گزارش نهایی پروژه ارزیابی اصالت رساله‌ی دکتری آقای حسن روحانی

از ۴ سال پیش مکرراً[۱][۲][۳] ادعاهایی از جانب رسانه‌های غربی، با تکیه بر چکیده‌ی رساله‌ی دکتری آقای حسن روحانی در دانشگاه کلدونین گلاسکو در بریتانیا، در مورد اصالت متن رساله‌ی ایشان[۴] مطرح شده بود. ادعا کنندگان اظهار داشته بودند که آقای حسن روحانی (فریدون) چکیده‌ی پایان نامه خود را از یک مرجع دیگر کپی نموده و اخلاق علمی را رعایت نکرده است. به دلیل عدم شفافیت آقای روحانی در پاسخ به این ادعاها و نیز عدم شفافیت مسئولین دانشگاه کلدونین گلاسکو در انتشار کامل متن این رساله، راستی آزمایی ادعاها ممکن نبود.

سرانجام با فراهم شدن امکان دسترسی به متن اصلی رساله از طریق موسسات دانشگاهی دارای دسترسی کامل به سامانه پایگاه اطلاعات علمی ایران (ایران داک)، که یک نسخه از پایان نامه‌های دانشجویان داخل و خارج را نگهداری می‌کند، این امکان فراهم شد که صحت و سقم این ادعاها بررسی شده و در صورت خطا بودن آن‌ها، از رئیس جمهور اسلامی ایران اعاده‌ی حیثیت شود. برای این منظور تیمی از دانشجویان کارشناسی و تحصیلات تکمیلی داخل و خارج از کشور تشکیل شد و تلاش گردید با تقسیم کار گروهی، متن رساله مورد بررسی دقیق قرار گیرد.

روش‌شناسی کار به این صورت تعیین شد که از بین انواع و اقسام مختلف سرقت علمی (ادبی)[۵][۶] «ضابطه حداقلی» مورد اجماع، یعنی استفاده از جملات و پاراگراف‌ها از منابع دیگر بدون قراردادن متن در داخل علامت نقل قول (کوتیشین مارک) مورد استفاده قرار گیرد. براساس این ضابطه، دو روش مهم در انجام سرقت ادبی/علمی احصاء شد. این دو شیوه عبارتند از:

- سرقت موزاییکی (Mosaic plagiarism) به معنای کپی کردن سطور مختلف از متون مختلف برای تشکیل یک پارگراف،
- سرقت کامل کلمه به کلمه (Verbatim plagiarism) به معنای کپی کردن کل یک پارگراف یا چند جمله‌ی طولانی از متون دیگر بدون رعایت اصول نقل قول

با تقسیم کار انجام شده تلاش شد کار بررسی رساله، همزمان از دو طریق بررسی ماشینی (نرم افزاری) و غیرماشینی (انسانی) انجام شود. سپس با مقایسه نرم افزارهای مورد استفاده در محافل دانشگاهی، نرم افزار معتبر و پیشتاز iThenticate[۷] برای بررسی رساله انتخاب شد. نرم افزار مذکور به دلیل دقت بالا، توسط مهمترین انتشارات، ژورنال‌ها و پایگاه‌های علمی و آکادمیک در جهان از جمله
Nature, Springer ،ELSEVIER, EBSCO ،IEEE, ProQuest, Pearson, Pub Med, Mc Graw Hill
و بسیاری از دانشگاه‌های معتبر جهان در امریکای شمالی و اروپا مورد استفاده قرار می‌گیرد. به دلیل گران‌قیمت بودن نرم افزار مذکور، تلاش شد از دانشجویان ایرانی دارای دسترسی به این نرم افزار استمداد شود. در تاریخ ۶ اردیبهشت ماه ۱۳۹۶، دسترسی به این نرم افزار از طریق دانشگاه ایالتی آیوا فراهم گردید. این دانشگاه نرم‌افزار را به صورت رایگان در اختیار محققان و دانشجویان خود قرار می‌دهد. با تقسیم کار انجام شده و با استفاده از نرم افزار تشخیص سرقت علمی iThenticate متن رساله[۸] تهیه و وارد این نرم افزار شد. سپس تلاش گردید، نتایج نرم افزار به

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1 http://www.telegraph.co.uk/news/worldnews/middleeast/iran/10143799/Iranian-president-Hassan-Rouhani-plagiarised-PhD-thesis-at-Scottish-university.html
2 http://www.universityherald.com/articles/3685/20130627/
3 http://foreignpolicy.com/2013/06/25/did-irans-new-president-plagiarize-in-his-ph-d-thesis-abstract/
4 Feridon, H., 1998. The flexibility of Shariah (Islamic law), with reference to the Iranian experience (Doctoral dissertation, Glasgow Caledonian University).
5 http://isites.harvard.edu/icb/icb.do?keyword=k70847&pageid=icb.page342054
6 https://www.princeton.edu/pr/pub/integrity/pages/plagiarism/
۷ عرضه شده توسط کمپانی iParadigms واقع در آوکلند کالیفرنیا
۸ دانشجویان و محققین جهت بررسی صحت متن منتشر شده به عنوان رساله‌ی دکترای آقای روحانی می‌توانند به محل «پایگاه اطلاعات علمی ایران (گنج) (ganj.irandoc.ac.ir) واقع در تهران، خیابان انقلاب، ابتدای خیابان فلسطین جنوبی یا دانشگاه‌ها و مراکز پژوهشی دارای قرارداد با این پایگاه مراجعه نمایند.

صورت دستی نیز مورد بررسی دوباره و چندباره قرار بگیرند. در فرایند کار علاوه بر همکاران پروژه، متن به صورت دسته جمعی و از طریق مخاطبان پایگاه در دانشگاه‌های مختلف بررسی گردید. در نهایت، نتایجی مطابق جدول ۱ به دست آمد.

جدول ۱. نتایج بررسی اصالت متن رساله دکتری آقای حسن روحانی[۱]

عنوان	حداقل درصد سرقت علمی
چکیده و مقدمه	۳۹
فصل ۱	۳۹
فصل ۲	۴۳
فصل ۳	۴۰
فصل ۴	**۸۲**
فصل ۵	-
فصل ۶	-
کل متن رساله از ابتدا تا انتهای فصل ۴	۴۱

شایان ذکر است که شدیدترین نوع سرقت علمی آن است که مقاله یا کتاب نوشته شده توسط فردی، به نام دیگری ثبت گردد. در وهله‌ی بعد سرقت علمی کلمه به کلمه قرار دارد که در سطح نهم از ۱۰ نوع سرقت علمی شناخته شده قرار دارد. این نوع از سرقت، رایج‌ترین نوع مشاهده شده در رساله‌ی مورد بررسی بوده و طبق معیارهای پذیرفته شده، هنگامی که ضوابط نقل قول رعایت نشود، چه نویسنده به منبع ارجاع دهد چه خیر، مرتکب این سطح شدید از سرقت علمی شده است. در رساله‌ی دکترای آقای روحانی، از ده‌ها کتاب و مقاله‌ی مختلف، سرقت کلمه به کلمه یا موزائیکی انجام شده و به برخی از منابع ارجاع داده و به مابقی هیچ‌گونه ارجاعی نداده‌اند؛ کتاب‌ها و مقالاتی از آیهٔ الله علی‌اکبر کلانتری، ضیاءالدین سردار، نوئل کالسون، حمید عنایت، وائل حلاق، سید ابوالاعلی مودودی، پاتریک بنرمن، هاشم کمالی، ویلیام مونتگومری وات از جمله پر تکرارترین قربانیان این سرقت کم‌سابقه اند.

نتایج مورد بررسی و درصدهای مذکور در جدول فوق به صورت حداقلی می‌باشند، چرا که رساله آقای روحانی در سال ۱۹۹۸ میلادی تدوین شده و بسیاری از منابع مورد استفاده در آن قدیمی بوده و در دیتابیس مورد استفاده نرم افزار موجود نبوده و ممکن است تیم بررسی نیز نتوانسته باشد در بررسی غیرماشینی برخی از آنها را پیدا کند (چنانکه برخی منابع مورد استفاده، پس از تلاش‌های شبانه روزی و صرف صدها نفر ساعت کار تیمی در پروژه، از کتابخانه‌های شهرهای مختلف یا مراجعی که معمولا در اینترنت فهرست نمی‌شوند یافت شده و یا خریداری شد اما دسترسی به بقیه فراهم نبود).

[۱] معمولاً یک بازه‌ی خطاب ۵ درصدی در اعلام درصدها وجود دارد، چرا که می‌توان از برخی سرقت‌های کوتاه (مثلاً کمتر از ۳۰ کلمه) چشم پوشید یا آن‌ها را به حساب آورد. نکته‌ی دوم این است که درصدها با اضافه شدن منابع و مراجع جدید به دیتابیس نرم‌افزار قابلیت افزایش دارند.

در حالی که در محیط آکادمیک کشورهای غربی حتی یک صفحه سرقت علمی در کل متن یک رساله‌ی چند صد صفحه‌ای می‌تواند منجر به رد آن و پس گرفتن مدرک تحصیلی گردد، در ابتدای امر، درصد بسیار بالای سرقت علمی در چکیده و معرفی رساله‌ی آقای روحانی حیرت‌انگیز بود. بسیاری از متون، پاراگراف‌ها و صفحات این رساله به صورت مستقیم و با کمترین تغییرات از روی مراجع، کتب و مقالاتی که پیش از سال ۱۹۹۸ چاپ شده بودند کپی غیر مجاز شده بود. با ورود به فصول بعدی، درصد سرقت‌های علمی نه تنها کمتر نشد بلکه شاهد افزایشی خیره کننده در فصل ۴ بودیم. بین ۷۵ الی ۸۵ درصد[۱] فصل ۴ رساله‌ی آقای روحانی با عنوان «احکام ثانویه» مستقیماً ترجمه شده‌ی کتابی فارسی با عنوان «حکم ثانوی در تشریع اسلامی»[۲] نوشته‌ی آیهٔ الله علی‌اکبر کلانتری[۳] می‌باشد. شایان ذکر است که نه در مراجع فصل ۴ و نه در کتابنامه، آقای حسن روحانی هیچگونه ارجاعی به این کتاب و به این نویسنده نداده‌اند[۴]. با شواهدی که از سرقت بزرگ و فاحش فصل ۴ رساله‌ی دکترای آقای روحانی به دست آمده، حال با قطعیت می‌توان گفت که این رساله‌ی دکترا بنا به تمامی معیارها، به طور کامل مردود و متقلبانه است.

تاسف‌بارتر اینکه طبق شواهد موجود، حتی در ترجمه‌ی انگلیسی از کتاب آیهٔ الله کلانتری نیز پای افراد دیگری به جز آقای روحانی در میان بوده و حتی ترجمه نیز توسط ایشان انجام نشده است. تیم پروژه به کمک نرم‌افزار سرقت‌یاب، به مقاله‌ای انگلیسی[۵] دارای همپوشانی ۸۲ درصدی با متن فصل ۴ رساله‌ی آقای روحانی در وب‌سایتی به نام The Islamic Seminary دست یافت (ذکر عدد ۸۲ در جدول به عنوان درصد سرقت علمی فصل ۴ به همین علت است). با پیگیری‌های بیشتر مکشوف به عمل آمد که این پایگاه اسلامی متعلق به عالمی شیعی به نام «شیخ محمد سرور»[۶] می‌باشد. طبق اظهار صریح ایشان طی تماس با مدیر پروژه، پیش از برگزاری کنفرانس سران کشورهای اسلامی در تهران[۷] متنی به زبان فارسی توسط آقای کمال خرازی[۸] به ایشان داده و خواسته شده برای استفاده در این کنفرانس به انگلیسی ترجمه شود. این امر توسط شیخ سرور انجام شده اما در سال بعد، قسمت اعظم این ترجمه (بیش از ۷۰ درصد آن) از تز دکترای آقای حسن روحانی سر در آورده و در قالب یکی از فصول به دانشگاه انگلیسی تحویل شده است. این اتفاق عجیب و تاسف‌آور می‌تواند سرنخ‌های بیشتری جهت بررسی‌ها به نهادهای ذی‌ربط بدهد تا تیم متخلف تهیه‌کننده‌ی رساله‌ی آقای روحانی شناسایی شوند.

شایان ذکر است، در جریان بررسی این رساله، موارد دیگری نیز به تیم واصل شد. از جمله، تیم پروژه در بررسی مقاله‌ی آقای حسن روحانی که تابستان سال ۲۰۰۲ میلادی (مصادف با سال ۱۳۸۱ هجری شمسی) در جلد نهم ژورنال بین المللی علوم انسانی دانشگاه تربیت مدرس منتشر شده است[۹]، حداقل «۴۰ درصد» سرقت علمی تشخیص داد که گزارش آن مستقلاً پیوست خواهد شد.

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۱ به این علت که نرم‌افزار از زبان فارسی پشتیبانی نمی‌کند، این بازه به صورت حدودی محاسبه و بیان شده است.

۲ برگزیده شده به عنوان کتاب سال حوزه در سال ۱۳۷۸ – تاریخ اتمام نگارش این کتاب در سال ۱۳۷۶ و تاریخ درج شده در مقدمه‌ی آن ۲۰ آبان ۱۳۷۶ می‌باشد.

۳ محقق نمونه و مجتهد شناخته شده، عالم حوزوی و نماینده‌ی کنونی مردم فارس در مجلس خبرگان رهبری http://aliakbarkalantari.ir/fa/?page_id=84

٤ مدارک و مستندات این سرقت بزرگ در پیوست درج می‌گردد. در این مستندات، متون انگلیسی فصل ۴ رساله‌ی آقای روحانی به دقت با مطالب کتاب آقای کلانتری تطبیق داده شده اند.

5 http://www.theislamicseminary.org/wp/the-secondary-laws-of-sharia/

۶ شیخ محمد سرور اصلیت پاکستانی داشته و ساکن در شهر نیویورک امریکاست، در حوزه‌های علمیه‌ی ایران و عراق درس خوانده و ترجمه‌های انگلیسی وزینی از قرآن کریم و کتب حدیثی تشیع از جمله اصول کافی و بحار الانوار به جای گذاشته است.

۷ برگزار شده در آذرماه ۱۳۷۶

۸ نماینده‌ی وقت جمهوری اسلامی در سازمان ملل متحد

9 Rouhani, H., 2002. Legislation in Islam Methodological and Conceptual Foundations. The International Journal of Humanities, 9(3), pp.27-45.

تیم بررسی پروژه و کمیته‌ی حقیقت‌یاب رساله‌ی دکترای آقای حسن روحانی که تلاش داشته به صورت فراجناحی و غیر سیاسی و به دلیل شائبه‌ها و شایعات پر حجمِ داخلی و خارجی در مورد رساله‌ی دکترای آقای رئیس جمهور این بررسی آکادمیک را انجام دهد، از دانشجویان علاقه‌مند به رعایت اخلاق علمی در دانشگاه‌های مختلف داخل و خارج کشور به دلیل کمک‌های فراوان در مراحل مختلف تهیه، پردازش و بررسی متن، از تیم رسانه‌ای K1inUSA@ برای مدیریت پروژه و از دیده‌بان شفافیت و عدالت به دلیل حمایت قانونی و قبول مسئولیت این پروژه‌ی علمی نهایت تشکر را دارد. ما با تقدیم مدارک و مستندات، خواهان ورود هر چه سریع‌تر مراجع رسمی از جمله وزارت علوم، دانشگاه‌ها و مراکز آموزش عالی، مجلس شورای اسلامی و کمیسیون آموزش و تحقیقات این مجلس، شورای نگهبان قانون اساسی و شورای عالی انقلاب فرهنگی به موضوع بوده تا با اثبات بی‌چون و چرای وقوع سرقت علمی در رساله‌ی دکترای آقای حسن روحانی، عنوان و مزایای دکتری از ایشان خلع شده، ضررهای مادی و معنوی قربانیان این سرقت به خصوص محققین ایرانی و مسلمان جبران، از دانشگاه کلدونین گلاسکو و دولت انگلستان بازخواست و از صدمه‌ی بیشتر به آبروی ملی و دانشگاهی ایران جلوگیری شود.

بدیهی‌ست که در صورت تعلل نهادهای مربوطه، گام بعدی دست‌اندرکاران پروژه و تمامی ایرانیان پایبند به اخلاق علمی در محیط‌های دانشگاهی داخل و خارج از کشور، درخواست جدی از دانشگاه انگلیسی و تحت فشار گذاشتن مسئولین آن توسط نهادها و رسانه‌های غربی جهت بررسی کامل و باز پس‌گیری و ابطال مدرک دکترا[1]ی حقوق آقای حسن روحانی می‌باشد. نیک به یاد داریم که مدرک دکترای تقلبی در سال‌های نه چندان دور موجب استیضاح و برکناری یکی از وزرای دولت نهم شد و دور از انتظار نیست که خلع مدرک دکتری از آقای روحانی نیز به چنین سرانجام ختم شود[۲]. لذا برای مصلحت کشور لازم است که حکم رسمی و نهایی در این خصوص هر چه سریع‌تر اعلام گردد.

و آخر دعوانا أن الحمد لله رب العالمین
جمعی از دانشجویان داخل و خارج
با مدیریت تیم رسانه‌ای K1inUSA@
و با حمایت دیده‌بان شفافیت و عدالت
چهارشنبه ۲۰ اردیبهشت ۱۳۹۶

1 Revoke Ph.D. certificate for plagiarism

۲ در سال‌های اخیر، مقامات ارشد (از جمله رئیس جمهور و وزرا) برخی کشورهای اروپایی به دلیل افشای تقلب در تدوین رساله‌های دکتری خود در چند دانشگاه اروپایی، از منصب خود برکنار شده یا استعفا داده‌اند.

مصادیق سرقت علمی کدامند؟[1] (ذکر چند نمونه‌ی مبتلا بِه در این پروژه)

تعویض نام و آدرس مقاله، پایان نامه یا رساله ای که قبلا توسط محقق(ین) دیگری در همان کشور یا کشور دیگری انجام و منتشر شده است با نام و آدرس جدید و چاپ یا ارائه در یک مجله یا مرکز دیگر، مصداق بارز سرقت علمی از نوع عمد است.

استفاده از داده‌ها، متون و یافته‌های چند مقاله و تلفیق آن‌ها در یکدیگر به منظور تولید یک مقاله نو. این نوع از سرقت علمی تحت عنوان "The Potluck paper" شناخته می‌شود که شاید بهتر باشد در فارسی به آن "مقاله معجون" گفته شود، چرا که آمیخته‌ای از داده‌های مقالات دیگران است. در برخی موارد، مقاله‌نویس یا به عبارت بهتر، مقاله‌ساز، متن را نیز به نحوی تغییر می‌دهد که تشخیص تقلبی بودن آن به سادگی امکان پذیر نیست. در این حالت به آن "The labor of laziness" یا "تنبل کاری" اطلاق می‌گردد، فرد به جای انجام کار به آن اصلی، وقت خود را صرف سوء استفاده از داده‌های دیگران می‌کند.

مقاله‌ساز، با حفظ محتویات مقاله اصلی، ظاهر مقاله، مثل شکل جداول یا نحوه رسم نمودارها را تغییر می‌دهد. یا مثلاً جداول ارائه شده در مقاله اصلی را به نمودار تبدیل می‌کند، کلید واژه‌ها را تغییر می‌دهد، خلاصه را عوض می‌کند و غیره. به این عمل "استتار جزئی" یا " The poor disguise" گفته می‌شود.

استفاده از عین جملات یا عبارات دیگران بدون ذکر منبع و گذاشتن گیومه. این عمل تحت عنوان "سرقت علمی کپی و درج" (copy and paste plagiarism) شناخته می‌شود. حتی تغییر چند کلمه در یک جمله نیز نمی‌تواند این جرم را تقلیل دهد و به آن "سرقت علمی با تغییر چند کلمه" (Word Switch Plagiarism) گفته می‌شود.

---

[1] از مقاله‌ی «سرقت علمی: تعریف، مصادیق و راهکارهای جلوگیری، پیشگیری و تشخیص» نوشته‌ی سیده زهرا بطحائی، دانشیار دانشکده علوم پزشکی، دانشگاه تربیت مدرس، چاپ سال ۹۰ – لینک دانلود: goo.gl/qQxsPZ

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یا از محصول کار دیگران استفاده کرده اید؟

استفاده کرده ام

آیا مطلب استفاده شده را داخل " " گذاشته اید و در همان جا (نه در کتابشناسی و ...) ارجاع داده اید؟

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نکنید این کار را!
مطلب استفاده شده را داخل کوتیشن مارک بگذارید
و در همان جا منبع را اعلام کنید

بلی: خوش به حال شما!
شما در حال سرقت علمی نیستید.

استفاده نکرده ام

آیا نوشته ها، ایده یا نتایج فعالیت ذهنی خودتان بوده است؟

خیر: ظاهرا شما در حال بازنویسی یا تفسیر هستید
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متد تحقیق

در تاریخ ۶ اردیبهشت ماه ۱۳۹۶، جهت بررسی اصالت رساله‌ی دکترای آقای حسن روحانی، دسترسی به قوی‌ترین نرم‌افزار کشف سرقت‌های علمی از طریق معاون پژوهشی رئیس دانشگاه ایالتی آیوا فراهم شد. شایان ذکر است که نرم‌افزار مشهور و معتبر iThenticate[1] توسط برترین دانشگاه‌ها، انتشارات، ژورنال‌های علمی و جوامع دانشگاهی مورد استفاده قرار می‌گیرد. منابع و دیتابیس غنی این نرم‌افزار در تصویر پیوست قابل مشاهده است. قیمت استفاده‌ی تک‌باره از آیثنتیکیت جهت بررسی یک متن تا ۲۵ هزار کلمه‌ای ۱۰۰ دلار، قسمت بررسی سه متن تا حداکثر ۷۵ هزار کلمه ۳۰۰ دلار و برای متون طولانی‌تر بیشتر است. دانشگاه ایالتی آیوا این نرم‌افزار را به صورت رایگان در اختیار محققان و دانشجویان خود قرار می‌دهد، با اکانتی که قابلیت بررسی صدها متن را دارد.

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1 www.ithenticate.com

برخورد با سرقت علمی سیاستمداران در دنیای امروز[۱]

۱. وزیر دفاع آلمان

سال ۲۰۱۱ بود که «تئودور گوتنبرگ»، وزیر دفاع وقت آلمان مجبور شد تا استعفای خود را تقدیم آنگلا مرکل، صدراعظم این کشور کند. دانشگاه بایروس چندی پیش از این استعفا اعلام کرده بود که رساله دکتری آقای گوتنبرگ ایرادات جدی دارد که شائبه‌ی تقلب علمی را تقویت و اثبات می‌کند. در ابتدا «گوتنبرگ» منکر سرقت علمی در تز دکترایش شد، اما بعدا ابراز کرد که به دلیلی مشغله‌ی فراوان دچار «اشتباه‌هایی جدی» در نگارش پایان‌نامه‌اش شده اما به هیچ وجه قصد تقلب نداشته است.

وی از استعفا سرباز می‌زد و مرکل نیز می‌گفت که که قصدش از افزودن «گوتنبرگ» به کابینه، «به کارگیری یک سیاستمدار بوده است؛ نه استخدام یک دستیار دانشمند». اما ده‌ها هزار نفر از مردم آلمان با امضای دادخواستی استهزای ارزش‌های علمی و دانشگاهی توسط دولت را محکوم کردند. مردم و رسانه‌ها به مدت دو هفته گوتنبرگ را «وزیر #کات–و–پیست» می‌خواندند تا وی سر انجام از منصب وزارت استعفا کرد.

۲. رئیس‌جمهور مجارستان

ماجرای استعفای «گوتنبرگ» در مرزهای سیاسی آلمان باقی نماند. چندی بعد در سال ۲۰۱۲، هفته‌نامه‌ی دنیای اقتصاد مجارستان پرونده‌ی سرقت علمی در پایان‌نامه‌ی دکترای رئیس جمهور وقت مجارستان، «پال اشمیت» را گشود. این نشریه رئیس جمهور را متهم کرد که تز دکترای ۱۹۹۲ او حاوی سرقت‌های علمی است. دانشگاه سِملوِیس بوداپست تز دکترای اشمیت را مورد بازبینی قرارداد و گزارش خود را برای وزیر منابع ملی مجارستان برای داوری نهایی ارسال کرد. اما این وزیر از داوری گزارش سر باز زد. در اینجا دانشگاه سِملوِیس اعلام کرد که رأساً موضوع تز رئیس جمهور را بررسی می‌کند و به این ترتیب مدرک دکترای اشمیت – تنها به علت کپی کردن چند عبارت در متن رساله – باطل شد. اشمیت کماکان خودش را بی‌گناه می‌دانست اما بر اثر بالا گرفتن فشارهای سیاسی مجبور به استعفا شد.

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[۱] گردآوری شده از منابع معتبر اینترنتی:
https://www.timeshighereducation.com/features/a-plague-of-plagiarism-at-the-heart-of-politics/2003781.article#survey-answer
https://www.usnews.com/education/best-global-universities/articles/2012/05/02/10-high-profile-people-whose-degrees-were-revoked
http://www.rajanews.com/news/270615
http://edition.cnn.com/2008/WORLD/meast/11/04/iran.impeachment/

۳. وزیر آموزش آلمان

«آنت شاوان» (Annette Schavan) از سال ۲۰۰۵ تا ۲۰۱۳ وزیر آموزش آلمان بود. در سال ۲۰۱۳ در دولت آنگلا مرکل، پس از آنکه برخی اسناد درباره کپی بودن بخشی از رساله دکتری شاوان منتشر شد، دانشگاه دوسلدورف ضمن پس گرفتن مدرک دکترای او، خواستار استعفا و برکناری وی شد. نهایتاً خانم شاوان مجبور به کناره‌گیری از کابینه دولت مرکل شد.

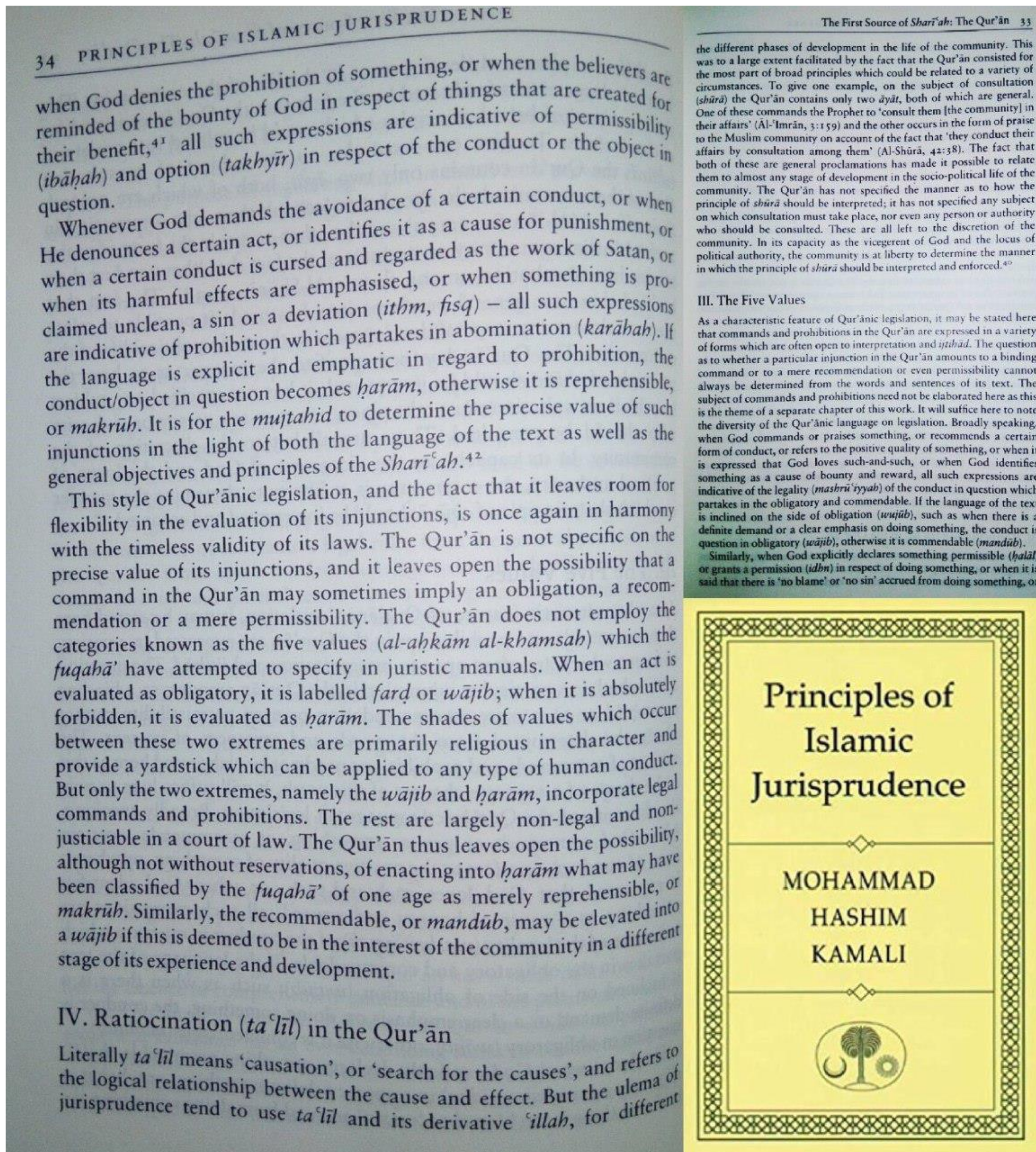
۴. وزیر کشور ایران، علی کُردان

در سال ۲۰۰۸ (برابر با ۱۳۸۷ هش.) مجلس هشتم، وزیر کشور ایران علی کردان را به دلیل مدرک دکترای جعلی از دانشگاه آکسفورد استیضاح و از کار برکنار کرد. کردان مدعی بود که از جعلی بودن مدرک بی‌اطلاع است و از عنوان دکترا استفاده‌ی ناصحیحی نکرده است.

۵. ؟!

سرقت علمی آقای حسن روحانی در چکیده‌ی رساله‌ی دکتری

پیش از انتخابات ریاست جمهوری ۹۲، اطلاعات جامعی از مدرک دکتری حسن روحانی در دسترس نبود. اما در زمان انتخابات ۴ سال پیش، جزئیات بیشتری از این مدرک منتشر شد، و دانشگاه کلدونین گلاسکو چکیده رساله دکتری او را منتشر کرد. همین کافی بود تا روشن شود که حتی چکیده رساله دکتری حسن روحانی به طور مستقیم از کتاب حقوق‌دان افغانستانی مقیم مالزی پروفسور محمدهاشم کمالی کپی‌برداری شده است.



The First Source of *Sharīʿah*: The Qur'ān 33

the different phases of development in the life of the community. This was to a large extent facilitated by the fact that the Qur'ān consisted for the most part of broad principles which could be related to a variety of circumstances. To give one example, on the subject of consultation (*shūrā*) the Qur'ān contains only two *āyāt*, both of which are general. One of these commands the Prophet to 'consult them [the community] in their affairs' (Āl-ʿImrān, 3:159) and the other occurs in the form of praise to the Muslim community on account of the fact that 'they conduct their affairs by consultation among them' (Al-Shūrā, 42:38). The fact that both of these are general proclamations has made it possible to relate them to almost any stage of development in the socio-political life of the community. The Qur'ān has not specified the manner as to how the principle of *shūrā* should be interpreted; it has not specified any subject on which consultation must take place, nor even any person or authority who should be consulted. These are all left to the discretion of the community. In its capacity as the vicegerent of God and the locus of political authority, the community is at liberty to determine the manner in which the principle of *shūrā* should be interpreted and enforced.[40]

III. The Five Values

As a characteristic feature of Qur'ānic legislation, it may be stated here that commands and prohibitions in the Qur'ān are expressed in a variety of forms which are often open to interpretation and *ijtihād*. The question as to whether a particular injunction in the Qur'ān amounts to a binding command or to a mere recommendation or even permissibility cannot always be determined from the words and sentences of its text. The subject of commands and prohibitions need not be elaborated here as this is the theme of a separate chapter of this work. It will suffice here to note the diversity of the Qur'ānic language on legislation. Broadly speaking, when God commands or praises something, or recommends a certain form of conduct, or refers to the positive quality of something, or when it is expressed that God loves such-and-such, or when God identifies something as a cause of bounty and reward, all such expressions are indicative of the legality (*mashrūʿiyyah*) of the conduct in question which partakes in the obligatory and commendable. If the language of the text is inclined on the side of obligation (*wujūb*), such as when there is a definite demand or a clear emphasis on doing something, the conduct is question in obligatory (*wājib*), otherwise it is commendable (*mandūb*).

Similarly, when God explicitly declares something permissible (*ḥalāl*) or grants a permission (*idhn*) in respect of doing something, or when it is said that there is 'no blame' or 'no sin' accrued from doing something, or

34 PRINCIPLES OF ISLAMIC JURISPRUDENCE

when God denies the prohibition of something, or when the believers are reminded of the bounty of God in respect of things that are created for their benefit,[41] all such expressions are indicative of permissibility (*ibāḥah*) and option (*takhyīr*) in respect of the conduct or the object in question.

Whenever God demands the avoidance of a certain conduct, or when He denounces a certain act, or identifies it as a cause for punishment, or when a certain conduct is cursed and regarded as the work of Satan, or when its harmful effects are emphasised, or when something is proclaimed unclean, a sin or a deviation (*ithm, fisq*) – all such expressions are indicative of prohibition which partakes in abomination (*karāhah*). If the language is explicit and emphatic in regard to prohibition, the conduct/object in question becomes *ḥarām*, otherwise it is reprehensible, or *makrūh*. It is for the *mujtahid* to determine the precise value of such injunctions in the light of both the language of the text as well as the general objectives and principles of the *Sharīʿah*.[42]

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

IV. Ratiocination (*taʿlīl*) in the Qur'ān

Literally *taʿlīl* means 'causation', or 'search for the causes', and refers to the logical relationship between the cause and effect. But the ulema of jurisprudence tend to use *taʿlīl* and its derivative *ʿillah*, for different

در صفحه ۳۴ کتاب پروفسور کمالی که در سال ۱۹۹۱ چاپ شده (صفحه۴۰ فایل PDF[1]) آمده است:

This style of Qur'anic legislation, and the fact that it leaves room for flexibility in the evaluation of its injunctions, is once again in harmony with the timeless validity of its laws. The Qur'an is not specific on the precise value of its injunctions, and it leaves open the possibility that a command in the Qur'an may sometimes imply an obligation, a recommendation or a mere permissibility.

Prof. Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, 1991.

در متن چکیده رساله حسن روحانی که ۷ سال بعد در سال ۱۹۹۸ تهیه شده و در سایت کتابخانه دانشگاه کلدونین گلاسکو منتشر شده، این عبارات عیناً کپی‌برداری شده است:

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

Hassan Feridon, The Flexibility of Shariah; Islamic Law, 1998[2].

بخش‌های دیگر نیز از صفحات دیگر کتاب کپی شده است. به طور مثال، ادامه مطلب کپی از صفحه ۳۳ کتاب پروفسور کمالی است. در صفحه ۳۳ کتاب پروفسور کمالی آمده است:

…it may be stated here that commands and prohibitions in the Qur'an are expressed in a variety of forms which are often open to interpretation and ijtihad.

کپی‌برداری در چکیده رساله دکتری به معنی کپی‌برداری در اصل موضوعی است که نویسنده رساله دکتری باید درباره آن به تحقیق و بررسی می‌پرداخته است.

– نکته‌ی عجیب اینکه وقتی جهت دانلود ۲۰ صفحه‌ی ابتدایی رساله‌ی کارشناسی ارشد آقای حسن روحانی (که آن را نیز از دانشگاه اسکاتلندی اخذ کرده‌اند) به لینک زیر از سامانه‌ی ایران داک[3] مراجعه می‌کنیم، یک رساله‌ی ارشد مهندسی برق و کامپیوتر، نوشته شده توسط یک دانشجوی ایرانی دانشگاه ولونگونگ استرالیا دریافت می‌شود که هیچ ارتباطی با رساله‌ی آقای روحانی ندارد!

1 http://www.targheeb.com/phocadownload/Fiqh/ISLAMIC%20LAW%20HISHAM%20KAMALI.pdf
2 http://www.caledonianblogs.net/library/files/2013/06/RouhaniPhD-2aawku2.pdf
3 http://ganj.irandoc.ac.ir/articles/380974

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در بخش معرفی		
فصل مورد بررسی: مقدمه (Introduction)	**شماره صفحه در متن رساله:** ۱	**شماره پاراگراف در صفحه:** ۱

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

Introduction

The ***Shariah*** is that body of knowledge which provides the Muslim civilization with its major means of adjusting to change. The ***Shariah*** is normally described as "Islamic law". But the boundaries of ***Shariah*** extend beyond the limited horizons of law. The ***Shariah*** is also a system of ethics and values, a pragmatic methodology geared to solving today's and tomorrow's problems. For a Muslim community, the ***Shariah*** represents that infinite spiritual and worldly thirst that is never satisfied. Muslims always seek an increasingly comprehensive implementation of the ***Shariah*** on their present and future affairs.

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

The Shari'ah is the core of the worldview of Islam. It is that body of knowledge which provides the Muslim civilisation with its unchanging bearings as well as its major means of adjusting to change. Theoretically, the Shari'ah covers all aspects of human life: personal, social, political and intellectual. Practically, it gives meaning and content to the behaviour of Muslims in their earthly endeavours.

Normally, the Shari'ah is described as 'Islamic law'. But the boundaries of Shari'ah extended beyond the limited horizons of law. The Shari'ah is also a system of ethics and values, a pragmatic methodology geared to solving today's and tomorrow's problems. Literally, the Shari'ah means 'way to water' – the source of all life. For a Muslim civilisation, the Shari'ah represents that infinite spiritual and worldly thirst that is never satisfied: a Muslim people always seeks better and better implementation of the Shari'ah on its present and future affairs. The Islamic nature of the Muslim civili-

آدرس مرجع اصلی:

Originally published as Chapter 5 of *Islamic Futures: The Shape of Ideas to Come, Mansell, London, 1985, p 107*

توضیح:

کتاب *Islamic Futures: The Shape of Ideas to Come* که در سال ۱۹۸۵ منتشر شده است، بعدها به صورت های مختلف توسط مولف اصلی، آقای Ziauddin Sardar در کتاب های دیگر از جمله Islam, Postmodernism and Other Futures در سال ۲۰۰۳ بازنشر شده است:

Islam, Postmodernism and Other Futures, A Ziauddin Sardar Reader, Ziauddin Sardar, 2003, p 65

نوع Plagiarism:

کپی قابل توجه بدون ذکر منبع در متن و ارجاعات

(توضیح: در بخش دیگری از رساله، از صفحات دیگری از همین متن استفاده شده و به آن اشاره شده است.)

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در بخش معرفی

فصل مورد بررسی: مقدمه (Introduction)	**شماره صفحه در متن رساله:** ۱	**شماره پاراگراف در صفحه:** ۲

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

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

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

In the entire history of Islam, the Shari'ah has not been more abused, misunderstood and misrepresented than in our own epoch. It has been used to justify oppression and despotism, injustice and criminal abuse of power. It has been projected as an ossified body of law that bears little or no relationship to modern times. It has been presented as an intellectually sterile body of knowledge that belongs to distant history rather than the present and the future. All this has been to the detriment of the Muslim people; and has suffocated the true revival of Islam and a genuine emergence of a contemporary Muslim intellectual tradition.

منبع اصلی:

Originally published as Chapter 5 of *Islamic Futures: The Shape of Ideas to Come, Mansell, London, 1985, p 107*

توضیح:

کتاب *Islamic Futures: The Shape of Ideas to Come* که در سال ۱۹۸۵ منتشر شده است، بعدها به صورت های مختلف توسط مولف اصلی، آقای Ziauddin Sardar در کتاب های دیگر از جمله Islam, Postmodernism and Other Futures در سال ۲۰۰۳ بازنشر شده است:

Islam, Postmodernism and Other Futures, A Ziauddin Sardar Reader, Ziauddin Sardar, 2003, p 65

نوع Plagiarism:

کپی قابل توجه بدون ذکر منبع در متن و ارجاعات

(توضیح: در بخش دیگری از رساله، از صفحات دیگری از همین متن استفاده شده و به آن اشاره شده است.)

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در بخش معرفی		
فصل مورد بررسی: مقدمه (Introduction)	**شماره صفحه در متن رساله:** ۲	**شماره پاراگراف در صفحه:** ۱

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

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

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

If the Shari'ah is to become the dominant guiding principle of behaviour of contemporary Muslim societies, then it must be rescued from the clutches of fossilised traditional scholars and overzealous westernised lawyers. The legalistic rulings of the classical Imams, and

آدرس مرجع اصلی:

Originally published as Chapter 5 of *Islamic Futures: The Shape of Ideas to Come, Mansell, London, 1985, p 107*

توضیح:

کتاب *Islamic Futures: The Shape of Ideas to Come* که در سال ۱۹۸۵ منتشر شده است، بعدها به صورت های مختلف توسط مولف اصلی، آقای Ziauddin Sardar در کتاب های دیگر از جمله Islam, Postmodernism and Other Futures در سال ۲۰۰۳ بازنشر شده است:

Islam, Postmodernism and Other Futures, A Ziauddin Sardar Reader, Ziauddin Sardar, 2003, p 65

نوع Plagiarism:

کپی قابل توجه بدون ذکر منبع در متن و ارجاعات

(توضیح: در بخش دیگری از رساله، از صفحات دیگری از همین متن استفاده شده و به آن اشاره شده است).

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در بخش معرفی		
فصل مورد بررسی: مقدمه (Introduction)	**شماره صفحه در متن رساله:** ۲	**شماره پاراگراف در صفحه:** ۲
تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):		
It is the purpose of this thesis to verily the hypothesis that Islamic law ***(Shariah)*** enjoys dynamic features and devices which are truly liberal, progressive and broad-minded and therefore the application of these devices equips the Islamic law with features that it can cope with changing conditions of different eras. The thesis considers it a platitude that change is inescapable and that the details of the law must vary according to the exigencies of changing times. Owing to this fact, nearly all the legal provisions contained in the ***Quran*** reflect the social conditions and to treat them as binding for all time is to defy the primordial law of evolution and to ignore the spirit of the ***Quran*** which attributes the quality of permanence only to spiritual values and ultimate goals. All other aspects of life on earth are necessarily subject to change, and no enlightened community would legislate on a contrary principle.		
تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):		
laid down 14 centuries ago are invariable and binding for all time is to defy the primordial law of evolution and to ignore the spirit of the Qur'an which attributes the quality of permanence only to spiritual values. All other aspects of life on earth are necessarily subject to change, and no enlightened community would legislate or act on a contrary principle.		
آدرس مرجع اصلی:		
Sherif Faruq, A Guide to the Contents of the Qur'an, London, 1985, p. 4.		
توضیح:		
کتاب A Guide to the Contents of the Quran که در سال ۱۹۸۵ منتشر شده است، بعدها به صورت های مختلف توسط مولف اصلی، آقای *Faruq Sherif*، از جمله در سال ۱۹۹۵ بازنشر شده است.		
نوع Plagiarism:		
کپی کامل بدون ذکر منبع در متن و ارجاعات		

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در بخش معرفی		
فصل مورد بررسی: مقدمه (Introduction)	**شماره صفحه در متن رساله:** ۲	**شماره پاراگراف در صفحه:** ۳
تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):		
Islamic system has faced different circumstances many times in practice as well. When the Islamic state expanded into provinces of the Byzantine and Persian empires, new problems had to be faced which had not been encountered during Muhammad's (S A W.) lifetime. The ***Quran*** and the ***Sunna***, however, contained the principles on which such problems		
تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):		
those now known as ulema (*'ulamā'*). When the Islamic state expanded into provinces of the Byzantine and Persian empires, new problems had to be faced which had not been encountered during Muḥammad's lifetime. The Qur'ān and the Sunna, however, contained the principles on which such problems could be solved.		
آدرس مرجع اصلی:		
William Montgomery Watt, Islamic Fundamendalism and Modernity, 1988, Page 6-7		
نوع Plagiarism:		
کپی کامل بدون ذکر منبع در متن و ارجاعات		

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در بخش معرفی		
فصل مورد بررسی: مقدمه (Introduction)	**شماره صفحه در متن رساله:** ۳	**شماره پاراگراف در صفحه:** ۱

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

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

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

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آدرس مرجع اصلی:

William Montgomery Watt, Islamic Fundamendalism and Modernity, 1988, Page ۱۰۵

توضیح:

مرجع اصلی در سال های بعد، از جمله در سال ۲۰۱۳ توسط مولف بازنشر شده است.

نوع Plagiarism:

کپی کامل بدون ذکر منبع در متن و ارجاعات

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در بخش معرفی		
فصل مورد بررسی: مقدمه (Introduction)	**شماره صفحه در متن رساله:** ۳	**شماره پاراگراف در صفحه:** ۲

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

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

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

As you will all know, the law of continental Europe looks back, generally speaking, to Roman law. And Roman law, of course, received its most authoritative articulation under Justinian, when the empire was already officially

آدرس مرجع اصلی:

Anderson, J. N. D. Sir, Islamic law in the modern world. New York University Press, 1959. p 2

توضیح:

مرجع اصلی در سال های بعد، بازنشر شده است.

نوع Plagiarism:

کپی کامل بدون ذکر منبع در متن و ارجاعات

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در بخش معرفی		
فصل مورد بررسی: مقدمه (Introduction)	**شماره صفحه در متن رساله:** ۴	**شماره پاراگراف در صفحه:** ۱

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

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

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

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

آدرس مرجع اصلی:

Anderson, J. N. D. Sir, Islamic law in the modern world. New York University Press, 1959. p 2

توضیح:

مرجع اصلی در سال های بعد، بازنشر شده است.

نوع Plagiarism:

کپی کامل بدون ذکر منبع در متن و ارجاعات

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در بخش معرفی

فصل مورد بررسی: مقدمه (Introduction) | **شماره صفحه در متن رساله:** ۵ | **شماره پاراگراف:** ۱- بخش اول

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

and suppress the former. This motto does not merely reflect the innate conservatism and the deep seated attachment to tradition which was so strong among the early Muslim peoples who formed the first adherents of the faith, it also expresses a principle which became a fundamental axiom of religious belief common to Islamic communities everywhere - namely, that the code of conduct represented by the religious law, or ***Sharia***, was fixed and final in its terms and that any modification thereof was necessarily a departure and a deviation from the one legitimate and valid standard. Based on the ideologies

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

NOEL J. COULSON

'All innovation is the work of the devil'. These alleged words of the founder Prophet of Islam, Muhammad, do not merely reflect the innate conservatism and the deep seated attachment to tradition which was so strong among the Arab peoples who formed the first adherents of the faith. They also express a principle which became a fundamental axiom of religious belief common to Islamic communities everywhere — namely, that the code of conduct represented by the religious law, or *shari'a*, was fixed and final in its terms and that any modification thereof was necessarily a departure and a deviation from the one legitimate and valid standard.

Among Muslim peoples, therefore, it is what we may call the traditional or classical Islamic concept of law and its role in society that constitutes a most formidable obstacle to progress. Western jurisprudence has provided a number of different answers to the

function of Muslim jurisprudence, from the beginning, was simply the discovery of the terms of that command.

Having thus been discovered, the religious code of conduct (thus formed) was a comprehensive and an all-embracing one, wherein every aspect of human relationships was regulated in meticulous detail. Moreover, the law, having once achieved perfection of expression, was in principle static and immutable: for Muhammad was the last of the Prophets and after his death in 632 A.D. there could be no further direct communication of the Divine Will to man. Henceforth the religious law was to float above Muslim society as a disembodied soul, representing the eternally valid ideal towards which society must aspire. In classical Islamic theory, therefore, law does not grow out of or develop along with an evolving society as is the case with Western systems, but is imposed from above.

آدرس مرجع اصلی:

Noel J. Coulson, The Concept of Progress and Islamic Law, in the book titled "Readings on Islam in Southeast Asia", 1985. P 203

توضیح:

این منبع بعدها توسط مولف در کتاب های دیگر بازنشر شده است.

نوع Plagiarism:

کپی کامل بدون ذکر در متن و ارجاعات

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در بخش معرفی

فصل مورد بررسی: مقدمه (Introduction)	**شماره صفحه در متن رساله:** ۵	**شماره پاراگراف:** ۱- بخش دوم

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

Based on the ideologies of Islam, the Islamic world has survived for many centuries, and its steadily increasing population is now said to surpass one billion. It has been able to operate effectively through out the ages and in all places under the ***Sharia*** law, generating a splendid civilization in its early history. Despite the savage wars of the Mongol hordes, the Crusades, and then the European colonialism, the Islamic world endured. This survival bears witness to the existence of a working and adaptable nature of the Islamic system.

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

Based on the ideologies of Islam, the Islamic world has survived for many centuries, and its steadily increasing population is now said to approach one billion. It has been able to operate effectively throughout the ages and in all places under the Shari'a law, generating a splendid civilization in its early history. Despite the savage wars of the Mongol hordes, the Crusades, and then the European colonialism, the Islamic world endured. This survival bears witness to the existence of a working and adaptable concept of economy.

آدرس مرجع اصلی:

Muhhamad Abdul-Rauf, The Islamic Doctorine of Economics and Contemporary Economic Thought, 1979, Page 2.

نوع Plagiarism:

کپی کامل بدون ذکر در متن و ارجاعات

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در فصل ۱		
فصل مورد بررسی: اول	**شماره صفحه در متن رساله:** ۱۸	**شماره پاراگراف در صفحه:** ۱

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

reasoning to arrive at a logical conclusion on a legal issue The scope of Ijtihad ranges from textual interpretation, assessing the authenticity of a hadith (a saying of the Prophet (S.A.W.)), to systematic deductive reasoning from first principles.2 It therefore allows for logical reasoning to deduce a rule where no precedent exists If properly applied. Ijtihad bridges the apparent gap between theory and practice.3

"Ijtihad is defined as the total exercise of effort made by a jurist in order to infer the

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

Ijtihad covers a much wider range of mental activity, ranging from textual interpretation, to assessing the authenticity of a *hadith*, and to systematic deductive reasoning from first principles. It therefore allows for logical reasoning to deduce a rule where no precedent exists. Thus, for example, 'if it becomes established that smoking tobacco definitely causes cancer, a *mujtahid* (i.e. one qualified to practise *ijtihad*), according to the judgement of reasoning will establish the law that smoking is forbidden according to the Divine Law'.[19] This is, admittedly, a modern Shi'a ruling based on the premise that one purpose of the Divine Law is to meet man's best interests and welfare, but it is a vivid example of the manner in which *ijtihad*, if properly used, bridges the apparent gap between doctrine and practice. Most authorities state that the use of *ijtihad* died out in the tenth century on the grounds that its creative force

منبع اصلی:

Patrick Bannerman. Islam in Perspective: A Guide to Islamic Society, Politics and Law. London ; New York : Routledge for the Royal Institute of International Affairs, 1988. P 38.

نوع Plagiarism:

کپی کلمه به کلمه

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فصل مورد بررسی: اول	**شماره صفحه در متن رساله:** ۲۰	**شماره پاراگراف در صفحه:** ۱

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

Most authorities state that the use of Ijtihad died out in the tenth century on the grounds that its creative force had become exhausted and that there was in any case no requirement for further interpretation. Thus, they assert that the "door of Ijtihad" was closed for good and the era of Taqlid (following of previous authorities) set in. 11 It is

generally but erroneously asserted that, ever since the codification of the doctrine of Islam by the four great orthodox imams, this door of Ijtihad has been closed so that Muslims must conform their opinions strictly to the opinions enumerated by these imams without seeking to arrive by means of their own reasoning at a personal opinion about the tenets of Islam.12

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

doctrine and practice. Most authorities state that the use of *ijtihad* died out in the tenth century on the grounds that its creative force had become exhausted and that there was in any case no requirement for further interpretation. Thus the 'gate of *ijtihad*' was closed for all time and the era of *taqlid* set in.[20]

It is generally admitted that, ever since the codification of

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The Law

the doctrine of Islam by the four great orthodox imams, this door (of *ijtihad*) is closed and that Muslims must conform their opinions strictly to the opinions enumerated by these imams without seeking to arrive by means of their own reasoning at a personal opinion about the tenets of Islam.[21]

However, one observer has recently argued convincingly that the

منبع اصلی:
Patrick Bannerman. Islam in Perspective: A Guide to Islamic Society, Politics and Law. London ; New York : Routledge for the Royal Institute of International Affairs, 1988. Pp 38-39.
نوع Plagiarism:
پلیجریسم کلمه به کلمه.

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<tr><td colspan="3">تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):</td></tr>
<tr><td colspan="3">Throughout the centuries. Mujtahids (qualified Islamic lawyers) have incessantly contributed to the further development of positive law and legal theory. This is an important point, since most leaders of reformist movements necessarily claim the right to practice Ijtihad Legal activity, whether in theory or in practice, continued</td></tr>
<tr><td colspan="3">تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):</td></tr>
<tr><td colspan="3">However, one observer has recently argued convincingly that the orthodox view is incorrect, that the concept has been misinterpreted, and that throughout the centuries, mujtahids (and others) have contributed to the further development of positive law and legal theory.[22] This is an important point, since most leaders of reformist or renewalist movements necessarily claim the right to practise ijtihad. However, since they do so on the basis of discarding or ignoring the developments he describes, they are unlikely to accept</td></tr>
<tr><td colspan="3">منبع اصلی:</td></tr>
<tr><td colspan="3">Patrick Bannerman. Islam in Perspective: A Guide to Islamic Society, Politics and Law. London ; New York : Routledge for the Royal Institute of International Affairs, 1988. P 39.</td></tr>
<tr><td colspan="3">نوع Plagiarism:</td></tr>
<tr><td colspan="3">پلیجریسم کلمه به کلمه.</td></tr>
</table>

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در فصل ۱		
فصل مورد بررسی: اول	**شماره صفحه در متن رساله:** ۲۰	**شماره پاراگراف در صفحه:** ۲

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

to practice Ijtihad [3] Legal activity, whether in theory or in practice, continued unceasingly. The vast bulk of fatwas (legal opinions) that have appeared and continued to grow quite rapidly from the tenth century onwards is a telling example of the importance of fatwas as personal legal opinions and precedents and tacit proof of the continuation of the use of Ijtihad.13 [1] It is in this large body of material that one may look for positive legal developments.14

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

The Role of Ijtihad in Developing Positive Law

As far as the potential and ability of the legal system to provide solutions to all newly arising problems is concerned, it need not be reiterated that up to Ibn ʿAqil's time, and for a long time afterwards, jurists had performed their task most appropriately. Therefore, the dissatisfaction of Muslims with the status quo could not have been the result of the impotency of lawyers to supply the required answers. Legal activity, whether in theory or practice, continued unceasingly. The vast bulk of *fatwas* (legal opinions) that appeared and continued to grow rapidly from the fourth/tenth century onwards is a telling example of the importance of fatwas as legal decisions and precedents. It is in this large body of material that one may look for positive legal developments. But the current state of scholarly research does not enable us to undertake the investigation of this important subject. When a record of consecutive collections of fatwas throughout a given period of time is made available, the growth of legal materials and of unprecedented decisions, which may be coupled with developments of technical

منبع اصلی:

Hallaq, Wael B. Was the Gate of Ijtihad Closed? International Journal of Middle East Studies. Vol 16, Issue 1 March 1984, pp. 3-41
DOI: https://doi.org/10.1017/S0020743800027598

توضیح:

این قسمت از تز از روی صفحه‌ی ۱۸ مقاله‌ای که در سال ۱۹۸۴ در مجله ی بین المللی مطالعات خاور میانه منتشر است، عاریه گرفت شده است.

نوع Plagiarism:

کپی کلمه به کلمه با ذکر منبع

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در فصل ۱

فصل مورد بررسی: اول	**شماره صفحه در متن رساله:** ۲۱	**شماره پاراگراف در صفحه:** ۱

تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):

The distinction [2] between Ijtihad and the revealed sources of the Shariah lies in the fact that Ijtihad is a continuous process of development whereas divine revelation and Prophetic legislation discontinued upon the demise of the Prophet (S.A.W.).15 In this

تصویر مرجع اصلی (بخش های رنگی شده، کپی شده):

Ijtihad is the most important source of Islamic law next to the Qur'an and the *Sunnah*. The main difference between *ijtihad* and the revealed sources of the *Shari'ah* lies in the fact that *ijtihad* is a continuous process of development whereas divine revelation and prophetic legislation discontinued upon the demise of the Prophet. In this sense, *ijtihad* continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community in its aspirations to attain justice, salvation and truth.

منبع اصلی:

Kamali, Mohammad H. Principles of Islamic Jurisprudence. Islamic Texts Society, 1991.

توضیح:

این قسمت تز از صفحه‌ی ۳۱۵ کتاب Principles of Islamic Jurisprudence نوشته‌ی M.H. Kamali گرفته شده است.

نوع Plagiarism:

کپی کلمه به کلمه

عنوان: گزارش بررسی اصالت متن رساله دکتری آقای حسن روحانی – چند نمونه از سرقت‌های علمی فاحش در فصل ۱		
فصل مورد بررسی: اول	**شماره صفحه در متن رساله:** ۲۵	**شماره پاراگراف در صفحه:** ۳
تصویر بررسی اصالت متن رساله (بخش های رنگی شده، کپی شده):		

5

primitive mode of Ijtihad) and Ijtihad On the occasion of Badr. to give an instance, the Prophet (S.A.W.) chose a particular place for the encampment of the Muslim forces. A companion. Hubab Al-Munzcr. asked him whether he had chosen (hat place on his own judgement (ra'y) or on revelation from God The Prophet (S.A.W.) replied that he

had done so on his own judgement. When the Companion suggested a more suitable place, the Prophet (S.A.W.) told him

"You have made a sound suggestion".33

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

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This implies that intellectual perfection and maturity in judgement had been since long a criterion of greatness. The Qur'ān itself time and again exhorts to deep thinking and meditation over its verses.[10] It justifies the exercise of reason and personal opinion in legal matters. The Prophet himself set examples by accepting the opinion of the Companions in the matters where he was not directed by the Revelation. On the occasion of Badr, to give an instance, the Prophet chose a particular place for the encampment

of the Muslim forces. A Companion, Ḥubāb b. al-Mundhir, asked him whether he had chosen that place on his own judgement (*ra'y*) or on revelation from God. The Prophet replied that he had done so on his own judgement. When the Companion suggested another place the Prophet told him : "You have made a sound suggestion (*laqad asharta bi'l-ra'y*)".[11] Examples are abundant where the Prophet consulted the Companions and accepted their opinions. The Qur'ān's insistence on consulting the Companions in different matters presupposes its approval of the exercise of personal opinion in deciding problems.

Matters were not much complicated during the lifetime of the Prophet because his decision was the last word. But after his death

منبع اصلی:

Hasan, Ahmad. Early Modes Of Ijtihād: Ra'y, Qiyās And Istiḥsān in: "Islamic Studies, 1 March 1967, Vol.6(1), pp.47-79". ISSN: 05788072

توضیح:

این قسمت از تز از روی مقاله‌ی احمد حسن که در سال ۱۹۶۷ منتشر شده است، برداشته شده.

ارجاع این قسمت از تز به ریفرنس زیر است:

Ibn Hisham, Sirai Al-Nabii, Cairo, 1329 A.H., Vol. 2, PP. 210-211.

که به زبان عربی است! (سال ۱۳۲۹ ه.ق. مصادف می‌شود با ۱۹۱۱ میلادی).

نوع Plagiarism:

پلیجریسم کلمه به کلمه بدون ذکر منبع

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در این بخش به بارزترین و روشن‌ترین مدرک سرقت علمی در رساله‌ی حاضر پرداخته می‌شود. بین ۷۵ الی ۸۵ درصد[۱] فصل ۴ رساله‌ی آقای روحانی با عنوان «احکام ثانویه» مستقیماً ترجمه شده‌ی کتابی فارسی با عنوان «حکم ثانوی در تشریع اسلامی»[۲] نوشته‌ی آیهٔ الله دکتر علی‌اکبر کلانتری[۳] می‌باشد. ایشان سرقت علمی از کتاب خود را تایید کرده اند و شایان ذکر است که نه در مراجع فصل ۴ و نه در کتابنامه، آقای حسن روحانی هیچگونه ارجاعی به این کتاب و به این نویسنده نداده است. با شواهدی که از سرقت بزرگ و فاحش فصل ۴ رساله‌ی دکترای آقای روحانی به دست آمده، حال با قطعیت می‌توان گفت که این رساله‌ی دکترا بنا به تمامی معیارها، به طور کامل مردود و متقلبانه است.

تاسف‌بارتر اینکه طبق شواهد موجود، حتی در ترجمه‌ی انگلیسی از کتاب آیهٔ الله کلانتری نیز پای افراد دیگری به جز آقای روحانی در میان بوده و حتی ترجمه نیز توسط ایشان انجام نشده است. تیم پروژه به کمک نرم‌افزار سرقت‌یاب، به مقاله‌ای انگلیسی[۴] دارای همپوشانی ۸۲ درصدی با متن فصل ۴ رساله‌ی آقای روحانی در وب‌سایتی به نام The Islamic Seminary دست یافت (ذکر عدد ۸۲ در جدول به عنوان درصد سرقت علمی فصل ۴ به همین علت است). با پیگیری‌های بیشتر مکشوف به عمل آمد که این پایگاه اسلامی متعلق به عالمی شیعی به نام «شیخ محمد سرور»[۵] می‌باشد. طبق اظهار صریح ایشان طی تماس با مدیر پروژه، پیش از برگزاری کنفرانس سران کشورهای اسلامی در تهران[۶] متنی به زبان فارسی توسط آقای کمال خرازی[۷] به ایشان داده و خواسته شده برای استفاده در این کنفرانس به انگلیسی ترجمه شود. این امر توسط شیخ سرور انجام شده اما در سال بعد، قسمت اعظم این ترجمه (بیش از ۷۰ درصد آن) از تز دکترای آقای حسن روحانی سر در آورده و در قالب یکی از فصول به دانشگاه انگلیسی تحویل شده است. این اتفاق عجیب و تاسف‌آور می‌تواند سرنخ‌های بیشتری جهت بررسی‌ها به نهادهای ذی‌ربط بدهد تا تیم متخلف تهیه‌کننده‌ی رساله‌ی آقای روحانی شناسایی شوند.

در ادامه، متن فصل ۴ رساله‌ی آقای روحانی به علاوه متون فارسی اصلی از کتاب آیهٔ الله کلانتری ذکر می‌شوند. راهنمای رنگ‌ها در ادامه آمده است:

متون انگلیسی قرمز رنگ: ترجمه‌ی مستقیم متون اصلی فارسیِ هایلایت شده با رنگ زرد

متون فارسی با هایلایت زرد رنگ: قربانیان سرقت علمی کلمه به کلمه / متون انگلیسی سبز رنگ: نقل قول‌ها

متون انگلیسی سیاه رنگ: تنها قسمت‌هایی که (احتمالاً) توسط نویسنده یا تیم نویسنده‌ی رساله نوشته شده اند و بخش اندکی از یکی از فصول انتهایی رساله (فصل ۴) را تشکیل می‌دهند.

نکته: با کمال تاسف، در قسمت نتیجه‌گیری این فصل از رساله، پاراگرافی از کتاب شهید مطهری نقل شده است، بدون آنکه ارجاعی به کتاب شهید داده شده باشد. در کتاب استاد کلانتری این قسمت از مرجع به نقل از استاد مطهری بیان شده اما در رساله‌ی آقای روحانی هیچ صحبتی از مرجع نشده و گویی نقل قول استاد شهید را در مقام نتیجه‌گیری فصل به نام خود کرده است !!!

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۱ به این علت که نرم‌افزار از زبان فارسی پشتیبانی نمی‌کند، این بازه به صورت حدودی محاسبه و بیان شده است.

۲ برگزیده شده به عنوان کتاب سال حوزه در سال ۱۳۷۸ – تاریخ اتمام نگارش این کتاب در سال ۱۳۷۶ و تاریخ درج شده در مقدمه‌ی آن ۲۰ آبان ۱۳۷۶ می‌باشد.

۳ محقق نمونه و مجتهد شناخته شده، عالم حوزوی و نماینده‌ی کنونی مردم فارس در مجلس خبرگان رهبری http://aliakbarkalantari.ir/fa/?page_id=84

4 http://www.theislamicseminary.org/wp/the-secondary-laws-of-sharia/

۵ شیخ محمد سرور اصلیت پاکستانی داشته و ساکن در شهر نیویورک امریکاست، در حوزه‌های علمیه‌ی ایران و عراق درس خوانده و ترجمه‌های انگلیسی وزینی از قرآن کریم و کتب حدیثی تشیع از جمله اصول کافی و بحار الانوار به جای گذاشته است.

۶ برگزار شده در آذرماه ۱۳۷۶

۷ نماینده‌ی وقت جمهوری اسلامی در سازمان ملل متحد

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Chapter 4
Al Ahkam Al Thanaviiah
(The Secondary Laws)

Islamic laws and rules due to the conditions in which the people qualified to fulfil their responsibilities and the circumstances prevailing and governing, are divided into two categories:

a. Al Ahkam Al avvaliiah
(the Primary Laws and rules or the Original Laws)
The primaries are those laws and rules that remain the same and are for normal conditions. They are called The primary or the original laws.

b. Al Ahkam al thanaviiah
(the Secondary or the Alternate Laws)
The Secondary laws and rules are those sanctioned with due effect but are enforceable for a limited time and in exceptional cases and conditions.

Such laws are called the secondary and alternate laws.1 In other words, the laws and rules that are sanctioned without having in consideration the special and exceptional conditions are called the primary and original laws and those that are sanctioned for exceptional conditions are called the secondary laws.2

احکام ثانوی ناظر به حالات عارضی و استثنایی مکلف، و احکام اولی ناظر به حالات طبیعی و وضعیت عادی او هستند

It is the responsibility of a Muslim to practice and follow the primary laws and rules of *Shariah* unless it becomes impossible to do so. Such impossibility and reason may come into existence due to the circumstances prevailing and governing the society, such as birth control (to control the population) when population explosion would cause huge social, economic and educational hardships in the society. In such cases it becomes obligatory to control the exploding population. There is also the need to see that prices for much needed marketable commodities are reasonable and to see that harmful monopoly of goods in public demand is controlled. This is so if non-intervention of government would lead to the deprivation of the disadvantaged groups of people in the society. Sometimes the reason for the inability to follow the primary laws may come from ones personal conditions and circumstances such as unbearable hardships and impasses (*osr and haraj*) or harms (*zarar*) related to ones own circumstances, which will be discussed, in greater details later.3

As a matter of fact, the case that the emergence of certain conditions and elements or new issues could become reasons for changing the primary laws and rules existed in the very early days of the history of Islam. The Muslims were aware of the criteria of *Shariah* knew them because the general principles such as abolishment of hardships and extreme harms are founded on the basis of the text from the *Quran* and the *Sunnah*.4

این نکته که عارض شدن برخی عناوین بر بعضی امور، موجب دگرگونی در حکم‌شرعی آن‌ها می‌شود، از همان صدر اسلام در ارتکاز مسلمانان متشرع و آگاه به موازین شرعی بوده‌است؛ چرا که قواعدی، مانند قاعده نفی حرج، نفی ضرر، تقیه و... ریشه در کتاب (قرآن) و سنت دارد و از همان سال‌های نخست، مسلمانان این دو منبع را در اختیار داشته‌اند.

The fact that the emergence of certain conditions and circumstances may become the reason for change in the good (*Husn*) and the evil (*Qubh*) of certain facts is also one of the issues that since a long time has been considered by the scholars. Allamah Helly in the topics dealing with the issue of *Husn* and *Qubh* as factors based on grounds of reason has said the following:

این مطلب که پیش آمدن برخی حالات و پیدایش بعضی عناوین نیز حسن وقبح برخی امور را دست‌خوش تغییر و تبدیل قرار می‌دهد، از دیرباز مورد توجه ومطالعه دانش‌مندان بوده‌است. علامه حلی در مبحث حسن و قبح عقلی می‌نویسد:

"The theologians of the *Shia* and the *Mu'tazilah* maintain that the grounds for the validity and genuineness of the existence of *Husn* and *Qubh* in human deeds are based on the decision and the judgment of reason. They also maintain that such issues can sometimes be made clear and plain with a simple and normal consideration of reason. Sometimes They are very complex and exist in certain cases and conditions such as exacerbating truth or expedient lies’’5

However, the terms such as the secondary laws, or the secondary responsibility do not have a very long history.

ولی تعبیر حکم ثانوی یا تکلیف ثانوی پیشینه زیادی ندارد.

These terms are mostly found in the works of the *Shia* scholars. The Muslim scholar who first made use of the term “the secondary laws” was Sheikh Muhammad Taqi Isfahani (d. in 1248 H.). In *Hedayat Al Mustarshedin*, he has called the fatwa of a *Mujtahid* that may not concede the actual rule of *Shariah* for a case, a secondary law and responsibility.

بر اساس جست‌وجویی که انجام گرفت، نخستین دانش‌مند شیعی که سخن از حکم ثانوی به میان آورده، شیخ محمدتقی اصفهانی (متوفای ۱۲۴۸ ق.) است. وی در مبحث صحیح و اعم در صورتی که حکم صادر از مجتهد مخالف با واقع باشد و مجتهد خطا کرده‌باشد را نسبت به خود مجتهد و مقلدان او «تکلیف ثانوی» شمرده‌است.

Today the scholars call such a case the apparent rules (*Al-Ahkam Al-Zaheriiah*) as opposed to the actual rule not a secondary law and rule.

Following him Muhammad Hussein Ibn Abdurrahim (d. 1250 H.) the author of *Fusul* expressed the primary and the secondary laws by the expression and terms as the original and temporary responsibilities.

پس از وی، به شیخ محمدحسین‌بن عبدالرحیم (متوفای ۱۲۵۰ ق.) مؤلف کتاب فصول می‌رسیم که از احکام اولیه و ثانویه به «التکالیف الأصلیۀ و العارضیۀ» تعبیر کرده‌است

In his discourses on the issues of *Ijtihad* where he has a short discussion about the primary laws, hinted to the secondary laws. He divides the applicable rules and laws into the actual and primary and the actual non-primary laws.7

در مبحث اجتهاد و تقلید نیز به گفتاری کوتاه از ایشان درباره احکام اولیه، همراه با اشاره‌ای به احکام ثانویه برمی‌خوریم. وی در این مبحث، احکام فعلی را به دو دسته احکام واقعی اولی و واقعی غیر اولی تقسیم می‌کند

In fact, the beginning of the investigations and verifications of the issue of the secondary laws was the time of Sheikh Ansari (d. 1281 H.).8

ولی آغاز بحث و تحقیق در مورد این احکام را باید از زمان شیخ مرتضی انصاری (متوفای ۱۲۸۱ق.) دانست.

The previous scholars of *Fiqh* have made certain presentations on the issue of the secondary laws and principles but within such presentations what exist are discussions on the issue without specifying the title of the issue.

دانش‌مندان متقدم بر این بزرگان نیز به گونه پراکنده مباحثی را در مورد احکام و قواعد ثانویه ابراز داشته‌اند، ولی آن‌چه در آثار آنان می‌یابیم بحث درباره مصادیق حکم ثانوی است بدون آن‌که به عنوان مزبور تصریح کنند.

On examining the works of the *Sunni* scholars I did not find anyone writing about the secondary laws in *Shariah*, although there are certain precedents in the works of a number of earlier Sunni scholars.10

در میان صاحب نظران عامه به کسی که در جوانب حکم ثانوی و کلیات مربوط به آن به بحث پرداخته‌باشد برنخوردیم. به نظر می‌رسد این بحث از ابتکارات دانش‌مندان شیعه و در رأس آنان شیخ انصاری باشد.تحقیق و تألیف در مورد مصادیق احکام و قواعد ثانویه در میان دانش‌مندان سنی نیز پیشینه‌ای دیرینه دارد.

Malik Ibn Anas (d. 179 H.) in "*Al-Modavvanah-Al-Kobra*" about the secondary titles of vows, covenants and oath has some discourses.11

مالک بن‌انس (متوفای ۱۷۹ق.) درباره عناوین ثانوی نذر، عهد و قسم، بحث نموده‌است

Muhammad Ibn Idris Shafei (d. 204 H.) also towards the end of the book *Al-Omm* has some discourses on this issue.12 He under the heading "what may become lawful due to necessity" has dealt with the issues of necessity, which are of the secondary laws.'4 Abul Qasim Kharafi (d. 334 H.) also under the heading, "coercion" (Ikrah) has dealt with such discourses.14

محمد بن‌ادریس شافعی (متوفای ۲۰۴ق.) نیز مطالبی در این زمینه دارد. وی‌هم‌چنین زیر عنوان «ما یحلّ بالضرورة» مباحثی در مورد عنوان ثانوی ضرورت، طرح نموده‌است.

ابوالقاسم خرقی (متوفای ۳۳۴ق.) نیز مباحثی درباره عنوان اکراه، پیش کشیده‌است.

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The Views of the Foqaha on the Definition of the Secondary Laws

In the works on *Osul-Al-Fiqh* and *Fiqh* one may find such terms as Secondary Rules, Secondary Legislation, Secondary Principles, and the Secondary Order. Such terms in some respects are similar and in other respects they are different.

در کتب اصولی و متون فقهی، به اصطلاحاتی هم‌گون، مانند حکم ثانوی، تشریع ثانوی، اصل ثانوی، امر ثانوی، قاعده ثانویه و... برمی‌خوریم. این اصطلاحات از برخی جهت‌ها مشابه یک‌دیگر هستند و از جنبه‌های دیگر با هم متفاوت‌اند.

1- On the basis of what is popular among the *Foqaha* the primary laws are such laws that are sanctioned for certain cases in normal conditions such as the obligation of prayers, unlawfulness of drinking intoxicating substances. The secondary laws are such laws that are sanctioned for certain cases in abnormal conditions such as emergencies, coercion etc. Such as fasting in the month of *Ramadhan* for one who may suffer harms due to fasting.15

۱– بر اساس آن‌چه میان فقها مشهور است: حکم اولی، حکمی است که بر افعال و ذوات به لحاظ عناوین اولی آن‌ها بار می‌شود، مانند وجوب نماز صبح و حرمت نوشیدن شراب؛ حکم ثانوی، حکمی است که بر موضوعی به وصف اضطرار، اکراه و دیگر عناوین عارضی بار می‌شود، مانند جواز افطار در ماه رمضان در مورد کسی که روزه برایش ضرر دارد

2- Some of the *Foqaha* have defined the primary and secondary laws differently. They say that the primary laws are those that are permanently applicable at all times and conditions and the secondary laws are those that are of a general nature not in the absolute sense but with conditions and restrictions. In this way the proposition comes out of permanency and assumes a timely nature.16 One of the contemporary scholars has a similar view and he says, "Those Islamic Laws that are based on permanent needs of human beings are the primary laws".17 On this basis, the laws that are sanctioned for timely needs are called the secondary laws.

۲– برخی برخلاف تعریف رایج و مشهور، احکام اولیه و ثانویه را به گونه دیگری توضیح داده و گفته‌اند: احکام اولیه عبارت‌اند از آن دسته از احکام که بر موضوعات خود به نحو اطلاق و دوام بار می‌شوند؛ یعنی احکامی که به صورت قضیه دائمه، همه مصادیق خارجی خود در جمیع زمان‌ها و مکان‌ها و حالت‌ها را در بر می‌گیرد، و احکام ثانویه عبارت‌اند از آن دسته از احکام کلی که دارای عناوین و موضوعاتی عام هستند، ولی نه به گونه مطلق، بلکه همراه با تقیید و توصیف به چیزی؛ بدین ترتیب، قضیه از حالت اطلاق و دوام بیرون می‌آید و به صورت قضیه حینیه وصفیه مادامیه، نمایان می‌شود. برخی از صاحب‌نظران معاصر نیز در این زمینه سخنی مشابه گفتار بالا دارند: آن‌قسمت از احکام اسلامی که برمبنای نیازهای ثابت وضع شده‌است، احکام‌اولیه است.(3) بر اساس این بیان، احکامی که با توجه به نیازهای ناپایدار وضع می‌شود، احکام ثانویه نام دارد.

3- From other scholars point of view the primary laws are those that are sanctioned on the basis of the benefits and harms or the good (*Husn*) and the evil (*Qubh*) that exist in certain cases to which such laws apply. The secondary laws are those that are sanctioned on the basis of the existence of a conflict between a benefit and harm, a good and evil and for certain conditions.18

۳- بعضی دیگر چنین گفته‌اند: حکم اولی به آن دستوری گفته می‌شود که شارع اسلام بر مبنای صلاح و فساد اولی موجود در موضوع یا متعلق، حکم نموده‌است و حکم ثانوی، در موردی است که شارع بر مبنای تزاحم صلاح و فساد حالت عارض و موقت،با مصلحت‌و مفسده ثابت‌اولی، حکم می‌کند.

Sheikh Ansari has said, the primary laws are sanctioned regardless of the possibility for its applicability to other cases. What follows it is that there will be no conflict between such laws and those that may come into being due to certain conditions.

شیخ انصاری در مبحث خیارات، هنگام بحث از شروط صحت شرط می‌گوید: گاهی حکم، برای موضوع فی حدّ نفسه و با قطع نظر از عنوان عارضی دیگر، ثابت می‌شود و لازمه چنین وضعیتی این است که میان این حکم و حکم دیگری که به سبب عنوان عارضی برای آن موضوع پیدا می‌شود، تنافی نباشد.

For example, consuming meat for food in normal conditions are permissible (*Mubah*), however, if one would swear not to consume it for food it becomes unlawful (*Haram*) for him to consume it for food. Or it may become obligatory to consume it. For example one may have made a vow to consume meat for food.19

مانند خوردن گوشت که شرع آن را فی نفسه مباح اعلام کرده‌است، به گونه‌ای که اباحه مزبور منافاتی با این ندارد که در صورت خوردن سوگند بر ترک آن یا امر پدر به ترک آن، خوردن آن حرام شود، یا اگر این خوردن، مقدمه عملی واجبی شد آن را نذر نموده، واجب شود

4- According to some scholars the primary and secondary status are relative conditions. When laws are sanctioned regardless of other conditions they are called primary laws but if they are sanctioned with a view to certain conditions and cases they are called secondary laws.20 For example *vozu* (ablution) is a case that has a special status in *Shariah* and its primary rule is that it is a preferable act and in certain cases it becomes obligatory. In some cases if *vozu* would be harmful to a person or cause suffering to one its status changes into a harmful and hardship causing status as its secondary name and title and accordingly to avoid it becomes permissible (*Mubah*) and even performing *vozu* may become unlawful (*Haram*).

۴- و بالاخره دیدگاه برخی دیگر چنین است:» اولیت و ثانویت» اموری نسبی هستند. وقتی حکمی بر عنوانی از موضوعات بار می‌شود، اگر بدون عنایت و نظر به عنوان دیگری لحاظ شود، آن را حکم اولی می‌نامند، اما چنان‌چه حکم یک عنوان که بر ذاتی رفته‌است، با عنایت و فرض این‌که عنوان دیگری نیز بر همین ذات، وجود دارد، بار شود، آن حکم ثانوی است، مثلاً وضو یک عنوان شرعی است که حکم نفسی آن استحباب، و حکم غیری آن وجوب است. ذاتِ شستنِ دست و صورت و مسح سر و پا، به همراه قصد عنوان وضو، به علاوه نیت قربت -یا بدون آن بنا بر اختلافی که در این مورد هست- ذاتی است که عنوان شرعی وضو بر آن رفته‌است. اکنون اگر وضویی برای مکلفی ضرری یا حرجی باشد، عنوان ضرر و حرج که با عنایت و نظر به عنوان وضو و در طول آن لحاظ می‌شود، عنوان ثانوی وضو خوانده می‌شود که حکم جواز ترک یا حرمت ارتکاب را برای آن ذات، به دنبال خود می‌آورد .

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The Differences between the primary and Secondary Laws

From the above details it becomes clear that the differences between the secondary and the primary laws are as follows:

1. In the terminology of the *Foqaha* the secondary laws always are in a longitudinal line with primary laws not at the same time and simultaneous which means that as long as it is possible to observe the primary laws there is no need to apply the secondary laws. The secondary laws are followed only when one is not able to follow the primary laws.

2. The primary laws are permanent while the secondary laws are temporary. According to certain *Hadith* (format tradition deriving from the Prophet (S.a.w.)) the primary laws remain valid until the Day of Judgement. As the sixth Imam21 has said, "Whatever Prophet Muhammad (S A W.) made lawful (*Halal*) will be lawful to the Day of Judgement and whatever he made unlawful (*Haram*) will be unlawful to the Day of Judgement".22

3. Whenever a conflict may rise between the secondary and the primary laws the secondary laws will have priority because the secondary laws would have the effect of an exception to and limiting the primary laws. Just as a particular rule comes before the general rule in the same way the secondary laws come before the primary laws.

4. In other words, the secondary laws are in fact the same primary laws but a change has taken place in the case or subject to which they apply in that case in the terminology of the Foqaha they are called the secondary laws. Therefore the difference between the two comes from the change and difference in the case and subject to which they apply.

The Kinds of the Secondary Laws

After considering the secondary laws of every case or subject and its primary laws it is possible to picture a great number of the secondary laws. For example with a view to the five categories of rules, namely the obligatory (Wajeb), the desirable (Mandub), the prohibited (Haram), the detestable (Makruh), and the allowable (Mubah), if the primary rule of a case would be permissible the secondary rule may become cither one of the five therefore five multiplied by five would result into twenty five cases.

می‌توان با سنجیدن حکم ثانویِ هر چیزی با حکم اولی آن، گونه‌های فراوانی از حکم ثانوی تصویر کرد. بدین ترتیب در نگاه نخست، تصور می‌شود ۲۵ قسم حکم ثانوی داشته‌باشیم و این عددی است که از ضرب نمودن احکام پنج گانه اولیه؛ یعنی وجوب، حرمت، استحباب، کراهت و اباحه در شکل ثانوی همین احکام به دست می‌آید

There is, however, one exception: Both the primary and secondary rules can not become of the same nature like both being obligatory or prohibited. Based on this five out of twenty five will become exceptional and the remaining twenty cases will remain valid possibilities.

پنج قسم از میان گونه‌های متصور بیرون می‌رود، مثلاً نمی‌شود حکم اولی یک چیز وجوب و حکم ثانوی آن نیز وجوب باشد، و با این حساب بیست صورت دیگر باقی می‌ماند.

There are also some other examples that do not seem to have clear applications in Shariah, this may happen when the primary rule for a case would be a prohibition and its secondary rule would be a desirable one or that the primary rule would be detestable and its secondary rule would be a desirable one or vice versa.

برای برخی از این صور نیز مثال و مصداق روشنی در احکام شرعی نیافتیم، مانند این‌که حکم اولی چیزی، حرمت و حکم ثانوی آن استحباب باشد، یا حکم اولی آن کراهت و حکم ثانوی‌اش استحباب باشد و برعکس.

The rest of the possibilities may have certain applications and one may find real examples in Shariah for them.23

به هر حال بیش‌تر این گونه‌ها، ممکن به نظر می‌رسد و می‌توان برای هر کدام از آن‌ها مثال یا مثال‌هایی در احکام شرعی جُست.

Some Examples of the Secondary Laws.

1. The case wherein the primary rule would be detestable (Makruh) and the secondary rule would be a prohibited one (Haram). One example is hoarding of in-public-demand-commodities, which is considered as detestable in normal conditions by a group of Foqaha. However, in the other conditions such as when famine would exist and people would direly need the commodity, hoarding is prohibited and the Islamic government will make the hoarder sell such commodity.24

۱ – حکم اولی کراهت و حکم ثانوی حرمت، مانند مورد احتکار که گروهی از فقها آن را در وضعیت عادی مکروه می‌دانند، ولی به سبب عارض شدن برخی حالت‌ها و شرایط آن را حرام می‌شمارند، مثلاً موقع قحطی و تنگ‌دستی مردم و احتیاج آنان به کالای مورد احتکار که در این فرض محتکر از سوی حاکم اسلامی وادار به فروختن کالای خود می‌شود.

2. The case wherein the primary rule would be permissible {Mubah) and the secondary would be obligatory (Wajeb). An example of such case is learning industrial skills according to the primary rules is only permissible (Mubah), however, if the protection and the security of the Islamic system would depend on it, then as being an introductory step for the fulfillment of an obligation it becomes obligatory (Wajeb).

۲– حکم اولی اباحه و حکم ثانوی وجوب، مانند اشتغال به امور صنفی که به عنوان اولی آن مباح است، ولی در صورتی که حفظ نظام بر آن متوقف باشد، از باب مقدمیت واجب می‌شود.

Muhaqqiq Khoei in this matter has said, “learning all industrial skills are of the permissible tasks. It is not even desirable thus; there is no question about its being an obligatory task. However, if ignoring to learn it would cause huge losses to the system then its learning becomesnecessary”.25

آیتاللّه خوئی در این زمینه می‌گوید:

اما الصناعات بجمیع أقسامها فهی من الامور المباحهٔ و لا تتصف بحسب انفسها بالاستحباب فضلاً عن الوجوب فلایکون التکسب بها الا مباحا. نعم انما یطرء علیها الوجوب اذا کان ترکها یوجب اخلالاً بالنظام و حینئذ یکون التصدی لها واجباً کفائیاً أو عینیاً، و هذا غیر کونها واجبهٔ بعنوان التکسب.

Another example of this nature is the case of drinking or eating in normal conditions as a permissible act and an obligatory act when preserving one's life would depend upon eating and drinking.

مثال دیگری که می‌توان برای این‌گونه آورد، نوشیدن آب و صرف طعام است که در موقعیت عادی، مباح و در صورت تشنگی و گرسنگی مفرط به خاطر حفظ جان، واجب می‌باشد.

3. The case wherein the primary case would be a prohibition (Haram) and its secondary rule a permissible one (Mubah). An example of such case is consuming for food of carcasses or pork as a permissible act to preserve one's life, while in normal conditions and as a primary rule it is prohibited. This example, however, would only hold when following the laws for emergencies would only be permissible (Mubah) and not obligatory (Wajeb).

۳- حکم اولی حرمت و حکم ثانوی اباحه، مانند خوردن مردار و گوشت خوک و شراب و چیزهایی از این قبیل که در شرایط معمولی، حرام و در صورت پیدایش حالت اضطرار و درماندگی، مباح می‌باشد. البته این اباحه در صورتی است که عمل نمودن به قاعده اضطرار را رخصت بدانیم، نه عزیمت

4. The case wherein the primary rule would be a prohibition (Hurmat) and its secondary rule an obligation (Wujub). An example of such case is the same as the one in 3 when following the rule for emergency is obligatory, (in such a case the opinion of the Foqaha are different).26

۴- حکم اولی حرمت و حکم ثانوی وجوب، مانند مثال فوق، در صورتی که عمل نمودن به قاعده مزبور را عزیمت بدانیم، البته در این مورد اختلاف است که بحث آن خواهد آمد.

5. The case wherein the primary rule would be an obligation and its secondary rule a prohibited one. An example of such a case is obeying parents as an obligation according to many of the Foqaha. This is obligatory as long as it would not lead to an unlawful act and disobedience to God in which case it becomes prohibited.

۵- حکم اولی وجوب و حکم ثانوی حرمت، مانند اطاعت از والدین که از دیدگاه بسیاری واجب است، ولی این وجوب تا وقتی است که تبعیت از آن، موجب معصیت خداوند نشود که در صورت عارض شدن چنین عنوانی، حرام می‌گردد.

6. The case wherein its primary rule would be permissible and its secondary rule a prohibition. An example of this case is consuming the flesh of lamb or cow and other animals for food while if such animals would feed solely on human waste, as a secondary rule consuming their flesh for food becomes prohibited.

۶- حکم اولی اباحه و حکم ثانوی حرمت، مانند خوردن گوشت گوسفند و گاو و دیگر حیوانات حلال گوشت که در صورت نجاست‌خوار شدن یا مورد نزدیکی قرار گرفتن آن‌ها، حرام است.

7. The case wherein the primary rule would be permissible and the secondary one would be a desirable rule. An example of such case would be making people to smile for fun, which is a permissible act but it may become a desirable act when it would make people happy.

۷- حکم اولی اباحه و حکم ثانوی استحباب، مانند بذله‌گویی در صورتی که به حدّ لغو نرسد و نیز خواندن شعر در فرضی که مکروه نباشد، مثل آن‌که در خواندن آن زیاده‌روی نکند و نیز در شب نخواند. همین دو کار مباح، در صورتی که بر آن‌ها عنوان ادخال سرور بر مؤمنان صدق کند، حکم استحباب پیدا می‌کنند.

The Difference between the Secondary Laws and the Abrogation of the Laws

تفاوت حکم ثانوی با نسخ

Apparently people who have discussed the abrogated and the abrogating verses of the Quran they have taken the verses indicating the primary laws as the abrogated and those indicating the secondary rules and laws as.

ظاهر گفتار برخی از کسانی که در زمینه آیات ناسخ و منسوخ قرآن بحث نموده‌اند این است که ایشان در پاره‌ای موارد، آیه دال بر حکم اولی را منسوخ و آیه دال بر حکم ثانوی را ناسخ پنداشته‌اند.

It is very possible that the words of Hibbatullah Ibn Salaraah (d. 410 H.) in "Al-naskh va Almansoukh"28 and those of Abdurrahman Ibn Ata'eqi (a scholar of the eighth century) in their discourses about the Quran may have such implications.29 The interpretation of the first and last part of the verse 2:173 is being considered as abrogated and abrogating ones. In the first part of this verse pork is prohibited (He has only forbidden you what dies of itself, and blood, and flesh of swine).30 and in the second part in an emergency it is permissible (But whoever is and in the second part in an emergency it is permissible (But whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him).31

شاید بتوان گفت کلمات هبةالله بن‌سلامه (متوفای ۴۱۰ق.) و عبدالرحمن‌بن محمد عتائقی (از علمای قرن هشتم) ظهور در چنین پنداری دارد؛ زیرا این دو، بخش نخست آیه ۱۷۳ سوره بقره؛ یعنی جمله «انّما حرّم علیکم المیتة و الدم و لحم الخنزیر» و بخش پایانی آن؛ یعنی جمله «فمن اضطرّ غیر باغ و لا عاد فلا اثم علیه» را جزو آیات ناسخ و منسوخ برشمرده‌اند

thus, these scholars have called the first part as abrogated and the second part of the verse as abrogating.

One of the contemporary scholars has considered this opinion as the one to apply to all the works Obviously, there is a fundamental difference between the abrogation and secondary laws.

یکی از محققان معاصر این پندار را به بسیاری از کسانی که در باب نسخ قلم‌زنی کرده‌اند نسبت می‌دهد ولی همان‌گونه که روشن است صدور حکم ثانوی از سوی شارع با وقوع نسخ از ناحیه وی، تفاوتی اساسی دارد؛

In the definition of abrogation it is said, "Abrogation means the removal of the previously existing law by the law and a rule that is sanctioned later. The relations between the two laws would be as such that both laws would not possibly exist together".33

نسخ عبارت است از، از میان برداشتن تشریع پیشین به وسیله تشریع پسین، به گونه‌ای که اجتماع آن دو با هم ممکن نباشد.

In the case of emergencies, coercion and sever hardships and such other secondary status the previously sanctioned laws do not become obliterated only their subjects change because the subjects of the previously sanctioned laws are for normal conditions and subjects of the secondary laws are for unusual conditions.

و این در حالی است که با پیدایش حالاتی، مانند اضطرار و اکراه و حرج و دیگر عناوین ثانوی، تشریع پیشین از بین نمی‌رود، بلکه تنها موضوع تغییر می‌یابد، مکلف با حالت طبیعی موضوع تشریع پیشین است، ولی در حکم پسین، مکلف با حالت غیر طبیعی موضوع است

In the case of consuming carcasses for food a prohibition is for normal conditions and permissibility is for the case of emergency.

مثلاً حرمتِ خوردن مردار، انسان مختار و موضوع حلیت آن، انسان مضطر است

In other words, an abrogation is thinkable only in the case of such two laws that would be of totally opposite nature and as such they would not exist together at the same time. Secondly, the subject for both laws would be the same.

به دیگر سخن، نسخ در مورد دو حکمی متصور است که اولاً: میان آن دو تنافی باشد به گونه‌ای که نتوان در زمان واحد بین آن دو جمع نمود و ثانیاً: موضوع هر دو حکم، یکی باشد.

Such conditions do not exist in the case of the secondary laws. It is possible in the case of a primary and secondary law to exist at the same time.

این دو شرط در مورد حکم ثانوی منتفی است؛ زیرا اجتماع حکم چیزی به عنوان اولی‌اش با حکم همان چیز به عنوان ثانوی‌اش در زمان واحد، هیچ محذوری ندارد.

The author of "Haqa'eq Al Osul" also says it clearly, "Naskh or abrogation means obliteration of the primary or the secondary laws of a subject".

چنان‌که صاحب حقائق‌الاصول نیز به این نکته تصریح می‌کند. وی در شرح این سخن صاحب کفایه که می‌گوید: «ان النسخ و ان کان رفع الحکم الثابت» می‌نویسد :ای رفعا للحکم الواقعی الاولی او الثانوی

Therefore, although the secondary laws are for accidental and unusual conditions they in such conditions have the due force of validity. It is possible that the Shariah for some reason in a later time abrogates them just as is the case with primary laws.

توضیح این‌که، حکم ثانوی کلی گرچه برای حالت‌های عارضی و غیر طبیعی تشریع شده‌است، ولی به هر حال نوعی ثبوت و دوام دارد.شارع می‌تواند ترک عمل واجبی را در موقع بروز حرج، تجویز کند، و آن را به خاطر برخی مصالح برای همیشه مباح اعلام کند

The Criteria to Discern the Primary and the Secondary Laws

According to many of the Foqaha the secondary laws are associated with exceptional conditions and the primary laws are associated with the normal conditions. On this basis the text of verse 173 of chapter 2 gives a secondary status to an emergency.

بر اساس بیان مشهور، احکام ثانوی ناظر به حالات عارضی و استثنایی مکلف، و احکام اولی ناظر به حالات طبیعی و وضعیت عادی او هستند، مثلاً با توجه به همین تعریف، از آیه «انما حرّم علیکم المیتهَ و الدّم و لحم‌الخنزیر، و ما اُهلّ به لغیراللّه فمن اضطرّ غیر باغٍ و لا عاد فلا إثم علیه» به وضوح،عنوان ثانوی بودن «اضطرار» استفاده می‌شود

"He has only forbidden you what dies of itself and blood, and flesh of swine, and that over which any other (name) than (that of) Allah has been invoked; but whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him" 35

ترجمه آیه ۱۷۳ سوره بقره

Just because a status of a law is secondary it can not be considered a secondary law.

به صرف ثانوی بودن عنوان یک حکم، نمی‌توان آن حکم را ثانوی، به معنای مصطلح شمرد

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This is true because it is a fact in the case of the apparent, as opposed to actual, laws such as the laws on the basis of bar'aoh (freedom from responsibility on the basis of the absence of sufficient reason to prove responsibility) and emergencies. This also applies to the cases of the primary laws for emergencies like the obligation of Tayammum (particular ablution with pure earth)36 for a person who does not have any water for vozu or using water would be harmful for him.

چرا که در احکام ظاهری، مانند احتیاط و برائت و نیز در احکام اولی اضطراری، مانند وجوب تیمم برای کسی که آب در اختیار ندارد، یا استعمال آب برایش زیان‌آور است، نیز عناوین ثانویه، مأخوذ است.

For this reason some of the Foqaha have considered these two kinds of laws as the secondary laws. Of such Foqaha is Muhaqqiq-e-Naeeni who calls the primary laws for emergencies as the secondary laws.37

از همین رو برخی از اصولی‌ها و فقها بر این دو نوع حکم نیز «حکم ثانوی» اطلاق نموده‌اند. از جمله محقق نائینی که بر حکم اولی اضطراری، حکم ثانوی اطلاق نموده‌است

Allamah Muzaffar also has considered such rules as the apparent ones (Al Ahkam Al Zaheriiah) as opposed to the actual ones like precaution and freedom from responsibility as the secondary laws.

مرحوم مظفر نیز بر حکم ظاهری وجوب احتیاط یا برائت، حکم ثانوی اطلاق نموده‌است

The task of discerning the primary laws from the secondary ones although may not seem to be difficult, but in some cases it may not be that easy. Of such examples are the cases wherein the primary laws would have several possibilities. One such case comes in the sections of the laws of worships (Ibadat). For one who may have access to water, the rule is to have a Ghusl (a shower) or vozu, but for one who may not have access to water for good reasons such as when using water would be harmful for him he must perform Tayammum.

شناخت احکام ثانویه از احکام اولیه، در بسیاری‌موارد آسان به نظر می‌رسد، ولی با این وجود ممکن است در برخی موارد، این کار به راحتی ممکن نباشد و آن مواردی است که حکم اولی، اَشکال و صوری چند داشته‌باشد. از باب مثال در باب عبادات، حکم شخص حاضر، نماز تمام خواندن و روزه تمام گرفتن است، ولی حکم شخص مسافر، نماز شکسته خواندن و و افطارکردن است؛ یا مثلاً حکم کسی که آب در اختیار دارد، وجوب غسل و وضو است، ولی مکلفی که فاقد آب است یا استعمال آب برایش زیان‌آور است، باید تیمم‌نماید.

At first, it may seem as if the law therein is a secondary one but there is no doubt that the law in this case also is a primary law.

در نگاه نخست ممکن است تصور شود، در این موارد، نماز شکسته، افطار و تیمم از احکام ثانوی است، در حالی که بی‌تردید این‌ها از احکام اولی هستند

In certain cases the Shariah pictures several conditions for the people qualified to shoulder a responsibility and on such basis it has classified, or has categorized such people. For example, a person is not on a journey or is on a journey. A person not on a journey must pray in full and a person on a journey must shorten the prayers (qasr). Or that a person who intends to pray he may

have access to water or does not have access to water or that the use of water is harmful for him or it is not harmful for him. All the laws in such cases are the primary laws.39

با مراجعه به مصادر تشریع، روشن می‌شود، در برخی موارد، خود شارع برای مکلف، حالات گوناگونی در نظر گرفته و به اصطلاح تنویع نموده‌است، مثلاً فرموده‌است مکلف یا حاضر است یا مسافر، حاضر باید برخی نمازها را تمام بخواند. مسافر نیز یا سفرش، سفر معصیتی است و یا نیست، در فرض نخست نیز برخی نمازها، تمام خوانده می‌شود و در فرض دوم همان نمازها شکسته به جا آورده می‌شود، یا مثلاً مکلفی که می‌خواهد نماز بخواند، یا برای ساختن وضو، آب پیدا می‌کند یا پیدا نمی‌کند، یابنده آب نیز یا استعمال آن برایش مضر است یا مضر نیست و... تمام احکامی که شارع در این‌گونه موارد دارد، احکام اولی هستند

For some cases in Shariah there are certain rules without categorization and dividing methods and for certain conditions other laws are declared. In such instances the second law is a secondary law.40

در مواردی نیز، شارع به طور مطلق و بدون تنویع، احکامی را انشا می‌کند، سپس در جمله دیگری، یا به صورت متصل و یا به گونه منفصل، حکم حالت عارضی را ابراز می‌دارد، که در چنین فرضی، از حکم دوم، تعبیر به حکم ثانوی می‌کنیم

In other words in the first examples the laws from the very beginning are introduced in categories and in divisions but in the second examples such laws are introduced in the form of exceptions.

به‌بیانی کوتاه، در دسته اول سخن از تقسیم و تنویع است و در دسته دوم، مسئله‌تبصره و استثنا مطرح است.

The task of discerning and properly identifying the cases and the subjects to which such laws apply is also very important. A lower degree of carefulness and proper expertise may lead a Faqih to confusion and instead of a more important case he may give more consideration to what is less important, or in a crucial time the Islamic system and its protection may be exposed to dangers and insecurity.

بر اهمیت موضوع شناسی و تعیین مصادیق خارجی برای عناوین ثانویه، بیش‌تر از آن جهت پا می‌فشاریم که اگر این مرحله، با دقت و ظرافت و کارشناسی لازم، همراه نباشد، چه بسا کار بر فقیه مشتبه شود، مثلاً به جای اهتمام و توجه به امر اهم و صدور حکم بر طبق آن، توجه او به مهم معطوف شود و بر آن تأکید ورزد، یا مثلاً به دلیل عدم آگاهی عمیق از شرایط حاکم بر جامعه نتواند به موقع، اموری را که حفظ نظام بر آن‌ها مبتنی است، تشخیص دهد.

The significance of this task for the leader and the Imam of the society is of a much greater degree. The position of the Imam and leader is one that, in order to manage and supervise the system properly, requires discerning precisely all the laws and cases related to the management of the state. It is very important to discern what is important and more beneficial for the state and what is not important and beneficial for it. The leader and the Imam may even need the help of the experts in certain fields related to the management of the state.

اهمیت این مرحله در مورد حاکم اسلامی که مسئولیت امامت و هدایت سیاسی و اجتماعی جامعه را بر عهده دارد، بیش‌تر احساس می‌شود؛ چرا که به اقتضای این مسئولیت، شناسایی موضوعات آن دسته از احکام ثانوی که به اداره جامعه و وظایف حکومتی مربوط می‌شود، در حیطه کار او است. البته بسیار روشن است که تشخیص

همه موضوعات مسائل حکومتی و تعیین اهم و مهم آن‌ها و بررسی مصالح و مفاسد همه امور کشوری، در سعه و توان شخص حاکم اسلامی نیست. از این‌رو چه بسا وی لازم بداند در زمینه‌های یاد شده از کارشناسان و متخصصان مربوط کمک بگیرد.

Imam Khomeini with a view to such task has said:

"Ii is possible, based on the fact that the running of the government is only for the just Foqaha, an objection or question may arise in the minds. One may say that Foqaha are not capable of running the state. This question and objection does not have a strong base because we see that in every state the affair are managed with cooperation of a great many of the experts and knowledgeable people. The kings and the Chief Executives a long time ago until our times did not know all the issues related to the running and management of the state. The expens of every field managed the affairs of the state. If the head of the government is a just person he finds the just or trustworthy ministers and officers and in this way he brings injustice, transgression and corntption in the public treasury\ against people's lives, honor and properties under control. Just as during the government of Imam Ali all the affairs of the government were not managed by him alone, instead the governors, the judges and commanders of the army were involved. Today also we see that the management of the political issues, the army and defence of the solidarity and the independence of the country each post and position is assigned to qualified persons.

امام خمینی در اشاره به این نکته می‌نویسد:

ان ما ذکرنا من ان الحکومهٔ للفقهاء العدول قد ینقدح فی الاذهان الاشکال فیه بانهم عاجزون عن تمشیهٔ الامور السیاسیهٔ و العسکریهٔ و غیرها، لکن لا وقع لذلک بعد ما نری ان التدبیر و الادارهٔ فی کلّ دولهٔ بتشریک مساعی عدد کبیر من المتخصصین و ارباب البصیرهٔ. و السلاطین و رؤساء الجمهور من العهود البعیدهٔ الی زماننا الّا ما شذّ منهم لم یکونوا عالمین بفنون السیاسهٔ و القیادهٔ للجیش، بل الامور جرت علی ایدی المتخصصین فی کلّ فنّ، لکن لو کان من یترأس الحکومهٔ شخصاً عادلاً فلا محالهٔ ینتخب الوزراء و العمّال العدول او صحیح العمل، فیقل الظلم و الفساد، و التعدی فی بیت مال المسلمین و فی اعراضهم و نفوسهم. کما انّ فی زمان ولایهٔ امیرالمؤمنین –علیه‌السلام– لم یجر جیمع الامور بیده الشریفهٔ، بل کان له ولاهٔ و قضاهٔ و رؤساء الجیش و نحوهم. و الآن تری ان تمشیهٔ الامور السیاسیهٔ او العسکریهٔ و تنظیم البلاد و حفظ الثغور کل موکولهٔ الی شخص او اشخاص ذوی الصلاحیهٔ بنظرهم.

It is certain that if the secondary status of a rule would become an individualized matter in such a case the task of discerning the cases to which such rules and laws may apply will not be very difficult.

البته اگر عناوین ثانویه، جنبه فردی پیدا کند، تشخیص موضوعات آن‌ها در بسیاری از موارد کار دشواری نخواهد بود.

Obviously and very often the individuals easily discern what is difficult, harmful and a case of emergency for him or her. Although in some cases even individuals need the help of an expert of the field to which the case is related such as the physicians etc., especially when the level and degree of difficulties and hardships would he such that is judged by commonsense not according to the individuals standards.

چه این‌که غالباً هر شخصی، اضطرار و عسر و حرج خود را به راحتی تشخیص می‌دهد، گرچه در بعضی موارد نیز این کار بدون رجوع به متخصص مربوط، مانند پزشک، میسر نیست، مخصوصاً اگر معیار در این موارد عسر و حرج نوعی باشد.

The Procedures to Enforce or Practice the Secondary Laws

In general, three stages can be presumed for the secondary laws:

The initiation;

The discernment;

The enforcement stage.

The first stage is of the functions of the legislative authorities in Shariah. When there is a need and there is no obstacle the Shariah may sanction a law, which will be addressed to all Muslims universally and not individually, like the following verse of the Quran:

"Allah has not laid upon you any hardship (haraj) in religion. The second stage, which can also be called the stage of discernment, is when the people study the individual case to find which rule is applicable to it. The ordinary people themselves can, sometimes, carry this task. One example of such a case is the case of one who finds himself in a difficult position of consuming pork or carcasses for food or in the month of Ramadhan one is convinced that fasting is harmful for him due to a certain illness.

In some cases the leadership or the legislative body carries the task of the stage of discernment. This is when the government, in order to solve social problems, would need to benefit from the secondary laws. If the leadership or the advisors would see that standardizing the prices of in-public-demand commodities would help to overcome certain difficulties they may do so for the protection of the system. The author of Al-Jawahir in the section on "unlawfulness of wages for obligatory acts"

writes:

"It is not an offense to receive wages for teaching certain industrial skills that are needed in the society because running of43 the social order and the lives of industrialist depend on it.

به طور کلی می‌توان برای احکام ثانویه، مراحل سه‌گانه انشا، تشخیص و اجرا را در نظر گرفت. مرحله نخست که از شئون شارع است و به دستگاه تشریع، مربوط می‌شود، زمانی است که مصلحت و مقتضی برای صدور حکم، موجود و مانع از آن مفقود باشد. حکمی که در این موقعیت از ناحیه شارع صادر می‌شود، کلی و خطاب او به مکلفین به گونه قانونی است نه شخصی، مانند این‌که می‌فرماید: «ما جعل علیکم فی الدین من حرج.» مرحله دوم که می‌توان آن را مرتبه تطبیق نیز نامید، زمانی است مابین جعل حکم ثانوی و عمل به آن. در این مرحله،

شخص واقعه مورد ابتلا را مورد مطالعه قرار می‌دهد تا معلوم شود آن واقعه، مصداق کدام عنوان است. این کار در پاره‌ای موارد توسط مکلف معمولی (مقلّد) انجام می‌گیرد، مثلاً چنین فردی در شرایطی ویژه خود را نسبت به استفاده از گوشت خوک یا گوشت حیوانی که ذبح شرعی نشده، مضطر می‌بیند، یا در ماه رمضان، روزه گرفتن را برای سلامتی خود مضرّ تشخیص می‌دهد.

در برخی موارد نیز تشخیص و تطبیق، از سوی حاکم اسلامی یا ابزار ولایی او، مانند قوه مقننه انجام می‌گیرد و آن زمانی است که حکومت، در حل معضلات اجتماعی و مشکلات جامعه نیازمند بهره‌گیری از احکام عناوین ثانویه شود. از باب مثال، ممکن است حاکم یا کارگزاران او تشخیص دهند آزاد بودن قیمت‌ها و عدم نرخ‌گذاری، در شرایطی ویژه، موجب هرج و مرج و اختلال نظام می‌شود و بدین ترتیب نرخ‌گذاری، از باب مقدمیت داشتن برای حفظ نظام، لازم می‌شود. گاهی نیز این‌کار، توسط فقیه و مفتی دیگر غیر از حاکم انجام می‌پذیرد و آن زمانی است که فتوای او بر اساس عناوین ثانویه باشد، مثلاً صاحب جواهر در تعلیل این حکم که «جهت حل و فصل خصومات، تحصیل مرتبه اجتهاد، واجب است» می‌نویسد: «لتوقف النظام علیها(42).»

هم چنین در مبحث «حرمة التکسب بما یجب علی الانسان فعله» عبارتی دارد که حاصل آن چنین است: مانع ندارد انسان بر انجام دادن واجب‌های کفایی، مانند صنایع، اجرت بگیرد؛ چرا که بدیهی است نظام جامعه بر آن توقف دارد

The author of "Miftah al Keramah" in his discussion on the barren and unutilized lands points out to one of the cases to which the rule of no hardships (la-haraj) applies, and says:
"By utilizing the unutilized land (Mavat) one becomes the owner of such land. Because of the fact that people need to live in civilized manners if utilizing the land would not give one the right to become the owner it will cause huge hardships (haraj) to the 44society.

صاحب مفتاح الکرامه، هنگام بحث از اراضی موات، یکی از موارد قاعده نفی حرج را مورد اشاره قرار داده و می‌نویسد:

زمین‌های موات به اجماع امت، به وسیله احیا به ملکیت احیا کننده در می‌آید، به شرط این‌که موانعی در کار نباشد... و برای این‌که احیای موات مورد نیاز واقع می‌شود و به آن ضرورت شدید پیدا می‌شود؛ زیرا انسان مانند چهارپایان نیست، بلکه مدنی الطبع و نیازمند مسکن و مکان اختصاصی است، بنابراین اگر احیای موات مشروع نباشد، حرج بزرگ پیش می‌آید.

Obviously the task of deducing the secondary laws from the texts of Shariah is the task of a Mujtahid just as deducing the primary laws and the branches of such laws is.45 Those of the secondary laws that in regards to their applicability are not of limited nature are dealt with only in the section to which such laws belong as branches in a process jurisprudential accepted. Those of the secondary laws that arc dealt with in several sections of Fiqh are treated as the rules of Fiqh, such as the principle of no harm (la-zarar) and no hardships (la-haraj). The task of a Faqih is to study the basis of such rules in regards to their authority and authenticity and clarify their limits and domain.46

البته روشن است که استنباط خود احکام ثانویه و استخراج آن‌ها از ادله نقلی و عقلی نیز کار مجتهد است، همان‌گونه که استنباط احکام اولیه و بحث در فروع این احکام، از شئون او است؛ منتها آن دسته از احکام ثانوی که جنبه جزئی و موردی دارد و تنها در یک یا دو باب فقه، مطرح می‌شود، در همان باب به صورت فروع فقهی مورد بررسی قرار می‌گیرد، مانند بحث در مورد حرمت استفاده از گوشت حیوانی که نجاست‌خوار شده‌است، ولی آن دسته از احکام ثانوی که در بیش‌تر یا همه ابواب فقه جریان می‌یابد، به عنوان قواعد فقهی مورد بررسی واقع می‌شود، مانند لاضرر و لاحرج. کار فقیه این است که قواعد مزبور را از جهت مستند و دلیل مشروعیت، مورد مطالعه قرار دهد و حدود و ثغور آن‌ها را تبیین نماید.

In regards to the third stage, namely the application and execution stage, in general, one may say that it is the task of the people or the government and from this aspect there is no difference between the secondary and the primary laws.47
One very important point to note in this regard is the fact that the secondary rules are often involved in the social issues and it, obviously, in the first place, is the duty of the government to see it executed properly. For this reason it is important to consider the secondary laws from two angles:
در مورد مرحله سوم؛ یعنی مقام اجرا، به طور کلی می‌توان گفت: مسئولیت اجرای احکام ثانویه، بر عهده «مکلفین» است و از این حیث، تفاوتی میان احکام اولیه و ثانویه نیست. آن‌چه در این‌جا در خور توجه می‌باشد این است که مقصود از مکلفین، برخلاف آن‌چه به ذهن پیشی می‌گیرد، تنها آحاد معمولی جامعه نیست؛ زیرا همان‌گونه که در فصل سوم گذشت، بسیاری از احکام ثانویه، ارتباطی تنگاتنگ با مسائل اجتماعی و کلی جامعه دارد و روشن است که اهتمام به این مسائل در وهله نخست، وظیفه حکومت اسلامی است. از این‌رو مناسب است اجرای احکام ثانوی را در دو قسمت مورد توجه قرار دهیم:

(a) The Secondary Laws Applicable to the individuals only:

احکام ثانوی فردی

Examples of such laws are the obligations of fulfilling one's vows, covenants, oaths, the conditions set along with a contract, involvement in certain prohibited matters due to emergencies, coercion and missing certain obligations due to an emergency. Such cases are of the ones for which people and individuals are responsible to fulfil and the government or the leadership does not play any role therein.
مانند وجوب وفا به نذر، عهد، قسم، شرط در ضمن عقد و جواز ارتکاب پاره‌ای از محرمات در هنگام اضطرار و اکراه. اجرای این دسته از احکام، از جمله تکالیف افراد مکلف است و به طور مستقیم هیچ مساس و ارتباطی با حاکم و مدیریت جامعه ندارد.
(b) The Secondary Laws that are Applicable to the Social Issues:
احکام اجتماعی
Just as discernment of the secondary laws applicable to the social issues is the duty of the government so also is its application and execution. The reason for this is also clear. Of such

reasons are disruption and chaos that may follow due to ignoring the duty of enforcing such laws.49

همان‌گونه که تشخیص احکام ثانوی اجتماعی، مربوط به حاکم و ولی‌امر است، اعمال و اجرای آن‌ها نیز در وهله نخست به او و ابزار ولایی او مربوط می‌شود، دلیل این امر هم روشن است و آن این‌که اگر افراد خود سرانه این احکام را اِعمال کنند، اختلال نظام و هرج و مرج اجتماعی لازم می‌آید.

For example, adjustment of prices of certain commodities and controlling them and controlling the activities of hoarding urgently needed commodities are all of the duties of the government and no one would have the right to interfere with such issues. Of such examples are the issues related to the export and import of the commodities, during peace or war times if they would affect the security of the state.

مثلاً نرخ‌گذاری کالاها و کنترل قیمت‌ها، جلوگیری از احتکار یا واردات و صادرات برخی کالاها، اعلان صلح یا جنگ، تعطیل نمودن حج و زیارت عتبات عالیات و... در صورت توقف داشتن نظام جامعه و مصلحت اسلام بر آن‌ها از جمله وظایف حکومت اسلامی است و کسی حق ندارد خودسرانه به این امور اقدام کند.

Imam Ali in one of his instructions to Malik-e Ashtar has considered the tasks of controlling hoarding of needed commodities and of maintaining proper prices for the needed goods among the duties of the governor.

علی –علیه‌السلام– در عهدنامه خود به مالک اشتر، جلوگیری از احتکار و نظارت بر قیمت‌ها را از جمله وظایف او دانسته و می‌فرماید

The Imam has said:
"Do not allow hoarding of in-public-demand goods because (he Holy Prophet (S.A.W.) would not allow it. The dealings of the people must be based on justice and fairness. In the exchange of the goods no harm or loss should be caused to the buyers or sellers. After wanting people against the evil of hoarding you may bring such people into account through balanced penalties".5

:

پس، از احتکار جلوگیری نما، چرا که رسول‌اللّه –صلی‌اللّه علیه و آله از آن جلوگیری نمود و باید معامله، آسان و بر اساس موازین عدالت باشد و نرخ کالاها به گونه‌ای باشد که به هیچ کدام از فروشنده و مشتری اجحاف نشود. و اگر کسی پس از این‌که او را از احتکار منع نمودی، به آن مبادرت ورزید، بدون زیاده‌روی، کیفر و مؤاخذه نما.

One of the contemporary jurists after giving some explanation about the secondary rules, says: “How many great problems which were solved in the light of the secondary rules and how many sophisticated and difficult problems will be solved by these rules; the secondary rules are the greatest instrument available in the Islamic government for solving the problems of the society”.

یکی از فقهای معاصر پس از توضیحاتی چند در مورد احکام و قواعد ثانویه می‌نویسد: چه بسا مشکل‌های بزرگ و دشواری‌های پیچیده و تاریک که به کمک این قواعد و احکام و در پرتو آن‌ها حل و روشن می‌گردد. از این‌رو احکام عناوین ثانویه، از مهم‌ترین اسباب حکومت اسلامی، برای حل مشکلات است.

Certainly, one should not exaggerate the usefulness of the secondary rules and with the emergence of every problem resort to them. The expediency of the Islamic society is that its problem resort to them. The expediency of the Islamic society is that its difficulties should be solved as much as

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possible by the primary rules except in the emergency times; only when the primary rules are not useful, the secondary rules should be used.

نکته مهمی که باید در این‌جا خاطرنشان شود این است که نباید در راه‌گشا دانستن احکام ثانوی به جانب افراط رفت و با پیدایش هر مسئله و مشکلی بی‌درنگ به سراغ این احکام رفت. مصلحت جامعه اسلامی در این است که در حد امکان، مشکلات آن را با احکام ثابت و اولیه، مرتفع نمود و تنها در مواقع ضرورت و هنگامی که احکام اولیه، جواب‌گو نیستند، به سراغ احکام ثانویه رفت.

Recognition of the criteria ol the secondary rules requires awareness. The criteria of the secondary rules is the impossibility of acting upon the primary rules and following them. Recognition of this and recognition of the instances and cases requires religious knowledge; for example wherein *zarar* and *haraj* is instance of the secondary rule, or distinguishing of the most important matter from more important ones *(Ahamm and Mohemrn),* requires the religious expertise.[51]

Categories of the Secondary Laws

None of the *Foqaha* in their investigations and works have specified the number of the titles for the categories of the secondary laws. Only the following are the well-known titles for the categories of such laws.

1. Protection of the Islamic system. (*Hefz alnedam)*
2. The Urgencies and Pressing Needs. (*Izterar)*
3. Losses. (*zarar)*
4. Hardships and Constraints *(Osr and haraj*)
5. Coercion *(fkrah)*
6. Being a lead, or Introductory (*Muqaddimah-Al-Wajeb or Hararn*)
7. Important and more important *(Ahamm and Mohemm)*

Initially, each of the above mentioned titles seems independent titles but a careful study and proper consideration of these titles reveal that many of them are very closely related to the others. These relations are as such that in some cases two of them can be considered as one and the same.

In the views of some of the scholars of *Shariah* urgency (*Izterar*) is a universal title and the issues of hardships and constraints are some of the examples of urgency and pressing needs. The author of *Al-Jawahir* in the section of the *Taharat* dealing with rules of cleanliness has said this:

"It is not permissible to have Vozu or Ghusl with unclean water nor is it permissible to drink such water except in the case of urgency. Hardships and extreme constraints are of such examples" [52]

In some cases he considers the case of losses *(Zarar)* the same as an urgency. In the section of the law about food and drinks he has the following expressions, "In all cases wherein eating or drinking is not permissible, in all such cases due to urgency it all becomes permissible. Proof for such rules are the verses of the Quran, the principle of no harm, no constraints *(la-haraj)* and that Islam is an easily practicable religion *(Al Shariah Al samhah)* [5۳]

Although, hardships and constraints *(Osr and Haraj)* may be considered the same as "urgency"

(*Izterar)* each one is dealt with separately as an independent principle and rule. The existence *oiAhadith* in the *Shariah* is the reason for such separation. In some of these *Ahadith* the title "urgency" *(Izterar)* and in some of them "hardships"
and "constraints" *(osr* and *haraj)* or "losses" (*zarar)* are mentioned. One of the contemporary *Foqaha* also points out saying:
"Coercion may also be considered an other example of "urgency". Some of the scholars have even considered both titles; (coercion and urgency) as one and the same as in the interpretation of verse 173 of chapter two wherein a compelled person ('moztarr) is considered as a coerced one *(mokrah).*[54] *The* Foqaha *have considered the titles such as "important and more important"* (Ahamm and Mohemm) *as the secondary titles side by side with the other secondary titles such as extreme "hardships and constraints" and it seems as if it is not a separate title. In fact, urgency should, with a view to the following, be considered a basic standard for the practice of the secondary laws. Although the primary laws from the point of view of the* Shariah *are important and in normal conditions it is necessary to obey such laws but in certain cases obedience to the secondary laws is more important. In the* Quran *and* Sunnah *also there are no such captions. It is only the decision of reason that when facing an important and more important* (Ahamm and Mohemm) *issue the more important must be given priority.*
Therefore, the law of "important and more important" is the criteria and standard that dictates to obey the secondary laws, in certain cases, before the primary laws. On this basis one may say that giving priority to the secondary laws before the primary laws for practical reasons is because of the fact that a more important case has priority over an important case. Some scholars have also stressed on this point.[55]
The law of "important and more important" is not limited to the cases of the secondary laws. In the case of a conflict between two laws of primary nature also this law is followed. For example, in the case of saving a life from drowning the *Foqaha* consider it permissible to walk on a piece of land that is currently under the control of some one due to usurpation, if saving a life may require it. It is very likely that in those cases wherein making an untrue statement or a statement that involves backbiting is considered permissible is based on this law. [5۶] However, the number of the secondary laws can not be limited to a known number of cases, even though the idea about the applicability of the popularly known secondary laws may be considered a good possibility. It is not so in the cases of the secondary laws that are not so popular because there are no known rules to follow in discerning and distinguishing such laws. Such secondary laws are found only in scattered sections of the law where one may face them.
It seems necessary to conduct more precise and profound studies to discern, distinguish and analyze the issues of the principles of jurisprudence and issues of jurisprudence. It is also necessary to deduce and infer secondary laws for the newly emerging issues and cases that require the application of such laws.

Titles of the Popularly Known Secondary Laws: Protection of the System

Of the most important issues, according to the *Shariah,* one is the protection of the Islamic system *(Hefz-al-Nedam).*

حفظ نظام، از موضوعات بسیار مهم فقهی است

This caption and title implies sometimes (a) the preservation and protection of the sovereignty of the Islamic system and the prevention of confusion and uncertainty from creeping into the system at the hands of the internal and external enemies. For this reason Naeeni considered the protection of the sovereignty of the country against the hostile intentions of the foreigners and their plots to mobilize the defence capabilities as preservation and protection of the Islamic system. In other words he considered preserving the sovereignty and independence of Muslim lands.

نگاهی به متون و نوشته‌های فقهی نشان می‌دهد این عنوان به دو معنا استعمال می‌شود؛ زیرا گاهی مقصود از آن، حفظ و نگه‌داری حاکمیت اسلامی و جلوگیری از خدشه‌دار شدن آن به وسیله دشمنان داخلی و خارجی اسلام است که می‌توان عنوان «حفظ بیضه اسلام» را نیز به همین معنا یا دارای معنایی نزدیک به این دانست و به همین جهت، مرحوم نائینی «تحفظ از مداخله اجانب و تحذّر از حیل معموله در این باب و تهیه قوه دفاعیه و استعدادات حربیه» را در لسان متشرعین، حفظ بیضه اسلام، و در بیان دیگران «حفظ وطن» نامیده‌است

(b) Sometimes it means to enforce and bring about law and order within the Muslim society. It is to enforce the rules of discipline among the people, the establishments and institutions of the society. Protection of the system in this sense is opposed directly to chaos and anarchy.

گاهی هم مراد از آن، حفظ نظم در درون جامعه اسلامی و برقراری انضباط میان مردم و سازمان‌ها و دستگاه‌های اجتماعی است. حفظ نظام به این معنا، در مقابل اختلال و هرج و مرج، استعمال می‌شود.

The caption "protection and preservation of the system" in the majority of cases, applies to its meaning in case (b), the author of *Jawahir,* on the issue and discourse that in order to settle the court cases and disputes among people, and it is obligatory to acquire the qualification of a *Mujtahid,* has said this: "The basis and proof for such necessity is that the Islamic system needs it."[59]

کلمه مورد بحث، در بیش‌تر موارد، در معنای دوم به کار رفته‌است، از باب مثال صاحب جواهر، در تعلیل این حکم که جهت حل و فصل خصومات، تحصیل مرتبه اجتهاد، واجب است، می‌نویسد: «لتوقف النظام علیها

According to Imam Khomeini, prevention of chaos and anarchy from creeping into the society is the basis of the philosophy to establish a government.[60]

امام راحل، جلوگیری از هرج و مرج و حفظ نظام به معنای دوم را یکی از فلسفه‌های تشکیل حکومت می‌داند و می‌نویسد:.............

According to Naeeni, in a discourse on preservation and protection of the system it indicates and refers to both meanings of the phrase preservation and protection of the system, mentioned in (a) and (b). Naeeni has said:

"In *Shariah,* the protection and preservation of the Islamic system is one of the most important obligations. Evidently, all of the aspects related to the foundation of the government, protection of the honor and the rights of the people are based on two principles:

مرحوم نائینی در گفتاری، حفظ نظام به هر دو معنای گفته شده را مورد توجه قرار می‌دهد و می‌گوید:

در شریعت مطهره، حفظ بیضه اسلام را اهم جمیع تکالیف و سلطنت اسلامی را از وظایف و شئون امامت، مقرر فرموده‌اند... و واضح است که تمام‌جهات‌راجعه به‌توقف نظام‌عالم، به اصل سلطنت و توقف حفظ شرف و قومیّت هر نوعی به امارت نوع خود انسان، منتهی به دو اصل است

(a) The maintenance of law and order as means of progress in the society is one of such principles. It is the protection of the people's rights, maintaining justice and other obligations related to the welfare of the country and people, (b) The other such principle is *defending the country against the invaders and intruders "*[61] Both tasks of the safeguard and protection of the system in the sense mentioned in (a) or (b) are obligatory tasks according to *Shariah* and according to reason. The scholars consider this issue and principle a firmly and already settled one, free from any need of further analysis. They have based many rules on this principle.

اول: حفظ نظامات داخلیه مملکت و تربیت نوع اهالی و رسانیدن هر ذی‌حقی‌به حق خود و منع از تعدی و تطاول آحاد ملت بعضهم علی بعض الی غیر ذلک، از وظایف نوعیه راجعه به مصالح داخلیه مملکت و ملت؛ دوم: تحفظ از مداخله اجانب و تحذر از حیل معموله. نکته قابل توجه در این زمینه این‌که، حفظ نظام، به هر دو معنا، از واجبات شرعیه و عقلیه است. نگاهی به ابواب مختلف فقه نیز نشان‌دهنده مسلّم بودن این مطلب در میان همه فقها است. این دانش‌وران در موارد فراوانی، با مفروغ عنه گرفتن این حکم، احکام و آثار گوناگونی را بر آن مبتنی کرده‌اند که با نمونه‌هایی از آن آشنا شدیم،

For example Naeeni writes:

"The **Shariah** does not agree with causing anarchy and chaos in the society is clearly evident and all the duties related to the protection and safeguarding of the system and the country are of the urgent obligations beyond any doubt

از این‌رو محقق نائینی به مناسبتی می‌نویسد:

چون عدم رضای شارع مقدس به اختلال نظام و ذهاب بیضه اسلام، بلکه مهم‌تر بودن وظایف مربوط به حفظ نظم مملکت اسلامی از تمام امور حسبیه، از اوضح قطعیات است، پس ثبوت نیابت فقها و نوّاب عام عصر غیبت، در اقامه وظایف مذکور، از قطعیات مذهب خواهد بود

The reason that these laws are considered as the secondary ones is because of the fact that in many cases the protection and the safeguarding of the system involves doing or otherwise of certain acts. Such acts that may have been permissible in normal conditions may be due to the efforts of providing security to the system have become obligatory or otherwise. Therefore, the title and caption of being a secondary law is an introductory and a step towards some other tasks and because of this they have become obligatory or otherwise Al-Khoei has said:

"Learning all artistic abilities are of the permissible activities and they do not even come under the desirable activities far from being obligatory or otherwise ones. However, if ignoring to learn such skills would lead to the emergence of chaos in the society and the system then learning such skills becomes an obligation (*Wajeb*).[63]

حتی به نظر ما، این واجب، از احکام اولیه است و علی‌رغم آن‌چه مشهور است، دلیلی بر ثانوی شمردن آن نمی‌یابیم، ضابطه اولی بودن این حکم نیز که در بخش نخست کتاب گفتیم به طور دقیق بر آن انطباق دارد؛ چرا که در عروض حکم وجوب بر عنوان حفظ نظام، هیچ عنوان و حالت عارضی، واسطه نشده‌است. ظاهراً آن‌چه موجب ثانوی شمردن این حکم شده، این است که در بسیاری موارد حفظ نظام، متوقف بر انجام یا ترک برخی امور است.

می‌توان عبارتی از مرحوم آیت‌اللّه خویی در مباحث «مکاسب محرمه» را نیز اشاره به همین نکته دانست:

اما الصناعات بجميع اقسامها فهي من الامور المباحة و لا تتصف بحسب انفسها بالاستحباب فضلاً عن الوجوب، فلا يكون التكسب بها الا مباحاً، نعم انما يطرء عليها الوجوب اذا كان تركها يوجب اخلالاً بالنظام و حينئذ يكون التصدى لها واجباً كفائياً او عينياً؛

همه اقسام صنایع، از امور مباح محسوب می‌شوند و فی‌نفسه به استحباب متصف نمی‌گردند چه رسد به این‌که متصف به حکم وجوب شوند، پس تکسّب با این امور، حکمی جز اباحه ندارد، بله هرگاه رها نمودن این صنایع سبب اخلال به نظام شود، حکم وجوب بر آن‌ها عارض می‌شود و در این صورت تصدی برای انجام آن‌ها واجب کفایی یا عینی خواهد بود.

Hardships and Constraints

عسر و حرج

One *of* the important rules and principles that apply very frequently in *Fiqh* and the Islamic law is the principle of "no hardships and no constraints". (*La-haraj*)

یکی از قواعد مهم و کثیر الاستعمال در فقه و قانون اسلامی «قاعده نفی عسر و حرج» است

The fact that so many of the *Foqaha* apply it in so many sections of the law to various cases is proof of the significance and usefulness of this principle.

تمسک فقها به این قاعده، در ابواب گوناگون و مسائل متنوع فقه، دلیل بر اهمیت و فواید فراوان آن است.

In most of the issues related to the government and the society and some of the newly emerging complex cases that require ruling from *Shariah* this principle may provide key answers and solutions.

در بسیاری از مسائل حکومتی و اجتماعی و پاره‌ای از معضلات و مشکلات نوپیدای فقهی نیز، چنان‌که در بخش نخست کتاب اشاره نمودیم می‌توان این قاعده را راه‌گشا و مؤثر دانست.

There is another point that reveals the significance of more investigations into this principle. It is the fact that some people, despite the existence of solid evidence to prove "hardships" authority and authenticity and the fact that so many of the *Foqaha* have applied this principle to so many cases, they have considered its nature and applicability unclear. They have limited its authority to the obligations whose fulfillment is beyond human capabilities. Thus, practically they have denied its authority unaware of the fact that in such cases reason independently negates the responsibility and there will be no need on the part of *Shariah* to declare such a principle. Of such people one may name Sheikh Hurr Ammili".[64]

نکته دیگری که اهمیت بحث از این قاعده را روشن‌تر می‌کند این است که برخی علی‌رغم ادله محکم و متقن این قاعده و استفاده فراوان فقها از آن، مفاد آن را مجمل دانسته، و با محدود ساختن حجیت آن به موارد تکلیف ما لایطاق، عملاً حجیت آن را مورد انکار قرار داده‌اند، غافل از این‌که در چنین مواردی، خود عقل به‌طور مستقل به نفی تکلیف، حکم می‌کند و دیگر حاجت به تأسیس این قاعده امتنانی از سوی شارع نیست. در این زمینه می‌توان از مرحوم شیخ حر عاملی نام برد

Hardships and Constraint are of Four Kinds

عسر و حرج در کارها، دارای چهار قسم است

(1) Hardships and Constraints beyond human capabilities to bear.

(2) Hardships and Constraints of a smaller degree than the one mentioned, but they would cause disruption in the society.

(3) Constraints that would be to none of the degrees mentioned above, but they would cause loss of life, property or honor.

(4) The degree of constraint that is not beyond human capabilities to bear and would not cause disruption or losses in the social system, but to endure and bear it would cause a great deal of suffering.

۱– عسر و حرج به اندازه‌ای که مکلف طاقت تحمل آن را نداشته‌باشد

۲– عسر و حرجی که از مقدار فوق کم‌تر است، ولی با این وجود تحمل نمودن آن موجب اختلال نظام می‌شود؛

۳– حرجی که به هیچ یک از این دو پایه نرسد، ولی به حدی باشد که مستلزم ضرر جانی یا مالی یا آبرویی شود؛

۴– حرجی که تحمل آن فوق طاقت و مستلزم اختلال نظام و ضرر نباشد، بلکه در تحمل آن، تنها مشقت و تنگنا باشد.

From the *Foqaha* point of view, the first kind of constraints and hardships are not of the cases to which the secondary laws may apply. It is obvious that the *Shariah* does not impose a responsibility beyond peoples' capabilities.

در این‌که قسم نخست از محل بحث بیرون است، هیچ شبهه و تردیدی نیست. جای بحث از آن، کتب کلامی و برخی از کتب اصولی است که در آن‌ها جواز و استحاله «تکلیف به ما لا یطاق» را مورد بررسی قرار داده‌اند. البته تمام کسانی که در این زمینه، بحث نموده‌اند، بر این نکته اتفاق نظر دارند که چنین تکالیفی در شریعت، وجود خارجی ندارد.

The second kind of hardships and constraints is just like the first one because the expressions and the pronouncements of *Foqaha* on the issue of hardships and constraints do not include this kind. Evidence to this is the fact that the unreasonableness of imposing an obligation that would cause disruption in the social system is obvious and without any shred of doubt. We all know that the goal of *Shariah* for having such laws is not to disrupt and destroy the social orders and paralyze the sound and peaceful way of life of individuals. The final goal of the *Shariah* is to, in most of the rules, safeguard and protect society to the highest level of excellence and decency. With the view to this, how could it be acceptable on the part of the *Shariah* to command people for the duties that would disrupt social order?

قسم دوم نیز مانند قسم نخست، از محل بحث بیرون است؛ زیرا کلمات و عبارات‌علما، از این قسم، انصراف دارد، و دلیل آن هم این است که قبح تکالیفی که موجب اختلال نظام می‌شود، آن چنان روشن و ظاهر است که حاجت به استدلال ندارد. زیرا بدیهی است که مقصود شارع مقدس از تشریع نمودن احکام، ابطال نظام‌جامعه و تعطیل نمودن زندگی افراد آن نیست، بلکه غرض نهایی او از تشریع بسیاری از تکالیف، تنها حفظ این نظام به بهترین وجه است. با این حساب چگونه‌می‌توان پذیرفت شارع مردم را به اموری تکلیف نماید که موجب اختلال نظام شود؟!

As far as the case in (3) is concerned, it may fall under the laws of the "principle of no harm" and that the "principle of no constraint" does not apply to it, although in many cases of no harm one

could present evidence from both principles. Therefore, the fundamental argument in the "principle of no constraint" is only related to the fourth kind of hardships and constraints, mentioned above.[65]

در مورد قسم سوم نیز باید گفت این قسم، داخل در تحت قاعده لاضرر است و از مجاری ویژه قاعده نفی حرج به حساب نمی‌آید، گرچه می‌توان در بسیاری از موارد ضرر، به هر دو قاعده، استدلال نمود. از آن‌چه گفتیم روشن می‌شود که محل بحث در قاعده نفی حرج، تنها قسم چهارم از اقسام عسر و حرج است.

Evidence of the Authority and Sources of this Principle

(a) Evidence of the Authority of this Principle from The verses of the Holy *Quran*

آیات

1. "Allah has not laid upon you any hardship (haraj) in religion[66]
2. "Allah does not desire to put on you any difficulty" (haraj).
3. "Allah desires ease for you, and He does not desire for you difficulty (Osr) "[68]
4. "Allah does not impose upon any soul a duty but to the extent of its ability" [69]

۱ – و ما جعل علیکم فی الدین من حرج؛(4)

و خداوند در دین حرجی بر شما قرار نداده‌است.

۲– ما یرید اللّه لیجعل علیکم من حرج؛(5)

اراده خدا این نیست که بر شما حرجی قرار دهد.

۳– یرید اللّه بکم الیسر و لا یرید بکم العسر؛(6)

خداوند درباره شما، آسانی را اراده کرده و سختی را اراده نکرده‌است.

۴– ربّنا و لا تحمل علینا اصراً کما حملته علی الذین من قبلنا؛(7)

پروردگارا هیچ بار گرانی بر (دوش) ما مگذار همان‌گونه که آن را بر (دوش) پیشینیان ما نهاد.

(b) Evidence of the Authority of this Principle from *Ahadith*

روایات

1. "A man asked Imam Ali, my fingernail came off in an accident. How should I make vozu ? "Wipe it from the surface a piece of cloth and you do not have to wash i t R e p l i e d Imam Ali.[70]

۱ – روایت معروف عبدالاعلی مولی آل‌سام:

قلت لابی‌عبداللّه –علیه‌السلام–: عثرت فانقطع ظفری فجعلت علی اصبعی مرارهٔ فکیف أصنع بالوضوء؟ قال – علیه‌السلام–: یعرف هذا و اشباهه من کتاب‌اللّه عزّ و جلّ قال‌اللّه عزّ و جلّ: «ما جعل علیکم فی الدین من حرج» اسمح علیه

2. "Imam Ali was asked about the use of a jacket made of the leather from an animal that is not known as regards being slaughtered properly according to the instructions of the Shariah or not. The Imam considered its use lawful even during pray ers on the basis that Islam is a religion that does not impose hardships on p e o p l e [71]

۲– مضمره محمد بن‌ابی‌نصر:

سألته عن الرجل یأتی السوق فیشتری جبهٔ فراء لا یدری أذکیهٔ هی أم غیر ذکیهٔ، أیصلّی فیها؟ فقال نعم، لیس علیکم المسئلهٔ، ان اباجعفر –علیه‌السلام– کان یقول: ان الخوارج ضیقوا علی انفسهم بجهالتهم ان الدین اوسع من ذلک؛ از او در مورد مردی پرسیدم که به بازار می‌رود و ردایی از جنس خزّ می‌خرد، در حالی که نمی‌داند آن خزّ، تذکیه شده یا نه، آیا می‌تواند در آن ردا نماز بخواند؟! حضرت فرمود: بله، این پرسش بر شما لازم نیست. امام باقرعلیه السلام– می‌فرمود: خوارج به‌سبب نادانی، زندگی را بر خود تنگ کردند. دین، وسیع‌تر و آسان‌تر از چیزی است که آنان می‌گویند.

Muhaqqiq-e Bujnurdi also writes in this regard

محقق بجنوردی، پس از توضیح دلیل‌های این قاعده (آیات و روایات) با اشاره به قلمرو گسترده آن می‌نویسد

"The evidence for relieving people from the burden of the laws that cause constraints on the Muslims is the kindness and the grace of Lord God on His servants. He wanted the religion to be easy to follow for Difficulties the people and without The Meaning and the Implications of this Principle under consideration are indicative of the fact that God has not sanctioned any law that would cause constraints on the people.

و هذه الآیات تدلّ دلالهٔ واضحهٔ علی ان‌اللّه تبارک و تعالی لم یجعل فی دین الاسلام احکاماً حرجیهٔ بحیث یکون امتثال احکامه و اطاعهٔ اوامره و نواهیه شاقاً و حرجاً علی المسلمین و المؤمنین بهذا الدین این آیات به روشنی بر این نکته دلالت دارند که خداوند تبارک و تعالی، در دین اسلام، احکام حرجی، جعل نفرموده، احکامی که امتثال آن‌ها و اوامر و نواهیی که اطاعت آن‌ها، برای مسلمانان، مشقت‌بار و حرجی باشد.

For example, in the case of a person whose injured finger is bandaged and difficult to remove such bandages for *Vozu,* no obligation that would make him have *Vozu* as in normal conditions is sanctioned Also, if severe weather would cause a great deal of constraints, compared to normal conditions, no law that would obligate him to have *Ghusl* in such condition is sanctioned.

از باب مثال، بر کسی که جبیره بر دست دارد و برداشتن آن مستلزم حرج و عسر است وجوب وضوی معمولی،جعل نشده،و بر شخصی‌که در برودت‌هوا گرفتار آمده‌و غسل نمودن در آن وضعیت، مستلزم حرجی است که عادتاً تحمل نمی‌شود، وجوب غسل، جعل نشده‌است.

Therefore, all the Islamic responsibilities of the people at first relates to conditions free from constraints as if all the laws and religious rules initially are sanctioned with the stipulation of freedom from hardships and difficulties.[73]

The Meaning of Hardships and Constraints

مفهوم عسر و حرج

Constraint, in its dictionary definition is narrowness and impasse.

حرج در اصل به‌معنای تنگنا و ضیق است

In *"7 *A Hadith,* sometimes it refers to sin and unlawful matters.

حرج، در اصل به معنای تنگنا است، و به گناه و حرام [نیز] حرج گفته می‌شود... و در حدیث، حرج به این معنا زیاد آمده‌است

The author of *Sihah al Lughah* and Ibn Manzur say "Constraint means sin, difficulty and narrowness".[75]

ابن‌منظور نیز می‌گوید: الحرج: الاثم و الضیق... الحارج: الآثم. حرج؛ یعنی گناه و تنگنا... و حارج، به معنای گناه‌کار است.

Talking this into consideration, the original meaning of "constraint" is narrowness. Also sin and unlawful matters are called constraints (*Haraj)* because of this aspect, sins and unlawful matters committed in this world will cause constraints and narrowness in the next world and life.

می‌توان با توجه به این کلمات گفت، معنای اصلی حرج، همان ضیق است و اگر هم به گناه و حرام، حرج گفته می‌شود، از باب اطلاق مسبب بر سبب و بدین لحاظ است که گناه و امر حرام، در دنیا و آخرت سبب پیدایش ضیق می‌شود.

In the following verses of the *Quran* the word *Haraj* (constraints) is used to mean sins and unlawful matters:

در قرآن کریم نیز گاهی حرج، به معنای اثم و گناه استعمال شده‌است، مانند دو آیه زیر

"It shall be no crime (haraj) in the weak, nor in the sick, nor in those who do not find what they should spend (to stay behind)[76]

"There is no blame (haraj) on the blind man, nor is there blame on the lame, nor is there blame on the sick, nor on yourselves that you eat from your houses, or your fathers' houses or your mothers' houses, or your brothers' houses, or your sisters' houses ..." Also in these two following verses "haraj" *has been used in its main meaning:*

"Therefore (for) whomsoever Allah intends that He would guide him aright, He expands his breast for Islam, and (for) whomsoever He intends that He should cause him to err, He makes his breast strait (haraj) and narrow".

A book revealed to you - so let there be no constraints (haraj) in your breast on account of it - that you may warn thereby, and a reminder close to the believers

According to the linguists one may find a meaning for the word Osr *(hardships) very close to that of the word* Haraj *(constraints).*

بر اساس آن‌چه لغت‌دانان گفته‌اند، می‌توان برای «عسر» نیز معنایی نزدیک به‌معنای «حرج» در نظر گرفت

In *Al-Nihayah,* Ibn Athir has said, "The word *Osr* (hardships) is opposite of the word *Yusr* meaning ease and comfort. *Osr* means hardships and narrowness.[80] In *Lisan Al-Arab* it is recorded, *"Osr* is opposite to *Yusr* that means ease and comfort".[81]

در نهایه ابن‌اثیر آمده‌است:

العسر: ضدّ الیسر، و هو الضیق و الشدّة و الصعوبة .

جوهری نیز می‌گوید:

العسر: نقیض الیسر .

و در لسان‌العرب می‌خوانیم:

العُسْر و العُسُر: ضدّ الیسر

From the above one may have the understanding that *Osr* and *Haraj* both have the same meaning or very closely similar meanings as such that to draw a fundamental distinction is not possible. A further evidence to this is the fact that the *Foqaha* in many cases have placed the two next to each other.

می‌توان از مجموعه این گفته‌ها استفاده کرد که حرج و عسر، به یک معنا هستند، یامعنایی بسیار نزدیک به هم دارند به نحوی که نمی‌توان فرق جوهری میان آن دو تصور نمود، شاهد بر این نکته نیز آن است که فقها در موارد فراوانی، این دو را درکنارهم آورده و به نفی هر دو استدلال نموده‌اند.

Cases to which this Principle may apply

The evidence related to the principle of "no hardships" and "no constraints" clearly show that this principle has a vast field for application. Verse 78 of chapter 22, which is the fundamental evidence[82] to prove its authority requires many *Ahadith* to take it in due consideration.

The above verse considers what is outside the limits of "no constraints" law as the field of application for the religious laws, and it negates the existence of narrowness and constraint from religion. Therefore, the domain of this principle extends to all the laws applicable to both the individual and the society.

دلیل‌های قاعده نفی عسر و حرج، به وضوح نشان می‌دهد که این قاعده میدانی گسترده دارد و قلمرو آن تا جایی است که شارع بما انّه شارع، حق جعل و تقنین دارد.

آیه «ما جعل علیکم فی الدین من حرج »که در حقیقت، دلیل اصلی این قاعده محسوب می‌شود و بسیاری از روایات مربوط نیز به آن نظر دارند، محدوده نفی حکم حرجی را «دین» معرفی می‌کند. بر اساس مضامین بالا، مجاری این قاعده را همه احکام دین و شریعت می‌دانیم، اعم از احکام فردی و اجتماعی، ظاهری و باطنی، سیاسی، اقتصادی و....

Muhaqqiq-e Bujnurdi, has explained the supporting evidence for the authority of this principle in the form of the verses of the *Quran* and *theAhadith* He has pointed out the domain of this principle

محقق بجنوردی، پس از توضیح دلیل‌های این قاعده (آیات و روایات) با اشاره به قلمرو گسترده آن می‌نویسد:

He has said, "The verses of the Holy *Quran* and *the Ahadith* have clearly stated that this religion, Islam, is not a religion to impose hardships and constraints upon people, and God did not want Muslims to suffer hardships in following the laws of this religion".[84]

این آیات به روشنی بر این نکته دلالت دارند که خداوند تبارک و تعالی، در دین اسلام، احکام حرجی، جعل نفرموده، احکامی که امتثال آن‌ها و اوامر و نواهیی که اطاعت آن‌ها، برای مسلمانان، مشقت‌بار و حرجی باشد.

The *Foqaha* have based their decision of applying this law only in the case of the obligations of the form of compulsory or prohibitions not the desirable or the detestable ones. It is because of the fact that the kindness and grace oi *Allah* come to relieve people from "hardships" and "constraints".

In the case of the detestable and desirable duties because such duties do not force one to suffer hardships and constraints the rules of this law do not apply to them. As a result of this, if one would engage himself in non-compulsory duties due to extra-ordinary attention and carefulness towards one's duty that may cause him suffering and hardships, under the application of this law he can not be subjected to any admonition and objections.

فقها، تنها در محدوده واجبات و محرمات، به این قاعده تمسک می‌کنند، به این سبب که هدف از امتنان شارع و جعل این قاعده از سوی او، رفع مشقت و تنگنا از بندگان است و بدیهی است که از ناحیه مستحبات و مکروهات که رعایت آن‌ها الزامی نیست، هیچ‌گونه تنگنا و مشقتی متوجه مکلف نمی‌شود. تتیجه‌ای که از این رهگذر عاید می‌شود این است که اگر شخصی، به خاطر اهتمام فوق‌العاده به این‌گونه احکام و عمل بدان‌ها، در عسر و حرج افتاد، نمی‌توان او را با استناد به قاعده مورد بحث، سرزنش نمود

Some Examples of the Inference of ***Foqaha*** in the Light of this Principle

1. In *Miftah Al-Keramah,* in the discourse over the issue of the unutilized land in relation with the fact that people need food and shelter, Amily writes this:

"The unutilized lands become the property of those who revive and utilize them because of such act. Otherwise, it will become the cause of suffering from hardships and difficulties "[86]

2. Allamah Helli has considered the mental and psychological sufferings due to hardships and constraints as the cases to which this principle applies.

مرحوم علامه حلّی، حرج روحی و شخصیتی را نیز، مشمول قاعده نفی حرج می‌داند

Therefore, if a duty would cause mental and psychological hardships and sufferings to one he may benefit in such duties under this principle.

The author of *Al-Jawahir,* in a discourse on the issue of *Tayammum* (the process of purification for prayers when water is not available) when the cause would be fear from thieves or wild beasts or the loss of life or property has said this:

صاحب جواهر ضمن بحث تیمم به عنوان یکی از مسائل عبادی و فردی و پس از این‌که تیمم را هنگام ترس از دزد یا درنده یا از بین رفتن مال، جایز می‌داند، می‌نویسد

"The statement of the author of Al-Hadaeq on the issue that fear for loss of property does not become a good cause to give up one's duty is opposed to the evidence in support of the law of "no constraints". This law is universal. The evidence from religion[88] clearly say that there is no constraints and hardships in religion".

لکن أشکل الحال علی صاحب الحدائق بالنسبهٔ للخوف علی المال، قال لعدم الدلیل لظهور الروایات فی الخوف علی النفس و معارضته نفی الحرج و وجوب حفظ المال بما دل علی وجوب الوضوء و الغسل، و فیه ان ادلهٔ العسر و الحرج غیر قابلهٔ للتخصیص لظهورها ان لیس فی الدین ما فیه حرج

From this it appears that the author of Jawahir considers the evidence in support of this law an evidence from reason, which does not accept any exceptions.

از این عبارت استفاده می‌شود که صاحب جواهر قاعده نفی حرج را قاعده‌ای عقلی و تخصیص ناپذیر می‌داند که در این زمینه توضیحی خواهیم داشت.

3. Also the author of *Jawahir* in a discourse on the issue of whether or not it is necessary for a person praying to keep his mind all the time during prayers on his intention to pray. He says:

جمله صاحب جواهر هنگام بحث از باطل نشدن نماز به خاطر استحضار نیت، عبارتی دارد که حاصل آن چنین است

"The idea that it is necessary to keep one's mind on the act all the time during an act of worship such as prayers etc., is against the law of "no hardships" and "constraints".

اما النیهٔ فلانها القصد الی الفعل، و هو ان لم یکن استحضاره مؤکّداً لم یکن مفسدا، بل قد عرفت سابقاً ان الذی تقتضیه الضابطهٔ استحضار هذا القصد فی تمام الفعل، لکن لمکان العسر و الحرج اکتفی بالاستدامهٔ الحکمیهٔ

4. In a discourse on "justice of witnesses" he has also said:

همچنین ایشان به کسانی که عدالت را به ملکه نفسانی بر تقوا و مروّت، تفسیر کرده‌اند اشکال می‌کند و می‌نویسد

"**The Foqaha of the past would also consider the proper appearance of the people as sufficient proof of one's justice. If one would not openly and publicly commit sins he would have been considered a just person. In search for a just person to the extreme limits would cause hardships and constraints.**

ان امر العدالهٔ محتاج الیه فی کثیر من الأشیاء کالطلاق و الدیون و الوصایا و سائر المعاملات، و هی علی هذا الفرض فی غایهٔ الندرهٔ، بل لا یخلو من العسر و الحرج قطعاً

در بسیاری از امور، مانند طلاق، دیون، وصایا و دیگر معاملات، عدالت مورد نیاز است و اگر آن به معنای ملکه نفسانی بر تقوا و مروت باشد، بسیار کم‌یاب است، بلکه به یقین این فرض خالی از عسر و حرج نیست.

A divorce is possible in the following cases: If the husband of a woman disappeared and she knows that he is alive but she is not able to live alone patiently and even in the case of woman whose husband has not disappeared but is somewhere and unable to come home such as being in jail etc. This also applies if he is at home but is so poor that is not able to provide sustenance for her and she can't tolerate it.

زنی که می‌داند شوهر مفقودش زنده است، ولی نمی‌تواند با این حالت صبر کند، بلکه درباره زنی که شوهرش

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مفقود نیست، ولی می‌داند او در جایی محبوس است که هیچ‌وقت امکان آمدنش نیست و هم‌چنین در مورد مردی که مفقود نیست، ولی آن‌چنان تنگ‌دست است که نمی‌تواند نفقه همسرش را بدهد و زن هم بر این حالت صبر نمی‌کند

For such cases he has said

"In all of such cases under the law of "no hardships" and "no constraints" the court is authorized to issue her a divorce especially if she is a young woman"

در همه این موارد و مانند این موارد، اگرچه ظاهر کلمات فقها، این است که حاکم نمی‌تواند این زن را طلاق دهد و عقد آن دو را منحل نماید، ولی می‌توان گفت این کار برای حاکم، جایز است، به دلیل قاعده نفی حرج و ضرر، به ویژه آن‌گاه که زن، جوان باشد

One of the contemporary *Foqaha* includes another case to the above ones. It is the case of a woman whose personal safety and her sexual needs would depend on having a husband in such a case one may consider it unnecessary on her part to wait for four years. If her husband has disappeared in such a case a Muslim judge may issue her a divorce so she can marry another man. [92]

یکی از فقهای معاصر، مصداق دیگری به موارد فوق اضافه می‌کند و آن در مورد زن جوانی است که امنیت شخصی و عفت او منوط به داشتن شوهر است، که در این صورت ممکن است بگوییم چهار سال انتظار برای او لازم نیست و حاکم اسلامی می‌تواند او را طلاق دهد و زن ازدواج نماید

With a view to the meaning and implications of the law of no hardships and no constraints a question may rise that in the Islamic system there are many instances that involve hardships and difficulties. An example of such a case is becoming a member of the army for defence, the prohibition of fleeing from the battle field, fasting in the month of *Ramadhan* in summer, surrendering to judicial penalties, applying *hudud* (punishment)[93] and *qesas* (law of equality)[94], leaving the country when one feels that it is necessary etc. How could all such cases be reconciled with the universal nature of the law of "no hardships and no constraints"? The Holy *Quran* (22: 78) says in a very general manner that *"He has nor sanctioned any hardships upon you in religion"*

درباره قاعده عسر و حرج با توجه به مفاد و مضمون آن، این شبهه پیش می‌آید که بی‌تردید در اسلام احکامی تشریع شده که امتثال آن‌ها، همراه با سختی و مشقت است، مانند جهاد، حرمت فرار از میدان نبرد، وضو ساختن با آب سرد در زمستان، روزه ماه رمضان خصوصاً در تابستان، تسلیم نمودن خود برای اجرای حدود و قصاص، هجرت از وطن برای تحصیل مسائل دینی و از همه بالاتر، مبارزه با نفس و جهاد اکبر و... پس چگونه قرآن به نحوی فراگیر، می‌فرماید: «و ما جعل علیکم فی‌الدین من حرج

Can one say that the above law has priority over so many of the obligations and prohibitions? Or that certain cases due to their greater significance such as the cause of defence, prayers, saving lives and unlawful sexual activities, have a particular status in the Islamic system. Just because

this law exists, such cases cannot be over looked even though this law has a priority over less significant obligations and duties.

آیا قاعده نفی حرج، بر اطلاقات و عمومات ادله همه واجبات و محرمات، حکومت و تقدم دارد، با این‌که در میان این احکام الزامیه، به اموری بسیار مهم، مانند جهاد، نماز، قتل نفس، زنا و... برمی‌خوریم که شارع نسبت به آن‌ها، اهتمام ویژه‌ای دارد و به مجرد حصول عسر و حرج، راضی به مخالفت با آن‌ها نمی‌شود، یا این‌که قاعده مزبور، تنها بر ادله برخی واجبات که نسبت به واجبات دیگر، اهمیت کم‌تری دارند

The author of *Fusul* has said in this regard.

پاسخ صاحب فصول

وی در این زمینه می‌نویسد:

"What is required as to the degree of hardships is what the majority of people normally would not bear. A small degree of hardships do not justify the case. There is no doubt that in the cases such as defence, in order to repulse evil from oneself and protect the property, family, tribe and compatriots is a job that most people stand up as a matter of honor and dignity and it is not considered difficult. It is not so especially in the case of Muslims who expect great rewards for such heroic deeds in the life to come[9 5]

آن‌چه در این‌جا معتبر است، این است که در کار، حرج و ضیق بر بیش‌تر مردم باشد و حرج ناچیز نفیاً و اثباتاً، مورد اعتبار نیست و تردیدی نیست در این‌که وارد شدن در جنگ‌ها، به منظور دفع ننگ از خود و حمایت از مال و اهل و عشیره خود و... کاری است که بیش‌تر مردم، آن را آسان می‌شمارند و به آن تن درمی‌دهند و شکی نیست در وجود این انگیزه‌ها در شخص مؤمن نسبت به جهاد با کفار، علاوه بر امید رستگاری به سبب نیل به اجر عظیم و ذخیره بزرگ.

The author of Jawahir has said, "In the case of very important duties like defence matters such obligations never fall under the law of "no hardships and no constraints" because of the great benefits of these duties". In the book of Tciharat, after applying the law of no hardships he has said, "For one who can acquire water only through buying and it would be, in such conditions, difficult for him he must perform Tayammum (particular ablution with pure earth) instead of vozu".[۹۶]

آن‌چنان که از چند موضع جواهر الکلام استفاده می‌شود، می‌توان پاسخ صاحب جواهر را نیز شبیه پاسخ بالا ارزیابی کرد. تکیه کلام وی بیش‌تر روی این نکته است که لسان قاعده عسر و حرج، ابا از تخصیص دارد. ان الادلهٔ العسر و الحرج غیر قابلهٔ للتخصیص لظهورها ان لیس فی الدین ما فیه‌حرج؛(42) دلیل‌های عسر و حرج قابل تخصیص نیستند؛ زیرا ظاهر این دلیل‌ها این است که در دین، هیچ حکم حرجی نیست. «بر کسی که آب بیابد، اما باید برای آن‌ها قیمت بپردازد، و این کار برای او در حال حاضر مضرّ است، تیمم واجب است»

He further adds, "In some of the very important duties such as defence matters the law of no hardship and no constraints do not apply because of the very important benefits involved in such matters, however, in the cases that do not have such significance this law is applicable".[97]

و در مورد تکالیف پر اهمیت، مانند جهاد نیز نظر ایشان این است که این‌گونه تکالیف اصلاً حرجی نیست به خاطر مصالح و فواید با ارزشی که بر آن‌ها مترتب می‌شود.

It can, however, be said that the existence of hardships and constraints in difficult matters like defence is very obvious. Just because some people due to their expectation of reward in the next life and for the sake of spiritual accomplishments do not dislike such hardships does not remove the hardships from such matters.

در مورد تکالیف پر اهمیت، مانند جهاد نیز نظر ایشان این است که این‌گونه تکالیف اصلاً حرجی نیست چه حرجی در جهاد و جان باختن و به دست آوردن حیات ابدی و سعادت جاودانی وجود دارد

According to Muhaqqiq-e Bujnurdi, the verse of the Holy Quran that says, "God has not sanctioned any thing that would cause you hardships "[98] from the meaning of this verse that is obvious and apparent that, it is of a universal nature.

وی در پاسخ شبهه مزبور، می‌نویسد: ظاهر آیه شریفه «ما جعل علیکم فی الدین من حرج» که اساس قاعده نفی حرج است، عموم است و هر حکم شرعی حرجی را در بر می‌گیرد؛

It includes all the laws of Shariah that involve hardships and constraints, i.e. all the obligations and prohibitions." However, the Foqaha have not dealt with it in this way, especially, when the hardships and constraints would be of a personal nature not one for a whole species.

یعنی همه واجبات و تمامی محرمات، اعم از کبیره و صغیره، اما ظاهراً فقها و اصحاب به این عموم عمل و اخذ نکرده‌اند، مخصوصاً اگرمقصود از حرج و ضیق، حرج شخصی باشد

Staying away from most of the prohibited matters does cause hardships and constraints to some people, and no Faqih would issue a fatM>a in favor of such case.

ترک اغلب محرمات کبیره، مانند زنا با زن شوهردار و نظیر آن برای اشخاص، حرجی و همراه با مشقت است و بدون تردید فقیه راضی نمی‌شود به جواز چنین کاری فتوا دهد.

With a view of the evidence supporting the authority of this law and opinions of the scholars in this matter it is possible to fmd several categories of the issues that cause hardships and constraints:

با توجه به ادله این قاعده و مجموعه کلمات صاحب‌نظران در مورد آن، در حل اشکال مزبور می‌توان گفت: (54) برای عسر و مشقت، اقسامی متصور است

1. There are the kinds of hardships and constraints that do exist in certain duties but they are normally tolerated. It is obvious that this law does not apply to such cases.

مشقت و کلفتی که در انجام و ترک نوع واجبات و محرمات یافت می‌شود، ولی این مشقت به حدی است که عرفاً و عادتاً قابل تحمل است، تردیدی نیست که ادله قاعده، از چنین مشقت و عسری انصراف دارد. توضیح بیش‌تر در این باره خواهد آمد.

2. There are also the kinds of duties that normally do not cause any hardships and constraints. Although many people consider them of such nature such as paying *Zakat* (taxes), but due to the social benefits and the service for the well being of the society they arc not of the duties that cause hardships and constraints.

برخی امور، عادتاً حرجی نیست، گرچه بسیاری آن‌ها را حرجی دانسته‌اند، مانند ادای خمس و زکات که پس از کسر نمودن مخارج و هزینه‌های مصرف شده، انجام می‌گیرد. در انجام این‌گونه وظایف مالی، مخصوصاً با لحاظ این‌که این‌گونه اموال برای رفع نیازهای جامعه و عمران و آبادی آن و تأمین دیگر مصالح آحاد مردم از جمله خود پرداخت کننده، هزینه می‌شود، عسر و حرجی نیست

3. Some of the obligations, without any doubt, involve great degrees of hardships and constraints but because they are the outcome of the wrong doings of the people themselves, such as the judicial penalties, compensations and punishments for such crimes they do not fall under this law. Such hardships are exceptions to this law.

پاره‌ای از تکالیف نیز گرچه اجرای آن‌ها بی‌تردید مستلزم عسر و حرج شدید است، ولی آن‌ها ناشی از سوءاختیار خود مکلف است، مانند قصاص و حدود و دیات که نتیجه بزه‌کاری‌ها و جنایات برخی مکلفین است.

4. There is another category of duties that cause hardships and constraints to some people only and they are not as such for the others such as fasting during summer. In such cases the law is applicable to some and it is not applicable to the others. The degree of the hardships and constraints, however, must be to the degree that is not normally tolerated.

برخی از تکالیف را نیز می‌توان، در حق بعضی حرجی و در حق بعضی دیگر غیر حرجی دانست، مانند وضو گرفتن با آب سرد در سرمای شدید و روزه گرفتن در گرمای سوزان تابستان. بعید نیست در این‌گونه موارد قاعده لاحرج را در حق گروه نخست جاری بدانیم، البته به شرطی که مشقت در این‌گونه تکالیف به حدی باشد که عادتاً تحمل نمی‌شود و مقصود از حرج نیز حرج شخصی باشد، چنان‌که مختار هم همین است.

5. There are the duties that involve a great degree of hardships and constraints such as serving for defence matters and even the Holy *Quran* also acknowledges such hardships despite this, this law does not apply to them:

برخی از تکالیف هم تردیدی در حرجی بودن آن‌ها نیست، مانند دفاع از دین و جهاد با دشمنان خدا، چنان‌که قرآن می‌فرماید:

"Fighting is made mandatory for you, but you dislike it. You may not like something which, in fact, is for your good and something that you may love, in fact, may be evil. God knows, but you do not *know*".[100]

"Eyes became dull and hearts almost reached the throat when they>
attacked you from above and below and you started to think of God with suspicion. There (he believers were tested and tremendously
shaken[101]

God pardoned the Prophet (S.A.W.), the Emigrants, the Helpers, and those who followed them, when the hearts of some of themalmost deviated (from the truth) in their hour of difficulty. God forgave them because of His Compassion and Mercy. [103]

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Some Points in the Law of "No hardships"

1. ***Azimah*** or ***Rokhsah*** (obligation or Permission)

The fact that the application of the law "no hardships and no constraints" is obligatory or permissible. Some of the scholars consider it an obligation. The author of *Al-Jawahir* is one of such scholars who in the issue that "fasting is not obligatory for very old people" has said, *"In* such a case the application of this law is obligatory because of the no hardships[104]

Some scholars have decided according to the second form, the permissibility. Among them is Muhaqqiq-e Hamedani, who writes:

" **Tayammum in the conditions wherein it is permissible is based on the law of "no hardships" as a permissible duty*[1]* and not an obligatory one. As a result of this if one would bear great hardships and instead of Tayammum make vozu or Ghusl his choice is acceptable."[105]**

Proof for this is the fact that the evidence supporting the authority of the law of "no hardships" are to provide ease and to facilitate, for this reason such evidence are qualified for the negation of obligation not for non-permission.

The author of *Orvah* in the section on *Tayammum* points out to this viewpoint and considers a *vozu* made with suffering hardships and constraints as a valid one.[106]

The fact that removal of hardships from the servants of God is a favor from Him, can not become evidence for the validity of the very desirability of the act, it, in fact, can become evidence of its undesirability. It, in fact, is a form of disregard for the favor like the act of ignoring the rule of shortened prayers on a journ ey and instead praying a complete prayers and fast during a journey which indeed is an undesirable act[107].

Muhaqqiq-e Hamedani, defending his view has said, The reason for exception in choosing the primary laws instead of following the secondary laws in the kind of duties such as *Vozu* and *Gusl* are the constraints in them without having any evil in performing such acts. On this basis, the exception is because of "no necessity" not because of "undesirability" of the duty[108]. As a result if one would bear the hardships and perform the act that was not required of him he has performed an act that was desirable in the sight of God.

Quite opposite of this is what one of the scholars of our time believes:

"The imposition of heavy duties causes disobedience and opposition in people and this by itself is a great evil. For this reason, some of the scholars have maintained that the law of "no hardship" due to the kindness of God towards people is based on an obligatory' ground*"*.*[109]*

2. **Is the Criteria in the Law of "No Hardships"**

Hardships for Individuals or for a whole Species?

Some of the scholars have for two reasons affirmed the hardships for individuals

1. All the captions and titles that are mentioned in the *Ahadith,* like "constraints" "losses" and "emergency" etc. are related to individuals cases.

2 . The hardship for a whole species is not definite and distinguishable because it does not say

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whether the species of people of
all times are the criteria or those of a particular time and place.[110] Another reason that could be added to this would be the case of a commander that may issue an order for his subordinates to follow with a choice that in the case of hardships they may disregard it. In such a case if one of them did not follow the orders due to such reasons he could be excused even if it would not be hard for others. The hardships in individuals cases may be considered as the criteria but it is possible that such law would apply to the Islamic government in which case consideration of the welfare of the whole species and society would have to be studied.

3. Does the Law of "No hardships" Apply to Negativities also?

Sometimes the negativity and absence of something may become the cause for hardships and constraints. For example not removing certain buildings from the road areas may cause traffic congestion, not broadening roads may also cause delays for the emergency services such as ambulances and fire fighting machines, leaving certain shops and stands may cause bad congestion on the footpaths and sidewalks. It seems that in such cases also the law of "no hardships" applies very well. As discussed above the meaning of the evidence supporting the authority of this law is the removal of all kinds of rules that would cause hardships, regardless of their applicability to the positive matters or those of negative nature.

In the matters of the above cases it is possible to say that nonpermissibility of doing any thing to the properties of the others may cause huge hardships and the *Shariah* does not agree with it. This is in addition to the evidence in the Holy *Quran* that has clearly removed all kinds of hardships. [111] In *Ahadith,* also one finds such expressions as “there is no religion more facilitating than Islam”.[112] Islam is a very easy system to follow".[113] Without any doubt such expressions include the negativity and absence of some thing also.

4. How much Hardship Justifies the Applicability of this Law?

The existence of any degree of hardships and constraints may not justify the application of this law. It must be as such and to the degree that normally people would not agree to bear.
The evidence supporting the authority of this law also does not support its applicability to the smaller degrees of hardships, otherwise, most of the religious duties would fall under this law because almost all the obligations in religion involve some degree of hardships. Therefore, this does not agree with the fundamentals of religion. It is for this reason that the *Foqaha* whenever discussing this issue have included in their expressions the words like "great", "sever" and "huge" hardships. Sheikh Ansari has said, "Whenever there are huge "hardships" and "constraints" this law may be applied". [114]

Losses **(Zarar)**

Another caption and title for the secondary laws that has been discussed very often in *Fiqh* and applied is the law of "no losses" (*la-Zarar).* The *Foqaha* have been applying this law for a long time. For example, Sheikh-e Tusi in *Al-Khilaf* in the section on the contracts of exchanging certain merchandise in which losses have taken place against one of the parties, expresses his belief in the nullification of such contract. It is based on a *Hadith* from the Holy Prophet

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(S.A.W.) that says, "There is no
losses in Islam".[115]
Also Ibn Zuhra in the section of *Fiqh* dealing with the "choice" to revoke the contract due to the defect in the merchandise, writes: "The evidence supporting this fact is the *Hadith* from the Holy Prophet (S.A.W.)
that says, "There is no losses in Islam".[116]
revoke the contract due to the defect in the merchandise, writes: "The evidence supporting this fact is the Hadiih from the Holy Prophet (S.A.W.) that says, "There is no losses in Islam".116
Allamah Helli also in Tcidhkirah in the section on losses has based his decision on the above Hadiih from the Holy Prophet (S.A.W.).
The evidence proving the authority of this law is the same Iladith the, "no (suffering) losses" and "no (causing) losses". This hadith is recorded in the books like *Sunan* Ibn Dawud,[117] *Sahih-e Termezi,*[u%] and *Sunan* Ibn *Majeh.*[u9] Some of the *Foqaha* along with this law have discussed another law that says, "The losses are to be abolished". The two laws are dealt with separately. Of these scholars is Abdul Karim Zeydan who has discussed it in *Al-Madkhal*[m] Others like Ibn Najim have considered the two laws as one. Najmuddin Tufi also gives preference to the supporting proof of this law over those of the primary law.

The Evidence Proving the Authority of this Law

The evidence proving the authority of this law are many *Ahadith* which contain the very popularly known expression, "no losses and no suffering losses". Fakhral Muhaqqiqin has stated that this *Hadith* is *Mutawaitir,*
(unanimously reported).[123]

روایات فراوانی است که در بسیاری از آن‌ها جمله معروف «لاضرر و لاضرار» آمده‌است. این روایات گرچه برخی از لحاظ سندی، قابل مناقشه است، ولی کثرت آن‌ها موجب اطمینان است، حتی فخر المحققین قائل به تواتر حدیث لاضرر و لاضرار شده‌است

The *Ahadith* Narrated from the
Holy Prophet (S.A.W.) about this Matter.

Samrat Ibn Jundab had a palm tree inside the compound of the house of a man who belonged to Ansar, (of the people of Madina who helped the Prophet (S.A.W.)). Anytime he wanted he would enter the man's house without permission to see his palm tree. The Ansari man complained about it before the Holy Prophet (S.A.W.). The Holy Prophet **(S.A. W.) asked Samrat Ibn Jundab to ask permission from the Ansari man any time he wanted to see his palm tree but Jundab did not agree. The Holy Prophet (S.A.W.) said, "I am ready to buy this tree for whatever price you would ask". Jundab did not agree. The Holy Prophet (S.A.W.) said, "For this tree God in the next life will give you a tree in Paradise". Jundab did not accept the offer. The Holy Prophet (S.A.W.) then told the Ansari man to uproot the palm tree and throw it away because there is no causing losses in Islam. 124**

شاخه‌ای از درخت سمرهٔ بن‌جندب در درون منزل مردی از انصار بود و منزل شخص انصاری در درب باغ قرار

داشت. سمرۀ بدون اذن انصاری به نخل خود سرکشی می‌کرد، از این‌رو، او با سمرۀ صحبت کرد و از او خواست هنگام آمدن به آن‌جا اذن بگیرد، ولی سمرۀ از این کار خودداری ورزید. شخص انصاری که چنین دید، نزد پیامبرصلی‌اللّه علیه وآله– رفت و از این بابت به آن حضرت شکایت نمود. پیامبرصلی‌اللّه علیه وآله– هم به دنبال سمرۀ فرستاد و شکایت انصاری را با او در میان نهاد و به او فرمود: هرگاه خواستی وارد شوی اجازه بگیر، ولی سمرۀ از این کار خودداری نمود. پیامبر که چنین دید به قصد خریدن درخت سمرۀ با او گفت‌وگو نمود و قیمت بالایی به او پیشنهاد کرد، ولی سمرۀ از فروختن آن ابا ورزید. در این هنگام پیامبر به او فرمود: (اگر به فروختن این درخت رضایت دهی) در مقابل آن درختی پر برکت در بهشت خواهی داشت. باز هم سمرۀ از فروختن آن سر باز زد. این‌جا بود که رسول خدا به شخص انصاری فرمود: برو درخت او را بکن و به پیش او انداز؛ زیرا که ضرر و ضرار، مردود است.

2. The Holy Prophet (S.A.W.) declared to the people of Madina that no one must create obstacles on the way of irrigating the palm trees, or prevent others from utilizing the excess waters because according to *Shariah* "no (suffering) losses" and "no (causing) losses is the law" .[۱۲۵]

پیامبر –صلی‌اللّه علیه وآله– بین مردم مدینه در مورد آبشخورهای خرما حکم فرمود: نباید از نفع شیء جلوگیری شود و حکم آن حضرت در میان بادیه نشینان این بود که نباید مانع از زیادی آب شد تا این‌که از چراگاه، جلوگیری شود [مقصود حضرت این است که اگر دسته‌ای از مردم، پس از این‌که زمینشان سیراب شد، مانع از رسیدن آب زیادی به زمین دیگران شوند، آنان نیز به منظور تلافی، مانع از چریدن حیوانات آن مردم در چراگاه خود می‌شوند. از این‌رو نباید آن کار انجام پذیرد]. پس حضرت فرمود: ضرر و ضرار، مردود است.

3. The Holy Prophet (S A W.) also declared that there must be sufficient distance between two water tunnels so that they would not effect each other in reducing or increasing of the amount of water that would normally come out of each of them.[126]

4. The Holy Prophet (S.A.W.) was asked about a canal through which water would flow for a certain distance in a field and between the which water would flow for a certain distance in a field and between the source of water and the field there would be palm trees that belong to people other than the owner of the canal. Can the owner of the canal create another canal to let the water flow to his field away from the palm trees that exist on the old canal? "Have fear of God and do not cause any losses to your brethren”. Replied the Holy Prophet (S.A.W.).

The Meaning of this Law

مفاد قاعده

The *Foqaha* within the limits of this law have expressed differing opinions.

فقها و اصولی‌ها در مورد مفاد این قاعده، اقوال و نظریات متعددی ابراز داشته‌اند

The Theory Of Sheikh Ansari

نظریه شیخ انصاری

From Sheikh Ansari's point of view, the meaning of the law "no (suffering) losses" and "no (causing) losses" is the negation of any rule in *Shariah* that would involve losses to people. Any such rule is declared none existent, i.e. if a contract which would cause losses to one party would have been considered binding and irrevocable it would be contrary to the above-mentioned law, but no such law is sanctioned in *Shariah*. The same is true in the case of a person who can not have any water without a great deal of difficulties or expenses.

از دیدگاه شیخ اعظم، مفاد جمله «لاضرر و لاضرار» عبارت است از نفی احکام شرعیه ضرریه و عدم جعل آن‌ها از ناحیه شارع؛ یعنی شارع با این بیان، جعل هر حکمی را از سوی خود که منشأ ضرر باشد، منفی اعلام نموده‌است. از باب مثال می‌توان گفت حکم نمودن شارع به لازم بودن بیع غبنی، موجب تضرر مغبون می‌شود، بنابراین چنین حکمی، در شریعت اسلامی جعل نشده‌است و از همین قبیل است وجوب وضو گرفتن بر شخصی که فاقد آب است و چاره‌ای جز خریدن آن با قیمت گزاف ندارد.

In such case he is not required to find water for *Vozu*. He has emphatically relied on this law in many instances in the books on Fiqh and the principles of jurisprudence.[128]

وی این مضمون را در چندین موضع از آثار فقهی و اصولی خود مورد تأکید قرار می‌دهد

The Theory Of Sheikh Al-Shariah Isfahani

نظریه شیخ الشریعهٔ اصفهانی

From this scholar's point of view, the meaning of this law amounts to an imperative prohibition. According to him any act that involves losses is prohibited and people must not involve themselves in such acts.

از دیدگاه این محقق، نفی ضرر در قاعده مورد بحث، به معنای نهی از ضرر است.

As evidence to prove this he points out a great deal of expressions from the Holy *Quran* and the *Sunnah* which are very similar to what the law of no losses states.[129]

وی برای تثبیت این دیدگاه، به جملات فراوانی از کتاب و سنت استشهاد می‌کند و همه آن‌ها را نظیر جمله «لاضرر و لاضرار» می‌داند.

Of such expressions is this, " ... *after commencing the* acts of Hajj, he is not allowed to have carnal relations or to lie or to Swear by the Name of God*"*.[130] *He (Moses) said:*

"Go away; throughout your life you will not be able to let anyone touch you. This will be your punishment in this life. The time for your final punishment is inevitable. You will never be able to avoid it. Look at your god, which you have been worshipping. We will bum it in the fire and scatter its ashes into the *s e a* .[131]

. جملاتی از قرآن مانند: «فلا رفث و لا فسوق فی الحج «و «لک فی الحیاۀ ان تقول لا مساس«

From the Sunnah he quotes the following Hadith: Obedience to **someone that would lead you to disobey the Creator is prohibited". That**
cheating Muslims is prohibited. [132]

از سنت، مانند جملات زیر که از پیامبرصلی‌اللّه علیه و آله– نقل شده‌است:

»لا اخصاء فی الاسلام و لا بنیان کنیسۀ»، «لا طاعۀ لمخلوق فی معصیۀ الخالق» و «لا غش بین المسلمین.«

The Theory Of Imam Khomeini

نظریه امام خمینی

He maintained that the law of "no losses" falls under the governmental commandments. It is on this basis that the Holy Prophet (S A W.) served as the administrator of the government and commander of the Muslim nation.

از دیدگاه امام راحل –قدس سره– نفی در حدیث «لاضرر و لاضرار» به معنای نهی‌است، ولی این نهی، حکم شرعی الهی، مانند نهی از غصب و کذب نیست، بلکه نهی در این‌جا، حکم مولوی سلطانی است. وجه صدور آن از پیامبر –صلی‌اللّه علیه و آله– نیز این است که ایشان حاکم و سلطان بر امت اسلامی بوده‌است.

He sanctioned such laws to abolish corruption not that they were

the Divine laws. The following are of the evidence to establish this theory.

معظم‌له پس از بیان مقدمات بالا می‌افزاید: جمله «لاضرر و لاضرار» به عنوان حکم سلطانی وبر این اساس که پیامبر، مدیر و حاکم امت اسلامی است و به منظور قطع ریشه‌های فساد، از سوی آن حضرت، صادر شده‌است، نه به عنوان حکم الهی شرعی و اموری چند بر این سخن دلالت دارد.

Ahmad Ibn Hanbal has mentioned the expression of "no losses" among the rulings and judicial decrees of the Holy Prophet (S.A.W.). He has narrated it from Ubadah Ibn Samit saying. "Judging is no (suffering) losses and no (causing) losses". It is a fact that this expression is not a ruling to settle a dispute between two parties. Therefore, it must be of one of the commandments of the Holy Prophet (S A W.) that he issued to declare that no one has the right to cause losses to others and cause sufferings and constraints to others and that Muslims must also obey this commandment.

(a)

احمد بن‌حنبل، جمله نبوی «لاضرر و لاضرار» را در ضمن بیست‌واندی قضا و حکم، از قول عبادهٔ بن‌صامت نقل نموده و گفته‌است: «قضی لاضرر و لاضرار» و از آن‌جا که مورد، از موارد قضاوت نیست؛ چرا که در این‌جا جهلی نسبت به حکم و موضوع، وجود ندارد، صحیح نیست آن را حمل بر قضاوت و فصل خصومت نماییم. پس آن‌چه تعیّن می‌یابد این است که جمله مزبور را حمل کنیم بر حکم سلطانی که از آن حضرت به منظور دفع فساد، صادر شده‌است و مفاد آن این است که پیامبر حکم فرمود به این‌که کسی حق ندارد به دیگری ضرر وارد نماید و او را در ضیق و حرج بیندازد، و بر امت نیز اطاعت از این نهی مولوی سلطانی، واجب است.

(b) The case (of Jundab and the Ansari man mentioned above) that lead to the issuance of such commandment is another evidence to prove this point.

جریانی که سبب صدور این جمله از پیامبر شد، نیز دلیل دیگری بر این مدعا است

The complaint of the Ansari man to the Holy Prophet (S A W.) was due to the fact that he was the head of the government of the Islamic system capable of abolishing the evils of a transgressor.

مرد انصاری که از آمد و رفت سمرهٔ بن‌جندب و سر زدن او به درخت خرمایش، به ضیق و مشقت افتاده بود، شکایت نزد پیامبر برد و از آن حضرت یاری طلبید، و این دادخواهی او از باب این بود که پیامبر، سلطان و رئیس وحاکم و مقتدر است و می‌تواند شرّ و ضرر انسان متجاوز را دفع کند

Samrat Ibn Jundab was summoned and was informed of the complaint against him and that because he did not obey the commandment of the head of the government an order was issued to uproot his palm tree. This was ***to***

make a point that no one has the right to disobey the Islamic government and cause losses to others. The step taken by the Holy Prophet (S A W.) in this case was an order of the government to establish a fact that people do not have the right to cause losses to each other.[133]

حضرت نیز سمره را احضار و شکوه مرد انصاری را به اطلاع او رسانید، و چون آن شخص، به دستور پیامبر وقعی ننهاد و از آن پیروی ننمود، آن حضرت دستور به کندن درختش داد و حکم نمود به این‌که کسی حق ندارد در حوزه فرمان‌روایی و حکومت او، به دیگری ضرر وارد نماید.

پس آن‌چه در این جریان از پیامبر صادر شد، یک حکم سلطانی بود به این مفاد که رعیت و مردمان حوزه حکومت اسلامی حق زیان رسانیدن به یک‌دیگر را ندارند

The Theory Of Some of the Contemporary Foqaha

نظریه برخی از فقهای معاصر

Some of the contemporary scholars have come up with a new theory about the law of "no losses". They maintain that this law is related to the relations among the people and not to the rules of *Shariah* and the Divine duties.

برخی از محققان معاصر، پس از بیان ایراد یا ایرادهایی که بر هر یک از نظریات چهارگانه پیش داشته‌اند، خود نظریه جدیدی ارائه داده‌اند که در زیر خلاصه آن می‌آید:

در قاعده لاضرر، «لا» به معنای نفی است نه به معنای نهی (برخلاف دو نظریه اخیر که در آن دو، «لا» به معنای نهی گرفته شد) و مصدر و فاعل ضرر، خود مردم، بعضی نسبت به بعضی دیگر هستند، نه شارع و تکالیف او.

With a view to the fact that in the society some times losses are found, the objective of this law is to inform people of the unacceptability of the activities that cause losses. The apparent meaning of this law indicates the negation of losses. It should be considered a metaphorical expression of discrediting all the activities that cause losses.

غایت و هدف از این قاعده، با توجه به این‌که در جامعه بالوجدان، ضرر یافت می‌شود خبر دادن از عدم امضای ضرر تکلیفاً و وضعاً است. معنای ابتدایی این قاعده، اخبار از عدم وجود ضرر در خارج است، ولی چون چنین چیزی، مراد جدّی نیست، باید آن را کنایه از عدم امضای ضرر دانست.

Thus, the goal is to teach people that causing losses according to *Shariah* is prohibited and any thing that would cause losses or sufferings to others such as neighbors is unlawful. That the transactions that cause losses to one party are invalid.

پس هدف از ابراز این قاعده، تفهیم این معنا است که زیان وارد نمودن به دیگری، به لحاظ شرعی، ممنوع است و مورد امضای شارع نیست. بر این اساس هر کار ضرری که از فردی، متوجه فرد دیگری شود، مانند آزار و اذیت نمودن همسایه به همسایه، حرام است و نیز معاملات ضرری، مانند بیع غبنی، باطل و غیر نافذ است.

This theory, although in some respects, in regards to the results, is the same as some of the above-mentioned ones, however, in the matters of the acts of worship such as *Vozu* and fasting, it is different from them. According to those theories on the basis of the existence of hardships and losses such acts of worships could be negated but on the basis of this new theory this can not be

done on the basis of the law of "no losses". An act that would cause losses may be negated by this theory because the meaning of losses according to this theory is the losses that are caused by the people not the losses because *of* Shariah.[134]

این نظریه گرچه به حسب نتیجه، با برخی از نظریات پیش، توافق دارد، ولی در مورد عبادات ضرریه، مانند وضو و روزه ضرری، با آن‌ها تفاوت دارد؛ زیرا بر اساس برخی از آن نظریات می‌توان با استناد به قاعده لاضرر، وجوب این‌گونه عبادات را نفی کرد، ولی بر اساس این نظریه، نمی‌توان چنین کاری انجام داد؛ زیرا گفتیم در این نظریه، مقصود از ضرر، زیان وارد نمودن بعضی از مردم به بعضی دیگر است نه ضرر شارع، و چنین معنایی در عبادات ضرریه یافت نمی‌شود.

Coreion and Compulsion (Ikrah)

Coercion is one of the titles and captions that appears in various sections of the *Fiqh* with various kinds of effects and consequences and in most cases the rules of this law receives priority over the primary laws. According to the dictionary it means compelling and coercing some one to do something. [135]

The Evidence proving the Authority of this Law

In order to prove the authority of this law the *Foqaha* have mentioned some verses of the Holy *Quran* and some *Ahadith* as proof.

1. *"No one verbally denounces his faith in God - Unless he is forced but his heart is confident about his faith. But those whose breasts have become open to disbelief will be subject to the wrath of God and will suffer a great torment*136

This does not apply to people like Ammar-e Yasir. *It applies to those who with open hearts became unbelievers. It is they who are subject to the anger of God.*

2."Do not force your girls into prostitution to make money if they
want to be chaste. If they have been compelled to do so,
God will be all merciful and all forgiving to them".137

3. The Holy Prophet (S A W.) addressing his followers said, "Mistakes, forgetting and all that is due to coercion, ignorance, inability and due urgency are forgiven (there is no sin for such acts)
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The kinds of Coercion and Compulsion (Ikrah)

There are two kinds of coercion and compulsion:

1. The use of force against someone who is not able to counter such force such as water being forced to enter one's throat while he is fasting. This kind is called a complete compulsion (*Iljaei)*

2. The other kind of compulsion is like the case wherein one is threatened to imprisonment or physically hurt if he would not do a certain act. In this case one still may have the ability not to do it. This kind of
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compulsion is called an incomplete compulsion, *(gheir -lljaei).*

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The Difference between the Compulsion and Urgency

Compulsion (*Ikrah)* is used when some one else would force one to do something or not to do some thing. In this case there are three elements, compulsion, compelling and compelled. Urgency (*Izterar),* however, is often used in a case wherein someone without the involvement of others is compelled to do or not to do something.

The Rules for Compulsion (Ikrah)

The rules for compulsion and coercion are scattered in various sections of the law without any proper categorization and order and to show a certain order for it is not an easy task. Because of this reason for one case of compulsion different kinds of *Fatwa* and legal opinion may come into existence. All that could be stated in such a case is that the ruling for an incomplete compulsion in terms of effects is different from those for a complete compulsion and coercion. In some cases both kinds of compulsion may have the same kind of rule. Along with the rule for an act under compulsion its primary rule should also be taken into consideration. This will help to find out if such rules could be removed due to compulsion or not and if so it then should be considered whether it is so due to complete compulsion or even incomplete compulsion would require such rules.

For example one may consider the case of the contracts for certain transactions in which the invalidity of a contract incomplete compulsion is sufficient because of *Ahadith* and the Holy *Quran* consent of parties for the validity of a contract is one condition. "*Believers, do not exchange* your property in wrongful ways unless it is in trade by mutual agreement[140]

Since the consent of parties is a condition for the validity of the contract even incomplete compulsion would invalidate it. Also from the *Shariah* one may have an understanding that in the case of the unlawfulness of murder and injuries to Muslims... due to the seriousness of such cases an incomplete compulsion would not justify it to follow the rules for compulsion. In such a case the rules for "important" and "more important" matters play their role.[141]

Urgency or Exigency (Itferar or Zarurah)

Izterar literally and linguistically means to become compelled to do something.[142] It also means dire need for something.[142] To become compelled in doing something or to have a dire need for something may be considered as a cause and reason as when one urgently needs to sale his house due to a need. The first meaning is in consideration of the meaning of exigency and the second meaning is in consideration of the cause of the emergence of the exigency.[144] The great exegete (Tabari,) in
(he interpretation of verse 173 chapter two writes: *"Izterar,* is a condition
from which man can not escape like hunger that is not avoidable.[143]

The Evidence Proving the Authority of the Law of Exigency

All the *Foqaha* agree on the issue that the secondary title like exigency

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may become the cause for the inapplicability of some of the primary laws. Certain verses of the Holy Quran and certain Ahadith are cited as evidence in this matter.

1. "God has forbidden you to eat that which has not been properly slaughtered, blood, pork, and the flesh of any animal which has not been consecrated with a mention of the Name of Allah, God.. However, in an emergency, without the intention of transgression or repeating transgression, one will intention of transgression or repeating transgression, one will not be considered to have committed a sin. God is all
forgiving and all merciful".[146]

2. "It is unlawful for you to consume the following as food: an animal that has not been properly slaughtered, blood, pork, an animal slaughtered and consecrated in the name of someone other than Allah ... If anyone not (normally) inclined to sin is forced by hunger to eat unlawful substances instead of proper food, he may do so to spare his life. God is all forgiving and all merciful.[147]

3. **"If you have faith in God's revelations, eat the flesh of the animal, which has been slaughtered, with a mention of His Name. Why should you not eat such flesh when God has told you in detail what is unlawful to eat under normal conditions. Most people, out of ignorance, are led astray by their desires. Your Lord knows best those who transgress" [148]**

4. The Holy Prophet (S.A.W.) has said:
"If one would not spare his life even by consuming carcasses for
149
food until he dies he will die without faith

5. "The Holy Prophet (S A W.) has said:
"If you are compelled, God has announced it lawful ",[150]

6. Imam Ali has said:
"There is not anything that God has made unlawful but that He Cases to which this Law may apply

The *Foqaha* have applied this law to cases wherein there is an order or prohibition from *Shariah.* Only when there is an obligation or prohibition then this law is applied. In cases of desirable, detestable or permissible matters there is no need for the application of this law because acting against such cases is permissible any way.

Although the evidence supporting the authority of this law such as the verses (in 1 and 2) above are indicative of certain prohibited matters only, however, the indications in the *Sunnah* on this issue is rather of a general expression. They include all that is a must to do or to avoid.

Some of the *Foqaha* have considered this quite beneficial in the cases
152wherein dangers to lives are involved. Imam Khomeini has said this on this issue, "All the unlawful matters become lawful in exigencies either because of saving lives, the body from decease or other such dangerous conditions wherein not acting in an unlawful manner would cause such a degree of hardship, e.g. in the case of hunger that normally is not bearable".[153]

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The Exceptional Cases

Although it may appear that all unlawful matters due to an exigency become lawful, however, as mentioned in the discourse on negation of hardships, this law is not applicable to those cases that the *Shariah* treats them in a special way. In those cases to which the indications of the verses of the Holy *Quran* and the *Sunnah* point out that even in exigencies one must not act in such an unlawful way, the *Foqaha* in such cases benefit from and apply the law of "important" and "more important". One example is taking the life of another human being due to an exigency. From the *Shariah's* point of view, without any doubt, to save one's own life or the lives of one's children one can not endanger the lives of other human beings.[154] Of some of the rules of the law of exigency, which by itself may be treated, as a very important subsection in *Fiqh* is this: "Acting against the primary law due to an exigency is permissible until it is over and not more".[155] The *Foqaha* have considered this rule as a rule whose authority
is self-evident and as a rule of reason. In other words, the law of exigency has two conditions: One is quantity, e g. in the case of hunger one is allowed to use inedible substances as much as it spares one's life and not more. The other condition is time. This rule is applicable only until the exigency exists. As soon as it is over the primary law will The application of this law in social issues and the issues that relate to the government also is subject to the two above-mentioned conditions. For example if the Islamic government due to an exigency would assign definite prices for certain commodities, firstly, it should be only to the limit of getting over with a dire need. Such a step would only be necessary in the case of the goods, which are being sold with excessive prices. Secondly, as soon as the conditions would turn to normal controlled prices should be abolished because the primary law in *Shariah* is for an open market and free competition in trade.

About the permissibility of inedible substances for food in an exigency, Sheikh Tusi has said this, "If one would fear for his life, he may consume inedible substances for food only to spare his life but not a
bellyful of it".[157]

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An Introductory Condition

{Muqaddimah-Al- Wajeb/Haram)

(Something leading to an obligatory or prohibited act)

The issue of being a lead or an introduction to something is one of the secondary titles that has produced a great deal of lengthy discourses in the works on *Fiqh* and the principles of jurisprudence. An act that in relation to the primary laws falls under one of the three of the universal categories such as being desirable, detestable and permissible may, for certain reasons, become an introductory act. And as such it may become an obligation or a prohibition when it becomes a lead and an introductory factor towards the completion of another act that is a must to do or otherwise. Therefore, a change in the status comes into existence in the form of an obligatory or prohibited act Lhat was only a desirable, a detestable or permissible before. This comes into existence as an introductory or a leading relationship with something. An introductory or being a lead means to be as such that completion of an obligatory or a prohibited one etc. would depend on it and without it such obligation etc. would not come into existence. Because of such relationship the lead or the introduction also under a secondary title becomes either obligatory or prohibited.

The Evidence Proving the Authority of this Law

Most of the *Foqaha* have considered such evidence to come from reason only. They do not accept the fact that *Shariah* has given it an obligatory or prohibited status. Muhaqqiq-e Naeeni has said, "If completion of some act would depend on something else the latter also becomes obligatory because of the decision of reason. It is so because of the fact that the existence of such relation, both from the point of views of reason and common sense, the lead and introduction also become obligatory. All
scholars agree on this issue".

Some of the *Foqaha* instead of considering something as a lead and an introduction to a prohibited act have called it (*sadd-e zara'i)* which is one of the established principles and it literally implies blocking the means to an expected end. Imam Malik and Ahmad Ibn Ilanbal have considered this to be one of the principles in the fundamentals of religion. Ibn Qayyim has said that *Sadd-e Zara'i* is one fourth of religion. He has refercd to about one hundred verses and *Ahadith* as being the evidence for its authority. Abu Hanifah and Shaft'i also have applied this principle in
some cases.[159] From the point of view of these scholars anything that would serve as lead to and introduction for a prohibited act and the spread of evil must be stopped from taking place so that evil would not spread in the society and among the people.

On the other hand anything that would become the lead to and an introduction for an obligatory act is obligatory. It has called *Fath-e Zara'i* (opening the way). However, the term *Zara'i* is used more often for the The following verses of *Quran* and *Ahadith* are pointed out to be evidence of the authority of this view.

**1. "Believers, do not say bad words against the idols lest they (pagans) in their hostility and ignorance say such words against God. We have made every nation's deeds seem attractive to them. One day they will all return to their Lord
who will inform them of all that they have done".[161]**

2. "Believers, do not address the Prophet (S.A.W.) as ra'ina (whereby the Jews, in their own accent, meant: Would that you would never hear), but call him unzurna (meaning:

P,ease sPeak 1° slowly so that we understand), and then listen. The unbelievers will face a painful torment''.[162]

In this verse it is prohibited to use the word because the unbelievers would use this word in a slandering manner.

3. From *Hadith,* those *Ahadith* that prohibit hoarding of goods are considered to be *sadd-e zara'i* (to remove the ladder to evil)[163]

4. The *Ahadith* of the Holy Prophet (S.A.W.) prohibiting to accept gratuity from an indebted person is considered as *sadd-e zara 'i* so that people would not become involved in accepting usury.[164]

The Effects of this Law on Social Issues

The existence of this law in *Fiqh* has a great deal of favorable effects. Many of the obligations and prohibitions of social nature related to the society and the government are based on this law. It is a fact that the prosperity of an orderly social life depends on the existence of people educated and skillful in different social enterprises such as industries, education, the army, medicine and agriculture. The *Foqaha* have also issued the *Fanva,* that if there is not enough people with such skills it is an obligation on the whole society in the form of a social obligation to acquire such skills and know-how. They must do so until enough people are educated for such tasks, even though, regardless of the social nature of these obligations, they by themselves are not obligatory. Many of the commandments that come from the Islamic government are based on this law. The instructions and the commandment of the Holy Prophet (S A W.) to manage and maintain the social order all may have been based on this law.

Conclusion

Without any doubt, the Islamic society due to new changes and developments in all walks of life is facing new problems and the *Shariah* must accommodate such issues and solve such problems according to its own standards.

بی‌تردید، جامعه اسلامی در گذر زمان و به موازات پیشرفت‌ها و دگرگونی‌های شگرف در ابعاد مختلف زندگی بشر، با مسائل نو و معضلات جدیدی روبه‌رو است که باید فقه اسلامی برای آن‌ها راه‌حل‌های مناسب و منطبق با موازین دینی بیابد.

In such a case it is the task of the *Faqih* who is well aware of the conditions of the time to take two steps: First, he must clarify properly the basics that *Fiqh* requires and rectify all the complexities through the skills of being a *Faqih* It is very much possible to solve a case with the application of the primary laws without resorting to the secondary laws.

بنابراین بر فقیه آگاه به زمان لازم است که اولاً: احکام و قواعد و مبانی فقهی را به خوبی تنقیح و تبیین نماید و نقاط نامنقح و مبهم آن‌ها را با سرانگشت فقاهت روشن نماید؛ زیرا چه بسا معضلات و مشکلات جدیدی که با همان احکام و قواعد اولیه قابل حل است

Secondly, he must carefully study the cases and subjects to which the secondary laws could be applied so that when necessary after inapplicability of the primary laws the secondary laws would be applied. Through such process it becomes possible to find proper Islamic solutions to all the

issues and the problems of the society in all times and circumstances.

ثانیاً: بر احکام و قواعد ثانویه و مجاری آن‌ها به خوبی وقوف یابد تا در صورت لزوم، معضلاتی را که از طریق احکام اولیه قابل حل نیستند، با این قواعد و احکام مرتفع نماید و بدین ترتیب جاودانی بودن اسلام حنیف و توان‌مندی آن برای اداره جوامع در همه زمان‌ها را به منصه ظهور برساند

The secondary laws are beneficial utilities for the government. The Islamic government may study any newly emerging case and find proper solutions for the key issues such as balancing the economy, curbing inflation, controlling the population, regulating prices of goods, issues related to currencies, banking issues, taxes, internal and external affairs of trade etc.

احکام عناوین ثانویه، ابزار کارآمدی است که ولی‌فقیه می‌تواند به کمک آن‌ها، حوادث واقعه و مشکلات حکومت اسلامی را رسیدگی نماید و در امور مهم و کلیدی، مانند ایجاد توازن اقتصادی، مهار تورم، کنترل نفوس، تعیین و کنترل قیمت‌ها، پول و ارز، بانکداری، مالیات، تجارت داخلی و خارجی و... از آن‌ها بهره گیرد.

The secondary laws, however, must not be carried out to their extremities and with the emergence of every new case the secondary laws must not, before proper studies, be declared as solutions. Proper discernment of the cases and subjects to which a secondary law could be applied requires a sound degree of knowledge and awareness. The basis for the application of the secondary laws is when it would not be possible to apply the primary laws.

نکته مهمی که باید در این‌جا خاطرنشان شود این است که نباید در راه‌گشا دانستن احکام ثانوی به جانب افراط رفت و با پیدایش هر مسئله و مشکلی بی‌درنگ به سراغ این احکام رفت. مصلحت جامعه اسلامی در این است که در حد امکان، مشکلات آن را با احکام ثابت و اولیه، مرتفع نمود و تنها در مواقع ضرورت و هنگامی که احکام اولیه، جواب‌گو نیستند، به سراغ احکام ثانویه رفت.

To explore this and the case to which the secondary laws could be applied, as just mentioned, requires a sound degree of knowledge of the Islamic resources. For example when and to which case the rules of no harm and no hardships are applied or that which case is important and which one is more important all require proper knowledge of the *Shariah.*

The secondary laws come from very high grounds in the *Shariah* and that such laws play very significant roles in the law. In many cases the primary laws do not have the necessary force, especially, the social issues. In such fields the secondary laws work as the key to solve difficult problems. Taking into consideration the availability of such sources of laws to the Islamic social system in all times and places it will have proper laws for all cases. In reality the secondary laws are complimentary to the primary laws.

The existence of the secondary laws in the Islamic system is not due to shortages of legal resources. On the contrary, it is the sign of its richness and the vastness of its resources. These laws exist due to the unavoidable emergence of changes that take place in human life and in certain circumstances and surroundings. The presence of such categories of laws in the Shariah of Islam are significant factors in dealing with changes. It is a degree of flexibility for variously changing needs of all times and locations.

باید گفت نه تنها وجود این احکام در فقه اسلامی، بیان‌گر نقصان و عدم غنای آن نیست، بلکه نشانه کمال و بالندگی آن نیز هست؛ چرا که وجود این احکام، لازمه حتمی و غیر قابل گریز تحول و تغییر در زندگی انسان‌ها

و بروز حالات و موقعیت‌های غیر عادی در جهات مختلف حیات بشری است. وجود این عناوین و احکام در متن فقه اسلامی، عاملی بسیار مهم در پویایی و انعطاف‌پذیری و تطبیق آن بر نیازهای گوناگون و متحول هر زمان و مکان است.

Islam is a religion with preciseness of mathematical characteristics. It calculates with accuracy and balances that which is important and which is more important. According to the Islamic system in times of need, an issue of vitality could and should be sacrificed for that of greater vitality. This factor has bestowed proper flexibility to the system. We have not introduced such a factor into the system. The system has been made this way and in this form it has been given to us. Even if we wanted to make the system flexible, we did not have such a right in the first place. Flexibility is a component part of the nature of this system, and it is an equating process that it contains for us.

در کتاب استاد کلانتری این قسمت از مرجع شماره ۵ به نقل از استاد مطهری بیان شده است اما در رساله آقای روحانی هیچ صحبتی از مرجع نشده و گویی نقل قول استاد شهید را به نام خود کرده است !!!!

علامه شهید مطهری می‌گوید: اسلام دین حساب است، حساب اهم و مهم را می‌کند، می‌گوید در موقع لزوم آن چیزی را که اهمیت کم‌تری دارد فدای چیزی که اهمیت بیش‌تری دارد بکن. این خودش یکی از اموری است که به اسلام انعطاف بخشیده‌است. این انعطاف را ما نداده‌ایم، خودش این‌جور ساخته شده و به دست ما داده شده‌است. اگر ما می‌خواستیم به زور یک نرمش به آن بدهیم حق نداشتیم، ولی این یک نوع نرمش است که خود اسلام به خودش داده‌است، حسابی است که خودش به دست ما داده‌است

The position of the secondary rules and laws in the *Shariah* is as those of an integral part in a system. Evidence to this is the fact that the authoritative basis for these laws and the primary laws are the Holy *Quran* and the *Sunnah.* Secondly, the *Foqaha* according to their methodology of reasoning have dealt with the secondary laws along with the primary laws. They have not dealt with the secondary laws in a separate chapter.

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Notes:

1. Hakim Muhssen, *Haqaq Al-Osul,* Najaf, 1968, Vol.l, P. 504.

2. The laws which have been laid down irrespective of die special and extraordinary circumstances are called Al ahkam al avvaliiah; and the laws which have been laid down for the special and extraordinary circumstances are called *Al ahkavi al* rhanaviiah (Makarem. Alqavaed Al Fiqhiiah. Vol. 1. P 147).

3. Khoei Abolqasim, *Mesbah Al-Fiqahah,* Najaf, 1973, Vol. 1, P. 23.

4. Makarem Naser, *Al-Qavaed Al* Fiqhiiah, Qom, 1966, Vol. 1,

Allameh Helli, *Nahaj Al Haqq,* Tehran, 1990, P. 82.
Isphahani Muhammad Taghi, *Hedayat Al-Mustarshedin,* Qom, 1951, P. 112.
Muhammad Hussein, *Fusul,* Tehran 1948, P. 335.
In his book *"Makasib"* and also in *"Fraed Al Osul*", when he discusses about *la-zarar* rule has put forth some precise and valuable subjects about *Al ahkam al thanaviiah.* (Ansari Mortaza, *Al-Makasib* Vol.2, P. 58).
Mohaqqiq Khorasani (d. 1329) in his book *" Kef ayah-Al-usul"* when discussing about *la-zarar* rule makes some remarks about the secondary rule (Khorasani Kadem, *Kefayal Al-Osul,* Vol.l, P.348).

9. For example, Allameh Majlesi (d. 1111) in his account of the *hadith "la-zarar and la-zarar"* writes: This *hadith* has been reported by all the *ulama* and has become an important legal principle (Majlesi, *Behar al Anvar,* Vol. 92, P.75).

Ibn Hazam Andolosi (d. 456) in his book "Al-Mohalla" has discussed about "Ikrah" and its kinds in several pages. He also has some remarks about oblation, promise and oath in this book. Ahmad ibn Hussein Beihagqi (d. 458) in his book "Al-Sonanal- kobra' has discussed in detail about oblation, promise and oath. Abu Bakr ibn Masoud in his book "Badae'Al- Sanae"' under the heading of Ikrah has discussed about literary and legal sense of Ikrah and its kinds, conditions and rules in several pages. He has also some remarks about oblation, promise and oath. Also Ibn Qudameh (d. 620) in the 5th and 8th volume of his book "Al- moqni" has discussed about Izterar (emergency) and Ikrah and the conditions for their realization and their rules. He has some remarks about oblation, promise and oath in the 1 lih volume of this book. Abd-Al-Aziz ibn Abd-Al-Salam (d. 660) in his book *"Qava 'ed Al Ahkam"* has discussed about *Ikrah, Izterar, Ahamm* and *Mohemm* (important and more important) law and lesser of two evils law. lie discusses about the matter of how a *Haram* (prohibited) action becomes *Mubah* (permitted) and considers it a case of "victimize an expediency for a more important one". Mohie Al-din Novi (d 676) in his book *"Sharh Al Mohazzab*", in several instances resorts to the *La-*

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zarar rule and in die 13th
volume of this book in the subject of mortgage, have a brief explanation about the hadith of la-zarar *and la-zarar.* In the 9th volume of this book, we encounter some issues about *Ikrah* and *Izterar.* Suiuti (d. 911) in his book *"Al-Ashbah and Al-nazae'r"* has discussed about the negation of *haraj* rule and the negation of Zarar rule and about Ikrah respectively in 9 pages.
11. Malek Ibn Anas, Almodavvanah-Al-Kobra, Birut, 1931, Vol.2, PP. 291-292.
12 Shafei, *Al-Omm,* Birut, 1959, Vol 1, P 254

13. Ibid, P. 252.
14. Ibn Qudameh, *Al-Moglini,* Birut, 1989, Vol. 5, P. 273.
15. Meshkini Ali, *Estelahat Al-Osul,* Qom 1969, P. 121.
16. Sharabiani Abd Al-Majid, *Majmueh* Author, Tehran, 1996, Vol.9, P. 290.
17. Jafari Muhammad Taqi, *Majmueh Aathar,* Tehran, 1996, Vol. 3, P. 91.
18. Yazdt Muhammad, *Nor-e-ilm,* Qom, 1981, Vol. 9, P. 86.
19. Ansari, *Al-Makaseb,* Tabriz, 1940, P. 278.
20. Makarem Naser, op.cit., Qom, 1966, Vol 1, P. 169.
21. Imam Jafar Sadeq, the son of the fifth Imam, was born in 83/702. He died in 148/765 according to Shiite tradition. During the
imamate of the sixth Imam greater possibilities and a more favorable climate existed for hum to propagate religious teachings. This came about as a result of revolts in Islamic lands, especially the uprising of the Muswaddah to overthrow the Umayyad caliphate, and the bloody wars which finally led to the fall and extinction of the Umayyads. The greater opportunities for Shiite teachings were also a result of the favorable grounds the fifth
Imam had prepared during the twenty years of his imamate through the propagation of the true teachings of Islam and the sciences of the Household of the Prophet (S.A.W.). The Imam took advantage of the occasion to propagate the religious sciences until the very end of his imamate, which was contemporary with the end of the Umayyad and beginning of the Abbasid caliphates. He instructed many scholars in different fields of the intellectual and transmitted sciences.
22. Koleini Muhammad, Osul-e-ATa/t, Birut, 1987, Vol. 2, P. 327.
23. Saremi, *Majmueh Aathar,* Tehran, 1996, Vol. 7, P. 337.
24. Allameh Helli, *Mokfualaf Al-Shia,* Qom, 1995, Vol. 5, P. 41.
25. Khoei Abolqasim, *Mesbah Al-Feqahah,* Najaf, 1973, Vol. 4, P. 93.
26. Ansari Mortaza, *Almakaseb,* Bimt, 1995, Vol. 2, P.17.
27. Allameh Helli, *Sharaie Al Ahkam,* Tehran, 1977, Vol. 2, P. 331.
28. Ben Salameh Hebatollah, *Al-naskh va Al mansookh,* Cairo, 1983, P.15.

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29. Ata'eqi Abd-Al-Rahman, *Tafsir Ata'eqi,* Qom, 1980, Vol. 1, P.142 .

30. The *Quran* 2: 173.

31. Ibid.

32. Mareft Hadi, *Talkhis al Tamhid*, Qom, 1994, Vol. 1, P. 412.

33. Ibid.

34. Hakim Muhseen, *Haqa'eq Al-Osul,* Najaf, 1968, Vol. 1, P. 542.

35. The *Quran 2:* 173.

36. The word *"Tcryammum"* is derived from "amma": he repaired a thing and *"Tayammum", therefore,* means, originally, betaking oneself to a thing and, since the word is used here is connection
with betaking oneself to pure earth, *"Tayammum"* has come technically to mean this particular practice of touching the earth and then wiping over the face and hands.
Naeeni Muhammad Hussein, *AlTaqrirat,* Najaf, 1951, Vol. 1, P. 194.
Mozaffar Muhammad Reza, *Osul-AI-Fiqh,* Tehran, 1968, Vol. 1, P.6.
The *Quran,* 5: 6; 4: 43.
The *Quran* 6: 119; 2:173; 5:3 .
Imam Khomeini, *Al Beia,* Qom, 1980, Vol. 2, P. 498.
The *Quran* 22:78.
Najafi Muhammad Hassan, *Jawahir Al-Kalam,* Birui, 1981, Vol. 21, P. 404.
44 A'meli Javad, *Miftah al Keramah,* Qom, 1973, Vol. 7, P. 3.
45. Those secondary rules which are represented in few cases in one or two chapter offiqh, are surveyed in the same chapters such as the discussion about the prohibition of eating the meat of an animal who eats nejasat, bui those secondary rules which flow in the majority or all of the chapters of *fiqh* are surveyed as main rules, such as the *la-zarar* and *la-haraj* rule.
Ansari Mortaza, *Faraed Al-Osul,* Tabriz, 1932, P 279. Montazeri, *Velaiat Al Faqih,* Qom, 1985, Vol. 2, P. 194.
Ibid.
Ansari Mortaza, *Al-Makaseb,* Birut, 1995, Vol. 1, P. 392.
Imam Ali, *Nahjul Balaghah,* Rome , 1984, P.542.
Makarem Naser, *Anvar Al Fiqahah,* Vol. 1, P. 546.
Najafi Muhammad Hassan, *Jawahir al Kalam,* Birut, 1981, Vol. 1, PP. 289-290.

53. Ibid, Vol. 36, PP. 424-425.

54. Makarem Naser, *Al Qavaed Al Fiqhiiah* Qom, 1966, Vol. 1,
P. 393.

55. Therefore, "the most important and important" rule is the criterion and reason for precedence of the secondary rules in relation to the primary rules. Thus, it is not very unusual to

say that the precedence of the secondary rules in relation to the primary rules practically is placed under the heading of the precedence of the most important in relation to an important case.

56. Ansari Mortaza, *Al Makaseb,* Birut, 1995, Vol. 2, P. 452.
57. Naeeni Muhammad Hussein, *Tanbih al Ummah,* Tehran, 1961, P. 5.
58. Najafi Muhammad Hassan, *Jawahir Al-Kalam,* Birut, 1981, Vol.l, P. 404 .
59. Ibid. Vol. 22. P. 119.
60. Imam Khomeini, *Al Beia',* Qom 1980, Vol.2, P. 461.
61. Naecni Muhammad Hussein, *Tanbih al Ummah,* Tehran, 1961, P. 5.
58. Ibid, P. 46.
59. KJioei Abolqasim, *Mesbah Al-Fiqahah,* Najaf, 1973, Vol. 1, P. 27.
60. Some jurists in spite of strong reasons for this rule and its frequent use by the jurists, considers its content ambiguous and by limiting its authencity (*hojiyyat)* to the obligatory cases that are out of the power of the human beings, actually have denied its authencity, neglecting this fact that in these cases the reason itself independently rules the negation of obligation and *Shariah* no longer needs this rule. (A'meli, *Al Fosul al Muhemmah,* P. 249).
61. Makarem Naser, *Al qavaed al fiqhiiah,* Qom, 1966, Vol. 1, P. 160.
62. The *Quran,* 22: 78
63. Ibid, 5: 6.

68 Ibid, 2: 185.

69. Ibid, 2: 286.
70. A'meli, *Vasael Al Shia,* Birut, 1983, Vol.l, P. 326.
71. Ibid, Vol. 2, P. 1072.
72. Bujnurdi Hassan, *Alqavaed Al Fiqhiiah,* Najaf, 1979, Vol. 1, P. 211.
73. Ibid, P. 183.
74. Ibn Al Athir, *Al Nehaialt,* Cairo, 1967, Vol. 1, P. 251.
75. Ibn Manzur, *Lesan Al Arab,* Birut. 1970, Vol. 2, P. 233; Jowhari, *Sehah Al Lugha/i,* Birut, 1956, Vol
76. The *Quran,* 9: 91.
77. Ibid, 24:61.
78. Ibid, 6: 125.

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79. 79. Ibid, 7: 2.

80. Ibn Athir, *Al Nehaia,* Cairo, 1967, Vol. 1, P. 342.

81. Jowhari, *Sehah Al Lughah,* Birut, 1956, Vol. I, P 42; *Lesan al Arab,* Vol. 2, P. 314.

82. **"And strive hard in (the way of) Allah , (such) a striving as is due to Him; He has chosen you and has not laid upon you any hardship in religion" (the Quran , 22: 78).**

83. A'meli, op.cit., Vol. 1, P.179.

84. Bujnurdi Hassan, *Al Qavaed al fiqhiiah,* Najaf, 1979, Vol. 1, P. 209.
85. Ibid, PP. 211-214.

86. A'meli, *Miftah-Al-Keramah,* Birut, 1981, Vol. 7, P. 3.

87. Bahrani, *Hadaeq-Al-Nazereh,* Birut, 1985, Vol. 12, P. 473.

88. Najafi Muhammad Hassan, *Jawahir-Al-Kalam,* Birut, 1981, Vol. 5, PP. 102-103.

89. Ibid, Vol. 12, PP. 250-251.

90. Ibid, Vol. 13, P. 283.

91. Tabatabaii, *Al Orvah Al Wuthqa,* Najaf, 1974, Vol.2, P. 75.
"Hadd" punishment only given when there is a violation of people's Rights. The word Hudud is the plural of an Arabic word Hadd, which means prevention, restraint or prohibition, and for this reason, it is a restrictive and preventive ordinance, or statute, of Allah concerning things lawful (Halal) and things unlawful (Haram). Hudud of Allah are of two categories. Firstly, those statutes prescribed to mankind in respect of foods and drinks and marriages and divorce, etc., what are lawful thereof and what are unlawful; secondly, the punishments, prescribed, or appointed, to be inflicted upon him who does that which he has been forbidden to do. In Islamic jurisprudence, the word hudud is limited to punishments for crimes mentioned by the Holy *Quran* or the *Sunnah* of the Prophet (S A W) while other punishments are left to the discretion of the *Qaz.i* or the rule which are called *Taazir* (disgracing the criminal).
The word "*qesas*" is derived from an Arabic word *qessa* meaning he cut or he followed his track in pursuit, and it comes therefore to mean Law of Equality or equitable retaliation for the murder already committed. The treatment of the murderer should be the same as his horrible act, that is, his own life should be taken just as he took the life of his fellow man. This does not mean that he should also be killed with the same instrument or weapon. The injunctions on qesas in the *Quran* are based on the principles of strict justice and equality of the value of human life.

94. The *Quran*, 22: 78.

95. Muhammad Hussein, *Al Fosul,* Qom, 1932, P. 334.

96. Najafi, *Javaher Al Kalam,* Birut, 1981, Vol. 5, P. 103; Vol.21,
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P. 62.

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97. Ibid.
98. The *Quran,* 22:78.
99. Bujnurdi, *Qavaed Al Fiqhiiah,* Najaf, 1979, Vol. I, P.74.
100. The *Quran,* 2: 216.
101. Ibid, 33: 10.
102. Makarem Naser, *Al Qavaed Al Fiqhiiah,* Qom, 1966, Vol. 1, P. 194 .
103. The *Quran.* 9: 117.
104. Najafl, *Jawahir Al Kalam,* Birut, 1981, Vol. 17, P. 150.
105. Hamedani Reza, *Mesbah Al Faqih,* Qom, 1941, P. 463.
106. Tabatabaii, *Al Orvah Al Wuthqa,* Birut, 1990, Vol. 1, P.
107. A'meli, *Vasael Al Shia,* Birut, 1983, Vol. 5, P. 417.
108. Hamedani, *Mesbah-Al-Faqih,* Qom, 194, P. 463.
109. Makarem Naser, *Al Qavaed al Fiqhiiah,* Qom, 1966, Vol. 1, P. 198.
110. Andari, *Al Fraed Al Osul,* Tabriz, 1932, Vol. 1, P. 198.
111. Al A'meli, *Vasael Al Shia,* Birut, 1983, Vol. 2, P. 512.
112. Ibid, P. 995.
113. Kolani, *OsulalKafi,* Birut, 1985, Vol. 2, P. 512.
114. Ansari, *Al Makaseb,* Birut, 1995, P. 360.
115. Tosi Muhammad Hassan, *Al Khelaf,* Qom, 1989, Vol. 1, P.552.
116. Ibn Zohreh, *Qonyah Al Nuzua',* Cairo, 1995, P 588.

J17. Ibn Dawud, *Al Sunan,* Cairo, 1971, Vol. 3, P.315, *hadith* no. 3035.

118. Termezi, *Al Sahih,* Cairo, 1968, Vol. 4, P. 332, *hadith no.* 1940.
119. Ibn Majeh, *Al Sunan,* Birut, 1981, Vol. 2, P. 5800.
120. Zeydan Abdulkarim, *AI Madkhal le derasah al Shariah*, PP. 98-99.
121. Ibn Najim, *Al Ashbah va Al Nazaer,* Cairo, 1988, P. 85.
122. Abd al Munem, *Al Ijtihad,* Cairo 1995, P. 106.
123. Fakhr Al-Muhaqqiqin, *Izah-Al-Favaed,* Qom, 1991, Vol. 2, P. 48
124. A'meli, *Vasael Al Shia,* Birut, 1983, Vol. 17, P. 256.

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125. Ibid, P. 179.

126. Ibid, P. 324.

127. Ibn Athir *Al Nehaiah,* Cairo. 1978. Vol. 3.

128. Ansari, *Faraeci Al Osul,* Tabriz, 1932, Vol.

129. Meshkini*, Astelahaiol Osul,* Qom, 1969, P.

130. The *Quran*, 2: 197.

131. Ibid, 20:97.

132. Koleini, *OsulAlKafi*, Biait, 1995, Vol. 2, P. 183.

133. Imam Khomeini, *Tahzib Al Osul,* Qom 1959, Vol. 2, PP. 112-117.

134. Makarem Naser, *Al QavaedAl Fiqhiiah,* Qom, 1966, Vol. 1, PP. 61-65.

135. Ibid, P.68.

136. The *Quran,* 16:106.

137. Ibid, 24: 33.

138. Saduq, *Al Khesal,* Tehran, 1948, Vol. 2, P. 45.

139. Ansari, *Alma Kaseb,* Birut, 1995, Vol. 2, P. 87.

140. The *Quran* 4: 29.

141. Imam Khomeini, *Al Rasael,* Qom, 1948, Vol. 2, P. 65.

142. Jowhari, *Al Sehah,* Cairo, 1973, Vol. 3, P. 72.

143. Ibn Manzur, *Lesan Al Arab,* Birut , Vol. 6, P. 94.

144. *Ikrah* is used in the cases that the other person forces an individual to implement or abandon a job, in this event, three headings of *tnokreh, niokrah* and *Ikrah* are found, but *Izterar* is used often where the person without imposition by the other person is forced to implement or abandon a job.

145. Tabari Fasl Ibn Hassan, *Majma' al Baian,* Birut, 1995, Vol. I, P. 257.

146. The *Quran, 2:* 173.

147. **Ibid, 5: 3.**

148. Ibid. 6: 119.

149. A'meli, *Vasael Al Shia',* Birul, Nori Hussein, *Mostadrak al* P.166.

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150. *Vasael,* Birut, 1993, Vol. 16.
151. Ameli, *Vasael Al Shia',* Birut, 1983, Vol. 2, P. 690.
152. Tosi Muhammad Hassan, *Al Nehaiah,* Birut, 1980, P. 586.
153. Imam Khomeini, *Tahrir al Vasilah,* Najaf, 1966, Vol. 2, PP. 169-170.
154. Helli, *Sharaea Al Islam,* Tehran, 1977, Vol. 2, P 418.
155. Makarem Naser, *Anvar Al Fiqahah,* Qom, 1983, Vol. 2, P.199.
156. Ibid, PP. 199-202.
157. Tosi Muhammad Hassan, *Al Nehaiah,* Birut, 1980, P. 586.
158. Naeeni, *Tanbih Al Ummah,* Tehran, 1961, P. 50.
159. Zohalei, *Ijtihad,* Cairo 1982, P. 37.
160. Zeydan Abdulkarim, *Al Madkhal,* Cairo, 1981, P. 204.
161. The *Quran,* 6: 108.
162. Ibid, 2: 104.
163. Zeydan Abadul Karim, *Al Madkhal,* Cairo, 1981, P. 201.
164. Ameli, *Vasael Al Shia*', Vol. 18, Birut, 1983, PP. 152-159.

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THE FLEXIBILITY OF SHARJAH (ISLAMIC LAW) WITH REFERENCE TO THE IRANIAN EXPERIENCE 20

By: HASSAN FERIDON

A thesis submitted in partial fulfilment of the requirements of Glasgow Caledonian University for the degree of Doctor of Philosophy 14

(ph.D)

July 1998 Abstract This thesis verifies that no laws in Islam are immutable. Immutability is only applicable to faith, values and ultimate goals in Shariah. Those laws which look immutable even in ritual part of the religion are not actually immutable and are subject to change under special circumstances. Islamic laws have been developed out of certain conditions and necessities of the time and space. This flexibility must be known as the essential feature of the Islamic law. The framework for this flexibility and change has been predicted and verified in the main sources of Shariah i.e. the Quran, the Sunnah, Ijma, Qiyas, Aql and Urf. The primary source of the Islamic law (the Quran) is, in itself, flexible on the basis of the analysis that the Quranic legislation leaves room for flexibility in the evaluation of its injunctions. The Quran is not specific on the precise value of its injunctions, and it leaves open the possibility that a command in the Quran may sometimes imply an obligation, a recommen¬dation or a mere permissibility. Commands and prohibitions in the Quran are expressed in a variety of forms which are often open to interpretation. The main devices for 4

change predicted in Shariah are Ijtihad, Maslaha and Al-ahkam- al-thanayiiah (secondary rules). Chapter one discus¬ses Lite concept and development of Ijtihad. In chapter two, the role of Ijtihad in providing the shariah with flexibility will be analysed. Chapter three outlines how in practice Ijtihad has been effective in making the Islamic law flexible. Chapter four is devoted to the concept of Al-ahkam-al-thanaviiah (secondary rules) as it has been developed by Muslim jurists. Chapter five will deal

with the theory of Maslaha as a dynamic device in Shariah. Finally, in chapter six, the role of A l-ahkam-al-thanaviiah and Maslaha in Islamic Iranian law will be examined as it has been developed over the years. Introduction The Shariah

is that body of knowledge which provides the Muslim civilization **with its** 2

major means of adjusting to change. The Shariah is normally

described as "Islamic law". **But the boundaries of** 2

Shariah extend eyond

the limited horizons of law. The Shariah **is also a system of ethics and values, a pragmatic methodology geared to solving today's and tomorrow's problems.** 2

For a Muslim community, **the** Shariah **represents that infinite spiritual and worldly thirst that is never satisfied.** Muslims **always** 2

seek an increasingly comprehensive

implementation of the Shariah **on** their **present and future affairs.** 2

However

in the entire history of Islam, the Shariah **has not been more abused, misunderstood and misrepresented than in our epoch. It has been** confined **to** observing formalities **and** 2

ritual ceremonies while being

projected as an ossified body of law that bears little or no relationship to modern times. It has been presented as an intellectually sterile body of knowledge that belongs to past **history rather than the** 2

present and the future. All this has been to the detriment of the Muslim people; and has suffocated the

true revival of Islam and a genuine emergence of a contemporary Muslim intellectual tradition. 2

Although Shariah comprises spiritual and ethical aspects of life in an Islamic society, the legal aspect of Shariah is the dominant part and that is the legal part of Shariah which has been subjected to in-depth research and analysis in this thesis. If the Shariah

is to become the dominant guiding principle of behaviour of contemporary Muslim societies, then it must be rescued from the clutches of fossilized traditional 2

tendencies. It is the purpose of this thesis to verify the hypothesis that Islamic law (Shariah) enjoys dynamic features and devices which are truly liberal, progressive and broad-minded and therefore the application of these devices equipS the Islamic law with features that it can cope with changing conditions of different eras. The thesis considers it a platitude that change is inescapable and that the details of the law must vary according to the exigencies of changing times. Owing to this fact,

nearly all the legal provisions contained in the Quran reflect the social conditions 19

and to treat them as

binding for all time is to defy the primordial law of evolution and to ignore the spirit of the Quran which attributes the quality of permanence only to spiritual values and ultimate goals. All other aspects of life on earth are necessarily subject to change, and no enlightened community would legislate on a contrary principle. 6

Islamic system has faced different circumstances many times in practice as well.

When the Islamic state expanded into provinces ot the Byzantine and Persian empires, new problems had to be faced which had not been encountered during 6

Muhammad's (S.A.W.) lifetime. The Quran

and the Sunna, however, contained the principles on which such problems. could be solved. 6

Islamic countries today are faced with many new social problems. Most of these are the inevitable result of the technological and industrial developments of the last two centuries, which have been made possible much larger conurbations, much larger political units and more rapid communications. Because Islamic societies want to have the products of industrial technology, they cannot avoid the relevant **problems.** However, **the** fundamental difference between **the** 6

Islamic laws and the statute law (written law passed by a human law-making body) lies in the fact that the statute law is made by man and therefore can also be changed by man if need arises. When we are operating in the context of such laws, no one doubts that the laws can be changed if necessary. No one claims that these laws are eternal and immutable and there are even cases where the conditions for changing any items of the Constitution have been specified and set out. The man-written laws are not considered to be sacred by the society and therefore making any changes to such laws do not in normal circums- tances lead to any social turmoil vor disturbance if they were based on the needs of the society itself; rather, even the contrary is true in the sense that making changes to man-made laws is considered to be a necessary process of law making.The

law of continental Europe looks back, generally speaking, to Roman law. And Roman law, of course, received its most authoritative articulation under Justinian, when the empire was already officially Christian. But the Justinian legislation itself looked back to the great jurists of the Antonine era, who wrote at a time when the old paganism had already lost its hold over educated men, yet before the influence of Christianity had taken its place. Essentially, then, Roman law represents a law devised by men for men, a masterpiece of mature legal deliberation. It was therefore a law that could be changed, if circumstances so required, in much the same way in which it had been formulated. The 7

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

lawgiver. Now, the question is who can make changes to the divine laws in an Islamic system and how? Has the dynamism of changing laws been predicted in the Islamic texts of law? Is there any authority recognizable in the text of the Quran and the Sunnah for changing and interpreting divine laws? The difference of opinion between the progressive Islamic scholars and the traditional forces became so acute that the latter claimed that "all innovation and change is the work of devil" to condemn and suppress the former. This motto does

not merely reflect the innate conservatism and the deep seated attachment to tradition which was so strong among the early Muslim **peoples who formed the first adherents of the faith,** it **also** expresses **a principle which became a** fundamental **axiom of religious belief common to Islamic communities everywhere - namely, that the code of conduct represented by the religious law, or** Sharia, **was fixed and final in its terms and that any modification thereof was necessarily a departure and a deviation from the one legitimate and valid standard.** 5

Based on the ideologies of Islam) the Islamic world has survived for many centuries, and its steadily increasing population is now said to surpass **one billion. It has been able to operate effectively** through out **the ages and in all places under the** Sharia law, generating **a splendid civilization in its early history. Despite the savage wars of the Mongol hordes, the Crusades, and then the European colonialism, the** 1

Islamic world endured.

This survival bears witness to the existence of a working and adaptable nature **of** 11

the Islamic system. Islamic guidance permeates

all aspects of human life and divides all human behavior into five moral categories: obligatory (Wajib), **merely desirable** (Mandub), **forbidden** (llaram), **merely undesirable** (Makruh), **and** neutraJ (Mobah). **The** 11

question is whether all the human affairs which are among these categories are rigid so that no item can be transferred from one category to another because of changing circumstances of the time. In other words, are these categories so flexible that, for instance, one item which is considered obligatory (Wajib) at a certain lime becomes neutral (Mobah) at a

different lime (the secondary law). One of the major concerns of this thesis is to provide reliable and well-researched answers and good solutions to these complexities. Islamic teachings

does not confine man to a single course of action without **choice, nor does it leave him a victim of uncontrolled greed, human vagaries, and stubbornness. It grants man a wide range of choices and creativity, motivates him to satisfy his physical and psychological needs in progressive processes, but seeks to protect him from evil. In** 1

order to direct man toward happiness and prosperity certain values have been introduced.

In the light of these values, **the Islamic concept of** law **may be defined as a framework for motivated but free human action within the Islamic value system. That action must respect specific ordinances pertaining to** social **life and take into account the spiritual and material needs of the individual and his** or her **society in a balanced and harmonized way.** 1

while law in Islam is **God-given, it is man who must apply the law.** 3

And between the original divine proposition and the eventual human disposition is interposed an extensive field of intellectual activity and sphere of **decision** 3

making.

In short, jurisprudence in Islam is the whole process of intellectual activity which ascertains and discovers the terms **of the divine will and transforms** 13

this body of ideas

into a system of legally enforceable rights and duties. 23

It is within these terms of reference that the tensions and conflicts of Islamic legal thought arise. Therefore, Islamic law has

a distinctly dual basis. It is a compound of the two separate spheres of divine ordinance and human decision. 3

One obvious consequence is that the role of human reason¬ing in Islamic jurisprudence does not always meets with the approval of Muslim governments and some prominent Islamic jurists. There is still a deep-rooted opposition to change both in principle and in practice. The above-stated problem can be more explored to clarify the nature and complexity of the issue under discussion. In Medina, the first community of

Islam, the Islamic city-state was established with the Prophet (S A W.) himself as its temporal head. 1 With the basic ideology of Islam well entrenched, legislative guidance developed, aiming at the best possible results in all spheres of life, including the social, economic, and political domains. At the death of the Prophet (S.A.W.) in 632, the Holy Book of Islam, the Quran, had been completely revealed. It incorporates the basic guidance of Islam and is believed to be God's own word. Preserved in the beans of thousands of the Prophet's disciples and also recorded in writing during his lifetime, the Quran was soon duplicated for wide distribution. As a source of Islamic guidance, the Quran was supplemented by the Sunna, the reported words and actions of the Prophet (S A W), which run into tens of thousands of records, known as hadiths (traditions). Both these literary works have always been acknowledged as the primary sources of guidance for Muslims on all aspects of life. As the Islamic state expanded and incorporated most of the territories then known, Muslim leadership was confronted with innumerable problems, which they resolved with an amazing degree of efficiency. As a result, the Islamic legal system emerged, known as Fiqh or Sharia, based primarily on the Quran and the hadith records. Muslim jurists sought to answer every conceivable question and organized their findings into several categories -- dealing first with the details of the ritual duties then with all types of human interactions, including what may be regarded as commercial law, personal law, and criminal law.

The

first 150 years of Islam were characterized by an almost untrammeled freedom of juristic reasoning 3 in the solution of problems not specifically regulated by divine revelation. Such rules of law as the Quran and the Surma established were regarded simply as ad hoc modifications of the existing customary law. This existing law remained the accepted standard of conduct unless it was expressly superseded in some particular by the dictates of divine revelation. And when new circumstances posed fresh problems, these were answered on the basis simply of what seemed the most proper solution to the individual judge or jurist

concerned. In the expression of his personal opinion, known as ra'y, the individual was free to take into account any factors

he deemed relevant. In short, in

these early days law had a distinctly dual basis 8

But this pragmatic attitude soon fell victim to the increasing sophistication of theological and philosophical inquiry. Among the growing body of scholars whose deliberations were attempting to explain the essence of their faith arose a group who took their stand on the principle that every aspect of human behavior must of necessity be regulated by the divine will. In their philosophy of law the legal sovereignty of God was all-embracing. 8

To allow human reason to formulate a legal rule -- whether by continued recognition of a customary law or by juristic speculation on a new problem -- was tantamount to heresy. In 12

the language of Islamic theology it was "to set up a competitor with Allah" (sherk) and to contradict the fundamental doctrine of the omniscience and omnipotence of the Creator. 3

Because this group believed that every rule of law must be derived either from the Quran or from the Prophet's practice as recorded in reports known as hadith, they became known as "the supporters of hadith",

(ahl al- hadith), as 21

against "the supporters of ra'y"

(ahl al-ra'y), who maintained that the 21

free use of human reason to elaborate the law was both legitimate and necessary, The rift between the two groups hardens whenever the Islamic societies face with changing circumstances both domestically and interna¬tionally. Therefor, the tension arises again and again

between the divine and the human element in law. 3

Among Muslim peoples, therefore, it is what we may call the traditional or classical Islamic concept of law and its role in society that constitutes a most formidable obstacle to progress. 5

It is necessary to emphasize that finding solutions to these problems is of great significance. The population in 57 states are currently living either directly or indirectly under the Islamic system of laws. The way we interpret and understand the Islamic laws has a great and crucial impact on the quality of the life of millions of Muslims in the world. It is to be noted that the twentieth century has been a difficult time for the lands of Islam. Despite the backwardness of Islamic societies, the spiritual vigour of the Muslim peoples never died. Beneath the surface of a society apparently acquiescent in its backwardness and enslavement to the great Powers, there is a long-standing vital current flowing, ready to burst into spiritual and intellectual life, as soon as conditions allowed. These conditions were enhanced by the First World War, at the end of which the Islamic world appeared to be emerging from its past lethargy into a new era of self- consciousness. It had also become evident that the Muslim people were endeavouring to readjust themselves to conditions in the modem world. This is one reason why so many Islamic societies have worked so hard to encourage new thinking about Islam. At international level the objective and reasonable interpretation of Islamic laws can improve the relationships between the Islamic countries and the non-Muslim nations. An active religious revival and a modem and pragmatic approach to the Islamic laws are talcing place in the Muslim countries. There is no part of the Islamic world where these changes are succeeding one another so rapidly as in the Middle East, and it is in this region that today the observer can see at its best the transformation in progress. Here is the great meeting-place of world religions, races and cultures. A glance at the map will show the vast strategic importance of this region of the globe. Any development in rational and correct understanding of Islam can eventually help the non-Muslims to make a correct judgment of the nature and features of the Islamic laws. This will help realize better relationship between the non-Muslim countries and the Islamic world. In such circumstances the significance of the interpretation and understanding of Islamic laws become even clearer from both domestic and international point of view. The solution to the problems specified above are lying in the complicated discussions of Islamic jurisprudence. The Muslim peoples are rapidly adjusting themselves to modem conditions, but the type of culture, that they wish to carve out for themselves in this new age, is a revitalized Islamic culture with a glorification of the spiritual values and a fostering of the teachings of Islam. This thesis is an attempt to formulate the methods Islamic societies have used and can use to cope with modern changes. This thesis also attempts to verify the hypothesis that Islamic laws arc dynamic and that tools of flexibility are provided with the Islamic system of law. In-dcpdi research has been carried out to verify

whether dynamism is predicted in the original texts and primary sources of Islamic laws and jurisprudence. The main features and devices of dynamism in Islamic laws will be identified and then the identified features will be applied in an analysis to test the hypothesis whether Islamic system itself visualizes a changing social order and therefore admits of change and flexibility of its laws. Reservations have been expressed by many Islamic scholars as to the relevance and application of the concept of dynamism to the Islamic laws. An investigation of the literature on Islamic laws illustrates that on the one hand many writers and scholars have considered the inflexibility of Islamic laws as the main shortcoming of the Islamic legal system. Their main criticism was that social needs are mutable while divine laws are fundamentally immutable. On the other hand, other studies give the strong impression that Islam

has granted man **freedom and has left** some **margin of choice open to human beings.** 5

However, there is strong resistance against such a view to the extent that some writers have regarded the application of dynamism to Islamic laws as the demolitions of the pillars of Islam. The rigid

interpretations and elaborations of the Shariah **have been gradually** miscon¬ceived **as matters of** indisputable **validity, so much so that as soon as the word** "Shariah" **is mentioned** 5

the concept of rigidity comes

instantly to mind and impair the grace and flexibility **of the** 5

Islamic law. Therefore, regarding the issues analyzed in this thesis, there are still many conflicts unresolved, many problems unanswered. This necessitates an in-depth research work to be carried out to do away with much of the controversy that exists. This thesis is meant to be a step further to providing solutions and eliminating controversies through discovering and deriving evidences from the main Islamic sources of law to verify the hypothesis that Islamic laws are dynamic and permit of flexibility and change. The thesis attempts to verify whether all the Islamic laws are subject to change and that they hold valid under certain conditions. Thus, are those laws which are believed by these scholars to be immutable also subject to change under certain circumstances? This requires new, consolidated and concrete evidence discovered or derived from the main sources of Islamic law if controversies are to be settled at least to some extent. In the first the concept and proof of Ijtihad will be examined. Then the development of Ijtihad will be brought under scrutiny. Following that the qualifications of Mujtihad (qualifies Islamic lawyer) and the procedure for Ijtihad will be discussed. The capability and robustness of Ijtihad will be analyzed in an attempt to identify its deserved position in the system of Islamic law. Ijtihad will be examined in this thesis in its modern sense is a dynamic device which deduces laws from the Islamic sources

(the Quran, the Sunnah, Ijma, Aql and UrJ). **The** 4

traditional conception that deals with Ijtihad as a secondary source of the Shariah is not the concern of this thesis. The second chapter of the thesis is concerned with the examination of the role that Ijtihad can perform in providing the Shariah with flexibility. In this chapter it will examine how Ijtihad can be a device imparting prominent flexibility to Shariah in theory. In order to do away with so much controversy, the verification of the hypothesis that the divine command itself visualizes a changing social order and thus approves of flexibility and change will be supported and substan¬tiated by evidences discovered or derived from Shariah itself. Evidences will be derived from the main sources of Islamic law to verify if Ijtihad, or the exercise of informed, independent judgment is the

key to the implementation of God's Will in any given time or place. 9

The hypothesis tested will be to the effect

that God has revealed only broad principles and has endowed man with the freedom to apply them in every age in the way suited to the spirit and conditions of that age. 9

That people of every age try to implement and apply divine guidance to the problems of their times. 15
In **the**

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

in the deduction of Ahkam from the various Islamic **sources. The** 22

potentialities of these Islamic sources will be identified to illustrate how these sources can become flexible through fjtihacl in the face of different circumstances and needs of time and space. As an essential procedure, those potentialities of individual Islamic sources which Ijtihnd can deal with dynamically

to find solutions to new problems will be identified and subjected to in-depth research. The 10

purpose will be to verify the hypothesis that the Shariah is able to provide solutions to new problems and needs of the modem Islamic societies. The fourth chapter of the thesis is concerned with the examination of the secondary laws (Al-Ahkam Al-Thanaviah) in Shariah. Important concepts such as Haraj (hardships), Zarar (losses), Zarurah (urgencies) will be carefully examined in this chapter. Particular attention will be given to the analysis of these decrees to verify the hypothesis whether these secondary decrees of the Shariah can make the Sharia flexible. The main purpose will be to verify whether these secondary decrees form

a valuable source of legislation and a viable means by which the Shariah can meet the challenge of change. 18

The verification to the effect that Shariah

is completely open and that it can be developed and shaped according to the needs of society and time by any number of its 2

secondary decrees will require in-depth analysis which will be presented in the fourth chapter. The main argument in this chapter comprises two issues. The first issue is whether the application of the secondary decrees is limited only to certain cases or that it covers a much wider scope. The second issue will be whether the application of the secondary decrees are appropriated only to the individual cases or it can also apply to the public issues of the Islamic communities. Chapter five will deal with the concepts of “Maslahu” which identified in the system of the Islamic law as a dynamic instrument. First, a comprehensive definition of the term will be given and then the type of Masalih (pi. of Maslaha) will be examined. It will be argued any reliance on Maslaha must be validated on certain conditions. These conditions will be set out

to ensure that Maslaha does not become an instrument of arbitrary desire or individual bias in legislation. The conditions will be 16

examined and clarified. In the course of analysis in this chapter distinctions between Maslaha and Ijtihad will be made in order to illustrate the place of each of these applications in the Islamic law system and how Maslaha can impart flexibility to the Islamic laws. This chapter will also identify and examine another important device in the Islamic law system as a dynamic feature. That will be the principle of Maslaha which is to be considered as an important branch of Ijtihad. The

identification of Maslaha as a dynamic feature of the Islamic law not been made by the author on arbitrary basis but that the in-depth research carried out by the author has persuaded him that Maslaha can pay

a prominent role in the **adaptation of Islamic law to the changing needs of** the **society and** thus is apt **to** 17

be chosen to test the flexibility of the Islamic legal system. The hypothesis will be tested to the effect if Maslaha can provide

Islamic law with the necessary means with which to encourage flexibility and growth. Notwithstanding a measure of juristic technicality which seems to have been injected into an originally simple idea, Maslaha **remains** examined **and** 10

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

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Chapter 1 IJTIHAD (Personal Reasoning) Ijtihad is

an effort or an exercise to arrive at one's own judgement. In its widest sense, it requires **the use of human reason in the elaboration and explanation of** the Shariah. **It covers a variety of mental processes, ranging from the interpretation of texts of the** Quran **and the assessment of** 17

other sources.1

Ijtihad, therefore, is an exercise of one's reasoning to arrive at a logical conclusion on a legal issue. The 26

scope of Ijtihad ranges

from textual interpretation, assessing the authenticity of a **hadith** 3

(a saying of the Prophet (S.A.W.)), to

systematic deductive reasoning from first principles. 2 **It therefore allows for logical reasoning to deduce a rule where no precedent exists.** 3

If properly applied, Ijtihad

bridges the apparent gap between theory **and practice.** 3

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

Thus a person who knows the rules of Shariah **in detail but is unable to exercise his judgement in the inference of the** decree **direct from their sources is not a Mujtahid** (qualified Islamic lawyer). **Ijtihad, in other words, consists of the formulation of an opinion in regard to a** religious decree. **The presence of an element of speculation in Ijtihad implies that the result arrived at is** 13

a human effort and therefore the

possibility of its being erroneous is not excluded. 5

5 Some Islamic scholars have imparted a narrow concept to Ijtihad because they have asserted that the two principles of Ijtihad and Qiyas (analogy) are identical. Shafii, while criticizing the exercise of ra'y (individual reasoning), recognized the principle of Qiyas as a standard mode of legal reasoning.6 However, since Qiyas and Ijtihad were identical in his opinion, the scope of Ijtihad was narrowed down by him. Some other scholars have asserted that Ijtihad is the same as ra'y1 However, ra'y was a very primitive form of Ijtihad. Ijtihad covers a very wide scope so that it can be a bridge between all the sources of law and the everyday needs of the Islamic society.8 Among the characteristic features of Islamic law, the principle of Ijtihad is very important.9 Its application was absolutely necessary to develop the Muslim law so that it can administer justice and provide solutions to new problems. Without Ijtihad the Muslim law would have remained stagnant and in irretrievable ruin. "The essential unity of the Shariah lies in the degree of harmony that is achieved between revelation and reason, Ijtihad is the principal instrument of maintaining this harmony. The various sources of Islamic law that feature next to the Quran and the Sunnah are all manifestations of Ijtihad. In this way, consensus of opinion (Ijma), analogy (Qiyas), juristic preference (Istihsan), considerations of public interest (maslahah), etc., are all interrelated under the main heading of Ijtihad".10

Most authorities state that the use of Ijtihad **died out in the tenth century on the grounds that its creative force had become exhausted and that there was in any case no** requirement **for further interpretation.** 3

era of Taqlid (following of previous authorities) set in.11 It is generally but erroneously asserted

that, ever since the codification of the doctrine of Islam by the four great orthodox imams, this door of Ijtihad has been closed so that Muslims must conform their opinions strictly to the opinions enumerated by these imams without seeking to arrive by means of their own reasoning at a personal opinion about the tenets of Islam. 3

12 Throughout the centuries, Mujtahids (qualified Islamic lawyers) have incessantly contributed

to the further development of positive law and legal theory. This is an important point, since most leaders of 3

reformist movements necessarily claim the right to practice Ijtihad. 15

Legal activity, whether in theory or in practice, continued unceasingly. The vast bulk offatwas (legal opinions) that have appeared and continued to grow quite rapidly from the tenth century onwards is a telling example of the importance of fatwas as personal legal opinions and precedents 3

and tacit proof of the continuation of the use of Ijtihad.13

It is in this large body of material that one may look for positive legal developments. 14 The 1

distinction

between Ijtihad and the revealed sources of the Shariah lies in the fact that Ijtihad is a continuous process of development whereas divine revelation and Prophetic legislation discontinued upon the demise of the Prophet 5

(S A W.).15

In this sense, Ijtihad continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim communities. In 5

this thesis, Ijtihad is being examined in its modern sense i.e. a dynamic device which deduces laws from the Islamic sources (the Quran, the Sunnah, Ijma, Aql and Urf). The Proof of Ijtihad Ijtihad derives its validity from divine revelation. The primary

source of law in the early era was the Quran. The Quran was elaborated and interpreted by the Sunnah. 16 Thus the Quran and the Sunnah constituted the primary sources of Islamic law. However, the society in which the Quran was revealed was naturally to develop further by the expansion of Islam. Most of the problems that confronted the Muslims living in the time of revelation were bound to 6

differ from those of the

coming generations in the wake of the interplay of Islam and other neighboring cultures with which they came in contact. As such, the law furnished by the 6

Quran-Sunnah

source in the time of the Prophet (S. A.W.) had to be supplemented and sometimes reinterpreted 6

and elaborated to cover

new problems in order to find answers for them. 17 Islamic law, therefore, developed with the emergence of new problems from time to time since the days of the Prophet (S.A.W.), and was examined and re¬examined, interpreted and reinterpreted, in accordance with the varying circumstances of the age. The process of rethinking and reinterpreting the law 6

independently was carried out through Ijtihad. Intellectual development and maturity in judgement had been since long a criterion of dynamism. The Quran itself time and

again exhorts to deep thinking and meditation over its verses. 18 It invites to the exercise of reason and personal opinion (Ijtihad) in legal matters. The 6

holy Quran says : "And it does not beseem the believers that they should go forth all together; why should not then a company from every party from among them go forth that they may apply themselves to obtain understanding in religion".19 In this verse, the Quran emphasises that at least some of the people must endeavor to become knowledgeable ifaqih) so that they can guide the laymen. The Quran also advises thus: "Ask the knowledgeable scholars if you do not know" 20 The above-stated verse, while implicitly implying the importance of knowledge, explicitly urges people to seek specialized knowledge. The Quran emphasises that there is a need for interpretation. When there are ambiguous verses, one should only refer to knowledgeable scholars who have sound understanding. The Quran says: "He it is who has sent down to thee the book, of it there are some verses decisive, they are the basis of the Book, and others are ambiguous: then as for those in whose hearts there is perversity, they follow the part of it which is ambiguous, seeking to mislead, and seeking to give it (their own) interpretation, but none knows its interpretation except Allah; and those who are firmly rooted in knowledge".21 The Quran makes a difference between those who are knowledgeable and those ignorant and encourages man to pursue learning and understanding: "What! He, who is obedient during hours of the night, prostrating himself and standing, rakes care of the hereafter and hopes for the mercy of his Lord! Say: Are those who know and those who do not know alike? Only the men of understanding are mindful".22 The Quran insists that one should not follow that which he does not have knowledge about: "And follow not that of which you have not the knowledge; surely the hearing and the sight and the heart, all of these, shall be questioned about that".23 The Quran considers faith and knowledge having the same importance: "Allah will exalt those of you who believe, and those who are given knowledge, in high degrees; and Allah is aware of what you do". 24 The above-stated verses are presented just as a few examples illustrating how the Quran encourages man to pursue understanding and knowledge. The verses all verify the fact that the Quran as the main and most important

source of law in Islam necessitates the 31

use of reason and the exercise of efforts to acquire sound understanding. That was such Quranic verses that formed the pillars on which the Islamic knowledge and science and later science of Islamic jurisprudence were based. In addition to the teachings of the Quran, the other primary source of Islamic law i.e. the Sunnah also encourages and makes it incumbent on every Muslim to seek knowledge and correct understanding continuously. The hadith of Muaz-Ibn-Jabal provides clear authority for Ijtihad teaching how to apply laws under different circumstances. In this context the issue of Ijtihad emerged as a mechanism for handling problems for which there existed no specified laws. When the Prophet (S.A.W.) decided to send Muaz

-Ibn-Jabal to Yemen, he 23

said, "How will you execute judgement when a case comes before you, Muaz replied" I will judge by the Quran. The Prophet (S.A.W.) said, "And if you do not find a similar case in the Quran and the traditions?", Muaz replied "Then I will decide according to my own judgement and will not abandon effort. "Thereupon the Prophet (S.A.W.) was pleased and said "Praise be to God who has caused the messenger of the Apostle of God to agree with what the Go and his apostle like".25 There is a very important hadith related to the holy Prophet (S.A.W.) which reads thus: "When a judge exercises Ijiihad and gives a right judgement, he will have two rewards, but if he errs in his judgment, he will still have earned one reward" 26

This hadith implies that regardless of its results, Ijtihad never partakes in sin. When the necessary requirements of Ijtihad are present, the result is always meritorious and never blameworthy. In another hadith, the Prophet (S.A.W.) is reported to have said: "Strive and endeavour, for everyone is ordained to accomplish that which he is created for". 27 According to the Quranic 11

verses, man has been created for the purpose of fulfilling his ultimate obligation and responsibility. The discovery of those responsibilities in various circumstances of time and space can not be realized without the application of Ijtihad. The Quran specifies that man has not been created purposelessly and that he must not

think that he is left to wander without an aim. 22

The Quran also specifies that the man is being continuously tested as he has been endowed with the tools of understanding.29

There is also the haciiih, which reads thus: "When God favours one of His servants, He enables him to acquire knowledge in religion".30 The Islamic Jurists of Osul have also quoted in this connection two other ahadith 21

from the holy Prophet (S A W),

one of which makes the pursuit of knowledge and understanding an obligation of every Muslim, man or woman. 5

"All Muslims must aspire after knowledge".31

And the other declares the Islamic Jurists **to be the successors of the Prophets:** 30

"The Islamic Jurists are the successors of the Prophets".32

The relevance of the last two ahadith to Ijlihad **is borne out by the fact that Ijtihad is the main instrument of creativity and knowledge in Islam.** 21

We also find in the Sunnah

of the Prophet (S.A.W.) 27

that the holy Prophet (S.A.W.) sought **the** advice and opinions **of his** companions **and** 28

encouraged them to comment on daily issues of the community. This fact provided the first cornerstone of ra'y (as a primitive mode oiljtihad) and Ijtihad.

On the occasion of Badr, to give an instance, the Prophet (S **.A.** W.) chose a **particular place for the encampment of the Muslim forces. A companion, Hubab Al-** Munzer, **asked him whether he had chosen that place on his own** judgement {ra'y) **or on revelation** from God. **The Prophet** (S.A.W.) **replied that he had done so on his own judgement. When the Companion suggested** a more suitable **place, the Prophet** (S.A.W.) **told him:** 6

"You have made a sound suggestion". 33

Examples are abundant where the Prophet (S.A.W.) **consulted the Companions and accepted their opinions. The** Quran's **insistence on consulting the Companions in different matters presupposes its approval of exercise of personal opinion in deciding problems.** 6

34 The

rational argument in support of Ijrihad is to be sought in the fact that while the nusus (texts) of Shariah are limited, new experiences in the life of the community continue to give rise to new problems. It is therefore, imperative for the learned members of the community to attempt to find solutions to such problems through Ijtihad. 5

The Development of Ijtihad Evidence was the cornerstone of laws devised by early Muslims. The said Muslims were, nonetheless, divided over the interpretation of evidence, which was mostly based on Arabic texts. For instance, they widely differed in the implied meanings of words, particularly the legal terminology.35

Furthermore, the traditions differ widely in respect of the reliability of the recessions. Their legal contents, as a rule, seem to be contradictory. Therefore, a decision is needed. This makes for differences of opinion. Furthermore, evidence not derived from texts causes other differences of opinion. Then, there are new cases, which arise and are not covered by the texts. 4

Proponents of logical reasoning or analogy resorted to reason even when texts existed about certain cases. As such, differences of opinion seemed unavoidable and justified among the early Muslims and the posterior religious authorities.36 Moreover, not all of the men around Mohammad (S.A.W)

were qualified to give legal decisions. Not all of them could serve as sources for religion. That was restricted to men who knew the Quran and were acquainted with the abrogating and abrogated, the ambiguous and unambiguous verses, and with all the rest of the evidence that can be derived from the Quran, since they had learned these matters from the Prophet (S.A.W) directly or from 4

the companions

who had learned it from him. These men, therefore, were called "readers", that is, men who were able to read the 4

Quran. 37 The rise of the Islamic civilization and expansion of the cities served as the bedrock for Islamic science. Mere reading of the Quran was no longer sufficient. Something more was imperative. This move necessitated the rise and perfection of jurisprudence based on specific sources. Jurisprudence, consequently, evolved as

a craft and science. The Quran readers were no longer called Quran readers but jurists and religious scholars. The jurists developed two different approaches to jurisprudence. One of them hinged on analogy

4

and reasoning, while the other relied on the traditions. In a drive to initiate the Ijtihad, the advocates of the first approach resorted to ra'y (personal reasoning).38 The ra'y was actually initiated and later on supported by the story of the conversation between the

holy Prophet (S.A.W.) and

27

Muaz

whom he was sending as a judge to the Yemen.

9

It was not very long, however, before the view came to prevail that this juristic opinion (ra'y) was at once too subjective and too fallible a basis on which to found a law which was divinely authoritative. 39 Being too subjective, the

12

ra 'y prompted the jurist to mainly rely on analogy (Qiyas) to apply a rule of the Quran or the Sunnah to a similar - yet not totally identical - case.40 But Qiyas

was also too fallible, for it was recognized that even in the application of rules of analogy an individual jurist might err. So the opinion gained ground

9

that although individuals might err, the great jurists, collectively, could not; so the consensus of the jurists

12

(fjma)

came to be regarded as yet another manifestation of the divine voice. Such development was requisite, given the exigency of interpreting the 9

Quran and the necessity of authenticating the traditions.41 Now the problem posed itself as how a jurist must derive Shariah from these sources. The discovery of a novel and consolidated approach was imperative; hence the emergence of Ijtihad. During the early days, any competent jurist was believed to possess the capability for Ijlihad. However,

with the passage of the years, the crystallization of the different schools of law and the progressive enunciation of the doctrine, this faculty was held to have fallen into abeyance; and, since about the end of the third century of the hijra, ail jurists have been regarded as mere muqallids 9

(persons bound to practice Tciqlid),

that is, those whose duty it is to accept the opinions of their great predecessors without the exercise of private judgment. 12

42 "Il is true that many authorities allow that even a muqallid may, in the exigencies of private life, pick and choose between the different opinions of his great predecessors; but it was generally asserted that the judge and the jurisconsult had no such liberty in their public capacity, but must follow the dominant opinion in their particular school in every detail 43 It was thus that until recently a big part of the Muslim world had become largely stagnant. The law was still the principal discipline for study; but this study showed itself in the production of commentaries most of which represented a substantial repetition of what had gone before. There was indeed a certain development, particularly in the books of fatawa or legal decisions, but it was very slow; and it was the dominant opinion that came to prevail in each of the schools, on this point or that, which constituted the authoritative criterion.44" As per the diverse schools of law, it is interesting to note that jurists of the early days formed regional groupings. Later on, such regional groupings were converted to center around a renowned personality such as Shafii. From then on, the names of the prominent jurists were used in reference to the regional groups.45

Eventually four schools not only established themselves but survived in Sunni Islam 32

(Hanafi, Maliki, Shafii, and Hanbali); and

these, although they differ from each other on innumerable points, mutually recognize each other's orthodoxy.	9

46 Diverse elements - including extremist legal groups demanding Tciqlid or denouncing Qiyas - rejected Ijtihad all through the third, fourth and fifth centuries after hijrah (A.H.).

These groups came mainly from the lines of the "people of hadilh", or Traditionalists, who were primarily concerned with the study of transmitted sources and their literal interpretation, while denying human reason	18

in Ijtihad or in the process of legal reasoning.	1

47 A distinction among different groups of Traditionalists seemed in point, as they ranged from moderates opting for co-existence with the "people of ra'y" to extremists denouncing Qiyas, even if it was totally reliant on the Book.48

More than two centuries later, when all legal schisms became well defined, Mawardi described the	1

status of this extreme Traditionalist party vis-a-vis Ijtihad as follows:	1

"There are two kinds of people who reject analogy. Some reject it, follow the text literally and are guided by the sayings of their ancestors if there is no contradiction to the text in question. They reject completely the independent Ijtihad and turn away from individual contemplation and free investigation. No judgeships may be entrusted to such persons since they apply the methods of jurisprudence insufficiently. The other category of people does reject analogy, but still uses independent judgement in legal deduction through reliance on the meaning (spirit) of the words and the sense of the address. Al-Shafii's followers are divided as to whether or not such theologians may be entrusted with a judgeship".49 Scholars of all schools, in early fourth century A. II., came to the conclusion that all major questions had been duly addressed and resolved. Little by little, a consensus appeared regarding disqualification of individuals for independent reasoning in law. Based on the same consensus, explication, application and interpretation of the final doctrine were determined as the main tasks ahead for the years to come. The

closing of the door of Ijtihad, as it was called, amounted to the demand for Taqlid, a term which had originally denoted the kind of reference to Companions of the Prophet (S.A.w.) that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities. 14

50 According to Anderson and many other scholars, the gate of Ijtihad was believed to have been shut by the late third century A.H.51

And to confirm that this closure was a fait accompli, Gibb asserted that the early Muslim scholars held that "the gate was closed, never again to be reopened".52 Though Watt 1

sees certain inaccuracies in this standard view, he has not offered another substitute outlook.53

Depending on the particular subject of their discussion, many scholars would have believed that the closure of the gate had an impact on, or was influenced by, this or that element in Islamic history. 1

The

closure of the gate of Ijtihad 18

had dual applications: On the one hand, it served to immunize the Shariah against government interference. On the other hand, it was used to demonstrate the

problem of retrogression in Islamic institutions and culture. Some date the closure at the beginning of the fourth Islamic century and others advance 1

it to the seventh, depending on the facts and analyses involved in each study. Thus, on the basis of this alleged closure, aspects of Islamic history were reconstructed and interpreted time after time. The baselessness and inaccuracy of the 2

said approaches toward the

history of Ijtihad following the second century 18

A H. come to the fore through meticulous survey of the original legal sources. Interestingly, traditional attempts to root out Ijtihad were thwarted, primarily because of the firm establishment of Osul-Al-Fiqh (principles of jurisprudence) which included the indispensable component of

Ijtihad. In fact, an examination of the writings of jurists after the third century will demonstrate that Ijtihad was exercised with no interruption. 1

54 The Methodology of Islamic Jurisprudence The

science of the principles of Islamic jurisprudence (Osul-Al- Fiqh) is one of the most 4

significant disciplines of the Islamic law.55 The

early Muslims could dispense with it. Nothing more than the linguistic habit they possessed was needed for deriving ideas from words. The early Muslims themselves also were the source for most of the norms needed in special cases for deriving laws. They had no need to study the chains of transmitters, because they were close to the transmitters in time and had personal knowledge and experience of them. When the early Muslims died, the first period of Islam was over. All the sciences became technical. 4

56

Jurists and religious scholars of independent judgement now had to acquire these norms and basic rules, in order to be able to derive the laws from the evidence. They wrote them down as a discipline in its owm right and called it "principles of jurisprudence". The first scholar to write on the subject was Al-Shafii. He dictated his famous Risalah on the subject. 4

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

applicable to specific cases than what was done by the latter. This is because the jurists present examples and rely on legal issues while dealing with a problem. The

theologians, on the other hand, present these problems in their bare outlines, without reference to jurisprudence, and are inclined to use abstract logical deduction as much as possible, since that is their scholarly approach and required by their method. 4

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

It is exactly for the purpose of finding the rulings decreed by God that the methodology of Osul -Al-Fiqh was established. 59 The Quran and the Sunnah of the Prophet (S A W.) do not, as a rule, specify the law as it might be stated in specialized law manuals, but only contain rulings 2

and indications Lhat

lead to the causes of these rulings. On the basis of these indications and causes the mujtahid may attempt, by employing the procedure of Qiyas to discover the judgement of an unprecedented case. But before embarking on this original task, he must first search for the judgement in the works of renowned jurists. If he fails to find a precedent in these works he may look for a similar case in which legal acts are different but legal facts are the same. Failing this he must turn to the Quran, the Sunnah, or Ijma for a precedent, 1

When this is reached he is to apply the principles of Qiyas in order to reach the rulings of the case in question. This ruling may be one of the following: the obligatory (wajib), the forbidden (haram), the recommended (mandub), the permissible (mubah), or the disapproved (makruh). 20

60 As such, development of a system of principles based on which competent jurists could issue verdicts for new cases was vested with legal theory. Jurists, since the third century A.H., have unanimously regarded this as the lofty objective of Osul

-Al-Fiqh. 61 Legal theory in all its parts is sanctioned by divine authority, that is, it derives its authority from revealed sources. It is partly for this reason and partly for the reason of man's duty to 1

worship his Creator in accordance with divine law that the practice of Ijtihad was declared to be a religious duty incumbent upon all qualified jurists whenever a new case should appear. Until Ijtihad is performed by at least one mujtahid, the Muslim community remains under the spell of this unfulfilled duty. Legal theory

has

played a rather significant role in favor of Ijtihad. Thus, the practice of Ijtihad was the primary objective of the methodology and theory of Osul -Al-Fiqh throughout Islamic history. 2

62 Shia

theory on the sources of the law and on the nature of the law provides a dynamic form of law. 3

63

By elevating Aql (reason) to the status of a source of the law, they 15

have given deductive reasoning a more important place than it occupies in Sunni theory. 64 In the 15

case of the Sunnah, the Shia accept only those haclith transmitted through one or more of the twelve impeccable Imams, and some believe that traditions of the holy Prophet (S.A.W.) should be accepted through the channel of narrations by the people of the holy Prophet's 3

Progeny.65 The Shia

concept of Aql is closely linked to Ijtihad, since the Shia jurist uses Aql, usually supported by the other three sources of the law. 15

66 The notion of Aql specifies that God, the Creator and the Formulator of the law, has bestowed man with the faculty of reason to appropriately determine the terms of the law. Aql,

as a source of Islamic law in the view of the 5

Shia, imparts the flexibility feature to Ijtihad in the same manner that Qiyas equips Aql with the feature of flexibility in the Sunni doctrine. The

theory set out briefly above is essentially that of the Osuli school 3

and

was largely in place by the tenth century. However, an opposing school, the Akhbari (Traditionalist), 3
rose to prominence and doctrinal development paused until the controversy between the two was finally resolved in favour of the Osulis towards the end of the eighteenth century. In essence, Akhbari theory rejected the rationalist basis of the Osuli view in favour of heavy' reliance upon the Quran and the Sunna as explained by the Imams and upon a much larger corpus of hadith than that accepted as valid by Lhe Osulis.
It follows that the Akhbaris rejected the Osuli linkage between the sources of the law and rational principles and they equally reject Ijtihad in favour of taqlid.

68 The Osuli

victory was followed by a resurgence of theoretical development, with the main contribution coming 3
from Sheikh Murtaza Ansari in his definition of the principles to be followed in reaching a decision in cases where there was doubt. In such cases, he argued, the principles to be applied were: Al- bara 'a

(freedom from obligation or liability in the absence of 3

proof); Al- Takhir

(freedom to select the opinion of other jurists or even other schools if these seem more suitable); Al-Istishab (the continuation of any state of affairs in existence or legal decisions already accepted unless the contrary can be proved); and Al- Ihtiyat (prudent caution whenever in doubt). 19

69 Whether dealing with implications of primary texts or with cases in the absence of directly relevant texts, juristic reasoning is never final and ultimate. Says Gibb: "The Quran and the Tradition are not, as it is often said, the basis of Islamic legal speculation but only its sources".70 This statement presents a basic fact regarding the course of evolution in the applicability of the Shariah. It emphasizes the role of human thought, as called upon, urged and directed by the legal authority of Quran and Sunnah. Apart from the Shariah, there is no legal speculation to a world prone to constant change and transformation. None of the recorded works by the distinguished Islamic jurists suggest a monopoly of interpretation or finality. The imputation of finality to the findings of the schools of law is contrary to the creative spirit of the Quran, specifying thus: "This is a Book that we have revealed to you abounding in good, that they may ponder over its verses, and that men of understanding may mind." 71

Iqbal, in his Reconstruction of Religious Thought in Islam, states: 23

“Turning now to the groundwork of legal principles in the Quran, it is perfectly clear that far from leaving no scope for human thoughts and legislative activity, the intensive breadth of these principles virtually acts as an awakener of human thought. Our early doctors of law taking their clue mainly from this groundwork evolved a number of legal system; and the student of Mohammadan history knows very well that nearly half the triumphs of Islam as a social and political power were due to the legal acuteness of these doctors The teachings of the Quran that life is a process of progressive creation necessitates that each generation, guided hut unhampered by the work of its predecessors, should be permitted to solve its own problems",72 Ijtihad as an evolutionary field of specialized knowledge Ijtihad is a complex and complicated process in the Islamic legal system so that the jurist who is going to exercise Ijtihad must possess certain qualifications.73 The examination of these qualifications can bear witness to the important fact that Ijtihad has consistently been viewed as a specialised skill whose application has been indispensable. Not only have the great Islamic jurists believed in Ijtihad but also they have demanded higher qualifications from Mujtahids. A survey of the Islamic legal theory illustrates that since the earliest time of the Islamic century the qualifications of Mujtahids have been considered an important issue, which per se can be taken as a consolidated evidence of the recognition of Ijlihad as a significant dynamic feature of the Islamic law. Abu

Husayn al Basri (d. 436) believes that mastery of the Qura ?i, 5

the Sunnah

of the Prophet (S.A.W.), 34

and the rudimentary principles of inference (istidlal) and Qiyas are the prerequisites and preconditions of Ijtihad, 74 The 2

investigation of the ways of hadith transmission and the trustworthiness of transmitters is necessary for verifying the credibility of 23

hadith. Basri particularly underlines the indispensability of Qiyas for Ijtihad. He also holds that Ijtihad hinges on knowledge of rules of illah (cause), asl (fundamental cast),fara (parallel case), and hukm (legal competence).75

In the process of deducing the ilia from the asl, the text, with its inner contradictions and linguistic-legal complications, has to be analyzed. To solve these contradictions and to understand intricate exegetical matters the jurist must have a thorough knowledge of the principles of majaz (metaphors), particularization, and Naskh (abrogation). Familiarity with the Arabic language, particularly with the kliass (particular) and the a 'mm (general), is a prerequisite. Basri regards familiarity with customary law (Urf) as a qualification required for Ijtihad, for it is essential, he argues, to determine God's law in the light of the exigencies of human life. 76 The jurist 2

should, in addition, be versed with the attributes of God to safely come up with a sound awareness of His Will as specified in the Book. Basri, moreover, argues that a case with a ruling cannot be taken up by any other jurist.

This implies that whoever intends to practice Ijtihad to solve a specific case must first be certain that it was not treated before, and this consequently requires of him to know the furua of at least his school. Basri mitigates the rigorousness of these requirements in the law of inheritance. 77 In a single case of 1

inheritance and without possession of the aforementioned skills, a jurist may

be allowed to practice Ijtihad. According to Basri, this is justified on the grounds that methodical principles and textual subject matter related to inheritance are independent of and unconnected with, other 2

parts of the law. Otherwise, the jurist must not attempt Ijtihad in any other area of law until he is well equipped with the necessary tools. 78 **Shirazi (d. 467)** is of **the**

view that only those parts of the Quran and the Sunnah with direct relevance to the Shariah should be known to the jurist. This provision allows for the omission of the inapplicable parts. The principles of Arabic language, views of the former generations, and Qiyas are the fundamentals of Osul. The

jurist must know the texts from which he can extract the illah **and must possess the methods to do so. Given the fact more** than **one** illah **may be deduced in a single case, he must be able to distinguish between a variety of ilal and to determine which deserves to be advanced over the others.** 1

79 Ghazali (d. 505), commenting on the qualifications for Ijtihad, asserted that a jurist should just know - not memorize - the 500 verses required in law to become a Mujtahid.80 He must also

know the methods by which legal evidence is derived from the texts and **know the Arabic language; complete mastery of its principles is not a prerequisite. The** 1

jurist should, moreover, be versed with the rules of the doctrine of Naskh (abrogation), and not the details, to determine the authenticity of hadith. The Mujtahid must be able to

investigate the authenticity of hadith. If the hadith has been accepted by Muslims as reliable, it may not be questioned. If a transmitter was known for probity, all ahadith **related through him are to be accepted.** 1

81 According to Ghazali, a jurist wishing to engage in

Ijtihad in all branches **of substantive law** 18

must have all these qualifications.

Those who want to practice Ijtihad in one area, e.g., family law, or only in a single case, say a case of divorce, need not fulfill all the conditions but are instead required to know the methodological principles 2

and the textual material needed to solve that particular problem.

82 Ghazali's legal doctrine was almost fully followed by his successors such as Baydawi, Subki, Isnawi, and Ibn Abd Al-Shakur.

Some of these authors, such as Baydawi, demanded encompassing knowledge of the Quran. 2

The

more important point is that the divisibility of Ijtihad was recognized to be lawful and thus a limited knowledge of 1

the principles of Ijtihad

was sufficient to allow a jurist to practice Ijtihad in an individual case. 83 However, only **Basri and Shirazi** 1

did not consider the

divisibility of Ijtihad permissible in all areas of law. 1

84 Though Muslim legal texts presented difficult qualifications for Ijtihad, prominent Islamic jurists embarked on Ijtihad in accordance with the requirements of life and prescribed the needed conditions. Further investigation of the

role of Ijtihad and Mujtahids (qualified **Islamic** lawyers) in Islamic **legal history** following **the** 1 eleventh **century will show that Ijtihad remained an integral part of the** Islamic **legal** system **and that those who opposed it were**

virtually pushed to the corner as minorities.85 Ijtihad was taken by Abd Al-Jabbar to be a requisite part of the law, without it, law could not flourish.

For them taqlid is to be used only by the commoner and by those for whom the exercise of Ijtihad is impossible. 1

Ibn Abd Al-Barr

devoted a whole chapter in refutation of taqlid. He maintained that on the basis of many Quranic verses an agreement among scholars has been reached on the nullity of taqlid. 2

The

works of these scholars reflect the conviction of Muslim lawyers with regard to matters of religious and legal practices. 1

86 The influence of Ijtihad transcended

law to embrace the political thought of medieval Islam. An account of the transforming 11th century politics 1

sheds light on the essential role of Ijtihad in the political institution dominated by the Islamic Jurists.

Such a discussion will also demonstrate that whereas political theory, which was the product of juristic thought, recognized the failure of Caliphs to meet the requirements of Shariah by their incompetence to practice Ijtihad. 1

In his discussion of the qualifications of the Imam, Baghdadi considers the ability to practice Ijtihad as one of the four conditions that the Imam (or Caliph) must satisfy in order to rule efficiently. 1

87 Mawardi also sets a similar condition, stressing the need for the Imam to master Ijtihad, since he needs to be versed with law and to find solutions to new tangles. Based on the political theory of Juwayni, Ghazali, Mawardi, Baghdadi, and

others, Ijtihad is regarded as a rudimentary pillar of both the legal and the political life of Islam. 88 The analysis presented thus far makes it

clear that in practice and in theory the activity of Ijiihad **during the period under discussion was uninterrupted. Furthermore, Mujtahids proved to have existed at all times, a fact which finds full support in the ample material available from the period itself.** 2

89 The analysis so far made confirms the inevitability of newly emerging problems in a gradually evolving society. Ijtihad served as the sole solution to the problems, which surfaced. As a result, the methodology of Ijtihad was practically enforced but without reference to its designation.

Many jurists admitted that it was indispensable, and so it was, but they were convinced that very few **contemporary** jurists **possessed the qualification to practice it.** Due to **the** 2

inner dynamic attribute of Ijtihad which arises from its capacity to find appropriate solutions to the problems risen from different circumstances, of time and place the complication of the problems necessitated higher and much expertwise qualifications on the part of the Islamic jurists. In other words, with the passage of time there was a need for higher qualified Mujtahids to issue Ijtihad. The more complicated problems called for better qualified foqaha to the effect that each Islamic jurist was required to be a specialist in the field he was intending to exercise Ijiihad. Ijtihad as a principle of movement The 19th and 20th centuries marked the advent of modernization in the Islamic countries. As such, it was imperative to revamp the Islamic understanding to insure the presentation of solutions to newly appearing problems. However, the failure to apply the device of Ijlihad to seek solutions, which was the result of the extreme conservatism of traditional Islamic scholars and their static approach, led to the adoption of different methodologies. For instance, in Iran as a Muslim nation the idea of separation of religious and secular affairs was propounded.90 The two were respectively directed by the jurist and the head of the state. The theoreticians of the day stressed that the jurist should cooperate with the head of the state. Separation of the religious and secular rules and regulations, power distribution, and cooperation are of importance here.91 This theory stipulates the superiority of the religious laws and the need for the head of the state to adapt himself with the jurist. The importance of such classification cannot be overlooked. The

courts presided over by the foqaha **were known as** sharei **courts, with the law** being **dispensed that evolved by** Shia **Islam; the system of law controlled by the** stale **was called** Urfi. Urfi **has been called common law or law of precedent, but since no** records **of proceedings were kept, and since the verdicts delivered were not necessarily committed to writing, it is difficult to see what basis of precedent could have been referred to.** 7

The exigencies of the state at a specific time entailed the Urfi jurisdiction by town governors. Consequently, Urfi jurisdiction can be snugly dubbed as arbitrary law, notwithstanding the contradiction at the heart of such classification.92 Seemingly, the Urfi and sharei jurisdictions were not exactly demarcated. A distinction can, nonetheless, be detected: C/r/7 jurisdiction mainly zoomed in on offenses

against the state or public security, 7

while sharei jurisdiction took up personal or commercial conflicts and litigations.

Theft and drunkenness might, however, come within the jurisdiction of a shara' court 93 Thus the jurisdictions of sharei and Urfi frequently overlapped, and in general the system was conductive to a certain interaction, not to say conflict, between its two parts, shara courts were powerless in that they lacked the ability, for the most part to enforce their decisions. 7

94 In like manner, Urfi jurisdiction was exposed to sharei intervention, such that the shara' court had the authority to reverse the verdicts issued by Urfi.95

A governor in judging a case brought before him might request a 7

fatwa

from a mujtahid, as might either of the parties to the dispute; such afatwa, once issued, was normally acted upon96 The fatwa of a mujtahid might also be used to settle a case out of court; since litigation was generally a costly and unprofitable business, recourse was had to it only in case of absolute necessity. 7

97 Such an interaction, coupled with absence of distinction between the two jurisdictions, sparked sundry clashes

between the state and the foqaha. The state's attempts to assert its judicial power inevitably meant a lessening of the prerogatives of the foqaha, who for their part could not accept the validity of Urfi jurisdiction. 7

98 It is noteworthy that during that period, the great Islamic jurists issued fatwas incessantly. The last fatwa given by Imam Khomeini to the effect that the head of the state must necessarily be a qualified Islamic jurist led to the increasing weakening of the secular government so that it ultimately lost its legitimacy and popularity among the people.99 This was again a proof of the influence Islam enjoyed with Muslims. The conflict ultimately led to the fall of the secular system of government and an Islamic government was established in 1979. The collapse of the secular government in Iran actually witnessed the fact that modern problems could not be solved through means ignorant oflslamic values. However, as the Islamic government was established in Iran, they faced the same problem i.e. solving the issues arisen from modernization. As it had been established that the problems had to be solved in the context of Islamic values, the Islamic scholars found no other choice but to reconsider their traditional views and seek a device in Islam to enable them to solve new problems. That device was Ijtihad, which enabled them to make appropriate decisions. Such was the case with most of the Islamic societies in the world and so great Islamic scholars some of whom were also important governmental officials started to rethink and re-examine their faith looking for dynamic devices to solve the everyday needs of their modernizing societies. Sheikh Mohammad Abdu in Egypt blasted the stagnation of the Islamic world for not duly reaping benefit of the dynamic Ijiihad. Abdu staunchly held that man's freedom of conscience and belief is insured by the legal system of Islam. He found

that "reason" **was denied its role in understanding the Shariah** and **in deducing judgements** 16 **from it. He observed that Muslim people were satisfied with books written** by latter- **day scholars who were a product of the period of stagnation of thought and whose books,** reflecting popular **religious lore, incorporated many nonsensical concepts.** Abdu, while glancing **abroad,**

reflected on the sanctification of reason in the 18th century Europe, following dramatic scientific discoveries and predominance of rationalism as a philosophy which branded reason as an unlimited faculty.

At the same time, Orientalists of various hues were busy attacking the Islamic concept, the belief in the 10 **Will and Power of Allah and the apportionment of good and evil and were blaming Islam for the lethargy and intellectual inactivity of Muslims Consequently Abduh decided to address himself to this particular situation.** 100 Through revitalizing **the** principle **of**

Ijtihad, he corroborated the importance of reason in connection with the Quran and countered the piffle which had turned into a popular cult. Based on his views, Islam attaches high importance to man's reason and accords it a conspicuous role in both religion and every day practical affairs. He fought the claims made outside the realm of Islam by stressing that absolute predestination without free will is not a teaching of Islam.

However, caught between the two extremes of the intellectual inertia in the Muslim world and the deification of reason in Europe, lie propounded the theory that human reason and divine revelation are of equal importance for the guidance of man, and that it is impossible that knowledge acquired through rational thought should come in conflict with divinely-revealed truths. 10

101 This in accordance with the teaching of the Quran which says: "Faith and knowledge have the same weight"102 Iqbal emphasized the elements of change in life. He stated emphatically that: "This is a dynamic universe and it calls for positive action! Believe in yourself, for only in the development of the self can success be found. The self could best develop to its fullest capacity only within the circle of a righteous community such as the community of Islam. Yet Islam — properly the best of all righteous communities — was deep in a dogmatic slumber that denied intellectual freedom."103 Iqbal's views and methodology illustrates very well the role of Ijtihad can play as a dynamic device in the system of Islamic law. Iqbal believed that liberating Islam from its medieval shackles required first of all liberating the concept of individual interpretation in legal matters - Ijtihad- from the restrictions that had grown around it.104 He stated:

"Such a conception of Reality must reconcile, in its life, the categories of permanence and change. It must possess eternal principles to regulate its collective life; for the eternal gives us a foothold in the world of perpetual change. But eternal principles when they are understood to exclude all possibilities of change which according to the Quran, is one of the greatest signs of God, that tend to immobilize what is essentially mobile in its nature. The failure of Europe in political and social science illustrates the former principle; the immobility of Islam during the last 500 years illustrates the latter. What then is the principle of movement in the structure of Islam? This is known as Ijtihad. It means to exert 8

with a view to form an independent judgement on a legal question. The idea, / believe, has its origin in a well-known verse of the Quran: 8

"And to those who exert We show Our path ",105 In the initial clays of Islam, Ijtihad was used interchangeably with opinion, he contended, adding that it assumed a specific meaning later on, standing for an opinion shaped and presented by people entitled to relevant judgments. Iqbal believed this narrow definition of the term was the result of three things: the activity of conservative thinkers, the appeal of aesthetic Sufism, and the destruction wrought by the Mongols. Firstly, conservative thinkers, afraid of the early rationalist (Mu'tazileh) movement in Islam, had utilized Islamic law to hamstring the rationalist movement. The Sufis, in turn, reacted against subtleties of the legalists and attracted to themselves, and

absorbed, the best minds in Islam. As a result, the Muslim state was left in the hands of mediocrities 29

who "found their security only in blindly following the schools" of Muslim law.106 The coup de grace, according to Iqbal, was inflicted by the Mongols whose sack of Baghdad destroyed the center of Muslim intellectual life and threatened Islamic society as a whole. To meet this threat, and to preserve what remained, conservative thinkers tended to resist all innovation in Islamic law, no matter what the practice of the early Muslims may have been. In the modern era, Iqbal insisted, there was no need for restrictions so hidebound as to be almost impossible of realization by any individual. 107 Iqbal's intellectual activity is praiseworthy due to his insistence on surveying the Islamic law with a critical eye.108 He argued that modernization of the law would pave the way for settling basic problems gripping Islam. The problem of Ijlihad disturbed Iqbal because he was trying to effect a change within the established order. He strongly supported the idea that Ijtihad had always been a vital part of Islam;

it was the only way through which the needs of succeeding generations and the requirements of the different races merging into Islam could be met. 22

Abul Kalam Azad was another contemporary scholar advocating Islam's support for dynamism. Singling out man's reform and welfare as the aim of religion, he stressed that materialization of this aim hinges on the adequacy of the code of conduct to issues such as time and place, as well as social and intellectual conditions of the people for whom the code is formulated.109 When people begin to attach primary importance to difference, they are beginning to stray from true religion. The Quran, Azad maintained, really set out to distinguish between the principles and the forms of religion; its purpose was to direct attention to the essence of religion. Azad refers to the Quran, which says thus: "We have set for each (group) of you a particular code and path. Had God so willed, He could have made you one people, but He tests you by the separate regulations which He has made for you (according to your different circumstances and capacities). So (do not lose yourself in these differences but) endeavor to surpass each other through your good deeds".110 Muslim modernists generally believed the traditionalist religious leaders were improperly interpreting the Quran. By heeding certain social and political concerns of his time, Maududi was reputed as a Muslim modernist. The role of Maududi was to show that a conservative interpretation of Islam need not be out of place in the modern world; perhaps his most important function was to weaken the extreme traditionalists, but he lent at least temporary relief to many Muslims who wanted to remain traditionalists and also accept - or reject in a rational manner - the teachings of modern science.111 Maududi was a prominent and unrivaled intellectual and religious personality of the pre World War II era. He highly attracted the educated Muslims and generally those Muslims who perceived what impacts different educational approaches had on the followers of Islam. He won greater appeal, especially between the two wars, due to his insistence that religion - i.e. Islam - and politics should go hand in hand. The universe, Maududi holds, is God's kingdom, and this kingdom has the earth as solely a province.112 Man is an

autonomous being on earth, but his autonomy entails a responsible understanding to him is given the power to distinguish between good and evil and to adopt whatever manner of life he will.113 He maintains that: "In fact, there are two spheres to human life: the physical and the moral. In the physical sphere man has practically no option at all; he has to adjust himself to the laws of nature. All that man can do is to discover them. In the physical sphere everything is created as it is. Personally, I would prefer not to believe in evolution, I believe that man exists very much as he was created. In any case, the problem of evolution is a problem of the physical sphere; it is not the function of religion to give guidance in this. Religion is confined to the moral sphere, and deals with the proper conduct of man. Progress in our knowledge of the physical sphere may be effected by scientific investigation, but progress in the moral sphere including political, social, and economic realms – requires guidance through the prophets" 114 Maududi maintains that "quest for knowledge of reality", mastery over the moral order, and reliance on facts of the universe to form views about life and the world are Quranic injunctions. The Quran forbids and discourages only "the fanciful and speculative" theories and philosophies. It is left to the properly educated individual to determine whether a given theory does not in itself transgress revealed knowledge. It is revealed knowledge, after all, that is the basis for salvation, and that knowledge is not the product of any human experience, whether in the physical or social sciences or in philosophy. Maududi deems it inadvisable to back up such sciences by reference to the scriptures. He, furthermore, notes the incorrectness of saying that Islam discourages the experimental sciences and that Muslims believe they need nothing further than knowledge sent down by God. Nonetheless, such a basically traditionalist interpretation of divine religion and attempts to slave off fanciful theories preclude diverse forms of interpretation of the revelation.115 Some analysts hold the view that: "Maududi removed himself from the ranks of the modernists because he insisted that the Quran can be interpreted only against a background of Muslim philosophy, that western philosophy has no place in it. When, for instance, a British scholar advocated a synthesis of scientific and religious spirit, Maududi argued that no such synthesis could ever be effected because religion is "the soul and the guiding spirit behind science "116 The analysis presented above clearly demonstrates the fact that although Islamic modernism has contained many variations, two features can be identified. Firstly, all the Islamic scholars recognize the significance of the necessities and changing circumstances of the time. However, some of the progressive scholars like Iqbal hold the view that Ijtihad is the dynamic device through which Islam can liberate itself from reactionary tendencies. To that effect the Islamic scholars must try to liberate the concept of individual interpretation in legal matters- T/fi/tad- from the restrictions that had grown around it. Secondly, the idea that it was not the Islamic concept that had changed but the mind- set of some Muslims was propounded by other Islamic scholars such as Maududi. These scholars, in the meantime, heeded the contemporary conditions. The dynamics of Islam do not lie in reinterpretation and conscious adaptation to changing conditions, but rather in the simple affirmation that the Man's dynamics can only be toward closer and closer obedience to the sayings

and actions of the Prophet (S.A.W.). 28

However, he knowingly or unknowingly admits that Man's interpretation and mentality has been subjected to change in practice.117 Maududi appears to be a modernist through his admission of the revival and renaissance of Islam and of the 20th century challenges Islam IIS faces.118 However, when he comes to the interpretation of the Shariah to meet the new

challenges he forwards the view that dynamism lies in the absolute submission to God: "Man's dynamics can only be toward closer and closer obedience to the sayings and actions of the Prophet (S.A.W.)" Maududi actually does not provide any solutions to the new problems and challenges the Islamic societies face today. Maududi actually confuses the concept of followership with that of dynamism. He also ignores the methodology the

holy Prophet (S.A.W.) and his companions applied **to the** 27

effect that whenever it was necessary they made the laws flexible. Iqbal takes a brave step farther and introduces Ijtihad as the dynamic device, which can be implemented to seek solutions to the problems of the changing circumstances of the time. Conclusion As yet, Ijtihad serves as the major vehicle to

interpret the divine revelation and to apply the latter **to the** dynamic **Muslim society** 33

which opts for equity, redemption, and truth. Ijtihad should be in accordance

with the Quran and the Sunnah to insure validity. **The sources of Islamic law are therefore essentially monolithic.** 11

The essential unity of the Shariah **lies in the degree of harmony that is achieved between revelation and reason. Ijtihad is the principal instrument of maintaining this harmony.** 25

Ijtihad is enforced in connection to three types of evidence: 1. authentic but speculative in purport; 2. authenticity doubted but meaning definite; 3.

speculative in both authenticity and meaning. 31

The

practice of Ijtihad is a religious duty. The Islamic Jurists **are in agreement that Ijtihad is the collective obligation** 5

(Wajeb-al Kefa'ei)

of all qualified jurists in the event where an issue arises but no urgency is encountered over its ruling. The duty remains unfulfilled until it is performed by at least one 24

mujtcihid. Many

ay at in the Quran lend support to the conclusion that it is the duty of the learned to study and investigate the Quran and the teachings of the Prophet (S.A.W.). The 5

Mujtahid must be a highly qualified person of sound mind, enjoying superb intellectual faculty, possessed of knowledge of different religious disciplines for independent judgment. He must be knowledgeable in Arabic

that enables the scholar to enjoy a correct understanding of the Shariah's texts, and 5

he

must also be a knowledgeable in the Quran and the 11

Sunnah especially that part of it which relates to the subject of his Ijtihad. The 5

Mujtahid must also know the substance of \hcfuru

works and the points on which there is an ijma, and he should 5

also

know the objectives (Maqased) of the Shariah, which consist of the 5

Maslaha. Though Ijtihad has no uniform procedure, it should primarily be based on the Quran and the hadilh, as two sources with highest

priority over any other evidence. Should there be no nass on the matter, then 5

he must find out if there is a ruling of ijma, Qiyas or other sources available on the problem in the works of the renowned jurists. Today the former conditions of 11

Ijtihad practiced by the earlier Islamic Jurists are not extant.

For one thing, the prevalence of statutory legislation as the main instrument of government in modern limes has led to the imposition of further restrictions on Ijtiliad. The 5

revival of Ijlihaci in our times would necessitate efforts, which the government must undertake. Since education is the business and responsibility of modern governments, it should be possible to provide the necessary education and training that a mujtahid would need to possess, and to make attainment to this rank dependent on special qualifications. 5

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Chapter 2 Ijtihad and the flexibility of Shariah in theory It is essential to verify how Ijtihad can impart flexibility to Shariah when it becomes operative as a dynamic device in the deduction of Ahkam (legal qualifications) from the various Islamic sources. The potentialities of these Islamic sources have been identified to illustrate the important role that Ijtihad assumes and to verify how these sources can become flexible in the face of different circumstances and needs of time and space. As an essential procedure, those potentialities Of each individual Islamic sources which Ijtihad can deal with dynamically

to find solutions to new problems have been identified **and** subjected **to** in-depth research. **The** 1

purpose is to verify the hypothesis that the Shariah is able to provide solutions to new problems and needs of the Islamic society and that the application of Ijtihad to the Islamic sources to deduce laws is not only permissible but essential and indispensable. It is a fact that Shariah in the past fourteen centuries has never been silent to provide solutions to the needs of a particular time. Shariah in particular Islamic communities in different parts of the world, has always challenged other particular methods of providing solution. These solutions have been put forward by the religious authority of the Islamic Jurists. Differences among Muslims have been ironed out by Shara courts in the Islamic communities. Tens of governments in the last centuries have ruled under the authority of Shariah. The legal and institutional systems have always been expanding and the legal parts of Shariah have always been considered as the main part of Shariah. These have all been witnesses to the fact that Shariah have never been static. The need to meet the necessities of changing and novel circumstances of different generations. Hard work was undertaken by Islamic jurists such that from the middle of the first century until early fourth century, some nineteen Islamic law schools were set up.

This fact alone is sufficient to show how incessantly the **early** Islamic jurists **worked in order to** 19 **meet the necessities of a growing civilization. With the expansion of conquest and the consequent widening of the outlook of Islam these early legists had to take a wider view of things, and to study local conditions of life and habits of new peoples that came within the fold of Islam. A careful study of the various schools of legal opinion, in the light of contemporary social and political history, reveals that they gradually passed from the deductive to the inductive attitude in their efforts at interpretation.**

1 The device that has enabled Shariah to transfer from a static or immobilized state to a dynamic and mobilized doctrine to meet the growing needs of different generations has been Ijtihad. However, the principle of Ijtihad had always had to challenge its way through the conservative dogmatism. Therefore, from the very beginning of the development of Islamic law, rigidity and conservative dogmatism have incessantly presented itself as a concrete obstacle on the way of the progress of Islam. The dogma was based on the wrong perception that because the Quran and the Sunnah can not allow of change and evolution. This native though plausible view disabled the Muslims mind to think of the dynamic outlook of the Quran and the Sunnah. Such a dogmatic view has sparked two pitiful and somewhat fatal impacts in the Islamic communities. Firstly, many Muslim communities lost the chance for technical and intellectual development Secondly, many of the intellectuals in the Islamic societies either have completely abandoned or sometimes tend to reject their faith on the basis of this misunderstanding and wrong though plausible rigid view. This dogmatic attitude, however, is now facing the problems it deserves.

Things have changed and the world of Islam is today confronted and affected by new forces set free by the extraordinary development of human thought in all its directions. 25

Hence, this altitude can not

be maintained any longer. The wish **of the present generation of** Muslims **to** re interpret **the foundational legal principles, in the light of their own experience and** the **altered conditions of modern life is perfectly justified.** 37

We will see how the

teaching of the Quran **that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors,** must **be permitted to solve its own problems.** As regards hadith, **it is** 35

noteworthy

that generally the law revealed by a prophet (S.A.W.) **takes** special **notice of the habits, ways, and peculiarities of the people to whom he is specifically sent. The Prophet** (S A W.) **who aims at all-embracing principles, however, can neither reveal different principles for different peoples, nor leaves them to work out their own rules of conduct. His method is to train one particular people, and to use them as a nucleus** 20

for the building up of a universal Shariah. As such, he underscores the tenets of the social lives of all people and applies them to specific cases based on the particular habits of the people before him. The

Shariah

values (Ahkam) resulting from this application (eg,, rules relating to penalties for crimes) are in a sense specific to that people; and since their observance is not an end in itself they cannot be strictly enforced in the case of future generations. 2 It was perhaps in view of this that Abu Hanifa, who had a keen insight into the universal character of Islam, made practically no use of these traditions 3 The fact that he introduced the principle of Istihsan

24

which necessitates a careful study of actual conditions in legal thinking; throws further light on the motives which determined his attitude towards this source of Islamic law. It is said that Abu Hanifa made no use of traditions because there were no regular collections in his day. In the first place, it is not true to say that there were no collections in his day, as the collections of Abdul Malik and Zuhri were made not less than thirty years before the death of Abu Hanifa. However, even if

22

such collections did not supposedly reach him or lacked legally important traditions,

Abu Hanifa, like Malik and Ahmad ibn Hanbal after him, could have prepared his own collection if he

25

felt it was imperative.

On the whole, then, the attitude of Abu Hanifa towards the traditions of a purely legal import is perfectly sound

25

a further intelligent study of the literature of traditions, if used as indicative of the spirit in which the Prophet (S.A.W.) himself interpreted his Revelation, may still be of great help in understanding the

27

life-value of the legal principles enunciated in the Quran. **A complete grasp of their life-value alone can equip us in our endeavour to re-interpret the foundational principles. The** precepts **of**

Islam are derived from the holy Book and the Sunnah of the holy Prophet (S A W.) **(the legal text). If so, for the soundness** every one **of these texts with the exception of the** Quranic text **and a small body of the texts of the Sunnah established by** tawator **(continuity), we have to rely upon the transmission of one of its transmitters.** 3

Now howsoever carefully we may scrutinize the account about the transmitter and the extent of his trustworthiness and faithfulness as to his transmission, as long as we are made acquainted about the extent of the integrity and the faithfulness of the transmitters historically and not in a direct manner and so long as there is a likelihood that the faithful transmitter, being fallible, may have misconstructed the text and transmitted it to us obliquely especially in circumstances in which the text reach our hands only after going around of passing through the hand of a number of transmitters, each transmitter, in his turn handing it down to the next till it reached us at the end of the long journey, we cannot be sure of the soundness of the text in an absolutely decisive manner. But even when we have made ourselves **sure of the soundness of the text and of its having originated from the Prophet** 3

(S A W), comprehension of this is based on our present lifestyle.

On setting out the text with other legislative text to reconcile it with them, too, we are likely to make mistake in our mode of reconciliation and give preference to this or that text while that text may be sounder than it — and indeed **even there might be existing an exception in yet another text and the exception may not have** reached **our ears.** 3

This is the reason why Allameh Sadr maintains

that the portion of the precepts of the law of Islam which has been kept preserved with its clarity, its need and its character of finality, notwithstanding these long centuries which separate us from the (early) law making age of Islam, is very small. Surely from among the body of the precepts we find in the juristic books, **those of the class which enjoys the quality of absolute finality does not exceed five per cent.** 3

4 In order to verify the hypothesis that the Shariah is flexible, it is necessary that we examine

the main sources of Shariah i.e. The Quran, the Sunnah, Ijma, Qiyas, Aql and Urf. The	47

purpose is to determine how Ijtihad can be a device imparting flexibility to Shariah through the aforementioned sources. The emphasis will be focused on the

Quran and the Sunnah. In the case of the Quran, it	57

can be viewed as dynamic source of law. This has been carried out through the examination of the most relevant important criteria, which the Islamic Jurists have applied to assess the Quranic injunctions. The theory of abrogation, the generality of the versus, the issue of ambiguity and decisiveness, the issues of Tafsir (interpretation) and Ta'wil (allegorical interpretation)5, the Nass and Zaher6, etc. have been applied to categorize the Quranic injunctions for the purpose of our analysis. Finally, the issue of how time and space plays a vital role in our interpretations of the Quranic injunctions will be investigated. As regards the Sunnah, there are three important issues as follows. 1) meaning of the hadith (Nass, Zaher, etc), 2) the chain of hadith (Mashhoor, Wahed, Mursal, Sahih, Hassan, etc.)7 3) the role of time and space with a view to explore the relevancy of the Islamic decrees to the particular circumstances. Overall, the purpose is to verify whether the alleged rigidity is correct or that it is merely a misunderstanding, which must be corrected. The Features of the Quranic Injunctions The Quran is the primary source of legislation in the Islamic law. Numerous Quranic verses explicitly

indicate that it is the basic and main source of law in Islam 8 The	5

type of guidance, which the Muslims required at Medina, was not the same as they had needed at Mecca. That is why the Medinese	5

suvar (Pl. of Surah)

differ in character from those revealed at Mecca. The latter are comparatively small in size, and generally deal with the basic beliefs of Islam.	5

The Medinese Suvar, on the is why the Medinese suvar (Pl. of Surah)

differ in character from those revealed at Mecca. The latter are comparatively small in size, and generally deal with the basic beliefs of Islam. 5

The Medinese Suvar,

on the other hand, are rich in laws relating to civil, criminal, social, and political problems of life. 5

9

We do find the term Zakat in several Meccan Suvar;10 but Zakat was not in existence at Mecca in its institutional form. In Mecca, the term 5

Zakat denoted voluntary financial help or ethical

purity. It was not an obligatory social duty of the opulents. Moreover, at Mecca no administrative staff was recruited for this purpose. From 5

this observation, we can infer that the laws of the Quran were issued appropriate to the circumstances and new conditions. Rather than presenting meticulous or unimportant details, the Quran specifies fundamental

principles that guide a Muslim to a specific direction, where he 5

has to strive to get the answers. Moreover, it appropriate to Uie circumstances and new conditions. Rather than presenting meticulous or unimportant details, the Quran specifies fundamental

principles that guide a Muslim to a specific direction, where he 5

has to strive to get the answers.

Moreover, it presents the Islamic values in a general form, suited to the changing circumstances in all ages. The Quran calls itself "guidance", and not a code of law. 11 It goes without saying that the 5

Quran does not seek

to lay down once and for all the details of life. Broadly speaking, it should be borne in mind that the legislative part of the Quran is the illustration for future legislation and does not constitute a legal code by itself. History tells us that the revelation came down when some social necessity arose, or some companion consulted the Prophet (S A W.) in connection with certain significant problems. 5

12 A common reader begins to read the Quran as a versatile code and an all-embracing law book.

He does not find in detail the laws and by¬laws relating to the social life, culture, and political problems. Further, in the Quran he reads numerous verses to the effect that everything has been 5

an ajj-cmuiaiiug taw UUUE. nt uwva uw uuu m uvu»i —« — j Jaws

relating to the social life, culture, and political problems. Further, in the Quran he reads numerous verses to the effect that everything has been mentioned in this Book and nothing has been left out. 13 Besides, he notices that the Quran lays great emphasis on saying prayers and giving Zakat, but at the same time he finds that it does not mention their specific definitions or details. Questions, therefore, arise in the mind of the layman as to the nature of the comprehensiveness of the Quran. The difficulty arises from ignoring the fact that God did not reveal the Quran in a vacuum, but as a guide to a living 5

community with certain characteristics. As such, the Islamic law evolved such that exegesis of the Quran became more sophisticated as time went by. The

legal rules not derived from the specific verses of the Quran in the early period were sought to 5

As such, the Islamic law evolved such that exegesis of the Quran became more sophisticated as time went by. The

legal rules not derived from the specific verses of the Quran in the early period were sought to be so drawn later on. This was a continuous activity .14 The methodology of inference from the Quran grew more and more intricate and philosophical in the wake of the deep and minute study of the Quran by jurists in the later ages. 15 The corpus of Islamic law is rich in examples where, with regard to a problem, some jurists argued on the basis of the Quran, whiJe the others did so on the basis of traditions or personal opinion, for these latter did not think the Quranic verse relevant to the point at issue. 5

Although, generally, the legal verses of the Quran are quite definite, nevertheless all such verses are open to interpretation, and different rules can be derived from the same verse on the basis of Ijtihad. 5

16 According

to one jurist, a law can be deduced from some verse but the same verse is silent on the same problem according to the other. Thus, one argues on the same point on the basis of the Quran, while the 5

Ijtihad.10 According

to one jurist, a law can be deduced from some verse but the same verse is silent on the same problem according to the other Thus, one argues on the same point on the basis of the Quran, while the other on the basis of the Sunnah. 5

The

doctrine of abrogation (Naskh) of the individual verses in the Quran is significant in Islamic jurisprudence. 17 The classical concept of this doctrine affirms that a number of verses in the Quran, having been repealed, are no longer operative. These revealed verses are no doubt part of the Quran but they carry no practical value. This 5

verifies the point that some of the Quranic verses in the form of decrees were appropriate to certain circumstances and necessities of the time.18 Though different in form, the abrogative and the abrogated share the perfection and the benefit. The demise of a prophet (S.A.W.) and his substitution by another is fully compatible with the natural system, since

appropriate to certain circumstances and necessities of the time. Though different in form, the abrogative and the abrogated share the perfection and the benefit. The demise of a prophet (S.A.W.) and his substitution by another is fully compatible with the natural system, since both are signs oi Allah and since one abrogates the other.

Life, death, sustenance and other such things often replace each other, the succeeding factors abrogating the preceding ones. It all depends on the varying needs of the society's welfare, on ever-changing level of the man's perfection. Likewise, when a religious law is replaced by another, the abrogating one has the same power as the abrogated one had, to lead to the spiritual and temporal well-being of the individual and the society; each perfectly suitable for the time it was, or is, in force; each more beneficial in the context of its time. For example, the order to "forgive" **in the beginning of the call when the Muslims had neither the manpower nor the armaments, and the command to** "fight" **when Islam had gained some strength, when the Muslims had gathered enough force and the disbelievers and the polytheists were frightened of them. However, seldom is an abrogated verse devoid of some phrase showing that it was a transitory order, which would be abrogated in due course. For example: The verse:** "But pardon and forgive (them) until Allah should bring about His command"19 **which was abrogated by the verse of fighting. And. confine them until death takes them away or Allah makes some way for them.** "20 **which was abrogated by the verse of flogging. The phrases,** "until Allah should bring about His command", **and** "or Allah makes some way for them", **give clear indication that the order given therein was temporary and transitory which would soon be abrogated.** 21 **The**

11

Quranic injunctions are not all definitive and decisive. The Quran verifies this when it says: "He it is who has sent down to thee the Book, of it there are some verses decisive, they are the basis of the Book, and others are ambiguous; then as for those in whose hearts there is perversity, they follow the part of it which is ambiguous, seeking to mislead, and seeking to give it (their own) interpretation, bid none knows its interpretation except Allah; and those who are firmly rooted in Knowledge"22 The following points can be derived from the above-stated verse: First; The Quran

contains two kinds of verses, the decisive and the ambiguous.

55

If a verse, seen alone, is capable of more than one meaning, it is ambiguous; otherwise, it is decisive. Second; The whole Quran, with all its decisive and ambiguous verses, has its interpretation. That interpretation is not the connotation of its words; it is an actually existing reality; a reality that has the same relation with the knowledge, facts and ideas mentioned in the Quran,

as the significance of a proverb has with that proverb.

40

All the Quranic knowledge is like a similitude for the Quranic interpretation that is with Allah. Third; Decisiveness and ambiguousness are relative qualities. The same verse may be decisive in one context and ambiguous in another. Also, it may be decisive in comparison to one verse and ambiguous in relation to the other.23 The most salient feature of the Quranic laws is the categorization of the verses as decisive or ambiguous .24 A decisive verse is one which is straightforward and specific. It can have only one specific meaning. An example of this is as follows: "Come /

will recite what your Lord has forbidden to you (remember) that you do not associate anything with Him and be 40

"Come / will recite what your Lord has forbidden to you (remember) that you do not associate anything with Him and be good to (your) parents, and do not slay your children for (fear of) poverty - We provide for you and for them - and do not draw near to indecencies. . This He has enjoined you with that you may be mindful"25 Being straightforward and lucid, this verse lends only one meaning and interpretation. Other verses in this category such as prayers, fasting, the specified shares in inheritance are all clear and definitive and therefore not subject to different interpretations. The speculative injunctions of the Quran, however, are open to interpretation and Ijtihad.26 The Quran in such cases candidly approves of the exercise of individuai opinion, employment of personal judgement, and employing the faculty of speculation, conjecture, deep thinking and contemplation in affairs. It provides a wide latitude for variant approaches to a problem. The divergent views on a problem, provided they stand on and employing the faculty of speculation, conjecture, deep thinking and contemplation in affairs. It provides a wide latitude for variant approaches to a problem. The divergent views on a problem, provided they stand on a sound basis, are to be accommodated. One point of view cannot be declared right and the other absolutely wrong. Since no absolute certainly can be claimed in such decisions, various opinions on a single point shall be entertained. It will be shown somehow Quranic verses provide religious sanction for the use of reason and analogical deductions in formulating fresh laws. The Quran reads: "Mothers shall suckle their children two years completely, for such as desire to fidfil the suckling. It is for the father to provide them and cloth (clothe) them honourably.... But if the couple desire by mutual consent and consultation to wean, then it is no fault in them".27 Based on this verse, a mother breast-feeding her child should be honorably or customarily be furnished with food and clothing. The verse does not qualify food and clothing. It gives liberty in providing maintenance honourably or according to the prevalent custom. Moreover, mutual consultation and agreement require freedom of opinion in making a decision for weaning the child. Both these points are to be settled by One's own choice and judgment. Another verse reads as follows: "There is no fault in you, if you divorce women while as yet you have not touched them nor appointed any dower for them; yet make provision for them, the affluent according to his means, and the needy according to his means, a fair provision"28 The verse recommends that the husband must make some provision for the divorced woman in addition to the dower. The Quran is silent on the quality and quantity of the provision. This will be determined hv hushand's fair iudement provision for the divorced woman in addition to the dower. The Quran is silent on the quality and quantity of the provision. This will be determined by husband's fair judgment. The Quranic commandment

that the Prophet (S.A.W.) should hold consultations with his companions on 41

significant issues justifies the use of individual opinion and reason in legal reasoning.29 The

Prophet (S A W.) used to consult his Companions in 30

questions not decided by revelation. He then adopted the opinion, which was sound and reasonable in his eyes. This shows that mutual consultation was designed to elicit public opinion. The Prophet (S A W.) himself exercised Ijtihad along with them.30 The mutual consultation

of the Prophet (S.A.W.) with the 30

Companions was in fact an implementation of the Quranic commandment. The Quran Says: them.30 The mutual consultation

of the Prophet (S.A.W.) with 30

the Companions was in fact an implementation of the Quranic commandment. The Quran Says: "So pardon them, and pray forgiveness for them, and take counsel with them in the affair; and when you are resolved, put thy trust in God" 31 A Quranic commandment may have a speculative and a definitive meaning at the same time. The two meanings will, nevertheless, present two totally independent rulings.32

An example of this is the injunction concerning the requirement of ablution for prayers which reads in part .. and wipe your heads 1

".33

This text is definitive on the requirement of wiping (mash) of the head in wuzu, but since it does not specify the precise area of the head to be wiped, it is speculative in regard to this point. Hence we find that the jurists are unanimous in regard to the first, but have differed in regard to the second aspect of this injunction. 1

34

There are sometime instances where the scope of disagreement over the interpretation of the Quran is fairly extensive 1

At times seven or

There are sometime instances where the scope of disagreement over the interpretation of the Quran is fairly extensive. 1

At times seven or eight different juristic conclusions have been arrived at one and the same issue. 1

35 These are Ijtihad opinions. The great Islamic scholars have practice Ijtihad because they believe that

Ijtihad is not only permissible but is obligatory.36 For the Shariah does not restrict the liberty of the individual to investigate and express an opinion. 1

The

diversity of opinion offers a range of choice from which one can select the view it deems to be most beneficial. 37 So far, the study of the 1

Islamic law's evolution corroborates the fact that interpretation of the decisive verses is also possible. This broadens the scope of Ijtihad even more.

For example, the penance (kaffarah) of a false oath according to textual ruling of the 1

Quran38 is of

three types, one of which is to feed ten poor persons. This is a specific ruling in the sense that ten poor persons has only one meaning But even so, the Hanafis have given this text an alternative interpretation, which is that instead of feeding ten poor persons, one such person may be fed ten times. The majority of Islamic Jurists, however, do not agree with the Hanafis on this point. 1

This example will serve to show that the scope of Ijtihad is not always confined to the A 'nun (general) but that even the khass (specific) and definitive rulings may require elaboration which might be based on speculative reasoning 1

39 In addition, it is noteworthy that the Islamic jurists

have deduced the rules of Shariah not only from the explicit words of the Quran, which is referred to as the mantoq, but also from the implicit meanings of the text through inference and logical construction, which is referred to as the meaning, or mafhum. 1

40 Therefore, the

deduction of the rules of Shariah by way of inference from the implied meaning of a text partakes in speculative reasoning and 1

Ijtihad. Sometimes

each verse of the Quran must be explained and interpreted by means of other Quranic verses. 34

41

Imam Ali has said: "Some parrs of the Quran speak with other parts of it revealing to us their meaning and some pans attest to the meaning of others ".42 And the Prophet (SAW.) has said: 16

"pan of the Quran verify other parts."43

As a simple example of the commentary of the Quran through the Quran may be cited the story of the torture of the people of Lot about whom in one place God says, "and we rained on them a main."44 and in 16

And the Prophet (S.A.W.) 32

has said: npart of the Quran verify other parts. 34

"43

As a simple example of the commentary of the Quran through the Quran may be cited the story of the torture of the people of Lot about whom in one place God says, "and we rained on them a main, and in another place He has changed this phrase to, "Lot! We sent a storm of stones upon them (all) ".45 By relating the second verse to the first it becomes clear that by "precipitation" is meant "stones" from heaven. 16

Therefore,

a speculative indication in the text of the Quran or hadith may be supported by a definitive evidence in either, in which case it is as valid as one which was definitive in the first place. All the "Wahed" ahadith 7

(narrated by only a single individuals)

which elaborate the definitive Quranic prohibition of usury (riba) 1

46 are speculative by virtue of being Wahed. Nevertheless, as the definitive text of the Quran supports their substance, they become definitive not withstanding any possible doubts about

their authenticity. Thus as a general rule, all Wahed ahadith whose authenticity is open to speculation are elevated to the rank of qata; if they can be substantiated by clear evidence in the 1

Quran.47 General rules, however, permeate the Quran's legal contents, even though there are specific commandments on some subjects, the conclusion which can lead us to the correct understanding of the Quran is that the Quran

is specific on matters which are deemed to be unchangeable 1

(values and ultimate human goals),

but in matters which are liable to change, it merely lays down general guidelines and the 21

details is left to the knowledgeable scholars of the time to provide solutions to the problems through Ijtihad. The Quran

itself warns the believers against seeking the regulation of everything by the express terms of divine 1 revelation, as this is likely to lead to rigidity and cumbersome restrictions: "O you believers, do not keep asking about things which, if they were expounded to you, would become troublesome for you ...".48 In this way, the Quran discourages the development of an over- regulated society. What the Quran has left unregulated is meant to be devised, in accord with the general objectives of the Lawgiver, through mutual consultation and Ijlihad. A careful reading of the Quran further reveals that on matters pertaining to belief, the basic principles of morality, man's relationship with his Creator, and transcendental matters which are

characteristically unchangeable, the Quran is clear and detailed, as clarity and certainty are the 1 necessary requirements of belief. The

relationship between the Quran and Sunnah is largely specified by the fact that Quranic legislation is presented briefly and generally.

Since the general, the ambiguous and the difficult portions of the Quran **were in need of elaboration, the Prophet was expected to provide the necessary details and determine the particular focus of the general rulings of the** Quran. **It was due to these and other such factors that a unique relationship was forged between the Sunnah and the** Quran **in that the two are often integral to one another and inseparable. The** 1

dynamic outlook of the Quran In verification of the fact that each generation has its own interpretation of the Quran, which is appropriate to that specific generation and that the interpretation of one generation mav be Quite different from the other the of interpretation of one generation may be quite different from the other, the holy Prophet says: "The Quran is in motion as the sun and the moon are m motion." 49 The relationship between the Quran and its interpretation is emphasized in the above- stated hadith by the holy Prophet. It is now more than fourteen centuries since the Quran was revealed. Each generation has understood the Quran according to its own particular interpretation was subject to those specific circumstances of the time and place. However, every new interpretation abrogated the former one because the understanding and intellect of the people have incessantly been developing. That is the reason why the new generation reject the old interpretation of the Quran. But the Quran itself has been always alive and in motion The holy Prophet advises the Muslims in a hadith as follows: "The Quran is magnificent in appearance and deep in essence. There are unlimited layers of understanding in the Quran so that when you remove one layer, there is still another".50 This bears witness to the truth that the interpretation of the Quran is always in a process of development. The examination of the verses of the Quran provides the best witness to the dynamic feature of the Quran. For example, the Quran in the seventh year of the Hijrah orders that the hypocrites should leave Medina otherwise they will be killed. This verdict did not exist in Medina before. The reason for issuing such a verdict was that the hypocrites had adopted strict policies against the Muslims on the one hand and the the seventh year of the Hijrah orders that the hypocrites should leave Medina otherwise they will be killed. This verdict did not exist in Medina before. The reason for issuing such a verdict was that the hypocrites had adopted strict policies against the Muslims on the one hand and the Muslims were then strong enough to execute the order on the other hand. The verses read thus: "If the hypocrites and those in whose hearts is a disease and the agitators in the city do not desist, We shall most certainly set you over them, then they1 shall not be your neighbors in it but for a little while" 51 " Cursed: wherever they are found they shall be seized and murdered, a (horrible) murdering. " 52 At the time when the

family of the Prophet (S.A.W.) were followed by **the** 42

Muslims as good examples, the enemies

of the Prophet (S.A.W.) were trying **to** find faults with **the** family of **the** 32

prophet (S A W.) so that they will use them as malicious. Therefore, the Quran ordered

the family of the holy Prophet (S A W.)	42

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

"And whoever of you is obedient to Allah and His Apostle and does good, We will give to her reward doubly, and We have prepared for her an honorable sustenance ”54 Before the	38

Muslims conquered the city of Mecca they followed certain rules and regulations

After the conquest of Mecca in the eighth year of the Hijrah, the	54

laws regarding the sacrifice for the sake of God and charities given to the poor all underwent change. The reason was that the status of the Muslims before the conquest was different from that after the conquest. As a result and with a view to different circumstances of lime and space, the Quran modified the regulations. The Quran reads thus: "And what reason have you that you should not spend in Allah's way? And Allah's is the inheritance of the heavens and the earth; nor alike among you are those who spent before the victory and fought (and those who did not): they are more exalted in rank than those who spent and fought afterwards; and Allah has promised good to all; and Allah is Aware of what you do" 55 A point of reference which clearly illustrates the role of time and space in the teachings of the Quranic verses are those verses regarding the gains Muslims achieved from wars. First, the rule was established to the effect that four fifth of the booty should be given to the soldiers who took pan in the wars. The Quran reads thus: "And know that whatever thing you gain, a fifth of it is for Allah and for the Apostle and for the near of kin and the orphans and the needy and the wayfarer, if you believe in Allah and in that which We revealed to Our servant, on the day of distinction, the day on which the rwo parties met; and Allah has power over all things"56 However, in the war of Baninazir, as a result of different circumstances, the ruling was changed and a new ruling was established to the effect that all the war booty must be delivered to the public treasury' to be used

for the benefit of the needy and welfare of the Islamic society.	64

The verses read thus: "Whatever Allah has restored to His Apostle from the people of the towns, it is for Allah and for the Apostle, and for the near of kin and the orphans and the needy and the wayfarer, so that it may not be a thing taken by turns

among the rich of you, and whatever the Apostle gives you, accept it, and from whatever he forbids you, keep back, and be careful of (your duty to) Allah; surely Allah is severe in retributing (evil):"57 "(It is) for the poor who fled, those who were driven from their homes and their possessions, seeking grace of Allah and (His) pleasure, and assisting Allah and His Apostle: these it is that are the truthful." 58 "And those who made their abode in the city and in the faith before them love those who have fled to them, and do not find in their hearts a need of what they are given, and prefer (them) before themselves though poverty may' afflict them, and whoever is preserved from the niggardliness of his soul, these it is that are the successful ones." 59 The new ruling was established due to different circumstances of time and space. The war of Baninazir was actually settled by peaceful negotiations and Muslims did not suffer any hardship. Moreover, the war was emerging in a situation where the Muslims' welfare was relatively good and the new ruling prevented the accumulation of wealth in the hands of only a few Muslims. There are many passages in the Meccan suvar that ask the Muslims to be patient and to tolerate the aggression of the infidels. "And be patient and your patience is not but by (the assistance of) Allah, and grieve not for them, and do not distress yourself at what they plan" 60 On the contrary, the Medinese surahs consist of a few verses that call upon the Muslims to launch an attack on the infidels and kill them wherever they arc found. "So when the sacred months have passed away, then slay the idolaters wherever you find them, and take them captives and besiege them and lie in wait for them in every ambush, then if they repent and keep up prayer and pay the poor-rate, leave their way free to them, surely Allah is Forgiving,Merciful."6 When these two verses are compared, one may jump to the conclusion that the verses are contradictory. However, the two different attitudes ordered reflects the different circumstances of time and space. The Meccan verses containing the order of tolerance were revealed in a situation when the Muslims were weak and could not retaliate the aggression of the infidels, while the verses containing the command of Jihad belong to a period when the strength of the Muslims had grown considerably. Thus, these different types of rulings belong to different Situations. Hence, there is no contradiction between them. From this it may be inferred that, in the first place, if the Muslims any where are weak, they may tolerate the aggression of the non-Muslims temporarily. But simultaneously they are duty-bound to make preparations and make themselves powerful. Secondly, when they grow powerful they are required to live in a state of preparedness and to shatter the power of the enemies of Islam. It is, therefore, clear that the rulings of the Quran revealed in different situations may be implemented in view of their perspective and situational context. The analysis in this section leads us to the conclusion that although the Ouran is a holy book which must always be eternal and esteemed, our interpretation and understanding derived from it can be different. The definitive and clear injunctions are also subject to certain conditions the details of which will be examined in the next two chapters. Given the fact that the Ouran does not discuss details and usually issues decrees on general values, Islamic jurists have extracted dissimilar verdicts from the same injunction. A review of such verdicts makes it clear that the qualifications of the Islamic jurists (Mujtahids) and the different conditions and circumstances of the

time have played the major role in the variation of 32

juristic decrees (fatwas). The best testimony to this derived conclusion is the different Tafsirs (exegesis) written by great Islamic scholars such as an exegesis of the Quran by Allameh Tabatabii; Tafsir e-Tebian by Sheikh Tusi; Tafsir-Al-Kash-Shaf

by Zamakhshari; Tafsir-Al-Javaher by Tantavi. These great Islamic scholars have written different interpretations on the same verse, which reflects their different qualifications as philosophers or Islamic jurists. As stated earlier, this bears testimony to the fact that two important criteria are involved in various interpretations of Islamic laws. Firstly, the qualifications of the faqih (the Islamic jurist) and secondly, the changing circumstances of the time and place. The Essential Role of Ijtihad in the Sunnah Though the Quran presents the basic rule of life, it remains silent on many issues which necessitate guidance for practical life.

In such cases the obvious thing was to follow the custom or usage of the Prophet 28

(S.A.W).6

Literally, Sunnah means a way or rule or manner of acting or mode of life. 6 **In consequence of this, there arose in Islam a class of students who made it their business to investigate and hand down the minutest details concerning the life of the Prophet** 28

(S.A.W.). As a result, the Muslims considered the Prophet's Sunnah (i.e. his words and deeds) as the yardstick and as the source of inspiration.

After his death, reports of the Prophet's wonderful **sayings and doings began to circulate.** 6 **These sayings continued to increase from time to time as they were collected from the** Sahabah **(the** Companions **of the Prophet** 14

(S.A.W.))

and became subject to standardization and selection. This **represented the** word **of the Prophet** (S.A.W.) **as supplemented to the word of Allah. The hadith, in other** words, **is the second pillar after the** Quran **upon which every Muslim rests the** structure **of his faith and life. The body of traditions circulated orally for some time, as indicated by the word** "hadith", **commonly used for tradition and which** literally **means a saying conveyed to man either through hearing or through witnessing an event.** 15

6 The

hadith, in short, is the reservoir of the Sunnah of the Prophet (S.A.W.), serving an essential need of the Muslims, be they individuals or communities. 15

The

hadith has come to supplement the Quran as a source of the Islamic religious law. 15

Whenever legal problems arise, Muslims can resort to both sources. Following the Prophet's demise, the Holy Quran and the prophetic judgments and sayings served as the groundwork for decisions on cases that appeared. The holy Quran with its wealth of detail is still insufficient by itself without the assistance of fatwa (a religious decision) and Tradition, and the hadith arose to supply this need. 6 "However, the majority of the texts available to us under the category of the Sunnah in Shariah, are not definitive either with respect to their meanings of the ahadith or to that of their chains. The application of Ijtihad assumes an indispensable role in this context. Ijtihad must be used here to determine firstly which ahadith are authentic and secondly to clarify the meaning and implications of the ahadith. Even after a hadith is made clear with respect to its meaning and its authentication, the issue of the conditions of the time and place appropriate to the application of the respected hadith emerges as a very vital concern" 6 Clear understanding of the Quran and the Sunnah is the prerequisite for deduction of legal rules from them. In order to use these sources, the Mujtahid must be well versed with the words

and their exact implications. 6 For this purpose, the Islamic Jurists include the classification of words and their usages in the methodology of 43

Osul- AlFigh.6 The

rules which govern the origin of words, their usages and classification are primarily determined on linguistic grounds and, as such, they are not an integral part of the law or religion. But they are instrumental as an aid to the correct understanding of the 1

Shariah.70

When the text is self- explanatory and clear, the 1

Mujtahid will not make use of interpretation. Yet a major part of fiqh is based on rules which interpretation and Ijtihad yield.

Ijtihad can take a variety of forms, and interpretation which aims at the correct understanding of the words and sentences of a legal text is of crucial significance to all forms of Ijtihad. 1

71 Interpretation aims at realizing the lawgiver's intention from his words and deeds.

Discovery of that which is not self-evident is the task of interpretation. 1

Thus the object of interpretation in Islamic law, as in any other law, is to ascertain the intention of the Lawgiver with regard to what has been left unexpressed as a matter of necessary inference from the surrounding circumstances. 1

72 Words fall into two categories based on their lucidity,

scope, and capacity to convey a specific meaning. 26

With reference to their conceptual clarity, the Islamic Jurists of Osul have classified words into the two main categories of "clear" and "unclear" words. 73 The main purpose of this division is to identify the extent to which the meaning of a word is made clear or left ambiguous and doubtful. The significance of this classification can be readily observed in the linguistic forms and implications of commands and prohibitions. The task of evaluating the precise purport of a command is greatly facilitated if one is able to ascertain the degree of clarity (or of ambiguity) in which it is conveyed. Thus the manifest (Zaher) and explicit (Nass) are "clear" words, and yet the jurist may abandon their primary meaning in favour of a different meaning as the context and circumstances may require, Words are also classified, from the viewpoint of their scope, into homonym, general, specific, absolute and qualified. Based on this categorization, the grammatical application of words to concepts 7

is clarified, indicating the meaning, specificity or generality of a word, and limitation of a word's absolute application to its subject.74 "The strength of a legal rule is to a large extent determined by the language in which it is communicated. To distinguish the clear from the ambiguous and to determine the degrees of clarity/ambiguity in words also helps the jurist in

his efforts at resolving instances of conflict in the law. When the Mujtahid is engaged in the deduction of rules from indications which often amouru to no more than probabilities, some of his conclusions may turn out to be at odds with others. Ijtihad is therefore not only in need of comprehending the language of the law, but also needs a methodology and guidelines with which to resolve instances of conflict in its conclusions".75 The ahadith fall into yet another classification based on the continuity and completeness of the chain of their transmitters. Continuous (mottasel) and discontinued.76 A

continuous hadith is one which has a complete chain of transmission from the last narrator all the way back to the Prophet (S **.A.** W.). A **discontinued hadith, also known as** Morsal, **is a hadith whose chain of transmitters is broken and incomplete. The majority of** Islamic Jurists **have divided the continuous hadith into the two main varieties of** MotaWater **and** Wahed. **To this the** Ahadith **have added an intermediate category, namely the well-known, or** 1

Mashhoor.77 Motawater means a report by many people presented in a way to prevent any collusion and machination to lie. This possibility is beyond conception due to the huge number and diverse residence and reliability of those relating it.78

A report would not be called Motawater **if its contents were believed on other grounds, such as the rationality of its content, or that it is deemed to be a matter of axiomatic knowledge.** 1

79

A report is classified as Motawater **only when it fulfills the following conditions: A)** 1

In each period or generation, there should be a large number of reporters to prevent any collusion in presenting a falsehood. In case the reporter's number does not make

a reliable multitude, their report will **not** lead to **positive knowledge and is therefore not Mutawatir.** 1

80 Some Islamic Jurists

have attempted to specify a minimum, varying from as low as four to as many as twenty, forty and seventy up into the hundreds. All of these figures are based on analogies: The requirement of four is 21

based on the similar number of Witnesses which constitute legal proof, twenty is analogous to the Quranic ayah in sura Al- Anfal81 which reads: "If there are twenty steadfast men among you, they will overcome two hundred fighters". The next number, that is seventy, represents an analogy to another Quranic passage where we read that

"Moses chose seventy men among his people for an appointment with us".82 B) According to some Islamic Jurists, the reporters should be equitable people (A 'del), indicating that they should not be infidels or profligates. The

correct view, however, is that neither of these conditions are necessary. What is essential in Motawater is the attainment of certainty, and this even can be obtained through the reports of non-Muslims. 1

83 C)

That the reporters are not based in their cause and are not associated with one another through a political or sectarian movement. And finally, all of these conditions must be met from the origin of the 1

associated with one another through a political or sectarian movement. And finally, all of these conditions must be met from the origin of the report to the very end. 1

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

after the demise of the Holy Prophet (S.A.W.). As the 44

Prophet (S.A.W.) passed away the flow of the revelations ceased but the 30

changing circumstances of time and space was a fact of life. So, the problem was to apply the teachings of the Quran to the new generation's different situations and needs. The fact was that the generation who followed the Prophet (S.A.W.) needed to

find solutions to new problems and therefore had to heed the 1

feature of flexibility of the Quran. The safe way for them to do so was to resort to the Sunnah. Hence the Sunnah imparted flexibility to the Quran in three ways: The first was the interpretation of the Quran through the Sunnah. The rationale behind this was provided by the Islamic jurists to the effect that the Quran is

mainly concerned with general principles borne out by the fact that its contents require a great deal of elaboration, which must be provided by the Sunnah. To give an example, the following Quranic ayah provides the textual authority for all the material sources of the Shariah, namely the Quran, the Sunnah, Ijma and Qiyas. The ayah reads: "O you who believe, obey God and obey the Messenger, and those of you who are in authority, and if you have a dispute concerning any matter refer it to God and to the Messenger. 1

85 The word "obey" in this verse has two references: the Quran as the first source and the Prophet's Sunnah, and those of

you who are in authority pertains to the Islamic Jurists' consensus. The last portion of the ayah (and if you have a dispute...) validates Ijtihad. For a dispute can only be referred to God and to the Messenger by extending the rulings of the Quran and Sunnah through analogy to similar cases. In this sense one might say that the whole body of Osul -Al-Fiqh is a commentary on this single Quranic ayah. 1

86

Al-Shatibi further observes that wherever the Quran Provides specific details it is related to the exposition and better understanding of its general principles. 1

87

Most of the legal contents of the Quran consist of general rules, although it contains specific injunctions on a number of topics. At times, the 1

Sunnah clarifies any ambiguity of the Quran, and such clarification turns into an inseparable part of the Ouran.88

There are numerous examples of this, such as the words salah, zakat, hajj, riba, which occur in the following ayat: 1

“Perform the salah and pay the Zakat”.89 “God has enacted upon people the pilgrimage of hajj to be performed by all who are capable of it”.90 “God

permitted sale and prohibited usury (riba). 91 The brief references of 26

the Quranic verses to salah, Zakat, haij and riba do not shed light on the juridical meanings of these terms. Hence the Prophet (S.A.W.)

provided the necessary explanation in the form of both verbal and practical instructions. In this way the text which was initially ambivalent (mujmal) became unequivocal (Mufassar). With regard to salah, for example, the Prophet (S.A.W.) instructed his followers to perform the salah the way you see me performing it. 92 And regarding the hajj he ordered them to 1

“take from me the rituals of the hajj”.93 And

there are also many ahadith which explain the Quranic prohibition of riba in specific and elaborate detail. 1

94 Secondly, an argument was raised whether the Sunnah could annul Quranic commands and vice versa in accordance with the exigencies of time and place and to seek solutions to emerging problems.95 The opinion of the jurists is divided on this point.96 One of them is the well-known dictum which says: “The Sunnah decides upon the Quran, while the Quran does not decide upon the Sunnah”97 All-Amidi has listed a number of examples where the Quran had abrogated the Sunnah.98 A glance on earlier literature on the subject suggests that the posing of this issue itself is a result of the rigid formalization of

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

evidence of two women is **equal to** that **of one man.** 60

On these and many other points, the Sunnah apparently determined the application of the Quran, and in some cases went against the literal meaning of the Quran. This process was also inevitable. In the face of this situation and when we take into account both sides of the picture, the whole complexion of the problem changes. "Al-Shafi has dealt with the Problem of abrogation at a greater length in his work Al- Risalah. He maintains that the Quranic commands can be abrogated only by the Quran, and those of the Sunnah only by the Sunnah. He is opposed to the view that the Sunnah can abrogate the Quran and vice versa. In support of his view, he adduces the Ouranic verse 2:106 which explicitly speaks, according to him, of the abrogation of the Ouran by the Quran. He argues that the Prophet (S.A.W) was ordered by God to follow the revelation and not to change the Quran himself. He quotes several Quranic verses which indicate that God alone can change revelation".99 Why does Al-Shafii believe that the Quran cannot abrogate the Sunnah? He argues that in case of the Quran's abrogation of any Sunnah, this means that all Prophet's commands that do not conform to the Quran is regarded as abrogated by the Quran. For the abrogation of a Sunnah he thinks it necessary that the Prophet (S.A.W.)

should have informed the people specifically, even if **it** is abrogated by **the** 1

Quran. Thus, he takes this information by the Prophet as

abrogation of the Sunnah by the Sunnah. 26

He gives several illustrations of how a host of rules framed

by the Prophet (S.A.W.) would **be** abrogated if **the** 30

Quran was accepted to abrogate the Sunnah. He says that various types of sale

which the Prophet (S.A.W) had 30

made unlawful would be considered to be abrogated by the Quranic verse: “Whereas Allah permitted trading and forbidden usury”.100 Again, the Sunnah with regard to stoning the adulterer and the adulteress would be regarded as repealed by the verse: “The adulterer and the adulteress, scourge each one of them (with) a hundred stripes”.101 In like manner, he notes that the Quran abrogates one-fourth of a Dinnar as minimum amount for

amputation of a thief's hand. 67

“As for the thief, both male and female, cut off their hands”.102 For this he gives the reason that the Quran does not lay down any minimum value of theft. But Al-Shafii also believes that no

Sunnah of the Prophet (S.A.W.) contradicts the Quran; on the 32

contrary it elaborates it.103 Therefore, the Quran does not abrogate any Sunnah. “Likewise, no Sunnah of the Prophet (S.A.W.), according to Al Shafii, abrogates the Quranic injunctions. He contends that the function of the Sunnah is to point out which of the Quranic passages are abrogating and which abrogated. Again, he argues that the Sunnah follows the spirit of the Quran. In cases of the clear-cut injunctions it follows the Quran, while in case of general 104 or ambiguous commands, it explains and elaborates them”.104 In this way, the Sunnah's abrogation of the Quran is out of the question. He, moreover, furnishes examples of the way the Sunnah refers to abrogation of individual Quranic verses. He says that the Quran, in verse 2:180, commands to leave a will in favour of the parents and other near relatives at the time of death. Similarly, in passage 2:240 it commands the husbands to bequeath in favour of their wives before their death. Simultaneously, the Quran prescribes respective shares in the inheritance of the deceased for his parents, widows, and the near relatives. Now, Al-Shafi says that there may be a twofold meaning of these passages. Firstly, the bequest and their shares of inheritance as determined by the Quran are granted to parents and wives. Secondly, the Quranic verses that name the share of the wives and parents in the inheritance may be treated as abrogating (Naskh) the injunction about making a will contained in the passages 2:180, 240. But of these two alternatives, he chooses the latter in the light of the Sunnah. He quotes a hadith, which states that no will is valid in favour of a legal heir. This hadith shows, according to him, that the injunction with regard to leaving a will at the time of death had been abrogated by the fixation of the shares in the inheritance.105 It should be noted that Al-Shafii does not regard the hadith quoted above as repealing the Quranic injunction about leaving a will at the time of death, as held by the classical jurists. According to him, the Quranic rulings, as we explained earlier, can be abrogated only

by the Quran and not by the Sunnah (hadith). The idea that the 34

Quran has some abrogated verses is the cornerstone of all these contentions. Al-Shafii was no exception either but his difference with other may lay in the verses he deemed abrogated. They can be shown to be operative if interpreted in a different manner. Suppose the parents of a deceased are non-Muslim, he can leave a will in their favour at the time of his death. Malik holds that a person can bequeath in favour of his legal heirs with the permission of other heirs.106 Similarly, there is no harm if the husband leaves a will for the maintenance of his wife for one year, as the Quran is clear on this point. The matter, however, depends on adequate interpretation of the Quranic Passages. The third important role that the Sunnah has played in the flexibility of the Quranic verses when the verses are going to be exercised in practice is the transforming of the Amm (general ruling) to the Khass (exceptional cases). An example is when

we refer to the Quranic proclamation that 1

“God has permitted sale but prohibited usury”107.

This is a general ruling in the sense that sale, that is any sale, is made lawful. But there are certain varieties of sale, which are specifically forbidden by the Sunnah. Consequently, the Amm of this ayah is specified by the Sunnah to the extent that some varieties of sale, such as sale of unripened fruit on a tree, were forbidden and therefore excluded from the scope of this ayah. Another example is the 1

ruling of the Quran regarding a thief. The Quran reads thus: “And (as for) the man who steals and the woman who steals, cut off their hands as a punishment for what they have earned, an exemplary punishment from Allah, and Allah is Mighty, Wise”.108 According to the hadith, the

Prophet (S.A.W) has rejected the execution of the ruling if the 41

stolen good is worth less than one fourth of a Dinnar of pure gold.109 The Islamic jurists have also aggregated 25 exceptional cases where the ruling of cutting hands of thieves must not be put into effect. 110 The Question of Nass The exercise of the principle of Ijtihad was not confined only to cases where there are no injunction in the Quran and the Sunnah.

Even in the presence of the Quranic verses and traditions on a certain problem the employment of Ijtihad could not be avoided. The reason for this is obvious. The Quranic verses and traditions are to 4

be interpreted by the Muslims in order to be definite whether a certain verse or tradition is applicable to a certain situation. Interpretation and application, therefore, presuppose exercise of personal judgement. Hence, since the early days of Islam, there has been perpetual conflict between the letter and the spirit of the law. Thus, it is not correct to say that Ijtihad was exercised only in the absence of the Quranic verses or traditions on a problem. The opponent of Shafii contends that in the

absence of Quranic injunctions or Sunnah, differences appear over the problems. However, Shafii, in response, stresses that even when explicit rules of the Quran or the Sunnah exist, differences will appear as well. Thereafter Shafii

recounts a number of the Quranic verses and traditions on which the Companions and the early jurists differed because of their interpretation. 45

111 Can Ijtihad be used when there is mass on some point?" Classical legal theory leaves no room for Ijtihad when there is nass.112

We have previously pointed out that every command, whether in the Quran or hadith, requires interpretation and application to a given situation. That is why the Companions differed in the interpretation of the Quranic verses. Therefore, we think, there is no escape from the use of Ijtihad even in the presence of nass. But it is worthy of note that where there is no allowance of any interpretation except in one aspect, the decision will naturally be taken on the basis of nass. 4

Nevertheless, the point of subtle significance is that the issue of time and space still hold valid regarding the mass verses as well. As a matter of clarification, we can consider the verse of the holy Quran reading as follows: "And prepare against them what force you can and horses tied at the frontier, to frighten thereby the enemy of Allah and your enemy and others besides them, whom you do not know (but) Allah knows them, and whatever thing you will spend in Allah's way, it will be paid back to you fully and you shall not be dealt with unjustly."114 The verse specifies that the Muslims must be prepared against the enemy by having horses. However, today, horses are of no avail when fighting against the enemy. Thus, even the nass verses of the Quran are subject to interpretation appropriate to the time and place. What we understand from this verse is that we should be prepared to defend ourselves against the enemy with a view to the fact that technology has now superseded horses. Nass

has been defined in the classical literature on jurisprudence as "the text which conveys only one meaning", or 4

"whose interpretation is the text itself."175 Based on such definition, nass can be applied only to a few texts. In addition, texts which do not lend themselves to different interpretations

are rarely found. It seems that the definition of nass, as stated above, is a development from its original meaning. 4

Al-Shaybani's Al- Siyar Al-Kabir 4

is cited, indicating the existence of different

protection to the enemy he remarks that the protection given by a free Muslim man, whether he be an upright person (adel) or a profligate (fasiq), will be 4

binding on all Muslims. He justifies this

view by quoting a hadith from the Prophet, which says: 4

"Muslims are equal in respect of blood and they are like one hand over against all those who are outside the Community. The lowest of them is entitled to give protection on behalf of them." 116 Commenting on the word adna (translated here as "lowest")

he says that, if it means "minor" as in the Quranic verse117, it is a textual evidence that protection given by one man is valid. But, if it is a derivative of dunuw which means "nearness" as in the Quranic verse118, then it would be taken as (textual) evidence for giving protection by a Muslim who resides in the border area (on the enemy' 4

s territory)

being close to the enemy. Further, he observes that if it is derived from dana 'ah which means lowliness, it would be textual evidence for the validity of giving protection even by a profligate (fasiq) Muslim. 4

119 For Shafii, nass stands in opposition to Ijtihad, which had appeared among the traditionalists prior to Shafii but which Shafii took as a principle of law.I2U The cases to which Shafii

applies the principle ot nass or which are regarded by him as being clear injunctions are not open to reasoning, whether they be in the Quran or in hadith. He himself explains the idea of nass to his opponents. This, too, implies that his opponents, who represents the early schools, is not perfectly aware of the concept of nass now developing by degrees. Shafii says that on the emergence of fresh problems (Waqeah), the Quran directs explicitly (nass) or implicitly (mojmal). Further, he remarks that nass means whatever had been ordered or 4

forbidden by God in plain words (nass).121 He then cites cases,

which fall under nass and mojmal respectively. Under nass he mentions the relatives with whom marriage is forbidden, prohibited edibles like blood and pork, and the ritual purity. Mojmal, according to him, stands for the 4

duties made obligatory by God

like salah, Zakat, and hajj. These duties, he says, were explained and elaborated by the Prophet 4

(S A W.)122 Of the cases which

he mentions under nass he remarks that the Quran is enough for them and no further argumentation is needed. 123 This means that Shafii validates the employment of Ijtihad in cases which fall under mojmal. In his Al-Risalah, Shafii uses the term nass in different forms. 4

In these different places in the Risalah he seems to mean by nass the direct textual evidence whether in the Quran or in the Sunnah 4

.124 At times, he distinguishes Nass Al-Kitab from the Sunnah in

places where he particularly lays stress on the 4

text of the Quran.'25 He devotes a chapter to duties specified by the Quran for

which the Sunnah of the prophet (S.A. w.) offers 63

details. Some Quranic verses on ritual purity are cited in this chapter, together with several prophetic traditions expounding there. This chapter is followed by another one entitled the duty laid down

in the text of the Quran limited and particularized by the Sunnah. 58

Shafii discusses, in this

chapter, several problems, namely, heritage, homicide, and usury. From the wordings of the Quranic verses dealt with in this chapter it appears that the injunctions contained in them were of general nature. But he, by quoting the traditions from the Prophet, explained that they had specific and definite meaning. 126 This implies that nass requires details, elaboration and amplification. Hence, there can be allowance for the difference of opinion. That is why we find that usury, homicide and heritage are cases subject to legal differences, although Shafii describes them as 4

niansos.127 Shafii's detailed discussion of nass indicates the novelty of this problem for the early schools and his attempt to fully familiarize them with it. The theory of

nass later on became a dogmatic instrument for justifying one's own views on some legal problems and for rejecting those of others. Moreover, emphasis on nass closed the door to the use of Ijtihad in law 4

in some periods. The early authorities' regular issuance of ra'y in law sparked disorder in various areas. In case it had

continued, Islamic law would not have arrived at any 4

unity. The necessity for basic unity in law was felt to overcome such diversity and dissensions.

"Ibn Al-Muqaffa, having been fed up with the differences in law, suggests a method to bring about unity He assigns the right of exercising Ijtihcid, only to the Imam, i.e. the political authority. He maintains that people can make suggestions to the Caliph but have no right to

4

stick to and implement

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

4

Ijma Ijma is recognized by Islamic jurists as an important source of Shariah.129

Ijma is defined as the unanimous agreement of the mujlahidun of the Muslim community of any period following the demise of the Prophet

1

Mohammad (S.A.W.) on any matter.130

In this definition, the reference to the mujtahidun precludes the agreement of laymen from the purview of Ijma.

1

131

Ijma can only occur after the demise of the Prophet. For during his lifetime, the Prophet alone was the highest authority on Shariah, hence the agreement or disagreement of others did not affect the overriding authority of the Prophet. In all probabilities, Ijma occurred for the first time among the Companions in the city of Madinah. Following the demise of the Prophet (S A W.), the Companions used to consult each other over the problems they encountered, and their collective agreement was accepted by the

1

community. After the Companions, this leadership role passed on to the next generation, the Successors (tab'iun) and then to other over the

problems they encountered, and their collective agreement was accepted by the community After the Companions, this leadership role passed on to the next generation, the Successors (tab'iun) and then to the second generation of Successors. When these latter differed on a point, they naturally referred to the views and practices of the Companions and the Successors. 132 In this way, a fertile ground was created for the development of the theory of Ijma. 133 The essence of Ijma lies in the natural growth of ideas. It begins with the personal Ijtihad of individual jurists and culminates in the universal acceptance of a particular opinion over a period of time. 14

Before a consensus is reached, differences of opinion are tolerated. During the process for a consensus, compulsion and imposition of views on the people are ruled out.

Ijma plays a crucial role in the development of 1

Shariah. Iqbal

considers it as the most important legal notion in Islam. 36

134 The

existing body of fiqh is the product of a long process of Ijtihad and Ijma. Since Ijma reflects the natural evolution and acceptance of ideas in the life of the community, the basic notion of Ijma can never be expected to discontinue. 1

"The idea that Ijma came to a halt after the first three generations following the advent of Islam seems to be a by-product of the phenomenon known as the closure of the gate ofIjtihad. Since Ijma originates in Ijtihad, with the closure of the gate ofIjtihad, it was expected that Ijma also came to a close. This is, however, no more than a superficial equation, as in all probabilities Ijma continued to play a role in consolidating and unifying the law after the supposed termination of Ijtihad".135 Considering the Ijma's dynamism and infallibility, the Islamic Jurists did not

impose any advance reservations on it. 26

lima warrants the sound Quranic interpretation, the Sunnah's faithful understanding and transmission, and the authorized application of Ijtihad.136 The

question as to whether the law, as contained in the divine sources, has been properly interpreted is always open to a measure of uncertainty and doubt, especially in regard to the deduction of new rules by way of analogy and Ijtihad. Only Ijma can put an end to doubt, and when it throws its weight behind a ruling, this becomes decisive and infallible. Ijma 1

provides Islam with a potential for freedom of movement and a capacity for evolution. 48

Ijma is authorized mainly on the basis of a hadilh quoted from the holy Prophet (S A W.). The hadilh reads thus: "My community shall never agree on an error" 137 There are other ahadith[U in support of Ijma including the following: "God will not let my community agree upon an error"139 And:

"Whoever separates himself from the community and dies, dies the death of 1

before Islam (jahiltyyah)*.140 and; "Those who seek the joy of residing in Paradise will follow the community. For Satan can case an individual but he stands farther away from two people"141 There are also numerous cases, which clearly show the authority ofljma. A few cases are cited here: (i) Drinking liquor is prohibited by the Quran, but the Book does not determine any particular penalty for this wrong. The Holy Prophet (S A W.)

imparted different punishments to different offenders — each suiting the specific case in which it was awarded. As such, He did not prescribe any specific punishment (hadd) for this offense. Abu Bakr and Umar gave the punishment of forty stripes to the offender but they too did not make any law to that effect. During the reign of Uthman, when the number of offenders increased, the problem was presented before the Mqjlis -i-Shura. In the meeting of this council, Ali made a brief but impressive speech and suggested that eighty stripes be laid as punishment for the crime. They unanimously adopted this suggestion and through this Ijnia the decision became law. 8

142 (ii)

During the Khilafat-e Rashidah, a worker or manufacturer was entitled to protect the commodity on which he had to work. 8

He had to compensate for any losses or destruction of the commodity while it was with him.

For instance, if some cloth has been given to a tailor or a piece of gold to a goldsmith and the commodity is destroyed while in his possession, he will have to make good the loss. This decision too was made on the plea made by Ali. He argued that although on the face of it, the worker or the manufacturer does not seem to be responsible for the loss which is not the result of his own negligence, but if there is no such law of vicarious liability, the workers will normally become negligent towards the properties of others and this would involve a greater national loss. Thus it is expediential to hold him responsible for the goods given to him. This law, too, was made through 8

Ijma.143 (iii) Based on Umar's judicial decision, when more than one person were involved in a murder, all accomplices were subject to Qisas (law of equal). The same position has been taken by Malik and Shafei.

But the decision of Umar has not been regarded as a part of the law, for it was a judicial verdict, and was not enacted into law by an Ijma or the majority of the Shura. 144 (iv) There was a question about a man whose whereabouts were unknown and whose wife had 8

a second marriage based on court verdict. Once the said man

appears, which of the two husbands would have preferential right on the wife? Khulafa-e-Rashidin gave quite different verdicts in such cases. But none of the 8

decisions enjoys the status of law, for the problem was never presented before the Shura and no Ijma was ever arrived at on the same. 145 The 8

potentialities of Ijma as a concept that can impart flexibility to the Shariah have been analyzed by great contemporary Islamic jurists. Iqbal Finds it strange

that this important notion has remained practically a mere idea, and rarely assumed the form of a permanent institution in any Muslim country. He 36

further maintains that

it was favourable to the interest of the Omyyad and the Abbaside Caliphs to leave the power of Ijtihad to individual Mujtahids rather than encourage the formation of a permanent assembly which might become too powerful for them. 146 The application of the 33

potentials of Ijma to modern statutory legislation is expounded by Iqbal, who takes it as an important, yet

largely theoretical, doctrine. It is strange, Iqbal writes, that this important notion rarely assumed the form of a permanent institution. He then suggests that the transfer of the power of Ijtihad from individual representatives of schools to a Muslim legislative assembly is the only possible form of Ijma can take in modern times. 1

147 The Islamic Jurists should have a pivotal role in such an assembly which must, nevertheless, include laymen who normally have

keen insight into the affairs. Furthermore Iqbal draws a distinction between the two functions of Ijma as discovering the law and implementing the law. He maintains that the former function is related to the question of facts and the latter relates to the question of law. In the former case, as for instance, when the question arose whether the two small suvar known as Mu'awwazatain formed part of the Quran or not, and the Companions unanimously decided that they did, we are bound by their decision, obviously because the Companions alone were in a position to know the fact. In the latter case, the question is one of interpretation only, and so one ventures to think 1

that later generations are not bound by the decision of the Companions148. Clearly, Iqbal 1

considers Ijma binding in as much as it relates to facts but not when it is

based on juridical Ijtihad. This distinction between the factual and juridical Ijma will not apply to the Ijma that Iqbal has proposed: the collective decisions of the legislative assembly will naturally be binding on points of law. Iqbal's proposed reform has been widely supported by other scholars. 149 It is a basically sound proposal. But to relate this to the idea of a distinction between the factual and juridical Ijma seems questionable. Apart from the difficulty that might be involved in distinguishing a factual from a juridical Ijma one can expect but little support for the view that the Ijma of the Companions on Ijtihad matters is not binding. Criticism of Iqbal's views has been rife for other 1

reasons.150 The critics blast Iqbal's attempt to turn

Ijma into a modern legislative institution. They argue that Ijtihad and Ijma have never been the prerogatives of a political organization, and any attempt to institutionalize Ijma is bound to alter the nature of Ijma and defeat its basic purpose. For Ijtihad is a non-transferable right of every competent scholar, and a rnujtahid is recognized by the community by virtue of his merits known over a period of time, not through election campaigns or awards of official certificates. The process of arriving at Ijma is entirely different from that of legislation in a modern state assembly. Ijma passes through a natural process, which resembles that of the survival of the fittest. No attempt is made in this process to silence the opposition or to defeat the minority opinion. Opposition is tolerated until the truth emerges and prevails. Ijma is a manifestation of the conscience of the community, and it is due mainly to the natural strength of Ijma and the absence of rigid organization that no one is able to lay his hands on Islam. 1

151

Iqbal's suggested reform is criticized on the dubious supposition that an elected legislative assembly will not represent the community's collective conscience and will be 1

a tool of

power politics. Although the cautious advice of this approach may be persuasive, the assumption behind it goes counter to the spirit 1

and

theory of Ijma which endows the community with the divine trust of having the capacity and competence to make the right decisions. According to the 7

ahadilh stated earlier,

one must trust the community itself to elect only persons who will honour their collective conscience and interest. In addition, such critique of Iqbal merely suggests that nothing should be done to relate Ijma to the realities of contemporary life. The critic is content with the idea of letting Ijma and Ijtihad remain beyond the reach of the individuals and societies of today. On the contrary, the argument for taking a positive approach to Ijma is overwhelming. The gap between the theory and practice of Shariah law has grown to alarming proportions, and any attempt at prolonging it further will have to be exceedingly persuasive. The 1

main issue in institutionalizing is

that freedom of opinion should be vouchsafed the participants of Ijma. This is the essence of the challenge, which has to be met through 1

Ijtihad and Ijma. Ijma has proved itself

an outstanding factor in the adaptability of 26

Islam152 to new circumstances and hence has imparted the important element of flexibility to the Shariah on the one hand and has rendered Ijtihad the most powerful and authoritative role. The Assessment of Qiyas The emergence of the methodology of Qiyas as a systematic expert knowledge for solving problems was an indication to the fact that the other three

sources of the Shariah (the Quran, the Sunnah and 59

Ijma) were not sufficient to provide solutions to the everyday problems of different generations. For example,

in view of different social and agricultural conditions prevailing in the countries conquered by Islam, the school of Abu Hanifa seem to have found, on the whole, little or no guidance from the precedents recorded in the literature of traditions. The only alternative open to them was to resort to speculative reason in their interpretations. 9

"The application of Aristotelian logic, however, though suggested by the discovery of new conditions in Iraq, was likely to prove exceedingly harmful in the preliminary stages of legal development. The intricate behaviour of life cannot be subjected to hard and fast rules logically deducible from certain general notions. Yet looked at through the spectacles of Aristotle's logic it appears to be a mechanism pure and simple with no internal principle of movement. Thus the school of Abu Hanifa tended to ignore the creative freedom and arbitrariness of life, and hoped to build a logically perfect legal system on the lines of pure reason. The legists of Hedjaz, however, true to the practical genius of their race, raised strong protests against the scholastic subtleties of the legists of Iraq, and their tendency to imagine unreal cases which they rightly thought would turn the Law of Islam into a kind of lifeless mechanism". 153 The early Islamic jurists' biting disputes sparked a

critical definition of the restrictions, **conditions, and correctives of Qiyas which, though originally appeared as a mere disguise for the Mujtahid's personal opinion, eventually became a source of life and movement in the law of Islam.** Iqbal maintains that **the spirit of the acute criticism of Malik and** Shafii **on Abu Hanifa's principle of Qiyas, as a source of law, constitutes really an effective Semitic restraint on the Aryan tendency** to **seize the abstract in preference to the concrete, to enjoy the idea rather than the event. This was really a controversy between the advocates of deductive and inductive methods in legal research. The legists of Iraq originally emphasized the eternal aspect of the notion while those of Hedjaz laid stress on its temporal aspect. The latter, however, did not see the full significance of their own position, and their instinctive partiality to the legal tradition of Hedjaz narrowed their vision to the precedents that had actually happened in the days of the Prophet and his companions. No doubt they recognized the value of the concrete, but at the same time they eternalized it, rarely resorting to Qiyas based on the study of the concrete as such.** 154 **Their criticism of Abu Hanifa and his school, however, emancipated the concrete as it were, and brought out the necessity of observing the actual movement and variety of life in the interpretation of juristic principles.** In fact, **the** emergence **of** 9

different schools of law was the result of various circumstances of time and space. Due to the dual reasons of the Qiyas' fallibility and diversity of life in various areas, Qiyas, after some time, appeared as a complicated methodology. Hence the correct application of Qiyas required Ijtihad. And here again Ijtihad assumed its supremacy. The complication of Qiyas emerged to be even greater as issue like the conditions and the types of Qiyas called for expert knowledge. The validity and

the determination of appropriate circumstances in which Qiyas could be applied, added even more to the complication. Nevertheless, Qiyas has proved to be a useful method of solving new problems in spite of its complexity. Qiyas attempts to establish the law of the

original case for the parallel case on the basis of 26

their common legal cause (illah).

Qiyas in its early stages was simple and 4

used in its rudimentary form.155 "The Quran uses many similitudes employing words "mathal", to denote similarity between various cases. These similes cannot be called Qiyas in strict sense of the term. It seems however plausible that such Quranic expressions might have contributed to the emergence of the notion of

Qiyas. Reasoning based on similarity of parallel cases is also noticed in hadith literature. It shows 17 the frequent use of

Qiyas in the early phase of Islam. We find its technical use in Umar's well-known letter addressed to Abu Musa Al-Ashari".156 It was also used in the reasoning of the companions. As an instance, Ibn Abbas reportedly determined the compensation for the injury of teeth to be analogous to that of the fingers. The fourfold confession of Muaz before the Prophet, apart from the variety of its versions and criticism upon it, indicate the non-technical use of Qiyas in its early stages.157 The principle of fourfold confession of the accused in the absence of four witnesses as required by the Quran is followed by the Iraqis basing themselves on the tradition of Muaz. The examples of the use of Qiyas in its rudimentary form by the Iraqis can be cited endlessly.158 The starting point seems to be, as Schacht observes, the fixing of the minimum value of dower by drawing an analogy with the minimum value of stolen goods for hadd. This is based

on the traditions reported from the Prophet (S.A.W.), 41

Umar, and Ibn Masud. 159 Qiyas, as used earlier, is general and closer to ra'y than to technical Qiyas. The frequent use of words such as mathal in Malik's Muwatta reflected the similarity of parallel cases. 160 They are at times accused of inconsistency in Qiyas by Shafii for their inclination towards ra'y.161 It appears that the use of Qiyas was a part of their individual reasoning (ra'y). At

the time of the Prophet (S.A.W.) when the companions asked the 32

Prophet about religious decrees, the Prophet (S.A.W.), while answering their questions, taught them the application of Qiyas. On being asked about the performance of hajj by proxy the

Prophet (S.A.W.) replied 66

to the questioner: "What do you think if your father runs into debt and you pay it off on his behalf, would it be valid? .... Likewise the religion of God is more deserving".162 According to a tradition Umar kissed his wife while he was fasting. When the matter was reported

to the Prophet (S.A.W.) he said that there was no harm in kissing the 53

wife while one was fasting, just as there was no harm in rinsing the mouth during the fast. We adduce some illustrations of Qiyas to elucidate its definition and application in legal cases.163 According to the Quran, the orphans who are weak in understanding cannot be guardians of property. Only when they come of age and attain intellectual maturity are they allowed guardianship of property.164 From this verse a law has been derived by analogy that all transactions of a minor are not valid without the permission of the guardian. The legal cause (illah) is the immaturity of understanding. Drinking wine is forbidden according to the Quran.165 The beverage called nabiz and similar other drinks which are intoxicant are also unlawful on the basis of analogy. According to the Quranic verse,166 all transactions or sale are forbidden after the call to Friday prayers. On the analogy of this injunction all kinds of business, such as hiring, borrowing, working in the factories and offices and similar other engagements which prevent a man from offering Friday prayers are forbidden. Several examples of earlier Qiyas are presented here. The minimum dower of a woman, as fixed by the people of Medina, was one fourth of a Dinnar by analogy to the minimum value of stolen goods for enforcing hadd. Malik says that the dower of a woman should not be less than one-fourth of a Dinnar, the minimum value for which a hand is mutilated for theft. Further, they fixed the compensation of the fingers of a woman at ten camels each, despite variety of their size and number. Malik does not follow the doctrine narrated by Ibn Al-Musayyib where the compensation is fixed at ten camels for one finger, twenty for two, and thirty for three, but twenty for four. Ibn Al- Musayyib calls this doctrine Sunnah, but Rabi'ah expresses his astonishment, as the doctrine goes against Qiyas.167 "From the various examples of Qiyas it is manifested that the doctrine in the early schools of law was under development. It carried the sense of parallel, precedent, reason and established rule. Minor resemblance was sufficient to employ Qiyas by the early authorities. There were no hard and fast rules for its employment. By degrees it was substituted by logical Qiyas in later times. Shafii theorized it in the early period". 168 Shafii's adduced reflection of the legitimacy of Qiyas allows the jurist to resort to Ijtihad on issues not taken up by the Quran and Sunnah. A

man who wants to offer his prayers but does not know the right direction of the kabah makes strenuous efforts to search it by means of signs and indications.169 Likewise, a jurist who is confronted with a legal problem but does not know its answer tries to find confirmatory evidence. This example given by Al-Shafii underlines a methodology for legal reasoning.170 A jurist, as a researcher, tries to find the relevant material on a given subject thinks over the problem, and interprets his evidence to prove his proposition. The conclusion thus reached may vary from person to person. This also justifies disagreement and divergence of opinion on a disputed question. There are four parts to every Qiyas: 1) The original case covered by the text. This is known as asl (the original). 2) The parallel or fresh case which is not covered by the text. A jurist finds out a rule of law for this case by the exercise of Qiyas. This is known as fora (parallel case). 3) The

ratio legis of the law. This **is** 17

known as ellah

(cause of the textual law of the original case). 4) **The** law of **the** 17

original case covered by the text.171 In the illustration of prohibition of nabiz, the

original case (asl) **is wine forbidden** by **the** 17

Quran; the parallel case (fara) is nabiz for which

a rule of law is sought; **the cause** (illah) **or ratio legis of the law is intoxication which** is common to **both cases; and the rule of** law of **the original case is the prohibition of drinking wine.** 17

172 Shafii considers Qiyas and Ijtihad identical, being two separate terms carrying the same meaning. 173 The reason seems to be that Qiyas was in its rudimentary form during the time of Shafii. As the Islamic legal thinking developed with the passage of time, Qiyas became an independent doctrine having its own characteristics and uses other than Ijtihad. Actually, Qiyas serves as one of the several modes of Ijtihad. Every Qiyas is Ijtihad, but the opposite is not true. Ijtihad is

based on the literal interpretation **of the Quran, the Sunnah** 65

and on personal opinion not grounded on systematic reasoning. In point of fact, Ijtihad is a best possible attempt at seeking the truth by any means of reasoning. Before the development of the systematic reasoning known as Qiyas, all modes of reasoning leading to the discovery of truth were termed Qiyas.174 "Ibn Rushd dram a distinction between Qiyas and Ijtihad. According to him, Ijtihad applies to a case which can be returned to the original, (asl) and also to a case which cannot be returned to the original, such as determining the compensation of injuries, maintenance of wives, and the bloodwit imposed on the clan of the murderer. Qiyas, on the contrary, applies only to a case which can be returned to the original. It is in fact a mode of Ijtihad. Thus Ijtihad is general and Qiyas is particular". 175 Another paramount issue is the condition for Qiyas validity as determined by most Islamic scholars to be as follows: Firstly, to be valid, Qiyas should be based on a non-exceptional textual injunction about an original case. The reason is that the legal

cause of the law of the original case 17

is determined for generalization. If a certain injunction is exceptional and confined to a particular case and situation, that cannot be evaluated rationally and generalized. Al- Sarakhsi has cited a number of examples of such Qiyas. 176 According to the Quran two males or one male and two females are required to bear witness in a case of evidence. 177

But the Prophet (S.A.W.) accepted **the** evidence **of** 44

Khuzaymah alone in a certain case for his merit and eminence known to the

Prophet (S.A.W.). This case **of** 30

Khuzaymah, being exceptional, cannot be logically evaluated and generalized. In other words, as against the general law of evidence, the case of Khuzaymah cannot be made an original basis for analogy. It will not be valid to produce only one witness in a suit by drawing an analogy with the exceptional case of Khuzaymah. 178 Secondly, the original case's law should not be in contradiction to human reason, since a law's causation extends it analogically to other parallel cases. However, a law open to rational evaluation cannot be generalized. In case human reason rejects the application of a law to a parallel case, analogical extension will not be valid. 179 For example, the ritual ablution becomes void in case one laughs loudly during prayers.180 The breach of ablution by laughing is not rationally intelligible. Reason requires that only prayers should break by laughing and not ablution. Hence the law cannot be rationally evaluated and generalized. It is, therefore, not extendible to the funeral prayers and prostration for thanks giving. If a man laughs loudly in the funeral prayer or in the prostration for thanks - giving, his ablution will not become void. One more example is given: The fast does not become void

by eating or drinking in forgetfulness. Human reason requires that the fast should 4

become void by eating or drinking because prevention from eating and drinking is an essential condition of fasting. Rationally there should be no fast if this condition is not present. But as a tradition of the Prophet says that the fast is not affected by eating or drinking, this injunction becomes rational. There will be no causation of this rule for analogical extension to eating and drinking during fast by mistake, under duress, and during sleep. The fast will become void by eating or drinking in all such conditions. 181 Thirdly, a law must be applied on legal - and not lexical or medical - grounds. In addition, the law should be extendible in tune with the extension of the original case, as put forward by the Hanafis. But according to the Shafii jurists its extendibility is not necessary. Moreover, the parallel should be similar to the original case. In other words, if the original case is not extendible after causation of the law, the original and the parallel case will be equal. Hence analogy will not be operative therein. Analogy operates in two similar and equal cases. In case the original and the parallel are varying, they cannot be made corresponding by the process of causation. Hence in such a position analogy will not work.182 Fourthly, the textual

law of the original case must not be changed after causation 18

and after extension to the parallel case. According to the Hanafis, a man who is punished for false accusation of adultery (qazf) cannot give evidence even after repentance as required by the Quranic verse. 183 In all other affairs if the offender is punished or repents, his evidence is valid. In case the law of qazf is compared with other offenses by causation, the

law of the original case (asl) will be changed. 184 Finally, the 18

law's workings should not change after causation, since a textual injunction is, in letter and spirit, prior to Qiyas which is invalid in the

presence of a textual law. Similarly, it is not valid if the words of the law of the original case are changed. For example the Prophet has allowed to kill only five reptiles specified by him within the premises of haram (sacred territory at Mecca). The analogy of these reptiles cannot be extended to other animals because the causation changes the words of the text. As such, the number of animals exempted by the Prophet will be more than five. Hence this cannot be allowed. 18

185

It is unanimously agreed that Qiyas reveals the law, which already exists; it does not originate it. The rule of **law** 17

exists in the original case and Qiyas merely indicates that the divine command is so and so.

Thus the law is originated by God and discovered by Qiyas. Reasoning 17

(Aql)

Reasoning is one of the sources of Shariah. **What is meant is that sometimes we discover a law of the** Shariah **by the proof of reason. That is by means of the deduction and logic of reason we discover that in a certain instance a certain necessary law or prohibitive law exists, or we discover what type of law it is and what type it is not.** 186 **The binding testimony of reason is proved by the law of reason** and also by **the** 2

confirmation of the Shariah. The holy Quran advises man to listen carefully to the remarks, ponder on them and pick out the best of them. The Quran reads thus: "Therefore give good news to my servants. Those who listen to the remarks, then follow the best of them; those are they whom Allah has guided, and those it is who are the men of understanding. " 187 Another verse emphasizes thus: "In case your fathers do not reason and do not follow the right path, be aware not to follow them. "188 The Quran says that the philosophy of its existence is to urge man to ponder and understand. It says thus: "Surety the Quran is revealed to urge you to apply your reason and intellect".189 The holy Quran places great emphasis on the power and application of reasoning. The Quran reads thus: "Allah has revealed all the necessary signs for you so that you may apply your reasoning to understand." 190 The Quran considers those who do not use their reason and intellect to be the worst of the creatures.191 Along with the Quran, the Sunnah considers the application of reason and intellect to be incumbent on every man as well. The holy Prophet says: "The best friend for the man is his reason and intellect. "192 The holy Prophet also emphasizes thus: "The religion and the reason (aql) are inseparable." 193 Imam Ali had defended his right of reasoning. When Muslims assembled to choose the third Caliph, Imam Ali had been asked if he promises as Caliph, to follow the Quran, the traditions of Mohammad and the conduct of ruling of the two late Caliphs, Abu Bakr and Umar, Ali said no, I follow the Quran, the traditions of Allah's Prophet Mohammad and my Reasoning and he persisted in for the third time that he should not follow the conduct of ruling of the two previous Caliphs but, his own reasoning.194 This principle of the right of reasoning had been followed by Imam Al-Sadiq. Imam Sadiq said: "We give you he Roots and you must branch out." 195 And this statement of Imam Al-Sadiq is a proof of the need of reasoning. On the basis of the verse of the Quran that reads thus: "Indeed we see the turning of your face to heaven, so we shall surely turn you to a qiblah which you shall like;

turn then your face towards the Sacred Mosque, and wherever you are, turn your face towards it".196 When the Ka'bah is in sight, one should face it in prayer, Shafii stresses, noting that when it is away or out of sight, one should pray in the direction of the Ka'bah, not Ka'bah itself. The Ka'bah's direction can be determined by the indications. The indicators, which point to the direction, are

the sun, the moon, the stars, the seas, **the** mountains **and the** wind. **People** 51

exercise their reasoning power to know the right direction of the Ka'bah by means of certain indications.197 Arguments over Husn and Qubh With the development of the systematic reasoning in law there arose the question of authority. It became an important point of discussion in Islamic law. The problem is whether the good (Husn) or the evil (Qubh) of actions is determined by reason or by authority, i.e. the lawgiver. There are two major points of view about this question. The Mu'tazilah198 maintain that the determinant of the good and evil of actions is reason.199 Their contention goes that the Shariah commanded to do an action because it is good by itself, and prohibited an action because it is evil by itself. The actions are good or bad by themselves and not by the commandment or prohibition of authority. Hence reason is an obligating authority. There are a number of actions that are taken as good or bad on rational grounds. The knowledge about the creator of the universe, commandment or prohibition of authority. Hence reason is an obligating authority. There are a number of actions that are taken as good or bad on rational grounds. The knowledge about the creator of the universe, thankfulness to God for His bounties,

saving the life of a drowning or a burning **man** 1

is good actions by themselves. Ignorance about God, ingratitude to His bounties, doing injustice and telling a lie are actions condemned by human reason. The legal causes are not the real causes, which obligate or prohibit actions by themselves. Instead, they are virtually symbols subject to change and abrogation. Reason, on the contrary, is an autonomous authority, which obligates or prohibits actions on the basis of their intrinsic values. Hence it is superior to the legal values or causes.200 On these grounds the Mu'tazilah did not accept any religious doctrine, tenet or a rule of law which ran counter to reason. They also substantiated their stand on the basis of such Quranic verses as ask man to look into the

portents of God in the universe and from **the** 49

anecdote of Abraham who argued logically

to prove the existence of God. 49

201 A person, according to them, who does not exercise his reason to believe in God in the absence of divine revelation, and passes away, will not get salvation and will go to hell. 202 The Asharis, 203 hold that the values of the legal injunctions or moral values are not objective. There is nothing good (Husn) or bad (Qubh) per se. The good or evil of actions is known through authority. There is no intellectual ground for goodness or badness of divine things. Whatever God

commands is good, and whatever He **forbids is evil.** Hence it **is** 1

the authority (the Shariah) which obligates or prohibits an action, and not reason. Reason plays no role in determining the goodness or badness of actions. The legal injunctions are therefore arbitrary; they are binding because they spring from authority. The Shariah is authority-based. The dictates of reason are not binding on God — a view contrary to the stand of the Mu'tazilah. 204 They maintain that this point of view is also justified on the basis of the Quran. The Asharis adduce such verses from the Quran as indicates that God will not punish any person or nation unless He sends a Prophet (S.A.W.) to them. 205 They are of the opinion that in the absence of revelation if a man does not exercise his reason to have his faith in God, and consequently dies, he will not be punished by God, even if he and consequently dies, he will not be punished by God, even if he believed in polytheism. Since orthodoxy was influenced by Asharism, Islam ultimately became the religion of authority. The tremendous emphasis on authority divested the Muslims of the Medieval period of rational thinking and approach to Islam. Asharism held, in its radicality, that it was permissible for God to forbid an action which He commanded to do and vice versa. 206 The advocates of this view were questioned whether God could prohibit prayer, Zakat and fasting. They replied that it would have been permissible for Him if He had done so.207 The Mu'tazilah maintain that reason obligates or forbids actions by itself, just as man creates his actions by himself. But orthodoxy rejected this view. The determining authority, according to them, is God alone. Reason is an instrument of recognition of what is good or evil, or what is obligatory and forbidden. As God is the real authority through the Prophet (S.A.W.), He is also a guide and authority through reason. Reason, however, does not stand as a self-sufficient authority, even if it is combined with traditional authority (dalil sam'i). In case reason is not combined with traditional authority, it stands only as an instrument and cannot obligate anything by itself. If it is combined with traditional authority, the act of obligation will be attributed to the traditional authority and not to reason. 208 "Among the Islamic scholars who argued against the stand of the Mu'tazilah Imam Razi is the most important. Fakhr Al-Din Al-Razi (d. 606 A. H) maintains that God has not taken into account any public interest in divine injunctions. Arguing from verse 5:64 he remarks that the verse shows that the revelation enhanced the contumacy and unbelief of the most infidels. If the actions of God had been based on certain motives, and public weal were considered in His commands, He would have surely discontinued the revelation, particularly after realizing the consequences".209 Al-Razi refutes the stand of the Mu'tazilah that all divine injunctions have some purpose and objective behind them. They base themselves on the Quranic verse 14:1 which shows that the Quran was revealed for the guidance of the people. 210 This is not a correct view in the opinion of Al-Razi. He contends that if a person adopts some means to achieve his end, it signifies that he needs the means and he cannot secure his objective without it. How can it be true of God? He needs no means to achieve the end. The verse in question therefore should be interpreted in a different way. It is already established that

actions of God have no motives.211 It may be pointed out that Al-Razi's argument from verse 5:64 is untenable. The Quran never tells us that the divine revelation causes the enhancement of contumacy and unbelief of the infidels. Instead, it portrays their perverted nature and persistent obstinacy. Similarly, his refutation of the Mu'tazilah does not hold well. We observe in our daily life the causal connection in the functioning of nature throughout the whole universe. Moreover, no action of man is purposeless and futile. It is ridiculous to think about God that His actions are arbitrary, having no objective behind them. It goes without saying

that God has sent down revelation **for** the **guidance and** welfare **of** 61

mankind. The perpetual century-long discussions of the Islamic scholars is based on the fact that the Asharis did not believe in originality of good (Husn) independent of the lawgiver's (God's) will. Therefore, the good or the evil can not be determined or defined before God has desired so. Such an attitude resulted in no more than searching for textual sources whereas the Mu'tazilah believed in the originality of the good or the evil and argued that the good or the evil exists independently of the will of any authoritative lawgiver. All the modern legislation, the legal systems and free Ijtihad are, of course, based on the views of the Mu'tazilah. The development of the Islamic legal system has also been based on their dynamic views. Since the Quran puts so much emphasis on rational approach to the injunctions, a number of the traditions of the Prophet were not accepted as genuine by some of the Companions. Ibn Abbas, for example, is reported to have rejected a tradition, which suggests that ablution becomes void by eating anything cooked with fire. He asked the narrator whether one should perform the ablution again, if one washes with hot water. Similarly, he is reported to have questioned the tradition which says that if anyone carries the bier (janazah), he should perform ablution, because it becomes void by touching it. He asked the reporter whether the ablution becomes void by carrying a few wood sticks.212 Aishah also is reported to have doubted such traditions as conflicted with reason. This happened in the early decades of Islam. 213 In the wake of the development of the science of traditions, differences emerged among the scholar on the possibility of questioning any genuine prophetic tradition by recourse to reason. The Hanafis formulated a principle that if a tradition contradicts reason, but it is narrated by a Companion who has deep understanding in law, it will be recognized. In case it is reported by a Companion who is devoid of legal acumen, it will be rejected. On the basis of this principle they rejected a number of traditions reported by Abu Hurayrah, but validated many others transmitted by the Companions who were taken as lawyers by them.214 Shafii, though he criticized a number of traditions logically, validated all such traditions as were sound according to the principles formulated by him.215 "Malik had his own criterion to judge the traditions. He, however, did not give much weight to reason in this respect. In an attempt to reconcile between reason and authority, the Islamic scholar, Ibn Taymiyah also took an important step towards the reconciliation. He argued that there was no conflict between reason and tradition. He devoted a voluminous work to establish this theory. " 216 Malik maintains that there is a harmony between the divine law and reason. The rules of

law based on the Quran and the Sunnah 62

never conflict with reason. No true dictates of reason contradict the revealed law except the doubtful and confused points. Such points are based on sheer speculation bearing ambiguous meaning and words. But when such equivocal points are examined, it is revealed that all that which appeared to conflict with the law was sophistication and not rational demonstrative proofs.217 A thing being legal (sharei) is not antithetical to being rational (aqli). One point can be legal as well as rational. The legal is opposite to heretical (bid'a) and not to rational. The quality of legality is praised whereas the quality of heresy is condemned. Sometimes a legal point may be traditional and sometimes rational. The legality of a point means that the law has established and disclosed it. A legal question may be understood by means of reason, but it is revealed by means of the law. Thus a question may be legal and rational because it is understood by reason and revealed by the law.218 This can be illustrated by a variety of proofs from the Quran. They are, for instance, the unity of God, truthfulness of the Prophets, divine attributes and the life hereafter. They are legal as the Quran mentions them. They are rational because their truth is understood by reason.219 To exclude the legal from the rational and from the traditional is wrong. As the Quran uses rational as well as traditional proofs, both are legal. They may be classified as legal- traditional and legal-rational. 220 Further, Ibn Taymiyah observes that it is not necessary that anything, which is rationally wrong, must be recognized as unbelief by the law. Similarly, anything, which is rationally right, may not be recognized necessarily in law. 221 What the Quran says about the use of reason in understanding the religion must be taken as the criterion for answering questions and clarifying any ambiguity. The Quran addresses itself to human mind. It does not require that people may believe in its teaching blindly. It appeals to both believers and infidels to "reflect", "understand", "ponder", and use their reason and sense and not to lock their hearts while believing in the divine message. It appears that the Quran does not want a blind faith before entering the fold of Islam. 222 Instead, it inveighs against the blind allegiance to ones forbears. 223 Its repeated pronouncements like "haply you will understand", what, have you no reason? "Unto a people who understand" 224, Succinctly indicate that its teachings, moral or legal, must be purposive and logical. "The Quran invokes reason before it invites man to have a faith. We find a multitude of verses, which provide a discursive reasoning for the unity of God. The most significant of them is the verse which substantiates this belief by saying that the whole universe would have perished if there existed several Gods beside Allah ".225 The Quran also expatiates on the arguments

for the truthfulness **of the Prophet (S.A.W.).** 42

It refers to his pious life which he had led in the society before the revelation came down to him.226 Belief in the life hereafter has also been explained logically in the Quran at greater length. It is replete with the argumentation about the resurrection of man and his accountability. The Quran exhorts man

to understand the spirit and purpose of these **injunctions.** The prayer **and** 56

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

that they may witness things profitable to them and mention God's name. 50

230 The Quran explains certain principles about its conception of law. The legal injunctions prescribed in the Quran are meant for "the ease and comfort of man" and there is "no intention of hardship" to him by them.231 Moreover, the Quranic legislation takes into consideration the nature and faculties of human and the social conditions. 232 The aim of the Quran in its legal prescriptions, though the legal element, in the strict sense of the term, is small in quantity, is the common weal and the good of man. It aims at building up an ideal man and society based on morality more than on law. Hence sometimes it gives an explanation of its injunctions in terms of reason and purpose, though an absolute authority is not required to do so. This is why the genre and tone of the Quranic legislation is general and rational so that it may be adaptable to the changing conditions. That is the reason why the understanding of the Islamic law becomes necessary before its compliance. One can obey the law in a better way if one understands its purpose, too. The Quranic teachings, law and pronouncements are not arbitrary; they are to be followed with careful and deep understanding. The eternity of the Quranic message requires that emphasis should also be laid on the spirit, value, and ethos of divine commands along with their letters. The injunctions are obviously limited, while the situations are unending. The law therefore is to be applied by evaluation and not by literal adherence. Aspects of Reasoning The

issues of the principles related to reason arc **in two parts. One part relates to the inner meaning or philosophy of the commandments. The other part is related to the requirements of the commands.** 2

The

first part, one of the obvious elements of Islam 2

is that the Shariah **of Islam exists in accordance to what comprises the best interests of human beings.** 2

That is, each command (Al -Amr) of the Shariah is due to the necessity of meeting the best interest of human beings and each prohibition (Al -Nahy) of the Shariah arises from the necessity of abstaining from their worst interests, i.e. the things that corrupt them. 233 Almighty God, in order to inform them so to what comprises their best interests, in which lies their happiness and prosperity, has made a chain of commands obligatory (wajeb) or desirable (mandub) for them. And so as to keep human beings away from all that which corrupts them, He prohibits them from those things. If the best interests and forms of corruption did not exist, neither command nor prohibition would exist. If the reasoning of human beings became aware of those best interests and those forms of corruption, they are such that it would devise the same laws that have been introduced in the Shariah. 234 This is why the

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jurists

consider that, because the laws of the Shariah accord to and are centered on the wisdom of what is best for human beings.

2

Wherever laws of reason exist, so the corresponding laws of the Shariah also exist. And wherever there exists no law of reason, there exists no law of the

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Shariah. The holy Prophet has guided man thus by saying that “reason and religion are inseparable”.235

Thus, if we suppose that in some case no law of the Shariah has been communicated to us, particularly by means of narration, but reasoning absolutely traces with certitude the particular wisdom of the other judgments of the Shariah, then it automatically discovers the law of the Shariah in this case too. In such instance reasoning forms a chain of logic: First, in such and such a case, there exists such and such a best interest which must necessarily be met. Second, wherever there exists a best interest that must necessarily be met, the Legislator of Islam is definitely not indifferent, rather He commands the meeting of that best interest. Third, so, in the quoted instances, the law of the Shariah is that the best interests must be met. 236 For instance, in the time of the Holy Prophet (S.A.W.) there was no opium or addiction to opium, and we, in the narrated testimonies of the Quran and the Sunnah and consensus, have no testimonies particular to opium one way or the other, yet due to the obvious proofs of experiencing opium addiction, its corruption has been experienced. Thus, with our reasoning and knowledge, and on the basis of "a form of corruption which is essentially to be avoided", and because we know that a thing which is harmful for

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health is considered corruptive in the

view of the Shariah, we have realized that the law about opium is that addiction to opium is forbidden. 237 Similarly, As Motahhari maintains if it becomes established that smoking tobacco definitely causes cancer, a rnujtahid, according to the judgment of reasoning will establish the law that smoking is forbidden according to the Divine Law. 238 The jurists call reason and the Shariah inseparable from each other. They say that whatever law is established by reason is also established by the Shariah. 239 However, this of course is provided that reasoning traces in an absolute, certain and doubtless way those best interests which must be attended to and those worst interests or forms of corruption that must be shunned. If not, the name reasoning cannot be given to the use of opinion, guesswork and conjecture. Analogy for this very factor is void for it is more opinion and imagination rather than reasoning and certitude. 12

240 Therefore, Some Shia jurist have argued that

whatever is a law of reason is a law of the Shariah and whatever is a law of the Shariah is a law of reason. 31

241 Discussing the second part i.e. the

requirements of the commands, we know that whatever law made by whatever sane law-maker possessing intellect naturally has a chain of essentials that must be judged according to reason to see if, for example, that particular law necessitates a certain other law, or if it necessitates the negation of a certain other law. 242 A clear example is the concept of 12

"leading to an obligatory" (Moqaddamah-Al- Wajib).243 This forms one of the principles of the Osul

treatises, comprising some of the most typically convoluted discussions on the definitions and varieties of the preliminaries of an act. 244 The 13

Osulis define Moqaddamah

as the precondition of an act. They have numerous ways for dividing such preconditions. One is to divide them into internal and external, the internal being the inherent or essential components of an act, and the external being the outside factor causing or facilitating the performance of an act As always, such divisions are rather abstract, and sometimes extremely difficult to differentiate. But the division which is of interest to us is that between a Moqaddamah which is explicitly required by the Shariah (such as ablution for prayer), and one which is not so but can become obligatory if another obligatory act depends on it. For instance, horseracing and arrow throwing are normally permissible or recommended practices, but if it becomes necessary for Muslims to wage jihad (holy war), the same acts become obligatory by implication. In the same way the adoption of a constitution becomes obligatory for Muslims when it is a precondition of their welfare, security or progress.

13

245 The

concept of obligatory preliminary is a device to circumvent any objection to law-making for which there is no specific canonical license.

46

Another example is where

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

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a lesser degree of importance. 248

In the above mentioned examples, it is reasoning with its precise calculations which clarifies our specific duties, and in the study of Principles these issues and issues like these are all discussed and the way of properly determining the answers is learned. 2

(Asl-Al-Ahamm-wa-Al-Mohemm). The jurists refer to the Islamic

sources for their deducing of the laws of the Shariah. Sometimes in his referrals the jurist is successful and sometimes he is not. That is, sometimes (of course predominately) he attains the actual law of the Shariah in the form of certitude or a reliable probability, which means a probability that has been divinely endorsed. In such cases, the duty becomes clear and he realizes with certitude or with a strong and permissible probability what it is the Shariah of Islam demands. Occasionally, however, he is unable to discover the duty and the Divine Law from the sources, and he remains without a defined duty and in doubt. . 249 In these cases what must be done? Has the Legislator of Islam or reason or both specified a certain duty in the case of the actual duty being out of reach? And if so, what is it? The answer is that yes, such a duty has been specified. A system of rules and regulations has been specified for these types of circumstances. Reason too, in certain circumstances, confirms the law of the Shariah, for the independent law of (aware) reasoning is the very same as the law of Shariah, and in certain other instances it is at least silent. 2

250 In the part of Principles which concerns Ijtihad,

we learn the correct and valid method of deducing the 2

laws of the Shariah,

and, in the part concerning the principles of Application, we learn the correct way of benefiting from the rules that have been introduced for the kind of situation mentioned above, and of putting them into practice. The general principles of application that are used in all the sections of Islamic Jurisprudence are four: 1) The principles of Exemption (bara' ah); 2) The Principle of Precaution (ehtiat); 3) The Principle of Option (takhir); 4) The Principle of 6

Continuity (esteshab). 251 Bara'ah

means freedom from obligations until the contrary is proved. No person may, therefore, be compelled to perform any obligation unless the law requires so. For example, no one is required to perform the pilgrimage (hajj) more than once in his lifetime, 1

because the Shariah

imposes no such liability. Similarly, no one is liable to punishment until his guilt is established through lawful evidence. 1

252 The

Principle of Option (takhir) is that we have the option to choose one of two things, whichever we like. Esteshab is the principle that which existed remains in its original state - or 31

masters the doubt that opposes it - while the doubt is ignored. 2

Ehtiat is the principle that it is possible for both possible duties to act.253 The question may arise in what circumstances the bara 'ah applies and in what circumstances the ehtiat, takhir and esteshab

apply. Each of these has its particular instance. 2

254 “Sometimes the jurist remains unable to deduce the law of the Shariah and is unable to trace a particular necessity and remains in a state of doubt, and it might be that the doubt is linked to some general or broad knowledge. The doubts of the jurists about an obligation either are linked to some general knowledge or are primary doubts. If they are linked to some general knowledge it is either possible to act in accordance to ehtiat, meaning that it is possible for both possible duties to be performed, or it is not possible to act in precaution. If ehtiat is possible, it must be acted in accordance with, and both of the possible duties must be performed, and such an instance calls for the Principle of ehtiat. Sometimes, however, precaution is not possible, because the doubt is between obligatory and forbidden. " 255 Assuming

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

2

Principle of bara'ah. 256

These four principles are not particular to Mujtahids for under¬standing the laws of the Shariah. They are also relevant to other subjects. People who are not Mujtahids

2

can also benefit from them at the time of certain doubts. For example, imagine that an unweaned baby boy takes milk from a woman other than his mother, and when that boy grows up, he wants to marry the daughter of that woman, and it is not known whether as a baby he drank so much milk from that woman's breast that he is to be counted as the "wet-nurse son" of that woman and her husband or not. That is, we doubt whether the boy drank milk from her breast fifteen consecutive times, or for a complete day and night, or so much that his bones grew from her milk (in which cases the boy becomes counted as her son and thus similar to the daughter's brother are forbidden for her). This instance calls for the Principle of Mastery, because before the boy drank the woman's milk he was not her "wet- nurse son", and now we doubt whether or not he is. By the Principle of Mastery, we conclude that there is no question of a wet-nurse

6

relation-ship.257

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

29

Shariah.

For the Shaft is and the Hanbalis, esteshab denotes continuation of that which is proven and the negation of that which had not existed. 258 Esteshab, in other words, presumes the continuation of both the positive and the negative until the contrary is established by evidence. In its positive sense, esteshab requires, for example, that once a contract of sale 1

is concluded, it is presumed to remain in force until there is a change. Thus the ownership of the purchaser, and the marital status of the spouses, are presumed to continue until a transfer of ownership, or dissolution of marriage, can be established by evidence. Since both of these contracts are permanently valid under the Shariah and do not admit of any time limits it is reasonable to presume their continuity until there is evidence to the contrary. A mere possibility that the property in question might have been sold, or that the marriage might have been dissolved, is not enough to rebut the presumption of 7

esteshab. 259 "Esteshab also presumes the continuation of the negative. For example, someone purchases a hunting dog from another one with the proviso that it has been trained to hunt, but then the purchaser claims that the dog is untrained. His claim will be acceptable under esteshab unless there is evidence to the contrary". 260 Because eteshab

consists of a probability, namely the presumed continuity of the status quo ante, it is not a strong ground for the deduction of the rules of Shariah. Hence when esteshab comes into conflict with another proof, the latter takes priority. 1

When the jurist is asked about the ruling of a particular case, he must first search for a solution in the Quran, the Sunnah and consensus of opinion. If a solution is still wanting, he may resort to esteshab in either its positive or negative capacities. Should there be doubt over the non-existence of something, it will be presumed to exist, but if the doubt is in the proof of something, the presumption will be that it is not proven. With regard to the determination of 1

the rules of law- that may be applicable to a particular issue, the presumption of esteshab is also guided by the general norms of the 1

Shariah. 261 "Esteshab is supported by rational (aql) evidences. Reason tells us that in God's order of creation and in popular custom, it is normal to expect that pledges, contracts and laws will probably continue to remain operative until the contrary is established by evidence. It is equally normal to expect that things, which had not existed, will probably remain so until the contrary is proved. When reasonable men (oqala) and men who comply with the accepted norms of society, have known of the existence or non- existence of something ". 262

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

263 2) Presumption of original presence (esteshab-e-Wojob)

variety of esteshab takes for granted the presence or existence of that which is indicated by the law or reason. For example when 1

the

presumption of original presence, the purchaser is presumed liable to pay the purchase price by virtue of the presence of the contract of sale until it is proved that he has paid it. By the same token, a husband is liable to pay his wife the dower (mahr) by virtue of the existence of a valid marriage contract. In all these instances, esteshab presumes the presence of a liability or a right until an indication to the contrary is found. The Islamic Jurists are in agreement on the validity of this type of esteshab, which must prevail until the contrary is proved. 1

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

As for the three types of esteshab, which relates to the attributes, whether new or well established, it is a subject on which the jurists have disagreed. The Shafii and the Hanbali schools 1

have upheld it absolutely, whereas the Hanafi and Maliki schools accept it with reservations. 265 The principle of

bora 'ah has important application in the courts of law. According to this principle, any one accused of a charge is considered innocent unless his accusation is proved. 266 In law courts where there is doubt about a previously undoubted case, esteshab is often used. For instance, regarding the ownership of a property, if the property was in the possession of a person in the past but presently we are in doubt about his ownership, his right of possession of that properly holds valid until the contrary is proved. Defined

as a principle of evidence, esteshab mainly 26

establishes or rebuts the facts, and for this reason it bears

greater relevance to the rules of evidence. The application of esteshab to penalties and to criminal law in general is to some extent restricted by the fact that these areas are mainly governed by the definitive rules of Shariah or statutory legislation. The jurists have on the whole advised caution in the application of penalties on the basis of presumptive evidence only. Having said this, however, the principle of the original absence of liability is undoubtedly an important feature of esteshab which is widely upheld not only in the field of criminal law but also in constitutional law and civil litigations generally. This is perhaps equally true of the principle of baraah, which is an essential component of the principle of legality, also known as the principle of the rule of law. This feature of esteshab is once again in harmony with the modern concept of legality in that permissibility is the norm in areas where the law imposes no prohibition. 1

Urf

The collective practice of a large number of people is normally denoted by Urf. Thus the habits of a few or even a substantial minority within a group do not constitute 39

"Urf". 267

Urf is defined as recurring practices which are acceptable to people of sound nature. This definition is clear on the point that custom, in order to constitute a valid basis for legal decisions, must be sound and 1

reasonable. Hence recurring practices among some people in which there is no benefit or which partake in prejudice and corruption are excluded from the definition of Urf.

268 The Quran specifies the importance of

Urf in the text found in Surah -Al- 26

Araf which reads thus: "Exercise forgiveness, enjoin "Urf" and bear with the ignorant".269

According to this Surah Urf is clearly upheld in the Quran as a proof of Shariah and an integral part of it. 1

As ignoring the prevailing Urf

is likely to lead to inflicting hardship on the people, 1

the text in Surah Al- Hajj which reads thus: "God has not laid upon you any hardship in religion ".270 This is an indirect authority on the validity of Urf. Despite the importance attached to Urf in the Shariah, some Islamic scholars, especially in the West, have maintained that Urf does not hold a prominent position in the Shariah. For example, Coulson maintains thus "it will be evident from the classical doctrine of the sources of law that custom (Urf) per se had no binding force in Islamic legal theory and within the framework of the recognized Osuli Urf operated as a principle of subsidiary value". In fact, Coulson considers the role of Urf in Islamic legal theory very limited. Coulson's impression of Urf is not baseless. 271 The Islamic jurists have also had hot debates regarding the authoritativeness of Urf. Allameh Sadr discusses the issue of Urf under the title of Al-taqrir. He defines taqrir as the

silence of the Prophet or Imam as in regard of a definite action which takes place in the presence of him or which comes to his ear - a silence which reveals his (Al -taqrir) tacit consent (approval) of it and its validity in Islam. 3

272 He maintains that Al

-Taqrir is of two kinds because at one time it will constitute a taqrir for a definite action, which an individual carries out such as when one drinks beer in front (in the presence) of the Prophet (S.A.W.) and the Prophet (S.A.W.) keeps silence. This silence on the part of the Prophet (S.A.W.) reveals the permission of the drinking of it in Islam. At another time it will constitute a taqrir for a common action, frequently carried at by the people in their usual life. Such as when we learn from the usual practice of the people, during the Islamic legislative age of extracting mineral riches from the bowels of the earth and owning it on the ground of their having extracted these riches, the silence and non- objection of the Shariah to this usual practice will be considered a (consent) taqrir in respect of that practice and will constitute a ground of Islam's sanction to individuals to extract from the bowels of the earth its mineral riches and to own them. It is to this that the name Al- Urf Al-Amm or surat Al-Aqlaiyyah (common usage, or practice of the common people) is applied in juridical discussion. Recourse to it, in fact reveals Shariah agreement with a practice common contemporaneously with the age of legislation by way of the non-occurrence of prohibition against it from the Shariah; for if the Shariah did not agree with that practice which was contemporaneous with it, it would have forbidden that practice. So the absence of the Shariah's prohibition against it constitutes its permissibility. 273 This mode of reasoning depends upon a number of things: Firstly, the contemporaneous existence of that practice with the age of Islamic legislation should be established with historical certainty; for it were found that the practice obtained at later date than its being contemporaneous with the age of legislation then the silence of Shariah in respect of it would not constitute Shariah's approval of it.

3

Secondly, the absence of the issuance of prohibition by the Shariah against that practice should be established with certainty absence of its prohibition would not be deemed sufficient until the investigator establishes the absence of the issuance of the prohibition in respect of that practice, otherwise he will have no right to declare Islam's sanction of that practice, since it is probable the Shariah might have prohibited it. Thirdly, all the objectively satisfied circumstances and conditions should have been obtained by a personal observation since it is possible that some of these circumstances and conditions may have affected the sanction of that practice and the non-prohibition of it. And when we have drawn up and methodically arranged with scrupulous exactness all the circumstances and conditions which surround that practice which existed contemporaneously with the age of legislation, it will be possible for us to discover from Shariah's silence, Shariah's permission of that practice when found within those circumstances which we have drawn up and arranged with scrupulous exactness.

3

274 "Some other Islamic jurists argue that

Urf is not an independent proof in its own right 10

and that it has not

played a significant role in the development of the Shariah '.275 However, the 52

reluctance of the Islamic jurists in recognizing Urf as a proof has been partly due to the circumstantial character of the principle, in that it is changeable upon changes of conditions of time and place. This would mean that the rules of fiqh which have at one time been formulated in the light of the prevailing custom would be liable to change when the same custom is no longer prevalent. The different fatwas that the later Islamic Jurists of different schools have occasionally given in opposition to those of their predecessors on the same issues are reflective of the change of custom on which the fatwa was founded in the first place. In addition, since custom is basically unstable it is often difficult to ascertain its precise terms. These terms may not be self-evident, and the frequent absence of written records and documents might add to the difficulty of verification. The issue has become even more complex in modern times. Owing to a variety of new factors, modem societies have experienced a disintegration of their traditional patterns of social organization. The accelerated pace of social change in modem times is likely to further undermine the stability of social customs and organizations. The increased mobility of the individual in terms of socio¬economic status, massive urbanization and the unprecedented shift of populations to major urban centres, and so forth, tend to interfere with the stability and continuity of Urf. 10

Despite the aforestated conditions, the careful survey of the application of Urf verifies the point that the foqaha

are on record as having changed the rulings of the earlier jurists which were based in custom (Urf) owing to subsequent changes in the custom itself. The 1

Islamic jurists

have generally accepted Urf. though reluctantly, as a valid 26

Quranic

commentators have referred to Urf in determining the precise amount of maintenance that a husband must provide for his wife. This is the subject of sura Al- Talaq276 which provides: "Let those who possess the means pay according to their means". In this ayah, the Quran does not specify the exact amount of maintenance, which is to be determined by reference to custom. Similarly, in regard to the maintenance of children, the Quran only specifies that this is the duty of the father, but leaves the quantum of maintenance to be determined by reference to custom

1

(Al-Baqarah).277 "The Shariah has, in principle, accredited approved custom as a valid ground in the determination of its rules relating to halal and haram. This is in turn reflected in the practice of the foqaha, who have adopted Urf, whether general or specific, as a valid criterion in the determination of the ahkam of Shariah". 278 The

rules of fiqh which are based in juristic opinion (ra'y) or in speculative analogy and Ijtihad have often been formulated in the light of prevailing custom; it is therefore permissible to depart from them if the custom on which they were founded changes in the course of time. The rules of fiqh (Ijtihad) are, for the most part, changeable with changes of time and circumstance. To deny social change due to recognition in the determination of the rules of fiqh would amount to exposing the people to hardship, which the Shariah forbids. Sometimes even the same mujtahid has changed his previous Ijtihad with a view to bringing it into harmony

1

has changed his previous Ijtihad with a view to bringing it into harmony with the prevailing custom. It is well-known, for example, that Imam Al- Shafii laid the foundations of his school in Iraq, but that when he went to Egypt, he changed some of his earlier views owing to the different customs he encountered in Egyptian society.

7

On the whole, the Islamic jurists have

accepted Urf as a valid basis of

26

Ijtihad . 279 Conclusion Four types of flexibility have been identified in the Shariah. Firstly,

the primary source of the Islamic law (the Quran) is, in itself, flexible on the basis of the analysis that the Quranic legislation leaves room for flexibility in the evaluation of its injunctions. The Quran is not specific on the precise value of its injunctions, and it leaves open the possibility that a command in the Quran may sometimes imply an obligation, a recommendation or a mere permissibility. Commands and prohibitions in the Quran are expressed in a variety of forms, which are often open to interpretation 23

and Ijtihad. The question as to whether a particular injunction in the Quran **amounts to a binding command or to a mere recommendation or even permissibility cannot always be determined from the words and sentences of its text.** 1

Secondly, each individual source of the Islamic law has the authority to abrogate its previous decisions by passing new laws. For example, the Quran abrogates its former verdicts when new circumstances require a different and an appropriate solution to a new problem. The decisions made through Ijma can also be annulled by the decisions through Ijma of later generations owing to the changing circumstances. Thirdly, each individual source of Islamic law brings about flexibility for the other through specification, expansion or interpretation. As circumstances change new methods and devices are needed to modify the previous source to adapt to new conditions. As a result, initially the Sunnah took up the role of interpreting the Quran. On the same bases Urf interprets the Sunnah and Ijma interprets the Quran, etc. Finally, the examination of the Islamic sources of law in the context of time and space leads to the conclusion that the element of time and space imparts the greatest flexibility to these sources. The emergence of the science of Asbab Al-Nuzul, which explains and examines the events, which led to the revelation of a particular verse, was the outcome of this development. For the Islamic sources of law, Ijtihad is to be viewed as the supreme dynamic device when we deal with imparting dynamism and flexibility to Shariah owing to the necessities of time and space. Ijtihad bridges between all the sources of law and the everyday needs of the Islamic society and its application has been absolutely necessary to develop the Muslim law. The analysis presented makes it clear that all the Islamic sources stand in need of Ijtihad in order to be practically exercised. For example, as the most part of the Sunnah has been narrate

and transmitted in the form of solitary or Wahed and **only a small portion of the Sunnah has been transmitted in the form of Mutawatir, the** Sunnah, itself stood **in** need **of** 1

Ijtihad in order to be practically exercised. The same is true with the rest of the sources. Making decisions through any one of the other sources also required the practice of Ijtihad.

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Chapter 3 Ijtihad and the flexibility of Shariah in practice The best evidence for the flexibility of Shariah can be explored in the exercise of Ijtihad by the companions

of the holy Prophet (S.A.W.) and the Islamic jurists. The 16

holy Prophet (S.A.W.) placed emphasis on this attribute of the Shariah when he said thus: "The Islamic jurist who masters the circumstances of his time never goes stray1 This hadith of the Prophet (S A W.) clearly bears witness to the fad that one of the most important qualifications that an Islamic jurist (Mujtahid) must possess is the awareness and mastery of the needs and conditions of his time so that he can provide solutions to the everyday problems with a view to the Islamic values. This bears witness to the fact that Islam is opposed to confining and limiting the process of development and progress. That is the reason why the holy Prophet (S A W.) advises thus: "Bring up your offsprings not according to the exigencies of your time but according to the exigencies of the next generation they are going to live in." 2 Imam Ali recognizes this important Islamic value by advising his son as follows: "My son, if you happen to live in a new land or another region, live according to their way of life and manners."3 During the lifetime of Prophet (S A W.) in Medina we witness how the holy Prophet (S A W.) decided cases according to the necessities arisen from different circumstances. Abdullah bin Masud remarks as follows. "We used to go on Ghazawat with the Messenger of Allah, and we did not take our women with us. We asked (the Prophet) if we could get ourselves castrated The Messenger of Allah refused us to do so and allowed us to marry women by giving them clothes for a certain period." 4 It is also narrated by "Ali":

I said to Ibn Abbas during the Battle of Khaibar. 17

"The Prophet (S.A.W) forbade the temporary marriage and the eating of the flesh of donkey."5 After the Shariah of Islam reached its completion, those were made lawful (Halal).

Temporary' permission due to force of circumstances that the 5

Prophet (S A W.) had given was made haram immediately after the

conquest of Mecca as narrated by Ali. 5

He says: "He was with the Prophet (S A W.) on the occasion of the Battle for the conquest of Xfecca. The Prophet (S.A.W.) had permitted Mui ah marriage for the Sahabah. He says that the Prophet (S.A W.) declared it unlawful even before leaving that place " 6 Ijtihad in the Caliphs' Era

On going through the cases of Ijtihad of 3

several Companions

we find that Ijtihad was exercised even in the presence of the injunction in the Quran or the Sunnah The fact is that one Companion singled out one verse or tradition for a situation while another pointed to quite a different verse. We give below a few cases where Umar exercised his personal opinion, although instructions on these very points can he taken to have already existed in the texts of the Quran or the Sunnah. Umar is known to have abolished a share of Zakat which was given to certain Muslims or non-Muslims for conciliation of their heart, as ordained by the 3

Holy Quran.1 The Prophet (S.A.W.) used

to give this share to chiefs of certain Arab tribes 10

in

order to attract them to embrace Islam or to prevent them from doing harm to the Muslims. This share was given also to the neo-Muslims so that they might remain steadfast in Islam. But Umar discarded the order, which Abu Bakr 3

had written in his caliphate for donation of 10

certain lands to some persons on this basis. He argued that the Prophet (S A W.) had given this share to strengthen Islam; but as the conditions had changed, this share ceased to be valid. Umar's action seems apparently contrary to the Quran. But, in fact he considered the obtaining situation and followed the spirit of the Quranic injunction. His personal judgement led him to decide that if the Prophet (S.A.W.) had lived in similar conditions he would have done the same. Umar b. Abd Al- Aziz, during his caliphate, had given this share to a certain person to the same purpose for which the Prophet (S A W.) used to give in his lifetime. 9 Both these examples show how Ijtihad decided where to apply a Quranic injunction and where not. 3

The point is further illustrated by Umar's decision not to distribute Iraqi and Syrian lands among the companions, in the face of Muslim insistence that the land should be distributed among them in tune with the practice of the Prophet (S A W). To

all their contentions Umar replied that if he kept on distributing the lands, from where he would maintain the army to protect the borders and the newly conquered towns. The Companions, therefore, finally agreed with him and remarked: "Yours is the correct opinion". Umar later on found the justification of this decision in the Quranic verses 3

59:6-10 which entitled the Muhajirun, the Ansar, and the coming generations to receive the Share from booty (ghanimah). 10 Umar apparently departed 10

from those Quranic verses which contain the injunction of distributing booty

among the Muslims. According to the rule and practice, the lands, too, should have been distributed 3

like other articles of ghanimah. But Umar

preferred the general benefit of the Muslims to that of the individuals. Social justice demanded that these conquered lands should not be distributed among the army. This illustration provides an important example of early 3

/jtihad It is documented in history that

some slaves had stolen a camel, slaughtered and eaten it. When the matter was referred to Umar, he in 3

the first instance ordered the cutting of the hands of the thieves, but after a moment's reflection he said, addressing the slaves' master: "I think you must have starved these slaves out". He, therefore, ordered the master of the slaves to pay double the price of the camel and withdrew his order for the cutting of the thieves' hands.11 Another story runs that a man stole something from Bayt Al-Mal (an Islamic treasury) but Umar did not amputate his hand .12 That Umar desisted from cutting the

hands of thieves during the days of famine 3

is a well-known fact of history.

In these cases Umar apparently contravened the Quranic verses which contain 3

the injunction of cutting the hands of a thief. But it should be noted that the Quran is silent on the details of the punishment of the amputation of hands. It is for the Sunnah or Ijtihad to decide where and when to cut the hand and where or when not Umar, as recorded in history, banned the sale of the slave

mother- of-the-child (Umm Al-Walad) or offering her as a gift or inheritance. After the death of her master, he declared her to be free. 13 On this problem he discontinued the practice rampant during the lime of the Prophet (S a w.) and the predecessor, Abu Bakr. Of course, it may be objected that he changed the Sunnah 3

through

his personal opinion. Here it may be remarked that Umar was faced with a social situation which was radically different from that of his predecessors. People used to keep slave-girls, who abounded in Umar's time because of conquests, with 3

them for some time Then these slave-girls fell into the hands of

another master with the result that none took the responsibility to look after these women's children. 3
Moreover, this practice was giving an impetus to the growth of the institution of slavery The following remarks of Umar show how grave the situation had become, and how seriously he was talcing this problem. According to Al-Muwatta', he remarked:

"why is it that people have intercourse with their slave-girls, and why then abandon them to go out freely? If any slave-girl comes to me and her master confesses cohabitation with her, I shall assign her child to him Henceforth, cither set them free or keep hold of them" .14

During the life time of the Prophet (S A 17

W.), the holy Prophet (S A W.) had imposed Znkai on nine pieces of property as follows: gold, (S A W.) had imposed Zakat on nine pieces of property as follows: gold, silver, camel, cow, sheep, wheat, barley, date and raisin.15 When Imam Ali became the head of the state he imposed Zakat on horses as well. The companions of the Prophet (S A W.) questioned the policy of Imam Ali. He replied that firstly,

at the time of the Prophet (S A W) the 19

number of horses were limited; secondly, at the

time of the Prophet (S.A.W.) it was possible to run the 18

affairs of the society on the basis of Zakat on those nine pieces of property while the income was no longer sufficient .16 From these it is clear that this problem had become acute for the caliphs and they were

forced to take these stern measures due to the changed social conditions. Similar 3
considerations explain exercising Ijtihad in the other cases mentioned above. These are a few examples where the caliphs apparently departed from the clear injunctions or the previous practice. But it should be noted that this was not really a departure but true adherence to the spirit and intention of the command based on their personal

judgements (Ijtihad). Ijtihad in Contemporary Era After the demise of the four orthodox caliphs, the necessity of considering the needs and conditions of different eras urged the Islamic jurists to issue decrees appropriate to the new situation. For example, the

injunction of the Quran is quite explicit regarding the remarriage of the divorced women. 5

The Quran reads thus: The

divorced women shall wait concerning themselves for three monthly periods." 16

17 This verse had a very important object to serve, that is it may

make it known whether the woman is having a child of the former husband in her womb so that there may be no confusion about the paternity of such a child if the 5

woman seeks to remarry. However, today the medical development has made it possible to ensure if the divorced woman is having a child and therefore some Islamic jurists argue that the waiting period of three months (iddah) can now be shortened.18 Another case is where divorce becomes inevitable. When marriage becomes indefmilely.

In Islam marriage is a contract and the contract should be made to work but not when it becomes humanly impossible. It is only in such unavoidable circumstances that divorce is permitted in Shariah. 11

Although Islam allows divorce if there are sufficient grounds for it yet the right is to be exercised only under exceptional circumstances. The 5

Quran reads dius "If you fear a break between them two. appoint, (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause them reconciliation: for Allah has full knowledge and is acquainted with all things”. Given the fact that today the issue of divorce must be settJed through the courts of law, Some Islamic jurists have issued the decree that the appointment of two arbitrators is no longer necessary .20 Islamic jurists have also confirmed the element of flexibility in the issue of maintenance. Maintenance

(Nafaqah) is the right of one's wife and children to get food, clothing and a residence, some other essential services and medicine, even if the wife happens to be a rich lady. Maintenance in this form is essential (Wajeb) **according to the** Quran, **Sunnah and the consensus of opinion of the Jurists.** 9

The necessity of providing maintenance is emphasized in the Farewell Pilgrimage (HajAl- Wida) address of the Prophet (S.A.W.): "Beware about your treatment of women. You have accepted them with the word of Allah, and have made lawful sexual relationship with the word of Allah ...as you have a duty to provide them with reasonable maintenance and clothing ".2l

Some jurists have given detailed instants of things to be provided as Nafaqah during the time **they** were writing **about it. These are to be adjusted in the light of modern necessities to suit the circumstances of the countries and** their **living standards. It will be the responsibility of a father to maintain his daughters until they are married, and sons until they reach the age of puberty** 5

22 As regards to marriage, the holy Prophet (S A W.) rules thus: "And there is no marriage except with the permission of guardian and payment of dower and two reliable witnesses".23 What is a reasonable amount of dower will depend on the relative position in life and social status of parties to marriage and differ from place to place, period to period and country to country. Some Islamic jurists have now passed judgement through Ijtihad that given the present status of women in the society, no longer is it necessary to seek the permission of guardian and two reliable witnesses on condition that the girl has reached the age of majority .24 It is noteworthy in this context that regarding the penal law (Hudud and Ta 'zirat)

all the violations and breaches of Divine limits in a general sense are not punishable since the punishment is only inflicted in those cases in which there is violation or **breach of other people's rights.** 25 **As for example, if someone neglects** 6

his prayers (Salat), or does not observe fasts or

perform pilgrimage when he has the means, they are **not punishable. But if one does not pay Zakat or poor due, which is a charity as well as a tax from the rich to the poor, there will be punishment accorded to the defaulter.** 6

26

Punishment is only given when there is a violation of People's Rights 12

and for this reason, it is a restrictive and preventive ordinance 12

In Islamic jurisprudence, Holy Quran

or the Sunnah of the Prophet (S A W.) **while other punishments are left to the discretion** 6

by Ijtihad

which are called Ta'azir (disgracing the criminal). 27 On **the** basis **of** 6

the verse of the Holy Quran which reads as follows: "Good men are for good women and good women are for good men"28 Some Islamic jurists had concluded that Muslim men must marry only Muslim women.29 But as a result of changing circumstances, in a fatwa the late Sayyid Muhsin Al-Hakeem, the great profound scholar of our time has decided lately that it is legally to a Muslim man to marry, in permanent marriage, a woman even she is Jewish or Christian. And this was an answer to the Court of Religious Affairs in Baghdad, The Court said in her letter to The Scholar Al-Hakccm that there are numerous marriage affairs between Muslim-Shiite men and scriptural women and it is not fair to tell the girl or the woman that her marriage to the Iraqian is a temporary marriage even for ninety nine years. The late Al-Hakeem's answer was that a Muslim has the right to marry permanently a scriptural woman.30 This fatwa of Al-Hakeem indicates how he was, always, in connection with the modern problems of Muslim Community in this modern world. And this fatwa may be or should be generalized forever, if we consider the relations amidst people of all nations and the new methods of communication between man and woman. There are other similar cases, which confirms how the necessities of time and space have urged the Islamic jurists to adopt flexibility in their fatwas. For example, the sale of blood which was forbidden by the their fatwas. For example, the sale of blood which was forbidden by the fatwas of the earlier Islamic jurists due to the uncleanness of blood 31 is now permissible because they can use the blood to save another person s life. The examination of a dead body which was formerly made forbidden by the Islamic jurists to teach medical students has now been made permissible by Islamic jurists.33 The transplantation of bodily organs are now allowed by Islamic jurists to save the life of another human being.34 All these cases have been decided through the significant device of Ijtihad which allows of the element of time and space. One of the outstanding achievements of Ijtihad in practice in recent time is the change of attitude it has prompted among Islamic creeds.

Changing attitude towards the Sunnis has acted as one of the factors of Shia modernism while with the Sunnis 2

modernism has stimulated a re-evaluation of the

pristine notions about all heterodox sects including 2

Shiism. “For the Shia, any rethinking way bound, to touch upon their disagreements with the majority sect, disagreements which are all bound up with the raison d'etre of Shiism. For (he Sunnis, rethinking implied no inescapable necessity of an excursus into the relationship with the heterodox sects, at least not in the beginning, since its most pressing concern was a frontal assault on the problems posed by modernization. Apart from the affirmation of Islamic unity as an overriding objective shared with all other Muslims, Sunni modernism has brought about a change in the essential area of religious thinking i.e. on the principle of Ijtihad or the exercise of individual judgement" 35

Ijtihad was one of the causes of dispute, because the Shia hold it to be not only permissible, but also a permanent, imperative duty of the learned as the principal means of extracting the religious rules from the Quran, the Tradition and the consensus,while the Sunnis have repudiated it ever since the ninth century as an aberration leading to intellectual disarray and legal void. 37 The teachings of Asad-abadi, Abduh, Muhammad Iqbal and other modernists on the necessity of reconstructing Muslim thought gradually generated an atmosphere in which Ijtihad could rid itself of much of the opprobrium formerly attached to it. 38 Later, the advent of state ideologies requiring the orthodox legitimization for public acceptance became another contributory factor: governments put pressure on the Islamic Jurists to justify the various reforms they were carrying out in the name of nationalism or socialism, and the Islamic Jurists could give their blessings to such reforms, which violated the traditional sanctity of ownership, the standing of women, and the jurisdiction of religious courts, only by seeking the liberating intervention of Ijtihad 39 A convergence has thus slowly taken shape between the positions of both sides, and, in theory, the Shia should now draw comfort from the Sunnis conversion to their view that Ijtihad is indispensable to the proper understanding of the religious rules. 4

40 Aspects of Sheikh Mahmud Shaltut The revival of Ijtihad among the Sunnis have affected the Sunni- Shia

dialogue by encouraging individual initiative for effecting some measure of reconciliation. 2

Cairo's official Al-Azhar review, in February 1959, ran a fatwa by its Rector, Sheikh Mahmud Shaltut, allowing instruction in Shia jurisprudence. This fatwa indicated that Shiism was recognized as being on a par

with the four orthodox Sunni **legal schools. When Shaltut gave his fatwa,** Shia **studies had been absent from the curriculum of that university for over nine hundred years.** 2

41 "

Under the title "Islam the religion of unity", **the fatwa is prefaced by two arguments in its** justification, **one historical, the other pragmatic The historical argument is** a reminder **of the spirit of mutual respect and tolerance, which permeated the relationship between the legal** schools **in early Islam. At that time, says Shaltut, Ijtihad was a source of plurality of ideas, but not discord, because the different schools were united by their belief in the paramount authority of the** Quran **and the Tradition. The motto of the founders of** all **schools was:** 2

"when a hadith is proved authentic. It is my opinion; and do not care at all for my word ",42 This allowed the cooperation of all groups - the Sunnis among themselves and with the Shia - to promote Islamic jurisprudence.

It is obvious that in this argument, Shaltut is using the term Ijtihad in the sense of the exercise of collective judgement 2

because he goes on to say that legal plurality degenerated into antagonism once the individual form of 2

Ijlihad

was introduced. Subordinated as it was to personal whims and wishes, Ijtihad then became a factor of dissension, to be later exploited and intensified by the imperialist enemies who fostered enmity among the Muslims, setting every group against another. 2

45 ShaJtui then blasts prejudice and partiality and its adverse practical effect on quests for best solutions to the social tangles grappling the Muslims.

He says that the legal schools of all persuasions should now be ready to accept from one another any idea which conforms to Islamic principles, and can best ensure the welfare of family and society. By way of example, he mentions his own fatwas in favour of the shia rejection of the validity of suspended divorce and divorce by triple repudiation in one sitting. 2

44 In a more outspoken fatwa, Shaltut raised similar arguments, proving that Shia worship rites were credible.

Combined with other conciliatory gestures such as the publication of 2

Wasael Al- Shia,45

one of the most authoritative sources of traditional Shiism and Majma' Al- Bayan,' 12 a shia commentary on the Quran, both with Al-Azhar's blessings, and a series of friendly communications between Shalrut and wo Shia leaders in Iraq, 2

Muhammad Khalisi and Muhammad Hussein Kashef Al-Gheta, thesefarwas given through Ijnhad

established a distinct trend towards greater Sunm-Shia understanding 2

* Through Ijnhad, caliphate was abolished in Turkey. A clear judgment advocating the Turkish move was presented by Iqbal as the most sophisticated Islamic modernist.

Iqbal's basic answer to this question was that the Turks had merely practiced Ijnhad by taking the view- that the Caliphate could be vested sometimes in a body of persons, or an elected assembly Although the religious doctors 4

had not yet expressed themselves on the point, he personally found the Turkish view to be perfectly sound: The republican form of government is not only thoroughly consistent with the spirit of Islam, but has also become a necessity in view of the new forces that are set free in the world 2

of AW Islam.

He further cited two examples of earlier Sunni **adaptation** of the **Caliphate to political realities: first was the abolition of the condition of Qarashiyat (descent from the tribe of Quraysh) by** Qazi Abu **Bakr** Baqillani **(d.** 1013), **for the candidates of the Caliphate, in deference to the facts of experience, namely the political fall of the Quraysh and their consequent inability to rule the world of Islam. The second was Ibn Khaldun's suggestion, four centuries later, that since the power** of the **Quraysh had vanished, there was no alternative but to accept the most powerful man as Imam or Caliph in the country where he happens to be powerful. Iqbal concluded from all this that there was no difference between the position of Ibn Khaldun, who had realised the hard logic** of facts, **and the attitude of** modern **Turks, who were equally inspired by the realities of experience, and not by the scholastic** reasonings **of jurists who lived and thought under different conditions of life.** 49 **These were brave words at the time, expressive of an enlightened spirit impatient with the backwardness** of the **Muslims and the obscurantism of their religious leaders. They were meant to persuade those leaders to change their attitude, and come to terms with the** modern **world.** 2

That was the exercise of Ijlihad as Iqbal also emphasizes, that could realize such big achievements and remove obstacles. The

Repeal of the Tobacco Concession The twofold impacts **of** the unrest against **the** 1

tobacco concession included an accentuation of the Islamic Jurists’

traditional role in confronting **the state and** 1

served as a prelude to the constitutional movement.

On numerous occasions, the Islamic Jurists **acted against the** slate **in order to defend national interests. In each case, they gave expression at the same time to the demands or grievances of various persons or groups; yet in the case of the tobacco concession, virtually the whole nation was united under their leadership.** 50 **The agitation was not merely a protest against a specific measure taken by the government, for although centered on the question of the tobacco monopoly, it was essentially a** confrontation **between the people and the state, in which the** leadership **exercised by the** Islamic Jurists **showed a new determination and sense of direction.** 51 Early in **the** last decade of **the** 1

19th century, Iran was witness to the tobacco monopoly, which was among the concessions given to foreign economic interests. The

preliminary negotiations were completed in London during Naser-Al -Din Shah's third visit to Europe in 1889, and in the spring of 1891, the agents of the British company to which the monopoly had been granted began to arrive in Iran. All rights concerning the sale and distribution of tobacco inside Iran, and the export of all tobacco produced in Iran, were vested in the Imperial Tobacco Corporation, which in return was to pay the Iranian government £15 million a year. 52 Furthermore, the regulation of the yearly crop was to be the prerogative of the company. Whether or not these conditions were known of accurately and in detail, popular discontent arose as soon as the agents of the monopoly started their activities. 1

In September,

1891, protests began to be heard in Tabriz. As a sign of dissatisfaction, the Islamic Jurists stopped teaching in the Madrasas, and the commercial life of the city was brought to a standstill by the closure of the Bazaar. A telegram was sent to the Shah demanding the withdrawal of the concession, threatening armed resistance if he failed to do so. 1

53 Lead by Aqa Najafi, the Islamic Jurist of Isfahan, an ancient clerical bastion, opposed the

tobacco monopoly. They went so far as to prevent the sale of tobacco even before the issue of the celebrated 1

fatwa 54

These expressions of discontent and anger, despite their similarity, do not appear to have formed part of accordinated plan. Such 1

unity, both among the Islamic Jurists and, through their medium, among the people, was achieved in the first place by the fatwa prohibiting the use of tobacco, attributed to 1

Mirza Hassan Shirazi Mujtahid.55 In a telegram to Naser Al-Din Shah on July 26, 1891, Mirza Hassan objected to the

tobacco monopoly. Soon after the receipt of this telegram in Tehran, the Iranian charge d'affaires in Baghdad, Mahmud Khan Mushir ul -Vuzara, was sent to Samarra to point out to Mirza Hassan Shirazi the benefits accruing to Iran from the concession, but he was unable to deflect him from his opposition. Flattering letters from Amin- Al-Sultan and Mirza Zayn- Al -Abidin were similarly ineffective in influencing Mirza Hassan's opinion of the tobacco monopoly. The Shah did not reply to his first telegram, and Mirza Hassan wrote to him again in September. 1891. setting forth in detail his objections to the tobacco concession. 1

56 Early in December, Mirza Shirazi issued a fatwa in Tehran

declaring "the use of tobacco in any form to be tantamount to war against the Hidden Imam", i.e., haram Its effect was immediate and total: throughout the country the use of tobacco was abandoned. 1

The unity the people was due to the obligatory

nature of the farwa.51 Feuvrier writes of the surprise felt in Tehran, by both the court and the British embassy, at the purposeful manner in which the boycott was applied. More than ever before, the Islamic Jurists were in control of the people and represented an authority firmer than that of the Shah. This result had been achieved by the unity of the marja'-i taqlid and the unity of direction and could be destroyed only by breaking that unity. For this purpose too it was necessary to rely on the Islamic Jurists, such was the measure of clerical ascendancy 1

After a direct and violent confrontation between the government and the people of Tehran 1

Naser-Al-Din Shah

was obliged to yield to the demands of the 1

Islamic Jurists.58 Aspects of Shia Modernism Another significant event highlighting the decisive role Ijlihad played in shaping the Iranian history was the clerical approach to Constitutionalism led by the writings of Mirza Muhammad Husayn Naini (1860 - 1936). In 1906, the Iranian Constitutional Revolution occurred under the impact of the a fama issued by Islamic jurists. The arbitrary rule and corruption, on the pan of the Persian government in Tehran and the provinces, were such as to necessitate an abrupt change. Most of the people, including the Islamic Jurists were unhappy with the Qajar rulers The positions of the Islamic Jurists and the religious institutions were being called into question by the growth of foreign interventions as well as the force of Westernization.59 There was needed a mediator to ally all the different groups of the people who, for different reasons, were aiming at the downfall of the Iranian regime. Sayyid Jamal Al- Din Asad-abadi, proved to be the architect of this alliance. In the wake of some events occurring in Tehran, three prominent Mujtahids, namely Nuri, Bihbahani, and Tabatabaii revolted against the oppressive government and called for reforms in the justice administration. They enjoyed a great following from among a variety of groups, including clerical students. This movement finally resulted in the declaration of the Persian Constitution of 1906.61 Since the Islamic Jurists believed that Constitutionalism was in conformity with Islam, they focused all their powers to support the new regime. In their speeches and writings they strongly advocated a constitutional from of government. They made an attempt to reconcile democratic Constitutionalism with the Shia system to government in order to put an end to tyranny and arbitrary rule which they considered to be un-Islamic. The Islamic Jurists' participation in the Revolution allowed it, from the outset, to enjoy nation-wide support.62 It is generally held, and rightly so, that the most influential force behind the Iranian Revolution was the Islamic Jurists' support of the constitutionalists. Had the Islamic Jurists not sanctioned the Revolution, it would definitely have died still born.63 A study of Nairn's writings on Constitutionalism will help us understand the Islamic Jurists' own justification for their participation in the Constitutional Revolution. By examining Nairn's accounts of the principles of democratic Constitutionalism, such as liberty, equality, the parliamentary system, and so on, we shall discover to what extent the Islamic Jurists were aware of the idea of democracy and to what extent they were prepared to make concessions to modernism in general and to accommodate Constitutionalism in particular.64 Renowned as a prominent Mujtahid of his own time, Naini played an active role in the Revolution and events on the trail of the 1911 Anglo- Russian invasion of Iran and in Iraqi politics. While in Iran as an "exile", Naini was involved in the republican movement of that country. The role of the Islamic Jurists in power politics in the course of the Persian Revolution, the Anglo-Russian invasion of Iran, the Iraqi Revolution of 1920, and finally the republican movement of Iran in 1924 reflects the vital role of Ijtihad in the form offatwas,65 The

Islamic Revolution of 1979 in Iran which terminated **the** rule **of** 20

2500 years of monarchy in Iran was also realized and triggered by Imam Khomeini who was a Mujtahid. The revolution actually occurred on the basis of four fatwas issued by Imam Khomeini .66 The four fatwas were as follows: 1- The farwa to the effect that monarchy is no longer a legitimate system of government: "Now the regime of Shah is ruling tyrannically over our oppressed people today. He continues to rule in defiance of the law and the wishes of the people, who have risen up against him throughout Iran, and he threatens the higher interests of the Muslims and the dictates of Islam with imminent

destruction for the sake of his own satanic rule and his parasitic masters. It is the duty of the entire nation that has now risen in revolt to pursue and broaden its struggle against the Shah with all its strength and to bring down his harmful, disastrous regime" 67 The fatwa which made it incumbent on all the soldiers to leave their military bases: "Members of the armed forces. Islam is better for you than unbelief, and your own nation is better for you than (he foreigners. It is for your sake, too. that we are demanding independence, so you should do your part by abandoning this man. Do not think that if you do, we will slaughter you all. Other people behave that way. Look at the Humafars and officers who have joined us; they are treated with the utmost respect. We want our country to be powerful and to have strong armed forces. We do not wish to destroy our armed forces; we wish rather to preserve them so that they belong to the people and sen e (heir interests, instead of being under the command and supervision of foreigners. ” 68 The farwa calling upon all the governmental employees to go on strike till the downfall of the regime: “The military government is usurpatory and contrary to both the law and the Shariah. It is the duty’ of everyone to oppose it. to refrain from aiding it in any way. to refuse to pay taxes or render any other assistance to this oppressive regime of transgressors, and it is the duty of all oil company officials and workers to prevent the export of oil. this vital resource. Do those workers and officials know that the bullets that pierce the breasts of our precious youths, that drown our men, our women, our infants in blood, are paid for with the money earned by the oil that their exhausting labor produces? Do they know that the major part of the oil used by Israel, that obstinate enenxy of Islam and upurper of the rights of Muslims, is provided by Shah ?" 69 The fatwa to break the martial law: “Although / have not given the order for sacred Ijtihad, and I still wish matters to be sealed peacefully, in accordance with the will of the people and legal criteria, I cannot tolerate these barbarous actions, and 1 issue a solemn warning that if the Imperial Guard does not desist from this fratricidal slaughter and return to its barracks, and if the military authorities fail to prevent these attacks, I will take my final decision, placing my trust in God. The responsibility for whatever ensues will then belong to those shameless aggressors. If the aggressors retreat, / request the courageous people of Tehran to retain their stare of readiness and to be alert for the stratagems of the enemy and to preserve order and tranquility. They should be fully equipped and prepared to defend Islam and the orders issued by the Muslim authorities. As for the declaration of martial law. that is a mere trick. It is conrrary to the Shariah and people should nor per,• it the slightest attention. " 70 It is to be noted that Imam Khomeini issued all these fatwas on the basis of the authority of Ijlihad which he exercised decisively. The analysis presented thus illustrates how the practice of Ijtihad has offered solutions to the problems of the lime and place and on occasions even revolutionized the situations. Ijtihad has been actually that driving engine which on the one hand have empowered the great Islamic leaders to discover solutions to the problems of the modem time and on the other have practically equipped Shariah with the most dynamic device. Hence, the exercise of Ijtihad is

not only the right, but also the duty of present generations if Islam is **to adapt itself successfully to the modern world.** 15

Conclusion The divine revelation guides the

Prophet (S a w.) and that is the basis **of** 21

aJJ his utterances. In other words, the Prophet's rulings are based on Divine revelation and not on

Ijtihad The majority of Islamic Jurists have, however, held that the Prophet (S A W.) in fact practiced Ijtihad just as he was allowed to do so, 8

such as temporal and military affairs The Prophet (S A W)

often resorted to reasoning by way of analogy and Ijtihad, and did not postpone all matters until the reception of divine revelation. The 13

term qurra' was prevalent among the Muslims living during the Prophet's time Through contact with new cultures and civilizations, the Arabs later spread knowledge and progressed in different branches of learning Now- that Islamic law was perfected and other branches of Islamic learning had developed, the Quran readers were no longer called qurra' but w'ere known as Mujtahids and Islamic Jurists. During the Prophet's life, Ijlihad

was lawful for the companions, irrespective of whether it occurred in the presence or absence of the Prophet 8

(S.A.W.). The

companions did, on numerous occasions, practice Ijtihad both in the presence of the Prophet (S A W.) and in his absence. The 8

Prophet (S.A.W.)

while laying down a law, primarily considered the value and spirit of the action and not the form of the action itself. 7

The companions formed an opinion by looking to the Shariah value, which led the Prophet (S A W.) to take a decision. The major sources of Islamic law for jurists are the Quran and the prophetic traditions. But compared with what is now known as

Islamic law. the legal norms of these sources appear to be very few. The Quranic decreed are mostly general principles, and although the Prophet's tradition provides more detail, it, too, is concerned primarily with religious rites and less with real legal matters. Most detailed laws provided by the Prophet's tradition originally arose under special circumstances, and their applicability to later circumstances is not always clear. Generally, the Companions did not ask many questions from the Prophet (S A W). Consequently, the Sunnah appeared mainly as a general guideline that was acted upon and that had different interpretations by early Muslims.

People did not know the details of many problems **even in the lifetime of the Prophet** (S A W). **Of course, the Prophet** (S.A.W.) **laid down certain regulations, but the** jurists **elaborated them with more details. The reason for this further addition to the laws** enunciated **by the Prophet** 7

(S. A W)

by interpretation is that he **himself had made allowances in his commands. He left many things to the discretion of the community to be decided according to a given situation.** 7

For the most part, then, Islamic law has not received through the two main sources by Ijtihad. Yet, the system that exist today as Islamic law is actually much broader, the product of a centuries-long process of legal interpretation rendered by numerous jurists who derived the relevant legal precepts for various case from the general principles Therefore the

flexibility of Islamic law in practice and the **emphasis on Ijtihad sufficiently demonstrate that Islamic law is adaptable to social change and** the Ijtihad is **a** 14

solution to the paradox of the dilemma of Islamic law, namely: that of being immutable and yet adaptable to social changes.

sources:

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Chapter 4 Al Ahkam Al Thanaviiah (The Secondary Laws) Islamic laws and rules

due to the conditions in which the people qualified to fulfil their responsibilities and the circumstances prevailing and governing, are divided into two categories: a. 1

Al ahkam al avvaJiiah (the Primary Laws and rules

or the Original Laws) The primaries **are those laws and rules** 1

that remain the same and are for normal conditions. They are called (he **primary or the original laws. b.** 1

Al ahkam al avvaliiah (the

Secondary or the Alternate Laws) The Secondary laws and rules 1

are those sanctioned with due effect but are enforceable for a limited time and in exceptional cases and conditions. Such laws are called the secondary and alternate laws. 1 **In other words, the laws and rules that are sanctioned without having in consideration the special and exceptional conditions are called the primary and original laws and those that are sanctioned for exceptional conditions are called the secondary laws.** 2 **It is the responsibility of a Muslim to practice and follow the primary laws and rules of** Shariah **unless it becomes impossible to do so. Such impossibility and reason may come into existence due to the circumstances prevailing and governing the society, such as birth control (to control the population) when population explosion** 1

would cause huge social, economic and educational hardships in the society. In such cases it becomes obligatory to control the exploding population. There is also the need to see that prices for much needed marketable commodities are reasonable and to see that harmful monopoly of goods in public demand is controlled. This is so if non-intervention of government would lead to the deprivation of the disadvantaged groups of people in the society. Sometimes the reason for the inability to follow the primary laws may come from ones personal conditions and circumstances such as unbearable hardships and impasses (osr and haraj) or harms (zarar) related to ones own circumstances, which will be discussed, in greater details later. 3 As a matter of fact, the case that the emergence of certain conditions and elements or new issues could become reasons for changing the primary laws and rules existed in the very early days of the history of Islam. The Muslims were aware of the criteria of Shariah knew them because the general principles such as abolishment of hardships and extreme harms are founded on the basis of the text from the Quran and the Sunnah. 4 The fact that the emergence of certain conditions and circumstances may become the reason for change in the

good (Husn) and the evil (Qubh)

of certain facts is also one of the issues that since a long time has been considered by the scholars. Allamah Helly in the topics dealing with the issue of Husn and Qubh as factors based on grounds of reason has said the following: "The theologians of the Shia and the Mu'tazilah maintain that the grounds for the validity and genuineness of the existence of Husn and Qubh in human deeds are based on the decision and the judgment of reason They also maintain that such issues can sometimes be made clear and plain with a simple and normal consideration of reason. Sometimes they

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are very complex and

exist in certain cases and conditions such as exacerbating truth or expedient lies" 5 However, the terms such as the secondary laws, or the secondary responsibility do not have a very long history. These terms are mostly found in the works of the Shia scholars. The Muslim scholar who first made use of the term "the secondary laws" was Sheikh Muhammad Taqi Isfahani (d. in 1248 H.). In Hedayat Al Mustarshedin, he has called the fatwa of a Mujtahid

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that may not concede the actual rule of Shariah for a case, a secondary law and responsibility /' Today the scholars call such a case the apparent

1

rules (Al-Ahkam Al-Zaheriiah)

as opposed to the actual rule not a secondary law and rule. Following him Muhammad Hussein Ibn Abdurrahim (d. 1250 H.) the author of Fusul expressed the primary and the secondary laws by the expression and terms as the original and temporary responsibilities. In his discourses on the issues of Ijtihad 1

where he has a short discussion about the primary laws, hinted to the secondary laws. He divides the applicable rules and laws into the actual and primary and the actual non- primary laws. 7 In fact, the beginning of the investigations and verifications of the issue of the secondary laws was the time of Sheikh Ansari (d. 1281 1

H.).8 The

previous scholars of Fiqh have made certain presentations on the issue of the secondary laws and principles but within such presentations what exist arc discussions on the issue without specifying the title of the issue. 1

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On examining the works of the Sunni scholars I did not find anyone writing about the secondary laws in 1

Shariah,

although there are certain precedents in the works of a number of earlier Sunni scholars. 10 Malik Ibn Anas (d. 179 H.) in "Al-Modavvanah-Al-Kobra" about the secondary titles of vows, covenants and oath has some discourses. 11 Muhammad Ibn Idris Shafei (d. 204 H.) also towards the end of the book Al- Omm has some discourses on this issue. 12 He under the heading "what may become lawful due to necessity" has dealt with the issues of necessity, which are of the secondary laws.' 4 Abul Qasim Kharafi (d. 334 H.) also under the heading, "coercion" (Ikrah) has dealt with such discourses. 1

14 The

Views of the Foqaha on the Definition of the Secondary Laws In the works on Osul -Al-Fiqh and Fiqh one may find such terms as Secondary Rules, Secondary Legislation, Secondary Principles, and the Secondary Order. 1

Such terms in some respects are similar and in other respects they are different. 1. On the basis of what is popular among the Foqaha the primary laws are such laws that are sanctioned for certain cases in normal conditions such as the obligation of prayers, unlawfulness of drinking intoxicating substances. The secondary laws are such laws that are sanctioned for certain cases in abnormal conditions such as emergencies, coercion etc. Such as fasting in the month of Ramadhan for one who may suffer harms due to fasting. 15 2. Some of the Foqaha have defined the primary and secondary laws differently. They say that the primary laws are those that are permanently applicable at all times and conditions and the secondary laws are those that are of a general nature not in the absolute sense but with conditions and restrictions. In this way the proposition comes out of permanency and assumes a timely nature. 16 One of the contemporary scholars has a similar view and he says, "Those Islamic Laws that are based on permanent needs of human beings are the primary laws".1 On this basis, the laws that are sanctioned for timely needs are called the secondary laws. 3. From other scholars point of view the primary laws are those that are sanctioned on the basis of the benefits and harms or the 1

good (Husn) and the evil (Qubh)

that exist in certain cases to which such laws apply. The secondary laws are those that are sanctioned on the basis of the existence of a conflict between a benefit and harm, a good and evil and for certain conditions. 18 Sheikh Ansari has said, the primary laws are sanctioned regardless of the possibility for its applicability to other cases. What follows it is that there will be no conflict between such laws and those that may come into being due to certain conditions. For example, consuming meat for food in normal conditions are permissible (Mubcih), however, if one would swear not to consume it for food it becomes unlawful (Haram) for him to consume it for food. Or it may become obligatory to consume it. For example 1

one may have made a vow to consume meat for food. 19 4. According to some scholars the primary and secondary status are relative conditions. When laws are sanctioned regardless of other conditions 1

they are called primary laws but if they are sanctioned with a view to certain conditions and cases they are called secondary laws. 20 For example vozu (ablution) is a case that has a special status in Shariah and its primary rule is that it is a preferable act and in certain cases it becomes obligatory. In some cases if vozu would be harmful to a person or cause suffering to one its status changes into a harmful and hardship causing status as its secondary name and title and accordingly to avoid it becomes permissible (Mubah) and even performing vozu may become unlawful (haram) The Differences between the Primary and Secondary Laws From the above details it becomes clear that the differences between the secondary and the primary laws are as follows: 1. In the terminology of the Foqaha the secondary laws always are in a longitudinal line with primary laws not at the same time and simultaneous which means that as long as it is possible to observe the primary laws there is no need to apply the secondary laws. The secondary laws are followed only when one is not able to follow the primary laws. 2. The primary laws are permanent while the secondary laws are temporary. According to certain Hadith

(format tradition deriving from the Prophet (S.A.W.)) the

primary laws remain valid until the Day of Judgement. As the sixth Imam21 has said, "Whatever 1 Prophet Muhammad (S A W.) made lawful (Halal) will be lawful to the Day of Judgement and whatever he made unlawful (Haram) will be unlawful to the Day of Judgement".22 3. Whenever a conflict may rise between the secondary and the primary laws the secondary laws will have priority because the secondary laws would have the effect of an exception to and limiting the primary laws. Just as a particular rule comes before the general rule in the same way the secondary laws come before the primary laws. 4. In other words, the secondary laws are in fact the same primary laws but a change has taken place in the case or subject to which they apply in that case in the terminology of the Foqaha they are called the secondary laws. Therefore the difference between the two comes from the change and difference in the case and subject to which they apply. The Kinds of the Secondary Laws After considering the secondary laws of every case or subject and its primary laws it is possible to picture a great number of the secondary laws. For example with a view to the five categories of rules, namely the obligatory (Wajeb), the desirable (Mandub), the prohibited (Haram), the detestable (Makruh), and the allowable (Mubah), if the primary rule of a case would be permissible the secondary rule may become cither one of the five therefore five multiplied by five would result into twenty five cases. There is, however, one exception: Both the primary and secondary rules can not become of the same nature like both being obligatory or prohibited. Based on this five out of twenty five will become exceptional and the remaining twenty cases will remain valid possibilities. There are also some other examples that do not seem to have clear applications in Shariah, This may happen when the primary rule for a case would be a prohibition and its secondary rule would be a desirable one or that the primary rule would be detestable and its secondary rule would be a desirable one or vice versa. The rest of the possibilities may have certain applications and one may find real examples in Shariah for them. 23 Some Examples of the

Secondary Laws. 1. The case wherein ihe primary rule would be detestable (Makruh) and the secondary rule would be a prohibited one (Haram). One example is hoarding of in-public-demand-commodities, which is considered as detestable in normal conditions by a group of Foqaha. However, in the other conditions such as when famine would exist and people would direly need the commodity, hoarding is prohibited and the Islamic government will make the hoarder sell such commodity. 24 2. The case wherein the primary rule would be permissible {Mubah) and the secondary would be obligatory (Wajeb). An example of such case is learning industrial skills according to the primary rules is onJy permissible (Mubah), however, if the protection and the security of the Islamic system would depend on it, then as being an introductory step for the fulfillment of an obligation it becomes obligatory (Wajeb). Muhaqqiq Khoei in this matter has said, "learning all industrial skills are of the permissible tasks. It is not even desirable thus; there is no question about its being an obligatory task. However, if ignoring to learn it would cause huge losses to the system then its learning becomesnecessary".25 Another example of this nature is the case of drinking or eating in normal conditions as a permissible act and an obligatory act when preserving one's life would depend upon eating and drinking. 3. The case wherein ihe primary case would be a prohibition (Haram) and its secondary rule a permissible one (Mubah). An example of such case is consuming for food of carcasses or pork as a permissible act to preserve one's life, while in normal conditions and as a primary rule it is prohibited. This example, however, would only hold when following the laws for emergencies would only be permissible (Mubah) and not obligatory (Wajeb). 4. The case wherein the primary rule would be a prohibition (Hurmat) and its secondary rule an obligation (Wujub). An example of such case is the same as the one in 3 when following the rule for emergency is obligatory, (in such a case the opinion of the Foqaha are different). 26 5. The case wherein the primary rule would be an obligation and its secondary rule a prohibited one. An example of such a case is obeying parents as an obligation according to many of the Foqaha. 25 This is obligatory as long as it would not lead to an unlawful act and disobedience to God in which case it becomes prohibited. 6. The case wherein its primary rule would be permissible and its secondary rule a prohibition. An example of this case is consuming the flesh of lamb or cow and other animals for food while if such animals would feed solely on human waste, as a secondary rule consuming their flesh for food becomes prohibited. 7. The case wherein the primary rule would be permissible and the secondary one would be a desirable rule. An example of such case would be making people to smile for fun, which is a permissible act but it may become a desirable act when it would make people happy The Difference between the Secondary Laws and the Abrogation of the Laws Apparently people who have discussed the abrogated and the abrogating verses of the Quran they have taken the verses indicating the primary laws as the abrogated and those indicating the secondary rules and laws as It is very possible that the words of Hibbatullah Ibn Salaraah (d. 410 H.) in

"Al-naskh va Almansoukh"28 and

those of Abdurrahman Ibn Ata' eqi (a scholar of the eighth century) in their discourses about the Quran may have such implications. 29 The interpretation of the first and last part of the verse 2:173 is being considered as abrogated and abrogating ones. In the first part of this verse pork is prohibited 1

(He has only forbidden you what dies of itself, and blood, and flesh of swine). 2,0 and 3

in the second part in an emergency it is permissible 1

(But whoever is and

in the second part in an emergency it is permissible 1

(But whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him) 3

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thus, these scholars have called the first part as abrogated and the second part of the verse as abrogating. One of the contemporary scholars has considered this opinion as the one to apply to all the works 1

Obviously, there is a fundamental difference between the abrogation and secondary laws. In the definition of abrogation it is said, "Abrogation means the removal of the previously existing law by the law and a rule that is sanctioned later. The relations between the two laws would be as such that both laws would not possibly exist together".33 In the case of emergencies, coercion and sever hardships and such other secondary status the previously sanctioned laws do not become obliterated only their subjects change because the subjects of the previously sanctioned laws are for normal conditions and subjects of the secondary laws are for unusual conditions. In the case of consuming carcasses for food a prohibition is for normal conditions and permissibility is for the case of emergency . In other words, an abrogation is thinkable only in the case of such 1

two laws that would be of totally opposite nature and as such they would not exist together at the same time. Secondly, the subject for both laws would be the same. Such conditions do not exist in the case of the secondary laws. It is possible in the case of a primary and secondary law to exist at the same time. The author of "Haqa'eq Al Osul" also says it clearly, "Naskh or abrogation means obliteration of the primary or the secondary laws of a subject". Therefore, although the secondary laws are for accidental and unusual conditions they in such conditions have the due force of validity. Jt is possible that the Shariah for some reason in a later time abrogates them just as is the case with primary laws. The Criteria to Discern the Primary and the Secondary Laws According to many of the Foqaha the secondary laws are associated with exceptional conditions and the primary laws are associated with the normal conditions. On this basis the text of verse 173 of chapter 2 gives a secondary status to an emergency.

"He has only forbidden you what dies of itself and blood, and flesh of swine, and that over which any other (name) than (that of) Allah has been invoked; but whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him" 35 Just

because a status of a law is secondary it can not be considered a secondary law. This is true because it is a fact in the case of the apparent, as opposed to actual, laws such as the laws on the basis of bar'aoh (freedom from responsibility on the basis of the absence of sufficient reason to prove responsibility) and emergencies. This also applies to the cases of the primary laws for emergencies like the obligation of Tayammum

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(particular ablution with pure earth)36

for a person who does not have any water for vozu or using water would be harmful for him. For this reason some of the Foqaha have considered these two kinds of laws as the secondary laws. Of such Foqaha is Muhaqqiq-e- Naeeni who calls the primary laws for emergencies as thesecondary laws. 37 Allamah Muzaffar also has considered such rules as the apparent ones

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(Al Ahkam Al Zaheriiah)

as opposed to the actual ones like 38 precaution and freedom from responsibility as the secondary laws. The task of discerning the primary laws from the secondary ones although may not seem to be difficult, but in some cases it may not be that easy. Of such examples are the cases wherein the primary laws would have several possibilities. One such case comes in the sections of the laws of worships (Ibadat). For

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one who may have access to water, the rule is to have a Ghusl (a shower) or vozu, but for one who may not have access to water for good reasons such as when using water would be harmful for him he must perform Tayammum. At first, it may seem as if the law therein is a secondary one but there is no doubt that the law in this case also is a primary law In certain cases the Shariah pictures several conditions for the people qualified to shoulder a responsibility and on such basis it has classified, or has categorized such people. For example, a person is not on a journey or is on a journey. A person not on a journey must pray in full and a person on a journey must shorten the prayers (qasr). Or that a person who intends to pray he may have access to water or does not have access to water or that the use of water is harmful for him or it is not harmful for him. All the laws in such cases are the primary laws. 39 For some cases in Shariah there are certain rules without categorization and dividing methods and for certain conditions other laws are declared. In such instances the second law is a secondary law. 40 In other words in the first examples the laws from the very beginning are introduced in categories and in divisions but in the second examples such laws are introduced in the form of exceptions. The task of discerning and properly identifying the cases and the subjects to which such laws apply is also very important. A lower degree of carefulness and proper expertise may lead a Faqih to confusion and instead of a more important case he may give more consideration to what is less important, or in a crucial time the Islamic system and its protection may be exposed to dangers and insecurity. The significance of this task for the leader and the Imam of the society is of a much greater degree. The position of the Imam and leader is one that, in order to manage and supervise the system properly, requires discerning precisely all the laws and cases related to the management of the state. It is very important to discern what is important and more beneficial for the state and what is not important and beneficial for it. The leader and the Imam may even need the help of the experts in certain fields related to the management of the state. Imam Khomeini with a view to such task has said: "Ii is possible, based on the fact that the running of the government is only for the just Foqaha, an objection or question may arise in the minds. One may say that Foqaha are not capable of running the state. This question and objection does not have a strong base because we see that in every state the affair are managed with cooperation of a great many of the experts and knowledgeable people. The kings and the Chief Executives a long time ago until our times did not know all the issues related to the running and management of the state. The expens of every field managed the affairs of the state. If the head of the government is a just person he finds the just or trustworthy ministers and officers and in this way he brings injustice, transgression and corntption in the public treasury\ against people's lives, honor and properties under control. Just as during the government of Imam Ali all the affairs of the government were not managed by him alone, instead the governors, the judges and commanders of (he army were involved. Today also we see that the management of the political issues, the army and defence of the solidarity and the independence of the country each post and position is assigned to qualified „ 41 persons . It is certain that if the secondary status of a rule would become an individualized matter in such a case the task of discerning the cases to which such rules and laws may apply will not be very difficult. Obviously and very often the individuals easily discern what is difficult, harmful and a case of emergency for him or her. Although in some cases even individuals need the help of an expert of the field to which the case is related such as the physicians etc., especially when the level and degTee of difficulties and

hardships would he such that is judged by commonsense not according to the individuals standards. The Procedures to Enforce or Practice the Secondary Laws In general, three stages can be presumed for the secondary laws: A. The initiation; B. The discernment; C. The enforcement stage. The first stage is of the functions of the legislative authorities in Shariah. When there is a need and there is no obstacle the Shariah may sanction a law, which will be addressed to all Muslims universally and not individually, like the following verse of the Quran: "Allah has not laid upon you any hardship (haraj) in religion The second stage, which can also be called the stage of discernment, is when the people study the individual case

to find which rule is applicable to it. The ordinary people themselves can, sometimes, carry this task. 1 One example of such a case is the case of one who finds himself in a difficult position of consuming pork or carcasses for food or in the month of Ramadhan one is convinced that fasting is harmful for him due to a certain illness. In some cases the leadership or the legislative body carries the task of the stage of discernment. This is when the government, in order to solve social problems, would need to benefit from the secondary laws. If the leadership or the advisors would see that standardizing the prices of in-public-demand commodities would help to overcome certain difficulties they may do so for the protection of the system. The author of Al- Jawahir in the section on "unlawfulness of wages for obligatory acts" writes: "It is not an offense to receive wages for teaching certain industrial skills that are needed in the society because running of 43 the social order and the lives of industrialist depend on it The author of "Miftah al Keramah" in his discussion on the barren and unutilized lands points out to one of the cases to which the rule of no hardships (la-haraj) applies, and says: "By utilizing the unutilized land (Mavat) one becomes the owner of such land. Because of the fact that people need to live in civilized manners if utilizing the land would not give one the right to become the owner it will cause huge hardships (haraj) to the 44 society Obviously the task of deducing the secondary laws from the texts of Shariah is the task of a Mujtahid just as deducing the primary laws and the branches of such laws is. 45 Those of the secondary laws that in regards to their applicability are not of limited nature are dealt with only in the section to which such laws belong as branches in a process jurisprudentially accepted. Those of the secondary laws that arc dealt with in several sections of Fiqh are treated as the rules of Fiqh, such as the principle of no harm (la-zarar) and no hardships (la-haraj). The task of a Faqih is to study the basis of such rules in regards to their authority and authenticity and clarify their limits and domain.

46 In regards to the

third stage, namely the application and execution stage, in general, one may say that it is the task of the people or the government and from this aspect there is no difference between the secondary and the primary laws. 47 One very important point to note in this regard is the fact that the secondary rules are often involved in the social issues and it, obviously, in the first place, is the duty of the government to see it executed properly. For this reason it is important to consider the secondary laws from two angles: (a) The Secondary Laws Applicable to the individuals only: Examples of such laws are the obligations of fulfilling one's vows, covenants, oaths, the conditions set along with a contract, involvement in certain prohibited matters due to emergencies, coercion and missing certain obligations due to an emergency. Such cases are of the ones for which people and individuals are responsible to fulfil and the govem-ment 48 or the leadership does not play any role therein. (b) The Secondary Laws that are Applicable to the Social Issues: Just as discernment of the secondary laws applicable to the social issues is the duty of the government so also is its application and execution. The reason for this is also clear. Of such reasons are disruption and chaos that may follow due to ignoring the duty of enforcing such laws. 49 For example, adjustment of prices of certain commodities and controlling them and controlling the activities of hoarding urgently needed commodities are all of the duties of the government and no one would have the right to interfere with such issues. Of such examples are the issues related to the export and import of the commodities, during peace or war times if they would affect the security of the state. Imam Ali in one of his instructions to Malik-e Ashtar has considered the tasks of controlling hoarding of needed commodities and of maintaining proper prices for the needed goods among the duties of the governor. The Imam has said: "Do not allow hoarding of in-public-demand goods because (he Holy Prophet (S.A.W.) would not allow it. The dealings of the people must be based on justice and fairness. In the exchange of the goods no harm or loss should be caused to the buyers or sellers. After wanting people against the evil of hoarding you may bring such people into account through balanced penalties".5 One of the

contemporary jurists after giving some explanation about the secondary rules, says: "How many great problems which were solved in the light of the secondary rules and how many sophisticated and difficult problems will be solved by these rules; the secondary rules are the greatest instrument available in the Islamic government for solving the problems of the society". Certainly, one should not exaggerate the usefulness of the secondary rules and with the emergence of every problem resort to them. The expediency of the Islamic society is that its problem resort to them. The expediency of the Islamic society is that its difficulties should be solved as much as possible by the primary rules except in the emergency times; only when the primary rules are not useful, the secondary rules should be used. Recognition of the criteria ol the secondary rules requires awareness. The criteria of the secondary rules is the impossibility of acting upon the primary rules and following them. Recognition of this and recognition of the instances and cases requires religious knowledge; for example wherein zarar and haraj is instance of the secondary rule, or distinguishing of the most important matter from more important ones (Ahamm and Mohemrn), requires the religious expertise.51 Categories of the Secondary Laws

None of the Foqaha in their investigations and works have specified the number of the titles for the categories of the secondary laws. Only the following are the well-known titles for the categories of such laws. 1. Protection of the Islamic system. (Hefz alnedam) 2. The Urgencies and Pressing Needs. (Izterar) 3. Losses. (zarar) 4. Hardships and Constraints 1

(Osr and haraj) 5. Coercion (fkrah) 6. Being a lead, or Introductory (Muqaddimah-Al-Wajeb or Hararn) 7. Important and more important (Ahamm and Mohemm)

Initially, each of the above mentioned titles seems independent titles but a careful study and proper consideration of these titles reveal that many of them are very closely related to the others. These relations are as such that in some cases two of them can be considered as one and the same. In the views of some of the scholars of Shariah urgency (Izterar) is a universal title and the issues of hardships and constraints are some of the examples of urgency and pressing needs. The author of Al-Jawahir in the section of the Taharat dealing with rules of cleanliness has said this: "It is not permissible to have Vozu or Ghusl with unclean water nor is it permissible to drink such water except in the case of urgency. Hardships and extreme constraints are of such examples" 52 In some cases he considers the case of losses (Zarar) the same as an urgency. In the section of the law about food and drinks he has the following expressions, "In all cases wherein eating or drinking is not permissible, in all such cases due to urgency it all becomes permissible. Proof for such rules are the verses of the Quran, the principle of no harm, no constraints (la-haraj) and that Islam is an easily practicable religion 1

(Al Shariah Al samhah) 5}

Although, hardships and constraints (Osr and Haraj) may be considered the same as "urgency" (Izterar) each one is dealt with separately as an independent principle and rule. The existence oiAhadith in the Shariah is the reason for such separation. In some of these Ahadith the title "urgency" (Izterar) and in some of them "hardships" and "constraints" (osr and haraj) or "losses" (zarar) are mentioned. One of the contemporary Foqaha also points out saying: "Coercion may also be considered an other example of "urgency Some of the scholars have even considered both titles; (coercion and urgency) as one and the same as in the interpretation of verse 173 of chapter two wherein a compelled person ('moztarr) is considered as a coerced one fmokrah).54 The Foqaha have considered the titles such as "important and more important" (Ahamm and Mohemm) as the secondary titles side by side with the other secondary titles such as extreme "hardships and constraints" and it seems as if it is not a separate title. In fact, urgency should, with a view to the following, be considered a basic standard for the practice of the secondary laws. 1

Although the primary laws from the point of view of the Shariah are important and in normal conditions it is necessary to obey such laws but in certain cases obedience to the secondary laws is more important. In the Quran and Sunnah also there are no such captions. It is only the decision of reason that when facing an important and more important (Ahamm and Mohemm) issue the more important must be given priority. Therefore, the law of "important and more important" is the criteria and standard that dictates to obey the secondary laws, in certain cases, before the primary

laws. On this basis one may say that giving priority to the secondary laws before the primary laws for practical reasons is because of the fact that a more important case has priority over an important case. Some scholars have also stressed on this point. 55 The law of "important and more important" is not limited to the cases of the secondary laws. In the case of a conflict between two laws of primary nature also this law is followed. For example, in the case of saving a life from drowning the Foqaha consider it permissible to walk on a piece of land that is currently under the control of some one due to usurpation, if saving a life may require it. It is very likely that in those cases wherein making an untrue statement or a statement that involves backbiting is considered permissible is based on this law However, the number of the secondary laws can not be limited to a known number of cases, even though the idea about the applicability of the popularly known secondary laws may be considered a good possibility. It is not so in the cases of the secondary laws that are not so popular because there are no known rules to follow in discerning and distinguishing such laws. Such secondary laws are found only in scattered sections of the law where one may face them. It seems necessary to conduct more precise and profound studies to discern, distinguish and analyze the issues of the principles of jurisprudence and issues of jurisprudence. It is also necessary to deduce and infer secondary laws for the newly emerging issues and cases that require the application of such laws. Titles of the Popularly Known Secondary Laws: Protection of the System Of the most important issues, according to the Shariah, one is the protection of the Islamic system (Hefz-al-Nedam). This caption and title implies sometimes (a) the preservation and protection of the sovereignty of the Islamic system and the prevention of confusion and uncertainty from creeping into the system at the hands of the internal and external enemies. For this reason Naeeni considered the protection of the sovereignty of the country against the hostile intentions of the foreigners and their plots to mobilize the defence capabilities as preservation and protection of the Islamic system. In other words he considered 57 preserving the sovereignty and independence of Muslim lands, (b) Sometimes it means to enforce and bring about law and order within the Muslim society. It is to enforce the rules of discipline among the people, the establishments and institutions of the society. Protection of the system in this sense is opposed directly to chaos and anarchy. The caption "protection and preservation of the system in the majority of cases, applies to its meaning in case (b), the author of Jawahir, on the issue and discourse that in order to settle the court cases 58 and disputes among people, and it is obligatory to acquire the qualification of a Mujtahid, has said this:

"The basis and proof for such necessity is that the Islamic system needs it."59

According to Imam Khomeini, prevention of chaos and anarchy from creeping into the society is the basis of the philosophy to establish a government. 60 According to Naeeni, in a discourse on preservation and protection of the system it indicates and refers to both meanings of the phrase preservation and protection of the system, mentioned in (a) and (b). Naeeni has said: "In Shariah, the protection and preservation of the Islamic system is one of the most important obligations. Evidently, all of the aspects related to the foundation of the government, protection of the honor and the rights of the people are based on two principles: (a) The maintenance of law and order as means of progress in the society is one of such principles. It is the protection of the people's rights, maintaining justice and other obligations related to the welfare of the country and people, (b) The other such principle is defending the country against the invaders and intruders "6I

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Both tasks of the safeguard and protection of the system in the sense mentioned in (a) or (b) are obligatory tasks according to Shariah and according to reason. The scholars consider this issue and principle a firmly and already settled one, free from any need of further analysis. They have based many rules on this principle. For example Naeeni writes: "The Shariah does not agree with causing anarchy and chaos in the society is clearly evident and all the duties related to the protection and safeguarding of the system and the country are of the urgent 62 obligations beyond any doubt The reason that these laws are considered as the secondary ones is because of the fact that in many cases the protection and the safeguarding of the system involves doing or otherwise of certain acts. Such acts that may have been permissible in normal conditions may be due to the efforts of providing security to the system have become obligatory or otherwise. Therefore, the title and caption of being a secondary law is an introductory and a step towards some other tasks and because of this they have become obligatory or otherwise Al- Khoei has said, "Learning all artistic abilities are of the permissible activities and they do not even come under the desirable activities far from being obligatory or otherwise ones. However, if ignoring to learn such skills would lead to the emergence of chaos in the society and the system then learning such skills becomes an obligation (Wajeb).63 Hardships and Constraints One of the important rules and principles that apply very frequently in Fiqh and the Islamic law is the principle of "no hardships and no constraints". (La-haraj) The fact that so many of the Foqaha apply it in so many sections of the law to various cases is proof of the significance and usefulness of this principle. In most of the issues related to the government and the society and some of the newly emerging complex cases that require ruling from Shariah this principle may provide key answers and solutions. There is another point that reveals the significance of more investigations into this principle. It is the fact that some people, despite the existence of solid evidence to prove “hardships” authority and authenticity and the fact that so many of the Foqaha have applied this principle to so many cases, they have considered its nature and applicability unclear. They have limited its authority to the obligations whose fulfill¬ment is beyond human capabilities. Thus, practically they have denied its authority unaware of the fact that i n such cases reason independently negates the responsibility and there will be no need on the part of Shariah to declare such a principle. Of such people one may name Sheikh Hurr Ammili". 64 Hardships and Constraint are of Four Kinds (1) Hardships

and Constraints beyond human capabilities to bear. (2) Hardships and Constraints of a smaller degree than the one mentioned, but they would cause disruption in the society. (3) Constraints that would be to none of the degrees mentioned above, but they would cause loss of life, property or honor. (4) The degree of constraint that is not beyond human capabilities to bear and would not cause disruption or losses in the social system, but to endure and bear it would cause a great deal of suffering. From the Foqaha point of view, the first kind of constraints and hardships are not of the cases to which the secondary laws may apply. It is obvious that the Shariah does not impose a responsibility beyond peoples' capabilities. The second kind of hardships and constraints is just like the first one because the expressions and the pronouncements of Foqaha on the issue of hardships and constraints do not include this kind. Evidence to this is the fact that the unreasonibleness of imposing an obligation that would cause disruption in the social system is obvious and w ithout any shred of doubt. We all know that the goal of Shariah for having such laws is not to disrupt and destroy the social orders and paralyze the sound and peaceful way of life of individuals. The final goal of the Shariah is to, in most of the rules, safeguard and protect society to the highest level of excellence and decency. With the view to this, how could it be acceptable on the part of the Shariah to command people for the duties that would disrupt social order? As far as the case in (3) is concerned, it may fall under the laws of the "principle of no harm" and that the "principle of no constraint" does not apply to it, although in many cases of no harm one could present evidence from both principles. Therefore, the fundamental argument in the "principle of no constraint" is only related to the fourth kind of hardships and constraints, mentioned above. 65 Evidence of the Authority and Sources of this Principle (a) Evidence of the Authority of this Principle from The verses of the Holy Quran 1. "Allah has not laid upon you any

hardship (haraj) in religion66 2. "Allah does not desire to put on you any difficulty" (haraj).67 3. "Allah desires ease for you, and He does not desire for you difficulty (Osr)"68 4. "Allah does not impose upon any soul a duty but to the extent of its ability" 69 (b)

Evidence of the Authority of this Principle from Ahadith 1. "A man asked Imam Ali, my fingernail came off in an accident. How should I make vozu ? "Wipe it from the surface a piece of cloth and you do not have to wash itReplied Imam Ali. 1

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2. "Imam Ali was asked about the use of a jacket made of the leather from an animal that is not known as regards being slaughtered properly according to the instructions of the Shariah or not. The Imam considered its use lawful even during pray ers on the basis that Islam is a religion that does not impose hardships on people71 Muhaqqiq-e Bujnurdi also writes in this regard, "The evidence for relieving people 1

from the burden of the laws that cause constraints on the Muslims is the kindness and the grace of Lord God on His servants. He wanted the religion to be easy to follow for the people and without Difficulties”72 **The Meaning and the Implications of this Principle The meaning and the implication of the Principle under consideration** are **indicative of the fact that God has not sanctioned any law that would cause constraints on the people. For example, in the case of a person whose injured finger is bandaged and difficult to remove such bandages for** Vozu, **no obligation that would make him have** Vozu **as in normal conditions is sanctioned Also, if severe weather would cause a great deal of constraints, compared to normal conditions, no law that would obligate him to have Ghusl in such condition is sanctioned. Therefore, all the Islamic responsibilities of the people at first relates to conditions free from constraints as if all the laws and religious rules initially are sanctioned with the stipulation of freedom from hardships and difficulties.** 73 **The Meaning of Hardships and Constraints Constraint, in its dictionary definition is narrowness and impasse. In** *"7 A **Hadith, sometimes it refers to sin and unlawful matters. The author of Sihah al Lughah and Ibn Manzur say**

"Constraint means sin, difficulty and narrowness".75 Talcing this into consideration, the

original meaning of “constraint” **is narrowness. Also sin and unlawful matters are called constraints (Haraj) because of this aspect, sins and unlawful matters committed in this world will cause constraints and narrowness in the next world and life. In the following verses of the Quran the word Haraj (constraints) is used to mean sins and unlawful matters:** 1

"It shall be no crime (haraj) **in the weak, nor in the sick, nor in those who do not find what they should spend (to stay behind)** 3

76 "There is no blame (haraj) on the blind man, nor is there blame on the lame, nor is there blame on the sick, nor on yourselves that you eat from your houses, or your fathers' houses or your mothers' n77 houses, or your brothers' houses, or your sisters' houses ..." Also in these two following verses "haraj" has been used in its main meaning: "Therefore (for) whomsoever Allah intends that He would guide him aright, He expands his breast for Islam, and (for) whomsoever He intends that He should cause him to err, He makes his breast strait (haraj) and narrow".

A book revealed to you - so let there be no constraints (haraj) **in your breast on account of it - that you may warn thereby, and a reminder close to the** 3

believers72

According to the linguists one may find a meaning for the word Osr (hardships) very close to that of 1 the word Haraj (constraints). In Al-Nihayah, Ibn Athir has said, "The word Osr (hardships) is opposite of the word Yusr meaning ease and comfort. Osr means hardships and narrowness. 80 In Lisan Al-Arab it is recorded, "Osr is opposite to Yusr that means ease and comfort".81 From the above one may have the understanding that Osr and Haraj both have the same meaning or very closely similar meanings as such that to draw a fundamental distinction is not possible. A further evidence to this is the fact that the Foqaha in many cases have placed the two next to each other. Cases to which this Principle may apply The evidence related to the principle of "no hardships" and "no constraints" clearly show that this principle has a vast field for application. Verse 78 of chapter 22, which is the fundamental evidence82 to prove its authority requires many Ahadith to take it in due , 01 consideration. The above verse considers what is outside the limits of "no constraints" law as the field of application for the religious laws, and it negates the existence of narrowness and constraint from religion Therefore, the domain of this principle extends to all the laws applicable to both the individual and the society. Muhaqqiq-e Bujnurdi, has explained the supporting evidence for the authority of this principle in the form of the verses of the Quran and theAhadith, He has pointed out the domain of this principle. He has said, "The verses of the Holy Quran and theAhadith have clearly stated that this religion, Islam, is not a religion to impose hardships and constraints upon people, and God did not want Muslims to suffer hardships in following the laws of this religion".84 The Foqaha have based their decision of applying this law only in the case of the obligations of the form of compulsory or prohibitions not the desirable or the detestable ones. It is because of the fact that the kindness and grace oi Allah come to relieve people from "hardships" and "constraints". In the case of the detestable and desirable duties because such duties do not force one to suffer hardships and constraints the rules of this law do not apply to them. As a result of this, if one would engage himself in non-compulsory duties due to extra-ordinary attention and carefulness towards one's duty that may cause him suffering and hardships, under the application of this law he can not be subjected to any admonition and objections. 85 Some Examples of the Inference of Foqaha in the Light of this Principle 1. In Miftah Al- Keramah, in the discourse over the issue of the unutilized land in relation with the fact that people need food and shelter, Amily writes this: "The unutilized lands become the property of those who revive and utilize them because of such act. Otherwise, it will become the cause of suffering from hardships and difficulties "86 2. Allamah Helli has considered the mental and psychological sufferings due to hardships and constraints as the cases to which this principle applies. Therefore, if a duty would cause mental and psychological hardships and sufferings to one he may benefit in such duties under this principle. The author of Al-Jawahir, in a discourse on the issue of Tayammum (the process of purification for prayers when water is not available) when the cause would be fear from thieves or wild beasts or the loss of life or property has said this: "The statement of the author of Al- Hadaeq on the issue that fear for loss of property does not become a good cause to give up one's duty is opposed to the evidence in support of the law of "no constraints". This law is universal. The evidence from religion88 clearly say that there is no constraints and hardships in religion". From this it appears that the author of Jawahir considers

the evidence in support of this law an evidence from reason, which does not accept any exceptions. 3. Also the author of Jawahir in a discourse on the issue of whether or not it is necessary for a person praying to keep his mind all the time during prayers on his intention to pray. He says: "The idea that it is necessary to keep one's mind on the act all the time during an act of worship such as prayers etc., is against the law of "no hardships" and "constraints". 4. In a discourse on "justice of witnesses" he has also said: "The Foqaha of the past would also consider the proper appearance of the people as sufficient proof of one's justice. If one would not openly and publicly commit sins he would have been considered a just person. In search for a just person to the extreme 90 limits would cause hardships and constraints. A divorce is possible in the following cases: If the husband of a woman disappeared and she knows that he is alive but she is not able to live alone patiently and even in the case of woman whose husband has not disappeared but is somewhere and unable to come home such as being in jail etc. This also applies if he is at home but is so poor that is not able to provide sustenance for her and she

can't tolerate

it. For such cases he has said, "In all of such cases under the law of "no hardships" and "no constraints" the court is authorized to issue her a divorce especially if she is a young woman". 91 One of the contemporary Foqaha includes another case to the above ones. It is the case of a woman whose personal safety and her sexual needs would depend on having a husband in such a case one may consider it unnecessary on her part to wait for four years. If her husband has disappeared in such a case a Muslim judge may issue her a divorce so she can marry another man. 92 With a view to the meaning and implications of the law of no hardships and no constraints a question may rise that in the Islamic system there are many instances that involve hardships and difficulties. An example of such a case is becoming a member of the army for defence, the prohibition of fleeing from the battle field, fasting in the month of Ramadhan in summer, surrendering to judicial penalties,

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applying hudud (punishment)93 and qesas (law of equality)94,

leaving the country when one feels that it is necessary etc. How could all such cases be reconciled with the universal nature of the law of "no hardships and no constraints"? The Holy Quran (22: 78) says in a very general manner that "He has nor sanctioned any hardships upon you in religionCan one say that the above law has priority over so many of the obligations and prohibitions? Or that certain cases due to their greater significance such as the cause of defence, prayers, saving lives and unlawful sexual activities, have a particular status in the Islamic system. Just because this law exists, such cases can not be over looked even though this law has a priority over less significant obligations and duties. The author

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of Fusul has said in this regard. "What is required as to the degree of hardships is what the majority of people normally would not bear. A small degree of hardships do not justify the case. There is no doubt that in the cases such as defence, in order to repulse evil from oneself and protect the property,

family, tribe and compatriots is a job that most

people stand up as a matter of honor and dignity and it is not considered difficult. It is not so especially in the case of Muslims who expect great rewards for such heroic deeds in the life to come95 The author of Jawahir has said, "In the case of very important duties like defence matters such obligations never fall under the law of "no hardships and no constraints" because of the great benefits of these duties". In the book of Tciharat, after applying the law of no hardships he has said, 1

"For one who can acquire water only through buying and it would be, in such conditions, difficult for him he must perform Tayammum (particular ablution with pure earth) instead of vozu".96

He further adds, "In some of the very important duties such as defence matters the law of no hardship and no constraints do not apply because of the very important benefits involved in such matters, however, in the cases that do not have such significance this law is applicable".97 It can, however, be said that the existence of hardships and constraints in difficult matters like defence is very obvious. Just because some people due to their expectation of reward in the next life and for the sake of spiritual accomplishments do not dislike such hardships does not remove the hardships from such matters. According to Muhaqqiq-e Bujnurdi, the verse of the Holy Quran that says, "God has not sanctioned any thing that would cause you hardships "98 from the meaning of this verse that is obvious and apparent that, it is of a universal nature. It includes all the laws of Shariah that involve hardships and constraints, i.e. all the obligations and prohibitions." However, the Foqaha have not dealt with it in this way, especially, when the hardships and constraints would be of a personal nature not one for a whole species. Staying away from most of the prohibited matters does cause hardships and constraints to some people, and no Faqih would issue a fatM>a in favor of such case. With a view of the evidence supporting the authority of this law and opinions of the scholars in this matter it is possible to fmd several categories of the issues that cause hardships and constraints: 1. There are the kinds of hardships and constraints that do exist in certain duties but they are normally tolerated. It is obvious that this law does not apply to such cases. 2. There are also the kinds of duties that normally do not cause any hardships and constraints. Although many people consider them of such nature such as paying Zakat (taxes), but due to the social benefits and the service for the well being of the society they arc not of the duties that cause hardships and constraints. 3. Some of the obligations, without any doubt, involve great degrees of hardships and constraints but because they are the outcome of the wrong doings of the people 1

themselves, such as the judicial penalties, compensations and punishments for such crimes they do not fall under this law. Such hardships are exceptions to this law. 4. There is another category of duties that cause hardships and constraints to some people only and they are not as such for the others such as fasting during summer. In such cases the law is applicable to some and it is not applicable to the others. The degree of the hardships and constraints, however, must be to the degree that is not normally tolerated. 5. There are the duties that involve a great degree of hardships 6. and constraints such as serving for defence matters and even the Holy Quran also acknowledges such hardships despite this, this law does not apply to them: "Fighting is made mandatory for you, but you dislike it. You may not like something which, in fact, is for your good and something that you may love, in fact, may be evil. God knows, but you do not know".100 "Eyes became dull and hearts almost reached the throat when they> attacked you from above and below and you started to think of God with suspicion. There (he believers were tested and tremendously shaken101 God pardoned the Prophet (S.A.W.), the Emigrants, the Helpers, and those who followed them, when the hearts of some of them J 02 almost deviated (from the truth) in their hour of difficulty. God forgave them because of His Compassion and Mercy. 103 Some Points in the Law of "No hardships" 1. Azimah or Rokhsah (obligation or Permission) The fact that the application of the law "no hardships and no constraints" is obligatory or permissible. Some of the scholars consider it an obligation. The author of Al-Jawahir is one of such scholars who in the issue that "fasting is not obligatory for very old people" has said, "In such a case the application of this law is obligatory because of the no hardships104 Some scholars have decided according to the second form, the permissibility. Among them is Muhaqqiq-e Hamedani, who writes: " Tayammum in the conditions wherein it is permissible is based on the law of "no hardships" as a permissible duty1 and not an obligatory one. As a result of this if one would bear great hardships and instead of Tayammum make vozu or Ghusl his choice is acceptable. "105 Proof for this is the fact that the evidence supporting the authority of the law of "no hardships" are to provide ease and to facilitate, for this reason such evidence are

qualified for the negation of obligation not for non-permission. The author of Orvah

in the section on Tayammum points out to this viewpoint and considers a vozu made with suffering hardships and constraints as a valid one. 106 The fact that removal of hardships from the servants of God is a favor from Him, can not become evidence for the validity of the very desirability of the act, it, in fact, can become evidence of its undesirability. It, in fact, is a form of disregard for the favor like the act of ignoring the rule of shortened prayers on a journ ey and instead praying a complete prayers and fast during a journey which indeed is an undesirable act107. Muhaqqiq-e Hamedani, defending his view has said, The reason for exception in choosing the primary laws instead of following the secondary laws in the kind of duties such as Vozu and Gusl are the constraints in them without having any evil in performing such acts. On this basis, the exception is because of "no necessity" not because of "undesirability" of the duty108. As a result if one would bear the hardships and perform the act that was not required of him he has

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performed an act that was desirable in the sight of God. Quite opposite of this is what one of the scholars of our time believes: "The imposition of heavy duties causes disobedience and opposition in people and this by itself is a great evil. For this reason, some of the scholars have maintained that the law of "no hardship" due to the kindness of God towards people is based on an obligatory' ground". 109 2. Is the Criteria in the Law of "No Hardships" Hardships for Individuals or for a whole Species? Some of the scholars have for two reasons affirmed the hardships for individuals 1. All the captions and titles that are mentioned in the Ahadith, like "constraints" "losses" and "emergency" etc. are related to individuals cases. 2 . The hardship for a whole species is not definite and distinguishable because it does not say whether the species of people of all times are the criteria or those of a particular time and place. 110 Another reason that could be added to this would be the case of a commander that may issue an order for his subordinates to follow with a choice that in the case of hardships they may disregard it. In such a case if one of them did not follow the orders due to such reasons he could be excused even if it would not be hard for others. The hardships in individuals cases may be considered as the criteria but it is possible that such law would apply to the Islamic government in which case consideration of the welfare of the whole species and society would have to be studied. 3. Does the Law of "No hardships" Apply to Negativities also? Sometimes the negativity and absence of something may become the cause for hardships and constraints. For example not removing certain buildings from the road areas may cause traffic congestion, not broadening roads may also cause delays for the emergency services such as ambulances and fire fighting machines, leaving certain shops and stands may cause bad congestion on the footpaths and sidewalks. It seems that in such cases also the law of "no hardships" applies very well. As discussed above the meaning of the evidence supporting the authority of this law is the removal of all kinds of rules that would cause hardships, regardless of their applicability to the positive matters or those of negative nature. In the matters of the above cases it is possible to say that non¬permissibility of doing any thing to the properties of the others may cause huge hardships and the Shariah does not agree with it. This is in addition to the evidence in the Holy Quran that has clearly removed all kinds of hardships. 111 In Ahadith, also one finds such expressions as

“there is no religion more facilitating than Islam”.112

Islam is a very easy system to follow". 113 Without any doubt such expressions include the negativity and absence of some thing also. 4. How much Hardship Justifies the Applicability of this Law? The existence of any degree of hardships and constraints may not justify the application of this law. It must be as such and to the degree that normally people would not agree to bear. The evidence supporting the authority of this law also does not support its applicability to the smaller degrees of hardships, otherwise, most of the religious duties would fall under this law because almost all the obligations in religion involve some degree of hardships. Therefore, this does not agree with the fundamentals of religion. It is for this reason that the Foqaha whenever discussing this issue have included in their expressions the words like "great",

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"sever" and "huge" hardships. Sheikh Ansari has said, "Whenever there are huge "hardships" and "constraints" this law may be applied". 114 Losses (Zarar) Another caption and title for the secondary laws that has been discussed very often in Fiqh and applied is the law of "no losses" (la-Zarar). The Foqaha have been applying this law for a long time. For example, Sheikh -e Tusi in Al-Khilaf in the section on the contracts of exchanging certain merchandise in which losses have taken place against one of the parties, expresses his belief in the nullification of such contract. It is based on a Hadith from the Holy Prophet (S.A.W.) that says, "There is no losses in Islam".115 Also Ibn Zuhra in the section of Fiqh dealing with the "choice" to revoke the contract due to the defect in the merchandise, writes: "The evidence supporting this fact is the Hadith from the Holy Prophet (S.A.W.) that says,

"There is no losses in Islam".116

revoke the contract due to the defect in the merchandise, writes: "The evidence supporting this fact is the Hadiih from the Holy Prophet (S.A.W.) that says, "There is no losses in Islam".116 Allamah Helli also in Tcidhkirah in the section on losses has based his decision on the above Hadiih from the Holy Prophet

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(S.A.W.). The

evidence proving the authority of this law is the same Iladith the, "no (suffering) losses" and "no (causing) losses". This hadith is recorded in the books like Sunan Ibn Dawud,

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117 Sahih-e Termezi,u% and Sunan Ibn Majeh.u9

Some of the Foqaha along with this law have discussed another law that says, "The losses are to be abolished". The two laws are dealt with separately. Of these scholars is Abdul Karim Zeydan who has discussed it in Al-

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Madkhalm

Others like Ibn Najim have considered the two laws as one. Najmuddin Tufi also gives preference to the supporting proof of this law over those of the primary law. The Evidence Proving the Authority of this

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Law The evidence proving the authority of this law are many Ahadith which contain the very popularly known expression, "no losses and no suffering losses". Fakhral Muhaqqiqin

has stated that this Hadith is Mutawcitir, (unanimously reported). 123 The Ahadith Narrated from the Holy Prophet (S.A.W.) about this Matter. Samrat Ibn Jundab had a palm tree inside the compound of the house of a man who belonged to Ansar, (of the people of Madina who helped the 1

Prophet (S.A.W.)). Anytime

he wanted he would enter the man's house without permission to see his palm tree. The Ansari man complained about it before the Holy Prophet (S.A.W.). The Holy Prophet (S.A. W.) asked Samrat Ibn Jundab to ask permission from the Ansari man any time he wanted to see his palm tree but Jundab did not agree. The Holy Prophet (S.A.W.) said, "I am ready to buy this tree for whatever price you would ask". Jundab did not agree. The Holy Prophet (S.A.W.) said, "For this tree God in the next life will give you a tree in Paradise". Jundab did not accept the offer. The Holy Prophet (S.A.W.) then told the Ansari man to uproot the palm tree and throw it away because there is no I 24 causing losses in Islam. 2. The Holy Prophet (S.A.W.) declared to the people of Madina that no one must create obstacles on the way of irrigating the palm trees, or prevent others from utilizing the excess waters because according to 125 Shariah "no (suffering) losses" and "no (causing) losses is the law". 3. The Holy Prophet (S A W.) also declared that there must be sufficient distance between two water tunnels so that they would not effect each other in reducing or increasing of the amount of water that would normally come out of each of them. 126 4. The Holy Prophet (S.A.W.) was asked about a canal through which water would flow for a certain distance in a field and between the which water 1

would flow for a certain distance in a field and between the source of water and the field there would be palm trees that belong to people other than the owner of the canal. Can the owner of the canal create another canal to let the water flow to his field away from the palm trees that exist on the old canal? "Have fear of God and do not cause any losses to your brethren". Replied the Holy Prophet (S.A.W.). The Meaning of this Law The Foqaha within the limits of this law have expressed differing opinions. 1

From Sheikh Ansari's point of view, the

meaning of the law "no (suffering) losses" and "no (causing) losses" is the negation of any rule in Shariah that would involve losses to people. Any such rule is declared none existent, i.e. if a contract which would cause losses to one party would have been considered binding and irrevocable it would be contrary to the above-mentioned law, but no such law is sanctioned in Shariah. The same is true in the case of a person who can not have any water without a great deal of difficulties or expenses. In such case he is not required to find water for Vozu. He has emphatically relied on this law in 1

jurisprudence.128 and the principles of From this scholar's point of view, the

meaning of this law amounts to an imperative prohibition. According to him any act that involves losses is prohibited and people must not involve themselves in such acts. As evidence to prove this he points out a great deal of expressions from the Holy Quran and the Sunnah which are very similar to what the law of no losses states. 129 Of such expressions is this, " ... after commencing the acts of Hajj, he is not allowed to have carnal relations or to lie or to Swear by the Name of God".130 He (Moses) said: "Go away; throughout your life you will not be able to let anyone touch you. This will be your punishment in this life. The time for your final punishment is inevitable. You will never be able to avoid it. Look at your god, which you have been worshipping. We will bum it in the fire and scatter its ashes into the sea131 From the Sunnah he quotes the following Hadith: Obedience to someone that would lead you to disobey the Creator is prohibited". That cheating Muslims is prohibited. 1

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He maintained that the law of "no losses" falls under the governmental commandments. It is on this basis that the Holy Prophet (S A W.) served as the administrator of the government and commander of the Muslim nation. He sanctioned such laws to abolish corruption not that they were the Divine laws. The following are of the evidence to establish this theory. (a) Ahmad Ibn HanbaJ has mentioned the expression of "no losses" among the rulings and judicial decrees of the Holy Prophet (S.A.W.). He has narrated it from Ubadah Ibn Samit saying. "Judging is no (suffering) losses and no (causing) losses". It is a fact that this expression is not a ruling to settle a dispute between two parties. Therefore, it must be of one of the commandments of the Holy Prophet (S A W.) that he issued to declare that no one has the right to cause losses to others and cause sufferings and constraints to others and that Muslims must also obey this commandment. (b) The case (of Jundab and the Ansari man mentioned above) that lead to the issuance of such commandment is another evidence to prove this point. The complaint of the Ansari man to the Holy Prophet (S A W.) was due to the fact that he was the head of the government of the Islamic system capable 1

of abolishing the evils of a transgressor Samrat Ibn Jundab was summoned and was informed of the complaint against him and that because he did not obey the commandment of the head of the government an order was issued to uproot his palm tree. This was to make a point that no one has the right to disobey the Islamic government and cause losses to others The step taken by the Holy Prophet (S A W.) in this case was an order of the government to establish a fact that people do not have the right to cause losses to each other. 133 Some of the

contemporary scholars have come up with a new theory about the law of "no losses". They maintain that this law is related to the relations among the people and not to the rules of Shariah and the Divine duties. With a view to the fact that in the society some times losses are found, the objective of this law is to inform people of the unacceptability of the activities that cause losses. The apparent meaning of this law indicates the negation of losses. It should be considered a metaphorical expression of discrediting all the activities that cause losses. Thus, the goal is to teach people that causing losses according to Shariah is prohibited and any thing that would cause losses or sufferings to others such as neighbors is unlawful. That the transactions that cause losses to one party are invalid. This theory, although in some respects, in regards to the results, is the same as some of the above-mentioned ones, however, in the matters of the acts of worship such as Vozu and fasting, it is different from them. According to those theories on (he basis of the existence of hardships and losses such acts of worships could be negated but on the basis of this new theory this can not be done on the basis of the law of "no losses". An act that would cause losses may be negated by this theory because the meaning of losses according to this theory is the losses that are caused by the people not the losses because of 1

Shariah.134 Coreion and Compulsion (Ikrah)

Coercion is one of the titles and captions that appears in various sections of the Fiqh with various kinds of effects and consequences and in most cases the rules of this law receives priority over the primary laws. According to the dictionary it means compelling and coercing some one to do something. 135 The Evidence proving the Authority of this Law In order to prove the authority of this law the Foqaha have mentioned some verses of the Holy Quran and some Ahadith as proof. 1. "No one verbally denounces his faith in God - Unless he is forced but his heart is confident about his faith. But those whose breasts have become open to disbelief will be subject to the wrath of God and will suffer a great torment' This does not apply to people like Ammar-e Yasir. It applies to those who with open hearts became unbelievers. It is they who are subject to the anger of God. 2. "Do not force your girls into prostitution to make money if they want to be chaste. If they have been compelled to do so, 137 God will be all merciful and all forgiving to them". 3. The Holy Prophet (S A 1

W.) addressing his followers said, "Mistakes, forgetting and all that is due to coercion, ignorance, inability and due urgency are forgiven (there is no sin for such acts) The kinds of Coercion and Compulsion (Ikrah) There are two kinds of coercion and compulsion: 1. The use of force against someone who is not able to counter such force such as water being forced to enter one's throat while he is fasting. This kind is called a complete compulsion (Iljaei) 2. The other kind of compulsion is like the case wherein one is threatened to imprisonment or physically hurt if he would not do a certain act. In this case one still may have the ability not to do it. This kind of 139 compulsion is called an incomplete compulsion, (gheir -Iljaei). The Difference between the Compulsion and Urgency Compulsion (Ikrah) is used when some one else would force one to do something or not to do some thing. In this case there are three elements, compulsion, compelling and compelled. Urgency (Izterar), however, is often used in a case wherein someone without the involvement of others is compelled to do or not to do something. The Rules for Compulsion (Ikrah) The rules for compulsion and coercion are scattered in various sections of the law without any proper categorization and order and to show a certain order for it is not an easy task. Because of this reason for one case of compulsion different kinds of Fatwa and legal opinion may come into existence. All that could be stated in such a case is that the ruling for an incomplete compulsion in terms of effects is different from those for a complete compulsion and coercion. In some cases both kinds of compulsion may have the same kind of rule. Along with the rule for an act under compulsion its primary rule should also be taken into consideration. This will help to find out if such rules could be removed due to compulsion or not and if so it then should be considered whether it is so due to complete compulsion or even incomplete compulsion would require such rules. For example one may consider the case of the contracts for certain transactions in which the invalidity of a contract incomplete compulsion is sufficient because of Ahadith and the Holy Quran consent of parties for the validity of a contract is one condition. "Believers, do not exchange your property in wrongful ways unless it is in trade by mutual

agreement140

Since the consent of parties is a condition for the validity of the contract even incomplete compulsion would invalidate it. Also from the Shariah one may have an understanding that in the case of the unlawfulness of murder and injuries to Muslims... due to the seriousness of such cases an incomplete compulsion would not justify it to follow the rules for compulsion. In such a case the rules for "important" and "more important" matters play their role. 141 Urgency or Exigency

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(Itferar or Zarurah) Izterar

literally and linguistically means to become compelled to do something.142 It also means dire need for something.142 To become compelled in doing something or to have a dire need for something may be considered as a cause and reason as when one urgently needs to sale his house due to a need. The first meaning is in consideration of the meaning of exigency and the second meaning is in consideration of the cause of the emergence of the exigency. 144 The great exegete (Tabari,) in (he interpretation of verse 173 chapter two writes: "Izterar, is a condition from which man can not escape like hunger that is not avoidable. 143 The Evidence Proving the Authority of the Law of Exigency All the Foqaha agree on the issue that the secondary title like exigency may become the cause for the inapplicability of some of the primary laws. Certain verses of the Holy Quran and certain Ahadith are cited as evidence in this matter. 1

1. "God has forbidden you to eat that which has not been properly slaughtered, blood, pork, and the flesh of any animal which has not been consecrated with a mention of the Name of Allah, God.. However, in an emergency, without the intention of transgression or repeating transgression, one will intention of transgression or repeating transgression, one will not be considered to have committed a sin. God is all forgiving and all merciful".146 2.

"It is unlawful for you to consume the following as food: an animal that has not been properly slaughtered, blood, pork, an animal slaughtered and consecrated in the name of someone other than Allah ... If anyone not (normally) inclined to sin is forced by hunger to eat unlawful substances instead of proper food, he may do so to spare his life. God is all forgiving and all merciful. 147 3. "If you have faith in God's revelations, eat the flesh of the animal, which has been slaughtered, with a mention of His Name. Why should you not eat such flesh when God has told you in detail what is unlawful to eat under normal conditions. Most people, out of ignorance, are led astray by their desires. Your Lord knows best those who transgress" 148 4. The Holy Prophet (S.A.W.) has said: "If one would not spare his life even by consuming carcasses for 149 food until he dies he will die without faith 5. "The Holy Prophet (S A W.) has said: 1

"If you are compelled, God has announced it lawful ",150 6. Imam Ali has said: "There is not anything that God has made unlawful but that He

Cases to which this Law may apply The Foqaha have applied this law to cases wherein there is an order or prohibition from Shariah. Only when there is an obligation or prohibition then this law is applied. In cases of desirable, detestable or permissible matters there is no need for the application of this law because acting against such cases is permissible any way. Although the evidence supporting the authority of this law such as the verses (in 1 and 2) above are indicative of certain prohibited matters only, however, the 1

indications in the Sunnah on this issue is rather of a general expression. They include all that is a must to do or to avoid. Some of the Foqaha have considered this quite beneficial in the cases 152 wherein dangers to lives are involved. Imam Khomeini has said this on this issue,

"All the unlawful matters become lawful in exigencies either because of saving lives, the body from decease or other such dangerous conditions wherein not acting in an unlawful manner would cause such a degree of hardship, e.g. in the case of hunger that normally is not bearable".153

The Exceptional Cases Although it may appear that all unlawful matters due to an exigency become lawful, however, as mentioned in the discourse on negation of hardships, this law is not applicable to those cases that the Shariah treats them in a special way. In those cases to which the indications of the verses of the Holy Quran and the Sunnah point out that even in exigencies one must not act in such an unlawful way, the Foqaha in such cases benefit from and apply the law of "important" and "more important". One example is taking the life of another human being due to an exigency. From the Shariah's point of view, without any doubt, to save one's own life or the lives of one's children one can not endanger the lives of other human beings. 154 Of some of the rules of the law of exigency, which by itself may be treated, as a very important subsection in Fiqh is this: "Acting against the primary law due to an exigency is permissible until it is over and not more".155 The Foqaha have considered this rule as a rule whose authority is self-evident and as a rule of reason. In other words, the law of exigency has two conditions: One is quantity, e g. in the case of hunger one is allowed to use inedible substances as much as it spares one's life and not more. The other condition is time. This rule is applicable only until the exigency exists. As soon as it is over the primary law will The application of this law in social issues and the issues that relate to the government also is subject to the two above-mentioned conditions. For example if the Islamic government due to an exigency would assign definite prices for certain commodities, firstly, it should be only to the limit of getting over with a dire need. Such a step would only be necessary in the case of the goods, which are being sold with excessive prices. Secondly, as soon as the conditions would turn to normal controlled prices should be abolished because the primary law in Shariah is for an open market and free competition in trade. About the permissibility of inedible substances for food in an exigency, Sheikh Tusi has said this, 1

"If one would fear for his life, he may consume inedible substances for food only to spare his life but not a bellyful of it".157 An Introductory Condition {Muqaddimah-Al- Wajeb/Haram) (Something

leading to an obligatory or prohibited act) The issue of being a lead or an introduction to something is one of the secondary titles that has produced a great deal of lengthy discourses in the works on Fiqh and the principles of jurisprudence. An act that in relation to the primary laws falls under one of the three of the 1

universal categories such as being desirable, detestable and permissible may, for certain reasons, become an introductory act. And as such it may become an obligation or a prohibition when it becomes a lead and an introductory factor towards the completion of another act that is a must to do or otherwise. Therefore, a change in the status comes into existence in the form of an obligatory or prohibited act Lhat was only a desirable, a detestable or permissible before. This comes into existence as an introductory or a leading relationship with something. An introductory or being a lead means to be as such that completion of an obligatory or a prohibited one etc. would depend on it and without it such obligation etc. would not come into existence. Because of such relationship the lead or the introduction also under a secondary title becomes either obligatory or prohibited. The Evidence Proving the Authority of this Law Most of the Foqaha have considered such evidence to come from reason only. They do not accept the fact that Shariah has given it an obligatory or prohibited status. Muhaqqiq-e Naeeni has said, "If completion of some act would depend on something else the latter also becomes obligatory because of the decision of reason. It is so because of the fact that the existence of such relation, both from the point of views of reason and common sense, the lead and introduction also become obligatory. All scholars agree on this issue". Some of the Foqaha instead of considering something as a lead and an introduction to a prohibited act have called it (sadd-e zara'i) which is one of the established principles and it literally implies blocking the

means to an expected end.

Imam Malik and Ahmad Ibn Ilanbal have considered this to be one of the principles in the fundamentals of religion. Ibn Qayyim has said that Sadd-e Zara'i is one fourth of religion. He has refercd to about one hundred verses and Ahadith as being the evidence for its authority. Abu Hanifah and Shaft 'i also have applied this principle in some cases. 159 From the point of view of these scholars anything that would serve as lead to and introduction for a prohibited act and the spread of evil must be stopped from taking place so that evil would not spread in the society and among the people. On the other hand anything that would become the lead to and an introduction for an obligatory act is obligatory. It has called Fath-e Zara'i (opening the way). However, the term Zara'i is used more often for the

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The

following verses of Quran and Ahadith are pointed out to be evidence of the authority of this view.

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1. "Believers, do not say bad words against the idols lest they (pagans) in their hostility and ignorance say such words against God. We have made every nation's deeds seem attractive to them. One day they will all return to their Lord who will inform them of all that they have done".161 2. "Believers, do not address the Prophet (S.A.W.) as ra'ina (whereby the Jews, in their own accent, meant: Would that you would never hear), but call him unzurna

(meaning: P,ease sPeak 1° slowly so that we understand), and then listen. The unbelievers will face a painful torment".162 In this verse it is prohibited to use the word because the unbelievers would use this word in a slandering manner. 3. From Hadith, those Ahadith that prohibit hoarding of goods are considered to be sadd-e zara'i (to remove the ladder to evil) 163 4. The Ahadith of the Holy Prophet (S.A.W.) prohibiting to accept gratuity from an indebted person is considered as sadd-e zara 'i so that people would not become involved in accepting usury. 164 The Effects of this Law on Social Issues The existence of this law in Fiqh has a great deal of favorable effects. Many of the obligations and prohibitions of social nature related to the society and the government are based on this law. It is a fact that the prosperity of an orderly social life depends on the existence of people educated and skillful in different social enterprises such as industries, education, the army, medicine and agriculture. The Foqaha have also issued the Fanva, that if there is not enough people with such skills it is an obligation on the whole society in the form of a social obligation to acquire such skills and know- how. They must do so until enough people are educated for such tasks, even though, regardless of the social nature of these obligations, they by themselves are not obligatory. Many of the commandments that come from the Islamic government are based on this law. The instructions and the commandment of the Holy Prophet (S A W.) to manage and maintain the social order all may have been based on this law.

Conclusion

Without any doubt, the Islamic society due to new changes and developments in all walks of life is facing new problems and the Shariah must accommodate such issues and solve such problems according to its own standards. In 1

such a case it is the task of the Faqih who is well aware of the conditions of the time to take two steps: First, he must clarify properly the basics that Fiqh requires and rectify all the complexities through the skills of being a Faqih It is very much possible to solve a case with the application of the primary laws without resorting to the secondary laws. Secondly, he must carefully study the cases and subjects to which the secondary laws could be applied so that when necessary after inapplicability of the primary laws the secondary laws would be applied. Through such process it becomes possible to find proper Islamic solutions to all the issues and the problems of the society in all times and circumstances. The secondary laws are beneficial utilities for the government. The Islamic government may study any newly emerging case and find proper solutions for the key issues such as balancing the economy, curbing inflation, controlling the population, regulating prices of goods, issues related to currencies, banking issues, taxes, internal and external affairs of trade etc. The 1

secondary laws, however, must not be carried out to their extremities and with the emergence of every new case the secondary laws must not, before proper studies, be declared as solutions. Proper discernment of the cases and subjects to which a secondary law could be applied requires a sound degree of knowledge and awareness. The basis for the application of the secondary laws is when it would not be possible to apply the primary laws. To explore this and the case to which the secondary laws could be applied, as just mentioned, requires a sound degree of knowledge of the Islamic resources. For example when and to which case the rules of no harm and no hardships are applied or that which case is important and which one is more important all require proper knowledge of the Shariah. The 1

secondary laws come from very high grounds in the Shariah and that such laws play very significant roles in the law. In many cases the primary laws do not have the necessary force, especially, the social issues. In such fields the secondary laws work as the key to solve difficult problems. Taking into consideration the availability of such sources of laws to the Islamic social system in all times and places it will have proper laws for all cases. In reality the secondary laws are complimentary to the primary laws. The 1

existence of the secondary laws in the Islamic system is not due to shortages of legal resources. On the contrary, it is the sign of its richness and the vastness of its resources. These laws exist due to the unavoidable emergence of changes that take place in human life and in certain circumstances and surroundings. The presence of such categories of laws in the Shariah of Islam are significant factors in dealing with changes. It is a degree of flexibility for variously changing needs of all times and locations. Islam is a religion with preciseness of mathematical characteristics. It calculates with accuracy and balances that which is important and which is more important. According to the Islamic system in times of need, an issue of vitality could and should be sacrificed for that of greater vitality. This factor has bestowed proper flexibility to the system. We have not introduced such a factor into the system. The system has been made this way and in this form it has been given to us. Even if we wanted to make the system flexible, we did not have such a right in the first place. Flexibility is a component part of the nature of this system, and it is an equating process that it contains for us. The position of the secondary rules and laws in the Shariah is as those of an integral part in a system. Evidence to this is the fact that the authoritative basis for these laws and the primary laws are the Holy Quran and the Sunnah. Secondly, the Foqaha according to their methodology of reasoning have dealt with the secondary laws along with the primary laws. They have not dealt with the secondary laws in a separate chapter. 1

sources:

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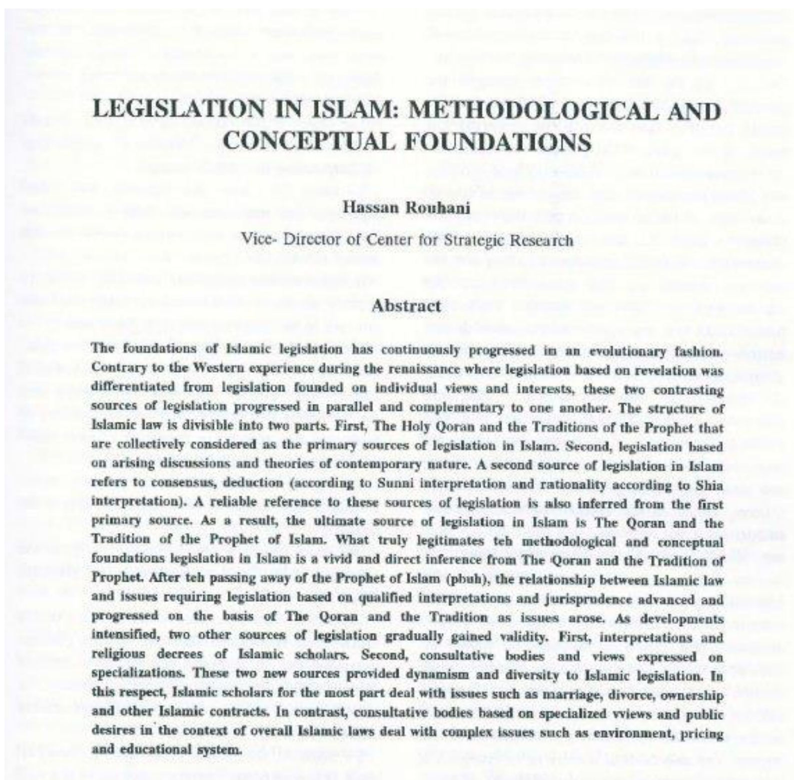
سرقت علمی حداقل ۴۰ درصدی در مقاله‌ی آقای حسن روحانی، چاپ شده در ژورنال بین‌المللی دانشگاه تربیت مدرس



LEGISLATION IN ISLAM: METHODOLOGICAL AND CONCEPTUAL FOUNDATIONS

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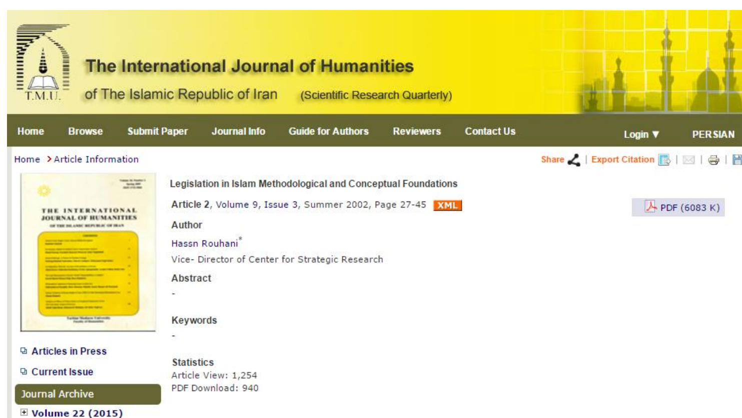
Abstract

The foundations of Islamic legislation has continuously progressed in an evolutionary fashion. Contrary to the Western experience during the renaissance where legislation based on revelation was differentiated from legislation founded on individual views and interests, these two contrasting sources of legislation progressed in parallel and complementary to one another. The structure of Islamic law is divisible into two parts. First, The Holy Qoran and the Traditions of the Prophet that are collectively considered as the primary sources of legislation in Islam. Second, legislation based on arising discussions and theories of contemporary nature. A second source of legislation in Islam refers to consensus, deduction (according to Sunni interpretation and rationality according to Shia interpretation). A reliable reference to these sources of legislation is also inferred from the first primary source. As a result, the ultimate source of legislation in Islam is The Qoran and the Tradition of the Prophet of Islam. What truly legitimates teh methodological and conceptual foundations legislation in Islam is a vivid and direct inference from The Qoran and the Tradition of Prophet. After teh passing away of the Prophet of Islam (pbuh), the relationship between Islamic law and issues requiring legislation based on qualified interpretations and jurisprudence advanced and progressed on the basis of The Qoran and the Tradition as issues arose. As developments intensified, two other sources of legislation gradually gained validity. First, interpretations and religious decrees of Islamic scholars. Second, consultative bodies and views expressed on specializations. These two new sources provided dynamism and diversity to Islamic legislation. In this respect, Islamic scholars for the most part deal with issues such as marriage, divorce, ownership and other Islamic contracts. In contrast, consultative bodies based on specialized vviews and public desires in the context of overall Islamic laws deal with complex issues such as environment, pricing and educational system.

بررسی‌ها نشان می‌دهند مقاله‌ی آقای حسن روحانی[1] که تابستان سال ۲۰۰۲ میلادی (مصادف با سال ۱۳۸۱ هجری شمسی) در جلد نهم ژورنال بین المللی علوم انسانی دانشگاه تربیت مدرس[2] منتشر شده، حداقل حاوی «۴۰ درصد» سرقت علمی‌ست. گزارش بررسی سرقت علمی این مقاله توسط نرم‌افزار معتبر iThenticate در ادامه پیوست خواهد شد. متون هایلایت شده، بدون رعایت ضوابط اولیه‌ی علمی و آکادمیک از مراجع دیگر کپی شده اند.

مهم‌ترین مراجعی که از آنان کپی‌برداری و سرقت شده عبارت‌اند از:



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-Modern Islamic Political Thought, Hamid Enayat, 1982

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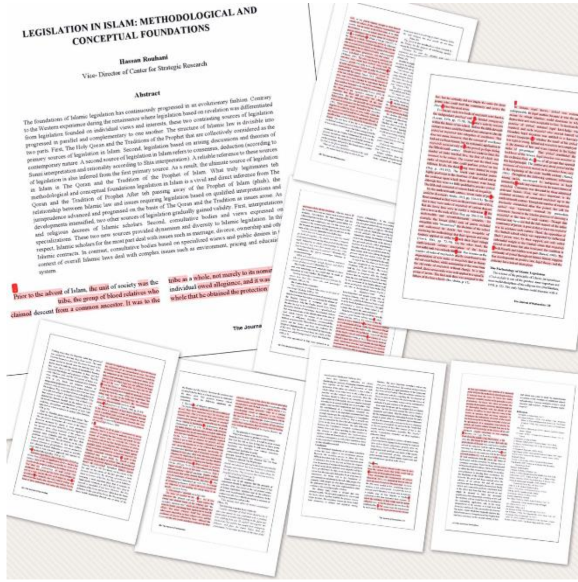
[1] Legislation in Islam Methodological and Conceptual Foundations

[2] http://eijh.modares.ac.ir/article_5432.html


LEGISLATION IN ISLAM: METHODOLOGICAL AND CONCEPTUAL FOUNDATIONS

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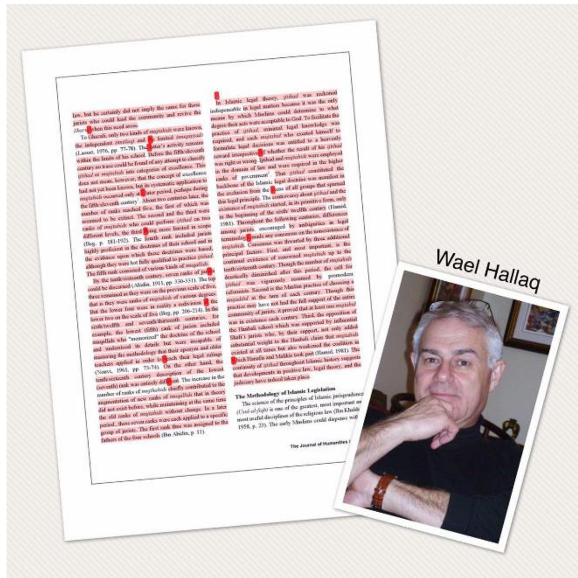
Abstract

توضیح مهم: برخی مراجع فوق در مقاله‌ی آقای روحانی رفرنس داده شده (کتاب نوئل کالسون) و برخی رفرنس داده نشده اند (کتاب حمید عنایت پژوهشگر فقید ایرانیِ علوم سیاسی در آکسفورد لندن و دانشگاه تهران در سال‌های پیش و ابتدای انقلاب، و مقاله‌ی وائل حلّاق پروفسور و پژوهشگر حقوق اسلامی در دانشگاه‌های امریکا و متولد ناصره‌ی فلسطین). نکته‌ی حائز اهمیت آن است که در هر دو حالت، سرقت علمی کلمه به کلمه (Verbatim Plagiarism) محرز است.

تکلیف سرقت‌های علمی بدون اشاره به مرجع مشخص بوده و نیاز به توضیح ندارد. از دگر روی، هنگامی که نویسنده‌ی یک رساله یا مقاله عیناً متن دیگری را نقل می‌کند بایستی از علامت "نقل قول" استفاده نماید، چرا که کپی‌کاریِ بدون نقل قولِ یک مطلب به معنای انتساب آن به خود است و به هیچ وجه رفرنس دادن به متن اصلی به معنای رفع تکلیف و تطهیر عمل انجام گرفته نیست. شایان ذکر است که در غرب، با سرقت‌های علمی به مراتب کمتر از این با شدت و جدیت برخورد می‌شود.



در یک صفحه از مقاله، آقای حسن روحانی متنی طویل از مقاله‌ی «آیا باب اجتهاد بسته شده است؟» نوشته‌ی پروفسور وائل حلّاق[1] متفکر فلسطینی ساکن در غرب کپی کرده و تنها کلمات معدودی را در کل این خطوط پرشمار تغییر داده اند، همچون کلمه‌ی عربی tabaqat به excellence و کلمه‌ی backbone به scene.

در مقاله‌ی آقای روحانی هیچ‌گونه رفرنسی به کار حلّاق داده نشده و با توجه به سرقت علمی حداقل ۴۰ درصدی در کل مقاله، سرقت علمیِ درجه‌ی ۹ از ۱۰ محرز است. جهت کسب اطمینان می‌توانید مقاله‌ی «آیا باب اجتهاد بسته شده است؟» را دانلود[2] نموده و عبارات هایلایت شده را در آن جستجو و ملاحظه نمایید. سال انتشار مقاله‌ی آقای روحانی ۲۰۰۲ و سال انتشار مقاله‌ی پروفسور حلّاق به ۱۹۸۴ باز می‌گردد. بدین ترتیب مقاله متقلبانه بوده و بایستی این ژورنال برای ترمیم اعتبار خود هم که شده آن را رسماً حذف نماید. در ادامه گزارش نرم‌افزاری بررسی مقاله‌ی آقای حسن روحانی پیوست خواهد شد؛ عبارات هایلایت شده سرقتی‌اند.

پی‌نوشت: ذیل نام آقای روحانی در مقاله‌ی ژورنال تربیت مدرس نوشته شده «قائم مقام رئیس مرکز تحقیقات استراتژیک» و در صفحه‌ی ویکی‌پدیای آقای حسن روحانی آمده: «حسن روحانی دارای مرتبه علمی استاد پژوهشی مرکز تحقیقات استراتژیک می‌باشد. وی به زبان‌های عربی و انگلیسی مسلط است»

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۱ صفحه‌ی پروفسور حلّاق در دانشگاه کلمبیا واقع در منهتن نیویورک:
www.columbia.edu/cu/mesaas/faculty/directory/hallaq.html

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Legislation in Islam: Methodological and Conceptual Foundations

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Abstract

The foundations of Islamic legislation has continuously progressed in an evolutionary fashion. Contrary to the Western experience during the renaissance where legislation based on revelation was differentiated from legislation founded on individual views and interests, these two contrasting sources of legislation progressed in parallel and complementary to one another. The structure of Islamic law is divisible into two parts. First, The Holy Qoran and the Traditions of the Prophet that are collectively considered as the primary sources of legislation in Islam. Second, legislation based on arising discussions and theories of contemporary nature. A second source of legislation in Islam refers to consensus, deduction (according to Sunni interpretation and rationality according to Shia interpretation). A reliable reference to these sources of legislation is also inferred from the first primary source. As a result, the ultimate source of legislation in Islam is The Qoran and the Tradition of the Prophet of Islam. What truly legitimates the methodological and conceptual foundations legislation in Islam is a vivid and direct inference from The Qoran and the Tradition of Prophet After the passing away of the Prophet of Islam (pbuh), the relationship between Islamic law and issues requiring legislation based on qualified interpretations and jurisprudence advanced and progressed on the basis of The Qoran and the Tradition as issues arose. As developments intensified, two other sources of legislation gradually gained validity. First, interpretations and religious decrees of Islamic scholars. Second, consultative bodies and views expressed on specializations. These two new sources provided dynamism and diversity to Islamic legislation. In this respect, Islamic scholars for the most part deal with issues such as marriage, divorce, ownership and other Islamic contracts. In contrast, consultative bodies based

on specialized views and public desires in the context of overall Islamic laws deal with complex issues such as environment, pricing and educational system.

Prior to the advent of Islam, the unit of society was the tribe, the group of blood relatives who claimed descent from a common ancestor. It was to the tribe as a whole, not merely to its nominal leader, that the individual owed allegiance, and it was from the tribe as a whole that he obtained the protection of his interests. The exile, or any person hapless enough to find himself outside the sphere of this collective responsibility and security, was an outlaw in the fullest sense of the term, his prospects of survival remote unless he succeeded in gaining admittance into a tribal group by a species of adoption or affiliation (Williams, 1904, pp. 284-293). To the tribe as a whole belonged the power to determine standards by which its members should live. But here the tribe is conceived not merely as the group of its present representatives but as a historical entity embracing past, present, and future generations. And this notion, of course, is the basis of the recognition of a customary law (Williams, 1904). The tribe was bound by the body of unwritten rules which had evolved along with the historical growth of the tribe itself as the manifestation of its spirit and character. Neither the tribal Sheikh nor any representative assembly had legislative power to interfere with this system (Ernest, 1952) . Modifications of the law, which naturally occurred with the passage of time, may have been initiated by individuals but their real source lay in the will of the whole community, for they could not form part of the tribal law unless and until they were generally accepted as such (Torrey, 1892). In the absence of any legislative authority it is not surprising that there did not exist any official organization for the administration of the law. Enforcement of the law was generally the responsibility of the private individual who had suffered injury (James, 1965). Tribal pride usually demanded that intertribal disputes be settled by force of arms, while within the tribe recourse would usually be to arbitration. But again this function was not exercised by appointed officials. A suitable ad hoc arbitrator was chosen by the parties to the dispute. The sole basis of law lay in its recognition as established customary practice (Schacht, 1986, p. 6).

It was in these circumstances that Islam emerged and the will of God as transmitted to the community by his Prophet Muhammad (S.A.W.) in the *Quranic* revelations came to supersede tribal customs in various respects. The injunctions revealed were all based on the necessities and good of the human nature created by God, as the *Quran* specifies:

"Then set your face upright for religion in the right state the nature made by Allah in which He has made men; there is no altering of Allah's creation; that is the right religion, but most people do not know__." (Rum, 30).

The *Quran* is also introduced as a book revealed by the Creator for the purpose of establishing equality among the human beings:

"Certainly We sent Our apostles with clear arguments, and sent down with them the Book and the balance that men may conduct themselves with equity." (Hadid, 25).

In order to emphasize that the rules already in practice are not to be followed any longer and new laws are to be complied with, the *Quran* says:

"And whoever did not judge by what Allah revealed, those are they that are the transgressors. You should judge between them by what Allah has revealed, and do not follow their low desires, and be cautious of them, lest they seduce you from part of what Allah has revealed to you." (Ana'm, 150).

The *Quran* specifies that its purpose is to introduce and establish new laws that should be followed:

"We made for you a law, so follow it and not the fancies of those who have no knowledge." (Jathieh, 18).

Inevitably, therefore, the revealed law plays a crucial role in Muslim thinking. In this *Quranic* command lies the supreme innovation introduced by Islam into the social structure of society: the establishment of a novel authority possessing legislative power.

To Muslims, the *Quran,* being the very word of God, is the authority wherefrom emanates the very conception of legality and every legal obligation. Among the

Muslims, there is no doubt that the only main lawgiver is God. Every other legislating
authority must base its legitimacy on revelation. The *Quran* repeatedly stresses it with an increasing emphasis:

"The command is for none but God: He has commanded that you obey none but Him: that is the right path" (Yusof, 40).

"Follow the revelation given unto you from your Lord, and follow not, as guardians or protectors other than Him" (Aara'f, 3).

Islamic scholars have long discussed the issue whether even the Prophet has the right to legislate or not. Some scholars are convinced that in legislating, the Prophet is only a messenger (Maududi, 1978, p. 9). They base their argument on the *Quranic* verse saying:

"I am only a mortal like you, it is revealed to me" (Kahf, 110).

Even the time of revealing a specific injunction was set by God and the Prophet communicated the revelations at appropriate time set by God. The *Quran* says to the Prophet:

"Do not make haste with the Quran before its revelation is made complete to you" (Taha, 114).

Other scholars argue that the Prophet had the authority to legislate, referring to the *Quranic* verse saying:

"Whoever obeys the Apostle, he indeed obeys Allah" (Nesa, 80).

They also refer to the lifetime of the Prophet, when the Muslims obeyed the Prophet's, decrees uncritically. However, even this group of scholars admit that the legitimacy of the Prophet emanates from the will of God. They refer to the revelation saying :

" *Whatever the apostle gives you, accept it, and from whatever he forbids you, keep hack"* (Hashr, 7).

The study of the injunctions of the *Quran* and the lifetime period of the holy Prophet leads us to the conclusion that the Prophet legislated in two ways. Firstly, he

legislated on the basis of the revelations and thus his role as a lawgiver was only that of a messenger. This is stressed by the *Quranic* revelation saying:

"Nor does he speak out of desire. It is naught but revelation that is revealed" (Najm, 3).

We further read in the *Quran:*

"O apostle! deliver what has been revealed to you from your lord" (Maddeh, 67).

Secondly, he legislated as the leader of the state for the purpose of running the various affairs of the society. This function of legislating can be deduced from the revelation saying:

"The Prophet has a greater claim on the faithful than they have on themselves" (Ahzab, 6).

The *Quran* further stresses this point saying: *"Surely those who swear allegiance to you do but swear allegiance to Allah*" (Fath, 6).

This gives the Prophet the role of a lawgiver as that of a leader. In this context, although the Prophet legislated on the basis of expediency, welfare and prosperity of the society, his legitimacy was still derived from the will of God. Therefore in Islamic legislation, the legitimacy of laws is derived solely from God and the Prophet is ranked as the second main lawgiver after God. For this reason, the *Quran* and the *Sunna (Sharia)* establish the two fundamental pillars on which Islamic legislation rests. The structure of *Sharia* was consummated during the lifetime of the Prophet, in the *Quran* and the *Sunna*. This brings us to the recognition of an important fact which is generally overlooked. It is that the invariable basic rules of Islamic Law are only those prescribed in the *Sharia*.

Important features of legislation in the *Quran* and the *Sunna*

It has to be noted that the *Quran*, being basically a book of religious guidance, is not an easy reference for legal studies. It is more particularly an appeal to faith, human soul and Islamic worldview rather than a classification of legal prescriptions. Some Islamic scholars, however, have classified the *Quranic* legal prescriptions.

Regarding family law, they are laid down in 70 injunctions; civil law in another 70; penal law in 30; jurisdiction and procedure in 13; constitutional law in 10; international relations in 25; and economic and financial order in 10 (Khallaf, 1956, pp. 34-35).

Such an enumeration, however, can only be approximate. For our purposes, however, the examination of the nature and features of Islamic legislation is of more importance. Probing the *Quran* and the *Sunna (Sharia)* leads us to the important and fundamental status of the legislation in Islam. The following illustrations can highlight the main features:

1- The *Sharia* has been formulated in a fashion whose application is easy for the Muslims and a Muslim will not have to suffer any hardship or meet any difficulties to implement the Islamic laws. The *Quran* specifies:

"Allah does not impose upon any soul a duty hut to the extent of its ability" (Baqarah, 286).

The Prophet himself comments on *Sharia* saying:

"I *am the messenger of an easy religion"* (Hanbal).

"This religion is not strict, thus you also go easy on other fellow human beings" (Bokhari).

The best example is the regulations about fasting. Fasting which is incumbent on any Muslim can be abrogated for any Muslim who is sick or is travelling. The *Quran* specifies:

"... and whoever is sick or upon a journey, then *(he shall fast)* a *(like) number of other days: Allah desires ease for you, and he does not desire for you difficulty*" (Baqarah, 185).

Another example relates to the Islamic penal law. The Islamic penal law (hodud) is abrogated when there emerges any doubt regarding the conditions enforcing the law. The Prophet specifies:

"Stop carrying out hodud (Islamic punishment) where there is any doubt or if an excuse can be found" (Mosa, p. 129).

The Prophet further specifies that:

"Forgiveness is better than punishment" (Mosa).

2- They are basically inclined towards establishing general rules without indulging in much detail. As regards civil law, (Al-shatibi) the *Quran says*:

"O ye who believe! Appropriate not one another's wealth among yourselves in falsehood, except it be as a trade by mutual consent" (Ra'ad, 29).

This clause postulated in the seventh century[1], the principle of "mutual consent" as being enough to conclude a contract at a time when formalities were abounding in Roman Law. Nallino records that "it is well known that in the Hellenistic environment the purchase-sale is a "real" contract, whereas all the Muslim schools are unanimous in considering it a purely "consensual" contract, and this in neither by a return to the original Roman conception nor because they have always posed the problem of the distinction between "real" and "consensual" trade, but simply on the basis of a passage of the *Quran* (Nesa, 33), where it is ordained that commercial acts *(tijarat)* should take place in virtue of consensual contracts (tarazi: with mutual consent)" (Nallino). Schacht (1955) admits that the principle which this *Quranic* injunction introduced could be considered a complete abnormality in the history of old statutes. The Prophet Says:

"Muslims have to abide by their conditions except one that makes the unlawful lawful or the lawful unlawful" (Zarqa, p. 126).

This saying of the Prophet implies the principle of freedom of conditions upon concluding contracts within the public order. As regards criminal law, says the *Quran:*

"Every soul is held in pledge for its own deeds" (Moddather, 38).

"Each soul earns only on its own account, nor does any laden bear another's load" (Ana'm, 16).

These injunctions state a basic principle in criminal law, namely, the personal responsibility and punishment of the guilty thus suppressing all vicarious responsibility. As regards the constitutional law, The *Quran* says:

"And those who answer the call of their Lord and establish worship, and whose affairs are decided by counsel among themselves" (Shura, 3).

One of the attributes of the believers in such injunctions is that their affairs are settled by consultation. This includes the principle of representation in government. With respect to international law, The *Quran* declares:

"O mankind! We have created you male and female, and have made you nations and tribes that ye may know one another (and be good to one another). The noblest of you with God is the best in conduct" (Hojora't, 13).

The injunction states clearly the oneness of mankind, the brotherhood of man, and the international peace which can be achieved only when nations come to know one another, be good to one another, rid themselves of all kinds of inferiority complexes as well as superiority complexes, and recall that the best in the eyes of God is the best in conduct. These are all principles without which no international law can exist (Hamidullah, p. 43).

3- *Sharia* teaches us that human beings all must be treated on the same footing and no privilege is assumed for any Muslim before the law. On this basis, race, nationality, social status, etc. pose no advantage or disadvantage for some Muslims against the others. This equality between the Muslims before *Sharia* is best reflected when Ali who was the Caliph of the Islamic society *(Kufa)* was summoned to the court (Al-Amini, 1987). When Ali appeared in court as the defendant, the judge addressed the plaintiff by his name while addressing Ali by his honorific title (konyeh). Ali stopped the process of judging protesting strongly at being called by his title as it could distort the administration of justice which is one of the main goals of *Sharia*. This equality of Muslims before the Islamic laws is based on the *Quranic* verses saying:

"*.... And He it is who has brought you (Mankind) into being from a single soul"* (Ana'm, 70). *"He it is who created you from a single being and of the same kind did He make his mate"* (Aara'f, 189).

Furthermore, the *Quran* stresses that all human beings enjoy the same honour and respect. It specifies:

"And surely we have honoured all the children of Adam" (Esra', 70).

4-*Sharia* deals with actual events. Presupposition was basically excluded from its philosophy of legislation thus differing from other codes of law which legislate upon the presumption and calculation of probabilities. This trend in Islamic Law is deliberate and not a matter of coincidence.

The Prophet said:

"God has enjoined certain enjoinments, so do not abandon them. He has imposed certain limits, so do not transgress them. He has prohibited certain things, so do not fall into them. He has remained silent about many things, out of mercy and deliberateness, as He never forgets, so do not ask me about them" (Ibn al-Qayyim, pp. 11-12).

Again, he instructed his followers to avoid asking his guidance on every issue. Said he:

"Leave me as long as I remain silent. Too much questioning brought only disaster upon people before you. Only if I forbid your doing anything, then do not do it, and if I order you to do something, then try to do whatever you can of it" (Ibn al-Qayyim, pp. 71-72).

The Prophet even went so far as to hold blameworthy the one whose undue questioning was responsible for the prohibition of something which had been left unspecified before his question. He said:

"The worst guilt of a Muslim against Muslims is that of him whose undue question caused the prohibition of what would have been left permitted had he not asked" (Khallaf, 1956).

In all these sayings, Muhammad was only conveying and stressing the clear command of the *Quran:*

"O you who believe! do not put questions about things which if declared to you may trouble you, and if you question about them when the Quran is being revealed, they

shall be declared to you; Allah pardons this, and Allah is Forgiving Forbearing. A people before you indeed asked such questions, and then became disbelievers on account of them" (Ma'edeh, 101).

This *Quranic* text can be translated as "when the *Quran* is being revealed" or "when the *Quran* has been revealed." Thus, we can derive the interpretation that questions are allowed for more elaboration on a general rule which had been revealed, and it could also mean a warning against much asking during the time when the *Quran* was being revealed (Qayyim, p. 72). This method of legislation, intended to legislate only for actual events and not upon presuppositions, is apt to minimize the definite limitations imposed on human dealings. We may call it a realistic method. The companions of Prophet Muhammad were characterized with this spirit of realism and often refrained from speculation on hypothetical issues. Ibn Ka'b, when once asked for his opinion on such an issue, asked: "Has it happened?" As the answer was "no", he said: "Then leave us at ease until it happens. When it does happen, we shall pass our judgment accordingly" (Qayyim, p. 64). This realistic nature of both the *Quran* and the *Sunna* is dominated by a basic tendency which is not usually associated with the term "religion": the repeatedly declared will of God to make things easier for man. Here are some quotations from the *Quran* which explicitly illustrate this tendency:

"God would not place an embarrassing burden upon you, but He would purify you and would perfect His grace upon you, that you may give thanks" (Ma'edeh, 6). *"God desires for you ease, He desires not hardship for you"* (Baqarah, 186)..*"God takes not a soul beyond his capacity*" (Baqarah, 286). *"He has not laid upon you in religion any hardship*" (Hajj, 78).

When we read these injunctions within their proper contexts in the *Quran,* we see that they do not merely state theoretical rules. The first injunction, for example, comes immediately after the one relieving the sick and the traveller from the obligation of fasting until the sick recovers and the traveler returns home. Muhammad was the example of this tendency throughout his Prophetic career. His

wife A'ishah said: "Whenever the choice was his, it was always the easier of two things that he chose, unless it would have been a sin; then he was far from it" (Al-Shatibi, p. 343). And he himself said:

"Behold, this religion, is ease, and whoever goes against its nature and overdoes it, will be overwhelmed by it. So take the middle path, and approach perfection and be of good cheer".

5- That which is not prohibited is permissible. Islamic Law was not meant to paralyze people so

that they might not move unless allowed to. Man, on the contrary, is repeatedly called upon by the *Quran* to consider the whole universe as a Divine grace meant for him, and to exhaust all his means of wisdom and energy to get the best results. Says the *Quran:*

"And God has made of service unto you whatever is in the heavens and whatsoever is in the earth; it is all from Him. So herein verily are portents for a people who reflect" (Jathieh, 13).

This characteristic is further represented in the following *Quranic* injunctions which prohibit certain items of food:

"Say: I do not find in that which has been revealed to me anything forbidden for an eater to eat of except that it be what has died of itself, or blood poured forth, or flesh of swine for that surely is unclean _ or that which is a transgression, other than (the name of) Allah having been invoked on it; but whoever is driven to necessity, not desiring nor exceeding the limit, then surely your Lord is Forgiving, Merciful" (Ana'm, 145).

The *Quran* also says:

"He has explained to you that which is forbidden to you, unless you are compelled thereto" (Ana'm, 119).

And again:

"He had made clear unto them what they should guard against" (Towbeh, 115).

On the other hand, the *Quran* blames those who had forbidden to themselves in the name of God what He had not forbidden, and about them it says:

"Then who does greater wrong than he who devises a lie concerning God?" (Ana'm, 144).

Further, the universe is described as an adornment of God meant for the enjoyment of His bondmen; thus, the more religious man is, the more alive and comprehensive his relation with the universe becomes. Says the *Quran:*

"Say (O Muhammad): Who has forbidden the adornment of God which He has brought forth for His bondmen, and the good things of His providing?" (Aara'f, 32).

This injunction is an answer to those who dare to prohibit what God has not prohibited (Ibn Kathir, p. 211). As Islam discouraged rigorous practices, such as monastic life, it also prohibited questions relating to details on many points which would require this or that practice to be made obligatory, and much was left to individual will or the circumstances of the time and place. The exercise of judgment occupies a very important place in Islam and this gives ample scope to different nations and communities to frame laws for themselves to meet new and changed situations. The hadith shows that the Prophet also discouraged questions on details in which a Muslim could choose a way for himself (Mohammad Ali, p. 271).

6. The implementation of any articles of *Sharia* must not lead to loss or damage to another Muslim. This important feature was deduced from an incident which happened at the lifetime of the Prophet. A man who owned a house went to the. Prophet complaining that another Muslim entered his house without permission to pick dates from a palm-tree which the man owned but was located in his house. The holy Prophet told the man who owned the palm-tree to sell his tree to the owner of the house. The man disagreed arguing that he owned the tree and so the right of ownership gave him the right to reach his tree even if it is located in somebody else's property. The man, therefore, continued trespassing on the house. The Holy Prophet, hearing the complaint for the third time, ordered that the tree must be removed or cut down (Ansari, 1982, p. 68). The judgement passed by the Prophet led to an important

principle of the Islamic law which is now known as the important feature of not imposing losses or harm on a Muslim through implementing Islamic laws *(Asle-la'-Zarar)*. On this basis, no Muslim is allowed to cause harm to another Muslim arguing that he is implementing the law. In such cases the enforcement of the law must be ceased. This feature is also supported by the *Quranic* verses. When Muslims deal with each other in contracting a debt for a fixed time, the *Quran* advises that a witness should be called in to supervise the procedure; however, it further specifies that no harm should be done to the witness:

"When dealing with each other in contracting a debt, call in a witness and let no harm be done to the witness" (Baqarah, 282).

Another example is provided by the *Quran* when it advises mothers on suckling their babies. The *Quran* advises that although mothers should suckle their children but they are committed only to the extent of their capacity so that no harm can be caused to mothers:

"No soul shall have imposed upon it a duty but to the extent of its capacity, neither shall a mother be made to suffer harm on account of her child" (Baqarah, 233).

Consequently, this main feature of *Sharia* that Islamic laws should not be enforced to the detriment of Muslims is even complied with by *foqaha* today.

7- As regards the prohibitive laws, the *Quran* sometimes uses a method which could gradually meet a growing readiness in the society where the revealed enjoinments are to be implemented (Ibn Khathir, pp. 255-256). A good example is the prohibition of intoxicants. It was gradually prohibited, first with the *Quranic* words:

"They question thee about intoxicants and games of chance. Say: In both is great sin and some utility for men, but the sin of them is greater than their utility" (Baqarah, 219).

There is not, in this text, a definite prohibition of intoxicants. Then were revealed the words of the *Quran:*

"O you who believe! Draw not near unto prayer when ye are drunken, till you know that which you utter" (Nesa, 43).

Prohibition in this clause is only from praying while drunk. Then were revealed the verses:

"O you who believe! Intoxicants and games of chance and sacrificing to stones set up and divining by arrows are only uncleanness, the devil's work; so shun it that you may succeed." "The Satan only desires to cause enmity and hatred to spring in your midst by means of intoxicants and games of chance, and to keep you off from the remembrance of Allah and from prayer. Will you then desist?" (Maedeh, 90-91).

A probing of these texts reveals that all the *Quranic* texts about intoxicants had been heading towards their prohibition. The first text stresses their evil as against their utility in order to stimulate a moral deterrent. The second text stigmatizes intoxicants as spoiling prayer, and forbids drinkers from praying until they are sober, thus backing the moral deterrent by the inescapable necessity of avoiding drunkenness in order to be able to perform the five obligatory daily prayers at the proper times. In the third text, the *Quran* describes intoxicants as "the devil's work" together with their prohibition. The Muslim society had been gradually prepared for such a prohibition; so well prepared that when the Prophet's messenger announced that the text forbidding intoxicants had been revealed, the Muslims poured forth on the ground all the intoxicants which they had stored. History' records that on the very day of its prohibition, wine flowed in the streets of Medina (Al-Bukhari, pp. 20-46). There is not, so far as we know, such a precedent in the history of legislation of a people complying so swiftly with the law especially in the case of the prohibiting of drinking, which was a deep-rooted habit of Arab society, glamoured by its poets and affecting its trade.

These documents have led distinguished scholars to refer to Islamic Law as the main component of Islam. Gibb referring to the concept of the Islamic Movement while considering it to be the main characteristic of the entire Islamic structure states that: "The kind of society that a community builds for itself depends fundamentally

upon its belief as to the nature and purpose of the Universe and the place of the human soul within it. This is a familiar enough doctrine and is reiterated from Christian pulpits week after week. But Islam possibly is the only religion which has constantly aimed to build up a society on this principle. The prime instrument of this purpose was law" (Gibb, 86-87). Furthermore, Schacht (1955) also emphasizes that: "Islamic Law is the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel
of Islam itself" (p. 28).

The Evolution of Islamic Legislation

It is clear, then, that the two main lawgivers in Islam are God and the Prophet. As long as the Prophet was alive, legal issues were settled by him as the ideal person with the function of interpreting and explaining the provisions of the divine revelation. After the demise of the Prophet, there was no longer such a trusted authority available. Nevertheless, the fact remained that the relationship between law and a people's actual affairs is a permanent and evolutionary one. For this reason and in response to the everchanging requirements of social life, the Prophet set a path to fill this gap. He did this on the basis of the *Quranic* injunction revealed to him:

"And it does not beseem the believers that they should go forth all together; why should not then a company from every party from among them go forth that they may apply themselves to obtain understanding in religion, and that they may warn their people when they come back to them that they may be cautious?" (Towbeh, 122).

Furthermore, the *Quran* encourages Muslims to acquire knowledge:

"Allah will exalt those of you who believe, and those who are given knowledge, in high degrees; and Allah is Aware of what you do" (Mojadeleh, 11).

The Prophet incessantly urged the Muslims to learn and seek knowledge to the extent that he made it incumbent on every Muslim. The Prophet said:

"Seeking knowledge is incumbent on every Muslim. Be aware that God likes those who seek knowledge" (Koleini, 1985, p. 31).

The Prophet further stipulates:

"The evolution of religion takes place in the light of knowledge" (Koleini, 1985, p. 39).

That was on the basis of these texts of encouragements that the first steps were taken, even during the lifetime of the Prophet himself, to recognize *fiqh* (Islamic jurisprudence). After the Prophet passed away, it took decades for *fiqh* to be established as a specialized and distinctive branch of

knowledge. Ibn Khaldun defines fiqh as the knowledge of the classification of the laws of God, which concern the actions of all responsible Muslims, as obligatory, forbidden, recommendable, disliked, or permissible. These laws' are derived from the *Quran* and the *Sunna,* and from the evidence the lawgiver (Muham-mad) has established for knowledge of the laws. The laws evolved from the whole of this evidence are called "jurisprudence" *(Jlqh)* (Ibn Khaldun, 1958, p. 3).

Those who specialized in fiqh were referred to as *foqaha* (Mujtahedin). In the second century, the distinguished Islamic jurists were addressed as Imams. The four great jurists who are recognized as the founders of the main schools of fiqh are Abu Hanifa (the founder of Hanafi school), Malik Bin Anas (the founder of Maliki school), al-Shafi'i (the founder of Shafi'i school) and Ahmad bin Hanbal (the founder of Hanbali school). This reflects the transformation of the ancient schools of law into personal schools, which perpetuated not the living tradition of a city but the doctrine of a master and of his disciples, which was completed about the middle of the third century of the *Hijra.* It was the logical outcome of a process which had started within the ancient schools themselves but was precipitated by the activity of Shafi'i.

As regards the *Shia,* there are twelve infallible Imams who are recognized as the successors of the Prophet (Nettleton, 1979, pp. 97-101). The twelve *Shia* Imams and the four Sunni Imams are ranked the highest authorities as lawgivers after the Prophet. The *Shia* believe that the twelfth impeccable Imam was hidden from the eyes and therefore *foqaha* have been trusted to be the successors of the hidden Imam to perform their duties as lawgivers. On this basis in the *Shia* society, the one who is distinguished among *foqaha* is regarded as Mujtahid *A'alam* (the most

knowledgeable) and people regard him as the main lawgiver (Martin, 1987, pp. 47-94). *Mujtahid A'alam* usually has a published reference book everybody refers to as the book of guidance *(Risalah)*. The equivalent rank of *Mujtahid A 'alam* in Sunni school

is called Mufti A'azam who enjoys the same authorities.

Both the *Shia* and the Sunni hold the view that in every century a great Islamic scholar appears who renovates Islam (Hakimi, 1975, p. 12). Ghazali is the first scholar known to have claimed that he was chosen by God to revive the religion of Islam. Subki also presented Ghazali as the renovator of the sixth/twelfth century who had perfected the science of legal theory, "renewed" the *fiqh* of the Shafi'i school, and molded the science of *khilaf* (legal differences) (Subki, p. 112). There was no doubt in Ghazali's mind that *ijtihad* is attainable through diligent study, intellectual exercise, and immersion in scholarly disputations. He admitted the extinction of independent *mujtahids* who were able to establish their own school of law, but he certainly did not imply the same for those jurists who could lead the community and revive the *Sharia* when this need arose.

To Ghazali, only two kinds of *mujtahids* were known, the independent *(mutlaq)* and the limited *(muqayyad)* (Laoust, 1976, pp. 77-78). The latter's activity remains within the limits of his school. Before the fifth/eleventh century no trace could be found of any attempt to classify *ijtihad* or *mujtahids* into categories of excellence. This does not mean, however, that the concept of excellence had not yet been known, but its systematic application to *mujtahids* occurred only at a later period, perhaps during the fifth/eleventh century[1]. About two centuries later, the number of ranks reached five, the first of which was assumed to be extinct. The second and the third were ranks of *mujtahids* who could perform *ijtihad* on two different levels, the third being more limited in scope (Beg, p. 181-192). The fourth rank included jurists highly proficient in the doctrines of their school and in the evidence upon which these doctrines were based, although they were not fully qualified to practice *ijtihad*. The fifth rank consisted of various kinds of *muqallids*.

By the tenth/sixteenth century, seven ranks of jurists could be discerned (Abidin, 1911, pp. 330-331). The top three remained as they were on

the previous scale of five, that is they were ranks of *mujtahids* of various degrees. But the lower four were in reality a redivision of the lower two on the scale of five (Beg, pp. 206-214). In the sixth/twelfth and seventh/thirteenth centuries, for example, the lowest (fifth) rank of jurists included muqallids who "memorized" the doctrine of the school and understood its details but were incapable of mastering the methodology that their eponym and older teachers applied in order to reach their legal rulings (Nouvi, 1961, pp. 73-74). On the other hand, the tenth/sixteenth century description of the lowest (seventh) rank was entirely different. The increase in the number of ranks of *mujthahids* chiefly contributed to the augmentation of new ranks of *muqallids* that in theory did not exist before, while maintaining at the same time the old ranks of *mujtahids* without change. In a later period., these seven ranks were each applied to a specific group of jurists. The first rank thus was assigned to the fathers of the four schools (Ibn Abidin, p. 11).

In Islamic legal theory, *ijtihad* was reckoned indispensable in legal matters because it was the only means by which Muslims could determine to what degree their acts were acceptable to God. To facilitate the practice of *ijtihad,* minimal legal knowledge was required, and each *mujtahid* who exerted himself to formulate legal decisions was entitled to a heavenly reward irrespective of whether the result of his *ijtihad* was right or wrong. Ijtihad and *mujtahids* were employed in the domain of law and were required in the higher ranks of government[2]. That *ijtihad* constituted the backbone of the Islamic legal doctrine was manifest in the exclusion from the scene of all groups that spurned this legal principle. The controversy about *ijtihad* and the existence of *mujtahids* started, in its primitive form, only in the beginning of the sixth/ twelfth century (Hamid, 1981). Throughout the following centuries, differences among jurists, encouraged by ambiguities in legal terminology, made any consensus on the nonexistence of *mujtahids*. Consensus was thwarted by three additional principal factors: First, and most

important, is the continual existence of renowned *mujtahids* up to the tenth/sixteenth century. Though the number of *mujtahids* drastically diminished after this period, the call for *ijtihad* was vigorously resumed by promodern reformists. Second is the Muslim practice of choosing a *mujaddid* at the turn of each century. Though this practice may have not had the full support of the entire community of jurists, it proved that at least one *mujtahid* was in existence each century. Third, the opposition of the Hanbali school which was supported by influential Shafi'i jurists who, by their support, not only added substantial weight to the Hanbali claim that *mujtahids* existed at all times but also weakened the coalition in which Hanafis and Malikis took part (Hamid, 1981). The continuity of *ijtihad* throughout Islamic history suggests that developments in positive law, legal theory, and the judiciary have indeed taken place.

The Methodology of Islamic Legislation

The science of the principles of Islamic jurisprudence *(Usul-al-fiqh)* is one of the greatest, most important and most useful disciplines of the religious law (Ibn Khaldun, 1958, p. 23). The early Muslims could dispense with it. Nothing more than the linguistic habit they possessed was needed for deriving ideas from words. The early Muslims themselves also were the source for most of the norms needed in special cases for deriving laws. They had no need to study the chains of transmitters, because they were close to the transmitters in time and had personal knowledge and experience of them. Then the early Muslims died, and the first period of Islam was over. All the sciences became technical (Ibn Khaldun, 1958, p. 23). Jurists and religious scholars of independent judgement now had to acquire these norms and basic rules, in order to be able to derive the laws from the evidence. They wrote them down as a discipline in its own right and called it "principles of jurisprudence." The first scholar to write on the subject was al-Shafi'i. He dictated his famous Risalah on the subject. In it, he discussed

commands and prohibitions, syntax and style, traditions, abrogations, and the position of ratio legis indicated in a text in relation to analogy (Ibn Khaldun, 1958, p. 23).

Later on, Hanafite jurists wrote on the subject. They verified the basic rules and discussed them extensively. The speculative theologians also wrote on the subject. However treatment by jurists is more germane to jurisprudence and more suited for (practical application to) special cases, (than treatment of the subject by speculative theologians), because (juridical works) mention many examples and cases and base their problems on legal points. The theologians, on the other hand, present these problems in their bare outlines, without reference to jurisprudence, and are inclined to use (abstract) logical deduction as much as possible, since that is their scholarly approach and required by their method (Ibn Khaldun, 1958, p. 30).

In Islamic legal theory, discovering the law of God has always been of crucial significance, for it is the law that informs man of the conduct acceptable to *Allah*. It is exactly for the purpose of finding the rulings decreed by God that the methodology of usul *al-fiqh* was established. The *Quran* and the *Sunna* of the Prophet do not, as a rule, specify the law as it might be stated in specialized law manuals, but only contain rulings and indications that lead to the causes of these rulings. On the basis of these indications and causes the *mujtahid* may attempt, by employing the procedure of qiyas to discover the judgement of an unprecedented case. But before embarking on this original task, he must first search for the judgement in the works of renowned jurists. If he fails to find a precedent in these works he may look for a similar case in which legal acts are different but legal facts are the same[3]. Failing this, he must turn to the *Quran*, the *Sunna*, or *ijma* (consensus) for a precedent. When this is reached he is to apply the principles of qiyas in order to reach the rulings of the case in question. This ruling may be one of the following: the obligatory *(wajib)*, the forbidden *(mahzur)*, the recommended *(mandub)*, the permissible *(mubah)*, or the disapproved *(makruh)* (Al Shirazi, 1908, pp. 83-84).

The primary objective of legal theory, therefore, was to lay down a coherent system of principles through which a qualified jurist could extract rulings for novel cases. From the third/ninth century onwards this was universally recognized by jurists to be the sacred purpose of *Usul-al-fiqh* (Shirazi, 1985, p. 6).

Legal theory in all its parts is sanctioned by divine authority, that is, it derives its authority from revealed sources. It is partly for this reason and partly for the reason of man's duty to worship his Creator in accordance with divine law that the practice of *ijtihad* was declared to be a religious duty incumbent upon all qualified jurists whenever a new case should appear. Until *ijtihad* is performed by at least one *mujtahid,* the Muslim community remains under the spell of this unfulfilled duty. Legal theory has played a rather significant role in favor of *ijtihad.* Thus, the practice of *ijtihad* was the primary objective of the methodology and theory of *Usul-al-fiqh* throughout Islamic history (Hamid, 1981, p. 78). *Shia* theory on the sources of the law and on the nature of the law provides a more dynamic form of law. By elevating *aql* (reason) to the status of a source of the law, they have given deductive reasoning a more important place than it occupies in Sunni theory (Coulson, p. 105). For the *Shia, qiyas* is rejected as unreliable if not false. However, the *Shia* definition of the *Sunna* and of *ijma'* differ from the Sunni definition. In the case of the *Sunna,* the *Shia* accept only those hadith transmitted through one or more of the twelve impeccable Imams, and some believe that traditions of the Holy Prophet should be accepted through the channel of narrations by the people of the Holy Prophet's Progeny (Kashif al-Ghita, 1985, p. 139). The *Shia.* concept of aql is closely linked to *ijtihad,* since the *Shia* jurist uses aql, usually supported by the other three sources of the law (Kashif al-Ghita, 1985, p. 186). The rationale behind the concept of aql is that although God is the sole creator and provider of the law, He has furnished man with reason and the power of reasoning so that he may
properly identify the terms of the law. Any ruling derived by the use of reason from the *Quran* and the *Sunna* cannot be in contradiction with any ruling reached through the application of rational principles. This line of argument leads effectively to the *Shia* definition of *ijma,* which means the unanimous view of the *foqaha* on a particular issue (lambton, 1981, p. 228).

1. The theory set out briefly above is essentially that of the *usuli* school and was largely in place by the sixteenth century. However, an opposing school, the

akhbari (traditionalist), rose to prominence and doctrinal development paused until the controversy between the two was finally resolved in favour of the *usulis* towards the end of the eighteenth century. In essence, akhbari theory rejected the rationalist basis of the usuli view in favour of heavy reliance upon the *Quran* and the *Sunna* as explained by the Imams and upon a much larger corpus of *hadith* than that accepted as valid by the usulis. It follows that the akhbaris rejected the usuli linkage between the sources of the law and rational principles and they equally reject *ijtihad* in favour of taqlid but a restricted form of *taqlid* in which it is the Hidden Imam who must be emulated (Momen, pp. 185-6). The usuli victory was followed by a resurgence of theoretical development, with the main contribution coming from Sheikh Murtaza Ansari in his definition of the principles to be followed in reaching a decision in cases where there was doubt. In such cases, he argued, the principles to be applied were:

Al-bara'a (freedom from obligation or liability in the absence of proof); *al-takhir* (freedom to select the opinion of other jurists or even other schools if these seem more suitable); *al-istishab* (the continuation of any state of affairs in existence or legal decisions already accepted unless the contrary can be proved); and *al-ihtiyat* (prudent caution whenever in doubt) (Momen, p. 187).

Juristic reasoning is never final, whether it be reasoning on the implications of the primary texts, or reasoning pertaining to occurrences in the absence of a directly applicable text. Gibb says: "The *Quran* and the Tradition are not, as it is often said, the basis of Islamic legal speculation but only its sources" (Gibb, 1975). This statement presents a basic fact regarding the course of evolu-tion in the applicability of the *Sharia*. It emphasizes the role of human thought, as called upon, urged and directed by the legal authority of *Quran* and *Sunna*. Legal speculation for an ever-changing world has been left undetermined except for the authority of the *Sharia*. None of the recorded works by the distinguished Islamic jurists suggest a monopoly of interpretation or finality. The imputation of finality to the findings of the schools of law is contrary to the creative spirit of the *Quran* specifying:

"This is a Book that we have revealed to thee abounding in good, that they may ponder over its verses, and that men of understanding may mind" (Sa'd, 29).

Iqbal, in his *Reconstruction of Religious Thought in Islam,* states: "Turning to the groundwork of legal principles in the *Quran,* it is perfectly clear that far from leaving no scope for human thought and legislative activity, the intensive breadth of these principles virtually acts as an awakener of human thought. Our early doctors of law taking their clue mainly from this ground-work evolved a number of legal system; and the student of Muhammadan history knows very well that nearly half the triumphs of Islam as a social and political power were due to the legal acuteness of these doctors. The teaching of the *Quran* that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems" (Iqbal, 1951).

The Role of the Consultative Assembly *(Majlis-al-Shura)*

It is now clear, then, that the main lawgivers are God, the Prophet and the *foejaha.* However the question may be asked whether there is a fourth lawgiver in addition to the above cited. This question assumes critical importance when the following arguments are considered:

1. The concept of obligatory preliminary

The *foqaha* define a preliminary as the precondition of an act. They have numerous ways for dividing such preconditions. One is to divide them into internal and external, the internal being the inherent or essential components of an act, and the external being the outside factor causing or facilitating the performance of an act (Muhammad, 1977, p. 154). As always, such divisions are rather abstract, and sometimes extremely difficult to differentiate. But the division which is of interest to us is that between a preliminary which is explicitly required by the *Sharia* (such as ablution for prayer), and one which is not so but can become obligatory if another obligatory act depends on it. For instance, horse-racing and arrow-throwing are normally permissible or recommended practices, but if it becomes necessary for

Muslims to wage jihad (holy war), the same acts become obligatory by implication. In the same way the adoption of a constitution becomes obligatory for Muslims when it is a precondition of their welfare, security or progress (Na'ini, 1979, pp. 74-75). It is interesting to note that the Sunnis usually arrive at the same conclusion from a different premise - that of maslahah, literally welfare, which means that public interest should always prevail over the preference of jurisconsults. But since the *Shia* refute maslahah (Muhammad, pp. 164-170), the concept of obligatory preliminary is also a device to circumvent any objection to law-making for which there is no specific canonical license.

2. The concept of apparent secondary rules

The rules of conduct in the *Sharia* are of two categories: the "primary real rules" which explain the eternal and abstract tenets of the religion, and "the secondary apparent rules" which govern accidental and concrete details concerning their application to worldly affairs. The latter category itself has numerous subdivisions depending on their subject-matter, and the conditions of persons affected by them. Although the *foqaha* are the only people qualified to interpret the first category, and even to lay down the general principles concerning

the second, deciding the subjectmatter of the second kind is only the task of lay experts. Just as if two qualified physicians prescribe wine to a patient, wine-drinking which is otherwise a sin becomes permissible for him, so too if doctors of politics, who in this case are none other than the elected representatives *(Majlis-al-Shura)*, deliberate on matters of state interest within their competence, their decisions must be binding even without the approval of the *foqaha* (Kasravi, pp. 371-2).

3. The principle of *Mantaqah-al-Feraq*

Wherever evidence or guidance is not available

from the *Quran*, or the *Sunna*, it would be taken to mean that God has left us free to legislate on those points according to our best lights: In such cases, therefore, the legislature can formulate laws without restriction, provided such legislation is not in contravention of the spirit of the *Sharia* the

principle herein being that whatever has not been disallowed is allowed. The Prophet says:

"whatever God has allowed in His book is permissible (halal) and whatever has been prohibited is forbidden (haram), and whatever God has been silent about, He has left you free. Thus be aware that God has not been forgetful of anything" (Nouvi, p. 2).

4. The principle of Consultation

Islamic way of life requires that the principle of consultation should be applicable to every small or big collective affair. The *Quran,* as the very primary source of Islamic legislation, stipulates that all the collective affairs must be performed by mutual consultation. In the context it occurs, it is evidently not merely a statement of fact but an injunction and an order.

"They manage their affairs by mutual consultation" (Shura, 37).

The following is quoted from Caliph Ali:

"I *said O, Messenger of Allah! What should we do, if after your demise we are confronted with a problem about which we neither find anything in the Quran nor have anything from you. He replied: Get together the obedient (to God and His law) people from amongst my followers and place the matter before them for consultation. Do not make decisions on the basis of the opinion of any single person*" (Khatib-al-Baqdadi, 1961, pp. 15-21).

When the Medinese Muslims swore allegiance with the Prophet, the Prophet asked them to introduce twelve representatives. The Muslims elected nine representatives from Khazraj tribe and three from Ows tribe (A'tef-al-Zane, 1991, p. 56). The Prophet held consultations with these twelve representatives to run the affairs of the society. Another example is the case when the Mecca Muslims migrated to Medina, Prophet ordered that seven representatives be elected from the Mecca Muslims and seven others from the Medina Muslims (A'tef-al-Zane, 1991). The Prophet incessantly consulted with these representatives.

In the Battle of Uhud, the companions of the Prophet had recommended that it is better that they defend against the enemies coming from Mecca while keeping themselves in Medina. But Hamza, the uncle of the Prophet and other young men were of the opinion that they should bravely go out of Medina and fight the incoming enemies. After viewing their opinions the Prophet resolved to go out of Medina and fight. Later the elderly companions persuaded the young men to withdraw their suggestion. The young men went to the Prophet and with repentance withdrew their opinion but the Prophet said that now after weighing the viewpoints in the consultation he had already resolved and it would be against the prophetic mission to go back on the final resolution (Fathal-Bari, 1977, pp. 71-80).

Mutual consultation is, therefore, one of the great qualities that a Muslim has to cultivate in himself. It is ordained *by Allah* in *Quran: "It is part of the Mercy of Allah that you do deal gently with them, were you severe or harsh hearted, they would have broken away from about you: So pass over their faults and ask for Allah's forgiveness for them, and consult them in affairs. Then when you have taken a decision, put your trust in Allah"* (Shura, 159).

Muslim Jurists have said that when mutual consultation was made necessary for the Prophet himself to follow, it really becomes incumbent upon
his followers to resort to Shura in all our activities whether individual, social or political matters. The Messenger of *Allah* used to receive revelation from *Allah*, hence, seemingly he was not in need of mutual consultation but still he was asked to do so through divine commandment. It is on this basis that the leader has no other option but to resort to Shura since *Allah* had commanded his Prophet to do so. All others, therefore, have a special need for mutual consultation.

The other fine example to show how the Caliphs depended on the mutual consultations of the public is that of caliph Umar who was of the opinion that after the conquest of Iraq and Syria the land should not be divided among the warriors as booty but should be made the property of the state so that through its produce and income the essential works of public welfare can be carried out. But some

companions opposed the view of the Caliph. When they could not find any solution through mutual consultation, the Caliph called a public meeting in the prophetic mosque for general consultation and addressed the public in the following words: "I have not just gathered you here and given you the trouble for nothing. The reason for inviting you is that you should also participate in the trust of the caliphate which has been trust upon me by you. Undoubtedly, I am an ordinary human being like you. I want that those who have opposed my point of view and those who have favoured it should declare it openly. I do not wish that you should follow my point of view because you all possess the Book of *Allah* (from which you may derive guidance to resolve the issue)" (Kashif-al-Ghita, 1985, p. 143).

Therefore, the following three features are deduced from the *Quranic* verses and the traditions of the Holy Prophet and the Orthodox Caliphs cited above:

(1) As no collective affair of the Muslims should be conducted without consulting the people concerned.

(2) All the people concerned should be consulted directly or through their trusted representatives.

(3) The consultation should be free, impartial and genuine. Any consultation held under duress or temptation is in reality no consultation at all.

Thus, these three principles of the *Sharia* must be observed, and no loophole should be left whereby anyone gets the opportunity at any time to make public decisions without consulting the people or their accredited representatives. As regards the mode of consultation, it has been very wisely left to the discretion of Muslims. Islam does not prescribe any definite form for the formation of the consultative body or bodies for the simple reason that it is a universal religion meant for all times and all climes. It does not, therefore, lay down whether the people should be consulted directly or through their representatives; whether the representatives should be elected in general elections or through electoral colleges; whether the consultative body should have one house or two houses, etc. Obviously, these are mailers of detail and can vary with different societies and cultures existing under different conditions. That is why the

Sharia leaves these problems open for solution according to the needs of the time. These stipulations bring us to a very crucial fact. The fact is that an Islamic society in modern times need a fourth legislating authority which should be based on consultation and in the direction of realizing the goals of Islam and the needs of the modern sophisticated society. The question, then, arises that, this being so, what is the function and scope of a Legislature in Islam? The function of the Legislature in an Islamic State is manifold:

1) Where the explicit Directives of God and His Prophet exist, the legislature, though it cannot alter or amend them, will alone be competent to make rules and regulations within their framework, for the purpose of enforcing them.

2) Where the directives of the *Quran* and the *Sunna* are capable of more than one interpretation, the legislature would decide which of these interpretations should be placed on the Statute Book. To this end, it is indispensable that the legislature should consist of a body of such learned

men who have the ability and the capacity to interpret *Quranic* injunctions and who, in giving decisions, would not take liberties with the spirit of the *Sharia*. Fundamentally, it will have to be accepted that for the purposes of legislation, a legislature has the authority to accord preference to one or the other of the various interpretations and to enact the one preferred, provided always that it is only an interpretation and not a misinterpretation.

3) Wherever there arc no explicit laws, the function of the legislature would be to enact laws, of course always keeping in view the general spirit of Islam, and where previously enacted laws are traceable in the Islamic book of Jurisprudence, to adopt any one of them.

4) Where a pressing necessity arises, what the *Quran* and the *Sunna* have prohibited becomes permissible. This has been reiterated throughout the *Quran:*

"But he who is driven by necessity, neither craving nor transgressing, it is not sin for him" (Baqarah, 172).

"But who so is compelled (Thereto), neither craving nor transgressing: (for him) lo! thy Lord is Forgiving, Merciful" (Ana'm, 145).

"Whoever is forced by hunger, not by will, to sin: (for him) surely God is Forgiving Merciful" (Nahl, 115).

It is a generally accepted rule among jurists that "necessity renders the forbidden permissible." Intoxicants, for instance, are allowed to the thirsty when water is not available, and to the sick for treatment. Carrion is allowed to the hungry who cannot get anything else to eat.

It is now clear, then, that four main lawgivers can be recognized in an Islamic system. The first two have created *Sharia* which is immutable and eternal. The other two the *foqaha* and the Consultative Assembly are those legislative authorities giving the Islamic legislative system a dynamic feature, *foqaha* are mostly engaged in discovering the required laws such as family, inheritance, property laws, etc. from *Sharia. Majlis-al- Shura* must mostly deal with complicated daily problems and needs of the society such as environmental, pricing, educational and

This reasoning is supported by the hadith from the Holy Prophet:

"I *am only a mortal like you. In matters revealed to me by God you must obey my instructions. But you know more about your own worldly affairs than I do. So my advice in these matters is not binding"* (Maududi, 1982, p. 186).

Sadiq al Mahdi elaborates on this citing Abu Ja'far al Naqib:

"The Companions of the Prophet recognized that the spiritual message of Islam is fixed. To that they were faithfully committed. The social message of Islam is, however, flexible. Their experience amply demonstrated that flexibility" (Sadiq and Mahdi, p. 233).

These two legislative authorities are always functioning in a process of changing situations and thus they legislate on the basis of necessities of each generation. If the affairs are related to, a clan, a tribe, a whole village, or an entire town or city so that it is not possible to take counsel with everybody, then the decisions should be taken by an Assembly of trusted representatives of the people, who are selected or elected

according to an agreed method and set procedure. Thus unlike some incorrect impressions that Islam is against the establishment of a Consultative Assembly we, conversely, come to the important conclusion that Islam strongly encourages the establishment of a Consultative Assembly body *(Majlis-al-Shura)*. This is actually not only recommended by *Sharia* but also emphasized in the *Quran* in the form of injunctions. The only difference between the Consultative Assembly recommended by Islamic *Sharia* and those operating in other countries is that whereas in other countries the *Majlis-al-Shura* operates within the framework of a certain Constitution, in Islamic communities, as well as the Constitution, there exists a supreme Constitution (*Sharia*) contrary to which no laws should be enacted.

Conclusion

The theoretical foundations of an Islamic legislation system has been subject to an evolutionary process. However, the evolution process in Islam has been different from that in the West. The most important point of distinction lies in the fact that in Islam the disputes over the question of whether the foundation of legislation is based on the divine authority or the popular will have had a parallel trend. In other words the two trends have never been disconnected while in the West, at the time of renaissance, the divine will as the foundation of government was substituted by the will of the people. For example, while people do elect their representatives in the parliament but the very same representatives must conform to the overall principles of Islam.

The Islamic legal system is divided into two distinctive parts. The first part comprises the *Quran* and the *Sunna* which together establish the primary sources of law in Islam. The secondary sources are those which lend themselves to debates and argument among Muslims. The most important secondary sources are *ijma, qiyas, aql* and *ijtihad*. The contents of these sources are derived from the legal injunctions of the Quarn and the *Sunna* of the Prophet. Thus, the ultimate sanction for all intellectual activities regarding the development of *Sharia* is derived only from the *Quran* and

the *Sunna* of the Prophet. No secondary source can be considered as authentic if it goes contrary to the primary sources.

Four main lawgivers can be recognized in an Islamic system. The first two have created the *Sharia* which is immutable and eternal. After the demise of the Prophet, the fact remained that the relationship between law and a people's actual affair is a permanent and evolutionary one. For this reason and in response to the ever-changing requirements of social life the path set by the Prophet led to the recognition of two other sources of law ie. the *foqaha* and the Consultative Assembly. The "*foqaha*" and the "Consultative Assembly" are those legislative authorities which give the Islamic legislative system a dynamic feature. *foqaha* are mostly engaged in discovering the required laws such as family, inheritance, property laws, etc. from *Sharia*. *Majlis-al-Shura* must mostly deal with complicated daily problems and needs of the society such as environmental, pricing, educational and policy-making issues which require expert skill and specialization not specified in the *Sharia*.

Footnotes

[1] The eleventh century tabaqat works seem to have been the earliest works that Subki could find as sources for his biographical dictionary.

[2] When discussing the requirements of *ijtihad*, Ghazali (d. 505/1111) maintained that in order to reach the rank of *mujtahid* the jurist must. 1) Know the 500 verses needed in law; committing them to memory is not a prerequisite. 2) Know the way to relevant *hadith* literature; he needs only to maintain a reliable copy of Abu Dawud's or Bayhaqi's collections rather than memorize their contents. 3) Know the substance of furu works and the points subject to *ijma*, so that he does not deviate from the established laws. If he cannot meet this requirement he must ensure that the legal opinion he has arrived at does not contradict any opinion of a renowned jurist. 4) Know the methods by which legal evidence is derived from the texts. 5) Know the Arabic language; complete mastery of its principles is not a prerequisite. 6) Know the rules governing the doctrine of abrogation. However, the jurist need not be thoroughly familiar with the details of this doctrine; it

suffices to show that the verse or the *hadith* in question had not been repealed. 7) Investigate the authenticity of *hadith.* If the *hadith* has been accepted by Muslims as reliable, it may not be questioned. If a transmitter was known for probity, all *hadiths* related through him are to be accepted. Full knowledge of the science of al-tadil wal-tajrih (*hadith* criticism) is not required. (Mustasfa, Vol. 2, pp. 350-354).

[3] From about the middle of the third century of the *hijra* the idea began to gain ground that only the great scholars of the past who could not be equalled, and not the epigones, had the right to independent reasoning. By this time the term *ijtihad* had been separated from its old connexion with the free use of personal opinion *ra'y,* and restricted to the drawing of valid conclusions from the Quran, the Sunna of the Prophet, and the consensus, by analogy *qiyas* or systematic reasoning. Shafi'i had been instrumental in bringing about this change, but he did not hesitate to affirm the duty of individual scholars to use their own judgement in drawing these conclusions. By the beginning of the fourth century of the *hijra*, however, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all. This amounted to the demand for *taqlid,* a term which had originally denoted the kind of reference to Companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities. A person entitled to *ijtihad* is called *mujtahid,* and a person , bound to practice *taqlid, muqallid.*

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