

**CERTAIN ASPECTS OF IJITHĀD IN ISLAMIC  
JURISPRUDENCE : WITH SPECIAL REFERENCE  
TO THE COMPARATIVE STUDY BETWEEN  
SUNNĪ AND SHĪ'Ī PRINCIPLES**

Rahimin Affandi Abd. Rahim

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THE UNIVERSITY OF ST. ANDREWS

CERTAIN ASPECTS OF IJTIHAD IN ISLAMIC JURISPRUDENCE, WITH  
SPECIAL REFERENCE TO THE COMPARATIVE STUDY  
BETWEEN SUNNI AND SHI'I PRINCIPLES.

BY

RAHIMIN AFFANDI ABD. RAHIM

A DISSERTATION PRESENTED TO THE  
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## ABSTRACT

This work is concerned with certain aspects of Ijtihād in Islamic jurisprudence by the comparative study of Sunnī and Shi'ī views. The chosen aspects are;

- (1) The historical development of Ijtihād within both traditions
- (2) The methodological principles of Ijtihād.
- (3) The concept of Ijma'.

Chapter one deals with the basic formation of the whole discussion, including the background of the concept of Ijtihād, the origin of Sunnism and Shi'ism and the main reasons for the separation between the two.

Chapter two demonstrates the historical development of the theory of Ijtihād on both sides. It can be seen that there are two figures, i.e. al-Shāfi'ī and 'Allāma al-Hillī, which played an important role in elaborating and developing the theory of Ijtihād. Therefore, the discussion of this chapter has been separated into three different sections with reference to these two figures.

It is suggested that the main reason for the Ikhtilāf between the two in the concept of Ijtihād was;

- (1) Different understanding of methods and principles of Ijtihād.
- (2) Different understanding of the concept of Ijma'.
- (3) Different understanding of certain basic principles in Usūl al-Dīn.

Each of these matters has been discussed in chapters three to five.

TRANSLITERATION TABLE

ARABIC LETTER	TRANSLITERATION	SHORT VOWELS
ا	r	ا a
ب	b	و u
ت	t	ي i
ث	th	LONG VOWELS
ج	j	أ a
ح	h	و u
خ	kh	ي i
د	d	DIPHTHONGS
ذ	dh	أو aw
ر	r	أى ay
ز	z	أىي iyy
س	s	أوى uww
ش	sh	
ص	s	
ض	ḍ	
ط	t	
ظ	ẓ	
ق	q	
ك	k	
ل	l	
م	m	
ن	n	
ه	h	
و	w	
ي	y	
آ	t	

**CHAPTER I : INTRODUCTION**

**PART A - IJTIHĀD IN ISLAMIC JURISPRUDENCE.**

**(I) THE MEANING OF IJTIHĀD.**

**(II) THE PLACE OF IJTIHĀD IN ISLAMIC JURISPRUDENCE.**

**(III) THE IMPORTANCE OF IJTIHĀD IN THE DEVELOPMENT OF ISLAMIC LAW.**

**(IV) THE MUJTAHID.**

**(V) THE GENERAL QUALIFICATION OF MUJTAHID.**

**(VI) THE ACADEMIC QUALIFICATION OF MUJTAHID.**

**PART A - IJTIHĀD IN ISLAMIC JURISPRUDENCE.****The meaning of ijtiḥād****Literal meaning of ijtiḥād**

Literally the word ijtiḥād is taken from the word al-Juhd (exertion) which means doing the utmost in the performance of a certain task.<sup>(1)</sup> Al-Juhd is used only in reference to tasks involving a heavy weight.<sup>(2)</sup> Accordingly, it is correct to say that so and so has exerted himself (ijtahada) in lifting a heavy stone, but it is wrong to say that so and so exerted himself in lifting a piece of paper.<sup>(3)</sup>

**The technical meaning of ijtiḥād**

The jurists run counter to each other in elaborating the meaning of ijtiḥād according to Shari'ah. This was so because of their disagreement regarding certain aspects which led them to different interpretations. Among those matters are:-

- (1) Disputation regarding the types of legal ruling resulting from ijtiḥād. It is either Qat'i (undoubted) or Z'anni (presumptive) law.<sup>(4)</sup>
- (2) Disputation regarding the degree of effort produced by a Mujtahid.<sup>(5)</sup>
- (3) Disputation whether to apply the word Faqih and Mujtahid to those who perform ijtiḥād.<sup>(6)</sup>

Shawkānī gave the meaning of ijtihād as "one's effort in deriving regulation by means of istinbāt".<sup>(7)</sup> He then elaborated the meaning of ijtihād as follows :-

(1) The word بذل الوسعي refers to the orders produced without effort : rejected and effort here means that he has stretched his ability to the limit and cannot proceed further.

(2) The word علم شرعي i.e. revealed injunction. Therefore the jurist rejected the orders of language i.e. imperative intellectual or sensory imperatives.

(3) Also effort in order to obtain law in religion or theological matters is not regarded as ijtihād according to the Fuqahā', although recognised as ijtihād by Ilm al-kalām.

(4) The word بطريقة استنباط is intended to reject laws obtained from Nass which are ẓāhir or by memorising problems, or by asking a Muftī or obtaining it from a book. All knowledge mentioned here is not included in the technical meaning of ijtihād according to the Fuqahā', although it is regarded as ijtihād according to the linguistic meaning.<sup>(8)</sup>

Meanwhile Badakhshī<sup>(9)</sup>, after defining the word ijtihād, further explained that the word has four important aspects:-

(1) Tremendous effort put in by the Faqih to the extent that he cannot go further. The Fuqahā' described a Faqih as a person who had mastered the fundamental elements of Ilm al-Usul, and is able to produce practical laws from theoretical ones. The word

Faqih is not applicable to those who have memorised laws only for such a method is not called ijtihād according to the jurists. (10)

(2) The methods used in practising ijtihād must obey certain rules of Ilm usūl al-Fiqh.

(3) The orders resulting from ijtihād must be more certain than either Qat'i or Zanni laws.

(4) Orders or law produced by performing ijtihād must be related to the Sharī'ah only.

These are some opinions amongst the Fuqahā' to the effect that ijtihād is similar to Qiyās. (11) Al-Shāfi'i stressed that ijtihād and Qiyās have similar meanings. Based on these, he was led to explain Qiyās under the heading of ijtihād. (12)

Al-Shāfi'i's opinion regarding the above was strongly spoken against by the later jurists. They emphasized that the idea of equalising ijtihād and Qiyās is wrong because ijtihād has a more general character than Qiyās. (13)

They went further in explaining ijtihād's spectrum as covering all methods used in search for the 'Illah behind the laws, and needing tremendous effort, time and energy to clarify a law. Meanwhile Qiyās is regarded as only a small part of the process of ijtihād. (14)

Conventionally, there are several definitions which appeared in the writings of the Shī'ī scholars. Amongst them are the following:-

(1) Ijtihād is "the exertion of oneself to the utmost to obtain a supposition (al-zann) in support of a legal judgement". (15)

(2) Ijtihād is "a talent (malaka) by which the deduction of legal judgements is possible". (16) This definition was criticized, as this talent depends upon a group of principles and sciences such as al-Nahw, al-Sarf, 'ilm usūl al-fiqh and others from which, when one has learnt them, one is sufficiently equipped to exercise the faculty of deduction, even though one has not actually practised the exercise of deduction. Deduction, therefore, is consequent on possession of the talent. Thus Ijtihād does not mean the possession of talent only. (17)

(3) Ijtihād is "the derivation of proof (al-Hujja) in support of legal judgement". (18) The proofs in support of legal judgements are derived by deduction from their sources, which are: the Qur'ān, Sunnah, the Ijmā' and reason (al-'aql). (19) The function of the reason here is only to recognize the benefit or damage that may result from rendering a judgement. (20)

(II) The place of Ijtihād in Islamic jurisprudence

The whole phenomenon of Islamic law, in its basic formation and composition has two major components, namely that which is believed to have been revealed from God and that which is assumed not to have been revealed. The first component handed down to man ready-made, was only to be passively received and applied. On the other hand, the second component, which was not ready-made, was in fact, to be constructed.

Hence the second component must be regarded as subject to human involvement. This human involvement might take place in the form of interpreting and applying the revealed instruction or in the form of deducing new rules from the revealed component. Furthermore, the possibility was always implicit of evolving some absolutely new laws and regulations, but always within the limits of not contradicting the general spirit of the revealed component as a whole. (21) This human involvement is termed Ijtihād, one of the basic instruments of law-making in Islamic legal philosophy.

The using of Ijtihād indirectly means that human reason has a great importance in the field of the Shari'ah. The question about the function of reason in this field had not been presented for open discussion until the time of the third generation after the prophet (Tābi'i t-tābi'in). But it should be mentioned that general thinking about using human reason in

this field started from the time of the prophet Himself according to a number of traditions attributed to Him.(22)

During the time of the third generation it became important and urgent to discuss and clarify the place and limitations of using human reason in the Shari'ah. This was because reasoning in this field widely increased to the point that some people were said to have subjugated the sayings of the prophet to their rational judgement.(23)

However, it was the theologians represented by the Mu'tazila who first discussed the function of human reason in the field of the Shari'ah. That is whether man has free will to choose his actions in his life, or whether he is compelled and directed by God.(24) These discussions were presented and extended by the jurists in order to establish bases for their subject, which is the place of reason among the roots of Islamic jurisprudence.

Basically, all the Islamic sects divided the sources of law into the naql (transmitted knowledge, from revelation and tradition) and 'aql (reason). However, they debated with each other on the question of the priority of using both the sources.

(1) Abū Hanīfa and Malik ibn Anas.

They believed that the revelation might be supplemented by independent reason. They relied on the naql sources whenever they gave clear guidance. When this source failed, however, they

felt free to use judgement of equity. (25)

(2) Mu'tazila and Shi'is.

They believed that the independent reason supplemented revelation. (26) Thus for them, reason, far from being necessary to bring one to the knowledge of God, cannot bring man to know either God or man's own moral obligation unless it is helped by God's revelation. (27) Besides that, the Shi'is also held that the revelation was extended by the infallibility of the Imams. (28)

(3) Al-Shafi'i

He believed that the revelation might be supplemented by dependent reason. The impetus came from a rejection of human opinion in making legal decisions, as being an arbitrary lack of method and a failure to make the law fully Islamic, fully a Shari'ah system of law. What Shafi'i did was in the first place to make more use of the traditions as a valid source of law. Then he extended the range of coverage of scripture and traditions by supporting the method of Qiyas, which could apply a prescription mentioned in the scripture or traditions for one kind of case to similar cases with the same relevant characteristics. This was a method of reason in the service of scripture, thus dependent. (29)

(4) Ahmad ibn Hanbal and Zahirīs.

Both held that revelation alone should refer to all of the religious matter.<sup>(30)</sup> Ibn Hanbal made a very large collection of traditions to supplement revelation. Another interesting method of covering more ground without the use of Qiyās was the doctrine of permission to do anything not prohibited.<sup>(31)</sup>

Basically, most of the jurists, including the Mu'tazila, Sunnī and Shi'ī, proclaimed that the rules of the Shari'ah were based on specific "grounds". They generally agreed that the rules of the Shari'ah were revealed in order to secure people's interests. Every single rule of the Shari'ah has its own particular ground which contributes to this aim. It cannot exist for no reason. They were revealed to secure first the interests which include the largest possible number of people, and then to secure the interests of the individuals. All the interests were intended by the Shari'ah to be secured, unless two of the interests were contradictory.<sup>(32)</sup>

However, when they come to discuss certain aspects in the same subject, they disagreed and divided into several sections;

(1) The nature of the grounds in the Shari'ah rules, whether it was rational or divine and created by God.

According to Mu'tazila and Shi'īs, the grounds of the Shari'ah rules are rational. Every Shari'ah rule should have its own rational ground in order to convince human reason that

these rules are securing the public interest. If ever human reason could not understand a particular ground of a particular rule, then it should be understood that the inability to understand it belongs to the people<sup>(33)</sup>, and this particular rule is certainly securing a public interest. The ground of every Shari'ah rule has an effect on the existence of the rule. To them, 'illa (ground) and maṣlaḥa (interest) are synonymous. (34)

The Sunnis had taken a different approach in this matter. They decided that the grounds of the Shari'ah rules are merely signs (amārat) created in order to indicate certain rules. They have no connection with convincing human reason of the relevance of the rules, and have no effect on the existence of them. In their opinion the term 'illa and maṣlaḥa are different. 'illa in the Shari'ah is merely a sign which might or might not indicate the maṣlaḥa secured by a rule. To them it is not necessary to understand the maṣlaḥa of every Shari'ah rule, and maṣlaḥa should not be regarded as a ground of a rule since it is not stable. It has not a single standard. It is sometimes very clear, sometimes less clear, and sometimes completely disappears. (35)

(2) The most authentic and practical method of using reason in Islamic law.

The Sunnīs had used the method such as the maṣāliḥ mursalah, Qiyās, istiḥsān and others. (36) It was the result of the difference of opinions between the Sunnī jurists regarding the trustworthiness of these methods that diverse legal schools came into being. (37)

For the Shi'īs, instead of the previous methods, they only refer to al-'aql (reason). Muḥammad Baqir al-Sadr maintains that reason is a potential rather than an actual source for Shi'ī law. He says that although according to the methodology of Shi'ī law, reason can on its own discover an injunction and guide one toward a certain religious precept, this has never been actualized in practice and all religious commands which can be discovered through categorical verdicts derived from abstract thought (pure reason) are to be found in the Qur'ān and tradition. (38)

'Aql has been referred to, in Shi'ī law as common sense, general public intellect (badāḥat al-'aql), intellect of the community and sometimes as general intellect (al-'aql al-basharī). It will be shown that 'aql as a source of Shi'ī law is not only the 'aql which is used in opposition to body, science or practice, but it also covers that which is used in opposition to text, traditions or revelation. (39)

Finally, intellectual principles (al-usūl al-'aqlāniyyah) and rational maxims have often been referred to in Shi'i jurisprudence as sources of law. They are a body of generally applicable principles which are accepted and agreed upon by all intelligent people on the ground of rational understanding and intellectual unanimity (tawāfuq al-'uqalā'i). They do not, therefore, change as a result of changes in time, place or circumstances. They do not vary from one nation to another, e.g. laws of necessity, compulsion, or laws of health and hygiene. (40)

The term al-usūl al-'aqliyyah which is often, in fact, loosely used for reasonable or rational maxims covers three distinct categories (41):-

- (i) The maxims which are made or derived from definite scientific facts or from absolute logical analysis (al-usūl al-'ilmīyyah wa - al-qawā'id al-mantiqīyyah). They must be of positive and certain scientific value and they must not be conjectural or fallible, e.g. the principle of cleanliness and hygiene which could not be challenged under any circumstances.
- (ii) The maxims which are based on human nature and instincts (al-fitrat al-bashariyyah). They are the kind of maxims which are accepted by various people regardless of whether or not these people had intercourse. This is because these norms are indivisible truths discernible by human nature and instincts, e.g. the principle of evil and prohibition of murder, theft, aggression and cruelty.

(iii) The principles which are based on the doctrine of ethical quality and postulate (al-Husn wa al-qubh al-'aqliyain).

The theory of ethical quality is fundamentally a combination of two principles; namely, first, the existence of a genuine ethical value belonging to the nature of legal rules. Legal values are the corollaries of ethical postulates; God, therefore, distinguishes between good and bad, through Shari'ah, on account of their being good or evil.

Second, the capacity of human reason to understand and find out the ethical quality of the law. All objects of knowledge fall under the supervision of reason and receive their obligatory power from rational insight.

To sum up, the sources for Islamic law which are the most authorised and used as base are the Qur'an<sup>(42)</sup> and Sunnah<sup>(43)</sup>, also called the Nass sources which are fixed and will remain unchanged until the Day of Judgement.<sup>(44)</sup> Other sources that stem from the Nass sources, as mentioned above are Ijmā' and Ijtihād. Many jurists consider these four sources to be the chief sources of Islamic law.<sup>(45)</sup>

### (III) The importance of Ijtihād in the development of Islamic law

A brief look into the development of Islamic law shows that Ijtihād has been one of the most important sources for the formulation, systematization and development of Islamic law. This

is quite obvious when one realizes that two out of the four sources of Islamic jurisprudence directly or indirectly evolved out of Ijtihād. (46)

The importance of Ijtihād can be further substantiated by looking into the nature<sup>(47)</sup>, objectives and function of the Islamic law. Many jurists<sup>(48)</sup> divided the objectives of the Shari'ah into 'ibādāt (religious observances) and mu'āmalāt (worldly transactions), the 'ibādāt are well defined and their mechanism greatly elaborated in Qur'ān and Sunnah, <sup>subject</sup> is beyond the scope of human study<sup>(49)</sup>, the mu'āmalāt mainly due to different and everchanging conditions which characterise human society, can be discerned by reason. So it was left to Muslims themselves to define and organize. This means that it was up to the Muslim community itself to devise suitable means to deal with the problems of human relations. This however should be done within the framework of some general guidelines laid down in the Qur'ān and Sunnah. (50)

The main objective of these guidelines is to define the spirit of Islamic law, which aims at the establishment of social justice, the guarantee of freedom of belief and practice and the provision of equal opportunity to all members of the society. (51) The details as to how social justice is to be established is left to the Muslim society to work out and this is the function of Ijtihād. (52)

Ijtihād also can be regarded as a vehicle for the development of Islamic law<sup>(53)</sup>. Conclusions reached by the companions of the prophet through Ijtihād became Ijmā', which later was considered as one of the four principles of Islamic jurisprudence. It is also through the continuous use of Ijtihād that the schools of Islamic law were founded and developed.<sup>(54)</sup>

Although Ijtihād, from what can be seen, basically proceeds by means of human intellect which is relative in nature<sup>(55)</sup>, it is an inevitable element in Islamic jurisprudence<sup>(56)</sup>. This fact is supported by certain points:-

(1) Qur'an and Sunnah are the only basis of Islamic law, while the real source is the application of intellect to both sources. As been said by Gibb precisely :-

"The Qur'an and the tradition are not, as it is often said, the basis of Islamic legal speculation but only its sources. The real foundation is to be sought in the attitude of mind which determined the methods of utilizing the sources."<sup>(57)</sup>

The Shari'ah is the totality of rules which God has laid down for the governing of man's behaviour; it is the aggregate of al-hukm al-Shari'. Though ordained by God, few of these rules have been precisely spelled out for man's convenience; rather, man has a duty to derive them from their sources. The distinction between law and its sources is carefully maintained in Islamic jurisprudence. This distinction

assumes that the Shari'ah as the aggregate of divinely-ordained rules, is not entirely self-evident from the sacred texts. If it were, the sacred texts would not be sources of the law, but rather the law itself; they would constitute a divinely given code of law. (58)

In fact, the sacred texts do not, as a rule, state the law in a strictly legal sense, in the sense that a code or similar instrument would state law. They do, however, contain the law, because the law is buried, as it were, within the legally imprecise and sometimes ambiguous language of the sacred texts; it is said to be extracted from the texts; and it is for this reason that the texts are to be considered as sources of the law rather than the law itself. (59)

(2) The texts of Qur'an and Sunnah in relation to matters of jurisprudence are very restricted; on the other hand, the events that occur nowadays in human communities are unrestricted.

During the prophet's time, Qur'an and Sunnah were sufficient to answer the problems arising in the Muslim community. (60)

The prophet will reply by means of the revelation from God or by his Sunnah. After the death of the prophet, the revelation stopped and the Muslim community had to rely on their own intellectual sense to face new problems that had not been faced during the prophet's time. (61)

Therefore, in order to narrow the gap between the restricted texts of Qur'ān and Sunnah and the Muslim's daily needs and life, Ijtihād has been introduced and has been regarded as capable of providing a solution. (62)

Simultaneously, the matters directly involved in Islamic law in the Qur'ān are very limited. This led Leon Ostrog<sup>(63)</sup> and Fitzgerald<sup>(64)</sup> to disagree with the views of the scholars<sup>(65)</sup>, which is say that the Islamic law seeks its basis in divine revelation through the prophet. Being divine, the sources are believed to be sacred, final, eternal and hence immutable.

Both argue that the strictly legal materials in these revealed sources are limited and indeed negligible. Furthermore, this material is more concerned with religious and moral teachings than with matters strictly pertinent to law. The whole body of Islamic law, cannot, therefore, be called revealed and sacred when the amount of legal material existing in the revealed sources is very little.

According to the Sunnī scholars<sup>(66)</sup>, it has to be admitted that the Qur'ān, being basically a book of religious guidance, is not an easy reference for legal studies. As a book of guidance, the Qur'ān contains three types of instructions; articles of faith, ethics and regulations of

society and state. The legal prescriptions are comparatively limited and few in number, being no more than ten percent of the entire book. Seventy injunctions are laid down for family law, another seventy for civil law, thirty for penal law, thirteen for jurisdiction and procedures, and so forth.

Therefore, Muhammad Rashid Ridā suggested that only ten percent of the Qur'ān deals with legal prescription because it is the intention of the Qur'ān to give wide scope for man to determine his worldly affairs by using independent resourcing (Ijtihād) and the usage of the community. (67)

The Shi'is take a different approach in this matter. In accordance with two of the Qur'ānic verses (68), they believe that everything has been mentioned in the Qur'ān and nothing been omitted by it. However, it does not imply that everyone, regardless of his qualifications, is capable of obtaining the pearls lying in the depths of its shoreless oceans. Moreover, based on a tradition, they declare that there is everything in the Qur'ān, but also add that it is not possible to understand part of Qur'ānic meaning without reference to the infallible Imāms. Al-Kūlaynī records the following statement of 'Alī in this regard :-

"There is the Qur'ān: ask it to speak, but it will never speak to you, because its profound speech is audible only to <sup>one who is</sup> ma'sum and it is he who can make it speak unreservedly, yet I will inform

you about it. Verily, in it is the knowledge of the past and the future up to the Day of Resurrection. In it is the judgement touching whatever passes between you and the explanations of your differences. if you ask me about it, I will inform you." (69)

(3) The assumption is that Islamic law is complete and unobjectionable in any place, time and situation (70), although it faces the ever changing human community. (71)

The majority of the Islamic scholars (72) contend that such legal principles as the consideration of maṣlaḥa, the flexibility of Islamic law in practice and emphasis on Ijtihād sufficiently demonstrate that Islam is adaptable to social change.

Not only that, while discussing the evolution of Islamic law, Ibn Qayyim explains that legal interpretation should change with the change in time, places, conditions, intentions and customs. (73) If the causes change or disappear, rules based upon them must change or cease. So, in fact a Shari'ah rule is based upon its cause; when it ceases, the rule also ceases. (74)

Some of the jurists accepted the legality and possibility of change in the explanation or the interpretation of the text itself, because of a change in their causes or in the customs upon which they were based, or in answer to necessity and public interest. (75)

According to Shāṭibī, the fundamental principles revealed in Mecca were permanent; they were never changed or repealed, because they were necessary and essential matters. Abrogation (naskh) occurred only in particular details, not in universal principles. (76) Legal change is, however, possible in individual cases. Therefore two legal institutions are needed and involved in this matter, i.e. futyā and Qadā'. He considered Qadā' and futyā both as wilāyat (administrative office), like the establishing of a government they are also kifa'iyah. (77)

The completeness of Islamic law can be seen from al-Shāfi'i's statement that for every problem which occurred in the Muslim community, there is a law mentioned by Shari'ah which it is compulsory to follow. If it is not mentioned in the Shari'ah, one needs to solve it by Ijtihād and the means of Ijtihād is Qiyās. (78)

Moreover, this matter, was closely related to the power and authority of the Mujtahid. According to the Sunnīs, the Mujtahid's role in search of God's order from Qur'ān and Sunnah is an important assignment. This is so because, from their work, an order is derived and it will be considered as law by God. (79)

According to Shāṭibī; prophet, muftī and Mujtahid are to be considered Shari', but they function on God's behalf and not in their own right. (80)

The Shi'is take the same approach in this matter. The Shi'i Mujtahids are considered as deputies<sup>(81)</sup> or intermediaries<sup>(82)</sup> or the spokesmen<sup>(83)</sup> of the hidden Imām to the people. To the Shi'is, the Mujtahids are the best interpreters of the will of the ma'sūm concealed Imām in religious and political matters.<sup>(84)</sup>

The deputyship of the Mujtahid to the Imām is different from the deputyship of the Imām to the prophet, in that the Imām is the prophet's deputy in all his power and even has the absolute authority over people's souls, while the Mujtahid's sphere of influence is confined only to juridical and executive issues.<sup>(85)</sup> Also, the Imām is a ma'sūm person while the Mujtahids are liable to error<sup>(86)</sup> and their judgements may be affected by their own personalities.<sup>(87)</sup>

They also believed that a certain link exists between the Mujtahids and the concealed Imām. S.H. Nasr, for example, indicated that the Mujtahid in Shi'ism "is in inner contact with the concealed Imām".<sup>(88)</sup> Donald N. Wilber wrote that in Iran "the Shi'a doctors of religious laws are held to be inspired by the Hidden Imām".<sup>(89)</sup>

In summary, in Islamic legal theory discovering the law of God was of crucial significance, for it was the law that informed man of the conduct accepted by God. It is exactly for the purpose of finding the rulings decreed by God that the methodology of uṣūl al-fiqh was established.<sup>(90)</sup>

**(IV) The Mujtahid and its type**

From the linguistic point of view, Mujtahid in Arabic means a person who strives very hard in his work. (91) In terms of uṣūl al-fiqh, it has a wider and deeper meaning. Al-Banānī explained that a Mujtahid is a faqīh who has reached adulthood, developed mentality and good personality. A faqīh means a person who has a deep understanding of the meanings of Shari'ah law according to the right methods of the matters. (92)

The jurists when discussing Mujtahid always associated it with the subject of Muftī, fatwā and faqīh. This can be seen clearly if one analyses carefully the explanations offered by them. (93)

Badakhshī elaborated on the meaning of iftā' given by Baydāwī: it is permissible for a Mujtahid to give fatwā if he can fulfill the requirements according to uṣūl al-fiqh. It meant that fatwā is the outcome of Shari'ah law given by a Mujtahid. (94)

In an other clarification, muftī is explained by Badakhshī, as a Mujtahid who is a Muslim who has fulfilled the qualifications for Ijtihād, and at that time can produce <sup>a</sup> fatwā about Shari'ah law. (95)

Fatwā is also explained by Tahā 'Abdullāh al-Dasūqī, as reasoning on the law given by a Mujtahid mutlaq or Mujtahid Fi-al-Madhhab. (96) According to al-Basri, muftīs are those who have

the requisite skills to be a Mujtahid. (97) Meanwhile, a mufti who wishes to give fatwā to himself and others must be amongst those who can perform Ijtihād. (98)

Only Abū Zuhrah separated Ijtihād and fatwā. He stressed that fatwā is more specific than Ijtihād, because Ijtihād is done to obtain law either in the past or future. Fatwā, in order to be declared must refer to events of the past and a faqih must know about the law which is going to be produced. (99)

What can be understood, based on the jurist's discussion is that Mujtahid, fatwā, mufti and faqih are closely related. Mufti is he who reached the level of Mujtahid according to 'ilm usūl al-fiqh. Meanwhile fatwā is the outcome of Shari'ah law given by a mufti who is a Mujtahid.

The Sunni jurists normally divided Mujtahid into several types and levels. these are as follows:-

(1) Mujtahid mutlaq

Amongst those who have been described under this heading are Abū Hanīfa, Malik ibn Anas, al-Shāfi'i, Ahmad ibn Hanbal and several other Imams who followed their footsteps in creating Qawā'id al-usūl and producing fatwā from their sources. (100)

(2) Mujtahid fi al-Madhhab

They are the followers of Mujtahid mutlaq and capable of producing orders from the reasoning explained by their Imams. They sometimes produced fatwas which contradicted the fatwas produced by Mujtahid mutlaq, but they still held the Qawa'id al-usul used by their Imams. (101)

(3) Mujtahid fi al-masa'il

This group did not produce any orders which contradicted their Imams, either in Qawa'id al-usul or furū' cases. They produced fatwas related to the problems and clearly based on Qawa'id al-usul explained by their Imams. (102)

The Shi'is also taken the same approach. Usually, they divide Mujtahid into the following two classifications:-

(1) Mujtahid mutlaq

In the case of this group, the talent of Ijtihad is not confined to a certain sort of judgement. Instead, it embraces all the body of fiqh. They must not resort to the fatwa of other Mujtahids and the people are religiously entitled to follow them to know the legal judgements necessary to the right regulation of their life. They are also permitted to assume the post of judge and have jurisdiction over some other issues such as the wealth and property of legal minors. (103)

**(2) Mujtahid al-mutajazzi'**

This group refers to the ability to deduce only a certain number of judgements. They must not resort to the fatwā of other Mujtahids. (104) The people are not allowed to follow them unless they have investigated and given judgements on a considerable number of cases to an extent that may be called faqih. (105) Usually this type of Mujtahid is considered as a stage which precedes the Mujtahid mutlaq, because they must have been at a certain time a Mujtahid al-mutajazzi' and then gradually promoted to the level of Mujtahid mutlaq. (106)

The jurists from both sides agreed that there are certain general (107) and academic qualifications which are indispensable for the person before becoming a Mujtahid. These qualifications are;

**(V) General qualification****(1) Steadfastness**

A Mujtahid must be a Mu'min who believes in God, prophet, Day of Judgement and all matters covered by the word Imān. (108) Despite that, a majority of the jurists did not insist on the requirement on a Mujtahid to know 'ilm kalām in great depth like the mutakallim (109) and permitted a Mujtahid on the legal matters to apply taqlīd in the usūl al-Dīn context. (110)

**(2) Taklif**

What is meant by taklif is that a Mujtahid needs to be adult (Baligh) and mentally developed in order to make correct and precise study of a matter and be able to understand the texts of the Shari'ah. (111)

Adulthood (Bulugh) is an important requirement in Ijtihad, because ideas are not accepted from one who is not Baligh due to his undeveloped mentality. (112) So, it is not accepted for those are not Baligh to do Ijtihad, it is only for those who Baligh. (113)

However, the majority of jurists did not set the requirement that a Mujtahid must be a man and free. This is because the companions of the prophet received numerous fatwas from the prophet's wife, while the Tabi'un group also received fatwas from Wafi' ('Umar's slave) and 'Ikrimah (slave of ibn 'Abbas) before both of them had been set free. (114) The meaning of mentally grown is that a Mujtahid must be healthy and free from brain damage, delirium and inflexibility. (115)

**(3) Deep knowledge**

This requirement is considered as an ordinary requirement in order to understand the aims of Shari'ah, and it is possible for a Mujtahid not to have such a character which will enable him to apply Ijtihad in difficult matters. (116)

Al-Jassās laid a requirement for those who want to practise Ijtihād, they must know the law or order which is accepted and its dalīl. (117)

Abū Zuhrah explains that a Mujtahid must be amongst the most clever, most witty and most excellent in making assumptions. This will help him to make the best choice when facing the good and the bad pronouncements. (118)

#### **(4) Being fair and pious (Taqwā)**

The jurists laid down the principle that a Mujtahid must be fair, pious, of good conduct, lead others toward goodness and away from evil and a man who would not betray his religion for worldly wealth. (119)

However, this requirement is not necessary in order to reach the level of Mujtahid, but it is required for the others to accept the result of the Ijtihād from a Mujtahid. (120)

**(VI) The academic qualifications****(1) Knowledge of the Arabic language**

The jurists have come to an agreement that one of the requirements of a Mujtahid is to know the Arabic language, since the Qur'an was in Arabic and the Sunnah which explained the Qur'an is also in Arabic. It is impossible for those who do not understand Arabic language very well to do Ijtihād. Only from the knowledge of the Arabic language will a Mujtahid be able to interpret and enhance his understanding of the Qur'anic verses and Sunnah. (121)

Al-Shawkāni stated that a Mujtahid is not required to memorise everything related to the Arabic language, he is required only to be able to refer to or recall the language books which are authorised when needed. (122)

The majority of the jurists also came to an agreement that it is not necessary for a Mujtahid to know the language in great depth up to the level of a language scholar like Sibawaihi and Asmā'i. On the other hand, they have set the level of the language which is needed to be learnt like the rules of the language and its customs, till he can differentiate words of sarīh, zāhir, mujmal, haqīqah, majāz, 'Amm, khāṣṣ, maksūd, muḥkamāt, mutashābihāt, mutlaq, muqayyad and others. (123)

Meanwhile, al-Shāfi'i laid down that a Mujtahid also needed to learn the Arabic poetry, because those who understand it, besides 'ilm al-bayān and ma'nā, can give interpretations and inner meanings of certain verses and also verses which have different meanings from original text. (124)

Even al-Shirāzi while explaining the requirements of a Mujtahid, restricted himself to stating that a Mujtahid must have knowledge of the Qur'ān and Sunnah, and matters related directly with the Sharī'ah. He did not include matters not related with the Sharī'ah such as proverbs as requirements of a Mujtahid. (125)

## (2) Understanding the Qur'ān

What is needed from these requirements includes the knowledge of the ayāt ahkām with the lughawiyyah and Shara'iyyah meanings. The former requires one to know the meaning of mufradāt and murākabāt. Meanwhile the latter requires one to know the meanings which exert effects on orders or laws and the aim which are required by the Sharī'ah. (126)

The jurists, however, disputed whether a Mujtahid needs to know all verses of Qur'ān or not. In this complication the jurists are divided into two groups;

(1) The majority of the jurists laid down a requirement that a Mujtahid need not know all of the verses of Qur'ān. It is only required to learn about the five hundred of the ayāt ahkām (127) and their references, where needed. (128)

(2) Some jurists agreed with the first amongst those:-

(i) The jurists who stated that the ayāt aḥkām are far more than five hundred verses. This was based on 'Abdullāh ibn Mubārak who deduced that the ayāt aḥkām are nine hundred; according to other jurists it is more than that. (129)

(ii) Shawkānī in commenting on al-Ghazālī's view, stated, that the ideas of those who said that ayāt aḥkām are limited to five hundred verses had been looking at it superficially. What is certain is that, in Qur'ān there are far more verses than the figure shown for the verses to which istinbāt was applied in order to deduce an order. For those with deep knowledge and a sharp mind will apply istinbāt to produce an order from verses on event. (130)

(iii) Al-Qawfī stated that istinbāt can be applied to almost all of the verses in producing orders. Verses narrating events are difficult to do istinbāt from but can be used as lessons. The verses that mention punishments or deplore certain behaviour can be used as reasons to forbid such conduct. Meanwhile the verses which mention blessings and rewards for certain behaviour by the Shari'ah can be used as either Wajib or sunnat. (131)

(iv) Al-Thaufi stated that it is very rare to find verses of the Qur'ān where istinbāt cannot be used to produce law. (132)

(v) Al-Asnawī held that although the jurists do not require a Mujtahid to memorise the whole Qur'an, it is important for a Mujtahid to understand the whole Qur'anic text and not only five hundred of the ayāt ahkām. To sum up, a Mujtahid ought to know and have deep knowledge of all Qur'anic verses and simultaneously concentrate on ayāt ahkām. (133)

Besides the above matter, another problem arose; whether a Mujtahid must memorise the whole Qur'an or not. In this problem the jurists deduced two opinions;

(1) According to al-Shāfi'i, a Mujtahid must memorise the whole Qur'an. This opinion coincided with some of the jurist's opinions which required a Mujtahid to know the whole content of the Qur'an in order to make it easy in producing orders. (134)

(2) Al-Ghazālī and the majority of the jurists do not require a Mujtahid to know the whole Qur'an. He is required to learn where the places are in the Qur'an so reference can be made easily when needed. (135)

### (3) Knowledge of the prophet's Sunnah

According to Dr. Yūsuf al-Qardāwī and Kashf al-Ghitā, as a rule a Mujtahid is required to have wide comprehensive knowledge of Sunnah, besides concentrating on the traditions concerning law. This was so because some traditions are regarded as far from the law, but a Mujtahid can deduce law from such traditions which are normally unknown by others. (136)

In the problem whether a Mujtahid must understand and memorise all traditions, the jurists have all agreed that it is not compulsory for a Mujtahid to memorise all of them, only those related to the matter, for reference can be made when needed. However, it is good if one can memorise those traditions related to law. (137)

The jurists, however, debated the number of traditions that needed to be known to a Mujtahid.

To al-Ghazālī, although there were several thousands of traditions, a Mujtahid is not required to learn all of them. He is required only to be able to refer to the traditions concerning law, like Sunan Abū Dā'ūd and Ahmad Baihaqī or books containing collections of traditions of law. (138)

As stated by Ahmad ibn Hanbal through a narration by Abū 'Alī al-Zarīr, a Mujtahid must learn about five hundred thousand traditions in order for him to be a Mujtahid in giving fatwā. Meanwhile a minimum of one thousand and two hundred traditions are required for ahl al-Fiqh. (139)

Al-Zarkashī, in commenting on Ahmad ibn Hanbal's idea, said that the figure five hundred thousand covers al-Athar of the companions of the prophet and the Tabi'in, and the sanad of a narration. Therefore, those who do not know the sanad science a tradition cannot declare law and give fatwā. (140)

Meanwhile some of Zarkashi's companions considered that ibn Hanbal meant to be very careful and strict in giving fatwas, or to sympathize with the ahl al-Fiqh, since the number of traditions required to be learnt by a Mujtahid is only one thousand and two hundred traditions. (141)

Al-Shawkani, on the other hand, questioned the authority of traditions in the sunan Abū Da'ūd suggested by al-Ghazālī and other jurists. (142) To him, a Mujtahid must have great knowledge of Sunnah. A Mujtahid must master the six authentic books of the tradition. (143) Also when required, a Mujtahid must know how to act when facing traditions which cancel each other. (144)

Ibn Amir al-Hajj commenting on the kitāb al-Tahrīr of Ibn Humām, pointed out the illogical requirements regarding traditions which were put on a Mujtahid. He rejected the requirement which stated that a Mujtahid must know at least five hundred traditions because, to him, the number is too low and inadequate. He also disagreed with the figure of five hundred thousand traditions because to him the figure is too much. (145)

He added that weighty requirements will lead the effort to do Ijtihād to end. For a change he has laid the requirement of one thousand and two hundred Hadith al-ahkām and not all of them needed to be memorised. (146)

In addition to learning Hadith al-ahkām, the jurists laid a requirement that a Mujtahid must know 'ilm Dirayyah al-Hadith. This knowledge covers mustalah al-Hadith, narrator of traditions and its authority to enable him to base practice on authentic traditions. (147)

Al-Ghazālī explained the meaning of 'ilm Dirayyah of traditions, that a Mujtahid must know the narration system and be able to differentiate between an authentic tradition and a false one, also which to accept and which to reject. The traditions which had not been conveyed by an honest narrator from another honest narrator cannot be accepted as Hujja. (148)

He stressed that it had been a rule or common practice that the isnād of traditions which can be used as a base for the fatwā and is accepted by the community, not need be checked, although some jurists rejected it. A Mujtahid must know the narrators of tradition and their trustworthiness. When the narrator in a sanad of tradition is famous, one has to accept such traditions since the narrators of such traditions are well known for their trustworthiness. (149)

Al-Asnawī and al-Subkī stressed that a Mujtahid is not required to know the narrating system of traditions or the trustworthiness of its narrators. To them, it is satisfactory for a Mujtahid to be able to refer to the authentic books. (150)

**(4) Knowing the 'ilm al-Nāsikh wāl Mansūkh of the Qur'ān and Hadīth**

Dr Muḥammad Sa'id Tawāna affirmed that jurists have laid a requirement that a Mujtahid must know 'ilm al-Nāsikh wāl Mansūkh. It is important since it completes the methods of understanding Qur'ān and traditions. (151)

This requirement was to avoid the danger of reasoning in favour a law using Qur'ānic verses and traditions which have been abrogated and cannot be used as basis and Hujja. (152)

However, the jurists came to an agreement that a Mujtahid is not required to know all the Qur'ānic verses and traditions which have been abrogated. They are also not required to memorise all of them. It is sufficient for them to know that the verses and traditions which they used for their reasoning to determine law were not included amongst those which have been Mansūkh. (153)

**(5) Knowledge of the Ijma'**

Abū Zuhrah stated that all jurists have agreed to set the knowledge regarding ulema's Ijma' as the most important requirement for a Mujtahid. (154) It covers Shari'ah laws which had been agreed by the jurists since the sahāba period until the period of a Mujtahid's Imām and the generations that followed.

The jurists set this to avoid a Mujtahid's giving fatwās which contradict those of the Ijmā' of the past ulama'. (155)

A Mujtahid is also required to know the text of the Qur'an and tradition and its 'illah in order to avoid giving fatwās which contradict the text. (156)

Al-Shawkānī explained the need to know Ijmā' as stated by jurists who considered Ijmā' as one source of Islamic law. Some jurists thought that the occurrence of Ijmā' is rare or impossible and cannot be accepted as a Shari'ah source. It is clear that this group has not any association with the requirement mentioned above. (157)

#### **(6) Knowledge of 'ilm usūl al-Fiqh**

The jurists have stated that the most important knowledge is 'ilm usūl al-Fiqh (158) which a Mujtahid is required to know. The initial object of this knowledge is agreed by the jurists in order to set certain methods in making istinbāt of law from certain nass and from those without nass. (159)

This requirement is clear since the knowledge of usūl al-fiqh covers all the matters debatable amongst the jurists which include understanding of Shari'ah law whether its reasoning is done directly or by means of different methods like orders, prohibitions, 'Amm and Khāss. To give a fatwā, a Mujtahid has to know those methods and their rules and all these are included in 'ilm usūl al-fiqh. (160)

What can be understood from al-Shawkānī's idea regarding 'ilm usūl al-fiqh is that the contents of the knowledge will enable a Mujtahid to stand on a sound basis. This is so because it is the pillar of Ijtihad and it can act as a basis for further building. (161)

He went on to say that a Mujtahid should understand the problems of usūl al-fiqh and analyse the related books either minor or major, within his ability. Also, he should be able to examine every problem until the truth is revealed and be able to trace branches of law to the roots easily. If a Mujtahid is inexperienced in usūl al-fiqh, he will have difficulties in deducing the branches of law in its original place and this will lead him to confusion. (162)

#### **(7) Knowing the meanings and aims of Shari'ah**

Besides all those requirements mentioned above, the jurists have added another, that is to know the meanings of Shari'ah which is the main reason for the revelation of the Qur'an from God and his Messenger who constituted several Shari'ah laws. (163)

Al-Shātibi explained the presentation methods in Islamic Shari'ah are covered by three maṣlahat stages (164):-

(i) Maslahat al-Darūriyyah; are important matters which need to be fulfilled for human existence, which cannot be separated in building the importance of the religious life and also in preservation of the aims of Shari'ah. If not fulfilled or only

partially done this will lead to destruction. For example in protecting wealth, religion, health, mentality and offspring.

Dr. Muhammad Sa'id clarified that these jurists have fixed the existence of orders between the five types of darūriyyah. The importance of religion is placed in the first class and has more priority than the importance of health. Meanwhile, the importance of health is of more concern than mentality, followed by the importance of offspring which is greater than importance of wealth and economy. (165)

(ii) Maslahat Hajiyyah consists of matters required by human to avoid destruction and solve complications. If is not fulfilled many difficulties will arise in human life though it might not lead to its destruction. Maslahat Hajiyyah occurs in four categories: 'ibādah, tradition, mu'amalat and jinayah. (166)

As an example in 'ibādah, Islamic jurisprudence has set several rukṣat like giving relief to those who are ill or travelling in breaking their fast, such as shortening and combining prayers to musāfir and many other examples to disburden mankind. (167)

(iii) Maslahat Tahsinah is using all suitable and logical things to upgrade morality, pride and duty of the community. Unlike the Darūriyyah and Hajiyyah, maslahat Tahsinah, if left, will not destroy mankind. But life will be hated and cursed by those of high morals and good attitude. Maslahat Tahsinah includes

makārimul akhlaq and matters that can improve traditions and human way of life. (168)

Ibn Qayyim, on the other hand, mentioned that Islamic Shari'ah was built on the basis of intelligence and importance to life in this world and the life hereafter. Overall, Islamic Shari'ah consists of elements like justice, blessing and intellectual power. Therefore every problem which lacks any of the above elements will not be included in Islamic Shari'ah, although required to be done through ta'wil. (169)

From all that, it can be understood, the requirements set by the jurists concerning the aims of Shari'ah were so, to allow a Mujtahid not to be misled when doing Ijtihad. Also those who are careless will not be deceived by taking into account only Juz'iyah law and ignoring what it meant in kulliyah law, as a result they would be confused and at loss, without a clear path. (170)

Al-Shatibi particularly stressed this need and has taken it further by making it the way to reach the level of Mujtahid. He stated that the level of Mujtahid could be reached by those who have these two qualifications (171):-

(i) Understanding the meanings of Shari'ah very well as being based on total concentration of the three maslahat mentioned earlier. He added when a level is reached where one understood the meanings of Shari'ah in Islam and all problems related, one

has reached the degree of prophet's caliph in teaching, giving fatwā and judgement according to the law set out by God.

(ii) Ability to summarize law based on understanding Shari'ah, aided by knowledge of Arabic language, knowledge of law in Qur'an, Sunnah and Ijma'. All these act as devices in helping istinbat of law from its sources. Indirectly, al-Shatibi placed this second qualification as a method to reach the first. The first qualification is regarded as a target while the later as means to reach the target. (172)

**NOTE TO CHAPTER ONE -- PART A**

(1) Ibn Manẓūr; Lisān al-'Arab, Beirut, 1956, v.111, page 133.

(2) Badakhshī; Manāhij al-Uqūl, Cairo, 1953, v.111, page 191.

(3) Muḥammad Taqī al-Hakīm; Al-uṣūl al-'Āmma fi al-fiqh al-Muqārin, Beirut, 1963, page 561.

(4) In these problems the jurists are divided into three groups:-

(i) Group that explained the meaning without using Qā'id 'ilm or Qā'id ḥikm. Instead, they used the phrase: Dark al-Hukm.

See Asnawī; Nihāyat al-Sul fi sharḥ minhāj al-wuṣūl, Cairo, 1899, v.11, page 191.

Zarkashī; Bahr Muḥit, Cairo, n.d., v.111, page 79.

(ii) Group that explained the meaning by using Qā'id 'ilm.

See Ghazālī; Al-Mustasfa min 'ilm uṣūl al-fiqh, Cairo, 1937, v.11, page 350.

(iii) Group that explained the meaning by using Qā'id al-ḥikm.

See Al-Āmidī; Al-Ihkām fi uṣūl al-aḥkām, Cairo, 1941, v.111, page 204.

See Ibn Humām; Al-tahrir fi uṣūl al-fiqh, Cairo, 1351H, v.4, page 179; Muḥammad Taqī Hakīm, op.cit. page 287.

(5) In these complications the jurists are divided into two groups :-

(i) Group who chose the word Bazl ( بزل ) in their definition. See Ghazālī, op.cit., v.11, page 350; Ibn Humām, op.cit., v.4, page 179.

(ii) Group who chose the word istifragh ( استفراغ ) in their definition.

See Āmidī, op.cit., v.111, page 204; Asnawī, op.cit., v.111, page 191.

(6) In these complications, jurists are divided into two groups:-

(i) Group who mentioned the word faqīh and Mujtahid in their definition.

See Ghazālī, op.cit., v.11, page 350; Ibn Humām, op.cit., v.4, page 179.

(ii) Group who never mention the word faqīh or Mujtahid in their definition.

See Āmidī, op.cit., v.111, page 204; Asnawī, op.cit., v.111, page 191. Zarkashī, op.cit., v.111, page 79.

(7) Shawkānī; Irshād al-Fuḥūl, Cairo, 1937, page 250.

(8) Ibid.

(9) Badakhshī; Sharḥ al-Badakhshī wa manāhiḥ al-Fuḥūl, Cairo, 1953, v.111, page 191 - 192.

- (10) Ghazālī, op.cit., v.11, page 362.
- (11) Al-Shāfi'i; al-Risālah, Cairo, 1940, page 477.
- (12) Ibid, page 487.
- (13) Ghazālī, op.cit., v.11, page 54.
- (14) Ibid.
- (15) Muḥammad Taqī al-Ḥakīm, op.cit., page 561.
- (16) Muḥammad Ḥusain al-Isfahānī; Al-Ijtihād wa Taqlid, Najaf, 1957, page 2.
- (17) Al-Hasānī, Jihād; The Question of Imama, political and Religious Authority in Twelver Shi'ite Thought, Ph.D. Thesis, Manchester Univ., 1974, page 287 - 288.
- (18) Ibid and Muḥammad Ḥusain Isfahānī, op.cit., page 2.
- (19) Ḥusain al-'Āmili, 'Aqīdat al-Shi'a, page 333  
Al-Zanjānī; 'Aqā'id Imāmiyyah, v.1, page 113; Muḥammad Mahdī al-Khalkhālī; Durūs fi fiqh al-Shi'a, Najaf, 1964, v.1, page 25.
- (20) Ḥusain al-'Āmili, op.cit., page 333.
- (21) Al-Shāṭibi; Al-Muwāfaqāt fi usūl al-Aḥkām, Cairo, 1933, v.111, page 24; Ibrahim Salgīnī; "Al-Maṣḍar al-Awwal min maṣādir al-Shari'ah al-Islāmiyyah", in Al-Tawhid, 9 (1404H), page 300.
- (22) Al-Āmīdī, op.cit., v.4, page 28 - 30.
- (23) Ibn Qayyim; al-A'lām al-Muwāqī'in, v.1, page 80.
- (24) Al-Ash'arī; Maqālāt al-Islāmiyyīn, page 356 - 357.

(25)G.F.Hourani;"Combinations of reason and tradition in Islamic ethics",in Reason and tradition in Islamic ethics, Cambrigde,1985,page 270 - 275.

(26)Ibid.

(27)M.J.Mc Dermott;The theology of Al-Shaikh Al-Mufid,its relations to the Imamate traditionists and to the Baghdad Mu'tazilites,Chicago,1971,page 54 - 57.

(28)Hourani,op.cit.,page 275.

(29)Ibid.

(30)Ibid.

(31)Ibid.

(32)Al-Shāṭibī,op.cit.,v.11,page 8 - 17.

(33)Al-Āmidī,op.cit.,v.111,page 186 and v.4,page 76.

(34)Ibid.

(35)Al-Ghazali,op.cit.,v.11,page 72 and 75;Al-Shawkānī,op.cit.,page 181;Al-Āmidī,op.cit.,v.111,page 186.

(36)Al-Bayhaqī reported that Abū Ḥanīfa used as the sources of law;first Qurān,second, tradition,third, sahāba's fatwā and fourth, Ijtihād done by the way of Qiyās.Among types of Qiyās which were used are istihsan,Qiyās Khafī and Qiyās Jalī.

See Muṣṭafā al-Sibāī;Al-sunnah wa makanatah fi al-tashri' al-Islāmi,Cairo,1961,page 452.

Ibn Qayyim explained that the sources of law used by Mālik ibn Anas were; first Qur'ān, second tradition, third ṣahāba's fatwā and fourth Ijtihād done through Qiyās, istiḥsan and maṣālih mursalah. See Ibn Qayyim, op.cit., v.11, page 304.

From what is known from al-Risālah and al-Umm, <sup>al-</sup>Shafi'i divided Islamic sources into several different stages: first stage; Qur'ān and tradition, second Ijmā', third ṣahāba fatwā which were agreed upon and fourth Qiyās. He preferred Akhbār Ahād which does not exclude Qiyās application and rejected istiḥsan and maṣālih mursalah. See al-Risālah, page 503 - 508. Al-Umm, v.7, page 270 - 304.

Ibn Qayyim reported that Ibn Ḥanbal divided the sources of Islamic law into five sections. The first section: al-nuṣuṣ which are the Qur'ān and tradition. Second: ṣahāba's fatwā which were agreed upon, third: fatwā of ṣahāba which were argumentative but he chose those which were closest to the nuṣuṣ. Fourth: Hadith Mursal and Hadith d'a'if which were related by the narrators who have not reached the degree of Thiqah and lastly: Qiyās applied in emergencies only. See Ibn Qayyim, op.cit., v.1, page 29 - 33.

(37) Muḥammad Ibrāhīm Jannati; "Ijtihad and the practice of Ra'yu", in Al-Tawhid, v.V, No.2, page 71 - 72.

(38) Muhammad Baqir al-Ṣadr; Al-Fatawā al-Wāḍiḥa, Beirut, 1978, v.1, page 98.

(39) Ezzati, Abu'I-Fadl; An introduction to Shi'i Islamic law and jurisprudence, Lahore, 1976, page 36 - 37.

(40) Ibid.

(41) Ibid, page 36 - 41.

(42) Several Qur'ānic verses expressly indicate that it is the basis and main source of law in Islamic law.

See Qur'an 5:47 - 50.

(43) The Sunnah is closely linked with the Qur'an.

See Qur'an 5:48 - 49; 16:44 and 3:164.

(44) S. Mahmassani; The philosophy of jurisprudence in Islam, Translated by Farhat Ziadeh, Malaysia, 1987, page 109.

(45) Ghazālī, op.cit., v.1, page 170.

(46) Umar Jah; "The importance of Ijtihād in the development of Islamic law", in Journal of Islamic comparative law, 1977, page 31 - 40.

(47) Ibid.

(48) Ibn 'Abd al-Salām; Qawā'id al-aḥkām fi maṣāliḥ al-'Anām, Cairo, 1934, v.1, page 1; Shāṭibī, op.cit., v.11, page 5.

(49) Shāṭibī, op.cit., v.11, page 300.

(50) Ibid.

(51) Al-Asnawī, *op.cit.*, v.111, page 108.

Dā'ūd al-Zāhiri did not distinguish between religious observances and worldly transactions, but considered both of them as religious observances that cannot be discerned by reason. Shāṭibī; Al-I'tisām, Cairo, 1915, v.11, page 114.

(52) Umar Jah, *op.cit.*

(53) Sa'id Ramadān; Islamic law, its scope and equity, London, 1961, page 75.

(54) Ibn 'Abd. Barr; Jami' al-Bayān al-'ilm, Cairo, 1975, page 323.

(55) Muhammad Muslehuddin; Philosophy of Islamic law and the Orientalist: A comparative study of Islamic legal system, Lahore, 1980, page 118 - 119.

(56) Goldziher; The Zahiris: Their doctrine and their history, translated by W. Behn, Leiden, 1971, page 3 - 4.

(57) Gibb; Mohammedanism, New York: Oxford, 1962, page 74.

(58) Weiss Bernard; "Interpretation in Islamic law: The theory of Ijtihād", in The American Journal of comparative law, 26(1978) page 199 - 212.

(59) Muhammad Muslehuddin, *op.cit.*, page 125 - 126.

(60) Ahmad Hasan; The early development of Islamic jurisprudence, Islamabad, 1970, page 12 - 13.

(61) J. Schacht; Usul, in E. I.

(62) Ibn Qayyim, *op.cit.*, v.11, page 20 - 21.

(63) Leon Ostrog; The Angora reform, London, 1927, page 17.

(64)S.G. Vesey Fitzgerald;"Nature and sources of Shari'a",  
in Law and the middle East,v.1,Washington,1955,page 87.

(65)N.J.Coulson;A history of Islamic law,Edinburgh,1964,  
page 1 and 2;H.Lammens;Islam,belief and institutions,London,  
1929,page 82;H.J.Liebesny;"Religious law and westernization in  
the Moslem near east",in The American Journal of comparative  
law,1953,v.11,page 492;J.N.D. Anderson;Islamic law in the  
modern world,New York,1959,page 17.

(66)Sa'id Ramadan,op.cit.,page 43;'Abd. Wahab Khalaf;Khulāsat  
tārīkh al-tashrī' al-Islāmī,Beirut,1968,page 28 - 29;  
Fazlur Rahman;Islam and modernity:Transformation of an  
intellectual tradition,Chicago and London,1982,page 20.

(67)Muhammad Rashid Rida;Al-Wahy al-Muhammadi,Cairo,1931,  
page 225.

(68)See page 245 - 246.

(69)Kulaynī;Usūl al-Kāfi,v.1,page 62.

(70)Subhi Mahmasani,op.cit.,page 105.

(71)Ibn Khaldūn;Al-Muqqadima,page 24.

(72)Rashid Ridā;Yusr al-Islām,Cairo,1956,page 72 - 75.

Dawālibī;Al-Madkhal ilā 'ilm usūl al-fiqh,Beirut,1965,  
page 442 - 450;Muṣṭafā Shalabī;Ta'līl al-ahkām 'ard wa tahlīl  
li tariqat al-ta'līl wa tatawwurātihā fi usūl al-Ijtihād wa al-  
Taqlid,Cairo,1949,page 278 - 384.

'Abd Wahab Khalaf;Masādir al-Tashrī' al-Islāmī fi mā lā nassa  
fihi,Cairo,1955,page 70 - 122.

(73) He was right also when he understood this clear fact by saying: "ignorance of this fact has resulted in grievous injustices to the Shari'ah and has caused many difficulties, hardships and sheer impossibilities, although it is known that the noble Shari'ah, which serves the highest interest of mankind, would not sanction such a result".

See Ibn Qayyim, op.cit., v.111, page 1.

(74) Ibn 'Abidin; Nashr al-'Arf fi bina' ba'd al-ahkam 'ala al-'urf,

Damascus, 1302H, page 17.

(75) See Mahmasani, op.cit., page 110 - 115.

(76) Shaṭibi, op.cit., v.1V, page 236.

(77) Ibid, v.11, page 247 and 189.

(78) <sup>al-</sup>Shafi'i, Risalah, page 477.

(79) <sup>al-</sup>Shafi'i explains that the decisions taken on the basis of Ijtihad are all correct ostensibly (zahiran) and not really (Batinan). See <sup>al-</sup>Shafi'i, Al-Umm, v.V11, page 261 and 274.

(80) Shaṭibi, op.cit., v.1V, page 245.

(81) Al-Zanjani, Al-'Aqa'id, v.1, page 114.

(82) Macdonald, al-Mahdi, in E.I.<sup>1</sup>

(83) Macdonald, Idjtihad (11), in E.I.<sup>2</sup>

(84) See Nikki R. Keddie's introduction in Scholars, Saints and Sufis, California, 1972, page 3.

(85) Muhammad Jawad Mughniya; Al-Islam wal 'Aql, page 225 - 226.

- (86) Macdonald, Al-Mahdi, in E.I.<sup>1</sup>
- (87) Mughniya, op.cit., page 222.
- (88) S.H. Nasr, Ideals and realities, page 173.
- (89) Donald N. Wilber; Iran: past and present, Princeton, 1967, page 200.
- (90) W.B. Hallaq; The gate of Ijtihad: A study in Islamic legal history, Ph.D thesis, University of Washington, 1983, page 13 - 14.
- (91) Idris al-Marbawi; Qamūs al-Idris al-Marbawī, Cairo, 1350H, v.1, page 112; Antuni; Modern dictionary of the Arabic- English, Cairo, 1954, page 126.
- (92) Al-Banāni; Hashiyah al-'allāmah al-Banāni, Cairo, 1954, v.11, page 399 - 401.
- (93) Al-Badakhshi, op.cit., v.111, page 192  
Abū Nor al-Zuhair; Uṣūl al-fiqh, Cairo, 1952, v.4, page 226.
- (94) Badakhshi, op.cit., v.11, page 210.
- (95) Ibid, v.111, page 210 - 212.
- (96) Toha 'Abdullāh al-Dasūqī; Uṣūl al-fiqh, Cairo, 1966, page 366.
- (97) Al-Baṣri; Kitāb al-Mu'tamad fī uṣūl al-fiqh, Beirut, 1965, v.11, page 929.
- (98) Ibid, page 929 - 930.
- (99) Abū Zuhrah; Uṣūl al-fiqh, Cairo, 1957, page 401.
- (100) Jamāluddīn al-Qāsimī; Kitāb al-Fatwā fī al-Islām, Beirut, n.d., page 15 - 16; Ibn 'Abidīn; Majmu'at rasā'il Ibn 'Abidīn, Beirut, 1325H, page 11.

- (101) Ibid.
- (102) Ibid, page 213 - 214.
- (103) 'Alī Kāshif Ghītā'; Al-Nur al-Satī' fi al-fiqh al-Nafī', Najaf, 1961, v.1, page 121; Husain al-'Āmili, 'Aqīdat al-Shī'a, page 336.
- (104) 'Alī Kāshif Ghītā', op.cit., v.1, page 121. Muḥammad Mahdī al-Khalkhālī; Durus fi fiqh al-Shī'a, Najaf, 1964, v.1, page 125.
- (105) Ibid, v.1, page 128 - 130.
- (106), op.cit., page 34.
- (107) For the Shi'i point of view, see Muḥammad Kāzīm al-Ṭabāṭabā'i al-Yazdī; Al-'Urwa al-Wuthqā, Tehran, 1968, page 5. 'Alī Kāshif Ghītā', op.cit., v.11, page 196 - 233.
- (108) Al-'Āmidī, op.cit., v.111, page 204.
- (109) Ibid, page 405; Banānī, op.cit., v.11, page 374. al-Shawkānī, op.cit., page 235.
- (110) <sup>al-</sup> Ghazālī, op.cit., v.11, page 51 - 52.
- (111) Banānī, op.cit., v.11, page 382; Al-Asnawī, Sharḥ al-Asnawī wa sharḥ al-Badakhshī 'alā minhaj Bayḍāwī, v.111, page 200.
- (112) Banani, op.cit., v.11, page 382.
- (113) Sa'id Mūsā Tawāna; Al-Ijtihād wā madā hajatih ilaihi fi hādha al-'asr, Cairo, 1972, page 161.
- (114) Ibid, page 162.
- (115) Banānī, op.cit., v.11, page 382.
- (116) Sa'id Mūsā Tawāna, op.cit., page 163.

- (117) Al-Jaṣṣaṣ; Kitāb usūl al-fiqh, Cairo, v.111, page 800.
- (118) Abū Zuhrah, Usūl al-fiqh, page 308.
- (119) Ibn Qayyim, op.cit., v.1, page 11; Ghazālī, op.cit., v.11, page 350; Banānī, op.cit., v.11, page 385.
- (120) Yūsuf al-Qardawī; Al-Ijtihād fī al-Shari'ah al-Islamiyyah ma'a nadharatul tahyatīn fī al-Ijtihād al-Mu'ashir, Kuwait, 1985, page 49.
- (121) Abū Zuhrah, op.cit., page 380 - 381; 'Alī Kāshif Ghitā', op.cit., v.1, page 79.
- (122) Shawkānī, op.cit., page 251 - 252.
- (123) Āmidī, op.cit., v.111, page 205; Ghazālī, op.cit., v.11, page 351 - 352; Ibn Qayyim, op.cit., v.1, page 46.
- (124) Ibn Qayyim, op.cit., v.1, page 51.
- (125) Al-Shirāzī; Al-Luma' fī usūl al-fiqh, Cairo, 1970, page 85 - 86.
- (126) Sa'id Mūsā Tawāna, op.cit., page 177; 'Alī Kāshif Ghitā', op.cit., v.1, page 79.
- (127) Ghazālī, op.cit., v.11, page 350.
- (128) Ghazālī, op.cit., v.11, page 350; Asnawī, op.cit., v.111, page 200; Ibn Qayyim, op.cit., v.1, page 46.
- (129) Yūsuf Qardawī, op.cit., page 17.
- (130) Shawkānī, op.cit., page 250 - 251.
- (131) Yūsuf Qardawī, op.cit., page 18.

(132) Ibn Qudāmah; Rawdah al-Nādhir wa janātul munādhir, v.11, page 401.

(133) Al-Asnawī, op.cit., v.111, page 307 - 313.

(134) Sa'id Mūsā Tawāna, op.cit., page 181.

(135) See note no.128.

(136) Yūsuf Qardawī, op.cit., page 25; 'Alī Kāshif Ghita', op.cit. v.1, page 91.

(137) Ghazālī, op.cit., v.11, page 351; Asnawī, op.cit., v.11, page 200; Amidi, op.cit., v.111, page 205.

(138) Ghazālī, op.cit., v.11, page 350 - 354.

(139) Shawkānī, op.cit., page 251.

(140) Ibid.

(141) Ibid.

(142) Ibid, page 232 - 235.

(143) Ibid.

(144) Ibid.

(145) Ibn 'Amir al-Hajj; Sharh al-Tahrir wal-Tahbir, Cairo, 1898, v.111, page 292 - 294.

(146) Ibid.

(147) Yūsuf Qardawī, op.cit., page 26.

(148) Ghazālī, op.cit., v.11, page 352 - 353.

(149) Ibid.

(150) Al-Subki; Jam' al-Jawāmi', Bombay, 1970, v.11, page 382 - 386. Asnawī, op.cit., v.11, page 307 - 313.

(151) Sa'id Mūsā Tawāna, op.cit., page 183.

- (152) Yūsuf Qardawī, op.cit., page 27 - 28.
- (153) Ghazālī, op.cit., v.11, page 353; Asnawī, op.cit., v.11, page 201  
Ibn Qayyim, op.cit., v.1, page 46.
- (154) Abū Zuhrah, op.cit., page 380 - 388.
- (155) Ghazālī, op.cit., v.11, page 353; Asnawī, op.cit., v.11,  
page 201; Ibn Qayyim, op.cit., v.1, page 46.
- (156) Ghazālī, op.cit., v.11, page 351; Asnawī, op.cit., v.11,  
page 200; Amidi, op.cit., v.111, page 205.
- (157) Shawkānī, op.cit., page 251.
- (158) Ghazālī, op.cit., v.11, page 353; 'Alī Kāshif Ghita', op.cit  
v.1, page 104 - 105.
- (159) Yūsuf Qardawī, op.cit., page 29.
- (160) Ibid.
- (161) Shawkānī, op.cit., page 252.
- (162) Ibid.
- (163) Abū Zuhrah, op.cit., page 380 - 383.
- (164) Shāṭibi, op.cit., v.2, page 8.
- (165) Muḥammad Sa'id; Buḥūth fi al-Adillah mukhtalaf fiḥā inda  
usūliyyīn, Cairo, 1977, page 98.
- (166) Ibid.
- (167) Ibid.
- (168) Ibid.
- (169) Ibn Qayyim, op.cit., v.111, page 3.
- (170) Ibid.

(171) Shāṭibī, op. cit., v. 1V, page 105 - 107.

(172) Ibid.

PART B - THE ORIGIN OF SUNNISM.

(I) 'UTHMANIYYA.

(II) ASHAB AL-HADITH.

(III) EARLY NOTION OF ORTHODOXY ASCRIBED TO ASHAB AL-HADITH.

(IV) AHL AL-SUNNAH WAL JAMA'AH.

PART B -- THE ORIGIN OF SUNNISM

The word "Sunni" refers to the majority of Muslims, who are opposed to the Shi'i. In early Islam, the word Sunni or Ahl al-Sunnah wal-Jama'ah did not exist, and this word was introduced during the Abbasid period. (1)

It is believed, that the word Sunni originated at a much earlier time, i.e. before the Abbasid supremacy. At an early stage, the elements that formed the proto-Sunni party were represented by the 'Uthmaniyya group (2) politically and the Ahl al-Hadith or Ashab al-Hadith (3) religiously. These two groups influenced each other and later formed the group called Sunni.

(I) 'UTHMANIYYA

History states that the rise of the 'Uthmaniyya party occurred at the end of the first civil war which left Mu'awiya as de facto ruler. At that time, the Muslims were divided into two distinct groups; the 'Uthmaniyya and Shi'i (4). The 'Uthmaniyya had been the suppressors of 'Ali's supporters. (5) The 'Uthmaniyya claimed that 'Uthman was the just and legitimate caliph and his murder was to be condemned. They did not support 'Ali (6), and in simpler terms this group are those who spoke much of the merit of 'Uthman and demerits of 'Ali. (7)

However, the 'Uthmāniyya were further divided into two groups. First, the group that announced that Mu'āwiya was the respected caliph<sup>(8)</sup> and the second, a group of the upholders of the principles of the early caliphate, in particular the rights of the families of the early non-Hashimite companions of the prophet.<sup>(9)</sup>

According to some scholars<sup>(10)</sup>, the leaders who had held these ideas were Abū Bakr and 'Umar. Both of them indirectly tried to deny the idea that only the Banī Hashim had the sanctity to hold the caliphate after the death of the prophet.<sup>(11)</sup>

In the later development, the death of Mu'āwiya and the establishment of the Umayyad dynasty, further sharpened the front between these two parties. The 'Uthmāniyya especially those in Hijaz<sup>(12)</sup>, who supported the tradition of the early caliphate tried to render support in the election of 'Abdullāh ibn al-Zubayr as caliph in order to gain power and destroy the Umayyad dynasty.<sup>(13)</sup>

After the fall of 'Abdullāh ibn al-Zubayr<sup>(14)</sup>, these groups tried to avoid political conflict<sup>(15)</sup> and concentrated on religious learning. They came to idealize the period of the first three caliphs. Later they started to support the Umayyad

government<sup>(16)</sup> and opposed any sort of conflicts that arose in the Islamic countries. Compared to the Syrian supporters of the Umayyads<sup>(17)</sup>, they did not consider the Umayyads as part of the genuine caliphate.<sup>(18)</sup>

Despite this, their support for them was for the sake of unity among the Muslim community. This point was held by most leaders of the religious movement of that time, for example Hasan al-Basri<sup>(19)</sup> and many others.

When the Umayyad dynasty subsided and was followed by the Abbasid dynasty, owing to certain policies produced by the Abbasid caliphate such as founding the state religion on the tenets of the Madhab Ashāb al-hadith, which created the Islamic orthodoxy in the full sense, the 'Uthmāniyya groups began to disappear<sup>(20)</sup>

especially those who supported the Umayyad party.<sup>(21)</sup>

When the traditionist circles adopted the Murji'a point of view on the subject of 'Alī and 'Uthmān<sup>(22)</sup>, the conflict in the doctrinal sphere was largely reduced. Later the orthodox theologians went even further in their recognition of 'Uthmān<sup>(23)</sup>. They declared that all the first four caliphs were rightly guided, and that the only precedence which could be given anyone of them, was in the chronological order of their rule.<sup>(24)</sup>

When the 'Uthmāniyya lost the reason for its existence as a separate sect, they became absorbed into the rising Sunni orthodoxy. When Sunnism assimilated 'Uthmāniyya, the former Umayyad government and a number of the religious scholars which acted as pro-Umayyad had been treated by the new orthodoxy as their Salaf<sup>(25)</sup>, and the heretical views they professed, glossed over or even completely denied.<sup>(26)</sup> The Abbasid caliph occasionally tried to introduce the ritual cursing of Mu'āwiya from the pulpits<sup>(27)</sup>, but this measure only stirred the orthodox masses to outbursts of rage and led to disturbances and riot.<sup>(28)</sup>

### (II) Ashāb al-Hadīth

Many scholars said that Ahl al-Hadīth were the proto-Sunni movement.<sup>(29)</sup> Ahl al-Hadīth originated from the Islamic ulema. During the Umayyad period, the Ahl al-Hadīth or Ashāb al-Hadīth<sup>(30)</sup> were a group that were traditionist and represented all 'ulama' who were involved in the religious movement.<sup>(31)</sup> These groups are not the Hijaz people only, but cover all scholars of every Islamic country.<sup>(32)</sup>

It appears that in the main centres, and notably Medina, Damascus, Kufah and Basrah<sup>(33)</sup>, there were a considerable number of men who were religiously-minded.<sup>(34)</sup> They seem to have met together to discuss the application of Islamic principles to the fresh problems that were arising<sup>(35)</sup>, and making sure

whether the customary law, including the government administration system, conformed to the Islamic norm or not. (36) From this aspect, this movement may be described as the "Ancient school of law". (37)

The term of Ashāb al-Hadīth came into use at some unspecified period, and included both the collector of the tradition and the practical lawyer. During this time (Umayyad), there were no firm distinctions between the different fields of interest, and the view in different field might be reported by the same person. (38)

Later, the function of traditionist became gradually separated from that of the practical lawyer. (39) Thus, the term Ahl al-Hadīth came to be used with reference to the collectors (40), while the practical jurists became known as Fuqahā' or Ashāb al-Ra'y. (41)

With the rise of the schools of law, one emphasizing deduction by analogy, the other upholding adherence to the text of the tradition, a new use of the terms Ahl al-Hadīth and Ahl al-Ra'y became customary. (42) These new meanings became generally and emphatically accepted and they almost superseded the older ones. (43)

**(III) Early notion of orthodoxy ascribed to Aṣḥab al-Ḥadīth**

Since the Umayyad period, the Aṣḥab al-Ḥadīth were regarded as orthodox in Islam. Owing to their attitude and role they played in society, the term of orthodoxy is self-declared by the Aṣḥab al-Ḥadīth itself.<sup>(44)</sup> The term was also given and agreed by the masses. Many other factors helped and they cross-linked with one another. After the 'Uthmān period<sup>(45)</sup>, the Muslims were divided into several groups, but there was not, as yet, the idea that one of the opposing parties was the orthodox branch of Islam, and the other heretical. At that time each group often regarded the other as impious.<sup>(46)</sup> It was later that the notion of orthodoxy arose. This occurred after the abdication of Ḥasan ibn 'Alī leaving Mu'āwiyā as de facto ruler<sup>(47)</sup> and a certain vague notion of orthodoxy began to emerge<sup>(48)</sup>, attached to the "religion" of 'Uthmān (al-dīn 'Uthmān), which then became predominant. For example, in the early political struggle between the political parties, the Zubayrite party<sup>(49)</sup>, considered themselves as the true followers of the religion (al-dīn) of 'Uthmān, denied that the Umayyads held the same faith and said that they professed the "religion" of Marwān.<sup>(50)</sup>

The concept of orthodoxy became clear soon after speculative theology ('ilm al-Kalām) was introduced in Islam. Every sect claimed to be the sole true believer (either the 'Uthmāniyya or the Shī'i), and called their opponents the heretical innovators (Ahl al-Bid'ah) or the people of religious fancies

(Ahl al-ahwā').<sup>(51)</sup> In fact all the existing sects of Islam considered themselves to be adherents of the Sunnah, while they denied this honour to their adversaries.<sup>(52)</sup>

Before the concepts of orthodoxy and heresy became crystallized on the level of religious doctrine, certain notions in this sphere arose in connection with geographical division. According to Goldziher<sup>(53)</sup>, the earliest conception of orthodoxy as identified with adherence to the Sunnah, was based on sentimental and geographical factors, with the idea of political neutrality between Iraq and Syria in the background. An excellent example to explain this opinion is what happened in Hijaz. Mecca was the sacred city<sup>(54)</sup> and its citizens "The guardians of the Ka'abah", and the protected of God, were called the people of the religious community.<sup>(55)</sup>

Meanwhile the people of Medina thought of themselves as the direct successors of the original Muslim community from the time of the prophet and the descendants of the "helpers of God" (Anṣār Allāh). They laid great store on the role of their place as the capital of Islam in the time of Abū Bakr and 'Umar, whose memory they revered in a particular way.<sup>(56)</sup> They were in their own estimation the prophet's most faithful imitators (in the whole Muslim community) and the possessors of his tradition in the widest sense of that word.<sup>(57)</sup> This complex of orthodoxy resulted in the opinion held later by Mālik ibn Anas, that only the consensus of the scholars of Medina could be legally

accepted as the real Ijmā'.<sup>(58)</sup> In later times, Medina was called the abode of the prophet after the migration and home of his custom.<sup>(59)</sup>

Not only that, the identification of the Ahl al-Hadīth with the Ahl al-Hijāz was, in fact, the consequence of the previous geographical conception of orthodoxy. The Meccans and Medinese thought of themselves as the Ahl al-Hadīth not only because they stressed the adherence to the traditions in jurisprudence, but because they were the inhabitants of the twin cities, and psychologically bound to be the imitators of the prophet and his companions by the very virtue of their occupation; they claimed to be the spokesman of the community, and the interpreters of the word of the God and the custom of the prophet.

From the political view, these groups of people were taking the neutral view, whenever there were political clashes between Shi'ī's and 'Uthmāniyya.<sup>(60)</sup> However, their neutral attitude did not stay long as they seem to be siding with the group that will benefit them.<sup>(61)</sup> Later, the term Ashāb al-Hadīth did not imply any particular political orientation, and thus, among the Ashāb al-Hadīth, we meet with every branch and shade of 'Uthmāniyya and Shi'ī groups. There were several ulema who were pro-'Uthmāniyya, and supported 'Abdullāh ibn al-Zubayr for the caliphate, but decided to support the Umayyads after the fall of 'Abdullāh ibn al-Zubayr.<sup>(62)</sup> Amongst those ulema were

'Urwah ibn al-Zubayr<sup>(63)</sup>, Hishām ibn 'Urwah<sup>(64)</sup>, al-Zuhri<sup>(65)</sup> and others.

Although the jurists of Kufah were mostly pro-Alid, they differed in the degree of their partisanship. Many, such as Zurāra ibn A'yān and his circle<sup>(66)</sup>, Jābir al-Ju'fi<sup>(67)</sup> and Abū Abdullāh al-Jadali<sup>(68)</sup> were Shi'i zealots, not far removed from extremism.<sup>(69)</sup> Others, such as al-A'mash<sup>(70)</sup>, Ibrāhīm al-Nakha'i<sup>(71)</sup>, al-Sha'bi<sup>(72)</sup>, Sufyan al-Thawri and others were moderates.<sup>(73)</sup> Still others were only semi-Shi'i, prepared to meet the 'Uthmāniyya half way. Among these were Hammād ibn Abī Sulaymān, 'Amr ibn Qays al-Masir and later Qadi Abū Yūsuf and Muhammad ibn al-Hasan ash-Shaybāni.<sup>(74)</sup>

Therefore, the Shi'i partisanship (Tashayyu'), which characterised Ashāb al-hadīth did not, in the early period, imply the disavowal of the first three caliphs.

In the second century of the Hijra, when the rift began to appear between the zealous Shi'is and the moderates, the term Ashāb al-Hadīth acquired a more strict sense and at the same time excluded those traditionists who followed the newly established Madhab Ahl al-Bayt. Thus Madhab Ashāb al-Hadīth became in fact a religious denomination, still predominantly pro-Alid, but only mildly Shi'i, and with a marked tendency to approach the 'Uthmāniyya point of view. The first step in that direction was the adoption by many of Ashāb al-Hadīth of the

doctrine of "postponement" (al-Irja').

The doctrine of postponement (al-Irja') did appeal to a great number of the Ashāb al-hadīth, who were naturally inclined to moderation. Among these were Ibrāhīm al-Nakha'i<sup>(75)</sup>, Muhārib ibn Dithār adh-Dhuhli<sup>(76)</sup>, Hammād ibn Abī Sulaymān<sup>(77)</sup>, Abū Hanīfah<sup>(78)</sup> and others. We may state that the overwhelming majority of the Ashāb al-Hadīth in Kufah and many in Medina of those, who came later to be regarded as protagonists of orthodoxy, held moderate Shi'i views, combined with the doctrine of postponement.<sup>(79)</sup>

In the face of the radicalization of the Shi'is, the movement of the Murji'a, initiated by Hasan ibn Muhammad ibn al-Hanafiya<sup>(80)</sup> attempted to close the gap between the moderate Shi'is and 'Uthmāniyya.<sup>(81)</sup> The early Murji'a affirmed the superiority of Abū Bakr and 'Umar over the later caliph<sup>(82)</sup> compared with the Khawarij who declared both 'Alī and 'Uthmān as infidels, recognising only Abū Bakr and 'Umar.<sup>(83)</sup> The Murji'a deferred the case of 'Uthmān and 'Alī and the other participants in the civil war to the judgement of God.<sup>(84)</sup> They also accepted the caliphate of the Umayyads as decreed by God, without necessarily justifying their conduct<sup>(85)</sup>, and were opposed to any breach of the peace of the Muslim community.<sup>(86)</sup>

Despite all that, most of the Ashāb al-Hadīth who initially adopted the doctrine of the Murji'a, by no means propagated surrender to the rulers. On the other hand, some of the Ashāb al-Hadīth who were pro-Alid still supported the right of 'Alī and advocated resorting to the force of arms. (87)

The rise of the Abbasid dynasty did not at first change this attitude. The traditionists were not impressed by the alleged right of 'Abbas ibn 'Abd al-Muttalib to the caliphate claimed by the Abbasid government. (88) They still continued to assert that the only just candidates to the Imamate were the Alids. (89)

It was only later, when the Ashāb al-Hadīth were reconciled with the Abbasid caliphate, that the war-like and revolutionary disposition was replaced by the spirit of submission, and gave way to the doctrine that the rulers, even the most tyrannous should be obeyed. (90)

#### (IV) Ahl al-Sunnah wa al-Jamā'ah

For a long time, the orthodox were known as Ashāb al-Hadīth, but other terms came into use as well. Thus the orthodox, treating their opponents, and in particular the Mu'tazilites as "the adherents of heretical innovation and error" (Ahl al-Bid'ah) (91), believed themselves to be the adherents of custom and truth (Ahl al-Sunnah wal Haqq) or simply "the adherents of truth" (Ahl al-Haqq). (92)

As the Mu'tazilites denied the eternal attributes of God, their antagonists became "the adherents of affirmation" (Ahl al-Ithbat) because they affirmed these attributes<sup>(93)</sup> or "the attributists from among the people of the Sunnah" (As-Sifatiyya min Ahl al-Sunnah).<sup>(94)</sup>

Decrying their adversaries as heretics and sinful innovators, the traditionists assumed the role of spokesman for the majority of Muslims, and began to call themselves "the adherents of custom and unity" (Ahl al-Sunnah wal Jama'ah).<sup>(95)</sup>

Although the "orthodox church" of Islam began to emerge about the middle of the second century of Hijra, the ideas as to whom it included were vague until the time of al-Mutawakkil.<sup>(96)</sup>

The rise of the Sunni congregation and its popularity has a close link with several Abbasid policies. The matter was further exposed from several aspects regarding the religious policy of the Abbasid caliphate.

The religious policy of the Abbasid caliphate was the result of two forces. On the one hand, it was in accordance with the evolution of the Sunni theology as against other contending forces, and on the other hand, it reflected the pre-occupation of the caliph to ensure security for the Abbasid house against all elements of opposition, potential as well as active, and in particular the Alid opposition.<sup>(97)</sup> All forces ranged against Sunni Islam tended to concentrate around either the Alid or the

Mu'tazilite sect, while all the opposition against the Abbasid house focussed itself around the Alids and the pro-Alid sects. (98)

In order to strengthen their government, the Abbasid caliphate suppressed the Alid movement and depended on the Madhab Ashāb al-Hadīth and also the Mu'tazilite sect. The Abbasids had exploited religious sectarian movements in order to attain power. After initial experiments with various ideas, the Abbasids decided to adopt the religion of the Sunni theologians and began to lend favour to the Sunni orthodox. (99)

As heresy became identified with the political ambitions of the Alids (100), the Abbasids felt themselves obliged to take suitable measures against the growth of heresy especially for the sake of their own security. Official orthodoxy was the weapon in their fight against the menace. (101) The promotion of religious orthodoxy by the Abbasids resembled the Sasanid Zoroastrian organization. (102) So, the Abbasids pursued the policy of repression against the Alids on the one hand and against the heretics on the other hand. (103)

At the early stage, especially during the caliphate of al-Mansūr, the Abbasids mostly depended on the Madhab Ashāb al-Hadīth, in their resistance to the sects aligned on the side of the Alids, who actively opposed him (104), or were dangerous to his plan. He did not attack the Ashāb al-Hadīth group as such.

Quite on the contrary, he regarded them as the basic element of state, headed by the caliph of God<sup>(105)</sup>, obedience to whom was an absolute religious duty.<sup>(106)</sup> To show his interest in the faith of Islam, he treated the will of God as synonymous with his own aim and he did several actions which supported the realization of religion in his government.<sup>(107)</sup> As a most important policy to strengthen the religious aspect of the caliphate, he nominated judges, who until then had been the agents of the provincial governors.<sup>(108)</sup>

In this way, by making the Madhāb Ashāb al-Hadīth as the "church of the state", he associated it especially with the Iraqi school of law<sup>(109)</sup> When Abū Yūsuf and Muhammad ibn al-Hasan al-Shaybani were appointed by Harun al-Rashid, the first to the post of Qādī al-Qudāt in Baghdad<sup>(110)</sup> and the second to the post of Qādī al-Raqqa<sup>(111)</sup>, the position of the Hanafite school of law as the official rite of the caliphate became definitely assured.

Nevertheless, the other schools of Ashāb al-Hadīth were by no means treated inimically and their orthodoxy also became gradually acknowledged. Later the schools of Mālik, Shafi'i, al-Awzā'i, Ibn Hanbal and Dāūd al-Zāhiri<sup>(112)</sup> as well as some other minor rites of ephemeral existence obtained recognition as orthodox. Thus, by founding the state religion on the tenets of the Madhāb Ashāb al-Hadīth, the Abbasid government had created Islamic orthodoxy in the real sense of the word.

Meanwhile during the time of al-Ma'mun, Mu'tasim and Wathiq, they abandoned the Madhab Ashab al-Hadith influence in large measure and took their stand on the basis of "compromise" seeking to adopt a policy somewhat closer to the Alids<sup>(113)</sup> and leaned to Mu'tazilism.<sup>(114)</sup> Such a course of action weakened, however, the real support for the Abbasids, the forces of traditional Islam (Ashab al-Hadith), which had been growing stronger not only frowned at this change of policies, but came into open conflict with the authorities, when al-Ma'mun tried to force the Mu'tazilite compromise on them.<sup>(115)</sup>

Mu'tazilism became a powerful weapon in the hands of the Abbasids after they came to power and remained so for at least a century. It was of use to counter the influences of the Imami Shi'i and the Ghulat groups in respect of their political doctrines.<sup>(116)</sup> The clearest evidence to support these statements is the works of Mu'tazilism written against the Shi'i claim to leadership of the Muslim community on the basis of Nass transmitted from the prophet through 'Ali constituting as it were a hereditary mandate for the Alid house. The Mu'tazilites also discarded the principle of conceiving the Imam as Ma'sum and possessor of divine knowledge and perfection; they upheld the freedom of the Muslim community to choose their leader.<sup>(117)</sup>

Mu'tazilism, installed during the reigns of al-Ma'mūn, Mu'tasim and Wāthiq as the religion of the state, was later overthrown by al-Mutawakkil who restored the Shāfi'ite-Hanbalite schools of law<sup>(118)</sup> to the dominant position.<sup>(119)</sup> The attitude of al-Mutawakkil to the Shi'is was similar to that of al-Mansūr, al-Mahdi and Hārūn al-Rashīd; it was one of deep suspicion about the movement of the Alids and their supporters.<sup>(120)</sup> It thus differs markedly from the lenience shown to Alids during the reign of al-Ma'mūn, al-Mu'tasim and al-Wāthiq.<sup>(121)</sup>

Towards the end of the fourth century of the Hijra, Abū Hasan ibn Ismā'il al-Ash'arī<sup>(122)</sup> undertook the task of tracing a middle way between Mu'tazilism and Madhāb Ashāb al-Hadīth. His school enjoyed great popularity from the start<sup>(123)</sup>, but it took some time to overcome the various obstacles raised by the reactionaries, especially the Hanbalites.<sup>(124)</sup> The Ash'arites were even persecuted, because 'A mid al-Mulk, the vizier of Sultān Toghrul Beg convinced his master of the unorthodoxy of their teaching, and introduced an inquisition.<sup>(125)</sup>

These persecutions lasted four years, but after the death of Toghrul Beg and the execution of 'Amid al-Mulk by Alp Arslan<sup>(126)</sup>, the Ash'arite system was definitely accepted by the majority of the Sunni theologians as the exposition of the orthodox faith. Only the extreme Hanbalites<sup>(127)</sup> and the school of Da'ud al-Zahiri<sup>(128)</sup> continued to oppose it.

Thus established, Islamic orthodoxy was further perfected by al-Ghazali, who reconciled its tenets with moderate Sufism, and gave the Sunni religion its present form.<sup>(129)</sup>

The ultimate step to affirm the four main rites (al-Madhahib al-arba'ah) as equally orthodox within the Sunni community, was taken by the Mamluk Sultan of Egypt <sup>al-</sup>Malik az-Zahir Baybars. He nominated in the year 663/1264 to each of them a separate Qadi al-Qudat, whereas in the previous system there had only been one Qadi belonging to the official rite of the state.<sup>(130)</sup>

NOTE TO CHAPTER ONE-PART B

(1) Shārafuddīn Mūsā al-Mūsawī; al-Muraja'at, Najaf, 1369, page 29.  
S.H.M. Jafri; The origin and early development of Shi'a Islam, London, 1979, page 277 - 281.

(2) W.M. Watt; The formative period of the Islamic Thought,  
Edinburgh, 1973, page 167.

(3) M. Mo men; An introduction to Shi'i Islam, London, 1985,  
page 69 - 71.

(4) W. Madelung; Imama, in Ency. of Islam.

(5) The crossed swords between the various groups were described in various points. The supporters of 'Alī were at first described as "The people of Iraq" (Ahl al-Iraq), as well as "The party of 'Alī" (Shi'at 'Alī).

See Ibn Abī al-Ḥadīd; Sharḥ Nahj al-Balāghah, Cairo, 1378/1959 -  
1383/1964, v.1, page 251.

al-Ya'qūbī; al-Tarīkh, Leiden, 1883, v.11, page 234.

Their opponents were called Shi'at Uthmān or commonly al-Uthmāniyya. They included the faction of 'Ā'isha, Ṭalḥah and az-Zubayr or "The companions of the camel" (Ashāb al-Jamal) and "The Syrians" (Ahl ash-Shām) also known as Shi'at Mu'āwiya.

See Ya'qūbī, op.cit., v.11, page 218.; Goldziher; Muslim studies,  
v.11, page .

It is also customary to describe the partisanship as "religion" (Dīn), either of 'Alī (Dīn 'Alī) or of 'Uthmān (Dīn 'Uthmān). See Tabarī; Ta'rikh al-Rusul wa al-Mulūk, Leiden, 1879 - 1901, v.11, page 342, 350 and 659.

Another way of expressing this was to say that one held the Alawite or the Uthmānite "opinion" (Ra'y al-Alāwiyya and Ra'y al-Uthmāniyya respectively).

See al-Kashshī; Ma'rifat Akhbār ar-Rijāl, Bombay, 1317/1899, page 60; Aghānī; Kitāb al-Aghānī, Cairo, 1284/1285, v.XI, page 122.

(6) Watt, op.cit., page 75 - 76.

(7) ibid.

(8) W. Madelung, op.cit.

Although, at the later stages, the name Shi'at Mu'āwiya was replaced by the more general al-Umawīyya.

See Aghānī, op.cit., v.XI, page 38.; Kashshī, op.cit., page 61.

(9) Madelung, op.cit.

(10) S.H.M. Jafri, op.cit., page 13 - 15.; Rajwoski, W.W.; Early Shi'ism in Iraq, PhD thesis, School of Oriental and African Studies, 1955, page 83 - 85.

(11) This assumption is strongly supported by the statement of 'Umar to Ibn 'Abbās: "The people do not like having the prophethood and caliphate combined in the Banī Hashim".

See Tabarī, op.cit., v.1, page 2786.

A further example is Abū Bakr's refusing to return the fertile al-Fadak land to Fāṭimah quoting the prophet's word: "We do not leave as inheritance, what we made legal alms". This tradition is given in many versions slightly differing in form.

See Ibn Sa'ad; Kitāb al-Tabaqāt al-Kabīr, Leiden, 1322/1905, v.11, page 85.; Bukhari; Saḥīḥ, Leiden, 1862, v.11, page 435.

Abū Bakr maintained that al-Fadak was the "property of God"; to mean that it belonged to the community as a whole, and that Fāṭimah could be entitled to the usufruct, but could not hold the right of ownership. See *ibid*, page 437.

(12) Madelung, *op.cit.*

(13) The riots were the continuation to the struggle of Talḥah and 'Ā'ishah in fighting 'Alī in the war of al-Jamal.

See Watt, *op.cit.*, page 69.; Muir; The caliphate, its rise, decline and fall, Edinburgh, 1915, page 246 - 250.; Hitti; History of the Arabs, London, 1970, page 178 - 180.

(14) Ya'qūbī, *op.cit.*, v.11, page 326.; Mas'ūdī; Murūj adh-Dhahab wa Ma'adin al-Jawhar, Paris, 1861, v.V, page 295.

(15) *ibid*, v.V, page 395 - 396.

(16) Besides getting supporters among the Syrian common people, Umayyad government was rendered help and backing from the Syrian scholars. The centre of learning in Damascus established by al-Zuhri, was naturally too much under the supervision of the Umayyads to be anything else but Umayyadite.

See Goldziher, *op.cit.*, v.11, page 43 - 48.

Among these scholars are Khālid ibn Yazīd ibn Mu'āwīya al-Umawī traditionist, alchemist and astrologer. See Ibn al-'Imād; Shudhurāt adh-Dhahab, Cairo, 1350, v.1, page 96.

Al-Awzā'i was the most prominent jurist of Damascus during the later Umayyad period and his views seem to have been more or less officially accepted. They continued to be influential under the Umayyads of Spain until about the end of the eighth century. See Watt, *op.cit.*, page 71.

(17) Madelung, *op.cit.*; Watt, *op.cit.*, page 69 - 75.

(18) Madelung, *op.cit.*

(19) Watt, *op.cit.*, page 77 - 81.

(20) Most groups, then, decided to support the Abbasid reign, even the caliphs of Spain accepted the new orthodoxy.

See 'Alī al-Wardī; Wu'āz as-Salātīn, Baghdad, 1954, page 372.

(21) Only a few groups remained faithful to the memory of the vanquished dynasty, and awaited the coming of as-Sufyānī. A kind of belief connected with Mahdi or Messiah known as the

Sufyānī, a descendant of Mu'āwiyā's father, Abū Sufyān.

See Watt, op.cit., page 168.

In addition, following the fall of the Umayyad dynasty, a few scholarly groups rose to condemn the Umayyad dynasty on their mistake. Although this criticism existed before the fall of the Umayyads, the process was speeded after its fall.

See Watt; The majesty that was Islam, London, 1974, page 54 - 55.

(22) See page 62 - 63 below.

(23) The basic difference between the Uthmanite and the pro-Alid was that the former regarded Abū Bakr as the most worthy of all Muslims after the prophet, while the later gave precedence to 'Alī, though admitting, that the election of Abū Bakr was legal and justified for political reasons.

See al-Jāhiz; Rasā'il al-Jāhiz, Cairo, 1933, v.1, page 1 - 12.

(24) Malatī; Kitāb al-Tanbih wa ar-Radd, Istanbul, 1936, page 11.

Presentation by Mac Donald, D.B.; Development of Muslim theology, jurisprudence and constitutional theory, London, 1903, page 296 - 299, 313 - 315.

See also Watt, op.cit., page 166 - 167.

(25) Goldziher, op.cit., v.11, page 21.

(26) When Islamic orthodoxy was finally established, many Sunni writers, afraid that confession of the fact that their renowned authorities were Murji'a, might put them in the same rank as the heretics, endeavoured to describe al-Murji'ah as a separate

sect with which they had nothing in common. Even though the most honest of them admitted that at least the Murji'ah as Sunnī or the Murji'ah al-Mahdī were in reality identical with the early orthodoxy.

(27) The Abbasid caliphs who tried to introduce this view are al-Ma'mūn, al-Mu'tadid and al-Mu'ti'.

See Ibn Abū al-Ḥadīd, *op.cit.*, v.111, page 442.

Ibn al-Jawzī; al-Muntazam, Hayderabad, 1938, v.V11, page 7.

(28) At certain periods, by way of reaction against the Shi'i influence, some Sunnis went so far towards accepting the Uthmanite view, that they professed particular reverence for Mu'āwīya ibn Abī Sufyān. This attitude was characteristic of the fanatical Ḥanbalites of Baghdad at the beginning of the fourth century of hijra.

See Ḥabīb al-Zayyāt; "al-Tashayyu' li Mu'āwīya fī 'Ahd al-'Abbāsī"

in al-Mashriq, XXVI(1928), page 410 - 415.

(29) See Note no. 4.

(30) Aṣḥāb al-Ḥadīth was often used interchangeably with Ahl al-Ḥadīth.

See Abū al-A'lā' al-Ma'arri; Risālat al-Ghufran, Cairo, 1950, page 386.

(31) Watt, *op.cit.*, page 66 - 67.; Islamic philosophy and theology, Edinburgh, 1962, page 30.

(32) Thus the partisans of Sufyān al-Thawrī (a pro-Zaydite) though they were Ahl al-Iraq, were called too Ahl al-Ḥadīth. See ash-Shāhrastānī; Kitāb al-Milal wal Nihal, Cairo, 1967, v.11, page 38.

(33) Besides the cities of Hijaz, the twin cities of al-Iraq, Basrah and Kufah, under the Umayyad period, were the centres of the most animated intellectual activity in the Muslim world. See Hitti, *op.cit.*, page 241.

(34) See Watt, *op.cit.*, page 67.

(35) However, most attention seem to have been paid to legal questions. See Watt, Islamic philosophy and theology, page 30; The Majesty that was Islam, page 78 - 79.

According to Schacht, this group is known by various names: early Qadis (judge), first specialists, pious persons and first Muftis. See Schacht, An introduction to Islamic Law, page 23 - 27. Watt, The Formative period, page 65.

(36) Schacht, *op.cit.*, page 26.

(37) *ibid*, page 28.; Watt, The formative period, page 65.

(38) Watt, Islamic philosophy, page 28.

(39) Schacht; Origins of Muhammadan jurisprudence, page 253.

(40) Ibn Abī al-Ḥadīd, *op.cit.*, v.111, page 305.

(41) Ibn Qutaibah; al-Ma'ārif, Cairo, 1934, page 216 - 219.

See also Ibn Sa'ad, *op.cit.*, v.11, page 109., v.VI, page 232.

(42) Schacht, An introduction to, page 28 - 37.

According to Ahmad Hasan, the sharp distinction between Ahl al-Ḥadīth and Ahl al-Ra'y did not exist in the early period. The extreme opposition between Ḥadīth and Ra'y appears to have developed in the post Shāfi'i period when the school-bias took root in the followers of each school. That in the early period, there existed two separate groups, one advocating Ḥadīth exclusively and the other al-Ra'y alone, does not appear to be true. The reason is that the scholars of Ḥadīth in this period were not free from exercising Ra'y in their reasoning and vice versa.

See Ahmad Hasan, The early development of Islamic jurisprudence, Islamabad, 1970, page 126.

(43) Shāhrastānī, op.cit., v.11, page 38 - 39.

(44) See note no. 50 and 51.

(45) For the detailed account about the event that led to the death of 'Uthmān, see Muir, op.cit., page 225 - 233.

(46) The Shi'i nicknamed their opponents, the Uthmānites as an-Na'thaliyya, al-Qāṣitūn (Those who act wrong fully), al-Muḥillūn (Those who may be legally slain), an-Nākithūn (Those who break their allegiance), al-Māriqūn (Those who missed the truth of religion) and later the Anti-Shi'is were usually termed as an-Nawāṣib (The hater of 'Alī).

See Aghānī, op.cit., v.VII, page 17.; Majlisi; Bihar Anwar, v.1X, page 634.; Ibn Abī al-Ḥadīd, op.cit., v.11, page 175.

The Uthmanites, especially the Umayyad group, held the Saba'ite and Turabites to be the accomplices of the murder of Uthmān, and therefore simply criminals. They also described them as "opposing the religion of Muslims", while various words implying unbelief such as al-Mulhīdūn, Munāfiqūn, Mushrikūn and Kuffār are applied to the opponents of the regime.

See al-Farazdaq; Diwān, Cairo, 1936, v.1, page 22 and 47, v.11, page 312.; Jarīr ibn Atīyya ibn al-Khaṭafā; Diwān, Cairo, 1953, page 195.

The opponents of the Umayyad regime, however, considered themselves as Mu'minūn. See al-Ṭabari, op.cit., v.11, page 1066.

(47) The year of al-Ḥasan's abdication became known as "Ām al-Jamā'ah". See Ibn Abū al-Ḥadīd, op.cit., v.111, page 15.

(48) The first civil war, during 'Alī's supremacy, meant a serious split in the Islamic Ummah. However, there was no question as yet, of orthodoxy and heresy. The party supporting 'Alī represented at this stage the majority of the Muslims.

Now, by the abdication of Ḥasan, the pendulum swung in the opposite direction, and the Uthmāniyya branch became the official "church of Islam" with Mu'āwīya as its head, while Shī'at 'Alī was reduced to the role of a small opposition party.

(49) <sup>For</sup> More information about the Zubayrite party,  
see Watt, op.cit., page 69 - 70.

(50) ibid, page 69.

(51) Aghānī, op.cit., v. XI11, page 38.

(52) Ibn 'Asākir; Tabyin Kidhb al-Muftari fima Nusiba ilā al-Imām Abi al-Ḥasan al-Ash'ari, Damascus, 1347, page 163, 345 - 346 and 348.; Ibn Qutaibah, op.cit., page 84.; <sup>al-</sup>Shahrastānī, op.cit., v.1, page 11.

(53) For example, when the army of Mus'ab ibn Zubayr met the army of Mukhtarites at al-Madhar, each side invited the other in turn to accept the Book of God and the Sunnah of his prophet. See Ṭabarī, op.cit., v.11, page 76.

This attitude became a precedent, and from that time onwards, whenever two Muslim armed forces met on the battle field they exchanged the same mutual invitation.

See ibid, v.11, page 1347, 1391 and 1567.

(54) Goldziher, op.cit., v.11, page 119.

(55) Mālik ibn Anas; al-Muwāṭṭa', v.111, page 89.

(56) al-Jāhiz; al-Bayān wa al-Tabyin, Cairo, 1926, v.111, page 33.

(57) al-Yaqut; Mu'jam al-Buldān, Brockhaus, 1866, v.11, page 412.

(58) Ibn Qutaybah; al-Imāma wa's-Siyāsa, Cairo, 1937, v.11, page 141.

(59) Schacht; Origins, page 8 states that that the reputation of Medina as "the true home of the Sunnah" dated from the time of Ibn Hanbal. Again Schacht , page 23, states it is possible that the actual honorific title "Dār al-Hijra" was invented somewhat later to justify the old claims of the Medinese to particular orthodoxy.

(60) Ghazālī; al-Mustafa' min 'ilm al-Uṣūl, v.1, page 137.

(61) Watt referred to 'Abdullāh ibn 'Umar in illustrating the leader who takes the neutral stand, see Watt, The formative, page 72 - 73.

Islamic philosophy, page 28.

See also L. Veccia Vaglieri; 'Abdullah ibn 'Umar ibn al-Khattab, in Ency. of Islam.

(62) ibid, page 73 - 75.

(63) ibid, page 69 - 70.

(64) Compared with Muṣ'ab ibn al-Zubayr who strongly opposed the Umayyad regime, Urwah normally kept out of politics, and once served as Abdullāh's envoy to Ibn al-Ḥanafiyya.

See Dhahabī; Ta'rikh al-Islām wa-Tabaqāt al-Mashāhir wa al-A'lām,

Cairo, 1367, v.111, page 299.

Urwah is said had been influenced by Shi'i ideas after his friendship with 'Alī Zayn al-'Ābidīn and started to fight against the Umayyad regime. See Ibn Sa'ad, op.cit., v.11, page 135.

However, Marwan <sup>ibn</sup> al-Ḥakam had a very high opinion of him.

See Ibn 'Abd Rabbih; Kitāb al-Iqd al-Farīd, Cairo, 1953, v.11, page 144.

(65) Hisham transmitted materials from his father, Urwah ibn al-Zubayr, but otherwise seems to have been a sound middle of the road scholar. See Dhahabī; Tadhkirat al-Huffāz, Hayderabad, 1955 - 1958, v.1, page 144.

(66) al-Zuhri, at first, was influenced by and supported the Zubayrite party, since his formative years had been spent in Medina under Zubayrid rule. But later he gave allegiance to the Umayyads. For example, so far as the struggle between 'Alī and Mu'āwīya is concerned, his version is broadly pro-Umayyad. See Petersen; 'Alī and Mu'āwīya in early Arabic Tradition, Copenhagen, 1964, page 36.

(67) Kashshī; Ma'rifat Akhbār ar-Rijāl, page 135.

(68) *ibid*, page 191.

(69) *ibid*.

(70) Ibn Qutaybah, al-Ma'ārif, page 267 - 268.

(71) Ibn al-'Imad, *op.cit.*, v.1, page 220 - 221.

See also Khalil Athamina; "The early Murji'a: some notes", in Journal of Semitic Studies, v.XXXV, 1990, page 109 - 130.

(72) Watt, The formative, page 50 and 73.

(73) For a time he seems to have been on good terms with the caliph 'Abdul Malik and the governor al-Hajjaj, see Goldziher, *op.cit.*, v.11, page 200.

Ibn Khallikān; Wafayāt al-A'yān, Paris, 1842 - 1871, v.11, page 4 - 7.

But this attitude changed for he took an active part in the rising of Ibn Ash'ath and also refused the office of Qādī.

See Goldziher, *op.cit.*, v.11, page 40.

His account of the struggle between 'Alī and Mu'āwīya insists on 'Alī's complicity in the Uthmān murder, so that Mu'āwīya was justified in seeking vengeance for 'Uthmān; and moreover Mu'āwīya claimed homage only as governor (Amīr), not as caliph. See Petersen, *op.cit.*, page 36 - 38.

In this historical material, ash-Sha'bi is shown as accepting the caliphate of Alī, though without attributing any special gift to 'Alī or the clan of Banī Hashim, and as being critical of the Umayyad dynasty.

(74) Ibn Qutaybah, al-Ma'ārif, page 267 - 268.

(75) *ibid*, page 268.

See also Hodgson; "How did early Shi'a become sectarian", in Journal of the American Oriental Society, 75(1955), page 3 and 4.

(76) Ibrāhīm an-Nakha'i called Murji'ism "Heretical innovation" (Bid'ah) and exclaimed: I am neither a Saba'ite nor a Murji'a. 'Amīlī points out that by these words Ibrāhīm an-Nakha'i suggested that he was a moderate Shi'i.

See 'Amilī; Wasā'il ash-Shi'a, v.V, page 748 - 749.

See also Ibn Sa'd, op.cit., v.VI, page 189.

Ibrāhīm an-Nakha'i was also reputed to have said to a man who declared that he preferred 'Alī to Abū Bakr: "Could 'Alī hear your words, he would make your back hurt". See ibid, page 189.

See also Abū Nu'aym Isbahānī; Hilyat al-Awliya', Cairo, 1938, v.IV, page 224.

This saying indicates that his Shi'i views were very restrained, and in fact not far removed from those held by the Murji'as.

(77) Ibn Sa'd described him as "one of the first Mur'jites" for he kept silent concerning 'Alī and Mu'āwiyā, and did not bear witness to either their piety or infidelity.

See Ibn Sa'd, op.cit., v.VI, page 214.

(78) Dhahabī, op.cit., v.IV, page 244; Ibn Sa'd, op.cit., v.VI, page 237.

(79) Article 5 of "al-Fiqh al-Akbar 1" says: "We leave the question of Uthmān and 'Alī to Allāh, who knows the secret and hidden things". See Wensinck; The Muslim creed, Cambridge, 1932, page 104 and 109 - 110.

(80) The case of ash-Shāfi'i is somewhat different, for he belonged to a later epoch when Sunni orthodoxy had already begun to be separated from moderate Shi'ism. He agreed with the view of his predecessors on the subject of 'Alī and 'Uthmān, but

his pro-Alid inclinations were more marked than those of the other disciples of Abū Hanīfa, and he was accused before Harūn ar-Rashīd of Shi'i learning.

Aḥmad Amin; Dhuḥā al-Islām, Cairo, 1942, v.11, page 219 - 220.

(81) The doctrine of Postponement was first introduced by al-Hasan, son of ibn Hanafiyya who preferred him to his eldest son Abū Hashim 'Abdullah. See Ibn Sa'd, Kitāb at-Tabaqāt al-Kabir, v.V, page 241.

By this doctrine, he may have intended to justify the consistently non-committal attitude of his father. In a way it was a development at the neutralism of 'Abdullah ibn 'Umar.

See Tritton; Muslim Theology, London, 1947, page 43.

After long involvement in various groups, such as those of al-Mukhtar, Khashabite and his father, he had lost his taste for adventure and devoted himself to religious study.

See Dhahabī, Ta'rikh al-Islām, v.111, page 358.

The result of his labours was the treatise, in which he expounded the doctrine of irjā'. See Ibn Sa'd, *op.cit.*, v.V, page 68 and 241.

(82) W. Madelung, Imama, in E.I.

(83) *Ibid.*

(84) Dhahabī, *op.cit.*, v.111, page 358; Ibn Sa'd, *op.cit.*, v.V, page 241.

(85) Ibn Sa'd, *op.cit.*, v.VI, page 214.

(86) To some scholars, Murji'a ideas were thought to have supported Umayyad government. See Watt, The formative period, page 125; Goldziher, Muslim studies, v.11, page 89 - 92.

(87) Madelung, Imama, in E.I.

(88) Aghānī, Kitāb al-Aghānī, v.VIII, page 92.

(89) Ibn Qutayba, 'Uyūn al-Akhbar, v.11, page 140 - 141.

Philip Hitti, History of the Arabs, page 282 - 283.

(90) When an-Nafs az-Zakiyya rose in rebellion, Malik ibn Anas declared that the oath of allegiance given by the inhabitants of Medina to the 'Abbasids, was unlawful.

See Tabarī, op.cit., v.111, page 200.

During the revolt of Ibrāhīm ibn 'Abdullāh, Abū Hanīfah, Sufyān ath-Thawrī, al-A'mash and other Kufan jurists gave their most emphatic and wholehearted support to the revolution.

See Isfahānī; Kitāb Maqātil al-Talibiyyin, Najaf, 1303AH, page 239 - 261; al-Khatīb Baghdādī; Ta'rīkh Baghdād, Cairo, 1931, v.XIII, page 380.

(91) Alā' ud-dīn al-Muttaqī al-Hindī; Kanz al-'Ummāl, v.111, page 197 - 201.

(92) Ibn Asākir, Tabyīn kidhb al-muftarī, page 165 and 348.

(93) Asha'ri, Kitāb Maqālat, v.11, page 454, 474 and 475.

Ibn Asākir, op.cit., page 313 - 314.

(94) Ibid, v.1, page 257, v.11, page 541, 558, 573 and 577.

(95)Shahrastāni,Kitāb al-Milāl,v.1,page 95.

Baghdādī,al-Farq bayna al-Firaq,Cairo,1948,page 189.

(96)Ash'arī,Maqālāt,v.11,apge 454 and 471.

(97)Thus Khalid ibn 'Abdullah al-Wasiti,a Zaydite is described as being "min ahl as-sunna wal Jama'ah".

See Isfahānī,kitāb maqālāt at-talibiyin,page 254.

(98)M.Shamsuddin Miah;The reign of al-Mutawakkil,Pakistan,1969 page 101.

(99)Ibid.

(100)Ibid,page 75.

In this matter Watt explains that,"Most of those who were interested in legal matters in fact supported the 'Abbasids,since the Umayyad often followed pre-Islamic arabs custom rather than specifically Islamic rules.In consequence of this support the ancient schools in particular received a measure of recognition from the 'Abbasid government.Many of the judges were now chosen from men whose legal scholarship was approved by the school.See Watt,Islamic political thought, page 65.

(101)Lewis;"The significance of heresy",in Studia Islamica,1953 page 48 - 59,and 'Abbasid ,in E.I.

(102)M.Shamsuddin Miah,op.cit.,page 75 - 76.

(103)Gibb;"Interpretation of Islamic history",in Journal of world history,v.1,1953,page 40 - 54.

(104)Ibid.

(105) See note no. 109 and 110.

(106) Arnold, sir Thomas; The caliphate, Oxford, 1924, page 51.

Ibn Khaldūn, Muqaddima, v.1, page 387.

(107) This was stressed, too, by other 'Abbasid caliphs.

See Tabarī, op.cit., v.111, page 1475 and 1563.

(108) To show his interest in the development of canon law, he invited Malik ibn Anas to write a collection of the tradition. See Ibn Khaldūn, op.cit., page 19.

Malik's action was followed by many other jurists, who by that time began to compose works on the tradition.

See Suyūṭī; History of the caliphs, (Translated by A. Jarrett) Calcutta, 1881, page 260.

Mansūr never missed an opportunity to show his goodwill to the divines, and often commanded them to exhort and rebuke him, shedding copious tears, when they thundered about his sins.

See Ibn 'Abd Rabbihi, al-Iqd farīd, v.1, page 64 and 67;

Ibn Khallikān, Wafayāt al-a'yān, v.11, page 393;

Ibn Qutaybah, Imāma wa siyāsa, v.11, page 140 - 142.

(109) The first Qādi were appointed was Sharīk ibn Abdullah an-Nakha'i. He died in 177 AH/793 AD.

See Ibn Sa'd, op.cit., v.VI, page 363; Khaṭīb Baghdādī, op.cit., v.1X, page 279.

(110)The teachings of the Hanafite branch of the Kufans (Ahl al-Ra'y) were commonly accepted in Iraq, and so it was natural that in his quest for a suitable denomination to be established as the authorized one of the caliphate he should choose it rather than any other system.

(111)Philip Hitti,History of the Arabs,page 326.

(112)Ibid.

(113)Nevertheless, the Zahiri school was excluded from the Sunni congregation finally. See Ibn Khaldun, op.cit., page 446 - 447.

(114)Tabari, op.cit., v.111, page 1012 - 1013 and 1032.

(115)M. Shamsuddin Miah, op.cit., page 78 - 79.

(116)Ya'qubi, op.cit., v.111, page 194 and 198.

Patton, W.M.; Ahmad ibn Hanbal and the Mihna, Leiden, 1894, page 2 and 6.

(117)Mas'udi, op.cit., v.111, page 232 - 236, v.VI, page 23 - 28, 54 - 58.

(118)Ibid, page 24 - 25.

See also al-Kashshi; Ma' rifat akhbar al-Rijal, page 322 - 323.

(119)The Hanbalites considered themselves at that time as the followers of Shafi'i's school of law.

(120)Mas'udi, op.cit., v.VI, page 190.

Under al-Mutawakkil and his successors, efforts were made to consolidate Sunnism.

For more information see Watt, The formative period,  
page 256 - 263.

(121) Tabarī, op.cit., v.111, page 445; Isfahānī, Kitāb Maqātil,  
page 128, 176 - 177, 145, 149 and 151; Ya'qubī, op.cit., v.111,  
page 105 - 137.

See also G. Leiser; "Hanbalism in Egypt before the Mamluk", in  
Studia Islamica, LIV, 1981, page 155 - 182.

(122) Ibid, page 175, 182, 195 and 208 - 209.

Tabarī, op.cit., v.111, page 1012 - 1013, 1029 and 1098.

(123) Maqrīzī; al-Mawā'iz wa al-'Itibār, Cairo, 1270H, v.11, page 359

(124) Ibid, page 358.

(125) Ibn 'Asākir admits the Hanafites, Malikites and the  
Shafi'ites as the Ahl al-Sunnah Wal-Jamā'ah, but rejects the  
Hanbalites and the Murji'a.

See Ibn Asākir, op.cit., v.1, page 101; Subkī, Tabaqat ash-  
Shāfi'iyya, v.11, page 255 and 259.

(126) Ibn Asākir, op.cit., v.1, page 108 and 278; Subkī, op.cit.,  
v.11, page 269.

(127) Ibid, v.11, page 272.

(128) They were nevertheless admitted as a branch of the  
orthodox community. See Maqrīzī, op.cit., v.11, page 359.

(129) Goldziher; The Zahiris; Their Doctrine and their history,  
page 137.

(130) Maqrīzī, op.cit., v.11, page 358; Ibn Khaldūn, op.cit., page 511

**PART C - THE ORIGIN OF SHI'ISM.**

**(I) DEFINITION OF SHI'ISM.**

**(II) ORIGIN AND PATTERN OF EARLY SHI'Ī MOVEMENT.**

**(III) PHASES OF DEVELOPMENT OF THE SHI'A.**

PART C - THE ORIGINS OF THE SHI'ISM(I) Definition of Shi'a

Literally the word Shi'a means follower, party, group, partisan, associate, or in a rather looser sense the supporter. (1) In this meaning the word Shi'a occurs a number of times in the Qur'an. (2)

In its applied meaning, it refers to a particular religious designation for the followers of 'Ali and the ahl al-Bayt as a sect against the Sunnis. (3)

(II) Origin and pattern of early Shi'i movement

The Shi'i group under the name of ithnā 'ashariyya came into existence after the ghaybah of the twelfth Imām. (4) Before that, the Shi'i is more known as Imāmiyyah and later the ghaybah doctrine clearly distinguished ithnā 'ashariyya from the earlier Imāmiyya. (5)

Western scholars like Watt (6), Lewis (7), Moojan (8) and Hodgson (9) stated that the Shi'i movement in its proto stage is more an Arab political movement, demanding that 'Ali be the successor of the prophet. During its first period it was an Arab movement untouched by the social and religious ideas and problems of the near eastern world. For the first half century of the Islamic era Shi'ism retained this non-religious character.

The original support for 'Ali, and subsequent support for one of his descendants, had not been intrinsically different from the support given to other persons as regards religious beliefs and their party was considered a lawful partisanship. (10)

Therefore, the faction was purely Arab, and made no attempts to gain the sympathy or the support of the subject races. (11)

The Arabic features can be looked at from different angles:-

(1) The idea of respect for certain noble family. It is one of the important roots of the Shi'ism. (12) This was in accordance with the traditional Arab idea that if a man performed noble deeds, it was because he came of noble stock; that is to say, they believed that the capacity for achievements of outstanding quality was transmitted in the tribal and family stock. It was therefore natural for the Arab to suppose that some of the exceptional qualities present in the prophet would be found in his family or clan. (13)

(2) The concept of vengeance which is present in the Arab community. This has been confirmed from the event of tawābbūn, which declared their aim as twofold; to show that they repented of their betrayal of Husayn and undertook to seek vengeance for his blood. (14)

(3) The charismatic features of an Imām in Shi'a have a relation with the principles of the Yamanite Arabs during the pre-Islamic time. (15)

(4) The support from 'Ali's followers has a connection with the 'Asabiyya spirit of the Arab. The Ansār and other Arab tribes except the Quraish supported 'Ali, since they did not want the political power to be dominated by the Quraish only. (16)

S.H. Jafri (17) stressed that besides those features mentioned above, the Shi'i sect also was based on religious grounds. This can be analysed from the principles held and defended by the early supporters of 'Ali :-

(1) The early supporters of 'Ali understood the leadership of the community (Khilafah) as above all a religious office. To them, the prophet was the restorer of the true religion of Abraham and Ishmael, and so in him the hereditary sanctity of his clan reached its highest level. This idea was also strongly supported by the Qur'an (18) Thus, they believe when the prophet died his successor could only be a man from the same family and endowed with the same qualities and driven by the same principles. (19)

More important is the fact of the Qur'anic verses constant repetition of this idea (20) it also left the impression among some of the Muslims the prophet's family had a religious prerogative over others. (21)

(2) During the life time of the Prophet, numerous reports showed that the prophet was in favour of 'Ali (22), and this led to the idea that 'Ali was the best person and the most qualified person to hold the caliphate. (23)

After several decades of Islamic settlement and dominion in the more cultured lands of the near and Middle east, new conditions were created, and the Shi'a movement was transformed into something entirely different. (24) Firstly, it was linked with the aspirations of the non-Arab Muslims. The movement came to be dominated by the Mawālī and other oppressed classes, and became the instrument of their social and religious revolt against the oppression of the orthodox state. (25)

Secondly, the Shi'a movement was influenced by a religious character (26) and strove to obtain victory as a Muslim sect. (27) Soon a welter of strange beliefs, brought over from Christian, Iranian and old Babylonian heresies, found their way into the Shi'i theology. (28)

One of the characteristic marks of the change from Arab to Mawālī Shi'ism is the appearance of the Mahdī idea. (29) From being a political candidate for power, the Shi'i Imām became a mysterious figure of great religious importance, at first Messiah and later an avatar of divinity. This conception was transferred to the family of the prophet and the personality of 'Alī. (30)

**(III) Phases of Development of the Shi'ism****(1) The period of Abu Bakr and 'Umar.**

Historically, the event of the Saqifa is inextricably connected with the emergence of the Shi'i view point. 'Ali and his followers who could not attend the meeting held in the Saqifa hall for some reason, were not pleased with the choice made.<sup>(31)</sup> Not only that, 'Ali claimed that he was the most qualified person for the caliphate compared to others<sup>(32)</sup> and this led to several disputations between 'Ali and Abu Bakr and 'Umar<sup>(33)</sup>. 'Ali's opinion and principle was strongly supported by his followers<sup>(34)</sup>, which formed the nucleus of the first Alid party of the Shi'a.<sup>(35)</sup>

However, when 'Ali later gave Bay'ah to Abu Bakr, the development of the supporters of 'Ali which formed the nucleus of Shi'a, stopped for the moment. The presence of ideas and tendencies of Shi'a amongst 'Ali's first followers was sensed by Abu Bakr and 'Umar, and both tried to stop its development.<sup>(36)</sup>

## (2) The period of 'Uthmān and 'Alī

In this era, the development of the Shi'a was far greater than before. It can be explained from different angles. Firstly, this period created an atmosphere which encouraged Shi'i tendencies to become more active and evident. The period of 'Uthmān's supremacy was the starting point of conflicts and struggles in the country. (37) At that time, the early nucleus group of Shi'is came to merge, they strongly opposed 'Uthmān's policies (38) and claimed the religious functions for 'Alī. (39)

Secondly, the Shi'a had widened its circle of influence to those who needed an outlet for their political grievances, especially against Mu'awiyah, the representative of the Umayyad aristocracy and Syrian domination. (40)

The emergence of the political Shi'a is characterised both by the increase in its influence and its numbers, and by the sudden rapidity with which it henceforth grew.

## (3) The period of the Umayyads

Compared to the earlier period which showed that Shi'is remained united considering Hasan and Husayn as the head and Imām of the house of the prophet in this period Shi'ism entered the second phase of its history.

While the basic principle remained the same, disagreements arose over the specific criteria for deciding who the divine leader was, and this led to the internal division of the Shi'a. To sum up, this period is characterized by a proliferation of the Shi'i sects. The disagreements resulted from a few matters<sup>(41)</sup>:-

(1) The problem of who exactly constituted the family of the prophet. Whether it is simply direct descendants or a more general and extended family.

(2) How should the leader be chosen. Whether by designation of Nass from previous leader or by choosing who is the most qualified candidate.

(3) The problem of how the movement should be taken forward.

In these matters, there are two main tendencies. First, those who remained neutral in politics and second those who had warlike tendencies.

Referring to the first problem, Shi'a is divided into Fatimiyya and Hanafiyya groups.<sup>(42)</sup> The first of these were the followers of the various Imams through the line of 'Ali by Fatimah, i.e. Hasan, Husayn, Zaid and other offspring. The second were the followers of Muhammad ibn al-Hanafiyya.<sup>(43)</sup>

However, according to Bernard Lewis<sup>(44)</sup>, these distinctions were never very firm and a group of followers seem to have flitted easily from one side to the other.

Referring to the second and third problem, overall, the Shi'a is divided into three big groups and their existence can be seen until the present day. The first group is the Imāmi Shi'a (central body of Shi'a)<sup>(45)</sup> which later are to be known as ithna 'ashari Shi'a. This group, based on the principles of Imamate doctrine explained by Imam Ja'far Sadiq, emphasized that the selection of an Imam is designated by the Nass system.<sup>(46)</sup>

Looking at the shape and trend of movements, the Imāmi Shi'a had taken a silent attitude and avoided any political activities. As a substitute they concentrated on religious study. This policy was introduced for the first time by 'Ali Zayn al-'Abidin.<sup>(47)</sup> Later, during the time of Muhammad al-Baqir and Ja'far al-Sadiq this policy is referred to as the concept of Taqiyya.<sup>(48)</sup> The Imams also encouraged their followers to practise Taqiyya.<sup>(49)</sup> This had been proved, as historically, the group (Imāmi Shi'a) had good relations with the government of the time though it was not considered a legitimate government.<sup>(50)</sup>

Although they were not active in politics, they still assumed the title Imam as spiritual leader in their community.<sup>(51)</sup> This led Imam Ja'far al-Sadiq to clarify the differences between Imamate and caliphate. Comparing the Imamate with caliphate, the former derives his exclusive authority, not by

political claims, but by Nass and inherits the special knowledge of religion coming down in the family from generation to generation. Thus the sphere and domain of the Imam is chiefly religious leadership and the spiritual guidance of the community and not temporal power. (52)

However, the Imami Shi'a in this period had not yet formulated their beliefs in theology and jurisprudence in a well developed and systematic way. (53)

The second group are those who accepted the Imamate of Muhammad ibn al-Hanafiyya. (54) To this group, the system of selection of an Imam is not based on designation by nass or he must be in the line of Fatimah. Anyone besides ahl al-Bayt can represent the Imam and continue his work and struggle and this role had been played by Mukhtar ibn Ubaid. (55)

Historically, the early Shi'i movement under the Umayyad dynasty, clearly showed the group who loved bloodshed and many supporters (56) compared to the group who disliked politics. Mukhtar is credited with being the first to develop the idea of Mahdi as a religious Messiah. (57) The idea of Mahdi which Mukhtar emphasized was directed at the socially deprived groups, who looked to ibn al-Hanafiyya as their saviour, the one to establish a reign of justice. (58)

The third group are those who accepted the Imamate of Zayd ibn 'Ali (Zaydiyyah).<sup>(59)</sup> This group retained the essential belief in an Imām descended from 'Ali and Fatimah.<sup>(60)</sup> They differed from the Imāmi Shi'a concerning the doctrine of Imamate. Firstly, they rejected the idea of designation of Imām by Nass<sup>(61)</sup> and secondly they considered the Imām as not Ma'sūm.<sup>(62)</sup>

What is more important, besides the requirements laid down for an Imām<sup>(63)</sup>, they maintained that the Imām had to prove his leadership by fighting a Jihād against illegitimate rulers.<sup>(64)</sup> To sum up, this group carried on the pattern and tendencies practised by the Hanafiyya Shi'i and went completely against the concept of Taqiyya of the Imāmi Shi'a.<sup>(65)</sup>

#### **(4) The period of 'Abbasid rule**

At this time, 'Abbasid government was established after overthrowing the Umayyad dynasty. It appears that the members of the 'Abbasid family who became part of the revolutionary movement against the Umayyads adhered to the belief that the caliphate must belong to the ahl al-Bayt.<sup>(66)</sup> However, 'Abbasid government later continued policies similar to those of the Umayyads which pressurised the Alid followers even further.<sup>(67)</sup>

**(i) The period of Ja'far al-Sadiq**

This period is the most crucial period in Islamic history. It was the time in which the compromising attitude between the ahl al-hadith and the Murji'ites happened, in the effort to standardize a corpus of doctrine for the unification of the Muslim community or al-Jamā'ah.<sup>(68)</sup>

After the fall of the Umayyad government many of the religious-minded groups (ahl al-hadith and Shi'i)<sup>(69)</sup>, realized that the 'Abbasids did not have potential to rule the Muslims according to religious ideas.<sup>(70)</sup> Confronted with this disappointment they could either find a new foundation for opposition, or accept the 'Abbasids and find another way to realize their goal. The majority accepted the latter choice<sup>(71)</sup> and over the next two centuries they endeavored to provide in the law (Shari'ah) a comprehensive source on which the pious Muslim could pattern his life. Among a smaller number of these religious-minded, specifically those who had favoured the rule of an Alid, disappointment led in a very different direction. Eventually they would identify themselves as the Ahl Sunnah wal-Jamā'ah in contrast to the smaller groups (Shi'a).<sup>(72)</sup>

This period appears to be the first in which a particularly Imāmi view on a number of central doctrinal matters is crystallised. The beginning of an independent Imāmi school of law can also be traced back to this period. These developments are connected with the Imām Ja'far al-Sādiq. The matter can be more clearly explained :-

(1) the 'Abbasids managed to establish themselves as the sole authority in both the state and religion. A process of assimilation was set into motion and most of the cross-currents represented by the number of politico-religious or religio-political groups were gradually being absorbed under the patronage of the state authority into a synthesis to be known as the Jamā'ah which was supposed to support and in turn was supported by the 'Abbasid caliphate. (73) However, Imām Ja'far al-Sādiq had saved the basic ideal of Shi'ism from absorption by the emerging synthesis on the one hand and set out to purify it from the extremist tendencies within itself on the other hand. (74)

(2) According to Hodgson, Imām Ja'far al-Sādiq elaborated the doctrine of Imamate in greater depth. The doctrine had taken on a main role in the development of the Sunnī and Shi'i sectarian issue. (75)

Coincidentally, at the same time amongst the Sunnis <sup>they</sup> came into existence an attempt to construct total systems of pious life which eventually issued in the full Shari'ah law. Indirectly, the same effort was made by Imam Ja'far al-Sadiq. What is certain is a few elements of the Imamate doctrine were absorbed into Shi'i jurisprudence systems. (76)

**(ii) The period after Ja'far al-Sadiq**

As to the Imami Shi'a, the number of its followers had increased markedly and expanded. As the example, the enlargement of Imami Shi'a under Imam Musa al-Kazim can be seen Imam Musa al-Kazim increased his wealth, for there is much evidence to indicate that he collected secretly from his adherents the Khums, Zakat, gifts and other taxes enjoined in the Shari'ah as part of what was due to his Imamate. (77)

For the greater part of this period the Imami Shi'a community was ruled by Imams who were the ultimate source of authority. There appears to be no evidence that the view of these Imams on basic doctrinal issues differed from those formulated in the previous period. The utterances attributed to the Imams appear mainly in Shi'i collections of traditions of which most Imami Shi'a literature of that period consisted. (78)

In order to cope with the rapid progress of the Shi'a<sup>(79)</sup>, the 'Abbasid government had taken up several policies;

(1) Compromising with the Shi'a, for example al-Ma'mun's choosing 'Ali al-Rida to marry his daughter and become the heir-apparent to the caliphate. In fact, this policy was likely to lead to an alliance with the 'Abbasid and thus split the Shi'i rebellion that was gaining ground in whole areas in the empire.<sup>(80)</sup>

(2) During al-Mahdi's reign the claim was put forward that the lawful Imam after the prophet was not 'Ali but al-'Abbas, and that therefore the Imamate belonged to his family.<sup>(81)</sup> Al-Mahdi simultaneously approached the Zaydites in order to gain their assistance in monitoring the activities of the Alids and their followers.<sup>(82)</sup>

(3) The military activities of the various Shi'i groups confused the 'Abbasids and led them to believe that the Imami Imams were behind them or at least that the result of their intellectual activities would be militant actions. Therefore, the 'Abbasid authorities forced the Imams to reside in the capital under house arrest.<sup>(83)</sup> This policy led the Imami Shi'a to develop the underground system of their organisation (al-Wikala)<sup>(84)</sup>, so that it could function under these difficult conditions.

**(iii) The period of occultation (ghaybah) of the twelfth Imām**

According to Imāmi Shi'a doctrine, this Ghaybah is divided into two periods. First, the shorter ghaybah (al-ghaybah al-sughra)<sup>(85)</sup> lasting from 260/874 to 329/941 and the second longer ghaybah (al-ghaybah al-kubra) whose duration is known only to God.<sup>(86)</sup>

During the shorter ghaybah, the twelfth Imām is considered to have pursued his activities from behind the scenes and to have led his followers by means of four specially chosen representatives (Safir).<sup>(87)</sup> A critical study of the history of this period (260/874 - 329/941) reveals that the main function of the Safir was to implement certain tasks previously undertaken by the Imām, so as to save him from the political pressures of the 'Abbasids.<sup>(88)</sup>

The occurrence of the second ghaybah which followed the immediate dissolution of the Wikāla after the death of the fourth Safir in 329/941<sup>(89)</sup>, left a serious vacuum in the Imāmi Shi'a leadership. This situation allowed the Imāmi jurists to extend their activities. They reached a consensus that the concealed Imām would be alive until the moment of his rising in arms, irrespective of the length of his concealment.<sup>(90)</sup>

To sum up, when the Imāms were openly living amongst their followers, they suffered along with them from the oppressions of the government. But after the second ghaybah, this oppression disappeared and the jurists began to carry out their activities instead of the Imāms, which has continued until the present day to be the case. (91)

#### (5) The Buwayhid period

This is by far the most important period in the early history of the Imāmi Shi'a. The benevolent rule of the Buwayhids (92) gave the Imāms a golden opportunity to consolidate their doctrine and establish it along clear lines. (93)

The disappearance of the twelfth Imām placed Imāmi Shi'a scholars in a position of greater authority from which they could express their own views on doctrinal and legislative questions. Therefore, there are an impressive number of works on historical, legal and doctrinal subjects which were written during this time by such outstanding figures as ash-Shaykh al-Mufid (D 413/1022), Sharīf al-Murtada (D 436/1044) and Abū Ja'far al-Tūsi (D 460/1067). (94)

NOTE TO CHAPTER ONE -- PART C

(1) Lane, E.W.; A Arabic - English Lexicon, London, 1863 - 1893, v.1V, page 1632 - 1633.

(2) Qur'an XI:69, XXV111:4 - 15, XXX:32, XXXIV:54, XXXV11:83 and LIV:51.

(3) See definition of ibn Hazm regarding the Shi'a, which was cited by Hollister; The Shi'a of India, London, 1979, page 4.

Shahrastānī; Kitāb al-Milal wa- al-Nihal, Cairo, 1948, v.1, page 234  
Ash'arī, Maqālat al-Islamiyyin, page 5 and 64.

(4) W. Montgomery Watt; "The Rafidites: a preliminary study", in Oriens, 1963, page 119.

(5) Etan Kohlberg; "From Imamiyya to Ithna -Ashariyya", in BSOAS, 1976, page 521 - 539.

With the increasing predominance of the twelvers, the terms "Imamiyya" and "Ithna-Ashariyya" gradually became synonymous. See I. Friedlaender; "The heterodoxies of the Shi'ites in the presentation of ibn Hazm", in JAOS, 1908, page 151.

(6) Watt, The formative period, page 40 - 44.

(7) Lewis, The origin of Ismailism, page 23.

(8) M. Moojan, An introduction to Shi'i Islam, page 62 - 65.

(9) Hodgson; "How did early Shia become sectarian", in JAOS, 1955, page 1 - 13.

(10) J. Bradin; Early Islamic Historiography: ideology and Methodology, The Ohio State University, 1986, page 44.

(11) Lewis, op.cit., page 23.

(12) Watt, op.cit., page 40; The majesty that was Islam, page 66.

(13) It appears, however, that different people took "the family" in different senses. The Imāmi Shī'a restricted it to the descendants of 'Alī and Fātimah. See ibid, page 66.

The Umayyads also claim to extend "the family" to include all descendants of 'Abd al-Manaf (the father of Hāshim and grandfather of Umayya.

whereas the 'Abbasid propaganda emphasized the special character of the whole clan of Hāshim. See ibid, page 66.

(14) Watt, The formative, page 41.

(15) ibid, page 43.

(16) ibid, page 41.

(17) S.H. Jafri; The origin and Early development of Shi'a Islam, page 1 - 23.

(18) Qur'an 111:33.

(19) Jafri, op.cit., page 14.

(20) Qur'an 11:124, XI:37, XIX:58, IV:54, XXXI:33 and XLII:23.

(21) Ibid, page 16.

(22) Ibid, page 17 - 20.

(23) Ibid, page 16 and 22.

(24) Lewis, op.cit., page 23; Watt, The formative, page 44 - 47.

(25) Lewis, op.cit., page 24.

(26) Ibid, page 23; Watt, op.cit., page 44 - 46.

(27) Lewis, op.cit., page 23.

(28) Ibid, page 24 and 25.

(29) Ibid, page 24.

(30) Ibid, page 24.

(31) 'Alī did not paid homage (bay'ah) to Abū Bakr until the death of Fātimah six months later.

Al-Ya'qūbī, Ta'riḫ al-Ya'qūbī, v.11, page 126.

Sharīf Raḍī, op.cit., v.11, page 22; Tabarī, op.cit., v.1, page 1825.

(32) It was based on the sermon during his own caliphate at the mosque of Kufa. See Sharīf Raḍī, op.cit., v.1, page 205.

(33) Disagreement with policies of Abū Bakr and 'Umar can be inferred from an evasive answer he gave to 'Abd al-Rahmān ibn 'Awf at the Shūrā, when he was asked whether he would follow the Qur'ān, Sunnah of the prophet and the Sirāh al-shaykayn (policies of Abū Bakr and 'Umar).

See Tabarī, op.cit., v.1V, page 233.

According to S.H. Jafri, this point was later made the basis of the difference between Sunnī and Shī'i legal theory and practice, whereby the Shī'i jurists rejected the decisions of the first three caliphs. See Jafri, op.cit., page 71.

(34) Ibid, page 51 - 53.

(35) Ibid, page 53.

(36) See page 55.

(37) Mas'ūdī, Murūj adh-Dhahab wa ma'adin al-Jawhar, v.11, page 342; Tabarī, op.cit., v.1, page 2948.

Ya'qūbī, op.cit., v.11, page 164.

(38) It was based upon what happened to Abū Dharr.

al-Tabarī, op.cit., v.1, page 2858; <sup>al-</sup>Ya'qūbī, op.cit., v.11, page 172.

al-Mas'ūdī, op.cit., v.11, page 339.

(39) It is based upon Abū Dharr' speeches :-

"'Alī is the legate (Wasi) of Muhammad and the inheritor (Warith) of his knowledge. O you bewildered and perplexed community after its prophet, if you give preference (in leadership) to those to whom God has given preference, and set aside those whom God set aside, and if you firmly place the succession and inheritance in the people of the house of your prophet, you will certainly be prosperous and your means of subsistence will be made ample".

Ya'qūbī, *ibid.*

(40) Jafri, op.cit., page 80 - 81.

(41) Hugh Kennedy; The early 'Abbasid caliphate, London, 1981, page 38 - 39.

(42) Lewis, op.cit., page 26.

(43) *Ibid.*

(44) *Ibid.*

(45) Jafri, op.cit., page 237.

(46) See page 133 - 135.

(47) Zayn al-'Abidin did not accept the offer of Mukhtar ibn 'Ubaid. See Mas'udi, op.cit., v.111, page 74.

(48) Jafri, op.cit., page 298 - 299.

(49) Ibid.

(50) Madelung; "A treatise of the Sharif al-Murtada on the legality of working for the government", in BSOAS, 1980, page 18 - 30.

(51) Jafri, op.cit., page 300.

Sachedina, Islamic Messianism, the idea of the Mahdi in twelver Shi'ism, page 30 - 32.

Kohlberg; "Some Imami Shi'i view on Taqiyya", in JAOS, 1975, page 395 - 402.

(52) Jafri, op.cit., page 248 - 249.

(53) Ibid, page 281 - 282.

Hodgson; "How did <sup>the</sup> early Shi'a became sectarian", in JAOS, 1955, page 11.

(54) Jafri, op.cit., page 253 - 254.

(55) This sect was later responsible for forming the Da'wah of 'Abbasid which overthrew the Umayyad government.

See Lewis, op.cit., page 27 - 28.

(56) Jafri, op.cit., page 262.

(57) Ibid, page 252 - 254.

(58) Lewis; The Arabs in history, London, 1964, page 72.

Margoliouth; al-Mahdi, E.I.

(59) Ibid.

- (60) R. Strothmann; al-Zaydiyyah, E.I.
- (61) Lambton, State and government, page 30.
- (62) Ibid, page 28 - 29.
- (63) Most Zaydi jurists maintain, however, that 'Ali, Hasan and Husayn were endowed with infallibility.  
Etan Kohlberg; "Some Zaydi views on the companions of the prophet", in BSOAS, 1976, page 91 - 98.
- (64) See Madelung; Imama, E.I<sup>2</sup>.
- (65) E. Kohlberg, op.cit.
- (66) Jafri, op.cit., page 251.
- (67) Ya'qūbī, op.cit., v.111, page 90.  
Ṭabarī, op.cit., v.111, page 33 - 34 and 37.
- (68) Kāshif al-Ghitā', Asl al-Shi'a wa - usūluhā, page 51.  
Ahmad Amin; Dhuhā al-Islām, Cairo, 1956, v.111, page 281 - 282.  
Al-Isfahānī, Kitāb al-Aghānī, v.XI, page 300.
- (69) Jafri, op.cit., page 261.
- (70) Hodgson, op.cit.
- (71) See page 64 and 66 - 68.
- (72) J. Bradin, op.cit., page 50.
- (73) Ibid, page 43.
- (74) Jafri, op.cit, page 289; Hodgson, op.cit., page 2.
- (75) Jafri, op.cit., page 289.
- (76) Hodgson, op.cit., page 9 - 10.
- (77) Ibid, page 11.
- (78) Al-Haythamī, al-sawā'iq al-Muhriqa, page 101.

(79) E. Kohlberg; "Al-usul ar-Arba'umia", in JSAI, 1987,  
page 128 - 166.

(80) Moojan, op.cit., page 73.

(81) al-Nawbakhti, op.cit., page 43; Watt, Formative period, page 155

(82) <sup>al-</sup>Tabari, op.cit., v.111, page 486 - 487.

(83) Jassim M. Hussain, op.cit., page 55.

(84) Ibid, page 45 - 47.

(85) Al-Nu'mānī; Kitāb al-Ghayba, Tabriz, 1317/1899, page 92.

(86) Al-Sadr, Muhammad; Ta'rikh al-Ghayba al-Kubrā, Beirut, 1975,  
v.1, page 341 - 346.

(87) The name of the Safirs are :-

(1) 'Uthmān ibn Sa'id al-'Umari.

(2) Muhammad ibn 'Uthmān al-Umari.

(3) al-Husayn ibn Rūh al-Nawbakhti.

(4) 'Alī ibn Muhammad al-Sammari.

See J.M. Hussain, op.cit., page 83.

(88) Ibid.

(89) Ibid, page 134.

(90) Ibid, page 148.

(91) Ibid, page 157.

Alqar, Hamid; Religion and state in Iran (1785 - 1906),  
California, 1969, page 3 - 4.

(92) The religious policy of the Buwayhid is clearly pro-Shi'a.

J.L. Kraemer; Humanism in the renaissance of Islam, The cultural  
revival during the Buyid Age, Leiden, 1986, page 40 - 42.

(93)Ibid,page 43.

The most important gain of Shi'ism under the Buyids was their licence to practise openly,without the need for Taqiyya.

(94)Ibid,page 65 - 68.

**PART D - THE CAUSES OF SEPARATION.**

**(I) THE DIFFERENCE OF VIEW REGARDING THE CONCEPT OF SAHĀBA.**

**(II) THE DIFFERENCE OF VIEW REGARDING THE DOCTRINE OF IMAMATE.**

PART D - THE CAUSES OF SEPARATION.

The causes of separation between Sunnis and Shi'is can be traced to the two important factors :-

(I) The difference of view regarding the concept of Sahābā<sup>(1)</sup>

Sunni heresiographers like al-Ash'ari<sup>(2)</sup>, Abū Muzaffar al-Isfahāni<sup>(3)</sup> and Shahrastāni<sup>(4)</sup>, in explaining various Islamic sects, had often presented a negative attitude to the companions as one of the distinctive characteristics of the Imāmi Shi'a.

On the question of the companions there is a large measure of agreement among the Sunni authors to the point that the Imāmi Shi'a are usually referred to by the abusive term "Rāfida<sup>(5)</sup>"; those who vilify the companions and consider practically all of them as unbelievers.

The difference of view regarding this matter has led the Sunnis to attack the Shi'is violently. Sunni polemicists cite anti-Shi'i traditions with the aim of substantiating this claim. In an often quoted Hadith the prophet tells 'Ali to fight the Rāfida, whose distinguishing mark is their defamation of the first generation.<sup>(6)</sup>

The Sunnis<sup>(7)</sup> and Mu'tazila<sup>(8)</sup> in every generation have been intensive opponents of the Shi'is regarding this issue. They stretched their ideas to the extent that the Shi'i is no longer accepted as a Muslim.

(i) The issue whether the Sahābā were Muslim or not.

To the Sunni, the Sahābā are highly regarded not only as pious Muslims but also as the most excellent of the time who could never be matched by the generation after. (9)

The Sunnis who provoked this idea managed to bring evidence from numerous traditions in which the merits of the companions are stressed. Among the most often quoted is one in which the prophet declared "my companions are like lodestars, by imitating anyone among them you will find the right path". (10) Even though the authenticity of this tradition was questioned it is significant because of the very clear reference it makes to the companions as authorities and guides to the community.

Not only that, the Sunnis also had the idea of "Tafādul al-Sahābā"; the tendency to arrange the companions in a hierarchical order points to the different views which have existed in Islam from its inception, according to which all companions are good, but some are better than others. (11)

In order to contrast the Shi'i view regarding the first matter, one has to look at the doctrine of Imamate in the Shi'i faith. The elevation of the principle of the Wilayah to the level of an essential of faith (12) was bound to focus attention on the problem of the status of those who refused to abide by it. The immediate and obvious solution is based on the assumption that a denial of the foundation upon which a

doctrinal structure stands means a denial of that structure in its entirety. In other words, denial of the Imamate of 'Alī and his descendants is tantamount to unbelief. (13)

As stated by E. Kohlberg (14), initially the Shi'a regarded the caliphs who deprived 'Alī of his right as kāfir, but later they blamed the whole community. The transition from the phase of declaring the first three caliphs as unbelievers to that of denouncing the entire community may have taken place during the later years of the Umayyad regime. With the emergence of an embryonic theory of the Imamate it must have become clear that the rejection of the entire community was the logical outcome of the rejection of the first three caliphs, since it was with the support of the community that Abū Bakr, 'Umar and 'Uthmān came to power.

The Shi'a unaffected by all that, still regarded the companions as Muslims because they did not abandon the prophet's message. (15) Their status is not that of the good Muslim, but of the Munāfiq. (16)

Obviously, a community consisting of unbelievers cannot be accepted as an authority for the prophet's sayings. (17) This led in turn to the development of an independent Shi'i legal system, based on the authority of the Imams. (18)

**(ii) The question whether the companions are all good or not**

The Sunnis, relying on the Hadith which emphasized the merits of the companions, made two important points regarding the companions of the prophet which were raised to the level of an article of faith. The first was that all the companions are righteous persons of high morals ('Adl)<sup>(19)</sup> who could do no wrong.<sup>(20)</sup> The second was that one should not attempt to interpret the historical events of early Islam in a manner which might shed an unfavourable light on any of its adherents.<sup>(21)</sup>

In the first idea, al-Ash'ari<sup>(22)</sup> and Ibn Taimiyya<sup>(23)</sup> believe that in addition to believing that all companions were 'Adl, they should also be regarded as Mujtahidun. Therefore, it is declared that the companions were not infallible and may have committed sins; yet they were pardoned because they possessed many virtues and because they were Mujtahid.

To the Shi'a, the companion is not highly regarded and not treated as a great asset. They tried to refute the Sunni claims that the companions are beyond reproach. This is achieved by various methods, all aimed at showing that the companions, like all other Muslims, with the exceptions of the prophet and the Imams, belong to the category of normal and erring mortals.

According to the Shi'a, being the companion of the prophet or of anyone else, has no intrinsic positive value. (24) They insist (25) that a companion, like any other Muslim, must distinguish himself by his acts and beliefs, not by having simply met the prophet. In fact, sins committed by the companions are more odious than those committed by others, since the companions witnessed the signs and miracles of the prophet so that they were bound to believe in him by necessity, whereas following generations had to base their belief on logical reasoning only, so that their sins may be viewed with greater leniency. (26)

Al-Murtada for example, claimed that every prophet in the past generations had companions who used to disobey him and turn their backs on him. A typical example is that of the Israelites (Qawm Musa) who turned almost to a man to worship the golden calf, despite the fact that Moses was still alive and had only recently been in their midst. (27)

### **(iii) The importance and authority of Sahāba in Islam**

The Sahāba are very important to the Sunnī, and this is clearly shown by the theory put forward by Schacht that the basis for the law that was applied in the first two generations of Islam was ideal custom as this is reflected in the ancient schools of law. With the spread of Islamic religious

consciousness, lawyers increasingly felt the need to establish their doctrine on a firm theoretical footing. The first major step in this direction was taken when the doctrines of the various schools were retrospectively attributed to famous companions who had lived in the areas where these schools flourished. (28)

At that stage, opinions of a companion were accorded more authority than what the same companion reported as having been said by the prophet. (29) The only knowledge ('ilm), al-Awzā'ī is said to have declared, is that which has come down from the companions. (30)

Most of the Ahl al-ḥadīth (proto-Sunni) agreed that the term 'adāla, when applied to the companions, is not limited to their high morality as individuals (31), but extended also to their reliability as transmitters. In their view, no investigation is needed to measure the existence of 'adāla in each individual companion; hence the science of estimating the trustworthiness of transmitters ('ilm al-jārh wal-ta'dīl) is irrelevant in the case of the companions. (32)

Some scholars argued that the companions cannot be accorded a special privileged position and that their 'adāla, both as the transmitters of the prophet's sayings and as witness to his actions, must be subjected to careful scrutiny—the only

exception being companions such as Abū Bakr and 'Umar, whose 'adāla is so well established that it stands in no need of further proof. (33)

Whereas Sunnī Islam regarded the companions as not only exemplary Muslims but also as the sole transmitters of the prophet's teachings, in Imāmī Shī'a doctrine, all authority is vested in the Imāms. In principle, this would leave all companions without any authority in religious matters.

In order to study the Shī'i view regarding this third matter, one must look into the fundamental difference between the knowledge possessed by the Imāms and that possessed by the companions of the prophet. The Imāmī Shī'a believe that their Imāms are the only true men of knowledge. (34) While they receive their knowledge directly from God (35), others receive it from men, who in turn received it from other men. (36)

The Sunnis might argue that this last point has no real bearing on the status of the companions, since they received their knowledge directly from the prophet and they therefore were not in a basically inferior position to that of the Imām; but the Shī'a point to other factors which render the knowledge of the Imāms far superior to that of the companions. In the Shī'i view, only the Imām knows the true significance of the various sayings of the prophet, some of which appear to be contradictory.

This idea is expressed in the word of al-Baqir, "The Apostle of God has bestowed (knowledge) upon mankind, bestowed and bestowed (again); we the Ahl al-Bayt, are the stronghold of knowledge, the gates of judgement and the light (which illuminates and elucidates) the decrees (revealed by the prophet)". (37)

In contrast to the Imams, most companions have deficiencies which render them unsuitable as authorities. This claim is contained in a critique of the reliability of the companions ascribed to 'Ali. (38) He is reported to have divided the companions into four groups :-

(1) The hypocrites (Munāfiqūn) who only pretended to believe in Islam, and who joined the ranks of the "misguiding Imams" (i.e. the first three caliphs and the Umayyads) after the prophet's death. Although they deliberately spread lies, ignorant people, not knowing their real attitude, are ready to accept traditions transmitted by them on the ground that they saw and heard the prophet.

(2) Those who heard the prophet but did not remember his words correctly. Despite their good intentions, they distorted the prophet's words and therefore are unreliable.

(3) Those who reported truthfully and correctly what they had heard from the prophet, but were unable to distinguish between abrogating (Nāsikh) and abrogated (Mansukh) traditions, thus bringing about many contradictions. (39)

A favourite example among the Shi'a in this matter is the question of al-Mash 'alā khuffayn.<sup>(40)</sup> The Shi'a argue that the difference on this point arose because some companions were unaware that the edict which allowed the wiping of shoes had been abrogated by the prophet.

(4) Companions who had none of the defects mentioned above. But even they were not perfect; some of them were unable to understand the prophet's answer to the questions which they put to him and others refrained from asking him anything, and were glad if a desert Arab would come and ask, and they would listen. According to Ibn Babawayhi<sup>(41)</sup>, the reason these companions did not put the questions to the prophet was that God had forbidden them to ask about something which if made known, would trouble them and might even cause them to disbelieve.<sup>(42)</sup>

Kāshif al-Ghita'<sup>(43)</sup> explains that the prophet realised that the time was not right to reveal certain kinds of knowledge to the community, consequently though he told his companions some things, he entrusted the whole of his knowledge only to his legat<sup>e</sup>s. Their duty is to reveal it piecemeal at the appropriate time.

Although the Imāms are considered by the Shi'a as the sole transmitters of the prophet's Sunnah, the companions are not entirely devoid of authority. Good companions<sup>(44)</sup> only rarely transmit legal traditions, but they are often cited as

authorities for traditions of the prophet which deal with the virtues of the Ahl al-Bayt. Such traditions are accepted as reliable since they are regarded as having been approved and agreed by an Imam.<sup>(45)</sup>

Rejected companions<sup>(46)</sup> are quoted as transmitters from the prophet in polemical texts or for reasons of Taqiyya. Independent legal opinions (Fatwas) of any companion which do not go back to the prophet are not accepted.

#### (iv) The question of cursing the Sahāba

In the Sunni view, cursing the companions of the prophet is strongly prohibited.<sup>(47)</sup> An obvious corollary of the demand that all companions should be held in high esteem is that no defamatory statements should be made about them.

This attitude, which is the consequence of the way in which most Sunnis interpreted the historical role which the companions played in early Islam, had to be constantly reiterated and insisted upon in the face of challenges from outside the Sunni camp. Hence the proliferation of traditions in which the Muslims are warned against making impious remarks about the companions.

The prophet is said to have expressed his solidarity with the companions by warning "whoever harms them has harmed me; whoever harmed me has harmed God; whoever harmed God will be punished by Him".<sup>(48)</sup>

Qadi Abu Ya'la is reported to have maintained that according to the jurists, if a man thinks that his vilification of the companions is legal, he is an unbeliever. If he vilifies the companion but does not think it legal, he is a grave sinner (fasiq) but not an unbeliever, even if he claims the companions to be unbelievers or attacks their faith. (49)

On the legal aspect, Sunni jurists attempted to determine the correct punishment for defamation of the companions. In this they had only one prophetic tradition on which to base themselves, "whoever vilifies a prophet is to be killed and whoever vilifies his companions is to be flogged." (50)

Malik ibn Anas, is reported to have expressed himself in a manner similar to that of the tradition quoted above, "whoever defames the prophet is to be killed and whoever vilifies his companions is to be chastised." (51)

The punishment of flogging is said to have been decreed by Ibn Hanbal. (52) He is quoted as asserting that he who vilifies the companions should be punished and called upon to repent; if flogging prove of no avail he should be imprisoned until he repents, that is, for life if necessary. (53)

An elaboration of the Shi'i view is preserved in the Zaydite Shi'a whose arguments are also quoted in Imami Shi'i texts and may be taken as representing Imami Shi'i views as well. (54)

The Zaydite point out that God himself has cursed and has ordered his servants to curse. This is proved by many Qur'anic passages, for example, "They shall be cursed both by God and by the cursers." (55)

The gist of the argument is clear: once it is established that cursing is not prohibited and that there is no reason to exempt the companions from the category of ordinary men, then there can be no objection in principle to the cursing of the companions. Since opposing the right of 'Ali and his family is a major sin, those guilty of it should be cursed. 'Ali himself is quoted as declaring that the best way of examining one's soul is to show loyalty to 'Ali and to curse repeatedly his enemies, his haters and those who wrested away his right. (56)

The Shi'a also gave the tradition of the prophet as saying "whoever is too weak to support us, the Ahl al-Bayt (openly), but (instead) curses all enemies when he is alone, will have his voice transported by God to all the angels who fill the space between the earth and the heavenly throne. Whenever this man curses all enemies, then (the angels) will aid him and curse whoever curses him." (57)

True believers may not be vilified, Ibn Babawayhi<sup>(58)</sup> quoted a tradition in which the prophet states, "vilifying the believer is a grave sin and fighting him is unbelief." According to the Shi'a, the enemies of 'Ali cannot be included among the true believers<sup>(59)</sup> and this applies to the companions as to all others.

### (II) The difference of view regarding the doctrine of Imamate

The Imamate issue had been the most controversial point between the Sunni and Shi'a, and has been described by some scholars<sup>(60)</sup> as the turning point for the split between Sunni and Shi'a.<sup>(61)</sup>

In the historical view, the idea of Imamate developed by the Shi'a had been established earlier than that of the Sunnis. The basic doctrine of the Shi'a on the Imamate was not formulated until the time of the Imam Ja'far al-Sadiq<sup>(62)</sup> and appears to have been largely the work of Hisham ibn al-Hakam.<sup>(63)</sup>

On the other hand, the Sunni Imamate idea, was largely formulated in response to the claims and counter-claims of the opposition movement, especially the Shi'a and Khawarij.<sup>(64)</sup> The Sunni jurists claim that their doctrine of the Imamate is based on the practice of the early Islamic community. As Gibb points out, the fully developed theory of the Sunni jurists was, thus, in contrast to the theories of the Shi'a and Khawarij, not speculatively derived from the sources of the revelation, but

rather based upon an interpretation of these sources in the light of the later political development and reinforced by the dogma of the divine guidance of the community and the infallibility of its Ijma'. (65)

According to Lambton, the Sunni jurist's theory about the Imamate is to a large extent an apologia for the historic caliphate against the charges of the Shi'a, Khawarij and Mu'tazila. (66)

Rosenthal in his work found that several Sunni jurists who wrote about the theory of Imamate, like Abu Yusuf, al-Mawardi, al-Baghdadi, al-Ghazali, Ibn Jama'a and Ibn Taimiya; aim at achieve two points: first, to vindicate and uphold the divine purpose of the Muslim state. Second, to give support to the 'Abbasid caliphs in their struggle against both Sunni and sectarian groups (Shi'i in the first place) challenges to and encroachments on their authority. (67)

(i) The question as to whether the prophet appointed his successor (68)

The Sunnis believed that the prophet did not appoint his successor over the state and that he left it to the Muslim community to appoint an Imam. Al-Bukhari has recorded a tradition which bears evidence that up to the time the prophet was on his death-bed, he had not appointed anyone as his state-successor (69) and that it was for the community to appoint their Imam after the prophet.

In contrast to the Shi'i view, the Islamic community in the Saqīfā event<sup>(70)</sup> unanimously agreed to elect Abū Bakr as the caliph. This election has been regarded as the Ijma' of the Sahābā and was made lawful according to the Qiyās method, because Qiyās was applied to the caliphate in which Abū Bakr was the Imām for the prayer during the prophet's illness.<sup>(71)</sup>

The Sunnis also tried to claim that the caliphate in favour of Abū Bakr was based on a report of the prediction of the prophet and his desire that Abū Bakr be his successor.<sup>(72)</sup>

In order to deny the presence of the tense atmosphere between 'Alī and Abū Bakr as claimed by the Shi'a, the Sunnis brought forward numerous reports and evidences which showed that 'Alī agreed with Abū Bakr<sup>(73)</sup>, 'Umar<sup>(74)</sup> and 'Uthmān<sup>(75)</sup>.

The Shi'a maintain that the prophet designated<sup>(76)</sup> 'Alī as his successor by God's command.<sup>(77)</sup> They brought forward numerous Qur'ānic verses<sup>(78)</sup> and prophet's traditions<sup>(79)</sup> which show that the prophet selected 'Alī to be his successor. Among the Hadiths frequently used is the Hadith of Ghadir Khumm<sup>(80)</sup>. In this Hadith, the real disagreements between Sunni and Shi'a are on the meaning of the word "Mawla" which has been used by the prophet.<sup>(81)</sup>

The Shi'a unequivocally take the word in the meaning of leader, master and patron, and therefore the explicitly nominated successor of the prophet. (82) The Sunnis on the other hand, interpret the word "Mawlā" in the meaning of friend, or the nearest kin and confidant. (83)

The Sunnis assert that the prophet's sentence simply meant to exhort his followers to hold his cousin and the husband of his surviving daughter in high esteem and affection. (84)

The Shi'a considered the historical caliphate, with the exception of the time of 'Alī ibn Talib, as invariably usurpatory and illegitimate. (85) They had been pushed aside from their rightful position, first by the three caliphs preceding 'Alī (86) and later by the Umayyads and the 'Abbasids. (87) In Imāmi Shi'i writings, non-Imāmi Muslims are known collectively as the Ahl al-Khilāf. The worst offenders among these from an Imāmi point of view are the Nāsiba. (88) These are variously defined as people who rejected the notion of 'Alī's superiority to Abū Bakr and 'Umar, and denied his right to succeed the prophet, or who hated 'Alī or the entire Ahl al-Bayt or all Imāmi Shi'is. Early adherents of the Nāsiba are said to have included the Khawārij and most Umayyad rulers. (89)

Compared with Nasiba, Ahl al-Khilaf are entitled to be treated in this world as Muslims, even if in God's eyes they are unbelievers; the Nasiba in this world are in a state of actual unbelief and are to be treated accordingly. (90)

To the Shi'a, 'Ali claimed the caliphate and this had led to a conflict with the first three caliphs. (91) When faced with the fact that 'Ali recognised the rule of Abu Bakr, 'Umar and 'Uthman, they ascribe his behaviour to Taqiyya. He is said to have practised Taqiyya only in the broad sense of refraining from action which would inevitably have led to unnecessary and useless bloodshed. (92)

**(ii) On the means whereby the Imam is established in the office**

The Sunnis and others like Mu'tazila, Khawarij and Najariyya (93) hold that the method of establishment is by testamentary designation ('Ahd) (94) or by election by the Ahl al-Hall wal-'aqd (95).

This type of idea clearly contradicted the Shi'i ideology which asserts that the method of establishment of the Imamate is by the designation of the Imam from God.

According to al-Baghdadi (96), the argument for the doctrine of the majority is that if announcement of the designation of the Imam had been incumbent on the prophet, he would have announced it in such a manner that the community had public knowledge of it and no grounds for disagreement. But since there is nothing

in the traditions sponsored by the Shi'a which constitutes authoritative information, the question became one of Ijtihād and the exercise of selection by the Muslim community.

Al-Juwayni states there was in the first place no means of knowing the idea of designation by Nass and second such a claim was demonstrably false because Ijmā' supported a contrary view.<sup>(97)</sup> In the absence of designation there remained only election. It was proved by Ijmā' that election had been practised for a long period without its principle having been denied by any learned man.<sup>(98)</sup>

Once elected and invested, this choice had to be confirmed by the people and in technical terms, this means that election take place by Bay'ah, investiture with the elector's oath of loyalty, to be followed by Bay'ah in public, expressing the Ijmā' of the community.<sup>(99)</sup>

Once elected and invested, the caliph binds himself to the Jamā'ah by a contract ('Ahd) guaranteeing loyal fulfilment of his duties and receiving in exchange a binding promise (Bay'ah) by the Ahl al-Hall wal-'Aqd.<sup>(100)</sup>

To the Shi'a, the choice of Imam is neither by selection nor by election, but by the designation of God and the indication of the prophet to show who should succeed him in office.<sup>(101)</sup>

In other words, since God is All-knowing of the innermost thoughts of people and of who is the evil-doer and who is the one who acts righteously, He is the one who appoints the Imām and the prophet declares it by himself. (102)

According to S.H.Jafri, in the doctrine of the Imamate, emphasis on the principles of the Nass means that the Imamate is a prerogative bestowed by God upon a chosen person from the family of the prophet who before his death and with the guidance of God, transferred the Imamate to another by an explicit designation (Nass). On the authority of the Nass, therefore, the Imamate is restricted, through all political circumstances to a definite individual among all the descendants of 'Alī and Fātimah, whether he claims the temporal rule for himself or not. (103)

After the prophet's death, each succeeding Imām will be indicated by his predecessor<sup>(104)</sup>, and this is in accordance with the testament (Wasiyya) revealed to the prophet. (105) It means that God alone appoints the Imāms, one by one, in accordance with the testament (Wasiyya) which announces the names of those who will succeed him. (106) The oath of allegiance (Bay'ah) which is given to the Imām by the people is but a demonstration of their recognition and acceptance of what had been already assigned by God. (107)

The Shi'a went further because of their belief in the appointment of Imām by God, and came to the point of showing numerous evidences in order to criticise the principles of establishment of the Imamate which were held by the Sunnis, such as :-

(1) God's mercy to His servants requires that He appoints an Imām for them, since leaving aside this important office will cause each one to select a leader, and this makes room for great corruption, which is in contrast to the divine Wisdom. (108) It is also impossible to leave the appointment of the Imām to the people because each will choose one who is nearest in relationship to himself, which will cause violent revolts and disputes among the people. (109)

(2) The actual qualifications of the Imām are known only to God and the people have neither the means to know them nor can they evaluate opinion about the recognition of his qualification. (110) The public selection of the Imām depends upon the apparent qualities of the person who could be secretly impious or dissolute. On the other hand, the Imām who is appointed by God is certainly distinguished in his abilities. (111)

(3) As to the doctrine of Ijma' announced by the Sunnis, the Shi'a point out that a number of the earliest Muslims like Banu Hashim and a number of the Muhajirin had opposed this principle and disapproved of the selected one although they did not openly declare this. (112)

(4) As long as the Ahl al-Hall wal-Aqd rely on their own opinion in selection of the Imam, they will differ in their choice. Thus some may choose a superior (Fadil), whereas others may choose an inferior one (Mafdul), resulting in controversy and disputes. (113)

**(iii) The question whether the Imamate is a usuli matter or not**

The Sunnis do not consider the Imamate as a fundamental principle of religion (Asl). (114) This matter was clearly stated by Ibn Khaldun, who was speaking for the Sunni view point:-

"It is an error of the Imami Shi'a to pretend that the Imamate is one of the pillars of the religion; it is in reality only an office instituted for the general good. If it had been a pillar of religion, the prophet would have delegated it to some one." (115)

The Shi'a make it their central and cardinal principle of faith and religion is incomplete without it. (116)

In fact the foundation of the Shi'i creed is based on the principle of the Imamate. (117) For the Shi'i, belief in the Imamate was inseparably linked with the question of the Wilayah

Which involved :-

- (1) Love and devotion to the Ahl al-Bayt, i.e. the Imams.
- (2) Following them in the religion.
- (3) Obedience to their commands and abstention from what they prohibited.
- (4) Imitation of their actions and conduct.
- (5) Recognition of their rights and belief in their Imamate. (118)

The Shi'a like the Sunnis developed a short phrase proclaiming faith in the form of personal witness (al-shahadah). But, while the Sunni shahadah comprises two tenets only, belief in the unity of God and in the commission of Muhammad as his messenger<sup>(119)</sup>, the Shi'a add a third tenet, belief in the designation of 'Ali as the Wali of God. (120)

The term Wali is used not merely as by the Sunnis, in the sense of the "friend of God" who intercedes for the believer<sup>(121)</sup>, but there is implicit in the term the conception of an heir to Muhammad, whose nomination is incumbent upon God, and upon God's messenger. (122)

**(iv) The issue of function and loyalty to an Imam**

Both sides believe that there are two chief aspects of the prophet's life; first he received the revelation from God and conveyed his message with its proper explanation to the people, to form the spiritual guidance of the community. Second, he administered their affairs as head of state. (123)

But both parties, disagreed on the continuation of the prophet's second task.

To the Sunni, when the prophethood had come to an end and the last prophet passed away, the first function is finished and the caliph is the one who was entrusted with the responsibilities of this second aspect of the prophet's life. The first function did not, according to the Sunnis, pass to his successor but was inherited by the community as a whole. In other words, the leader of the community had no authority to give new interpretations on religious matters and his function was merely to maintain existing doctrine. (124)

The Sunnis regard the Imamate as a fundamental of the administration and not as a fundamental of the religion and argue that the religion had already been perfected and completed in the lifetime of the prophet, while the administrative affairs continue up to the last hour. The Sunnis provoked a tradition which suggests that the caliphs of the

prophet are the successors of the prophet and apart from the administration of the prophet's mission according to the instruction there is no other function of the Imamate. (125)

The Sunnis believe that unconditional obedience is due only to God and the prophet, while obedience to the Imams is subject to their acts being consistent or not with the Qur'an and the Sunnah. (126)

According to the Sunnis, the spiritual status of the Imam and the idea of sinless (Ma'sum) Imamate as depicted in the Shi'i tradition conflicted with the fundamental doctrine of Khatm al-Nubuwwah, that Muhammad is the seal of the prophets and after him no prophet is to be born. Shah Wali Allah comments upon the doctrine of the Shi'a as follows :-

"According to the Shi'a, the Imam is sinless, one to whom obedience is obligatory, one who is appointed for the creature and one for whom they suggest a secret revelation. So they are rejecting the fact that the prophethood has come to an end, although they declare that Muhammad is the seal of the prophets. (127)

Abu Mansur 'Abd al-Qahir al-Tamimi also agrees with this idea:-

"The majority of the Muslim community believes that protection from sin is among the conditions of the prophethood and Apostleship but it is not considered among the conditions for the Imamate. (128)

To the Shi'a, besides the second affair mentioned earlier<sup>(129)</sup>, there were also the spiritual aspects of the Imamate: to keep the knowledge of religion purified and to interpret the Qur'an according to the good pleasure of God and the will of the prophet.<sup>(130)</sup>

Consequently, the Imamate, like the prophethood, has to be announced at the set time for the guidance of mankind by the will of God. The leadership of the Imām resembles that of the prophet himself in its temporal and spiritual aspects; this means that the Imām is equal to the prophet in all respects except that the Imām has not received the revelation from God like the prophet.<sup>(131)</sup>

The Imām, like the prophet, is endowed with special knowledge and has inherited the knowledge of all the ancient prophets and their legates.<sup>(132)</sup> In this way, the Imām is the link with the way of guidance and without acknowledging him, a person seeking guidance cannot obtain it.<sup>(133)</sup>

The special mark of the Imām, according to the Shi'a was 'Isma.<sup>(134)</sup> The Shi'a contended that since the Imamate was intended for the continuation of the mission of the prophet and the guidance of mankind after him, the community could not afford to accept a fallible successor to this divine institution; therefore the Imām had to be protected from sin like the prophet.<sup>(135)</sup>

NOTE TO CHAPTER ONE -- PART D

(1) Goldziher; Ashab, in E.I.<sup>1</sup>

(2) Al-Ash'ari distinguishes two Imāmi Shi'a attitudes to the companions; some Shi'is consider as unbelievers all the companions who fought 'Ali, such as Talhah, Zubayr and Mu'awiya, as well as all the companions who did not follow 'Ali after the prophet's death; others consider those who fought 'Ali as grave sinners (Fussāq), except when they were also rebelling against the prophet, in which case they are considered as unbelievers. See Ash'ari; Maqālāt al-Islamiyyin, page 57.

(3) He declares that all the Imāmi Shi'a sects agree that the companions are unbelievers. See Al-Isfarā'ini; Al-Tabsir fi din, Cairo, 1955, page 43.

(4) According to Shahrastāni, the Imāmiyya are accused of attacking the companions and declaring them as unbelievers as well as of forging traditions to suit their own views.

See Shahrastāni, Kitāb al-milal wa I-nihal, v.1, page 123 - 124.

(5) I. Friedlaender; "The heterodoxies of the Shi'ites in the presentation of Ibn Hazm", in JAOS, 29(1908), page 137 - 159.

The Shi'is themselves, in reaction to the attacks against them, stress that their designation as Rafida is a sign of special honour and merit. See Kulayni, Ar-Rawda min al-Kafi, Tehran, 1377, page 34; Majlisi, Bihar al-Anwar, v. XV/i, page 127.

(6) Ibn Hajar al-Haytami; Majma' az-zawa'id wa-manba' al-Fawa'id, Cairo, 1933, v.X, page 21 - 22; Ibn Qutaybah; Ta'wil Mukhtalif al-Hadith, Cairo, 1966, page 81.

(7) To Ash-Sha'bi is ascribed, "say the Rafida are worse than the Jews and the Christians. The Jews were asked, who are the best men ? They said, the companions of Moses. The Christians were asked, who are the best men ? They said, the companions of Jesus. The Rafida were asked, who are the worst men ? They said, the companions of Muhammad.

See Ibn Taimiyya; Minhaj al-Sunna al-Nabawiyya, Cairo, 1962, page 17.

(8) In Mu'tazili circles, the anti-Shi'i attacks of al-Jahiz are reiterated by al-Khayyat, who ascribes to the Rafida a long list of heretical views, one of these is that the entire Sahaba with the exception of five or six persons are unbelievers and polytheists. See Al-Jahiz, Kitab al-Uthmaniyya, page 180.

Al-Khayyat, Kitab al-Intisar, Beirut, 1957, page 100 and 104.

(9) Muslim reports the tradition of the prophet:-

"The most excellent (persons) are my generation, then the following (generation), then the following (generation)"

Muslim, Kitab as-Sahih, v.VII, page 185; Ibn Hajar al-Haytami, op.cit., v.X, page 19.

(10) Muslim, op.cit., v.VII, page 183.

Khatib at-Tibrizi; Mishkat al-Masabih, Damascus, 1961 - 1962, v.111, page 219.

(11) This position was given an official stamp of approval by 'Umar who allotted the biggest financial rewards from the public treasury to the families of those who had been most closely associated with the prophet.

See A.A.Duri; Diwan, in E.I.<sup>2</sup>

(12) See page 135 - 136.

(13) W.Madelung; Hisham ibn al-Hakam, in E.I.<sup>2</sup>

(14) E.Kohlberg; "Some Imami Shi'a views on the Sahaba", in JSAI, 5(1984), page 147.

(15) Al-Muzaffar; Dala'il as-Sidq fi Nahj al-Haqq, Najaf, 1953, v.11, page 275.

(16) A further distinction between apparent and real faith is made in the tafsir of 'Ali ibn Ibrahim al-Qummi on the Qur'an 61:2; "Believers, why do you profess that which you do not practise." The commentator says; "This is addressed to the companions of the prophet who promised that they would support him, would not disobey his orders, and would not break covenant with the Commander of the Faithful; but God knew that they would not keep their word... God called them believers because they acknowledged (Islam verbally), even though they did not assent (to it in their hearts).

See al-Qummi; Tafsir, Najaf, 1386 - 1387, v.11, page 365.

In Imāmi Shi'a literature the term Munāfiqun is often reserved specially for those who did not follow the prophet's command to show loyalty to 'Alī.

See Kulaynī, op.cit., v.1, page 432.

According to Madelung, this attitude of Imāmi Shi'a is linked to the increasing interaction between Mu'tazilism and Shi'ism in the 4th/10th century.

See Madelung; "Imamism and Mu'tazilite theology", in Le Shi'isme imamite, Paris, 1970, page 13 - 30.

(17) Sachedina; Islamic Messianism; the idea of the Mahdi in twelver shi'ism, State university of New York press, Albany, 1981, page 18.

(18) Madelung; Der imam al-Qasim ibn Ibrahim und die Glaubenslehre der Zaiditen, Berlin, 1965, page 46 - 47.

(19) See page 116 and 316.

(20) E. Tyan; 'Adl, in E.I<sup>2</sup>.; G.H.A. Juynboll; The authenticity of the tradition literature, Leiden, 1969, page 12.

(21) Al-Khayyāt, op.cit., page 64.

(22) Wensinck; The Muslim Creed, Cambridge, 1932, page 104.

D.B. MacDonald; Development of Muslim Theology, Jurisprudence and Constitutional theory, Lahore, 1903, page 19.

(23) Al-Ash'arī, op.cit., page 9 - 11.

(24) Ibn Taimiyya; Al-'Aqida al-Wasitiyya, Cairo, 1346, page 32 - 33

(25) Muzaffar, op.cit., v.111/ii, page 11.

(26) Al-Qazwini, Kitab al-Naqd, page 261 - 263.

- (27) Ibn Abi al-Ḥadīd, op.cit., v. XX, page 22.
- (28) Murtadā, Ash-Shafi fi 'I-ināma, page 102.
- (29) Schacht; "Law and justice", in The Cambridge history of Islam, Cambridge, 1970, v. 11, page 554.
- (30) Schacht, Origins, page 24 and 29.
- (31) Ibn 'Abd al-Barr, Mukhtasār Jami bayān al-'ilm wa fadlihi, page 83.
- (32) See page 118 and 121.
- (33) Ibn Abi Ḥatīm ar-Rāzī; Kitāb al-Jarḥ wa't - ta'dil, Hayderabad, 1953, v. 1, page 14.
- (34) Ibn Taimiyya, Minḥaj as-Sunna, v. 11, page 363.
- (35) Al-Mahallī; Al-Badr at-Tāli, Cairo, 1285H, v. 11, page 148.
- (36) As-Saffār, op.cit., page 85.
- (37) Majlisi, op.cit., v. VI, page 754.
- (38) al-Shirāzī; Sharḥ uṣūl al-Kāfi, Tehran, 1865, page 65.
- (39) As-Saffār, op.cit., page 136; Majlisi, op.cit., v. 1, page 136.
- (40) Majlisi, op.cit., v. 1, page 140 - 141; Kulaynī, op.cit., v. 1, page 62 - 64.
- (41) Kulaynī, ibid, v. 1, page 65; Majlisi, op.cit., v. 1, page 140.
- (42) Majlisi, ibid, v. VIII, page 302 - 303.
- (43) Ibn Bābawayhi; A Shi'ite Creed, London, 1942, page 122.
- (44) Qur'ān 6:101 - 102.
- (45) Kāshif al-Ghitā'; Asl ash-Shi'a wa usuluhā, Najaf, 1950, page 113 - 114.

(46) They are Abū Dharr al-Ghifārī, Miqdad ibn 'Amr, Hudhayfa ibn al-Yamān and 'Ammār ibn Yasir.

(47) Ibn Bābawayhi, op.cit., page 119; Majlisi, op.cit., v.1, page 140.

(48) According to Imāmi Shi'a, it is those openly opposed to 'Ali from the companions.

(49) Ibn Taimiyya, As-Sarīm al-Maslūl, page 574 - 575.

Ibn Hajar al-Haytami, As-Sawa'iq al-Muhriqa, page 256.

(50) Ibn Taimiyya, op.cit., page 92.

(51) Ibn Taimiyya, As-sarīm al-Maslūl, page 62.

(52) Ibid, page 574.

(53) Ibid, page 572.

(54) Ibid, page 572; Ibn Abi Ya'la, op.cit., v.1, page 30.

(55) Ibn Abi Ḥadid, op.cit., v.XX, page 10 - 35.

See also E.Kohlberg; "Some Zaydi views on the companions of the prophet", in BSOAS, 39(1976), page 96 - 97.

(56) Qur'an 2:159.

(57) Al-'Askari, Tafsir, page 19.

(58) Ibid, page 24.

(59) Ibn Bābawayhi, Man lā yahduruhū I'-faqih, v.111, page 373.

(60) See page 115 note no. 1 and Jafri, op.cit., page 312.

(61) Lambton, A.K.S.; State and government in medieval Islam: an introduction to the study of Islamic political theory; the jurists, Oxford, 1981, page 21; Hodgson; "How did the early Shi'a become sectarian?", in JAOS, 77(1955), page 9 - 13.

Sachedina says: "However close the Shi'a moved to the Sunnis in observing the precepts of the law, the cardinal doctrine of the Imamate and the insistence on intense devotion to holders of this office became obstacles to full assimilation of Ja'afari Shi'ism into Sunnism." See Sachedina, op.cit., page 18.

(62) It also had been the main reason in the conflict between Imami Shi'a and Zaydi Shi'a.

See Lambton, op.cit., page 28 - 31.

(63) Despite all that, Ja'far was by no means the originator of the theory of the Imamate. But his task was to elucidate the doctrine and elaborate it in a definitive form, based on the rudiments of the concept and function of the Imam already introduced by 'Ali in his speeches, by Hasan in his letters to Mu'awiya, by Husayn in his correspondence with the Shi'is of Kufa and Basrah and by Zayn al-'Abidin and Muhammad al-Baqir.

See S.H.M. Jafri, op.cit., page 282 - 290.

(64) Madelung; Imama and Hisham ibn al-Hakam Abu Muhammad, in E.I<sup>2</sup>.

(65) Lambton, op.cit., page 21.

(66) Gibb, H.A.R.; "Al-Mawardi's theory of the caliphate", in Studies on the civilization of Islam, London, 1982, page 154 - 155.

(67) Rosenthal; Political thought in medieval Islam, Cambridge, 1958, page 27 - 28.

(68) According to Moojan<sup>momen</sup> the question is not only who was the successor of the prophet, but also the nature of the role of this successor, for it is on both these points that the Shi'a and Sunnis disagree. See Moojan, op.cit., page 11.

Further information see M. Sharon; "The development of the debate around the legitimacy of authority in early Islam", in JSAI, 5, 1984, page 121 - 142.

(69) Bukhārī reporting 'Abd Allāh ibn 'Abbās as stating :-

"'Alī ibn Abī Tālib came out from the prophet's room during his illness in which he expired. The people asking him: Abū al-Hasan, what was the prophet's condition in the morning?.

He answered: praise be to God that he feels relief. Abbas ibn 'Abd al-Muttalib then caught his hand and said :By God, after three days time you will be the servant of God (of authority); verily by God, I see that in the near future the prophet will pass away by this illness of his. Verily I recognise the faces of the descendants of 'Abd al-Muttalib at the time of death; let us go to the prophet of God and ask him who will be in charge of the affairs. If is for us ,we shall know it and if it for others than us, we would know that and he will give some advice for us. 'Alī said: Indeed by God, if we asked the prophet of God for it and he rejected that for us the people will never give us that after the prophet, and I by God, will never ask the prophet of God for it." See Bukhārī, op.cit., v.6, page 15, v.8, page 74.

(70) See page 95.

(71) Ibn Qayyim, op.cit., v.1, page 120.

(72) Bukhari transmits that a woman came to the prophet in his last days to ask about something. He told her to come on another occasion. She, alluding to his imminent death, asked what she should do if she could not find him. The prophet said: If you do not find me then go to Abu Bakr.

See *ibid*, v.5, page 5, v.9, page 101 and 135.

(73) *Ibid*, v.5, page 178.

(74) According to the reports 'Umar always consulted 'Ali in a major matter. See al-Sharīf al-Rādī, Sharh Nahj al-Balāgha, v.11, page 24 - 25; v.11, page 39 - 40.

(75) Bukhārī, op.cit., v.5, page 22.

(76) According to the Zaydī Shi'īs, 'Ali's designation was not explicit (Nass jāli) but concealed or implicit (Nass khafi), of a kind that could be inferred logically (Nass istidlālī) but which could not be proved by reference to an explicit text.

See Kohlberg; "Some Zaydi views on the companions of the prophet", in BSOAS, 1976, page 92.

(77) E. Kohlberg; 'Ali ibn Abi Talib, in *Ency. Iranica*.

(78) Moojan, op.cit., page 13 - 17.

(79) Kulaynī, al-kāfi, v.1, page 287 and 236.

(80) L. Veccia Vaglieri; Ghadir Khumm, in *E.I*<sup>2</sup>.

(81) S.H.M. Jafri, op.cit., page 21.

(82)Ibid.

(83)L.Veccia Vaglieri;Ghadir khumm,in E.I<sup>2</sup>.

(84)Ibid.

(85)Moojan,op.cit.,page 61.

See also E. Kohlberg;"The development of the Imami Shi'is doctrine of Jihad",in ZDMG,126(1976),page 67.

See also Madelung;"A treatise of the Sharif al-Murtada on the legality of working for the government",in BSOAS 43(1980), page 18.

(86)Lambton,op.cit.,page 221.

(87)Madelung;"A treatise of the ",page 18.

(88)E.Kohlberg;"Non-Imami Muslims in Imami fiqh",in JSAI,6(1985),page 199.

(89)Ibid.

(90)Ibid.

(91)Moojan,op.cit,page 62 - 63;Hodgson,"How did early Shi'a",page 2 - 3.

(92)E.Kohlberg;"Some Imami-views on Taqiyya",in JAOS,95(1975) page 398.

(93)Gibb,H.A.R;"Constitutional organization" in Majid Khadduri and Herbert J.Liebesny(Eds.),Laws in the Middle East:origin and development of Islamic law,Washington D.C.,1955,page 10.

(94) Al-Nawawī states:-

"It is unanimously agreed that the Khalifah is established with his appointment by the foregoing Imām, and if there is no such appointment, then by the counsel of the men of opinion, and they agree that it is also lawful for the Imām to leave the affair to a council as 'Umar did with the six companions.

Nawawī, Commentary on Ṣaḥīḥ Muslim, v.11, page 120.

(95) Lambton, op.cit., page 73 and 89; Rosenthal, op.cit., page 30.

(96) Gibb, "Constitutional organization", page 10.

(97) Lambton, op.cit., page 105.

(98) Ibid.

(99) Ibid, page 73 and 74; Rosenthal, op.cit., page 31.

(100) Ibid, page 32.

(101) Ḥusain al-ʿAmīlī; 'Aqīdat al-Shi'a fi al-Imām al-Ṣādiq wa Sa'ir al-A'imma, Beirut, 1963, page 32.

(102) Al-Shirāzī; Al-'Aqā'id al-Islāmiyya, Najaf, 1961, page 130.

(103) S.H.M. Jafri, op.cit., page 290.

(104) Muḥammad Ridā al-Muzaffar; 'Aqā'id al-Imāmiyya, Najaf, 1968, page 66.

(105) Sachedina, op.cit., page 19.

(106) Kulaynī, op.cit., v.11, page 54.

(107) Ḥusain al-ʿAmīlī, op.cit., page 32.

(108) Al-Hillī; Kitāb al-fayn fi imāmat amir al-Mu'minin 'Ali ibn Abi Ṭālib, Najaf, 1969, page 29.

(109) Ibid, page 30 - 31.

(110) See note no.104 above.

(111) Al-Hilli, Kitāb alFayn, page 34 - 35.

(112) Al-Tūsi; Talkhīṣ ash-Shafī, Tehran, 1884, v.1, page 279.

See also Mahmood Shehabi; "Shi'a", in Islam -The straight path, New York, 1958, page 189.

(113) Al-Murtadā; Ash-Shafī fi 'I-Imāma, Tehran, 1884, v.11, page 216 - 217.

(114) Iji, Adab al-din; Sharaf al-Mawaqif, Cairo, 1907, v.111, page 261.

(115) Hollister, op.cit., page 33.

(116) Majlisi, op.cit., v.23, page 76.

(117) Sachedina, op.cit., page 19; Madelung, Imama, in E.I<sup>2</sup>.

(118) Fyze, A.A.; The Shi'ites Creed, London, 1942, page 86.

(119) A.J.Wensick; The Muslim creed, Cambridge, 1932, page 15, 22, 270 - 275.

(120) Hollister, op.cit., page 49.

The Shi'a form of the Shahādah reads as follow:-

"I bear witness that there is no God but the one God, and I bear witness that Muhammad is the Messenger of God, and I bear witness that 'Alī is the Walī of God".

(121) Eliash, J.: "On the genesis and development of the twelver-Shi'i three-tenet Shahadah", in Der Islam, 47(1971), page 265.

(122) Ibid.

(123) Bukhārī, Sahīh, v.4, page 84, 80; v.9, page 86 and 92.

(124) Lambton, op.cit., page 19; Sachedina, op.cit., page 5.

Further information see Y.Friedmann;"Finality of prophethood in Sunni Islam",in JSAI,7,1986,page 177 - 216.

(125)Bukhārī reports the prophet as saying:-

"The Banū Isrā'īl were governed by the prophets;as often as one died another succeeded him;Verily there will be no prophet after me,but there will be caliphs and they will be numerous".

See Bukhārī,op.cit.,v.4,page 206.

(126)Abū Yūsuf,Al-Kharaj,page 9.

(127)Shah Walī Allāh;Al-Tafhimāt al-Ilāhiyah,Bijnor,1936, v.11,page 244.

(128)Abū Mansūr 'Abd al-Qāhir al-Tamīmī,op.cit.,page 278.

(129)Sharīf al-Rādi,Nahj al-Balāghah,v.1,page 87.

(130)Kulaynī,op.cit.,v.1,page 192,211 and 223.

(131)According to the Shi'i doctrine,there was no real distinction between the Imām and the prophet;the function which the prophet derived from revelation the Imām obtained through his infallibility,which made him not only the guardian (Hafiz) but also the interpreter of the law.

See Lambton,op.cit.,page 236;Friedmann,op.cit.,page 206.

(132)S.H.M.Jafri,op.cit.,page 291.

(133)Kulaynī,al-kāfi,v.1,page 208.

(134)Moojan,op.cit.,page 155;Lambton,op.cit.,page 230 - 231.

(135)Al-Hilli,Kitāb alFayn,page 7 - 10.

CHAPTER II : THE HISTORICAL DEVELOPMENT OF IJTIHĀD  
WITHIN THE SUNNI AND SHI'Ī TRADITION

THE DEVELOPMENT OF THE SUNNĪ DOCTRINE OF IJTIHĀD

PART A - BEFORE SHAFI'Ī.

PART B - DURING SHAFI'Ī'S TIME.

PART C - AFTER SHAFI'Ī.

THE DEVELOPMENT OF THE SUNNI DOCTRINE OF IJTIHĀD.Part A-- Before Shāfi'i.

It is true as has been said by Goldziher<sup>(1)</sup>, that ijtiḥād is an inevitable element in Islamic jurisprudence. The main reason is that the texts of Qur'ān and Sunnah in relation to matters of jurisprudence are very restricted, whereas the events that occur nowadays in the human community are unrestricted. Therefore, ijtiḥād has been introduced and has been regarded as capable of providing a solution<sup>(2)</sup>.

During the early period of Islam, which consisted of the ancient schools, ijtiḥād was exercised in two ways; Ra'y<sup>(3)</sup> and Qiyās.

(i) Ijtiḥād by the mode of Ra'y

According to Ibn Qayyim<sup>(4)</sup>, Ra'y is a decision which the mind arrives at, after thinking, contemplation and genuine search for truth in a case where indications are conflicting. Therefore, Ra'y has a flexible and dynamic nature. It decided cases in the light of the spirit, wisdom and justice of Islam. It is the well-considered, balanced opinion of a qualified person who aspires to reach a correct decision.

The employment of ijtihād by this mode is very widespread, not limited to the effort of deriving a ruling where no Qur'ānic injunction or Sunnah is available<sup>(5)</sup>, it also acts more positively when facing the Qur'ān and Sunnah.

As regards the Qur'ān, Ra'y was used as the best method to judge which Qur'ānic verse was applicable to a given situation and which is not<sup>(6)</sup>.

Even in the presence of the Qur'ānic verses and the Sunnah on a certain problem, the employment of Ra'y could not be avoided<sup>(7)</sup>. Ra'y here is later known as Istihsān, i.e. departure from the established rule in the interest of equity and public welfare<sup>(8a)</sup>.

According to al-Shāfi'i<sup>(8b)</sup>, during the time of the companions, some other terms regarding the use of reason (ijtihād) appeared, but they were not used as technical terms until the third century of the hijra, when these terms began to have their technical meanings. Some examples of such terms are Maslahah, Istihsān, etc.

During the time of the ancient schools there existed the differences between Ahl al-Hadīth and Ahl al-Ra'y<sup>(9)</sup>. Despite differences regarding the principles of Usul al-Fiqh, they both agreed that ijtihād can be done by this mode<sup>(10)</sup>.

The result of the wide use of Ra'y led to many conflicts among the Fuqahā'<sup>(11)</sup>, and consequently to a chronic problem in the Muslim community<sup>(12)</sup>.

**(ii) Ijtihād by the mode of Qiyās.**

Since the early period, ijtihād by the mode of Qiyās had been used by the scholars<sup>(13)</sup>. But its usage is not as wide as Ra'y<sup>(14)</sup>.

Qiyās in the early period was simple, unsophisticated and used in rudimentary form. Its usage during the early period can be classed in different ways:-

(i) It was simple and more like the presentation of the parallel without any specific restriction<sup>(15)</sup>.

(ii) It was used in a not very formal and rigid form. Words like Mathal, Ka and Bimanzilah are usually used to denote the similarity between the two parallels. Even a minor resemblance is enough to apply Qiyās and to derive a rule from it<sup>(16)</sup>.

(iii) It was used in the sense of a general rule or rational ground and not in its purely technical meaning<sup>(17)</sup>.

In summary, following the Companions<sup>(18)</sup>, the ancient scholar used the Qur'ān, Sunnah<sup>(19)</sup>, Ijmā'<sup>(20)</sup> and Ijtihād as their bases to justify their Fiqh doctrine<sup>(21)</sup>. But, they used these materials without system and proper discipline, compared to the later time, started by the efforts of Shāfi'i<sup>(22)</sup>.

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Part B-- During Shāfi'i's time

It is well-known that Shāfi'i played an important role in the development of Islamic jurisprudence. Shāfi'i stands at the turning point in the history of Islamic jurisprudence. With him begins a new phase of the development of legal theory<sup>(23)</sup>, especially in the doctrine of the ijtiḥād.

Most of the eminent scholars have concerned themselves with Shāfi'i's contribution<sup>(24)</sup>. One of them is Joseph Schacht, who considered Shāfi'i's personal achievements in legal theory as consisting (1) in the development of a new theory of interpretation applied to the two principal sources of the revealed law: the Quran and the prophetic traditions<sup>(25)</sup>; (2) in the almost complete identification of Sunnah with the traditions which later become part of the classical theory of Islamic law;<sup>(26)</sup> and (3) in the hierarchy of the four sources of law, including consensus and Qiyās<sup>(27)</sup>.

Not only that, several of his new ideas of Usūl al-Fiḥ in al-Risālah<sup>(28)</sup> had a great influence on the scholars in his time<sup>(29)</sup> and after him<sup>(30)</sup>.

Before him, the differences among the ancient schools of law already existed<sup>(31)</sup>, but their differences were not basic<sup>(32)</sup>. These differences were mostly in the detail of legal problems, while their basic reasoning and approach to the problems, apart from certain sharp distinctions here and there seem to have been more or less uniform<sup>(33)</sup>.

But Shāfi'i's differences from the early schools are of a fundamental nature and, therefore, he cannot be placed on a par with them<sup>(34)</sup>. The reason for his disagreement with the early schools is that by his extensive study of law and debates with representatives of the different regions<sup>(35)</sup>, he formulated certain new principles of law and strictly followed them. These principles are set out in his writings, especially in Al-Risālah. The doctrines of his predecessors which conflicted with his newly-formulated theory and principles were rejected by him. Thus, in a way he was the pioneer of a system in law which was adopted by the jurists of the later ages<sup>(36)</sup>.

It is generally alleged that Shāfi'i laid down for the first time the theory of law in a systematic form. However, the claim that he was the first legal thinker who introduced strict principles of law is not true. There are many reports which show that there did exist some work on Usūl al-Fiqh before him<sup>(37)</sup>. In early Fiqh literature we find the key-terms of the theory of the law, such as Kitāb, Sunnah, Ijmā', Qiyās, Ra'y, 'Amal, Istihsān, Naskh etc. These terms indicate that the early jurists in general had some sort of principles of law which were present in their minds if not in their writing<sup>(38)</sup>.

Shāfi'i developed his own system and gave it a defined shape. Except for certain additions, the key-terms used by him were the same as those of his predecessors<sup>(39)</sup>, but their application and interpretation differed in his system<sup>(40)</sup>.

Generally Shāfi'i made a great contribution in explaining the concept of ijtihād in a more systematic way, compared to other jurists before him. His ideas of ijtihād can be laid out as follows:-

(i) He tried to establish the validity and justification of using ijtihād (Qiyās) in Islamic law. This had not been done by the early schools before him<sup>(41)</sup>. He proffers two Qur'ānic verses; sūrah 2:145 and surah 5:96, in order to show the validity of ijtihād<sup>(42)</sup>. The main point which Shāfi'i emphasizes by citing these verses is that certainty cannot be claimed in questions settled on the basis of human reason and personal judgement<sup>(43)</sup>. However, they direct men to exercise reason and individual opinion in cases which have no precedents. The indications, however, are necessary for guidance<sup>(44)</sup>.

He justifies ijtihād by quoting two traditions from the prophet, namely, the well-known tradition of Mu'āz b. Jabal<sup>(45)</sup> and the tradition which speaks of different degrees of reward for a Mujtahid depending on whether his ijtihād is correct or not<sup>(46)</sup>.

According to Shāfi'ī, every person is allowed to hold what he concludes on the basis of his ijtihād and is not required to follow others against his findings. He remarks that if two persons exercise ijtihād and differ in their conclusions, each of them thereby discharges his duty to God and each is right in so far as his ijtihād is concerned<sup>(47)</sup>. That is why he thinks that the decisions taken on the basis of ijtihād are all correct ostensibly (Zāhiran) although not really (bāṭinan)<sup>(48)</sup>. He argues, for instance, that what is obligatory on Muslims is to face the direction of the ka'abah and not the ka'abah itself<sup>(49)</sup>.

Since Qiyās and ijtihād are justified on the authority of the Qur'ān, although inferentially, he holds that the decisions taken on their basis should be accepted as being from God, like the Qur'ān and the Sunnah<sup>(50)</sup>. The difference between them is that the former is Jumlah (ambiguous) and the latter is Iḥāṭah (certain)<sup>(51)</sup>.

(ii) He tries to limit the scope of Qiyās<sup>(52)</sup>. His main purpose is that he wants to bring about systematic reasoning in law and to eliminate the chaos which resulted from the free use of Ra'y.

He does this in certain ways. First, contrasting the practice of Qiyās by the early schools<sup>(53)</sup>, what he understands by Qiyās in identical or quasi-identical cases. He demands perfect resemblance in both cases<sup>(54)</sup>.

Shāfi'i recognizes two categories of Qiyās, one being that which is the extension of the explicit ruling of the Qur'ān or the Sunnah on a given case to another parallel for which no text is available<sup>(55)</sup>. The other, generally regarded as more cogent, is the Qiyās which he terms ( أولى )<sup>(56)</sup> and ( أدخل في معنى )<sup>(57)</sup>.

He explains this : "The deduction from the prohibition by God or by the prophet of a small quantity, of the equally strong or stronger prohibition of a greater quantity; from the commendation of a small act of piety, of the stronger commendation of a greater act of piety; from the permission of a great quantity of the permission of a smaller quantity"<sup>(58)</sup>. Some scholars, he remarks, do not recognize this as Qiyās but consider it as falling under the original ruling of God and the prophet<sup>(59)</sup>.

Second, Qiyās must stand on some original and independent basis, and not on a derivative and analogical conclusion<sup>(60)</sup>.

(iii) He tries to make Qiyās become a quasi-nass.

By doing so, he laid stress on Nass and adherence to the Hadīth<sup>(61)</sup>.

In order to guard against arbitrary deduction and to prevent legal decisions being made by unauthorized persons, he propounds in a passage about the necessary requirements for a scholar to exercise Qiyās: "Qiyās can be exercised only by a scholar who has achieved its necessary requirements.

These are, first, knowledge of the ruling of the book of the God; secondly, knowledge of the Sunnah, the opinion of the forebears, agreement and disagreement amongst the Muslims, and also the Arabic language; thirdly, the scholar must attain the age of sound mind and be able to distinguish between confused situations. He must not make his decision hurriedly and without proper deliberation; he must not refuse to listen to his opponents, which may lead him either to realize a defect in his thinking or to affirm his decision; he must do his best to know the grounds on which he bases his decision and reject the others. A scholar who falls short of the above requirements is not allowed to exercise Qiyās and must follow (Ittība') the decisions made by others" (62).

It is evident that knowledge of the Qur'ān and the Sunnah is the vital requirement which qualifies a scholar to exercise Qiyās, since they are the Asl (source) on which Qiyās should be based.

The conclusion that can be drawn from the above argument is that the Qur'ān and the Sunnah are indispensable for ijtihād. In this, he aims at establishing for Islam a systematic method of legal deduction. All problems should be referred to the revelation which guarantees their solution. That is either by the explicit text of the Qur'ān or the Sunnah, or by extending the explicit text to parallel cases by the means of Qiyās.

He places Qiyās in a subordinate position (a Far'), to the extent that it cannot be employed in any case on which the Qur'an or the Sunnah provides a ruling. Strict Qiyās is, therefore, a reflection of his opposition to the free use of Ra'y which is subject to arbitrariness, as well as of his obsession with the Sunnah<sup>(63)</sup>.

Shāfi'i's efforts to restrict the use of Ra'y to Qiyās and to establish the indispensable relationship between Qiyās and revelation, are governed by a prime motive. This is to create a novel function for opinion; as well as being a means to reason and a defence of existing legal doctrines, Qiyās is also a means by which scholar may derive (استنباط) from revelation rulings for new cases, whereby the rulings decided upon for the Muslim community are truly Islamic and revelatory.

To this effect he says<sup>(64)</sup>, "legal knowledge is obtained in two ways: 'adherence' (اتباع) and 'derivation' (استنباط). To adhere means to follow the book and, where the book is not explicit, the Sunnah. Where the Sunnah is not explicit, one must follow such of the opinions of the majority of our forebears over which we are unaware of any reported disagreement. If none of this is possible, Qiyās is to be applied, based on one of the sources and using the above order of preference".

It is clear from this passage that, for him, Qiyās (ijtihād) is Istiqbāt. This is, indeed, the function which he desires to

establish for the entire science of Usūl al-Fiqh. He was successful because Usūl al-Fiqh was later understood as a science presenting the rules which guide the scholars in deriving rulings from the recognized sources<sup>(65)</sup>. Thus, for Shāfi'i, Usūl al-Fiqh is not only to be used for settling legal discrepancies (Khilāf) or vindicating this or that doctrine in the conflicts among the schools<sup>(66)</sup>, but also to enable the Muslim scholar in any generation to make revelation-based law for the Muslim community.

The restriction introduced by Shāfi'i on the use of ijtihād to Qiyās, together with his obsession with the Sunnah of the prophet, had as its consequences that it curtailed development in the utilisation of ijtihād in the growth of the Fiqh.

His tireless preaching of the importance of the Sunnah<sup>(67)</sup> and unquestioning adherence to it had such a successful effect upon later scholars that the Sunnah was accepted as the most adequate and important source for the Fiqh. This caused an overwhelming demand for the Sunnah, and it encouraged the searching out and collecting of the Sunnah<sup>(68)</sup>.

This activity produced in Islam in the generations immediately after Shāfi'i, the six canonical collections of the Hadīth which are held to provide the answer to all legal problems.

Reliance on the Sunnah gradually diminished the importance of Ra'y in the development of the Fiqh. Eventually it was to be suggested that the door of ijtihād had closed. Then there arose arguments against Ra'y, including Qiyās which Shāfi'i himself had systematized<sup>(69)</sup>.

Enthusiasm for the Sunnah and an abhorrence of Ra'y caused the emergence of the two new schools of law: the Hanbali<sup>(70)</sup> and the Zāhiri<sup>(71)</sup>. These schools rejected human reasoning of any kind and relied exclusively on the texts of the Qur'ān and the Sunnah<sup>(72)</sup>. The emergence of such attitudes represents the partial failure of Shāfi'i's endeavour to bring together the divergent theories of Ahl al-Ra'y<sup>(73)</sup> and Ahl al-Hadīth<sup>(74)</sup> under one system.

Part C-- After Shāfi'i

In this period, two developments and changes seem to appear in the history of Islamic jurisprudence: the emergence of the idea of Taqlid and the emergence of the Anti-Ijtihād groups.

The first development originated indirectly from the time of Shāfi'i (75). It has been accepted that the idea of Taqlid had existed before and during Shāfi'i's time. However, this idea during the time after Shāfi'i is totally different compared with the time before.

During the period of the Ancient Scholars, this idea was more based on and according to geographical character (76). The jurists of different regions based their decisions and legal verdicts on the opinions and decisions of the companions who had lived in their respective places (77). Shāfi'i mentions these tendencies in his writings. He says that every town of the Muslims was a seat of learning whose people followed the opinion of ancient jurists of their town in most cases (78).

Soon after the time of Shāfi'i, the geographical character of the ancient schools of law disappeared more and more, and personal allegiance to a master and to his principles became preponderant (79).

Finally in the period after Shafi'i, especially at the beginning of the fourth century (H), emerged the idea that the door of Ijtihād was closed and all the jurists must follow one of the established Madhāhab.

The process of the demise of Ijtihād has been described by many scholars<sup>(80)</sup>. J. Schacht has told us about this and about its relationship to the activity of the jurists, in the following words:

"By the beginning of the fourth century of the Hijrah (about A.D. 900), however, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onward 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 'closing of the door of ijtihād', as it was called, amounted to the demand for Taqīd, a term which had originally denoted the kind of reference to the 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"<sup>(81)</sup>.

However, from what is understood<sup>(82)</sup>, the closure of the door of ijtihād referred only to Ijtiḥād Mutlaq<sup>(83)</sup> and not to other forms of ijtiḥād<sup>(84)</sup>.

This view was based on several things; first, the jurists who were capable of Ijtiḥād still existed during this time and from then onward<sup>(85)</sup> and Ijtiḥād was used in developing the positive law after the formation of the schools of law<sup>(86)</sup>.

Second, the effort in writing up of 'ilm Usūl al-Fiqh discussing the concept of ijtiḥād in more detail still progressed. Those of Shāfi'i's principles which are not clear<sup>(87)</sup> were now clarified by certain scholars during this time. Amongst those are:-

(i) Shāfi'i considers Qiyās and Ijtiḥād identical, being two separate terms carrying the same meaning<sup>(88)</sup>. However, later jurists like al-Bazdawī, al-Ghazālī, al-Jassās and Ibn Rusḥd rejected the identity between the two. For them, Ijtiḥād is more general than Qiyās. Qiyās is a mode of Ijtiḥād, and always goes under it, and not vice versa. Ijtiḥād has been defined as spending one's best effort in the pursuit of truth by means of signs that lead to it. Qiyās on the contrary means combination of the original and the parallel case on the basis of the common value (cause). Ijtiḥād is, therefore, not identical with Qiyās. There may be a number of modes of Ijtiḥād to reach the truth and Qiyās is one of them<sup>(89)</sup>.

(ii) The jurists tried to justify the use of Ijtihād by citing a large number of Qur'ānic verses and traditions from the prophet<sup>(90)</sup>. They also justified it on the basis of the practice and agreement of the companions<sup>(91)</sup> and by human reason<sup>(92)</sup>.

(iii) In order to regulate the practice of ijtiḥād, the jurists had developed a set of conditions which were required to be met by any jurist who wished to embark on such activity.

Sometimes an exposition of these conditions will prove that, unlike the former time, the demands of legal theory were relatively easy to meet and that they facilitated rather than hindered the activity of ijtiḥād<sup>(93a)</sup>.

(iv) Though the Sunnī jurists of the second century of hijra endeavoured to formulate their reasoning on valid grounds by attempting to identify the commonality between the case at hand and its equivalent in the texts, they failed to construct a systematic and sufficiently comprehensive theory of 'illah owing to the absence of a logical system of argumentation and proof from which they could draw their material. While Shāfi'i and his predecessors had no clear view of the concept of 'illah and its importance, Farābī, reflecting the juridicological theory of his contemporaries and immediate precursors, demonstrated that the presence of 'illah in any argument is a prerequisite for a valid conclusion. His concept of 'illah was sufficiently

advanced to qualify as the foundation of later expositions. By the time of Al-Basri, a considerably more comprehensive and detailed system of Qiyas and 'illah was constructed. Less than a century later Al-Ghazali succeeded in attaching to his concepts of 'illah, a technical term as well as in contributing materially to the body of this theory. (93b)

For the second development; from this time onward<sup>(94)</sup> there existed certain groups, such as the Zahiri<sup>(95)</sup> and the Hashwiyya<sup>(96)</sup>, which rejected the use of Ijtihad in Islamic law. These groups came mainly from the lines of the ahl al-Hadith, who were primarily concerned with the study of the transmitted sources and their literal interpretation, while denying human reason any right to be exercised in the process of legal reasoning<sup>(97)</sup>.

During the first half of the fourth century both of these schools still remained as Sunni as any other major school<sup>(98)</sup>. But when a Legal Theory was finally established and promulgated as the only Sunni doctrine, both of them gradually slipped outside the orbit of Sunnism<sup>(99)</sup>. It is clear then that there was no school or wing of a school inside the Sunni Muslim community that could have opposed Ijtihad as a principle<sup>(100)</sup>.

NOTE TO CHAPTER TWO

(1) See footnote No.56,page 14.

(2) See footnote No.62,page 16.

(3) Schacht;The Origins of Muhammadan Jurisprudence,page 98.

According to Schacht,the actual foundations of Islamic law were established not by the prophet and his followers,but by the early Qādīs,appointed by the Umayyad governors,who gave judgement according to their own discretion(Ra'y) and transformed the popular and administrative practice of the Umayyads into the religious law of Islam.

See Schacht;An introduction to Islamic Law,page 23 - 26.

Later on,he gave several examples of this statement,see op.cit. page 100 - 102.

(4) Ibn Qayyim,op.cit.,v.1,page 23.

(5) ibid,v.1,page 81 - 85,63,204 - 205.

al-Ghazālī;al-Mustasfa fi 'ilm al-Usul,v.11,page 53 - 59.

Ibn al-Rushd;al-Muqaddimat,page 19 - 20.

(6) Ahmad Hasan;Early development of Islamic jurisprudence, page 117 - 118.

(7) 'Umar's decision not to distribute the lands of Iraq and Syria among the companions.His decision apparently departed from the Qur'ānic verses 59:6 - 10,which entitled the Muhajirīn,the Anṣār,and the coming generations to receive the share from the Ghanīmah.See Abū Yūsuf;Kitāb al-Kharāj, page 13 - 15.

According to Shāfi'i, the difference of opinions among the companions exists even on points on which there are explicit rules in the Qur'ān or the Sunnah. He then recounts a number of Qur'ānic verses and traditions on which the companions and early jurists differed because of their interpretation.

See Shāfi'i, *Al-Umm*, v. VII, page 245.

(8a) According to Schacht, this term *Ihtihāsān* was first introduced by Abū Yūsuf. See Schacht, *op.cit.*, page 112.

(8b) Shāfi'i, *al-Risālah*, page 71.

(9) There had existed the opposition between Ahl al-Ḥadīth and Ahl al-Ra'y, see Schacht, *An introduction to...*, page 28 - 36.

(10) The scholars of Ḥadīth were not free in exercising Ra'y in their reasoning and vice versa. Malik frequently uses Ra'y in his *al-Muwatta'*. For example, they employ their Ra'y and reasoning in accepting the tradition of the prophet. Malik narrates a hadith that the prophet had said his *Zuhr* and '*Aṣr* prayers together, and similarly he had combined *Maqrib* and '*Ishā'* prayers in the absence of any fear of attack. Concluding, he remarks: I think (*arā*) it happened on a rainy day.

See Malik; *Al-Muwatta'*, v. 1, page 144.

(11) Shāfi'i, *op.cit.*, v. VII, page 146 - 257.

Ibn al-Muqaffa'; *Risālah fi'l-ṣahābah: Rasā'il al-Bulaghā'*, Cairo, 1954, page 126.

(12) *ibid*, page 121, 122, 125 and 127.

(13) We first meet with a semi-technical use of the term *Qiyās* in the alleged letter of 'Umar, to Abū Mūsā al-Ash'arī.

See Al-Mubarrad; al-Kāmil, Cairo, 1936, v.1, page 14.

(14) Ahmad Ḥasan, *op.cit.*, page 53 - 54.

(15) The following example will show its character. Abū Ḥanīfah maintains that if a mother of the child (*umm al-Walad*) embraces Islam in enemy territory and migrates to Muslim territory, then in case she is not pregnant she can marry if she desires, and no 'Iddah is binding on her. Abū Ḥanīfah, according to Abū Yūsuf, argues on the basis of a ḥadīth from the prophet. But al-Awza'i differs from him on this point and remarks that if a woman leaves her country for the sake of God to protect her religion, her case is parallel to that of the women who migrated from Mecca to Medina in the prophet's time. She cannot marry until the expiry of her 'Iddah. He elaborates his argument that the female emigrants had gone to the prophet at Medina while their husbands, who were infidels, lived on at Mecca. The prophet returned the wives of those persons who became Muslims and found them passing 'Iddah. See Abū Yūsuf; al-Radd 'alā Siyar al-Awza'i, Cairo, n.d., page 99 - 100.

(16) A suitable example of this kind of *Qiyās* by the Medinese can be found in *al-Muwatta'*. The Medinese fixed the minimum amount of dower of a woman at one-fourth of a dinar by *Qiyās* with the minimum value of stolen goods for applying

hadd punishment. Mālik says that the dower of a woman should not be less than one-fourth of a dinar, the minimum value for a hand to be amputated. See Mālik, op.cit., v.11, page 5.

(17) Al-Shaybānī, for example, holds that if an article or a slave-girl is mortgaged or given in donation by the purchaser, or he had sexual intercourse with her or kissed her in the case of slave-girl, all such acts, according to Qiyās indicate the purchaser's assent. Hence the article or the slave-girl cannot be returned to the seller on the grounds of defect. See Al-Shaybānī; al-Asl, Cairo, 1954, v.1, page 131.

(18) In the course of conflict between the schools, there emerged the tendency of attributing the doctrine of each school to the generation who knew the prophet and even to the authority of the prophet. See Schacht, An introduction, page 31 - 33.

See also note 5 above.

(19) The Qāḍīs rendered judgement according to their own discretion taking into consideration customary practice. They also took into account the letter or the spirit of the Qur'ānic regulations and religious norms as they thought fit.

See Al-Kindī; Kitāb al-Wulāt Wal-Qudāt, page 334f, 311f.

See also Schacht, op.cit., page 26.

According to the adherents of the ancient schools, the Sunna was not necessarily embodied in traditions of the prophet, but in

traditions of authorities subsequent to the prophet and in the established practice of the community.

See Schacht, Origin, page 61.; Malik, op.cit., v.11, page 713 - 714.

(20) The ancient scholars also based their legal doctrines on customary local practice which was often described as 'Amal.

The Iraqian scholar, as explained by Shāfi'ī, had rejected a doctrine expressed in a tradition and said that the doctrine was rejected because "everyone" had abandoned it.

He explained that what he meant by "everyone" was the Muftis of his time or immediately before, but the generation of the successors. See Shāfi'ī, Ikhtilāf al-Hadīth, page 336f.

Shāfi'ī says that a Basran opponent has taken "practice" as the basis of legal doctrine. See Shāfi'ī, Ikhtilāf Malik, page 243.

The Medinese likewise took customary practice as a basis for reasoning out the law but clearly showed that they limited it to the practice of Medina. For example, Malik rejected the legal doctrine of Khīyār al-Majlis, which gives the parties to a contract, duly completed by offer and acceptance, the right to repudiate it during the formal concluding of the agreement, although the rival Meccan school, which adopted the doctrine, ascribed it to the prophet. Malik said: "here we have no such specific rule and no established practice for this".

See Malik, op.cit., v.11, page 671.

(21) Goldziher; Muslim studies, v.11, page 81.

(22) Al-Rāzī; Manāqib al-Shāfi'i, Cairo, 1301, page 55.

(23) Schacht, Origin, page 136 - 137.; Ahmad Hasan, op.cit., page 179.

(24) Goldziher in The Zahiris: their doctrine and their history, Schacht in both of his famous books, The origins, and An introduction and Ahmad Hasan in The early development of Islamic jurisprudence.

(25) Schacht, Origin, page 56. (26) ibid, page 77.

(27) ibid, page 134. See also Goldziher, op.cit., page 20 - 21.

(28) The birth of al-Risālah appears to have occurred some time prior to the death of 'Abd ar-Rahmān ibn Mahdī in 198 of hijra. Ibn Mahdī is said to have written to Shāfi'i asking him to compose a work dealing with the legal statements of the Qur'ān, the accepted historical reports relating to them, the probative value of the consensus, and to clarify the repealing and repealed doctrines of the Qur'ān and the prophet's Sunna. Shāfi'i's Risālah is said to have been written in answer to this request. See Khaṭīb al-Baghdādī; Ta'rikh Baghdād, Cairo, 1931, v.X, page 240 - 248.; Ibn al-Imād; Shadhard al-Dhahāb fī akhbār man dhahab, Cairo, 1931, v.1, page 355, v.11, page 10.

(29) See Goldziher, op.cit., page 23 - 24.

(30) G. Makdisi; "The juridical theology of Shafi'i: Origins and significance of Usul al-Fiqh", in Studia Islamica, 1984, page 13 - 18.

- (31) See note 11 and 12 above.
- (32) Ahmad Hasan, *op.cit.*, page 178.
- (33) *ibid.*
- (34) Schacht, An introduction, page 46.
- (35) *ibid.*, page 56.
- (36) G. Makdisi, *op.cit.*, page 7 - 8.; Ahmad Hasan, *op.cit.*, page 168.
- (37) Ibn Nadīm; Al-Fihrist, Cairo, 1348, page 288, 286.
- (38) Abū Zahra, Uṣūl al-Fiqh, Cairo, 1957, page 14 - 15.
- (39) Ahmad Hasan, *op.cit.*, page 179.
- (40) A suitable example is the term of Sunna of the prophet. He distinguishes sharply between the tradition of the prophet and the tradition of the companions. Further information see Schacht, Origin, page 16 - 18.
- (41) Ahmad Hasan; Analogical reasoning in Islamic jurisprudence, Islamabad, 1986, page 27.
- (42) Shāfi'ī, *op.cit.*, page 67 - 69.
- (43) *ibid.*
- (44) *ibid.*
- (45) Shāfi'ī, Al-Umm, v. VII, page 273, 275.
- This tradition has been reported by several authorities. See Ibn Ḥanbal; Musnad, Cairo, n.d., v. V, page 230.; Ibn Sa'd, Tabaqāt al-Kubrā, Beirut, 1376, v. III, page 584.
- (46) Shāfi'ī, Kitāb Jimā' al-'Ilm, page 274 .

- (47) *ibid*, page 261, 274.
- (48) Risālah, page 1328f.
- (49) *ibid*, page 69.
- (50) It is only God who knows things implicitly; men are asked to make judgement on the basis of explicit evidence.  
See Kitāb Ibtāl al-Istihsān, page 268.
- (51) Kitāb Jimā' al-'Ilm, page 272.
- (52) Ahmad Ḥasan, The early development, page 194 - 195.
- (53) See note 15.
- (54) K. Ibtāl al-Istihsān, page 271.
- (55) Risālah, page 1495.
- (56) K. Ikhtilāf Malīk, page 198; K. Ikhtilāf al-Iraqiyīn, page 125.
- (57) K. Ikhtilāf Malīk, page 204.
- (58) Risālah, page 1483ff.
- (59) *ibid*, page 1495.
- (60) K. Ibtāl al-Istihsān, page 101 - 102.
- (61) *ibid*, page 274.
- (62) *ibid.*; Risālah, page 1469ff.
- (63) K. Ibtāl al-Istihsān, page 274.
- See also Goldziher, The Zahirīs, page 20f.
- (64) K. Ikhtilāf al-Hadīth, page 148.
- (65) Ghazali; Mustasfa, v.1, page 5.
- (66) The Ikhtilāf Malīk, Ikhtilāf al-Iraqiyīn, Siyar al-Awzā'i are the best examples of the surviving ancient works dedicated to this function of Uṣūl al-Fiqh.

- (67) K. Ikhtilāf 'Alī wa-'Abdullah b. Mas'ūd, page 177, 179, 184.
- (68) Goldziher, Muslim Studies, v.11, page 164ff.
- (69) Ibn Qutaibah; Ta'wil Mukhtalif al-Hadith, Cairo, 1326, page 51ff.
- (70) Further information see G. Makdisi; "The significance of the Sunni schools of law in Islamic religious history", in Journal of Middle Eastern Studies, 10(1979), page 1 - 8.
- (71) Goldziher, The Zahiris, page 23 - 30.; Ibn Khaldun, op.cit., v.111, page 5.
- (72) Goldziher, The Zahiris, page 24f.
- (73) Coulson; History of Islamic law, page 73.
- (74) *ibid.*
- (75) See note 71 above.
- (76) Schacht, Origin, page 8 - 10.
- (77) Ahmad Hasan, op.cit., page 20 - 21.
- (78) Shāfi'i, K. Ikhtilāf Mālik wal-Shāfi'i, page 246.
- (79) Schacht, Origin, page 10.
- (80) W.M. Watt; Islam and the integration of society, Evanston, 1961, page 206 - 207, 242 - 243.; H.J. Liebesny; "Stability and change in Islamic law", in The Middle East Journal, 21(1967), page 19.; Coulson, op.cit., page 80 - 81.; Schacht, An introduction, page 75.; H.A.R. Gibb; Modern trends in Islam, Chicago, 1947, page 13  
J.N.D. Anderson; Law reform in the Muslim world, London, 1976, page 7.

(81) Schacht, op.cit, page 70 - 71.

Ibn Amir, quoting a certain Ibn al-Munir, remarked that the existence of a new legal system, i.e., a system of Uṣūl and Furū' within the general context of Muslim religion is hard to perceive because early scholars, by exhausting all methodological means and deriving all possible solutions, have left no room for an additional school of law.

See Ibn Amir; al-Taqrir wal-Tahbir, Cairo, 1898 - 1899, v.111, page 345.; Ibn 'Abidīn; al-Rasā'il, Lahore, 1976, v.1, page 30.

(82) W.B.Hallaq; The gate of ijtihad: a study in Islamic legal history, Ph.D thesis Univ. of Washington, 1983, page 9 - 10.

(83) See page 22 - 23 above.

During this time, the scholars's activity, however creative, had to be contained in a certain school's doctrine, and in essence all teachings had to be attributed to one eponym or another.

The creative scholars of the fourth century of Islam such as Abū Yūsuf, Shaybānī and Muzanī attributed their own doctrine to a great master.

See Schacht, Origin, page 6 - 7.

(84) Hallaq, op.cit.

(85) During the third and fourth century of hijra, all Mujtahids have expressed highly original views on law. The perfect examples are the scholars like Ibn Surayj (d.306), Tabarī (d. 301) Ibn Khuzayma (d.311) and Ibn Mundhir (d.316).

See Goldziher, The Zahiris, page 31.; Subkī; Tabaqāt al-Shāfi'iyya al-Kubrā, Cairo, 1906, v.1, page 105, 224., v.11, 89, 96, 126, 131.

Yet, although joining a law school and attributing new ideas to older authorities became the prevailing norm, a number of scholars, especially from Shāfi'i and Ḥanafī schools of law, openly disagreed with the established doctrines of the schools. See *ibid*, v.11, page 112 - 125, 193 - 205, 206 - 210, 303 - 307.

See Ibn Wafā' al-Qarashī; al-Jawāhir al-Mudī'a fi Tabaqāt al-Ḥanafīyya, Cairo, 1978, v.1, page 137 - 138.

See also Goldziher, *op.cit.*, page 26.

(86) Hallaq, *op.cit.*, page 35 - 52.

(87) Aḥmad Ḥasan, Analogical reasoning in islamic jurisprudence, page 17.

(88) Shāfi'i, Risālah, page 66; K. Ibtāl al-Istiḥsān, page 272f.

(89) 'Abd 'Azīz al-Bukhārī; Kashf al-Asrār, Constantinople, 1307, v.111, page 988.; Ibn Rushd; Kitāb al-Muqaddimat, Cairo, n.d., v.1, page 25.; Ghazālī, *op.cit.*, v.11, 54.; al-Jaṣṣāṣ; Kitāb Usūl al-Fiqh, fols. 245b - 246a.

(90) For the detail see Aḥmad Ḥasan, Analogical, page 29 - 38, 39 - 41.

(91) *ibid*, page 42 - 43.

(92) *ibid*, page 44 - 49.

(93a) See Hallaq, *op.cit.*, page 9 - 10.

(93b) Hallaq, W; "The development of Logical structure in Sunni Legal theory", Der Islam, 64, 1987, page 42 - 67.

(94) See note 99.

(95) For more information see Goldziher, The Zahiris, page 34 - 39, 145 - 147.

(96) Further information about the doctrine of Hashwiyya, see Halkin; "The Hashwiyya", in Journal of the American oriental society, 54(1934), page 1 - 28.

(97) G. Makdisi, The significance of the school of law in islamic religious history, page 4.

(98) Goldziher, op.cit., page 156 - 157.

(99) ibid, page 36.

(100) Ibn 'Abd al-Barr; Jāmi' Bayān al-'Ilm, Cairo, 1975, page 323.

THE DEVELOPMENT OF THE SHI'Ī DOCTRINE OF IJTIHĀD

PART A - BEFORE AL MUHAQQIQ AND 'ALLĀMA AL-HILLĪ.

PART B - THE TIME OF AL MUHAQQIQ AND 'ALLĀMA AL-HILLĪ.

PART C - AFTER AL MUHAQQIQ AND 'ALLĀMA AL-HILLĪ.

THE DEVELOPMENT OF THE SHI'Ī DOCTRINE OF IJTIHĀD

Part A - Before Al-Muhagiq and 'Allāma Al-Hilli

(1) During the presence of Imām(1)

In contrast to the Sunnis, the development of ijtiḥād and the principles of Usūl al-Fiqh in the Shi'a are behind the Sunni two centuries or more (2). This happened because the Sunni regarded the Nass period (3) as <sup>having</sup> stopped with the death of the prophet (4), and the duties to explain the Fiqh of Islam are taken up by the effort of the Sunni jurists (5).

For the Shi'a, the Nass period is not limited to the prophet's time, but extended to the twelve Imāms (6). During this time, the Imāms are regarded as the absolute source of law, like the prophet (7). Hence, ijtiḥād is not regarded as an important or necessary principle (8), and if the employment of ijtiḥād by the Shi'ī jurists existed, it was in the restricted manner (9).

It is not true that Shi'ī law was undeveloped in this period which began with the prophet and ended in 260/874. This idea is based on the assumption that since the Imāms were present and accessible, there was no great urge to develop the practice of independent judgement (ijtiḥād) and that the law was limited to the transmission of Ḥadīth (10).

This view is based on several facts; firstly, it can be clearly seen from the religious traditions that Shi'i Imams had persistently urged their followers to reason and use their minds in theology<sup>(11)</sup> and also in legal matters<sup>(12)</sup>.

In the case of legal problems, the Imams stated explicitly that their own duty is in explaining general rules and principles, whereas inferences in details and minor precepts for actual cases were left to the learned followers of the Imams<sup>(13)</sup>.

The Imams sometimes also explained when faced by questions from their followers that the correct replies to their questions could be grasped and derived from the general Islamic principles<sup>(14)</sup>. On some occasions, the Imams themselves followed what they advised as the correct method of reasoning and thus instructed their followers on the proper procedure for the inference of legal precepts<sup>(15)</sup>.

The Imam's followers are reported to have collected and compiled the principles of Fiqh as they heard it from the Imams<sup>(16)</sup>. These collections are known as Usul al-Arba'umi'a<sup>(17)</sup>. Its content later on is added into the four Shi'i hadith books<sup>(18)</sup>.

Secondly, when the Shi'is were spread all over the Islamic cities<sup>(19)</sup>, and under government pressure<sup>(20)</sup>, or long distances made access to the Imams very difficult and impossible, from day to day there were some new cases which needed new

replies. To this extent, the Shi'is solved their problems through the institution of al-Wikalā' (21), and later on after the Occultation of the Twelfth Imām (22) through the institution of al-Sufarā' (23). To the first institution, the Imāms tried to train some persons (24) and encourage them to pronounce on and reply to the cases of the people (25).

Therefore, in summary, during this time the use of independent reasoning in law already existed, although it is not termed ijtihād. (26). However, the kind of analogical reasoning which is entitled Qiyās in Islamic law was rejected by the Shi'i scholars from the time it came to the Islamic law, in the 2nd /8th century (27).

Regarding legal matters, like the Sunni schools (28), the Shi'i scholars in the period of the presence of Imāms also represented two legal tendencies in the Shi'i community. One of them is the Fuqahā' (29), who adhered to the analytical rational approach toward legal problems within the framework of the general principles of the Qur'ān and tradition (30). More than that, it is reported that some companions of the Imāms had practised Qiyās on occasion when instructions over a particular problem were not explicitly and clearly given in the Qur'ān and tradition (31), and that some of them were practising the method of Ra'y (32).

The other was the traditionalist approach which relied mostly on transmitting traditions without any further inferential derivation of the law<sup>(33)</sup>. They were opposed to any kind of rational argument and held that this mode of arriving at categorical judgments amounted to Qiyās and was therefore unlawful<sup>(34)</sup>.

However, the well-established Shi'i religious mentality during the first centuries, considered all kinds of rational argument as Qiyās<sup>(35)</sup>. This was perhaps caused by some outward or terminological similarities<sup>(36)</sup>.

The traditions from the Imāms which forbade the practice of Qiyās<sup>(37)</sup> were also applicable to any other mode of rational analysis. It also forbade practising independent judgment, which is called Ra'y in legal terminology<sup>(38)</sup>. In the usage of the early periods, the term Ijtihād was used<sup>(39)</sup> in the sense of personal judgments including Ra'y<sup>(40)</sup>. This explains why Shi'is refrained from the use of the term Ijtihād until the 6th /12th century<sup>(41)</sup>.

## (2) During the Occultation of the Twelfth Imām.

After the period of the Imāms, especially from the early years of the period of Minor Occultation<sup>(260)</sup> until the second half of the 4th century, the traditionalist school gradually

gained control over the whole Shī'ī intellectual community, and totally suppressed the rational legal tendencies which were based on reasoning<sup>(42)</sup>.

The overwhelming majority of Shī'ī jurists during this time and up to the late 4th century were adherents of this school of thought<sup>(43)</sup>. Like their predecessors in the time of the Imāms, they devoted their efforts to collecting, recording and preserving the tradition from the Imāms<sup>(44)</sup>. They were not sympathetic to rational arguments in religious matters, and condemned even those efforts which applied rational argument to religious questions in order to strengthen the Shī'ī points of view<sup>(45)</sup>.

While the traditionist school was predominant in Shī'ī academic circles in the second half of the 3th and a greater part of the 4th centuries, two important figures emerged among Shī'ī scholars. They are Ibn Abī 'Aqīl<sup>(46)</sup> and Ibn al-Junayd al-Iskāfi<sup>(47)</sup>.

Both of them practised rational reasoning in legal thought. Hence, their methods can be considered a continuation of the exercise of analytical and rational thought in law which existed in the period of the Imāms. They are regarded<sup>(48)</sup> as constituting the first school of Shī'ī deductive law, based not merely on collections of traditions but on speculative analysis and rational argument.<sup>(49)</sup>

However, their works and legal opinions were abandoned<sup>(50)</sup> and did not receive much attention during their own time<sup>(51)</sup>. In the later time, especially from the second half of the 7th century onwards, when rational analysis penetrated more deeply into Shi'i law, the works of these scholars received much praise and admiration<sup>(52)</sup>.

In the last decades of the 4th and 5th centuries, emerged the school of Rationalists<sup>(53)</sup>, which placed the school of traditionalists under pressure and exposed them to severe criticisms<sup>(54)</sup> gradually weakened, and finally reduced them to silence<sup>(55)</sup>.

Simultaneously, as the Mu'tazilite school began to influence Shi'ism during this time, the use of reason became increasingly important in Theology<sup>(56)</sup>, so this had an effect in the sphere of jurisprudence<sup>(57)</sup>. There are three important figures which played an important role in this case; Mufid<sup>(58)</sup>, Murtada<sup>(59)</sup> and Al-Tusi<sup>(60)</sup>.

During this time, two main developments regarding the concept of ijtihad appeared :-

(i) The idea of the role of Fuqahā' (Mujtahid) which replaces the occult Imām<sup>(61)</sup>.

In contrast with the period of the presence of the Imāms or the period of the small Occultation when the Shī'a can get contact with their Imāms<sup>(62)</sup> and their Safirs<sup>(63)</sup>, the period of the Greater Occultation has left the Shī'i community without any leader<sup>(64)</sup>.

It was through Al-Tūsī that the Shī'i community found the solution for this problem. He interpreted the doctrine so as to allow delegation of the Imām's authority<sup>(65)</sup> to those who had studied Fiqh (Fuqahā'). He considered the Fuqahā' the people to act and to organise the Imām's function during the absence of the Imāms and their Safirs<sup>(66)</sup>.

Later, by the interpretation of certain scholars<sup>(67)</sup>, all the principal functions of the Imams have been delegated to the Shī'i Fuqahā'<sup>(68)</sup> and Mujtahids<sup>(69)</sup>. A century later, Al-Karākī created the concept of Nā'ib 'Āmm in contrast to the Nā'ib Khāss<sup>(70)</sup>. This concept then has been elaborated and developed by Shahīd al-Thānī<sup>(71)</sup>. He took the concept of Nā'ib Al-'Āmm to its logical conclusion in the religious sphere and applied it to all of the religious functions and prerogatives of the hidden Imam. Thus all the judicial authority of the Fuqahā' now became a direct reflection of the authority of the Imām himself<sup>(72)</sup>.

The belief in the general authority of the Mujtahid indicates, to a certain extent, that the Mujtahid has a similar authority to that of the Imām in religious and secular affairs. However, he differs from the Imām in that he does not have a similar position in conveying the teachings of God, he is not ma'sūm and does not command the same honour and esteem as the Imām.<sup>(73)</sup> Such differences between the authority of the Mujtahid and that of the Imām have led the Shi'ī jurist, such as 'Alī Kāshif Ghītā',<sup>(74)</sup> to name the authority of the prophet and the Imāms as "the general authority in the wider sense" (al-wilāya al-'amma bi- -ma'nā al-a'amm), and the authority of the Mujtahid as "the general authority in the special sense" (al-wilāya al-'amma bi- -ma'nā al-khāss).

(ii) Emergence of the efforts to deduce many subordinate cases from the primary sources, and give a Fatwā regarding cases by rational analysis<sup>(75)</sup>. Therefore, the activities of the jurists are not limited to the transmission of the traditions<sup>(76)</sup>.

In this case, Tūsī had played an important and effective role. The legal works of Tūsī opened up much new ground in Shi'ī law. His first book, Al-Mabsūt is a book of ijtihād<sup>(77)</sup> and it is the first Shi'ī law book in which the subordinate cases are drawn from principles<sup>(78)</sup>. His second book, Al-Khilāf was the first notable work in the field of comparative law among the Shi'īs<sup>(79)</sup>.

These two books were modelled upon Sunni works, and through them, an important part of Sunni legal scholarship passed into Shi'i law, facilitating its further development. Shi'i law at this stage benefited much from the heritage of the Sunni legal thought of the early centuries of Islam. At the same time, non-Shi'i concepts, which were alien to traditional Shi'i thought, also crept into Shi'i law and created some inconsistencies in it<sup>(80)</sup>. In his two works, Tusi cited the text of some Sunni legal works literally and added his judgements on the basis of Shi'i general principles or Shi'i traditions in the form of marginal notes<sup>(81)</sup>.

Despite that, al-Mufid, Murtada and al-Tusi still regarded ijtihād as Qiyās<sup>(82)</sup> and say that it is not a source for Islamic jurisprudence<sup>(83)</sup>.

In legal matters, all of them try to save the principle of certitude<sup>(84)</sup>. It means that the law must be based on certain sources<sup>(85)</sup>, which can give 'Ilm(knowledge) and not Zann (opinion)<sup>(86)</sup>.

Therefore, they rejected any sources or any methods of derivation which in their eyes could compromise the principle of certitude<sup>(87)</sup>. On this basis, they repudiated the attempt by Ibn Junayd to introduce the method of Qiyās <sup>(88)</sup>. They maintained that the law was complete and comprehensive as it had been laid down by the Imāms. The task of the Fuqahā' could merely be to find it, not to derive any new norms<sup>(89)</sup>.

Part B -- The time of Muhāqqiq<sup>(90)</sup> and 'Allāma Al-Hillī<sup>(91)</sup>

The religious and legal heritage of the rationalist scholars such as (Al-Mufīd, Murtadā and Al-Tūsī), though fertile in new perspectives was nevertheless as yet immature and inconsistent and needed further refinement and organization.

Some of the elements which they adopted from the Sunnī law<sup>(92)</sup> overall remained tied to their original framework, and were not well absorbed and adjusted to the new system. If the Shī'i law were to benefit fully from these elements, the whole system had to be adjusted and reorganized in order to accommodate them. This task was accomplished by Al-Muhāqqiq and 'Allāma Al-Hillī<sup>(93)</sup>.

Al-Muhāqqiq's main contribution and importance in Shī'i law can be seen from his reconstruction and refinement of the previous legal system, and also his positive statement about the doctrine of ijtihād. By these efforts, the Shī'i law came to be placed on a firmer base and its further development enabled.

The attempt to maintain the principle of certitude in law during the absence of the infallible imām, introduced by the Rationalist scholars<sup>(94)</sup>, was sustained by the jurists of the 6th century onward, especially by the above scholars<sup>(95)</sup>.

As already mentioned, since the majority of the Shi'i scholars were against the use of Qiyās as one of the sources of Fiqh<sup>(96)</sup>, owing to its identification with the term ijtihād at that time, the term ijtihād was criticized and rejected by that majority<sup>(97)</sup>. The Shi'i attitude towards the use of ijtihād in the sense of Qiyās continued until the time of Al-Muhaqqiq who, in his concept of ijtihād, separated the two terms.

He thought that ijtihād is the derivation of judgements from legal sources<sup>(98)</sup>. Thus, for him, ijtihād became a procedure of derivation, as opposed to the definition of Qiyās as a source of Fiqh. He then concluded that the Shi'i scholars, though rejecting Qiyās, were practising ijtihād in deriving legal norms, since these were most often based on theoretical considerations not deduced from the literal meaning of the texts<sup>(99)</sup>.

Al-Muhaqqiq's pupil, Allāma Al-Hillī strove to elaborate and expand the Shi'i law on the basis of the Rationalist legal doctrine and of Al-Muhaqqiq's reorganization. He greatly enlarged the section of the non-legal transactions on the basis of relevant general rules mainly taken from Sunni law. His efforts in this area reflect his thorough knowledge of Sunni legal principles<sup>(100)</sup>.

'Allāma contributed to the development of the Shi'i law in many such things. However, his main contribution can be summed up by reference to two spheres of innovation. Firstly, he proposed a new terminology for the organization and evaluation of the Shi'i traditions<sup>(101)</sup>. He made a great contribution to the development of Shi'i law through his criticism of the transmitters of the traditions and his implementation of a novel classification for the Shi'i traditions according to the degree of authority of their narrators<sup>(102)</sup>.

Secondly, having demonstrated the unreliability and uncertainty of much of the Shi'i tradition<sup>(103)</sup>, he adapted the technical terminology of Shi'i Usūl in such a way as to render its central principle that of ijtihād by the use of 'Aql<sup>(104)</sup>. Thus the Shi'i jurists use 'Aql, usually supported by the other three sources of law (Qur'ān, Hadīth and Ijma') to arrive at legal decisions. This implied that the Shi'i scholars, like the Sunnī scholars, were often forced to work on the basis of preponderant probability (Zann) rather than certainty sources this could no longer be concealed<sup>(105)</sup>.

Therefore, it can be concluded that by the process of adoption, ijtihād in Shi'ism as in Sunnism, is premised on the admission that certitude about the true intent of the Lawgiver is, in some instances at least, unattainable<sup>(106)</sup>. The Mujtahid may be successful or not in his attempt to discover it<sup>(107)</sup>.

The Lawgiver may place a special reward on his effort in either case<sup>(108)</sup>. The ordinary believer (Mukallaf) may be obliged under the law to follow the opinion of a qualified Mujtahid<sup>(109)</sup>, but no one can ever derive a sense of certitude from it<sup>(110)</sup>.

### Part C - After Al-Muhaqqiq and 'Allāma Al-Hilli

The doctrine of ijtihād which must have appeared as a radical departure from the traditions of early Shi'i scholars was not universally accepted. From the early 10th century until the 12th century, the development of ijtihād amongst the Shi'a had stopped, owing to the influence of the traditionalists.

After the decline of the traditionalist school in the early 5th century<sup>(111)</sup>, a small number of its adherents survived here and there. During the time of Al-Muhaqqiq and 'Allāma Al-Hilli, they were not active and were therefore largely ignored by the others<sup>(112)</sup>. It was not until the beginning of the 11th century that this school was revived by Muhammad Amin Al-Astarabādi<sup>(113)</sup> through his book Al-Fawā'id Al-Madāniyya<sup>(114)</sup>.

However, the ground for this revival had gradually been provided since early 10th century onwards<sup>(115)</sup>. A suitable evidence for this statement can be seen in the attitude of certain scholars during this time.

Husayn b. Abd. Al-Samad Al-'Amili (116), Shaykh Al-Islām of the Safavid court held that *ijtihād* which is based on rational argument is not the only way to discover legal norms. In most of his other works, he criticized the legal method of Shi'i jurists and blamed them for being imitators of the ancient scholars (117).

Subjects such as the validity or invalidity of the traditions as a source of law had again become points of debate among the jurists of the early decades of the same century (118). The value of logic and philosophy in Islamic scholarship had already come under question (119). These kinds of elements had contributed enormously to the appearance of a new traditionist school and its rapid development and predominance.

The new traditionist school, which was now called by its other old name, Akhbārī, (120) was like its predecessor, opposed to the rational, analytical approach to the law and adhered strictly to the outward, literal meanings of the traditions. This approach basically resembled the more radical wing of the early traditionists which considered all traditions transmitted from the Imāms as authentic (121).

For the authority of his doctrines, Astarabādī claims that the Akhbārī doctrine was introduced and followed by all disciples of the Imāms during the early period (122).

In the Fawā'id al-Madāniyya, Astarabādi argues that " the first persons to abandon the path followed by the companions of the Imāms and to rely on the art of theological discussion(Kalām)and on the juridical principles(Usūl al-Fiqh) based on rational arguments as common among the Sunnīs, Muhammad Ibn Junayd, who acted on the basis of Qiyās, and Hasan Ibn 'Alī Ibn Abī A'qil al-'Umāni the Mutakallim "(123). He goes on to say that, when al-Shaykh al-Mufid (124) expressed his views on the worth of these two men to his pupils, these ideas continued to spread over a long period until the time of the foremost Shi'i authority on Usūl, 'Allāma al-Hilli (125), who emphasized them in his writings.

He states that his book was written at the behest of his teacher, Muhammad ibn 'Alī Astarabādi, who told him that he had been predestined to revive the Tariqat of the Akhbarīs. He saw his task as one of restoring to its former preponderance the doctrine which he believes to have been espoused by the Imāms themselves (126).

The principal ideas of the Akhbari school and their concept of the Shi'i law can be summarised as follows; firstly, on the sources of doctrine and law, they accept only the Qur'an and Sunnah, and consider that both sources can be understood only where their meaning has been made explicit by the commentary (Tafsīr and Ta'wīl) of the Imāms. Therefore, the single most important source of law is the traditions of the Imāms.

These provide the community with an infallible guide to all aspects of life<sup>(127)</sup>; they are also indispensable for a correct understanding of the Qur'an<sup>(128)</sup> and the prophet's utterances.

They maintain that all traditions in the Usūl al-Arba'umi'a derive with certainty from an Imām (i.e. they are qat'i al-sudūr or al-Wurūd), and are therefore to be accepted without reservation as the basis for legal rulings<sup>(129)</sup>. They were composed by order of the Imāms, who told their disciples to learn them by heart and propagate them among all Shi'is, in preparation for the period of Greater Occultation<sup>(130)</sup>. The four books of Shi'i ḥadīth were reliable, because the material in derives entirely from the Usūl Al-Arba'umi'a<sup>(131)</sup>.

Secondly, on the principles of jurisprudence. They totally rejected ijtihād in the law<sup>(132)</sup>. The focus of Astarābādī's argument was on the invalidity and peccability of the Aristotelian logic which had been the basis for the Shi'i jurists in their legal reasoning<sup>(133)</sup>.

They consider that decisions can be given only where there is certain knowledge ('Ilm) through a relevant tradition from the Imāms. They forcefully rejected any interpretative role for the Mujtahid and the Mujtahid can be consulted only when he knows of a tradition relevant to a particular problem or when he is able to elucidate an obscure passage; but since such matters are within the purview of the hadith specialists, there is no need for a separate institution of Mujtahid<sup>(134)</sup>.

After Astarabādi, the Akhbāri school were supported and enriched by the later Akhbāri 'Ulama. All of them tried to concentrate their activity by criticizing the activity and the functions of the former and the present Mujtahids<sup>(135)</sup>.

The Imams also laid down rules to be followed in cases of apparently contradictory traditions. However, where these do not enable one to arrive at a clear decision in favour of a particular tradition, an attitude of Tawaqquf should be adopted; none of the traditions should be followed, but at the same time no blame should be attached to someone who acts in accordance with one of them<sup>(136)</sup>.

Therefore, they hold that all men are Muqallid to the Imams and it is not permissible to turn to a Mujtahid. A central idea underlying these views is that there is no essential difference between the legal state of the community before and after the Ghaybah<sup>(137)</sup>.

The Imams made certain that all major questions which might arise in the future would be addressed in the traditions dictated to their followers. For this reason, all believers are Muqallidūn; all can reach a correct understanding of the utterances of the Imams through training in the Arabic language and a study of the Shi'i traditions. The knowledge acquired in this way, while insufficient to lead to absolute certainty (Yaqīn al-Wāqī'i) as to God's intent, does establish with certainty

that the religious law conforms with the transmitted utterances of the Imāms. It is this customary ('Ādi) certainty which matters for religious practice, and not preponderant probability (Zann)<sup>(138)</sup>.

As a result of the attitude of the Akhbārī school which rejected the methodology of Usūl al-Fiqh<sup>(139)</sup> upon which ijtihād had relied, this discipline was abandoned and forgotten<sup>(140)</sup>. There is no mention of any important mujtahid in the history of Shi'i law during this time. Only a very few continued to teach a limited number of students in small schools, distant from urban religious and academic centres<sup>(141)</sup>.

Each generation then follows the same rules even though these rules were established by persons now dead. This principle is known as Taglid al-Mayyit<sup>(142)</sup>.

The Akhbārī tendency gained supremacy in all Shi'i centres of learning<sup>(143)</sup> in the fourth decade of the 11th century and also in the following century<sup>(144)</sup>, and held Shi'i law in its grasp for several decades until the second half of that century when it again declined in the face of the Usūli resurgence<sup>(145)</sup>.

In the second half of the 12th century, an outstanding Shi'i jurist with a genius for rational argument and analysis, succeeded in dismantling the influence of the Akhbārī school and in establishing a new rational school in Shi'i law. This scholar was Muhammad Baqir b. Muhammad Akmal al-Behbahānī (146).

Although the historical roots of Usūlī thought go back to the earlier period (147), and since then there have been numerous Usūlī Fuqahā' among the Shi'is, Muhammad Baqir Behbahānī is considered to be the founder of the Usūlī school (148).

Behbahānī's great achievement was twofold. On the one hand, he destroyed the influence of the Akhbārī school (149). His Risālat al-ijtihād wa 'i-Akhbār remains the most important and influential treatment of the arguments used to invalidate the Akhbārī position and to justify that of the Usūlī school (150).

On the other hand, he redefined the nature of ijtihād, established the roles of the mujtahid, and laid the basis for a system of Fiqh which has been in use in Twelver Shi'ism ever since until the present time (151). As a result of this formidable achievement, he came to be regarded as the Mujaddid of the thirteenth century of Hijra (152).

In contrast to the Akhbārī school, the sources of law and doctrine according to the Usūlī were contained in the four sources; the Qur'ān, Sunnah, Ijmā' and 'Aql (153). They accept and use the literal meaning of the Qur'ān and Sunnah, claiming that it is possible to know the meaning of these sources through the use of 'Aql. Furthermore, they consider that the doctrine or legal decisions derived from the Naqlī sources cannot contradict what had been derived from rational principles (154).

They consider that the four canonical books of Hadīth contain many unreliable Hadīths, and therefore they try to devise a system based on 'Ilm al-Rijāl for testing the reliability of the Shi'i hadīth (155).

In other words, they do not automatically accept the tradition appearing in Usūl al-Arba'umi'a as reflecting the view of an Imām. In fact, they subject it to the same rules as any other tradition (156).

As regards the principles of jurisprudence, they accept the use of ijtihād. Decisions can be given on the basis of Zann achieved through ijtihād, in cases where certain knowledge ('Ilm) from an explicit text in the Qur'ān and Sunnah is not available (157). Furthermore, they consider that knowledge was obtainable only directly from the Imāms by those who were in their presence, i.e. the legal decisions of the Imāms may have been affected by individual circumstances and do not

necessarily have general applicability and so, during the greater Occultation, it is necessary to resort to ijtihād<sup>(158)</sup>. They also proposed that the Mukallaf can act on the basis of freedom and the permissibility of all actions, if there is no clear text against it<sup>(159)</sup>.

The Usūlis divide men into two groups; Mujtahid and Muqallid<sup>(160)</sup>, and consider that the unrestricted Mujtahid is learned in all of the ordinances of the religion since the condition for issuing legal decisions is knowledge of a large number of the sciences, the most important of which is Usūl al-Fiqh<sup>(161)</sup>. They also consider it obligatory for the Muqallid to obey a Mujtahid as much as to obey the Imāms<sup>(162)</sup>.

Finally, in contrast to the Akhbārī view, they forbid Taglīd to a dead Mujtahid.

In summary, ijtihād which was condemned in early Shi'ism, now became a vital and dynamic principle of jurisprudence, at the time when the door of ijtihād was widely claimed to be closed in Sunnism. Every Shi'i who does not himself have the qualifications of a Mujtahid is expected to choose one whose legal opinions he will regularly follow<sup>(163)</sup>. He is not permitted to follow the legal doctrine of a book, however highly esteemed it may be in scholarship, or the opinion of Mujtahid who is no longer alive. The ijtihād is thus constantly renewed. For this purpose, a copious literature on Usūl al-Fiqh, ever more elaborate and refined, continues to be produced

in Shi'ism<sup>(164)</sup>, a literature that has no counterpart in modern Sunnism. Furthermore, according to the Usūlī Shi'i, the effort of ijtihād must constantly be renewed in the hope of coming still closer to objective truth and certainty. Ijtihād thus must remain an open process until the return of the Imām who alone can offer perfect truth and certainty<sup>(165)</sup>.

As the result of the Usūlī movement, the Mujtahid grew in power. So the role of Mujtahid as Marja' al-Taqlid<sup>(166)</sup> increased in importance, not only as the source of charismatic authority, but also increasingly as a source of unity for the Shi'i community<sup>(167)</sup>.

Behbahānī's views were elaborated in the work of the later Usūlī 'ulamā', and the repudiation of the Akhbāris continued in the work of others such as Muhammad Tabātabā'i, Shakh Jaafar al-Najafi and others<sup>(168)</sup>. In this way, Behbahani's views on the legislative authority of the Mujtahid won universal acceptance in the Shi'i community.

The last fundamental change which occurred in Shi'i law was associated with the reconstruction of the law and its methodology through the scholarly approach of al-Shaykh al-Murtada b. Muhammad Amin al-Ansari. This major development in the principles of jurisprudence remains current in Shi'i law to the present time<sup>(169)</sup>.

Al-Ansari extended the sections of Usul al-Fiqh which dealt with the most general principles of the law (Usul al-'amaliyya) to a remarkable degree, and rebuilt it with subtlety and precision on a firmly rational base. (170) Therefore, his most important contribution was in deriving a set of principles to be used in formulating decisions in cases where there was doubt.

He divided legal decisions into four categories (171):-

(i) Certain (Qat'i). This represents cases where clear decision can be obtained unambiguously from the Qur'an and reliable traditions, and there is no need to involve reasoning.

(ii) Valid conjecture (Zann). This represents cases where the probability of correctness can be guaranteed by using certain rational principles to arrive at an individual binding norm.

(iii) Doubt (Shakk). This refers to cases where there is no guidance obtainable from the sources and nothing to indicate the probability of what is the correct answer. It is in relation to these cases that al-Ansari formulated four guiding principles called al-usul al-'amaliyya. (172)

They consist of; al-Bara'a, al-Takhyir, al-Istishab and al-Ihtiyat.

(iv) Erroneous Conjecture (Wahm). This refers to decision where there is a probability of error; such decisions are of no legal standing.

The effect of the development instituted by al-Ansāri was far-reaching<sup>(173)</sup>. Whereas previously the Mujtahids had restricted themselves to ruling on points where there was the probability or certainty of being in accordance with the guidance of the Imāms, the rules developed by al-Ansāri allowed them to extend the area of their jurisdiction to any matter where there was even a possibility of being in accordance with the Imām's guidance. This effectively meant that they could issue edicts on virtually any subject.<sup>(174)</sup>

(1) Especially a distinct legal doctrine was first formulated by Muhammad al-Bāqir and elaborated by his son Ja'far as-Ṣādiq, to whom the bulk of their legal traditions is attributed.

See Madelung; "The sources of Isma'ili law", in Journal of Near Eastern studies, XXXV, (1976), page 34.

(2) Schacht; The origins of the Muhammadan jurisprudence, pages 260 and 262.; Abū al-Qasim Gorjī; "A brief survey of the development of 'ilm Uṣūl al-Fiqh - part one", in Al-Tawhid, vol. 111, no. 2, 1986, page 66 - 71.

(3) For more information about the nass period see Rushdi Muhammad 'Alyān; al-'Aql 'inda' al-Shi'a al-imāmiyya, Baghdad, 1973, page 47 - 48.

(4) see page 237 - 238.

(5) According to Schacht, during the time of the prophet, there was no such science as that of jurisprudence. The prophet did not categorise the injunctions into Wājib, Mandūb, Ḥarām, Makrūh and Mubāḥ as propounded in the later legal theory. This classification of acts is the work of the jurists themselves who studied different passages of the Qur'ān, various traditions of the prophet, the practice of the companions and the early Muslims. Schacht; An introduction to Islamic Law, page 20.

Gorjī says that the Ahl al-Sunnah, although they took up writing on the subject ('ilm Uṣūl al-Fiqh) later than the Shi'a, were indubitably earlier to think of developing this

discipline which they needed for deduction of the Ahkām. There were two reasons for this: firstly, the end of the period of recourse to the prophet, one of the main sources of Ahkām, came at an earlier date for them by the demise of the prophet. Secondly, whatever reliable traditions were available to them were not sufficient for satisfying their religious needs. That is why they had to advance the ideas of Ra'y and Ijmā' from the beginning and later develop the conceptions of Qiyās, Maṣālih Mursalah, etc.

(6) 'Alyan, op.cit., page 47.

(7) ibid, page 55 - 56. But the Shi'is regard their Imāms not like other Mujtahid, they get their knowledge through Ilhām from God. see Muzaffar; 'Aqa'id al-Imamiyya, page 67.

(8) Muḥammad Bāqir Ṣadr; al-Ma'alim al-Jadidah li-l-Uṣul, page 54 - 55.

(9) ibid.

(10) Modaressi; An introduction to Shi'i law, page 24.

(11) Kulayni; al-Kāfi, v.1, page 169 - 174.; Kashshi, Rijal al-kashshi, page 268, 278, 484 - 486, 489 - 490.

(12) Fayd, Muḥammad b. Murtada; al-Haqq al-Mubin, Tehran, 1390, page 7, Hurr al-Āmili; Wasa'il al-Shi'a, Tehran, 1376-89, v.XV111, page 41.

(13) ibid.

(14) Kulaynī, v.111, page 33; v.V, page 357; Ṭūsi, Istibṣār, v.1, page 77 - 78.; v.111, page 178; v.V11, page 297.; Hurr al-Āmili, op.cit., v.1, page 327.

(15) Kulaynī, v.111, page 83 - 88; Hurr al-Āmili, op.cit., v.11, page 538 - 539, 542, 546, 547 - 548.

(16) According to Shi'i view, Imām Muḥammad al-Bāqir is the first person who founded 'ilm Uṣūl al-Fiqh. see Ḥasan al-Ṣadr; Ta'sīs al-Shi'a li-funūn al-Islām, Baghdad, 1951, page 310.

(17) Etan Kohlberg; "Al-Uṣūl al-Arba'umi'a", in JSAI, 10(1987) page 128 - 166.

(18) ibid.

(19) Further information see Mo men; An introduction to Shi'i Islam, page 71 - 74.

(20) See page 100 and 104.

(21) See page 105 - 106.

(22) Further information see Mo men, op.cit., page 161 - 171.

(23) Further information see Jassim M.Hussain; The occultation of the twelfth Imam, London, 1982, especially the chapter 1V to the chapter VII.

The four Safirs as recorded are no more than the office of mere message carrier. They received queries from the believers, and they carried them to the Imām, and they returned with his response which they produced in the form of a prescription (ruq'a)

in his own hand writing. see Tūsī; Kitāb al-Ghayba, Tabriz, 1323/1903, page 172ff.

(24) Zurārā b. A'yān, Ṣafwān b. Yahyā, Mu'min al-Ṭāq, Yūnus b. Abd. al-Rahmān and others. see Maḥmūd Ramyār; "Ijtihad", in Shi'ism: doctrine, thought and spirituality, Edited by Seyyed Hossein Nasr, Hamid Dabashi and Seyyed Vali reza nasr, New York, 1988, page 229 - 230.

(25) Imām Ja'far al-Ṣādiq is reported as saying to Abān b. Taghlib: "Sit in the mosque of Madīnah and give fatwās for the people. Indeed, I would love to see more like you amongst my shī'ah". see Kulaynī, op.cit., v.1, page 59ff.

(26) Gorjī, op.cit, page 70.

(27) Ibn Ḥazm; al-Ihkām fi usūl al-ahkām, Cairo, 1345-8, v.V11, page 177.

(28) see page 58.

(29) They also were the theologists at the same time. see Modaresi, op.cit., page 27.

(30) ibid, page 29.

(31) Hurr al-'Āmili, op.cit., v.XV111, page 33, 38.; Kashshī, op.cit. page 239.

(32) ibid, page 156 - 157.

(33) Madelung, op.cit., page 163 - 165.; Khumaynī; Risāla fi ijtiḥād wa 'i-taqlīd, Qum, 1385, page 125 - 128.

- (34) Kashshī, op.cit., page 189.; al-Muḥaqqiq al-Hillī; Ma'ārij al-Wuṣūl, Tehran, 1310, page 127.
- (35) ibid.
- (36) Modarressi; "Rationalism and Traditionalism in Shi'i jurisprudence", in Studia Islamica, LIX (1984), page 148 - 149.
- (37) Kulaynī, op.cit., v.11, page 323.
- (38) Modarressi, op.cit., page 149.
- (39) Abū Ḥusayn al-Basrī; al-Mu'tamad fi uṣūl al-Fiqh, page 689, 722, 762 - 766.
- (40) J.Schacht; Idjtihad, in Ency. of Islam.
- (41) Muḥammad Bāqir Ṣadr; Durūs fi 'ilm al-uṣūl, Beirut, 1978, v.1, page 55 - 64.
- (42) Modarressi, op.cit., page 151.
- (43) Ṭūsī; 'Uddat al-Uṣūl, page 248.
- (44) Modarressi, op.cit., page 151.
- (45) Ṭūsī; Kitāb al-Ghayba, Tabriz, 1323, page 3.
- (46) Najāshī; Rijāl al-Najāshī, Tehran, 1337, page 38.
- (47) ibid, page 301.
- (48) Baḥr al-'Ulūm; al-Fawā'id al-Rijāliyya, Najaf, 1965-67, v.11, page 218.
- (49) ibid.
- (50) Ṭūsī; Fihrist, Najaf, 1937, page 134.
- (51) Kāzīmī, op.cit., page 297 - 298.
- (52) Baḥr al-'Ulūm, op.cit., v.111, page 205 - 206.

(53) Further information see Madelung; "Imamism and Mu'tazilite Theology", in Le Shi'isme imamite, 1968, page 13 - 30.

(54) Mo men, op.cit., page 76 - 81.

(55) 'Abd al-Jalil al-Qazwini; Kitāb al-Naqd, Tehran, 1358, page 568.

(56) Further information see Mac Dermott; The theology of al-Shaikh al-Mufid, Beirut, 1978.

(57) ibid, especially part one, chapter XI.

(58) Mamaqānī, op.cit., v.V, page 84, 249.

(59) Mc Dermott, op.cit., part 111, chapter 1V11.

(60) For the full information about the role of al-Tusi in Shi'i theology and law, see Ramyar, Mahmud; Shaykh Tusi, The life and works of Shi'ite leader, Ph.D. thesis, Univ. of Edinburgh, 1977

(61) See Sachedina; Islamic Messianism, The idea of the Mahdi in Twelver Shi'ism, New York, 1981, especially chapter three, page 78 - 109.

(62) see note 23.

(63) see note 23.

(64) Sachedina, op.cit., page 99 - 101, 106 - 108.; J. Hussain, op.cit, page 148 -152.

(65) Calder, Structure of authority, page 73 - 74, 110 and 132 - 133, 160.

(66) ibid.

(67) It was such as Muḥaqqiq al-Hilli, ibid, page 77 - 78, 123.

(68) The principal functions of the Imam were considered as:

(i) Leading the Holy war(Jihād).

(ii) Division of the booty(qismat al-Fay').

(iii) Leading the Friday prayer(salāt al-jum'a)

(iv) Putting judicial decisions into effect(Tanfidh al-ahkām).

(v) Imposing legal penalties(iqāmat al-hudūd).

(vi) Receiving the religious taxes of zakāt and khums.

(69) The term Fuqahā' sometimes was used for the Mujtahids.

(70) *ibid*,page 163 - 165.

(71) *ibid*,page 84 - 85,112,125 - 126,147 - 151.

(72) *ibid*.

(73) 'Alī Kāshif Ghita',al-Nūr al-Sāṭi',v.1,page 341.

(74) *Ibid*,page 341 - 374.

(75) Mahmud Ramyar,*op.cit.*,page 234 - 235.

(76) *ibid*.

(77) His Kitāb al-Mabsūṭ treated many cases which Shi'i jurists had not dealt previously.

(78) His legal method in effect combined the method of Rationalists with that of Traditionalists.He strove to retain the authority of Ahād traditions as a source of law,while preserving the analytical and rational method of law.

See Ṭūsī,'Uddat al-Usūl',page 25 - 63.

(79) Modarressi,*op.cit.*,page 44;Arjomand,The shadow of god and the hidden Imam,page 51 - 54.

(80) Modarressi, op.cit., page 44.

(81) Mufid; Awā'il al-Maqālat, Tabriz, 1364, page 115 - 116.

(82) For Mufid, the sources of the law are three things; Qur'ān, Sunnah of the prophet and the sayings of the Imāms. Reason ('aql) can be used to supplement these three things, and the role of reason and the science of language is to understand the contents of the three sources. See Mufid, "Uṣūl Al-Fiqh", in Karājiki, Kanz al-Fawā'id, Mashhad, 1323, page 186 - 187.

The same idea had been adopted by Ṭūsī. See Ṭūsī, op.cit., v.11, page 125 - 127.

(83) Madelung, op.cit., page 167 - 168.

(84) In regard to the ahād traditions, Mufid held that while as such unacceptable as a basis of the law, they could become valid if they were found to agree with reason, Qur'ān, or another well authenticated tradition, or if they were universally accepted. See Mc Dermott, op.cit., page 298, 230.

al-Murtadā rejected the ahad traditions altogether as not normative in the law according to the order of the Divine Lawgiver and attempted to found the law largely on the consensus of the Shī'i community as including the opinions of the Imām. For further information see in general R. Brunschvig; "Les Uṣūl al-Fiqh imamites a leur stade ancien", in Le Shi'isme imamite, page 201 - 213.

For Ṭūsī, he argued that the statements of the Imāms handed down until his own time, while formally in many instances ahad traditions, had been universally accepted by the Shi'i community in the presence of the Imāms and with their approval. They were thus collectively confirmed by the consensus of the Shi'i community and the Imāms. see Note 76 above.

(85) Calder, The structure of authority, page 223 - 226.

(86) Madelung, op.cit., page 168.

(87) Mc Dermott, op.cit., page 306.

(88) Madelung, op.cit., page 168. However, al-Murtada admitted the need of ijtihād in some practical decisions, like determining the direction of the prayer in a certain locality, but not in establishing legal norms. See Brunschvig, op.cit, page 210.

(89) For more information about his life and work, see M.M. Mazzaoui; The origins of the Safawids, Wiesbaden, 1972, page 28, footnote no.2.; Al-Bahrayn; Lu'lu'at al-Bahrayni, page 227 - 232. See a list of his works in Khwansari, Rawdat al-Jannat, v.11, page 183.

(90) See Mazzaoui, op.cit., page 23, 27, 63.; S.H.M. Jafri; al-Hilli, in Ency. of Islam.; Bahrayni, op.cit., page 212 - 220.; Khwansari, op.cit., v.11, page 271 - 275.

(91) See page 192 - 193.

(92) Norman Calder; The Structure of Authority in Imami Shi'i Jurisprudence, page 228.

(93) See page 192 - 193.

(94) Ibid. page 228 - 232.; Madelung, Authority in twelver Shiism in the Absence of the Imam, page 168.

(95) A.A.A. Fyzee, "Shi'i legal theory", in Law in the Middle East, I, page 123.

(96) This was due to the influence of the juristic ideas of al-Shāfi'i and his identification of Qiyās with ijtihād. See Muḥammad Taqī al-Ḥakīm's introduction to: 'Abd. al-Ḥusain Sharaf al-Dīn al-Musāwī, Al-Naṣṣ wa-I-Ijtihād, page 43; Mustafa Jamal al-Dīn, al-Qiyās haqiqatuh Wa-Hujjiyyatuh, Najaf, 1972, page 137-138 and 140; See also page 3 below.

(97) al-Muḥaqqiq; Al-Mukhtaṣar al-Nafi', page ; Ma'ārij al-Uṣūl, fol. 72a.

(98) Ibid.

(99) He is reported as having studied under a Sunni teacher. See Al-Ḥurr al-'Āmilī; Amal al-'Āmil, vol. 2, page 81 - 85, vol. 1, page 85 - 91; Calder; The structure of authority in Imami Shi'i Jurisprudence, page 233 - 235; Modarressi, An introduction to Shi'i law, page 47 - 48.

(100) Calder, op.cit. page 230; Madelung, op.cit. page 168.

(101) This novel classification was originally initiated by Allāma's teacher Jamāl al-dīn Aḥmad b. Mūsā b. Tāwūs and gained popularity through its wide implementation by 'Allāma in his work, see Modarressi, op.cit, page 48.

(102) Muḥammad al-Astarabādi, the founder of the Akhbārī school accused 'Allāma of claiming that most of the Shī'i traditions were Ghayr saḥīḥ.

(103) Calder, op.cit. page 230.

(104) 'Allāma; Mabādi' al-Wuṣūl ilā 'ilm al-Uṣūl, Najaf, 1970, page 240.

(105) Shāfi'i; Risālah, page 1328f; 'Allāma, op.cit., page f.3b ; Tahrir al-Ahkām, page 2.

(106) Shāfi'i; K.Jimā' al-'Ilm, page 261, 274; 'Allāma, ibid.

(107) Shāfi'i; ibid, page 274; 'Allāma; Mabādi' al-wuṣūl, page 244 - 245; Tahdhib , f. 205b -206a.

(108) Shāfi'i, Risālah, page 1469ff;

'Allāma, Mabādi', page 240 - 241; Tahdhib, f. 202b - 203a.

(109) Shāfi'i, K.Ibtāl al-Istihsān, page 268;

'Allāma, see note 104.

In summary, Dr. Calder did mention the similarity of the conception of the ijtihād between both scholars.

see Calder, op.cit., page 233 - 234.

(110) See page 262 - 263.

(111) Modarṣsi, op.cit., page 52.

(112) Etan Kohlberg; Astarabādi, Mohammad Amin, in Ency. Of Iranica.

(113) For the story of this revival and its background, see Amin al-Astarabādi, Dānish-nāma-yi shāhī; quoted by Khwansari; Rawdat al-Jannāt, v.1, page 121.

(114) Around the same century, tendencies calling for more freedom in Shi'i law began to gain popularity. It has been said that Ibn Abi Jumhur al-Aḥṣā'i, Shi'i theologian with sufi tendencies of early 10th century was a follower of the traditionist school. See Khwansārī, *ibid*, v. VII, page 33.

(115) Modarēssi, *op.cit.*, page 53.

(116) *ibid*.

(117) Khwansārī, *op.cit.*, v. I V, page 238.

(118) Modarēssi, *op.cit.*, page 156.

(119) Madelung, *op.cit.*, page 170.

(120) Khwansārī, v. 1, page 127 - 130.

(121) *ibid*, v. I V, page 33.

(122) Fawā'id al-Madāniyya, quoted in Khwansārī, v. I V, page 34.

(123) *ibid*, page 534 - 536.

(124) *ibid*, page 172 - 177.

(125) Etan Kohlberg; Akbariya, in *Ency. Of Iranica*.

(126) *ibid*.

(127) Murtadā Mutāhharī; "Shi'i Interpretation of the Qurān", in Shi'ism: doctrines, Thought and Spirituality, New York, 1988, page 30.

(128) Fawā'id al-Madāniyya, quoted in Khwansārī, v. I V, page 30.

(129) *ibid*, page 3, 30.

(130) *ibid*, page 52f, 58f, 65.

(131) Etan Kohlberg; Akbariya, in *Ency. Of Iranica*.

(132) Khwansārī, op.cit., v.1, page 127 - 120.

(133) Etan Kohlberg, op.cit.; Khwansārī, op.cit., v.1V, page 250.

(134) One of them is Mulla Muḥsin Fayḍ Kashānī (d.1091/1680).

He stated that religious legislation can be based only on the Qur'ān and the traditions, not on the other sources used by the Uṣūlīs. see Muḥammad 'Alī Mudarris; Rayḥanat al-Adab fi Tarājim al-Ma'rūfīn bi al-Kunyāt wa al-Laḡab, v.4, page 377.

(135) Etan Kohlberg; Astarabadi, Mohammad Amin, in Ency. Of Iranica.

(136) Khwansārī, op.cit., v.1V, page 35 - 36.

(137) Madelung, op.cit., page 170; Etan Kohlberg, op.cit.

(138) Khwansārī, op.cit., v.1, page 127 - 130.

(139) It had been mentioned that anyone carrying with him books of 'Ilm Uṣūl al-Fiqh was obliged to cover them up for fear of provoking attack. see ibid, page 123.

(140) Modaressi, op.cit., page 55.

(141) Khwansari, op.cit., v.1V, page 35 - 36.

(142) Most of the jurisconsults of Najaf, Iran and in Mesopotamia had followed the Akhbārī school. see Khwansārī, op.cit., v.1, page 136 - 137, page 21.

(143) The Akhbārī school had spread to Bahrain. see Bahrānī; al-Lu'lu'at al-Bahrayn, page 13.; Tunukābunī, Qisās al-Ulamā', page 227.

(144) Modaressi, op.cit., page 55.

- (145) Hamid Algar; Behbahani, Mohammad Ali, in Ency. Of Iranica.
- (146) Ibid.
- (147) Mu'allim Hadibabādi; Makārim al-Āthar, page 222.
- (148) Tunūkabūni, op.cit., page 204.
- (149) Hamid Algar, op.cit.
- (150) Hamid Algar; Religion and state in Iran 1785-1906, Los Angeles, 1969, page 34.
- (151) Tunūkabūni, op.cit., page 204; Khwansāri, v.1, page 124.
- (152) Said Amir Arjomand; The shadow of god and the hidden Imam, Chicago, 1984, page 232.; Moomen, An introduction to Shi'i islam, page 223.
- (153) ibid.
- (154) Etan Kohlberg, "Al-uṣūl al-arba'umi'a" in JSAI, 10 (1987), page 141.
- (155) ibid, page 141 -142.
- (156) Moomen, op.cit., page 224.
- (157) Al-Mamaqāni; Tahqib al-Maqāl, Najaf, 1931, v.1, page 181.
- (158) Moomen, op.cit., page 224.
- (159) Khwansāri, op.cit., v.1V, page 35 - 36.
- (160) Moomen, op.cit., page 225.
- (161) Abū 'i-Qasim Qumī; Qawānīn al-Uṣūl, Tehran, n.d, page 355ff, Page 392 - 412, and 429 - 430.
- (162) Scarcia, G; "Intorno alle controversie tra Usuli e Akhbari presso gli Imamiti", in Rivista degli studi Orientali, 33(1958) page 237.

(163) The doctrine of recent Shi'i literature on Uṣūl al-Fiqh has been studied by H.Loschner;Die dogmatischen Grundlagen des schiitischen Rechts, Köln, 1971.

(164) Madelung, op.cit., page 169.

(165) For detailed information see Leonard Binder; "Marja' iyyat", in Shi'ism: Doctrine, Thought and spirituality, page 236 -242.

(166) The implications of this development as a means of extending or projecting the charisma of the Imām into individual figure of supreme authority are clear. The Marja' is considered as a living deputy of the Imām in an active and distinct sense. See Dr. Norman Calder; "Zakāt in Imāmi Shi'i jurisprudence", in BSOAS XLIV(1981), page 479 - 480.

(167) Shaykh Ja'far al-Najafi wrote two books; Kashf al-Ghita' and al-Haqq al-Mubin fi al-Radd 'alā al-Akhbāriyyin. Both of these books are devoted to a description of the Uṣūli approach to the legislation problems and reject the extremist Akhbāri approach. see Muḥammad 'Alī Mudarris, op.cit

v.V, page 24. For the role of Muḥammad Tabātabā'i in this case, see Hamid Algar, Religion and State in Iran, page 35 - 36.

(168) Moomen, op.cit., page 187.

The contemporary scholars of the Shi'i like Ayyatollah Khumayni are follower of al-Anṣari's school. see Modarressi, op.cit., page 58.

For the further information about Khumaynī's view in this case, see Calder; "Accommodation and revolution in imāmi shi'i jurisprudence: Khumayni and classical tradition", in Middle Eastern Studies, 18(1982), page 3 - 30.

(169) Al-Anṣārī's period can be called the period of technical maturity. See Arjomand, op.cit., page 235.

(170) Shaykh Murtadā Anṣārī; Farā'id al-Uṣūl, Tehran, n.d, page 2 193 - 444.

(171) H. Loschner, op.cit., page 195.

(172) Al-Anṣārī's method is still dominant in Shi'i academic life. His works like al-Makāsib on the law of sale and al-Rasā'il on Uṣūl al-Fiqh are text-books in Shi'i academic centres.

(173) S.A. Faṭimi; Tajrid al-Uṣūl, Mashhad, 1974, page 169.

CHAPTER III : THE METHODOLOGY AND PRINCIPLES OF IJTIHĀD

(I) THE MINOR DISAGREEMENT.

(II) THE CONCEPT OF IJTIHĀD.

(III) THE PRINCIPLE OF TAQLĪD.

(IV) THE IDEA OF THE PROPHET'S IJTIHĀD.

Since there are more similarities than differences between the Sunnīs and Shī'as regarding the principles of Uṣūl al-Fiqh,<sup>(1)</sup> as the result of the adoption by the Shī'i scholars of certain Sunnī principles, in this chapter we look at the differences between both sides in order to discover the origin of the main differences.

### **(I) THE MINOR DISAGREEMENT**

Both sides had agreed on the four primary sources of law the Qur'ān, Sunna, Ijmā' and Ijtihād.<sup>(2)</sup> On the first two sources, not much difference existed except in a few aspects:-

(1) According to certain scholars<sup>(3)</sup>, the Shī'a maintain that the original Qur'ān was partly falsified. They claim that the Uthmānic Qur'ān is not the true Qur'ān as revealed to the prophet, and that many verses and certain Sūrahs which glorified 'Alī and asserted the prominent position of him and his family were omitted by 'Uthmān and that the order of others was altered. Two of the omitted Sūrahs are; The two lights, containing 41 verses and the Al-Walāyah, containing 7 verses.<sup>(4)</sup>

They also maintain that 'Alī possessed the complete and authentic copy of the Qur'ān which is three times longer in text than the 'Uthmānic codex; it also contained explanatory notes compiled on the authority of the prophet. This copy, called Mushaf Fātima, was given by the prophet to his daughter before his death. It was secretly kept by 'Alī and the Imāms after him.

It disappeared with the twelfth Imām on whose reappearance it will be revealed to the believers. (5)

However, the majority of the Shi'i scholars (6) hold that the official version of the Qur'an was identical with the Qur'an as it was collected and composed in the time of the prophet. Finally, the consensus of opinion among most Imāmi Shi'is is that only the order of some of the Surahs as well as the odd verses and not their content was corrupted in the 'Uthmānic codex (7) and that 'Alī and the eleven Imāms are the only ones after the prophet who know the right order. (8a)

(2) In regard to the traditions, the Shi'a differ from the Sunnis in that they accept only those traditions the Isnād of which goes back to an Imām or to an Imām who transmits the traditions from the prophet directly or through his forefathers, all three forms of which are considered to possess equal authority (8b). In other words, according to the Shi'i principles of Usūl al-Fiqh, an authentic tradition attributed to the Imāms is as binding as the direct word of God through the prophet. (9a)

The Sunnis, who do not adhere to the Shi'i theory of the imamate, regard most of these asānid as being clearly unacceptable. From the Sunni point of view, the Shi'a Imāms were ordinary human beings whose reliability as transmitters must be measured by the same stringent yardsticks that apply to

all others. An isnad in which a Shi'i Imam, even when he is accepted as reliable, transmits directly from the prophet without having met him, would be rejected by the Sunnis as Mursal.<sup>(9b)</sup> The only legitimate Shi'i isnad in Sunni eyes is that in which a trustworthy Imam transmits from the prophet through the Imam's forefathers, when these forefathers are also regarded as trustworthy.<sup>(9c)</sup>

It is clear that this difference between Sunnis and Shi'a regarding the isnad springs from their conflicting notions as to the identity of the religious authority after the prophet and also to the attitude of judging the companions of the prophet.<sup>(9d)</sup> A normal Shi'i isnad, in contrast to its Sunni counterpart, would have a companion as an authority in one of two cases only; either when the companion is also an Imam, or when the companion transmits from an Imam.<sup>(9e)</sup>

(3) The disagreement regarding the requirements for holding to the traditions transmitted by a single or a few transmitters (Akhbār al-Wahid). Basically, they both accepted Ahad traditions as valid and considered them as a principal source of law in legal matters.<sup>(10)</sup> The point of difference is that the Shi'a, besides accepting the requirements set by the Sunnis<sup>(11)</sup>, had added that it must be narrated or transmitted by the Shi'i scholars, known as Firqah al-Mutawahir.<sup>(12)</sup> This has

led to several instances of Ikhtilāf, especially in the matter of Furu'. (13)

Meanwhile in understanding and application of the latter two sources; Ijtihād and Ijmā', many disagreement arose between both sides.

## (II) The Concept of Ijtihād

Ijtihād is a familiar term both in Sunni and Shi'i Fiqh, but its meaning and characteristics are different in the contexts of the two. Whereas ijtihād in the Sunni Fiqh means deduction of Ahkām through such means as Ra'y, Qiyās, Istihṣān, Istifāh, etc. (14), the same term in the Shi'i sense means deduction of Ahkām from the sources and through the principles of the Shari'ah. (15)

Therefore, it has come about that Shi'i ijtihād does not involve legislation (Tashrī') of new laws as divine commands regarding emergent issues and events. It confines itself to applying the unchanging general principles to emergent, changing particulars (Tafri'). The Shi'a do not look upon ijtihād as an independent source of Ahkām, but as the means of their identification through a study of the sources of the Shari'ah. (16) The Sunnīs, on the contrary, consider ijtihād as an independent source of legislation parallel to the Qur'an, Sunnah and Ijmā'. (17)

This happened because of the different understanding of the two regarding certain principles, methods and sources in doing ijtihād.

(i) The concept of Ra'y

Literally speaking, Ra'y means opinion and judgement. But the Arabs had used it for the well-considered opinion and skill in affairs. A person having mental perception and sound judgement was known as Dhū'l-Ra'y. The antonym of Dhū'l-Ra'y was Mufannad, a man weak in judgement and unsound in mind. The epithet (Mufannad) is reported to have been applied to men alone and not to a woman, because, according to the Arabs, she had not possessed Ra'y even in her youth, let alone in her old age. (18)

The term was also applied to the views of the Khawārij and they were known as Ahl al-Ra'y. (19) The reason for this appears to be that their views departed from those of Ahl al-Sunnah. From this it follows that Ra'y had the element of exclusive and independent idiosyncratic thinking, which might not be accepted by others.

Macdonald had defined Ra'y as an opinion that is thoughtful, weighed and reasonable as opposed to a hasty dictate of ill-regulated passion. (20)

Meanwhile in terms of Usūl al-Fiqh, several definitions were suggested by the Usūli scholars. Amongst those are :-

(i) It is a means of ijtihād which is not by the mode of Qiyās. (21)

(ii) It is ijtihād based on the Nass which is unclear or lacking in Dalālah. (22)

(ii) It is a way to obtain the Shari'ah norm by means of Istidlāl and Qiyās. But to any arising problem which has a clear rule from the Qur'an, Sunna and Ijmā', it is not known as Ra'y. Therefore, Ra'y is used in contradiction with the Qat'i nass of the Shari'ah. (23)

(iv) It is a detailed or deep observation in legislation problems by referring to the methods of Usūl al-Fiqh and not following Hadīth and Āthar. It is done by looking at the Maslahah and 'illa of the enactment found in the Shari'ah's Nass. (24)

It seems that Ra'y was a generic term representing overall reasoning frequently employed by the early schools of law before Al-Shāfi'i. (25) During its various phases of development, it emerged under different names, like Qisy, Istihāsān, Istīlāh, Istishāb etc. (26)

In the later period, great emphasis was laid on reasoning based on the text (Nass). This movement, though initiated a little earlier (27), was launched vigorously by Al-Shāfi'i, culminating in the emergence of the literalist school of Dawūd and Ibn Hazm. Ra'y was debunked either by trenchant criticism of the traditionists, or by the stereotyped reasoning of the classical jurists. (28) The principle of Qiyās was consequently substituted for Ra'y and became a recognized mode of reasoning.

The hostility of the traditionists<sup>(29)</sup> towards the use of Ra'y and Qiyas led to the striking out of new concepts like Istidlal and Nazar. The former was the Zahiri contribution and the later that of the Mu'tazila and Shi'a. Nazar and 'Aql originated with the speculative theologians and was given a place as one of the Usul of Fiqh by the Mu'tazila and Shi'a.<sup>(30)</sup>

Ra'y in the later ages was divided into three categories, namely void, sound and doubtful. Following the doubtful opinion is allowed only in the case of exigency. Just as eating of forbidden food is permitted in pressing necessity, so resort to doubtful opinion is permitted in a similar situation. Further, a sound opinion, according to the classical jurists, stands for the opinion of the companions, that which explains the text, that which is agreed upon by the community and handed down from the past to the present generation, and that which is based on the Qur'an, or on the Sunnah, or on the opinions of the rightly-guided caliphs, or on the verdicts of the companions, and finally that which were based on individual opinion. Such a type of opinion is termed as Al-Ra'y al-Mahmud.<sup>(31)</sup>

### The Sunni's view

Ra'y's authority is acknowledged by the Sunnis and it can be looked at in two aspects:-

(1) The practice of the method of Ra'y amongst the Sunni jurists in their ijtihād. It is not only limited to the Hanafite and Malikite jurists, but applies also to the Shāfi'ite and Hanbalite jurists. (32)

The best example to show this attitude is a statement ascribed to Al-Shaybānī who belongs to the early legal school; "Whoever is conversant with the Qur'ān and the Sunnah and the opinions of the companions, and what has been approved of by the early Muslim jurists, is allowed to exercise his opinion on legal matters. He may base a decision on his opinion, and follow it in his prayer, fasting and pilgrimage, and in all commands and prohibitions. If he exerts his best effort, deeply reflects, and exercises analogy with parallels, showing no slackness, he is permitted to act upon it (his personal opinion), although he misses the right judgement. (33)

However, the majority of the Sunni jurists tried to restrict the employment of the Ra'y to the qualified jurists. It appears that the attitude of the Sunnis was in general dominated by fears that this latitude would be misused. In this case, two dangers might be anticipated.

First, Ra'y would be employed arbitrarily by caliphs, governors and other administrative officials exercising judicial powers. Very significant in this context is the rejection, in the early years of the Abbasids, of Ibn al-Muqfafa's theory that the caliph alone has the right to exercise Ra'y, and that he may use

it to modify and codify Islamic law. (34)

From the jurists' viewpoint, <sup>al</sup>Ibn/Muqaffa' was offering the worst of two worlds, for he was both withdrawing Ra'y from themselves and allowing it to the chief executive. Thus they rejected it (35), probably they felt that a law based squarely on the Qur'an and Sunnah alone would serve a more vital purpose, by acting as a constitutional check on rulers and preserving Islamic standards in public life.

The other danger came from the side of Shi'ism. If Ra'y were allowed, the opinions of ordinary jurists were fallible. This would make more attractive the idea of a living authority, such as a Shi'i Imām, who could give an infallible opinion.

Al-Ghazālī was acutely aware of this possibility as a threat to the Sunni community and his answer rings out clear in refutations of the Batinite Shi'a: there is no need for a living Imām, the Imām of the Muslims is Muhammad, and all ethical and legal questions can be answered from the Qur'an and Sunah. (36)

(2) The acceptance by the Sunnis of the Ra'y and Fatwa of the prophet's companions. Sunni jurists like Al-Ghazālī, Al-Shatibi, Al-Basri (37) etc considered that Ra'y done by companions, although at variance with the Qur'anic Nass and Sunna, as 'Umar's action in relation to the Kharāj affair (38), is permissible. Furthermore, they said that 'Umar had based the

legislation of Kharāj on the legal principle of discretionary interests (al-Masālih al-Mursalah).

This technical term refers to the general interests and needs of the community concerning which no specific injunction is found in the Qur'ān and Sunnah, but where social conditions indicate the need for such an injunction.<sup>(39)</sup> Concerning this matter, many other reasons were given by the Sunni jurists in order to justify the actions of the companions, described as Bid'ah by the Shi'a.<sup>(40)</sup>

It is also in relation to this base which encouraged the Sunni jurists to regard the companion's Fatwā, especially from the al-Khulafā' al-Rāshidūn, although it may seem to be at variance with the Qur'ānic texts and Sunna<sup>(41)</sup>, as proof and a source of law by itself.<sup>(42)</sup>

Such opinion is based on several degrees.<sup>(43)</sup> First, the Fatwā is produced after hearing it from the prophet. Second, it was produced after getting it from a second person that heard it from the prophet. Third, their excellent knowledge of the Qur'ān. Fourth, it was produced after being agreed by the other companions.<sup>(44)</sup> Fifth, they have good understanding of the language and wide knowledge of the state of affairs during the prophet's time.

Actually, according to the Sunni view, not only were the prophet's directives considered Sunnah (normative conduct), but

the first four caliphs actions and sayings were also incorporated into the Sunnah, at least in part. (45) In a way, their sayings and actions were also considered infallible. However, their infallibility was different both in kind and degree since it did not originate from God as did that of the prophet. The caliphs' infallibility, and thus authority, can be traced back to the prophet. Since they were his companions and disciples, they had not only learnt from him but also followed his path and adapted themselves to his thinking, his feelings and his spirit. They themselves became, and certainly were regarded as, the living embodiments of prophetic Sunnah. (46)

To sum up, according to the Sunnis, if efforts to forbid the application of Ra'y existed, the whole Sunni Fiqh system which is mainly based on the jurists' Ra'y and on the authority of the companions (47) which is also based on Ra'y will be useless. (48)

### The Shi'i's view

In contrast with the Sunnis, the Shi'a strongly opposed the application of Ra'y in ijtihad. (49) Not only that, they deny the claim that the prophet sometimes practised ijtihad by the method of Ra'y, when facing problems unrevealed by God. (50)

They believe that ijtihād by the method of Ra'y may lead to<sup>(51)</sup> :-

(1) A Hukm formulated by a mujtahid exercising Ra'y and subjective opinion being regarded as a Hukm of the Shari'ah,<sup>(52)</sup> each of the individuals who exercise ijtihad by Ra'y, occupies the high station of a divine legislator and lawgiver, whereas it is neither possible nor proper to accept this, because the source of legislation in the light of definite Shar'i dicta, is God alone, and no other being. No Hukm or law except that which is legislated by Him can be given the status of a Shar'i hukm.

Accordingly, when the prophet cannot be considered as the source of the Tashri' of Ahkām,<sup>(53)</sup> it is possible that subjective views and opinions of human individuals with no links with Wahy, and whose character, behaviour and speech are not considered a norm and model for others, will be considered laws of God and they themselves as legislators of the Ahkām of the Shari'ah.

(2) Reliance on ijtihād by Ra'y and subjective judgement is a kind of admission of the shortcoming of the Shari'ah, and is an implicit declaration that the Islamic Shari'ah is incapable of answering emerging issues and new problems, whereas anyone acquainted with the spirit of Islam and its comprehensiveness cannot concede this.

This view cannot be true because the process of legislation concerning all the necessary spheres of human life, either in particular detail or in the form of general laws, was completed during the lifetime of the prophet. There are certain Qur'anic verses<sup>(54)</sup> which clearly declare this fact.

Shi'a scholars also quoted several traditions<sup>(55)</sup>, in order to support this fact. Some of them are:-

(i) Al-Kulayni says: From a number of our companions, From Samā'ah from Imām Mūsā al-Kazīm. Samā'ah said: "I said to him: Is everything in the Book of God and the Sunnah, or have you something to say (in addition)?" He said: No, rather, everything is in the Book of God and the Sunnah of his Apostle."<sup>(56)</sup>

(ii) Also in Usūl al-Kāfi, the following tradition is reported on the authority of Sulayman ibn Hārūn from Imām Ja'far al-Sādiq. There the Imām states:

"God has not created any Halāl or any Haram except that he has determined a boundary for it like the limits and boundaries of a house. That which belongs to the limits of the road is reckoned as the road, and whatever comes within the boundaries of the house is considered as part of the house. (This is true) even of a scratch on the skin, a full lash or half a lash."<sup>(57)</sup>

Besides the rational arguments<sup>(58)</sup>, Shi'i scholars also rejected the employment of Ra'y by the way of the text. They recite many traditions from reliable sources in support of their denial of Ra'y. One of them is a tradition reported from 'Ali ibn Abi Talib:

"When a case relating to one of the Ahkām is put before any one of them he passes judgement on it according to his Ra'y. Afterwards, when the same problem is placed before another of them, he passes a different verdict. Then these judges go to the chief who had appointed them and he confirms all the verdicts, although their God is one, their prophet is one and the same and their scripture is one and the same. Was it God who enjoined them to differ (while laying down the Ahkām), and they obeyed him? Or He forbade them from it and they disobeyed him? Or, did God almighty send his Dīn in a defective and imperfect form and ask for their help and assistance in order to make it perfect? Or, were they His partners and assistants (in performing legislation). So that He has to concede to whatever judgement they pronounce? Or it is that God almighty made his Dīn perfect, but the prophet fell short of communicating it to the people? The fact is that God states in the Qur'ān (we have not neglected anything in the book; 6:38), and in it is (exposition of all things; 16:89), and that one part of the Qur'ān verifies another part and that there is no contradiction in it. And the almighty has said (if it had been from other than God they would

have found therein much incongruity;4:82)."(59)

The Shi'a rejected the Sunni claim that Ra'y done by the companions although differing from the Shari'ah texts is permissible, for it is based on certain Islamic principles such as Masālih al-Mursalah. The reason is, as Al-Murtadā stated, God who knows all interests (Masālih) is the most competent to consider them in His legislation.(60) Therefore, they claimed that the practice of Ra'y by the companions which is at variance with both the Qur'anic norms and the prophet's practice, must be considered as a Bid'ah (innovation) in the divine law and a violation of Islamic principles.(61)

To the Shi'a, the Fatwā of the prophet's companions, in parallel with their views of the companions(62), is regarded as unauthorized. It is only thought to be authorized when it was included with those given by the Imams of Ahl al-Bayt.(63)

The main source of error done by the Sunnis holding to Ra'y, is their refusal to accept the authority, knowledge and teaching of the Imām of Ahl al-Bayt.(64) If the Sunnis accept these authorities, they will not face any difficulties and receive the Hidāyah from God. More important, the teaching of the Imams is not based on Ra'y as claimed by the Sunni scholars(65), but on knowledge and Ilhām from God.(66)

Consequently, the basic difference of viewpoint regarding Ra'y is rooted to the time while the Islamic Ummah had no access to Wahy and had lost the biggest source towards which they looked for the solution of their problems much greater problems cropped up, and this vacuum was felt more acutely than ever before. Two different outlooks emerged in order to confront this difficult situation in the newly-born Islamic society:-

(1) The Shi'a consider that the authority for determining the divine Ahkām and expounding the Qur'ānic meanings belonged to the house of the prophet after him, and that they alone, in accordance with the prophet's express decree, should be referred to for solution of problems and determination of the Ahkām of the Shari'ah. Those who believed in this outlook did not face any insoluble problem in the wake of the cessation of Wahy, as they knew well that their duty was to refer to the Imāms.

(2) The Sunnis believed that there were no specific persons after the prophet to interpret and determine the divine commandments. They maintained that the book and the Sunnah of the prophet were the only sources from which the Ahkām regarding the new legal issues could be derived. But they soon realized that it is not an easy task to extract all the Ahkām of the Shari'ah from express Qur'ānic texts (Nusūs) and the Sunnah of the

prophet, and that they are not adequate to answer many of the new issues.

This led the Sunnis into finding other ways and sources of ijtihād and to put their trust in the practice of Ra'y and to rely on such other sources for basing legal conjectures as Qiyās, Istihsān, Maṣāliḥ Mursalah, etc. (67)

#### (ii) THE CONCEPT OF QIYAS

The original etymological Arabic meaning of the word Qiyās is to measure something with another. (68) It was used in the field of jurisprudence to mean the search for certain indications from the Qur'ān and Sunna leading to the way of judgement through ijtihād in cases not dealt with by either the texts of the Qur'ān or the Sunna. (69)

This is the definition which was given by Al-Ghazālī and by almost all the jurists, with slight differences in terms but with the same meaning. (70)

Al-Juwaynī believed that it was very difficult to give it a precise and satisfactory definition. He said that Qiyās consists of several different elements which are difficult to join in one definition. These elements are: the rule which is eternal (Qadīm), the action for which a particular rule was revealed originally and this is created (Ḥadīth), the branch which is the new case for which a rule is sought, and the

connection between the original action and the new case which is the ground ('illah) of the revealed rule. (71)

### The Sunnī view

The majority of the Sunnī schools (72) had accepted Qiyās as a recognized way for deciding the rules of the Shari'ah and regarded it as the fourth source of Islamic law. The importance of the doctrine of Qiyās with the Sunnīs, can be felt through the historical view, by which is shown that any school or wing of a school who had opposed Qiyās as a principle, will slip outside the orbit of Sunnism. (73)

However, after they had agreed that Qiyās can be a recognized way for deciding the rule of Shari'ah, there exist disagreements among the Sunnī jurists on the question whether Qiyās can be regarded as an independent source or as a way of interpreting the texts of the Qur'ān and the Sunna.

Certain jurists like Al-Ghazālī, Al-Basrī, Al-Juwaynī Al-Sarakhsī (74); supported the second view and considered that the authority of Qiyās is different from the first three sources of law.

While discussing the sources of law, Al-Ghazālī enumerates the first three sources together and calls them Muthmir (that which gives fruit), and deals with Qiyās separately under the category "methods of deriving rules" (Turuq al-istithmār,

lit. methods of seeking fruits). Thus he considers Qiyās as a method of deriving rules of law from the original sources and not a source of law in itself. (75)

Some jurists like Al-Sarakhsi, did not even include Qiyās in the scheme of the four sources of law. He said: "know that the roots (Usūl) about the proofs or evidences of the Shari'ah root is Qiyās, it is the inner reason (Ma'nā) derived from these three roots". (76) Explaining it, some scholars are of opinion that the first three sources are certain (Qat'i) and Qiyās is probable (Zanni). Hence it has been mentioned separately. (77)

Certain jurists like Ibn Amir al-Hajj, Ibn al-Hajib and others (78); supported the first view. According to Ibn Amir al-Hajj, Qiyās is like Ijmā' in respect of being the action of a Mujtahid. Hence nothing prevents it from being regarded as an independent authority, even though Qiyās is dependent upon the similarity of the new case which needs a rule to the case which is provided for in the Qur'ān, Sunna and Ijmā'. (79)

Most of the Sunni jurists had made an effort to justify the authority of Qiyās and also to defend it from attacks by the opponents of Qiyās.

The Muslim jurists consider that any sound basis for the authority of any Islamic principle, such as Qiyās, as a definite institution of Islam, must be found in a text of Islamic scripture. Hence, the need of religious sanction for the use of reason and Qiyās in law was

felt acutely. Therefore, in this case the Sunni jurists had recourse to the Qur'ānic text, Sunna, Ijmā' and also reason.

Al-Ghazālī presented merely three verses as proofs that Allah himself directed people to use Qiyās when there is no text stating a rule for the case under consideration. (80)

At the same time the other jurists produced nearly thirty verses as proofs for Qiyās. (81)

Among the Qur'ānic verses presented by Al-Ghazālī is: "Take a lesson, O you who have eyes." (Q.59:2). This verse came after a story of some people who had been punished because of their disobedience. Al-Rāzī considers this verse as a proof for the legality of Qiyās. Ibn 'Abbās said that "O you who have eyes" means "O you who have minds to think and compare". (82)

Al-Ghazālī said: as we know, there are many cases where rules are not provided in the Qur'ān. Accordingly we have to acknowledge the recognition by the Qur'ān of Qiyās to treat those sorts of cases which are not provided for so that we can understand what is meant by the verse and what Allah meant by the verse and what Allah meant by "did not neglect anything in the Book" (Q.6:38). (83)

Al-Jassās, after quoting verse (Q.16:44), said that this verse contains three different points, namely first, that nothing is obscure in the revelation. Second, that anything not intelligible to the common man will be explained by the prophet and third, that people should reflect upon the cases not covered by the

text. Such cases are to be settled by exercising Qiyās with the textual injunctions on the basis of similarity. (84)

The most fundamental and significant verse cited by the Sunnī jurists to substantiate Qiyās is 59:2. Al-Bazdawī tends to show that muslims are duty-bound to think deeply over the causes and values of injunctions of the Qur'ān. He contends that the Qur'ān mentions a large number of anecdotes from the past history so that people may take lessons from them. They can save themselves from the divine punishment by avoiding such evil deeds as resulted in the sufferings of the past generations. This can be done by reflection upon the historical events mentioned in the Qur'ān. This type of thinking is called I'tibār. From this it follows that I'tibār and Qiyās are identical. The former stands for taking a lesson from a past event and applying it to the corresponding existing situation. Qiyās conveys the same meaning. Here the value is the common factor between the two similar rules of law, as a lesson or warning is a common factor between the two situations in the case of I'tibār. Moreover, both value and lesson will be derived by reflection. The Qur'ān thus indirectly demands the muslim think over the causes and values of the divine injunctions. (85)

The Sunnī jurists in their effort to substantiate Qiyās on the basis of the practice and traditions of the prophet, had divided it into several groups. First, Sunna considered to show that the prophet permitted and agreed to the use of ijtihād and Qiyās. Second, Sunna which show that the prophet had taken decisions on the basis of the similarity of two cases.

In the first group, they disclosed Hadiths such as act in which the prophet accepted the answer given by Mu'ādh ibn Jabal<sup>(86)</sup>, the prophet agreed to the ijtihād done by the companions in the Banī Qurai zāh village<sup>(87)</sup>, the prophet's acknowledgement of the verdict of Sa'ad ibn Mu'ādh regarding the Jews of Banī Qurai zāh<sup>(88)</sup> and the advice of the prophet to Ibn Mas'ūd<sup>(89)</sup> etc.

In the second group, Sunnī jurists showed Hadiths, in which is found the prophet's answer to the man who wanted to do Hajj on behalf of his father who is long dead<sup>(90)</sup>, the prophet's reply to Umar ibn al-Khattāb's conduct when he kissed his wife which fasting<sup>(91)</sup> etc.

To sum up, all of these traditions of the prophet taught the Muslim to exercise Qiyās and to employ individual opinion for deriving rules in the novel situation.<sup>(92)</sup>

The principle of Qiyās has again been justified by the Sunni jurists on the basis of the practice of the companions and their followers (Ṭābi'īn).<sup>(93)</sup> This has been referred to as an Ijmā' of the companions and Muslims of early centuries after the prophet.

Arguing from the practice of the companions, Al-Jassās underlines two points. First, no one among the companions is reported to have rejected the use of Qiyās, nor had any of them ever hesitated to exercise Ra'y or Qiyās in legal matters. It means that they have been familiar with the permissibility of this doctrine by the instruction of the prophet. Second, the consensus of the companions upon the validity of Qiyās is in itself an authority. Dissent from their agreement is not permissible.<sup>(94)</sup>

Apart from the justification of Qiyās on the basis of tradition (Sam'i), Al-Basrī asserts that Qiyās should be obviously followed on the basis of reason ('Aql). In his opinion it is reason that obliges the employment of Qiyās by Muslims in legal reasoning. He said that:

"When we speculate on the cause or value of an injunction by means of a certain legal sign (Amārah shari'ah) and find it exists in another similar object by reason or sense perception, that reason naturally demands that the similar object should be compared analogically with the original textual injunction on the basis of the common cause or value.

As regards permissibility (Jawāz) of the existence of legal signs (Amārah al-Sharī'ah) which indicates the legal cause of the original injunction (it is manifest from the prohibition of drinking). Drinking is evil on account of its intense effect, and it ceases to be evil when it loses its intoxication. This is in fact a sign (Amārah) which requires us to speculate that intoxication should be the cause of its prohibition. And it is already known that intense intoxication exists in the beverage called Nabīdh. We assert that reason demand that Nabīdh should be compared with wine analogically. This is just the same as reason demands that sitting beneath the inclining wall should be bad, because we are aware that the sign of harm (Amārah al-Madarrah) does exist there." (95)

In the second effort, while discussing the doctrine of ijtihād, the Sunni jurists from different juridical schools also tried to refute the criticisms of Qiyās presented by its opponents.

Almost all of the arguments of the opponents based on the Qur'an to refute Qiyās had been criticized by the Sunni jurists. The opponents have put forward a large number of Qur'ānic verses, among them :-

- (1) "We have not neglected anything in the book" (6:38)
- (2) "And we have revealed the book to thee explaining all things, and a guidance and mercy and good news for those who submit" (16:89)

(3)"It is not enough for them that we have revealed to thee the book which is recited to them ?".(29:51)

(4)"He (Shai t̄ān) enjoins on you only evil and indecency, and that you speak against Allāh what you know not."(2:169)

(5)"And pursue not that of which thou hast no knowledge" (17:36).

In the first three verses, Ibn Hazm<sup>(96)</sup>, Al-Tūsī and other Shī'ī jurists<sup>(97)</sup> contend that these verses clearly indicate that the Qur'ān contains an explanation and elucidation of all legal prescriptions. It does not explain all things, but only those things which relate to law. Things which are not legal have been left in their original state, neither legal nor illegal (Mubāh).

By presenting these verses, they also contend that rules of law about all things exist in the Qur'ān. They can be known by connotation, signification and import of the text.<sup>(98)</sup>

To these arguments, the Sunnī jurists like Al-Ghazālī<sup>(99)</sup> reply that the Qur'ān does not discuss the share of inheritance of grandfather, brothers, increase in share (Al-'awl) laws about a woman divorced irrevocably, a woman given option for separation, and a woman to whom one says: "You are unlawful for me". The companions were agreed on searching for laws about these questions. The Qur'ān supports Qiyās by introducing the principle of taking lesson (I'tibār) from a preceding event, or by justifying the Sunna and Ijmā'.

It is already known that Qiyās is valid on the basis of Sunna and Ijmā'. Besides, the opponents consider Qiyās illegal but there is no indication of its illegality in the Qur'ān.

On the last two verses, the opponents argue that the verses of (5:49), (7:3) and (5:47) show that judgement in legal cases should be based on revealed prescriptions. But Qiyās is a judgement not based on revelation and more like conjecture or human opinion. They contend that these three verses indicate that the use of conjecture in law is forbidden. Conjecture does not lead to truth. Therefore, one should not follow an authority which is uncertain. (100)

According to Ibn Qayyim, all the verses presented by the opponents of Qiyās in order to refute its authority, are not relevant, because they refer to literal text, whereas the intended meaning is not like that. (101)

To both of these verses, Al-Ghazālī retorts that a man first imagines and after imagination he gains a certain knowledge, and not a probable one. For instance, the presumption of a judge about the trustworthiness of witnesses, one's estimation of the direction of the Ka'bah for prayer, one's imagination about the equal compensation for game hunted by a pilgrim, and one's determination of legal cause ('illah) of an injunction, all such speculation and probable judgements amount to certain knowledge. The verses offered by the opponents refer to the

conjecture of the unbelievers against conclusive and definite evidences. He remarks that the opponents themselves do exercise conjecture and imagination to refute Qiyās. This shows that they are not sure about its falsity. (102)

Moreover, according to the Sunnī jurists (103), the practice of Qiyās does not mean arbitrary action by the jurists. It was a good effort to understand the meaning of the texts by discovering the legal cause ('illah) of the injunction and by deleting the unnecessary qualities of the injunction. Sometimes it also was ijtihād by the jurists to search out the basis (Manāt) of the rule. (104)

The opponents of Qiyās argued in support of their decision by saying that it is rationally impossible to consider Qiyās as a part of the Shari'ah. The construction of the Shari'ah seems to be based on applying different rules to similar actions and similar rules for different actions. This construction means to accept these rules without establishing Qiyās. (105)

One of the examples presented by them to prove this claim was the situation of a woman who did not fast or pray during the month of Ramadān because of menses. The Shari'ah prescribed she fast what she missed at another time, but need not make up prayer. Fasting and prayer are very similar, and both are prescribed as worship. Nevertheless the Shari'ah distinguished between them and required a woman to fulfil only fasting. (106)

This proves that the construction of the Shari'ah is not always subject to human understanding. Accordingly one must not decide any similarity between a new case and a revealed one. Deciding such similarity requires the knowledge of the real purpose meant by God in prescribing a specific rule, and this is not possible. To avoid attributing to God what He did not mean, Qiyās must be rejected and human reason alone should be used where there is no text judging a case, without making comparison with the texts. (107)

The point that the construction of the Shari'ah is against Qiyās since it was based on at-Ta'abbud, was answered by the different juridical schools. Al-Āmidī said it is not true that the whole construction of Shari'ah was based on at-Ta'abbud. When we meet two similar cases which seem to be judged by the texts on two different rules, or two different cases judged on one rule, we must understand that this similarity or this difference between the two cases is not real. Reason may see similarity or difference between two cases while there may be another attribute not realized by reason which under this similarity or difference. The Shari'ah which was revealed by God considered all the factors and aspects of cases and accordingly rules were revealed. If ever all the aspects and factors of the cases judged by the Shari'ah were disclosed to human reason then it would be realized that the construction of the Shari'ah was not contradictory. (108)

Al-Jassās said that the arguments of the opponents of Qiyās were meaningless. The Sunni jurists did not state that Qiyās could be based on any similarity between two cases whether this similarity is important or unimportant. Qiyās may be established on reasonable and meaningful similarity which has an effect on the existence of the rule. The superficial similarity which is not important is not taken into account. Following this method, one can never find a new case which is similar to two fundamentally different revealed cases. (109)

Al-Qādi 'Abd al-Wahhāb said that the arguments of the opponent of Qiyās had no support from the Shari'ah texts. The example of the menstruant who missed fasting and prayers does not prove that the Shari'ah applied different rules to similar cases with no reason when it prescribed fasting at another time but not the prayers. We should acknowledge that the Shari'ah applied one rule to these two kinds of worship when it ordered the menstruant not to fulfil them during the menstrual period. But when it distinguished between them regarding their refulfilment, a good and convincing reason might have existed and caused the prescribing of different rules. We must not believe that the Shari'ah may prescribe one rule for two different cases, or two rules for two similar cases unless there is a good reason for this. (110)

Al-Qādi Abū-Ya'la and Ibn Qayyim have presented their refutation to the opponent. Abū Ya'la said it is rationally possible to find two different cases with one rule or two similar cases with different rules. This is when the similarity of these cases lies not in themselves. For example, blackness and whiteness are both different from redness. They shared the attribute of being different from this particular colour, and this attribute is not in themselves. But when we consider their attribute in themselves, they are certainly fundamentally different. Establishing Qiyās is always affected by circumstances which affect the attributes of actions which are not in the actions themselves. (111)

Ibn Qayyim considered the example produced by these opponents of Qiyās, and he justified the decision of the Shari'ah. He said that prayers are prescribed through the year five times a day and fasting is prescribed only once a year which is the month of Ramādān. A menstruant who missed prayers during a menstrual cycle will have immediate substitutes every day. But she will not have another prescribed fasting during the same year. Therefore, the Shari'ah required a menstruant to fulfil a missed fast at another time during the same year and not the prayers. (112)

With respect to the other point presented by the opponents of Qiyās which was that Qiyās may lead to giving one new case two

different rules, prescription and prohibition at the same time, this was also refuted by the Sunni jurists. Al-Āmidī said that whenever a new case seems to be similar to two different revealed cases, then we should consider the stronger and clearer similarity. If a jurist could not reach this result then he must choose one rule by his reason alone and apply it. There is no way in the Shari'ah to consider two contradictory rules for one action. (113)

### The Shi'i view

From the historical view, they were groups from different schools and sects which had rejected Qiyās in Islamic law. They based their rejection on different reasons, but agreed on the final result. These groups were the Imāmi Shi'a, some of the Zaydi Shi'a (114), an-Nazzām and his followers from the Mu'tazila (115), and the Zāhiris who were the most severe opponents of Qiyās. (116)

An-Nazzām was said to be the first to reject Qiyās. He was followed then by some of his colleagues from the Mu'tazila such as Ja'far ibn al-Harb (117), Ja'far ibn al-Habash, and Muhammad ibn 'Abd- Allāh al-Iskāfi. (118) These and some others of the Mu'tazila followed an-Nazzām and rejected Qiyās. (119) But in fact an-Nazzām and his colleagues who followed him were first

influenced by Ja'far as-Sādiq (120) and then they themselves became influential among the Shi'a. (121)

However, it became clear that most of the opponents had been influenced by the Shi'a, including an-Nazzām and the Zahiris. (122)

The Shi'a are vehemently opposed to the exercise of Qiyās in legal questions. They also unanimously agreed on its invalidity. (123) They believe that Qiyās is forbidden in their legal system. Prohibition of Qiyās is one of their fundamental principles established by consensus, necessity and constant reports from their early authorities. (124) Moreover, the rejection of Qiyās is rather one of the necessities of the sect (Darūriyāt al-Madhhab). (125)

The rejection of Ra'y and Qiyās by the Shi'a is a symbolic and an important principle in Shi'i jurisprudence (126). As we already discussed in the second chapter, their rejection of Qiyās can be seen from certain aspects:-

(1) Since the beginning, the Shi'a have strongly been opposing both Ra'y and Qiyās. Even till the time the application of ijtihād was acknowledged, its authorization is considered as the liberal view owing to the adoption from the Sunnis; Qiyās is still not accepted.

(2) If any Shi'i scholars tried to practise Qiyās in legal matters, they will be criticised and opposed by the other

scholars. However, explaining it away, some of the Shi'i scholars, like Al-Qummi say that it was dissimulation (Taqiyyah) done by these scholars. By this he means that the Shi'i scholars who validated Qiyās did not sincerely believe in its legitimacy. (127)

The Shi'a, as with any other opponent, tried to follow the same approach as the Sunni, in order to refute the authority of Qiyās. However as far as we are concerned, their main reason for the refutation of Qiyās can be summarised as :-

(i) They had followed the traditions from the Imams which denied the authority of Qiyās in legal matters. (128) Famous in this connection is the tradition about the debate between Ja'far al-Sādiq and Abū Hanīfa regarding fallibility of Qiyās. (129)

(ii) It is contradicted by the concept of conviction and certainty which is held by Shi'a, (130) Qiyās is similar to conjecture used to form the human opinion.

The best example to show this attitude is what has been said by Muhammad Ridā Muzaffar. (131) He said that Shi'is reject Qiyās for it is open to several possibilities. One cannot say for certain that the rule of law applicable to the original case will also apply to the parallel one.

The possibilities are as follows;

(A)First, it is possible that the rule of law of the original case (Asl) is governed in the eyes of God by a cause ('illah) other than the one presumed by the users of Qiyās. It is also possible that the original case has no cause at all in the eyes of God, for the exponents themselves differ in the question of causation of legal injunctions.

(B)Second, it is possible that the cause ('illah) of a rule of law may be compound and not simple, and a jurist may neglect a quality which should be added to it.

(C)Third, it is possible that the user of Qiyās might have added something new to the real cause ('illah) which is actually irrelevant to the rule of the original case.

(D)Fourth, a quality which is treated as the cause of a rule of law may be peculiar to that rule and may not be generalised, while the user of Qiyās regards it as general.

(E)Fifth, it is possible that the cause of the original case is not found at all with all its characteristics to apply to the parallel case. He asks how Qiyās can be valid in the presence of so many possibilities.

This factor also allowed the majority of the Shi'i jurists to think that it is permissible to use the Qiyās Mansūs al-'illah. (132) The reason is that this type of Qiyās is based on (256) Qat'i basis and is not like any other type which is based on zann basis (i.e. presumption). (133)

The Qiyās which is based on the cause clearly mentioned in the text is called Qiyās by the Shi'a. They called it by various names, such as Madlūl or Mantūq al-Kalām (import of speech), Mafhūm al-Muwāfaqah (obvious meaning), Fahwa' l-Khitāb (implied meaning of communication), Zāhir al-'Umūm (self evident generality) and Qiyās al-Awlawiyah (analogy by a stronger reason). The prohibition of hurting parents on the basis of verse 17:23 provides an illustration for this kind of Qiyās in their opinion. (134)

According to Mustafā Jamāl al-Dīn (135), the main reason for the critical attitude taken by Al-Mufīd regarding Qiyās practised by Ibn Junayd, was based on Qiyās Dhann such as Ra'y. Meanwhile al-Qiyās al-Qat'i is agreed upon by this group.

Despite this, their opposition does not mean the rejection of human reasoning in legal matters. For instance, owing to the rejection of Ra'y and Qiyās, they adopted several methods such as the authority of 'Aql and the principles of Al-Uṣūl al-'Amaliyyah. (136)

**(III) THE PRINCIPLE OF TAQLID**

The literal meaning of Taqlid is the act of putting a necklace around the neck.<sup>(137)</sup> As a term in Islamic jurisprudence, it has been given various definitions by the well-known jurists from both sides. All of these definitions contained the same meaning. According to Al-Amidi<sup>(138)</sup>, Al-Shawkani<sup>(139)</sup> and Ibn Humam<sup>(140)</sup>; Taqlid means to follow a jurist or Imam without knowing the wherefore and wherefrom of his Fiqh.

The same definition has been given by Sayyid Muhsin al-Hakim, the practice by one person according to someone else's opinion. He adds that the self obligation to follow a Mujtahid is not Taqlid itself, but is something which usually comes first.<sup>(141)</sup> The same term is also used by Abū al-Qasim al-Khu'i, who has defined it as the dependence in practice by a person on someone else's Fatwā.<sup>(142)</sup>

Basically, considering the nature of Taqlid, both sides agreed on many things:-

First, they divided people into two standards: those who have no ability nor knowledge to do ijtihād, usually known as Muqallid<sup>(143)</sup>, Al-'Ammi<sup>(144)</sup> and Al-Mustafti<sup>(145)</sup>. The others are those who have ability and knowledge which enable them to do ijtihād called Mujtahid.<sup>(146)</sup> Considering the weakness of the former, they are allowed to follow the latter.<sup>(147)</sup>

The reason is practice of religious duties without Taqlīd probably can be false unless it tallies with correct juristic rules or with the legal opinion of the Mujtahid whom people are obliged to imitate. (148)

Second, Taqlīd is concerned only with practical legal judgements connected with the Furū' and not with the Usūl or principles of religion. (149) An exception in this matter had been made by the Hanbalites. They stated that even in the Usūl knowledge can be attained by Taqlīd. They proved it by the situation of many of the companions, who believed in God without knowing or asking for any proof while the prophet was among them and he approved of this. They continued to make their attitude clearer by saying that they agree a person must have some logical proof for believing in God, but not the very complicated proofs described in the dogmatic books. (150)

Third, Taqlīd which is enjoined in Islam does not mean to surrender or submit. It is to open one's eyes and to keep them open to the Fatwā issued by the Mujtahid. (151)

Fourth, it is not compulsion on the Muqallids to attach themselves to any specific school or to a particular Mujtahid. There are certain ways and qualifications by which the Muqallids can choose their own Mujtahid. (152) The Muqallids can follow the opinion of a Mujtahid which is more appealing and convincing to them. (153)

### The disagreement regarding the principle of Taqlid

However, when it comes to certain issues, there existed certain disagreements between both sides.

First, according to the Sunnis, the form of Taqlid al-Shakhsi is restricted to the prophet only and not to anybody else.<sup>(154)</sup> All the Sunni jurists are unanimous that the Taqlid al-Shakhsi cannot be extended to any other Imam, and such attitude may lead to Kufr and Shirk.<sup>(155)</sup> Moreover, the Sunni jurists maintained that any Muqallids who follow their Imam with the conviction that they are infallible and remain steadfast in their exclusive Taqlid at all costs, are people who regard their Imams to be original law-givers, and thus behave like the Jews who used to follow their Ruhban (priests) instead of the Taurah.<sup>(156)</sup>

Whereas according to the Shi'a, besides the prophet, the Taqlid al-Shakhsi can be extended to the twelve Imams. Therefore, in contrast to the Sunnis, they believe Taqlid to the Imams, as to the prophet, is compulsory, and it is considered as one of the fundamental elements of the religion (Uṣūl ad-Dīn).<sup>(157)</sup>

Apparently, the doctrine of Taqlid during the concealment of the twelfth Imam was developed as an extension of the principle of obedience to the Imam during his presence.<sup>(158)</sup> In fact, the principle of obedience to the Imam had greatly assisted in the

preservation of the Shi'a and prevented their absorption into the communities of their opponents. Similarly, the doctrine of Taq̄līd played the same role in integrating the Imāmi Shi'a under the leadership of the Mujtahids and in building them up to a strong and influential community.

Therefore, to a certain extent, the Mujtahid has authority similar to that of the Imām in religious and secular affairs. (159) However, he differs from the Imām in that he does not have a similar position in conveying the teachings of God, he is not Ma'sūm and does not command the same honour and esteem as the Imām. (160)

Second, with regard to the attitude of the Shari'ah towards ijtihād, both sides agreed that ijtihād is prescribed by the Shari'ah on the community (Fard al-Kifāya). (161) Most of them also agreed that he who reaches the standard of Mujtahid must fulfil this duty. He will not be forgiven if he follows another jurist, even if there are some Mujtahids during his time who fulfil all the conditions of ijtihād. He is also asked to exercise it himself as it is not Fard al-Kifāya for those who reach its standard, rather it is Fard al-'Ayn. (162)

However, both sides disagreed on the question of whether ijtihād must be continued in all subsequent ages and must not be stopped, or whether it could be stopped after it has been fulfilled for a certain time.

On this matter, the Sunni jurists were divided into two groups. The first was the Shāfi'ite school and their supporters from the Hanafite and Malikī schools who held that ijtihād can be stopped after it has been fulfilled during a certain period. They claimed that this had actually happened and that the age was without a Mujtahid.<sup>(163)</sup> Moreover, the jurists like Shāh Waliyullāh and Ibn Humām held that Taqlīd al-Madhāhib in the present age has become indispensable and Wājib. It is also forbidden to act by Taqlīd of any other person except the four Imāms.<sup>(164)</sup>

The second group was the Hanbalī school and certain other jurists from the Shāfi'ite school, who stated that ijtihād must be continued at all times. It is not legally possible to be stopped, and it had never stopped. We find the Mujtahid in all ages. There was never an age that was without a Mujtahid.<sup>(165)</sup>

From the attitude which has been taken by the first group, we can conclude that they had looked upon the 'Ilm Usūl al-Fiqh as a way to justify and sometimes explain the static legal decisions which had already been taken by the recognised ancient jurists.<sup>(166)</sup>

The Shi'a on the other hand had strongly opposed the Sunni idea and it is the main argument used by the Shi'i scholars when discussing the Sunni concept of ijtihād.<sup>(167)</sup> In this matter, the Shi'a held two important ideas which are

related to one another and totally different from those held by the Sunnis.

The Shi'a believe that the gate of ijtihād is open at all times<sup>(168)</sup> and that it is quite correct to keep it open.<sup>(169)</sup> Secondly, the Muqallid must imitate only a living (Hayy) Mujtahid.<sup>(170)</sup> However, the Muqallid may continue to practise in accordance with the existing judgement and Fatwā of his Mujtahid after the latter's death. This would be permitted only if there was no living Mujtahid with better knowledge than that of the deceased. In the case of equality of their knowledge, the Muqallid has the choice to decide which one to imitate. It is preferable for him, however, to imitate a living Mujtahid.<sup>(171)</sup> If, from either negligence or laziness, the Muqallid continues to imitate a deceased Mujtahid and does not resort to the most knowledgeable living Mujtahid, his deeds will be regarded as similar to those of a person without Taq̄lid.<sup>(172)</sup>

The main reason for the Shi'a to hold this idea is that it was in accordance with the Shi'a legal theory concerning fallibility of the jurist's ijtihād.<sup>(173)</sup> It means that on part of the doctrine of ethical quality of law, there is a real value belonging to the law. This legal value may be correctly perceived by 'Aql or wrongly identified, or even missed completely. Juristic value, on the whole, is to be found and not

to be made. But 'Aql does not always succeed in finding it. In other words, although 'Aql is authorised, it is not infallible. (174)

Therefore, they hold that because there is always the possibility of finding and perceiving facts which had wrongly been identified or missed by other jurists, the gate of ijtihād must be kept open. They also hold that the juristic decisions taken by the ancient scholars might have been based, as they mostly were, on special circumstances or conditions attached to the tradition. These traditions, therefore, could be of no juristic value for other jurists. The decision might have been reached through misunderstanding of the traditions.

Moreover, the standard of factual authenticity varies with different jurists, i.e. a tradition which is accepted as genuine by one jurist may be categorised as to be rejected by another. Every jurist must have the opportunity of a fresh juristic approach to the law. (175)

Considering this fact had led the Shī'a to recognise and regard 'Ilm al-Uṣūl as the logic of juristic speculation and reasoning. It is the science of making fresh legal decisions and the method to establish fresh legal theories. In fact, it is looked on as the science of the criticism of rules of law. Therefore, their doctrine of ijtihād as a continuing and constant legal system of making law, is closely connected with their concept of 'Ilm Uṣūl al-Fiqh. (176)

**(IV) THE IDEA OF THE PROPHET'S IJTIHĀD**

Basically, they both had agreed that ijtiḥād was practised during the time of the prophet.<sup>(177)</sup> In many cases, the prophet had encouraged his companions to practise ijtiḥād when facing new problems. Scholars of both sides<sup>(178)</sup> had confirmed these matters and had tried to give certain evidences in support of their stand. On the occasion of the battle of Banū Qurayzah, the prophet sent some of his companions to the enemy territory and asked them to delay their 'Asr prayer to arrival at their destination. But it so happened that the time for the prayers came as they were on the way. Therefore, some of the companions said their prayers on the way, arguing that the prophet had not meant to postpone the prayers, while others said their prayers on reaching the destination at nightfall, taking the prophet's command literally. When the incident was reported to the prophet, he kept silent. The companions deemed this to be a tacit approval of the actions of both parties.<sup>(179)</sup>

From this event, several ideas regarding the doctrine of ijtiḥād can be understood. Firstly, ijtiḥād is done by the companions when the time and place do not allow them to meet the prophet. Secondly, any verdict given by the companion's ijtiḥād will be referred to the prophet and he is the only one who can give the final decision in this matter. Third, it implies that people can differ in the form of obedience on the basis of interpretation.

The different approach exists when it comes to the question whether the prophet can do *ijtihād* or not. Almost all the important books on Uṣūl al-Fiqh which contain sections about the discussion of the idea of the prophet's *ijtihād*, generally revolve around two basic points. The first question relates to the theoretical aspect of the idea and discussed the point as to whether or not the prophet might be entitled to carry out *ijtihād*. While the second question relating to the practical side is as to whether or not the prophet actually carried out *ijtihād* and whether it can be proved by any evidence.

### The Sunni view

The Sunni jurists on this issue can be divided into two groups. The first group comprises the numerous jurists who not only accept the idea and possibility of the prophet's *ijtihād* in theory, but consider that there is evidence to prove that such an *ijtihād* had taken place. This point of view was originally attributed to Ahmad ibn Hanbal.<sup>(180)</sup> However, some later writers attributed it to Abū Yūsuf as well.<sup>(181)</sup> Later Hanbalite and most Hanafite jurists have also taken this position.<sup>(182)</sup> Qādī 'Abd al-Jabbār, Abū al-Husayn al-Basrī and some Shafi'ite jurists have also adopted this view<sup>(183)</sup> and if the statement of Al-Qurāfi is to be accepted, then Al-Shāfi'i himself was in agreement with this view.<sup>(184)</sup>

However, the statement of Al-Āmidī indicates that whilst Al-Shāfi'i accepted the idea in theory, he had not reported any evidence in this regard. (185)

The second group comprises those jurists who accept in theory the logical possibility of the prophet's entitlement to do ijtihād. However, they adopt the stance that there is no absolute evidence to prove that the prophet actually practised ijtihād. Therefore, on account of this, some members of this group deny completely the practice of the prophet's ijtihād, while others adopt an uncommitted posture. Al-Ghazālī and Al-Baqillānī have taken this latter position. (186)

To both issues discussed above, the Sunni jurists had given certain evidence in support of their stand. First, the prophet had practised ijtihād by using his own Ra'y and personal wisdom. It is so, because all of the requirements needed in order to be a Mujtahid existed in him. (187) Moreover, any error in the prophet's ijtihād will be corrected by the revelation. (188)

Secondly, in the prophet's ijtihād, he always made consultation with the companions. Therefore, the prophet's consultation with his companions was one of the bases for that ijtihād, through which the prophet's law was shaped and came into existence.

These reasons are as follows:-

(1) It is mentioned in the Qur'ān regarding the prophet and his companions. "Their affairs are settled through mutual consultation".<sup>(189)</sup> The same instruction was given in Sūrat al-'Imrān to the prophet: "consult them in matters".<sup>(190)</sup> In the light of these Qur'ānic verses and from the report of Abū Hurayrah it seems most probable that the prophet used to consult his companions in most important issues.<sup>(191)</sup>

(2) On the rate of Sadaqat al-Najwā, the prophet consulted 'Alī,<sup>(192)</sup> Keeping this in view there seems no reason why he would not have consulted them in purely ijtihād matters.

### The Shi'i view

The Shi'a take a different approach in this matter. They reject the very concept of the prophet's ijtihād. According to them, being the bearer of divine revelation, the prophet is, in every matter guided by and subjected to revelation. There is no need for him to exercise his own ijtihād.<sup>(193)</sup> Moreover, this idea also extended to their Imāms.<sup>(194)</sup>

Beside the Shi'a, this point of view is generally attributed to the Ash'arites. However, among the Mu'tazilites, Abū 'Alī al-Jubbā'i and Abū Hashim al-Jubbā'i can also be included in this group.<sup>(195)</sup> Al-Shawkānī has added the name

of Abū Mansūr al-Maturīdī in the above mentioned group. (196)

The Shi'a who absolutely reject the idea of the prophet's ijtihād in legal matters, give many arguments in support of their stand. Their argumentation is mainly based on the following points:-

(1) Since the prophet had the privilege of being guided by divine revelation, a source of al-'ilm al-Qat'ī (absolutely correct knowledge), the prophet does not need in any case to apply his own reasoning and his own human wisdom through ijtihād, which leads only to al-'ilm al-Zannī (probable knowledge). Nor is it permissible for a person to follow uncertain knowledge when there is the possibility of acquiring certain knowledge. (197)

(2) If the prophet was allowed to carry out ijtihād then he must have applied it in every new case in which nothing had already been revealed and he should not have waited for revelation, but on the contrary there is evidence which shows that he actually waited for Wahy in some cases, and did not express his own opinion or verdict in the matter until a Wahy was revealed. (198) The problem of al-li'ān and Zihār are presented as examples in this regard. (199)

(3) They produced some Qur'ānic verses in support of their view. In this connection a verse of Sūrat al-Najm is cited in which it is stated: "The prophet does not speak from his own wish but this is a Wahy revealed to him". (200) They make this verse general in its application and thus they attempt to claim that every statement uttered by the prophet is Wahy. Thus, since every statement uttered by the prophet is Wahy, no room is left for ijtihād of any kind. (201)

(4) There is no actual report of the prophet's ijtihād.

If the prophet had at any time exercised his own ijtihād, this extraordinary matter must have been related. (202)

(5) To the argument which shows that the prophet had consulted his companions, al-Mufīd (203) indicated that the prophet was not in need of his companion's opinions. All Muslims had agreed that he was the most perfect of those who have a highly qualified opinion. Though the verse asked the prophet to consult his companions, it also added "and when thou hast made up thy mind, put thy trust in God". This means that though the decision arises from consultation, it was in fact, finally determined by the prophet himself and not by his companions. Thus, the prophet's consultation with them was to strengthen his friendship with them and to teach them how to deal with affairs.

Al-Mufid (204), however, gave another possible explanation. God informed the prophet that there were amongst his community some who hid their enmity against him and his religion. This was referred to in several Qur'ānic verses such as: "They swear by God that they belong with you; they are a people that are afraid". (IX:56) Therefore, the aim of the prophet's consultation with his companions may have been to uncover their hidden opinions and the hypocrites consequently would have been made known.

Al-Tūsi (205) quoted the following opinions on the reason behind the prophet's consultation :it was first, mollifying their souls, to strengthen friendship with them and to raise their status. Second, setting an example for them, and to let them believe that in so doing they would not be in an inferior status. Third, both for raising their status and setting an example for them and also for testing them, so that the sincere adviser would be distinguished from the deluding one.

NOTE TO CHAPTER TWO

(1) Schacht, Origins, page 260 and 262.

(2) See note 45, page 45; 'Allāma Hillī, Mabādi', page 240 - 243.

(3) Abū 'l-Ḥasan al-Ash'arī; Maqālāt al-Islamiyyīn, page 47.

Ibn Ḥazm; Al-Fisal fi 'l-milal wa'l-ahwā' wa'n-nihal, Cairo, 1317-1321/1899-1904, IV, page 182. Goldziher; Die Richtungen der islamischen Koranauslegung, Leiden, 1920, page 263 - 309.

(4) *ibid*, page 270.

(5) *ibid*, page 277 -278.

(6) Al-Mufīd; Awā'il al-Maqālāt fi l-Madhāhib al-Mukhtarah, page 54 - 56, Ibn Bābawayhi; Risālat al-I'tiqādāt al-Imamiyya, English transl. by Fyzee, "A Shi'ite creed", London, 1942, page 85.

(7) J. Eliash; "The Shi'ite Qur'an, a reconsideration of Goldziher's interpretation", in Arabica, XVI, no.1, 1969, page 24.

(8a) *ibid*.

(8b) E. Kohlberg; "An usual Shi'i isnad", in Israel oriental studies, Tel Aviv University, V (1975), page 142 - 149.

(9a) 'Allāma Al-Hillī; Mabādi' al-Wusūl ila 'ilm al-Uṣūl, page 202.

(9b) See for examples Ibn Ḥajar al-'Asqalānī; Tahdhīb al-tahdhīb, Haydarabad, 1325 - 1327, v.1X, page 350; Jamāl al-Dīn al-Qāsimī; Qawā'id al-tahdith min funūn mustalah al-hadith, Damascus, 1353, page 111 and 114; J. Robson; Hadith, in E.I.<sup>2</sup>

(9c) The most oft-recurring example is :Ja'far al-Sādiq--  
Muhammad al-Bāqir -- 'Alī Zayn al-'Abidīn -- al-Husayn ibn 'Alī  
(al-Hasan ibn 'Alī) -- 'Alī ibn Abī Tālib -- Muhammad. Such an  
isnād would meet the basic Sunnī requirement that each chain of  
transmitters go back to a companion, in this case 'Alī ibn Abī  
Tālib, on whose authority the tradition is related.

(9d) See page 118 - 124.

(9e) It should be noted, however, that certain companions who are  
considered by the Shi'īs as pro-'Alid sometimes appear in the  
isnād as transmitting directly from the prophet without an  
Imām as intermediary. The assumption is probably that these  
companions were so loyal and close to 'Alī that their words  
carry 'Alī's stamp of approval. Chief among the pro-'Alid  
companions are Salmān al-Fārisī, Abū Dharr al-Ghifārī, Al-Miqdād  
ibn 'Amr, Hudhayfa ibn al-Yamān and 'Ammār ibn Yāsir.

Further information see Muhammad Taqi Hakīm; Al-Uṣūl al-'Āmm li-  
Fiqh al-Maqārīn, page 148 - 189.

(10) 'Allāma al-Hillī, *ibid*, page 203.; Hasan ibn Zainul al-dīn  
al-Āmilī, Ma'ālim al-Dīn fi al-Uṣūl, page 235.

(11) Further information see Muṣṭafa Ibrāhīm al-Zalamī; Asbāb  
ikhtilāf al-Fuqahā' fi al-Ahkām al-Sharī'ah, Baghdad, 1976,  
page 288 - 293, page 311 - 312.

(12) Al-Tūsī; 'Uddāt al-Uṣūl, page 31.; Hasan ibn Zainul al-Dīn,  
*op.cit.*, page 249.

- (13) For example, it was the Ikhtilāf between Sunni and Shi'i regarding the Nikāh al-Mut'ah, see Al-Tūsī, Al-Khilāf, v.ii, page 180.
- (14) Al-Shawkānī, Irshād al-Fuhūl, page 250.
- (15) Muḥammad Ibrāhīm Jannatī; "The beginning of Shi'i Ijtihād", in Tawhid, v.IV, no.1, 1988, page 48 - 64.
- (16) *ibid.*
- (17) Muḥammad Ibrāhīm Jannatī; "The meaning of Ijtihād", in Tawhid, v.V, no.3, 1988, page 197 - 198.
- (18) Ibn Manzūr; Lisān al-'Arab,
- (19) Ibn Sa'd; al-Tabaqāt al-Kubrā, v.V, page 292 - 293.
- (20) D.B. Macdonald; The development of muslim Theology, Jurisprudence and constitutional Theory, Lahore, 1960, page 86.
- (21) Al-Shawkānī; Irshād al-Fuhūl, page 188.
- (22) *ibid.*
- (23) Jalāluddīn 'Abd al-Raḥmān ibn Abū Bakr ibn Muḥammad; Al-Radd 'alā man akhlada ilā al-ard, page 83 - 84.
- (24) Shāh Waliyu Allāh; Hujjattul Allāh, v.1, page 340.
- See also to M.W. Bravman; The spiritual background of early islam, Leiden, 1972, page 177 - 194.
- (25) See page 153 - 154.
- (26) Ahmad Ḥasan; Analogical Reasoning, page 5 - 6.
- (27) See page 159 - 162.
- (28) See page 164.

(29) See page 164.

(30) Qāḍī Nu'mān; Kitāb Ikhtilāf Usūli'l-Madhāhib, introduction by S.T.Lokhandwalla, Simla, 1972, page 129; J.Schacht, Origins, page 128.

(31) Ibn Qayyim; I'lām al-Muwaqqi'in, v.1, page 23.

(32) J.Schacht, Origins, page 120 - 122.

(33) Ibn Qayyim, op.cit., v.1, page 23.

(34) S.D.Goitein; "A turning-point in the history of the muslim state", in Islamic Culture, 23(1949), page 120 - 135.

(35) G.F.Hourani; Reason and tradition in Islamic Ethics, New York, 1985, page 61.

(36) ibid.

(37) Ghazālī; Mustasfā', v.1, page 142, see also his Wajiz, v.11, page 117; Shāṭibī; I'tisām, v.11, page 295 -296; Baṣṣri; Al-Mu'tamad, v.11, page 522.

(38) Abū Yūsuf; Al-Kharāj, page 58.

(39) Ghazālī; Mustasfā', v.1, page 141 - 142; al-Āmidī; Al-Ihkām v.111, page 138 -139; Shawkānī; Irshād al-Fuhūl, page 203, 225 - 226; Shāṭibī; I'tisām, v.11, page 281 - 316.

(40) See note no.61 below.

(41) H.Modarressi; Kharaj in Islamic law, London, 1983, page 78.

(42) Some Hanbali scholars held that a decision taken by one of the al-Khulafā' al-Rāshidūn, and according to one view, also the

Umayyad caliph 'Umar II is a proof and a source of law by itself. See Abū'l-'Abbas al-Harrānī; Al-Musawwada fī Usūl al-Fiqh, page 341.

(43) Ibn Qayyim; op.cit., v.1, page 203 - 227.

(44) H. Modarressi; op.cit., page 84 - 85.

(45) Fazlur Rahman; Islam, New York, 1968, page 78.

(46) ibid.

(47) See page 119 - 121.

(48) B. Dodge; "The Fatimid legal code", in The Muslim World, 50(1960), page 30 - 38, had quoted the Da'a'im al-Islām, ed. A.A.A. Fyze, Cairo, 1951, v.1, page 103ff.

(49) The Shī'i scholars had divided ijtihād into two kinds; one legitimate and the other forbidden, and the ijtihād in the term of Ra'y is considered as forbidden. See Murtadā Mutahhari; "Ijtihād in Imāmiyyah Tradition.", in Tawhid, v.1V, no.1, 1986, page 26 - 28.

(50) See page 268 - 270 below.

(51) Muhammad Ibrāhīm Jannatī; "Ijtihād and the practice of Ra'y", in Tawhid, v.V, no.2, 1988, page 64 - 70.

(52) See page 229 - 230.

(53) Qur'ān 4:53.

(54) Qur'ān 16:89, 6:38, 42:10 and 5:3.

(55) Muhammad Ibrāhīm Jannatī, op.cit., page 65 - 67.

(56) Kulaynī; Usūl al-Kāfi, v.1, page 80.

(57) ibid, v.1, page 77.

- (58) See page 232 - 234 below.
- (59) Majlisi; Bihār al-Anwār, v.11, page 284.
- (60) Murtada; Shafi, page 262.
- (61) Kulayni, op.cit., v.V111, page 60; Majlisi, op.cit., v.V111, page 702; 'Allāma al-Hilli; Kashf al-Haqq, page 136.
- (62) See page 116 - 124.
- (63) Jamāl al-Jurjāni; Sharḥ Tahdhib al-Uṣūl, page 167.
- (64) Muhammad Ibrahim Jannati; "The beginning of Shi'i Ijtihad." page 45 - 48; Murtada Mutahhari; "Ijtihad in Imamiyyah Tradition" page 26 - 28; Qadi al-Nu'man, op.cit., page 6 and 166.
- (65) Abū Zuhrah; Ta'rikh al-Madhāhib al-Islami, v.11, page 583.
- (66) See page 121 - 123.
- (67) Muhammad Ibrahim Jannati; "Ijtihad and the practice of Ra'yu", page 57 - 59.
- (68) Ibn Manẓūr; Lisān al-'Arab, v.8, page 70 - 71.
- (69) Ghazālī; Mustasfa', v.11, page 54.
- (70) Al-Jaṣṣāṣ; Uṣūl al-Jaṣṣāṣ, page 229, 267.; Al-Āmidī, op.cit., v.111, page 262 - 266; al-Baṣrī, op.cit., v.11, page 697, 699, 1031.
- (71) Shawkānī, op.cit., page 174.
- (72) Ibid, page 198; Baṣrī, op.cit., v.11, page 1031.
- (73) See page 169.
- (74) Ghazālī, op.cit., v.1, page 100, 217 - 218ff; Al-Banānī, op.cit, page 338 - 339; Al-Baṣrī, op.cit., v.11, page 713; Al-Sarakhsī; Uṣūl al-Sarakhsī, v.1, page 279.
- (75) Ghazālī, op.cit., v.1, page 6.

- (76) Al-Sarakhsi, op.cit.v.1, page 279.
- (77) Mullā Jiwān; Nūr al-Anwār, Delhi, 1946, page 5 - 6.
- (78) Al-Qāḍī 'Aḍud al-Dīn; Sharḥ Mukhtasar al-Muntahā li Ibn Hajab, Constantinople, 1310, v.11, page 350; Ibn Humām; Kitāb al-Tahrīr, v.111, page 267 - 268.
- (79) ibid.
- (80) Ghazālī, op.cit., v.11, page 64.
- (81) Ibn Ḥazm; Al-Ihkām fi Usūl al-Ahkām, Cairo, 1347, v.7, page 56 - 99.
- (82) Ar-Rāzī; Tafsīr, v.8, page 123.
- (83) Ghazālī, op.cit., v.11, page 63.
- (84) Al-Jaṣṣāṣ; kitāb Usūl al-fiqh, page 247 - 250.
- (85) Al-Bazdawī; Kanz al-Wuṣūl ila 'ilm al-Uṣūl, Karachi, 1966, page 248 - 253.
- (86) Shāfi'i; Al-Umm, v.V11, page 273 - 275.
- (87) Ibn Qayyim, op.cit., v.1, page 203.
- (88) Al-Āmidī, op.cit., v.1V, page 29.
- (89) ibid.
- (90) Ibn Qayyim, op.cit., v.1, page 199; Baṣrī, op.cit., v.1, page 735 - 736.
- (91) Ibn Qayyim, op.cit., page 199; Baṣrī, op.cit., page 737.
- (92) Sarakhsi, op.cit., v.11, page 130.
- (93) Baṣrī, op.cit., v.11, page 726ff.
- (94) Al-Jaṣṣāṣ, op.cit., page 255.

- (95) Baṣrī, op.cit., v.11, page 724 - 725.
- (96) Ibn Ḥazm, op.cit., v.V111, page 9, 21, 15.
- (97) Al-Ṭūsī; 'Uddāt al-Uṣūl, v.11., page 90.
- (98) ibid.
- (99) Ghazālī, op.cit., v.11, page 64.
- (100) Al-Ṭūsī, op.cit., page 90.
- (101) Ibn Qayyim, op.cit., page 222.
- (102) Ghazālī, op.cit., page 64 - 65.
- (103) Aḥmad Ḥasan, op.cit., page 354 - 367.
- (104) ibid.
- (105) Al-Āmidī, op.cit., v.4, page 7 - 8.
- (106) Ibn Qayyim, op.cit., page 62.
- (107) Ghazālī, op.cit., v.11, page 67.
- (108) Al-Āmidī, op.cit., v.4, page 13 - 14.
- (109) Ibn Qayyim, op.cit., page 65 - 66.
- (110) ibid, page 67.
- (111) Ibid, page 66.
- (112) ibid, page 69.
- (113) Al-Āmidī, op.cit., v.4, page 20.
- (114) Al-Ash'arī, Maqālat, page 17, 53, 74; Al-Baghdādī, Uṣūl,  
Page 19 - 20.
- (115) ibid.
- (116) Ibn Ḥazm, Al-Ihkām, v.7, page 55 - 56.

- (117) Albert N. Nader; "Dja'far b. Harb", in EI<sup>2</sup>.
- (118) W. Montgomery Watt; "al-Iskafi, Abu Dja'far Muhammad b. 'Abd Allah", in EI<sup>2</sup>.
- (119) Ghazālī, op.cit., v.11, page 56; Shawkānī, op.cit., page 175.
- (120) Al-Shahrastānī; Al-Milal, v.1, page 54 - 57.
- (121) Ghazālī, op.cit., v.11, page 56.
- (122) Babiker, 'Ali A.M.; The place of reason among the roots of Islamic jurisprudence, Ph.D Thesis, Edinburgh Univ., 1975, page 141 - 142.
- (123) Ibn Shahīd al-Thānī; Ma'ālim al-Usūl, page 402.
- (124) Abū'l-Qāsim al-Qummī; Kitāb al-Qawānim fi'l-Usūl, Tehran, 1304, page 291 - 292.
- (125) Ibn Shahīd al-Thānī, op.cit., page 402.
- (126) Al-Ash'arī, op.cit., page 52.
- (127) Abū'l-Qāsim al-Qummī, op.cit., page 291 - 292.
- (128) See chapter two, note no. 37.
- (129) *ibid.*
- (130) See page 190.
- (131) Muḥammad Riḍā Muẓaffar; Usūl al-Fiqh, Najaf, 1967, v.11, page 188 - 189.
- (132) *ibid.*, v.11, page 402 - 406; Mustafa Jamal al-Din, op.cit., page 440 - 441.
- (133) *ibid.*

- (134) Muḥammad Riḍā Muẓaffar, op.cit., v.111, page 200 - 203.
- (135) Mustafā Jamāl al-Dīn, op.cit., page 443.
- (136) See page 10 - 12, 204 - 205.
- (137) Al-Fairūzabādhi; al-Qāmūs al-Muḥit, v.1, page 330; Muhammad Murtaḍā al-Zabīdī; Tāj al-'Arūs min Jawāhir al-Qāmūs, v.1X, page 69.
- (138) Al-Āmidī, op.cit., v.111, page 166.
- (139) Shawkānī, op.cit., page 265.
- (140) Ibn Humām, op.cit., page 547.
- (141) Muḥsin al-Ḥakīm; Mustamsak al-'Urwā al-Wuthqā, Najaf, 1965 v.1, page 12 - 13; See also his Minhāj al-Ṣāliḥin, Najaf, 1969, v.1, page 3.
- (142) Quoted in al-Khalkhālī; Durūs, v.1, page 35.
- (143) Ghazālī, op.cit., v.1, page 115 - 116.
- (144) al-Khalkhālī, op.cit., page 104, 105, 118; 'Alī Kāshif al-Ghitā'; Al-Nūr al-Sāṭi, v.1, page 170, 171, 173, 174, 176.
- (145) ibid, v.11, page 36.
- (146) See page 23 - 24.
- (147) Ghazālī, op.cit., v.11, page 121 - 124; Muḥsin al-Ḥakīm, Minhāj, v.1, page 3; Mustamsak, v.1, page 10; Khalkhālī, op.cit., v.1, page 34, 103.
- (148) Al-Yazdī; Al-'Urwā al-Wuthqā, page 3; Al-Āmidī, op.cit., v.111, page 166.
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- (150) Al-Shawkānī, op.cit., page 234 - 236.

- (151) Al-Yazdi, op.cit., page 5; Mutahhari; "Ijtihad in the Imamiyyah tradition", page 35 - 37; Shāh Waliyū allāh; al-'Iqd al-Jid, page 36.
- (152) Ibn 'Abidin, op.cit., v.1, page 45; al-Khalkhālī, op.cit., v.1, page 74; al-Hakim, Mustamsak, v.1, page 25 - 28; Kāshif al-Ghitā', op.cit., v.11, page 432, 503.
- (153) Muḥammad Taqī al-Hakim, Al-Uṣūl, page 659; al-Yazdi, op.cit. page 4.
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- (156) ibid, page 44; Syed Moinuddin Qadri; "Tradition of Taqlid and Talfiq", in Islamic Culture, v.LVI1(1983), page 45 - 47.
- (157) See page 135 - 136.
- (158) Hamid Algar; "The oppositional role of the ulama in twentieth century Iran." in Scholars, Saints and Sufis, page 235.
- (159) Kāshif al-Ghitā'; al-Nūr al-Satī', v.1, page 341.
- (160) ibid, page 341 - 342.
- (161) Zanjānī; 'Aqā'id al-Imāmiyyah, v.1, page 113; Shawkānī, op.cit., page 220; Shahrastānī, op.cit., v.1, page 205.
- (162) Zanjānī, op.cit., page 113; Ghazālī, op.cit., v.11, page 121.
- (163) Shawkānī, op.cit., page 223.
- (164) Shāh Waliyū Allāh, al-'Iqd al-Jid, page 38; Ibn Humām, op.cit., page 552.
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- (166) W.Hallaq; "Considerations on the function and character of sunni legal theory", in JAOS, 104(1984), page 681 - 683.
- (167) For examples see Mutahhari; "Ijtihad in Imamiyyah tradition", and Muhammad Ibrahim Jannati, op.cit.
- (168) Kāshif al-Ghiṭā'; Shi'ah wa usūluhā, page 115.
- (169) Muḥammad Taqī al-Ḥakīm, op.cit., page 605.
- (170) al-Yazdī, op.cit., page 4; al-Ḥakīm, Minhāj, v.1, page 3, Mustamsak, v.1, page 21 - 23; al-Khalkhālī, op.cit., v.1, page 42.
- (171) ibid, v.1, page 56 - 57; al-Ḥakīm, Minhāj, v.1, page 3, Mustamsak, v.1, page 13 - 21
- (172) Kāshif al-Ghiṭā', al-Nūr al-Sāṭi', v.11, page 532 - 536; al-Yazdī, op.cit., page 5.
- (173) 'Allāma al-Hillī, op.cit., page 244 - 245.
- (174) Ezzati; An introduction to Shi'i islamic law and jurisprudence, page 99 - 100.
- (175) ibid, page 74 - 75.
- (176) ibid.
- (177) Al-Āmidī, op.cit., v.111, page 145; Kāshif al-Ghiṭā'; Shi'ah wa Usūluhā, page 114; Mūsawī; al-Naṣṣ wal al-Ijtihād, page 71.
- (178) Al-Āmidī, op.cit., v.111, page 145.
- (179) Ibn Sa'd, op.cit., v.11, page 76; Ibn Ḥazm, op.cit., v.V, page 72f.
- (180) Amir Badshāh; Taysir al-Tahrir, v.1V, page 183.
- (181) Al-Qurāfi; Sharḥ Tanqih al-Fusūl, page 436.

- (182) Al-Sarakhsī, op.cit., v.11, page 94 - 95.;
- (183) Al-Āmidī, op.cit., v.111, page 140.
- (184) Al-Qurāfi, op.cit., page 436.
- (185) Al-Āmidī, op.cit., page 140.
- (186) Ghazālī, op.cit., v.11, page 357; Shawkānī, op.cit., page 238 - 240.
- (187) Lajnah al-Ijtihād wa al-Tajdid, Tunisia, n.d., page 17.
- (188) Abū Zuhrah, op.cit., v.11, page 9.
- (189) Qur'an 42:38.
- (190) Qur'an 3:159.
- (191) Shāfi'ī, Al-Umm, v.V11, page 95.
- (192) Ibn Jarīr; Jāmi' al-Bayān 'an Ta'wil 'Ayi al-Qur'an, Cairo, 1968, v.XXV111, page 21.
- (193) Muḥaqqiq; Ma'ārij al-Uṣūl, page 118; 'Allāma al-Hillī, Mabādi' al-Wuṣūl, page 240.
- (194) ibid, page 241.
- (195) Bihārī, Muḥibb Allāh; Musallam al-Thubūt, v.11, page 366.
- (196) Al-Āmidī, op.cit., v.111, page 140.
- (197) 'Allāma al-Hillī, op.cit., page 240.
- (198) ibid.
- (199) ibid.

(200) Qur'ān 53:3.

(201) 'Allāma al-Hillī, op.cit., page 240.

(202) ibid, page 241.

(203) Al-Mufīd; Al-Fuṣūl al-Mukhtāra min al-'uyūn wa'l-Mahāsin,

Najaf, n.d., page 12 - 13.

(204) ibid, page 13.

(205) Al-Tūsī; Tibyān fī Tafsīr al-Qur'ān, v.111, page 32.

CHAPTER IV : THE CONCEPT OF IJMA'

- (I) THE DEFINITION OF IJMA'.
- (II) THE ORIGIN AND BACKGROUND OF IJMA'.
- (III) THE NATURE OF IJMA'.
- (IV) THE FUNCTION AND VALUE OF IJMA'.
- (V) THE BASIS AND AUTHORITY OF IJMA'.
- (VI) THE IDENTIFICATION OF IJMA'.

Besides the differences discussed in the previous chapter, the main reason why there existed the disagreement between both sides on the principle of *ijtihād*, was their different approach to and understanding of the third source of Islamic jurisprudence. In the debate between both sides on the problems of usūl al-fiqh, they usually used arguments based on the Ijmā'.

For example, al-Tūsī when rejecting the prohibition of the nikah mut'ah as has been claimed by the Sunnis<sup>(1)</sup>, used as his argument the Ijmā' of the Shi'i community.<sup>(2)</sup> The same approach would also be taken by the Sunnis. They tried to justify the validity of the acts of the first three caliphs which however were rejected by the Shi'is<sup>(3)</sup>, who preferred their own Ijmā'.<sup>(4)</sup>

Therefore, in order to discover the main causes of the disagreement between both sides regarding the doctrine of Ijmā', we must discuss it in more detail. In this chapter we will look at the important aspects of this Ijmā', such as the nature, the function and the value, the basis and authority, and also the way to decide the Ijmā'.

**(I) THE DEFINITION OF IJMA'**

Literally, the word Ijmā' is derived from Jam', which means gathering together. However, it has several different meanings. Firstly, it means "determination".<sup>(5)</sup> For instance, when people say: "the group has decided to do the work", or as the Qur'ān says: "so decide upon your course of action and gather your associates"<sup>(6)</sup>, or as in the Hadīth: "There will not be fasting for those who do not intend fasting from the night".<sup>(7)</sup>

Secondly, it also means an "agreement"<sup>(8)</sup>, as for instance when people say: "They have decided like this.....", which means that they have reached an agreement on it. In this sense the agreement would be general, for it could apply to any kind of agreement on either religious or worldly affairs, and it could also apply to everyone, even to unbelievers. Both meanings, i.e. determination and agreement, could however be confused with each other, for an agreement requires also determination (intention) for its performance. The only difference is that the former is applicable even to one person, whereas the latter can be applied only to several of them.

Meanwhile in terms of usūl al-fiqh, it is very difficult to give it a precise and satisfactory definition. The reason is :-

(1) At the early stage, they both disagreed as to the suitable definition to be given to the Ijmā'. In this case, what has been said by Goldziher is true. He remarks that the scope of Ijmā' is extensive and cannot be strictly defined and limited. The jurists have given, he continues, many definitions of Ijmā'; but total Ijmā', especially in respect of dogmatic issues, is difficult, without difference of opinion, because about a certain point what is held by one group is not held by the other. (9)

Therefore, in this section, we will discuss only the definition of Ijmā' in its technical meaning using the Sunnī point of view. Furthermore, in this concept, as the result of the adoption of the Sunnī principle, the Shi'ī jurists in certain places had theorized it like the Sunnis. (10)

(2) The definition of Ijmā' which occurs in the classical usūl al-fiqh was the product of a relatively late period. It occurs comprehensively only from the time of Ghazālī onward. (11) Once finally formulated, the classical concept of Ijmā' was conceded by almost all the later schools of law. (12)

For the technical meaning, the jurists had given their definition which is so highly developed that every phrase of it bears upon a definite point in regard to the constituent elements of the theory. It consists of five important and vital phrases:-

(1) "The agreement of all competent jurists or the 'ahl al-hall wa'l-'aqd'. (13) is required as constituting Ijmā' as defined.

It can be seen that neither the agreement of the community at large, nor that of the scholars of only one province or school is in view. (14)

While, considering the eligibility for Ijmā', people have been classified into three groups, namely, the experts in law (mujtahidūn), an ambiguous intermediary level (awsāt mutashābihah) and the persons not legally responsible (al-'awāmm ghayr al-mukallafīn). Only the first group are eligible for Ijmā', whereas the other two groups are not competent to participate in Ijmā'. (15)

(2) "Among the followers of Muhammad".

This makes it a prerequisite that the competent jurists whose view is to be taken into consideration in the formation of the Ijmā' must be Muslim. If somebody asks, why should a non-Muslim scholar with the same expert knowledge of law and jurisprudence be debarred from having any decisive or even secondary view

in the formation of Ijmā', the classical Muslim jurists answer : "Because he is not a Mujtahid, since the state of being a Muslim in faith is one of the necessary requirements before anyone can qualify as a Mujtahid." (16)

Therefore, the fact none the less remains that the non-Muslims are basically excluded from such juristic deliberations, and that the classical theory supports this by the consideration that the specific power to constitute Ijmā' is vested by the texts in the Muslim alone, since the non-Muslims, being misguided as to the very authority of the lawgiver, cannot be expected to arrive at the right decision in matters of religion and law. (17)

(3) "In any particular age".

It is intended to rebut the Zāhirite concept that Ijmā' was confined to the companions of the prophet, and that the Ijmā' of all subsequent generations was devoid of authority. (18)

The majority of the Muslim jurists which recognize the validity of Ijmā' in every generation contend that the purpose of Ijmā' is to protect the teaching of the Shari'ah from error. This is based on the idea that the community exists par excellence by virtue of its quality of commanding what is good and forbidding what is evil. This can be done by those who exist in every generation and not solely by those who have passed away. (19)

(4) "After the death of the prophet".

This phrase is intended to press the idea that Ijmā' was never put into practice as a source of law during the lifetime of the prophet, and that its authority as such was first recognised after he breathed his last. (20)

(5) "On a religio-legal (shar'i) question" (21) or "On any point whatsoever". (22)

This phrase tries to explain the subject matter of Ijmā'. Most of the Sunni jurists maintained that all the questions relating to the Shari'ah, except dogmatics (I'tiqādiyāt) are covered by Ijmā'.

According to Al-Basri (23) and Al-Shirazi (24), questions such as the creation of the universe, knowledge of its creator, His attributes and the question of prophethood do not fall within the scope of Ijmā'. This is because they take precedence over the knowledge of Shari'ah. Further, Ijmā' is a legal authority (dalil shar'i) established on the basis of oral proofs. It is not valid to establish on the basis of Ijmā' a point whose knowledge takes precedence over the Ijmā' itself, as the truth of the Qur'an cannot be proved by the Sunnah because the Qur'an precedes the Sunnah.

Al-Isnawī observes that the phrase "the agreement on any point whatsoever" which occurs in the definition of Ijmā', comprehends legal questions, lexicographical questions (lughawiyāt) and rational questions ('aqliyat). It is not restricted to the religious questions alone, but also extensible to the non-religious affairs too. (25)

## (II) THE ORIGIN AND BACKGROUND OF IJMĀ'

In accordance with the Muslim belief that the entire religion is taken only from God and then from the language of the prophet<sup>(26)</sup>, they also claim that the doctrine of Ijmā' was founded on definite injunctions in the Qur'ān and Sunnah - that it is Islamic in origin, root and branch. (27)

Moreover, they tried to deny the statement that the Muslim concept of Ijmā' had come into existence because of foreign influence and had been adopted by the Muslim scholars. (28) There are, indeed, specific verses of the Qur'ān and a number of formal traditions, which will be discussed in the next section, quoted in this respect and alleged to be the basic authorities of the doctrine of Ijmā'.

However, recent research which is concerned with the study of the pre-classical history of Islamic law and legal science, produced results which often differ from those of the classical authors, (29) especially about the impact of foreign elements on the Islamic law. (30)

The modern western scholarship has shown that there are two basic elements which are important to know while studying the origin of Ijma' :-

(1)The Sunnah and the consensus of the tribe or the community (al-Amr al-mujtama' 'alayh) in the Jahiliyya ,which constituted the law for the community.(31)

With the growth of Islam,the ancient notion of Sunnah came to be associated with a new notion,i.e. the Sunnah of the prophet.This is not to say that the Prophetic Sunnah existed alongside a non-Prophetic Sunnah.Rather,the Prophetic Sunnah was created by what J.Schacht<sup>(32)</sup> termed "the living tradition",the Sunnah as fixed by the consensus of one particular living generation.Thus the community,by associating its living Sunnah with the Sunnah of the prophet,granted itself the prerogative of determining the Divine Sunnah,which was soon to become the most substantive source of law.

(2)The Roman concept of consensus.

In this case,J.Schacht said :

"The idea of the general consensus of the community is so natural that the question of foreign influence does not arise.But things are different for the highly organized concept of the consensus of the scholars,which consists in the considered opinion of their majority and expresses the living

tradition of their school. This concept corresponds to the opinio prudentium of Roman law, the authority of which was stated by the Emperor Severus in the following terms: "In ambiguitatibus quae ex legibus proficiscunt, consuetudinem aut rerum perpetuo similiter iudicatarum auctoritatem vim legis obtinere debere". Goldziher has suggested an influence of Roman on Muhammadan law in this case. This concept may well have been transmitted to the Arabs by the schools of rhetoric." (33)

That long before the rise of Islam, consensus was regarded as a source of Roman law as can be attested in the Institutes of Gaius, who wrote at about the year 161 A.D., in the following terms: "The responsa of jurists are the decisions and opinions of persons authorized to lay down the law. If they are unanimous, their decision has the force of law; if they disagree, the judge may follow whichever opinion he chooses, as is ruled by a rescript of the late Emperor Hadrian." (34)

The same thing occurs in Justinian's Institutes, where mention is made of "the responsa of men learned in the law" as the sixth source of the written Roman law, (35) and where this is further elucidated in another passage which reads: "The answers of men learned in the law (responsa prudentium) are the decisions and opinions of those who were authorised to state the law. For in ancient times there were men charged with the function of public interpretation of the laws, on whom the Emperor had conferred the right of giving responses

(jus respondendi). They were called jurisconsults. The decisions and opinions of them all had so much authority that the judge was not allowed to depart from their responses, as was ordained by imperial constitutions." (36)

Following the conquests of Iraq, Syria and Persia in the early twenties of the first century of Hijra, the Arabs had close social and intellectual contact with the Hellenistic and Roman-Byzantine culture and learning<sup>(37)</sup>. Therefore, indirectly certain elements of these foreign source, especially on legal matters may have been borrowed and adopted by the Muslim scholars. The best example in this case are the concepts of Ijmā', Qiyās<sup>(38)</sup> and others.

This view of the matter is further borne out by certain other relevant data. In the first place, it is pointed out that the authentic material available on the doctrine of Ijmā' dates back to no earlier than the inception of the second century of the Hijra. Secondly, there is a statement by Al-Shāfi'ī, asserting that consensus as used by the ancient schools of law had never been known to the the companions of the prophet or their successors, and that it was the innovation of later generations, that is the ancient schools of law.<sup>(39)</sup> One should therefore conclude that the concept of Ijmā' must have come from some other source, such as the ancient Roman consensus rather than those generally supposed to have been the bases of doctrine in the Islamic legal system

As has been said above, the theory of Ijmā' which occurs in the classical 'ilm usūl al-Fiqh' was the product of a relatively late period. It was formulated in the interval between Al-Shāfi'i's death and the middle of the fourth century of the Hijra. The period in which this theory was formulated lies towards the middle of the 'Abbasid age," which from the accession of al-Saffāh in 749 A.D. to the destruction of Baghdad by the Mongols in 1258 A.D. makes a round sum of five centuries"<sup>(40)</sup>; the percolation into Islamic society of Greek philosophy and logic, which had begun in early 'Abbasid days, became by that time complete, and the whole literature of Islamic theology and legal science was already under the full impact of the Hellenistic technical thought and logic<sup>(41)</sup>. It is thus that the classical authors indulge in such logical forms of argumentation as had scarcely been used by the jurists of the early formative period, and that they epitomise the theory of consensus by couching it in the single formalistic definition.

In the earliest period, before it had come to develop into such a comprehensive one, Ijmā' has been taken and used differently from one jurist to another. Among them :-

(1) The Iraqi theory of Ijmā'.

Based on some writings that have reached us, the ancient school of Iraq used three different kinds or forms of

Ijmā', namely: the Ijmā' of the community, the Ijmā' of the scholars of the school and the Ijmā' of the scholars of all countries.

The first kind, consists in popular and administrative practice. This is evident from the relevant terminology of the ancient Iraqis; "mā lam yazal 'alaih al-nās", (that to which people are accustomed); and "Alladhī 'alaihi 'l-jamā'atu wa 'l-'amalu lā ikhtilāfa fih", (that on which the community and the practice are in accord, and on which there is no disagreement). (42)

As for the Ijmā' of the school, the relevant Iraqi terminology embraces the following phrases; "Fa hādihā 'l-mujtama'u 'alaihi min qawli man adrakna min 'ulamā' inā" (This is the generally agreed opinion of our scholars whom we have met) (43), "Wa 'alaihi adraktu fuqahā'anā, wa huwa 'l-mujtama'u 'alaihi 'indanā" (This is what I have seen our jurists hold and what is agreed on among us.) (44), "Wa ajma'a ashābunā" (Our scholars have agreed.) (45). Therefore, it is evident that their doctrine of Ijmā' was strictly provincial in character and that it consisted in such legal precepts and opinions as had been commonly accepted by Iraqi jurists and had become the traditional doctrines of the school by the time of Abū Hanīfa. (46)

The most important fact about the third type of Ijmā' is that it is not provincial in character, but extends in theory to all countries, that is to say, it consists in the agreed legal opinions of all competent Muslim jurists irrespective of their geographical locality. (47)

Having criticised both the Medinese and Al-Awza'i, and assimilated their considerations based on the popular and administrative practice, Abū Yusuf then states that this sort of legal argument is unacceptable and that law cannot be taken from the ignorant populace (48); and he reiterates this principle in another and more detailed passage which reads: "One does not decide a question of allowed and forbidden, by simply asserting that people always did it. Most of what people always did is not allowed and ought not to be done. There are cases which I could mention, .. where the great mass (al-'amma) acts against a prohibition of the prophet. In these questions one has to follow the Sunnah which has come down to us from the prophet and the forebears, his companions and the Fuqahā'. (49)

(2) The Medinese theory of Ijmā'.

In fact, recent research in the field of Islamic jurisprudence shows the Medinese legal doctrine to have been largely dependent on that of the Iraqis. (50) Therefore, in the case of the doctrine of Ijmā', their attitude is no less than what had been held by the Iraqis.

The Medinese take the practice ('amal) of Medina as one of the strongest sources of law. It appears that they refer to three types of Ijmā', namely :-

(i) The Ijmā' of the community of Medina.

The ancient school of Medina considered the Medinese practice or al-Sunnah, as far more authoritative than those formal traditions which the Medinese scholars themselves narrated and projected back to the prophet. (51)

(ii) The Ijmā' of the Medinese school.

There are certain terms which designate the Ijmā' of the Medinese school, such as "dhalika 'l-ladhi 'alaihi ahlu 'l-'ilmi bibalādinā" (That is what the scholars of our country hold) (52), "Wa 'alā dhalikā adraktu ahla 'l-'ilmi bibalādinā" (That is what I have found the scholars of our country hold) (53) and "'alā hadha adraktu man arḍā min ahli 'l-'ilm" (This is what I have seen those scholars hold whom I recognise). (54)

It is abundantly clear from these terms, as with the Iraqis, that the Medinese Ijmā' of scholars consisted in those legal precepts and opinions that had been generally accepted by Medinese scholars and had become the traditional doctrines of the school by the time of Malik.

(iii)The Ijmā' of the political authorities of the Medinese.

In many places we find Malik say:"The authorities ( a'immah) agreed on so-and so in the past and in the present (Fi' l-qadim wa'l-hadith). "We do not know for certain what he means by qadim and hadith. Qadim might refer to the practice of the first four caliphs and the companions, but it may also refer to the later governors.(55) We also find numerous cases(56) where Malik argues on the basis of the agreed decision of the political authorities.

(3)Al-Shafi'i's theory of Ijmā'.

Al-Shafi'i distinguishes between two types of Ijmā'. The first is the Ijmā' of the community and the second that of the 'ulama', the legal specialists. The Ijmā' of the community is again divided into two types. The first is that which is based on the Qur'an and Sunnah, transmitted "from the generality to the generality", and the second is not based on revelation(57), and serves as a working Ijmā' (mufid lil-'amal) which does not lead to certainty. The Ijmā' of the 'ulama' stands on an even lower level because it has the force of a solitary tradition (khabar al-khassa), which cannot lead to certain knowledge.(58)

Al-Shafi'i does not consider the second type of Ijmā' as authoritative. Only the first type, which is reached on the basis of the Qur'an and a Sunnah transmitted by the generality of Muslims, can yield certain knowledge of law decreed by God.

He asserted that it is impossible that the community should agree on something contrary to the words of the prophet and to the injunctions of the Qur'ān.<sup>(59)</sup> He went as far as to say that "the generality (of Muslims) cannot agree on an error,<sup>(60)</sup> thus anticipating the later Prophetic tradition "My community does not agree on error."

However, when the classical theory of Ijmā' was formulated, it was based, not on Al-Shāfi'i's doctrine of Ijmā', but on the non-provincial concept of the Ijmā' of scholars that prevailed in the ancient school of Iraq. Once finally formulated, the classical legal theory was conceded by almost all the later schools of law.

**(III) THE NATURE OF IJMA'**

As far as we can find, there are more similarities than disagreements between both sides regarding the nature of Ijma'. Among them are:-

(1) They both agreed in regarding Ijma' as one of the sources of law, and frequently refer to it. (61)

(2) They both agreed that the status of Ijma' is as an independent source of substantive law but subordinate to the Qur'an and the Sunnah. (62)

(3) They both agreed that the Mujtahids were the principal elements participating in Ijma' and held a monopoly of exegetical technique. (63) Therefore, the Mujtahids in that they preserved, interpreted and declared the law, are similar to the place of the prophet or they were Warathat al-Anbiya'. (64)

(4) They both had presented themselves as generally subject to an authority whose origins were external to the revelation.

Recognition of Ijma' as a further source of law may however mitigate that presentation. It is possible that the concept of Ijma' was used to assert overtly the authority of the community over part at least of the making and changing of the law. (65).

However, when they came to certain points of view regarding the nature of Ijmā', the major disagreement occurred:-

First, we pointed before to the Sunnis definition of Ijmā', they consider that the first and foremost condition for competence for Ijmā' is Islam. The assent or dissent of a non-Muslim is not taken into consideration in Ijmā'.<sup>(66)</sup> Furthermore according to the Sunnis, the extremists among the Muslims like Qadariyyah, Khawārij, Rawāfiḍ and Zahiri are also not eligible for Ijmā'.<sup>(67)</sup>

The best example in this case is what was happened to the Zahiris. The fourth and fifth century Ikhtilāf works, which dealt with differences on legal matters, excluded as a matter of principle the tenets of the Zahiris from consideration in determining the Ijmā'.<sup>(68)</sup>

The same approach has been taken by the Shi'is. They accepted their own community which is regarded as Mutawātirin as the important part in consideration for the formation of Ijmā'.<sup>(69)</sup> The opinions of non-Shi'is, those who opposed the Shi'i Usūl al-dīn, are not relevant to the assessment of Ijmā'.<sup>(70)</sup> The negative implications of that belief were as important as the positive ones: Sunni Ijmā' was not valid and by implication real knowledge ('Ilm) was restricted to the Shi'i sect. Furthermore, of Shi'is, it was only those who

were learned in Usūl and Furu' whose opinions were to be considered.

The 'Ammī and the Muqallid were excluded on the ground that the Imām, wherever he was, was bound to be an 'alim. Therefore, the elaboration of the theory of Ijmā' reflected and confirmed the authority of the Shi'i community and especially the clerical class within the Shi'i community. (71)

Secondly, according to Sunnī views, Ijmā' is the unanimous agreement of the community or of the scholars. If the whole community or all competent scholars agree upon a certain point, this would constitute Ijmā'. But the disagreement of a single competent scholar will invalidate the Ijmā'. (72)

Whereas according to the Shi'is, when Ijmā', through the discovery of the opinion of the infallible Imām, becomes an authoritative source of law, it is not necessary to attain the agreement of all the jurists without exception, as maintained by the Sunnis. It is sufficient that all those searching for the opinion of the Imām should concur in that the opinion revealed is that of the Imām, regardless of their number. The important thing is that their agreement can be rendered reliable only through the discovery of the opinion of the Imām.

In this matter, Al-Muhaqqiq after mentioning the condition for the Ijmā' regarding the inclusion of the infallible Imām's opinion, in order for it to become authoritative, says: "If one hundred of our jurists reached an opinion which was far from the opinion of the infallible Imām, then such an opinion has no evidential value. On the other hand, if such an opinion were arrived at by even two jurists, then their opinion is authoritative." (73)

#### (IV) THE FUNCTION AND VALUE OF THE IJMĀ'

Compared to the above area, this discussion has been marked as the most important one, as far as the disagreement between Sunnīs and Shī'īs was concerned.

According to the Sunnīs, the major function of Ijmā' is to unite the divergent opinions on a problem progressively and to ascertain the truth of a Qiyās. (74)

Since finding the 'illah in the process of Qiyās entails a certain amount of guesswork (Zann) on the part of the jurist and since it is highly probable that the 'illah is extracted from a text which is not entirely evident or a text capable of more than one interpretation, Sunnī jurists deemed the results of Qiyās to be probable (Zanni). It is only at this point that Ijmā' may enter into play in the legal process. Should

Muslims, represented by their jurists, reach an agreement on the validity of a Zanni legal judgement, such judgement is automatically transferred from the domain of juristic speculation to that of certainty (Qat'i). Ijma' then renders this judgement irrevocable, not to be challenged or reinterpreted by later generations. (75) Furthermore, this judgement being so irrevocable, acquires a validity tantamount to that of the Qur'an and the highly reliable traditions embodied in the Sunnah of the prophet. Thus, such a case with its established judgement becomes a precedent according to which another new legal question may be solved. It is only in this sense that Ijma' functions as a source of law, a source which is infallible. (76)

Whereas to the Shi'is, Ijma' is not an independent source equivalent to the Qur'an and the Sunnah. In fact, Ijma' is regarded as the process of discovering the Sunnah, which is the opinion of the infallible Imam. Consequently, Ijma' in itself is neither an authoritative nor an infallible source of law. In reality, the opinion of the infallible Imam is the source of law, provided that such an opinion can be discovered. Therefore, the function of Ijma' in the Shi'i legal theory is to unveil the opinion of the infallible Imam which is always included in the agreement of the entire Shi'i community. (77)

In other words, the opinion of the Imām cannot be known directly, especially when he is hidden, without the agreement of the Shi'i scholars of the community. The agreement of the Shi'i community is identified with the opinion of the Imām. (78)

As Ijmā' derives its sanction from the Qur'ān and the Sunnah, it is generally considered to be a decisive (Qat'i) authority. Explaining its value, most of the Sunni jurists remark that Ijmā' established a rule of law with certainty. In other words, a speculative rule or a moot point becomes definite and certain by means of the approval of Ijmā'. There remains no room for doubt, debate and disagreement when something is confirmed by it. Hence, the Sunni jurists recognized it as a decisive authority. (79)

Generally speaking, Ijmā' necessitates action and certain knowledge. It stands parallel to a Qur'ānic verse or Mutawātir tradition in respect of certainty. Therefore, the Sunnis had divided Ijmā' in respect of its value into various categories (80) :-

(1) The most effective of them is the Ijmā' of the companions transmitted by themselves by verbal expression. It corresponds to a Qur'ānic verse and a Mutawātir tradition.

(2) Ijmā' of the companions transmitted in part by verbal expression and in part by silence, i.e. when some companions expressed their consent verbally and others kept silent.

(3) Ijmā' of the successors on questions not disputed among the companions. This is like a Mashhūr tradition.

(4) Ijmā' of subsequent generations on questions already disputed among the previous generations. This is like a solitary tradition which entails action and not certain knowledge.

It is, however, superior to a rule derived on the basis of Qiyās. The first category of Ijmā' entails both certain knowledge and action, whereas others entail only action and not certain knowledge.

Some of the modern Sunnis jurists, like Shāh Walī Allāh<sup>(81)</sup> have given great weight to the Ijmā' of the early caliphate of the first three caliphs, and regard it as the only right type of Ijmā' in Islam. Thus, he considers that such a kind of Ijmā' was never reached in Islam except in the age of Abū Bakr, 'Umar and 'Uthmān. He does not take into account the age of 'Alī and the later years of 'Uthmān, because this period was one of instability. According to him, Ijmā' is reached on a certain point when the caliph issues his ordinance after consultation with the men of opinion and it is recognized by the community in toto. Abū Bakr, 'Umar and 'Uthmān had an opportunity to decide problems through the process of shūrā and enforced them. But 'Alī could not have such an opportunity owing to continuous civil wars and turmoil during his caliphate. He failed to consult the learned and men of opinion on legal problems in a formal manner. Hence, the legal knowledge possessed

by the jurists of his time could not spread throughout the community through the process of shūrā. Therefore, Ijmā' could not take place in the time of 'Ali.

Thus, according to Shah Wali Allāh, the four Sunni schools of law are based on the Ijmā' reached during the caliphate of Abū Bakr and 'Umar. The legal problems well known and agreed upon among the Sunnis are those which were decided during the time of the first two caliphs. The questions settled and agreed upon during the time of 'Umar became most authenticated. He compares Ijmā' with the knowledge of the prophet with respect to certainty and exactitude. Certainty in disputed legal problems can be achieved only through Ijmā'. No quality of the Muslim community is more important than its agreement on certain points. He contends that if the agreement reached in the time of 'Umar is totally ignored, most of the doctrines may lose their authenticity. There are many problems which remained obscure and disputed during the time of the prophet and Abū Bakr, but 'Umar decided them finally by means of Ijmā'. Whatever was left unsettled and disputed during his caliphate was never settled through Ijmā'. Furthermore, in order to justify the proposition that the four Sunni schools of law are based on the Ijmā' reached during the pious caliphate, he argues that all the basic legal manuals of these schools contain original reports mostly from 'Umar and not from 'Ali, except in a few cases. (82)

Since the infallible Imām was the true source of law and the final authority in legal matters<sup>(83)</sup>, the Shi'ī scholars like al-Mufid and 'Allāma al-Hillī', rejected any form of Ijmā' that does not include the Imāms, and they said that the authority of an Imām without the agreement of the rest of the community is enough to establish certainty.<sup>(84)</sup>

For instance, what has been said by al-Mufid regarding this matter can clearly show this attitude. He said:

"I say that the Ijmā' of the community is an argument (Hujja) because it includes the saying of the argument (Al-Hujja. i.e. the Imām). And so too, the Ijmā' of the Shi'īs without the Ijmā' of all Muslims is an argument for the same reason. The basic principle here is the establishment of the truth from its source by the word of the Imām who holds the place of the prophet. And even if he alone were to say something with which no other man agreed, that would be sufficient argument and proof. In fact, the only reason we have mentioned Ijmā' as an argument is the impossibility of having it without including him, for he has the greatest weight in the community and is superior to all in good deeds and rightness of word and act."<sup>(85)</sup>

Therefore, the term Ijmā' in the Shi'i legal system signifies any agreement whether of all or some jurists, as long as it reveals with certainty the opinion of the Imām. However, Ijmā' cannot be considered the source of law if it attains merely a strong probability (Zann); it must attain the highest degree of certainty to become authoritative.

In order to discover through Ijmā', with certainty, the opinion of the Imām, the Shi'i scholars have mentioned several ways, among which the following four are the most important<sup>(86)</sup> :-

(1) Tariqat al-Hiss (The method of direct sensory perception).

This method states that it should be known with certainty that the Imām was among those who had agreed upon a Ijmā', without his person being revealed among them. For instance, if forty opinions were found on a particular issue, it should be ascertained that one of them was the Fatwā of the infallible Imām.

This method is applicable only when a person trying to discover the Ijmā' should himself investigate and trace the opinions of the jurists and discover their agreement on a particular issue. This requires one of two procedures to be followed. The first one is that the person who is investigating an Ijmā' should contact all the jurists of the period and hear their opinions himself on the issue in question. During this process, it is possible that he might hear the Imām replying to

his inquiry; thus, his ultimate discovery is authenticated by the inclusion of the Imām's opinion. Nevertheless, he has to make sure that one of those whom he heard was the Imām himself, otherwise his finding has no legal value.

According to the second procedure, a person, in trying to reveal the Imām's opinion, may arrive at successively related opinions among the residents of one city or a single period. Thus, he may ascertain through its being successively related that the Imām was one of those who had given this opinion, although he might not know his opinion as such.

(2) Tariqat Qa'idat al-Lutf (The method based on the principle of Lutf.)

This is an important method of finding out the opinion of the infallible Imām in Ijmā'. While the previous method was based on hearing (Samā'i), this one is based on reason ('Aql) through the process of mental inference. This method mentally discovers the opinion of the Imām, through an agreement reached by a number of the jurists present during the Imām's time or in the later period (during the Ghayba), in such a way that no impediment occurs from the direction of the Imām in any possible way, whether secretly or openly. Just as the principle of Lutf requires the appointment of an infallible Imām, it also necessitates that the Imām reveal the truth about any problem

on which a wrong agreement may have been reached; otherwise Taklif regarding the particular injunction would be nullified. This situation would lead the Imām to appear, as one of the most important duties for which he was appointed was the teaching of the revealed injunctions.

However, there are two requirements in affirming the validity of Ijmā' arrived at by this method; first, once it is ascertained that the opinion is the Imām's, and that there is no proof that could support a contrary Fatwā, then one should not be concerned with the unsoundness of the opinion.

Second, where there exists a verse of the Qur'ān or an authentic tradition contrary to the view held by those who have agreed upon an issue, such an Ijma' cannot be considered as the discovery of the Imām's opinion.

The Ijmā' attained by the method of Lutf is of two types. One is Ijmā' -Dukhūlī, which states that in the absence of the Imām, as is the case with the twelfth Imām, if a group of the jurists come to an agreement on a certain solution to a problem, then it is maintained that one of those present on such an occasion was the twelfth Imām himself. In this case he was Dakhil when the agreement was reached; hence it is called as Ijmā' -Dukhūlī

The other kind is Ijmā' -Kashfi, which states that when a group of the jurists agree on a point which is not right, one of them is made to disagree with them by the Lutf of the Imām; this ensures that the group will discover (Kashf) the right point to agree on and hence is known as Ijmā' -Kashfi.

(3) Tariqat al-Hads (The method of intellectual intuition)

This method states that on whatever decision the Shi'i scholars may have agreed, it should be ascertained that it has reached them from their Imām, in an unbroken personal contact. Compared with Tariqat al-Hiss, this method depends on obtaining the opinion, not on its actual hearing. In spite of the differences that might exist in the legal opinions of the Shi'i scholars, their agreement reached by Ijmā' through this method is held to rely on the opinion of their Imām and not to derive from their personal opinion or independent comprehension. Their agreement is comparable to the agreement of groups who follow a certain opinion uniformly, conveying their agreement with the opinion of the leader whom they follow. The term Hads implies this sort of intuition on the part of the jurists.

This is the method adopted by the majority of the Fuqahā' in the modern period. The method requires that this agreement should be arrived at in all ages, beginning from the period of

the Imāms to the present time, because the agreement reached in one period when taken with a disagreement in another period impairs the attainment of the required certainty. The disagreement of any jurists, even if well known, hampers this attainment.

(4) Tariqat al-Taqrīr (The method of silent confirmation ).

This is the Ijmā' that should occur in the presence of the Imām, with the possibility of his preventing the jurists from agreeing either by explaining the truth of the matter or by casting a difference of opinion among them. Thus, an agreement of the jurists in respect to a certain injunction is brought to the light by the Imām's confirmation of their agreed opinion. This confirmation is interpreted as a proof that their decision was in accordance with the command of God.

However before that, the Taqrīr has certain prerequisites which include the ability of the Imām to reveal the truth on a certain question without endangering his life, and his not being short of time to express his opinion. These prerequisites must be fulfilled in order for it to become the valid method in discovering the Ijmā'. Only after the conditions are met is the Imām's agreement attainable.

In this method it is sufficient to discover an opinion of a single person who, in the presence of the Imām, might have explained an injunction with the full knowledge of the Imām and the possibility of his rejecting his explanation or confirming it by silence. His silence in this case is interpreted as Taqrīr, confirmation and revealing his opinion.

#### (V) THE BASIS AND AUTHORITY OF IJMA'

The Sunni jurists, over against the attack and formidable claim by the non-Sunni groups, such as Shi'i, Khawārij and Mu'tazila, had to develop and defend the rightness of their own Ijmā'. (87)

However, the Sunni jurists, who undertook the task of developing Usūl al-Fiqh, had to prove that Ijmā' rests on the strength of the two primary sources, the Qur'an and the Sunnah. For, according to the fundamental Islamic tenet, nothing can be regarded as binding if it is not somehow grounded in these sources.

Against the Shi'i claim on the authority of their Ma'sūm Imām to make infallible religious judgements, the Sunnis suggest that the quality of 'Isma is applied to the Muslim community as the whole. (88)

The notion of infallibility of the Ijmā' of the Muslim community was justified by the Sunnis through the Qur'ānic verses and the Sunnah. The infallibility of the Muslim community is, therefore, guaranteed by a divine favour (Karāmat Allāh) a breaking of habit (Kharq al-'āda) by God which amounts to a miracle. Such a miracle was not granted to any other community. Its existence in the case of Islam cannot be inferred from any fact of ordinary experience or any principle of pure reason, it is known only through the positive divine sources (Sam'īyyāt)<sup>(89)</sup>.

It appears that Ijmā' was justified earlier on the basis of tradition and later on the basis of the Qur'ān. This is because the jurists almost agreed that the Qur'ānic verses which are adduced to justify Ijmā', do not clearly prove its authority. The traditions of the prophet have been quoted copiously in its support. These traditions constitute an evidence, according to Al-Ghazālī, more explicit and stronger proof than the Qur'ānic verses.<sup>(90)</sup>

The Sunni jurists adduced many traditions to substantiate the 'isma authority of the Ijmā' of the Muslim community and as guaranteeing the infallibility of the community. Basically, these traditions can be divided into two groups, namely, first the tradition which encouraged the Muslim community to hold fast to the Muslim community and not to separate. The most important of these are the following<sup>(91)</sup>:-

(1)"God cherish him who hears my sayings and commits them to memory,comprehends them and imparts them.Many a transmitter of legal information is no lawyer himself;and many a transmitter passes on such information to him who is more proficient in law than he is.Three deeds are such as never cause a Muslim's heart to be given to hatred:to act in sincerity to God;to give advice to Muslims;and to keep to their community.."(92)

(2)"Whoso departs a single span from the community,he thereby takes off the tie of Islam from around his neck."(93)

(3)"Revere my companions,and then those who will succeed them,and then those who will come after these last.But after that,people will be given to lies,so that men hasten and swear,not being put on any oath,and rush to give witness,not having been asked to do so.Lo,whoso desires to have the delights of paradise,let him keep to the community;since Satan accompanies the single,but is further away from a pair.."(94)

By a little examination of their texts,one can see clearly that all three traditions speak,not of Ijma',but of the community and that they command Muslims not to form consensus on legal matters but to keep their unity as a religious community and not to scatter.Traditions with this same sort of meaning are not limited to three in number;there are many more in the later collections of Hadith.(95)

Second, the traditions which clearly show the notion of infallibility of the Ijmā'. Among them are :-

(1) "My community will never agree on an error. So if you find a divergency, follow the majority." (96)

(2) "And God will never let them agree upon an error." (97)

(3) "I begged God the exalted that my community might never be united on an error, and He granted it to me." (98)

According to Al-Ghazālī, as far as "error" is concerned, he admits that men are not entirely free from it, but it is impossible for all of them to commit an error. He substantiates this further by a tradition: "there will always be a group in my community maintaining the truth, unharmed by deserters and dissenters, until the judgement of God arrives." (99)

To begin with the Qur'ānic proof-texts of the case, there are the following verses:-

(1) "Whoso makes a breach with the messenger after the guidance has become clear to him, and follows a way other than that of the believers, him we shall turn over to what he has turned to and we shall roast him in Gehenna - an evil homecoming" (100)

Most of the Sunni jurists<sup>(101)</sup> maintained that it is clear that the Qur'ān makes adherence to the way of the Muslims binding on people, and forbids them to diverge from it. This proves the authority of their agreement because God commands men to follow the truth. Hence the pursuit of any way other than that of the believers is as unlawful as opposing the prophet.

(2) "O Believers, obey God, and obey the Messenger and those in authority among you. If you should quarrel on anything, refer it to God and the Messenger, if you believe in God and the last day; that is better, and fairer in the issue." (102)

According to Fakhr al-Dīn al-Rāzī<sup>(103)</sup>, God commanded unquestioning obedience to "those in authority" (Uli'-amr). The judgement of a person whose obedience is commanded by God must be immune from error. This is because God cannot command us to obey a person who is apt to fall into error, for committing an error is prohibited by God himself. It is, therefore, definitely proved that "those in authority" mentioned in this verse are infallible. Now the merit of infallibility applies either to "the community as a whole" or to individuals. But this cannot apply to the latter because it is a prerequisite for obedience to a person that he should be definitely known. Hence the term of "those in authority" occurring in the verse definitely means "people who bind and loose" and they represent the Muslim community.

(3)"Thus we appointed you a midmost nation that you might be witnesses to the people, and that the messenger might be a witness to you."(104)

Discussing this verse, the Sunni jurists claim that if this is correct, then the Muslim community is at least proclaimed superior to other nations and possessing the sense of justice and the good character required in witnesses.

Al-Zamakhshari(105), Ibn Taymiyya(106) and Al-Sarakhsi(107) state that the merit of bearing witness to the people is an honour bestowed by God on the Muslim community by virtue of its uprightness. The judgement of the community is, therefore, an authority as good as that of the prophet himself and always free from error.

(4)"You are the best nation ever brought forth to men, biddings to honour, and forbidding dishonour, and believing in God..."(108)

Interpreting this verse, Al-Jassas(109) remarks that the Qur'ān mentions three important merits of the Muslim community, namely excellence, enjoining good and forbidding evil. If the community agreed on an error, the Qur'ān would never have praised it in terms of these qualities. Al-Pazdawi says: "their excellence (al-khayriyya) implies the rightness of their Ijma'".(110)

Al-Baydawī,<sup>(111)</sup> on the other hand says; the verse has been used to prove that the Agreement of the Believers is a source of law, for the verse makes it certain that they enjoined everything right and forbade everything wrong, the article here (with ma'ruf and munkar) being universalizing. Now were they to agree to what is false, their conduct would be the reverse.

(5) "And hold you fast to God's bond, together, and do not scatter; remember God's blessing upon you when you were enemies, and He brought your hearts together, so that by His blessing you became brothers."<sup>(112)</sup>

Al-Āmidī, adducing this verse, contends that God prohibited disagreement, and opposing agreement (Ijmā') means disagreement which is forbidden. Ijmā' being an authority carries no other significance except debarring its opposition, and elimination of disagreement presupposes agreement.<sup>(113)</sup>

The Shi'i jurists had criticized all the Sunni contentions to substantiate Ijmā' on traditional grounds. For instance, Muhammad al-Ṣādiq Ṣadr<sup>(114)</sup> discussing surah 4:115 which has been used by the Sunnis, stated that this verse cannot be a Hujja for the notion of the infallibility of the Muslim community. The reason is that the real meaning and asbāb nuzūl of this verse are not in accordance with what has been claimed by the Sunnis. According to him, the attitude of al-Tusi<sup>(115)</sup> and

other Shi'i jurists was to reject the notion of infallibility for the Muslim community based on this verse, a view also taken by Al-Shawkāni (116), Muhammad 'Abduh (117) and Fakhr al-din al-Rāzi (118).

However, at the same time, the Shi'i jurists also used the Qur'ānic verses and traditions in order to show the basis of their Ijmā'. Most of these Qur'ānic verses and Sunnah are cited to justify the notion of infallibility of the Ijmā' of the Imams, which can be a Hujja in Islamic law. (119)

(1) "God desires to remove all uncleanness from you, O members of his family (ahl al-Bayt), and to purify you completely." (120)

(2) Hadith al-Thaqalayn

It has been reported that the prophet said;

"It seems that God has called me unto Himself and I must obey His call. But I leave two great and precious things among you: the Book of the God and My Household. Be careful as to how you behave toward them. These two will never be separated from each other until they encounter me at al-Kawthar (in paradise)." (121)

According to the Shi'is, the above verse and tradition clearly show the notion of sinlessness and infallibility of the Imams.<sup>(122)</sup> The notion of this 'isma has been given by God as a privilege in order to make the Ijma' of the ahl al-Bayt authorized and can be regarded as a Hujja in Islamic law.<sup>(123)</sup>

However, there has been some disagreement as to exactly who is meant by the phrase "ahl al-Bayt". Interpreting the above verse, the Shi'i scholars point to several traditions that can be found in Sunnī as well as Shi'i sources that confine the meaning of this phrase to 'Ali, Fatima, Hasan and Husayn.<sup>(124)</sup>

For example, in the Hadith al-Kisa', the prophet is made to say: "this verse was revealed about me and about 'Ali, Fatima, Hasan and Husayn." When the verse was revealed, the tradition goes on to say, the prophet took a Kisa', his robe or garment, wrapped it around his son-in-law, his daughter and his two grandchildren and said "O God, these are my family (ahl al-Bayt) whom I have chosen; take the pollution from them and purify them thoroughly."<sup>(125)</sup>

Alongside the above-mentioned interpretation, the Sunni scholars preferred the neutral interpretation. They interpret the term ahl al-Bayt in such a way that both the prophet's family and his wives are included in it. To achieve this end, the term ahl al-Bayt was divided into two categories: the one, ahl al-Bayt as-sukna, namely those who physically lived in the prophet's home and ahl al-Bayt al-nasab, the prophet's kin. The Qur'anic verse, according to this interpretation, openly means the prophet's household, namely his wives; but it also contains a concealed meaning, which the prophet himself revealed by his action, thus disclosing that ahl al-Bayt here included those who lived in his home, such as his wives, and those who shared with him the same pedigree; they were the whole (clan) of Banū Hashim and 'Abd al-Muttalib. (126)

Therefore, in summary, Ijmā', according to the Shi'is, is substantiated on three grounds, namely inclusion of the Imāms (dukhuḷ) in the Shi'i community when they agree, the principle of kindgrace (lutf) and meeting the Imām directly when he is hidden (tasharruf). The inclusion of the Imāms in the Shi'i community in the case of their unanimous agreement is a basic conception on which the Shi'i theory of Ijmā' stands (127).

The principle of lutf was devised by al-Tusi (128) to justify Ijmā'. It means that God sends prophets and appoints Imāms out of kindness for the guidance of people. Now if people go astray by their agreement on an error, it is obligatory on God, as His attribute of kindness requires, to reveal the truth in order to save them from falling into error. In such a situation the infallible Imām is duty-bound to come out of his "hiddenness" and point out the truth to the people. If the Imām does not come out in person to tell the truth, it would be supposed that the agreement of the community conforms to the will of the Imām; otherwise it follows that God is not kind to His servants. Ijmā' is thus justified on the basis of the principle of lutf.

Lastly the doctrine of Ijmā' is established on the ground of tasharruf (to have the honour of meeting the Imām directly). It means that sometimes a scholar has an occasion to see the Imām during his concealment and ask him about his opinion on the disputed point. The knowledge acquired from the Imām in this way is certain. Al-Muqaddas al-Ardābili and others are reported to have had a chance to see the Imām directly. The Ijmā' reached on such a definite report from the Imām is undoubtedly valid. But this happens in rare cases, and cannot, therefore, be generalized. (129)

**(VI) THE IDENTIFICATION OF THE IJMA'**

It is also this area that marked the major disagreement between Sunnis and Shi'is. As far as we can find, the differences can be traced as follows :-

Firstly, the Sunnis accept it through transmission and the method of Tawatur. Al-Juwayni for instance, qualifies it by Tawatur, because there remains no possibility of error in an Ijma' based on Tawatur. If the number of the participants in Ijma' is less than that of Tawatur, it may be open to error. (130)

The term Tawatur means literally concurrence. As a technical term of traditional Muslim scholarship it has reference to the concurrence of statements about the past events. According to the theory which Al-Ghazali and other Sunni jurists propound, the recurrence of such statements produces in the minds of the hearers a knowledge that such statements are true. This theory is expressed succinctly in the phrase al-Tawatur yufid al-'ilm.

Therefore, the theory which it expresses attempts to show how a knowledge of the truth of statements about the Ijmā' and the past events can be possible without empirical verification. (131)

However, in order to be true, it must meet a number of important conditions called "conditions of Tawātur" (Shurūt al-tawātur). (132) Among the conditions are:

(1) The statement must be based on knowledge, not on opinion.

(2) This knowledge must be necessary, that is based on what is perceived through the senses.

(3) The number of persons making the statement must be Kāmil. Kāmil is in this case a technical term meaning sufficient to rule out the possibility of collaborative fabrication. (133)

(4) When a report is transmitted from the original witnesses to an event through a series of intermediaries, the three above mentioned conditions must apply to each successive point or stage in the transmission process.

According to the Sunnis, in the case of statements about past events, no such verification is possible. The theory of Tawātur places the knowledge of the truth of Mutawātir statements on an independent footing, rendering such verification unnecessary. Through Tawātur a purely historical knowledge, distinct from sensory knowledge is upheld. Like

sensory knowledge, this historical knowledge is not the product of discursive reasoning, it simply occurs within us. However, in contrast to sensory knowledge, it is subject to those special conditions which we have just considered. (134)

The Shi'i has taken a different approach in this matter. Besides the method of Tawatur (135), we also must apply the method of intellectual reasoning to the Ijma', and not only resort to the method of Tawatur. According to the Shi'is, reliance on Tawatur alone would risk the danger that part of the Shari'ah might be lost. (136) For instead, the assessment of the Ijma' can be a Hujja :-

(1) It must reach behind the Shi'i community or the Mutawatirin. (137)

(2) Besides that, the Imam must exist, because; "if deviation from a transmission is possible for them (the transmitters) then their need for him (the Imam) is established; so that he might be behind them to rectify transmission when they deviate, either by himself, or by those who constitute a Hujja. (138)

(3) According to Al-Murtada, the Imam was not bound to appear if the community agreed on error: it was possible that the whole community could achieve Ijma' in opposition to the Imam without provoking him to appear. (139) Therefore, the ascertainment of the Imam's opinion depended entirely on the revelation and resort to action in accord with 'Aql. (140)

Secondly, the disagreement about the validity of the Ijmā' by silence or Ijmā' Sukūtī. Some of the Sunnī jurists had accepted this kind of Ijmā',<sup>(141)</sup> and others had rejected it.<sup>(142)</sup>

According to the exponent of this kind of Ijmā', if the opinion of some scholars on a disputed question spreads widely among the community, and the rest of the scholars accept it by verbal expression, or keep silent, then agreement is reached on that question. This kind of Ijmā' is known as Rukhsah (concession), and Ijmā' Sukūtī.<sup>(143)</sup>

Explaining the kinds of Ijmā' by verbal expression ('Azimah) and the Ijmā' by silence (Rukhsah), al-Bukhārī says that the former signifies the regular process of Ijmā', for the word 'Azimah connotes regularity or originality (Asl). The latter implies an Ijmā' reached by some necessity (Darūrah), for Rukhsah is based on necessity. The Ijmā' by silence is called Rukhsah in order that incompetence and impiety may not be attributed to the jurists who kept silent on a matter which required pronouncement of their opinion. A person keeping silent on a question where he should speak is called a dumb Satan.<sup>(144)</sup>

Al-Sarakhsi remarks that God has not put the community in hardship. It is not practically possible to hear directly from the scholars of the past, or from each and every scholar of every generation. Spreading out of an individual opinion about a disputed question among the community and silence of the rest of the scholars over that opinion will be considered sufficient for the validity of Ijmā'. This is because it is not lawful for the scholars to keep silent if they dissent from the point of view agreed upon by the community. This also removes the possibility of disagreement if they keep silent; rather the probability of their agreement would be inferred. (145)

Arguing against the arguments produced by the opponents of the Ijmā' Sukūtī, al-Sarakhsi remarks that the silence of the minority is taken as their agreement, not because minority fall under majority, but because it is not lawful for the scholars to keep silent over a point of view about the issue if they disagree. They are duty-bound to pronounce their disagreement and put forward their own point of view if they have any. The point at issue became clear if one or two scholars pronounced their standpoint; rather it becomes more manifest if the majority does so. Hence, silence of the scholars, whether they are in a minority or a majority over a legal opinion, provided it spreads widely among the community, is considered an indication of their agreement. (146)

In contrast to the Sunnī attitude, the Shī'is had strongly opposed the Sunnī idea. Shī'i scholars agreed that any Ijmā' or unanimity implies that the Imām's opinion must be proven. (147) This, in their view, meant that everyone should declare their approval of the measure taken. Silence alone could not be interpreted as indicating the true opinion of all, since some obstacles could have prevented open objection. (148) It has been claimed, for example, that 'Ali's silence in respect to the legislation of Kharāj was an instance of Taqiyyah. (149)

NOTES TO CHAPTER FOUR

- (1) Further information see Mut'a, in E.I (new edition) by Heffening.
- (2) Tūsī, al-Khilāf, v.1, page 180. For any other cases, in which Tūsī used the same argument, see *ibid*, v.11, page 48 - 49 and 52.
- (3) See page 129 - 131.
- (4) Ahmad Hasan, The Doctrine of Ijma' in Islam, page 25 - 26. Juwaynī, Kitāb al-Irshād, page 424.; al-Baghdādī, Kitāb usūl al-dīn, Istanbul, 1928, page 280 - 281.
- (5) Shawkānī, Irshād al-Fuhūl, page 71; Muhaqqiq, Ma'arij al-usūl, page 65.
- (6) Qur'an 10:71.
- (7) Nasā'ī, Sunan, v.4, page 196 - 198.
- (8) Ghazālī, Mustasfa, v.1, page 110; Muhaqqiq, *op.cit.*, page 65.
- (9) Goldziher; Le Dogme et La Loi de I' islam, Paris, 1958, page 152.
- (10) Ahmad Hasan, *op.cit.*, page 174 - 175.
- (11) W.Hallaq; "On the authoritativeness of Sunni consensus", Journal of Middle Eastern studies, 18(1986), page 427, 444 - 449.
- (12) See page 299.
- (13) Ghazālī, *op.cit.*, v.1, page 115; al-Mahallī; Sharh Jam' al-Jawami', v.1V, page 129.
- (14) Amidi, Ihkām, v.1, page 101.
- (15) Ghazālī, *op.cit.*, v.1, page 115.

- (16) al-Mahallī, op.cit., v.11, page 157.
- (17) Āmidī, op.cit., v.1, page 115.
- (18) al-Mahallī, op.cit., v.11, page 158.
- (19) Sarakhsī, op.cit., v.1, page 320; Ghazālī, op.cit., v.1, page 121 - 122.
- (20) al-Mahallī, op.cit. v.11, page 158.
- (21) Ghazālī, op.cit., v.1, page 173.
- (22) Āmidī, op.cit., v.1, page 101.
- (23) Baṣrī, Mu'tamad, v.11, page 493 - 494.
- (24) Shirāzī, al-Luma' fi usul al-Fiqh, page 204 - 205.
- (25) Isnāwī, Nihayāh al-Sul, v.11, page 231.
- (26) Juwaynī, al-Burhān, v.11, page 152.; Ibn Ḥazm, al-Ihkām fi usul al-ahkām, v.1, page 12.
- (27) See page 314 - 320.
- (28) Anderson, J.N.D; "Law as a social force in Islamic culture and History", BSOAS, v.XX(1957), page 15 - 16.
- (29) Ibid, page 18 - 20.
- (30) J.Schacht; "Foreign elements in ancient Islamic law", in JCLIL, v.XXXII, parts III and IV, 1950, page 10.
- (31) Goldziher, Muslim studies, v.11, page 25; Bravmann; Spiritual background of early Islam, Leiden, 1972, page 172.
- (32) J.Schacht, Origins, page 58; Goldziher, op.cit., v.11, page 11.
- (33) J.Schacht, Origins, page 83.
- (34) Poste, Edward; Institutions of Roman Law, London, 1904, page 2.

- (35) Lee, R.W.; Elements of Roman Law, London, 1949, part 1.11., page 3.
- (36) Ibid, part 1.11., page 45.
- (37) Ahmad Amin; Duḥā al-Islām, page 30.; Nicholson, Literary History of the Arabs, Cambridge, 1953, page 358.
- (38) Schacht, Origins, page 99.
- (39) Ibid, page 243 - 244, 250, 229 and 230 - 231.
- (40) Nicholson, op.cit., page 254.
- (41) Ibid, page 247 - 249, 276 - 279, 358 - 360 and 346.
- (42) Abū Yūsuf, al-Kharāj, page 129.
- (43) Ibid, page 51.
- (44) Ibid, page 76.
- (45) Ibid, page 166.
- (46) Ahmad Hasan, The early development, page 166 - 168.
- (47) Schacht, Origins, page 85.
- (48) Abū Yūsuf, al-Radd 'alā siyar al-Awza'i, page 40 - 42.
- (49) Schacht, Origins, page 75, citing al-Radd 'alā Siyar al-Awza'i
- (50) Ibid, page 275.
- (51) Malik, Muwatta', v.111, page 313.
- (52) Ibid, v.1, page 146 - 149.
- (53) Ibid, v.1, page 218.
- (54) Ibid, v.11, page 125.
- (55) Ibid, v.11, page 879.
- (56) Shāfi'i, Kitāb al-Umm, v.11, page 297.

- (57) Norman Calder; "Ikhtilāf and Ijmā' in Shafi'i's Risāla", Studia Islamica, 58(1984), page 76 - 77.
- (58) Ibid, page 77 - 78.
- (59) Schacht, Origins, page 92.
- (60) Shafi'i, Risāla, page 1312.
- (61) Ghazālī, op.cit., v.1, page 181.; Kulaynī, Kafi, v.1, page 169.
- (62) Bernard, weiss; "The primacy of revelation in Sayf al-dīn Amidī", in Studia Islamica, 61(1985), page 79 - 109.
- For the Shi'i view, see page 304.
- (63) This concept has been used and exploited by both sides, see Muḥaqqiq; Mu'tabar, page 1 - 2; Shāhid Thānī, Tamhid, introductory passage.
- (64) Ibn Qayyim, A'lam al-Muwaqqi'in, page 8, 9 and 11.
- (65) Norman Calder, The structure of authority, page 187 - 188.
- (66) Amidī, op.cit., v.1, page 321.
- (67) Ibid, v.1, page 327.
- (68) Goldziher, The Zahiris, page 36.
- (69) Ṭūsī, Talkhis, page 308.
- (70) Ṭūsī, 'Uddat al-uṣūl, page 245 - 246.
- (71) Ibid, page 248 - 250; 'Allāma, Mabādi', page 195 - 196.
- (72) Al-Bazdawī, Kanz al-Wuṣūl ilā ma'rifat al-uṣūl, page 243 - 244.
- (73) As cited by Muzaffar, uṣūl, page 106.
- (74) Abū al-Walīd Muḥammad ibn Rushd; Bidayat al-Mujtahid, Cairo, 1974, v.1, page 6.

- (75)W.Hallaq,op.cit.,page 427 - 428.
- (76)Shīrāzī,op.cit.,page 56 - 58;Shawkānī,op.cit.,page 78 - 79.
- (77)A.A.Sachedina,Islamic Messianism,page 139 - 140.
- (78)Ibid,page 140 - 141.See also note no.69.
- (79)Bazdawī,op.cit,page 245;Bukhārī,Kashf al-Asrār,v.111,  
page 971;Shawkānī,op.cit.,page 70.
- (80)Ahmad Hasan,The doctrine of Ijmā',page 149 - 150.
- (81)Shah Wali Allāh;Izālat al-khafā,Karachi,n.d.,page 72,262,  
314 and 270;Qurrat al-'aynayn fī tafdil al-shaykhayn,Peshawar,  
1310.A.H.,page 133.
- (82)Ibid,page 134 - 135,42,55,142 - 143,145 - 150 and 169.
- (83)See page 182.
- (84)'Allāma,Mabādi',page 193 - 194.
- (85)Mufid,Awā'il,page 99 - 100.
- The same is said in "uṣūl al-Fiqh",page 193,see also Brunshvig  
page 205.
- (86)Sachedina,op.cit.,page 141 - 147;Muhammad al-Ṣādiq Ṣadr,  
Ijmā' fī al-tashrī' al-islāmī,page 46 - 55.
- (87)Juwaynī,al-Burhān,v.1,page 676;Āmidī,op.cit.,v.1,page 166.
- (88)Hourani,"The basis of authority of consensus in Sunnite  
Islam",page 192 - 194.
- (89)Najm al-Dīn al-Tawfī,Risālat fī ri'ayat al-Maṣlaha,  
page 107;Weiss,B;The primacy of Revelation in Sayf al-Din al-  
Āmidī,page 92 - 93.
- (90)Ghazālī,op.cit.,v.1,page 111.

- (91) See Amīdī, op.cit., v.1, page 112 - 114, where all these traditions are cited and discussed.
- (92) Abū Yūsuf, Kharāj, page 9; Shāfi'ī, Risāla, page 401 and 475.
- (93) Abū Yūsuf, Kharāj, page 9; Bukhārī, Ṣaḥīḥ, v.1X, page 84 and 113.
- (94) Ibn Ḥanbal, Musnad, v.1, page 205 and 230.
- (95) Ibid, v.111, page 25, 145, v.1V, page 101 - 102 and v.V, page 145.
- (96) Ibid, v.V, page 145; Ibn Majah, v.11, page 241 Tirmidhī, v.1X, page 11.
- (97) This ḥadīth is reported in Tirmidhī, al-Dārimī and Ibn Ḥanbal, see Mu'jam, v.1, page 364.
- (98) Mahmassani, The philosophy of jurisprudence in Islam, page 77.
- (99) Ghazālī, op.cit., v.1, page 202 and 204.
- (100) Qur'ān 1V:115.
- (101) Amīdī, op.cit., v.1, page 286; Sarakhsī, op.cit., v.1, page 288 - 289.
- (102) Qur'ān 1V:59.
- (103) Fakhr al-Dīn al-Rāzī; Mafātiḥ al-Ghayb, Cairo, 1308 A.H. v.111, page 241 - 242.
- (104) Qur'ān 11:143.
- (105) Zamakhsharī, al-Kashshāf, v.1, page 110.
- (106) Ibn Taymiyya; Ma'ārij al-Wuṣūl, page 81 - 84.
- (107) Sarakhsī, op.cit., v.1, page 288 - 289.

(108) Qur'ān 111:109.

(109) al-Jaṣṣāṣ, op.cit., fos. 217a - 217b.

(110) al-Bazdawī; Kanz al-wuṣūl ilā ma'rifat al-uṣūl, with commentary of 'Abd al-'Aziz al-Bukhārī, in Kashf al-Asrār, v.111, page 975; Ghazālī, op.cit., v.1, page 111; Āmidī, op.cit., v.1, page 311.

(111) Cited by Hourani, op.cit., page 201.

(112) Qur'ān 111:102.

(113) Āmidī, op.cit., v.1, page 309 - 310.

(114) Muḥammad al-Ṣādiq Ṣadr, op.cit., page 39 - 41.

(115) Ṭūsī, 'Uddat al-uṣūl, page 65.

(116) Shawkānī; Fath al-Qadir, v.1, page 515.

(117) Muḥammad Rashīd Riḍā; Tafsīr al-Manār, v.V, page 417.

(118) Rāzī; Tafsīr al-Rāzī, v.11, page 42.

(119) 'Allāma, Mabādi' al-wuṣūl, page 190, 194 - 195.

(120) Qur'ān 34:33.

(121) 'Allāma, op.cit., page 195.

(122) See page 138 - 139.

(123) 'Allāma, op.cit., page 190 and 195.

(124) Muslim, Ṣaḥīḥ, v.11, page 323 - 324; Tirmidhī, Sunan, v.11, page 300; Ibn Bābawayh; 'Uyūn Akhbār ar-Riḍā, Najaf, 1930/1970, page 21.

(125) Karājaki; Kanz al-fawā'id, Mashhad, 1322, page 21 - 22.

(126) Haytami; as-Sawā'iq al-Muhriqah, Cairo, 1385, page 144.

(127) See page 302 - 304.

(128) See page 310 - 312.

(129) Muḥammad al-Mahdī al-Ḥusaynī; al-wuṣūl ilā kifāyat al-uṣūl, Najaf, n.d., v.111, page 272 - 274, 282 - 287.

(130) Juwaynī, al-Burhān, v.1, page 312.

(131) Weiss, B; "Knowledge of the past", page 87 - 88.

(132) Ghazālī, op.cit., v.1, page 134.

(133) Ibid, page 138 - 139.

(134) Weiss, B, op.cit., page 94 - 96.

(135) Norman Calder, The structure of authority, page 56 - 58.

(136) Murtadā, Shafi, page 11.

(137) Ṭūsī, Talkhīṣ, page 308.

(138) ibid, page 308 - 309 and 311.

(139) Ṭūsī, 'Uddat al-uṣūl, page 247.

(140) Ibid, page 253.

(141) See page 329.

(142) Ghazālī, op.cit., v.1, page 121 - 122.

(143) Sarakhsī, op.cit., v.1, page 303.

(144) al-Bukhārī, Kashf al-Asrār, v.111, page 948;

'Alī 'Abd al-Rāziq; al-Ijmā' fi-l-sharī'at al-Islāmiyyah, Cairo, 1947, page 74.

(145) Sarakhsī, op.cit., v.1, page 305 - 306; Bazdawī, op.cit., page 242.

(146) Sarakhsī, op.cit., v.1, page 305 - 306.

(147) Modarressi, kharaj in Islamic law, page 85.

(148) Bahā' al-Din al-'Amīlī; Zubdat al-uṣūl, Tehran, 1329q,  
page 64.

(149) Modarressi, op.cit., page 86.

**CHAPTER V : SUMMARY AND CONCLUSION**

**SUMMARY AND CONCLUSION**

The study of the concept of Ijtihād within the Sunnī and Shi'ī traditions requires as a basis an understanding of certain matters; (a) The background of Ijtihād, (b) The origins of Sunnism and Shi'ism and (c) the main causes of separation.

**(a) The background of Ijtihād**

Historically, in the process of development of Islam, there were two words which had a very strong influence upon the Muslim community; Ijtihād and Jihād. Both of these words were taken from the stem ( ج, ه, د ) "doing the utmost in the performance of a certain task". The word jihād meant effort to protect and defend Islam, while the word Ijtihād applied in the Islamic intellectual field "to work and find the right path in Muslim affairs". (1)

Ijtihād directly means that human reason has a great importance in the field of the Shari'ah. It was not raised for open discussion until the time of the Tabi'ī t-tabi'in by the theologians at first and later by the jurists.

Basically, all the Islamic sects believed that Islamic law must be based on two component sources, i.e. Naql and 'aql. However, they debated with each other on the question of the priority of these sources. (2)

Most of the jurists, including the Mu'tazila, Sunni and Shi'i, agreed that the rules of the Shari'ah were based on specific "grounds", i.e. to secure people's interests. Law cannot exist for no reason. It revealed to secure first the interests which included the largest possible number of people, and then to secure the interests of the individual.

Nevertheless they differed on the nature of and the practical method to use the human reason in Islamic jurisprudence. Whereas the Sunnis agreed with the methods of Ra'y, Qiyas, Istihsan, Masalih Mursalah and others; the Shi'is used 'aql.<sup>(3)</sup>

The importance of Ijtihad in the development of Islamic law can be further substantiated by looking into the nature, objectives and function of the Islamic law.<sup>(4)</sup> Apart from that, it can be regarded as an inevitable element in Islamic jurisprudence. This matter can be shown by several points; First, Qur'an and Sunnah are said to be the basis of Islamic law, whereas the real source is the application of human intellect through the method of Ijtihad to both sources.

Second, the texts of Qur'an and Sunnah relating to matters of jurisprudence are very few, whereas the events that occur in human communities are unrestricted. Therefore, in order to narrow the gap between the restricted texts of the Naql sources and human daily need, Ijtihad was introduced and regarded as capable of providing a solution to any problem.

Third, the assumption is that Islamic law is complete and applicable in any place, time and situation, although it faces the ever-changing human community. In order to prove this assumption, most of the Muslim scholars contend that such legal principles as the consideration of Maslahah, the flexibility of Islamic law in practice and emphasis on the continuing process of Ijtihād sufficiently demonstrate that Islamic law is adaptable to social change.

In order to define the duty of Mujtahids, considered important in Islam<sup>(5)</sup>, the jurists laid down certain indispensable qualifications, i.e. general and academic qualifications which must be fulfilled. Most of these qualifications were relatively easy to meet and they facilitated rather than hindered the activity of Ijtihād. The best example in this matter is that a Mujtahid is not required to memorize all the highly regarded knowledge such as the Arabic language, Qur'ān, Sunnah, Nāsikh wa Mansūkh, Ijmā' and others. A Mujtahid is required only to be able to refer to or recall the books which are authorised when needed.<sup>(6)</sup>

(b) The origin of Sunnism and Shi'ism

In early Islam, the sectarian group named Sunni<sup>̄</sup> opposed to the Shi'i<sup>̄</sup> did not yet exist. This particular group was built in a later time, i.e. during the Abbasid period.

Nevertheless at an early stage two groups with different approaches had formed the proto-Sunni<sup>̄</sup> group. It was combination between both of these groups that formed the group called Sunni<sup>̄</sup>.

(i) The political group of the 'Uthmaniyya.

They claimed that 'Uthmān was the just and legitimate caliph and his murder was to be condemned. Furthermore, they did not support 'Alī and spoke much of the merits of 'Uthmān and demerits of 'Alī.

However, they were further divided into two groups which confronted each other. First, the Syrian group that announced that Mu'āwiyā was the legitimate caliph. Second, the upholders of the principles of the early caliphate, in particular the rights of the families of the early non-Hashimite companions of the prophet, mostly represented by the people of Hijāz.

The second group had tried to support the revolt of 'Abdullāh ibn al-Zubayr to gain power and destroy the Umayyad dynasty. However, with the defeat of 'Abdullāh ibn Zubayr, they tried to avoid political conflict and concentrated on

religious learning. Later they started to support the Umayyad government and opposed any sort of conflicts that arose in the Islamic communities, although they did not consider the Umayyads part of the genuine caliphate.

(ii) The religious group of the Ashāb al-Hadīth.

They were a group of traditionist who represented the 'ulamā' involved in the "religious movement". These groups are not the Hijaz people only, but scholars in every Islamic centre. They concentrated on religious studies and usually discussed the application of Islamic principles to the fresh problems that were arising, enquiring whether the customary law or the government administration conformed to the Islamic norm or not. Owing to their attitude and the role they played in society, the label of "orthodoxy" has been ascribed to this group. The label of orthodoxy was self-proclaimed by the Ashāb al-Hadīth and agreed by the masses.

From the political view, they took a neutral view whenever there were political clashes between the Shi'a and 'Uthmāniyya. However, it seems clear that their neutral attitude did not last long as they seem to support the group that will benefit them. Therefore, the term Ashāb al-Hadīth did not imply any particular political orientation, and thus among them we meet also with every branch and shade of 'Uthmāniyya and Shi'i group. (7)

Later ,when most of the scholars known as the Ashāb al-Hadith adopted the doctrine of postponement (al-Irjā'), a rift began to appear between the zealous Shi'is and the moderates. Those who followed the newly established Madhhab Ahl al-Bayt were excluded from the Ashāb al-Hadith. Thus, Madhhab Ashāb al-Hadith in contrast to the Shi'a, became a quasi religious denomination, still predominantly pro-Alid, but only mildly Shi'i, and with a marked tendency to approach the 'Uthmāniyya point of view. (8)

When the Umayyad dynasty was followed by the 'Abbasid dynasty certain policies developed by the 'Abbasids further sharpened the split between the government and the Shi'a. The 'Abbasids tried to found the state religion on a reconciliation of the attitudes of the 'Uthmāniyya (9), Ashāb al-Hadith and Murji'ah in the effort to standardize a corpus of doctrine for the synthesis of the Muslim community or al-Jamā'ah. Thus the 'Abbasids created Islamic "orthodoxy" in the real sense of the word based on the tenets of the Madhhab ashāb al-Hadith.

Therefore with strong support at first from the 'Abbasids and later by the Mamlukes ,the Ashāb al-Hadith, which had changed to their new name, i.e. Ahl Sunnah wal Jama'ah (10) came to be regarded as the only Islamic "orthodoxy".

As the Sunnis, the Shi'is under the name of ithnā 'ashāriyya, with a complete doctrine in legal and theology matters, did not yet exist in early Islam. They came into existence only after the ghaybah of the twelfth Imām. (11)

Nevertheless in the earliest phase the Shi'i movement originated from several factors;-

(i) According to most western scholars, the Shi'i movement in its first stage was more an Arab political movement demanding that 'Alī be the successor of the prophet and uninvolved in any other particular religious ideas. The original support for 'Alī and his descendants not much different from the support given to other persons. The faction was a purely Arab movement (12), and made no attempt to claim a religious character or the support of the subject races.

(ii) But according to S.H. Jafri, besides these features, the Shi'i sect was also based on religious grounds. This can be deduced from the principles held and defended by the early supporters of 'Alī

First, the prophet's family had a religious prerogative which is supported by the Qur'an. (13) To them, the prophet was the restorer of the true religion of Abraham and Ishmael and in him the hereditary sanctity of his clan reached its highest level. Furthermore, they believed that when the prophet died, his successor could only be a man from the same family and

endowed with the same qualities and driven by the same principles.

Second, numerous reports<sup>(14)</sup> from the prophet clearly showed that the prophet was in favour of 'Alī, and this led to the idea that 'Alī was the best person and the most qualified Muslim to hold the caliphate.

After the first century of the Islamic era, Shi'ism's character was transformed into a non-Arab Muslim character. It became linked with the aspirations of the Mawālī and other oppressed classes, to be the instrument of their social and religious revolt against the oppression of the Islamic state.

#### Phases of development of the Shi'a

Historically the emergence of the Shi'i view point is inextricably connected with the event of the Saqīfah. 'Alī's disagreement with Abū Bakr was strongly supported by his followers who formed the nucleus of the first Alid party of the Shi'a.

During the period of Khulafa' al-Rāshidūn followed by the Umayyad period, the development of the Imāmi Shi'a was simple. Their beliefs in theology and jurisprudence were not yet formulated in a well developed and systematic manner. Moreover, compared to other Shi'i movements, such as that of Muhammad ibn al-Hanafīyya and Zaydiyya, the Imāmi Shi'a were not known and not gaining much support.

The reason for this situation was the different direction the movements had taken. The Imāmi Shi'a had adopted a silent attitude and avoided any political activities. As a substitute, they concentrated on religious study and their Imāms encouraged their followers to practise Taqiyya.

On the other hand, Muhammad ibn al-Hanafiyya and the Zaydiyya group had taken up a war policy. They maintained that the Imām must prove his leadership by fighting a Jihād against the Sunni rulers.

It was not until the time of Imām Ja'far al-Sādiq that the Imāmi Shi'a movement became more advanced and systematic. This period appears to be the first in which a particularly Imāmi view on a number of central doctrinal matters was crystallised. What is certain is that these new doctrinal matters were absorbed into Shi'i jurisprudence. This drastic change in the Imāmi Shi'i movement is closely related to the role played by Imām Ja'far al-Sādiq. (15)

The theory of Imām Ja'far al-Sādiq was later fully constructed and developed by the outstanding scholars during the time of the ghaybah of the twelfth Imām and also during the Buwayhid period. The serious vacuum left by the occurrence of the ghaybah in the Shi'i community had allowed the Imāmi jurists to extend their activities. From this time onward they express their own views on doctrinal and legislative questions with the alleged authority of the absent Imām. (16)

(c) The main causes for the separation between both sides.

The causes of separation between them can be traced in two factors, i.e. their different view of the prophet's Sahāba and the concept of Imamate. Both of these issues proved the most controversial points between the Sunnis and Shi'a, and have been described by most scholars as the point of the split between both sides.

On the concept of Sahāba, they contrasted in their attitude to certain points, such as :-

- (i) The issue of the status of Sahāba, i.e. whether they are Muslim or not.
- (ii) The issue of the behaviour of Sahāba, whether they are all good Muslims or not.
- (iii) The issue of the importance and authority of Sahāba.
- (iv) The issue of cursing the Sahāba.

On the whole, the Sunnis not only tried to show the positive merits of Sahāba, they also regarded them as exemplary Muslims, the sole transmitters of the prophet's teaching such that for them all religious matters are vested in the authority of Sahāba.

On the other hand, in Imāmi Shi'i doctrine, the prophet's Sahāba were usually presented in a negative light. For this reason they used to be called by the Sunnis and Mu'tazila "unbelievers" and normally referred to by the abusive term "Rāfida".

In Imāmi Shi'i doctrine all authority in religious matters is vested in the Imāms. They believe that their Imāms are the only true source of knowledge who alone know the true significance of the various teachings of the prophet. They are far superior to the Sahāba. In principle, this would leave the Sahāba without any authority in religious matters.

The same situation happened with the concept of the Imamate. The following points have been the controversy issue;-

- (i) The question as to whether the prophet appointed any successor.
- (ii) The means by which the Imām is established in office.
- (iii) The question whether the Imamate is a Uṣūli matter or not.
- (iv) The issue of function of and loyalty to an Imām.

The Sunnī point of view on those matters can be easily stated; first, they tried to justify the historic caliphate, including the Khulafā' al-Rāshidūn, Umayyads and 'Abbasids. Most of the theory is not speculatively derived from the sources of the revelation, but rather based upon an interpretation of these sources in the light of the later political development. In other words, their theory of Imamate is an apologia for the historical caliphate against the charges of the non-Sunnī groups.

Secondly, the Imamate is not regarded as one of the fundamental principles of religion (Asl), but rather as the fundament of the administration, as that can be perfected and carried on by the Muslim community. Thus, it was left to the Muslim communities themselves to determine how the office of the Imamate should be established. Later they held that the Imamate could be established through two methods, i.e. the method of testamentary designation (Nass) and by selection by the Ahl al-Hall wal-'aqd. Finally, they believed that unconditional obedience is due only to God and the prophet, while obedience to the Imams is subject to their acting consistently with the Qur'an and the Sunnah.

In contrast to the Sunnīs, the Shi'a strongly criticised the past caliphate and considered the historical caliphate, with the exception of the time of 'Ali, as invariably usurpatory and illegitimate.

For the Shi'a, the foundation of the creed was based on the principle of the Imamate which is a central and cardinal principle of faith without which religion is incomplete. Furthermore, there were also the spiritual aspects of the Imamate: to keep the religion pure and to interpret the Qur'an according to the good pleasure of God and the will of the prophet.

Consequently, the Imamate has to be announced at the set time for the guidance of mankind by the will of God. Thus, the choice of Imam is neither by selection nor by election but by the designation of God and the indication of the prophet or the previous Imam, to show who should succeed him in office. The Shi'a contended that, since the Imamate was intended for the continuation of the mission of the prophet and the guidance of mankind after him, the community could not afford to accept a fallible successor to this divine institution, like the prophet the Imam had to be divinely protected from sin.

From the discussion contained in the second chapter, we can conclude :-

(1) The development of Ijtihād in the realm standard of 'ilm usul al-fiqh with the Sunnis had existed earlier than with the Shi'a.

This happened because of their different understanding of the concept of Nass period and the similarities of meaning between Ijtihād, Ra'y and Qiyās.

According to the Sunnis, the Nass period had ceased with the death of the prophet. Therefore the Sunni jurists expanded their own role by undertaking Ijtihād to build their fiqh system and fill the vacuum which had been brought about by the death of the prophet. This can be clearly seen from the effort and activities undertaken by most of the Sunni jurists in the three different periods, i.e. before, during and after Shāfi'i's time.

Whereas to the Shi'a, the Nass period is not limited to the prophet's time, but extended to the twelve Imams like the prophet, the Imams are regarded as the absolute source of law for any new problem arising in human life. Thus, during this time Ijtihād is not regarded as an important principle and if the employment of Ijtihād by the Shi'i jurists occurred, it was in a restricted sense.

However, owing to historical incidents such as the house arrest of the Imāms by the Abbasid authority and the minor occultation of the twelfth Imām, the Imāms were unable to function as the source of law.

As the first, the Shi'a community depended on the Wukalā' institution and as to the second, they depended on the Sufarā' institution. Both of these institutions indirectly replaced the function of the Imāms as the recognized source of law.

The dependence on Ijtihād among the Shi'a is clear after the major occultation of the twelfth Imām. In the last decades of the 4th and 5th centuries, owing to the influence of the Mu'tazilite school on Shi'ism, two main developments regarding the concept of Ijtihād appeared :-

(i) The idea that the work of the Mujtahid can replace the occult Imām. Al-Tūsi interpreted the doctrine so as to allow delegation of the Imām's authority to the Mujtahid, considered as the person who can act to fulfil the Imām's function during the absence of the Imām and the Safirs.

(ii) The efforts to decide many subordinate cases from the primary sources and give a Fatwā in cases by rational analysis. Thus, the activities of the Shi'i jurists were not limited to the mere transmission of the traditions. The best example of this can be seen in the legal works of al-Tūsi like al-Mabsūt and al-Khilāf.

Based on the traditions from the Imāms which forbade the practice of Qiyās most of the early Shī'i scholars believed that this also applied to any other mode of rational analysis. In the early periods the term Ijtihād was used in the sense of personal judgements including Ra'y and Qiyās. Impressed by these same outward or terminological similarities, the Shī'is refrained from use of the term Ijtihad until the 6th/12th century.

The use of independent reasoning in law already existed since the Imām's time, although it was not termed Ijtihād as among the Sunnīs. First, in the traditions, the Imāms had persistently urged their followers to reason and use their minds in theological and legal matters. They stated explicitly that their own duties lay in explaining general rules and principles, whereas inferences in detail and drawing minor precepts for actual cases were left to the learned followers. Sometimes they also explained, when faced by questions from their followers, that the correct replies to their questions could be derived from general Islamic principles.

Second, during the period of the presence of the Imām two legal tendencies existed in the Shī'i community. Besides the traditionalists who relied mostly on transmitting traditions without any further inferential derivation of the law and so stood opposed to any kind of rational argument, there also existed

the Fuqahā' who adhered to the analytical rational approach toward legal problems within the framework of the general principles of the Qur'ān and tradition. More than that, it is reported that some companions of the Imām had practised Qiyās and Ra'y when faced with the problems which were not explicitly and clearly dealt with in the Qur'ān and tradition.

(2) The development of Sunnī Ijtihād is more continuous, stable and advanced than that of the Shi'īs.

In the early period of Islam, i.e. in the ancient schools, the application of Ijtihād was based on Ra'y and Qiyās. However its usage was simple, unsophisticated and rudimentary in form. This kind of attitude led to many conflicts among the jurists and consequently to a serious problem in the Muslim community.

Later it was Shāfi'i who formulated for the first time the theory of law in a systematic form. His contribution to legal theory consisting :-

(a) In the development of a new theory of interpretation applied to the two principal sources of the revealed law; the Qur'ān and the prophetic traditions.

(b) In the almost complete identification of Sunnah with prophetic traditions which later became part of the classical theory of Islamic law.

(c) In the hierarchy of the four sources of law, including Ijma' and Qiyās.

In order to eliminate the chaos which had resulted from the free use of Ra'y without proper discipline, he tried to systematise and limit the scope of Qiyās which is, according to him, the only way of exercising Ijtihād.

He does this in several ways :-

(a) Qiyās must involve identical or quasi-identical cases and must show the perfect resemblance in both cases.

(b) Qiyās must stand on an original and independent basis and not on a derivative or analogical conclusion.

(c) Qiyās must become a quasi-nass with the stress on the Nass and adherence to the traditions.

(d) Only the scholar who fulfills the necessary requirements of Mujtahid can be allowed to exercise Qiyās.

The system introduced by Shāfi'i became widespread having been adopted by most of the later jurists. Further, enthusiasm for the Sunnah and an abhorrence of Ra'y caused the emergence of two new schools of law; the Hanbali and the Zahiri. These schools rejected human reasoning of any kind and relied exclusively on the texts of the Qur'an and the Sunnah.

After the Shāfi'i's time, which is usually called the age of Taglīd, the development of the concept of Ijtihād continued its progress :-

(i) The jurists capable of Ijtihād still existed during this time and from then on, Ijtihād was used in developing the positive law after the formation of the schools of law.

(ii) The effort of writing up 'ilm uṣūl al-fiqh', discussing the concept of Ijtihād in more detail, still progressed. Those of Shāfi'i's principles which were not clear became clarified by the scholars during this time.

(iii) During this time certain groups emerge such as the Zāhiri and Hashwiyya, which rejected the use of Ijtihād in deriving Islamic law. They were primarily concerned with the study of the transmitted sources and their literal interpretation and denying human reason any right to be exercised in the process of legal reasoning. However, when a legal theory was finally established and promulgated as the only Sunni doctrine both gradually slipped outside the orb of Sunnism. Later there was no school inside the Sunni community that opposed Ijtihād as a principle.

On the other hand, the development of Ijtihād within Shi'ism was not constant and was always condemned among the Shi'i scholars themselves. Sometimes the anti-Ijtihād group, represented by the traditionalists, gained control over the whole Shi'i intellectual community. This can be seen from historical evidences :-

(i) Given the presence of Imāms, there existed two groups of scholars which represented two different legal tendencies in the Shi'i community, i.e. the Fuqahā' and traditionalists. Both of them were totally opposed and bitterly accused each other.

(ii) From the major occultation of the twelfth Imām, the same traditionalist school which existed during the Imām's time gradually gained control over the whole Shi'i intellectual community and totally suppressed the rationalist tendencies based on human reasoning. Like their predecessors in the time of the Imām, they were not sympathetic to rational arguments in religious matters and condemned even those efforts which applied rational argument to religious questions in order to strengthen the Shi'i point of view.

(iii) After the concept of Ijtihād had become established and generally accepted by the Shi'i community a new traditionalist school called Akhbārī emerged. They were extremely hostile to the rational, analytical approach to the

law and adhered strictly to the outward, literal meanings of the traditions. Moreover, the Akhbārī tendency gained supremacy in all Shi'ī centres of learning in the fourth decade of the 11th century until the second half of the following century when it once more declined in favour of the Usulī resurgence.

(3) In the process of developing their concept of Ijtihād, the Shi'ī jurists had adopted certain elements and principles from the Sunnis. Most of these principles, such as the concept of Ijtihād, were well absorbed and adjusted in order to be in accordance with Shi'ī principles.

The process of adoption was achieved by liberal scholars, such as al-Tūsī, al-Muhaqqiq, 'Allāma al-Hillī and others

through their extensive study of law and debates with the representatives of the Sunni schools of law :-

(i) As with the Sunnis, the Shi'ī jurists contend that Ijtihād is premised on the admission that certitude about the true intent of God is in some instances, at least, unattainable. Therefore, the Mujtahid may be successful or not in his attempt to discover it. The Lawgiver may place a special reward on his effort in either case. Every Mukallaf may be obliged to follow the opinion of a qualified Mujtahid, but no one can ever derive a sense of certitude from that.

(ii) According to Dr. Norman Calder, the sphere of Ijtihād as explained by 'Allāma al-Hillī, clearly resembled al-Shāfi'i's concept of 'ilm al-'amma and 'ilm al-khāssa. (17)

Furthermore, they also tried to clarify any principles not clear in the Shi'i law. This effort benefited from the understanding and inspiration derived from the Sunni law. The best example was the effort of al-Muhagiq who, in his concept of Ijtihād, separated Ijtihād from the forbidden Qiyās.

(4) In a later time after the concept of Ijtihād was well-established on both sides, the situation and application of Ijtihād within Shi'ism were more advanced and better adapted to face the modern world than among the Sunnis :-

(i) By the time the door of Ijtihād was claimed to be closed in Sunnism, it became a vital and was regarded as a dynamic principle for further development of the Shi'i jurisprudence.

In contrast to the Sunni attitude, the Shi'a do not permit their people (Muqallid) to follow the legal doctrine of a book or the opinion of a Mujtahid who is no longer alive. The effort of Ijtihād must be constantly renewed in the hope of coming

still closer to objective truth and certainty. For this purpose a copious literature on 'ilm usul al-fiqh was refined and continues to be produced in Shi'ism.

(ii) Once the Usuli movement defeated the Akhbari school, the power of Mujtahids grew greater than ever before. Their role as Marja' al-Taqlid increased in power as a source of charismatic authority and a force for unity in the Shi'i community.

Basically the ikhtilaf between Sunnis and Shi'is on the concept of Ijtihad as a whole resulted from their different approach and understanding of the two aspects :-

- (1) The methods and principles of Ijtihad itself.
- (2) The concept of Ijma'.

These two aspects were dominated and characterized by their different understanding of three principles;

- (1) The companions of the prophet against the Imamate.

To the Sunnis, the companions of the prophet are not only the exemplary Muslims but also the sole and most authoritative transmitters of the prophet's teachings. Almost all the matters transmitted and related by the companions of the prophet in religious studies, especially in legal matters, were considered the most effective, perfect and sometimes even infallible. (18)

The Sunnī jurists had made the effort to prove that their schools of law were based on a firm theoretical footing. Their major step in this direction was taken when the doctrines of their schools were attributed to the leading companions. The basis for the Sunnī system of fiqh was declared to be the authority of the companions of the prophet. (19)

The Shi'īs, on the other hand, believed that all authority in theological and legal matters is vested in the Imāms. In principle, this would leave all companions without any authority in religious matters. (20)

Instead of the companions of the prophet, in their view, every Muslim must recognize the twelve Imāms after the prophet as sources for the guidance of mankind. It is only through these Imāms, considered as the only true source of knowledge, that the true meaning and significance of the prophet's teaching can be known. (21)

The authority for determining the divine ahkām and expounding the Qur'ānic meanings belonged to the House of the prophet after him and they alone should be referred to as the source of law for the solution of problems and determination of the ahkām of the Shari'ah.

(2) The Firqah al-mutawātirah against the whole Muslim community.

The Shi'is condemned the alleged authority of the whole Muslim community. To them, the large sizes of communities did not mean they were in the right. They declared the first three caliphs unbelievers but afterward extended this to the entire non-Shi'i community. The denial by the Sunni community of the doctrine of Imamate, regarded as the foundation of the Shi'i uṣūl al-dīn, was considered tantamount to unbelief.

A community consisting of unbelievers cannot be accepted as authority for the prophet's sayings. (22) This led in turn to the development of an independent Shi'i legal system, based on the authority of the Imams through the firqah al-mutawātirah. (23)

What is meant by the firqah al-mutawātirah is their own community who believed in the Shi'i faith. The Sunni community's involvement in religious matters was not valid and by implication real knowledge ('ilm) was restricted to the Shi'i sect. It was only those Shi'is learned in uṣūl and furū' whose opinions were to be considered. The elaboration of this principle reflected and confirmed the authority of the Shi'i community over the Sunni community on one hand, and on the other hand, the authority of the clerical class within the Shi'i community.

(3) The concept of certainty against the method of conjecture

For the Sunnis, in accordance with their belief that the Nass period stopped with the death of the prophet, there were no specific persons after him who had the infallible authority to interpret and determine the divine commandments. They maintained that the Qur'ān and the Sunnah were the only sources from which the ahkām regarding new legal issues could be derived. Besides, in their Ijtihād, they put their trust and reliance on the conjectural sources such as Ra'y, Qiyās, Istihsān, Masālih Mursalah and others. Moreover, any ahkām derived by the effort of the Sunni Mujtahids through these techniques would be considered as law by God. (24)

These various sources were considered right and regarded as based on a firm theoretical footing (25);

(1) According to Shāfi'i, the method of Qiyās was originated from the idea that the revelation might be supplemented by dependent reason which could then be regarded as a fully Islamic source of law. He extended the range of coverage of scripture and traditions by the method of Qiyās which could apply a prescription mentioned in the scripture or traditions for one kind of case to similar cases with the same relevant characteristics. Therefore, Qiyās was a method of reason in the service of scripture. (26)

(2) As viewed by the Hanafi and Hanbali legal theorists, Istihsan is not the arbitrary opinion of the jurist but the carefully conducted analogy on the basis of textual evidence and sound methodological principles. Since the positive conclusions of Istihsan were made to agree with the principles of 'ilm usul al-fiqh, the methodology itself became in both schools of law as legitimate as that of Qiyas.<sup>(27)</sup>

As far as the Shi'a were concerned, they never needed to rely on those conjectural methods;

(1) The Shi'a believed that the Nass period is not limited to the prophet's time, but extended to the twelve Imams. During this time, the Imams were regarded as the absolute source of law. Therefore, by the time the Sunnis faced the insoluble problem in the wake of the cessation of Wahy and depended mostly on the conjectural methods; the Shi'a could still resort to real knowledge ('ilm) through their Imams.

(2) Apart from the weakness of the method of the Sunnis, in that it is not in accordance with the point of view based on the Qur'an and Sunnah<sup>(28)</sup>, it also contradicted the intellectual principles held by the Shi'a.<sup>(29)</sup>

Instead the Shi'a had adopted the ideas of Mu'tazilism which stressed the function of 'Aql in determining all aspects of Shari'ah<sup>(30)</sup> and emphasized that all should be proven.<sup>(31)</sup>

NOTE TO CHAPTER FIVE

- (1) See page 2 - 5.
- (2) See page 6 - 8.
- (3) See page 10 - 12.
- (4) See page 13 - 14.
- (5) See page 19 - 20.
- (6) See page 27, 28, 31 and 34.
- (7) See page 61 - 62.
- (8) See page 62 - 64.
- (9) See page 57, 65 - 67, 70 and 101 - 102.
- (10) See page 64 - 65, 67, 69 and 70.
- (11) See page 91, 105 and 106.
- (12) See page 91 - 93.
- (13) See note to chapter one, part C, no. 18 and 20.
- (14) See note to chapter one, part C, no. 22 and 23.
- (15) See page 101 - 103.
- (16) See page 105 - 106 and 187 - 189.
- (17) Norman Calder, The Structure of Authority, page 233 - 234.
- (18) See page 116, 118, 119 - 121 and 231 - 232.

- (19)See page 305 - 307.
- (20)See page 236 and 308.
- (21)See page 236 - 237,259,302 - 304,308 and 321 - 322.
- (22)See page 117,130 and 131.
- (23)See page 224,301 - 302 and 327.
- (24)See page 19 and 229.
- (25)See page 158 - 159,231 - 232 ,240 - 251.
- (26)See page 7,159 - 161.
- (27)Sarakhsi,op.cit.,v.11,page 200,202 and 208.
- (28)See page 233 - 236.
- (29)See page 10 - 12,254 - 256.
- (30)See page 10.
- (31)See page 309 - 314,327 and 330.

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