel with a very long neck". Then he said surely, "I heard the messenger of Allah saying: "We do not amputate the hands while on a journey."[79] In another version it says: "While on a military expedition".[80a] Otherwise I would have ordered for the amputation of your hand.

The companions were later on faced with a new case other than theft during a battle. They seriously thought over the matter and finally resolved not to implement any form of legal punishment in the land of the enemy. Although they all accepted the decision, they virtually disagreed with regard to the basis or grounds upon which the law was promulgated, because the rationale behind it was not categorically stated in the text reported above. The companions commonly resolved that the wisdom behind the establishment of the law was to avoid damage to the Muslims but they differed with regard to the nature or type and degree of the damage.

'Umar b. al-Khaṭṭāb and Zayd b. Thābit were of the view that the damage that could affect the Muslims had it been the prescribed punishments were implemented in the land of the enemy might lead the culprit to apostatise. To this effect, 'Umar wrote to Umayr b. Sa'īd al-Anṣārī and to his lieutenants commanding them not to execute any prescribed punishment (Hadd) while in the land of the non-Muslims until they came back to the abode of peace (Dar-al-Islām). Zayd b. Thabit was reported to have said: "Do not execute legal

punishment in the non-Muslim country to safeguard the culprit from joining the non-Muslims....."

'Abū Mas'ūd and Hudhayfah b. al-Yaman perceived the evils that could affect the Muslims in this matter as weakness in the eyes of their enemies. For instance in a situation where the non-Muslims openly witnessed the Muslims implementing legal punishments on their corrupt leaders.'A'mash reported from 'Ibrahim b. 'Alqama who said: Wâlid b. 'Uqbah, the leader of the Muslim army in a certain battle took an alcoholic drink and became intoxicated. It was said to 'Abū Mas'ūd and Hudhayfah b. al-Yamani: "Implement the legal punishment (Hadd) on him", but the two of them replied: "That is not proper, we would not do that because we are in the midst of the non Muslims and we don't want them to know about it otherwise it will be a slap on our face as well as causing weakness to ourselves by ourselves".[80b]

Non-execution of Hadd punishment in the land of the enemy should not be understood as a complete prohibition or suspension but simply a way of delaying its implementation for some benefits either to the culprit or to the society at large which is a well known principle in Islam. It has been reported in the Sunnah: "Delay the implementation of the legal punishment concerning a pregnant lady until she delivers; a suckling mother until she weans the child; the sick person until he/she recovers.[81] Therefore, a lady who commits adultery or fornication and becomes pregnant could not be stoned to death until she delivers and has weaned the child otherwise the foetus or the child will be

affected too, whereas it is an innocent soul; so also a sick person could not be given lashes for fear of finishing with him.

i) Punishment for the Drunkard: There is no clear text in both the Qur'ān and Sunnah that specifically states the punishment for the drunkard. Thus, according to some scholars there is nothing wrong in considering the punishment for alcoholic drinking as part of Ta'zirat (corrective punishment) instead of Hudūd (legal punishments). This is in line with the report of Abu Hurayrah that when a drunkard was brought before the Prophet (SAW), he instructed the companions to beat him. Abu Hurayrah said,some of us beat him with our hands while others used shoes, or pieces of cloth until he ran away....."[82]

According to San'ani (n.d), there is enough evidence to show that the Prophet (SAW) did not specify the punishment for drinking alcohol, since it falls within the sphere of Ta'zirat and as such if the culprit happens to die in the course of receiving the punishment, then the leader of the Muslim community would have to pay for his Diyyah, and the same law applies to anyone who dies while receiving Ta'zirat punishments. This is also the opinion of the majority of the Muslim jurists.

The moderates, on the other hand, maintained that there is no harm concerning any person who dies in the process of receiving corrective punishment (Ta'zir) just like in the case of Hadd because the two are ordained by the Shari'ah.

'Ibn 'Abbās was reported to have said: "Surely, the Prophet (SAW) did not specify the punishment for the drunkard but the companions fixed the beating at forty (40) or eighty (80) lashes". 'Anas reported that a drunkard was brought before the Prophet (SAW) and he was given about forty lashes of palm leaf stalk. He further said: "Abu Bakr implemented the same punishment during his time but 'Umar sought the opinion of the companions and Abd al-Rahman suggested eighty (80) lashes as the minimum punishment for the drunkard and 'Umar acted accordingly.

According to Wabrah, 'Umar varied the punishment for the drunkard in accordance with the personality of the culprit involved. He gave the offender eighty lashes, if he looked strong and powerful while he gave forty lashes only when the culprit was weak and disdainful.

2.3.2.4 SOME FACTORS THAT CONTRIBUTED TO THE UNITY OF THE MUSLIM COMMUNITY DURING THIS PERIOD

Despite the fact that, there existed differences of opinion among the companions, it was said to be negligible and it did not spread wide as it happened in the later periods. Some of the factors responsible for this healthy development included the following:

1. Strict adherence to the principle of consultation in accordance with the precepts of the Shari'ah, as earlier explained.

2. The majority of the companions were not allowed to move out of Madina hence they collectively consulted one another to arrive at a decision on new matters brought before them.

3. The companions were generally very careful in giving answers to questions raised to them. Whenever a companion was asked a question, he might prefer someone other than himself to answer it unless where and when it became absolutely necessary for him. Again they didn't usually give legal decisions on hypothetical issues until when they have actually occured physically so as to avoid mistakes.

2.3.2.5 EMERGENCE OF THE TRADITIONIST AND OPINIONIST TRENDS IN IJTIHAD

Although the companions conducted Ijtihad concerning new matters brought to them which had no preceeding text, yet their trend or methodology was not the same. Some of them went beyond the surface meaning of the text and considered the wisdom behind its legislation hence nothing stopped them from changing or amending some of the laws to suit the change in time, situation and circumstances, so as to achieve the desired objectives. This group was led by ʿUmar b. al-Khaṭṭāb and ʿAbdullah b. Masʿūd.

On the other hand, there was a group of companions who did not want in any way to go contrary to the clearly stated texts. For example there were those who insisted that women ought to be allowed to perform their

congregational prayers in the mosques despite the change in time and circumstances. This group was led by Abdullah b. Umar.

These two distinct trends of Ijtihad were responsible for what we are going to see in the next developmental stages of Islamic law in which the jurists leaned towards one direction or the other. Finally, there emerged two camps of jurists: The traditionists (Ahl al-Hadith) and the opinionists (Ahl al-Ra'y). The difference between the two could be brought to light when we consider the tradition which says: "The Prophet (SAW) made it incumbent on all slaves and free Muslims, male or female, to pay one Sa' of wheat or barley or dates as Zakat al-Fitr."(83)

The opinionists were of the view that one could pay Zakat al-Fitr either from the stated food items in the text or other foods or their monetary equivalent. The traditionists on the other hand insisted that it could only be paid from the stated food items mentioned specifically in the text, therefore it was not valid to use other food items or giving monetary equivalent.

According to Zaydan (1982), & al-Jawzi (n.d.), there were over one hundred and thirty (130) male and female companions, who were reported to have given various legal decisions or opinions. However, the most famous among them were seven: 'Umar b. al-Khattab, 'Ali b. Abu Talib, 'Abdullah b. Mas'ud, 'A'ishah 'Umm al-Mu'minin, Zayd b. Thabit, Abdullah b. 'Abbas and Abdullah b. 'Umar. Those who were said to be in the middle course include 'Abu Bakr al-Siddiq, 'Uthman b. 'Affan, 'Abu Musa al-'Ash'ari, Sa'd b. 'Abi Waqas and Salman al-Farisi etc.

2.3.3.0 THE THIRD DEVELOPMENTAL STAGE OF ISLAMIC LAW (FIQH): THE PERIOD OF THE YOUNGER COMPANIONS AND THE SENIOR TABI'IN

This period according to Khudri (1967) started with the coming of Mu'awiyyah into power, when Hassan b. 'Ali surrendered to him in the year 41AH in order to spare the lives of the Muslims and it continued till the first part of the second century after Hijrah which corresponds to the downfall of the Umayyad dynasty. This period is said to have some glaring features with regard to the development of Islamic law (Fiqh) which made it distinct and unique. This is probably why it was named the period of prominence. Some of the distinctive features of this period according to Khudri (1967), Shuafuddin (1969), Zaydan (1982) and Qattan (1976), are as follows:

2.3.3.1 POLITICAL CLIMATE

Now, let us briefly look at the political climate of the period, so that we can analyse issues in their clear perspectives. The Muslim community was initially united as a single body up to the period when 'Uthmān b. 'Affān was assassinated and 'Alī became the next caliph. Then, political differences crept into the Muslim Ummah from this period. Three senior companions: Talha b. 'Abdullah, Zubayr b. al-'Awwām and Mu'awiyyah b. Abu Sufyan opted out on the ground that Ali (r.a.) deserted 'Uthman b. 'Affān as he did not avenge his blood. So they refused to co-operate with the new caliph. Talha and Zubayr were among the six-member committee established by 'Umar during his death sickness to look into the appointment of the caliph. Thus each one of them felt

that he deserved to be on the throne whereas Mu'awiyyah felt that he was the closest blood relation to 'Uthmān and as such he ought to avenge his blood. The two others, Talha and Zubayr, were killed in the battle of the Camel while the forces of 'Alī (r.a.) clashed with those of Mu'awiyah in the battle of Siffin at Syria. When the forces of Mu'awiyyah were about to be defeated they resorted to a strategy of arbitration. Mu'awiyyah directed his forces to raise copies of the Qur'an with their swords seeking for peace and arbitration. The supporters of 'Alī became divided into two on this matter: One group accepted the need for peace and arbitration while the other group disagreed and accused the former group 'Alī (r.a.) inclusive as being unjust. Therefore, with this development, there emerged three main groups within the Muslim community: The Khawarij: the Shi'ah and the Jamhūr or Ahl al;-Sunnah wa al-Jama'ah.

As a matter of fact, Mu'awiyyah's hold on the Muslim Ummah had not ended up the sectarian and group differences in the polity of the time. Although the majority of the Muslims were siding with Mu'awiyyah, yet the minority groups consisting of the Kharijtes and the Shi'ites continued to play some significant roles in the political arena of the Muslim State.

MUSLIM SECTS AND THE SHARI'AH

A. KHAWĀRIJ:

These were the group of people who felt that arbitration between the forces of Ali and Mu'awiyyah was basically wrong because according to them, they started the war with full conviction that the truth was on their side. Thus

arbitration, to them showed that each of the two groups was not sure whether it was on the right course or not whereas that was not the case as far as they were concerned, hence their popular claim: La hukma illa lillah, (there is no judgement except with God). Some of the basic principles of the Kharijites concerning leadership are as follows:

(i) The Kharijites recognised and approved the leadership of Abu Bakr, Umar and the first part of the reign of Uthman as well as the leadership of Ali up to the period before the arbitration (tahkim)

(ii) They condemned Mu'awiyyah on the ground that he came to power by force and because of his role in the arbitration issue.

(iii) They seriously accused all those who actively participated in the arbitration matter such as 'Ali, Abu Musa al-'Ash'ari and Amr b. al-As.

(iv) They criticised all those who participated in the battle of the camel especially Talha, Zubayr and Aisha (r.a.).

(v) They believed that leadership of the Muslim community ought to be by election of any qualified free born Muslim without necessarily restricting it to the Qurayshites only contrary to the opinion of the Shi'ites who limited it solely to the Ahl al-Bayt and the majority of the Ahl al-Sunnah, who restricted it to the Qurayshites based on the tradition: "Leadership (of the Muslim community) should come from the Qurayshites."[81]

(vi) Some of the Kharijites believed that there was no need for the appointment of a political head as long as people could comply with the commandments in the Qur'ān. However, some of them rescinded their decision on this matter when they appointed Abdullah b. Wahab al-Rāsibī as their political head.

KHARIJITES VIEWS WITH REGARDS TO FAITH AND PRACTICE:

(i) They pretend and claim strict compliance with the commandments of the Shari'ah in its totality, and so offering prayers (Salāh), fasting, alms giving (Zakāt), fulfilment of covenants were considered part and parcel of faith. In this respect, faith was not limited to mere belief in the heart or belief accompanied with verbal utterance as conceived by the majority of the Muslims.

(ii) Whoever committed a major sin, was regarded as an unbeliever.

(iii) They didn't accept prophetic narrations except from some selected reporters among the companions whom they recognised as trustworthy. Therefore, they substantially differed from the majority of the Muslims on many jurisprudential issues.

The Kharijites seriously disagreed among themselves as they had so many sub-sects each having its own distinct principles, although they shared common views on leadership as well as on faith and practice as already explained above. According to some scholars, there were about twenty (20) different sub-sects of Kharijites, each one disagreeing with the other on some of

their basic principles; some of the most famous groups among them include: al-ʿAzāriqah; al-Najdāt; al-Ibadiyyah; and al-Safariyyah.

1. al-ʿAzāriqah: These were the followers of Nafiʿ b. al-ʿAzraq, who was one of their greatest jurists. They condemned all those who disagreed with them as infidels. They totally rejected the idea of al-Taqiyyah (hiding one's real identity) as commonly practiced by the Shiʿites based on the Qurʾanic verse in which Allah says: "Behold! a section of them feared men as or even more than they should have feared God...." (Nisaʾ 4:77). But on the other hand, they approved the idea of acting treacherously when dealing with those who disagreed with them.

2. al-Najdāt: These were the followers of Najdah b. Amir who were of the view that the entire religion was basically contained in two elements only: knowing Allah and knowing His Messenger. Whatever was not contained in these two, people had an excuse if they did not know it until a clear evidence or proof was established unto them.

3. al-Safariyyah: These were the followers of Zayyād b. al-Asfar who do not very much differ with al-ʿAzariqah in their basic principles.

4. al-Ibāḍiyyah: These were the followers of Abdullah b. al-Ibad al-Tamimi. They had less stringent opinions against those who disagreed with them and their arguments always tilted towards conciliation.[85]

THE FIQH OF KHAWARIJ:

1. The Kharijites were seriously concerned with the conceptual meaning of good manners and spiritual values vis-a-vis physical practice. For example, they said bodily purification needed for the correct performance of Salah included purification of the tongue from telling lies and vain talks and so they listed nonsensical or shameless talks among things that vitiate ablution. Thus, they observed physical purification along with conceptual cleanliness.

2. There was a certain group of the Khariiites that became extremist who recognised Qur'an as the only source of law while they refused to accept the other sources of the Shari'ah, as agreed by the majority of the Muslims. Consequently, they held different views with regard to the following issues:

a) It has been reported that the Prophet (SAW) stoned an adulterer to death so also did the rightly guided caliphs after him despite the fact that the Qur'anic injunction concerning the punishment of the slave women who commit adultery says: ".....if they fall into shame, their punishment is half that for free women." (Nisà' 4:25). This group of the Kharijites questioned how the punishment of stoning to death could be halved as indicated in the verse above. Therefore, this was a valid ground for restricting the punishment of a free born lady who committed adultery to one hundred (100) lashes only as clearly mentioned in Sūrah al-Nur 24:2: "The woman and the man guilty of adultery or fornication

flog each of them one hundred (100) stripes....." Thus, they totally rejected all other prophetic traditions narrated on the matter of Rajm.[86]

b) It has been reported that the Prophet (SAW) said: "There is no bequest to an heir"[87] whereas Allah says in the Qur'an: "It is prescribed, when death approaches any of you, if he leaves any goods that he makes a bequest to parents and next of kin...." (Baqarah 2:180). However, parents under normal circumstances are heirs and none has the right or power to completely exclude them from the inheritance. Thus, the Kharijites rejected the hadith on wills as it contradicted the surface meaning of the Qur'anic text, which is contrary to the views of the generality of the Muslim jurists.

c) It has been reported that the Prophet (SAW) said: "Do not marry a lady with either her paternal or maternal aunt under the same wedlock...."[88] Again he was reported to have said: "Suckling prohibits what blood relationship prohibits"[89] while Allah the Most High said in the Qur'an:

> "Prohibited to you (for marriage) are your mothers , daughters, sisters, father's sisters, foster mothers (who gave you suck), foster-sisters, your wive's mothers, your step-daughters under your guardianship, born of your wives to whom ye have gone in (those who have been) wives of your sons proceeding from your loins; And two sisters in wedlock at one and the same time, except for what is past, for God is oft-forgiving, Most Merciful. Also (prohibited are) women already married, except those whom your right hands possess. Thus hath God ordained (prohibitions) against you: except for these all others are lawful, provided you seek (them in marriage) with gifts from your property....." (Nisā'4:23-24).

In these verses, Allah did not mention categorically the prohibition of combining a lady with her paternal or maternal aunt; and on the basis of fosterage the text mentioned the foster-mothers and the foster-sisters only, while the verses conclude by saying: "Except for these (the mentioned) all others are lawful". Thus, according to the jurisprudential interpretation of the Kharijites, the last sentence includes both the paternal and maternal aunts as well as all other relations through fosterage with the exception of the foster-mothers and foster-sisters. In fact, some of these arguments are currently being revived in Nigeria especially by those who felt that they were contented with what was contained in the Qur'an alone to the exclusion of the Sunnah and the interpretation of the previous scholars.[90]

B. THE SHI'AH:

These were the supporters of Ali, who believed that the best people to succeed the Prophet (SAW) were those related to him by blood such as his uncle 'Abbas and 'Ali, the son of his full paternal uncle. However, they preferred ʿAli because he accepted Islam much earlier than 'Abbas, his knowledge was a force to be reckoned with, his outstanding contributions in the Jihad and above all he was married to Fatimah, the only daughter who survived the Prophet (SAW). The Shi'ites strongly believed that leadership of the Muslim community after the Prophet (SAW) automatically belonged to 'Ali and his family whereas there is no single authentic hadith that indicates the Prophet (SAW) has specifically designated ʿAli to succeed him.

Despite the fact that 'Alī paid allegiance to 'Abu Bakr, 'Umar, and 'Uthmān, after the death of the Prophet (SAW), yet a good number of the companions were of the view that 'Alī was the most suitable for the leadership post of the Muslim community. The Shi'ites considered leadership, among the essentials or pillars of religion and one of the fundamental principles of Islam. Therefore, according to them, it was not possible for the Prophet (SAW) to neglect the issue of leadership due to its importance, so he ought to have appointed someone specifically to succeed him who ought to be infallible with regard to the commitment of major and minor sins. They believed 'Ali was the one designated for the leadership based on certain hadith that they reported within their circle which were not known to the great scholars of hadith and most of such reports were either faulty or clearly defective.

This led the Shi'ites to arrive at the following conclusions: 'Ali was the best of all creatures after the Prophet (SAW) with the highest position in the paradise. He had the best qualities, with outstanding traits and virtues. He was infallible and so also were all the Imams who succeeded him. Whoever showed aggression towards him or fought or hated him was certainly an enemy to Allah and he would be in the hell-fire forever together with the unbelievers and the hypocrites.

After the assassination of 'Alī, the Shi'ites paid allegiance to his eldest son Hassan who later on stepped down for Mu'awiyyah to spare the lives of the Muslims. The Shi'ites thought the matter would end with the death of

Mu'awiyyah but he designated his son Yazid to succeed to the throne after his death. So, Husseini b. 'Ali living in Iraq revolted against this decision thinking that the supporters of his father would help him to restore their usurped right. This led to the battle of Karbala, wherein he and a lot of Muslims were slain and none among the descendants of Hassan and Hussaini survived the encounter except some minor children. This was where the problems of disintegration started within the Shi'ah group itself. One group opined that the leadership after the killing of Husseini went to his consanguine brother Muhammad b. 'Ali popularly known as Ibn al Hanafiyyah. They attributed the leadership role to the children of 'Ali generally without any distinction whether from Fatimah or not.

Another group restricted the leadership to the descendants of 'Ali through Fatimah only. Thus, after the death of Hussaini, it went to the children of Hassan his senior brother. The third group believed that it was restricted to the children of 'Ali through Fatimah only, but since Hassan had stepped down from it then his children were not eligible for it unlike Husseini who was killed in its course, and so his children were entitled to its inheritance.

MAJOR CLASSIFICATION OF THE SHI'AH

Some of the major classifications of the Shi'ah according to Sharafuddin (1969) and Qaṭṭān (1976) include the following: Zaydiyyah, Imamiyyah, Ithna 'Ashariyyah and Isma'iliyyah just to mention but a few.

a) Zaydiyyah: These were the followers of Zayd b. Hassan b. 'Ali Zayn al-'Abidin b. al-Hussaini b. 'Ali b. 'Abu Talib. This was the most moderate group who were closer to Ahl al-sunnah wa al-Jama'ah. They did not believe in the designation of 'Ali neither did they accept the views of the extremists who believed that 'Ali was part and parcel of God. They approved the leadership of a qualified person in the presence of a more qualified person, hence they recognised the leadership of 'Abu Bakr, 'Umar and 'Uthman despite the fact that 'Ali according to them was the most qualified.

b) 'Imamiyyah 'ithna 'ashariyyah: This group believed that 'Ali was of the Muslim community by the Prophet (S.A.W) before his death through a *clear text according to their narrations but unfortunately it was usurped* from him by the caliphs who preceded him. They considered political leadership as part and parcel of the fundamentals of the religion. They were called 'Imamiyyah 'ithna ashariyyah because they restricted the leadership to the twelve Imams only starting with 'Ali then his children through Fatimah alone and their descendants up to the twelveth (12th) 'Imam, Muhammad al-Mahdi, the awaited. The leadership did not move from the last Imam to any person because he did not die but simply disappeared from this world in the year 260AH. They are expecting him to come out toward the end of this world to fill the earth with justice and security after it has been contaminated with injustice and insecurity. The twelve Imams in their chronological order are: 'Ali al-Murtada; al-

Hassan al-Mujtabah; al-Husseini al-shahid; 'Ali Zayn al-Abidin; Muhammad al-Bāqir; his son Ja'far al-Sadiq; Musa al-Kazim; Ali b. Musa al-Ridah; Muhammad al-Tuqah; 'Ali al-Nuqah; al-Hassan al-Askari al-dhakā; and Muhammad al-Mahdi (al-Muntazir).

c) **Ismā'iliyyah:** This is a sub-group of Imāmiyyah who attributed themselves to Isma'il b. Ja'far al-Sadiq. They recognised him as the next Imam after his father but they refused to recognise Musa al-Kazim. It is also a sub-branch of Ghulat al-Shi'ah, who were of the view that the Qur'an had an exterior and interior meaning hence they were sometimes called the Batinites.

THE SHITTES AND THE DEVELOPMENT OF ISLAMIC LAW BASED ON THEIR BASIC PRINCIPLES

The majority of the Shi'ites condemned the companions of the Prophet (SAW) except a few ones who recognised the leadership of 'Ali. As a result of this, the Shi'ites refused to accept many prophetic reports from the majority of the companions except the Ahl al-Bayt. However, the Shi'ah Zaydiyyah disagreed with them as they recognised the leadership of those who preceded 'Ali despite the fact that they regarded him to be the most qualified as already mentioned. The Shi'ites did not accept Ijma (consensus of opinion of the Muslim jurists) and Qiyās (analogical deductions), as sources of law, because the first one would lead them to accept the views of non-Shi'ah followers while the latter was an individual opinion and religious values, which according to them, could not be understood on mere opinions (ra'y) only. They said the

precepts of the Shari'ah could only be known from Allah, His messenger and their recognised Imams. Consequently, the Shi'ites differed sharply from the Ahl al-Sunnah wa al-Jamà'ah on certain jurisprudential issues, as they interpreted the text of the Shari'ah in line with their basic principles. Therefore, let us cite some cases for the purpose of illustration:

1. The Shi'ites advocate for the legality of temporary marriage up to the end of the world insisting that it has not been abrogated basing their arguments on the surface meaning of the verse: ".....seeing that you enjoy some benefit from them, give them their dowers (at least) as prescribed....." (Nisà 4:24).

The majority of the Muslim scholars on the other hand were of the view that the verse in question is talking about the contract of the normal marriage and the word 'Ajr is a synonym to Mahr or Sadāq (dowry). The Muslim scholars further said the arguments advanced by the Shi'ites are baseless because in another place the Qur'ān used the word 'Ajr in the same meaning ".....wed them with the permission of their owners and give them their dowers according to what is reasonable ....." (Nisā' 4.25).

The temporary marriage (Mut'ah) was made lawful sometimes during the early days of Islam on account of necessity and prohibition was the last thing reported from the Prophet (SAW) concerning the case. Another basic of the Shi'ites is that most of the prophetic traditions narrated on the prohibition of Mut'ah were related through 'Alī b. 'Abi Talib. The companions accepted the

prohibition of temporary marriage by consensus to the extent that Ibn 'Abbās himself abandoned his former opinion of its legality to that of the majority.

2. The Shi'ites did not approve the marriage of a Muslim with women of the people of the Book, on the basis of the literal meaning of the verse: ".....But hold not to the guardianship of unbelieving women....." (Mumtahanah 60:10). The majority of the Muslims (Jamūr) refuted their claims on the ground that the verse specifically refers to the non-believers other than the people of the Book and the expressed permission is mentioned in the verse: ".....lawful unto you in marriage are (not only) chaste women who are believers, but chaste women among the people of the Book revealed before your time....." (Mā'idah 5:6). This idea is presently being revived in Nigeria by a certain group of Muslims.

However, this is entirely different from the position of 'Umar b. al-Khaṭṭāb who discouraged marriage with women from the people of the Book in the name of trying to safeguard public interest (Maslaha) as already mentioned.

3. The Shi'ites upheld distinct opinions with regard to some issues related to the Islamic law of succession. For example, according to their jurisprudential interpretation, females generally do not inherit except from moveable objects to the exclusion of farm lands, houses and other immovable property. They gave the whole estate to the nearest sharer but they did not allow the agnatic heir to take the remainder. For instance, in a situation where a person died and left behind a daughter and a full brother, the Shi'ites would give the whole property to the daughter and they exclude totally the full brother from the inheritance.

They would also give preference to the son of a full paternal uncle over the consanguine paternal uncle. This was why they felt Ali deserved the leadership of the Muslims more than Abbas because the former was a son of a full paternal uncle while the latter was a consanguine paternal uncle; so also Fatimah was preferred to the agnates. Again according to the Shi'ites, prophets were to be inherited contrary to the prophetic tradition: "We Apostles of God do not inherit nor are we inherited.[91]

Although the Kharijites openly criticized and fought the Umayyads largely due to their bedouin attitudes, the Shi'ites, on the other hand, mostly resorted to secret actions which they later on defined as Taqiyyah for fear of their lives, personality and property.

C. **AHL AL-SUNNAH WA AL-JAMĀ'AH (The Moderate Majority):**

These were the people who did not embrace the Kharijites' beliefs neither did they practice the fundamentals of the Shi'ites; in their opinion all the companions are trustworthy and trustful. They also believed that the leadership of the Muslim community should go to the most deserving person from the Qurayshites based on the prophetic tradition quoted earlier.[92]

2.3.3.2.THE SPREAD OF HADITH NARRATION: ITS CAUSES AND EFFECTS

Narration of hadith during the period of the rightly guided caliphs was not very much widely spread. But during the period of the younger companions and the senior Tabi'in, narration of hadith increased tremendously, spreading far

and wide. This was because 'Umar b. al-Khattab during his reign as a caliph, prevented most of the companions from going out of Madina, as earlier mentioned, so as to help him decide new cases brought before him and in the general discharge of the affairs of the state. As a result of this the narration of hadith did not spread widely out of Madina.

However, after the period of 'Umar, most of the companions travelled to different parts of the Muslim State where they became established scholars of hadith, Qur'an and Fiqh with large number of disciples learning under them, who later on issued legal opinions (Fatwah) too. Thus, in this regard such companions narrated to their disciples all what they had memorized from the Prophet (SAW). As a matter of fact, some of the companions narrated a large number of traditions such as 'Abu Hurayrah, who was said to have narrated about 5,374 traditions; A'ishah (r.a.) 2,210; 'Abdullah b. 'Umar; Anas b. Malik, Jabir b. 'Abdullah and 'Abdullah b. 'Abbas about 1500 each. This is probably because most of them lived a long period after the death of the Prophet (SAW) and in addition they taught large number of students who narrated traditions from them.

Again narration of prophetic traditions during this time became more rampant and common as people from different places came to the companions seeking solutions to new problems on account of change in time, circumstances or conditions. Therefore, this necessitated, according to Khudri (1967) and Sharafuddin (1969), asking questions about the Sunnah and those who

memorized it had no alternative other than to narrate it. Some of the famous companions who stayed and taught in Madina include Abdullah b. 'Umar, 'A'ishah (r.a.) and 'Abu Hurayrah. Abdullah b. 'Abbas became established in Makka; 'Abdullah b. 'Amr b. al-As in Fustat; Anas b. Malik stayed in Basrah; and in Kufah there lived 'Abdullah b. Mas'ud, Abu Musa al-Ash'ari, and the disciples of 'Ali b. 'Abi Talib.

However, one of the sad characteristic features of this period was that some people started to forge traditions of the Prophet (SAW) in order to defend some of their selfish interests or sometimes to support their political or religious inclinations by re-interpreting the text (nass) to suit their interests. Sharafiddin (1969) observed that during this period, the sectarian differences grew intense and became very much pronounced to the extent that each of the minority groups, in order to justify its views attributed many false traditions to the Prophet (SAW) which were not acceptable to the majority of the Muslim 'Ummah. The political differences led the various factions to condemn one another as heretic and physically fought one another.

The Shi'ites in particular were said to have fabricated the largest number of traditions, in order to establish the superiority of their Imams, that is 'Ali and his descendants. When Imam Malik was once asked concerning the Rafidah (a sub-group of the Shi'ites), he replied: "Do not talk to them, do not report from them, certainly they tell lies." Another false tradition reported by the Shi'ites relates to what they said about Fatimah (r.a.) that when the Prophet (SAW)

performed the night journey (Isra), the Angel Jibril gave him Safarjalah (quince) from the paradise which he ate. Then, when he came back and had contact with Sayyidah Khadijah, She conceived the pregnancy of Fatimah. So, any time, the Prophet (SAW) desired the smell of paradise, he simply sniffed at Fatimah. This claim has been clearly refuted on two grounds, based on reliable historical facts: Firstly, Fatimah was born before the Prophet's Isra and secondly Sayyidah Khadijah had died before it.

This trend unfortunately led some moderates, too, to fabricate some 'ahadith against 'Ali and his descendants such as: "There is no tree in the paradise except on its leaves, it is written: There is no deity worthy of worship, except Allah, Muhammad is the messenger of Allah, 'Abu Bakr al-Siddiq, Umar al-Faruq, and Uthman dhunnurayn". In the same way the supporters of Mu'awiyyah fabricated the following traditions in his favour: "Great leaders are three only, myself, Jibril and Mu'awiyyah." In another tradition, it reads: ".....You are from me Oh Mu'awiyyah! and I am from you."

However, the Kharijites were not counted among those who fabricated traditions because according to them commitment of sinful acts was incompatible with faith (Iman). Therefore, it was not logical for them to sanction what would take them out of Islam, by lying against the Prophet (SAW). Imam 'Abu Dawud was reported to have said: "There is none among the selfish groups who have more authentic traditions than the Kharijites."

Another group of people who actively participated in the fabrication of traditions were the atheists with the intention of spoiling some religious values. In this respect, an atheist, 'Abdulkarim b. 'Abi al-'Awja' was said to have confessed to have fabricated one hundred (*100*) hadith in circulation at the time when he was about to be executed by Muhammad b. Sulaymān b. Ali, the then governor of Baṣrah.

Partisan solidarity to a particular individual, group of people or certain places, was also among the causal factors responsible for the fabrication of traditions during this period. For example, a group of Muslims who deliberately refused to recognise the privileged position of the Arabs were reported to have invented a saying: "Surely, when God is angry, He brings down the revelation in the Arabic language but when He is pleased, He brings down the revelation in the Persian language." Some ignorant Arabs replied them saying: "Certainly, when God is angry He brings down the revelation in the Persian language but when He is pleased, He brings down the revelation in the Arabic language."

The supporters of 'Abū Hanīfah were reported to have concocted the following tradition in his favour: "There will be a man from among my community called 'Abu Hanifah al-Nu'man, he is the light of my community." On the other hand, some people who were seriously against Imam Shafi forged the following tradition: "There is going to be a man in my community called Muhammad b.' Idris, he is more dangerous unto my people than Iblis."

Fictitious story tellers and preachers were another source through which hadith was fabricated because some of such people had taken it upon themselves as a duty to make their listeners shed tears. Thus, they beautifully created stories out of their own imaginations and attributed the same to the Prophet (SAW). This group of people fabricated traditions under the pretext of the principle of Targhib (exhortation) and Tarhib (threat) to the extent that most of their narrations went beyond human imaginations, especially the sufis among them.[93] The Muslim scholars categorically disapproved this method of teaching and reminded them of the prophetic tradition which says: "Whoever lies against me deliberately, let him prepare his abode of rest in the hell-fire."[94] But such people usually replied: "We do not lie against him but in his favour." However, this is a wrong judgement.

Fabrications of hadith had a serious effect on the progress and development of Fiqh, during this period as rightly observed by Sharafuddin (1969) and Qattan (1976). It made the methodology of the jurists difficult and as such slowed them down in their work. Formerly, once a jurist heard of a hadith, he was certain and sure of its authenticity. Therefore, he simply studied it closely and discovered new laws from it. However, with the emergence of fabrications, the methodology of the jurists became complicated since the Mujtahid (legist) had to first of all consider the reliability and authenticity of both the chain (Isnād) and the text (Matn) before he could closely examine the hadith and extract new laws from it.

The evil conspiracies of the fabricators did not continue according to their evil plan and the Muslim Ummah was not deceived with what they had invented and fabricated. Certainly, a group of learned scholars stood up for unveiling the evil machinations of such fabricators by exposing their fallaciousness and making the Muslims aware of such people with their evil acts, one after the other. This is how the new knowledge evolved which has no pararel within the circle of the non-Muslims, known as 'Ilm al-Rijal. This is a science where the scholars of hadith critically studied the biographies of all the reporters of hadith in order to ascertain whether their reports could be accepted or not. This study gave birth to the science of al-Jarh wa al-Ta'dil, all in the name of trying to verify authentic traditions from fake ones. This is a very important field of study aimed at protecting the Sunnah, thereby exposing both the good and bad characters of the reporters one after the other, so as to differentiate between trustworthy and non-trustworthy reporters; reliable and non-reliable reporters; the people whose reports could be accepted and those who are injured since their reports could not be accepted. This issue of qualifying and disqualifying started at the beginning of this period. Thus, the scholars of hadith seriously scrutinized both the Isnad (chain) and the Matn (text), because they did not accept any report until they became satisfied with the reporter's qualities of head and heart.

Imam Muslim reported in the introductory part of his book a saying from Ibn Mas'ud: "Initially, the reporters of hadith were not asked to mention

the chain of their narrators but they were later on asked to do so after the occurrence of Fitnah (civil strife). Thus the scholars accepted the reports of trustworthy and reliable reporters while they rejected that of the innovators."[95]

It was once said to Yahaya b. Sa'id al-Qattan, one of the critics of hadith: "Don't you fear that such people who reports you rejected might have a case with you before Allah on the day of judgement?" He replied: "Certainly, it is better for me to have a case with such people than to have a case with the Prophet (SAW) saying why did you defend lies in my traditions?"

Imäm Mälik was reported to have said: "The reports of four people could not be accepted: A stupid person; a person lying when discussing with people even if he had not been accused of lying against the Prophet (SAW), one who follows his whims and caprices; and an old man who does not know what he is narrating."[96]

OFFICIAL DOCUMENTATION OF HADITH

Qattän (1976) and Zaydän (1982), observed that the period of the rightly guided caliphs ended without the hadith being officially documented, except in a few cases of personal efforts, under the pretext that the Prophet (SAW) initially did not permit the companions to record it during his time for fear of mixing it with the Qur'ān. It has been reported that 'Umar b. al-Khattab during his reign thought of the official documentation of the Sunnah but he later on rescinded his decision despite the fact that the companions had supported the idea.' Umar lamented: "I thought of compiling the Sunnah officially, then I

remembered some people who came before you, who compiled some documents and concentrated on them while they totally neglected the Book of their Lord, by God! I will never merge the Book of Allah with anything forever."

However, after the emergence of political disunity among the Muslims and the appearance of different sects as well as forgery in Hadīth, the need for the official documentation of the Sunnah became most obvious so as to safeguard it from distortions and fabrications.

'Umar b. 'Abd al-'Azīz, one of the 'Umayyad caliphs was the first to take an official step towards the compilation of the Sunnah. He took this step because he feared the loss of knowledge and the passing away of learned scholars. He wrote letters to different scholars and governors requesting them to compile all the available authentic traditions within their reach. One of such letters was written to 'Abū Bakr Muhammad b. 'Amr b. Hazam, one of his governors, saying: "Look at the available hadīth of the Prophet (SAW) and record it down."

Imām Muhammad b. Muslim b. Shihab al-Zuhri was one of the first scholars to carry out this assignment but Umar the second died before he finally completed his work which later on served as the basis for the compilation of Malik's Muwattā. During this period the compilation of hadith was not based on division into chapters as in the works of Imam al-Bukhari, Muslim and others.

2.3.3.3. THE SOURCES OF LAW AND THE STATUS OF IJTIHAD DURING THIS PERIOD

The jurists of this period refered to the sources of the Shari'ah in the following order: Qur'ān, Sunnah, Ijmā', and Qiyās. However, Ijtihad through collective effort popularly known as Ijmā' became no longer tenable during this period because most of the learned jurists became scattered into various places and so also this period witnessed the emergence of some sects such as the Khawārij and the rest. The expansion of the Islamic State brought a lot of new developments that contributed significantly to the emergence of so many problems and differences within it. The expansion also brought people of various places together with different backgrounds in terms of customs and traditions as well as political and economic ways of life. The jurists were also not of the same level of understanding; therefore differences of opinions among them became inevitable.

The Fiqh, during this period followed the methodology of the Sahabah as the followers (Tabi'in) learned it from them and so they followed their methodology in the derivation of new laws. The scope of Fiqh continued to expand with the increase of new happenings and incidents. Thus, the jurists had to find the Shari'ah value for each of the new happenings either directly through a clear text or indirectly through discovery by effort (Ijtihād). Some of the jurists gave legal opinions (fatwah) based on their understanding (ra'y) whenever they were asked questions on matters that had no textual basis in the

Qur'ān and Sunnah, while others refrained from the use of ra'y (personal opinion) following the practice of the rightly guided caliphs. This led to the formation of the traditionists' school (Madrsat Ahl al-Hadith) on the one hand and that of the opinionists (Madrsat Ahl al-Ra'y) on the other as a major aspect of the development of Islamic law. The former school was based in Madina while the latter was based in Kufah. The appearance of the two trends of Ijtihad during the period of the junior companions and the senior Tabi'in became much more pronounced, stronger and clearer than in the period of the rightly guided caliphs.

(a) The traditionists' School At Hijaz.

Hijaz in general and Madina in particular had a special status in the sense that it was the home place of Islamic legislation where a lot of prophetic traditions circulated as well as the saying and legal decisions of the companions. Thus it became a great centre of learning the Sunnah and its dissemination. It also became the centre point of the companions. The life in Madina could be described as simple since it did not generally change, a substantial number of the residents were God-fearing and as such they did not indulge in the fabrication of traditions for one reason or the other. This made the people of Madina to be the most reliable in Fiqh as they strongly stuck to the traditions of the Prophet (SAW) in their legal decisions.

The leading jurists of the traditionists' school in Madina included Zayd b. Thābit and ʿAbdullah b. 'Umar who were well known for strongly clinging to

the Sunnah. The jurists of this school did not attempt to provide legal decisions to hypothetical situations that had not emerged. They gave legal decisions on issues that had actually occurred using texts or traditions. But in certain cases when they were unable to get the relevant texts, they refrained from passing any decision while in other cases they reluctantly resorted to the use of ra'y under necessity with a very strict tone.

Whenever the followers of this school were asked a question, they would use Qur'anic verse or prophetic traditions where applicable to answer it, otherwise they would not use their personal opinions. For example, somebody asked Salim b. 'Abdullah b. 'Umar a certain question upon which he replied: "I have not heard anything about it." The man said: Tell me your opinion, may Allah guide you. Salim said: No. Then, the man repeated his question saying: "Certainly, I am contented with your opinion." Salim said: "Do you want me to tell you my opinion, then it may be I will see a better opinion after you have left while I cannot see you (to correct it)?"[97]

The scholars of Hijāz generally discouraged their disciples from asking too many questions. Although most of the scholars and jurists within the Hijaz adhered strictly to the use of traditions in passing legal decisions, yet a few ones among them leaned toward the use of ra'y similar to the scholars of Iraq. For example, Rabi'ah b. 'Abd al-Rahmān, one of the teachers of Imam Malik, was among the scholars of Madina said to be famous in the use of Ra'y to the extent that he was nick-named Rabi'ah al-Ra'y.

Sa'id b. al-Musayyib (d. 94AH) was the founder of the traditionists school in Madina during this period. He was among the leading Tabi'i jurists in the field of Hadith, Fiqh, religious knowledge in general, piety and moral excellence to the extent that he was given the title "the most learned of the jurists." He was among the seven[98] great jurists who spread the teaching of Fiqh in Madina after they had graduated from the companions. The traditionists' camp eventually gave birth to the Maliki, Shafi and Hanbali schools of law.

(b) The Opinionists School at Iraq:

This school was established under the leadership of Abdullah b. Mas'ud who was reported to have similar attitude with Umar b. al-Khattab who first posted him to Kufah as a teacher. He substantially depended on the use of ra'y (opinion) and he did not hesitate to use it whenever there was no text on the case.

There was little circulation of hadith in Iraq as compared to Hijaz, the home of the Prophet (SAW) and the great companions. The life in Kufah could be described as complex since the people there were very much familiar with the old Persian civilization and so there emerged a lot of things that invariably required the use of ra'y (personal understanding). Again Iraq was the home base of Shi'ah and Khawarij as well as the centre where all troubles emanated. Thus, fabrication of hadith got a strong base in the area due to the emergence of various sects who tended to fabricate hadith in order to justify their principles. Therefore, the traditions narrated within Iraq were not as reliable as those of

Hijāz, and so their jurists preferred to pass legal decisions based on their personal understanding or opinion (ra'y) in the absence of any reliable text.[99]

Zaydān (1982) observed that the jurists did not stop at giving legal decisions to cases that had actually taken place but they moved further to provide legal decisions based on their understanding to hypothetical cases that were yet to occur. This attribute was typical of the Hanafī school of law as we are going to see in due course. According to Sharafuddīn (1969) and Zaydān (1982), Ibrāhim b. Yazīd al-Nakha'ī was the founder of the opinionists school at Kūfah. He was the teacher of Hammād b. Sulayman, (d. 96AH) who was in turn the teacher of Imām Abū Hanīfah the founder of the Hanafī School of law. In Iraq there also emerged the Zāhiriyyah School of law founded by Imam Dawud b. 'Alī al-Zāhir. Then, the school was later on led by Ibn Hazam who also strictly adhered to the literal meaning of the text.

2.3.3.4 THE ROLE OF THE UMAYYAD CALIPHS IN THE DEVELOPMENT OF ISLAMIC LAW

After Mu'āwiyyah assumed power, he designated Yazid, his son, to succeed him and this was entirely a new phenomenon in the Islamic polity. It was reported that one day Mu'āwiyyah bought a small bowel or vessel (paying with gold) for more than its weight. Then 'Abu al-Dardā' said to him: "I heard the Messenger of Allah forbidding such a sale". Mu'awiyyah said: "I see nothing wrong in that". 'Abu al-Dardā' further said: "Who would absolve Mu'āwiyyah from guilt? I am narrating to him from the Prophet (SAW) while

he is narrating to me from his personal opinion, I will not stay in the same land with you".

However, some of the 'Umayyad caliphs contributed significantly to the development of Islam such as 'Abd al-Malik b. Marwan, 'Umar b. 'Abd al-'Aziz etc. The former was even nick-named Hamamah al-Masjid (dove of the mosque) due to his devotional services. A group of people asked Abdullah b. 'Umar: "Whom do we ask above religious matters when all the companions have perished?" He replied: "Ask 'Abd al-Malik b. Marwan". Another 'Umayyad caliph who was very much concerned with the religious matters was al-Walid b. 'Abd al-Malik, during whose reign most of the famous mosques were built.

'Umar b. 'Abd al-'Aziz otherwise known as 'Umar the second was popularly associated with justice and fairness in the discharge of his affairs. The credit of reviving the Sunnah of the Prophet (SAW) as well as the attempt to return all the neglected religious activities to the days of the Prophet (SAW), Abu Bakr, and 'Umar go back to him. He gave the official order for documentation and compilation of the Sunnah. Some writers called him the fifth (5th) rightly guided caliph because most of his activities resembled those of the four rightly guided caliphs.

2.3.3.5 SAMPLE CASES OF SOME CONTROVERSIAL DECISIONS TAKEN DURING THE PERIOD OF THE TABI'IN

In this sub-section, the researcher will attempt to give some high-lights with regard to some controversial decisions taken during the period of the Tabi'un. This is to provide sample cases for the purpose of illustration, so as to see how the jurists of that period sometimes disagreed with one another and the basis through which they disagreed. Some of the most significant decisions taken during this period included:

1. Recitation of some Qur'anic chapters or verses while praying behind the Imam: The most widely accepted opinion among the scholars of Hijaz was that one could recite the Qur'anic chapters or verses when praying behind the Imam in prayers when he recites siliently but one should not recite anything in the prayers where the Imam recites openly. Hisham b. 'Urwah narrated that his father recited something behind the Imam when he (the Imam) recited silently. Whereas the most popular view among the opinionists' school of law is that one should not recite anything behind the Imam whether he recited openly or silently. It has been reported from Abu Hanifah who narrated from Hammad narrating from Ibrahim and Sa'id b. Jubayr concerning the recitation behind the Imam: "The two scholars unanimously agreed that one should not recite anything behind the Imam in Maghrib, Isha and Subh prayers." Ibrahim

added that, so also in Zuhr and Asr prayers. Some people were of the view that it was not proper for any person to recite anything behind the Imam in any prayer. The scholars of Hijaz based their decision on the tradition that indicated permission of reciting Fatihah behind the Imam such as: "Do not recite anything but the opening chapter."[100] In another report, it reads: "There is no prayer to whoever does not recite the opening chapter."[101]

The opinionists on the other hand based their decision on the tradition which says: "Whoever prays behind the Imam, then, the recitation of the Imam stands as his own recitation."[102] However, this tradition was said to be weak according to the scholars of hadith. It is interesting to note that the adherents of both schools were agreed that whoever joined the Imam in a state of ruku' had got that raka'ah despite the fact that he did not recite anything. Therefore, this shows that recitation behind the Imām is not essential.

2. Sitting posture in prayers: The most widely accepted opinion in Hijaz pertaining to the mode of sitting in the performance of prayer is that one should sit on the hip. It has been narrated from Yahya b. Sa'id that Qasim b. Muhammad taught them the sitting position putting his right foot on the ground and sitting on his left hip but he did not sit on his foot. However, the people of Kufah narrated a different sitting posture and that is one should spread his left foot on the ground and sit on it.

In conclusion, there had emerged a third view point that attempted to strike a balance between the two opinions that the first sitting position in the prayer (Julus) would be observed according to the understanding of the people of Kufah while the second one would be observed according to the report of the people of Hijaz.

3. Passing a judicial decision on account of an oath accompanied with one witness: The majority of the jurists of Hijaz were of the opinion that a judicial decision could be passed on account of an oath with a testimony of one witness on matters related to property or wealth.

Imam Malik narrated that 'Abu Salmah b. 'Abd al-Rahman and Sulayman b. Yassar were asked: "Could a judicial decision be passed for an oath and one witness?" Both of them replied: "Yes". Imam Shafi' also narrated from Malik, who narrated from his father that the Prophet (SAW) passed a judicial decision based on the testimony of one witness accompanied with an oath and this specifically took place in a case that involved property.

The jurists of Iraq on the other hand did not pass judicial decision except when there was a testimony of two men or a man and two women basing their arguments on a Qur'anic verse in which Allah says: "And get two witnesses, out of your own men, and if there are not two men then a man and two women, such you choose for witnesses....." (Baqarah 2:282).

4. Price Control: The basic principle involved in the exchange of benefits is the mutual agreement between the parties concerned. In this respect,

the Most High said: "O ye who believe! eat not up your property among yourselves in vanities: But let there be amongst you traffic and trade by mutual good-will...." (Nisā' 4:29).

Then, how can the mutual agreement be realised if the prices of commodities are fixed in such a way that the seller has no option but to sell his goods at the controlled price? Naturally, prices of goods go high as a result of natural scarcity or high demand. In such a situation none has the right to interfere in the market affairs in the name of price control. This is why the Prophet (SAW) refused to fix prices of commodities when people complained of sky-roketting of prices in the markets. Abu Hurayrah reported that a man came to the Prophet (SAW) and said: "Oh messenger of Allah fix specific prices for our commodities". He replied: "I will pray to God for things to be easy". On another occasion, somebody came and said: "Oh Messenger of Allah fix prices for our commodities (as things are not easy)". He replied: "Certainly it is God who raises or lowers the prices of commodities (as He wish) and I hope to meet Allah, the Almighty, the Great while none has any wrongful claim on me."[103] The Prophet (SAW) refused to fix the prices because he felt that it was unfair and unjust in the sense that the owner of the property was being forced to sell his goods without his consent and permission which was against the Islamic law of business transaction.

However, where and when the traders deliberately planned to withhold the commodities from going to the market, so that the prices could go high,

then in such a situation the leaders of the Muslim Ummah were free to resort to price control, otherwise it was not lawful. The jurists who sanctioned this opinion include Sa'id b. al-Musayyib, Rabi'ah b. Abd al-Rahmān, and Yahya b. Sa'id al-Ansari. They based their decision on the principle of public interest and the aversion of evils.

5. Rejection of the Testimony of Close Relations: Testimony is one of the approved ways through which a judge can establish the fact of a case and consequently arrive at a certain decision. This is why the Qur'an stipulates the condition of good character for the validity of any person giving witness: "...And take for witness two persons from among you endued with justice...." (Talaq 65:2). In another place the Qur'an states: ".....And get two witnesses out of your own men, and if there are not two men, then a man and two women, such as you choose for witnesses, so that if one of them errs the other can remind her...." (Baqarah 2:282).

However, there is no stipulation against close relations giving testimony in respect of one another. Thus, 'Umar b. al-Khaṭṭab, Sa'id b. al-Musayyib, 'Umar b. 'Abd al-Aziz and Justice Shurayh accepted the testimony of close relations to one another such as between children and their parents or between spouses etc. During the early days of Islam, none of these close relations was denied the right of giving testimony for one another because then people were more conscious of their religious obligations. But with the passage of time some people started becoming weak in their religious consciousness, and so the

Tabi'ūn had no other alternative than to generally reject the testimony of close relations to one another such as between parents and their children; husband and wife etc. This was arrived at looking at the principle of public interest and the aversion of evils.

Justice Shurayh, who formerly accepted the testimony of close relations to one another, later on changed his position as a result of change in time, situation and circumstances. In the light of this, the following statement was attributed to him: "The testimony of a child in respect to any of his parents is invalid and vice-varsa; so also the testimony of a wife to her husband and vice-varsa; as well as the testimony of a slave to his master and vice-varsa...."[104] It is important to note that Justice Shurayh lived for about one hundred (100) years and spent about seventy (70) years serving as a judge in Kufah.

6. Taking an oath to disobey the commandments of the Shari'ah: Taking a vow to do some acts of goodness is generally one of the devotional duties through which a believer can gain closeness to Allah. Therefore if a person takes a vow to perform some good acts, then automatically it becomes an obligation upon him to fulfil such a pledge. The Qur'an categorically states: "And let them fulfil their vows...." (Hajj:29). The Prophet (SAW) was reported to have said: "Whoever took a vow to perform some acts of obedience to Allah, let him fulfil it but on the other hand whoever took a vow to commit some acts of disobedience to Allah, he should not fulfil it....."[105] It is clear therefore, from the above

tradition that there is no need for one to fulfil the vow taken in order to violate the laws of the Shari'ah because such does not lead to the desired objectives of getting closeness to Allah or His pleasure.

However, despite this explanation, Sa'id b. al-Musayyib and Ikramah rejected the opinion of one another on this particular issue. According to the former whoever took a vow to commit evils should fulfil it whereas the latter maintains that such a person should not fulfil his vow. Ibn al-Musayyib was probably not aware of the prophetic tradition that distinguishes between taking a vow to perform good and taking an oath to perform bad things, otherwise, he would not have disagreed with Ikramah on this issue.

7. The companions consulted the caliphs before taking decisions: The companions on many occasions did not pass legal decisions based on their personal understandings (al-ra'y) until they sought clearance from the caliphs. For example, 'Abd al-Hamid b. 'Abd al-Rahmian wrote to 'Umar b. 'Abd al-'Aziz saying: "A man abusing you was brought before me for adjudication and I resolved to execute him but I detained him and wrote this letter to seek your opinion on this matter". Umar, the second replied him: "Had it been you have executed him, certainly I would have cut you into strips because none shall be killed for simply abusing someone except in the case of the Prophet (SAW). Therefore, if you so wish, you can abuse him too, or leave him to go his way."[106]

The administrative officer who wrote this letter to the caliph thought abusing any leader of the Muslim Ummah was a serious offence which could warrant passing capital punishment on the culprit, so as to protect the image of the caliph in the minds of the people in consideration of the principle of public interest (Maslaha). The caliph, on the other hand felt that such a Maslaha contradicts an already established Islamic principle of safe guarding human life. This is because, in Islām, the blood of a Muslim should not be shed except on the following grounds: Intentional homicide, adultery, aspostacy, and abusing or defaming the personality of the Prophet (SAW).[107] Therefore, in the light of the above tradition abusing the character of the caliph is clearly not among the causal factors for which sheding the blood of a Muslim becomes lawful, as rightly observed by Sharafuddin (1969).

2.3.4.0 THE FOURTH DEVELOPMENTAL STAGE OF ISLAMIC LAW: THE PERIOD OF THE LEADING JURISTS

This period started from the early part of the second century after Hijrah and it extended to the middle of the fourth century after Hijrah. The change of government from the Umayyads to the Abbasid regime took place during this period. The conventional sciences of Fiqh and hadith as well as the emergence of the leading jurists came to lime light during this period. Fiqh in particular grew significantly, flourished wonderfully, matured fully and finally produced good results. It provided the Islamic State with code of laws for the proper

organization of its various aspects for many centuries and the people enjoyed such legislation for quite a long time. Therefore, because of these distinct peculiarities, this period was given various names explaining its manifestations in one way or the other, such as Aṣr al-Fiqh al-dhahabī (the golden period of Fiqh); Aṣar izdihār al-Fiqh (the blooming period of Fiqh); Aṣr al-Tadwin (the period of documentation); Aṣr al-Mujtahidin (the period of the leading jurists). Some of the basic characteristic features of this period are as follows:

2.3.4.1 TERRITORIAL EXPANSION

'Abū al-'Abbās, 'Abdullah commonly known as al-Safah b. Muhammad b. 'Alī b. 'Abdullah b. 'Abbas became the first political head of the Muslim State under the 'Abbasid dynasty, after a long tussle between them and the former ruling class. When 'Abū Ja'far al-Mansur became the second caliph, he founded the city of Baghdad which later on turned to be a centre for learning and educational studies. This was because people of different professions from different places converged in the city, and so it became a great centre of the Muslim civilization. According to Zaydan (1982), the Islamic State expanded and extended from 'Aṣbāniya (Spain) to China.

Sharafuddin (1969), observed that the Islamic State during this period expanded tremendously and the caliphs became interested in conducting all their affairs according to the requirements of the Shari'ah. They consulted the jurists for legal decisions on new matters that arose and the jurists on the other hand lived to their expectations by playing their roles as expected. Sometimes,

the jurists did not wait until new cases emerged practically but they tried to supply answers to hypothetical cases that were yet to occur.

Khudri (1967) observed that most of the new converts (mawāli) mainly came from Persia, Rome and Egypt, who hitherto had some experience of civilization. As a matter of fact the Abbasids came to power mainly through the effort of the new converts (mawāli). Majority of the new converts ardently learnt the sciences of the new religion under their Muslim leaders. Thus, there emerged among them distinguished Qur'anic reciters, traditionists, and jurists; and they also participated actively in the governance of the Muslim State. The number of people who memorized the Qur'an within the circle of the new converts increased significantly during this period and they spread to different parts of the Muslim State. For example, in Madina there lived Nafi' b. Nu'aym Mawlā Ju'ūnah and 'Abdullah b. Kathīr Mawlá 'Amr b. 'Alqamah in Makka; Abu 'Amr b. 'Alā al-Mazinī; in Basra; 'Abdullah b. 'Amir; in Damascus; 'Abu Bakr 'Āsim b. 'Abi al-Nujūd, Hamzah b. Habīb al-Zayyāt and 'Abu al-Hassan 'Ali b. Hamzah al-Kisā'i Mawla Bani 'Asad. They seriously struggled and learnt the precepts of the Shari'ah in all their day-to-day activities. They fled to the jurists within their reach asking them several jurisprudential questions and at the same time depended on them for legal decisions.

Zaydān (1982), stated that people of the new conquered places usually came along with some of their former beliefs, customs and traditions which Islam respected as long as such did not contradict the text of the Shari'ah.

Therefore, based on this there emerged different ways of handling issues among the Muslim jurists in different locations.

2.3.4.2 THE CONTRIBUTION OF ABBASID CALIPHS TO ISLAM IN GENERAL AND FIQH IN PARTICULAR

According to Sharafuddin (1969), the 'Abbasid caliphs became interested in encouraging the Muslim scholars in the pursuit of knowledge and civilization in general. The scholars and jurists were brought closer to the political authority and their views were respected as the caliphs intended to paint all their activities along the religious lines. For example Harun al-Rashid a famous caliph requested 'Imam 'Abu Yusuf, the Grand-kadi and a disciple of 'Abu Hanifah to compile a book which he would adopt in the running of his administration on economic matters. 'Imam Abu Yusuf compiled one of his famous books al-Kharaj in which he explained the various sources of Islamic income, and ways of disbursement.

'Abu Ja'far al-Mansur sought the opinion of Imam Malik in order to make his book Muwatta, the only official book of hadith recognised after it had been vetted by several other scholars who attested to its worthiness. Imam Malik replied: "Oh commander of the faithful! surely, some companions travelled to different parts of the Muslim world after the death of the Prophet (SAW) while each and everyone of them went along with him some authentic ahadith. Therefore it is not proper to restrict people to this book only". The caliph rescinded his decision when he was satisfied with the explanation given.

Other 'Abbasid caliphs were also reported to have reiterated the same request but Imam Malik refused to give his consent.[108]

The concern of the caliphs for the jurists further provided the need for a meaningful scientific research. This also made the jurists energetic and active as well as eager to proceed with their jurisprudential productions (Fiqh) and other scientific researches in general. Thus, a learned jurist was free to investigate on any matter of Fiqh and to announce publicly the result of his findings without any fear or favour.

As a matter of fact, most of the Abbasid caliphs were well versed in the religious matters hence they established circles of learning in their palaces. For example, the caliph al-Mamun used to come close to the jurists when deliberating on matters of Fiqh in his palace. He sometimes participated in the discussion supporting or disagreeing with an opinion while sometimes, he supplied further information on the case at stake. He strongly supported the Mu'tazilites and promoted their theological doctrine. It was unfortunate that some of the caliphs tried to impose their own doctrinal beliefs on their subjects. For example, Imam 'Ahmad b. Hanbal was seriously punished for upholding a contrary opinion over the issue of the createdness of the Qur'an.

Some of the leading jurists were seriously punished and humiliated on account of political differences with the ruling class. Imam Malik was scorned and his hands stretched out until his shoulders became dislocated simply because he narrated the hadith which says: "Divorce issued under coercion is

invalid."[109] This is because some people condemned the allegiance made under compulsion such as the one made to Abu Ja'far al-Mansur one of the 'Abbasid caliphs based on the above quoted tradition. The order for the punishment of Imam Malik was issued by Ja'far b. Sulayman, the then governor of Madina during the reign of al-Mansur. This episode greatly annoyed the generality of the people of Madina and other places because of the respect they had for Imam Malik.

Thus, the caliph had to apologise before Malik at the time when he visited Madina performing the rites of Hajj saying: "By Allah whom there is nothing worthy of worship except He, I did not give the order for what had happened nor do I know anything about it. Now, I have instructed Ja'far, the enemy of God to be taken to Iraq in chains and be under strict detention as well as to intensify humiliation on him and certainly I will punish him double of what he gave you.[110] Imam Malik on the other hand refused to give his consent to this decision and instead pardoned the governor because of his blood relationship with the Prophet (SAW) as well as his closeness to the caliph. Therefore, the leader of the faithful became extremely delighted with the kind gesture of Imam Malik.

The Abbasid caliphs continued to encourage and support the jurists up to the time when the people in the political authority initiated and sponsored the well-known project of "Translation"[111] during the period of al-Ma'mun. Consequently, this diverted their attention and relegated the jurists and Fiqh,

their field of study, to the background. Thus, experts in theological discussions were the only people who had high regard in the sight of the caliphs.

2.3.4.3 EMERGENCE OF THE GREAT JURISTS AND SCHOOLS OF LAW

The centres of learning Fiqh as observed by Sharufiddin (1969) expanded with the expansion of the Islamic State. Some of the famous centres include: Madina, Makka, Iraq, Kufah, Basra, Baghdad, Egypt, Fustat. The students learnt the precepts of the Shari'ah from their scholars through the Book of Allah and the Sunnah of His messenger. Each of the afore-mentioned schools maintained some of its distinctive features in their conduct of Ijtihad. The students began to shift from one scholar to another in an attempt to gain more knowledge. For example Imam Shafi'i travelled from Hijaz to Iraq and from Iraq back to Hijaz then to Egypt where he established a new school of law. The fruits of his travelling could be noticed in his book, the Risalah, which he compiled on Usul al-Fiqh. However, Imam Malik stationed himself in Madina only and did not go out of it except for the purpose of Hajj.

During this period, according to Qattan (1976), there emerged what the majority of the Muslims considered as the distinguished leading jurists. These great jurists, according to Zaydan (1982) were thoroughly versed in Fiqh; they worked earnestly for the progress of Fiqh and as a result solved most of the problems of the Islamic State in terms of law and order. Healthy discussions and disputations among the jurists resulted in the formation of the different

schools of law (al-Madhāhib al-Fiqhiyyah) based on the various opinions or legal decisions expressed by the founders of such schools. This made the scholars make deeper investigations in order to defend their views.

Khudri (1967) observed that most of the distinguished leading jurists had many disciples who took upon themselves the responsibility of spreading and defending the views of their masters. Zaydan (1982) further recognised that the teaching of the great jurists at this period became distinctive of one another and their sense of direction became clearer. Some of the most popularly recognised leading jurists of this period include: Imām Abu Hanifah (b. 80AH); Imām malik (b. 93 AH); Imam Shafi (b. 150 AH); and Imam Ahmad b. Hanbal (b. 164 AH). These jurists were generally recognised and regarded as the founders of the four Sunni schools of law.

The companions disagreed with one another in the methodology of conducting Ijtihad. The scope of the disagreement became wide during the period of the classical leading jurists. This is partly because some of the texts were capable of accommodating more than one meaning and sometimes the differences might emerge as a result of the difference in the principles they followed in the conduct of Ijtihad. Some of the jurists considered the following as bases for making their decisions while others did not: Mursal[112] traditions; the practice of the people of Madina; legal decisions of the companions based on their own Ijtihad etc. In the light of this, let us cite for the purpose of illustration some cases where the jurists of this period expressed different opinions:

1. **Prohibition of blood**: The Qur'anic verse revealed concerning the prohibited food states: ".....Aw Damanmnasfuhan." (An'am 6:145). This description refers to the blood that gushes out and the Muslims are clearly prohibited from consuming it. This is the immediate understanding that comes to someone's mind from the wording of the text and at the same time it shows lawfulness of the blood that does not rush out based on the Mafhum al-Mukhalafah,[113] of the text, which is the opinion of the majority of the Usulists.[114] Whereas the Hanafi jurists on the other hand, did not accept this explanation, but they opined that the verse simply explains the prohibition of blood that gushes out but it says nothing pertaining to the blood that is not gushing out. However, they said the law governing such blood could be taken from another source based on the Usulists' principle which says: "Everything is lawful except what the Shari'ah prohibited openly".

2. Combination of Prayers when it rains: According to Imam Malik it is lawful to combine the prayers of Maghrib and 'Isha' as a result of heavy rainfall based on the report of Ibn Abbas that the Prophet (SAW) prayed Zuhr and Asr together as well as Maghrib and 'Isha' not because of (any) fear or being on a journey.[115]

The Prophet (SAW) combined the two prayers in the opinion of Malik due to heavy rainfall and this tallied with the practice of the people of Madina whereas al-Layth b. Sa'd among the prominent jurists of Iraq did not agree with

the combination of prayers at a time as a result of heavy rainfall, and, at the same time, he did not recognise the practice of the people of Madina as a source of law. This is because, there was no single report that clearly stated the combination prayers due to heavy rainfall and as a matter of fact, the rainfall of Sham was much heavier than that of Madina. Again none of the early companions who stayed in Sham was reported to have combined two prayers because of heavy rainfall such as Abu ʿUbaydah b. al-Jarrah, Khalid b. al-Walid, ʿAmr b. al-Ass, Muʿadh b. Jabal; Abu Dharr al-Ghifari in Egypt; seventy (70) companions who participated in the battle of Badr who stayed in Hums; in Iraq there lived ʿAli b. Abi Talib; Hudhayfah b. al-Yaman and Imran b. Hussein but none of them was reported to have combined the prayers of Maghrib and Isha' due to heavy rainfall. Layth b. Saʿd, therefore concluded that Imam Malik simply based his decision on the practice of the people of Madina which he (Layth) did not recognise as a valid ground for such an act.

3. Salāh al-Istisqā' (Prayer for rainfall): According to Imam Malik the prayer for rainfall should precede the sermon (Khutbah) just like in the prayer of the two ʿIdayn while al-Layth disagreed with him saying: the sermon should precede the prayer similar to Friday Prayer basing his decision on the practice of ʿUmar b. Abd al-Aziz and Abu Bakr b. Hazam.

4. Zakāt of animals reared together: According to Imam Malik there is no payment of Zakat on animals reared together until each of the partners

possessed the minimum Nisab.[116] For example, if one of the two partners had forty (40) goats while the other one had less than that, then Zakat became compulsory on the former only but not on the latter. However, when each of the two parties possessed forty (40) goats then it became compulsory upon the two parties to give Zakat of one goat together.

Imam Layth disagreed with this decision and said payment of Zakat was compulsory on the total property without stipulating that each of the parties had to possess the Nisab individually. He further said that: this was the practice during the period of Umar b. al-Khattab and Umar b. Abd al-Aziz.

The jurists expressed different opinions based on their understanding of the prophetic tradition which says: "There is no payment of Zakat in less than five camels."[117] The opinion of Imam Malik considers the interest of the owners of the animals while that of Layth favours the poor.[118]

2.3.4.4 OFFICIAL DOCUMENTATION OF THE SUNNAH

In this sub-topic, the researcher will attempt to briefly analyse the various stages which the Sunnah went through before it was finally compiled. According to Sharafuddin (1969) the period of the Prophet (SAW) passed without the Sunnah being officially documented despite the fact that he spent twenty-three years from the time he started receiving the revelation. However, there were some Sahabah (companions) who recorded some ahadith as their

personal collections as mentioned earlier. The Prophet (SAW) was very much concerned about the preservation of the Qur'an and so at a certain period, he prevented the companions from recording anything from him other than the Qur'an, so as to avoid confusion between the two. He was reported to have said: "Do not write anything from me except the Qur'an and whoever has written anything from me other than the Qur'an, let him clean it."[119] In another tradition he said: "And write from me,. there is no blame on you."[120] At another time he warned against wrong reporting. "Whoever narrates lies against me intentionally, let him prepare his abode of rest in the hell fire."[121]

The Prophet (SAW) became contented with the preservation of the Sunnah in the hearts of the companions in line with their custom and traditions through which they memmorised their Jahiliyyah poetry and genealogical relationships. Although the Prophet (SAW) prevented the companions from making official documentation of the Sunnah like that of Qur'an, yet he permitted some of them to record it on certain occasions, for example after the conquest of Makka, 'Abū Shah al-Madani complained to the Prophet (SAW) that he wanted to preserve his sayings but he had weak memory and at the same time he did not know how to write. The Prophet (SAW) instructed some of the companions to write for 'Abū Shah.[122] In a related development, 'Abu Hurayrah was reported to have said: "None among the companions reported prophetic traditions more than myself except 'Abdullah b. 'Amr, because he used to write down while I did not".

'Abdullah b. 'Amr was reported to have been accused by some companions for recording everything he heard from the Messenger of Allah, despite the fact that he sometimes became angry as a human being. Then, Ibn 'Amr asked the Prophet (SAW) concerning the matter upon which he replied: "Write from me, by Allah nothing comes out of my mouth except the truth."[123]

Sharafuddin (1969) observed that when Abu Bakr became the caliph, the status quo remained the same thing as he did not think of compiling the Sunnah probably because he did not live long, and he was busy fighting the apostates as well as those who refused to give out Zakat. When Umar became the second caliph, he thought of the official compilation of the Sunnah for which he sought the opinion of the companions and they responded positively as already mentioned earlier. After some time, Umar resolved and said to the companions:

> "Although I had consulted you over the official compilation of the Sunnah which you expressed no objection but I have personally thought otherwise concerning some people who came before you, who wrote something together with the Book of Allah and they later on concentrated on the other thing neglecting the Book of Allah. Therefore, I will not put the book of Allah with anything".

The period of the rightly guided caliphs and the early Umayyad caliphs passed without the Sunnah being officially documented until the reign of Umar b. 'Abd al-'Aziz in the year one hundred after Hijrah. He set in motion the official compilation of the Sunnah, as the fear of mixing or confusing it with the Qur'an was no longer there. He took this step at the time when the narration

of hadith became widely spread and there emerged a lot of fabricated traditions in circulation. He wrote to Abu Bakr b. Muhammad b. Amr b. Hazam, the governor of Madina asking him to search for the real available hadith of the Prophet (SAW) and record it because "I fear the obliteration of knowledge and the disappearance of the learned scholars". He wrote a similar letter to Muhammad b. Shihab al-Zuhri as well as to other trustworthy and reliable hadith scholars within the Muslim State. However, Umar the second died before seeing the results of his actions along this direction.

The early Abbasid regimes witnessed great efforts in the documentation of hadith. The compilation took the shape of combining the Sunnah together with the interpretation of the Sahabah and the sayings of the Tabi'in (followers) in some occasions. Some scholars who made compilations along this line included: Sufyan al-Thawri at Kufah; al-Layth b. Sa'id at Egypt; and Imam Malik b. Anas at Madina. However, most of the early compilations did not reach us with the exception of Imam Malik's Muwatta compiled in the year 140AH. The Muwatta is regarded as a book of hadith and Fiqh at the same time. The author compiled the book in chapters based on topics or subject matter.

Toward the end of the second century after Hijrah, the compilation of hadith took another dimension completely different from the previous ones. Khudri (1967) and Khatib (1989) observed that during this period there emerged the Musnad form of compilation in which all the ahadith of a

particular reporter was brought under his name regardless of their subject matter such as the Musnad of Imam Ahmad b. Hanbal (d. 241 AH).

The third century after Hijrah was generally recognised as the golden period for the compilation of hadith in which there appeared distinguished scholars who became seriously interested in the compilation of purely authentic traditions only such as Imam al-Bukhari (d. 256 AH) whose book Sahih al-Bukhāri was regarded as the most reliable Book after the book of Allah; that of Imam Muslim (d. 261 AH) whose book Sahih al-Muslim was termed the second next to that of al-Bukhāri. These books were closely followed by other works such as the Sunan of Ibn Majah (d. 273 AH); the Sunan of Abu Dawud (d. 275 AH); the Sunan of al-Tirmidhi (d. 279 AH); and the Sunan of al-Nisa'i (d. 303 AH). These six works were commonly referred to as al-sitta al-sihah (the six sound collections). They were compiled and arranged according to topics of Fiqh (jurisprudence).

Again, during this period there emerged traditionists who specialized in the science of al-Jurh wa al-Ta'dil (the science of qualifying and disqualifying), so as to ascertain the reporters whose narrations could be accepted or rejected as the case might be. Thus, toward the first half of the fourth century after Hijrah, there appeared great learned scholars in the various aspects of Ulum al-Hadith. Some people who specialised in the sciences of hadith included Yahya b. Sa'id al-Qattan (d. 189 AH); Abd al-Rahman b. Mahdi (d. 198 AH); Yahya b. Mu'in (d. 233AH); and Ahmad b. Hanbal (d. 241AH) etc.

2.3.4.5 DOCUMENTATION OF FIQH AND USUL AL-FIQH

During this period, books of Fiqh were specifically compiled in respect of each of the recognised schools of law and such books formed the foundation of Fiqh books that came after them. One of the earliest books on Fiqh is the book of Imam al-Shafi known as Kitab al-Umm where he preserved a chapter for the discussion on people who completely rejected hadith as a source of law. Other works were, the book of Abu Yusuf, Kitab al-Kharaj written according to the Hanafi school of law, and al-Mudawwanah compiled by Ibn al-Qasim based on the Maliki school of law.

In addition, Zaydan (1982) observed that the jurists of different schools of law felt there was need to compile the principles of derivation and the rules of discovering new laws from the existing texts, so they started formulating the theory of Usul al-Fiqh or the principles of jurisprudence. One of the earliest book in the field of Usul al-Fiqh that has come to our time is the Risalah of Imam al-Shafi'i. In the book, he expatiated on the following sub-topics: The Qur'an with its commentaries, the status of Sunnah in relation to the Qur'an, the abrogating and the abrogated verses, irregular traditions, single narration, consensus (Ijma'), analogical deductions (Qiyas), al-Ijtihad, al-Istihsan, and al-Ikhtilaf. Then other scholars followed the footsteps of Imam al-Shafi'i in the compilation of books in this field of study with some interesting additions and styles. Indeed the compilation of many books on the principles of jurisprudence greatly helped the jurists in their scholarship and as a result of that they were

able to explain better the basis of the different schools of law as well as the causes for such differences.

Khudri (1967) observed that with the compilation of several books on the principles of jurisprudence, the jurists eventually evolved the well-known Fiqh terminologies which are the end product of this research. The Fuqaha' (jurists) classified the commandments of the Law-giver, Allah, generally into the following: Fard or Wajib; Haram; Mustahab or Mandub; Makruh and Mubah. Fard or Wajib and Haram, refer to acts in which the Mukallaf (compos mentis) was strongly required to perform or not to perform certain things and refusal to comply attracted appropriate penalty while compliance with brought reward. Mandub or Mustahab and Makruh, on the other hand, refer to acts in which a person was recommended to do or not to do certain things and compliance brought reward while non-compliance attracted no penalty. Mubah dealt with acts in which the law was indifferent, where the performance or non-performance of a thing was the same, in the sense that it attracted neither reward nor punishment. Other terminologies, usually added to the above are: al-Shart (condition), Sahih (sound) and batil (void).

2.3.5.0 THE FIFTH DEVELOPMENTAL STAGE OF ISLAMIC LAW (FIQH)

THE PERIOD OF STAGNATION:

The Fifth developmental stage of Islamic law (Fiqh) started from the middle of the fourth century after Hijrah to the fall of Baghdad in 656AH which

corresponded with the dawnfall of the Abbasid dynasty. This phase is generally recognised as a period of stagnation as far as the development of Fiqh is concerned and it is sometimes called the period of blind imitation (Taqlid). Certainly, we have already seen how Fiqh was always in progress and blooming continuously with full energy and vitality during its fourth developmental stage after the emergence of the different schools of law. However, the development of Islamic law (Fiqh) did not remain on the same condition described above because it was later on, little by little faced with weaknesses, stagnation and eventually reached to a standstill in contrast to its former speed.

Khudri (1967) and Sharafuddin (1969) are agreed that the weakening of the 'Abbāsid dynasty in the seventh century after Hijrah and consequently its downfall had a negative effect on the development of Fiqh which obviously resulted in its stagnation. The 'Abāssid Caliphs as already stated encouraged the scholars and scholarship in general by bringing them closer. But unfortunately, the regime was later on seriously affected by certain factors that finally led to its total collapse as the central authority of the Muslim State broke down into pieces. Thus, there emerged several Muslim States such as the Fatimids in North Africa, the Buwayhids in Baghdād, and the Saljuqs in Khurasān.

Initially, what was commonly known in the field of Fiqh was that a Mujtahid (a legist) was free and not restricted to any school of law (Madh-hab) but generally guided by the texts of the Qur'ān, Sunnah or what his acceptable Ijtihād (effort) led him to. Then, he was expected to make derivation of laws

from the two great sources of the Shari'ah, that is the Qur'an and Sunnah as well as from other sources indicated by the two. Sometimes the result of his Ijtihad might correspond with that of the earlier jurists but sometimes it might not. And sometimes he might be right in his Ijtihad whereas sometimes he might be wrong. He would be rewarded in both cases according to the prophetic tradition which states: "Whoever conducted an Ijtihad, if the result happen to be correct then he would receive double reward but if it happened to be wrong then he would have a single reward.[124]

Surely, this methodology of the jurists sharpened the intellect and promoted mastery of Fiqh cases and at the same time expanded its scope. This was the case with the scholars of the fourth period but unfortunately during the fifth period, the ambition of the jurists generally became weakened. Thus, they felt that they could not catch up with the standard of the previous jurists despite their thorough familiarity with Fiqh and the ready made instruments for conducting Ijtihad at their disposal such as the availability of authentic traditions without any difficulty or problem.

According to Sharafuddin (1969) the followers of the different schools of law strictly adhered to the views of their leaders, spreading their principles and compiling specific books on the good virtues of their great jurists. This "fanaticism" of the followers continued and reached a very advanced stage to the extent of discussing whether it is lawful for a person to shift from one school to another or not. Therefore, by and large some people started abstaining

gradually from learning the primary sources of the Shari'ah hence they became pre-occupied with the study of the views and legal decisions of their leading jurists. They continued to spread the fundamental principles of their recognised leaders until the Shari'ah, according to the perception of some people became nothing more than the views of their leaders. This assertion can easily be deduced according to Khudri (1967) from the views of some scholars such as Abū al-Hassan Ubaydullah al-Karkhi, one of the Hanafi jurists who said: "If you come across a verse or a prophetic tradition going against the views of our scholars, then you should certainly know they are either given further re-interpretation (Ta'wil) or abrogated."

Zaydān (1982) observed that the jurists of this period became more inclined to blind imitation as they strictly adhered to the views of a particular school of law. This trend continued to the extent that some jurists advocated for the closure of the door of Ijtihad in order to protect the religion from the frivolous play of the joker. According to the majority of the Muslim jurists it is not possible to completely close the door of Ijtihad and whoever advocated for it simply did so based on his own personal opinion with the good intention of turning away evils. This is because some unqualified people seriously started conducting Ijtihad and giving legal decisions with regards to so many issues without following the due procedure, and so the serious scholars on the other hand had no option but to block the way for such people.

However, there are certain rules and regulations laid down that must be obeyed before one could conduct a valid Ijtihad. Whoever does not satisfy such conditions is not qualified and so is not allowed to issue any legal opinion (Fatwah) concerning the Shari'ah of Allah.

In conclusion, according to Zaydan (1982), we should not favour the idea of complete closure of the door of Ijtihad in respect of the qualified jurists but in respect of the unqualified jurists only. In addition, the best alternative course is to advocate for the pursuit and spread of the true teachings of Islam within the Muslim community. This will help in teaching the citizens the necessary requirements and basic conditions for the successful conduct of the Ijtihad. The present researcher feels that this is better than advocating right away for the closure of the door of Ijtihad without making any distinction.

Furthermore, the jurists of this period became greatly relaxed because they discovered that most of the views of the different schools of law had already been compiled by the preceding jurists who had provided solutions and legal decisions to new cases that actually occurred as well as some other hypothetical cases that were yet to occur.

Sharafuddin (1969) observed that the judges of this period had no total freedom of Ijtihad as they were forced to adjudicate cases based on the opinion of a particular school of law chosen by the people in authority, so as to achieve their desired objectives. Whereas during the early days of Islam, judges were appointed and given freedom of Ijtihad without being forced to pass decisions

based on the views of any particular school of law and so they were at liberty to follow the Madh-hab of their choice. This assertion agrees with the teachings of the Salaf. For example, 'Umar b. al-Khattab once wrote to 'Abu Musa al-'Ash'ari warning him not to be rigid on an opinion where its mistake was quite conspicuous saying: "Let not the wrong decision you pass today hinder you from going to the truth after you have already contemplated over it and become fully convinced of it. Although truth is old nothing invalidates it. Thus, returning to the truth is better than continuity in error."[125]

'Imam Abu Hanifah used to comment concerning the Tabi'in (followers) saying: "They were men and we are men too like them, therefore, we are also in a position to conduct Ijtihad as they did."[126] The judges continued to enjoy the freedom of Ijtihad up to the time when Abu Yusuf became the Grand Khadi who was reported to have passed most of his decisions based on the views of the Hanafi school of law, being a Hanafite too. However, when the 'Abbasid regime weakened and unqualified people were appointed as judges, then there began the spread of confusion and disorder within the area of Fiqh. Thus, the call for the closure of the door of Ijtihad, during that period became absolutely inevitable in order to restrict the judges and jurists to the opinions of the preceding leading jurists. Consequently, this led to the opening of the door of Taqlid (blind followership).

The stand of the leading jurists concerning Taqlid was quite clear as they neither advocated nor propagated for it. Therefore, they could not be held

responsible for the trend of Taqlid which emerged and spread after their period. In fact, they believed in scholastic research which they actually advocated for and encouraged. They persistently advised people to demand for the basis of their decisions on different issues. In this regard, Imam Abu Hanifah was reported to have said: "It is not appropriate for any person who did not know my basis to pass a legal decision based on my statement". Again, he did not always see his opinion as conclusive talk less of saying someone should not disagree with it as he frequently used to say: "This is the understanding (ra'y) of Nu'mān b. Thabit, and that is the best we are able to arrive at, whoever comes with something better than it, is the most correct.[127]

'Abū Yusuf says: "It is not proper for a person to say anything concerning what we have said until he knows from where we have said so". 'Imām Mālik repeatedly says: "The opinion of any jurist could be accepted or rejected, since not everything reported from them may be correct and so it is allowed for one to abandon the opinion of a particular jurist in favour of a better or stronger evidence than his own". In this respect, Imam Malik was reported to have said: "The opinion expressed by any person is subject to acceptance or rejection as the case may be with the exception of the Prophet (SAW)".[128]

'Imām Shāfi'ī openly stated that accepting an opinion based on the evidence of hadith is above any other consideration. Once the hadith is proved to be authentic, then it is mandatory for a Muslim to accept the idea expressed therein and at the same time to reject any opinion that contradicts it". On

another occasion, he said: "Once a prophetic tradition is found authentic, then, that is my opinion (understanding)." He also said: "Whenever, you come across my opinion contradicting a hadith, use the hadith and throw my opinion to the wall."[129] Imām Shafi'ī further said: "My opinion is the most accurate and the opinion of others is wrong, although there is possibility that it may be correct".[130] Sharafuddin (1969) further observed that Imām Shafi'ī compared the person who followed the opinion of scholars blindly to the one who gathered firewood at night without knowing (in reality) what he is carrying, because it is possible to get in the firewood a viper that would sting him. He was also reported to have compared a person who sought knowledge without evidence to the one who gathered firewood at night carrying the bundle in which there was an adder biting him while he didn't know. Imam Shafi'ī once said to Ibn Hanbal." Oh Ahmad! you are more learned in the field of hadith than myself, please if a hadith is sound let me know, so that I opt for it, I don't mind whether the report is from Shām, Kufah or Basrah".[131] However, despite the effort of the leading jurists, there emerged the trend of Taqlīd after their period which the later jurists condemned strongly such as Ibn Taymiyyah and his disciple Ibn al-Qayyum. The two jurists were particularly interested in returning the religious life back to its former course.

Along the trend of Taqlīd, there also appeared another dangerous trend of Hīlah which had a devastating effect on the teachings of the Fiqh (Islamic law). Hīlah is a means to accomplish an end or a legal stratagem, which a

person adopts as a way out to dodge a responsibility. For example, when a woman decides to go out of the marital tie but the husband refuses to divorce her while she had no valid ground to take him to the court for a judicial action, then she may apostatise so that the marriage automatically becomes nullified after which she come back to Islām. Ibn al-Qayyum considered this act as purely a way of playing with the law of Allah.[132]

According to Sharafuddin (1969), it is important to note that although the jurists of this period substantially differ on many sub-branches of Fiqh yet they learnt to accommodate the views of one another, hence they did not condemn one another as heretics. Although some jurists of this period leant heavily toward the trend of Taqlid (blind imitation) some of them made remarkable and significant contributions to the growth and development of Fiqh as follows, according to Zaydān (1982).

(a) During this period as mentioned earlier, there used to be scholastic discussions and debates between the followers of the different schools of law on issues of general interest, each group trying to defend the views of their leaders. Khudrī (1967) observed that initially it started within the sphere of Ilm al-kalām (theology) but later on Fiqh became seriously involved. The discussions usually took place in the palaces of the ruling class. In order to organise this, the jurists thought and compiled books on the rules and regulations governing the conduct of the intellectual discussions and debates.

(b) The jurists of this period took it upon themselves as a duty to explain the principles and views transmitted from their leaders. Thus, they came out with detailed explanations and commentaries concerning the works written by previous scholars while on some occasions they provided useful abridgement where necessary and made derivation of laws from such works.

(c) The jurists of this period extracted the principles of derivation from the detailed Fiqh literature of all the recognised schools of law. This in addition helped them to discern and understand the methodology of Ijtihad adopted by the founder of each school of law and subsequently followed by his disciples. Finally, this development completed the principles of the science of usūl al-Fiqh which was started on record by 'Imām al-Shāfi' in his famous book al-Risālah.

(d) The jurists of this period also pondered over a number of sayings conveyed from a particular jurist. Sometimes a jurist might express an opinion which he might later on decide to change for one reason or the other but the reporter might not necessarily be aware of the later change, whereas sometimes there could be a little difference between the two opinions expressed. But sometimes, it might be the basis of an opinion expressed was Qiyas while the basis for the other one could be Istihsān hence the seeming difference between the two.

Therefore, the jurists of this period took it as a duty upon themselves to ponder over such opinions expressed in the light of what they knew from the general principles and guidelines of the particular school of law in question. Similarly, it was common to get differences of opinion expressed by jurists of a particular Madh-hab among themselves or sharply differing from the views of the founder of the school of law and all these seriously required explanations on why an opinion was preferred to the other as well as the bases of the preference.

(e) The jurists of this period also organised and systematised the Fiqh of the various schools of law. This was achieved through re-organization of the laws and principles adopted by a particular Madh-hab classifying and explaining in detail its general concepts, restricting the un-restricted, supplying further commentaries where necessary to clarify some obscure or abstract concepts as well as support views with clear proofs. Surely these series of efforts served as a great service for the development and expansion of Fiqh during this period.

2.3.6.0 THE SIXTH DEVELOPMENTAL STAGE OF ISLAMIC LAW (FIQH): THE PERIOD OF RESURGENCE

The sixth and the last developmental stage of Islamic law (Fiqh) started from the fall of Baghdad in the seventh (7th) century after Hijrah and extends to our present day. The development of Fiqh did not completely wake up from its slumber or stumble in the fifth period nor did most of the jurists change their attitude. Thus, the trend of Taqlid continued to gain ground and spread among

the jurists until it became a well-known principle or phenomenon that did not call for any astonishment or amazement.

The political climate of the period according to Khudrī (1967) indicates that the Manluks, the Saljuqs and the Turks continued to play significant roles in the political arena of the then Muslim-city states up to the time when the Mongols finally crushed the Ottoman Empire.

However, despite the fact that things had seriously deteriorated during this period we found some jurists who were highly principled, who insisted those things must be returned to their original course. These few individual jurists found here and there did not accept the idea of blind imitation (Taqlid) talk less of the closure of the door of Ijtihad. They advocated absolute Ijtihad and search for the precepts of the Shari'ah directly from the Qur'an and Sunnah without necessarily restricting themselves to any particular school of law. Some of these jurists included Imam Ibn Taymiyyah, al-Subki, Ibn al-Qayyum, al-Shawkānī, Jalal al-Din al-Muhalli, Jalal al-Din al-Suyūṭi etc just to mention a few.

Zaydān (1982) observed that although these jurists were numerically few all the same some of them were seriously criticised and rejected by the other jurists who favoured the idea of Taqlid. So each of the group of jurists necessitated for themselves following a specific school of law and devoted all their efforts and energy toward understanding its various principles and different jurisprudential issues, hence the Shari'ah became almost known

through a particular Madh-hab (school of law). However, the Shari'ah, as mentioned earlier could not be restricted to a single school of law because it was much wider than such restrictions. The Shari'ah is a proof to each of the schools of law whereas the latter is not a proof to the former. A school of law is one of the many ways of interpreting the text of the Shari'ah, understanding the various laws contained therein and the methodology involved in discovering or arriving at new laws from its original sources.

Production of Books, Commentaries and Super-Commentaries:

The jurists of this period heavily devoted their attention and efforts to the production of literary materials in form of abridgement, until it nearly reached the point of damaging the meaning and concealing the objectives of the original author. Thus, these abridgements eventually became seriously in need of additional commentaries too, in order to bring out their meaning and to remove all the ambiguities or obscurities. Some of the authors of the various abridgements as well as other scholars took it upon themselves the task of providing the (new) commentaries, which were conspicuously made beside the texts. Then, the footnotes were also made beside the commentaries. In fact, it reached a point when some of the commentaries and footnotes made were seriously criticised for too many linguistic deliberations and disagreements over the construction and composition of some sentences. This is because the reader may become confused in such discussions and complicated expressions over the wordings or expressions of the text. This form of compilations became wide

spread as many students and scholars of Fiqh became devoted to it. This was how gradually the early Fiqh books written during the fourth and the early part of the fifth periods containing simplified and clearer expressions were abandoned.

However, there were a few compilations made adopting a special method which substantially differed from that of the jurists of this period but exactly corresponded to the methodology of the fifth period such as the writing of al-Shaṭibī, Ibn al-Qayyum and others.

Books Compiled in the form of Fatwah: The trend of compiling Fiqh books did not stop with what we have described above as we found some writers who compiled new books in the form of Fatwah. These were usually questions which people asked the jurists in most cases dealing with practical matters. Then, some of their disciples or others would compile such answers, arranged and organised according to chapters of Fiqh. Usually, such books were written in the form of questions and answers but on some occasions the questions may not be recorded. Furthermore, in such compilations based on Fatwah, the authors in most cases do not cite evidences from the texts of the school of law which he followed in passing his decision but sometimes he cited evidences from the Qur'ān Sunnah etc. without restriction to the evidence of one single Madh-hab. This methodology of compilation was conspicuously followed by Ibn Taymiyyah in his Fatawah.

Sharafuddin (1969) observed that during this period, the Islamic law (Fiqh) entered into a new course of life gradually shifting away from the dangerous trends of the preceding period that was characterised with stagnation and blind imitation. Thus, the jurists of this period cleansed Fiqh of the dust that covered it previously and brought out its glaring advantages to the vision of all and sundry.

Codification of the Law: According to Khudri (1967) and Zaydan (1982) the development of Fiqh continued without any official codification throughout the previous periods. The judges and jurists had to go back always to the different books of Fiqh before passing any legal decision concerning litigations brought before them. Although, the Islamic state might sometimes patronise a particular school of law or become committed to it and adopt it as the official Madh-hab to be followed in legislation as did the Ottoman empire in relation to the Hanafi school of law. Despite all these efforts, the laws were not codified, neither were they made in a form of statute of constitution with selected topics from the Fiqh of the adopted school of law and was never presented in such a way that the judges were forced to use it to the exclusion of other thing else.

However, toward the end of the thirteenth (13th) century after Hijrah, the Ottoman empire noticed and observed the urgent need for the codification of the laws particularly governing transactions (Mu'amalat). Then, a committee of distinguished jurists was formed under the leadership of an able minister for the selection of laws relating to transactions according to the Hanafi school of

law. This committee started its work in the year 1285AH/1869AD and completed the assignment in 1293AH/1876AD. The committee selected the preferable opinions of the Hanafi school of law but at the same time it took and considered some non-preferable ideas from the Madh-hab for the suitability of such to the period and secondly because of its simplicity and easiness to the people. Finally, the committee compiled the laws which it selected based on their subject matters amounting to one thousand eight hundred and fifty one (1851) issues or topics.

Then, the government of the Ottoman Empire promulgated the law for its implementation on 26th Sha'aban 1293AH and it was named Mujallah al-Ahkam al-Adaliyyah. It thus became the state constitutional law. It was published in Iraq and remained as the only published work of its kind until the codification of Iraqi constitutional law number 40 of the year 1951 AD. After this important codification by the Ottoman empire many other codifications emerged in various places such as Egypt, Iraq, Tunis etc.

According to Zaydan (1982) it is important to observe that these various codifications of laws did not limit themselves to any particular school of law. They derived their laws from the different schools of law with the exception of the Mujallah al-Ahkam al-Adaliyyah, which was restricted to the opinion of the Hanafi School of law only. This orientation is a welcome development on the condition that no baseless ideas were incorporated therein. This is because we found in some codifications certain ideas being included which were not taken

from any of the schools of law, such as the Tunisian law edict which attempted to prevent polygyny (Ta'addud al-Zawjāt).

Comparative Study of Fiqh: The jurists of this period also introduced the comparative study of Fiqh without restriction to any particular school of law especially in the universities. In this modern approach of study, juristic views were accepted or rejected based on the perfection or otherwise of its Hujjah (evidence). Thus, the garment of Madh-hābiyyah was almost relegated to the background. In the light of this development there appeared a new set of literature such as the Fiqh'alā Madhāhib al-'Arba'ah and in recent years Fiqh al-Sunnah etc.

The recent time, as already mentioned in the introduction, heralded the revival of Fiqh, and some of its manifestations included the remarkable interest shown in Islamic law in the midst of the various subjects studied in the universities and its comparative study exposing its advantages and special characteristic features, as well as many other new compilations in the field. Therefore, we hope the concern shown for the study of Islamic law and its learning would increase until it is eventually returned to its earlier status, its constitutional supremacy restored, with the Islamic State extending its application in all aspects as it was the case during the early days of Islām.

2.4.0.0 SUMMARY OF THE RELATED LITERATURE REVIEW

In the introductory part of this chapter, an attempt was made to briefly analyse the status of the law during the pre-Islamic period within the Arabian Peninsula. The law at that time did not take into consideration the welfare of the weak, the women, the minor and the oppressed in general. There was obvious corruption in the ways of life with regard to acts of worship, transactions and beliefs.

The Islamic law introduced a number of changes and reforms to phase out the then existing obnoxious customs and traditions through a systematic and gradual approach. Thus, Islam organised the misguided people, permitted the lawful and prohibited the unlawful, modified the conduct of the people and their modes of belief back to the original message of God. The major components of the Shari'ah (Islamic law) included: 'Aqa'id (beliefs); 'Akhlaq (good manners); Ibadat and Mu'amalat (Worships and transactions).

The historical development of Islamic law was classified into six different periods. The legislative period started with the beginning of the revelation and lasted till the death of the Prophet (SAW) that is from 610AD to 632AD, the period of the rightly guided caliphs from 11AH to 40AH, the period of the younger companions and the senior Tabi'un from 41AH to the first part of the second century after Hijrah which corresponds to the downfall of the 'Umayyad dynasty, the period of the leading jurists from the early part of the

second century after Hijrah to the middle of the fourth century after Hijah, the period which some scholars regard as period of stagnation from the middle of the fourth century after Hijrah to the fall of Baghdad in the seventh century after Hijrah; and the period of resurgence from the fall of Baghdad in the seventh century after Hijrah to the modern times. Each of these periods was carefully studied taking note of the following: the political climate of the period, some distinguishing features of legislation, sources of legislation, methods of derivation and sample cases for the purpose of illustration.

In the literature review we have also seen how the two major trends with regard to the interpretation of the Shari'ah emerged that is the Ahl al-Ra'y (opinionists) and the Ahl al-Hadith (traditionists), which consequently led to the formation of the four recognised schools of law, the Hanafi, Malik, Shafi'i and Hanbali schools of law. It is also important to note that the fourth developmental stage of Fiqh witnessed the formal documentation of Fiqh and 'usul al-Fiqh.

In conclusion we can say that we hope the concern shown for the study of Islamic law and its learning in the modern times will increase until it is eventually returned to its earlier status, thus restoring its constitutional supremacy by extending its complete application as it was the case during the early days of Islam.

END NOTES OF CHAPTER TWO: REVIEW OF THE RELATED LITERATURE

1. Ibn Khaldun, A. (1958) The Muqaddimah: An Introduction To History, Translated from Arabic by Franz Rosenthal, Routledge and Kegan Paul, London, P. 41.
2. This phenomenon is referred to in Surat al-Quraysh (chaper 106); Zaydān, A. (1982) Al-Madkhal li dirasah al-shari'ah al-Islamiyyah, Baghdād, P. 16; Sharafuddin, A. (1969), Tārikh al-Tashri al-Islami, first edition, P. 12.
3. For the explanation of these terms refer to Ahkām al-Qur'an by Jussas, Vol. 2, P. 77 and 293; Zaydan, A. (1982), P. 17; Malumasani, S. (1961), Philosophy of Jurisprudence In Islam, Routledge and Kegan Paul, London, P. 12.
4. Sharafuddin, A. (1969), P. 9 - 10; and Zaydan, A. (1982), P. 19.
5. Zaydan, A. (1982), P.25.
6. Tafsir Tabari, Vol. 28, P.78; Muslim, Imarah, 58; Nisa'i, Tahrim, 28; and Ibn Majah, Fitan, 7.
7. Al-Darami, Riqaq, 40; Ibn Hanbal, Vol. 3, No 324.
8. Bukhari, Mazalim, 4, Ikrah, 7; Tirmidhi, Fitan, 68, al-Darami, Riqaq 40; Ibn Hanbal, 3\99.
9. Zaydan, A. (1982), PP. 22 - 23.
10. Sabiq, S. (1971) Fiqh al-Sunnah, Dar al-Fikr, Beirut Lebanon, Vol. 2, PP. 66 - 78; Ibn Rushd, A. (1969), Bidayat al-Mujtahid wa nihayat al-Muqtasid, Maktabah al-Kulliyat al-Azhariyyah, P. 37 - 48; al-Jaza'iri, A.J. (1976) Minhāj al-Muslim, Dar al-Fikr, P. 381-385.
11. There are three different forms of Nikah al-shighar as follows: Sarih: This is a situation where the two parties exchange the Daughters of one another without any mention of dowry. This type of marriage shall be anulled before or after consummation; Murakkab: This is a situation where one of the parties mentioned the dowry but without giving it to the wife whereas the other party did not mentioned the dowry at all. Then, the marriage of the person who mentioned the dowry shall be annulled before consummation but to be confirmed after consummation with the payment of the mentioned dowry while the marriage of the one who has not mention the dowry shall be nullified before or after consummation; and Wajhun: This is a situation where both the two parties mentioned the dowry but did not give it out to the wife. This type of marriage shall be nullified before consummation but to be confirmed after consummation with the payment of the mentioned dowry. Nafarawi, A.G. (1955) Fawakih al-Dawani, 3rd Edition, Mustafa al-Bab al-Halbi, Egypt, Vol. 2, P. 32; Shawkani, A. (n.d.), Vol. 6, PP. 277-278.

12. Shawkani, A.M. (n.d) Nayl al-Awtar, Dar al-Fikr, Beirut, Lebanon, Vol. 5, P. 140, Muslim, Nikah, 16: Nisa, Nikah, 60; Ibn Hanbal, 2/35.
13. Artificial insemination is a process through which the veterinarians remove the seman from the male reproductive organ and inject it into the female reproductive organ when they are on their heat period.
14. The people who specialised in the science of identifying people through physical resemblance are known as al-Qafah ____. its singular form is al-Qa'if; Sabiq, S. (1971) Vol. 2, PP. 6-7.
15. Muslim, Nikah, 22; Ibn Majah. Nikah, 44; Darami, Nikah, 16; Ibn Hanbal. 3/406.
16. Abu Dawud, Nikah. 12; Darami, Nikah. 8; Ibn Rushd, A. (1969) PP. 48.
17. Khomeini, M.R. (1982) Tahrir al-Wasilah Vol. 2, Mu'assisah al-Nashr al-Islami, Iran, PP. 279.
18. San'ani, M.I.K. (n.d) Subul al-Salam, Vol. 3, P. 175; Shaukani, N.A. (n.d); Nayl al-Awtar Vol. 5, P. 160; Bukhari and Muslim; Ibn Majah, Nikah, 40; Ibn Hanbal, 2/83.
19. Iddah (legal Period of Retirement): This refers to the period that a woman has to observe before contracting another marriage due to separation from the former husband as a result of death, divorce or otherwise. Some of the reationale behind the observance of this waiting period is to ascertain whether there is pregnancy or not so as to avoid mixture of families; Sabiq, S. (1971) Vol. 2, P. 277.
20. Al-Wasiyyah (bequest) is the act of giving something to someone which becomes effective only after the death of the testator: Ibn Rushd. A. (1969), PP. 366-367.
21. Bukhari Bab la wasiyah lilwarith Vol.4, P. 6 according to Shaukani, A. (n.d.) Rawah al-Khamsah illa al-Nisa'i, Vol. 6, P.151; Zaydan, A. (1982), P. 32.
22. Saib b. al-Sa'ib. I was unable to trace any information about him.
23. Bukhari Salam, 1,2,7; Muslim Musaqah 128; Dawud Buyu, 55; Tirmidhi, Buyu 68; Nisa, Buyu, 63; Ibn Hanbal 1/217; Sabiq S. (1971) Vol. 3, P. 171; Qardawi, Y. (1985) al-Halal wa al-Haram Dar al-Ma'arif, P. 260; Shawkani, A. (n.d.), Vol.5, PP. 342-343.
24. Sharafuddin, A. (1969), P. 12; Zaydan, A. (1982), P.33.
25. Rahn (Pledge) is a kind of loan whereby a person deposit a property at least morethan what he receives and such a property will be kept under the custody of the person who gave the loan untill he is fully settled or else he recovers it from the pledged property after following the normal prescribed procedure.
26. Bukhari, Jihad, 89, Maghazi, 86; Tirmidhi. Buyu: 7; Nisa'i Buyu, 58.83; Ibn Majah, Rahn 1: Ibn Hanbal 1/236; Sabiq. S. (1971), Vol.3, P. 188; al-Jazairi, A.J. (1976), P.343.

27. Bukhari, Buyu, 60; Muslim, Buyu, 13 Nisa'i Buyu, 16; Ibn Majah, Tijarat 14; shawkani, A. (n.d.), Vol.5, P. 266.
28. Muslim, Imam, 164; Dawud Buyu, 50, Tirmidhi buyu, 72; Ibn Majah Tijarat, 36; Darami Buyu, 10; Ibn Hanbal, 2/50; Zaydan, A. (1982), P.36; Qardawi, Y. (1985), P. 250; al-Jaza'iri A.J; (1976); Minhaj al Muslim. Dar al-Fikr, P. 318.
29. Bukhari Rahn 6; Tirmidhi, Ahkam, 12; Ibn Majah Ahkam 7; Ibn Asim, A. (n.d) Tuhfat al-Hukkam Maktabah wa matba'ah al-Mash-had al-Husaini, P.3-4.
30. Sharafuddin, A. (1969), P.17; Zaydan, A. (1982), P.38; DOI, I.A. (1984) Shari'ah: The Islamic Law. Taha Publishers, United Kingdom, P.2; Qadri A.A. (1981) Islamic Jurisprudence in the Modern World. Ashraf Printing Press, Lahore, Pakistan, PP. 15-17.
31. Nisa'i, Abu Dawud, Ibn Majah, Ibn Hanbal, al-Darami, Mu'watta; Shaukani, A. (n.d), Vol. 6, P. 194; Sabiq, S. (1971), Vol.3, PP.427.
32. Khudri, A. (1967), P.15; Sharafuddin, A. (1969), P.17; Qadri, A.A. (1981), P.16; Zaydan, A. (1982), P.50.
33. Bukhari, Ilm. 10; Muslim, Imarah, 175; Tirmidhi, Ilm, 3; Ibn Majah, Muqaddimah, 17; parami, Muqaddimah, 24; Mu'watta Qadr, 8; Ibn Hanbal, 1/306.
34. Mahmasani S. (1961), PP. 9-11; Sharafuddin, A. (1969), PP.17-23; Zaydan, A. (1982), PP.58-59.
35. Sharafuddin, A. (1969), PP. 19-20; Qardawi, Y. (1985), P. 20; Hasaballah, A. (1976): Usul al-Tashri al-Islami, Dar al-Ma'arif, Cairo, Egypt, P. 390.
36. Khudri, A. (1967), P.3; Sharafuddin, A. (1969), P.29; Zaydan, A. (1982), PP. 106-107.
37. Some of the famous scribes include: The four rightly guided Caliphs, Amir b. Fahira: Ubay b. Ka'b, Thabit b. Qays b. Shammas; Zayd b. Thabit; Mu'awiyah b. Abi Sufyan; Yazid b. Sufyan; al-Mughira b. Shu'bah, Zubayr b. al-Awwam; Khalid b. al-Walid, al-Ala b. al-Hadrami; 'Amr b. al-Ass; 'Abdullah b. al-Hadrami, Muhammad b. Maslamah and Abdullah b. Ubayy Ibn Salul: refer to Khudri, A. (1967), PP.10-11.
38 The Ash-hur al-Hurum are: Rajab; Dhul-Qadah; Dhul Hajj and al-Muharram.
39. 'Abu Dawud, Taharah, 52; Nisa'i, Taharah, 46, Ibn Majah, Tahara, 38; Darami, Wudu,' 53; Mu'watta, Taharah 12; Ibn Hanbal, 2/237; Shawkani, A. (n.d), Vol. 1, P.14.
40. Khudri, A. (1967), PP.15-16; Sharafuddin, A. (1969),PP.55-57; Zaydan, A. (1982), P.111.
41. Bukhari, Manaqib, 23; Muslim, Fada'il, 77,78; Abu Dawud, Adab, 4; Tirmidhi, Manaqib 34; Mu'watta, Husn al-Khulq, 2; Hanbal, 6/85.
42. Bukhari, Maghazi, 60; Darami, Muqaddimah, 24.

43. Bukhari, Tayamum, 2, Tirmidhi, Salah, 119; Ibn Majah, Masajid, 4; Darami, Salah,111; Ibn Hanbal, 5, 248; Khudri, A. (1967), PP. 16-17, Sharafuddin, A. (1969), PP.57-59; Zaydan, A. (1982), PP.112-113.
44. Bukhari, I'tisam, 2; Muslim, Hajj, 411; Tirmidhi, 'Ilm, 17; Nisa'i, Hajj, 1; Ibn Majah, Muqaddimah, 1.
45. Bukhari, I'tisam, 2; Muslim, Fada'il, 130.
46. See foot note no 21 above.
47. Muslim, Jana'iz 106; Abu Dawud, Jana'iz, 77; Tirmidhi, Jana'iz, 7; Nisa'i Jana'iz, 100; Ibn Majah, Jana'iz, 147; Ibn Hanbal, 1/145.
48. Abu Dawud, Aqdiyah, 11; Tirmidhi, Ahkam, 3; Nisa'i Qada, 11; Ibn Majah, Manasik, 38; Darami, Muqaddimah, 30; Ibn Hanbal, 1/37; I'lam al-Muwaqqi'in, Vol.1,P.175.
49. Bukhari, Adhan, 18; Darami, Salah, 42; Ibn Hanbal, 5/35.
50. Nisa'i Manasik, 220; Ibn Hanbal 3, 318 Khudri, A. (1967), P.30.
51. Bukhari, Nikah, 27; Muslim, Nikah, 37; Abu Dawud Nikah, 12; Tirmidi Nikah 30; Ibn Majah, Nikah, 31; Darami Nikah, 8; Ibn Hanbal.1/178.
52 Tirmidhi, Hajj, 112; Nisa'i, Manasik, 136; Darami, Manasik 32; Ibn Hanbal, 3/414.
53. Bukhari, Khums, 18; Maghazi, 54; Muslim, Jihad, 42; Abu Dawud Jihad, 136; Tirmidhi, Sayr, 13; Ibn Majah, Jihad, 29; Mu'watta, Jihad, 18; Ibn Hanbal 5/12.
54. Muslim, Fada'il, 141; Ibn Majah, Rahn, 15; Ibn Hanbal 5/16.
55. Ibn Hisham, A.M. (1955), al-Sirat al - Nabawiyyah, 2nd edition P. 620;al-Tabari, A.J. (n.d), Tarikh al- Rasul wal Muluk, 2nd edition Dar al- Ma'arif, Cairo, Egypt P. 440.
56. Sharafuddin, A. (1969), P.52, I'lam al-Muwaqqi'in, Vol.I, PP.176.
57. Bukhari, I'tisam, 21,20; Muslim, Aqdiyah, 15; Abu Dawud, Aqdiyah, 2; Nisa'i, Ahkam, 2; Ibn Majah Ahkam, 3; Ibn Hanbal 4/198.
58. Abu Dawud, Taharah, 126; Nisa'i, Ghusl, 27; Darami, Wudu', 66.
59. Sharafuddin, A. (1969), P.53; Qattan, M. (1976), P.85; Zaydan, A. (1982), P.115; I'lam al-Muwaqi'in, Vol.I. P.177; Bukhari, Bad'al-wahy, 6; Jihad, 102; Muslim, 74; Ibn Hanbal, 1/268.
60. Bukhari, Maghazi, 29,30, Khawf, 5.
61. Sharafuddin, A. (1969), P.54; I'lam al-Muwaqqin, Vol.I, PP.13-14.
62. Khatib, M.A. (1989), Usul al-Hadith, Dar al-fikr, P.147; Muslim, Zuhd, 72; Darami, Muqqaddimah, 42; Ibn Hanbal 3/12.
63a. Khatib, M.A. (1989), P.148; Abu Dawud, 'Ilm, 3; Darami, Muqaddimah, 43; Ibn Hanbal, 2/162.
63b. Hasaballah, A. (1978), P. 90
64. Khudri, A. (1967), P.93; Ibn Hanbal, 1/393,394.
65. Khudri, A. (1967), P.96; Sharafuddin, A. (1969), P. 65; Qattan M. (1976), P.100; Zaydan, A. (1982), P.120.

66. Khudri, A. (1967), P.98; Sharafuddin, A. (1969), PP.73-74, Uyun al-Masa'il al-Shar'iyyah, PP.95-96, Zaydan, A. (1982), P.129.

67a. Bukhari, Iman, 17, 28, Salah, 28; Zakah, 1, Ttisam, 2.28; Muslim, Iman, 32-36; Abu Dawud, Jihad, 95; Nisai, Zakah, 3; Ibn Majah, Fitan, 1-3; Ibn Hanbal, 4/8.

67b. Khudri, A. (1967); PP. 88-89; Sharafuddin, A. (1969), PP.82-83, Zaydan, A (1982), P.131.

68. Ibn Hanbal, 6/204.

69. The seven most famous Tabi'i Jursits in Madina include: Sa'id b. al Musayyib (d. 94 A.H). Urwah b. Zubayr (d.94 A.H) Abubakar b. Abd al-Rahman (d.94A.H) Abdullah b. Abdullah b. Utbah b. Mas'ud (d.98 A.H); Kharijah, b. Zayd b. Thabit (d. 99 A.H); Qasim b. Muhammad b. Abi Bakr (d. 105 A.H) and Sulayman b. Yasar (d.107 A.H); Qattan M. (1976), P.170; Zaydan A. (1982), P.138.

70. Bukhari, Talaq, 39; Nisa'i Talaq, 56; Ibn Majah, Talaq, 7; Ibn Hanbal 6/375.

71. This is not a genuine Hadith, rather its opposite was actually reported by Nisa'i, Talaq, 7; Tirmidhi, Talaq, 5, Ibn Hanbal 6/412.

72a Mafhum al-Mukhalafah means understanding opposite of the meaning of the text.

72b Sadd al Zara'i blocking the chance of misusing the provision of the Shar'iah.

73. Bukhari, Fara'id 5,7,9,10,15; Muslim, Fara'id 2,3,4; Tirmidhi, Fara'id, 8; Ibn Majah, Fara'id, 10; Ibn Hanbal, 1/225, 1/313; Sabiq, S. (1971), Vol. 3, P.437.

74. Bukhari, Adab, 75, Luqtah, 2,3; Abu Dawud, Luqtah, 4; Tirmidhi, Ahkam, 35; Mu'watta, Aqdiyah, 46; Hanbal, 2/18.

75. Ibn Majah; Daraqutni; al-Bayhaqi; Sabiq, S. (1971), Vol.3, PP.234-235; Shawkani, A. (n.d), Vol. 6, P.37.

76. Bukhari, Jum'ah, 13; Muslim, Salah, 135, 136; Abu Dawud, Qiblah, 12; Ibn Hanbal 2/36.

77. Muslim Salah , 135,138; Abu Dawud, Salah, 52a; Ibn Hanbal 2/42.

78. Bukhari, Jum'ah, 13; Muslim, Salah, 139; Ibn Hanbal 2/49.

79. Abu Dawud, Hudud, 19; Ibn Hanbal 4/181.

80a Tirmidhi, Hudud, 20; Darami, Siyar, 50.

80b Sharafuddin, A. (1969). PP. 89-91; Shawkani, A.M. (n.d), Vol.7. PP.111-112; I'lam al Muwaqqi'in, Vol.3, P.513.

81. Bukhari, Hudud, 21; Abu Daaawud, Hudud, 24; Nisa'i Jana'iz, 64; Ibn Majah,Hudud, 9; Ibn Hanbal, 1/93.

82. Sharafuddin, A. (1969), PP.91-92; Shawkani, A.M. (n.d), Vol.7. PP.49-50.

83. Bukhari Zakah, 70,71; Muslim, Zakah, 12, 13, 14, 16; Abu Dawud, Zakah, 18,20; Nisa'i, Zakah, 3,32,33. Ibn Majah Zakah, 21; Mu'atta, Zakah, 52; Ibbn Hanbal 2/102.
84. Ibn Hanbal, 3/129, 183, 4/147.
85. Encyclopaedia of Islam, P.247; Qattan, M. (1976), P.146.
86. Rajm means stoning to death whoever committeed adultery, male or female.
87. See footnote No. 21 above.
88. See foot note No. 51 above.
89. Bukhari, Shahadat, 7, Nikah, 20,27, 117; Khums, 4; Muslim, Rida; 1,2,9,12; Abu Dawud, Nikah, 6; Ibn Majah Nikah, 34; Darami, Nikah, 48; Muwatta, Rida, 1,216; Ibn Hanbal, 1/275.
90. Qattan, M. (1976), PP.143-147. The people reviving this argument in Nigeria are called different names such as Yan tatsine; Yan ba ceto, (those who reject the concept of shafa'ah) and their wrong beliefs led them to praying two raka'ats only for each of the five daily prayers and at the same time they don't believe in congregational prayers.
91. Abū Dawud, Ilm, 1; Tirmidhi, Ilm, 19; Ibn Majah, Muqaddimah, 17; Darami, Muqaddimah, 32.
92. Sharafuddin, A. (1969), P.117.
93. Ibn Qutaybah (1909) Ta'wil Mukhtalif al Hadith al-Qahirah, Vol.7, PP.101; Sharafuddin, A. (1969), P.122; Qattan, M. (1976), P.157.
94. Bukhari, Ilm, 38, Jana'iz, 23, Anbiya, 50, Adab, 109; Muslim, Zuhud, 72; Abu Dawud, Ilm, 4; Tirmidhi, Fitan, 70; Ibn Majah, Muqaddimah, 4, 16 Hanbal, 2/47.
95. Sharafuddin, A. (1969), P.122; Qattan, M. (1976), PP.160-161.
96. Sharafuddin, A. (1969), P.123.
97. Sharafuddin, A. (1969), P.118; Qattan, M. (1976), P.168, Zaydan, A. (1982), P.137.
98. See end note No. 69 above.
99. Qattan, M. (1976), PP.165-167.
100. Tirmidhi Mawaqit, 115; Ibn Hanbal 5/316, 322.
101. Tirmidhi, Mawaqit, 69, 115; Ibn Majah, Iqamah, 11.
102. Ibn Majah, Iqamah,13; Ibn Hanbal 3/339.
103. Tirmidhi Buyu, 73; Abu Dawud, 49; Ibn Majah, Tijarat, 27; Darami Buyu, 13; Ibn Hanbal, 2/338.
104. Sharafuddin, A. (1969), P.130; I'lam al-Muwaqqi'in, Vol. 1, P.97.
105. Bukhari, Ayman, 28, 31; Abu Dawud 'Ayman, 19; Tirmidhi, Nudhur, 2; Nisai, Ayman, 27,28, Ibn Majah, Kaffarat, 16; Muwatta, Nudhur, 8; Ibn Hanbal 6/36.
106. Sharafuddin, A. (1969), P.132; Sa'd, Tabaqat al-Kubra, Vol.5, P.272.
107. See end note No. 67 (a) above.
108. I'lam al-Muwaqqi'in, Vol.2, P.296; Sharafuddin, A. (1967), PP.135-136.
109. Bukhari, Talaq, 11.

110. Sharafuddin, A. (1969), P.136.
111. The project of translation was seriously undertaken during the Abbasid dynasty in which case many works in other languages especially related to natural sciences were carefully translated into Arabic language upon which the Muslim scholars made their own contributions
112. Mursal traditions are Prophetic narrations in which the last narrator who chain of transmitters.
113. See end notes No. 72a above.
114. Usulists are the scholars or jurists who specialised in the science or principles of derivation.
115. Bukhari, Taqsir al-salah, 14; Muslim Musafirun, 42-45; Abu Dawud, Manasik, 65; Tirmidhi, Hajj, 56; Nisa'i Mawaqit, 43-45.
116. Nisab is the minimum property a Muslim must possess before payment of Zakat becomes obligatory on him.
117. Bukhari, Zakah, 32,43,56; Nisa'i, Zakah, 18; Ibn Majah Zakah, 6; Muwatta, Zakah, 2; Ibn Hanbal, 2/93.
118. Sharafuddin, A., (1969), P.144.
119. See end note No. 62 above.
120. See end note No 63 above.
121. See end note No 94 above.
122. Bukhari, Ilm, 39, Luqtah, 7, Abu Dawud, Manasik, 89; Tirmidhi, Ilm, 12; Ibn Hanbal, 2/238.
123. See end note No. 63 above.
124. See end note No 57 above.
125. I'lam al-Muwaqqi'in, Vol.1, P.72.
126. Zaydan, A. (1982), PP.
127. Sharafuddin, A. (1969), P.176; I'lam al-Muwaqqi'in, Vol.2, PP.140-149.
128. Sharafuddin, A. (1969), P.176;
129. Sharafuddin, A. (1969), P.177; Khudri, M. (1967), PP.279-280; I'lam al-Muwaqqi'in, Vol.2, PP.140-149.
130. Although Imam al-Shafi'i was fully convinced that his opinion was the most accurate otherwise he would not have stuck to it but at the same time he had respect for the opinion of others who disagreed with him based on their own conviction. This clearly shows that he was not claiming any perfection.
131. Sharafuddin, A. (1969), P.177, I'lam al-Muwaqqi'in, Vol.2, PP.139-149.
132. Sharafuddin, A. (1969), P.184.

CHAPTER THREE

METHODOLOGY

3.1 RESEARCH DESIGN AND PROCEDURE

A research design is usually the plan, structure and strategy of investigation which guide the collection and analysis of data in any research.[1] Therefore, the plan is the overall scheme or programme of the research. It includes an outline of what the researcher intends to do from the beginning to the end of the research, so as to achieve the stated objectives of the research. In other words, a research design can be likened to a building plan which guides the builder at every stage of the construction such that the type of building constructed is exactly the same as that drawn by the architect.[2]

According to Ndagi (1986) a historical research deals with determination, evaluation and explanation of past events essentially for the purpose of gaining a better and clearer understanding of the present and making a more reliable prediction of the future. The topic of this current research, "Historical development of Islamic law (Fiqh) from the period of the revelation to the Seventh Century after Hijrah", falls within the domain of historical research which seeks to answer the question 'what was'? Thus, the researcher in this study critically examined the available records in order to arrive at certain decisions and conclusions on how past events have affected or influenced the behaviours of past generations. The researcher also examined the effects of

those historical events on the present generation. This is because a historical research is usually meant to provide information concerning past events or actions which may provide useful information to guide present day events or actions.

It is interesting to note that Muslim scholars like al-Ghazālī (d. 1505) and Ibn Khaldūn (d.1406) seem to have generally classified the major areas of research in Islamic studies into three: Jurisprudence (Fiqh and usūl al-Fiqh); theology (uṣūl al-Dīn); hadith and civilization (al-Hadarah). A researcher in the area of jurisprudence would be regarded as a jurist after completing the research. Jurisprudence essentially relates to interpretation of the precepts of the Shari'ah out of which the researcher decides certain religions duties to be basically Wajib (obligatory), Haram (prohibited) or Ja'iz (permissible). Therefore, whoever intends to conduct a research within the domain of jurisprudence definitely requires the knowledge of Fiqh, usul al-Fiqh, Ahkam al-Qur'ān, Ahkām al-Hadīth, and the general historical background and the development of Islamic law.

However, when the research reaches the stage of taking legal decisions, then the researcher needs to combine the precepts of the Qur'an and Sunnah as understood by the Ṣahābah (companions) to be the bases of his legal decisions. If he finds it impossible to arrive at a legal decision then he can look for Ijma' (consensus of opinion of the Muslim jurists) or Kalām al-Mash-hur (popular opinion of the jurists) and where such is not possible too then he moves to

Qiyās (analogical deductions). But where he is unable to arrive at a legal decision under Qiyās, then he can consider the case under any of the following principles depending on the nature and type of the case: Darurah, Rukhsah, Maslaha etc.

Based on the aforementioned discussion, a researcher in the field of Islamic law cannot use experiments to explain the Divine scriptures to arrive at certain legal decisions, so it is not within the domain of the natural sciences. Again, a researcher in the field of Islamic law cannot base his legal decisions purely on observations only without looking at the legal interpretations or procedures for legal decisions and so it is not within the domain of the social sciences. Furthermore, a researcher in the field of Islamic law cannot use merely philosophical or rational approach to pass any legal decision nor explain any religious duty without any reference to the precepts in the legal provisions which will enable him to understand the will of God.

Thus, in a nut shell we can summarise the juristic research procedure in the following words:

(a) Studying the al-Mas'alah (The problem, issue or case).

(b) Understanding the Sighah (nature) of the case.

(c) Identification of the Illah or manat al-Hukum (Affective cause).

(d) Understanding the relevant text and its munasabah (relationship) with the case.

(e) Consultation of the Nusus (Qur'an and Sunnah).

(f) Searching for the collective legal decisions of the Sahāba (companions) or Ijmā'.

(g) Searching for Kalam al-Mash-hur (popular opinion) among the legal views expressed by the Salaf (early Muslim scholars).

(h) Resorting to limited Qiyās (analogical deductions).

The second area of research in Islamic studies relates to 'usūl al-Din (fundamentals of the religion). This area of research is within the domain of Islamic theology and scholars conducting research within this field adopt almost the same procedures followed by the jurists except in some few cases. For example theologians do not apply the principle of Qiyās when trying to pass legal decisions on issues nor do they resort to Maslahah (public interest). However, theologians depend mostly on the Qur'án and Hadith Mutawatir in their decisions as well as Ijmā'. This is because scholars of usul al-Din depends on Qat'iyyat and sam'iyyat (clear-cut evidence) hence it is not permissible to take decision based on Zanniyyat (hypothetical reports). Although they respect Kalam al-Mash-hur and Khabar Ahād but they do not consider them as the real bases for the final decisions.

Another difference between the two methods is the fact that while a jurist attempts to explain a religious duty in relation to its legality or otherwise (halal, ja'iz, haram, sahih or fasid) the concern of a theologian relates to the interpretation of issues such as Imān (faith), Kufr (unbelief), Shirk (polytheism), Ikhlās (sincerity of intention), Nifaq (hypocracy), etc.

The third area of research in Islamic Studies relates to the methodology of the scholars of Hadith and civilization (al-Hadarah). The methodology of scholars carrying out research within this field deals with authentication, validating and proving the moral value of intellectual contributions relating to the religion and all other aspects of human relations such as politics, economy as well as other cultural contributions.

It is important to note that when a research relates purely to reports of hadith, then the methodology of hadith scholars has to be properly followed but where it relates to refinement of culture then such is the work of the scholars of civilization. Other contributions such as editions and translations of manuscripts falls within the domain of this category of research. Therefore, the topic of this research, "Historical Development of Islamic Law (Fiqh) from the period of the revelation to the 7th Century after Hijrah", falls within the domain of the methodology of the scholars of Hadith and civilization. It has been commonly observed that any research work within the domain of Islamic Studies must in one way or the other relate directly or indirectly to the work of the jurists and the interpretation of the precepts of the Shari'ah.

3.2 INSTRUMENTATION OR SOURCES OF DATA

The sources of data in a historical research is generally classified into two: The primary source and the secondary source. The primary source is the one recorded by an actual eyewitness or participant in an event (document) or the historical object itself (remain) while the secondary source is the one

recorded by someone who obtained his data indirectly. Therefore, in this research the primary sources include the precepts of the law obtained from the text of the Qur'an, Hadith and the legal decisions of the companions while the secondary sources refer to the legal decisions of the prominent Muslim jurists as contained in their works or that of their disciples. They also include Arabic textbooks written on the historical development of Islamic law (Tarikh al-Tashri' al-Islami).

In order to evaluate the information obtained from the prophetic traditions, the researcher feels it is necessary to verify clearly the status of each report with regard to its validity, reliability and authenticity so as to know its strength or otherwise. This will also enable the researcher to know the quality of the report and decide whether it could be used as a basis for the derivation of a (new) law or not.

END NOTES OF CHAPTER THREE

1. Olomolaiye, F.O. (1986), Research Methods and Statistics, Fab. Anieh (Nig.) Ltd. Jos, Nigeria.
2. Kerlinger, F.N. (1973), Foundations of Behavioural Research, Holt, Rinehart and Winston, London.

CHAPTER FOUR

SOME SIGNIFICANT LEGAL TERMS USED BY THE JURISTS IN THEIR ANALYSIS.

4.1. DEFINITION OF AL-ʾAHKAM AL-SHARʿIYYAH (RULES OF LAW) AND IT'S MAJOR CLASSIFICATIONS:

In the literature review an attempt was made to discuss the historical development of Islamic law (figh) from the period of the revelation to the fall of Baghdad in the Seventh Century after Hijrah. However, this chapter is designed to explain the rules of law (al-Ahkam al-shariyyah), it's fundamental objectives (al-Maqasid al-shariyyah) and the methodology adopted by the earlier jurists in learning the shari'ah.

According to Hasaballah (1976), the rule of law has generally been explained as an affirmation or non affirmation of a matter because of another matter based on the provision of the shari'ah. The jurists (fuqaha) commonly refer to the ʾAhkam as what they used in passing legal decisions (Mahkum bih) while the scholars of usul al Fiqh (jurisconsults) on the other hand define it as "The speech of God, which relates to the acts of legally capables (Mukallafin) by way of requirement, option or position". (1) The speech of God in this respect is the evidence of the law and it is sometimes called the law itself. Let us illustrate further the above definition of the usulists:

(a) The speech of God; clearly denotes what is contained in the Holy Qur'an as well as what it indicated to be other acceptable sources of the shari'ah, such as the sunnah, Ijma', Qiyas e.t.c.

(b) By way of requirement; it refers to the requirement (talab) for the performance or non-performance of an act in such a manner that the said act becomes obligatory or a preferred one. Thus, the requirement for the performance or non-performance of an act results in the following:

(i) Where the command for the requirement of an act was made with an emphatic tone then it denotes compulsion (al-wujib) and so its fulfilment becomes obligatory (wajib). A good example of this is where Allah says: "And establish regular prayers....." (Baqarah 2:43). This verse indicate that the performance of Salat is obligatory.

(ii) Where the command for the performance of an act was less emphatic, then it denotes commendation (al-Nadb or al-Istihbab) while its compliance is regarded as a commendable act (Mandub or Mustahab). An example of this could be seen where Allah says: "Oh ye who believe! when you contract a debt for a fixed period of time, record it in writing....." (Baqarah 2:282). This verse indicates that writing a contract of debt for record keeping is a commendable act.

(iii) Where the command for the non-performance of an act was made strongly, then such denotes prohibition (al-Hurmah) as in the verse:

"And come not near unto adultery (and fornication) Lo! it is an abomination and an evil way", (Isrā' 17:32). This verse indicates the prohibition of adultery and fornication.

(iv) Where the avoidance of an act is required by way of preference, then it denotes distaste (al-karahah) as in the verse: "O ye who believe! ask not questions about things which, if made plain to you, may cause you trouble....." (Ma'idah 5:104). This verse indicates that it is distasteful to ask unnecessary questions that may cause problem to the Muslim 'Ummah. But there is no harm if such questions are beneficial to the Muslim community based on another Qur'anic verse where Allah says: "..... if you realise this not, ask of those who possess the message....." (Nahl 16:43).

(c) By way of option; this denotes the state of balance between the requirement for the performance and non-performance of an act without preference to any side. Thus, the law is indifferent (al-Ibahah). The example of this could be seen in the verse: "..... And eat and drink, until the white thread becometh distinct to you from the black thread of the dawn....." (Baqarah 2:187). This verse serves as an evidence of permission to eat and drink in the night of Ramadan up to the stipulated time. However, if this verse is not understood to have this meaning, then one may assume the meaning to be an instruction to the believers to continue eating and drinking without limit even if they have taken enough they need.

(d) By way of postion; this means to put something as a casue (al-sabab) for another thing or its condition (al-shart), or its prevention (al-Mani'). Let us consider the following examples for the purpose of illustration:

(i) A positional cause (sabab) could be observed in the verse: "As to the thief, male or female, cut off their hands, it is the reward of their own deeds, an exemplary punishment from Allah, Allah is Mighty and Wise". (Ma'idah 5:41). This verse indicates that theft is the cause for the amputation of hands. Another example could be seen in the verse: "Allah directs you concerning (the inheritance for) your children: to the male the equivalent of the portion of two females....." (Nisa 4:11). Thus, kinship (Nasab) is regarded as one of the causes for inheritance.

(ii) A positional condition (shart) could be seen in the Prophetic tradition: "There is no valid marriage contract without two witnesses"[2] According to this Hadith two witnesses are among the conditions necessary for the validity of the marriage contract. Another example could be seen in the verse:....." pilgrimage thereto is a duty men owe to God, for those who can afford the journey....." (Ali 'Imran 3:97). Thus, according to this verse feasibility is a condition necessary for the obligation of pilgrimage.

(iii) A positional prevention (al-Mani') could be seen in the Prophetic saying: "The murderer cannot inherit anything (from the property of his close related victim)"[3]. This Hadith shows that intentional homicide (al-

Qatl al-Amd) is among the impediments to inheritance. Another example could be seen in the Hadith: "The Divine pen is raised up for three people: A sleeping person until he wakes up, a minor until he reaches the age of maturity, and a mad person until he becomes normal"[4]. In this Hadith sleeping, infancy, and madness are considered as barriers to liability.

According to Kamal (1989) it is important to note that the usulists define legal rules (Hukum shar'i) in a nutshell as "a speech of God or communication from the Law-giver concerning the conduct of the Mukallaf (mature person in full possession of his senses) which constitutes a demand, an option or an enactment". A demand (talab) is usually communicated in the form of either a command or a prohibition. The former demands the Mukallaf to do something whereas the latter is the opposite. A demand may either be binding leaving the Mukallaf with no choice but to conform, or it may not be so binding. When a demand to do or not to do something is established in definitive proof (dalil qat'i) such an act is called wajib or haram respectively. But when an act to do or not to do is not emphatic leaving the individual with an element of choice, then such an act is known as Mandub or Makruh respectively. The option (Takhyir), on the other hand is also among the hukum al-shar'i which gives the individual complete freedom to do a certain act or not and such an act is termed Mubah (permissible). An enactment (wad'i) is neither a demand nor an option but an objective exposition of the law which enact

something as a cause (sabab), or a condition (shart) of obtaining something, or it may be conveyed in the form of a hindrance (Māni') that might operate as an obstacle toward obtaining it[5].

Therefore, based on the above discussion, it is clear that the legal rules of law (Ahkam al-shar'iyyah) are basically classified into two according to Khallāf (1978), namely: The obligatory rule of law (Hukum al-Taklifi) and the positional or declaratory rule of law (al-Hukum al-wada'i). The former consists of a demand or an option whereas the latter consist of an enactment only. The differences between the two could be observed in two perspectives as opined by Hasaballah (1976) and Khallāf (1978):

(a) The obligatory rule of law denotes an obligation to be satisfied by the Mukallaf, while the positional or declaratory rule of law, on the other hand, denotes no obligation but it is simply a juristic connection of two matters as a cause (sabab) and the causal case (Musabbab); a condition (Shart) and the conditional case (Mashrūṭ); or a prevention (Māni') and the prevented case (Mamnū'). Other factors discussed along this division include: Resolution ('Azīmah) as opposed to concession (Rukhṣah) and sound (Sahīh) as opposed to null and void (Batil).

(b) The demands or requests made in the obligatory rule of law are always within the capacity of the Mukallaf such as offering' prayers, fasting, writing contracts of debts etc. whereas the declaratory or positional rule of law could be within or beyond the capacity of the Mukallaf.

Examples of things within the capacity of the Mukallaf are theft, witnesses, homicide, possession of Nisāb [6] for zakat etc while those beyond the power of the Mukallaf include: Kinship (Nasáb), feasibility, madness, arrival of a particular time of a day which is the cause (Sabab) for the obligation of Salat[7].

4.2. THE OBLIGATORY RULES OF LAW (AL-HUKUM AL-TAKLIFI):

The obligatory rules of law contain the descriptions that the Lawgiver set forth for the acts of the Mukallafin (the legally capable). These descriptions are classified into five based on the popular opinion of the Muslim jurists: al-wujūb (obligation), al-Istihbāb or al -Nadb (commendation), al- Huarmah (prohibition) al-karahah (distaste), and al-Ibáhah (indifference). Now let us discuss them one after the other.

4.2.1. Al-Wujub (obligation): This refers to the acts or duties the Mukallaf is required to perform and acting upon it leads to reward while deliberate refusal attracts punishment either in this world or in the hereafter. Thus any act that comes under this description is known as Wājib (obligatory). Some examples of such acts could be observed in the following verses of the Holy Qur'an: "O ye who believe! fasting is prescribed to you as it was prescribed to those before you, that ye may (learn) self-restraint". (Baqarah 2:183). In another place, the Qur'ān states: "And be steadfast in prayer; practice regular charity; And bow down your heads with those who bow down (in worship)". (Baqarah 2:43). The Qur'an also reads: "Thy Lord hath decreed that ye worship none but Him, and that ye be kind to parents. Whether one or both of them attain old age in thy

life, say not to them a word of contempt, nor repel them. But address them in terms of honour. ....." (Isrā' 17:23-24). It is also stated in the Qur'ān: ".... and fulfil (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning)". (Isra' 17:34).

Therefore according to Hasaballah (1976), Wājib (obligatory) can simply be defined as a strict commandment for the performance of an act and the doer is promised with Divine reward while the defaulter is threatened with divine punishment. The terms Wājib and Farḍ are synonyms, according to the interpretations of the Māliki and Shafi'i jurists whereas the Hanafi jurists consider them to be different. In the Hanafi school of law, Farḍ refers to an act which is proved with a palpable and emphatic evidence (Qaṭ'i al-thubut wa al-Dilālah). Kamal (1989) outlines the differences between Farḍ and Wajib as follows:

Whoever refuses to believe in the binding nature of Farḍ automatically becomes an infidel, but if he disputes the authority of Wājib he becomes a transgressor. Another difference between Farḍ and Wajib is that when the former is neglected, the act as a whole becomes null and void (baṭil). For example, if a person omits bowing (Ruku') or prostration (Sajdah) in the obligatory prayers, then the whole of the prayer becomes null and void. But if he leaves recitation of al-fātiha, the Salat is basically valid although deficient.[8]

Al-Ghazālī (1937) further states that: "As far as we are concerned, there is no difference between Farḍ and Wajib; the two terms are synonymous.

However, according to the Hanafi jurists, as mentioned earlier, Fard is based on definitive proof while Wājib is founded on speculative authority. al-Ghazali continued to say; "we do not deny the division of Wajib into definitive and speculative (Maqṭū' and Maẓnūn) and we do not object the use of different expressions once their meaning is clear"[69]. It is also important to note that the substitution of Wājib, with al-Sunnah al-Mu'akkadah (emphatic tradition) is common among the jurists of the Māliki, Shāfi'i and Hanbali schools of law.

DIVISIONS OF WAJIB

The scholars of Usul al-Fiqh generally classified Wajib broadly into four based on different considerations as follows:

(A) Al-Wājib in consideration of the nature of the duty demanded is of two types: al-Wajib al - Mu'ayyan and al-Mukhayyar

(i) al-Wājib al-Mu'ayyan (specified obligation); this refers to the specific duties demanded by the Law-giver without giving any option for choice, hence such a duty cannot be substituted with another duty rather than the specified one. Examples of these duties are in Ṣalāt, Ṣawm, Zakat, Hajj etc. Thus, the Mukallaf cannot be absolved of the said obligation unless he performed the specified duty.

(ii) al-Wājib al - Mukhayyar (unspecified obligation); this refers to a situation where the Mukallaf is required to discharge his obligation by selecting one out of a number of (given) options. For example, in the atonement for breaking an oath (Kaffarāt al-Yamīn), the Qur'an

states:".... for expiation, feed ten indigent persons, on a scale of the average for the food of your families; or cloth them; or give a slave his freedom. If that is beyond your means fast for three days, that is the expiation for the oaths ye have sworn...." (Ma'idah 5:92). According to this verse whoever breaks his oath can atone for it in anyone of the three mentioned ways.

(B) Wājib in consideration of the quantity of the duty required is classified into two; al-Wājib al- Muhaddad and ghayr al-Muhaddad (quantified and unquantified obligation):

(i) al-Wājib al Muhaddad (quantified obligation); this denotes the acts in which the Law-giver stipulates a specific quantity of the required obligation. For example, the five obligatory prayers with their specific number of raka'at. In this regard, the stipulated quantity must be met even when the said duty is paid as a debt.

(ii) al-Wājib ghayr al-Muhaddad (unquantified obligation); this refers to the obligations in which the Law-giver does not specifically stipulate any quantity. For example, spending in the way of God, helping on the right course, feeding the needy etc. These duties vary from one situation to another hence no body has the right to stipulate a certain quantity as obligatory since the Law-giver leaves it open. Another example of this is the maximum amount of dowry payable to a woman on marriage, which is not specifically fixed by the Lawgiver.

(C) al-Wājib, in consideration of the Mukallaf who is required to perform the obligation, is sub-divided into; al-'Ayni and al-Kafa'i (individual or personal and collective obligation).

(i) al-Wajib al-Ayni (individual or personal obligation); this refers to the acts which every Mukallaf is compulsorily required to perform. If such a duty is carried out by a group of people or any individual still others are not exonerated from it, until they perform it too. This type of duty cannot, in principle, be performed for or on behalf of another person. Examples of such duties are Salat, Zakat, Hajj, abstinence from committing Zinah, murder, taking alcoholic drinks etc.

(ii) al-Wajib al-Kafa'i (collective obligation); this consists of obligations addressed to the community as a whole. If such a duty is discharged by any individual or individuals, then all other Muslims are exonerated from it. But where such a duty is not carried out by anyone, then the entire Muslim community of that area has committed an offence. Example of such duties are funeral prayers, giving testimony, commanding the performance of good things and the prohibition of evils, Jihād, safe guarding a drowning person etc.

The reward (thawāb), however, belongs exclusively to those who actually took part in the discharge of the duty. It is also important to note that the collective obligation may sometimes change to a personal obligation. For example, where and when it happens that there is only one person who knows

how to swim well, then it becomes a personal obligation upon him to protect someone about to be drowned in the water. Another example could be seen in the fact that Jihad is a collective obligation but when the enemy attacks and besieges a locality, then it becomes the personal duty of every resident to defend it. Similarly, when it happens that there is only one Mujtahid within the city, then it becomes his personal obligation to carry out Ijtihad.[10]

(D) Al-wājib in consideration of the period of its performance is of two types: al-wjib al-mutlaq and al-muwaqqat (obligation with unspecified and specified period for performance of the obligation):

(i) al-Wājib al-mutlaq (obligation with unspecified period); this refers to the acts that the Law-giver does not stipulate specific time for their performance. Example of these duties include atonement (kaffarat), vow (nadhar) to fast some non-specified days etc. This set of duties can be performed at any convenient time.[11]

(ii) al-Wājib al-muwaqqat (specified period); this deals with the acts that the Law-giver stipulates specific time for their performance. For example, the five daily prayers, fasting in the month of Ramadan, pilgrimage etc. These duties have stipulated periods within which to be performed to have legal validity. al-Wajib al-muwaqqat, however, is further sub-classified into three namely: Al-muwassa', Al-mudayyaq, and dhush-shubhayn. al-Waqt al-muwassa' (wide or abundant period); this refers to the period which is quite sufficient for the performance of the

required duty and at the same time can accommodate a similar duty within its stipulated period. For example; the fixed period for the performance of the obligatory prayers is sufficient to accommodate other prayers (Salat) like Raka'atayn al -Fijr, Shafa'atayn wa al - witr, Salāt al-'Idayn, and other Nawafil prayers.

ii.- Waqt al-mudayyaq (limited or narrow period); this refers to the period stipulated by the Law-giver, which is not quite sufficient to accommodate another act of the same kind other than itself alone. For example, the period of Ramadān fasting cannot accommodate the performance of any other form of fasting.

Waqt dhush-shubhayn (wide- narrow period); this period seems to be accommodative of another act of its kind but cannot be repeated, as it can only be performed once annually. For example, Hajj can only be performed within the stipulated months of the year (al-'Ash-hur al-ma'lūmāt)[12] but at the same time 'Umrah (lesser pilgrimage) can be carried out within its period.

The Muslim jurists further explained that acts having sufficient period for their performance can only be valid when accompanied with determined intention (al-niyyah al-mu'ayyanah);[13] ordinary intention without any specification (niyyah al-mutlaq) is enough to validate duties performed within the non-accommodative period; whereas duties performed within the wide-narrow period (dhush-shubhayn) could be valid with either ordinary or determined intention as the case may be[14].

It is important, however, to note that where and when a Muslim discharges his obligation within the stipulated period perfectly and correctly, then such a duty is regarded as Adā'. If the said duty is performed correctly but not perfectly, then it is later on repeated perfectly within the stipulated period, the second action is regarded as'I'ādah. For example, after praying alone one may decide to join congregation (jamā'ah) for the same prayer. When a Muslim is unable to perform the required duty within its prescribed period, then it is mandatory upon him to repay it (Qadā').

The law governing obligatory acts (wājibāt) is that performance of the said duty or duties attracts heavenly reward while neglecting it attracts punishment[15] either in this world or in the hereafter, as mentioned earlier.

4.2.2. AL-ISTIHBĀB OR AL-NADB (commendation): This is a rule of law where the performance of an act is preferred to neglecting it. The act that comes under this description is known as Mustahabb or Mandub (recommended). It can also be defined as the act in which the Mukallaf is not strongly required to perform. An example of this act could be seen in the verse where Allah says:".....And if any of your slaves ask for a deed in writing (to enable them to earn their freedom for a certain sum) give them such a deed if you know any good of them....." (Nūr 24:33). This verse indicates that it is recommended for a master to give his slave the written document because the command is accompanied with a clause that shows it is not obligatory.

The law governing Mandūb is that the doer is promised with reward while neglecting it calls for no punishment. Thus, compliance with the demand earns the Mukallaf spiritual reward (thawāb) but no punishment is to be inflicted upon him for failure to perform it. According to Hasaballah, (1976) Mandūb is basically classified into three as follows:

(a) The performance of acts that serve as a form of perfection to some of the obligatory duties, like the call to prayer (ʾadhān), congregational prayer (Ṣalat al-jamāʿah), acts performed by the Prophet (SAW) regularly except on some few occasions simply to show that such acts are not obligatory such as rinsing the mouth in ablution, recitation of some chapters or verses of the Holy Qur'ān after the recitation of Surah al-Fātihah in prayers. These acts are sometimes commonly referred to as al-sunnah al- muʾakkadah and whoever deliberately refuses to perform such acts makes himself liable to accusation and punishment. For example, if the people of a given locality collectively decide to neglect an act like the call to prayer, they should be fought because such an act is among the symbols of the religion despite the fact that it is not obligatory (Wājib).

(b) Meritorious acts that bring one closer to God which were occasionally performed by the Prophet (SAW) such as giving alms to the poor, fasting on Mondays, two Nawāfil rakaʿat before or after the obligatory

prayers etc. These acts, according to the jurists, are sometimes known as additional sunnah and neglecting them attracts neither accusation nor punishment.

(c) Another form of Mandūb are the customary practices of the Prophet (SAW) which emanate from him as a human being such as his eating, drinking, sleeping, walking, dressing etc. Thus, emulating the life style of the Prophet (SAW) is among the recommended acts that brings perfection in one's religious life. However, abstention from such practices causes no alarm or punishment because originally they were not part of the fundamental principles of the religious affairs.

Other issues discussed under this sub-topic pertain to the question whether it is compulsory to complete a non-obligatory act (Nafilah) after its commencement or not. According to 'Imam al-Shafi'i, whoever starts the performance of a recommended act but does not complete it, then it is not binding upon him to pay back such a duty. This is because the act is not obligatorily demanded in the first place hence its repayment cannot be mandatory. Whereas according to the Hanafi jurists mere non-obligatory demand before the commencement of an act does not warrant non-completion of the duty after its commencement. They further argue that it is obligatory on a person to complete any good work he starts based on the verse: "O ye who believed obey God, and obey the Apostle, and make not void your deeds!" (Muhammad 47:33). Therefore, once the act of completion becomes binding

then repayments automatically becomes mandatory despite the fact that its commencement was optional[16]

4.2.3. AL-HURMAH (Prohibition): This refers to the prohibition of an act upon a Mukallaf in such a way that he feel divine punishment awaits whoever violates the law. The act that falls under this description is known as Haraam (prohibited). Thus, Haraam can simply be defined as what is strongly forbidden. In other words, Haraam is a binding demand of the Law-giver in respect of abandoning something. Committing the Haraam (prohibited) is punishable and omitting it is rewardable.

The prohibited acts could be known through many ways such as where the word "prohibited" is used like in the verse" "Prohibited to you (for marriage) are your Mothers, Daughters, Sisters....." (Nisa 4:23). Another Qur'anic verse states: "Divorced women shall wait concerning themselves for three monthly period as, it is not lawful for them to hide what God hath created in their wombs, if they have faith in God and the last day". (Baqarah 2:228). Other constructions containing prohibition could be expressed by threatening whoever violates the law with divine punishment or warning the believers not to come even close to some acts talk less of committing them, or to shun such evil acts as in the following verses: "Such are the limits set by Allah, whoever transgresses beyond the limits set by Allah, then such are the wrong doers". (Baqarah 2:229). Another verse states: "And come not near unto adultery or fornication. Lo! it is an abomination and an evil way". (Isra' 17:32). Another

verse reads: "Shun the abomination of idols, and shun the word that is false". (Hajj 22:30). Another verse states: "Those who eat up the property of the orphans, eat up fire into their own bodies. And they will soon be enduring a blazing fire". (Nisā' 4:10).

The Hanafi jurists also classified the prohibition into two, Haram, and Makrūh Tahrīm as they do in the case of Fard and Wājib. According to their interpretation, Harām, is a binding demand to avoid an act which is established in definitive proof; but if the demand is founded in speculative evidence, then it constitutes Makrūh Tahrīm. According to Kamal (1989) the two differ from one another because wilful denial of Harām leads to infidelity but not so in the case of Makrūh Tahrīm.

The jurists divided prohibition into two; perfect and conditional prohibition (Hurmah dhatiyyah and Hurma 'Aridah or lighayrih):

(a) Haram li-dhātih (perfect prohibition); this refers to things that are forbidelen for their own sake, such as theft, murder, Zina, marrying a close prohibited relative, performing Salat without ablution, taking alcoholic drinks, eating of dead animals etc. This form of prohibitions cannot create legitimate rights according to the prescription of the Shari'ah. Thus, zina for example cannot legitimize kinship (Nasab) nor can theft legitimize ownership.

(b) Haram li-ghayrih (conditional or circumstantial prohibition): this denotes things that were forbidden because of something else. Thus, an

act may be originally lawful but has been made unlawful owing to some circumstances. This means that such an act was not initially prohibited but later on certain things emerged that dictated its prohibition such as offering prayer (Ṣalāt) in an extorted land, performing Ṣalāt in stolen clothes, a contract of sales accompanied with deceit, marrying a triply divorced woman with the sole intention of legitimizing marriage with her former husband (Nikāh al-Tahlīl)[17], making an offer of betrothal to a woman who is already betrothed to another man etc. In each of these examples, the act involved is originally lawful but has become Ḥarām owing to certain circumstances. This form of prohibitions create legal rights in the Sharī'ah, according to the popular opinion of the Muslim jurists. Therefore, prayers offered in the extorted land are quite valid once their essentials and conditions are satisfied because the act of prayer is required and rewardable while on the other hand extortion of someone's property is prohibited. Similarly Nikāh al-Tahlīl creates legitimate kinship[18].

It is important, however, to note that perfect prohibitions are not permissible except in cases of dire necessity (darūrah) while circumstantial prohibitions are allowed not only in cases of absolute necessity but also when they prevent hardship. In the light of this, 'Abū Zahra (1958) observed that a physician is permitted to look at the private parts of a patient even in an illness which does not constitute an immediate threat to life[19].

4.2.5. AL-KARĀHAH (Distaste): This refers to Karáhah Tanzihiyyah which is an antonym (opposite) to al-Nadb (commendation) but it does not mean Karāhah Tahrim which is a synonym to Tahrim (prohibition). Karāhah, therefore, refers to a rule of law where the Law-giver prefers the avoidance of an act to its performance. The act that comes under this description is known as Makrūh (distasteful). Makruh could as well be defined as a demand of the Law-giver which requires the Mukallaf to avoid something but not in strictly prohibitory terms. Avoidance of the distasteful acts earns the Mukallaf external reward while its commitment attracts no punishment. An example of the distasteful acts could be seen in the verse: "O ye who believe! ask not questions about things which if made plain to you, may cause you trouble. But if you ask about things when the Qur'ān is being revealed they will be made plain to you. God forgives such things; for God is forgiving, most forbearing." (Mā'idah 5:104). This verse indicates that unnecessary questions are distasteful in the sight of God, whereas questions that lead to useful knowledge are encouraged in Islam as directed in the verse: ".....if you realize this not ask of those who possess the message (knowledge)." (Nahl 16:43).[20]

Another example of Makrūh is in the Prophetic tradition. "Surely, God feels distaste to you in, the acts of gossip, unwanted questions and extravagancy."[21] In another tradition the Prophet (SAW) was reported to have said, when a certain delegation came to him saying: One among us fasts everyday, worships throughout the night and supplicates frequently. Then he

asked: who among you takes care of his livelihood? They replied: All of us. The Prophet (SAW) remarked: You are all better than him."[22] This tradition indicates that the acts under discussion are distasteful in the eyes of the Shari'ah.

4.2.6 AL-IBĀHAH (Indifference): This refers to a situation where the law governing the performance or non-performance of an act is basically the same and none of the two is preferred to the other. The act that falls under this description is known as Mubāh (indifferent). Mubāh is sometimes referred to as Halāl or Jā'iz. In this regard the Law-giver gives the Mukallaf a free option whether to do or not to do such a thing.

The acts regarded as Mubāh could be known from the Shari'ah if no objection, blame, harm or interdiction is attached to its performance. Examples of these rules could be observed in the following verses: "No blame is there on the blind, nor is there blame on the lame, nor on one ill (if he joins not the war):...." (Fath 47:17). In another place the Qur'ān states: "There is no blame on you if you make an offer of betrothal or hold it in your hearts. God knows that ye cherish them in your hearts...." (Baqarah 2:235). Again it is stated in the Qur'ān: "He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Good. But if one is forced by necessity, without wilful disobedience, nor transgressing due limits, then is he guiltless....." (Baqarah 2:173). Another

example is where Allah says:"..... But when ye are clear of the sacred precincts and of pilgrim garb, ye may hunt...." (Mā'idah 5:2).[23]

The jurists have broadly divided Ibāhah into two, viz,'Ibāhah shar'iyyah (legal indifference) and Ibāhah 'Aqaliyyah (logical indifference). Let us consider them one after the other.

(a) 'Ibāhah shar'iyyah (legal indifference): This refers to acts in which the Law-giver is indifferent and they are known through the Shari'ah. For example the permission to have intercourse with one's wife in the night during the month of Ramadan was only known after the revelation of the following verse: "Permitted to you on the night of the fasts, is the approach to your wives." (Baqarah 2:187).

(b) 'Ibāhah 'Aqaliyyah (logical indifference): This refers to the acts of Mubāh that could be known through the common sense. This type of acts could as well be known through principle of istishāb al-Bara'at al-'Asliyyah (Associating things to the natural absence of the law) in the terminology of the jurists. According to this principle natural absence of any law with regards to a particular act is a clear evidence of no indictment. For example, people who transacted with usury before its prohibition were exonerated due to the absence of any law concerning it. In this respect, Allah says: "Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for God

(to decide), but those who repeat (the offence) are companion of the fire, they will abide therein (forever)". (Baqarah 2:275).

The law governing the acts of Mubāh is that the Law-giver gave the Mukallaf free option either to do or not to do an act and whatever line of action he takes attracts neither reward nor punishment.[25]

4.3. AL-HUKUM AL-WADA'I (DECLARATORY RULE OF LAW)

The declaratory or positional rule of law is concerned with the cause (sabab), condition (shart), hindrance (mäni'), resolution (azimah), concession (Rukhsah), correctness (sihhah), and incorrectness (butlän). Let us consider them one after the other.

4.3.1 AL-SABAB (cause): This relates to a clear and adequate description, upon which the Law-giver, regulates the happening of a particular act. Thus, sabab serves as a pre-requisite of the regulated act and such an act cannot be valid without it. The sabab (cause) in its characteristics is of two types, namely: Causes of divine nature and causes of worldly nature.

(a) Causes of divine nature refer to causes that originate from the divine order of the Law-giver. For example, the possession of Nisab is the cause for making the payment of Zakkat obligatory. If the Nisab is diminished by any circumstance, then the obligation of Zakat is no longer there. Again, journey is a valid ground for the breaking of one's fasting during the month of Ramadan. The acts mentioned in the two

examples are all within the capability of the Mukallaf whereas some of the causes that are beyond his capability could be seen in the coming for each prayer which necessitates the performance of that particular prayer; the Mukallaf may also be forced by necessity which is a cause for eating unlawful food.

(b) **CAUSES OF WORLDLY NATURE:** This refers to the causes related to worldly affairs, which were also ordained by the Law-giver. For example, a contract of sale is a cause that creates legitimate change of ownership (of property); so also damaging of someone's property is a cause for the law of tort. The acts cited in the two examples all fall within the capability of the Mukallaf. Example of causes beyond the capability of the Mukallaf is kinship, which is one of the causes of inheritance and young age (infancy) as a cause for guardianship. It is important to note that the law-giver laid down the causes to serve as a means to the act in question, otherwise there would be no relationship between the two talk less of regarding one of them as the cause (sabab) and the act upon which it has effect as Musabbab.

Based on the above explanation, jurists like Shatibi (134/AH) and others opined that where a Mukallaf, performs an act regarded as a cause for something with all its conditions, then such a cause will have legal effects on the relevant act even if the Mukallaf had no such intention. This is because the link between the cause and the case is regulated by the Law-giver not by the

Mukallaf hence he cannot resist what he does not lay down. For example whoever entered into a contract of sale or marriage, or divorced his wife, or manumitted his slave, then definitely his actions will have legal consequences as stated by the Law-giver even if he had no such intentions. Certainly, if he had no intention of such legal consequences then he is no better than a joker, just like a farmer who saws seeds in the ground during the raining season but does not intend their germination, or a warrior who shoots an arrow at a person without the intention to get him.[26]

4.3.2. AL-SHART (condition): This denotes what the Law-giver laid as a pre-requisite condition for an act, hence it cannot be valid without it. For example purity (al-Taharah) is a pre-requisite necessary for the validity of Salat (prayer). The usulists interpret this in a more technical term saying: "al-shart (condition) is what can neither necessitate any law nor negate it by its existence, but its absence makes the relevant act become void." Thus, for example the existence of purity (Taharah) does not necessitate the prayer but no prayer can be valid without it.

One of the major differences between Rukn (pillar) and Shart (condition) is that the former is part and parcel of the required duty like ruku' or sujūd whereas shart on the other hand is something outside the relevant act such as the purity required for the validity of the salat. In other words, the pillar partakes in the essence of a thing. This means that the law (hukum) could not exist in the absence of its essential requirement. As a matter of fact, when the

whole or even part of the rukn is absent, the hukum collapses completely and such an action becomes null and void (batil). Condition does not partake in the essence of the required duty although it is a complementary part of it. For example, rukū' and sujūd in prayers are among the essential requirements of the salāt but ablution is simply a condition necessary for the validity of the prayer and it does not partake in its essence.(27)

The Muslim jurists classified al-shart (condition) into three main divisions as follows:

(a) Al-shart al-mukammil lil-sabab (condition which is a requirement or a pre-requisite for a cause). Al-shart al-mukammil lil-musabbab (condition necessary for the act). An example of the first one is the expiration of a complete year (murur al-Hawl) as a pre-requisite condition of possessing the Nisab (minimum amount due for Zakat) which in turn is a cause (al-sabab) for the obligation of Zakat. Similarly, witness is a condition necessary for the validity of marriage contract which is a cause for wedlock, kinship and inheritance. Intention is a requisite of killing which is a cause for the law of equality (Qisas). Examples of the second one is purity (Taharah) as a condition necessary for the validity of Salat which becomes obligatory with the setting in of its time; so also death of the deceased and survival of the heir are some of the conditions for inheritance established usually on the bases of sound marriage or kinship.

(b) Al-Shart al-wujūb (condition for obligation) and Shart al-Ṣihha (condition for validity). An example of the former is like Zawāl al-shams (post-meridien) for Zuhr (afternoon) prayer. Thus, if the Mukallaf offers Zuhr prayer before the post-meridien (zawāl), then such a prayer is null and void. An example of the latter is like the cause of ablution for the Ṣalat. This is because any Salāt (prayer) performed deliberately (amdan) without ablution is invalid.

The difference between the two is that Shart al-wujūb is among the declaratory rule of law (al-hukum al-waḍ'ī) which is either within or out of Mukallaf's capability, but which he is not required to do or attain. Whereas shart al-Ṣihha falls among the obligatory rule of law (hukum al-Taklifi) which is directly under the mukallaf's capacity, and he is required to satisfy it.

(c) Al-shart al-shar'ī; shart al-Lughawi or 'Adi and Al-shart al-'Aqali:

(i) Al-shart al-shar'ī: This deals with condition(s) enacted by the Law-giver as necessary for the validity of the cause or the actual duty required and this is what we have been discussing since the beginning of this sub-topic.

(ii) Al-shart al-lughawī or 'Ādi: This relates to what people laid down as conditions by themselves concerning some of their daily transactions. These conditions are usually interpreted based on either the literal meaning of the words used or the customs of the traditions involved. For example, where a husband said to his wife: "If you enter that house

you are divorced," or a young man saying: I have sold these goods to you on the condition that my father agrees with it." However, this type of conditions should not in anyway prohibit a lawful or legalize an already prohibited act by the shari'ah.

(iii) Al-shart al-'Aqali (logical condition): This denotes something without which the relevant act cannot be accomplished rationally. For example as soon as a person sees an object, then one of the first thing that will come to his mind is that there ought to be someone who constructed it. Again, unless something is in existence (al-Hayāt), either physically or in reality, otherwise knowledge about it is impossible. Therefore, these types of conditions to a great extent, depend on logic or common sense.(28)

4.3.3. **AL-MĀNI'** (Impediment): This is what the Law-giver sets forward as a barrier to the cause or the law. Thus, its presence prevents the operation of the cause or the law itself. However, its absence raises no legal requirement whatsoever. Kamal (1989) defines Māni' as an act or attribute whose presence nullifies either the hukum or the cause of the hukum. An example of the māni' to the cause (sabab) is like a debt on a person who possesses the Nisab for zakat. The debt in this regard prevents the proper ownership of the Nisab which in turn is the cause necessitating the obligation for the payment of the zakat. The debt renders the ownership of the Nisab fictitious rather than real. Similarly,

is the case in the act of sales where the commodity or object of the contract happens to be a "free-man" hence his being free hinders the validity of the contract which is the legitimate cause of ownership. Again, differences of religion and intentional homicide are among the impediments to inheritance despite the fact that its causes such as sound marriage or kinship have been satisfied. A father cannot be subjected to the law of equality (Qisás) for intentionally killing his child but the reverse is not the case. In the same way menstruation serves as a hindrance to the performance of salāt (prayer), fasting etc.

4.3.4. **AL-ʿAZĪMAH** (Resolution) and Al-Rukhsah (concession): These two are also discussed along with the declaratory rule of law (hukum al-wadʿi). ʿAzīmah relates to the continuous operation of the existing law in the normal situation while Rukhṣah on the other hand deals with the exceptional rules deviating from the existing law granted as a concession or relief to the people based on certain circumstances. A law is regarded as ʿAzimah when it is in its primary and unabated without any circumstance which may soften its original force or even entirely suspend it. Thus, it is a law as the Law-giver had intended it in the first place.[29] For example, there are four rakaʿāt (prostrations) in Zuhr (afternoon), Asr (evening) and Isha' (night prayer) in the normal situation. This type of law falls under ʿAzimah because the Law-giver, originally ordained the prayers in this form.

However, where and when the Mukallaf, engages himself in a lawful journey either for a worldly or eternal gains, then he is legally allowed to shorten the mentioned prayers (salāt) to two raka'āt. In this regard, the Law-giver, God, intends to reduce the originally stated obligation on the Mukallaf, partly due to some of the hardships he may be subjected to when on a journey. The second enacted law is thus known as al-Rukhsah (concession) because it is an exceptional rule under the given circumstance from the general and original resolution. A law is regarded as Rukhsah when it is considered in conjuntion with certain circumstances. The two terms are inter-related in that Rukhsah can only exist when there is 'Azimah in the first place.

The Muslim jurists used the term al-Rukhsah in several ways, as they found it in the sources of the shari'ah as follows:

(a) The concession which permits the Mukallaf to do or use the prohibited things when he is under constraint or duress (al-Ḍarūrah). For example, pronouncing the words of unbelief under duress is allowed as long as one's heart remains firm in faith as breast will-be-dreadful penalty." (~~Nahl~~ 16:106) indicated in the verse: ".... Anyone who, after accepting faith in God, utters (words of) unbelief, - except under compulsion, his heart remaining firm in faith- but such as open their breast to unbelief, - on them is wrath from God, and theirs will be dreadful penalty." (Nahl 16:106).

Another example is the law that permits the eating of dead animals or taking alcoholic drinks under extreme constraints. This permission is based on the Qur'anic verse: "He has only forbidden you dead meat; and blood; swine flesh, and that which any other name is invoked beside that of God. But if one is forced by necessity, without wilful disobedience no transgressing due limits, - then he is guiltless, for God is forgiving most merciful." (Baqarah 2:173). In this regard, the Prophet (SAW) was also reported to have said: "al-Darurat tubih al-Mahzurat (necessity knows no bound).[30]

(b) The concession which permits the Mukallaf to defer an obligation till another time or to reduce the originally stated obligation. An example of the first one is the concession given to the Mukallaf in breaking the Ramadan fasting when he is ill or on a journey, based on the verse: "....But if anyone of you is ill or on a journey the prescribed number (should be made up) from days later...." (Baqarah 2:184). An example of the second one is shortening the salat as explained above, based on the verse: "When ye travel through the earth, there is no blame on you if ye shorten your prayers, for the unbelivers may attack you....." (Nisa' 4:101).

So also the permission to offer salat in a sitting position when standing becomes impossible for one reason or the other, based on the Prophetic traditions. In the terminology of the jurists this type of permission is originally regarded as Rukhsah (concession).

(c) The term Rukhṣah is also literally used in relation to some specific concessions given in the field of transactions to alleviate the suffering of people, like the contract of forward sales which is sometimes called the sales of immediate payment against future delivery (salam) and the order for the manufacture of goods (Istisnaʿ). These contracts have been exceptionally permitted to accommodate the public need for such transactions, despite the fact that they are contrary to the general principles governing sales. This is because they are sales of non-existing objects, which is not allowed looking at the general principles of business transactions in Islam. The express permission, however, came directly from the Prophet (SAW) in the Hadith: "The Messenger of God forbid the sales of what a person does not possess but permit the forward sales (salam)".[31] This is simply regarded as Rukhṣah (concession) with particular reference to its origin and development but not as it is in the law afterwards.

(d) Another use of the term Rukhṣah could be seen in what God has simplified for the Muslim community from certain hard and rigorous laws which were imposed under previous revelations. For example, purifying one's clothes by cutting off the portion affected with the Najasah (impurity), repentance by killing each other, payment of 1/4 of one's property as zakāt, illegality of taking booty (ghanimah) and non-permissibility of offering salāt outside the worshiping cults etc.[32] This

is based on the Quranic verse: "Our Lord! lay not on us a burden like that which you didst lay on those before us." (Baqarah 2: 286). Although, the verse is in a form of prayer it is still an indication that all the hardships in the previous revelations have been simplified for the ʾUmmah of Prophet Muhammad (SAW).

The rule of law governing Rukhsah (concession) is ʾIbahah (optional) once it is granted in accordance with the prescribed circumstance. The Mukallaf, therefore, is free either to adhere to the Rukhsah (concession) or stick to the ʿAzīmah (resolution) on the matter in question. The law of concession is regarded optional because all evidences that attest to its preposition are clearly indifferent in nature. Furthermore, if the law of Rukhsah, is made obligatory, then certainly it has lost its original aim which is commutation, in such a way that nothing could be understood from it except the biding nature of the rule ʿAzīmah.

It is important, however, to note that the rule of Rukhsah which is originally optional can circumstantially turn to ʿAzīmah. For example where the concession involves preventing great loss or saving life, then automatically it becomes a compulsory duty and no longer optional. Similarly, it is the case where a person finds himself in a condition of extreme necessity either to eat carrion or to die as a result of hunger. Then, in this situation eating carrion becomes obligatory hence it is no longer a concession based on the following verse: "And make not your own hands contribute to your destruction." (Baqarah

2:195). In another place, it reads:" And kill not (destroy) yourselves." (Nisa' 4:29).

The principle is upheld by the generality of the Muslim jurists except in the case of pronouncing words of unbelief under duress, where no single jurist made it a compulsory duty. This is because survival of one's life lies on a great prize to be paid in return hence when an individual refuses to utter the words of unbelief and stands firmly on his faith, certainly he will have in return a great prize of martyrdom, which is recommendable in Islam.

4.3.5. AL-SIHHAH (soundness) and Al-butlan (void): These two terms are also discussed along with the declaratory rule of law (al-hukum al-wad'i). They are shari'ah values which describe and evaluate legal acts incurred by the Mukallaf. To evaluate an act according to this criterion depends on whether or not the act in question has fulfilled the essential requirements (arkan) and conditions (shurut) which the shari'ah has laid down for its validity. Al-sihhah (soundness) refers to an action performed which has satisfied both the essentials and conditions necessary for its validity while al-butlan (void) is the opposite.[33] For example, a salat is regarded sound (sahih) when it fulfils all the essential requirements and conditions prescribed for it while it is regarded as void (batil) when any of its essential requirements or conditions is lacking. If the action is regarded as valid

then all the legal effects attached to it will become operative without any discrimination but that is not the case where the action is said to be null and void.

Contracts or actions with reference to their authenticity or otherwise could be generally classified into three according to the Hanafi jurists as follows:

(a) A contract or action which has satisfied all the essentials and conditions necessary for its validity is called authentic (sahih) and as such all legal effects attached to it will become operative.

(b) A contract or an action which is lacking in some of its essentials or conditions is termed null and void (batil) and as such none of the legal-effects attached to it will operate. For example selling a free born Muslim, marrying a prohibited relation while the couple are fully aware of the legal prohibition, a minor or an insane divorcing his wife etc.

(c) A contract or an action lacking in some of its conditions (shurut) but not in the essentials (arkan) is regarded as irregular (fasid), like a marriage contracted without witnesses. In this respect some of the legal effects attached to it will function to the exclusion of the others. If consummation has taken place with regard to the marriage contracted without witnesses, such a marriage has become null and void. However, the woman is entitled to the dowry and at the same time she is to observe Iddah (legal period of retirement), while the child obtained as a

result of such contract will legally be identified with the so-called husband despite the fact that the marriage contract is faulty (fāsid). Finally, it is important to note that there is no clear demarcation between bāṭil and fāsid within the sphere of ʿIbādat (acts of worship). Thus, the Mukallaf cannot be absolved once his prayer is regarded either bāṭil or fasid.

4.4. MAQĀSID AL-SHARIʿAH (OBJECTIVES OF THE LAW)

According to the Muslim jurists, the objectives which the Law-giver, God, intends to protect do not generally exceed three types and they are as follows:

4.4.1. DARŪRIYAT (Necessities): These relate to things upon which people's worldly and spiritual built in a way that if such things were neglected the essence of the whole life would become disrupted and meaningless leading to loss of eternal blessings, which leads someone to receive punishment in the hereafter. The basic necessities (Darūriyat) which the sharīʿah intends to protect are five and they are: Al-Dīn (religion), Al-Nafs (life), Al-ʿAql (sense or intellect), Al-Nasl (lineage), and Al-Māl (property). All the rules and regulations legislated in Islam for the betterment of mankind (masalih) in whatever direction will never go against the protection of these necessities.

The protection of the Darūriyāt (necessities) could be achieved in two ways: Establishment of the necessities satisfying all their essentials, conditions

and principles necessary for their validity and the prevention of evils that are likely to creep into them. Accordingly, the fundamental acts of worship such as Īmān (faith), confession of the two testimony (shahádatayn), salat, sawm, Hajj etc. were legislated for the proper establishment of religion (al-Din). Laws related to people's customs and moral characters as dealing with food, drinks, dress, dwelling places etc. were ordained to protect the life and the mind. Movements up and down for the search of means of livelihood, transactions between people etc. were regulated for the proper establishment of family affairs, acquisition of wealth as well as for the establishment of the life and the mind through the day-to-day affairs.

The punishments on the other hand, were legislated to protect the evils that are likely to enter into the necessities. The following laws and punishments were promulgated for the protection of the religion (al-Din). They are laws governing Jihad, Riddah (apostacy) in regard of which the Prophet (SAW) was reported to have said: "Whoever denounced Islam execute him."[34] The law of equality (Qiṣās) and blood money (diyyah) were ordained for the protection and sanctity of life: "O ye who believe! the law of equality is prescribed to you in case of murder: The free for the free; the slave for the slave..... In the law of equality there is (saving of) life to you, O ye men of understanding; that ye may restrain yourselves." (Baqarah 2:178-179). The punishment for the consumption of alcoholic drinks was promulgated as a safeguard against disruption of the intellect (al-Aqal). The Qur'anic verse states: "O ye who

believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination - that ye may prosper." (Mā'idah 5:93). The prohibition of zina was done for the purpose of protecting the sanctity of lineage and the verse reads" "Nor come nigh to adultery for it is a shameful (deed) and an evil opening the road (to other evils)." (Isrā' 17:32). In another verse Allah says: "The woman and the man guilty of adultery or fornication, - flog each of them with a hundred stripes....." (Nūr 24:2). The law prescribing the amputation of the hand for theft was decreed for the security of people's property (mal). The verse containing this injunction reads: "As to the thief male or female, cut off his or her hands: A punishment by way of example from God for their crime; and God is exalted in power." (Mā'idah 5:41).

4.4.2. HAJIYYAT (Needs): These relate to things which people may need to ward off some difficulties and hardships. But if such things were neglected the life of people will not be in total jeopardy like in the case of Darūriyyat (necessities). Thus, when the hājiyyāt (needs) are neglected people will be faced with some form of hardships and difficulties which have lesser effect than the expected disruption that will befall them in the absence of the necessities. The example of this in the sphere of 'Ibādat (acts of worship) is the case of concession of relieves given when there is additional burden on the Mukallaf either as a result of illness or travelling. In the field of 'Ādāt (customs and traditions), there is the permission of hunting and fishing, the permission to enjoy good and lawful food, drinks, clothes, beautiful surroundings, a luxurious means of transport etc.

In the sphere of Muʿāmalāt (transactions or contracts) there is the permission of the forward sales (salam or salaf), order for the manufacture of goods or sales of immediate payment against future delivery (Iṣtiṣnāʿ), the permission of divorce to avoid the dangers of problematic life partner. In ʿUqūbāt, there is payment for the lost or damaged items by the workman, asking close relatives (ʿAqīlah) to help in the payment of Diyyah (blood money) incurred by their relative as a result of accidental homicide, non implementation of had punishment when the case involves some uncertainties based on the principle that " all benefits of doubts goes to the accused" which is also in line with the juristic principle that stipulates: It is better for the judge to make a mistake of discharging a criminal due to lack of clear evidence to convict him than to mistakenly punish an innocent person.

4.4.3. TAHSĪNĪYYĀT (luxuries or embellishments): These refer to interests whose realization leads to improvement and the attainment of that which is desirable. Some of these things include avoidance of selfish interests, cultivation of good manners as well as safeguarding one's personality (murūʾah) - all these examples fall within the sphere of morality (Akhlāq). Some examples in the field of ʿIbādāt (acts of worship) is the ~~terms of~~ obligation of purifying oneself from both physical and spiritual impurities, covering the private part, seeking Allah's closeness through Nawāfil prayers or alms-giving. In the sphere of ʿĀdāt (customs and traditions), there is observance of good manners with regard to eating, drinking, avoidance of extravagancy, shunning (avoiding)

impure and unhealthy food and drinks etc. In the sphere of Mu'āmalāt, there is illegality of buying or selling things that are regarded as impure according to the prescription of the sharī'ah etc. In 'uqūbāt (punishments) there is the illegality of killing a freeborn Muslim for killing a Muslim slave. The shari'ah also did not permit the killing of women and small children, destroying animals and plants or farm products in the process of waging a Jihād[35] etc.

These three classifications of people's interests are also generally associated with certain things needed for their perfection, serving as their concluding parts (kamāliyyāt). For example in terms of Darūriyyāt (necessities) when salat (prayer) was ordained for the protection and proper establishment of the religion, then the law recommends its publicity through the call to prayer (Àdhān) as well as its observance in congregation (Jamā'ah) for the purpose of its perfection. When the sharī'ah, approves the legality of marriage and forbids zina (adultery and fornication) for the protection of progeny (Nasl), then the law in addition stipulates, for its perfection Kafā'ah (equality of status) between the married couple because it will lead to better understanding and happy living. Furthermore, the law forbids isolation with a female who is not within the prohibited relations for him; this is aimed at blocking the chance that will lead to a greater sin (saddan lidharī'ah).

In terms of Hājiyyāt (needs) when the law approves shortening of prayers (Qaṣr) when one is on a journey, it concluded its perfection by allowing the combination of two prayers at a time. Again, when the law permits the

contracts of sales, then the need for witnesses was recommended for its perfection especially when disputes arise between the two parties involved [36] etc.

In terms of Tahsīniyyāt (luxuries), when the law ordains sacrifice of animals (adhiyah) during the ʿīd al - kabīr celebration, it was recommended that one should carefully select the animal he intends to sacrifice to make his duty perfect in the sight of the Law-giver.

It is important to note that observance of Tahsīniyyāt as a whole could serve as perfection to the Hājiyyāt while that of Hājiyyāt serve as a means of perfection to the Darūriyyāt. Therefore, it could be said that necessities are the initial objectives of all the Islamic legislation. Whoever, neglects the necessities has certainly neglected all the remaining since they basically serve as their supporting instruments, whereas whoever neglects something from either Hajiyyāt or Tahsiniyyāt, is about neglecting the necessities too. This is because he is just like a shepherd who looks after his cattle near a forbidden area, which he is most likely going to fall in.

Thus, the protection and observance of Hājiyyāt and Tahsiniyyat in general could be regarded as a form of protecting the Darūriyyat. The likeness of this is a person who deliberately neglects an obligatory duty, then he is in a position of neglecting all other acts that are not up to the degree of Wājib; and alternatively he who observes regularly non-obligatory duties (Nawāfil) then he will be said to be in a better position by observing the obligatory duties whereas

whoever neglects Nawãfil duties without any cause, he has certainly opened in front of him a big door for neglecting more important duties.

It is important to note that the original (al-Aṣl) is to be preferred over and above what is meant for its perfection (Mukammil).[37] Therefore, it is not allowed to consider the rule of the latter if doing so will be at the expense of the former (Aṣl). Based on this principle (Qa'idah) the jurists proposed that there won't be any consideration for a rule of law which is meant for the procurement of luxury (Tahsīnī), if doing so will be at the expense of the needs (Hājīyyāt), or necessities (ḍarūrīyyāt). So also, there won't be any consideration for the rule of the needs when observing it will be to the detriment of the necessities (ḍarūrīyyāt). For example, the performance of salāt (prayer) is a necessity for the protection and proper establishment of the religion while facing the Qiblah adds to its perfection, hence it is not allowed to neglect the performance of salāt when one is unable to properly locate the Qiblah; eating food is a necessity to save one's life and for its perfection one should avoid impure and unhealthy food. However, where and when an individual could not get anything lawful to eat for his survival, then he is permitted to eat the flesh of dead animals; medication against dangerous diseases is a necessity for the protection of life while covering one's private part is among the embellishments (Tahsīnīyyāt) hence it is not permissible to neglect the former in consideration of the latter.

Thus, according to the juristic principle it is allowed to unveil one's private part when it becomes absolutely necessary for the purpose of

medication. It also goes along the same saying that necessities permit the forbidden needs while in turn the needs permit the forbidden luxuries. There also won't be any consideration for an act of necessity at the expense of another duty of necessity of similar importance, as long as the former is no better than the latter. This is why the rule of Jihād is made obligatory despite the fact that it involves loss of life because doing so will lead to the protection of an important necessity of life, that is religion (al-Dīn); the consumption of alcoholic drinks is made lawful under duress leading to loss of life or a significant part of one's body or under severe thirst because the protection of life is to be considered first before that of the intellect (ʿAqal). So also it is allowed to consume the property or food of another person when one is forced by necessity to do so because the protection of life takes precedence over and above that of the wealth.

4.5. THE METHODOLOGY ADOPTED BY THE EARLIER JURISTS IN LEARNING THE SHARĪʿAH:

This sub-section discusses the views of the jurists in the classical generation so that one can understand the methodology they adopted in matters of learning and the way they exchanged legal views. In this regard, it is necessary to go by sampling such views by selecting some few cases because the material related to such views of scholars may constitute another field of study due to its wide coverage. Therefore, we will be contented with some of the views discussed in matters of prayers and others which are discussed below:

4.5.1. THE VIEWS OF THE JURISTS IN THE CLASSICAL GENERATION CONCERNING CONGREGATIONAL PRAYER ACCORDING TO IBN RUSHD:

The jurists have expressed different views on whether it is compulsory upon whoever heard the call of prayer (adhān) to attend the congregational prayer or not. The majority of the jurists (Jamhūr) were of the view that it is sunnah or a collective obligation (farḍ kifāyah) whereas the ẓāhirī jurists on the other hand consider it an obligation on individual basis (Farḍ ʿalā al-ʿaʿyān). The source of their disagreement is based on the Prophetic tradition in which he was reported to have said: "The prayer in congregation is twenty-seven (27) or twenty-five (25) times superior in term of its spiritual values to the prayer offered by a person alone".[38] The majority of the jurists according to Ibn Rushd (1969) understood this ḥadīth to place congregational prayer on the level of Mandūb (recommended). This is because the text indicates that prayer in congregation is superior and more perfect than the prayer offered individually.

On the other hand, it was reported that al-ʾAʿmash, a blind man pleaded with the Prophet (SAW) to grant him concession to be away from the congregational prayer. This is because he had no body who could always lead him to the Mosque. The Prophet (SAW) granted him such a concession. Then, the Prophet (SAW) asked him: "Do you hear the call to prayer?" A'mash replied: "Yes". The Prophet (SAW) further said: "I have no reason from the law to grant you such a concession."[39]

Ibn Rushd (1969) observed that this text indicated congregational prayer to be obligatory in the absence of any valid reason (ʿadam al-udhr). He further supported this view with another authentic tradition reported by both Bukhārī and Muslim on the authority of ʾAbū Hurayrah in which the Prophet (SAW) was reported to have said: "By Him in whose Hand is my soul, I was about to order for the collection of fire-wood (fuel) and then order someone to pronounce the adhan for the prayer, then, I would go behind and burn the houses of men who did not present themselves for the congregational prayer. By Him, in whose Hand is my soul, if anyone of them had known that he would get a bone covered with good meat or two (small) pieces of meat present in-between two ribs, certainly he would have turned up for the ʾIshāʾ prayer".(40)

ʿAbdullah b. Masʿūd reported that the Prophet (SAW) once taught us various ways of guidance leading to the straight path which a sincere Muslim is expected to cultivate as a permanent habit. And he said one of such ways of getting guidance is praying in congregation in a Mosque where the call for prayer was pronounced. In another version of the tradition, he was reported to have said: "If you make a mistake to keep away from the Sunnah of your Prophet, certainly you would go astray."(41)

Imām Mālik reported in Muwaṭṭāʾ: "A blind man said to the Prophet (SAW): There is serious darkness on the road leading to the Mosque as a result of rainfall and the road is full of ditches, while I cannot see properly because of eye problem. So, I am appealing to you to select a particular place in my house,

pray in the place, then I will be observing my daily prayers there regularly. When the Prophet (SAW) arrived at the house, he asked the blind man to show where he would like to be praying. Then, the Prophet (SAW) prayed at the spot shown by the blind man". The content of this hadīth shows that there is no blame on anyone who is unable to attend prayer in congregation for a valid reason.

Another controversial issue discussed by Ibn Rushd (1969) relates to the opinions expressed by the jurists concerning a person who meets a congregational prayer going on in a Mosque after he has already offered that particular prayer alone or in another congregation. According to the opinion of Imam Malik and his disciples such a person could repeat the prayer in congregation except in the case of Maghrib alone. Abu Hanifah was of the view that whoever prays alone, after completing the prayer, if he should happen to meet a group of people performing that same prayer in congregation, then he could join them except the prayers of Maghrib and Aṣr. Awzā'ī was of the view that one could repeat, in congregation, all the prayers he had offered alone except the prayers of Maghrib and Subh. Abu Thawr exempted the prayers of Aṣr and Fajr. While Imam Shafi`i was of the view that all the prayers offered by a person alone could be repeated in congregation without any exception.

All the jurists have agreed that it is lawful for one to repeat, in congregation, certain prayers offered alone because of the report of Bashar b. Muhammad who narrated from his father that the Prophet (SAW) said to him

(Bashar's father) when he (the prophet) noticed that Bashar's father did not join in the congregational prayer saying: What is wrong with you that you did not pray with people in the congregation? Are you not a Muslim? He replied saying: Oh Messenger of Allah! I am a Muslim but I have already prayed this particular prayer with my people. The Prophet (SAW) further said: If you like you can still join the congregational prayer despite the fact that you have already offered such a prayer.

Thus the jurists expressed different opinions on what they understood from the above tradition. According to 'Ibn Rushd (1969), Imam Shafi`i, understood from this Hadith that Muslims are required to observe their prayers in congregation and as such they should join it wherever they meet people observing it. Imam Shafi`i considered such a report as a declaration of an obligation on the believers. Thus, he interpreted the text from the general and unrestricted point of view.' Imām Mālik, according to 'Ibn Rushd (1969) seem to be aware of all such reports but considered it necessary by analogy to exempt Maghrib prayer alone. This is because Maghrib prayer has odd number of Raka'āt hence if it is repeated again it will change its normal structure to even numbers, since it will then be six Raka'āt all together. However,' Ibn Rushd (1969) observed that this analogy (Qiyās) is weak because the Taslīm in between has separated the two set of odd Raka'āt. The people of Kufah advanced a more strong argument in the sense that if Maghrib prayer is repeated then it means one had performed Witr twice whereas the Prophet

(SAW) was reported to have said. "Witr should not be performed twice in a night".

'Abū Hanīfah was of the view that whoever repeated a prayer in a congregation, then the second one would be considered as Nafl (non-obligatory prayer). If this is the case, it will not be appropriate therefore to repeat Asr prayer in the congregation because it will imply that one has performed Nafl after Asr prayer which is not allowed. 'Abū Hanīfah exempted Maghrib prayer because if it is repeated then one has violated the ruling of the text which says: "Two Witr should not be observed in the same night," as already explained above.

According to 'Awzā'ī, one should not repeat in congregation, Maghrib and Subh prayers. This is because authentic reports have indicated that it is not allowed to perform Nawāfil prayers after Subh prayer; while that of Maghrib has already been explained above.

If a person has already observed a particular prayer in a congregation, then is he allowed to repeat such a prayer in another congregation or not? According to Ibn Rushd (1969), the majority of the jurists were of the view that such a person should not repeat that particular prayer in another congregation contrary to the opinion of the minority who uphold the opposite view. The proponents of the former opinion include Imām Mālik, 'Abū Hanīfah etc, while the latter opinion was upheld by Ibn Hanbal and Imām 'Abū Dāwūd al-Zāhirī

4.5.2. THE APPROACH OF EARLIAR JURISTS TO LEGAL INTERPRETATION OF THE GLORIOUS QUR'AN: A CASE STUDY OF AL - QURṬABĪ

It is a common knowledge that the primary sources of Islamic law are the Qur'ān, Sunnah and the Qiyās of which the Qur'ān has the greatest authority. Anyone conducting a historical survey of Islamic law may be curious to know how jurists of the earlier generation understood the law from the Qur'ān. Close study of various records indicates the degree of understanding Islamic law by earlier scholars and its legal interpretation. The jurists of the classical generation seem to be in most cases familiar with all the relevant verses related to the law and some of them had the priviledge of committing the Holy Qur'ān to memory.

Most of the senior Sahābah such as ʿAbū Bakr al-Ṣiddiq, ʿUmar b. al-Khaṭṭāb, ʿUthmān b. ʿAffān, ʿAlī b. ʾAbī Ṭalib, ʿAisha (r.a), ʿAbdullah b. ʿUmar etc. were reported to have learnt the Holy Qur'ān by heart before they became jurists. Any legal decision they took, whether they decided to base it on Sunnah of the Prophet (SAW) or al-Qiyās, they knew the relevant verse(s) of the Holy Qur'ān related to the case or they indicated their awareness of such a verse. Besides such scholars were also greatly familiar with the relevant Sunnah of the Prophet (SAW) related to the case to the extent of understanding the issue of abrogation related to it or occasions requiring al-Tarjīh[43] (preponderance) which always forms the bases of the legal decisions or grounds for Qiyās.

Records have also indicated the same thing regarding the students of ʿAbdullah b. ʿUmar, ʿA'ishah, ʿAbdullah b. Masʿūd, ʿAbdullah b. ʿAbbās as well as all the prominent companions who had the opportunity to settle down in a particular centre of learning to teach the generation who came after them until this practice became the common habit of jurists down to the generation of Malik b. Anas and Ibn Hanbal in the third generation after Hijrah. Later on, in about 500-600 after Hijrah prominent scholars like al-Ghazālī, and the great Andalusion scholars like al-Qurṭabī were able to receive the transmitted knowledge, revise it carefully and document it for the benefit of generations after them. This effort, therefore, established the superiority of the earlier Muslim jurists over jurists of the later generations, most of whom became contented by reading the written documents of law which transmitted the views of a particular school of law or a particular legal authority without considering it necessary to study and learn the legal interpretation of both the Qur'ān and Ḥadīth. Some of such scholars did not make effort to correlate between what has been documented in the collection of Ḥadīth books compiled by prominent traditionists like al-Bukhārī, with the legal views of his teacher Ibn Hanbal as documented in al-Mughnī or in other prominent documents of legal decisions such as al-Mudawwanah of the Mālikī law.

Records have shown that during the intermediate stage of Muslim civilization, Andalusian scholars seem to have had the greatest influence over the jurists of West African continent. It is therefore of much significance to

examine the approach of al-Qurṭabī (d. 595 AH) concerning the legal interpretation of the Holy Qur'ān. This will help us to learn through him what he was able to receive from the previous generations and to understand how he perceived the manner in which legal interpretation should be made from the Holy Qur'ān.

One of the best contribution requiring attention concerning al-Qurtabi is his popular book of Tafsīr[44] titled al-Jāmi'li 'Ahkām al-Qur'ān which is in twelve (12) volumes. In this regard, let us examine what al-Qurtabī understood concerning the significance of reciting al-Fātihat in the prayer (al-Ṣalāh) which the jurists have confirmed to be obligatory for the prayer to be valid.

A. AL-FĀTIHAH AND ITS SPIRITUAL VALUE IN THE SALĀH (PRAYER) ACCORDING TO AL-QURṬABĪ:

Al-Qurtabī began his discussion about al-Fātihah by examining the transmitted knowledge of previous scholars concerning its attributes and spiritual value as well as significance compared with other portions of the Holy Qur'ān. He explained that it has been narrated on the authority of al-Tirmidhī that al-Fātihah is the greatest revelation out of all the revelations constituting the Qur'ān and the previous scriptures. al-Qurṭabī further narrated another hadīth transmitted on the authority of al-Bukhārī in which the Prophet (SAW) was reported to have said: "The greastest sūrah which Allah has revealed in the Qur'ān is al-Hamd Lillāh Rabbil-'Ālamīn....."Again, he stated that 'Alī b. 'Abū Ṭālib was reported to have said: Sūrat al-Fātihah and 'Ayāt al-Kursī are among

the selected revelations of Allah attached to the divine throne of Allah (SWA). Then al-Qurṭabī moved to the significance of sūrat al - Fātihah in the prayer (ṣalah) after establishing the evidence validating it to be a chapter in the Holy-Qur'an.

According to al-Qurṭabī different scholars have expressed various opinions concerning the obligation of reciting al-Fātihah in prayers (ṣalāt). 'Imām Mālik and his students have declared it to be mandatory for whoever is observing prayers (ṣalāt) whether he prays as an 'Imām or alone and that it must be recited in every Raka'āt. Ibn Khuwayzī Mandad al-Basarī, one of the Māliki jurist stated that Mālik was of the opinion that: Prayer (ṣalāt) is not acceptable if Fātihah is not recited in it, in a prayer which has two Raka'āt. But Mālik expressed different opinions concerning the person who forgets to recite al-Fātihah in one Raka'ah, in a prayer having four or three Raka'āt. On one occasion, Mālik taught his students that such a person should repeat that particular prayer. At another occasion, he said one could correct the fault by performing sajdatay al - sahw[45] and this is also the opinion reported by 'Ibn 'Abd al-Hakam and others from 'Imām Mālik. 'Ibn Khuwayzī, further observed that Malik was reported to have said (at another time): If Fātihah was forgotten to be recited in any Raka'ah, that particular Raka'ah should be omitted in which case another Raka'ah has to be performed with al-Fātihah and then sujud al-sahw is performed after terminating the prayer. This opinion was what 'Ibn 'Abd

al-Barr reported as the best opinion chosen by 'Ibn Qāsim, one of the greatest students of 'Imām Mālik.

On the other hand, al-Hassan al-Basrī was reported to have established the recitation of al-Fātihah as obligatory but elaborated further and declared that if Fātihah is recited in a single Raka'āt, it is quite sufficient in satisfying the requirement of the Prophetic tradition in which the Prophet (SAW) was reported to have said: "He who does not recite 'Umm al-Qur'ān is not credited with having observed prayer."[46] Thus, according to al-Hassan al - Basri a single recitation of the Fatihah has satisfied the requirement of the Hadīth.

However, al-Qurtabī raised a serious objection concerning the view-point expressed by Hassan al-Basrī, saying that the best legal opinion which could be understood from the Hadīth of the Prophet (SAW), should be to assume that prayer is not approved implies that even if it failed to be recited in only one Raka'aah. This is the greatest view-point which has the validity of legal interpretation even though a possibility of conjecture may still make a jurist to assume that the Hadīth requires the recitation of al-Fātihah in the greater number of Raka'āt. Therefore, one can clearly see that al-Qurtabī has taken side with the Mālikī jurists who established the recitation of al-Fātihah as obligatory in every Raka'ah.

Al-Qurtabī continued to relate the view of 'Imām 'Abū Hanīfah, al-Thawrī, and al-'Awzā'ī which declared that if a person delibrately decided to omit the recitation of al-Fātihah in all the Raka'ah but recited other Qur'anic

chapters or verses instead, then his prayer is valid, except that ʿAwzāʿī was reported to have expressed a different opinion at another time.

Al-Qurṭabī, (1993) also related the view of Imām al-Ṭabarī the greatest authority in Tafsīr who declared that Fātihah must be recited in every Rakaʿah. But if one delibrately refused to recite al-Fātihah then such a prayer is not valid except if he recited other Qur'anic chapters or verses of similar length and wordings.[3] Ibn ʿAbd al-Barr, another Mālikī jurist, however, raised a serious objection to this opinion saying that it is meaningless. This is because the text specifically menttioned al-Fātihah, therefore, it is not appropriate to substitute it with something else.[47]

Al-Qurtabī, (1993) further observed that if a person joins a congregational prayer and he happens to meet the Imām in a state of performing the Rukū' then the Imam's recitation is enough for him. This is because the previous jurists have accepted by consensus (Ijmāʿ) that whoever joins a congregational prayer and meets the Imām in a state of Rukū' should simply say the Takbīr and perform the Rukū' too without waiting to recite anything. However, if one meets the Imām in a standing position, then he is expected to recite something from the Holy Qur'ān beginning with al-Fātihah. This is because it is not appropriate for one to neglect the recitation when he prays behind the Imām where he (the Imām) recites silently. But if he (the follower) did not recite anything there is no blame on him according to the opinion of Imām Mālik and his disciples.

The opinions cited above relates to a situation in which the Imām for a congregational prayer makes silent recitation. But in the occasion where the Imām makes recitation loudly, al-Qurṭabī (1993) understood the Mālikī jurists to be holding the opinion that those behind the Imam should only listen to the recitation of the Imām and should not recite anything even by heart. The Mālikī jurists cited the declaration of Allah (SWA) to support their opinion, where He says: "When the Qur'ān is read, listen to it with attention and hold your peace that ye may receive mercy". (Aʿrāf 7:204). This verse was supported by the saying of the Prophet (SAW) in which he was reported to have said: "It is not proper for me to challenge the recitation of the Holy Qur'ān".[48] This text was understood by the jurists to imply that it is not appropriate, when the Imām is reciting loudly for those praying behind him to recite something instead of listening to his recitation. In a related development, the Prophet (SAW) was reported to have said: "Whenever the Imām is reciting the Qur'ān loudly the followers should not recite anything."[49]

Finally, al-Qurṭabī (1993) decided to take a position regarding the argument as to whether Fātihah must be recited in every Rakaʿah of the daily prayers, and he stated in confidence that those who declared Fātihah must be recited in every Rakaʿah were right in their declaration while those who said it could be omitted in some Rakaʿāt were wrong. He stated that Imām Mālik, Shāfiʿī and ʿIbn Hanbal are all agreed that Fātihah must be recited in every Rakaʿāt. This opinion was also what the earlier jurists understood from the

teachings of ʿUmar b. al- Khaṭṭāb, ʿAbdullah b. ʿAbbas, ʾAbū Hurayrah, ʾUbay b. Kaʿb and other distinguished members of the ṣaḥābah.

It is possible for one to ask at this juncture that if the purpose of discussing the views of al-Qurṭabī is to understand the legal interpretation of the Qur'ān especially in matters of Tafsīr, then what is the relevance of relating the controversies of the jurists around the recitation of al-Fātihah in the daily prayers? The purpose of this is due to the fact that there is a need to give a total picture but in a form of a sample, how al-Qurṭabī (1993) understood the views of the jurists in the Tafsīr al-ʾAḥkām. Therefore, the approach to the legal interpretation of the Qur'ān was not limited to the commentary on words, phrases and clauses of the Qur'ān but it includes all the cases of law related to the surah. Thus, when the jurists made legal interpretation of the Qur'ān, they attempted to understand all the issues that were relevant to the verse and the case in question, including the mode of recitation, the grammatical analysis, issues of abrogation and others.

B. MODE OF RECITATION AND ITS RELEVANCE IIN THE LEGAL INTERPRETATION OF THE QUR'AN:

A typical example where the mode of recitation became considered in the legal interpretation of the Qur'ān as understood by al-Qurṭabī is in the case of Baqarah 2:184, where Allah (SAW) says: "Fast for a fixed number of days; but if any of you are ill, or on a journey, the prescribed number of days (should be made up) from days later. For those who can do it (with hardship), is a

ransom, the feeding of one that is indigent. But he that will give more of his own free will, it is better for him. And it is better for you that ye fast, if you only knew."

In this case, al-Qurtabi (1993) discussed the views of various jurists concerning the mode of recitations and true meaning of the word Yutiquna in which the discussion runs as follows. It is important to note that the commentary concerning the beginning of the verse (Ayah) relates to the obligation of fasting in the month of Ramadan in which certain classes of people were exempted. Those exempted from fasting are the sick and the travellers but they had to pay equal member of days later on. al-Qurtabi (1993) continued to explain under the case number sixteen (16) that majority of the Qur'anic reciters, recited the phrase as Yutiquna labeling ta'un with kasra and labeling sukun over al-ya whereas the Arabic lexicographers understood the original pronunciation of the word to be Yutiquna, but the waw which is a middle letter of the word became legitimately transformed to ya, thus transferring the kasra under waw to ta'un to read Yutiquna.

On the other hand, the popular narration from Ibn Abbas reported him to have recited the word as Yutawwaqunah labeling fatha on top of ta'un which conveys the meaning Yukallafunah suggesting the performance of fasting the Ramadan with much commitment, tolerating great pain and hardship.

Mujahid, the student of Ibn Abbas was reported to have recited the phrase as Yatiqunahu which in the opinion of al-Qurtabi was obviously wrong

and even the Arabic lexicographers will not approve it. Ibn al-Anbāri was reported to have recited the phrase as Yattayyaqūnahu lebelling fatha on top of yā'un as well as putting tashdīd on both tā'un and yā'un meaning ability to do the fasting. In another version, Ibn 'Abbās, 'A'isha, Tāwūs and 'Amr b. Dīnār were reported to have recited the phrase as Yattawaqūnahu lebelling fatha on top of yā'un and putting tashdīd with fatha on tā'un. This particular recitation, according to al-Qurtabī, has some merit from the physiological point of view.

In another controversy of scholars related by al-Qurtabī, he explained that some jurists were of the view that the verse has been abrogated. It was narrated on the authority of al-Bukhārī that when this particular verse was revealed making the fast of Ramadān obligatory, some members of the sahābah found it difficult to observe it. So they were therefore, granted the concession (as a form of Rukhsah) to feed the poor for each day they found it difficult to fast. Later on, however, a portion of the verse was revealed in which Allah, the Almighty, declared: "It is better for you to fast", thus abrogating the former concession.

Al-Qurṭabī (1993) further related what he regarded to be the actual interpretation of this verse according to Ibn 'Abbās by considering the circumstances behind its revelation; that it was revealed in relation to the old men and women who could not afford fastinng who were given the concession to feed the poor instead. But later on, another revelation came as an abrogation declaring that whoever witnessed the month of Ramadān should observe the fasting.

The issue of grammar (Nahw) came in considering the link and the reference of the pronoun in the phrase Yutiqunah? According to al-Farra, the pronoun is regarded to have been related to fasting, meaning that those who could not fast should feed the poor ~~on~~ each day they did not fast. But this law was later on abrogated with the declaration: "And it is better for you to fast." Again, it is possible to link the pronoun to the "feeding", meaning those who could afford feeding should feed (wa'alal-ladhina yatiqun al-fidyah fidyah).

Another viewpoint states that the verse in question relates to the case of a nursing woman and a woman under conception. In this case the recitation of Yutawwaquna would be more appropriate because they could afford to fast but with great difficulties. Therefore, the verse was a concession to the nursing and pregnant women who are to feed the poor instead of fasting.

Al-Qurtabi, (1993) was however doubting the chain of transmission linking some reports to Ibn Abbas, but he has accepted the one narrated by Abu Dawud that 'Abdullah b. 'Abbas recited the word as Yutiqunah. Al-Qurtabi (1993) finally decided to form a juridical opinion on this matter saying: It has been established beyond doubt that 'Abdullah b. 'Abbas regarded this verse Muhakkamah and not abrogated (Mansukhah). If anyone regard this verse to have been abrogated, it may not necessarily mean abrogation in the strict sense of the word. This is because there has been many occasions on which the earlier jurists consider a verse to have been abrogated whereas what they actually wanted to say was al-Takhsis (limitation or specification) but not al-Naskh (abrogation).

al-Haassan al-Basrī, ʿAṭa b. ʾAbī Rabah, Dalak, al-Nakhaʿī, al-Ẓuhrī, Rābiʿah, al-ʿAwzāʿī and the jurists of the opinionist camp were of the view that the verse under discussion relates to the pregnant women and nursing mothers who are not expected to feed the poor for the number of days they did not fast but instead they have to fast equal number of days later on, just like in the case of the sick people and the travelers as indicated in the beginning of the verse.

According to ʾImām Mālik a pregnant woman should not feed the poor for the number of days in which she did not fast but simply to pay the same equal number of days later, whereas the nursing mothers on the other hand are expected to feed the poor for each day they did not fast and later on to fast equal number of days missed. While according to ʾImām al-Shāfiʿī and ʾIbn Hanbal, the two categories of women under discussion are expected to feed the poor and to fast later for the same number of days they missed.

The jurists have agreed by consensus that people who could not afford to fast as a result of old age or they could afford it but with great pain and difficulties should break their fast. But the jurists differ on what such old men are then expected to do. Rabiʿah and ʾImām Mālik were of the view that such people are not expected to do anything after breaking their fast except that Malik was of the view that it is preferable for them to feed the poor and this is also the opinion of ʾImām al-Shāfiʿī, ʾIbn Hanbal and the jurists of the opinionists camp.

(C). SIGHTING OF THE NEW MOON

Another significant case related to fasting in the commentary and legal interpretation made by al-Qurtabī relates to the case of sighting the new moon of Ramaḍān. He reported the opinion of 'Imām Mālik and al-Shāfi'ī concerning the evidence for the sighting of the new moon and what validate the evidence from the legal point of view. 'Imām Mālik b. 'Anas in particular was of the opinion that the least number of people whose report should be accepted concerning the sighting of the new moon (cresent) are two, so as to validate their claim to have sighted the moon for the month of Ramaḍān, Shawwāl and Dhul-Hajj. 'Imām 'Abū Hanīfah and al-Shāfi'ī on the other hand approved the report of a single person and al-Qurtabī (1993) linked this idea to a Prophetic tradition reported by 'Abū Dāwūd on the authority of 'Abdullah b. 'Umar. In the said Hadīth, the Prophet (SAW) was said to have approved the report of a single person who sighted the crescent of the Ramaḍān. Thus, the Prophet (SAW) was said to have observed the fasting based on a single man's narration and he instructed the companions to do the same. Al-Qurtabī (1993) related the above discussions in his attempt to interprete the legal view point of Sūrah al-Baqarah 2:185 concerning the sighting of the new moon where Allah says: "..... so everyone of you who is present (at his home) during that month should spend it in fasting....."

Some of the earlier jurists who approved the report of a single person had in their mind the practice of some of the Ṣaḥābah like 'Alī b. 'Abī Ṭālib who

accepted the report of one person who claimed to have sighted the crescent of the month of Ramaḍān. ʿAlī b. ʾAbī Ṭālib (r.a) observed the fasting himself and instructed others to fast. He further declared that it is preferable to observe the fasting even if the report happens to be wrong because it gives greater benefit to fast even if it happens to be a day in Rajab than to refuse observing the fasting which may possibly turn out to be a day in Ramaḍān and it becomes much improper.

4.3.5 SIGHTING OF THE NEW MOON AS EXPRESSED IN THE MUDAWWANAH AL-KUBRĀ:

Now let us briefly consider the case of sighting the new moon from al-Mudawwanah al-Kubrā, one of the greatest sources of Mālikī law reported by Sahnūn on the authority of ʿAbd al-Rahmān b. Qāsim in which the conversation runs as follows:

Sahnūn: Can the Caliph refuse to accept or reject the report of an individual concerning the sighting of the new moon?

ʾIbn Qāsim: Yes! based on the understanding of the Mālikī school of law.

Sahnūn: Is this the opinion of Mālik himself?

ʾIbn Qāsim: Yes.

Sahnūn: Can such a person still observe the fasting despite the fact that the Caliph did not accept his report?

ʾIbn Qāsim: Yes.

Sahnūn: Is this the opinion of Mālik himself?

accepted the report of one person who claimed to have sighted the crescent of the month of Ramadān. ʿAlī b. ʾAbī Ṭālib (r.a) observed the fasting himself and instructed others to fast. He further declared that it is preferable to observe the fasting even if the report happens to be wrong because it gives greater benefit to fast even if it happens to be a day in Rajab than to refuse observing the fasting which may possibly turn out to be a day in Ramaḍān and it becomes much improper.

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ʾIbn Qāsim: Yes.

Sahnūn: Is this the opinion of Mālik himself?

ʾIbn Qāsim: Yes.

Sahnūn: If such a person whose report was rejected refuse to observe the fasting, then is he expected to pay back that particular day and perform Kaffārah according to the opinion of Mālik?

ʾIbn Qāsim: Yes

Sahnūn: Is it obligatory according to the opinion of Mālik for such a person who sighted the new moon alone to report such information to the Caliph (Imām)?

ʾIbn Qāsim: Yes. This is because it is quite possible that someone else might have sighted it too, hence it becomes mandatory to accept the report of two witnesses.

Sahnūn: Is it acceptable to approve the report of one person concerning the citing of the new moon of Ramaḍān according to Mālik?

ʾIbn Qāsim: Mālik says it is not proper to accept the report of an individual on this matter, even if such a person happens to be upright and a man of integrity (ʿĀdil).

Sahnūn: What of the report of two persons?

ʾIbn Qāsim: That is more appropriate.

Sahnūn: What can you say about the sighting of the moon of shawwal?

ʾIbn Qāsim: It is the same in the sense that the report of one person cannot be accepted but that of two persons are acceptable, if they happened to be men of integrity and uprightness, and this is exactly what Mālik said.

Sahnūn: What can you say about the sighting of the new moon of Ramadān or Shawwāl by male or female slaves, slaves under the term Mukātabah or Umm-walad?

Ibn Qāsim: We have not come across Malik's fatwah on this issue. But undoubtedly slaves are not qualified to serve as witnesses when it relates to the right of people (huqūq) hence it is not likely going to be accepted on this issue too.

It is therefore important to note that jurists of the earlier generation were very meticulous as they tried as much as possible to narrate accurately the views of their teachers without any omission or commission. This attitude of the jurists further explains their level of intellectual maturity and degree of scholastic reliability.

END NOTES OF CHAPTER FOUR

1. Al-Ghazali, A. H. (1937), al-Mustasfa min `Ilm al-Usul, 2 vols., Cairo, Egypt, P.42; Khallaf, A. (1978), ilm usul al-fiqh, 12th ed., Dar al-Qalam, Kuwait, P.100; Kamal, M.H. (1989), Principles of Jurisprudence, Pelanduk Publications, P. 407.
2. Bukhari, shahadat, 8.
3. See end note No. 31 of chapter II of this work.
4. Bukhari, Talaq, II; Hudud, 22; Dawud, Hudud, 17; Tirmidhi, Hudud, 1: Ibn Hanbal 1/116.
5. Al-Ghazali, A.H. (1937), vol. 1, P.42; al-Shawkani, N.A. (n.d), Irshad al-fukhul,.... P.6; Khallaf, A. (1978), P.100; Kamal, M.H. (1989), P.407.
6. Nisab is the minimum property that a Muslim must posses before it becomes obligatory on him to pay out zakat.
7. Khallaf, A. (1978), PP. 101-104.
8. Kamal, M.H. (1989), P.410.
9. Al-Ghazali, A.H. (1937), vol.1, P.42; Kamal, M.H. (1989), P.412.
10. Khallaf, A. (1978), P.109; Kamal, M.H. (1989), P.412.
11. Al-Ghazali, A.H. (1937), vol.1, PP.43-44; Kamal, M.H. (1989), P.412.
12. al-Ash-hur al-ma'lumat refers to the months of Dhul-Qa'dah, and Dhul-Hajj.
13. Al-Khudri, M. (1933), Usul al-fiqh, Cairo, P.33; Khallaf, A. (1978), P.108; Kamal, M.H. (1989), P.412.
14. Khallaf, A. (1978), PP.105-111.
15. Hasaballah, A. (1976), Usul al-Tashri' al-Islami. Dar al-ma`arif, Cairo, Egypt, PP.383-386.
16. Khallaf, A. (1978), PP.111-112.
17. Khallaf, A. (1978), P.113; Abu Zahra, (1958) Usul al-fiqh, P.34; Kamal, M.H. (1989), P.418.
19. Khallaf, A. (1978), PP.112-114.
19. Abu Zahra, (1958), P.35; Kamal, M.H. (1989), P.419.
20. Khallaf, A. (1978), P.114.
21. Bukhari, zakat, 53; Muslim, Aqdiyah, 12,13; Ibn Hanabl 2/327.
22. Abu Dawud, Muqaddimah, 30.
23. Al-Ghazali, A.H. (1937), vol.1, P.42; Khallaf, A. (1978), P.115.
24. Khallaf, A. (1978), PP.115-116.
25. Al-Muwafaqat, vol.3, P.135; Hasaballah, A. (1976), P.39.
26. Al-Muwafaqat, vol.1, P.150; Hasaballah, A (1976), PP.391-392.
27. Hasaballah, A. (1976), P.392.
28. Khallaf, A. (1978), P.118; Kamal, M.H. (1989), P.428.
29. Al-Muwafaqat, vol.1, P.209; Hasaballah, A. (1976), P.395.
30. Hadith 31. Ibn Majah, Tijarat, 20; Bukhari, Buyu`, 55; Abu Dawud, Talaq, 7; Tirmidhi, Buyu, 19; Nisa`i, Buyu, 60; Ibn Hanbal, 5/252.
32. Kamal, M.H. (1989), PP.430-432; Abu Zahra (1958), P.50.

33. Al-Muwafaqat, vol.1, P.102; Hasaballah, A. (1976), 397.
34. Bukhari, Jihad, 149; I`tisam, 28; Abu Dawud, Hudud, 1; Tirmidhi, Hudud, 25; Nisa`i, Tahrim, 14; Ibn Majah, Hudud, 2; Ibn Hanbal 1/2.
35. Al-Muwafaqat, vol. 2, PP.32-34; Kamal, M.H. (1989), P.344.
36. Al-Ghazali, A.H. (1937), Vol.1, P.389, Hasaballah, A. (1976), P.336.
37. Al-Muwafaqat, vol. 2, P.6; Hasaballah, A. (1976), P.337.
38. Bukhari, Adhan, 30; Muslim, Masajid, 345; Tirmidhi, salah, 47; Nisa`i, Imamah,, 42; Ibn Majah, Masajid, 16; Abu Dawud, Salah, 56; Muwatta, Jama`ah, 1; Ibn Hanbal,1/376.
39. Mulsim, Masajid, 255; Abu Dawud, Salah, 46; Nisa`i, Imamah, 50; Ibn Majah, Masajid, 17; Ibn Hanbal, 3/423.
40. Bukhari, Ahkam, 52; Adhan, 29; Tirmidhi, slah, 48; Nisa`i, Imamah, 49; Darami, Salah, 19,54; Muwatta, Jama`ah, 1; Ibn Hanbal, 1/450.
41. Muslim, masajid, 256, 257; Abu Dawud, Salah, 46; Nisa`i, Imamah, 50; Ibn Majah, Masajid, 14; Ibn Hanbal, 1/382.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

This research has been on 'The Historical Development of Islamic Law (Fiqh) from the Revelation to the 7th Century after Hijrah. In the introductory part of this research, the researcher briefly explained the necessity for the need of laws to guide and regulate the conduct of people in the society as it has been observed that man is a social being by nature. Basically humanity was used to two sets of laws; Man-made laws (Qānūn al-waḍ'ī) and Allah's revealed laws (Qānūn al-shar'ī).

The research further examined the social life of the Arabs before the advent of Islām. The majority of the Arabs were accustomed to nomadic life (Badāwah), full of atrocities and confusions. However, some few among them lived a sedentary life (Ḥaḍārah) especially those who lived around Yemen, Yathrib (Madina) and Makka. It has been established that peoples way of life during the Jāhiliyyah period necessitated sending a messenger among them to salvage the situation from total disorder and confusion with regard to beliefs ('Aqā'id), acts of worship ('Ibādāt) and chaotic customs and traditions, so as to liberate the weak ones from the domination of the powerful ones. The law as obtained among the Arabs at that time did not take into consideration the welfare of the weak, the women, the minor and the oppressed in general.

The Islamic law introduced a number of changes and reforms to phase out the then existing obnoxious customs and traditions through a systematic and gradual approach. Islam, therefore, condemned and rejected most of the Jāhiliyyah customs and traditions that contradicted it while on the other hand it retained and confirmed some that were in consonance with the fundamental objectives and principles of the sharī'ah.

The scope of the sharī'ah covers a complete code of faith and practice. So, its major components consists of laws related to 'Aqā'id (beliefs), laws related to 'Akhlāq (cultivation of good manners or morality); and laws related to 'Ibādāt (acts of worship) as well as Mu'āmalāt (transactions). Fiqh, on the other hand is among the sub-branches of the sharī'ah and its major components deal with detailed and specific laws related to 'Ibādāt (acts of worship) and Mu'āmalāt (transactions or contracts).

In the course of this study, the researcher examined the various developmental stages that the Islamic law (Fiqh) underwent from its early days to the period of documentation. According to the findings of this research, the developmental stages of Islamic law (Fiqh) were generally classified into six and they are as follows: The legislative period which started from the beginning of the prophet's mission to his death in 632 AD; The period of the rightly guided caliphs which started from the time when Abū Bakr became the leader of the Muslim community in 11 A.H. to the end of the period of the four rightly guided caliphs in 40 AH; The period of the junior companions and the senior Tābi'īn, which started from the time when Mu'āwiyyah came to power in 41 AH and continued to the fall of the Umayyad dynasty in the first part of the 2nd

century after Hijrah; The period of the leading jurists which started from the early part of the 2nd century after Hijrah to the middle of the 4th century after Hijrah; The period of stagnation which started from the middle of the 4th century after Hijrah to the downfall of the 'Abbāsid dynasty in 656 A.H; and The period of resurgence which started from the fall of the 'Abbāsid dynasty in the 7th century after Hijrah to the modern times.

It has been discovered that each of the enumerated developmental stages of Fiqh has its own basic distinguishing features of legislation and the researcher attempted to provide sample cases for the purpose of illustration.

The sources of Islamic law are the Qur'ān sunnah, and 'Ijtihād either in the form of 'Ijmā' or Qiyās. It has been observed that the jurists of the earlier generations turned to the sources of the law based on their hierarchical order. The jurists used the sources of the law as complementary to one another in matters of legal decision and application.

It was apparent that there emerged two trends of 'Ijtihād which started to surface from the period of the rightly guided caliphs. This is because the companions conducted 'ijtihād concerning new matters brought before them which had no preceding text but certainly their trends or methodology was not the same. In the course of their 'Ijtihād, same of the jurists went beyond the surface meaning of the text and considered the wisdom behind its legislation and as such changed or amended some of the laws to suit the charges in time, situation and circumstances, so as to achieve the desired objectives. Another

group of the jurists did not want in any way to go contrary to the clearly stated texts. The first group were later on termed the opinionists (Ahl al-Ra'y) while the second group were known as the traditionists (Ahl al- Hadīth).

These distinct trends in Ijtihād were the root cause that led to the formation of the different schools of law (al-Madhāhib al-Fiqhiyyah) at a later period that played significant role in the development of Islamic law (Fiqh). The former was based in Kufah while the latter was based in Madina. The most prominent schools of law that emerged were: The Hanafi, Māliki, Shāfi'ī and Hanbali schools of law.

It is interesting to report that during the 4th developmental stage of Islamic law (Fiqh), known as the period of the leading jurists, Fiqh grew significantly, flourished wonderfully, matured fully and finally produced good results. This was probably why this particular period was given various names explaining its distinct peculiarities, such as 'Asr al- Fiqh al-Dhahabī (the golden period of Fiqh), 'Asr izdihār al-Fiqh (The blooming period of Fiqh) 'Asr al-Tadwīn (the period of documentation), or 'Asr al-Mujtahidīn (the period of the leading jurists).

Documentation of Fiqh and 'Usūl al-Fiqh also took place during this period. This is because some books of Fiqh were specifically compiled in respect of each of the recognised schools of law and such books formed the foundation of other Fiqh books that came after them. One of the earliest books on Fiqh was the Kitāb al-Umm of Imām al-shāfi'ī. Others were Kitāb al-Khaīāj

by ʾAbū Yūsuf written according to the Hanafi school of law and al-Mudawwanah by Ibn al-Qāsim on the Mālikī school of law.

The jurists of the different schools of law, later on felt that there was need to compile books basically on the principles of derivation and the rules governing the discovery of new laws from the existing texts. So, they started formulating the theory of Uṣūl al - Fiqh (the principles of jurisprudence) and one of the earliest books that has come to our time is the Risàlah of Imàm Shāfiʿī.

Finally, the jurists evolved the well-known Fiqh terminologist by classifying the commandments of the Law - giver, Allah, into: Fard or Wājib (obligatory), Harām (prohibited), Mustahab or Mandūb (recommended), Makrūh (distasteful), and Mubāh (optional).

However, the development of Fiqh was later on little by little, faced with weaknesses, stagnation and eventually, reached a standstill in contrast to its former energy and speed. This was why some scholars termed this period as the stagnation period of Fiqh or the period of blind imitation (Taqlīd). This was generally attributed to the weakening and eventual downfall of the ʿAbbāsid dynasty which gave rise to the emergence of several Muslim states such as the Fatimids in North Africa, the Buwayhids in Baghdād and the Saljuqs in Khurāsān.

The development of Fiqh did not completely wake up from its slumber in the 5th developmental stage. This is because most of the jurists did not

change their attitude. So, the trend of Taqlīd continued to gain ground and spread until it became a well known phenomenon that calls for no amazement.

Despite the fact that things had seriously deteriorated during this period, we still found some jurists who were highly principled, who insisted that things must be returned to their original course. Those jurists did not favour the idea of. Taqlīd (blind imitation) talk less of the closure of the door of Ijtihād. Therefore, they advocated absolute Ijtihād and search for the precepts of the sharī'ah directly from the Qur'ān and sunnah without necessarily restricting themselves to any particular school of law. Some of these jurists included 'Imām' Ibn Taymiyyah, al - Subkī,' Ibn al-Qayyum, al - Shawkānī, etc. The jurists of this period devoted their attention and efforts to the production of books, commentaries and super-commentaries related to Fiqh literature. Some authors within this period compiled new Fiqh books in the form of Fatwah usually in he form of questions and answers.

The development of Fiqh continued without official codification up to the 13th century after Hijrah when the government of the Ottoman empire noticed and observed the urgent need for the codification of the laws particularly these governing transactions (Mu'āmalāt). This objective was eventually achieved in the year 1293 AH. After the Ottoman Empire codification of some laws there emerged other important codifications in various places such as Egypt, Iraq, Tunis etc.

The jurists of this period were also credited for introducing comparative study of Fiqh especially in institutions of higher learning. Thus, the garment of Madh - habiyyah was almost relegated to the background and some notable books compiled along this direction include al-Fiqh ʿalā Madhāhib al-ʾArbaʿah, Fiqh al-sunnah, Fatāwa al-Kubrā etc.

The research further dwelt on the fundamental aims and objectives of the Islamic law (Maqasid al-shari'ah) which were broadly classified into three, namely: Darūriyyat (necessities), Hājiyyāt (needs) and Tahsīniyyāt (embellishments). The Darūriyyāt (necessities) relate to things upon which peoples worldly and spiritual life are built, in away that if such things were neglected the essence of the whole life would become disrupted and meaningless leading to loss of eternal blessings by way of receiving punishment in the hereafter. The basic necessities (Ḍarūriyyāt) which the Sharīʿah intends to protect are generally five and they are: al-Dīn (the religion), al-Nafs (the life, al-ʿAql (the sense or the intellect), al-Nasl (lineage) and al-māl (property).

Hājiyyāt (needs) relate to things which people need to ward off some difficulties and hardships. But if such things were neglected the life of people will not be in total jeopardy like in the case of Darūriyyāt (necessities). Thus, when the Hājiyyāt (needs) are neglected people will be faced with some of hardships and difficulties which have lesser effect than the expected disruption that will befall them in the absence of the necessities.

Tahsīniyyāt (embellishments) refers to peoples' interests the realization of which leads to improvement and the attainment of that which is desirable.

However, it is important to note that there won't be any consideration for a rule of law which is meant for the procurement of luxury (Tahsīnī), if doing so will be at the expense of the needs (Hājiyyāt), or necessities (Ḍarūriyyāt). So, also, there won't be any consideration for the rule of the needs, when observing it will be to the detriment of the necessities (Ḍarūriyyāt).

Finally the researcher discussed the views of the jurists in the classical generation and brought to limelight the methodology they adopted in matters of learning as well as the way they exchanged legal views. Thus, some sample cases were cited for the purpose of illustration.

5.1 RECOMMENDATIONS

(a) I wish to recommend for the establishment of Islamic research centres in all the Nigerian Universities offering Islamic Studies and or Islamic Law.

(b) The researcher strongly recommend for the establishment of a central body in the country with the power to supervise and co-ordinate the efforts of the various Islamic research centres. The central body should also be responsible for the dissemination and circulation of the latest research information on Islamic Studies, Islamic Law and other related fields, so as to reduce duplication of research efforts to the lowest minimum possible.

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