IJTIHAD IN TWELVER SHI'ISM

The Interpretation and Application of Islamic Law in the Context of Changing Muslim Society

Esmat al-Sadat TABATABAEI LOTFI

Submitted for the Degree
of Doctor of Philosophy

Department of Theology and Religious Studies

The University of Leeds

September 1999

The candidate confirms that
the work submitted is her own and that appropriate credit has been given where
reference has been made to the work of others.

Dedicated to

The Memory of Founder of the Islamic Republic of Iran

Imam Khomeini

and

to my parents

Acknowledgments

In the Name of God, the Beneficent, the Merciful;

and thanks to be him

"Who taught man what he knew not"

(Qur'an, Surah XCVI, Verse 4)

Abstract

The purpose of the thesis is to investigate whether Islamic laws, without relaxing the nature of the *Shari'a*, could be expanded and adapted to meet the changing needs of modern Muslim societies. The focus is on the Shi'ites' approach to the law with special reference to the debates in Iran following Imam Khomeini's emphasis on the "role of the time and place in *ijtihad*". The thesis suggests that scientific knowledge in different areas should play a role in *ijtihad* beside the judgements of those possessing the accomplishments necessary to be a qualified *mujtahid*.

The first three of the seven chapters are designed to provide a general overview of *Shi'i* law, the concept of *ijtihad* and its development and also the sources and the methodology of *ijtihad* (*usul al-fiqh*) among the Shi'ite *'ulama*. The fourth chapter discusses the relation between *ijtihad* and the comprehensiveness of the *Shari'a*, and examines the different theories introduced by both traditional *'ulama* and Muslim modernists in adapting Islamic law to the requirements of the modern age. The fifth chapter focuses on the "role of the time and place" in *ijtihad*, and the ways and principles through which changes in the law may be justified. In investigating the stages through which a *mujtahid* may find out the rulings of the *Shari'a* on a particular subject, some new and controversial issues including insurance policies, Islamic banking, human dissection, organ donation, and woman's right to judge and to be followed are discussed briefly in the sixth chapter. By studying and examining in detail the rulings of the *Shari'a*, as extracted by some leading *fuqaha*, on the new reproductive technologies, artificial insemination, *in vitro* fertilisation and human cloning, it is shown how scientific knowledge can affect the procedure of *ijtihad*.

Overall it is concluded that participation of the *fuqaha* in regulating the law and giving practical instruction regarding different problems requires the authorisation of division in *ijtihad* and cooperation between *mujtahidun* and scientific authorities on various subjects. It is by recognising these necessities and considering the conditions of the time that they may be able to bring Islamic law successfully into harmony with the requirements of modern life.

Table of Contents

Chapter One: The Fundamental Belief in the Imamate and its Role in Producing the *Shi'i* Law

Chapter Two: The Meanings of the *Ijtihad* and its Historical Development among the Shi'ites

Chapter Three: *Usul al-Fiqh* or the Principles of Islamic Jurisprudence

Chapter Four: Comprehensiveness of the *Shari'a*

Chapter Five: *Ijtihad*, Continuity and Change in Islamic Law *"The Role of the Time and Place" in Adapting Islamic Law to the Changing Needs of Muslim Society*

Chapter Seven: The Rulings of the *Shari'a* on New Reproductive Technologies, *Ijtihad* in modern *Shi'i* Jurisprudence

List of Abbreviations

AD	Anno Domini, the year of the Lord
AH	Anno *Hijrae*, the year of the *Hijra*
AID	artificial insemination by donor
AIH	artificial insemination by husband
DNA	deoxyribonucleic acid
HFE	human fertilisation and embryology
HQ or H	Hijri al-Qamari, the lunar year of the Hijra
HS	*Hijri Shamsi*, the solar year of the *Hijra*
IVF	*In vitro* fertilisation
MIH	Muhammad Ibn al-Hasan al-Hurr al-'Amili
MIY	Muhammad Ibn Ya'qub Ibn Ishaq al-Kulayni al-Razi
PLS	profit-and-loss sharing
RM	Ruhollah al-Musawi, al-Khomeini
XX	sex chromosome in the female
XY	sex chromosome in the male
b	date of birth
d	date of death
pbuh	peace be upon him

Note on Arabic Transliteration

In the body of the thesis Arabic words and expression are transliterated in the simplest possible way; that is, without placing dots beneath consonants or macrons above vowels or using letters which are not found in the Roman alphabet. Most of them are listed below, accurately transliterated, in alphabetical order and without the Arabic definite article.

A
ʿadālah
ʿādil
adillah
āhād
aḥādīth
ʿāhir
aḥkām
ahl al-ḥall wa al-ʿaqd
akhbār
akhbārī
ʿālim
amārah
ʿāmil
ʿām al-fatḥ
ʿāmm
ʿarḍ
ʿāriyah
asbāb al-nuzūl
aṣl
awṣiyāʾ
āyah
āyāt al-aḥkām

B
banāʾ
bāb
barāʾah
bāṭil

D
ḍābiṭ
ḍaʿīf
ḍamīr
ḍarar
ḍarurah
ḍidd
ḍimān
dīnār
ḍirār
dirāyah
diyāt
dukhūlī

F
faqīh
fāsiq
fatawā
fatwā
fiʿlī
fuqahāʾ
furūʿ

G
ghaṣbī

H
ḥabs
ḥadīth
ḥads
ḥāfiẓ
ḥajar
ḥajj
ḥajr
ḥalāl
ḥaml
Hanbalī
ḥaqq al-shufʿa
ḥaraj
ḥarām
ḥasan
ḥilliyyah
ḥiss
ḥudūd
ḥujjiyyah
ḥukm
ḥullah
ḥurmah
ḥurr

I
ʿibādāt
ʿiddah
iḍṭrār
iḥday
iḥtiyāṭ
ījāb
ijārah

ijāzah
ijmāᶜ
ijmālī
ijtihād
ijtimāᶜ
ikhtilāf
ikhtīyār
īlāʾ
ᶜillah
ᶜilm
insān
īqāᶜāt
iqrār
Iqtiṣadunā
ᶜirfān
istiftāʾāt
istiḥsān
istīlād
istinbāṭiyyah
istiṣḥāb
istiṣlāḥ
iᶜtikāf

J
jamīᶜ
jarḥ
jihād
juᶜālah

K
kāffah
kaffārah
kashfī
kāshif ᶜan qawl al-maᶜṣūm
khāṣṣ
khuṭbah
khulᶜ
kitāb
kitābah

L
lā ḍarara wa lā ḍirār
lā ilāha illā al-llāh
liᶜān

luqaṭah
luṭf

M
Madanī
madḥ
madhāq al-Shāriᶜ
madrakī
mafāsid
mafqūd
maghṣub
maḥall
makhṣūṣ
Makkī
makrūh
mamdūḥ
mandūb
maᶜnawī
manqūl
manṣūb
mansūkh
manṣūṣ
manṭaqah al-firāgh
maqbūl
maᶜrūf
maṣāliḥ
mashūr
maṣlaḥah
mawḍuᶜāt
Muᶜāmalāt
muᶜawwaḍ
mubāḥ
mubāḥāt
mubārāt
muᶜḍal
muḍāribah
muḍghah
muḍmar
muḥaddithūn
muḥaṣṣal
muḥkam
muḥkamāt
mujtahidūn
mukhaṣṣiṣ al-munfaṣil

xiv

mukhaṣṣiṣ al-muttaṣil
muʾminūn
munāfiqūn
munāwalah
munqaṭiʿ
muqaṭṭaʿāt
musāḥiqah
musāqāt
mushāfahīn
mustafīḍ
mustaḥabb
mustanbaṭah
mustaqīm
mutajazzī
mutashābih
mutashābiḥāt
mutawātir
muṭlaq
muʿawwaḍ
muzāriʿ
muzāriʿah

N
nāʾib al-ʿāmm
naṣṣ
nawādir
neẓām
nikāḥ
nushūz
nuṣūṣ
nuwwāb

Q
qabūl
qaḍāʾ
qaḍāwah
qāḍī
qarḍ al-ḥasanah
qaṣd
qaṭʿī al-ṣudūr
qawlī
qāʿidah qubḥ ʿiqāb bi lā bayān
qiṣāṣ
qiyās

Qurʾān
qurūʾ
quṭb

R
Ramaḍan
rijāl
rimāyah
rujūʿ

S
ṣadaqāt
ṣadūq
ṣaḥābah
ṣaḥīḥ
ṣalāt
samāʿ
ṣandūq
ṣawm
Sharʿī
Sharʿiyyah
Sharīʿah
Shīʿī
Shīʿite
ṣiḥḥa
ṣīghah
sīrah al-ʿuqalāʾ
ṣirfah
ṣulḥ
ṣughrā
sulṭāniyyah
Sunnī
sūrah

T
taʿāruḍ
tābiʿī
tābiʿūn
tafṣīl
tafsīr
ṭāghūt
taḥammul
ṭahārah
ṭahir

xv

taḥkim
takhṣiṣ
takhṭiʾah
takhyīr
taklīf
ṭalāq
tanqīḥ al-manāṭ
ṭāqah
taqlīd
taqrīrī
tarājim
ṭard
ṭarīqah
tashkhiṣ
taṣwīb
tawātur
taʾwīl
taʾwīlāt
taʿzīrāt
thānawī
thānawiyyah

U
ʿudūlah
ʿulamāʾ
ʿunwān
ʿuqūd
ʿuṣr
uṣūl al-ʿamaliyyah
uṣūl al-fiqh
uṣūlī

W
waḍḍāʿ
wadīʿah
wāḥid
wājib
waḥy
wāqiʿī
wāqiʿiyyah
waṣiyyah
waṭan
wijādah
wilāyah

wuḍūʾ
wuqūf

Y
yā ayyuha al-nās
Yamānī
yaqtaḍī

Z
ẓāhir
ẓāhirī
ẓāhiriyyah
zakāt
ẓannī al-ṣudūr
ẓawāhir
zawāj
ẓihār

TRANSLITERATION

Symbol	Transliteration	Symbol	Transliteration
ء	ʾ	ل	l
ب	b	م	m
ت	t	ن	n
ث	th	و	w
ج	j	ه	h
ح	ḥ	ي	y
خ	kh	ة	ah
د	d		
ذ	dh	**Long Vowels**	
ر	r	١	ā
ز	z	و	ū
س	s	ى	ī
ش	sh		
ص	ṣ	**Short Vowels**	
ض	ḍ	َ	a
ط	ṭ	ُ	u
ظ	ẓ	ِ	i
ع	ʿ		
غ	gh	**Persian Letters**	
ف	f	پ	p
ق	q	چ	ch
ك	k	ژ	zh
		گ	g

Introduction

Islam and modernity or the difficulties of being in harmony with the times is one of the subjects that has attracted the attention of many Islamic scholars in recent centuries. Many Muslims and non-Muslims argue that since Islamic law is "discovered", and not legislated, by the *'ulama* in unchanging sources, it is necessarily limited, inflexible and rigid and therefore it may not meet the demands of human life in modern times. In response to this criticism some scholars take the view that religious commands should remain limited to personal matters and that there should be a disconnection of religion from political and administrative affairs. This view, generally described as secularism, is condemned by leading *fuqaha* and also by some Islamic reformists who, in reviving the basic values of the *Shari'a*, try to introduce a legal system which meets the varying needs of modern societies.

Insisting on the comprehensiveness, the universality and the eternality of the revealed teaching of Islam, leading *fuqaha* hold that Islamic law provides a wide scope for flexibility and the ability to adapt to new and changing circumstances, because in addition to permanent laws, which are ordained by the Lawgiver for

1

permanent human requirements, there are some temporal and varying laws which are ordained to meet varying human needs in variable situations.

Believing that assessment of an act is grounded in a full understanding of the act and its circumstances, *fuqaha* and Islamic scholars hold that the key point in developing and adapting the Islamic law to the changing needs of Muslim societies lies at the very heart of *ijtihad*, which must never be abandoned. In contradistinction to those who support secularism, Islamic scholars insist on the participation of qualified *mujtahidun* in the preparation and approval of statutory law so as to ensure its harmony with *Shar'i* principles. According to Imam Khomeini, *fiqh* provides the theoretical basis for administrating human life from birth to death, and Islamic legal theories come to be put into practice through the establishment of an Islamic government.

So *ijtihad* is described as the key to both development and the adaptation of the Islamic rules to meet with the changing needs of Muslim society. It is most important to note that the fulfilment of the aims of *ijtihad* is founded on the methods used in deducing the Islamic law from its relevant sources or, in other words, on the methodology of *ijtihad* or *usul al-fiqh*. For Sunni *fuqaha* this refers to those methods of reasoning introduced by the founders of different schools, such as analogy (*qiyas*), juristic preference (*istihsan*), public interest (*al-masalih al-mursala*), blocking the means (*sadd al-dharayi'*) and also *talfiq*, which gained a broader usage more recently as a result of 'Abduh's rethinking of the principle.

The *Shi'i usul al-fiqh* is distinguished by the acceptance of *'aql* as one of the main sources of the *Shari'a* besides the Qur'an and the *Sunna*. There is a principle in *Shi'i usul al-fiqh* known as the rule of correlation (*al-qa'ida al-mulazima*), which

states that whatever is ordered by reason is also ordered by the Lawgiver. The authority of *'aql* includes "the authority of all the positive scientific principles which are of absolute value".

The emergence of the school of Akhbari among the Shi'ites detracted from the importance of *'aql* in deducing the law of the *Shari'a*. It was at the end of the eighteenth century, as the result of the efforts of jurists of the *Usuli* school, that *ijtihad* came into practice more effectively. But since it rarely happened that *fuqaha* were involved in administrative affairs, the practice of *ijtihad* was largely limited to individual affairs and was less developed in public matters.

After the Islamic Revolution of Iran and the establishment of the Islamic government, which was supposed to be administrated under supervision of the *fuqaha,* governors faced certain problems whose resolution by the *fuqaha* seemed to be impossible. Indeed, some rules even appeared to be in conflict with the solutions offered by the experts in relevant subjects. This led to some controversial debates which required a reformation of *ijtihad* or perhaps some changes in its methodology. It was in recognition of this fact that Imam Khomeini, besides the theory of "authority of *faqih*" in enacting governmental regulations, introduced the doctrine of "the role of the time and place in *ijtihad*" and also the priority of the expediencies of the Islamic regime over the other rulings of the *Shari'a* on the basis of the principle of the most important and the important (*al-ahamm wa al-muhimm*) which is a rational principle accepted by the Shi'ites in determining the law in the case of conflict (*tazahum*) between two or more rules.

Imam Khomeini himself did not take the opportunity to explain these theories in more detail. There are, however, some key points that were mentioned by him during his leadership of the Islamic government of Iran. For example, he commented:

> Time and place are two crucial parameters in jurisprudence. The commandments on a case may change as a result of new political, social and economic situations. This means that, through the precise understanding of economic, social and political relations, it will appear that the issue, which is apparently the same in the new situation, has really changed and inevitably needs a new commandment.[1]

Although Imam Khomeini himself was educated in, and concerned with, the traditional method of *ijtihad*, he repeatedly stated that the usual approach to deducing Islamic law is inadequate and that *mujtahidun* have to be fully qualified in understanding the social and political circumstances of the time to be able to overcome the difficulties of governing the country. In one of his letters to the members of an institution known as "Majma'-e Tashkis-e Maslahat-e Nezam" (Council for the Discernment of the Regime's Interest)[2], he exhorted:

> At the same time that you must try your best to ensure that nothing contrary to the values of the *Shari'a* is passed - may God never bring the day when rules contrary to the values of the *Shari'a* are adopted - you should make strenuous efforts that amidst the ebb and flow of economic, military, social and political difficulties, Islam is not accused of being incapable of administering the world.

---

[1] *Sahifa-ye Noor* (a collection of Imam Khomeini's messages, speeches, interviews, decrees, and letters), Vol. 21, p. 98.

[2] In other words, National Exigencies Council.

Imam Khomeini's opinions were the threshold of novel debates on *ijtihad* and the scope of the change of the *Shari'a*. This is one of the subjects to be discussed in some parts of the thesis.

It appears that the main impediment to the successful exercise of *ijtihad* is the traditional form of learning and the individual practice of *ijtihad*. In expanding the Islamic rules and bringing them into harmony with the changing needs of the Muslim community, *mujtahidun* cannot content themselves with studying only the traditional texts. In order to be capable of relating the resources of the *Shari'a* to modern governmental processes in the fields of legislation and judicial practice, *mujtahidun* ought to be in contact with the changing conditions of contemporary life and be familiar with different branches of knowledge, such as politics, economics, sociology, and so on, besides having gained all the qualifications necessary to become a qualified *mujtahid*. The point just mentioned should be considered even in dealing with individual affairs, as I will show in examining the opinions of the *fuqaha* on some new subjects such as organ transplantation and new reproductive technologies including artificial insemination, *in vitro* fertilisation and human cloning.

I shall attempt to deal with these issues in such a way as to indicate how other branches of knowledge (besides all the necessary branches of scholarship one must study to qualify as a *mujtahid*) can influence the process of *ijtihad* and the determination of the rulings of the *Shari'a* on a particular issue in question.

1. Hypothesis

The thesis suggests that Islamic rules are subject to expansion and change and are by no means inflexible. These rules can meet the requirements of Muslim society

in all periods, provided that qualified *mujtahidun* employ appropriate methods in exercising *ijtihad*, and are aware of the changing needs of their society and of recent developments in scientific fields.

2. The Major Question

How, without relaxing the nature of the *Shari'a*, can *fuqaha* expand and adapt the Islamic rules to meet the varying needs of developing societies?

3. Minor Questions

1. How could it be possible for *Shari'a* to be on one hand eternal and comprehensive and on the other hand subject to change, flexibility and expansion?

2. Which types of Islamic rules are subject to change?

3. What are the reasons for change?

4. Is there any textual or rational evidence to support the idea ?

5. What is the role of *'aql* in deducing the law?

6. How can *mujtahidun* find the rulings of the *Shari'a* on new subjects resulting from scientific advances in modern times?

7. What is the role of science in *ijtihad*?

4. Assumptions

This research rests on a number of assumptions. First, the text of the Qur'an and the *Sunna* of the Prophet and infallible Imams of the Shi'ites are considered to be

the main and valid sources of the *Shari'a*. Second, qualified *mujtahidun* have

authority to deduce the law and the opinions of the most learned are valid as *Shari'a*.

5. Scope of the Study

First, in the terminology of the Shi'ites there are several kinds of *ijtihad*

including those exercised for knowing and examining the evidence (*dalil*) and the

basis of the Islamic law (*ijtihad al-usuli*), knowing the law through the valid sources

of the *Shari'a* (*ijtihad al-fiqhi*), and inferring the rulings of the *Shari'a* on a

particular case by referring it to the basic principles of the *Shari'a* or applying its

general rules (*ijtihad al-tafri'i and al-tatbiqi*). The thesis basically focuses on the last

kind of *ijtihad*. Second, the research is concerned with examining the rulings of the

Shari'a, as extracted by the Shi'ite *fuqaha*, on some new subjects resulting from

social or scientific developments in modern times, and also such issues as determining

the amount of blood-money, woman's right to judge, and so on that, although being

discussed by the ancient *'ulama*, may require a new investigation because of

changing conditions. The last four chapters cover the main purpose of the thesis.

6. Methodology

Apart from chapter two, which is also a historical description of the Shi'ite

doctrine of *ijtihad*, and chapter three, which is more or less descriptive, the other

chapters are mostly based on analytic methods. In addition, by means of a

comparison between different opinions on selected subjects, some assessment and

criticism are offered.

7. Sources

The sources used will be principally the Qur'an, *tafsir*, Shi'ite sources of *hadith*, related books, articles including the collection produced by the Congress for Investigating Imam Khomeini's Juridical Thought and individual requests for *fatwa* (*istifta'at*). Scientific books on selected subjects (artificial insemination, *in vitro* fertilisation and human cloning) will also be consulted.

8. Structure

After establishing the aim, scope and characteristics of the research, the structure of the thesis will be as follows:

The first chapter is designed to give a brief explanation of the concept of the Imamate in *Shi'ism,* a history of the infallible Imams and the *mujtahidun* as the deputies of the Imams during the period of Occultation, an explanation which is necessary because it must be understood that the ordinary people are supposed to acquire Islamic teachings by following these learned authorities.

Chapter Two explores the meaning of *ijtihad* and how it is differently understood by the Sunni and Shi'ites. A historical development of the practice of *ijtihad* by the Shi'ites will be followed.

The third chapter introduces the sources of *ijtihad* and the Shi'ites' methodology of *usul al-fiqh*.

The fourth chapter deals with the relation between *ijtihad* and the comprehensiveness of the *Shari'a*.

The fifth chapter explains the theory of "the role of the time and place in *ijtihad*", discusses the types of rules which are subject to change, examines the

reasons for change, considers the one who decides the changes, and finally investigates the rational and textual evidence on which the changes are based.

Chapter six examines the methods employed by the *fuqaha* in deducing the rulings of the *Shari'a* on some matters on which the text of the Qur'an and *Sunna* appear to be reticent. In the light of the methods introduced in chapter six, the seventh and last chapter explores the rulings of the *Shari'a* on new reproductive technologies.

Chapter One

The Fundamental Belief in the Imamate and its Role

in Producing the *Shi'i* Law

1.1 Introduction

One of the principles accepted by the Shi'ites as a fundamental belief is the

principle of the Imamate. This principle, along with the doctrine of the justice of God

(*al-'adl*), plays an important part in producing the legal and political system of the

Shi'ites. Since During the Greater Occultation every qualified faithful *mujtahid* is

considered a general agent (*al-na'ib al-'amm*) or deputy of the Imam, permitted to

interpret and apply the rulings of the *Shari'a*, it is necessary here to raise briefly the

subject of the Imamate before investigating the concept of *ijtihad* and its historical

development, which will be discussed in the next chapter.

1.2 The Imam and the Imamate

Imam, literally meaning leader or chief, is the title given to a person who leads

a particular social or political movement, or a scientific or religious school of

thought. In Shi'ite terminology this title, specially referring to infallible members of the Prophet's household, semantically goes beyond merely denoting a leader or governor of Muslim society.

The Imam is a Perfect Man (*al-insan al-kamil*) who is the Proof (*hujjah*) of God on Earth. He is the mystical Pole (*qutb*) of the universe who through the inner aspect of his being attracts the hearts of capable people and guides them towards perfection and the ultimate goal of existence. This kind of guidance, which is a type of spiritual kingship beyond the visible world, is construed as *al-wilayah al-takwini* (guardianship of genesis) and is restricted to some of the prophets and the immaculate (*ma'sum*) members of the Prophet's household (his daughter and the twelve Imams). The physical presence or absence of the Imam has no effect on this kind of guidance, which ensues from the relationship between the suprasensible world and the believers.[1]

As well as providing spiritual guidance through the inner aspects of the Imam, which signify the higher degree of being, Islam guides believers through intervention in their material lives by formulating a series of moral and practical injunctions including the duties man has before God and human society. The Qur'an as the first source of Islamic sciences and injunctions originates the general principles.

---

[1] For a study on the Imamate see Henry Corbin, "The Meaning of the Imam for *Shi'i* Spirituality" in Seyyed Hossein Nasr, Hamid Dabashi, and Seyyed Vali Reza Nasr (eds.), *Shi'ism: Doctrines, Thought, and Spirituality* (Albany, New York: State University of New York Press, 1988), pp. 167-187; 'Allamah Sayyid Muhammad Husayn Tabataba'i, *Shi'a*, translated by Sayyid Husayn Nasr (Qom, Iran: Ansariyan Publications, 1989), pp. 174-189. See also 'Allamah Tabataba'i's interpretation and explanation of the Qur'an, 21:73 (*Wa ja 'alnahum a'immatan yahduna bi-amrina*: And we made them chiefs who guide by our command) in his *Al-Mizan*, Vol. 14 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran), p. 304, and of 2:124 (*Inni ja'iluka li-nnas-i Imaman*: I have appointed thee a leader for mankind) in *Ibid.*, Vol. 1. P. 272-4.

Clarification and elaboration of the details is left to the Prophet and, as the Shi'ites

believe, to the infallible members of his household.

For the Shi'ites, the Imam is a person chosen by God to guard and preserve

the revealed messages of Islam after the Prophet. He knows the true meaning of the

Prophetic Revelation and is the rightful successor of the Prophet in interpreting and

applying the Divine Law. So, in addition to the Qur'an and the *Sunna* of the Prophet,

whatever originated with the Imams (whether a saying, a deed or something they

consented to) should be regarded as a source of knowledge, law and ethics. This

belief, which differentiates *Shi'i* from Sunni legal schools as regards their legal

sources, is supported by a series of Prophetic *hadith*, among which is the following,

known as *Hadith al-Thaqalayn*, handed down by both *Shi'i* and Sunni transmitters:

> I leave among you two great and precious things which if you cling to them you will
>
> never be misguided; the Book of God and My Household. These two will never be
>
> separated from each other until they encounter me at the *Hawz* (in paradise). Be
>
> careful how you behave toward them.[2]

1.3 The Twelve Imams

As the Shi'ites believe, the Prophet of Islam had repeatedly said that 'Ali ibn

Abi Talib was the man most qualified to succeed him as the leader of the Muslims.

The most important piece of evidence concerns an event that occurred when he was

---

[2] This *hadith* is recorded in different versions in both Shi'ite and Sunni sources of *hadith*. For the
above version see Muhammad Baqir al-Majlisi (here after: M. B. al-Majlisi), *Bihar al-Anwar*, Vol. 2
(CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran), Chapter
(*bab*) 14, p. 99, Riwayah No. 59; Chapter 34, p. 284, No. 2. For the Sunni sources of the *hadith* see
Tabataba'i Modarresi, Hossein, *An Introduction to Shi'i law: a bibliography study* (London: Ithaca
Press, 1984), p. 2, Footnote No. 1.

coming back from his last *hajj* in the year 10 A.H. On the 18th of *Dhu al-hijja*, at a place between Mecca and Medina called Ghadir Khumm, the Prophet took 'Ali by the hand in front of the resting pilgrims and said: "Every one whose patron I am should also take 'Ali as a patron (*man kuntu mawlahu fa-'Aliyun mawlahu*)". This event, which was later made into a festival by the Shi'ites, has been fully recorded by both Sunni and *Shi'i* transmitters. It is recorded, for example, by al-Bara':

> We were with the Apostle of God on his journey during the farewell pilgrimage. When we reached Ghadir Khumm he called for prayer and a place was swept for the Apostle under two trees. And then he took 'Ali's hand and said to the people: "Do you not acknowledge that I have a greater claim on each of the believers than they have on themselves?" And they replied: "Yes!" And he took 'Ali's hand and said: "Of whomsoever I am Lord (*mawla*), then 'Ali is also his Lord. Oh God! Be Thou the supporter of whoever supports 'Ali and the enemy of whoever opposes him." Then 'Umar met 'Ali and said to him: "May this position be pleasing to you, from now on you are the master of every believing man and woman."[3]

While the Sunnis hold that the Prophet wanted only to support 'Ali in some internal conflict and had no intention of giving him precedence over other senior men from his clan, the Shi'ites believe that the words of the Prophet regarding Imam 'Ali were a Prophetic response to a Divine command to appoint him as his definite successor. There are some verses of the Qur'an and *hadith* which are referred to by the Shi'ite *'ulama* in this regard:

---

[3] See M. B. al-Majlisi, *op. cit.*, Vol. 37, Chapter 52, p. 159. No. 40 and p. 198, No. 83. For the Sunni source of the *hadith* see Momen Moojan, *An Introduction to Shi'i Islam: The History and Doctrines of Twelver Shi'ism* (New Haven and London: Yale University press, 1985), p. 15, Reference No. 9.

O Apostle! Deliver what has been revealed to you from your Lord; and if you do it not, then you have not delivered His message, and Allah will protect you from the people; surely Allah will not guide the unbelieving people.[4]

This day have those who disbelieve despaired of your religion; so fear them not, and fear Me. This day have I perfected for you your religion and completed My favour on you and chosen for you Islam as a religion.[5]

According to *Shi'i* commentators, these two verses are related to each other and were revealed concerning the investiture (*wilayat*) of 'Ali. The later (5:3), some traditions assert, was revealed at Ghadir Khumm.[6] According to 'Allamah Tabatabaei's explanation, when the enemies of Islam lost all hope of destroying it, they flattered themselves that Islam would fade away after the death of the Prophet. But their wishes came to nought when the Prophet presented 'Ali as the guide and leader of the Muslims. The perfection of Islam, in fact, depended upon the decision that guaranteed the life of Islam after the Prophet is passing. This was to appoint someone who was the most qualified to take such a responsibility.

Unfortunately, at the very moment when the Prophet passed away, and while his household were still occupied with his burial, the news came that a group who

---

[4] The Qur'an, 5:67.

[5] The Qur'an, 5:3.

[6] It is reported by Abu Sa'id al-Khudari that: "The Prophet in Ghadir Khumm invited people toward 'Ali and took his arm and lifted it so high that the white spot in the Prophet's armpit could be seen. People were still there when this verse was revealed: 'This day have I perfected your religion for you and completed My favour unto you, and have chosen for you as religion al-Islam'. Then the Prophet of Islam said 'God is great' (Allahu akbar), that religion had become perfect and that God's bounty had been completed, His satisfaction attained and the *wilayah* of 'Ali achieved. Then he added, 'Every one whose patron I am has also 'Ali as a patron. Oh God! Be friendly with the friends of 'Ali and be the enemy of his enemies. Whoever helps him, help him and whoever leaves him, leave him.'" (See M. B. al-Majlisi, *op. cit.*, Vol. 37, Chapter, 52, p. 178. No. 65).

later formed the majority had selected a Caliph. The selection took place without any

consultation with 'Ali and his friends who were busy with the funeral. When they

became aware of the procedure they protested against the act of choosing the Caliph

by consultation or election. But the answer they received was that the interests of the

Muslims lay in what had been done.

It was this protest and criticism which separated the minority who followed

'Ali from the majority. These followers came to be known as the "party" or Shi'a of

'Ali. For the benefit of Islam and the Muslims, 'Ali did not oppose the existing

political order. Yet 'Ali's adherents refused to follow the majority in certain

questions of faith, and continued to hold that the succession to the Prophet and

religious authority rightly belonged to 'Ali, and that in all spiritual and religious

matters he was the one to be referred to. After twenty-five years (after the

Caliphates of Abu bakr, 'Umar and 'Uthman) the people turned to 'Ali, swore

allegiance to him and chose him as the Caliph. His Caliphate lasted about four years

and nine months. He was martyred by Ibn Muljam al-Muradi, one of the *Khawarij*.

There are some *hadith* recorded by both Sunni and Shi'ite transmitters to the

effect that the Prophet limited the number of his successors to twelve.[7] Among them

the following, related by Jabir al-Ansari, one of the Prophet's companions, who lived

until the Imamate of the fifth Imam, supports more clearly the Twelver Shi'ites' belief

that 'Ali ibn Abi Talib, Imam Hasan, and Imam Husayn and his nine descendants

should be admitted as the rightful Imams:

> In regard to the following verse: "O ye who believe! Obey Allah, and obey the
>
> messenger and those of you who are in authority" I [Jabir al-Ansari] stated to the

---

[7] For some of these *hadith* see: Shaykh al-Ta'ifah Abi Ja'far Muhammad Ibn al-Hasan al-Tusi, *Kitab al-Ghaybah* (Tehran: Maktabat Ninawi al-Haditha), pp. 88-93, 96-99.

Prophet that we knew Allah and his messenger. Then, who are those in authority (*ulu al-amr*)? [So I asked him to explain.] He said: "O Jabir! They are my successors and the Imams of the Muslims after me. The first of them is 'Ali ibn Abi Talib, then al-Hasan, then al-Husayn, then 'Ali ibn al-Husayn, then Muhammad ibn 'Ali, known as al-Baqir in Tourat. O Jabir! You will then be alive. When you see him give him my greeting. Then al-Sadiq, Ja'far ibn Muhammad, then Musa ibn Ja'far, then 'Ali ibn Musa, then Muhammad ibn 'Ali, then 'Ali ibn Muhammad, then al-Hasan ibn 'Ali, then my namesake (*samiyyi* and *kaniyyi*), the proof of Allah on his Earth and among his servants: Ibn al-Hasan ibn 'Ali. The one by whose hand Allah will open the easts and the wests of the Earth. He is the one who will be hidden from his followers as long as no one will remain on the belief on his Imamate except those whose hearts God had examined by belief.[8]

Among the Shi'ites' Imams, the fifth and the sixth (Imam Muhammad al-Baqir and Imam Ja'far al-Sadiq) had greater opportunities to spread the Islamic sciences. They trained many scholars in different fields of the intellectual and transmitted sciences,[9] so that there could be found about four thousand transmitters who narrated on the sixth Imam's authority.[10] The influence of the teachings of Imam Ja'far al-Sadiq on *Shi'i* jurisprudence is so huge that twelver Shi'ism is also known as Ja'fari Shi'ism.

The twelfth Imam, who is usually referred to by his titles of Imam-i 'Asr (the Imam of "period") and Imam Mahdi, was the son of the eleventh Imam. He was born

---

[8] M. B. Majlisi, *op. cit.,* Vol. 23, Chapter 17, p. 289, No.16.

[9] Zurara, Muhammad Ibn Muslim, Hisham Ibn Hakam, Aban Ibn Taghlib, Jabir Ibn Hayyan and many others were among these two Imam's renowned students. It is said that even some important Sunni scholars such as Abu Hanifah, the founder of the Hanafi school of law, had the honour of being the sixth Imam's students.

[10] I.K.A. Howard (trans.), *kitab al- Irshad: The book of Guidance by Shaykh al-Mufid,* with a preface by Seyyed Hossein Nasr, (Qom: Ansariyan publications), p. 408.

in Sammarrah in 256/868 and became Imam after the martyrdom of his father (260/872). To protect him from his enemies his birth was kept secret from all except a few special people. During the first sixty-nine years of his Imamate, known as the period of Lesser Occultation (*al-ghaybah al-sughra*), he contacted the people through four specially trustworthy deputies (*nuwwab*) appointed by himself. The first *na'ib* was Abu 'Amr 'Uthman ibn Sa'id al-'Amri, who had been the companion of the Imam's father and grandfather. After 'Uthman ibn Sa'id, his son Muhammad ibn 'Uthman succeeded him; and after his death Abu al-Qasim Husayn ibn Ruh al-Nobakhti and then 'Ali ibn Muhammad al-Samari were the special *nuwwab* for Imam Mahdi.[11] The followers would contact the Imam through these four people in order to put questions and to pay taxes. The questions were sometimes asked by means of sending letters through these agents and were answered in the same way in the Imam's own hand. The Imam's answers to these letters or any of his written messages are known as *al-tawqi'at* in the collection of *hadith*.[12] To be safe from the tyrannical dynasties of the time, the agents performed their tasks in secret so that the Imam's residence would not be found.

A few days before Samari's death, the Imam informed him that he (samari) would die within the next six days. The Imam told him to finish his tasks and not appoint anybody as his deputy.[13] In this manner the Greater Occultation (*al-ghaybah al-kubra*) of the Imam began and his contact with his followers, which used to take

---

[11] For a study of the lives of the special deputies of the twelfth Imam see Ali Ghafarzadeh, Zendegani-ey Nuwwab-e Khass-e Imam Zaman (Qom: Intesharat-e Nubugh, 1377 H.S.).

[12] Some of these letters also appear in al-Tusi, Shaykh al-Ta'ifah Abi Ja'far Muhammad ibn al-Hasan, *Kitab al-Ghaybah*, op. cit., pp. 228-258.

[13] See *Ibid.*, pp. 242-243.

place through the four special deputies, stopped. As the following *hadith*, recorded

on the authority of the Prophet, states, he will reappear and fill the Earth with equity

and justice:

> If there is to remain in the life of the world but one day, God will prolong that day
>
> until He sends on it a man from my community and my household. His name is the
>
> same as my name. He will fill the Earth with equity and justice as it will have been
>
> filled with oppression and tyranny [before him].[14]

1.4   The Mujtahidun, the Deputies of the Imam in the Greater Occultation

The emphasis laid on the fundamental belief in the Imamate required the

transmitters and the "learned authorities" (*'ulama* or *fuqaha* or *mujtahidun*) of the

Shi'ite school to take the place of the Hidden Imam during his occultation. It was

held that even when the Imam is inaccessible the guidance flows on through the

"learned authorities" of this school transmitting the Imam's teaching. This belief,

which later established the general deputyship (*al-niyabah al-'amma*) of the *'ulama*

in interpreting and applying the Divine law, also had confirmation from the following

hadith requiring the Shi'ites to refer to the transmitters of the Imams' sayings when

facing new questions regarding religious matters:

> And as for the events which may occur, refer to the transmitters (*ruwat*) of our
>
> sayings who are my proof (*hujjah*) to you and I am the proof of God.[15]

---

[14] M. B. al-Majlisi, *op. cit.*, Vol. 33, Chapter 20, p. 257, No. 529.

[15] Muhammad Ibn al-Hasan al-Hurr al-'Amili (here after: M. I. H. al-Hurr al-'Amili), *Wasa'il al-Shi'a ila Tahsil Masa'il al-Shari'a*, Vol. 27 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran), chapter: 11, p. 140, No. 33424.

This *hadith* was actually originated in reply to Ishaq ibn Ya'qub's inquiries about some religious questions submitted to the second agent, Abu Ja'far Muhammad ibn 'Uthman al-'Amri, for him to present to Imam Mahdi. It seems that one of those questions had been: Who should be referred to in the future in case of difficulty in religious matters?

The deputyship of the *'ulama* and *mujtahidun* during the greater Occultation was authorised by later scholars who interpreted the "transmitters of our saying" as the "learned authorities" of the Imamite School. The interpretation was on the basis that those who merely memorise and cite the *hadith* are not "transmitters"; rather the term refers to those who understand the general and specific connotations and denotations of the *hadith* and can derive precepts from them precisely. A prophecy made by the sixth Imam, Ja'far al-Sadiq, provided that it does not refer to Imams themselves, assures the presence of the "learned authorities" in every age and the continuation of the necessary guidance:

> The earth shall not remain deprived of a learned authority (*'alim*) from among us, who will distinguish the truth from falsehood.[16]

There are also some traditions reported on the authority of the Prophet introducing the *'ulama* as the trustees[17] and heirs of the teachings of the prophets[18] and similar in

---

[16] *Ibid.,* Vol. 16, Chapter: 31, p. 234, No. 21446.

[17] "The *fuqaha* are the trustees (*umana*) of the prophets." (See Muhammad Ibn Ya'qub Ibn Ishaq al-Kulayni al-Razi (here after: M. I. Y. al-Kulayni), *al-Kafi,* Vol. 1 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran), p. 46, No 5).

[18] "The *'ulama* are the heirs of the Prophets. The Prophets do not leave inheritance in the form of wealth (lit. *dinar* and *dirham*); rather, they leave behind their teachings. Anyone who acquires a part of it has gained a great amount of it." (See *Ibid.,* p. 34, No. 1)

position to that of the Prophets among the Children of Israel[19]. This gives the *'ulama* the authority to interpret Divine law as well as establish a just public order on the earth, which has been the purpose of God in appointing prophets throughout the history.

Cited below is the verse of the Qur'an referred to as another piece of evidence that Muslims should act in accordance with the rulings of *Shari'a* as deduced by the "learned authorities":

> And it does not beseem the believers that they should go forth all together; why should not then a company from every party from among them go forth that they may apply themselves to obtain understanding in religion, and that they may warn their people when they come back to them, that they may be cautious?[20]

Another tradition from the eleventh Imam stipulates that the *fuqaha*, representing justice and piety, must be obeyed. The tradition is as follows:

> ... As for any *faqih* who protects himself (from sin), preserves his religion, opposes his desires, and obeys his master, it is for the ordinary people to follow him. This only applies to some of the *fuqaha* of the Shi'a, not to all of them.[21]

The most important *hadith* that is cited as documentation in support of the appointment of qualified Imamite *mujtahids* as deputies of the Imams, is the one taking the form of a discussion between the sixth Imam, Ja'far al-Sadiq, and his close associate, 'Umar Ibn Hanzala of Kufa. According to this tradition, known as the

---

[19] "The (position of) *'ulama* of my nation is similar to that of Prophets among the Children of Israel."(See M. B. al-Majlisi, *op.cit.,* Vol. 2, Chapter 8, p. 22.No. 67)

[20] The Qur'an, 9: 122.

[21] M. I. H. al-Hurr al-'Amili, *op. cit.,* Vol. 27, Chapter 10, p. 131, No. 33401.

maqbula [22] of 'Umar Ibn Hanzalah in later works of *fiqh*, in the case of disputes only

the jurists of the Imamite school should be referred to. Since juridical authority

(*wilayah al-hukm*) serves as the stepping stone for all kinds of authorities, other

forms are derived through further interpretation of the same tradition. These include

the authority to infer the rulings of the *Shari'a* from the related sources, known as

ijtihad, and also the political authority of the *fuqaha*, known as *wilayah al-faqih*.[23]

The tradition also provides a method of resolving contradictions (*ta'arud*) that might

occur in the transmitted teachings of the Imams. Because of the importance of this

hadith for the authority of the Shi'ite *fuqaha* in *ifta*, judgement and political affairs it

is quoted here in full.

> I ('Umar ibn Hanzala) asked Abu 'Abd Allah (Ja'far al-Sadiq) whether it is lawful if
>
> two persons from our community, disputing about a debt of inheritance, refer to the
>
> ruling authority (*al-sultan*) and the judges (*al-qudat*) [appointed by him] for a
>
> judgement? The Imam said: "Whosoever refers to them for a judgement in the matter,
>
> whether in the right or in the wrong, has actually referred to a *taghut* (a tyrannical
>
> leader) to give judgement. And whatever judgement is given to him will be considered
>
> as unlawful (for him to take possession of a property) even if he is entitled to it. The
>
> reason is that he has obtained it through the judgement of the *taghut*, whereas God
>
> has commanded that they should reject him (*taghut*). God, the Exalted, has said:
>
> 'They desire to take their disputes to *taghut*, yet they have been commanded to
>
> disbelieve in them' (4: 60)."

---

[22]*Maqbula* in *hadith* classification is a tradition that has been "accepted" authoritatively by approving its text and putting the terms of its text into practice, without probing into the authenticity or weakness of all the transmitters who appear in the chain of the *hadith*.

[23] See for example: Ruhollah al-Musawi, al-Khomeini (here after: R. M. al-Khomeini) *Al-Rasa'il* (Qom: Mu'ssese-ye Matbu'ati-e Isma'iliyan, Rabi'al-Awwal, 1385), Vol. 2. P. 104.

I said: "What should they do, then?" The Imam replied: "They should refer to one among you who relates our traditions and who has examined what is lawful and what is unlawful according to us and has a deep insight into our decrees. They should take him as their arbitrator since I have appointed him a *hakim* [judge] over you. If such a person judges according to our ruling and the person concerned does not accept it, then he has shown contempt for the ruling of God and rejects us; and who rejects us, actually rejects God and such a person is close to [committing the sin of] associating (*shirk*) [a partner] with God." I inquired: "[What happens] if each of the two men [litigants] agrees on two arbiters of our community and they both agree to look into their case but they differ in their judgement and differ over [the transmission or interpretation] of your tradition?" The Imam said: "The ruling of the one who is more 'righteous' (*'adil*), more learned, more truthful in relating tradition, and more pious, shall prevail. And no attention shall be paid to the decision of the other." I asked: "[What] if both are equally righteous and equally accepted by our associates and neither of the two is regarded as more excellent?" The Imam replied: "[In that case] the tradition related on our authority by each of them, and according to which they would render their judgement, should be investigated. That which is agreed upon by your associates should be accepted as our ruling and that which is rare and unknown among your associates should be abandoned, for that which is agreed upon is not subject to doubt. Traditions are of three types:

(1) That whose integrity is self evident; such should be followed;

(2) That whose error is plain; such should be avoided;

(3) That which is difficult to comprehend. Such a tradition should be returned for elucidation to God and His Prophet. [This is the point of the tradition in which] the Prophet said: 'There are ordinances that are evidently lawful and evidently unlawful, and the ambiguous ones between the two.' The one who abstains from the latter will

save himself from the lawful; whereas the one who acts upon them will be guilty of having performed the unlawful and as a result destroy himself because of not knowing [that he should have abstained in the first place]."

I asked: "[What] if both traditions related on your authority are well known and are related by trustworthy narrators from you?" The Imam said: "They should be examined. The ruling of one which accords with the ruling of the Book and the Sunna and [even if it] contradicts [the ruling of] the Sunnis (al-'amma) must prevail. On the other hand, the ruling which contradicts the ruling of the Book and the Sunna and [even if it] agrees with that of the Sunnis must be abandoned.

I said: "May I be your sacrifice! What happens if both the jurists (faqih) establish their judgement and the ground of an evidence from the Book and the Sunna, but we find that one of the two traditions accords with the [traditions of the] Sunnis and the other contradicts them? Which one should be followed?"

The Imam replied: "The one that contradicts the Sunnis [should be followed] for therein lies guidance."

I [further] inquired; "May I be your sacrifice! [What] if both traditions accord with the Sunnis?" The Imam replied: "you should see which one of the two is preferred by their rulers and judges. [The one] preferred by them should be abandoned and the other must be followed." I said: "[What] if their rulers [and judges] accept both traditions?"

The Imam said: "In that case put off [judgement] till you meet your Imam. It is better to stop over a doubtful thing than to rush blindly into destruction."[24]

---

[24] M. I. Y. al-Kulayni, op. cit., Vol. 1. pp. 67-8, No. 10. Here, after making some changes to the first sentences of the English translation of the hadith I have cited it as translated in Abdulaziz Abdulhussein Sachedina, The Just Ruler (al-sultan al-'adil) in Shi'ite Islam: The Comprehensive Authority of the Jurist in Imamite Jurisprudence (New York-Oxford: Oxford University press,1988), pp. 140-1.

In sum, since the doctrine of the Imamate considers the deeds, tacit consent, and sayings of the infallible members of the Prophet's household as valid as those of the Prophet himself, it affects the *Shi'i* law by extending the limits of the *Sunna,* which is the second source of the law for Muslims. In other words, whereas Sunni legal schools follow the juridical opinion of their founders, Shi'ites follow the opinions of their Imams. As I will explain in the section on the source of Islamic law, even consensus (*ijma'*) needs the inclusion of the Imam's opinion to be accepted as a valid source.

Accepting the "learned authorities" of the Imamite school as the deputies of the hidden Imam, the Shi'ites have made it easy to follow the *mujtahidun,* who, employing the teachings of the Qur'an and the Sunna of the Prophet and the Imams, extend the Islamic law according to the changing needs of their societies. As well as having the authority to interpret the Divine law, *mujtahidun* have also the right to lead Muslim society; however, this does not earn them any extraordinary status above the level of common humanity.

Chapter Two

The Meanings of the *Ijtihad* and its Historical Development
among the Shi'ites

2.1 Introduction

This chapter will present a brief history of the development of *ijtihad* among

the Shi'ites. First of all it is necessary to point out the various meanings of *ijtihad*

because scholars belonging to different Sunni and Shi'ite schools understand the term

differently.

2.2 Literal Meaning of the Word *Ijtihad*

Ijtihad, according to the lexicographers, is derived from '*juhd*', which means

"exerting oneself" in performing a certain activity. This term, as al-Ghazali mentions,

is only used for activities entailing a measure of hardship. Hence, it would be correct

to use *jahada* or *ijtahada* for one who carries a heavy load (*ijtahada fi hamli hajar*

al-raha: he exerted himself to carry the millstone), but not if he carries only a trivial

weight; for example, *Ijtahada fi hamli al-khardala*: He exerted himself to carry a

grain of mustard seed is not said.[1] Ibn Manzur in *Lisan al-Arab* says:

> *Jahd* and *Juhd* mean power and strength *(al-taqah)*, and it is said that *Jahd* means
>
> hardship and difficulty *(al-mashiqqah)*, and *Juhd* means power and strength.[2]

He also states that *ijtihad* and *tajahud* mean "exertion of power and strength *(badhl*

al-wus' wa al-majhud)".[3]

2.3 Technical Meaning of the Term *Ijtihad*

In connection with the literal meaning, *ijtihad* also means using all one's

intellectual powers in deducing Islamic laws from the relevant sources in order to

discover the true application of the teachings of the Qur'an and *Sunna*, and the

person doing so is called a *mujtahid*. Different definitions are introduced by the

'ulama to determine the exact meaning of *ijtihad* as a technical term.[4] Here we are

not concerned to discuss the literal definition of the term. Rather we seek to explain

those ways of discovering the rulings of the *Shari'a* which are used synonymously

with *ijtihad*.

---

[1] See Abu Hamid Muhammad al-Ghazali al-Shafi'i, *al-Mustasfa min 'Ilm al-Usul*, with explanation
by Dr. Muhammad al-Ashghar (Beirut: Mu'assisa al-Risala), Vol. 2. P. 237.

[2] Ibn Manzur, *Lisan al-Arab* (Beirut - Lebanon, Dar Sader Publishers), Tome III, p.133.

[3] *Ibid.*, p.135.

[4] For a detail see Muhammad Ibrahim Jannati, "The Meaning of Ijtihad" in *Al-Tawhid*, Vol, V. Nos.
3 & 4 (Rajab - Duu al-Hijjah 1408 H.), pp.185-197.

2.3.1 *Ijtihad* in the Sense of *Ra'y*

A section of Sunni scholars has defined *ijtihad* as personal judgement or individual reasoning or individual intellectual effort to form an independent judgment on a legal question when the Qur'an and *Sunna* are silent. According to this definition, *ijtihad* could be an independent source of legislation parallel to the Qur'an and the Sunna. The second Caliph, 'Umar ibn Khattab, exercised this kind of *ijtihad* even in matters that were governed by a clear and definite text (*nass*) of the Qur'an or *Sunna*. For example, according to verse 9:60[5] the Prophet paid non-Muslims their share of public funds throughout his life. Nevertheless, 'Umar refused to pay this share, perhaps on the grounds that it was previously paid at a time when Muslims were weak and in need of the support of such people, and since that was no longer the case, payment would be discontinued.[6] This kind of *ijtihad* is also termed *al-ijtihad bi al-ra'y*; it is forbidden by the Shi'a faith and by some Sunni scholars in later periods. Some modernists today like to interpret *ijtihad* in this way and recommend it in order to change the Islamic laws and make them, in their view, applicable to the changing needs of developing societies.[7]

---

[5] "Alms are only for the poor and the needy, and the officials (appointed) over them, and those whose hearts are made to incline (to truth) and ..."

[6] Several examples of 'Umar's *ijtihad* are discussed by Shi'ite and Sunni scholars. While some Sunni scholars try to explain each of these instances in order to conclude that 'Umar did not contravene the Qur'an and Sunna, Shi'ites believe that 'Umar exercised his own opinion in matters governed by clear and definite texts of the Qur'an and Sunna ; this is not valid from the Shi'a point of view. For detailed information see for example, Sayyid 'Abdu al- Husain Sharaf al-Din al-Musawi, *Al-Nass wa al-Ijtihad*.

[7] See for example, Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, NewYork: Syracuse University Press, 1990), p. 28.

Ra'y means belief or opinion. As a technical term it is used when one holds an opinion not based on textual evidence (*nass*). According to Abu al-Husayn al-Basri (d. 436 A.H.), the use of individual opinion (*ra'y*) by the early authorities (*salaf*) means that their judgment was grounded in speculative signs (*al-amarah al-maznunah*), for example, through logical deduction or on the basis of certain signs (*amarah*) and indications (*adillah*) which do not constitute a patent or an implied text.[8]

It must be mentioned that when the Prophet (p.b.u.h) died and the process of revelation was terminated, the Islamic community lost its principal source for the solution of the problems raised by the new situation caused by the spread of Islam. At this point two different outlooks emerged in order to confront this difficult situation in the newly born Islamic society:

1. The point of view was expressed that the authority to determine the Islamic law should be restricted to the Household of the Prophet. The followers of this opinion, known as Shi'a, relying on some traditions from the Prophet, hold that only the Infallible Imams should be referred to for expounding the meanings of the Qur'an, the determination of religious duties and the solution of problems.[9]

2. The view was advanced that the Book and the *Sunna* of the Prophet are the only sources from which Islamic law regarding the new legal issues could be derived and that there is no specified person after the Prophet capable of determining the Divine law.

---

[8] See: Ahmad Hasan, "The Justification of Qiyas", *Islamic studies*, Vol. XX, No. 3 (Autumn 1981), pp. 218-219.

[9] For explanation and some Traditions in this regard see Chapter One.

The followers of this view, who were known as *Ahl al-Sunna*, soon realised that it is not an easy task to extract all the legal issues from the text of the Qur'an (*nusus*) and the *Sunna* of the Prophet. This led them into finding other ways and sources of *ijtihad* and to put their trust in the practice of *ra'y* and personal judgment. The adherents of this group quoted a number of traditions from the Prophet in order to justify their approach. According to one of these traditions it is said that when sending Mu'adh ibn Jabal as a judge to Yemen the Prophet asked him on what he would base his judgment. "On the Book of God", replied Mu'adh. The Prophet asked him what he would do when he could not find it therein. "According to the Sunna of the Prophet", said Mu'adh. The Prophet asked him again what he would do if he could not find it there either. He answered "I will exert my own opinion (*Ajtahidu ra'yi*)". Then the Prophet put his hand on Mu'adh's chest and said: "Thank God for assisting His Apostle with what he loves".[10]

The opponents of the view of *ijtihad bi al-ra'y* have mentioned several reasons in regard to this tradition which make it unacceptable. Some of these reasons are as follows:

1. The tradition about Mu'adh is unsound from the point of view of *sanad* (chain of transmission), as it is narrated only on the authority of al-Harith ibn 'Amr, whose character is not known. Al-Bukhari, in *al-Tarikh al-awsat*, stated that there is

---

[10] The *hadith* is recorded in different ways in the sources of *hadith*. For the *Shi'i* sources see: Muhammad Baqir Majlisi, *Bihar al-Anwar*, Vol. 2 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran), Chapter (*bab*) 34, p. 310, *Riwayah*: 75.

no mention of the name of al-Harith in any text of Traditions or book of *rijal* except this sole *riwayah*.[11]

2. This *hadith*, arguing as it does in favour of *ijtihad* in the sense of personal opinion, is not justified from the point of view of meaning (*dalala*), because *ijtihad*, in the sense of determination of the *Shari'a* and Islamic law by means of *ra'y* and personal opinion, was not practised in vogue during the lifetime of the Prophet. The answers regarding any problems of a religious, ethical, social, penal, and even economic and commercial nature could be found simply by referring to the Prophet, who had acquired divine commandments through *wahy*. There are some points in this connection discussed by Islamic scholars as follows:

- Whether all the rulings of the Prophet should be regarded as having been divinely inspired or he himself practised *ijtihad* in some situations.

- Whether *ijtihad* was lawful for the Companions during the lifetime of the Prophet or not.

- Accepting that the practice of *ijtihad* (even in its acceptable meaning for the Shi'ites) is lawful, whether every *mujtahid* can be assumed to be right in his conclusion, or only one of several solutions to a particular problem may be regarded as true to the exclusion of all others. This issue is discussed by the 'ulama as *taswib* and *takhti'a*.[12]

---

[11] See Muhammad Ibrahim Jannati, "Ijtihad and the Practice of Ra'y" in *Al- Tawhid*, Vol. V, No. 2, Rabi' al-Thani 1408, p. 62.

[12] See for example: Muhammad Kazim al-Khurasani, *Kifayah al-Usul* (Baghdad: Matba'at al-Shabandar, 1328 H.), pp. 120-1; Hsan ibn Zayn al-Din al-Shahid al-Thani, *Shatr al-Usul min Kitab al-Ma'alim al-Din wa Maladh al-Mujtahidin* (Tehran: Matba'at al-Rushdiyyah 1378 H.), pp. 235-6; al-Mirza al-Gharawi al-Tabrizi (ed.), *Al-Tanqih fi Sharh al-'Urwah al-Wuthqa: al-Ijtihad wa al-Taqlid,* Representation (*al-taqrirat*) of Ayatollah Abu al-Qasim al-Musawi al-Khoei's Discussion

The majority of the Sunni *'ulama* held that the Prophet himself exercised *ijtihad* in some temporal and military affairs and also sometimes legislated laws according to his own *ra'y* since he was allowed to do so.[13] Moreover, they held that *ijtihad* was lawful for the Companions in the presence or absence of the Prophet during his lifetime. Some of them, however, held that such an *ijtihad* is only valid in matters other than the *halal* and *haram*, and some have observed that it is only speculative and does not establish a definitive ruling.[14]

The *Shi'i* and some Sunni *'ulama* hold the view that every utterance of the Prophet partakes in *wahy*, that all his rulings comprise Divine revelation and that none occurred as a result of *ijtihad*. They maintain that the source of Divine legislation is God alone and that no other being, not even the Prophet, can be considered a source of the S*hari'a*. In their view there were no grounds for practising *ra'y* and relying on personal opinion to determine the *Shari'a* during the lifetime of the Prophet, even in his absence, because of the possibility of finding out the Divine commandment in a specific situation by sending a messenger to the Prophet or to individuals who trained under his guidance.

3. Accepting *ijtihad* in the sense given to it by this *hadith* results in a *hukm* formulated by a *mujtahid* exercising his individual opinion (*ra'y*) being regarded as a

---

on *fiqh* (Qom: Ansariyan Publications), pp. 36-43. For an English source in this regard see Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, Revised Edition,1991), pp.383-6. The discussion of *taswib and takhti'a* is usually followed by another discussion known as *ijza'*. The question arises, for example: if there were only one true answer to a religious question and a *mujtahid* changed his mind about a particular rule, would all of the actions performed according to the former rule be considered invalid or not?

[13] See Mohammad Hashim Kamali, *Ibid.*, p. 3801.

[14] See *Ibid.*, pp. 382-3.

hukm of the *Shari'a* and a Divine injunction. This means that all the individuals who exercise *ijtihad bi al-ra'y* occupy the high station of Divine legislator, which is neither possible nor proper.[15]

2.3.2 *Ijtihad* in the Sense of *Qiyas*

Later, *ijtihad* came to mean the use of the method of reasoning by analogy (*qiyas*). According to Al-Shafi'i, *ijtihad* and *qiyas* are the two terms with the same meaning. We read in his *Risala*:

> He asked: What is analogy? Is it ijtihad, or are the two different?
>
> [Shafi'i] replied: They are two terms with the same meaning.
>
> He asked: What is their common [basis]?
>
> [Shafi'i] replied: on all matters touching the [life of a] Muslim there is either a binding decision or an indication as to the right answer. If there is a decision, it should be followed; if there is no indication as to the right answer, it should be sought by *ijtihad*, and *ijtihad* is *qiyas* (analogy).[16]

The difference between *ra'y* (personal opinion) and *qiyas* is that in the latter the primary aim is to ensure consistency between revelation and reason in the development of the *Shari'a*, whereas in the former the jurist's perception of the best interest of the Muslim community and juristic preference play an important role in deducing legal decisions.

---

[15] For additional detailed criticism of the hadith concerning Mu'adh see Muhammad Ibrahim Jannati, "Ijtihad and the Practice of Ra'y", *op. cit.*, pp. 62-70.

[16] Majid Khadduri (trans.), *Al-Shafi'i's al-Risala fi Usul al-Fiqh: Treatise on the Foundations of Islamic Jurisprudence*, Translated with an Introduction, Notes, and Appendices, Second Edition (Cambridge: Islamic Text Society, 1987), p. 288; al-Shafi'i, *al-Risalah*, Second Edition (Maktabatu Dar al-Turath, 1979), p. 477.

The word *qiyas* etymologically roots in q-y-s or q-w-s, and was used by the Arabs for measuring the length, weight, or quality of something, which is why scales are called *miqyas*. It also conveys an equality or close similarity between two things, in quantity or quality, which underlies measurement.[17]

Technically, *qiyas* is defined as a method of seeking a rule of law about a new situation not covered by the text of the Qur'an or *Sunna* by applying a rule of law about the situation already covered by the text if it shares the same essential characteristic as the new situation. "It rests on the assumption that in a given rule revealed in the Qur'an or *hadith*, a particular attribute of the subject ruled upon is the governing consideration, and that by discovering what this attribute is, the rule can be systematically applied to other comparable situations."[18] In other words, it is by virtue of the commonality of the effective case (*'illa*) between the two cases, the original (*asl*) and the new case (*far'*), that the application of *qiyas* is justified. Al-Shafi'i states that:

> Every order laid down by God or by the Apostle for which there is evidence, either in itself or in some other of the orders of God or His Apostle, was laid down for some reason. If a case should arise for which there is no [specific] textual order, it should be decided on the strength of the case identical to it in reason for which a [specific] order was laid down.[19]

The essential requirements of *qiyas* are as follows:

---

[17] For the literal and technical meaning of *qiyas* see Ahmad Hasan, "The definition of qiyas in Islamic Jurisprudence" in *Islamic Studies*, Vol. XIX, No. 1 (Spring 1980), pp. 1-28.

[18] Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashid Rida* (Berkeley and Los Angeles: University of California Press, 1966), p. 66.

[19] Majid Khadduri, *op. cit.*, p. 307.

1) The original subject (*asl*) on which a ruling is given in the text.

2) The new subject (*far'*) on which a ruling is needed.

3) The effective cause (*'illa*) which is found to be common to both subjects.

4) The rule (*hukm*) governing the original subject to be extended to the new subject.

The following are some examples of arriving at an *ijtihad* through the use of analogical deduction:

1) Drinking wine is forbidden by the text of the Qur'an because of its intoxication. This prohibition is to be extended by analogy to spirits and narcotic drugs.

2) Selling or buying goods during the performance of the Friday prayer is forbidden by the text of the Qur'an.[20] The rule is extended by analogy to other kinds of transactions and engagements which distract Muslims from attending the prayer.[21]

3) The Prophet is reported to have said, "The killer shall not inherit [from his victim]." By analogy this ruling is extended to the law of *wasiyyah* (bequests) so that the killer cannot benefit from the will of his victim either.

4) According to a *hadith* a virgin not yet of age could marry, but only with the permission of her father or guardian; according to the Qur'an, an orphan's property should be held for him until his coming of age.[22] The jurists of the Hanafi school used the latter to interpret the former, holding that the determining element is the girl's minority rather than her virginity. By analogy they conclude that a widow or a divorcee not yet of age could remarry only by decision of her

---

[20] The Qur'an, 62: 9.

[21] See Hashim Kamali, *op. cit.*, p. 198.

[22] The Qur'an, 4:6: "And test the orphans until they attain puberty; then if you find in them maturity of intellect, make over to them their property."

father or guardian, although an adult woman marrying for the first time could do so independently.[23]

The principle of *qiyas* was introduced first by Abu Hanifah, the founder of the Hanafi school, in Iraq, and developed by al-Shafi'i.[24] Abu Bakr al-Jassas (d. 370 A.H.) in *al-Fusul fi al-usul* dealt with this doctrine in greater detail. He justified the principle of *qiyas* on the basis of the practice and agreement of the Companions and by human reason. He also cited a number of Qur'anic verses and traditions from the Prophet in support of *qiyas*, and put forward arguments in reply to the criticism made by the opponents of this principle.

The main thing in *qiyas* is the identification of a common *'illa* (effective cause) between the *asl* (the original case) and the *far'* (the new case), as I stated before. Since the identification of the *'illa* often involves a measure of juristic

---

[23] See Malcolm H. Kerr, *op. cit.*, p. 66. It seems that for the Shafi'i, Maliki and Hanbali the virginity is also a determining element, since, according to them, "The Guardian has the sole authority with respect to the marriage of his sane and major female ward if she is a virgin. But, if she is a person who has been married previously (*thayyib*), his authority is contingent on her consent. Neither can he exercise his authority without her consent, nor can she contract marriage without his permission." (See: Laleh Bakhtiar, *Encyclopedia of Islamic Law: A Compendium of the Major Schools* (Chicago: ABC International Group, Inc., 1996), p. 423.

[24] Schacht is of opinion that the doctrine of *qiyas* in Islamic jurisprudence has been influenced by Greek logic and Roman law. See Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford, 1959), pp.99-100. Although Abu Hanifah is known as the first jurist who used *qiyas* as a method of finding the rules of the *Shari'a*, there is evidence to show that *qiyas* was practiced by others before him, since the practice of *qiyas* is justified on the basis of the practice of the Companions. It is referred, in particular, to the well known letter sent by 'Umar to Abu Musa al-Ash'ari: " Think over, think over a point so long as it remains doubtful in your mind. A point which you do not find in the Qur'an or in the *Sunnah* of the Prophet. Get yourself acquainted with precedents and similar cases; then weigh up the matters (*qis al-umur*). Then adopt one that is more favorable in the eyes of God and identical with truth in your opinion." (See Ahmad Hasan, "The Justification of Qiyas", *op. cit.*, pp. 217-8.)

speculation, the validity of this principle has been questioned by the Shi'a, some eminent Mu'tazili thinkers, the Zahiris and some Hanbali 'ulama. According to Ibn Hazm ('Ali ibn Hazm al-Andalusi al-Zahiri, d. 456/1065) in his *al-Ihkam li usul al-ahkam*, "The *'illa* is either indicated in the text, in which case the ruling is derived from the text itself and *qiyas* is redundant; or alternatively, where the *'illa* is not so indicated, there is no way of knowing it for certain. *Qiyas* therefore rests on conjecture, which must not be allowed to form the basis of a legal ruling";[25] it is also forbidden in the Qur'an: "and surely conjecture does not avail against the truth at all."[26]

There are some Traditions from Shi'ite infallible Imams which forbid using the method of analogy in deducing the law of the *Shari'a*. Kulayni has gathered them in *Al-Kafi* in a chapter entitled "Chapter on Innovations, opinion and guess-work - deriving conclusions on the basis of similarities, semblance and appearances (in religion)". Some of these Traditions are as follows:

Al-Husayn ibn Muhammad (-) Mu'alla ibn Muhammad (-) al-Hassan ibn 'Ali al-ashsha' (-) Aban ibn 'Uthman (-) Abi Shaybah al-Khurasani as saying, "I have heard Abu 'Abdillah (p.b.u.h.) saying:

> Those who derived conclusions (in religion) on the basis of guess-work [*maqa'is*] are the people who take the same as the sources of the knowledge. The more they

[25] See Muhammad Hashim Kamali, *op. cit.,* pp. 220-1.

[26] Qur'an: 53, 28.

conclude in this way the further away they get from the truth, since the religion of Allah can never be realised through such conclusions and judgment.[27]

'Ali ibn Ibrahim (-) his father (-) Ibn Abi 'Umayr (-) Muhammad ibn Hukaym saying:

I inquired of Abu'l-Hasan Musa (p.b.u.h.), 'May my life be sacrificed for you, through your blessings and guidance, we (the Shi'ites) have learnt religion (Islam) and have developed insight into it in such a way that during any meeting and discussion, no one among our people has any need to ask any one else. As soon as a problem arises, the answer comes into our mind. All this is so because the blessings of Allah have reached us through you. But it frequently happens that an issue arises on which there is no specific ruling (precedents) available from your traditions, nor from those traditions which are related from your fore-fathers (the Imams). Could we, in such a case, consider the issue in the light of the best, the most related and the most relevant of your traditions? To cope with the issue could we adopt from among your traditions the ones which are the most similar?' Hearing this the Imam replied: 'This mode of dealing with the issues is remote, very remote from the truth. O son of Hukaym! he who ever met his doom, met it only because he acted on this very method.' Then the Imam added 'May the curse of Allah may fall upon Abu Hanifah who used to say, 'Ali (p.b.u.h.) has said so and so, but I say so and so.'

At this the narrator Muhammad ibn Hukaym addressed Hisham ibn al-Hakam, "By Allah, my intention all through this discussion was to obtain permission of the Imam for freedom to solve religious problems through *qiyas* (deriving conclusions on the

---

[27] Muhammad Ibn Ya'qub al-Kulayni al-Razi, *Al-Kafi: Al-Usul*, English Translation with Arabic Text Vol. 1, Part 1, No. 2 of "The Book of Excellence of Knowledge" (Tehran: World Organization for Islamic Service), pp.145-6.

basis of similarities and superficialities through independent opinions). But the Imam rejected the idea as a whole."[28]

Muhammad ibn Isma'il (-) al-Fadl ibn Shadhan (-) Safwan ibn Yahya (-) 'Abd al-Rahman ibn al-Hajjaj (-) Aban ibn Taghlab (-) Abu 'Abdillah (p.b.u.h.) as saying:

As-Sunna can never be guessed. Don't you see that the women have to perform their fasting (for the period of their menstruation etc., after the month of Ramadan) but they have not to perform their daily prayers after menstruation period. (Although offering prayers stands at a higher level than fasting.) O Aban! If as-sunna are manipulated on the basis of semblances and appearances, the religion of Allah (din) will totally be annihilated.[29]

The Sunni 'Ulama have introduced different means to identify the 'illa in a given legal ruling, eight of which are listed below:

1) *Nass* (explicit textual indication).

2) *Ima'* (implicit textual indication).

3) *Munasaba* (suitability): conductiveness of a rule to the preservation of the public interest or the prevention of an evil.

4) *Shabah* (general resemblance): This consists of comparing the case in question with two other similar cases which have different rulings. The jurist decides to which of the two cases his present case is the most similar. For example, when one man kills the slave of another, what compensation shall he pay? The dead slave might be considered comparable to a freeman or, alternatively, to some other form of property.

5) *Dawran* (concomitance).

---

[28] *Ibid.*, pp. 146-147.

[29] *Ibid.*, pp. 150-1.

6) *Sabr wa Taqsim* (experimentation and enumeration).

7) *Tard* (global examination): This is a method by which the *'illa* is deduced negatively. A common element between a number of rulings with the same *hukm* suggests that common element as the *'illa*. If there is no other ruling containing this special element but has another *hukm*, then this element is regarded as the effective *'illa*. For example, in his *fatwa* on *daman* agreement Ibn Taymiyyah first deduces from a Quranic verse (If they suckle for you, give them their recompense, 65: 6) that usufruct (*manfa'at*) is not an essential element of the contract of *ijara* and then reaches the conclusion that the rental element in the *daman* contract, which is a combination of share cropping (*musaqa*) and rent, is valid.[30] *Qiyas al-tard* is rejected by most jurists.

8) *Tanqih al-Manat* (refinement of the basis of the rule). Al-Ghazali in his *al-Mustasfa* has illustrated this by the *Sunna* of the Prophet. During the time of the Prophet a person came to him and said "I have ruined myself and my family. I had intercourse with my wife while fasting in Ramadan." The Prophet ordered him to expiate. From the question and the answer it is concluded that having intercourse during Ramadan is the *'illa* of the rules, although other qualities such as being a certain person may have an effect on the rule. So, the rule will be applicable to all similar cases where the basis (manat) is found.[31]

---

[30] See Benjamin Jokisch, "Ijtihad in Ibn Taymiyya's fatwas", in R. Gleave and E. Kermeli, *Islamic Law, Theory and Practice* (London and New York: I.B.Tauris & Co. Ltd., 1997), pp. 125-6.

[31] For more studies on *qiyas* in English see: Malcolm H. Kerr, *op. cit.*, pp.68-79; Hashim Kamali, *op.cit.*, pp. 196-226; Wael B. Hallaq, *A History of Islamic Legal Theories, An Introduction to Sunni usul al-fiqh* (Cambridge: Cambridge University Press, 1997), pp. 101-6. See also Ahmad Hasan, "The Justification of Qiyas", *op. cit.*, pp. 201-226, "The Definition of Qiyas in Islamic

It is only in the first case (explicit textual indication of the *'illa*) and partly in the last

case that the analogical method is considered valid by Shi'ite jurists, when it is known

certainly that the explicit *'illa* is the whole cause of the *hukm* (*'illa al-tammah li al-*

hukm) and is found to be common to the original and the new case. This kind of

analogy is known as *qiyas mansus al-'illa* and, as I mentioned before, some jurists

are of the opinion that there is no need in this case for analogy and that the ruling in

the new case could be derived from the general order specified in the text.

There is another kind of analogy known as *qiyas awlawiyah*, and some

scholars also hold that the rulings of this kind of analogical deduction fall within the

meaning of what God has made either lawful or unlawful rather than depending on

analogy based on another order. Some examples of these rulings could be found in

Al-Shafi'i's *al-Risala*:

> The Apostle said: "God has prohibited the shedding of the believer's blood and the
>
> taking away of his property, and [ordered] that only what is good should be thought
>
> of him."
>
> If [God] has made it unlawful for [the believer] to be thought of in any way contrary
>
> to the good which he manifests, then the thing greater than the thought, implying in
>
> any way that which is contrary to his good such as telling an untruth about him,
>
> should be more unlawful. The more this matter is indulged in, the stronger the order
>
> of prohibition becomes. [For] God said: "Whoever has done a particle's weight of
>
> good, he shall see it; and whoever has done a particle's weight of evil, he shall see it
>
> [Q. XC1X, 7-8]."

Jurisprudence", *op. cit.*, and "The Critique of Qiyas" in *Islamic Studies*, Vol. XXII, No.3 (Autumn
1983, July to September), pp. 45-69.

Thus what is greater than a particle's weight of good is a greater commendation [of

an act of piety] and what is greater than a particle's weight of evil is a greater sin.[32]

Another example which is generally mentioned by scholars is the verse of the Qur'an

forbidding Muslims to speak impolitely to their parents when they get old.[33] It is

concluded that anything worse than this which may upset them should be avoided.

Until the 5th /11th century the term *ijtihad* was used in the particular sense of

ra'y and *qiyas*, and since in the belief of Shi'a neither was valid in deducing the

Shari'a, the Shi'ite scholars refused *ijtihad* and said that it could not be a source for

Islamic jurisprudence. Until that time they used to include a chapter on *ijtihad* in their

books, in order to refute it and to make known its illegitimacy. Al- Shaykh al-Tusi

(d.460/1067) in *Uddah al-Usul* devotes several chapters to *qiyas* and *ijtihad*.

Discussing the claim of the legitimacy of the practice of *ijtihad* for the Prophet and

his Companions, and the subject of *taswib* and *takhti'ah*, he says "This controversy is

basically uncalled for according to our doctrine because, as we have proved earlier,

qiyas and *ijtihad* are absolutely impermissible in the Shari'ah."[34]

---

[32] Majid Khadduri, *op. cit.,* p. 308.

[33] The Qur'an, 17, 23: " And your Lord has commanded that you shall not serve (any) but Him, and goodness to your parents. If either or both of them reach old age with you, say not to them (so much as) "Ugh" nor chide them, and speak to them a generous word."

[34] Quoted in Murtada Mutahhari, "The Role of *ijtihad* in Legislation", *Al-Tawhid*, Vol. IV, No. 2, p. 29. This article is a translation from the original Persian entitled "*Asl-e Ijtihad dar Islam*" (the principal of *ijtihad* in Islam), the fourth in a collection of fourteen articles published under the title *Majmu'e-ye Maqalat* (Daftar-e Intisharat-e Islami-e Jame'e-ye Mudarrisin-e Hawzeh-ye Qom, 1983). The article is translated by 'Ali Quli Qara'i. The Persian article with some differences also appears in Murtada Mutahhari, *Dah Guftar* (Tehran: Intisharat-e Sadra, 1361 H.S.), pp. 76-107, and also in Tabatabaei, 'Allamah, et. al. (eds.), *Bahthi dar bareyeh Marja'iyyat wa Ruhaniyyat*, Second Edition (Tehran: Sherkat-e Sahami-e Intisharat), pp. 35-68.

2.3.3 The Wider Conception of the Term *Ijtihad*

The term *ijtihad* gradually lost its restricted sense. From the 6th/12th century the Sunni scholars used it in a wider and more comprehensive realm of meaning. According to Al-Ghazali (450-505/1058-1111) *ijtihad* is wider than *qiyas* as it comprises methods of reasoning other than analogy. He says:

> Some jurists hold that *qiyas* means *ijtihad*. This view is not correct, for *ijtihad* is more comprehensive than *qiyas*, and it (*ijtihad*) is exercised in the investigation of universals ('*umumats*), niceties of words (*daqa'iq al-alfaz*), and all methods of reasoning (*turuq al-adillah*), in addition to *qiyas*. Further, in the terminology of the 'ulama, *ijtihad* indicates the best effort spent by a jurist in the pursuit of a rule of law, and it applies only to him who exerts himself, and tries to do his best. He who bears a mustard seed is not called the one who exerted himself (*mujtahid*) or made his best effort. *Ijtihad* also does not imply the particular meaning of *qiyas*: it simply indicates an effort which is only a state of the user of *qiyas* (hal al-qa'is).[35]

There were other jurists at that time who used the term *ijtihad* in the sense of "the endeavor and effort undertaken for deducing a *hukm* of the Shari'a through means and sources which the Shari' (lawgiver) considered as valid proofs."

Though the term *ijtihad* acquired a wider and more comprehensive sense, nevertheless the *Shi'i fuqaha* still did not approve of the kind of *ijtihad* practised by the Sunni jurists as a reliable source from which Divine law could be derived. As in the previous ages, they criticised *ijtihad* in their writings and rejected it as invalid.

In the 7th /13th century the term *ijtihad* was used in a new sense by *Shi'i fuqaha*, the sense of referring new *furu'* to the basic principles (*usul*) of the *Shari'a*

---

[35] Abu Hamid Muhammad al-Ghazali al-Shafi'i Al-Ghazali, *op. cit.*, p. 237.

or applying its general laws to a corresponding particular case; this usage came to be accepted by the Shi'ites. Al-Muhaqqiq al-Hilli (d. 676/1277), the great *Shi'i faqih*, in his *Ma'arij al-Usul* defining *ijtihad* as "making effort in order to deduce *ahkam* of the *Shari'a* from its valid sources", mentions that to Shi'a *ijtihad* has never meant, nor does it mean, the practice of *qiyas*.

For *Shi'i* jurists *ijtihad* is a means of discovering the Divine law through the valid sources, the Book, the Sunna of the Prophet and infallible Imams, *ijma'* and *'aql*.

2.4 Commencement of *Ijtihad* among the Shi'ites and its Development

Although the term *ijtihad*, in the meaning of reverting the new *furu'* to the fundamental principle (*usul*), was accepted and used by *Shi'i fuqaha* in later periods, it was also practised in the early period, even when the Imams were present and accessible. According to traditions from infallible Imams, they had persistently urged their followers to use reason in theology and in legal matters. They explicitly stated that their own duty lay in explaining general rules and principles, whereas inference regarding details and minor precepts in actual cases was left to the learned followers of the Imams (*'Alayna ilqa' al-usul ilaykum wa 'alaykum al-tafri'*: we must give you the principles and you have to derive details and branches)[36].

---

[36] al-Hurr al-'Amili, Muhammad ibn al-Hasan, *Wasa'il al-Shi'a ila Tahsil Masa'il al-Shari'a*, Vol. 27 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran), Chapter (*bab*) 6, p. 62, Riwayah: 33202.

When faced by questions from their followers, the Imams sometimes explained that the correct replies to their questions could be derived from the general Islamic principles. For example, one of the companions of the sixth Imam asked him: "I slipped and my nail broke. I bandaged it. How can I make my *wudu?*" The Imam (p.b.u.h.) replied: "The answer to this question and other questions like this could be known from the Book of God Almighty (*He has not laid upon you any hardship in religion*: Qur'an, 22:78), pass your hand on it (*imsah 'alahi*)."[37]

During the period of the presence of the Imams, two legal tendencies existed in the Shi'i community. One of them adhered to a traditionalist approach which relied only on transmitting traditions from the Prophet and infallible Imams without further derivations. The other, referring to general principles of the Qur'an and *Sunna,* used also analytical and rational arguments in resolving legal problems. The names of some of the Shi'ite jurists of this period together with their works and opinions are mentioned in Shi'ite works on *'ilm al-rijal* and legal subjects.

2.4.1 *Shi'i* School of Law in the Early Period of Occultation until the Fourth Century of *Hijra*

After the period of the Imams, from the early years of the period of Occultation until the fourth century of *Hijra*, the majority of Shi'ite jurists devoted their efforts to collecting and recording traditions from the Imams. They were not concerned with rational argument in religious matters, and in their legal works contented themselves with collecting and compiling traditions according to their subject matter. There were two groups of traditionists in this period:

---

[37] *Ibid.*, Vol. I, Chapter (*bab*) 39, p. 464, Riwayah 1231.

1. Those who accepted and followed all the traditions, ignoring the rules by which a tradition could be examined. Some of the jurists of this group discussed law in the same way as *ahl al-zahir* and completely ignored the procedures of debate and reasoning.

2. Those who recognised and implemented the principles of *fiqh* contained in the traditions of the Imams and accepted only those traditions in which the reliability of the narrators had been examined. Muhammad ibn Ya'qub al-Kulayni and Muhammad ibn Ali ibn Babawayh al-Qummi, known as al-Saduq, are two important figures of this group, whose collections of traditions, *al-Kafi* and *Man la Yahduruh al-faqih*, are the reference books for *Shi'i* jurists.

At this time two other important figures, Ibn Abi 'Aqil[38] and Ibn al-Junayd al-Iskafi[39], emerged among Shi'ite scholars. Although both were dialectic theologians and practised rational reasoning in legal thought, there were some differences in their approach to law. Ibn Abi 'Aqil relied on general Qur'anic principles and widely transmitted (*mutawatir*) traditions. He did not consider "single" reports (*khabar al-wahid*)[40] as valid in legal matters. Ibn Junayd relied on rational analysis and tried to discover the *'illa* of the precepts. In contrast to Ibn 'Aqil he upheld the validity of *khabar al-wahid* as a source of law.

The works and legal opinions of these two scholars in their own time, when the school of traditionists gained control over the *Shi'i* community , did not receive much attention. However, later scholars, specially those from the second half of the

---

[38] He is the author of a legal work entitled *al-Mutamassik bi Habl Al al-Rasul*, which was a famous legal source during the 4th/10th and 5th/11 centuries.

[39] The author of *Tahdhib al-Shi'a li-Ahkam al-Shar'i* and *al-Ahmadi fi al-Fiqh al-Muhammadi*.

[40] For the meaning of this term see the Chapter Three, 3.3.2.2.

7th/13th century onward, quoted their legal opinions and methods and appreciated them.

In the same period there existed a group of jurists who held an intermediary position between the traditionists and the adherents of the approach based on reasoning. According the validity of many "single" traditions, they followed the practice of *ijtihad* by extracting specific precepts from the general principles implied in traditions, or by selection or reconciliation when traditions were contradictory.

2.4.2 The School of Rationalism (*Usuli*) from the Fourth/Fifth Century up to the End of the Safavid Period

In the last decades of the fourth and in the early fifth centuries, the use of reason in theology became important. This had also an effect in the sphere of jurisprudence. A new school of rationalists, founded by al-Shaykh al-Mufid (d. 413/1022), exposed traditionists to criticisms and gradually weakened them. Al-Mufid was a theologian and jurist who had studied under leading teachers of the three different schools - traditionist, rationalist and intermediate - and was very well acquainted with the three legal schools of his own time. He attacked those traditionists who, on the basis of some traditions, maintained certain peculiar views regarding the Imams and considered the attribution of anything supernatural to them as a religious deviation. Since the views held by these traditionists were not popular among the common people, he was able to break the power of his opponents.

His pupil al-Sharif al-Murtada (d. 436/1044), by criticising the traditionists in some of his works, also played an important part in weakening their school. Al-Murtada is reported to have written eighty books and devoted a considerable part of

his time to academic work despite his varied political and social responsibilities. *Al-Dhari'ah ila Usul al-Shari'a* is one of his major works of jurisprudence, which consists of fourteen chapters, each of them divided into many sections. It was the most comprehensive work on Shi'i *usul al-fiqh* written until that time.[41] Al-Mufid and al-Murtada and their students chose the method of Ibn 'Aqil, of which the most important characteristic was the refusal to rely on "single" traditions.

The other important figure in the history of *Shi'i* jurisprudence in this period is Muhammad ibn Hasan al-Tusi, known simply as "al-Shaykh" in *Shi'i* legal works. He was born in 385/995 in Tus (a large area, in Iran consisting at that time of four or five townships and one thousand villages), which was one of the largest districts of the Islamic world. Tus, at the time of al-Tusi's youth, was inhabited by Hanafi and Shafi'i Sunnis and Zaydi, Isma'ili and Twelver Shi'ites, but it was under the political control of Shafi'is. They continued to dominate its life for a long time, and characters like Abu Hamid Muhammad al-Ghazali and Ahmad al-Ghazali were born among them. Owing to the predominant Sunni atmosphere of Tus, al-Tusi attended the classes of Sunni teachers besides acquiring his early education under Shi'a scholars. In 408/1017, at the age of twenty-three, he emigrated to Baghdad, which was the greatest center of Islamic studies at that time. He studied for five years under al-Mufid and after his death joined the ranks of the eminent pupils of Sharif al-Murtada and succeeded him as the *marja'* (highest reference for verdicts) of the *Shi'i* community. Besides *al-Tahdhib* and *al-Istibsar*, which are two of the four basic

---

[41] For more on al-Sharif al-Murtada's life and works see Wahid Akhtar, "An Introduction to Imamiyyah Scholars: Al-Sayyid al-Murtada: Life and Works", *Al-Tawhid*, Vol. IV, No. 1 (Muharram-Rabi' al-Awwal 1407 H.), pp. 125-152.

sources of *Shi'i* Traditions (*ahadith*), al-Tusi compiled many other works on *Kalam, tafsir, rijal, fiqh* and *usul al-fiqh*. His commentary on the Qur'an, *al-Tibyan fi Tafsir al-Qur'an*, was the most comprehensive and conclusive of all *Shi'i* commentaries compiled until that time, and is still considered to be unique in its nature and content.

His legal works opened much new ground in *Shi'i* law. His first work on the subject is *al-'Uddah fi Usul al-Fiqh*. The Shaykh compiled this book during the lifetime of his teacher, al-Murtada, and reproduced his views in *al-Dari'ah* with minor modifications. It is on two subjects, *usul al-Din* and *usul al-fiqh*, and is divided into ten parts comprising ninety-two sections (*fasl*). *Al-Nihayah fi Mujarrad al-Fiqh wa al-Fatawa* is one of the most important works of al-Tusi and was used as a text as well as a reference book for two centuries. In his other work, *al-Khilaf fi al-Ahkam* or *Masa'il al-Khilaf*, he gathered together the various views of the different schools of *fiqh* from the authentic sources of each school and discussed their main points of difference in a critical manner. *Al-Mabsut* is his most important book in *fiqh*, and the first *Shi'i* law book on which the subordinate cases are drawn from principles. In the preface to *al-Mabsut*, explaining the reason for composing the book, he writes:

> I repeatedly came to hear from the *fuqaha* who did not accept the *usul* of *wilayah*, that the *fiqh* of the Imamiyyah was very limited and worthless, for the number of *furu'*(derived issues) was very small in it. They say that the Imamiyyah *fuqaha* are caretakers of an ice-depot in which contradictions are left to freeze. According to them a person who does not accept *qiyas* and *ijtihad* cannot add anything to the fundamentals (*usul*) and is unable to expand the issues, as these are the only two ways to do so. The root cause of these objections is the ignorance of the opponents of our creed and also their lack of thinking about our *usul*. Had they been able to think a

little about our *ahadith*, they would have discovered immediately that most of the issues which they had raised had been covered by (the collection of) our *hadith*. Our Imams (A) expressed their views about them in general or with specific reference explicitly or implicitly, and their judgments in themselves are as authentic and evident as those of the Prophet.

Those who have filled their books with derived issues should know that no derived issue can be found anywhere that could not have been solved in the light of our rules and principles, but, of course not by the method of *qiyas* but the manner which was more convincing, and upon which one could safely act....[42]

Al-Tusi differed from his teachers, Al-Mufid and Al-Murtada, in his legal approach and strove to retain the authority of "single" traditions while preserving the analytical and rational method of law. This method, which is a combination of the method of the rationalists with that of the traditionists, has remained characteristic of *Shi'i* law up to the present time.[43]

It was also through al-Tusi that the Shi'i community found the solution to the problem of leadership in the period of the Greater Occultation. He considered the *fuqaha* to be the deputies of the Imam during the Occultation. His idea of the role of the *fuqaha* was elaborated and developed by the scholars of the later period.[44]

---

[42] See Al-Shaykh al-Ta'ifah Abi Ja'far Muhammad Hasan al-Tusi, *Al-Mabsut fi Fiqh al-Imamiyyah* (Tehran: al-Maktabat al-Murtadawiyyah, Ihya' al-Athar al-Ja'fariyyah, 1387 H.), pp. 1-2.

[43] For Tusi's life and works see Wahid Akhtar, "An Introduction to Imamiyyah Scholars: Shaykh al-Ta'ifah al-Tusi: Life and Works", *Al-Tawhid*, Vol. IV, No. 2 (Rabi' al-Thani-Jamadi al-Thani, 1407 H.), pp. 126-167.

[44] See Rahimin Affandi Abd. Rahim, "The Historical Development of the Shi'i Doctrine of Ijtihad", *Hamdard Islamicus*, Vol. XVII, No. 4, p. 14.

Al-Tusi spent about forty years of his valuable academic career in Baghdad but in the year 448/1056, owing to a series of disturbances in which his house and library were ravaged, he left for Najaf, where he formed the famous scholastic centre which still exists today. He passed away there in the year 460/1067. It has been reported that his daughters were also distinguished jurists (*faqihah*: female jurist).[45]

During the century after al-Tusi's death *Shi'i* jurists merely narrated and explained his views and statements; none of them produced any major works or novel ideas.[46] In the second half of the 6th/12th century a number of scholars including Ibn Zuhra al-Halabi and Ibn Idris al-Hilli, reviving the rational method of al-Murtada, rejected the validity of "single" traditions as a source of law and rose in opposition to the fundamental principle of al-Tusi's approach to law. This new tendency did not develop any further, but the critical views of its adherents, especially those of Ibn Idris represented in his *al-Sara'ir*, furthered the evolution of *Shi'i* law.

During the 7th/13th century some new opinions were offered by a number of jurists who followed the Shaykh in their general methodology. The most important figures of this period are al-Muhaqqiq al-Hilli (d. 678/1277) and his student al-'Allama al-Hilli. Al-Muhaqqiq collected and rearranged al-Tusi's opinions on various subjects and defended his legal doctrine which had been discredited by Ibn Idris's criticism. His main works are *Nukat al-Nihaya*, *al-Mu'tabar*, *Sharayi' al-Islam* and *al-Mukhtasar al-Nafi'*, some of which are still used as text books in universities in

---

[45] See Murtada Mutahhari, *Ashnaei ba 'Ulum-e Islami*, (*part 3 usul fiqh, fiqh*), (Tehran: Intisharat-e Sadra, Tenth Edithion, 1372 H.S.), p.82.

[46] For this reason they have been called *muqallidun* (imitators). For the name and works of the scholars of this period see: Hossein Modarresi Tabataba'i, *An Introduction to Shi'i Law: A Bibliography Study* (London: Ithaca Press, 1984), pp. 45-6.

Iran. Al-'Allama al-Hilli also tried to expand Islamic law on the basis of the Shaykh's legal doctrine. He enlarged the section on legal transactions and introduced and used advanced mathematical rules in the relevant legal subjects such as the law of inheritance, the times of prayer and the direction of prayer (*qibla*). He also played an important part in the development of *Shi'i* law by classifying the Shi'i traditions according to the degree of authority of their narrators. 'Al-Allama's works on various legal subjects were also used as reference books by later jurists. His famous books on jurisprudence include *Irshad al-Adhhan*, *Mukhtalaf al-Shi'a*, *Muntaha al-Matlab*, *Nihayah al-Ihkam*, *Tabsirah al-Muta'allimin*, *Tahrir al-Ahkam al-Shari'a*, *Tadhkirah al-fuqaha*, *Talkhis al-Maram* and *Qawa'id al-Ahkam*. His son, Fakhr al-Muhaqqin al-Hilli, was among his most renowned pupils; his views have been cited in legal works.

Following the Shaykh's approach in his *al-Mabsut* and *al-Khilaf*, the *Shi'i* jurists after him arranged their legal works on the basis of Sunni legal texts. They first cited the views of Sunni jurists and then presented the opinions of *Shi'i* scholars. Hence, to properly study and understand the *Shi'i* legal sources a knowledge of the general rules used by Sunni jurists was necessary. Fakhr al-Muhaqqin, however, omitted the analyses and opinions of Sunni scholars in his *Idah al-Fawa'id*.[47]

After him, Shams al-Din Muhammad ibn Makki al-'Amilli, known as Al-Shahid al-Awwal (the First Martyr) in his *al-Qawa'id wa al-Fawa'id* reformulated the principles of *Shi'i* law and thus provided it with an independent identity. In

---

[47] In doing this he followed Hasan al-yusufi al-Abi, a student of al-Muhaqqiq and the author of *Kashf al-Rumus*, who for the first time refrained from quoting the opinions of Sunnis in his book. (See *Ibid.*, p. 49.)

applying these principles he introduced a system of law distinct from those of his predecessors and opened up new grounds of discussion in many new subsidiary cases. Besides *al-Qawa'id wa al-Fawa'id*, he produced some legal works such as *Ghayah al-Murad* and *al-Lum'ah al-Dimashqiyyah*, which are among the most important works of *Shi'i* law. Al-Shahid al-Awwal was born in 734/1332 and in 786/1384, as a result of the *fatwa* of a jurist from the Maliki school being endorsed by a jurist of the Shafi'i school, he was martyred.[48] He composed his famous book, *al-Lum'ah*, during the brief period he spent in prison awaiting his martyrdom. Two centuries later this noble book was the subject of a commentary by another great jurist who suffered the same fate as the author. He too was martyred and is thus called Al-Shahid al-Thani (the Second Martyr). The famous book *Sharh al-lum'ah*, which is still used as a textbook by *Shi'i* students of jurisprudence, is his commentary on al-Lumah.

Another leading figure in *Shi'i* scholarship who made a major contribution to the development of *Shi'i* law was Shaykh Ali ibn 'Abd al-Ali al-Karaki, known as Muhaqqiq Karaki or Muhaqqiq Thani. He was from Jabal al-'Amil. He completed his studies in Syria and Iraq and then, in the early Safavid period, went to Iran. The arrival of al-Karaki in Iran and his establishing a religious university in Qazvin and then in Isfahan, together with his training of outstanding pupils in jurisprudence, made Iran a centre of Shi'ite jurisprudence for the first time since the time of Shaykh Saduq and his father.

In the Safavid period, Shi'ism was adopted as the official religion of Iran. This new situation gave rise to some problems including the legitimacy of the Friday

---

[48] See Murtada Mutahhari, *Ashnaei ba 'ulum-e Islami (part 3, usul fiqh, fiqh), op. cit.*, p. 88.

prayer in the absence of the Imams, the limits of the legal power of the *faqih*, the land tax and so on. Al-Karaki paid close attention to these problems and discussed them in detail in his legal works, such as *Jami' al-Maqasid, Ta'liq al-Irshad* and *Fawa'id al-Shari'a*. Al-Karaki considered the *fuqaha* as general deputies (*al-na'ib al-'amm*) of the hidden Imam. Later, al-Shahid al-Thani extended the concept of *al-na'ib al-'amm* to include all the religious functions of the hidden Imam. Hence, in his view, the *faqih* has a similar authority to that of the Imam in both religious and secular affairs. However, the *faqih* differs from the Imam in that he is not immaculate (*ma'sum*) and does not command the same honour and esteem.

There is a famous order which the ruling king of Iran (Shah Tahmasb) wrote in Karaki's name, giving him complete control and declaring himself to be only his agent. In his legal works Karaki used the analytical method and based his judgment on a thorough investigation both in favour of and against arguments previously advanced on legal problems. He placed Shi'i law on a more stable and solid footing by reconstructing its principles and by stringent legal reasoning.[49]

Another important figure of the Safavid period is al-Muhaqqiq Ahmad ibn Muhammad al-Ardabili, Known as al-Muqaddas al-Ardabili (d. 993/1583). Although al-Ardabili did not make any fundamental changes in the methodology of law, he gave rise to a distinct school by his independent rational arguments which led to the opinions and views of previous scholars being ignored.[50]

---

[49] For the names and works of the jurists who followed Karaki see Hossein Modarresi Tabataba'i. *op. cit.,* p. 51.

[50] For example, all the Shi'ite and the majority of Sunni jurists are in agreement that a woman cannot pass a judgement in juridical affairs. Investigating the reasons for the rule, he came to the

2.4.3 New School of *Akhbarism*

In the beginning of the 11th/17th century a new school of traditionists, called *akhbari*, emerged among the Shi'a. The founder of this school was Mirza Muhammad Amin Astarabadi (d. 1033/1623) who expounded his views in his famous book *Fawa'id al-Madaniyyah*. He studied in Najaf, and after spending several years at al-Madina, went to Mecca and studied for about ten years under Muhammad Astarabadi, whom he refers to as a *faqih*, *mutakallim* and philosopher. Amin Astarabadi claimed a kind of Divine inspiration for himself by which he could discover hitherto unknown truths. In the introduction to his book he writes:

> And you, after having gone through this book, will find in it truths untouched by any of the early or latter philosophers (*hukama*), scholars (*fuqaha*), theologians (*mutakallimun*) and jurisprudents (*usuliyyun*), and yet they are only a sample of what my Lord, the Almighty and the Supreme, has granted to me.[51]

Astarabadi denied the authority of the Qur'an, *ijma'* and reasoning (*'aql*) as sources of law and thus accepted only the Sunna as a valid source. He attacked al-'Allama al-Hilli, who had classified traditions into *sahih*, *muwaththaq*, *hasan*, and *da'if*, and held that all the traditions, especially those of the *kutub arba'a* (the four main sources of Shi'i *hadith*)[52] were of certain authenticity and legally binding.

As to the Qur'an, he claimed that no one except the infallible Imams has the right to refer directly to the Qur'an and to interpret it. Only those parts of the Qur'an

---

conclusion that they may be allowed to judge when all the claimants and witnesses are women. The issue of women's right to judge will be discussed in Chapter Six, 6.3.4.2.

[51] Quoted in Murtada Mutahhari, "The Role of *Ijtihad* in Legislation", *op. cit.*, p. 34.

[52] The important *Shi'i* sources of *hadith* will be introduced in Chapter Three, 3.3.2.1.

that have been explained in *hadith* may be referred to for legal purposes; other parts must not be acted upon. In order to deny the authenticity of the text of the Qur'an he also raised the issue of its corruption.[53]

He considered *ijma'* as an innovation of the Sunnis and denied its validity, and also offered many arguments to deny the authority of *'aql* to elaborate the Divine law. Astarabadi rejected *ijtihad*, even in its later sense in which Shi'i *fuqaha* had accepted, and criticised the use of Aristotelian logic employed by the *Usulis* in the creation of the law. He held that no one has the right to follow any one other than an infallible Imam.[54]

Astarabadi did not consider himself the founder of a new school. Rather, he tried to find roots for his school in the early days of Shi'ism after the Occultation and considered himself a reviver of the method of *Shi'i* scholars of *hadith* such as al-Kulayni and al-Saduq. But, according to scholars who follow the *Usuli* school, *Akhbarism* had never existed before as a school with distinct doctrines such as those based on the denial of the authority of the Qur'an and reason. There had simply been some scholars who seldom went beyond quoting traditions in their books and *fatwa*.

Discussing some issues related to *kalam* and some well known problems of philosophy, Astarabadi even challenged the theologians and philosophers. He was of the opinion that reason can be a guide only in the study of problems related to the

---

[53] See Murtada Mutahhari, "The Role of *Ijtihad* in Legislation", op. cit., p. 34.

[54] For the differences between the Akhbari and Usuli schools, and the works on the subject see Chibli Mallat, *The Renewal of Islamic law, Muhammad Baqir as-Sadr, Najaf and the Shi'i International,* (Cambridge: Cambridge University Press, 1993), pp. 30-34. For a study on Akhbarism see also N. Levtzion & J.O. Voll, "Aspects of Akhbari though in the seventeenth and Eighteenth Centuries", pp. 133-160, in Etan Kohlberg, *Belief and Law in Imami Shi'ism* (Hampshire (UK): Variorum, 1991), Section XVII.

natural sciences, which are based upon sense-experience, or of mathematics, whose concepts are derived from such experience, but not of the problems of theology and metaphysics, which are based on pure reasoning. Since this view agrees with the outlook of the European empiricists of the sixteenth century, the period in which Astarabadi lived, some scholars consider it probable that he was influenced by them.[55]

The Akhbari tendency rapidly gained supremacy in most *Shi'i* centres of learning and held *Shi'i* law in its grasp until the second half of the 12th/18th century.

2.4.4 The Renewal of the *Usuli* School

2.4.4.1 The School of al-Wahid al-Bihbahani

The eighteenth century is the critical period of Akhbarism. For the first time "an outstanding jurist", known as al-Wahid al-Bihbahani, managed to re-establish the authority of rational argument in law. Al-Bihbahani was from Iran . As a result of the Afghan turmoil he left Iran for Iraq, made Karbala the new centre of learning and tutored numbers of prominent pupils who carried on his school and spread his legal doctrine. He worked hard to rehabilitate the *usul al-fiqh* and produced many legal works which are representative of a logical law. Besides these, he led the intellectual combat against *Akhbarism*. In his *Risalah al-Ijtihad wa al-Akhbar* he attempted to invalidate the position of the *Akhbari* and to justify that of the *Usuli* school.[56]

---

[55]. See Murtada Mutahhari, *"Asl-e Ijtihad dar Islam"* in *Majmu'e-ye Maqala*, op. cit., p. 45, and in *Dah Guftar*, op. cit., p. 85. It seems, however, that Akhbarism was, in fact, an objection to the tendency calling for more freedom in Shi'i law and to the discovery of legal norms through rational argument only.

[56] For the names and works of his followers see Hossein Modarresi Tabataba'i, *op. cit.*, pp. 57-8.

2.4.4.2 The School of al-Shaykh al-Ansari

The last fundamental change in *Shi'i* law occurred with the reconstruction of the law and its methodology through the scholarly approach of al-Shaykh Murtada al-Ansari (d.1281/1864). He was one who, in the precision of his views has very few equals. Two of his books, *Fara'id al-Usul* (or *al-Rasa'il*) on *usul al-fiqh* and *al-Makasib*, on which many commentaries have been written by later *'ulama*, are today's textbooks in *Shi'i* academic centres for higher religious students. Because of his contribution to *usul al-fiqh*, al-Ansari is called the *khatam al-fuqaha wa al-mujtahidin* (the seal of the jurisprudents and the *mujtahidun*). The contemporary scholars of the Shi'a are followers of his school.

Dividing legal decisions in to four categories, certain (*qat'i*), valid conjecture (*zann-i mu'tabar*), doubt (*shakk*) and erroneous conjecture (*wahm*), Ansari contributed to the derivation of a set of principles to be used in formulating decisions in cases where there is doubt (*shakk*) and no guidance obtainable from the sources. In this connection he formulated four guiding principles consisting of *al-bara'a*, *al-takhyir*, *al-istishab* and *al-ihtiyat* which are called *al-usul al-'amaliyya*. Each of these four principles has a special circumstance; these will be discussed briefly in the next chapter.

2.5 The School of Imam Khomeini

It is probably not yet acceptable to consider Imam Khomeini's approach to *fiqh* as a new school, since, in fact, he was a follower of Shaykh al-Ansari's school in the methodology of *fiqh*, and did not formulate a basically new method in *usul al-fiqh*. However, he brought to attention a novel aspect of *ijtihad* -"the role of the time

and place in *ijtihad*" - on which other *'ulama* had not explicitly focused before. Hence, Imam Khomeini might be considered a founder of a new school of *Shi'i* law whose outcomes are set to emerge during the decades to come.

To sum up, it might be said that in Shi'ism *ijtihad* in its restricted sense, *ra'y* and *qiyas*, is condemned. In its general and wider conception of reverting the new *furu'* to the fundamental *usul* and discovering the Divine law through valid sources and logical method, *ijtihad* was practised even in the early period. At the time when the door of *ijtihad* was widely claimed to be closed in Sunnism, *ijtihad* remained an open process among the Shi'ite scholars. Despite the fact that the *Shi'i* centres of law were dominated by Akhbarism for about two centuries, the *Shi'i* *'ulama* renewed *ijtihad* constantly and produced ever more elaborate and refined literature on *usul al-fiqh* which will be discussed in the next chapter.

Chapter Three

Usul al-Fiqh or the Principles of Islamic Jurisprudence

3.1 Introduction

Ijtihad or the inference of the precepts and legal norms of the *Shari'a* from the relevant sources follows particular rules. These are explained by a special branch of knowledge known as *usul al-fiqh*. This discipline of the *Shari'a* is so called because it embodies the study of the sources of Islamic law and the methodology of its development. The relationship between *usul al-fiqh* and *fiqh*, which is the knowledge of the practical rules of the Islamic law in its various branches,[1] resembles

---

[1] *Fiqh* is an Arabic word which essentially means profound understanding. The pre-Islamic Arabs used it with reference to camel experts. Hence, those who could distinguish any she-camels that were pregnant from those on heat were called *fuqaha*. In the Islamic period, the term *fiqh* lost its general meaning. It came to mean knowledge which exclusively refers to the religion of Islam (*'ilm al-din*): so, if one studied *fiqh*, he studied religion. This is perhaps because in the Holy Qur'an, and in the Traditions from the Holy Prophet and the infallible Imams, Muslims have been repeatedly commanded to seek profound understanding (*tafaqquh*) in religion. In one verse from the Holy Qur'an we read:

"And it does not beseem the believers that they should go forth all together; why should not then a company from every party from among them go forth that they apply themselves to obtain

that of logic to philosophy. *Usul al-fiqh* in this sense introduces criteria for the correct deduction of the detailed rules of the *Shari'a* from the sources. So it might be said that, in preparation for *ijtihad*, *usul al-fiqh* is the most important branch of knowledge among the other branches including Arabic, *tafsir, hadith*, logic, and so on. In fact, fulfilment of the aim of *ijtihad,* which is the expansion and adaptation of the Islamic rules in accordance the changing needs of rapidly expanding and developing societies, relies on the perfection of this discipline.

There is some diversity in the methodology of *usul al-fiqh* between different Sunni and Shi'ite schools. For example, Shi'ite jurists absolutely reject analogical deduction (*qiyas*) and juristic preference (*istihsan*) in deducing the law, while the majority of Sunnis employ them to serve as an aid to *ijtihad*. Shi'ites use some other rules of reasoning and general rules explained by their infallible Imams instead. Dissimilarity between the methods employed to infer the law and also between the sources of the *Shari'a* that Shi'ite and different Sunni schools accept as valid sometimes leads to different rules on particular issues.

---

understanding in religion (*yatafaqqahu fi al-Din*), and that they may warn their people when they come back to them that they may be cautious?" (9: 122)

Of course profound understanding in religion covers of all aspects of Islam. It includes what relates to the principles of Islamic beliefs, morality and practical rules covering the duties man has before God and human societies. However, since the second century of the *hijra* the word *fiqh* has been employed to refer to a special area of understanding among Muslims described as the "knowledge of the practical rules of the *Shari'a* acquired from the detailed evidence in the sources".

The name *fuqaha* was given to a group of jurists at the time of *tabi'un* (who had not witnessed the Prophet but had visited those who had). The year 94 A.H., in which the departure of Imam Ali ibn Husain, the fourth Imam of the Shi'ites, and some of the jurists of Medina took place, was called *sinah al-fuqaha*. (See Murtada Mutahhari, *Ashnaei ba 'ulum-e Islami: part 3, usul fiqh, fiqh,* (Tehran: Intisharat-e Sadra, Tenth Edithion, 1372 H.S.), p. 69).

In this chapter I will first briefly introduce the Shi'ite *usul al-fiqh*. Certain subjects will then be discussed in more detail. Some of the issues discussed in this discipline are, of course, common to the different schools.

3.2   An Overview of the Issues of *Usul al-Fiqh*

Shi'ite *usul al-fiqh* is divided into two parts. The first part, called the inferential principles (*al-usul al-istinbatiyyah*), deals with the method of inferring the precepts and legal norms from the four basic sources, namely the Qur'an, Sunna, Consensus (*ijma'*) and Reason (*'aql*). The second part discusses the manner of reasoning based on some special general principles, which are laid down to determine the duty of a Muslim when there is no longer any hope that the law might be discovered by resorting to the basic sources.[2] These principles are known as procedural principles (*al-usul al-'amaliyyah*) in *Shi'i usul al-fiqh*.

Each part consists of several sections. The first part, dealing with the method of reasoning based on the written code (the Qur'an and Sunna) and *'aql*, consists of some semantic discussions, such as the nature of word-making, the use of words in their metaphorical sense, and so on. There follows a discussion about the various implications of the imperative (*amr*) and negative imperative (*nahy*) of the texts. It is investigated, for example, whether they convey obligation, recommendation or mere permissibility (in *amr*), and whether a prohibition or just a disapproved (*makruh*)

---

[2] *Fuqaha* believe that everything we do goes under one of 'five qualifications' (*al-ahkam al-khamsah al-taklifiyyah*) consisting of obligatory (*wajib*), prohibited (*haram*), recommended (*mandub*), abominable (*makruh*) and permissible (*mubah*). The subject of the knowledge of *fiqh* is the detailed exposition of these *ahkam* and the conditions necessary for the validity of the religious duties.

precept (in *nahy*) is meant. It is also discussed whether according to the rule, *amr* implies immediacy or permissibility of delay in the performance of the duty. Classification of words into the clear and the unclear - *zahir* and *nass*, *mujmal* and *mubayyan*, *'amm* and *khass*, *mutlaq* and *muqayyad*, and so on - is also a subject that is explained in the first part. The validity of the four basic sources is investigated in a separate section. The nature of law, legal judgement arrived at through pure reasoning, and the valid means for arriving at the knowledge of legal obligation are also matters discussed in the first part of *usul al-fiqh*.

The second part is designed to examine the legal basis and the scope of the validity of the four general procedural principles: the principles of exemption (*bara'a*), precaution (*ihtiyat*), option (*takhyir*) and presumption of continuity (*istishab*). These principles, which are applicable to all subjects of jurisprudence,[3] cover all cases where there is doubt and where the real obligation is not known. Each of the procedural principles has a special circumstance and a *mujtahid* must, through frequent application, have enough ability to discern their proper execution. If there already exists a rule for a case the law should continue according to the last principle. Otherwise the first principle rejects any legal obligation where there is no collective knowledge (*'ilm al- ijmali*) and no record of precept. However, if there is a record of precept but it is uncertain between two or more options, according to the second principle all options must be followed if possible. But if it is impossible to follow both or all, one option should be chosen according to the third principle.

---

[3] There are also some principles and rules, such as the principality of purity (*isalah al-taharah*) and the rule of the completion of the duty (*qa'idah al-firagh*), which are applied to their relevant subjects.

In addition to the two main parts mentioned above there is a chapter on

conflict arising from contradictory evidence and on reconciliation. Some works also

include discussions on some "governing rules" which justify the issuing of secondary

commandments in special circumstances.[4] These discussions, together with the issues

of the second part of *usul al-fiqh,* have an important role in producing modern Shi'ite

law.

Discussions on *ijtihad* and *taqlid* (following a *mujtahid*) including the

necessary qualifications and conditions which permit a *mujtahid* to be followed, the

division of *ijtihad* into "partial" (*mutajazzi*) and absolute (*mutlaq*), *taswib* and

takhti'a, and some other relevant issues are also usually included in *usul al-fiqh.*[5]

3.3 The Four Sources of the *Shari'a* or *Adilla al-Arbi'a*

The jurisprudents of different schools have introduced different sources for

the Islamic law as follows: the Book, the *Mutawatir* Traditions, the statements and

consensus of the Prophet's Companions, *qiyas, istihsan* and *'urf* (custom) by the

jurists of the Hanafi school; the Book, the *Sunna, ijma'* and *qiyas al-mustanbata al-*

'illa by the Shafi'is; the Book, the *Sunna,* the consensus of the jurists of Madina,

masalih al-mursala, such statements of the Companions as are not based on *ra'y,*

and *qiyas mansus al-'illa* by the scholars of the Maliki school; the Book, the *Sunna*

---

[4] Some of these will be explained in the fifth chapter.

[5] Some developed and well-known works of *Shi'i usul al-fiqh* are: *Shatr al-Usul min Kitab al-Ma'alim al-Din wa Maladh al-Mujtahidin* by al-Shahid al-Thani, Hasan ibn Zayn al-Din; *al-Rasa'il* by Shaykh Murtada al-Ansri; *Kifyah al-Usul* by al-Akhund al-Shaykh Muhammad Kazim al-Khurasani; *Fawa'id al-Usul* by al-Na'ini; *Maqalat al-Usul* by Diya' al-Din al-Iraqi; *Muhadarat fi Usul al-Fiqh* by Ayatollah al-Khoei; *al-Rasa'il* by Imam al-Khomeini; *Usul al-Fiqh* by Muhammad Rida al-Muzaffar; *Durus fi 'Ilm al-Usul* by Muhammad Baqir al-Sadr.

and the *fatwas* of the Companions when they do not contradict the Book and the *Sunna* by the Hanbali school; the Book, the *Sunna* and the consensus of the Caliphs by the followers of the Zahiri schools; the Book, the *Sunna*, *ijma'* and *ijtihad* by Rashid Rida.

Among the Shi'ites, the followers of the *Akhbari* school have restricted themselves to the *Sunna* of the Prophet and the infallible Imams. For the followers of the *Usuli* school, however, the valid sources are the Book, the *Sunna* of the Prophet and the infallible Imams, *ijma' al-kashif 'an qawl al-ma'sum*, and *'aql*. These are collectively known as *al-adilla al-arbi'a*, the four proofs or sources of the *Shari'a*.

3.3.1 The First Source of the *Shari'a*: The Holy Qur'an

The Holy Qur'an, which is referred to in the terminology of jurisprudence as "the Book", is a proof of the prophecy of Muhammad, the most authoritative guide for Muslims, and the first and principal source of Islamic thought and law. It is the Qur'an which gives religious validity and authority to every other source. The Qur'an describes itself as the light which illuminates all things. It also challenges men and requests them to ponder over its verses and observe that there are no disparities or contradictions in them. It invites people to compose a similar work, if they can, to replace it.[6]

The Qur'an's full authority, for those who listen to its message resides in the literal meaning of its text. According to Shi'ite commentators, however, the meaning of the Qur'an is not limited to the external level. Rather, behind the expressions of Qur'anic words there are deeper and wider levels of meaning which only the spiritual

---

[6] See the Qur'an, 2: 23; 11: 13; 10: 38; 17: 88; 52: 34.

elite, the Prophet and the pure among the saints of God (including the Household of the Prophet) can comprehend.[7] The following *hadith* from the fifth Imam of the Shi'ites confirms the idea:

> The Qur'an has a *batn* (innermost or esoteric aspect) and there is a *batn* within the *batn*, and it has a *zahir* (outward aspect) and there is a zahir beyond that zahir ... and the intellect of man is incapable of truly interpreting (*tafsir*) the Qur'an. The beginning of a verse may concern something and its end some other thing, and it is continuous speech that is susceptible to different interpretations.[8]

The Qur'an was revealed in two distinct periods of the Prophet's mission, in Mecca and Madina. The larger part of the Qur'an, concerning matters of belief and morality, was revealed during the first thirteen years of the Prophet's residence in Mecca. The remainder was received after his migration to Madina. Since during the Madinese period the Islamic state took form, the Qur'an also comprised legal rules regarding various aspects of Muslim life.

In the Qur'an there are about five hundred verses related especially to the law. They are known as *ayat al-ahkam* (verses regarding law) and form the basis of what is called *fiqh al-Qur'an*. From the early periods, numerous books have been written by Muslim scholars from different schools on these verses. Some of the important works among the Shi'ites are *Kanz al-'Irfan fi Fiqh al-Qur'an*, by Fadil Miqdad al-Hilli (d. 826/1423), *Zubdah al-Ahkam fi Sharh Ayat Ahkam al-Qur'an*, by Ahmad ibn Muhammad known as Muqaddas al-Ardabili, a famous Iranian jurist of

---

[7] God in his book, The Holy Quran, says: "Most surely it is an honored Quran, in a book that is protected; None shall touch it save the purified one." (Quran, 56: 77-79). See Allameh Tabatabaei's explanation of these verses in his commentaries upon the Quran (*al-Mizan*).

[8] See Muhammad Baqir al-Majlisi, *Bihar al-Anwar*, Vol. 92 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom Iran), Chapter 8, p. 95, No. 48.

the tenth/sixteenth century, and *Qala'id al-Durar fi Ayat al-Ahkam bi al-Athar* by Ahmad ibn Isma'il al-Jaza'iri (d. 1151/1738). The most important among the Sunni works is *Sharh Ahkam al-Qur'an*, compiled by a Hanafi jurist known as al-Jassas (d. 370/980).

It must be mentioned that, excepting certain topics which are dealt with at considerable length, the Qur'an as the source of the law contains mostly general principles susceptible to the derivation of particular laws. Clarification and elaboration of the details, such as the manner of accomplishing the daily prayers, fasting, exchanging merchandise, and in fact all acts of worship (*'ibadat*) and transactions (*mu'amalat*), can be achieved by referring to the Traditions of the Holy Prophet and his Household.

Deduction of the *Shari'a* from the Qur'an and *Sunna* requires certain criteria and standards. Differences of opinion over these criteria and standards, as well as the degree of understanding of the experts and their point of view regarding Qur'anic interpretation, resulted in differences among the Islamic groups.

Different interpretations of the same passage are likely to produce different results. So, to infer the precepts of the *Shari'a* from the Qur'an correctly, a *mujtahid* should have a sufficient knowledge of the rules of interpretation and also other knowledge including that of the *Makki* and *Madani* verses and the occasions of revelation (*asbab al-nuzul*) of the Qur'an. All this is essential, in addition to the many branches of scholarship which I have previously mentioned as necessary preparations for *ijtihad*. With regard to the rules of interpretation, there are several pairs of expressions in the Qur'an and *hadith* which a *mujtahid* must learn to distinguish. Some of these pairs are as follows:

66

3.3.1.1 *al-Muhkam wa al-Mutashabih* (the Perspicuous and the Ambiguous)

The word *al-muhkam* refers to the communications that carry "explicit" signification and do not need to be interpreted by special reference to the context or with the help of other verses of the Qur'an, whereas *al-mutashabih* denotes those verses which are "ambiguous", with an implicit meaning which is susceptible to various possible interpretations. The terms *muhkam* and *mutashabih* are used in connection with Qur'anic verses, not *hadith*. The existence of these two types of verse is proven by the testimony of the Qur'an itself as follows:

> He is Who has revealed the book to you; some of its verses are decisive [*muhkamat*], they are the basis of the Book, and others are allegorical [*mutashabihat*]; then as for those in whose hearts there is perversity, they follow the part of it which is allegorical, seeking to mislead, and seeking to give it (their own) interpretation ...[9]

According to Shi'ite scholars, for the correct understanding of the *mutashabihat* verses one should refer to the Prophet and infallible Imams. It is reported in a *hadith* that when 'Ali was asked about the exposition of *muhkam* verse of the Qur'an, he said:

> As to the *muhkam* (verse) which has never been abrogated by any other verse of the Qur'an there is the utterance of God Almighty: 'it is He Who sent down upon thee the book, wherein are *muhkam* verses that are the *umm al-Kitab*, and others are *mutashabihat*.' Verily, the people have perished on account of the *mutashabihat*, for they did not understand their meaning and reality. Thus they fabricated their *ta'wilat* [allegorical interpretation] themselves, in accordance with their own opinions, seeking

---

[9] The Qur'an, 3:7.

thereby to be able to do without the *awsiya'* (the Prophet's Successors, i.e. the Imams)...[10]

In the same *hadith*, Imam 'Ali then gives several examples of these two types of verse and interprets and clarifies the correct meaning of some *mutashabih* verses. Those passages of the Qur'an which draw a resemblance between God and man, such as "God's hand is above their hands",[11] "Then He sat upon the Throne"[12], "And I blew (*nafakhtu*) in him (Adam) of my Spirit"[13], are usually mentioned as *mutashabih* verses.

Muhkamat (pl. of *muhkam*) are exemplified by frequently occurring Qur'anic statements like "God knows all things", "God is the creator of every thing", "God is powerful over every thing", whose meanings are clear and are not open to interpretation (*ta'wil*) and abrogation. Those texts of the Qur'an which preclude the possibility of their abrogation are also considered to be *muhkamat*. An example is the Qur'anic address to the believers concerning the wives of the Prophet which forbids the believer from ever marrying his widows: "It is not right for you to annoy the Messenger of God; nor should you ever marry his widows after him. For that is truly an enormity in God's sight"[14].

According to some scholars, *mutashabih* denotes a word whose meaning is a total mystery and is not known at all. They hold that such a word does not occur in legal matters. A clear example of *mutashabih*, according to this definition, is the abbreviated (alphabetical) letters (*al-muqatta'at*) which occur at the beginning of

---

[10] Muhammad Baqir al-Majlisi, *op. cit.*, Vol. 93, Chapter 128, p. 12.

[11] The Qur'an, 48:10.

[12] The Qur'an, 7:45.

[13] The Qur'an, 15:29.

[14] The Qur'an 33: 53.

some *sura*. Some *'ulama*, including Ibn Hazm al-Zahiri, have held that with the exception of these abbreviated letters there are no *mutashabih* in the Qur'an.[15]

Al-Ghazali, however, did not confirm this opinion. He held that *mutashabih* is an equivocal word like the word *qur'* which is a homonym (*mushtarak*) for both menstruation and purity from menses.[16] The word *quru'*, (plural of *qur'*), which appears in the Qur'an in respect to divorced women: "And divorced women should keep themselves in waiting for three *quru* "[17], is interpreted as denoting both purity and its opposite. This might affect the length of the waiting period (*'idda*) of a divorcee. To give as another example of an ambiguous verse from which different rules may be derived, the following verse may be cited:

> If you divorce them before you have touched them and you have appointed unto them a portion, then (pay the) half of that which you appointed, unless they (the women) agree to forgo it, or he in whose hand is the marriage tie agrees to forgo it. To forgo is near to piety.[18]

It is not clear whether the guardian or the husband is meant by "the one in whose hand is the marriage tie". If the husband is meant then it is better for him to pay the entire dower sum.

---

[15] See Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Revised Edition (Cambridge: The Islamic Texts Society, 1991), p. 102.

[16] See al-Imam al-Ghazzali, *al-mustasfa min 'ilm al-usul* (Beirut: Mu'assisa al-Risalah), Vol. 1, pp. 202-3.

[17] The Qur'an, 2:228.

[18] The Qur'an, 2:237.

3.3.1.2 *al-'Amm wa al-Khass* (the General and the Specific)

Words, from the viewpoint of their scope, are classified into *'amm* and *khass*. The first may be defined as a word which has a general meaning, and applies to the unlimited number of things to which it is applicable. The second, however, is a word which applies to a limited and specified number of subjects. Some of the well-known patterns of the "general" in Arabic are: a singular or plural form of a noun preceded by the definite article *al*: *al-sariqatu wa al-sariqa;*[19] a word preceded or succeeded by the Arabic expressions *jami'*, *kaffah* and *kull* ("all", "entire") which are generic in their effect: *kullu shay'in*; and an indefinite word (*al-nakara*) when used to convey the negative: *la ilaha illa al-lah*.

Regarding the verses of the Qur'an or *hadith* reports, this classification is used in determining, for instance, whether a prohibition has a "general" application or is a "specific" prohibition bearing on specific circumstances. Moreover, some verses of the Qur'an or *hadith* statements, although indicating a general order or prohibition, may be restricted by other evidence giving the specific circumstances under which a general ordinance must be applied. For example, according to one verse of the Qur'an divorcees have to keep a waiting period (*'idda*) and are not allowed to remarry before the expiration of the period.[20] According to another verse, however, if the marriage is not consummated (in the case of divorce before intercourse) it is not necessary to observe the term.[21] So, we might say that the latter, which is specific, explains and qualifies the former.

---

[19] The Qur'an, 5:38.

[20] See the Qur'an, 2:228.

[21] See the Qur'an, 33:49.

'*Amm* may be specified either by a dependent clause, or by an independent locution. The former is called *al-mukhassis al-muttasil*, that is, a clause which occurs in the same text, e.g. *la ilaha illa al-lah*, and the latter is called *al-mukhassis al-munfasil*. An example of this type is that given above about divorced women. According to the majority of Shi'ite and Sunni *'ulama* both of these eventualities are two varieties of specification (*takhsis*). The followers of the Hanafi school, however, hold a different view. They maintain that the second kind is a case of conflict between different kinds of evidence. First, one must ascertain the chronological order between *'amm* and *khass*. If the two happen to be parallel in time, the *khass* specifies the *'amm*. Otherwise, either one could be revealed first. If it is the *khass* it will be totally abrogated by the *'amm*, and if it is the *'amm* it will only be partially abrogated.[22]

There is no disagreement between *'ulama* of different schools on the specification (*takhsis*) of the general statements (*'amm*) of the Qur'an by *mutawatir*[23] Traditions. The legitimacy of *takhsis* by *khabar al-wahid*[24], however, is a controversial issue. The majority of Shi'ite and Sunni scholars, including Shafi'is, Malikis and Hanbalis, believe in the permissibility of such *takhsis*.

The main argument against the permissibility of the *takhsis* is that "single" Traditions are speculative as regards of transmission (*zanni al-sudur*), whereas the Qur'an is definitively issued (*qat'i al-sudur*). So it is not reasonable to forego something of definite authenticity for something whose authenticity is only probable.

---

[22] See Hashim Kamali, *op. cit.*, p. 112.

[23] *Mutawatir*, literally meaning "continuously recurrent", is a report by an indefinite number of people related in such a way as to preclude the possibility of their agreement to perpetuate a lie.

[24] Literally meaning single report, *khabar al-wahid* is a Tradition that is not *mutawatir*. The term is applicable to every report narrated by one , two or more persons from the Prophet or infallible Imams, which fails to fulfil the requirements of either *mutawatir* or well-known Traditions.

For this reason some of those who agree with the limitation of the general statements of the Qur'an by a "single" Tradition have put forward the argument that if the authority (*hujjiyya*) of *khabar al-wahid* can be substantiated by definite proofs, then it is permissible to use them as the *mukhassis*. The majority of jurists are of the view that one cannot rely on the "general" in the hope of finding a *mukhassis*. This view is based on the rule: "there is no "general" which is not specified" (*ma min 'ammin wa qad khuss*).

3.3.1.3 *al-Mutlaq wa al-Muqayyad* (the Absolute and the Qualified)

Mutlaq denotes a word which is neither qualified nor limited in its application. When it is restricted in its application by another word it becomes a *muqayyad*. *Mutlaq* and *muqayyad* are similar in some ways to *'amm* and *khass* respectively. The difference between *mutlaq* and *'amm* is that the latter comprises all to which it applies whereas the former can apply to any one of a multitude, but not to all. *Muqayyad* differs from the *khass* in that the former is a word which implies an unspecified individual who is merely distinguished by certain attributes and qualifications. An example of *mutlaq* in the Qur'an is the expiation (*kaffara*) of futile oaths, which according to the text is freeing any slave (*fa tahriru raqabatin*)[25]. In another Qur'anic passage, however, the expiation of erroneous killing, which is "freeing a believing slave" (*fa- tahriru raqabatin mu'minatin*)[26], is qualified.

The *mutlaq* remains absolute in its application unless there is a limitation to qualify it. If there are two texts issuing the same rule on the same subject as well as

---

[25] The Qur'an, 5:92.

[26] The Qur'an, 4:92.

both having the same cause, but one is *mutlaq* and the other *muqayyad*, then all jurists hold that the latter prevails over the former.

3.3.1.4 *al-Nasikh wa al-Mansukh* (the Abrogator and the Abrogated)

Sometimes in the Qur'an and the *Sunna* we come across an instruction that had been temporary, meaning that after a time a different instruction was given which cancelled the first instruction. For example, the Holy Qur'an first tells the Muslims:

> And those of you who die and leave wives behind, (make) a bequest in favor of their wives of maintenance for a year without turning (them) out.[27]

According to this verse the waiting period for a woman whose husband is dead was one year. This instruction was cancelled by another verse which determines four months and ten days for such a woman:

> And (as for) those of you who die and leave wives behind, they should keep themselves in waiting for four months and ten days.[28]

In the early period of Islam *naskh* had a broad meaning for scholars. It included all of the instances which are today reconciled by the relation between "general" and "specific", "absolute" and "qualified", etc. By the fourth/tenth century Muslim scholars had identified over 235 instances of abrogation in the Qur'an. Al-Suyuti reduced them to twenty verses. Some scholars believe that the number of abrogated verses in the Qur'an is five or less.[29]

---

[27] The Qur'an, 2:240.

[28] The Qur'an, 2:234.

[29] Ayatollah kho'i accepted only one instance of abrogation in the Qur'an.

73

3.3.1.5 *al-Mujmal wa al-Mubayyan* (the Ambivalent and the Manifested)

Mujmal is an unclear word or text which gives no indication of its precise meaning. This is because either the word is totally unfamiliar, or is a homonym with more than one meaning without any indication how to select the correct one, or the meaning the lawgiver has given it is other than its literal one. In any of these, the ambiguity should be removed by the explanation of the Lawgiver himself being "manifested". For example, in the Qur'an expressions such as *salat, siyam* and *hajj*, are used for purposes other than their literal meaning. The juridical meanings of these words have been explained by the Prophet.

3.3.1.6 *al-Nass wa al-Zahir* (the Explicit and the Manifest)

In the terminology of *fiqh, nass* means a definitive text or ruling of the Qur'an or the *Sunna*. It is said, for example, that this ruling is a *nass*, which means that it is a definitive injunction. As opposed to *zahir, nass* denotes clear words which are also in harmony with the context in which they occur. So we could say that *zahir* denotes a word that, while being clear, is open to interpretation since its meaning is not in harmony with the context in which it occurs. According to the rule, the obvious meaning of the *zahir* must be followed unless the existence of another meaning in greater harmony with the Lawgiver's intention be proven.

The authority of the Qur'anic *zawahir* from which to deduce laws has been a subject of argument since the dominance of *Akhbarism*. The *Akhbaris* believed that the *zawahir* had authority only for those people the Qur'an was orally addressed to

(*mushafahin*). This is why the *usulis* have put forward arguments in their books of

usul al-fiqh to prove the validity of the literal meanings (*zawahir*) of the Book.[30]

3.3.1.7 *Makki* and *Madani* Verses

The knowledge of the *Makki* and *Madani* verses can affect the deduction of

the *Shari'a* by determining the chronological order in the revelation of the verses,

which helps the scholars to distinguish, for example, the abrogator (*al-nasikh*) from

the abrogated (*al-mansukh*).

'Ulama have applied different criteria to distinguish the *Makki* verses from

the *Madani*. The most preferred description of the *Makki* and the *Madani* contents of

the Qur'an is the one which is based on the time of revelation, meaning that the

verses which were revealed prior to the Prophet's migration to Madina are classified

as *Makki* and the remaining are identified as *Madani*, even if they were revealed in

Mecca after the Year of Victory (*'am al-fath*) or during the Farewell Pilgrimage

(*hajjah al-wida'*).

The *Makki* and *Madani* verses can also be recognised by their own features.

For example, the shortness of the *suras* and verses, the reference to doctrinal issues,

the recurring oaths, the arguments against the idolaters, the stories of past prophets

and people, the use of the phrase 'O people' (*ya ayyuha al-nas*) to address the

people in general, the mentioning of *sajda*, and so forth are some characteristics of

the Meccan *suras*. The *Madani* verses, on the other hand, address the believing

---

[30] See for example al-Muzaffar, Muhammad Rida, *Usul al-Fiqh* (Nashr-e Danesh-e Islami), Vol. 2, pp. 121-141.

people (*ya ayyuha al-mu'minun*) and usually contain legal and practical matters. Also all references to the hypocrites (*munafiqun*) are Madinan.

3.3.1.8 *Asbab al-Nuzul* (The Occasions of Revelation)

Asbab al-nuzul consist of reports indicating where, when, and under which circumstances certain Qur'anic verses were revealed. Although some scholars do not consider *asbab al-nuzul* a reliable source for the reconstruction of the formation of the Islamic law, the study of it facilitates a better understanding of some of the characteristic features of Qur'anic legislation.

There are some conditions regarding the authenticity of the reports of the *asbab al-nuzul*. A person who relates them should have been present on the relevant occasion of the verses, and the same conditions for the reliability of a *hadith* are also applied to these reports and their transmitters.

3.3.2 The Second Source of the *Shari'a*: The *Sunna*

Literally, the word *sunna* means a clear or a beaten path. This word was used by the pre-Islamic Arabs in reference to the customs which they inherited from their forefathers. As a technical term in Islamic jurisprudence, *al-Sunna* originates from the Prophet's command to follow his *sunna* (*fa-liyastun bi-sunnati*[31] or *al-akhdh bi-sunnati*[32]), signifies the Prophet's sayings, deeds and consents, and is of the same importance as the Qur'an in inferring the rulings of the *Shari'a*.

---

[31] See for example, Muhammad Ibn Ya'qub Ibn Ishaq, al-Kulayni al-Razi, *Al-Kafi*, Vol. 5 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom Iran), p. 496, No. 6.

[32] *Ibid.*, Vol. 8, p. 79, No. 33.

The authority (ḥujjiyya) of the Sunna is derived from the Qur'an as it states, for example: "Certainly you have in the Apostle of Allah an excellent exemplar (uswatun hasanatun)" [33]; "We have revealed to you the Reminder that you make clear to men what has been revealed to them"[34]; "O you who believe! obey Allah and obey the Apostle and those in authority from among you; then if you quarrel about any thing, refer it to Allah and the Apostle if you believe in Allah and the Last Day"[35].

The Sunna is divided into three types: the verbal (qawli), which consists of the sayings of the Prophet on any subject; the actual (fi'li), consisting of his deeds and actual instructions, such as the way he performed the prayer (salat); and the tacitly approved (taqriri), consisting of actions which were performed in the presence of the Prophet and earned his approval, meaning that by his silence he actually gave his endorsement.

The Shi'i 'ulama, who accept the infallible members of the Prophet's household as the Proof of God (ḥujja), have extended the meaning of the Sunna so as to mean the sayings, deeds and consents of the Prophet and the Imams. They believe that the Imams' knowledge of the Shari'a is not through ijtihad. Rather, they receive them either from the Prophet through the previous Imams or by inspiration from God. So, their sayings, acts and tacit permission (taqrir) constants are the origins of legislation and have the same authority as the Sunna of the Prophet.

Now that this broad meaning of the Sunna, as understood by the Shi'a, has been described, it must be added that since in the time of the Occultation it is not

---

[33] The Qur'an, 33:21.

[34] The Qur'an, 16:44.

[35] The Qur'an, 4:59.

possible to get the *Sunna* directly from its origin (the Prophet or infallible Imams), it relies on the Traditions (*ahadith*) which transmit it. Although these Traditions are, rather, carriers and transmissions of the *Sunna*, they are named *Sunna* by the *'ulama* of *hadith*, since it could be found through them. By the *Sunna*, they refer to the *reports* which narrate the Prophet's (or the Imam's) sayings, acts and whatever he has tacitly approved, plus all the *reports* which describe his natural activities and physical attributes such as the manner in which he ate, slept, dressed, or his favourite food or colours, and so on classified as non-legal *Sunna*. In the terminology of *usul al-fiqh*, however, the description of the physical features of the Prophet which do not constitute legal norms is excluded from the definition of the *Sunna*. But the *reports* of the legal *Sunna* are accepted as a source of law. Hence, in dealing with the *Sunna*, we must discuss the issues that relate to the *hadith* reports.

3.3.2.1 The Record of the *Sunna*: *Akhbar* or *Ahadith*

Literally, *Khabar* means 'news' or 'report'. In the terminology of *usul al-fiqh*, this word is used synonymously with the words *hadith* and *riwaya*, which refer exclusively to the sayings of the Prophet and the Imams.

Since during the lifetime of the Prophet the Muslims had the opportunity of putting their questions directly to him, recording his sayings was not very common, although it should be mentioned that, there is some evidence that Imam 'Ali had written some of the Prophet's sayings dictated by the Prophet himself.[36] Soon after the Prophet's death the Muslims realised the pressing need to record the *hadith* so as

---

[36] See for example, Muhammad Baqir al-Majlisi, *op.cit.,* Vol. 26, chapter 1, p. 38, No. 70; p. 45, No. 81; p. 48, No. 90; p. 49, No. 93; p.51, No. 01.

to avoid the problems that otherwise would arise in future generations, although it is very well known that the second Caliph stopped the people from recording the Prophet's traditions. The recording of *hadith* among the Sunnis had started by the end of the first century, when the Umayyad caliph 'Umar ibn 'Abd al-'Aziz (99-101/717-19) has associated with the collection and compilation of the Prophetic Sunna, or, at least, with those *Sunna* that touched on administrative matters.[37]

The situation of Shi'ite *hadith* was different from that of Sunni traditions, since the Shi'ites insisted on receiving them through the Imams and the Household of the Prophet. It is reported that the Imam's followers wrote traditions down in texts or notebooks as they heard them from the Imams. Each text was called *"usul"*, and contained a number of traditions. Four hundred of these texts by different authors are known as *al-Usul al-Arba'mi'a*: Most of them were kept in the Sahpur Karkh Library in Baghdad and were lost when Tughrul the Turk burnt the city on conquering it in the year 448/1058. Others, which escaped this calamity and other disasters, were preserved until the time of Ibn Idris (d. 598/1202) and Ibn Tawus (d. 673/1274-5) and were available to them. Some, numbering more than two hundred, have survived to our own times. These notebooks usually have the prefix *"kitab"* and often *"nawadir"* (rarities). Thirteen of them are held in the library of Tehran University in Iran.[38] Most of the traditions of the *Usul al-Arba'mi'a* exist in the *Shi'i hadith* books, of which the most important are as follows:

---

[37] See Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge: Cambridge University Press, 1997), p. 14.

[38] See Mustafa Awliya'i, "Outlines of the Development of the Science of Hadith", *Al-Tawhid*, Vol. I, No.1, (Muharram 1404 H.), pp. 31-2

1. *al-Kafi*, by Abu Ja'far Muhammad ibn Ya'qub al-Kulayni (d. 329/941), which contains 16,099 documented *hadith* narrated from the Shi'ite infallible Imams.

2. *Man la Yahduruh al-Faqih*, by Muhammad ibn 'Ali ibn Babawayh al-Qummi, known as Saduq (d. 381/991-2). This book contains 9,044 *hadith*.

3. *Tahdhib al-Ahkam*, by Muhammad ibn Hasan al-Tusi, Shaykh al-Ta'ifah (d. 460/1067). This book contains 393 chapters comprising 13,590 *hadith*.

4. *al-Istibsar, fi ma Ikhtalafa min al-Akhbar*, by Muhammad ibn Hasan al-Tusi. This book contains 5,511 *hadith*. Two parts of it deal with the issues pertaining to worship, and a third covers all other subjects of *fiqh*. It also includes certain parts of *al-Tahdhib* dealing only with the points of agreement and difference among various Traditions without mentioning *ahadith*.

5. *Wasa'il al-Shi'a ila Tahsil Masa'il al- Shari'a*, by Muhammad ibn hasan al-Hurr al-'Amili (d. 1104/1693). This book is limited to Traditions concerned with legal subjects and is the most convenient reference book for jurists.

6. *Bihar al-Anwar*, by Muhammad Baqir ibn Muhammad Taqi al-Majlisi (d. 1110/1699).

7. *Mustadrak al-Wasa'il*, by Husayn ibn Muhammad Taqi al-Nuri (d. 1320/1908).

The first four of these books are collectively known as *al-kutub al-arba'a* (the four

books) and hold the same position as the six famous collections of Sunni traditions

have among Sunnis. Al-Tusi's approach towards contradictory traditions in his two

books *al-Tahdhib* and *al-Istibsar*, and his legal interpretation of them, have deeply

influenced *Shi'i* law.

Here it must be mentioned that despite the opinion of the *Akhbari* school,

who claimed that all the traditions, especially those of the *kutub arba'a*, are of certain

authenticity, the followers of the *Usuli* school believe that the acceptability of any

tradition depends on certain conditions. There are two branches of scholarship,

known in *Shi'i* literature as *'ilm al-rijal* and *'ilm al-dirayah*, which investigate the

narrators (*asnad*) of the traditions, their texts (*matn*), the conditions of their

reception by the narrator and the manner of its transmission.

3.3.2.2 Classification and Value of the *Hadith* Reports

Hadith reports are generally divided into two categories: *al-mutawatir* and *al-*

ahad. *Al-mutawatir* is a *hadith* that has been reported by an indefinite number of

people in each degree of its transmission in such a way that it would be absurd to

suppose that all these transmitters concurred to report a falsehood. In other words, a

mutawatir Tradition is "one that has been attested to in each generation without any

break". According to the majority of *'ulama* of different schools, the authority of a

mutawatir hadith is equivalent to that of the Qur'an.

There are two types of *mutawatir hadith*: *lafzi*, which are the Traditions that

have been preserved verbatim, and *ma'nawi*, consisting of those whose meaning has

been transmitted. Since there are very few *hadith* reports that can be categorised as *mutawatir lafzi*, by *al-mutawatir* the second type is usually meant.

Khabar al-wahid ("single" Tradition) is basically a Tradition that is not *mutawatir* - that is to say, the number of people transmitting it from the Prophet or the Imams is so limited (one or two or a very few) that we cannot say for sure that the report is not wrong. When a *khabar al-wahid* is transmitted in every generation (*tabaqat*) of transmission by at least three individuals, it is named as *al-khabar al-mustafid*. And if it is not narrated by more than one individual in every generation it is named as *al-khabar al-gharib*, a "rare" Tradition. A Tradition whose chain of transmission cannot be traced back to more than one individual, if it is well known among people, is called *mashhur* (famous) which is synonymous with *mustafid*.

Now, can such Traditions be used as a basis for deducing the rulings of the *Shari'a* or not? As mentioned before, this matter has been a controversial issue among scholars. While the early traditionists (*muhaddithun*) even used the *ahad* Traditions as their *fatwas* in their *fiqhi* works, others such as Ibn 'Aqil (early fourth/tenth century) and Sharif al-Murtada did not consider *khabar al-wahid* as a valid source of the *Shari'a*. When the *Akhbari* school became active, opposing the rational and analytical approaches to the law, the majority resorted only to the *Sunna* and claimed that all the Traditions, even the "rare" and *da'if* (weak) Traditions, are of certain authenticity and should be taken as valid sources. According to the followers of the *Usuli* school, however, provided that the transmitters of *khabar al-wahid* from the first to the last were all Shi'ite and just (*'adil*)[39], or at least were

---

[39] *'Adil* describs a person who strictly controls his deeds according to the *Shari'a*, refraining from all its prohibitions and performing all of its obligations.

truthful and reliable, the Traditions which they have narrated can be used to deduce the relevant law. To justify the authority of such "single" reports to the following verses are referred to:

> O you who believe! if an evil-doer (fasiq) comes to you with a report, look carefully into it, lest you harm a people in ignorance, then be sorry for what you have done.[40]

It is argued that this verse of the Qur'an means that if an ungodly man comes and gives you some news, you are to research into his report, and unless you have definitely established its validity you are in no way to put it into effect. Similarly, the verse implicitly indicates that if a just and reliable person gives you a report, you are to put it into effect. The implicit meaning of this verse, therefore, is proof of the binding testimony of the "single" report.

> And it does not beseem the believers that they should go forth all together; why should not then a company from every party from among them go forth that they may apply themselves to obtain understanding in religion, and that they may warn their people when they come back to them that they may be cautious?[41]

According to the above verse, known as aya al-nafr, at least some people should travel to research religious commands. This indicates that the others, who stay at home, should accept what the travellers have found as a proof; otherwise, their research would be of no use except to themselves, while everyone should to able to benefit from the Islamic teachings.

---

[40] The Qur'an, 49:6.

[41] The Qur'an, 9:122. This verse is also used as a proof for the necessity of ijtihad as well as the validity of taqlid from a mujtahid for ordinary people.

3.3.2.3 Classification and Value of *Khabar al-Wahid*

In addition to its frequency, *khabar al-wahid* is also classified under several subcategories on the basis of the chain (*sanad*) of its transmission and the reliability of its transmitters. All these issues are discussed in two branches of scholarship, known as *'ilm dirayat al-hadith* and *'ilm al-rijal*. The former is a critical study of *hadith* which discusses chains of *hadith*, its text, the conditions of reception by the narrators and the manner of its transmission. The chain of transmission, which goes back to the *ma'sum* (the Prophet or the infallible Imams) is termed *sanad al-hadith*, and the text of a *hadith* which is its real substance is called *matn al-hadith*. On the basis of the chain of transmission, *khabar al-wahid* is classified into *musnad*, *mu'allaq*, *mursal*, *munqati'* and some other kinds which are fully discussed in the relevant sources. A brief explanation of the mentioned kinds is as follows:

musnad: This is a Tradition whose chain of transmission is known. If the chain of transmission is short it is called *al-hadith al-'ali*.

mu'allaq: If the names of one or more persons are missing from the beginning or the middle of the chain of transmission, the Tradition is termed *khabar al-mu'allaq*.

mursal: A Tradition is named as *al-khabar al-mursal* when its proper *sanad* has been omitted, or it has been reported by someone who has not heard it directly from the Prophet or Imam (for example, a Tradition handed down by a *tabi'i*) without naming the associate who had heard it from them.

munqati': When the name of one transmitter is missing anywhere in the middle of the chain of *sanad*, the Tradition is called *al-khabar al-munqati'*, and when more than one transmitter is missing, *al-khabar al-mu'dal*.

mudmar: If the name of the *ma'sum* is referred to by means of pronouns (*damir*) it is *al-hadith al-mudmar.*

On the basis of the reliability of its transmitters, *khabar al-wahid* is classified into *sahih, hasan, muwaththaq, qawi* and *da'if.* If all the narrators of a *hadith* are *Shi'i, mamduh* (acclaimed) and *'adil,* the Tradition is called *al-hadith al-sahih* (a sound Tradition). But if some of the transmitters are *Shi'i* and *mamduh* and the rest non-*Shi'i* but *'adil,* the Tradition is given the name *al-hadith al-hasan* (a good or fair Tradition).

The authenticity (*'adula*) or inauthenticity (*jarh:* lit. wounding; i.e. questioning the authenticity or trustworthiness of a narrator) of a transmitter could be proved by the testimony of an individual *'adil.* Some words which are used for denoting the reliability and veracity (*ta'dil*) of a narrator are: *thiqah* (reliable), *hujja* and *'ayn* (eminent personality). Words like *mutqan, hafiz, dabit* (prudent recorder), *saduq* (truthful), *mashkur* (praiseworthy), *mustaqim, zahid,* and so on are used to denote the general acceptability (*madh*) of the narrator. Some words which are used in expressing the *jarh* of a narrator are: *da'if* (weak), *mudtarib* (confused), *muttaham* (suspected), *saqit* (vile, base), *laysa bi-shay'* (baseless), *kadhub* (liar), *wadda'* (forger, fabricator), and so on.

In contrast to some jurists of the earlier period who abstained from acting on *ahad* Traditions, the *'ulama* of recent centuries have acted upon Traditions which are *wahid* and *sahih,* and *al-hadith al-hasan* is also considered by a number of scholars as of equal value to *al-hadith al-sahih.*

If all or some of the narrators in the chain of transmission are not *Shi'i* but their veracity (*'adalah*) is confirmed, this kind of Tradition is termed *al-hadith al-*

muwaththaq (a reliable Tradition). In this case, if it is known that the Companions of the Prophet (*sahaba*) acted upon such a Tradition it would also be acceptable to act upon it today.

If all transmitters are *Shi'i*, and nothing is known about their being *mamduh* or *madmum* (objectionable), this sort of Tradition is termed *al-hadith al-qawi* (a strong Tradition).

A Tradition that does not belong to any of these four categories is *al-hadith al-da'if* (a weak Tradition). Sometimes, the epithet *da'if* is applied to the *qawi* and *muwaththaq*, and also to *al-hadith al-mu'allaq*, *al-hadith al-munqati'*, *al-hadith al-mu'dal* and *hadith al-mursal* which have been discussed above. But if any of such *ahadith* has been trusted by famous scholars, and acted upon, it is called *al-hadith al-maqbul* (acceptable Tradition).

When it is known for certain that some narrators have never transmitted any Tradition from an unreliable person, if they transmit any *mursal hadith* it is counted as *sahih*. For example, the *mursal* Traditions of Muhammad Ibn Abi 'Umayr, Safwan Ibn Yahya and some other associates of infallible Imams were regarded by common consent of the *Shi'i ulama* as reporting with full authenticity.

In his *Rijal*, Kashshi gives detailed information about three generations of the *Shi'i* transmitters of *hadith* who reported in the form of *mursal*, but their *mursal* Traditions have been regarded as attaining the level of *sahih*, and thus efficacious for making legal decisions. The first generation included the most prominent associates of the Imam al-Baqir and Imam al-Sadiq, the fifth and sixth infallible Imams of the Shi'ites. Six of them, who were regarded as leading *fuqaha*, were as follows: Zurara, Muhammad b. Muslim al-Thaqafi, Abu Basir al-Asadi, al-Fudayl b.Yasar, Ma'ruf b.

Kharrabudh and Yazid b. Mu'awiya al-'Ijli. As for the second generation, these were the *fuqaha*, other than the six mentioned in the first generation, who were the associates of Imam al-Sadiq. These included Jumayl b. Darraj, 'Abd Allah b. Muskan, 'Abd Allah b. Bukayr, Hammad b. 'Isa, Aban b. 'Uthman, and Hammad b. 'Uthman. The third generation comprised six *fuqaha* from among the associates of the seventh and eighth Imams, al-Kazim and al-Rida. They were Yunus b. 'Abd al-Rahman, Safwan b. Yahya Bayya' al-Sabiri, Muhammad b. Abu 'Umayr, 'Abd Allah b. al-Mughayrah, al-Hasan b. Mahbub, and Ahmad b. Muhammad b. Abu Nasr.[42]

3.3.2.4. Reception (*tahammul*) of Traditions

One of the issues discussed in *'ilm dirayah al-hadith* is the manner of reception of a Tradition. Traditions can be received by seven means:

1. By listening to a teacher (*shaykh*), which is regarded as the best way of receiving a Tradition. The transmitter begins with such phrases as: "I heard from so and so" (*sami'tu fulanan*), or "He narrated to us" (*haddathana*), or "He informed us" (*nabba'ana*).

2. By reading out the *hadith* to the teacher to be confirmed, which is also termed *al-'ard* (presentation). Its essential condition is that the teacher should have memorized the Tradition, or should possess a correct copy of the manuscript, or one should be in the hands of a person trusted by the teacher. A *hadith* so received begins with "I read out this Tradition to my teacher, and he confirmed it."

---

[42] See Abdulaziz Abdulhussein Sachedina, *The Just Ruler (al-sultan al-'adil) in Shi'ite Islam: The Comprehensive Authority of the Jurist in Imamite Jurisprudence* (New York & Oxford, Oxford University Press,1988), p. 155.

3. By *ijaza* (the permission giving the teacher to the pupil to transmit the Tradition). This method has been regarded as reliable by the majority of scholars. The permission can be oral or in writing.

4. By *munawala*. This term is applied to the teacher's handing over the *asl* (the books in which the *Shi'i* scholars of *hadith* recorded the Traditions received) of the Tradition to the transmitter, telling him, "This is what I have heard", without mentioning that he is granting him the permission to transmit it. There are some different opinions regarding the credibility of the *munawala*. Some scholars hold the opinion that if it is strengthened by an indication that the teacher has implicitly granted permission, it is acceptable. Then, the narrator has to say "My teacher narrated to me by means of *munawala*".

5. By *kitaba* (writing). In this case, the teacher himself either writes for the narrator or dictates to the narrator. The narrator has to say "The teacher wrote for me", or "Narrated to me by means of writing".

6. By *i'lam* (declaration). In this case the teacher declares to the narrator that he has heard a certain Tradition or it was narrated to him, without any accompanying *munawalah* or *ijaza*. The usual expression is, "He declared to us," or something of the kind.

7. By *wijadah*. This is something which is received by the transmitter in the handwriting of the narrator himself, who is not his contemporary as in the above-mentioned cases. The statement used on such occasions is, "I found it in the writing of so and so," or "So and so conveyed through his writing that this is the writing of so and so", and so forth. Opinions differ regarding the practice based on such Traditions, but agree that there is no harm in transmitting them.

3.3.2.5. '*Ilm al-Rijal*

Ilm al-rijal is the study of the narrators of *hadith*. From the early period, this discipline has been a matter of interest for Muslims. In the third and fourth centuries of *Hijra*, as a result of the compilation of the books of *hadith*, this branch of scholarship found a larger circulation and many books were compiled on it.

'Ilm al-rijal is generally defined as the study of the ancestry, lives, characteristics, works and some other specific features of a particular group (narrators of *ahadith*) to determine the acceptability or otherwise of their narration. *'Ilm al- rijal*, in this general sense, consists of various branches, namely *rijal, fihrist, tarajim* or *ta'rikh al-rijal,* and *mashikhah*.

Rijal is the study of narrators of *hadith* with reference to their names and characteristics relevant to the reliability and authority of their narration.

Fihrist is a list or bibliography giving details of the authors and their works.

Tarajim is a term used for biographies of narrators without dealing with details relevant to the authenticity of their narration.

Mashikhah is the knowledge of the chains of the teachers or authorities of the Tradition in chronological order.

3.3.3 The Third Source of the *Shari'a*: *Ijma'*

Ijma', the verbal noun of the Arabic word *ajma'a*, has two meanings: to determine, and to agree upon something. As a technical term it signifies the unanimous agreement of the whole Muslim community or Muslim jurists on a particular legal issue. Although it is accepted as one of the four sources of Islamic

law by both Sunni and *Shi'i 'ulama*, the way that they understand the concept of *ijma'* is different.

Following the demise of the Prophet, *ijma'* occurred for the first time among the elders in the city of Madina to validate the election of Abu Bakr as Caliph. After that, whenever they encountered a problem the Companions used to consult each other over it and their collective agreement was accepted by the community. This leadership role then passed to the next generation (*tabi'un*). When they differed on a point the jurists of later periods referred to the views and practices of the Companions and the Successors, and in this way *ijma'* came to be a binding proof equal to the Qur'an, *Sunna* and *qiyas* for Sunni *'ulama*. While the early jurists relied only on the agreement of the Companions, the majority of Sunni *'ulama* held that, whenever an issue arose, its ruling would be authorized by the unanimous agreement of all the jurists (*mujtahidun*) at the time of its incidence.

According to the Shi'ites, however, *ijma'* is not an independent source equivalent to the Qur'an and the Sunna, and in itself it is neither an authoritative nor an infallible source of the law. In fact, *ijma'* is regarded as the process of discovering the *Sunna*, which is the opinion of the infallible Imams. For this reason the Imamites have employed the term *ijma'* even when the consensus comprised a small number of jurists, if they had discovered with certainty the Imam's opinion. Thus, *ijma'*, for the Imamites, is a source of Islamic law only in form and name. In reality, the opinion of the infallible Imam is the source of the law, provided that such an opinion can be discovered.

The Imamites believe that the infallibility of the *umma*, as maintained by Sunnis, cannot be substantiated. The Sunni *'ulama* claim that the Prophet said: "My

community (*umma*) will never agree on an error." Basing their view on this, they say that if the whole community of Muslims agreed on an opinion, that opinion would be correct and an authoritative ruling of the *Shari'a*. According to this Tradition, the members of the Muslim nation in its entirety have the same status as the Prophet and are faultlessly free from error. The speech of the whole *umma* has the same rank as the speech of the Prophet, and the whole nation, at the moment of agreement, is infallible.

However, in the first place, the Shi'ites do not consider this *hadith* to be definitely from the Prophet. Secondly, they say that it is impossible for the whole community to agree wrongly about something, just because there is always an infallible Imam among them. The whole *umma* is infallible because one of them is infallible, and not because they agree among themselves. Thirdly, even if it is supposed that it would be impossible for the whole *umma* to make an error, that which is called *ijma'* in the books of jurisprudence is not the consensus of the whole *umma*. It is simply the agreement of the elders of a sect of the Muslim community (*ahl al-hall wa al-'aqd*).

To sum up, Shi'ites accept *ijma'* as one of the four sources merely as a way of discovering the *sunna*. Whenever there is no proof in the Book and *Sunna* about a question, but it is known that all or most of the Companions of the Prophet or the Imams, who did nothing except in accordance with the divine instructions, used to act in a particular way, then it is realised that in those times there existed an instruction of the *Sunna* which we are unaware of. *Ijma'*, in *Shi'i* jurisprudence, then, is used to designate that opinion which has been discovered with certainty as being the Infallible Imam's opinion.

3.3.3.1 Classification of *Ijma'*

From the perspective of the nature of the evidence by which the agreement of the *'ulama* on a particular question may be proved, *ijma'* is divided into two types, namely "acquired" (*muhassal*) and "transmitted" (*manqul*). *Ijma' al-muhassal* means the consensus, the knowledge of which the *mujtahid* has himself directly acquired as the result of minute research into history and the views and opinions of the Prophet's or the Imam's Companions, or of the people close to the time of the Imams.

Ijma' al-manqul is the consensus about which the jurist has no direct information, and which is established by means of reports. *Ijma' al-muhassal* is considered to be a binding testimony. *Ijma' al-manqul*, however, is relied on only when certitude obtained from its narrator reaches the level of *tawatur*. Therefore, the "single" report of the consensus does not constitute a binding testimony, even though the narrated "single" report of the Sunna (*khabar al-wahid*) does.[43]

The Shi'ites have also classified *ijma'* into *kashfi* ("means of discovery") and *madraki* ("based on evidence"). The former is the one through which the Imam's opinion can be discovered as explained before. In the latter, however, the *'ulama* may agree on a certain rule because of the existence of evidence such as a "single" report. The validity of this *ijma'*, in fact, relies on the validity of that evidence. Although this

---

[43] For a discussion on the invaldity of *ijma'* transmitted by "single" reports see al-Akhund al-Shaykh Muhammad Kazim al-Khurasani, *Kifayah al-Usul*, Vol. 2 (Baghdad: Matba'at al-Shabandar, 1328 H.), pp. 20-22. Some *'ulama*, however, hold a different opinion. According to them the establishment of *ijma'* can also be proved by "single" reports. (See for example al-Shahid al-Thani, Hsan ibn Zayn al-Din. *Shatr al-Usul min Kitab al-Ma'alim al-Din wa Maladh al-Mujtahidin* (Tehran: Matba'at al-Rushdiyyah 1378 H.), p. 182.

kind of *ijma'* is not considered as a valid source of the *Shari'a*, it can be used to put right the weak (*da'if*) Traditions.

3.3.3.2 The Methods of Finding Out the Imam's Opinion through the Consensus

There are three generations of the Imamite transmitters of *hadith* reports who are known as *ashab al-ijma'* and whose consensus has been regarded as authoritatively binding. They are those referred to before whose *mursal* Traditions are regarded as attaining the level of *sahih* and as efficacious for making legal decisions. But there are only a few cases where the consensus of the Imam's associations is recorded, while many rules of jurisprudence have been claimed to have *ijma'* as a proof. This is because jurists have relied on the methods used to find out the Imams' opinion through the *ijma'* of other *fuqaha* which also proves the validity of their agreement on a particular question. Some of these methods are as follows:

1. The Method of Direct Sensory Perception (*tariqah al-hiss*):

According to this method the person who is investigating an *ijma'* should contact all the jurists of the period and hear their opinion on the issue in question. During this process he has to make sure that one of those whom he listens to is the Imam himself.

It is evident that this kind of *ijma'* cannot be attained during the period of Occultation of the Imam. This method was known among the ancient Imamite jurists, including Al-Sharif al-Murtada (355 A.H-436A.H) and those who followed him in this matter. This *ijma'* is also known as *al-ijma' al-dukhuli*, because of "inclusion" of the Imam's opinion.

2. The Silent Method (*tariqah al-taqrir*):

According to this method the Imam's confirmation (by silence) of the agreement of the jurists, in respect to a certain injunction, is interpreted as a proof of their decision in accordance with the command of God. This *ijma'* should have occurred in the presence of the infallible Imam with the possibility of his rejection of the opinion held by a single jurist, or a group, on an injunction. So when the Imam has to live in *taqiyya* (dissimulation) or in *ghaybah* (occultation), it is not incumbent on him to prevent the jurists from agreeing on an issue.

3. The Method Based on the Principle of *lutf* (*tariqah qa'ida al-lutf*):

This method, which was preferred by Tusi (385 A.H.-436 A.H.) and those who followed him, is based on the principle of *lutf* and "reason" (*al-'aql*) instead of "hearing" (*al-sama'*) in the method of *hiss*. According to the principle of *lutf* (divine grace), because of *taklif* regarding the injunctions, the appointment of an infallible Imam is necessary and one of the most important duties for which he is appointed is teaching the revealed injunctions. So it is necessary for the Imam to reveal the truth or pronounce on *ikhtilaf* (diversity of opinion) about any problem on which a wrong agreement may have been reached by a number of jurists during the Imam's time, or may be reached in later periods (during the *ghayba*). Hence, the opinion of the Imam is discovered through an agreement by a number of jurists.

By the method of employing the principle of *lutf*, if a jurist disagrees and it is known that he is not the Imam himself and there is no proof that could support his contrary opinion, then this is not harmful to the *ijma'*. However, where there exists a

verse of the Qur'an or an authentic Tradition contrary to the view held by those who have agreed upon an issue, such an *ijma'* cannot be considered a correct means of discovery of the infallible Imam's opinion, even if the reason for the contrariety is not evident to the jurists. It is possible that the Imam might have based his opinion on these very sources in explaining the truth of the matter, which the jurists ought to look for in the source. But this method, quoted by Shaykh al-Ansari in his *Rasa'il*, is refuted by al-Sharif al-Murtada, who believed that it was not incumbent upon the Imam to reveal the truth of a matter. Since the people were the actual cause of his concealment, the blame for not knowing the truth was to be imputed to them, not to the Imam.

4. The Method of Intellectual Intuition (*tariqah al-hads*):

This is the method adopted by the majority of jurists in the modern period. Its method states that, whatever decision the Imamite jurists may have agreed, it should be ascertained that it has reached them from their Imam through unbroken personal contact. In spite of the differences that might divide the legal opinions of Imamite jurists, their agreement reached by *ijma'* is held to rely on the opinion of their Imam and not to derive from their personal opinion or independent comprehension. Their agreement is like that of groups who follow a certain opinion uniformly, conveying their agreement with the opinion of the leader whom they follow. The agreement should be accepted in all ages, from the period of the Imams down to the present time, because an agreement reached in one period taken with a disagreement in another period impairs the attainment of the required certainty. The disagreement of any jurist, even if well known, hampers this attainment.

In brief, in the view of the Shi'ites , firstly, consensus is not genuinely binding in its own right, but only in as much as it is a means of discovering the Sunna. Secondly, only the consensus of the jurists of the same period as the Prophet or Imams is binding and it must reach us by *tawatur* through an unbroken chain of transmitters or through a direct investigation of the opinion of the companions of the Prophet or the companions of the Imams, or of the jurists close to the time of the Imams. So if in our own time a consensus is reached about something between all the jurists without exception this is in no way binding for subsequent jurists.[44]

3.3.4 The Fourth Source of the *Shari'a*: *'Aql*

'Aql ('reason' or 'human intellect') is one of the four main sources of Islamic law for the followers of the Shi'ite *Usuli* school. The jurists of the early period, however, did not mention it as a source of the *Shari'a*. The earliest legal work in which *'aql* is mentioned along with the other three sources is *al-Sara'ir* by Ibn Idris al-Hilli, although he did not explain what it meant. Those scholars that did explain *'aql* each described it in a different way.[45] What is now meant by *'aql*, as a source of the *Shari'a*, is discovering a law by reasoning using the obvious rules. This involves categorical judgment drawn from both the theoretical and practical intellect.

---

[44] For the meaning of *ijma'* before the Shi'ites, its classification, and also the discussion on the methods of findindg the infallible Imams' opinion see al-Muzaffar, Muhammad Rida, *op. cit.,* Vol. 2, pp. 87-106; Hsan ibn Zayn al-Din al-Shahid al-Thani, *op. cit.,* pp. 174-183; al-Akhund al-Shaykh Muhammad Kazim al-Khurasani, *op. cit.,* Vol. 2, pp. 20-23. See also Sachedina, Abdulaziz Abdulhussein. *Islamic Messianism: The Idea of Mahdi in Twelver Shi'ism* (Albany: State University of New York Press, 1981), pp. 138-148.

[45] For a detail see Muhammad Rida al-Muzaffar, *op. cit.,* Vol. 2, pp. 110-111.

There is a principle in Shi'ite *usul al-fiqh* known as *qa'idah al-mulazamah* (the rule of correlation), which states that whatever is ordered by reason is also ordered by religion (*Kull ma hakama bihi al-'aql hakama bihi al-Shar'*). In accordance with this principle, religious rules may be inferred from the verdict of reason. A famous example is the judgement of the practical intellect that justice is good and injustice is evil. We discover by the principle of correlation that injustice is also forbidden by the Lawgiver. In the case of any injustice there would be an argument against it. There are also some rational regulations based on the theoretical intellect which are discussed in Shi'ite *usuli* works in order to discover legal rules. The four most important of them are as follows:

3.3.4.1 *Muqaddama al-Wajib* (Preliminary to Obligations)

Here the jurists discuss the obligation of the necessary preparation for a juridical command, e.g. the obligation to acquire a passport or buy a ticket for the *hajj*. The same thing can apply to religious prohibitions, bringing up the question whether the rule of a thing being forbidden demands the forbidding of its preparations.

The subject of *muqaddama al-wajib* is, in fact, a correlation between the obligation regarding an act and the obligation regarding its prerequisites. The important point is to discover the canonical obligation concerning the preliminary whose obligatory nature is affirmed by reason. If we accept that what is ordered by reason is ordered by the religion, then we can come to the conclusion that the performance of the preamble of an obligation is also ordered by the *Shari'a*.[46]

---

[46] For a discussion on the obligatory nature of a preliminary to an obligation see al-Akhund al-Shaykh Muhammad Kazim al-Khurasani, *op. cit.*, Vol. 1, pp. 51-73.

3.3.4.2 *Amr bi al-Shay Yaqtadi al-Nahy 'an al-Didd* (to order something necessitates the prohibition of its opposite) or *Mas'ala al-Didd* (the question of opposites)

This is a correlation between prescribing something and prohibiting its opposite. Sometimes we face simultaneously two things that are equally obligatory, and we are not able to do both because they must be done separately. For example, if the mosque becomes *najas* (unclean by blood, etc.), to immediately make it clean (*tahir*) is obligatory (*wajib*). Now, we cannot pray our obligatory ritual prayers when at the same time we must clean the mosque, and there is not enough time for prayer. So the performance of one of these two duties demands the neglect of the other. Jurists therefore need to discuss whether one command necessitates and contains the prohibition of the other, and whether both commands include this prohibition. The answer to these questions will affect the decision of *mujtahidun* in cases such as the one above.

The important issue in this discussion is the validity (*sihha*) of the prayer when we ignore cleaning the mosque although we have enough time for prayer. The *fatwas* of some *mujtahidun* in this regard are as follows:

-Whenever, during the time for prayer, one realises that the mosque has become *najas*, and there is enough time, then first the mosque must be cleaned and then the prayer should be performed,...but if only a little time remains in which to perform the prayer, then the prayer must be performed first.

- If one has plenty of time both to clean the mosque and to perform his prayer, but prays without having made the mosque clean, his prayer is *sahih* (valid); however, by delaying the cleaning of the mosque he has committed a sin.

3.3.4.3 *al-Ahamm wa al- Muhimm* (the More Important and the Important)

In the previous paragraph it was stated that sometimes two things are obligatory although it is not possible to perform both of them at once. Intellectually, we have no option but to choose only one of them. According to the principle of *al-ahamm wa al-muhimm*, if one of the two is more important, we must perform that one. An example of applying this rule is that when someone's life is in danger and we are at prayer, saving him is more important than prayer, so we must break off the prayer and save him. The issue of *al-ahamm wa al-muhimm* plays an important role in determining the actual law regarding questions that arise in special circumstances.

3.3.4.4 *Ijtima' al-Amr wa al-Nahy* (the Gathering of the Obligation and the Prohibition)

Here the impossibility of combining command and prohibition in a single case is discussed by the jurists. A clear instance is performing prayer in an illegitimate (*ghasbi* or *maghsub*) place. We are commanded to pray while at the same time we are forbidden to be in a illegitimate place.

Considering the fact that it is not possible for something to be commanded and at the same time be forbidden, the question arises whether the command regarding prayer is totally cancelled when one is in an illegitimate place. The answer will affect those cases in which one, for example, unwittingly prays in an illegitimate place. Since the majority of the *'ulama* consider prayer in such a place to be valid on some occasions, we might say that the command to pray has not been totally removed by the prohibition. To justify this we may say that the command and the prohibition each relate to a different subject which are combined when one prays in

an illegitimate place. Normally prohibition is to be preferred except in those specific

situations in which prayer in such a place might be considered valid. The following

are the *fatwas* of some *mujtahids* in this regard:

- Prayer performed in a place that is *maghsub* is invalid (*batil*) if performed

knowingly and intentionally,...and if overlooked, forgotten, or unknowingly done, the

prayer is valid (*sahih*),...but if one has oneself usurped the place and forgets, then the

essential precaution (*ihtiyat wajib*) is to repeat the prayer.

- If a person who prays in a place that is illegitimate (*maghsub*) does not

know the law of the *Shari'a* regarding *ghasb* being forbidden (*haram*) and is at fault

for not learning this law, then the prayer is *batil*.

There is also some discussion related to the inner meaning or philosophy of

the commandments. This subject, together with the relevant section above, shows

how the laws of the *Shari'a* come within the domain of reason. Below is a brief

explanation of this subject.

3.3.4.5 Philosophy of the Commandments

What has been explained about finding the rulings of the *Shari'a* through the

theoretical intellect relates to one of the issues discussed under the subject of *'aql*,

that is, the requirement of the laws (*lawazim al-ahkam*). The rulings of the *Shari'a*

can also come within the domain of reason by finding the *hikma* or *'illa* of the rules.

The explanation is that, according to the *Shi'ites*, all divine rules are established on

the basis of actual (*waqi'i*) expediencies (*masalih*) and inexpediencies (*mafasid*),

which may relate to body or soul, society or individuals, and this world or the

hereafter. In other words the reason to fulfil an obligation is to obtain some necessary

benefits, and similarly each prohibition exists to prevent injuries that must be avoided. Accordingly we could say that if there was no good or evil Almighty God would not need to give commands. This view relies on the idea that every Divine act, creation or legislation has a hidden purpose and aim and is originated on the basis of Divine justice.

This, however, opposes what the *Ash'arites* believe in regard to the correlation between the rules and good or evil. According to them, we only find something to be good or evil if God commands or prohibits it. The benefits and the injuries depend entirely on the command of God and are not inherent in nature. They are simply creations of God's will, directly applied to the circumstances of human behaviour.

Now if we go back to what the *Shi'ites* believe concerning the existence of good or evil independent of God's will, we can say that even in those cases where no rules are received from the Lawgiver, reason could establish a proper judgment on the basis of good and evil. One example is that addiction to opium would be prohibited because of the experience of its harmful nature, although there is no revealed rule about it.

Although *qiyas*, introduced by the Sunnis as one of the main sources of the *Shari'a*, also rests on the presumption that in the revealed rules some particular attributes of the subject affect the establishment of the rule, it is rejected by the *Shi'ites* since it is mostly based on assumption rather that certitude in finding the effective *'illa*. Certainly, if the effective *'illa* could be known for sure, for example if it is stated in a verse or a reliable *hadith*, then the same rule could be applied in any similar situation.

3.4 *al-Usul al-'Amaliyyah* (the Procedural Principles)

At the beginning of this chapter we mentioned that *Shi'ite usul al-fiqh* is divided into two parts. The first part, dealing with the methods of inferring the precepts and legal norms from the four basic sources, has been briefly explained above. The second part, which concerns the manner of reasoning using certain procedural principles, namely, exemption (*bara'a*), precaution (*ihtiyat*), option (*takyyir*) and continuance (*istishab*) is what we are now going to explain.

3.4.1 *Asl al-Bara'a* (the Principle of Exemption)

This principle declares that we are released from obligation and we have no duty. It is similar to the rule stating "everything is permissible until you know for certain that it is forbidden" (*asl al-ibaha*). The principle of exemption is used by jurists when they have an initial doubt about an obligation or prohibition because there is no general knowledge (*'ilm al-ijmali*), or record of precept and the texts are silent over it. For example, in the time and the place of the Prophet nobody smoked, and there is therefore no testimony concerning smoking in the Qur'an, *Sunna* or Consensus. If a jurist doubts the illegality (*hurma*) of smoking, and the harm of smoking is not definitely proven, then according to the principle of exemption smoking should be permitted.[47] The principle can also be used in the cases of ambiguity in the texts and conflict of evidence.

---

[47] If it is proven that smoking definitely causes cancer, a *mujtahid* according to the judgement of reason (whatsoever is harmful must be avoided) and "the rule of correlation" will establish the law that smoking is forbidden according to the Divine law. It is notable that the prohibition of smoking tobacco by Mirza Shirazi (a famous jurist at the period of Qajar) broke colonialism's famous

The principle of "exemption" is based on a reasonable (*'aqli*) rule stating that

it is not reasonable to punish for something that is not declared (*al-qa'ida qubh 'iqab*

bi la bayan). The rule is also confirmed by the following *hadith* from the Prophet:

> Nine things are excused from my nation: mistakes, forgetfulness, what they have
>
> been compelled to do, what they have not tolerated, what they do not know, what they
>
> have found themselves in need of, envy (which they have not acted on), misfortune,
>
> and thinking about satanic temptations in the creation until it causes one to speak.[48]

'Ulama have had numerous discussions about this Tradition and about each

of its points. The part that sanctions the principle of *bara'a* is the clause which states

that Muslims are excused from whatever they do not know (*la ya'lamun*).

The principle of exemption can also be applied by ordinary people when they

have a doubt about the subject matters of the law rather than the law itself. If, for

example, one is unsure whether a woman he wants to marry is one of his

unmarriageable relatives, he could, following the principle of exemption, marry her.

Another case in enacting law for which this principle would be useful is when one

claims that somebody is indebted to him, which, if not proven, would be ignored

according to the freedom from liability of the defendant.

3.4.2 *Asl al-Ihtiyat* (the Principle of Precaution)

According to this principle, if a duty actually exists as a law of the *Shari'a*,

our reaction should be able to ensure that we have performed it correctly. This

---

monopoly agreement in Iran. He realised that this agreement was against Iran's interest. This is also

an example of governmental commandments ruled by the *fuqaha*, and an instance of their political

authority.

[48]Muhammad Baqir al-Majlisi, *Bihar al-Anwar*, Vol. 2 (CD of Noor, Produced by Computer

Research Center of Islamic Sciences, Qom Iran), Chapter 33, p. 280, No. 47.

principle is used when the doubts of jurisprudents about an obligation are linked to some general knowledge (*'ilm ijmali*) and it is also possible to act in accordance with precaution, meaning that it is possible for all duties to be performed. For example, it is necessary that the prayers be offered facing the *qibla*. Now, if the probable direction of the *qibla* cannot be ascertained, the prayers should be performed in all four directions. Another example is when one is unsure to whom, out of two people, he owes some money. In such a case if the debtor knows for certain that he cannot find out, he should pay the same amount of money to each, and so be sure of being free from liability.

According to the principle of precaution, if we are unsure whether an action is obligatory or preferred (*mustahabb*), we must take it as obligatory and make sure we have performed our duty. Likewise, if uncertain about the prohibition or unpleasantness (*kiraha*) of an action, one should avoid it. It appears that the principle of precaution is mostly used in personal and devotional matters rather than in enacted laws.

3.4.3 *Asl al-Takhyir* (the Principle of Option)

The principle of option says that we have the option to choose one of two things. This principle is used when doubt about an obligation is linked to some general knowledge, and because the doubt is between the obligatory and the forbidden it is not possible to act in precaution. For example, one (a *mujtahid*) living in the period of Occultation might doubt the exclusivity of certain duties to the Imams and therefore hesitate between their obligation and prohibition. To give an example, we may refer to the permissibility of leading the Friday (*Jum'a*) prayer

when the Imam is absent, which is questioned by some of the *Shi'ite* jurists. The difficulty lies in the fact that during the Occultation jurists were left with two options in their rulings about the Friday prayer: either to declare it to be a permissible or recommended act of worship, or to consider it prohibited since it was not clear that the Imam had given general permission to all qualified believers to lead it at all times.

The principle of option could be used in the case of ambiguity or lack of evidence but it is mostly used in the case of conflict between two pieces of evidence of equal strength; for example, between two non-*mutawater hadith*, which cannot be either reconciled nor preferred. In this case, according to some *'ulama*, both conflicting pieces of evidence should be abandoned.

3.4.4 *Istishab* (Presumption of Continuity)

According to the principle of *istishab*, one should ignore doubts regarding those facts or rules of the *Shari'a* whose existence (or non-existence as validated by some scholars in *istishab al-'adam al-asli,* meaning the presumption of original absence), has been proved in the past. They will remain in their original state as long as there is lack of evidence to establish any change with certainty. So we can define *istishab* as continuation of that which is proven. This definition of *istishab* relates to its literal meaning, companionship, indicating that "the past 'accompanies' the present without any interruption or change". When we are certain that there exists a precept or a subject of a precept, but we doubt whether that precept is still valid because of changing conditions, it is necessary to act according to the previous certainty until we are convinced that there is another precept on that issue.

The principle of *istishab* is also validated by the Shafi'i and Hanbali schools, however, it is not considered a proof in itself by the Hanafis and Malikis. They are of the view that establishing the existence of a fact in the past does not constitute evidence of its continued existence.[49]

For the Shi'ites, the principle of *istishab* is justified by a number of reliable Traditions from the infallible Imams, in some of which the rule is stated explicitly: "Do not reverse a certitude by a doubt but reverse it by a certitude."[50]

The principle of *istishab* is also supported by rational (*'aqli*) evidence. That is to say, it is reasonable to expect that things which have existed before remain in existence until the contrary is established. When it is established by reason to accept the existence of a fact or a rule, it would be also acceptable by the Lawgiver. This inference is based on the rule of correlation between the rule of reason and the *Shari'a* (*qa'idah al-mulazimah*) which was explained before.

From the viewpoint of the nature of what is certain and the conditions that are presumed to continue, *istishab* is divided into several types which are discussed by Shaykh al-Ansari and other scholars in their works on the principles of jurisprudence. These discussions mostly take place under the title of *al-tanbihat al-istishab* (notes on *istishab*) and consist of fourteen notes by al-Khurasani to be found in his *Kifayat al-Usul*.[51]

---

[49] See Hashim Kamali, *op. cit.,* p. 297.

[50] See al-Hurr al-'Amili, Muhammad Ibn al-Hasan, *Wasa'il al-Shi'a ila Tahsil Masail al-Shari'a,* Vol. 1 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom Iran), Chaprer 1, p. 245. No. 631; Muhammad Baqir al-Majlisi, *op. cit.,* Vol. 2, Chapter 33, p. 274, No. 17, and p. 281, No. 53 and 55.

[51] For discussion on these notes see al-Akhund al-Shaykh Muhammad Kazim al-Khurasani, *op. cit.,* Vol. 2. p. 83-103. For further detailed discussion on the principle of *istishab* see Ruhollah al-

3.5 Other Subjects in *Usul al-Fiqh*

In addition to the two main parts mentioned above, works of *usul al-fiqh* include a chapter on the ways of reconciling conflicting evidence, called *Ta'adul* and *Tarajih*, which are not considered in this dicussion. There is also a chapter on a rule known as *la darara wa la dirar* ("there is no harm and no injury", or "there is no loss and no harm"). This will be discussed in the fifth chapter of this thesis. Some issues regarding *ijtihad* and *taqlid* (following a *mujtahid*) which are discussed in some works of *usul al-fiqh* will be examined in the next chapter.

Chapter Four

Comprehensiveness of the *Shari'a*

4.1 Introduction

Muslims believe that Islam is the continuation of the other Divine religions,

just as each Divine religion is the continuation of the previous ones. All Divine

religions originate from the same source and were delivered for the guidance of the

people through individuals who were infallible and devoid of any kind of error. Thus,

naturally, none of the messages of these prophets can contradict each other, nor can

they be different. With regard to Islam and its similarity with the previous religions,

the Qur'an tells the Muslims:

> He has made plain to you of the religion what He enjoined upon Noah and that which
>
> We have revealed to you, and that which we enjoined upon Abraham and Moses and
>
> Jesus, that keep to obedience and be not divided therein.[1]

---

[1] The Qur'an, 42:13.

Muslims also believe that all Divine religions, in spite of their common message, are complementary to previous Divine religions and that in the course of history they have become more complete and comprehensive. This completeness and comprehensiveness reached its ultimate climax with Islam, which is the last of the religions. Therefore Islam, unlike other religions which were intended for a specific period of time or a special group of people, belongs to all people and all times.

'Allamah Tabatabaei,[2] in his great commentary on the Qur'an, al-Mizan, explains that every religion must be obeyed in all its detailed commands and that all of the Divine religions are true. He explains that every time a new religion appears it abrogates the previous one. However, abrogation does not mean nullification. Rather, it means that the commands of each religion are limited to a period or a special group of people who should believe and act accordingly. The appearance of the new religion indicates the end of that period. The followers should believe in the rightfulness of both sets of commands (as God in the verse mentioned above commands obedience to the rules and forbids disunity) but follow the new ones only.[3]

---

[2]'Allama Tabatabaei, the late Islamic scholar, thinker and philosopher, was born in Tabriz (Iran) in 1903. He went to al-Najaf al-Ashraf (Iraq) in 1923 where he received his higher education in the religious sciences. He returned to Iran in 1934 and began his teaching in Qom. Gradually his intellectual and mystical characteristics attracted his students. Many religious leaders of the present generation were and are among his students and disciples, the most famous being the late Murtada Mutahhari (1338/1920-1399/1979). 'Allamah Tabatabaei's fame rests on his various acadamic works - the most important being his great exegesis of the Qur'an, al-Mizan fi Tafsir al-Qur'an in twenty volumes, in which he adopted a new approach in interpreting the Qur'an that he called tafsir al-Qur'an bi al-Qur'an (Exegesis of the Qur'an by the Qur'an). Among his other works is Usul-e falsafah wa rawesh-e realism (The Fundamental of Philosophy and the Doctrine of Realism), which is a comparative study of Islamic Philosophy and various modern anti-Islamic schools of thought, especially Marxism.

[3] See 'Allamah Sayyid Muhammad Husayn Tabatabaei, Al-Mizan, Vol. 18 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom Iran), p. 30.

Like all Muslims Tabatabaei believes that Islam is the last and most complete religion for all human beings in all periods.

Here, however, some questions might be raised. It is possible to say, for example, that we accept that Islam is the last and most complete of the religions and that it has many commands regarding different aspects of human life. It intervenes in social life as well as individual affairs and worship. It has economic and political dimensions, and so on, but the question is:

-How can a fourteen centuries' old legal system be adequate to fulfil the requirements of human life in modern times?

- Is the *Shari'a* still the same today, now that science has changed the whole course of life?

- Are the rulings of the *Shari'a* applicable in the traditional manner today?

-What are the reasons for the eternality and the comprehensiveness of the *Shari'a*, and what are meant by them?

There are different views regarding these questions which will be considered in this chapter, which is divided into two sections, namely "the Role of *Ijtihad* regarding the Comprehensiveness of the *Shari'a*" and "Proving the Comprehensiveness".

4.2 The Role of *Ijtihad* regarding the Comprehensiveness of the *Shari'a*

There is a close relation between *ijtihad* and the concept of the comprehensiveness of the *Shari'a*, since it is described as the key point concerning the adaptation of the Shari'a to the changing needs of Muslim society. Examining objections to the application of some public laws of Islam in modern times, I will

present some leading scholars' opinions in this regard. But first it is necessary to explain the term *Shari'a*.

4.2.1 The Meaning of *Shari'a*

Shari'a is an Arabic word which literally means "a way to a watering place". According to Ibn Manzur (d.711H./1311A.D.), the most famous Arab lexicographer, in *Lisan al-'Arab* under the root "-sh-r-'-", *Shari'a* is a place from which one descends to water. He also comments:

> According to the acceptation of Al-Laith, this word has been used to refer to what
>
> God has decreed for the people in terms of fasting, prayer, pilgrimage, marriage etc.[4]

Technically, *Shari'a* signifies the canon law of Islam as a clear path shown by Allah through His Messenger and the way to be followed. This word occurs only once in the Qur'an:[5]

> Then we have made you follow a course [*Shari'a*] in the affair, therefore follow it,
>
> and do not follow the low desires of those who do not know.[6]

The connection between *Shari'a* as a generic term for the Islamic law and precepts, and *Shari'a* as the path to water is perhaps the centrality of both of them in Islam and in life, as the Qur'an has said:

> O you have believed! Answer (the call of) Allah and His Apostle when he calls you to
>
> that which gives you life.[7]
>
> We have made of water everything living.[8]

---

[4] Ibn Manzur, *Lisan al-Arab*, Tome VIII (Beirut - Lebanon: Dar Sader Publishers), p. 175.

[5] Other words from the same root also appear in the Qur'an: in 5:48 (*shir'ah*: way), 7:163 (*shurra'an*: on the surface of the water), 42:13 and 42:21 (*shara'a* and *shara'u*: legislated),

[6] The Qur'an, 45:18.

[7] The Qur'an, 8:24.

Later *Shari'a* came to mean all the commandments of God concerning human activities. *Shari'a* is therefore the expression of Allah's commands for Muslim society and, in application, constitutes a system of duties that are incumbent upon a Muslim by virtue of his religious belief. It is a divinely ordained path of conduct that guides Muslims towards the practical expression of their religious conviction in this world and the goal of divine favour in the hereafter. So the concept of *Shari'a* means those sets of legal, religious and traditional rules which are based on the teachings of the Qur'an and the *Sunna*.

It is important to emphasise that *Shari'a* does not cover only the individual's religious duties, and moral or ethical issues. Rather, it encompasses the whole field of what the modern world perceives as "law". *Fiqh*, that is, the science of the practical rules of the *Shari'a* derived by the *'ulama* from the valid sources through the procedure of *ijtihad*, is sometimes used synonymously with *Shari'a*. In this sense, as will be explained through the following chapters, the *Shari'a* could be subject to expansion and change.

4.2.2 Islamic Law and the Social and Cultural Change

Some people say that the passage of time itself is a sufficient ground for the need of new guidance and that a religion which was revealed fourteen centuries ago must necessarily grow obsolete and become a thing of the past, not suited to the needs of the new age. In other words, since laws are made according to needs, and since a human being's social needs are not fixed and unchanging, social laws cannot be fixed and unchanging. So the application of Islamic law, which was framed

---

[8] The Qur'an, 21:30.

fourteen centuries ago in the light of the requirements of a simple society, is not practicable in the twenty first century.

It is said, for example, that "today we cannot apply the same punishments which were applied long ago in the desert." It is not permissible to cut off a thief's hands. Criminals should be entitled to medical treatment rather than punishment.[9] "Today the law of apostasy is not acceptable as the law of Islam."[10] The status and rights of women under secular public law are superior to their status and rights under the *Shari'a*. Private ownership, as accepted in Islam, is not a natural propensity and all things must be public property, shared by all people. The prohibition of *riba* (usury), or banking without interest, prevents economic and social development and so on.

These are views that, since the middle of the nineteenth century, during and after the hegemony of the West and the political, social and economic weakness of Muslim societies, have been taken regarding some public laws of Islam. Since that time Muslims have struggled to adapt or redefine their social and legal norms in the face of changed conditions. Some groups have sided with secularism and the separation of state politics or administration from religious matters, and others have started to challenge some of the sources of the *Shari'a* or reinterpret them in order to restore the strength of Islam.

---

[9] For this and the questions that are generally asked about the applicability of Islamic rules in modern times see Muhammad Qutb, *Islam the Misunderstood Religion*, Sixth Edition (Rome: Islamic European Cultural Centre, 1984).

[10] Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, New York: Syracuse University Press, 1990), p. 183: "I am unable as a Muslim to accept the law of apostasy as part of the law of Islam today."

4.2.3 Islamic Scholars and the Adaptation of the *Shari'a* to the Modern Age

In the twentieth century some dominant figures of the modern Muslim world such as Jamal ad-Din al-Afghani[11], his Egyptian disciple Muhammad 'Abduh, and the Indian poet and philosopher Sir Muhammad Iqbal warned against the blind pursuit of Westernization, arguing that the blame for the weaknesses of Muslims lay not with Islam but rather with Muslims themselves, because they had lost touch with the progressive spirit of social, moral, and intellectual reconstruction that had made early Islamic civilisation one of the greatest in human history. The following are the opinions of some Islamic scholars in this regard.

---

[11] Al-Sayyid Jamal al-Din Asad Abadi al-Afghani is known as the chief agent in the inception of the modern movement in Egypt. He was born in 1839 at Asad Abad (Some scholars believe this to be a village near Hamadan (south-west of Tehran) in Persia, while others place it near Kabul in Afghanistan). He was a Shi'ite and, as his title, al-Sayyid, indicates, was from a family connected to the Prophet of Islam. Jamal received his early education in the local school. From his tenth year onward he continued his studies of the Islamic sciences: Arabic, logic, jurisprudence, philosophy, mysticism, physics, metaphysics, astronomy, medicine, etc. When he was eighteen he went to India, where he stayed for about a year and a half and became acquainted with European sciences. He then returned to Afghanistan and tried to play a leading role in local politics. He left Afghanistan for India in 1869. From there, after briefly visiting Cairo, he travelled to Constantinople, where he was received with honours by Sultan 'Abdu al-Hamid and the leading officials and scholars. However, one of his lectures, which seemed to place philosophy on the same level as prophecy, aroused the hostility of the orthodox and led the Turkish Government to order Jamal to leave the country. He returned to Egypt, arriving in Cairo in March 1871. During his stay of about eight years he trained many pupils, among whom was 'Abduh, and took an active interest in Egyptian political affairs. For an account of the life of Jamal al-Din and a study of his works see Charles C. Adams, *Islam and Modernism in Egypt: A Study of the Modern Reform Movement Inaugurated by Muhammad 'Abduh* (London: Oxford University Press, 1933), pp. 4-17; Albert Hourani, *Arabic Thought in the Liberal Age* (Cambridge: Cambridge University Press, 1984), pp. 103-129; Nikki R. Keddie, *Sayyid Jamal al-din "al-Afghani": A political Biography* (Berkeley, Los Angles and London: University of California Press, 1972).

4.2.3.1 Muhammad 'Abduh

According to 'Abduh (1849-1905)[12] the responsibility for the backward state of Muslims belonged principally to their rulers and religious leaders who had neglected the Qur'an, the Sunna and the moral teachings of the religion, and disregarded the education of the people. He blamed the Shaikhs of the Sufi orders, who had made religion a form of entertainment by mumbling confused words instead of being the spiritual guides of the people.

The fundamental reason, however, for the degeneracy of the Muslim communities according to 'Abduh was that Islam had drifted away from its early simplicity. The religion in the time of the Prophet was so easy that it was possible for an Arab to learn enough of its practices in one session to become a Muslim, and it was easy for other people to learn Islam from the Arabs. But the development of the science of jurisprudence to meet the rulers' requirement of a broad system of legislation, and the development of the science of theology in defence of the articles of belief, made it involved and difficult to learn.

'Abduh held that regarding the bases of the religion, which consist of the correct beliefs, the moral and ethical teachings, the religious practices, the general principles governing civil relationships and the moral principles which underlie legal and governmental regulations, such as justice, equality of rights, prohibition of crimes and prescription of punishments for certain offences, Muslims have to return to the

---

12 For the life and doctrine of 'Abduh see: Charles C. Adams, *op. cit.*, pp. 18-176; Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashid Rida* (Berkeley and Los Angeles: University of California Press, 1966), pp.103-152; Albert Hourani, *op. cit.*, pp. 130-160. The original record of information on 'Abdu's life and work is Rashid Rida's three-volume *Tarikh al-Ustadh al-Imam ash-Shaykh Muhammad 'Abduh* (Cairo: 1931). For a brief biography of 'Abduh see Appendix I of the thesis.

early form of Islam of the time of the Prophet, and the days of the first four Caliphs and great theologians of the third/ninth-fourth/tenth centuries,[13] and should lay aside everything that had been introduced into Islam contrary to that practice. In all other matters, such as the regulations which govern social relations and civil and commercial transactions, the learned men and rulers, taking into account the Qur'an and the *Sunna*, may take counsel together and prescribe what is of most advantage to the community. So these regulations are subject to change from age to age according to the requirements of the time.

With this outlook 'Abduh delivered many *fatwas* on questions arising out of the contact of the Muslims with non-Muslims and with the conditions of modern civilisation, which spread his fame throughout the Muslim world. Two of his *fatwas*, which aroused against him the opposition of some *'ulama*, are well known: one declaring it lawful for Muslims to eat the flesh of animals slain by Jews and Christians; the other declaring it likewise lawful for Muslims to deposit their money in Postal Servings Banks where it would draw interest. In those areas of Islamic law which govern Muslim family relationships, ritual duties and personal conduct, 'Abduh tried to promote considerations of equity, welfare, and common sense through the principle of "interest" (*maslaha*), to which he gave a more general meaning than it had in Maliki jurisprudence, and also through the principle of *talfiq* (picking and choosing from among the decisions of the law schools, and even among the doctrines of independent jurists who accepted none of those decisions, those he considered

---

[13] See Albert Hourani, *op. cit.*, the use of term salaf by 'Abduh, p. 149. See also Elizabeth Sirriyeh, *Sufis and Anti-Sufis: The Defence, Rethinking and Rejection of Sufism in the Modern World* (Richmond: Curzon Press, 1999), p. 95.

were closest to the *Sunna* and best fitted the circumstances).[14]In this manner 'Abduh

called for reopening the gate of *Ijtihad*, which had been closed since the third century

(A.H.) according to Sunni doctrine.[15]

4.2.3.2 Iqbal

After 'Abduh, Iqbal[16] in the sixth lecture of his well known work, *The*

Reconstruction of Religious Thought in Islam[17], calls *ijtihad* a "principle of

---

[14] The principle of *talfiq* was accepted within limits by some classical authorities to be practised in judgement. "In any particular case a judge could choose that interpretation of the law, whether it came from his own legal code or not, which best fitted the circumstances." 'Abduh suggested a broader interpretation and usage of talfiq to justify those interpretations of the law which seem to meet the requirements of the modern age. It is reported that "an Indian Muslim sent to ask him whether it was lawful for Muslims to co-operate with non-Muslims in framing charitable works. In his reply he first of all asked the shaykhs of all four codes at Azhar to state the position of their code, and then gave his own opinion, taking the four statements into account but going behind them to the Qur'an, the hadith of the Prophet, and the practice of the first age." (See Albert Hourani, *op. cit.*, p.152-3).

[15] It must be mentioned that before 'Abduh some scholars like Ibn Taymiyah (1263-1328), Jalal al-Din al-suyuti (1445-1505), Muhammad ibn 'Abd al-Wahhab (1703-17870) and Muhammad 'Ali al-sanusi (1791-1859) tried to reactivate *ijtihad* among the Sunnis, although their practice of *ijtihad* differs from what 'Abduh called for. For the countinuity of *ijtihad* through Islamic history see Wael B. Hallaq, "Was the Gate of Ijtihad Closed?", *International Journal of Middle East Studies*, Vol. 16, 1984, pp. 3-41.

[16] Muhammad Iqbal (b. November 9, 1877, Sialkot, Punjab, India [now in Pakistan] - d. April 21, 1938, Lahore, Punjab), Indian poet and philosopher, is well known for his influential efforts to direct his fellow Muslims toward the establishment of an independent Islamic state. His aspiration was eventually realised with the founding of Pakistan. Iqbal was born into a pious family of small merchants. He received his early education under the supervision of Moulvi Sayyid Mir Hasan and won distinctions in Arabic and Persian. Iqbal was educated at Government College, qualified as a barrister in London, and received his doctorate from the University of Munich. His thesis, *The Development of Metaphysics in Persia*, revealed some aspects of Islamic mysticism previously unknown in Europe. On his return from Europe he gained his livelihood by the practice of law, but his fame came from his Persian and Urdu poetry. Several books have been written on his life, works

movement" and emphasises that the Muslim community ought, through the exercise

of *ijtihad*, to devise new social and political institutions. According to him *ijtihad*

reconciles the categories of permanence and change in life and represents spiritual

eternity, which manifests itself through variety and change. He mentions that the

schools of law recognise three degrees of *ijtihad*: (1) complete authority in

legislation, which is practically confined to the founders of schools (absolute *ijtihad*

or *ijtihad mutlaq*), (2) relative authority, which is to be exercised within the limits of

a particular school (*ijtihad fi al-madhab*), and (3) special authority, which relates to

the determining of the law applicable to a particular case left undetermined by the

founders (special *ijtihad* or *ijtihad-i makhsus*). His own concern was with the first

degree of *ijtihad;* that is, complete authority in legislation. After a detailed discussion

of the gradual decay of this kind of *ijtihad* in the history of the Muslims, he

emphasises its importance to the modern period. Iqbal criticises those *'ulama* who

assert the finality of the legal schools of Islam and deny the theoretical possibility of

complete *ijtihad*:

> I know the *'ulama* of Islam claim finality for the popular schools of Mohammedan
>
> Law, though they have never been able to deny the theoretical possibility of a
>
> complete *Ijtihad*. I have tried to explain the causes which, in my opinion, have
>
> determined this attitude of the *'ulama*; but since things have changed and the world

---

and thought. See for example Annemarie Schimmel, *Gabriel's Wing: A Study into the Religious Ideas of Sir Muhammad Iqbal*, Second Edition (Lahore: Iqbal Academy, Pakistan, 1989).

[17] This is a collected series of seven lectures delivered in English by Iqbal in the years 1928-9 at the Universities of Madras, Hyderabad, and Aligarh. The aim of the lectures, as he himself mentions, was to meet the demand for a scientific form of religious thought "by attempting to reconstruct Muslim religious philosophy with due regard to the philosophical traditions of Islam and the more recent developments in the various domains of human knowledge" (See Allama Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore, Pakistan: Ashraf Press, 1975), Preface).

of Islam is today confronted and affected by new forces set free by the extraordinary development of human thought in all directions, I see no reason why this attitude should be maintained any longer. Did the founder of our schools ever claim finality for their reasoning and interpretation? Never. The claim of the present generation of Muslim liberals to re-interpret the foundational legal principles, in the light of their own experience and the altered conditions of modern life is, in my opinion, perfectly justified.[18]

Like the traditional schools of Sunni scholars of Islam, Iqbal gives four sources of *ijtihad* - the Qur'an, *hadith*, *ijma'* and *qiyas* (the use of analogical reasoning in legislation) - but his explanation of these sources varies somewhat from that of the traditional *'ulama*:

On the first source of Islamic law, the Qur'an, Iqbal observes that the Qur'an gives us a dynamic outlook on life. According to him "The Qur'an is not a legal code. Its main purpose is to awaken in man the higher consciousness of his relation with God and the universe". By this statement he means that the Qur'an is not a code of law like any man-made constitution but is an embodiment of both moral principles and positive legal rules; he explains that the "legal principles in the Qur'an, far from leaving no scope for thought and legislative activity, act as an awakener of human thought".

In his discussion on the Qur'an as the primary source of the law of Islam, Iqbal replies to the views of Zia Gokalp (1876-1924), Turkish poet and prominant

---

[18] Allama Muhammad Iqbal, *op. cit.*, p. 168. Although here Iqbal stipulates his agreement with the liberals in re-interpreting the legal principles in the light of the altered conditions of the modern time, his views regarding woman and marriage which will be mentioned later reflects his relative conservatism.

sociologist on women,[19] who had sought change in Islamic family law to ensure the equality of men and women regarding divorce, separation and inheritance. Rejecting Zia's idea of change in family law, Iqbal argues that Islam already maintains the equality of man and woman:

> Marriage, according to Mohammedan Law, is a civil contract. The wife at the time of marriage is at liberty to get the husband's power of divorce delegated to her on stated conditions, and thus secure equality of divorce with her husband.[20]

To Iqbal equality of wealth is maintained by the property which a woman receives from her father and husband at the time of marriage. On *hadith*, Iqbal reproduces the substance of Shah Wali Ullah's view and proceeds to suggest that traditions were prescribed by the Prophet for concrete cases in the light of the specific habits of the people, and since the observance of the traditions is not an end in itself they cannot be strictly enforced upon future generations. However, in the end he comes to this conclusion:

> A further intelligent study of the literature of traditions, if used as indicative of the spirit in which the Prophet himself interpreted his Revelation, may still be of great help in understanding the life-value of the legal principles enunciated in the Qur'an. A complete grasp of their life-value alone can equip us in our endeavour to re-interpret the foundational principles.[21]

On the third source of Islamic law, Iqbal advocates a theory of *ijma'* and contends that the transfer of the power of *ijtihad* from individual representatives of the

---

[19] For study on Zia Gokalp see Niyazi Berkes, *Turkish Natinalism and Western Civilization: Selected Essays of Zia Gokalp* (London: George Allen and Unwin Ltd., 1959).

[20] Allama Muhammad Iqbal, *op. cit.,* p. 169.

[21] *Ibid.,* p .173.

to a Muslim legislative assembly, with the active participation of the *'ulama*, is the only possible form *ijma'* can take in the modern age.

On *qiyas* he is of the opinion that the bitter controversies among the early scholars of Islam led to a critical definition of the limitations, conditions, and correctives which project it as the source of life and movement in the law of Islam.

4.2.3.3 Liberal Muslims

Some people, mostly those who side with Liberalism, argue that the public law of the *Shari'a* is not acceptable and applicable today. They say "The application of the public law of the *Shari'a* today will be counterproductive and detrimental to Muslims and to Islam itself"[22]. This group advocate a different manner of interpretation of the *Shari'a*. Challenging the whole structure of the *Shari'a* as established by the founding jurists, they try to resolve the problems connected with the public law of the *Shari'a* by their own reform methodology, which sometimes requires overriding clear and definite texts of the Qur'an and *Sunna*. As an example we may refer to An-Na'im's interpretation of some public law of the *Shari'a* on the basis of Taha's method of deriving the law of the *Shari'a* from the Qur'an, which can simply be described as moving from one text of the Qur'an (mostly Madinan) to another (Meccan) which seems to be more advanced at the time.[23] Confirming this

---

[22] Abdullahi Ahmed An-Na'im, *op. cit.*, p. 187.

[23] "The evolution of Shari'a ... is simply its evolution by moving from one text [of the Qur'an] to the other, from a text that is suitable to govern in the seventh century, and was so implemented, to a text which was, at the time, too advanced and therefore had to be abrogated. God said: "whenever We abrogate any verse or postpone it, We bring a better verse or similar one. Do you not know that God is capable of everything?" (2:106) The phrase, "When we abrogate any verse" means cancel or repeal it, and the phrase "or postpone it" means to delay its action or implementation. The phrase "We bring a better verse" means bringing one that is closer to the understanding of the people and

method, An-Na'im explains how Taha, through a combination of contextual analysis of the Medinese text and invocation of the Meccan text, has argued for the complete equality of men and women to be instituted as an Islamic law:

> According to *Ustadh* Mahmoud, the *qawamah* of men over women is made conditional, by the express terms of the verse [4:34], upon the security and economic dependence of women over men. Because this is no longer the case in a society in which both men and women are dependent for their security on the rule of law and women are, as a general rule, more capable of being economically independent, the rationale of *qawama* has been repudiated in practice. When we take this analysis together with the general principle of the equality of men and women to be found in the Qur'an of the Mecca stage, argued *Ustadh* Mahmoud, we can only conclude that

---

more relevant to their time than the postponed verse; "or a similar one" means reinstating the same verse when the time comes for its implementation. It is as if the abrogated verses were abrogated in accordance with the needs of the time and postponed until their appropriate time comes. When it does, they become the suitable and operative verses and are implemented, while those that were implemented in the seventh century become abrogated. The dictates of the time in the seventh century were for the subsidiary verses. For the twentieth century they are the primary verses. This is the rationale of abrogation. ... [In other words it was not intended to be] final and conclusive abrogation, but merely postponement until the appropriate time.

In this evolution we consider the rationale beyond the text. If a subsidiary verse, which used to overrule the primary verse in the seventh century, has served its purpose completely and become irrelevant for the new era, the twentieth century, then the time has come for it to be abrogated and for the primary verse to be enacted. In this way, the primary verse has its turn as the operative text in the twentieth century and becomes the basis of the new legislation. This is what the evolution of Shari'a means. It is shifting from one text that served its purpose and was exhausted to another text that was postponed until its time came. Evolution is therefore neither unrealistic nor premature, nor expressing a naive and immature opinion. It is merely shifting from one text to the other." (Mahmoud Mohamed Taha, *The Second Message of Islam* ,Translation and Introduction by Abdullahi Ahmed An-Na'im, (Syracuse, New York: Syracuse University Press, 1987), pp. 40-1); Quoted also in Abdullahi Ahmed An-Na'im, *op. cit.*, pp. 59-60.

men and women must be equal today as a matter of law. This is the necessary first step in the long process of achieving such equality in practice.[24]

An-Naʿim goes even further and argues that *usul al-fiqh* (the rules governing the derivation of principles of *Shariʿa* from their sources) have to be reformulated and independent juristic reasoning must be exercised even in matters which are governed by clear and definite texts of the Qurʾan and *Sunna* as long as the outcome of such reasoning is consistent with the essential message of Islam. He does not, however, give a clear outline of this essential message. He looks for partial support for his proposition to the second Caliph, ʿUmar, who, according to his perception of what constitutes the best interest of the Muslim community, had exercised his independent opinion in some matters.

Giving a historical development of Islamic *Shariʿa* law, which in his view was created through the interpretation by jurists of the Qurʾan, based on texts of the second (Medina) stage and the Sunna, An-Naʿim explains that, according to *Ustadh* Mahmoud, *Shariʿa* is not the whole of Islam but merely the level of Islamic law that suited the previous stage of human development. He continues:

> *Ustadh* Mahmoud proposed to shift certain aspects of Islamic law from their foundation in one class of texts of the Qurʾan and Sunna and place them on a different class of texts of the Qurʾan and Sunna. The limitations of reform noted above are removed by reviving the earlier texts, which were never made legally binding in the past, and making them the basis of modern Islamic law. Explicit and definite texts of the Qurʾan and Sunna that were the basis of discrimination against women and non-Muslims under historical Shariʿa are set aside as having served their transitional purpose. Other texts of the Qurʾan and Sunna are made legally binding in

---

[24] Abdullahi Ahmed An-Naʿim, *op.cit.,* pp. 99-100.

order to achieve full equality for all human beings, regardless of sex or religion. This shift is made possible through examining the rationale of abrogation (*naskh*) in the sense of selecting which texts of the Qur'an and Sunna are to be made legally binding, as opposed to being merely morally persuasive.[25]

---

[25] Abdullahi Ahmed An-Na'im, "Introduction", Mahmoud Mohamed Taha, *The Second Message of Islam*, op. cit., pp. 23-24. An-Na'im (the active disciple of Taha) in his introduction to *the Second Message of Islam* (pp. 1-30), which is a translation of Taha's *al-Risalah al-Thaniyah min al-Islam*, gives a brief biography of Mahmoud Mohamed Taha, the leader of an Islamic reformist group in Sudan known as the Republican Brothers and Sisters. Taha (1909 or 1911-1985) graduated from the Engineering School of Gordon Memorial College (now the University of Khartoum) in 1936. He played an active part in the nationalist struggle for the independence of Sudan, which was ruled as an Anglo-Egyptian condominium from 1898 until 1956. Opposing both traditional religious groups, and radicals and communists, Taha formed the Republican Party in 1945; it was Islamic modernist in character. The party's policy of direct confrontation with the colonial authorities led several times to his arrest and imprisonment. During one two-year term of imprisonment and a subsequent period of self-imposed religious seclusion in his home town of Rufa'h, he undertook a rigorous programme of prayer, fasting and meditation. This, he believed, led to his insight into the meaning of the Qur'an and the role of Islamic law, which he subsequently articulated as the "second message" of Islam.

The heart of Taha's teaching was that Muslims should apply the basic and universal principles of Islam (mostly revealed in Mecca before the immigration of the Muslims to Medina and the establishment of the Muslim community) "rather than work to perpetuate forms and structures that developed as a result of specific historical circumstances" (Medinian stage). According to him the Medinian verses (the "second message"), which mostly prescribe the Islamic rules, while being important because show how the basic principles can be applied, were designed specifically for the needs of that particular time and place and should not be taken as universal rules to be followed in all periods. Acting within this theoretical framework, his followers, the Republicans, supported full equality for women and advocated national unity between the Muslim north of Sudan and the non-Muslim south. When President Ja'far Numayri undermined the effectiveness of the Addis Ababa Agreement of 1972 (through which the autonomy of southern Sudan was recognised and defined) by dictatorial interference in southern affairs, and began the enforced Islamization of the political, legal, and economic system of the Sudan with the "September Laws" of 1983, the Republicans, led by Taha, started to oppose the regime. Numayri responded by executing Taha in January 1985. For more detail regarding the Republicans see Abdullahi Ahmed An-Na'im, "Introduction", op. cit., pp. 1-30; see also John Obert Voll, *Islam: Continuity and Change in the Modern World*, Second Edition (New York: Syracuse University Press, 1994), pp. 267-8, 355.

This interpretation of *naskh* is contrary to the rules and conditions accepted regarding the issue of *naskh* in the science of jurisprudence. For example, one of the conditions for indisputable *naskh* is that the abrogating verse must be revealed after the abrogated one. Before applying *naskh* we must be sure that there is no way for reconciliation through *taqyeed* (making qualified) or *takhsis* (taking a particular application).[26]

4.2.3.4 Shi'ite *'Ulama*

In Shi'ism *ijtihad* has been an important element in legal science even during the period when, according to the classical doctrine of the Sunnis, the "gate of *ijtihad*" was closed. However, it must be mentioned that according to the Shi'ites *ijtihad* is not, as some modernists interpret, "freedom of judgement". Nor it is an independent source parallel to the Qur'an, the *Sunna* and *ijma'*, as it is considered by most Sunni scholars, who describe *ijtihad* as exercising independent juristic reasoning to provide answers when the Qur'an and *Sunna* are silent. According to Shi'i *fuqaha*, *ijtihad* is merely a means of deriving and determining the laws of the *Shari'a* from the sources for the emergent issues and new phenomena of life by employing general principles and rules. *Ijtihad* means "exerting one's self", in the sense of striving to discover the true application of the teachings of the Qur'an and *Sunna* to a particular situation, and it may not go against the plain sense of these teachings.

Shi'ite *'ulama*, like many other Islamic scholars, believe that Islam's teachings are eternal, because they have been revealed by Allah who Himself is eternal and

---

[26] For the collection of works which reflect some Liberal Muslims' attitudes to the Islamic law see Charles Kurzman (ed.), *Liberal Islam, A Source Book* (New York-Oxford: Oxford University Press, 1998).

knows the past, present, and future. They emphasise that Islam is based on human nature, and that the nature of man has remained the same in all times and epochs. They also maintain that within Islam there is an enigmatic secret which enables this religion to adapt and improve with the advance of time. They believe that Islam is in harmony with the forward movement of time, with the development of learning, and with the changes that arise from such development. So in each period its legal system is able to fulfil the requirements of Muslim society. The following is Ayatollah Murtada Mutahhari's statement in this regard:

> There are a number of factors which contribute to the secret of how the pure religion of Islam, with the fixed and unchanging laws that it has, can accommodate the development of civilisation and culture, and can remain in conformity with the changing patterns of life.[27]

His explanation of these secrets can be summarised as follows:[28]

1. Islam is not concerned with the outward aspects of life, which totally depend on the standard of human knowledge. Islamic instructions are rather based on the spirit, meaning and aim of life and are the best course that a man should adopt to attain that final aim. Islam, by keeping the aims under its own authority, and by leaving the forms, models and tools to the realm of science and skill, has kept away from all conflict with the development of culture and civilisation. Furthermore, Islam, by encouraging the factors of development of civilisation, namely science, labour,

---

[27] Murtada Mutahhari, *The Rights of Women in Islam*, Fourth Edition (Translated and Published by: World Organisation for Islamic Services, 1991), p. 100.

[28] *Ibid.*, pp. 99-108. For more information about his opinions on the adaptability of Islam to modern times, see also Mutahhari, Murtada. *Islam wa Muqtaziyat-e Zaman* (Islam and the Requirements of the Time) in two volumes (Persian).

piety, volition, courage and perseverance, plays an important part in the development of civilisation.

2. Islam ordains permanent laws for permanent human needs, and has maintained a changing attitude towards varying requirements.

Some individual or social requirements are permanent and the same for ever. The discipline that human beings maintain in respect of their instinctive urges, and the discipline that they establish for their society are, as a general rule, always the same.

Another group of human requirements, which may vary, call for non-permanent laws. The Islamic rules that take a variable position regarding these needs are based on some stable principles which create particular laws for each changing condition. Mutahhari clarifies this point by giving some examples:

> Islam has laid down principles to do with exchange, one of which is: *Do not consume your wealth amongst yourselves in vain* (Qur'an, 2: 188). This means that ...the passing of wealth from hand to hand without a return that may be humanly valuable for the owner is prohibited. Islam does not consider ownership as an absolute right of control.
>
> Beside that, it is made clear in the precepts of Islam that the sale and purchase of certain things, including blood and human excrement, is forbidden. Why is that so? Simply because the blood of a man or a sheep cannot be put to any useful purpose and cannot be considered a useful commodity and a part of human wealth. The root cause of the prohibition of blood and human excrement is the principle of: *Do not consume your wealth amongst yourselves in vain*; the prohibition of the sale and purchase of these particular things is not fundamental. The basic thing is that exchange of only those things which are of human use should take place. ...This principle is invariable for all times and is based upon a general constant human

necessity, but the fact that blood and human faeces do not constitute wealth and are not exchangeable depends upon the times, the historical period, the level of civilisation, the change in the conditions and advancement of knowledge, upon industry and the possibilities of the right and profitable utilization of these things. These factors may bring about alterations in the law.[29]

Another example is the explanation that Ayatollah Mutahhari gives in regard to the verse "And prepare against them whatever force you can..."(Qur'an, 8: 60), and also the traditions of the Prophet under the title of 'horse racing and archery':

There are commands that you yourself and your sons should learn the arts of horse-riding and archery to a degree of complete proficiency. Horse-riding and archery were a section of the martial arts in those days. It is quite evident that the origin and the basis of the command about horse-riding and archery is the principle: *And prepare against them whatever force you can*. This means that the arrow, the sword, the spears, the bow, the mule and the horse are not fundamental in themselves in the eyes of Islam: the basic point is to be strong enough. The thing that has real importance is that Muslims, in every period of history and in every age, should do their utmost to strengthen themselves with regard to military and defence forces against the enemy. The necessity of being proficient in archery and horsemanship is an expression in which to clothe the necessity of being powerful. In other words it is the practical or executive form of the latter. The necessity of strength against the enemy is a permanent law which originates from a permanent and constant necessity.

However, the requirement of proficiency in archery and horsemanship is a manifestation of a changing necessity linked to time, and it changes according to the age and the times. With changes in the conditions of civilization, other things such as

[29] Murtada Mutahhari, *The Rights of Women in Islam*, op. cit., pp. 104-105.

the preparation of up-to-date weapons, and proficiency and specialisation in their use, take the place of that necessity.[30]

3. According to Ayatollah Mutahhari, another feature which gives Islam the ability to adapt to the requirements of the times, is the rational aspects of this religion. He explains that all Islamic commands arise from a series of supreme exigencies, the degree of importance of which is established in Islam. In the event of conflict between diverse exigencies, Islam permits the *fuqaha* to select the more pressing exigencies according to their degree of importance. This, in fact, is what was explained before as the principle of "the most important and important" (*al-ahamm wa al-muhimm*).

4. He also refers to a series of Islamic principles whose function is to control and harmonise the other laws. The *fuqaha* call these rules *al-qawa'id all-hakimah* (governing principles), such as the principles of *la haraj* (no burden) and *la darar* (no harm) which have authority over Islamic jurisprudence.

Some scholars, such as Ayatollah Na'ini[31], 'Allamah Tabatabaei[32] and Imam Khomeini have laid great emphasis on the authority which Islam confers on a competent Islamic government which is one of the things giving Islam its eternal

---

[30] *Ibid.*, p. 103.

[31] Muhhamad Husayn Ibn 'Abd al-Rahim al-Na'ini (1277/1860 - 1355/1936) was one of the great teachers of an-Najaf al-Ashraf (Iraq). He supported the Persian Constitutional Revolution in 1906, attempting to reconcile constitutionalism with Islam. His book *Tanbih al-Uummah wa Tanzih al-Millah* (The Admonition and Refinement of the People) is the best representative expression of the opinion of the constitutionalist *'ulama* in Iran.

[32] His valuable article "Wilayat wa Zi'amat" (Guardianship and Authority) has been published in Tabatabaei, 'Allamah, et. al. (eds.), *Bahthi dar bareyeh Marja'yat wa Ruhaniyyat* (A Discussion on the Marja'iyyat and the Position of the Clergy), Second Edition (Tehran: Sherkat-e Sahami-e Intisharat), pp. 71-99.

nature. Imam Khomeini, the founder of Islamic Republic of Iran, in a series of his lectures at Najaf in 1970 between January 21 and February 8[33], pointed out that:

> Islam is the religion of militant individuals who are committed to truth and justice. It is the religion of those who desire freedom and independence. It is the school of those who struggle against imperialism. But the servants of imperialism have presented Islam in a totally different light. They have created in men's minds a false notion of Islam. The defective version of Islam, which they have presented in the religious teaching institutions is intended to deprive Islam of its vital, revolutionary aspect and to prevent Muslims from arousing themselves in order to gain their freedom, fulfil the ordinances of Islam, and create a government that will assure their happiness and allow them to live lives worthy of human beings.

> For example, the servants of imperialism declared that Islam is not a comprehensive religion providing for every aspect of human life and has no laws or ordinances pertaining to society. It has no particular form of government. Islam concerns itself only with rules of ritual purification after menstruation and parturition. It may have a few ethical principles, but it certainly has nothing to say about human life in general and the ordering of society.

> This kind of evil propaganda has unfortunately had an effect. Quite apart from the masses, the educated class - university students and also many students at the religious teaching institutions [hawzah] - have failed to understand Islam correctly and have erroneous notions. Just as people may, in general, be unacquainted

---

[33] These lectures were recorded and transcribed by a student, and then published in book form in Persian in 1971 with the title of *Hukumat-e Islami* (Islamic Government) and *Wilayat-e Faqih* (the Governance of the Faqih) in later editions. There are also two Arabic editions, published in Beirut in 1979. The Persian text of the collection was translated by H. Algar as "Islamic Government" in Hamid Algar, *Islam and Revolution: Writings and Declarations* (of) *Imam Khomeini* (translated and annotated) (London: Mizan Press, 1981), pp. 26-166.

with a stranger, so too they are unacquainted with Islam; Islam lives among the

people of this world as if it is a stranger. If somebody were to present Islam as it

truly is, he would find it difficult to make people believe him. In fact, the agents of

imperialism in the religious teaching institutions would raise a hue and cry against

him....

At a time when the West was a realm of darkness and obscurity with its

inhabitants living in a state of barbarism and America still peopled by half-savage

redskins - and the two vast empires of Iran and Byzantium were under the rule of

tyranny, class privilege, and discrimination, and the powerful dominated all without

any trace of law or popular government, God Exalted and Almighty, by means of the

Most Noble messenger (peace and blessing be upon him), sent laws that astound us

with their magnitude. He instituted laws and practices for all human affairs and laid

down injunctions for man extending from even before the embryo is formed until

after he is placed in the tomb. In just the same way that there are laws setting forth

the duties of worship for man, so too there are laws, practices, and norms for the

affairs of society and government. Islamic law is a progressive, evolving, and

comprehensive system of law. All the voluminous books that have been compiled

from the earliest times on different areas of law, such as judicial procedure, social

transactions, penal law, retribution, international relations, regulations pertaining to

peace and war, private and public law, taken together, contain a mere sample of the

laws and injunctions of Islam. There is not even a single topic in human life for

which Islam has not provided instruction and established a norm.[34]

Elsewhere in his lecture he comments:

It is self-evident that the necessity for enactment of the law, which necessitated the

formation of a government by the Prophet (upon whom be peace), was not confined

---

[34] Hamid Algar, *op. cit.*, pp. 28-30.

or restricted to his time, but continues after his departure from this world. According to one of the noble verses of the Qur'an, the ordinances of Islam are not limited with respect to time or place; they are permanent and must be enacted until the end of the world. They were not revealed merely for the time of the Prophet, only to be abandoned thereafter, with retribution and the penal code of Islam no longer to be enacted, or the taxes prescribed by Islam no longer collected, and the defence of the lands and people of Islam suspended. The claim that the laws of Islam may remain in abeyance or are restricted to a particular time or place is contrary to the essential credal bases of Islam. Since the enactment of laws is necessary after the departure of the Prophet from this world, and indeed, will remain so until the end of the world, the formation of a government and establishment of executive and administrative organs are also necessary.[35]

Imam Khomeini emphasises that Islamic government is the government of God's decree and command, and sovereignty belongs to Him. He concludes that the ruler must know the Islamic laws. He brings forward several pieces of evidence from *hadith* to prove that only the just *fuqaha* have the right to rule over the people at the time of Occultation.

After the Islamic revolution in Iran and the establishment of the Islamic Republic, Imam Khomeini , in his letter to a scholar who was worried about the diversity of opinions in regard to the expediencies of the Islamic regime (*maslehat-e nezam*), wrote:

> The books written by the great Islamic jurists are full of different views on and interpretations of issues regarding the army, culture, politics, the economy and worship. Even if we ignore the diversity of opinions between [the two schools of]

---

[35] *Ibid.,* pp. 41-42.

Usuliyyun and Akhbariyyun, there are opposite opinions, even in the subjects where *ijma*'(agreement of the *'ulama*) is claimed to exist. Since, in the past, these arguments arose exclusively rised among scholars in the field and were recorded in Arabic in their books, most people were unaware of them, or, if they heard about them, would rather not pursue them. Now, is it correct to say that since 'ulama have had diverse points of view, they have acted wrongly and against the religion? Of course not.

But today we are glad that because of the Islamic revolution, we can get to know the sayings of the *'ulama* and of clear-sighted people through the radio, television and newspapers, since in many areas there is a need to put their opinions into practice. These include the question of ownership and its limitation; the issue of land and its distribution; spoils and public wealth; the complicated problem of currency, foreign exchange and banking; tax on internal and external trade; *muzaribah* (limited partnership), *muzari'ah* (contract for agricultural purpose), rent and mortgage; punishment and blood-money; civil laws; cultural questions and the arts including photography, painting, sculpture, music, theatre, calligraphy, etc.; protecting the environment and the prevention of cutting trees, even at home and on private land; the question of food and drink; the prevention of pregnancy, family planning and the interruption of pregnancy; resolving medical difficulties such as organ transplants; the question of mining shafts and open cast mining; change of the contents of *haram* (forbidden) and *halal* (permitted), the extending and the restricting of some commandments in different times and places regarding legal problems and international law and comparing them with the Islamic precepts; the positive role of women in Islamic society and their negative role in non-Islamic and corrupt societies; the limitation of individual and public freedom; contact with unbelievers and the followers of polytheism and eclecticism; performing the injunctions while travelling

in the air and space and either in a motion contrary to the motion of the earth or at a higher speed than that of the earth's rotation, or in the vertical ascension and frustrating of the gravity of the earth; and most significant of all, determining the sovereignty of the *faqih* over the government and society. All these are some of the thousands of questions that the people and the government are faced with and most of which the great *fuqaha* have discussed and held different opinions on. If some of these questions have not been discussed in the past, today the *fuqaha* must think about them. So in an Islamic state the "gate of *ijtihad*" must be open for ever ...[36]

In brief, according to Islamic scholars, *ijtihad* plays a key role in developing and adapting Islamic rules to the requirements of life in the modern world. The Qur'an and the *Sunna* propound the eternal principles of Islam, while through *ijtihad* they are applied according to the needs of a particular age. On matters relating to the *Shari'a*, exercisers of *ijtihad* (*mujtahidun*) have a right to give new opinions (*fatwa*) according to their knowledge of religious science and by virtue of their moral qualities. The ordinary people are supposed to follow these learned people, who have also the right to rule the state or at least have a role in making decisions.

4.2.4 *Ijtihad* and *Taqlid*

The issues of *ijtihad* and *taqlid* (following a qualified *mujtahid*) have important places in the Shi'ite school of law.[37] One should either be a *mujtahid*, that

---

[36] This part of Imam Khomeini's letter, dated according to the Iranian calendar 67.8.10 (31.10.1988), was in its entirely published in Iranian newspapers.

[37] As mentioned in the second chapter, there is diversity of opinion between *usuliyyun* and *akhbariyyun* in this matter. According to the *Akhbari* school there is no requirement for the *taqlid* of any *mujtahid*, past or present. The followers of this school, holding that only the twelve infallible Imams must be followed, limit the sources of law to the *Kitab* (Qur'an) and *Sunna* (Traditions).

is, be qualified enough to derive Islamic precepts himself directly from the sources of the *Shari'a*, or should follow the one who is the most learned in deriving the law.

To justify the necessity of obtaining the precepts of the *Shari'a* through the learned authorities, the *'ulama* have relied on some verses of the Qur'an and a number of *hadith*, some of which have been quoted in the first chapter of this thesis, and also on *'aql* commanding the ignorant (*muqallid*) to refer to the most learned in each branch of knowledge.[38] The most learned of all the *'ulama* was given the title of the *marja' al-taqlid* meaning the locus of authority, the person with the right of command and rule. This title, however, cannot be obtained by appointment, selection, or election. The authority of the *marja'* will be bestowed on a person only by the universal recognition of the *Shi'i* community.

Some laws of *taqlid* ("imitation") mentioned in the Shi'ite *'ulamas'* books of epistles (*Risalah*) are as follows:[39]

-It is obligatory (*wajib*) for every sane adult[40] who is not a *mujtahid* to perform his actions of worship, trade, and, in fact, all works and affairs, either by *taqlid*[41] or *ihtiyat*[42].

According to the *Usuli* school, ordinary people must follow the living *mujtahidun* in the same way as they follow the Imam.

[38] For a detailed discussion on *ijtihad* and *taqlid*, the necessary qualifications for a *mujtahid* to be followed and some other relevant issues, see al-Mirza al-Gharawi al-Tabrizi (ed.), *Al-Tanqih fi Sharh al-'Urwah al-Wuthqa: al-Ijtihad wa al-Taqlid*, Representation (*al-taqrirat*) of Ayatollah Abu al-Qasim al-Musawi al-Khoei's Discussion on *fiqh* (Qom: Ansariyan Publications). See also R. M. al-Khomeini, "Risalah on Ijtihad and Taqlid" in his *Al-Rasa'il* (Qom: Mu'ssese-ye Matbu'ati-e Isma'iliyan, Rabi'al-Awwal, 1385), Vol. 2, pp. 93-172.

[39] I have used the epistles of Imam Khomeini, Ayatollah Golpaygani and Ayatollah Araki, three well-known *marja'* in Iran in recent years.

[40] "Adult" means having reached the age of sexual puberty, or, as the majority of Shi'ite *'ulama* hold, the age of fifteen lunar years for a boy and nine lunar years for a girl.

-It is not permissible to follow initially a deceased *mujtahid*. [43] Continuing the *taqlid* of such a *mujtahid* , however, according to the permission of a living one is considered valid.

According to some *mujtahid*s one can only continue the *taqlid* of the deceased *mujtahid* on those points which, during the *mujtahid*'s lifetime, one has put into practice or has learned in order to put into practice. According to Imam Khomeini and Ayatollah Araki, however, if one has put into practice some *fatwa* of a *mujtahid*, one can follow him on all issues after his death. Regarding the new questions, however, the most learned living *mujtahid* must be referred to.

-It is *ihtiyat*[44] to follow the most learned *mujtahid* (*al-a'lam*) who is more proficient than other *mujtahidun* at deriving the laws of the *Shari'a* from the rules and their documents.

-There are three occasions when a *muqallid* can consider a person to be the most learned *mujtahid*: (a) when he himself is an scholar and able to discern the

---

[41] *Taqlid* means to acquire and learn the *fatwa* (verdict) and instructions of a *mujtahid* in order to act in accordance with them.

[42] To perform one's duties by *ihtiyat* or precaution means that one acts in such a way as to be sure that one has acted correctly. For example, a person acting by *ihtiyat* does not perform a work that a number of *mujtahids* consider to be *haram* (forbidden), even though other *mujtahids* consider it not to be *haram*, but performs a work that some consider to be *wajib*, though other *mujtahids* consider it to be only *mustahab* (desirable).

[43] This view is contrary to that of the Sunnis, who follow the *ijtihad* of four leaders of Sunni Schools, Abu Hanifah (d. 150 AH/767 AD), Malik Ibn Anas (d.179 AH/795 AD), Al-Shafi'i (d. 204 AH/820 AD) and Ahmad Ibn Hanbal (d. 241 AH/855 AD).

[44]When a *mujtahid* does not issue a *fatwa*, but says: "according to *ihtiyat*" or, "it is *ihtiyat* that", it differs from a *fatwa* only in that his followers (*muqallids*) are permitted either to act in accordance with the *ihtiyat*, or turn to the *fatwa* of other *mujtahidun* whose learning is less than that of the most learned *mujtahid*, but more than that of all other *mujtahidun*. The same applies when a *mujtahid* declares an issue to be "a problem" or "not a problem".

136

a'lam, (b) when two just (*'adil*) Islamic scholars bear testimony that a person is the most learned *mujtahid* provided that no other two disagree, (c) when through fame and renown he knows or becomes confident that a person is the most learned *mujtahid.*

-An imitated *mujtahid* must meet several conditions. He must be male, adult, sane, a *Shi'a* of the twelve Imams, legitimately born, alive (necessarily when one initially begins to imitate him either completely or just concerning the new questions, but not necessarily when one continues the imitation), and, according to *ihtiyat,* to be the most learned and not a greedy person.[45]

4.3 Proving the Comprehensiveness of the *Shari'a*

On the principle of the comprehensiveness of the teachings of Islam there is no apparent quarrel between any of the sects of Muslims. The issue is justified by scholars on the basis of Qur'anic verses, *hadith* reports, and also logical and historical reasons. But there are different views on the domain of comprehensiveness which originate from different interpretations of it.

The main point referred to on this matter is that the comprehensiveness of Islam, in reality, depends on God's purpose in sending the Prophet and the revelation of the Qur'an. In other words, looking at the subject in a logical way, we must first answer the question, What is missing from life that human reason cannot supply, and which God has sent the Prophet and the Qur'an to remedy? The question concerns the important and original needs that humans have and which religion claims to answer.

---

[45] The last condition is held by Imam Khomeini and Ayatollah Araki.

Considering the Qur'anic verses and their explanation of the purpose of sending prophets, the revelation of the Qur'an and the necessity of accepting the commandments, it is said that the main aim in sending down the Qur'an and the Prophet's mission is guidance, happiness, the creation of a spiritual life and the perfection of mankind. So comprehensiveness means the existence of a collection of instructions and commands that answer man's needs and are necessary for his guidance towards prosperity, happiness and perfection. In this case, we might say that some goals to which the Qur'an refers, like adducing justice (57: 25;), amending society (11: 88), serving Allah (16:36), the creation of a divine government (4: 106) and many other issues which have been raised in the mission of the prophets and the sending of the Qur'an and the principal message of Islam, are inseparable from the primary purpose of human life; that is, perfection and eternal prosperity. Religion and revelation trace the relationship between mankind and God and the supernatural world. They provide the answers to intellectual problems and are capable of arranging different aspects of individual and social life on those grounds that provide man's prosperity in this world and hereafter. In other words they meet the necessities which the mind's power is incapable of understanding or cannot decide upon, and if one attempted to find out through trial and error, his experience would lead to his destruction. To gain a spiritual life and prosperity one has to deal with certain problems existing in this world which cannot be understood by the mind. Religion explains those problems and describes the connection between this world and the hereafter.

Although this point explains the meaning of comprehensiveness in general, it is still insufficient to make the domain of comprehensiveness clear. So it is essential

to look at the reasons which are quoted to demonstrate the subject, and examine each one individually. Given below is the evidence proving the comprehensiveness of the Qur'an, the main source of the *Shari'a.*

4.3.1 The reasons for the comprehensiveness of the *Shari'a*

1) The verses that relate to the comprehensiveness of the Qur'an.

2) The Traditions and narration of the *Ahl al-bayt* which clearly confirm the comprehensiveness of the Qur'an.

3) Logical reasons in different subjects that prove the comprehensiveness of the Qur'an.

4) The writings and speech of Islamic commentators and scholars on the subject of comprehensiveness.

4.3.1.1 Comprehensiveness in the Qur'an

The comprehensiveness of the Qur'an is characterised by a few groups of verses. These consist of:

1. Verses emphasising that the manifestation and detailed accounts of everything is given in the Qur'an.

2. Verses which introduce Islam as a universal religion.

3. Verses which count the Qur'an and its instructions as eternal and perfect.

4.3.1.2 First Group: The Qur'an is the explanation of everything

There are two verses about the comprehensiveness of the Qur'an that prove to be the explanation and the detail of its beliefs and commands:

And we have revealed the Book to you explaining clearly every thing (*tibyanan li kull-i shay'*), and a guidance and mercy and good news for those who submit.[46]

In their histories there is certainly a lesson for men of understanding. It is not a narrative which could be forged, but a verification of what is before it and a distinct explanation of all things (*tafsila kull-i shay'*) and a guide and a mercy to the people who believe.[47]

In these two verses the phrases of confirmation are, "explaining clearly (*tibyanan*) every (*kull*) thing (*shay'*)" and "a distinct explanation (*tafsil*) of all things", which, as pointed out before, confirm that the Qur'an deals comprehensively with all subjects and states and explains everything in detail. Two aspects of these verses require further discussion:

1. The literal sense of the verses and the meaning of *tibyan* and *tafsil*: What is meant by detailed explanation (*tafsil*) of all things?

2. If we accept that by these two expressions the comprehensiveness of the Qur'an is meant, what can be its sense at different periods of history and in different conditions and places?

Discussion about these two verses has attracted the attention of Islamic commentators and scholars for a long time. They have consistently used these two verses to prove the comprehensiveness of the Qur'an and even scholars in Qur'anic sciences have used these two verses to defend the Qur'an and certify its miraculous nature and have introduced different views. I will discuss the commentators' views on the comprehensiveness of the Qur'an separately. Here I will restrict my attention to the literal sense of the verses and the common views on them.

---

[46] The Qur'an, 16:89.

[47] The Qur'an, 12:111.

140

The first verse (16: 89) makes three points:

1. That God has sent down the Book to guide the people and has not left them to themselves.

2. This book (which has been sent as a help and guidance for people), serves to explain, which means that the reason for sending it is that is to be the explanation of everything. This explanation is sometimes to be found in the verses of the Qur'an itself, and is sometimes given by the Prophet, as is said in the Qur'an:

> And we have revealed to you the Reminder that you make clear to men what has been revealed to them ...[48]

Explaining clearly (*tibyan*) is different from stating, which means that as well as repeating the message and the divine invitation, the Prophet must explain what he has received from God, and understood.

3. The third point is that "every thing" is explained. The main reason for drawing the conclusion that the Qur'an is comprehensive lies in this phrase. What is meant by "every thing"? Does here "*kull*" express real generality or conventional generality? What is meant by "*shay*"? Does every thing - lawful (*halal*) and unlawful (*haram*), instructions and beliefs, science and education - become clear in the Qur'an? Or does "every thing" mean the Qur'an consists of the knowledge of the beginning and the end?

It is generally held that what is meant by every thing in the phrase, "explaining clearly every thing", is all that which is connected to the fate and eternal prosperity of man. This is firstly because the Qur'an introduces itself as the book of

---

[48] The Qur'an, 16:44.

guidance and secondly there are many subjects that are not discussed specifically in the Qur'an.

In the second verse (12: 111), we come across three points that are slightly different from the previous ones:

1. "It is not a narrative which could be forged." The subjects in the Qur'an, historical events, narration and teachings are not imaginary problems or tales and fantasies, but reality.

2. "A verification of what is before it." The mission of the prophets have a substance in common. Each mission confirms the last one.

3. "A distinct explanation of all things (*tafsila kull-i shay'*) and a guide and a mercy to the people who believe." Like *tibyan*, *tafsil* states the application of the range of the explanations of the Qur'an. Similar things are said about the Torah:

> Again, We gave the Book to Moses to complete (our blessings) on him who would do
>
> good (to others), and making plain all things (*tafsilan li kull-i shay'*) and a guidance
>
> and a mercy, so that they should believe in the meeting of their Lord.[49]
>
> And We ordained for him in the tablets admonition of every kind and clear
>
> explanation of all things (*tafsilan li kull-i shay'*).[50]

Is there a difference between "*tafsila kull-i shay'*" and "*tafsillan li kull-i shay'*", as the first refers to the Qur'an, and the second to the Old Testament? And if there is no difference between the expressions "*tafsila kull-i shay'*" and "*tafsilan li kull-i shay'*", can one use any external indication to express the difference between the aims of these expressions? There is nothing in *al-Mizan* to indicate the difference between the expressions about the Qur'an and Torah. Nevertheless, according to external

---

[49] The Qur'an, 6:154.

[50] The Qur'an, 7:145.

indications, some have maintained the difference and said that as the Qur'an has been sent for all of mankind and all eras, it must answer all things, and therefore is described as *"tafsila kull-i shay"* but as the Torah has come for a limited time, the words *"tafsillan li kull-i shay"* are used.

Basically, there is no problem in this, but it is not supported by literal explanations and scientific reasons, and also we see the same expression, but containing the word *"tibyan"* (*"tibyanan li kull-i shay"*), used of the Qur'an as well.

In interpreting this verse (12: 111), and 6: 154, 7: 145, and even 16: 89, the main problem is what to make of *"kull"*. Shall we leave it to its real meaning, but characterise it according to logic restrict the meaning to "everything that the people need from the religion", or interpret *"kull"* in the widest possible way, thus solving the other problem of characterising the verse. It seems, however, that the apparent meaning of *"kull-i shay"* can not be intended. This is because according to the principles of speech and conversation no one - not even the most exact - can infer and extract "all things" from the statements of the Qur'an, so we can say *"kull"* is limited to the teachings which count as the duties of the prophets, because the Qur'an has to do with the guidance of humans (2: 2). This guidance is for a right and healthy programme and instructions for life, and seen from this viewpoint the Qur'an explains everything in every direction needed, and has not left anything unexplained.

4.3.1.3 Second Group: The Universality of the Qur'an

Further evidence for the comprehensiveness of the Qur'an, is that for Islam as a universal religion. The universality of Islam means that the teachings and the instructions of the Qur'an are not specially directed to any particular class, group,

society or race. The holy verses address all people on Earth: Arabs, Persians, Turks, Kurds, Asians, Europeans, Americans, Africans, women, men, adults, children, villagers, urbanites, civilised and uncivilised. The aim of guiding humanity applies to every class and race of people. Verses which have been connected to the universality of the Qur'an are numerous and expressive. Some of these are as follows:

1. "And We have not sent you but as a mercy to the worlds". (21: 107)

2. "And it is naught but a reminder to the nations."(68: 52)

3. "And We have not sent you but to all the men as a bearer of good news and as a Warning, but most men do not know." (34: 28)

4. "Say O people! surely I am the Apostle of Allah to you all." (7: 158)

5. "Blessed is He who sent down the Furqan upon His servant that he may be a Warning to the nations." (25: 1)

For the religion to have a universal appeal, its instructions must be such that they secure the needs of different classes and, irrespective of the particular characteristics, solve their problems. So the comprehensiveness of Islam is dependent on the universality of the Qur'an and can be derived from the verses which confirm it.

4.3.1.4 Third Group: The Eternality of the Qur'an

Another of the Qur'anic claims to comprehensiveness is its eternal nature. The Qur'an introduces itself as a thing which cannot age, since it says: "Falsehood shall not come to it from before it nor from behind it"[51], and it is revealed to warn "whomsoever it reaches"[52].

---

[51] The Qur'an, 41:42.

[52] The Qur'an, 6: 19.

144

In fact there is a close relation between the eternality, the universality and the comprehensiveness of the Qur'an. If it is revealed as a mercy for all mankind ("*rahmatan li al-'alamin*"), then it should provide whatever is needed for the guidance of mankind, which is not limited to the time of revelation and belongs to all eras.

Another of the verses confirming the Qur'an's eternality and comprehensiveness is:

> This day have those who disbelieve despaired of your religion; so fear them not, and
>
> fear Me. This day have I perfected for you your religion and completed My favour on
>
> you and chosen for you Islam as a religion.[53]

Irrespective of the theological discussions about this verse among Shi'ite and Sunni scholars,[54] according to all commentators of all Islamic sects the verse confirms that Islam is a perfect religion and all things which must be said, and instructions and laws which must be made, have been specified.

Rashid Rida in *al-Manar* presents a detailed discussion of perfection of religion and its comprehensiveness mentioned in this verse. He remarks at the end of his discussion:

> In our opinion, the perfection of religion is what Ibn 'Abbas and most of the scholars
>
> (*jumhur*) have said; that the intention of the verse concerns beliefs and instructions
>
> and traditions of worship in detail, and transactions in brief, which end with
>
> appointment of the Ruler.[55]

---

[53] The Qur'an, 5:3.

[54] As explained before, the Shi'ites refer to this verse to prove the Imamate of 'Ali. See Chapter One (1.3).

[55]Rashid Rida, *al-Manar*, Vol. 6, Second Edition (Beirut: Dar al-Fikr), p. 166.

'Allamah Tabatabaei, who has quoted different interpretations of the verse, holds that this verse can only be interpreted with reference to the subject of the continuity of leadership and only then can the perfected religion be explained clearly. He has said:

> It becomes clear from what has been said that all the hopelessness of the unbelievers comes about when the Almighty God appoints someone to replace the Prophet in keeping and administrating and guiding the Islamic society for the sake of the continuity of religion.[56]

But in any case, he acknowledges that although the verse concerns the subject of the leadership, it confirms that the religion is a collection of divine teachings and instructions, which until then - before the revelation of the verse - had not been completed, and with the descending of the verse the other important problem has been decided, which was the problem of the Prophet's successor, in which case the perfection of religion and the principle aim in sending the apostles has been accomplished.[57]

Therefore, if stating the instructions and beliefs makes the religion perfect and comprehensive, this verse confirms the comprehensiveness of the religion of Islam and its teachings and *Shari'a*, specially when the subject of leadership becomes attached to it.

The last verse that is quoted in order to confirm the issue of comprehensiveness of the *Shari'a* of Islam is: "We have not neglected any thing in the Book". [58]

'Allamah Sayyid Muhammad Husayn Tabatabaei, *Al-Mizan*, op. cit., Vol. 5, p. 176. For his explanation of the verse and its relation with the subject of leadership see Chapter One (1.3).

[57] *Ibid*, p. 180.

[58] The Qur'an, 6:38.

There is some disagreement among the commentators about the meaning of "the Book" in this verse. Some have said that the intention of the verse might be to refer to the guarded tablet (*lawh mahfuz*),[59] but some others have said that the meaning is both the guarded tablet and the Qur'an. But in any case if the meaning of "the Book" is the Holy Qur'an, commentators believe that it is one of those verses which give confirmation on the comprehensiveness of the Qur'an; for example, Mahmud Alusi in *Ruh ul-ma'ani* writes about this verse and comprehensiveness of the Qur'an:

> The intention is that "the Book" is the Qur'an, and this is what Balkhi and some
>
> groups accepted. There are mentioned in it (the Qur'an) all things that people need
>
> about the religion and the affairs of this world, and even more than this, either in
>
> detail or in brief. From Shafi'i, mercy be upon him: "Nothing has descended to any
>
> one about the religion unless there is some guide in the Book of Almighty God about
>
> it."[60]

'Allamah Tabatabaei also confirms this meaning and writes:

> If the intention is the holy Qur'an ... the verse would mean that as the Qur'an is the
>
> book which guides to the right path, it undertakes to state some facts and teachings,
>
> which society is in need of, and religion must explain them and therefore has not
>
> forgotten these problems, and has stated every matter which plays an important role

[59]See the Qur'an, 85:22.

[60] Alusi Sayyid Mahmud, Ruh al-ma'ani, Vol. 5, New Edition (Beirut: Dar al-Fikr), p. 209, quoted in Muhammad 'Ali Ayazi, "Jame'iyyat-e Din" in *Majmu'e-ye Maqalat* (Collection of Works of the Congress of Investigating the Basis of Imam Khomeini's Juridical Thought: The Role of the Time and Place in Ijtihad), Qom: Mu'ssase-ye Chap wa Nashr-e 'Uruj, 1374 H.S. Vol. 10: *Jame'iyyat-e Shari'at*, p. 114.

in the prosperity of people in this world and hereafter, as the Almighty has said: "...

and We have revealed the Book to you explaining clearly every thing".[61]

4.3.2 The Infallible Imams and the Comprehensiveness of the Qur'an

One of the important elements, in the proof of the comprehensiveness of the

Qur'an, is the traditions that have been transmitted from the Prophet and his

Household. Most of these traditions are linked with the interpretation of the verse of

"*tibyanan li kulli shay*" (16: 68).

In addition to proving the comprehensiveness of the Qur'an, these Traditions

explain the different aspects of the manifestation of the Qur'an and also the origin of

the knowledge of the infallible Imams. Some of these Traditions are as follows:[62]

Muhammad ibn Yahya (-) Muhammad ibn 'Abd al-Jabbar (-) Ibn Faddal (-)

Hammad ibn 'Uthman (-) 'Abd al-A'la ibn A'yun, as saying, "I have heard Abu

'Abdillah (p.b.u.h.) saying:

> I have been given birth by the Messenger of Allah (p.b.u.h.a.h.p.), I know the book of
>
> Allah, and that how the creator originated and what will happen till the day of
>
> Judgement, all is to be found in this holy Book of Allah. It tells every thing about the
>
> heavens, the earth, paradise, hell and also about what has been and what will be. I
>
> know them all as clearly as though they were mirrored in the palm of my hand. Lo,

---

[61] 'Allamah Sayyid Muhammad Husayn Tabatabaei, *Al-Mizan,* op. cit., Vol. 7, p. 81-2.

[62] For Traditions in this regard see Muhammad Ibn Ya'qub Ibn Ishaq al-Kulayni al-Razi, *Al-Kafi*: *Al-Usul*, English Translation with Arabic Text, Vol. 1, Part 1, No. 2 of "The Book of Excellence of Knowledge", First Edition (Tehran: World Organization for Islamic Services), chapter on: "Taking (every case) back to the Qur'an and *al-Sunnah*, verily, there is nothing from what is lawful and what is unlawful and what needed by the mankind, but the book (of Allah) and *al-Sunnah* includes".

Allah, the Almighty has Himself proclaimed about His book. "It contains description of all things."[63]

Muhammad ibn Yahya (-) Ahmad ibn Muhammad ibn 'Isa (-) 'Ali ibn Hadid (-) Murazim (-) Abu 'Abdillah (p.b.u.h.), as saying:

> Verily, Allah the Almighty has revealed in the Qur'an, a description of each and every thing to such an extent as to leave out nothing which mankind needs, The description is so all-inclusive that there is nothing a man could wish, saying, "would that it were revealed in the Qur'an", that has not already been revealed in it.[64]

'Ali ibn Ibrahim (-) Muhammad ibn 'Isa (-) Yunus (-) Husayn ibn al-Mundhir (-) 'Umar ibn Qays (-) Abu Ja'far (p.b.u.h.) as saying:

> Verily, Allah the Almighty has not left anything which the Muslim community needs, without describing it to His Messenger - the Prophet. He has prescribed specific limits for each and every thing and has assigned to it distinct symbols indicative of those limits. He has also provided penalties for their transgressions.[65]

Muhammad ibn Yahya (-) some of his associates (-) Harun ibn Muslim (-) Mas'aadah (-) Abu 'abdillah (p.b.u.h.), as saying, 'Amir al-mu'minin ('Ali - the Chief of the Believers) has observed:

> O people! Allah the Almighty has sent His messenger (the Prophet) to you and revealed to him the Book of eternal truth, ... a prescription inclusive of all that was revealed in the preceding divine books, collaborating the truth of divine books they already had in their hands, distinguishing in detail what was lawful from Allah and what was unlawful. This (prescription) is none other than the holy Qur'an itself. And from it only ask whatever you have to ask. However, the Qur'an itself will never

---

[63] *Ibid.,* p.160, No. 188-8.

[64] *Ibid.,* p. 155, No. 181-1.

[65] *Ibid.,* p. 156, No. 182-2.

speak to you. It is I (the divinely appointed guide) who will answer to you each and every question from the Qur'an itself. Verily, there is in this Book (of Allah) the knowledge of every thing that will happen till the Day of Judgement. This book is the last word for you and is a (irrefutable) verdict and description for every dispute amongst you each and every thing from it (Qur'an).[66]

Allama Tabatabaei has an explanation about these traditions that I shall mention later.

4.3.3 Rational Vindication of Comprehensiveness

There are two considerations on this issue. One is based on the finality of the prophethood and the eternality of Islam's teachings; these are undeniable according to Muslim belief. So if Islam is the last religion that God has sent for man's guidance, and the message of Muhammad (p.b.u.h.) was meant to transcend any particular people, place, or period, then its teaching must be complete and cover all needs of human beings.

The second is that denying the comprehensiveness necessitates accepting deficiency or shortcoming in the religion. This means that God Almighty has not revealed those matters which must be revealed for guidance and happiness, which is contrary to the principle of *lutf* (Grace). The first Imam ('Ali p.b.u.h.) has also referred to this issue in disparagement of the differences of opinion among the theologians, as he has said:

> When a problem is put before any one of them he passes judgement on it from his imagination. When exactly the same problem is placed before another of them he passes an opposite verdict. Then these judges go to the chief who had appointed them

---

[66] *Ibid.,* pp. 158-160, No. 187-7.

and he confirms all the verdicts, although their Allah is One (and the same), their Prophet is one (and the same), their Book (the Qur'an) is one (and the same).

Is it that Allah ordered them to differ and they obeyed Him? Or He prohibited them from it but they disobeyed Him? Or (is it that) Allah sent an incomplete Faith and sought their help to complete it? Or that they are His partners in the affairs, so that it is their share of duty to pronounce and He has to agree? Or is it that Allah the Glorified sent a perfect faith but the Prophet fell short of conveying it and handing it over (to the people)? The fact is that Allah the Glorified says: "...We have not neglected anything in the Book..." (Qur'an, 6:38). And says that one part of the Qur'an verifies another part and that there is no divergence in it as He says: "...And if it had been from any other than Allah, they would surely have found in it much discrepancy." (Qur'an, 4:82)

Certainly the outside of the Qur'an is wonderful and its inside is deep (in meaning). Its wonders will never disappear, its amazing character will never pass away and its intricacies cannot be clarified except through itself.[67]

4.3.4 Commentators and the Comprehensiveness of the Qur'an

We can classify the commentators on the subject of the manifestation of the Qur'an in three groups:

1. Commentators who interpret the Qur'an with the help of Traditions from the Prophet and his Household. This group mostly were the Companions of the Prophet or their followers and believed that all knowledge and all things are

---

[67] *Nahj al-Balaghah*, Selection from Sermons, Letters and Sayings of Amir al-Mu'minin, 'Ali ibn Abi Talib, selected and compiled by al-Sayyid 'Abdu'l-Hasan Muhammad ibn Husayn al-Radi al-Musawi, English Translation from Arabic text by Sayyid 'Ali Reza, Vol. 1 (Karachi, 1971), Sermon 18, pp. 118-120.

manifested in the Qur'an.[68] Ibn Kathir, quoting the opinion of Ibn Mas'ud (one of the companions of the Prophet), explains that the Qur'an encompasses all useful knowledge including the news of the past and future and what is lawful and unlawful and everything that people need in regard to their affairs in this world and hereafter.[69]

2. Those who believe that the Qur'an makes manifest everything on which depends guidance, happiness and success and whose knowledge is essential for following the right way to reach prosperity and perfection. This is a common view and is taken by most of the commentators.[70] According to this group, the Qur'an explains what people need in regard to religious matters, either by clear and detailed expression on beliefs and instructions, or by referring to the Prophet and his Household.

'Allamah Tabatabaei comments that as the Qur'an is the book of guidance, its explanation would be in this direction. Indeed, the Qur'an explains what people need for guidance including the true knowledge in regard to origin and end, excellence of conduct, Divine law and stories of the prophets and sermons. However, at the end he adds:

---

[68] Ibn Mas'ud, quoted in: Abu al-Fida' Isma'il Ibn Kathir al-qurashi (d. 774 A.H.), *Tafsir al-Qur'an al-'Azim*, Vol. 2 (Beirut: Dar al-Qalam), p. 503.

[69] *Ibid.*,

[70]See for example: Abul A'la Maududi, *The Meaning of the Qur'an* (Lahore, Pakistan: Islamic publications), Vol. VI, p. 92; 'Allamah Tabatabaei, *al-Mizan*, op. cit., Vol.12, p.324. Tabari and Tabarsi are also of the opinion that the Qur'an makes manifest religious matters consisting of what is lawful and unlawful. See Tabari, *Jami' al-bayan 'an ta'wil al- Qur'an*, Vol. 16 (Turath al-Islam), p. 314; al- Abu 'Ali al-Fasl Ibn al-Hasan Shaykh al-Tabarsi, *Majma' al-Bayan fi Tafsir al-Qur'an*, Vol. 3 from 5 (Iran, Qom: Manshurat Maktabat Ayat al-lah al-'Uzma al- Mar'ashi al-Najafi, 1403. A.H.), Sada (Syria), Matba'at al-'Irfan, 1936), p. 380.

This is based on the external meanings of the word *tibyan*, that is explaining the senses through their literal manifestation. We do not understand from the literal meaning of the Qur'an except the general idea of what is mentioned. But there are some things in the Traditions which indicate that the Qur'an consists of the knowledge of what has been and what exists and what will be till the Day of Judgement. If these traditions are correct, the meaning of *tibyan* would be more extensive than the literal manifestation. There may be some indications other than the literal meaning which remove the veil of the mysteries and there is no way of understanding them with the common understanding.[71]

3. Modern commentators who believe that the Qur'an anticipates modern science. There are some "scientific" commentaries (*tafsir 'ilmi*) which seek to interpret the Qur'an with the help of the human knowledge of today. The authors of this kind of commentary often cite two verses of the Qur'an : "We have revealed the book to you explaining clearly every thing" (16:89), and "We have not neglected any thing in the book" (6:38), and also some traditions, in defence of the legitimacy of their endeavour to find in the Qur'an what has been discovered by science. One example of this kind of commentary is Tantawi Jawhari's scientific commentary, *al-Jawahir fi Tafsir al-Qur'an, al-Mushtamil 'ala 'Aja'ib Bada'i' al-Mukawwanat wa Ghara'ib al- ayat al-Bahirat,* which he started in 1923 and wrote in twenty-six volumes.[72]

There is another aspect of the doctrine of the sufficiency of the Qur'an which was revived in the nineteenth and twentieth centuries by some reformers who emphasised the independence of the Qur'an from traditional Sunna-based

---

[71] 'Allamah Tabatabaei, *al-Mizan,* op. cit., Vol. 12, p. 325.

[72] See J. J. G. Jansen, *The Interpretation of the Koran in Modern Egypt* (Leiden: E. J. Brill, 1974), p. 44.

interpretation. According to this group, know as Ahl al-Qur'an, the Qur'an is a self-contained, comprehensive and fully sufficient guide for belief and practice and all that is a necessary part of religion; even the essential details of ritual practice, i.e. the five pillars, can be derived from it.[73]

To summarise this chapter it could be said that, according to the Muslim, Islam is the last religion sent for the guidance of all human beings. In addition to the issues related to belief and morality, Islam provides practical instructions regarding both individual and social aspects of the Muslims including what is perceived as "law" and legal deeds in the modern time. In regard to the application and the adaptation of the Islamic rules, as they are revealed in the Qur'an or explained by the *Sunna*, to the changing needs of the Muslims in the Modern time, most Islamic scholars consider *ijtihad* as a key point, although their methods and views of it may differ. The principles considered in the change of the Islamic rules will be discussed in the following chapter.

---

[73] See Daniel W. Brown, *Rethinking Tradition in Modern Islamic Thought* (Cambridge: Cambridge University Press, 1996), p. 45.

Chapter Five

Ijtihad, Continuity and Change in Islamic Law

"The Role of the Time and Place" in Adapting Islamic Law to the Changing Needs of Muslim Society

5.1 Introduction

In the chapter on the comprehensiveness of the *Shari'a* I discussed the attempts of Islamic scholars to prove the universality and eternality of the *Shari'a*, and the attention they pay to the role of *ijtihad* in adapting Islamic rules to the changing needs of developing societies. Here I seek to introduce the ways and principles through which they can diversify Islamic rules without nullifying the nature of the *Shari'a*.

Following Imam Khomeini's emphasis on "the role of the time and place in *ijtihad*", the issue was set forth for discussion by various scholars at "the Congress for the investigation of Imam Khomeini's juridical thought" in Iran in 1996.[1] In my

---

[1] The works provided by the members of the Congress are collected and published as *Majmu'e-ye Maqalat (Majmu'e-ye Athar-e kongare-ye barrasi-e mabani-e feqhi-e hazrat-e Imam Khomeini: Naqsh-e Zaman wa Makan dar Ijtihad*: The Collection of Works of "the Congress for Investigating

study of nearly two hundred essays and interviews collected by the Congress and of some other sources I observed that according to these scholars Islamic rules can be subject to change either because of some alteration or novelty in the issues concerned, or by means of a series of "governing principles" whose function is to control and harmonise the rulings of the *Shari'a* in special circumstances. In both cases the *mujtahid's* understanding of the subject regarding which he wants to infer rulings and also of the conditions of the times and places in which the commandments are to be practised play an important role in his *ijtihad* and issuing of *fatwas* and orders. This very issue could be one of the reasons why the *Shi'i 'ulama* have prevented the ordinary people from following a defunct *mujtahid*, and which have caused Sunni scholars to call for the reopening of the door of *ijtihad* in recent centuries.

To examine "the role of the time and place in *ijtihad*" it is necessary to attempt a classification of the Islamic laws related to our subject.

5.2 Constant (*thabit*) and Changeable (*mutaghayyir*) Commandments

In traditional sources of Islamic law no division of the religious injunctions into constant and changeable can be found. However, in order to prove the applicability of Islamic law in the modern age, contemporary Islamic scholars usually refer to this classification of the revealed prescripts.[2] They define constant

---

the Basis of Imam Khomeini's Juridical Thought": The Role of the Time and Place in Ijtihad) in 14 volumes. Each volume is also subtitled according to its subject of discussion.

[2] See for example Murtada Mutahhari, *Nezam-e Huquq-e zan dar Islam*, Eighth Edition (Tehran: Intisharat-e Sadra, 1357 H.S.), p. 97. For an English translation see *The Rights of Women in Islam*, Translated and Published by World Organization for Islamic Services, Fourth Edition (Tehran, 1991/1412). Classification appears on p. 102.

commandments as those rules which are ordained in response to the permanent needs of human beings, and generally exemplify them as devotional matters (*'ibadat*), family law, punishments (*hudud*), and so on. Changeable rules, according to the majority, relate to a particular section of *fiqh* known as *mu'amalat* (transactions) in its general sense. Even in this section there are many precepts whose constancy is taken for granted. So classification of the Islamic rules into constant and changeable would be helpful where clear criteria exist to distinguish them.

There is no clear boundary between these two types of law, and the consequent ambiguity may lead to discrepancy in finding a true application of Islamic Law in particular situations. However, several causes of change to Islamic law or injunctions are mentioned by the Islamic scholars who claim that by studying them we can understand why some Islamic rules can be subject to change while others are unchangeable. The explanation of these reasons is as follows:

5.2.1 The Subject Matters of the Commandments (*mawdu'at al-ahkam*) and their Role in Changing the Rules

The subject matters of the commandments may be divided into various kinds according to different points of view. An important one, which is related to the present discussion, divides them into the legally deduced (*al-mustanbatah al-Shar'iyyah*), the customarily deduced (*al-mustanbatah al-'urfiyyah*), the lexically deduced (*al-mustanbatah al-lughawiyyah*) and the "pure" (*al-mawdu'at al-sirfah*).

157

5.2.1.1 The Legally Deduced Subjects

The legally deduced ones are those whose literal meanings have been altered by the Lawgiver to be employed in a new sense, such as *salat* (prayer), *sawm* (fasting), *hajj* (pilgrimage), and so on. *Salat*, for example, literally means supplication. However, in the Islamic lexicon it refers to a specific ritual worship. To understand this kind of subject matter together with its relevant values (*ahkam*) a *mujtahid* must refer to the valid sources of the *Shari'a*. The method of reaching a conclusion in this group differs from the others and requires its own specific principles. The law or values of the *Shari'a* regarding this type of subject matter will remain as it was in the time of the Prophet or infallible Imams. It is only in certain special circumstances that it is possible to reverse the original commandments and perform the duties according to some secondary commandments (*al-ahkam al-thanawiyah*) which are ordained by the Lawgiver in that field. I shall explain this issue later.

5.2.1.2 Customarily Deduced Subjects

Customarily deduced subjects are those whose identification relies on *'urf* (custom). When Islam appeared, various customs concerning business, transactions, retaliations, marriage, divorce, and so on were practised by the people. Islam did not deal with these customs identically. Some of them, such as usury, have been totally prohibited and others have been approved conditionally or with some reforms. Whenever there is evidence of the Lawgiver's intervention in this group of issues and their values, a *mujtahid* is charged with their determination according to the relevant sources and ordinary people are supposed to follow him. The matters in which no

change has occurred as a result of the Legislator's interference, and whose criteria for setting boundaries concerning meaning and usage depend on custom, are idiomatically known as customary subjects. Most of the topics of discussion in *fiqh* relate to this group of issues.

To give an example, *fuqaha* refer to *'urf* in determining the precise amount of maintenance (*nafaqah*) that a husband must provide for his wife. Also, the age of puberty in determining the beginning of the age of *taklif*[3], the lapse of time after which a missing person (*mafqud*) is to be declared dead, the concept of *al-ghabn al-fahish* (radical discrepancy between the market price of a commodity and the actual price charged to the customer), the concepts of *ghana* (profane singing) *watan* (home), and so on are among the subjects for which *'urf* is considered as a source in determination.

Fuqaha hold differing views on the necessity of *taqlid* regarding the subject matters of the commandments. With regard to legally deduced subjects, all scholars believe that recognition of the subjects is to be left to the *mujtahids*, and their views should be considered as valid as the rule themselves. With regard to customary and literal subjects, some *fuqaha* such as Ayatollah Khoei believe that *taqlid* is still

---

3 According to the majority of *Shi'i fuqaha*, the age of *taklif* for a boy is fifteen lunar years and nine for a girl. Reaching the age of sexual puberty or the growing of coarse hair below the stomach are also determined as a sign for one to start his religious duties. According to Abu Hanifah the age of *taklif* could vary from twelve to eighteen for boys and from nine to seventeen for girls (See Yahya Muhammad, al-Ijtihad wa al-Taqlid wa al-Itba'i wa al-Nazar: Bahth Istidlali Muqarin Yu'na bi tahdid al-Mawqif al-Shar'i li al-Muthaqqaf al-Muslim, (UK:. al-Rafid Distribution and Publishing, 1996), p. 249). The reason that the age of taklif is determined by sexual puberty is, perhaps, because by this time usually a person has reached the stage of being able to tell good from evil.

necessary.[4] Some others, like Imam Khomeini, hold that it is not obligatory to follow a *mujtahid* in recognition of the customary, lexical or pure subjects. In these cases, in accordance with texts and other proofs, the general rules, for instance the obligation to supply one's wife with money to cover living expenses, and the prohibition of profane singing, gambling or eating scale-less fishes, are declared by the jurists. However, it is by referring to *'urf* that one can determine the precise amount of maintenance, and know what is considered as gambling or profane singing. To distinguish scale-less fishes from other kinds one should refer to ichthyologists.[5] Even so, if some traditions exist regarding the definition of such subjects they will be considered as confirmation of common sense.

In the customary subjects the opinion of *mujtahidun* as a part of the community is valid when accepted by the majority of people. This, of course, concerns the recognition of the subject matters of the commandments and not their relevant precepts. So when it is mentioned that an issue is not legally deduced (*ghayr al-mustanbatah al-Shar'iyyah*) it means that the source for recognition of the subject matters of the commandment is not the religious texts (the Qur'an or *Sunna*) and a *mujtahid* should refer to some other sources, such as customs, dictionaries or experts.

---

[4] See al-Mirza al-Gharawi al-Tabrizi (ed.), *Al-Tanqih fi Sharh al-'Urwah al-Wuthqa: al-Ijtihad wa al-Taqlid*, Representation (*al-taqrirat*) of Ayatollah Abu al-Qasim al-Musawi al-Khoei's Discussion on *fiqh* (Qom: Ansariyan Publications), pp. 412-413.

[5] After the victory of the Islamic revolution in Iran, some questions arose concerning the permissibility of eating particular kinds of fish. Following Imam Khomeini's command, in the first half of 1983 a seminar consisting of a number of jurists and a group of ichthyologists was held in Bandar Anzali to discuss the issue. In this seminar the experts wrote and signed to the effect that three kinds of the fish in question have lozenge-shaped scales on some parts of their bodies especially on the stem of their tail fins.

This clearly differs from what is quoted from Sunni *'ulama* in accepting *'urf* as a source of the *Shari'a*, if they mean determination of its rules on *halal* and *haram* by reference to the common practices of communities in any age.[6] It is only when the practices are common and contemporaneous with the early stages of legislation that a *mujtahid* can derive a rule of the *Shari'a*, if there is no record of prohibition by the Prophet or infallible Imams. Customs which were prevalent during the lifetime of the Prophet and infallible Imams and were not overruled by them are held to have received their tacit approval (*al-taqrir*). The contemporaneous existence of a custom or a practice with the early stages Islamic of legislation, if it is established with historical certainty, allows a jurist to derive its permissibility by the *Shari'a* provided that the absence of the issuance of prohibition against it is established with certainty. Then through considering all the conditions and circumstances which surrounded that common practice in the early stages of legislation he can issue the Lawgiver's permission on such a common practice in later periods if it is found within the same circumstances.

There is another term used by *'ulama* in this area, known as *sirah al-'uqala* or *bana' al-'uqala,* which relates to agreement on a matter by all people (Muslim and non-Muslim) of sound mind and intellect. *Sirah al-'uqala* is considered by *'ulama* as a proof as long as no prohibition is issued against it by the Lawgiver. On the strength of such an agreement they accept the authority of the relevant literal meanings of the Qur'an (*hujjiyyah al-zawahir*), of *istishab* (legal presumption of continuity of the

---

[6] Al-Suyuti, as it quoted from his *al-Ashbah wa Al-Nazar*, has recorded a legal maxim according to which "What is proven by *'urf* is like that which is proven by a *Shar'i* proof."(See Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Revised Edition (Cambridge: The Islamic Texts Society, 1991), p. 284).

status quo in doubtful cases), and so on.[7] It is acceptable that all people rely on the literal meaning of a text as long as there is no indication to the contrary, as they always rely on the *status quo* in their own lives unless they know for certain that some change has occurred.

The important point regarding customary issues is that those rules of *fiqh* which are formulated in the light of the prevailing concepts of their subjects may change according to changes in time and circumstances. Different communities have different customs and a community may gradually change. It is possible that in the course of time they will come to understand the subject differently. The changing view of a subject may influence its relevant commandment. When a *mujtahid* wants to deduce the rule of the *Shari'a* on a particular issue which has a common meaning or usage among his own people, he has to consider all the ways in which it differs from similar issues in the early age of legislation. It was on this basis that, when Imam Khomeini was asked about chess (which was traditionally forbidden) not being played for gambling but as a mind-strengthening game, he stated: "Under the mentioned conditions, if there is no loss or gain, it is all right to play chess."[8]

Consideration of the variability of the commandments according to changes in their subjects during the course of time is effective in dealing with new questions, and provides suitable grounds for the execution of Islamic regulations in different periods and places. Imam Khomeini laid great emphasis on this point in confronting social problems. He states:

---

[7] See for example: Muhammad Rida Muzaffar, *Usul al-Fiqh* Vol. 2 (Beirut: Dar al- Ta'aruf, 1983), pp. 130, 252.

[8] *Sahifa-ye Noor*, Vol. 21, p. 15.

Time and place are two crucial parameters in jurisprudence. The commandments regarding specific cases may change as a result of new political, social and economic situations. This means, through precise understanding of economic, social and political relations, that it is revealed that the issue, though apparently seeming the same in the new situation, has really changed and inevitably needs a new commandment.[9]

As we can understand from Imam Khomeini's sayings, changes regarding the subject matters of the commandments are not exclusively dependent on changes of customs. Changes in the circumstances and conditions which surround the subject, the variety of the subjects to which a given word can be applied, the expansion or restriction of the meaning of a basic word of the text during the course of time, the birth of new subjects, and changes in the values of subjects, are all issues which require new regulations.

The change of the rule regarding selling blood, and the extension of the rules about horse-riding and archery (*al-sabq wa al-rimayah*) to apply to up-to-date weapons for defence against enemies, on which I quoted Mutahhari's explanation in the chapter on the comprehensiveness of the *Shari'a*, can also be justified by changes in the subject matters of the commandments.

Insisting on the view that there is no way to abrogate the Islamic commandments after the Prophet, Mutahhari in his *Islam wa Muqtadiyate Zaman* (Islam and the Requirements of the Time) emphasises that even the flexible laws of Islam cannot depart from some constant principles, the execution of which, however, requires some changes to Islamic rules in different circumstances. According to him,

[9] *Ibid.*, p. 98.

this is the reason why *mujtahidun* may give different *fatwas* regarding one subject over a period of time.[10]

5.2.2 *Al-Shahid* Baqir al-Sadr's View on the Changeable Rules

Al-Shahid Baqir al-Sadr[11] holds that most of the changeable rules of Islam belong to the social area in which a *waliyyu al-amr* (a qualified *mujtahid* who is the head of an Islamic state) is responsible and has the right to determine on the basis of social justice and the public interest. When so doing, however, he cannot breach the basic and general aims of the *Shari'a*. He insists that the State or the ruler may interfere only in those activities which are permissible (*mubah*) under Islamic Law. So it is not permissible for him, for example, to make usury lawful, or to suspend the law of inheritance, or to nullify a kind of ownership, in a Muslim society established on an Islamic basis.[12]

Al-Sadr calls the aspect of social affairs which comes under the changeable commandments *mantaqa al-firagh* (lacuna zone or gap). This is the domain which is devoid of fixed commandments and is left to be filled by the authorised ruler (*waliyyu al-amr*) in accordance with expediency in every age. By reference to the idea of

---

[10] See Murtada Mutahhari, *Islam wa Mmuqtadiyat-e Zaman*, Eleventh Edition (Qom: Intisharat-e Sadra, 1374 H.S.), pp. 77-81.

[11] Al-Sadr was a dominant Iraqi *Shi'i* jurist who was murdered with his sister by the regime of Saddam Husain in 1980. He was a political leader in the revival of *Shi'i* learning and made an important contribution to the renewal of Islamic law, especially in the areas of economics and banking.

[12] See Muhammad Baqir as-Sadr, *Iqtisaduna (Our Economics)*, English translation Vol. One, Part Two, Second Edition (Tehran: World Organization for Islamic Services, 1994/1414), p. 58.

mantaqa al-firagh permissible activities (*mubahat*) may change to obligatory or forbidden ones.

In his *Iqtisaduna* (Our Economics), which deals with the Islamic system of economics, he states:

> ... The idea of this zone of lacuna stands on the basis that Islam does not offer its principle of legislative enactment of the laws of economic life as a fixed treatment or a phase (stage by stage) system which history transmits through intervals of ages, from forms to forms to a last and final form of the system, but offers it as a theoretical form suitable for all ages. It is, therefore, essential to give this form completeness and comprehensiveness wherein to reflect the changes of ages, inside the dynamic element, assisting the form with the capacity to adaptation in accordance with divers circumstances.[13]

Like other scholars, al-Sadr considers two positions regarding to prophecy and guardianship of the Prophet. He holds that, since the Prophet was the messenger of God, he received the Divine Law through revelation and delivered it to the people. In his position as the leader of the society, he ordained commandments according to social justice and the public interest to protect the Muslim community. The commandments ordained by him as the messenger are not limited to any specific time or place and should be fulfilled by everybody in all eras. However, the commandments ordained by him according to the second position were specially designed for the people of his own time. After setting forth this introductory statement to prove the variability of some of the Islamic rules on economics, al-Sadr comes to the following conclusion:

---

[13] See *Ibid.*, Vol. Two, Part Two, p. 179.

Secondly, the species of legislation with which the Prophet affected to fill the lacuna were not injunctions of a permanent nature. The Prophet did not issue them in his capacity, as the promulgator of the permanently established injunctions (which admit no alteration, change or modification) but in the sense of his being a ruler and guardian of the Muslims. They cannot therefore be considered a permanent part of the economic doctrine of Islam yet they do throw light on the operation of filling up the lacuna, which must happen continuously according to the needs of the circumstances. This facilitates the understanding of the fundamental aims and objects to which the Prophet adapted his economic policy, a factor which fills the lacunae accordingly.[14]

After justifying the existence of such a region and leaving it to be filled by an authorised ruler, al-Sadr tries to specify its limits in the light of the indications of Islamic jurisprudence. He pays great attention to the role of "legitimate juristic *ijtihads*" in discovering the Islamic rules and conceptions and warns of the dangers of subjectivity in understanding the texts, especially those which are connected with the social aspects of human life. He holds the four following factors to be the main sources of the danger:

I. Justification of the Existing Reality

By this factor al-Sadr means the attempt on the part of the exerciser of *ijtihad* to put a particular construction upon a text to justify the defective reality in which he is living, rather than changing the reality on the basis of the text (*nass*). He blames those who, invoking the Qur'an ("*O you who believe! do not devour usury, making it*

---

[14] See *Ibid.*, Vol. Two, Part One, p. 35. I have made some corrections to the translation.

double and redouble"[15]) believe that Islam prohibits usury only when it reaches an unseemly amount (exceeds the reasonable limit).[16] According to al-Sadr, the verse does not sanction charging interest on a loan as long as it does not "double and redouble", but draws the attention of the usurer to the horrible consequences of usury.

II. Incorporation of the Text in a Definite Framework

He explains this factor as the study of the text in a non-Islamic framework, where the exerciser of *ijtihad* tries to understand the text within that definite framework. If he finds that the text does not go well with the existing social reality he puts it aside and invokes other texts which fit within this framework or at least do not clash with it.[17]

III. Separation of the Legal Evidence from its Conditions and Circumstances

This is an operation of the extension of a particular kind of legal ground, namely *al-taqrir*, without objective justification. *Al-taqrir* means the silence of the Prophet or infallible Imam with regard to a definite action which takes place in his presence or which comes to his ear, and which reveals his tacit approval of the action. The most important thing about *al-taqrir* is that all the circumstances and conditions in which a practice has existed should be considered. It is possible that

---

[15] The Qur'an, 3:130.

[16] By this he probably means those modernists who justify low interest charges by banks and only forbid combined (*murakkab*) interests; this will be discussed in Chapter Six, 6.3.2.2.

[17] By declaring this as a source of danger for *ijtihad* he may be objecting to some Liberals whose methodology of interpreting Islamic sources has been discussed in Chapter Four, 4.2.3.3.

some of these circumstances and conditions may have affected the sanction of that practice. If today on the ground of *al-taqrir* or the *Shari'a's* silence on hire-contract one tries to infer the legal validity of the capitalist ownership of mineral materials extracted by hired labour, al-Sadr holds that he has separated a practice from its conditions and circumstances without an objective justification.

IIII. Adoption of a Definite Point of View Prejudicial of the Texts

To clarify this point, al-Sadr imagines two persons studying the same text, one of whom is disposed toward discovering the social aspect of Islamic precepts, whilst the other is drawn by his own disposition towards discovering the Islamic concept regarding a particular practice of individuals. These two persons, he says, will derive different results in accordance with their own dispositions. If the exerciser of *ijtihad* wants to impose his personal point of view which he has already adopted he will not succeed in reaching the correct explanation of the legal texts.

To give an example, al-Sadr refers to a tradition according to which the Prophet passed judgement for the inhabitants of Medina concerning the use of water (which was in someone's property) for date-palms, that no one was allowed to deprive others of the surplus water; and he passed judgement for the desert dwellers forbidding them to withhold surplus water or sell of surplus pasture.[18] According to him, this interdiction of the Prophet forbidding the withholding of surplus water and pasture may be construed as a fixed rule of the *Shari'a* for all times and places, like the prohibition against gambling or drinking, but it may equally be construed as a

---

[18] This tradition with some differences is quoted in Muhammad Ibn Ya'qub Ibn Ishaq, al-Kulayni al-Razi, *Al-Kafi*, Vol. 5 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran), p. 293.

definite legal measure which the Prophet took in his capacity as a ruler responsible for the welfare of his community. As such it will not be an absolutely binding general law of the *Shari'a*.

The exerciser of *ijtihad* is supposed to consider both suppositions and determine each in the light of the text or similar texts. If one relies beforehand on his personal disposition toward a text, he takes it upon himself from the very beginning to find in every text the general rule of Islamic law and he may overlook the positive role of the Prophet in his capacity as a ruler.

The idea of the "lacuna zone" suggested by Baqir al-Sadr, which may be filled by the head of the Islamic government, is comparable to the subject of "the authority of the *faqih*" and his right to issue governmental rulings. Imam Khomeini laid great emphasis on this issue and held that "the Islamic government is the practical aspect of the *fiqh* while jurisprudence provides its theoretical side." In other words jurisprudence is the competence and the Islamic government is the performance.

According to Imam Khomeini, however, the authority of the *faqih* is more extensive. Whereas al-Sadr and other scholars held that the ruler should interfere within the limits of the *Shari'a* (in subjects where there is no absolute obligation or prohibition), Imam Khomeini suggested that "the Government can also prevent any devotional or non-devotional affair if it is opposed to the interests of Islam and for so long as it is so. The Government can prevent *hajj*, which is one of the important divine obligations, on a temporary basis, in cases when it is contrary to the interests of the Islamic country." Imam Khomeini's view on governmental rulings constitutes a major turning point in the history of the Shi'ites. A brief explanation of this issue follows.

5.3 Governmental Rulings

The jurists have not defined governmental rulings so thoroughly that they can easily be identified and distinguished from other types of commandment. From examples quoted in different books we can understand that governmental commandments are rulings which are ordained in regard to the execution of Islamic laws such as punishments, collecting *zakat*, litigation, and so on, or they are regulations which, based on the expediencies of the time, are enacted by a qualified *mujtahid* for the management of the Muslim community. Official appointments and removals, declaring the appearance of the new moon (as the sign for the start of Ramadan for example) are also counted as instances of governmental rulings.

5.3.1 Shi'ites and Governmental Rulings

Since over the centuries the *Shi'tes* have been in the minority they have rarely had a chance to establish *Shi'i* Islamic government. Therefore the *Shi'i 'ulama* have contributed less to the discussion of governmental issues than the *Sunni 'ulama*. As previously mentioned,[19] al-Shaykh al-Tusi was the first to pronounce that in the period of Greater Occultation *fuqaha* could take an infallible Imam's functions. After him, in the Safaviyeh period when *Shi'ism* was adopted as the official religion in Iran, Al-Karaki in his legal works paid close attention to some governmental problems, such as the legitimacy of the Friday prayer, land, tax, and so on. Later, al-Shahid al-Thani extended the concept of the general deputyship (*na'ib al-'amm*) of the hidden Imam to include all of his religious and secular functions. When the Islamic

---

[19] See Chapter Two, 2.4.2.

170

revolution of Iran succeeded the issues of the authority of the *faqih* and governmental rulings were given greater consideration.

The most important point is that, according to the majority of *Shi'i 'ulama*, governmental commandments, when issued by a qualified *mujtahid*, are as valid as the other rulings of the *Shari'a* and must be followed by everyone. No one, even another qualified *mujtahid* who has to act according to his own knowledge of Islamic rules, has the right to disobey governmental rulings. In one of his discussions on "authority and guardianship" 'Allama Tabatabaei states that:

> Within the boundaries of the rulings of the *Shari'a* the *waliyyu al-amr* [infallible
>
> Imam or a qualified *mujtahid* who is the head of the Islamic government] can make
>
> decisions and enact regulations based on the expediencies of the time. These
>
> regulations must be followed and are as valid as *Shari'a*, except that the heavenly
>
> rules are constant and invariable but the enacted regulations are variable. Their
>
> constancy and survival depends on the expediencies that have brought them into
>
> existence and, since the life of the human community is constantly changing and
>
> evolving, these regulations will naturally change gradually into better ones.[20]

Imam Khomeini, in his series of lectures known as "the authority of the *faqih*" or "Islamic Government", concerning the rule prohibiting the use of tobacco, which was issued by Mirza Hasan Shirazi to break colonialism's famous monopoly agreement in Iran, says:

> The ruling given by the late Mirza Hasan Shirazi prohibiting the use of tobacco was
>
> in effect a governmental ruling; hence all other *fuqaha* were obliged to follow it, and

---

[20] Muhammad Husain 'Allama Tabatabaei, "Wilayat wa Zi'amat" in Tabatabaei, 'Allamah, et. al. (eds.), *Bahthi dar bareyeh Marja'yat wa Ruhaniyyat*, Second Edition (Tehran: Sherkat-e Sahami-e Intisharat), p. 83.

indeed the great *'ulama* of Iran did follow it, with only a few exceptions. It was not a judicial ruling on a matter being disputed by a few individuals, based purely on their own determinations. It was instead a governmental ruling, based on the interests of Islam and the Muslims and his determination of a secondary consideration (*al-'unwan al-thanawi*). As long as this secondary consideration was obtained, the ruling retained its validity, and when the consideration were no longer applied, the ruling also ceased to apply.[21]

As we can see from 'Allama Tabatabaei's and Imam Khomeini's statements, governmental commandments differ from other rulings of the *Shari'a* in the following ways:

1. In governmental rulings, recognition of the best interests (*masalih*) and of corruption (*mafasid*) (which, according to *Shi'ites*, the Divine Law is based on) is left to the governor although the constant rulings of the *Shari'a* have been made by the Holy Legislator.

2. Governmental rulings are temporary and variable because they are ordained according to the governor's realisation of the existing expediencies in the issues of his own time. We can even say that it is possible for a governor to enact different regulations regarding one subject for people who live at the same time but in different places with different conditions.

According to Imam Khomeini, in the case of incompatibility between a constant commandment and an expediency to be gained through governmental rulings, the constant commandment may be suspended. He says:

---

[21] Hamid Algar, *Islam and Revolution: Writings and Declarations* (of) *Imam Khomeini* (translated and annotated) (England: Mizan Press, 1981), p.124.

Governing, which is a branch of the absolute guardianship of the Prophet, is one of the primary injunctions of Islam and has priority over all other subsidiary injunctions (*al-ahkam al-far'iyah*), even *salat* (prayer), fasting and *hajj*. A Governor can demolish a mosque or a house which is obstructing a street and pay the price to its owner. If necessary, the governor can close a mosque, and can destroy a *dirar* mosque if it is impossible to prevent harm without destroying it. The Government can unilaterally nullify the contracts which it has itself made with people when these conflict with the interests of the country and of Islam.[22]

---

[22]*Sahifa-ye Noor*, Vol. 20, p. 74. This is a part of a letter which Imam Khomeini wrote to the President of the Islamic Republic of Iran, 'Ali Khamene'i, on 6 January 1988, after the latter's speech at the Friday prayer on 1 January. In his prayer sermon (*khutbah*) the President defended an interpretation of *wilayah al-faqih*. He divided legal matters into those that operate on a personal and individual level, and those that are of a total, national type. He held that the first could be decided by the usual method of *taqlid* and the *fatwa* of the other *fuqaha* could also be taken into consideration, but in the second category only the *fatwa* of the Imam is acceptable. Since it appeared from the President's speech that there could be no amalgamation of devotional and non-devotional legal matters and that the latter may be held to be of lesser importance, Imam Khomeini took a strong stand against the view. In the first part of his letter, which immediately precedes the passage quoted above, Imam Khomeini writes:

"It appears from your Excellency's remarks at the Friday prayer meeting that you do not recognize government as a supreme deputyship bestowed by God upon the Holy Prophet (p.b.u.h) and that it is among the most important of divine laws and has priority over all peripheral divine orders. Your interpretation of my remarks that the "government exercises power only within the boundaries of divine statutes" is completely contrary to what I said. If the government exercises power only within the framework of peripheral (*far'iyyah*) divine laws, then the entrustment of divine ruling and absolute guardianship to the Prophet of Islam, peace of God be upon him and his household, would be hollow and meaningless.

I refer to the implications of this [view], which no one can accept. For instance, the construction of roads which may entail the requisition of houses or their environments is not within the framework of peripheral injunctions. Conscription, compulsory dispatch to the front, prevention of entry or exodus of any commodity, the ban on hoarding except in two or three cases, customs duty, taxes, prevention of profiteering, price-fixing, prevention of the distribution of narcotics, the ban on addiction of any kind except in the case of alcoholic drinks, the carrying of all kinds of weapons, and hundreds of similar cases which are within the prerogative of the government would be

173

Some people consider that what Imam Khomeini calls "the interest of the Islamic regime" (*maslahat-e nezam*) is the same as what is known as *maslahah mursalah* by the Sunni *'ulama*. Some scholars, however, believe that the subject of *maslahat-e nezam* is different from *maslahah mursalah*, which is still unacceptable by the Shi'ites. For the subject to be clear we need to have an explanation of *masalih-i mursalah*:

5.3.2 *Masalih-i Mursala* (Considerations of Public Interest)

By the term *masalih-i mursalah*, Sunni *'ulama* refer to "unrestricted public interest in the sense of its not having been regulated by the Lawgiver insofar as no textual authority can be found on its validity or otherwise."[23] It consists of considerations which, harmoniously with the objectives of the *Shari'a*, protect a benefit or prevent a harm. These objectives, according to al-Ghazali, comprise securing religion, life, intellect, lineage and property, which are known as the "five essential values".

Maslahah or *istislah* (taking the public interest into account) is accepted by the majority of *Sunni 'ulama* as a proper ground for legislation. However, they are in agreement that it is not a proof in regard to devotional matters (*'ibadat*) and other clear injunctions such as the prescribed penalties, fixed entitlements regarding inheritance, specified periods of *'iddah*, and so on.

---

inadmissible according to your interpretation." This letter was published in full in Iranian newspapers. A translation, as quoted by Chibli Mallat in *The Renewal of Islamic Law*, appears in *Summary of World Broadcasts: Middle East and Africa*, London, 8. Jan., 1988, p. A/7. Key.

[23] See Muhammad Hashim Kamali, *op. cit.*, p. 269.

To prevent misuse of the *maslahah*, some conditions are designed by the *Sunni 'ulama* to be fulfilled by relying on *masalih-i mursalah*. The first condition is that in enacting a *hukm* or regulation on grounds of *istislah* the benefit of the majority must be considered. The second condition is that the *maslahah* must not be in conflict with those principles or values of the *Shari'a* which are proven by *nass* or *ijma'*. According to al-Malik, two other conditions are also necessary: *maslahah* must prevent burdens being placed on, or remove them from, the people, and it must be acceptable to people of sound intellect. According to al-Ghazali, *maslahah* must be essential, which means it is valid when the protection of the five noted essential values (religion, life, intellect, lineage and property) depends on it.

Unlike the majority of the Sunni *'ulama*, who believe that *istislah* cannot be used in the presence of a clear text, Najm al-Din al-Tufi, a Hanbali jurist of the eighth century of *hijra*, held that *maslahah* can be a ground for legislation with or without the existence of *nass* in transactions and temporal affairs. He took his stand by referring to a Hadith from the Holy Prophet which states: "no harm shall be inflicted or reciprocated in Islam". According to al-Tufi, this Hadith provides a clear *nass* in favour of *maslahah* and when there is a conflict between a *maslahah* and *nass*, the former must take priority.[24]

To justify the authority of *istislah*, the *Sunni 'ulama* usually refer to the practice of the Companions and the Successors (*tabi'un*). *Maslahah* was used for the first time, in selecting Abu Bakr as a Caliph for the Muslims despite the Prophet's appointment of Imam 'Ali as his definite successor. Abu Bakr's collecting and

---

[24] See *Ibid.*, pp. 274-5. For more information about al-Tufi's view see also Hallaq, Wael B. *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge: Cambridge University Press, 1997), pp. 150-3.

compiling the scattered records of the Qur'an in a single volume, his nominating 'Umar to succeed him, the suspension of the execution of the prescribed punishment for theft in a year of famine by 'Umar and his approval of the view that a group of criminals may be executed for the murder of one person are some examples of decisions which were taken on the basis of *maslahah*. Some of them, as we can see, contravene the clear text of the Qur'an or the *Sunnah*.

Since it is possible for *maslahah* to become an implement of individual desire in legislation, the validity of *masalih-i mursalah* is questioned by the *Shi'i 'ulama*, some Shafi'i and Maliki jurists like al-Amidi and Ibn Hajib, and Zahiris. However, today in the Islamic republic of Iran the issue of *maslahat-e nezam* or "national exigencies" plays an important part in resolving problems with regard to enacting regulations which appear to be against some rulings of the *Shari'a*. The priority of these regulations, which are sometimes called governmental rulings, is justified by the principle of *al-ahamm wa al-muhimm* (more important and important), which will be explained later.

It seems that Imam Khomeini's opinion is similar to that of al-Tufi. But the rules legislated on the basis of *maslahah* would be considered valid when qualified and upright *mujtahids* take the lead on behalf of the Muslims, although regarding the discretion of the *maslahah* experts in different fields may be consulted. This issue might to clarified by investigating the process of the codification of some Islamic laws in Iran.

5.3.3 The Process of Changes in Islamic Law on the Basis of National Exigencies

After the Islamic revolution in Iran a new initiative began for editing the regulations on the basis of Islamic law. For this reason a council, to be known as the Guardian Council (*shawray-e negahban*), was constituted. The members of this Council included six specialists in different areas of law who were elected by the Islamic Consultative Assembly from among the Muslim jurists nominated by the Head of the Judicial Power, and six *'adil fuqaha* who were selected by the Leader and were conscious of current needs and the issues of the day. According to the constitution of the Islamic Republic of Iran all enactments of the Consultative Assembly (*Majlis*) must be submitted to the Guardian Council. The Guardian Council must examine them within ten days of receipt to see whether or not they can be reconciled with the tenets of Islam and constitutional law. If the Guardian Council finds the enactment contrary to Islamic tenets and constitutional law, it shall return them to the Majlis for reconsideration.[25]

Sometimes it happens that the Guardian Council finds a proposed bill of the Islamic Consultative Assembly to be against the principles of *Shari'a* or the Constitution, while the Assembly is unable to meet the expectations of the Guardian Council. In such cases the National Exigency Council (*majma'-e tashkhis-e maslahat*), among whose members are experts in different areas and eminent *fuqaha*

---

[25] See *The Constitution of the Islamic Republic of Iran*, Articles 91, 94.

appointed by the Leader, shall meet to resolve the problem.[26] The following are some

examples of the legislation passed by this Council.[27]

5.3.3.1 The Process of Change to the Rules regarding Work[28]

After the victory of the Islamic revolution in Iran, some efforts were initiated

to provide a draft of a labour act according to religious texts. The first draft of these

rules, based on the juridical book of hiring, was published by the Minister of Labour

and Social Affairs.

Since most of the rules of such a book cover issues concerning private

employment, there were no obligatory rules in this draft with regard to the maximum

hours of work, the minimum wage, conditions for young, adult and women workers,

insurance, and so forth. All these were left for employees and employers to agree

upon.

This draft was not approved by the relevant government committee, and a

committee was appointed to provide another draft for a labour act. After a year of

investigation a new draft, which was published in the newspapers of the country in

January and February 1983, was provided. In the second draft the views on private

---

[26] See *Ibid.*, Article 112.

[27] For legislation passed by the National Exigencies Council 1988-1997, see Bahram Ihtemami, *Musawabat-e Majama'-e Tashkis-e Maslahat-e Nezam 1367* (H.S)-*1376* (H.S.), First Edition (Intisharate Mushiri, 1376 H.S.)

[28] For detailed information on the process of legislation of subjects mentioned in this research see Ibrahim Shafi'i Sarwastani, "Sayr-e Tatawwur-e Qawanin dar Nezam-e Jumhuri-e Islami-e Iran" in *Majmu'e-ye Maqalat (Majmu'e-ye Athar-e kongare-ye barrasi-e mabani-e feqhi-e hazrat-e Imam Khomein: Naqsh-e Zaman wa Makan dar Ijtihad*: The Collection of Works of the Congress for Investigating the Basis of Imam Khomeini's Juridical Thought: The Role of the Time and Place in *Ijtihad*), Vol. 2: *Ijtihad wa Zaman wa Makan (Part two)* (Qom: Mu'ssase-ye Chap wa Nashr-e 'Uruj, 1374 H.S.), pp. 323-378.

rights had been balanced to a great extent, and the editors of this draft, unlike those of the previous one, paid attention to setting obligatory rules about matters such as insurance, leave with pay, maximum hours of work, minimum wages, and others, that guaranteed the employee's rights when faced with an employer's intransigence.

This draft met with the approval of the Islamic Consultative Assembly and was sent to be evaluated by the Guardian Council. However, the Guardian Council found fault with the first article of the approved bill, by which all those employers, employees, workshops, and manufacturing, industrial, service and agricultural institutes that in someway enjoyed governmental facilities to do with foreign exchange, power, raw materials and bank credits were obliged to conform to the act. The Council also considered that most of the sanctioned or approved parts were illegal according to religious law because they made employers keep promises not mentioned in their contracts, and they sent them back to be corrected.

While the draft labour act was being evaluated by the Guardian Council, the Minister of Labour asked for Imam Khomeini's opinion on the following question: "Is it allowed to enact an obligation for units that use governmental and public facilities and services?" The response was: "In both cases, whether past or present, government can enact obligatory conditions."

However, this response of Imam Khomeini could not change the Guardian Council's opinion; the Council insisted on the idea of the privacy of work relationships and consequently forbade the government to intervene in these relations.

Since there was disagreement between the Islamic Consultative Assembly and the Guardian Council, the labour act bill was sent to the National Exigencies Council.

The Council, after amending and completing some of its articles, approved the bill in November 1990.

5.3.3.2 Compensation Regulations in the Islamic Republic of Iran

Compensation rules under the title of the Islamic Penal Law were edited and approved in the first round of the Islamic Consultative Assembly in Iran in 1982. The significant point about these rules was that the legislators had contented themselves with merely referring to the translation of Imam Khomeini's text *Tahrir al-Wasilah*, regardless of the sociol-economic circumstances of the community in which these rules were supposed to be practised. Consequently the mutilation compensations and blood money had been determined according to the six things mentioned in the religious juridical books, namely camels, cows, sheep, *hulla Yamani* (a special dress), *dinar* and *dirham*.[29] With the agreement of both sides or owing to the unavailability of all six things, the equivalant price would be payable. The one to pay the compensation could choose one of the mentioned things.

Taking such a decision to determine the amount of compensation finally led to a situation in which *dirham* became the main from of payment of compensation in courts, because its real value was less than the others. This practice considerably reduced the real value of blood money.

---

[29] According to the juridical books the blood money for killing a Muslim man is one hundred camels or two hundred cows or one thousand sheep (they should be healthy and not too thin) or two hundred *hulla* or one thousand special gold coins (*dinar*) or ten thousand special silver coins (*dirham*). They should be paid by the killer (if he is forgiven and not killed, or in the case of manslaughter) to the victim's family.

In 1991 the compensation regulations were revised. In this revision, however, no noticeable change occurred, and the problem still existed of the lack of a proper criterion to determine the amount of compensation according to the exigencies of the time so that the interests of the injured people could be protected appropriately.

In 1992 the judicial system propounded an innovative idea and announced that because there still existed real camels, cows and sheep, the value of silver coin (*dirham*) could not be accepted as the only from of compensation, and so one of the mentioned animals, or its price according to the agreement of the one to whom the compensation is paid, should be determined as the unit of compensation. Consequently the amount of blood money increased by as much as ten times the amount paid in the courts.

However, as a result of objections to this sudden increase in the amount of compensation, the head of the judiciary power announced that no precedents regarding compensation payment had been set and that previous practice would continue. This announcement stopped the reform movement towards a better compensation payment system.

In 1995 the Minister of Justice, on the strength of a *fatwa* from the Supreme Leader, Ayatollah Khamanaei, issued a circular in which, in addition to determining the market prices of the mentioned animals, he obliged all the judicial departments to determine the amount of compensation payments based on the announced prices. Although there is still no fixed amount determined for compensation payments (there are some differences between blood money on the basis of the prices of one hundred camels or two hundred cows or one thousand sheep) the issuance of such a circular indicates that the attention of the judicial system of an Islamic country has turned to

the necessity of the proportionate reformation of Islamic rules according to the exigencies of the time.

5.3.3.3 Loss Caused by a Delay in Payment, and Usury in Banking

One of the controversial issues in the Islamic Republic of Iran which was resolved by the intervention of the National Exigencies Council was the problem of the loss caused by delayed payments.

Before the establishment of the Islamic Republic in Iran, according to some articles of the civil law regarding cash debts if a debtor delayed the payment of his debt beyond the agreed date, the creditor could bring a complaint to the court and ask for the "delayed payment penalty", the amount for each year of delay not exceeding more than twelve per cent of the total amount of the debt.

However, after the establishment of the Islamic system, the correctness of this situation was doubted and in three phases the rules regarding the delayed payment penalty changed.

In the first phase the Guardian Council, basing its judgement on Imam Khomeini's opinion, found the delay payment penalty to be usury. The members of this Council, making void the rules in this field, announced that taking any additional amount as the delayed payment penalty is against the religion.

In the second phase, because of some problems in the banking system of the country resulting from making void the delayed payment penalty, the Guardian Council agreed to allow the banks to include the following clause in their contracts with people asking for loans: "If the loan is not completely paid back by the date determined in the contract, there will be a penalty for the person signing this contract,

because of delay in payment from the due date up to the complete pay back date."
According to this clause people asking for loans undertook "to pay the bank as penalty an amount of twelve per cent of the outstanding debt mentioned in the contract, for each year". In other words, in this phase the Guardian Council agreed that borrowers from the banking system of the country, in the case of delay in payment of their debt, should pay an amount in addition to the amount of the loan. Of course, this extra payment was not considered as a delay penalty payment, but as resulting from a promise undertaken by the borrower on signing the contract and in fact, the amount of this extra payment was the same twelve per cent determined as the delayed payment penalty before the Islamic revolution.

However, the solution accepted by the Guardian Council could not completely properly remove the problem banks faced regarding the large loans taken out before the Islamic revolution and the establishment of the new banking system in the country, whose due date had already matured, because in the contracts for these loans the above-mentioned promise had not been undertaken by borrowers. Therefore, payment of the extra amount could not be insisted upon.

The continuation of this problem and the Guardian Council's holding to its conception, at last forced the matter to be presented to the National Exigencies Council; thus was initiated the third phase of the consideration of the rules of delayed payment penalty in the Islamic Republic of Iran.

The National Exigencies Council in January 1989 through approval of a law under the title of "the law concerning the recovery of bank claims", obliged all real or legal persons who had taken out any kind of loan from a bank before the interest free banking system was approved in September 1983, to pay back the claim according to

the rules and conditions of the time of the loan, including both the original amount and the additional costs and penalties.

By studying the examples which are mentioned above we may conclude that the execution of Islamic rules which is presented in traditional manner sometimes cannot meet the requirements of the modern age. Today, in order to overcome this problem, *Shi'i* *'ulama* rely on the authority of the *faqih* and his right to enact regulations on the basis of the public interest, which is mostly realised by the deliberation of experts from different backgrounds.

Bearing in mind the refusal of the ancient *Shi'i* *'ulama* to accept *maslahah* as a source of the *Shari'a*, we may consider Imam Khomeini as the founder of a new approach in *Shi'i* jurisprudence which adapts Islamic rules to the requirements of the time. Before setting forth the problems to be solved by the National Exigencies Council, however, he paid great attention to the role of the time and place in *ijtihad*. Addressing the members of the Guardian Council , he says:

> I point out in a fatherly way to the members of the Guardian Council that before these objections, they consider the expediency of the regime (*maslahat-e nezam*), because one of the crucial points in today's riotous world is the role of time and place in *ijtihad* and in making decisions. Government determines the practical philosophy of confronting atheism and polytheism and intricate national and international problems, and these scholarly debates in the theoretical framework, are not only insoluble but would lead us to deadlocks which would end in apparent violation of the constitution.[30]

---

[30] *Sahifa-ye Noor*, Vol. 21, p. 61.

5.4 Primary (*awwaliyyah*) and Secondary (*thanawiyyah*), and Real (*waqi'iyyah*) and Apparent (*zahiriyyah*) Commandments

One way of classifying Divine commandments is dividing them into primary and secondary commandments, based on the conditions in which the agent (*mukallaf*) happens to be.

As explained before, according to the *Shi'ites*, all legislation originated from the Holy Legislator is based on expediencies or evils relating to human beings in this world or the hereafter. Whenever there lies an interest to be gained, there is an obligation, and whenever there lies an evil or corruption which must be avoided, there exists a prohibition by God. His communications concerning human conduct, which occur in the five varieties of *wajib, mandub, haram, makruh* and *mubah*, are called "real primary commandments" (*al-hukm al-waqi'iyyah al-awwaliyyah*) by the *fuqaha*. A "real" commandment is a law or value of the *Shari'a* (*al-hukm al-Shar'i*) which is ordained regardless of the agent's (*mukallaf*) knowledge or ignorance. A commandment is "primary" when it is issued without considering the agent's capability of doing it, or regardless of its incompatibility with other most important expediencies which must be gained.

"Real primary commandments" can be discovered by referring to the definitive proofs of the Qur'an or *Sunna*. If, however, a *mujtahid* or a *mukallaf* is not capable of finding out the real commandment, he may be asked to perform a duty which is established in a speculative (*zanni*) authority, such as *ahad* traditions, or to do something according to the procedural principles (which have been discussed in chapter three) to be free from doubt. In the terminology of *usul al-fiqh*, duties which

are discovered in such a way are called "apparent" commandments in comparison with "real" ones.

If as a result of specific conditions the agent is unable to act according to the real primary commandment, the Lawgiver may ordain another commandment in that field, which is called a "secondary commandment". In such a commandment the subject matter of the *hukm* is considered from a secondary perspective (*al-'unwanu al-thanawi*). The following are cases in which the primary law may be suspended and secondary commandments followed:

5.4.1 The case of burden and impediment(*al-'Usr wa al-Haraj*)

If one will be caused great distress if he acts according to the "primary" commandment, he should follow an alternative commandment ordained in that regard. The reason for such a permission is some verses of the Qur'an:

> And he has not laid upon you any hardship in religion.[31]

> Allah desires ease for you, and He does not desire for you difficulty.[32]

On the strength of the above verses, a number of precepts are issued by the infallible Imams.[33]

5.4.2 The case of constraint (*al-Idtirar*)

According to the following verses the prohibition of eating certain things will be cancelled for one who is desperately in need of them:

---

[31] The Qur'an, 22:78.

[32] The Qur'an, 2:185.

[33] See for example: al-Hurr al-'Amili, Muhammad Ibn al-Hasan, *Wasa'il al-Shi'a ila Tahsil Masa'il al-Shari'a*, Vol. 1 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran), Chapter (bab) 39, p. 464, No. 1231.

He has forbidden you what dies of itself, and blood, and flesh of swine, and that over which any other (name) than (that) of Allah has been invoked; but whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him.[34]

He had already made plain to you what He has forbidden to you excepting what you are compelled to.[35]

By extension of the rule, it may apply to issues other than that concerning edible things. So whatever is forbidden is actually permissible in the case of exigency and coercion.

5.4.3 The Case of Inflicting or Reciprocating Harm (*al-Darar wa al-Dirar*)

One of the most influential issues in issuing secondary commandments is when the performance of an injunction results in illness or harm to the people concerned. According to some verses of the Qur'an and some narrations no harm and injury shall be inflicted or reciprocated in Islam:

Neither shall a mother be made to suffer harm on account of her child, nor a father on account of his child.[36]

From the traditions in this regard, a famous story is that of Samra ibn Jundab which is quoted in both *Shi'i* and Sunni sources with some differences:

From Zurara from Abi Ja'far (the fifth Imam peace be upon him): "Samra ibn Jundab had a yielding date-palm in a farm. The house of an *ansari* was built at the entrance of the farm, and Samra used to pass through it on his way to his palm-tree,

---

[34] The Qur'an, 2:173.

[35] The Qur'an, 6:119. See also 16: 115; 5: 3

[36] The Qur'an 2:233. See also 65: 6; 2: 282; 2:231; 4:12.

without asking the *ansari*'s permission. The *ansari*[37] talked to him and told him to ask his permission before entering, but Samra refused. So, the *ansari* came to the Messenger of Allah, complaining and telling him the story. The Messenger of Allah, peace be upon him, summoned Samra, informed him about the *ansari's* complaint, and told him: "when you want to enter ask for permission". Samra refused. The Prophet asked him to sell the tree to the *ansari*, and he offered him a price, and began increasing it until he reached a very high price, but the man continued to refuse. The Messenger of Allah said: "if you dig it up you will instead have a tree in paradise". He still refused. At this point the Messenger of Allah told the *ansari*: "Go dig it out and throw the tree away, as there is neither harm nor injury (*la darara wa la dirar*)".[38]

As a result of the harm Samra caused the *ansari*, his right of possession of the palm was rescinded and the *ansari* obtained the right to violate Samra's property by a secondary commandment.

It is obvious that if one is hurt through following a commandment, it will be cancelled for him. However, should a commandment that is harmful in general to the members of a community be cancelled, even for the ones who are not threatened with any harm?

---

[37]*Ansariyyun* (plural of *ansari*) is a term used for those people of Medina who helped the Prophet and the *muhajirun* (those people who moved with Prophet from Mecca to Medina) to stay in Medina.

[38] See Muhammad Ibn Ya'qub Ibn Ishaq, al-Kulayni al-Razi, *op. cit.*, Vol. 5, p. 292, No. 2. See also p. 280, No. 4; p. 294, No. 8. The statement *la darara wa la dirar* is cited on various occasions and in different languages. In one record the statement is *la darara wa la dirar fi* al-Islam (see al-Hurr al-'Amili, *op. cit.*, Vol. 26, Chapter (*bab*) 1, P. 14, No. 32382). In some records the phrase "*'ala al-mu'min*" is used instead of *fi* al-Islam (see for example: *Ibid.*, Vol. 25, Chapter 12, p. 429, No. 32282).

The answer to this question depends on the criterion of the nature and scope of the harm. If the criterion is personal harm, the injury that might happen to people in general does not lead to a general cancellation of the commandment. However if we accept that the criterion is general harm, cancellation will be general. There is, however, no agreement on this issue between jurists.

Another noteworthy issue in the rule of *la darar* is opposition between two harms. In the above story, for example, the *ansari* is permitted to dig out Samra's palm-tree; Samra's right of possession is rescinded: so Samra is harmed. Why, then, is Samra's right ignored and the *ansari* is not ordered, for example, to move his house?

The answer to this question may be found by invoking another rule, namely the rule of *al-ahamm wa al muhimm* (more important and important), which indicates that in an opposition between two things the one which is greater in importance has priority.

With regard to the meaning of the phrase *la darara wa la dirar* several possibilities are considered by the *'ulama*. Some of them are as follows:

1. The phrase *la darara wa la dirar* indicates that harm is prohibited. So it is an injunction to avoid inflicting harm.

2. The phrase cancels a juridical commandment which results in damage. So by the rule the cause is cancelled.

3. "No harm" refers to a damage which is not remediable. So, a remediable damage is not the subject of prohibition by this rule.

189

4. *la darara wa la dirar* is ordained by the Holy Prophet as the leader of the Muslim community and so is a governmental commandment.[39]

5.4.4 The Case of Dissimulation (*al-Taqiyyah*)

When by obeying a primary commandment a *mukallaf* confronts a danger from enemies, on the basis of *taqiyyah* it would be permissible for him to act differently. The proof is a number of traditions from infallible Imams and some verses of the Quran in this regard:

> Let not the believers take the unbelievers for friends rather than believers; and whoever does this, he shall have nothing of (the guardianship of) Allah, but you should guard yourselves against them, guarding carefully.[40]

In one tradition from the fifth Imam, peace be upon him, it is quoted that:

> *Taqiyyah* is (obligatory) in every thing that a human being is desperately in need of. Allah has permitted it for him.[41]

The above verse and tradition indicate that in some situations *taqiyyah* is permissible or even obligatory. In the case of *taqiyyah* a secondary commandment should be followed instead of a primary one. When *taqiyyah* is obligatory (for one's life for example), it makes prohibited (*haram*) or obliged (*wajib*) issues to become permissible (*mubah*).

---

[39] See Muhammad Rahmani "Ahkam-e Hukumati wa Zaman wa Makan" in *Majmu'e-ye Maqalat*, op. cit. Vol. 7: *Milakat-e Ahkam-e Hukumati*, P. 235. For study on the rule "*la darara wa la dirar*" see R. M. al-Khomeini, *Al-Rasa'il*, Vol. 1 (Qom: Mu'ssese-ye Matbu'ati-e Isma'iliyan, Rabi' al-Awwal, 1385), pp. 6-68.

[40] The Qur'an, 3:28.

[41] Al-Hurr al-Amili, *op. cit.*, Vol. 16, Chapter 25, p. 214, No. 21393.

There are some traditions from infallible Imams in which they have issued commandments according to *taqiyyah* because they felt that danger from non-Shi'ite Muslims threatened their followers. To infer the precepts of the *Shari'a* from *ahad* traditions, a *mujtahid* must be careful to distinguish those which are issued on the basis of *taqiyyah*. These traditions may be recognised when, being compared with other traditions or definitive proofs of the *Shari'a*, there is no possibility of reconciliation.

Like the other rulings of the *shari'a*, *taqiyyah* is divided into *wajib*, *mandub*, *haram*, *makruh* and *mubah*. This means that in some circumstances it is obligatory to perform duties in accordance with *taqiyyah* while in other situations it is preferred or forbidden. In some cases some people are permitted to resort to *taqiyyah* while others are not. Imam Khomeini in this regard states:

The purpose of *taqiyyah* is the preservation of Islam and the *Shi'i* school; if people had not resorted to it, our school of thought would have been destroyed. *Taqiyyah* relates to the branches (*furu'*) of religion-for example, performing ablution in different ways. But when the chief principles of Islam and its welfare are endangered, there can be no question of silence or *taqiyyah*. If they try to force a *faqih* to mount the *minbar* and speak in a way contrary to God's command, can he obey them, telling himself, "*Taqiyyah* is my religion and the religion of my forefather"? The question of *taqiyyah* does not even rise here.[42]

---

[42] Hamid Algar, *op. cit.*, p. 144. For a study on *taqiyyah* see R. M. al-Khomeini, *Al- Rasa'il.*, op.cit., Vol. 2, pp. 174-210.

5.4.5 The case of Opposition between More Important and Important (*al-Ahamm wa al- Muhimm)*

As I have mentioned on the subject of *'aql* as a source of the *Shari'a*, sometimes two things become obligatory at the same time, although it is not possible to perform both of them. In such a case, judging on the basis of reason, we must perform the one of greater importance (*ahamm*) and leave the other (*muhimm*), although according to its primary commandment it is not permitted to avoid it. According to *qa'idat al-mulazama* (the rule of correlation), which states that whatever is ordered by reason is also ordered by religion, giving priority to *ahamm* when it coincides with an opposing ruling is obligatory. This causes some changes in less important when they confront the others.

The important thing in the issue of *al-ahamm wa al-muhimm* is recognition of *al-ahamm* (the one which is more important). This should be done by considering all the criteria observed by the Holy Legislator. For example, by studying His commandments we understand that protecting one's life is more important than avoiding a sin (eating the meat of carrion to preserve one's life for example), while protecting Islam is more important than risking one's life.

Giving priority to *ahamm* applies with regard to many juridical issues, especially social ones. Solutions to many social, political and economic problems in the Islamic Republic of Iran, some of which were mentioned before, rely on a correct view of this matter. According to Imam Khomeini, "[The] expediency of the (Islamic) regime (*maslahate nezam*) is one of the most important issues, the neglecting of which may end to the failure of dear Islam." It is on the basis of his view that in the case of opposition between some rulings of the *Shari'a* and regulations which meet

the approval of the National Exigency Council (*majma'-e tashkhis-e maslahat-e nezam*) the latter come to be practised.

Chapter Six

Ijtihad and New Questions (*al-Masa'il al-Mustahdatha*) in *fiqh*

6.1 Introduction

Although technical works of *fiqh* or *usul al-fiqh* discuss the reasons for and sources of the many Islamic rules, it rarely happens that *'ulama* explain the reasons which lead them to a particular *fatwa* concerning new questions. In this chapter, giving some examples, I try to explain the stages through which a *mujtahid* finds out the ruling of the *Shari'a* on a new question on which the Qur'an and the *Sunna* are silent, and which has not been discussed before by scholars. I start by giving a brief introduction to the issues of *fiqh*.

6.2 An Introduction to the Issues of *fiqh*

As we have seen, according to Muslims Islam is the last and the most complete of all religions and takes into consideration all aspects of human life. Among the many branches of Islamic scholarship dealing with belief, morality and

practical rules, *fiqh* is the one whose range is widest. It includes all of the Islamic

instructions regarding one's behaviour in both private and public affairs. Over the

centuries, *'ulama* have focused their efforts on discerning Islamic directions with

regard to new questions raised by changing circumstances. Their endeavours in this

regard have resulted in a great expansion in *fiqh* or Islamic jurisprudence.

The issues of *fiqh* or practical rules of Islam, which are discussed in detail in

fiqhi works, are divided generally into three main areas: devotional matters (*al-

'ibadat*), transactions (*al-mu'amalat*), and laws (*al-ahkam*).[1] In this traditional

division of the issues of *fiqh*, followed now by the majority of *'ulama, al-'ibadat*

refers to the obligatory actions that ought to be done just for the sake of drawing

nearer to God (*qasd al-qurba ila Allah*) and if there is any other motivation for their

---

[1] For different classifications of the Islamic precepts introduced by both ancient and contemporary
'ulama see Tabataba'i Modarresi, Hossein, *An Introduction to Shi'i law: A Bibliography Study*
(London: Ithaca Press, 1984), pp. 13-18. The one which is closest to the modern Western approach
to the classification of legal subjects is that introduced by al-Shahid Baqir al-Sadr in the
introductory chapter of *al-fatwa al-wadiha*. He has divided the rules of the *Shari'a* into four
categories as follows:

1) *'Ibadat*, i.e. purity, prayer, fasting , etc.

2) The rules related to property, both public and private. The first set of rules concerns
property dedicated to matters of public interest such as *anfal, kharaj, khums, zakat*, etc.
The second set the rules concerning private property, cover such matters as the legal right
of possession, sale, inheritance, loans, revival of wastelands by individuals, hunting, etc.

3) Private affairs, which are subdivided into regulations governing the relationship between
men and women, and regulations dealing with private behavior in other spheres. The first
includes the rules of marriage, divorce and family law in general. The second contains the
rules concerning food, drink, clothing, accommodation, social behavior, promises, animal
slaughter, hunting, enjoining good and forbidding evil, oaths, etc.

4) Public affairs, by which is meant matters relating to the ruler (*waliyyu al-amr*) including
the rules of justice, penal provisions (*hudud*), international relations, *jihad*, etc. See Chibli
Mallat, *The Renewal of Islamic law: Muhammad Baqir as-Sadr, Najaf and the Shi'i
International* (Cambridge: Cambridge University Press, 1993), pp. 13-14.

performance, the obligation is not fulfilled and the actions must be done again. However, the second and third issues of *fiqh*, namely transactions and laws, do not have such a prerequisite. In contradiction to *al-ahkam*, the actualisation of transactions depends upon the execution of special contracts. If one sided, the transactions will be categorised as *al-iqa'at* (dispositions which can be carried out without the agreement of the other party, like divorce, manumission of slaves and so on), and if between two parties, they are called *al-'uqud* and concern such matters as selling and buying, marriage, and so on. Those subjects of *fiqh* which cannot be classified as devotional matters or contracts fall into the category of *al-ahkam*. These issues include the rules of hunting, slaughtering, foods and drinks, usurpation (*al-qasb*), right of pre-emption (*haqq al-shuf'a*)[2], cultivation of wasteland (*ihya' al-amwat*), found property (*al-luqata*), inheritance, arbitration (*al-qadawah*), testimony, punishments (*al-hudud wa al-ta'zirat*), retaliation (*al-qisas*), blood-money (*al-diyat*) and so on.

But a yet more detailed map of the divisions and subdivisions of *fiqh* issues is necessary. In Islamic works each aspect of jurisprudence is discussed in a chapter entitled "the book" or *bab*. The section on *al-'ibadat* consists of ten chapters covering: ritual purity (*al-tahara*); prayer (*al-salat*) including discussions on the times and directions of prayer, and also the social status of the *faqih* and the nature of Islamic government in the part devoted to Friday prayer; alms tax (*al-zakat*); the one fifth tax (*al-khums*); fasting (*al-sawm*); seclusion (*al-i'tikaf*), which to be regarded as a desirable act of devotion should be performed in the congregational mosque of the

---

[2] The co-owner's right to priority to buy the other share of the property, so that he can dissolve the sale of that share if it is sold to an outsider without his agreement.

town; pilgrimage to Mecca during the special period and with its special laws (*al-hajj*); *hajj* outside the holy month (*al-'umra*); the holy war (*al-jihad*); and ordering what is good and forbidding what is evil (*al-amr bi al-ma'ruf wa al-nahyi 'an al-munkar*).[3]

Under the category of *al-'uqud* come transactions (*al-matajir*); mortgages (*al-rahn*); bankruptcy (*al-mufallas*) including discussions on the responsibility of the Islamic state when somebody is declared bankrupt and his assets do not balance his liabilities; interdiction (*al-hajr*) involving cases where an owner is legally forbidden to dispose of his own property; liability (*al-diman*); conciliation (*al-sulh*); partnerships (*al-shirka*); partnership of capital and labour (*al-mudariba*); contracts for agricultural purposes (*al-muzari'a wa al-musaqat*); deposit (*al-wadi'a*); lending an object to another party to make use of it (*al-'ariya*); hire (*al-ijara*); representation or power of disposal over another (*al-wikala*); endowments and charity (*al-wuquf wa al-sadaqat*); temporary endowment (*al-sukna wa al-habs*); gifts (*al-hibat*); wagers on horse-races and shooting (*al-sabq wa al-rimaya*); legacies or wills (*al-wasiya*); and marriage (*al-nikah*).

This kind of contract, taking place between two parties, must be recited by both sides. One party states the contract (*al-ijab*) and the other accepts it (*al-qabul*). In some cases the validity of the contract depends on the reciting of special words. For example, in marriage the majority of *Shi'ite 'ulama* hold that the words of contract (*al-sighah*) must be in Arabic using the past tense (because it conveys the

---

[3] Although enjoining good and forbidding evil (*al-amr bi al-ma'ruf wa al-nahyi 'an al-munkar*) is usually mentioned in connecting with *'ibadat*, according to Imam Khomeini the intention to draw near to God is not necessary for that (See Imam Khomeini, *Risala: tawdih al-masa'il* (Qom: Kanun-e Intisharat-e Mehrab, 1366, H.S.), p. 494, Issue: 2790).

meaning of certainty) derived from the root *al-zawaj* or *al-nikah*.[4] This is because

both these words convey the meaning of the marriage and their use is testified by the

Qur'an itself: "But when Zaid had accomplished his want of her, we gave her to you

as a wife (*zawwajnakaha*)"[5]; "He said: I desire to marry one of these two daughters

of mine to you (*onkihaka ihday ibnatayya*)".[6]

The issues which are discussed in the category of *al-iqa'at* are as follows:

divorce (*al-talaq*) with its all variations including those wholly or partly instigated by

the wife (*al-khul' wa al-mubarat*); *al-zihar* (a kind of divorce in pre-Islamic Arabia

using a phrase which is forbidden in Islam)[7]; *al-ila'* (a husband's oath to abstain from

marital intercourse for a period of more than four months); *al-li'an* (cursing each

other which is related to the marital affairs); *al-'itq* (manumission of slaves); *al-*

---

[4] Like *Shi'ite* jurists, Shafi'is consider that the words used in the marriage contract should be
derivatives of the roots *al-zawaj* or *al-nikah*. According to the Malikis and the Hanbalis, in addition
to the words derived from *al-zawaj* and *al-nikah*, the word *al-hibah* can also be used for the
marriage contract when the amount payable as dowry (*sidaq*) is mentioned. For the use of the word
hibah, they have based their argument on the verse of the Qur'an: "And a believing woman if she
gave herself (*wahabat nafsaha*) to the Prophet, if the Prophet desired to marry her ..." (33: 50).

Hanafis hold that the marriage contract can be recited by any word conveying the intention
of marriage, even if the words belong to the roots *al-tamlik, al-hibah, al-bay', al-'ata', al-ibahah*
and *ihlal*, provided these words indicate their being used for the purpose of marriage. But the
contract will be invalid if the words used are derived from *al-ijarah* (hiring) and *al-i'arah* (lending).
(For more detail see Laleh Bakhtiar, *Encyclopedia of Islamic Law: A Compendium of the Major
Schools*, (Chicago: ABC International Group, Inc., 1996), pp. 397-8. The book is a comparative
study of the Islamic law developed by the five major schools: Hanafi, Hanbali, Shafi'i, Maliki and
Shi'i, and based on two main Arabic sources: *al-Fiqh 'ala Madhahb al-Arbi'a* and *al-Fiqh 'ala
Madhahib al-Khamsah* written by Allamah Muhammad Jawad Mughniyah.

[5] The Qur'an, 33:37.

[6] The Qur'an, 28:27.

[7] *Zihar* is a husband's statement to his wife, saying her back is like his mother's. According to
Islamic law this declaration requires a religious expiation.

tadbir and *al-mukatiba* and a*l-istilad* (three ways for slaves to acquire their freedom); *al-iqrar* (confession or acknowledgement of debt); *al-ju'alah* (offering reward for a certain act); *al-nadhr* (religious vow); and *al-yamin* (oath).

As we can see the variety of the subjects discussed in *fiqh* is so great that sometimes they are not related in the smallest way. The only thing that gathers them together under one branch is considering the Islamic instructions discovered from the sources of the *Shari'a*.

In addition to all the issues which are mentioned above there are some others that the ancient *'ulama* could not have dealt with. These issues, which are mostly the consequence of social, political and economic developments or recent scientific advances, are known in *fiqh* as *al-masa'il al-mustahdatha* (new questions). Some of these questions concern insurance policies, buying and selling shares, banking, fees for unlocking or key-money, national lotteries, artificial insemination and reproduction, medical dissection, selling blood, the donation and transplantation of human organs, changing sex, family planning, slaughtering with machines, eating imported red meat and chicken, watching television, praying at the North and South Poles where the length of nights and days varies enormously, and so on.

There are also some questions that were discussed before by the *'ulama* but changing needs and conditions necessitate new investigations. For example, the participation of women in social affairs, relationships with non-Muslims, music and singing (not just for amusement but for educational purposes for example), representational art, the limits of the authority of the *faqih*, the role of the media are some of the subjects that have raised new debates.

6.3 Drawing Conclusions on New Issues

In order to obtain the rulings of the *Shari'a* on new questions, a *mujtahid* should pass through several phases which will be discussed here along with some examples. However, it should be mentioned first that the method of reaching a conclusion in subjects which belong to different sections of *fiqh* (for example, devotional matters or transactions) varies and each group requires its own specific principles. Since new issues commonly do not belong to devotional matters I will focus on the methods of deduction in other subjects.

6.3.1 Identifying the Subject Matters (*mawdu'at*) of the Commandments

Al-mawdu', the subject matter, means what ordains the command of religion. In the precise terminology of jurists there are two expressions, namely *al-muta'llaq* and *al-mawdu'*. By the former they mean the actions which become obligatory or prohibited through religious commandments, such as *drinking* intoxicants, and the latter refers to the external entity or substance, such as the wine itself.

One of the most significant and considerable tasks in *fiqh* is recognition of the subjects and of the duty of the *mujtahid* in this regard. Without having a precise knowledge of a questioned subject, it is impossible to deduce correctly the command of religion (*hukm*) concerning it. *Fuqaha* have frankly admitted that in many cases suspicion regarding the *hukm* is a result of suspicion about the *mawdu'* and insufficient acquaintance with it. This is why they have sometimes discussed the subject matters of the commandments as well as the rules. For example, Shaykh

Ansari in his book *Makasib al-Muharramah* defines some subjects such as bribes, magic, profane singing, and so forth, when discussing their values (*hukm*).[8]

The statement that Islam can meet all human needs does not mean that all the commandments have been represented in detail by the Qur'an and *Sunna* or extracted and stated by the *fuqaha*. There are some issues now, and many to be encountered in the future, that have not been discussed and examined yet. The ability of Islam to meet the needs of Muslims requires great effort from Islamic scholars.

In the previous chapter I discussed the different types of *mawdu'* and their role in connection with the variability of *hukm*. I explained that there are two kinds of subjects: "pure" (*sirf*) and inferred (*mustanbat*). Inferred subjects are also divided into two kinds. Some of them are fixed and do not vary from one time or place to another. Others are variable, in the sense that they are influenced by surrounding circumstances. While the responsibility to identify a "pure" subject is left to *mukallaf* or other experts, identification of an inferred subject is a matter for the jurists.

Since rules depend on subjects, the identification of all conceivable kinds of subjects plays some part in Islamic jurisprudence and inferring the rules. Today, considering the fact that the appearance of new subjects or their adaptation to modern times necessitates the possession of a great range of knowledge, a serious problem for a *faqih* is having adequate knowledge about all the required subjects whose rulings he is supposed to deduce in different circumstances.

To overcome this problem, some scholars have suggested that the branches of jurisprudence should be specialised and that each jurist, after acquiring the ability to

---

[8] See Shaykh al-Murtada al-Ansari, *Al-Makasib al-Muharama* (copy in the handwriting of Tahir al-Khushniwis, 1375 H.Q.), pp. 30, 32, 36-7.

deduce in all the juridical fields, should focus thoroughly on a single aspect and leave the rest of jurisprudence to others. In the terminology of *usul al-fiqh* this is known as *al-ijtihad al-mutajazzi* ("partial *ijtihad*").[9] According to this suggestion, ordinary people may simultaneously follow several living *mujtahids*, who would be experts in particular aspects of *fiqh*.

Although "division in *ijtihad*" (*tajazzu' al-ijtihad*) had also been previously suggested by some of the *Shi'i* and *Sunni 'ulama*[10], it has not been accepted by all the *fuqaha*. One problem with this idea is that, according to *Shi'i 'ulama*, it is obligatory to follow (*taqlid*) the most learned (*a'lam*) *mujtahid* who has exercised *ijtihad* in all sections of *fiqh* and is the most capable of inferring the rules from the sources. So, even if one is expert in a particular subject of *fiqh*, but is not a full-fledged *mujtahid* (*mujtahid mutlaq*) or the most learned in the methodology of *fiqh*, his opinion could only validly be followed by himself.

The second solution is that before issuing a *fatwa*, *fuqaha* should consult with experts in the subjects and problems which require special knowledge and research. This solution could be applied in identification of the "pure" (*sirf*) subjects. Earlier I explained how on the basis of the ichthyologists' opinion the permissibility (*hilliyyah*) of eating particular kinds of questioned fishes was issued.[11] To give another example I turn to family planning procedures. Methods which prevent a

---

[9] For a discussion on "partial *ijtihad*" see al-Mirza al-Gharawi al-Tabrizi (ed.). *Al-Tanqih fi Sharh al-'Urwah al-Wuthqa: al-Ijtihad wa al-Taqlid,* Representation (*al-taqrirat*) of Ayatollah Abu al-Qasim al-Musawi al-Khoei's Discussion on *fiqh* (Qom: Ansariyan Publications), pp. 33-34.

[10] For example, see al-Imam al-Ghazali, *al-mustasfa min 'ilm al-usul* (Beirut: Mu'assisa al-Risalah), Vol. 2, p. 389: "I do not believe that ijtihad is indivisible. Indeed, it is permissible that a jurist (*'alim*) reach the position of *ijtihad* in some issues and not others ...".

[11] See Chapter Five, footnotes, No. 5.

woman becoming pregnant, as long as they do not cause barrenness, are permitted by the *Shi'i fuqaha*. Terminating a pregnancy, however, even in first few hours, is forbidden. To legitimise the use of contemporary contraceptives, a *mujtahid* needs to have a sufficient knowledge of the effect and the manner of usage available only from specialists in this area.

The best way, perhaps, that a *mujtahid* may be followed, lies in organising some groups to specialise in different fields of *fiqh* under his supervision. To have a clear idea about the subjects, these groups should employ experts in their own field of research. Besides considering the opinion of these experts, each group should submit their deduced opinion to a *marja'* (a *mujtahid* to be followed) for inspection before presenting it again to the followers. By employing this method one combines both solutions, while avoiding the related problems.

Although this method is not applied by the *fuqaha* who are traditionally considered as *marja'*, it is more or less what is practised in legislative procedures in the Islamic Republic of Iran. As has been mentioned, all legislation passed by the Islamic Consultative Assembly should be reviewed by the Guardian Council, among whose members are six just (*'adil*) *fuqaha*. They must be conscious of the needs and issues of the present day, and be selected by the Leader.

It is obvious that different regulations are designed by experts in different areas who are responsible for finding detailed and sufficient directions for the requirements of the country. These experts, however, are not necessarily jurists. So whatever is approved by the Consultative Assembly should be checked by the Guardian Council to ensure its compatibility with Islam. The Council may consider the opinions of other *mujtahidun* when they examine the matters under consideration.

If the Guardian Council finds the legislation incompatible with the *Shari'a*, it will return it to the Assembly for review.[12] Because of the Islamic nature of the Government, all the confirmed legislation by the Guardian Council will be considered as valid as other Islamic injunctions.

In particular situations when the Consultative Assembly and the Guardian Council fail to agree on theological and legal points, then the acts of the National Exigencies Council (*Majma'-e Tashkhis-e Maslehat-e Nezam*) will be deemed enforceable. The members of this Council are some leading jurists and experts in different areas, whose final opinion would be trusted to be a decision in the public interest.

6.3.2 Comparing the New Question with other Examined Subjects

The *faqih* needs to find out under which category of *fiqh* the new question should be discussed. He may either find some similarity between the new question and other subjects which have previously been discussed by him or other *fuqaha*, or the issue may be so new that it may not be comparable to any of the existing issues in *fiqh*.

In the first case the questioned issue might be discussed under one of the juridical titles, and all or some of the related values (*hukm*) may fit the subject. It is also possible that in spite of the similarity between the new question and other subjects, the *faqih* cannot categorise them under the same title. If this is so, some general or specific rules which are applied to similar issues may also be used for the

---

[12] *The Constitution of the Islamic Republic of Iran*, Article 94.

new subject. To give two examples, I discus below insurance policies and banking as they are perceived by the *fuqaha*.

6.3.2.1 *Fuqaha* and Insurance Policies

Fuqaha consider insurance policies as special contracts (*'aqd*). So they require the presence of all the essential conditions such as puberty (*blugh*), *'aql* (sound intellect) and *ikhtiyar* (having free choice in accepting the contract) which appear in other similar contracts, and apply to both sides; and also *ijab*, *qabul*, and so forth, are as necessary in insurance policies as they are in other valid contracts.

With regard to the question of whether insurance is an independent kind of contract or the same as other known contracts such as *diman, hibah, sulh*, and so on, various opinions are held. Imam Khomeini in this regard says:

> It appears that insurance is an independent contract, and the common insurance policies are neither *sulh*, nor *hibah al-mu'awwidah*. They can be a kind of *diman al-mu'awwad*. But it is more likely that insurance is an independent contract. It is not *diman al-'uhdah*, rather it is likely to be responsible to cover a damage, although it is possible to carry it out in the form of *sulh* or *hibah al-mu'awwidah* or *diman al-mu'awwad*. Insurance policies in all forms are valid contracts *'ala al-aqwa*. Insurance is an enforceable contract which neither side of the contract may cancel unless it is predetermined.[13]

---

[13] R. M. al-Khomeini, *Tahrir al-Wasilah* (Dar al-Sirat al-Mustaqim), Vol. 2, pp. 609-10.

6.3.2.2 *Fuqaha* and Banking

The attempts of Islamic scholars to justify the planning of an interest-free banking system on the basis of known contracts such as *mudariba, musharikah, muzari'ah, ju'alah*, and so on is another example of the comparison of new questions with other juridical titles.

In the Qur'an, *riba* (usury) is considered unjust and is forbidden.[14] *Riba* can occur in a contract of sale when there is an increase in the terms of exchange themselves, or in a loan when a fixed increase is charged on the amount of money over time. The former is known as *rib al-fadl* and the latter as *riba al-nasi'a*. Both kinds of *riba* are forbidden by the *Shari'a*.[15]

The foundation of conventional banks which yield depositors and savers a return in the form of fixed interest (as is common in Western banks), has produced a new debate among Islamic scholars over the past two centuries. All the Muslim countries have tried to practise Islamic banking or set up Islamic credit arrangements in varying degrees. In some countries, special banks operate on a non-interest basis; in others, for example in Egypt, Pakistan and Iran, the attempt has been made to bring the entire financial system into closer harmony with Islamic principles.

In Egypt, a polemic over *riba* was started by the establishment of a 'Savings Fund' (*Sanduq al-Tawfir*) in the early twentieth century. Many of the religious people refused to take their interest, which was fixed by decree of the Khedive. 'Abduh, who was the *mufti* at that time, was asked informally by the government whether there

---

[14] See the Qur'an, 2: 275, 276, 278; 3: 130; 4: 161.

[15] There are several *hadith* from the Prophet and Shi'ites' infallible Imams in this regard.

was a lawful way to authorise Muslims to take the profit earned by their money in the Savings Fund. He is quoted as having said:

> In no way can the mentioned *riba* be accepted, and since the Posts' administration exploits the moneys which it takes from the people and does not borrow from them out of necessity, it is possible for these moneys to be put to use on the basis of the commenda partnership (*sharikat al-mudariba*).[16]

Later, the controversy involved some other famous jurists including 'Abd al-Razzaq as-Sanhuri who was entrusted by the government to bring the dispositions on interest into the Code. 'Interest on interest', which was previously permitted under the Egyptian Civil Code, is now prohibited. Also, under the new Code the loan will be deemed interest free, if there is no prior agreement regarding interest on the loan. The provisions in the Egyptian law regulate the levying of interest at the rate of four percent in civil transactions and five percent in commercial dealing. It also stipulates that the contracting parties can agree on a different rate of interest provided that it does not exceed seven percent. This provision covers delays in payment and loans for interest.[17]

One obvious question arises here: how is the levying of interest justified, being categorically prohibited by the text of the Qur'an and *hadith*?

According to Sanhuri, what is absolutely forbidden by the text of the Qur'an is *riba al-nasi'a* which for him merely means combined (*murakkab*) interest. Because of the need for loans in capitalist societies, the legislator can allow interest on a loan as long as it does not reach an unseemly amount that makes the money deriving from

---

[16] See Chibli Mallat, *op. cit.*, p. 159.

[17] For more detail see *Ibid.*, p. 160.

the interest as important as the original capital. This is why the Code forbids 'interest on interest' while it permits a few percent of interest on a loan.[18]

Another justification is given by some modernists who support the provisions in the Egyptian law. They hold that in the Arabian society in which the Qur'anic verses regarding usury were revealed, usurious transactions amounted to exploitation of the debtor because an exorbitant amount of interest was charged. There is no exploitation of this sort in the modern community, they believe. According to them the function of interest is to protect the value of money, which fluctuates in today's economy. The lender must be allowed to levy a rate of interest on his capital to ensure that he would not lose the original value of his money when the loan is returned.

It is also argued that in Arabian society borrowing was a matter of personal need. Nowadays, the activities of borrowing and lending are not limited to individual needs; people and corporations borrow money from banks to invest and make more profit. So today it is hard to say that charging interest may lead to exploitation, which was the original reason why riba was forbidden. The prohibition of the charging of interest in the case of one borrowing from genuine need is ignored with excuses such as that it is difficult to tell one who borrows from need from others who borrow for investment. It is also proposed that the state might consider establishing a system of lending whereby the needy could borrow, in accordance with their needs, certain amounts free of interest.[19]

---

[18] For more information on Sanhuri's justification of the charging of interest see *Ibid.*, pp. 161-2.

[19] See Wael B. Hallaq, *A History of Islamic Legal Theories, An introduction to Sunni usul al-fiqh*, (Cambridge: Cambridge University Press, 1997), pp. 239-40.

Whereas some scholars try to come to terms with the existing reality of modern societies, traditional jurists attempt to apply their former learning in dealing with them whenever possible. The Islamic banking systems in Pakistan and Iran result from these attempts.

In Pakistan, the new system of regarding the activity of banks on the basis of Islamic principles was initiated in 1981 by permitting domestic commercial banks to accept deposits on the basis of profit-and-loss sharing (PLS). Gradually, the process of Islamization of the financial system was completed by letting PLS deposits be invested in the form of *Musharika*, *Mudariba*, hire purchase, etc.

Following the Islamic revolution in Iran a comprehensive Law for Usury-Free Banking was passed by the Islamic Consultative Assembly on 30 August 1983 and confirmed by the Guardian Council. All banks were required to convert their total operations in line with the *Shari'a* within three years from the date of the passage of the Law. The new Law required the banks to base their asset liability acquisition upon two kinds of transactions, namely *Qard al-hasanah* and term investment deposits. It also provided several modes of operation upon which the financial transactions of the banks must be based.

Qard al-hasanah is defined as a contract according to which one party (lender) gives possession of a certain amount of his possession to the other party (borrower) so that the borrower may return the same or, if it is not possible, its equivalent cash value to the lender. The term *qard al-hasanah* is derived from some Qur'anic verses one of which is as follows:

Who is there that will offer to Allah a good gift (*qardan hasanan*) so He will double

it for him, and he shall have an excellent reward.[20]

In the banking system, *qard al-hasanah* is comprised of both current and saving

deposits, as in conventional banks, except that they earn no interest. To encourage

qard al-hasanah savings deposits, however, the banks may consider incentives

including non-fixed prizes and bonuses to be awarded to the holder of such deposits,

exemption from the payment of commission, discount of fees, and priority in the use

of banking facilities.

Just as banks are to consider these deposits as their own resource, they are

required to set aside a portion of their money to extend interest-free loans to needy

consumers and small producers, farmers, and so on, who would otherwise be unable

to find an alternative source of financing investment. Banks are allowed to charge a

minimum service fee to cover the cost of administering these loans. *Qard al-hasanah*

savings deposits have earned the support and satisfaction of the people to a

considerable extent because of the Islamic culture in Iran.

Those who intend to gain profits from their deposits as well as to save may

make use of term investment deposits. Term investment deposits are comprised of

short-term and long-term savings deposits. The deposits differ with respect to the

minimum required time limits (three months for short-term and one year for long-

term deposits) and the minimum amount required. "As "depositors' resources" term

investment deposits shall be utilised by the banks, in their capacity as attorneys, in

---

[20] The Qur'an, 57: 11. See also the Qur'an, 2:245; 5:12; 57:18; 64:17; 73:20.

equity participation, *Mudariba*, hire-purchase, instalment transaction, *Muzari'a*, *Musaqat*, direct investment, *Salaf* (forward delivery transaction) and *Ju'alah*."[21]

Mudariba is a contract whereby one of the two parties (the owner) undertakes to provide capital (cash) on the provision that the other party (the agent) employs such capital in trade and that both parties share the resulting accrued profit or loss.

Muzari'ah is a contract under which one (*muzari'*) of the two parties commits a particular plot of land for a specified period of time to another party (*'amil*) to cultivate; the harvest is to be divided between them. According to this kind of contract, banks may provide agricultural lands to a farmer for cultivation for a specific period and a predetermined share of the harvest. Banks may also provide, by contract, other necessary elements such as water, seeds, fertiliser, and so on.

Musaqat is a contract concluded between the owner of trees and the like with the *'amil* (worker) in return for a specified share in fruit, leaves, flowers and the like. Banks may provide orchards or trees that they own or somehow are in their possession (e.g. as a trust) and share the harvest.

To avoid usury, the depositors' funds may be placed by the bank, as a trustee, in investments and other projects. The consequence of these activities, whether profit or loss, will be borne by the depositors. In this manner the banks virtually remain as the 'intermediaries of funds' and charge only a commission to cover the expenses of administering the account. Refunding the principal of such deposits is guaranteed

---

[21] See Zubayr Iqbal and 'Abbas Mirakhor, "Islamic Banking", Appendix: Regulations Relating to the Law for Usury-Free Banking, Article: 9, *Al-Tawhid*, Vol. IV, No. 3, Rajab - Ramadan 1407, pp. 147-8

only if this point is mentioned in the contract concluded between the bank and the customer. The banks are authorised to use a combination of their own and depositors' resources in investment projects, in which case the bank and depositor share the result.

I do not intend to discuss the system of Islamic banking in detail, but the main point with which I am concerned is the various modes of operating financial transactions which the Law permits. Most of them, as mentioned above, are based upon transactions which are known and have been discussed in detail by the *fuqaha*. Now they are applied in specific forms in the banking system. *Ju'alah*, for example, is another method through which banks render the required services to their customers. It is defined by the *fuqaha* as offering a reward for a person's purposeful legitimate action. To give an example, they refer to a person's offering a reward to another who looks for his lost books, or weaves a cloth. According to this mode of transaction, banks may provide or acquire services whenever they are needed and charge or pay fees, commission or remuneration for such services. These services and fees need to be determined at the time of the transaction.

The following, based on information supplied by the Central Bank of the Islamic Republic of Iran, is a table which shows the modes of permissible transactions upon which the banks in Iran mostly base their economic activities:[22]

---

[22] See *Ibid*, p.109. For more information about usury-free banking see *Ibid*, pp. 90-168; Members of the Staff of the Central Bank of the Islamic Republic of Iran, "Monetary Resources and Banking Facilities under the Law for Usury-Free Banking", *Al-Tawhid*, Vol. III, No. 4 (Shawwal - Dhu al-Hijjah 1406 H.), pp. 60-77; "The Impact of the New Banking System in Iran on the Instruments of Monetary and Credit Policy", *Ibid.*, pp. 78-89.

Modes of Permissible Transactions Corresponding to Types

of Economic Activity

Type of Activity	Permissible Mode
Production (industrial, mining, agricultural)	Musharakah (including both civil and legal partnership), lease-purchase, salaf transactions, instalment sale, direct investment, Muzara'ah, Musaqat, and Ju'alah
Commercial	Mudarabah, Musharakah, Ju'alah
Service	Lease-purchase, instalment sale, Ju'alah
Housing	Lease-purchase, instalment sale, Qard al-hasanah, Ju'alah
Personal consumption	Instalment sale, Qard al-hasanah

The above examples (insurance and banking) show that the *'ulama* try to apply their former learning in dealing with new matters whenever possible. Putting past theories into practice in modern times, however, is not always an easy task. Previously, in the chapter on Continuity and Change in Islamic Law, I discussed some examples of controversial issues which remained unresolved until the intervention of the National Exigencies Council.

The monetary experts who have studied Islamic banking systems have pointed out that the successful implementation of such a system requires an adequate financial infrastructure, fiscal policy objectives and instruments, and a well-defined legal

system. To introduce this legal system a *mujtahid*, as a specialist in law, must be able to deal with the questions in detail according to the conditions of his own time. He himself also needs to be familiar with the techniques of the financial systems of banks. Otherwise he must employ other experts to provide him with the necessary information.

In fact, these two elements - considering the circumstances of the age in which the *mujtahid* lives, and having sufficient information about the issue for which he wants to deduce the relevant law - are necessary in every worldly matter with which a *mujtahid* is involved. So, today, besides other essential studies that a *mujtahid* must undertake, he is also expected to have a proper grounding in issues which are under *ijtihad* and fall within an area of specialisation such as economics, politics, medicine, and so on. Otherwise his judgements in that area would not count or would fail in practice.

6.3.3 Referring to Specific Evidence and General Rules

If the new issue is not adaptable to any of the existing subjects of *fiqh*, the jurist first refers to the specific reasons that appear to be related to the issue in question, so as to find a point that includes it. He then refers to the general principles which can be applied in all sections of *fiqh*. To illustrate this, I shall refer to the rulings concerning the dissection of human cadavers or the donation of human organs as discussed by Islamic scholars.

6.3.3.1 Human Dissection

The dissection of bodies for medical research, teaching medical students, and investigating deaths which occur in suspicious circumstances, has a long history. Nonetheless, dissection is considered a new question (*al-mas'alah al-mustahdathah*) in *fiqh*, one which the ancient *'ulama* could not have dealt with or determined its *Shari'a* rulings. The reason lies in the technical advances in medical sciences which did not exist until relatively recently.

There are, however, some points in the sayings of the Infallible Imams and the words of the *Shi'i fuqaha* in the past which indicate the necessity of paying blood-money (*diyah*) for damaging (*muthlih*) dead bodies. The amount of blood-money for cutting the head off a free (*hurr*: non-slave) dead Muslim is fixed at one hundred *dinar*. The amount of blood-money for other parts would be fixed on the basis of the ratio of blood-money for these parts to the amount for killing a person unintentionally. For example, the amount of blood-money for cutting both hands off a live person is the same as for killing him, which is one thousand *dinar*. For cutting one hand off, five hundred *dinar* should be paid, which is half the whole amount of the blood-money. For cutting both hands off a dead person one hundred *dinar* (the amount for cutting off the head), and for cutting off one hand, fifty *dinar* should be paid. The same amount of blood-money is paid for man, woman or adult or child. The money belongs to the dead and should be given to charities on their behalf or used to pay their debts. Their inheritors have no right to this money.

Dissecting the body of a Muslim and selling the organs of a dead Muslim is conclusively prohibited on this basis and on the basis of a Muslim's dignity and his rights after death. After death a Muslim has the right to be washed, wrapped in a

shroud, have prayers said for him before his burial, and have his body preserved from mutilation. Dissection would violate these rights. Imam Khomeini's legal opinion on dissection is as follows:

> It is not permitted to dissect Muslims. If dissection takes place, for cutting off the head or other parts of the body there is a specific amount of blood money (*diyah*) which is determined in questions about blood moneys. However, dissection of non-Muslims, whether they are protegés (*ahl al-dhimmah*) or not, is permitted, and there is no blood money and no sin in doing this.[23]

Sunni fuqaha are not in agreement with the *Shi'ites* about the necessity of paying blood-money for damaging dead bodies but they too hold that tampering with the sanctity of a dead person is not allowed, on the grounds that there is a *hadith* from the Holy Prophet which states: "Breaking the bones of a dead person is just like breaking the bones of the living".

If the life of a Muslim depends on the dissection of or use of a part of a dead body and there is no access to a non-Muslim body, the dissection of a Muslim is permitted. This is probably because saving the life of a Muslim is more important than showing respect for a dead Muslim's body. It is for this very reason that the majority of *fuqaha* of different schools permit the cutting open of a dead woman's

---

[23]Imam Khomeini, *Tahrir al-Wasilah*, op. cit., Vol. 2. p. 624, Issue: 1.

abdomen to keep her foetus alive.[24] According to Imam Khomeini, when dissection is necessary blood-money may not have to be paid.[25]

Fuqaha are not unanimous on the permissibility of dissecting a murdered person in order to investigate the crime. According to some of them, such a practice is not permissible and if the crime is not proved through normal legal procedure, such as admitting the testimonies of two *'adil* people or the killer's own confession, the accusation should be lifted.[26] According to Imam Khomeini, dissecting a Muslim body for the investigation of a crime is permissible when it is the only way of protecting the life or reputation of another Muslim who is accused mistakenly.

Dissecting Muslim bodies for teaching is forbidden, unless the ability of the medical profession to save patients from death depends on such training and there is no access to non-Muslim dead bodies. According to Imam Khomeini, if a trainee uses a dead Muslim body for dissection while it is possible to dissect a non-Muslim body, he commits a sin and should pay blood-money.[27]

In the past non-Muslim bodies were used to train medical students in Iran. Today, because of the need to train more doctors and difficulties in getting access to non-Muslim bodies, it is authorised to use the bodies of Muslims for training and medical research. The rule of "the most important and important" (*qa'idat al-ahamm*

---

[24]Hanafi and Shafi'i jurists and some of the scholars of Maliki school also permit the cutting of a dead woman's abdomen to keep the foetus alive. Imam Malik and the scholars of the Hanbali school, however, have opposed this. (See: Mohammed Naeem Yaseen, "The Rulings for the Donation of Human Organs in the Light of Shari'a Rules and Medical Facts", *Arab Law Quarterly*, Vol. 5, 1990, p. 54).

[25] See Imam Khomeimi, *Tahrir al-Wasilah*, op. cit., Vol. 2, p. 624, issue: 4.

[26] See for example, Ayatollah Lotfullah Safi Golpaygani, *Istifta'at-e Pezeshki* (Qom, Dar al-Qur'an al-Karim, Sha'ban 1415), p. 57.

[27] See: Imam Khomeini, *Tahrir al-Wasilah*, op. cit. Vol. 2, p. 624, issue: 2.

wa al-muhimm) and necessity (*darurah*) are two reasons which justify the dissection of a Muslim body for medical purposes. I have referred to these rules and their application as secondary commandments (*ahkam thanawiyah*) in the previous chapter.

6.3.3.2 Organ Donation

Removing the organs of a dead Muslim for transplantation is permitted by the *fuqaha* when the life of another Muslim depends on it. However, removing parts, such as limbs, which are not necessary for life, is forbidden and blood-money should be paid. This applies when a person, before dying, has refused to allow these parts of his body to be removed for transplanting. According to the *fuqaha*, even if the dying person has given permission, there are still some difficulties in allowing the transplantating of the non-vital parts of a Muslim's body. They hold, however, that there is no need to pay blood-money in this case, although the surgeon is considered a sinner.

However, it seems that according to Ayatollah Khoei the surgeon does not sin in this case. This can be concluded from his answer to the question of the permissibility of willing some parts of one's body to be removed after his death: "The mentioned testament (*wasiyyah*) is valid and should be put into effect."[28] According to him, if one wills his organs to be donated after his death there would be no

---

[28] Abu al-Qasim al-Khoei al-Musawi. *al-Masa'il al-Shar'iyyah: Istifta'at*, Volume 2: al-Mu'amalat, Second Edition (Manshurat Mu'assisa al-Imam al-Khoei al-Khayriyyah, 1996), p. 133.

disgrace to his dignity, which is the main reason for forbidding the removal of organs from a dead Muslim.[29]

There is no prohibition, Imam Khomeini says, against trasplanting the organs of a dead non-Muslim. The question is whether prayer with such an organ is correct or not, since it has been dead and in any case is impure, since it belonged to a non-Muslim. Pointing out this difficulty he adds:

> It is possible to say that when the organ continues to be living after transplantation, it
>
> is no longer part of a dead body. It comes to be a part of a living person and therefore
>
> it is alive and pure and so prayer with it is correct. The rule is the same if the organ
>
> is cut from animals, even from impure animals, when it comes to be living within the
>
> body of a Muslim.[30]

Donation of organs by the living is another subject which is related to the discussion about transplants. One matter which is mentioned in ancient jurisprudence and which has a bearing on this issue is the sale of blood. This was forbidden by the *fuqaha* because blood did not have the medical use that it has today, and it was used by some people in cooking a special food. Eating or drinking blood is forbidden by the text of the Qur'an itself.[31] But, because of the changes in the use of blood, which is now employed in medication, the *fuqaha* permit donating or selling it for medical purposes. Another example is the sale of maternal milk, which is forbidden by the Hanafi school and a group of Hanbali scholars when taken from the woman to be sold separately (unlike payment made to a wet-nurse). It is argued that "maternal milk is a part of the human being, who is a dignified and worthy entity; therefore, no

---

[29] See *Ibid.*, p. 318.

[30] Imam Khomeini, *Tahrir al-Wasilah*, op. cit. pp. 624-5, issue: 6.

[31] Forbidden for you is that which dies of itself, and blood, and flesh of swine,... (The Qur'an, 5: 3)

part of them should be demeaned and humiliated".[32] Some scholars, however, supporting the permissibility of selling maternal milk, argue that it is clean (*tahir*) and beneficial.[33]

Permission to donate and sell other parts of the body could be given if the scientists are able to ensure that the donor will remain healthy and that there are no other ways to save the life of recipients. The basis of this permission is the rule of choosing the lesser of two harms or of acting in such a way that the greater harm is rejected. Scientists should be relied on to assess the present and future harmful effects resulting from the removal of the donated organ.

6.3.4 Considering the Holy Legislator's View (*madhaq al-Shari‘*)

In the above discussion reference has been made to specific or general rules. However, in using the phase *madhaq al-Shari‘* the *faqih* is more concerned with the purposes and aim of Divine legislation. If a *faqih* is sure enough in regard to the reasons for and criteria of injunctions, then the existence of the same criteria in the issue in question may lead him to find out its ruling. A clear example is the prohibition of drinking wine for its intoxicating effect which, if found in other things such as narcotic drugs, will lead to their prohibition as well.

The spirit of the Law plays an important part in legislation for both traditional jurists and modernists. However, their views sometimes differ in its interpretation. While the traditional jurists use the spirit of the Law to extend the rule in question

---

[32] See Mohammad Naeem Yaseen, *op. cit.*, p. 52.

[33] See *Ibid.*

with no textual evidence, the modernists try to apply it in solving the problems of modern life by avoiding a strict and literal interpretation of the text.

The important point here is to discover the real spirit of the Law. This is because different aspects of a subject in a particular case may lead to different views and rulings. To extract the spirit of the Law, one should consider all causes of the commandments carefully. According to *Shi'i 'ulama*, to find the reason (*'illa*) of the injunctions one must appeal for an approach which ends in certainty. An explicit textual indication or the significance of piece of an evidence (*fahwa al-khitab*) is acceptable but using other, analogical methods (*qiyas*) is rejected.

6.3.4.1 Women's Right to be Followed

One example that could be mentioned in regard to finding out the rulings of the *Shari'a* through *madhaq al-Shari'* relates to one of the several conditions that make a *mujtahid* eligible to be followed by others. According to the *fuqaha*, a *marja'* must be male. To justify this condition they turn to a different explanation. Resorting to the aims of the Lawgiver (*madhaq al-Shari'*), Ayatollah Khoei says:

> It is not permitted for women to be followed, because we have understood from the Holy Legislator's point of view (*madhaq al-Shari'*) that the desired duty for them is to be veiled and to do the house work. They should avoid whatever opposes this. It appears that to be in charge of issuing *fatwas*, one is, normally, expected to associate with other people in answering their questions. Since ruling over Muslims requires this, the Legislator never agrees with appointing a woman to such a position. How

would it be possible for a woman to manage a community and deal with men's affairs and rule over Muslims, while she is not even allowed to lead the prayer?[34]

We understand from Ayatollah Khoei's pronouncements that the reason for preventing people from following women in their *fatwas* is not that women cannot deduce the law of the *Shari'a*, but that they should not be in close contact with men. *Fuqaha* are in agreement that if one reaches the position of *ijtihad*, he or she should act according to his or her own knowledge of Islamic injunctions. *Taqlid* of any other *mujtahid* is forbidden for these people, and there is no difference between men and women in this regard. So when it is said that women are not to be followed, this does not mean that they cannot reach the position of *ijtihad*.

If the necessity of the condition of masculinity in *marja'* lies exclusively in what has been mentioned by Ayatollah Khoei at the beginning of his argument, then:

Firstly, either women should be totally forbidden from participating in social affairs or, if we accept that they can act within the boundaries of Islamic injunctions by observing chastity and covering themselves, as is also accepted by the majority of the *Shi'i fuqaha*, there should be no difference between religious affairs and the rest. It is well known that, in the time of the Prophet, women were even allowed to participate in wars to help the injured. This shows that women are allowed to take part in social activities. There is also no objection to permitting women to work within professions such as medicine and teaching.

Secondly, it should, at least, be permissible for women to follow another woman who is competent and deserves to get such a position. According to Imam Khomeini, a woman can be an Imam of prayer for other women although men cannot

---

[34] al-Gharawi al-Tabrizi, al-Mirza (ed.), *op. cit.*, p. 226.

join in this prayer. So, even when comparing the issue with that of prayer we cannot

justifiably forbid women to attain the position of *marja 'iyyat*.

Thirdly, if a *marja'* woman does not necessarily have to associate directly

with men in order to give her juridical opinion - for example if she can issue her *fatwa*

in writing or through publications - then the reason given for not permitting women

to be followed will be void.

The key point, however, which leads *fuqaha* to insist on the condition of

masculinity in *marja'*, is the position of sovereignty, which, according to *fuqaha*, is

restricted to men. Ayatollah Khoei refers to this point implicitly in the last part of his

statement.

Al-Mawardi, in his *al-Ahkam al-Sultaniyyah* (*the Ordinances of*

Government), defending the condition of masculinity in leadership and judgement,

holds that it is improper for women to take precedence over men. To support his

view he refers to the Qur'anic verse: *Men are in charge of women, for God has*

preferred in bounty one of them over the other (4:34).[35]

in order to examine the view of the *fuqaha* that men are sovereign in social

affairs such as leadership and judgement, we should discuss the reasons which they

bring as evidence.

6.3.4.2 The *Fuqaha* and Woman's Right to Judge

According to *Shi'i fuqaha*, a judge (*qadi*), like an imitated *mujtahid,* must

meet several conditions including being male. Among the Sunni schools, the majority

---

[35] See Wafaa H. Wahid, *The Ordinances of Government: A Translation of al-Ahkam al-Sultaniyyah
wa al-Wilayah al-Diniyyah* (The Centre for Muslim's Contribution to Civilization, 1996), p. 72.

of Shafi'i, Maliki and Hanbali jurists also hold that a woman cannot pass judgement in judicial affairs. According to Abu Hanifah, however, they may pass judgements in areas where their testimonies are valid, but not in punishment (*hudud*), where their testimonies are not acceptable.[36] Ibn Jarir al- Tabari departs from the consensus by considering women eligible to pass judgements in all circumstances. He holds that a woman can be a *muftiah*, so she can be a judge (*qadiah*).[37] Among the reasons advanced by scholars with regard to the invalidity of women's judgement, the most important are as follows:

1. The holy Qur'an, Sura al-Nisa'(4:34):

Men are the maintainers of women because Allah has made some of them to excel others and because they spend out of their property.

Allamah Tabatabaei, in his *al-Mizan*, by resorting to the first part of the above verse, makes the deduction that men have sovereignty over women in all the social affairs that require intellection, governance and conduct, in addition to matrimonial affairs. Consequently, he does not consider judgement, leadership and being a commander of an army permissible for women. The same view is held by al-Mawardi as mentioned above.

The conclusion drawn by these great scholars does not seem to be justified, because the verse concerns matrimonial affairs. This is clear in view of the phrase

---

[36] See Ibn Quddamah, *al-Mughni, Waylahu al-Sharh al-Kabir li Ibn Qudamat al-Muqaddasi,* Tahqiq al-Duktur al-Sayyid al-Ustad Sayyid Ibrahim (al-Qahirah: Dar al-Hadith), Vol. 13, p. 500.

[37] See *Ibid.* Al- Tusi in his *Khilaf* quotes Ibn Jarir's view as: "It is permissible for a woman to judge in all cases that a man does, because she is considered to be able to be a *mujtahid.*" See Shaykh al-Tusi, *Kitab al-Khilaf* (Maktabat al-Kutub al-Mutinawi'a min Khadim al-Ma'sumin wa Turab Aqdamihim), Vol. 3, p. 228.

"because they spend out of their property" and the fact that the rest of the verse is about the disobedience (*nushuz*) of wives.

What has been pronounced by the *fuqaha* on a woman's complying with her husband' wishes is concerned exclusively with matrimonial affairs and her not leaving home without his permission. Therefore extending men's sovereignty over women to include social affairs needs to be supported by other evidence.

2. In *sura* al-Baqarah (2: 228), Almighty God, after determining the waiting period which a divorced woman must observe in order to remarry (*'idda*), and giving the husband the right to return (*ruju'*) to his wife during this period, states:

> And they (women) have rights similar to those against them in a just manner, and the
> men are a degree above them.

Some scholars have used the second part (the men are a degree above women) as a conclusive argument for restricting the positions of leadership and judgement to men only. So, they have held that leaders and judges should be men and not women.

Considering the fact that this verse only concerns the position of men in married life, once again it is not enough to prove the predominance of men in social affairs.

3. According to a narration reported from the Prophet he has said: Those who entrust their affairs to a woman will not know prosperity.[38]

Ibn Quddamah (d. 630 A.H.), the author of a book on Hanbalite jurisprudence, has quoted this tradition along with other reasons to justify the prohibition of appointing a woman to the position of judgement. He argues that men and claimants come to the *qadi* and he needs to investigate the problem intelligently.

---

[38] For the sources of the *hadith* see Ibn Quddamah, *op. cit.,* footnotes on p. 500.

Since women are less intelligent, and they cannot attend in the men's gathering, and their testimonies are not accepted unless supplemented by a man's, the *qadi* must be a man and a woman cannot be a judge.[39] The whole text of the above *hadith* has been recorded by Bukhari in his *Sahih*. The narrator is Abu Bakrah, one of the Prophet's Companions. He says:

> I was guided and helped by God through the Holy Prophet's words, when during the battle of the Camel (*Jamal*) I was about to join the companions of the Camel and fight beside them. When the Holy Prophet found out that the Iranians had chosen their princess as their ruler, he said, "Those who entrust their affairs to a woman will never know prosperity."

If this tradition is correct [40], it should only apply to the ruler. We see, however, that Abu Bakrah has understood it as prohibiting women to give command in battle, while Ibn Quddamah has used it in connection with judgement. This is perhaps because in both of these instances there is a kind of sovereignty. Therefore, if a woman took any position in which she might have dominance over the people her authority would be questioned. Among the ancient *Shi'i fuqaha*, Shaykh Tusi has also resorted to this *hadith* to support the view that a judge must be a man.

4. In part of a long narration which is traced back to the Holy Prophet by a *Shi'i isnad* is the following remark:

> It is not for women to take part in Friday prayer and *jama'ah* prayer (group prayer), and it is not for them to recite *adhan* and *iqamah* or to visit patients and go to

---

[39] See *Ibid.*, pp. 500-1.

[40] This tradition is not found in *Shi'i* sources of *hadith*. According to *Shi' i fuqaha* this is a weak (*da'if*) tradition. For a critic of this *hadith* see *Fatima Mernissi, Women and Islam: An Historical and Theological Enquiry* (Oxford: Basil Blackwell, 1991), pp. 42-61.

funerals. It is not for women to trot the distance between Safa and Marwah or touch

and kiss the Black Stone of the Ka'bah, and it is not for them to judge.[41]

Although all the matters mentioned here are governed by the same word (*laysa* or *la*

in its Arabic text) and should therefore be equally taken into account in giving a

fatwa, the *fuqaha* have held that the prohibition only applies to giving judgement.

They consider other cases as unnecessary or undesirable (*makruh*).

If, however, judgement is the same as the others, then it should simply be

said that it is better for women not to judge. This is probably because judgement is a

difficult and stressful task and the *qadi* has to pass sentence on people's lives,

property and reputation. Sometimes he is not satisfied with his own verdict, which he

has issued on the basis of the available evidence. Therefore, judgement is not suitable

for women, who are naturally delicate and emotional. But this does not mean that if

they accept the responsibility of judgement they have committed a sin or their verdict

is not effective and creditable, as is held by the majority of the *fuqaha*.

5. *Ijma'* is the main reason given by most of the *Shi'i fuqaha* to justify the

condition of masculinity for a *qadi*.

Previously I mentioned that *Shi'i 'ulama* ensure the validity of *ijma'* only

when they discover the participation of the infallible Imams. Therefore, before we can

consider the agreement of the *Shi'i 'ulama* on the condition of masculinity for a *qadi*

as a valid *ijma'*, we need to know whether or not the subject was discussed during

the lifetime of the infallible Imams.

---

[41] M. I. H. al-Hurr al-'Amili, *Wasa'il al-Shi'a ila Tahsil Masa'il al-Shari'a*, Vol. 20 (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran), Chapter 117, p. 212, No. 25456.

It appears that there was no opportunity for women even to consider taking such responsibilities at that time. Therefore, it is probable that the *ulama* of the later period agreed on the condition of masculinity by relying on other reasons, some of which are discussed above. In this case *ijma'* would be a form of *madraki* ("based on evidence") which is not considered as a valid proof (as explained in chapter three, 3.3.3.1), although it can be used to correct the weak (*da'if*) Traditions relied on in the subject.

The oldest source used to prove the agreement of the Shi'ite *ulama* on the subject is *al-Khilaf* of *al-Shaykh* al-Tusi (d. 460/1067) written to express the differences between Shi'ite and Sunni *ulama* on Islamic jurisprudence. Since in discussing the existing views on the woman's right to judge he does not mention any opposition from the Shi'ites and himself explicitly forbids women's judgements, it is concluded that there was a consensus on it.[42]

Even if we accept this as a proof for *ijma'*, it would be a kind of transmitted (*manqul*) *ijma'* by "single" report on whose validity there is no agreement. Among the *Shi'i ulama* two people, namely al-Qummi and al-Muhaqqiq al-Ardabili, held different opinions regarding the appointed *qadi* (*al-qadi al-mansub*) and arbitrator (*al-qadi al-tahkim*). They only accepted the agreement of the *ulama* on the condition of masculinity when applied to a *qadi* appointed by the ruler. According to them it is difficult to say that women cannot administer judgement, especially when the claimants and witnesses are women.

---

[42] See for example, Muhammad Hadi Ma'rifat, "Shayestegy-e Zanan Baray-e Mansab-e Qedawat wa Manaseb-e Rasmi" (the eligibility of women to judge and take the official positions), *Hukumat-e Islami: wizhe-ye andishe-ye feqh-e siyasi-e Islam*, Year 2. No. 2. p. 42.

The fact is that the authority to administer justice was perceived by the *Shi'i* *'ulama* as a branch of divine sovereignty vested in the infallible Imams after the Prophet. At the beginning of their discussions on judgement (*al-kitab al-qada'*) *fuqaha* usually refer to certain traditions, among which is the statement of the first Imam, 'Ali, p.b.u.h., to Shurayh (the *qadi* of Kufa):

> O Shurayh! You are sitting in a place where no one but the Prophet or the legatee of
>
> the Prophet or the *shaqi* (dishonest) sits.[43]

According to this tradition, anyone besides the Prophet and the Imam who assumes the position of judgement without their permission, is unjust. In another tradition from the sixth Imam it is quoted that:

> Indeed *al-hukuma* belongs to the Imam who is knowledgeable in matters of *qada'*,
>
> and who is the just one among Muslims, such as the Prophet or his legatee.[44]

This tradition indicates the close connection between political authority and judgement. Thus, *Shi'i fuqaha* regard the administration of justice as symbolising general guardianship (*al-wilayah al-'amma*), the position which during the complete Occultation will only be occupied by people whose authority may be accepted with certainty. These people are well-qualified *mujtahidun* who are possessed of perfection in *'adala* and have a sound knowledge of *fiqh*.

---

[43] M. I. H. al-Hurr al-'Amili, *op. cit.,* Vol. 27, Chapter (*bab*) Three, p. 17, No. 33091.

[44] *Ibid.*, No. 33092.

According to both *Shi'i* and *Sunni* *'ulama*, a *qadi* does not only apply the existing and definite laws but he can also clarify, develop and even make law when it is necessary. Once he has pronounced his decision, no one has the authority to reverse it. This is another reason that requires the *qadi* to be a qualified *mujtahid* and eligible enough to take the position.

Finally it should be mentioned that, following Imam Khomeini's recognition of the contribution of women to the success of the Islamic revolution of Iran, religious women found more opportunity to participate in social affairs. Considering women's ability to gain all the necessary qualifications in different areas, the question of women's right to judge came to be discussed once again by some scholars. The issue of the role of time and place in *ijtihad* has also effected the re-examination of the subject. In April 1994 the Islamic Consultative Assembly approved a bill according to which women could be employed in judicial offices with the position of counsellor. Later on, this gave women the right to judge as interrogators in courts dealing with family law.

6.3.5 Referring to the Practical Principles (*al-Usul al-'Amaliyyah*)

If a jurist cannot reach a conclusion after thorough research into the available evidence, then the procedural principles (*al-usul al-'amaliyyah*) should be applied to solve the issue in question. I have already explained these principles and the different cases in which they should be applied. Here, I merely note that the procedural principles serve to explain the duty of an obliged person (*mukallaf*) when there is doubt about the real commandments and to excuse people if they act against them. Therefore, whatever conclusions are reached by applying these principles are

considered apparent commandments (*al-hukm al-zahiri*) and are valid as long as there is no reliable evidence for the real commandment (*al-hukm al-waqi'i*). For example, as smoking was unknown at the time of the Prophet there is no evidence in the texts of the Qur'an or *Sunna* which *fuqaha* could use in issuing their *fatwa* on smoking. On the strength of *asl al-bara'ah* (the principle of exemption), which indicates that people are released from obligation and that they have no duty unless notified by the evidence, or "things are assumed to be permissible until the contrary is proven", smoking has been allowed by the *fuqaha*. Considering the fact that it was not known that smoking caused cancer or other diseases, the permissibility of smoking may need to be reviewed, especially in cases where an illness could be aggravated by smoking.

To sum up this chapter: the first step in deducing the religious commandments on new issues is to have a clear idea about the subjects ordaining the rules. Considering the abundance of subjects in modern times, one can easily say that knowing the subjects well enough requires both extensive and detailed knowledge in many areas which any one person would be unlikely to achieve. So, today, to recognise subjects whose rulings need to be deduced, *mujtahidun* should consult with experts in different areas. It is also desirable to give opportunities for specialisation in specific aspects of jurisprudence to those who have already qualified as *mujtahidun*. In this way *fuqaha* will have greater opportunity to discuss specific problems.

When faced with a new question, *fuqaha* normally try to determine the rulings of the *Shari'a* on known subjects comparable with the issue in question. This leads to the fulfilment of some specific or general rules which are relevant to the question. If the execution of these primary rules causes problems which may threaten the life or

interests of the Muslim community, *fuqaha* are authorised to replace them with some secondary commandments which are ordained by the Lawgiver for specific circumstances. It is also conceivable to make some changes in the rules because of prevalent circumstances which influence and alter the subject matter of commandments.

Chapter Seven

The Rulings of the *Shari'a* on New Reproductive Technologies, *Ijtihad* in modern *Shi'i* Jurisprudence

7.1 Introduction

In previous chapter I introduced and discussed various issues to show how the one (a *mujtahid*) can draw a conclusion on a matter on which the text of the Qur'an and *Sunna* appear to be are silent. In the light of these above-mentioned methods I will examine here the rulings of the *Shari'a* on new reproductive technologies including artificial insemination, surrogate motherhood and human cloning. The legal opinion of the *fuqaha* on these issues are sometimes expressed in the form of questions (*istifta'at* or requests for *fatwa*) and answers, in some of the books of jurisprudence. Since most of the questions are posed by laymen, asking jurists for their legal opinion, the answers mostly do not indicate the basis of the opinion (*dalil*) or the method of *ijtihad*. They mostly consist of short texts or one

word answers such as permissible, not permissible and so on. Even those books of jurisprudence which are written to explain the practical rules of Islam in more detail rarely embody the reasons and methods which lead a *faqih* to come to a particular conclusion. Therefore my intention in this chapter is to discover the basis of the Islamic rules prescribed by some of the leading *fuqaha* on the above-mentioned issues.

As previously mentioned, the first step in deducing the rulings of the *Shari'a* on a particular issue in question is having precise knowledge of the subject. Therefore, I will give a brief explanation regarding each subject. Relevant sources which describe them in detail should be consulted for further information.

7.2 Artificial Insemination

Artificial insemination is the technique of artificially injecting sperm, containing semen from a male, into a female to cause pregnancy. The technique is widely used in, for example, the breeding of cattle, particularly to produce many offspring from one prize bull. In humans it is used when normal fertilization cannot be achieved, as in the case of sterility or impotence in the male or anatomical disorders in the female. When combined with centrifugal separation of the sperm, it can also be used to select the sex of offspring.

Inseminating a wife with her husband's semen is known as artificial insemination by husband (AIH). This procedure is used where there is a physical failure to deliver fertile semen high into the vagina during sexual intercourse. It can also be tried when the sperm count is low. Sometimes the semen is frozen for future

use, for example, when it is known that the husband will subsequently become infertile.

If the husband's semen has no fertilizing power, semen donated by someone else may be used. This procedure is called artificial insemination by donor (AID) and is the most common means of establishing a pregnancy among modern infertility treatments. Artificial insemination by donor may also be employed where there is a danger of the male transmitting an inheritable disease, or as part of a surrogacy arrangement in which the carrying woman provides the ovum. If only the wife is infertile the surrogate mother is commonly inseminated by the sperm of the commissioning father.

The simplicity of the insemination procedure and improvements in the technique of sperm storage, by freezing donated sperm and storing it until needed, has increased the use of artificial insemination in recent years.

7.2.1 Non-Muslim Attitudes to AID

In the early period of its practice, AID was considered to be a breach of marriage in that a third party was introduced into the procreative process. It was thus regarded as adultery and contrary to Christian and Jewish principles and teaching, and also contrary to the moral safety of the child, family and community. These views reflect the standpoint of Anglicans, Roman Catholics, the Protestants in the Netherlands and also the Jewish faith.[1]

---

[1] For more study see A. M. C. M. Schellen, *Artificial Insemination in the Human*, Translation by Miss M.E. Hollander (London), (Amsterdam: Elsevier Publishing Company, 1957), pp. 358-360.

In December 1945 the Archbishop of Canterbury, Geoffrey Fisher, appointed a commission to study AID with special reference to its theological, moral, social and legal implications. The Commission, stating the above-mentioned views, held that the practice of AID should be made a criminal offence and should not be permitted to continue.

Twelve years later the same views were repeated in the report of the Feversham Committee on Human Artificial Insemination. This committee, however, did not consider any legal prohibition or regulation of the practice to be either possible or desirable. The committee regarded some instances of AID, such as the insemination of single women, as clearly worse than others and also recommended that the wife's acceptance of AID without the husband's consent should be made a new ground for divorce or judicial separation.[2]

In 1973 the British Medical Association set up the Peel Committee to examine this issue in the light of recent experience. The growth in the use of AID in the years since the Feversham Report led this Committee to recommend that the rules on legitimacy should be changed so as to legitimate the AID child of a married couple where the husband gives his consent, and that the husband should be entitled as the father in the register of birth.[3]

The most recent official consideration of AID in England, as embodied in the Human Fertilisation and Embryology (HFE) Act 1990, emerged from the recommendations of the Committee of Inquiry into Human Fertilisation and Embryology, which was brought into existence by the birth of Louise Brown, the first

---

[2] For more detail see Robert Lee and Derek Morgan (eds.), *Birthrights, Law and Ethics at the Beginnings of Life* (London and New York: Routledge, 1989), pp. 121-2.

[3] See *Ibid.*, p. 122.

"test-tube baby" in 1978. The committee, headed by Mary Warnock and subsequently known as the Warnock Committee, published its report in 1984. The proposals of the Warnock Committee covered the areas of infertility services, the status of children born as a result of new reproductive techniques, and embryo research. According to Warnock's recommendations, when the husband consents to AID the child should be regarded as the legitimate child of the married couple and the donor be deemed to have no paternal rights with respect to the child. On reaching the age of eighteen the child would have the right of access to non-identifying information concerning the donor. The rules regarding ensuring the anonymity of the donor, obtaining the written consent of the parties involved, the limits on the number of children to be fathered by the sperm of one donor, and the payment of donors are some other aspects of AID which were left by the proposals to be considered by the licensing body.[4]

7.2.2 *Fuqaha* and the Rulings of the *Shari'a* on Artificial Insemination

According to the majority of *fuqaha*, of both *Shi'i* and Sunni schools, artificial insemination by husband (AIH) is permissible but artificial insemination by donor (AID) is forbidden. The following are questions forwarded to Ayatollah Seestani, who is a well-known *mujtahid* followed by many *Shi'ite* Muslims in Iraq and Iran.

---

[4] See *Ibid.*, pp. 123-4; Sarah Franklin, "Making Representations: The Parliamentary Debate on the Human Fertilisation and Embryology Act", in Jeanette Edwards, et al. (eds.), *Technologies of Procreation* (Manchester and New York: Manchester University Press, 1993), pp. 97-8. For a study on the HFE Act, see Gillian Douglas, *Law, Fertility and Reproduction* (London: Sweet and Maxwell, 1991), pp. 110-167.

Question: [What if] semen is taken from the husband and injected into his wife with a needle or by other means?

Answer: It is permissible as such.

Question: Is it permissible to inject it (semen) into a woman who is not his wife?

Answer: No, it is not permissible.[5]

His full *fatwa* in this regard is:

It is not permissible to inseminate a woman with the sperm of a man who is not her husband. The rule is the same whether she is married or not, whether the husband and wife consented to it or not, and whether insemination is carried out by the husband or by some one else.[6]

Imam Khomeini's *fatwas* regarding artificial insemination are as follows:

There is no problem in holding that injecting the sperm of a man into his wife is permissible, although it is obligatory to avoid whatever leads to prohibited actions such as the involvement of a stranger (*ajnabi*) who injects or inseminates in such a way as to require looking at what it is not permissible to look at. If it is supposed that sperm is taken in a permissible way and the husband injects it into his wife's body and then it becomes an offspring, the child will be their own as much as a naturally born child. However, if insemination of the sperm of the husband takes place in a forbidden way, for example, if the sperm is injected by a stranger or the sperm is

---

[5] See 'Abd al-Hadi Muhammad Taqi al-Hakim (ed.), *Al-Fatawa al-Muyyassara (al-Ibadat - al-mu'amalat)*, According to fatawa Ayatollah al-Sayyid 'Ali al-Husaini al-Seestani (Qom: Maktab Ayatollah al-'Uzma al-Sayyid al-Seestani, 1416, Jamadi al-awla - al-ukhra), pp. 432-3.

[6] See Ayatollah al-Sayyid al-Seestani, *al-Mustahdathat min al-Masa'il al-Shar'iyyah* (London: Mu'assisa al-Imam 'Ali, 1996), p. 76, Issue (mas'ala) No. 65.

removed by a forbidden method, the child will be still their own although they would

be committing a sin by doing prohibited (*haram*) actions.[7]

Insemination using the sperm of a man who is not the woman's husband is not

permissible. The rule is the same whether she is married or not, whether the husband

and wife consented to it or not, and whether the woman (who is inseminated) is a

relative of the donor of the sperm such as his mother or sister, or no relative.[8]

Ayatollah Khoei's opinion in this regard is:

Making the semen of a husband reach the womb of his wife artificially is permissible

and the child thus born is like all other children. However, if the person who injects

the semen is a stranger and the injection involves seeing or touching the private parts

of the woman, the action is not permissible.[9]

From the Sunni *Fuqaha*, I cite here *al-Shaikh* Shaltut's opinion. He writes:

In regard to the rulings of the *Shari'a* on artificial insemination, when it takes place

by the sperm of the woman's husband ... [it] is permissible and there is no sin. ...

But when insemination is by the sperm of a man who is a stranger and is not related

to her by marriage ... this is a great sin and is in the same category as adultery: they

are essentially the same, and their result, which is introducing the semen of a stranger

with the intention of procreation is the same. [10]

There are two cases of artificial insemination by husband which are worthy of

mention. The first is AIH of the woman who is divorced. The second is the use of the

[7] R. M. al-Khomeini, *Tahrir al-Wasilah*, Vol. 2 (Dar al-Sirat al-Mustaqim), p. 621, Issue No. 1 of Artificial Insemination and Reproduction (*al-Talqih wa al-Tawlid al-Sana'iyayn*).

[8] *Ibid.*, No. 2.

[9] *Imam Khoei's Fatawa, Articles of Islamic Acts* (London: Cultural and Guidance Section, Al-Khoei Foundation, 1991), p. 643, No. 2899.

[10] Mahmud Shaltut, *al-Fatawa: Dirasa al-Mushkilat al-Muslim al-Mu'asir fi Hayatihi al-Yawmiyya al-Mu'asir* (Cairo: Dar al-'Ilm), pp. 327-8.

semen after the death of the husband. The following are questions regarding these issues. In a request for a *fatwa*, Ayatollah Khoei is asked:

Question: Is it permissible for a divorcee who is either divorced *rij'iyyatan*[11] or *bi'inatan*[12] to use the stored sperm of her husband, without his permission? If she uses it, what would be the resulting regulations? Does the rule differ if the sperm is used within the waiting period or after that, without his permission?

Answer: It is permissible for a woman who is divorced *rij'iyyatan* to use it within the waiting period, and there is no need for permission. As regards the woman who is divorced *ba'inatan*, this is not permissible because she is an outsider (*ajnabiyya*). If she replaces the sperm -though it is not permissible - and it becomes an offspring, all the regulations pertaining to relatives and relatives-in-law regarding the child, even the rules of inheritance, would be applicable, because those excluded from inheritance are those born from adultery, and such a replacement is not adultery. God Knows best.[13]

The opinion of Ayattullah Khoei regarding the use of husband's semen during the waiting period in revocable divorce differs from that of those (among the Sunnis) who hold that the use of the semen is permissible only after his return (*ruju'*).[14]

---

[11] A *rij'i* (revocable) divorce is that in which the husband, as long as the woman's waiting period (*'idda*) has not come to the end, has the right to return to his wife and thus nullify the divorce.

[12] A divorce is *ba'in* (irrevocable) either because the wife has no waiting period, like a divorced woman with whom the husband has not had sexual intercourse, or a woman who has reached the age of menopause, or because even though the woman must keep *'idda*, the nature of the divorce disqualifies the man's right to return, like the third consecutive divorce.

[13] Abu al-Qasim al-Musawi al-Khoei, *al-Masa'il al-Shar'iyyah, Istifta'at*, Volume 2: al-Mu'amalat, Second Edition (Mnshurat Mu'assisa al-Imam al-Khoei al-Khayriyyah, 1996), p. 320.

[14] See Muhammad 'Ali al-Bar, "al-Talqih al-Sina'i wa Atfal al-Anabib" (Artificial Insemination and Test-Tube- Babies), *Majallah Majma' al-Fiqh al-Islami*, Second Circle, No. 2, Part. 1 (Jeddah, 1986), p. 290.

There are some questions which should be raised here. Does insemination during the waiting period cause any change in the waiting period? If the husband consents to insemination, does it mean that he has returned to his wife and the divorce is nullified?

In regard to the first question I should explain that, according to Islamic law, a woman who is divorced *rij'iyatan* has to wait until the end of her second menstrual cycle. As soon as she starts the third she is free to remarry. This obviously applies only to women who are not pregnant; the waiting period for pregnant women lasts until the birth or the miscarriage of the child. If, for example, a divorced woman gives birth to a child one hour after being divorced, her waiting period is over.[15]

If the reason for observing the waiting period is to ensure that she is not pregnant - the *fuqaha* usually mention this as the *illa* (cause) of the obligation of the *iddah* (waiting period) which is emphasised in the Qur'an (2: 228)[16] - then it should be said that a woman who is inseminated during the waiting period has to start her

---

[15] This is in the case of a legitimate child of the husband who is divorcing. If the pregnancy is illegitimate, and her husband divorces her, the waiting period will not be over (See Ayatollah Sayyid 'Ali al-Husaini al-Seestani, *Islamic Laws*, English Version of Tawdih al-Masa'il (Stanmore, UK: The World Federation of K.S.I. Muslim Communities, 1994), p. 466, issue 2523; R. M. al-Khomeini, *Tahrir al-Wasilah,* op. cit., p. 335, issue 6).

[16] The verse read as "And the divorced women should keep themselves in waiting for three courses; and it is not lawful for them that they should conceal what Allah created in their womb". Two more reasons are also mentioned concerning the obligation of keeping the waiting period: the suspension of the effect of divorce to give the parties the chance to have second thoughts in case they wish to resume their marriage, and to allow time for it to be ascertained that there is no cause why the parties should not be separated and the marriage dissolved (see A. Ezzati, *An Introduction to Shi'i Islamic Law and Jurisprudence: With an Emphasis on the Authority of Human Reason as a Source of Law according to Shi'i Law* (Lahore: Ashraf Press, 1976), p. 143.

iddah again after the insemination or at least continue until she knows that she is not pregnant.

The explanation regarding the second question is that to return to his wife the husband may use certain words (such as, "*raja'tuki ila nikahi*: I returned you in my marriage") or do something which is not permissible for a Muslim except in wedlock, such as touching, kissing, and so forth. During the waiting period these actions are permissible for him and in so doing he is regarded as returning (*ruju'*) to his wife, even if he has not intended to return. But, if in acting in this way he does not intend to return to his wife, it is difficult (*mahall ta'mmul*) to consider his actions as really a return to the wife.[17] So it is very probably correct to say that the husband's consent to the use of his semen by his divorced wife is in itself not to be regarded as constituting a return (*ruju'*), especially when he does not intend to return to the marriage.

In another request for a *fatwa* Ayatollah Seestani is asked:

> Question: Sperm was taken from a man for the purpose of impregnating his wife. By coincidence, the husband died and after his death the sperm was implanted into the womb of his widow who bore a child. What is the ruling with respect to the status of the child and his entitlement to inheritance?
>
> Answer: The child is to be attributed to the donor of the sperm, but, based on this hypothetical question, he does not inherit from him (the father). God knows best.[18]

Unfortunately, since the person who put the question did not ask for the rule concerning the use of the husband's sperm after his death, there is nothing in the

---

[17] For more detail see R. M. al-Khomeini, *Tahrir al-Wasilah*, op. cit., p. 347, issues 1 and 2.

[18] See 'Amir al-Hulw (ed.), *Ahkam al-Din bayn al-Sa'il wa al-Mujib*, Vol. (*al-halqa*) Four: Fataw Haditha li Samaha Ayatollah al-'Uzma al-Sayyid 'Ali al-Seestani (Vienna: Manshurat Markas Ahl al-Beyt al-Thiqafi al-Islami, 1995), p. 114, question 5.

answer to confirm or reject its permissibility, unless we say that, since the child is attributed to the donor (father), and not to both the parents, the prohibition is implied. However, this possibility is weakened by considering the fact that, according to the majority of *Shi'i fuqaha* including Ayatollah Seestani himself[19], AID is not adultery, although it is prohibited, and the child is regarded as the child of the donor of sperm and the woman who gives birth. I will discuss this issue later.

What should be said in regard to the use of the semen of the husband after his death is that, according to Islamic law, before the expiry of the waiting period (four months and ten days for a free non-pregnant woman)[20] a widow is not allowed to remarry. Considering this issue and comparing it with the case of revocable divorce one may come to the conclusion that the use of the semen of the husband by the widow during the waiting period is permissible. But, since in revocable divorce the possibility exists of taking back the marriage and the marriage is not definitely terminated, as it is in the case of the husband's death, there is no way to compare this case with that of case of revocable divorce. Since the death of the husband, as soon as it takes place, ends the marriage relationship, the rule regarding insemination by the sperm of the dead husband, even during the waiting period, would be the same as the rule regarding AID. If we still doubt that the relationship is fully terminated, because of the necessity of keeping the waiting period even by those who are not obliged to observe the waiting period after divorce (for example, a woman who has reached the age of menopause or who is divorced before the consummation of the

---

[19] For his opinion in this regard see his *al-Mustahdathat min al-Masi'il al-Shar'iyyah*, op. cit., pp. 76-77.

[20] If a pregnant woman's husband dies, she should observe the waiting period till the birth of the child. But if the child is born before the end of four months and ten days from the death of her husband, she should wait till the expiry of that period.

marriage), then the use of the semen during the waiting period after the death of the husband should be prohibited according to the rule of precaution. As I will explain later, the main reason for prohibiting the use of donor semen is the rule of precaution (*ihtiyat*) which is emphasised in marriage and reproduction.

Referring to some traditions and the verses of the Qur'an, the Sunni *fuqaha* state that man does not own himself; he is not an inheritable commodity and no part of his body may be sold or in any way used. With reference to this statement they come to the conclusion that "it is proscribed for a wife to request the sperm of her husband after his death, because death interrupts the relationship in marriage".[21]

7.2.3 Reasons for the Prohibition of AID

If AID is regarded as adultery, then there is no doubt that it is not permissible. But if we accept that AID is not adultery, because there is no sexual contact between donor and recipient, then what might be the reason for its prohibition? To answer this question I will first consider the text of the Qur'an and the Sunna. In *Surah* al-Nur Almighty God says:

> Say to the believing men that they cast down their looks and guard their private parts (*furujahum*) ... and say to the believing women that they cast down their looks and guard their private parts (*furujahunna*).[22]

---

[21] See Sheikh Saeed Abdul Hafeez Assad Hijawi (Acting Grand Mufti of the Hashemite Kingdom of Jordan), "Human Infertility", in *Ethical Implications of Modern Research in Genetics*, Proceedings of Seminar Organized by the Islamic Educational, Scientific and Cultural Organization and the World Islamic Call Society with the Cooperation of the Faculty of Science, University of Qatar, 13-15 February, 1993 (Rabat, Morocco: Islamic Educational, Scientific and Cultural Organization), p. 222.

[22] The Holy Qur'an, Surah al-Nur (24): 31.

Although these two verses start by ordering the law regarding the act of looking, and one may conclude that their intention is to guard the private parts from the view of strangers, they may also indicate that men and women should abstain from whatever is allowed only in wedlock, including what leads, whether naturally or not, to a birth. According to this generalised interpretation, men are not allowed to donate their sperm to women who are not related to them by marriage, and women are also forbidden to use it. The same interpretation can be made for the following similar verses:

> Successful indeed are the believers ... who guard their private parts, except for their mates or those whom their right hands possess, for they surely are not blameable.[23]

There are some traditions from the Prophet and infallible Imams of the *Shi'ites* which prohibit a man to introduce his semen into a woman's uterus in a forbidden way, or to place it into the body of a woman whose uterus is forbidden to him:

> A son of Adam can never do an act before God Almighty greater (in sin) than the act of a man who kills a prophet or an Imam, or destroys the Ka'ba which God has placed as *qibla* for His servants, or drops his water (semen) into (the body of) a woman in a forbidden way.[24]

It is quite possible for one to say that this *hadith*, even if we accept it as a binding *hadith* (this is a *mursal hadith* from the Prophet and has a defective chain of transmission), forbids AID only when performed by a stranger. Thus, such prohibition does not include AID in a case where a woman inseminates herself by her own hand or with the help of her husband.

---

[23] The Holy Qur'an, 23: 1-6; see also 70: 29-30.

[24] See M. I. H. al-Hurr al-'Amili, *Wasa'il al-Shi'a ila Tahsil Masa'il al-Shari'a*, chapter (bab) four from chapters on forbidden marriage and what is related to it.

In another tradition, from the Sixth Imam, it is recorded that:

> The greatest punishment on Judgment Day is for the one who places his semen into a
>
> uterus which is forbidden to him.[25]

This tradition is spelt out in such a way as to possibly include the case of AID,

although its definite meaning is limited to delivering the semen through the act of

sexual intercourse.

The main reason for prohibiting AID derives from the rule prohibiting

adultery and observing the waiting period; we understand that the Lawgiver has

attached paramount importance to marriage and family life, the preservation of races

and the prevention of confusion in paternity and kinship. Whenever a prohibition is

probable, restraint is obligatory. So even if one does not accept that the rule of

prohibition in this case can be clearly derived from the text of the Qur'an or Sunna,

he cannot rely on the rule that "everything is permissible unless the contrary is

proven" (*asl al-bara'a*). Here, therefore, the principle of precaution (*ihtiyat*) must be

considered, as it is emphasised by the infallible Imams in the case of marriage itself. In

one tradition, from the sixth Imam, it is recorded that one of his friends asked him

about the marriage of one of the Imam's followers with a woman who was divorced

in a way other than prescribed by Prophet's Sunna. He, peace be upon him, said:

"That is the vulva and it is serious (*shadid*); the offspring comes from it and we avoid

it as a precaution. He must not marry her."[26]

---

[25] *Ibid.*

[26] *Ibid.*

7.2.4 AID and Punishment (*Hudud*)

If donor insemination is forbidden, may the violators be punished? If yes, should the punishment for adultery be executed? Since donor insemination is not regarded as adultery, the punishment for adultery is not applicable. But, considering the fact that the result of donor insemination, which is the birth of a child of a man who is not related to the user of the semen by marriage, is the same as the result of adultery, legislators may enact laws to prevent it. However, the prescribed punishment for donor insemination should not be equal in severity to the punishment for adultery (it should be, for example, less than one hundred lashes which is the punishment of adultery for non-married persons).

7.2.5 *Fuqaha* and the Legal Status of Parents and AID Children

Determination of the legal parentage of the AID child is critical for both the child and those who have contributed to his/her birth. because it affects the rights and obligations of the parties involved with respect to custody, access, support and inheritance.

It is a well-established social principle that the parentage of a child should automatically be vested in the natural parents to whom he/she is related biologically. This principle is accepted by Islamic law with the exception of the child born as a result of adultery. However, some rules of marriage regarding such a child are the same as for the child who is born in wedlock. For example, if the child is a boy he cannot marry his mother or sister and if the child is female she cannot marry her brother and biological father. Nevertheless, other rules of parentage, such as those of custody and inheritance, are not applied. The reason is a well-known *hadith* from the

Prophet meaning that the child is of marriage and the adulterer should be stoned: "*al-waladu li al-firash wa li al-'ahir-i al-hajar*". *Firash* literally means bed, and here is made allusion to the legal father. This *hadith* is the basis of a principle known as *al-qa'idah al-firash* which is usually used by the *Shi'i fuqaha* to prove the legal status of the children in some doubtful cases.

In addition, a person who is born as a result of adultery cannot be a *qadi* (judge) or a *marja'* (a *mujtahid* to be followed) or even an Imam of prayer. So the answer to the question of whether an AID child is regarded as the child of an adulterous relationship or not plays an important part in both the legal and social status of the child.

Some of the *Shi'i fuqaha* have explicitly declared that although AID is not permissible, it is not regarded as adultery. According to them an AID child belongs to the mother and the donor and all parentage rules are to be applicable to them. Ayatollah Khoei in this regard says:

> It is not permissible to inject the semen of a stranger into the womb of a woman, and it makes no difference whether this is done by her husband or someone else. A child born in this way will also be treated as the offspring of the man whose semen was injected into the womb of the woman and all orders regarding pedigree and inheritance which apply to that man's other children will also apply to this child. A child who is deprived of inheritance is the one who is born as a result of adultery, but here the matter is different. Although the method of such procreation is unlawful, the woman will be treated to be the mother of the child and all orders regarding motherhood will apply to her. There will be no difference between that child and her other children. Similarly if a woman makes the semen of her husband reach the womb of another woman by some means (for example through illegal relationship:

248

musahiqa) and that woman becomes pregnant the father of the child will be the man whose semen was utilized. All orders applicable to a mother and a child will also apply to such mother and child.[27]

It appears that in determining the parental status of an AID child, besides the accepted principle of joining the child to his/her biological parents (with the exception of the child of adultery) Ayatollah Khoei has relied on a tradition which is recorded in *Shi'i* books of *hadith*. It is recorded that one day when the second Imam, Imam Hasan the son of Imam Ali, peace be upon them, was sitting in his father's session (where people came to ask questions) a group arrived to question Imam Ali. Because he was not there they asked his son. The question was about a married woman who, after having had intercourse with her husband, had made pregnant a virgin slave through an unlawful practice (*musahiqa*). Imam Hasan told them that at first the woman must pay a dowry suitable for a virgin slave because the child could not be born without removing the virginity. Then she must be stoned because she was a married woman.[28] The slave girl was not to be punished until the birth of the child, who belonged to his father who was the owner of the sperm. Then she should be lashed.[29]

But the case of AID differs from the case mentioned in this tradition. In the latter (the case mentioned in the tradition) the child belonged to the owner of the sperm because he had done nothing wrong. In AID, however, the donor offers his semen knowing that it will be used by a woman who is not his wife. It is, perhaps, in

---

[27] *Imam Khoei's Fatawa, Articles of Islamic Acts,* op. cit., p. 643.

[28] According to some of the *fuqaha* in this case she should be lashed and not to be stoned. See for example R.M. al-Khomeini, *Tahrir al-Wasilah,* op. cit. P. 471, issue 13.

[29] For the full statement of this *hadith* see M. I. H. al-Hurr al-'Amili, *Wasa'il al-Shi'a ila Tahsil Masa'il al-Shari'a,* chapter three from chapters on Punishment for *al-Suhq wa al-Qiyada.*

consideration of this fact that Imam Khomeini holds a different opinion. According to him, an AID child belongs to the mother and the donor only when the woman has been inseminated by his semen mistakenly. Otherwise, precaution must be observed. His full statement in this regard is as follows:

> If insemination takes place by the semen of a man other than the husband while she is married and it becomes clear that the child is the result of the AI, then there is no problem (*la ishkal*) in not joining the child to the husband. There is also no problem in joining the child to the owner of the sperm (donor) and the woman if insemination takes place by error, as in the case of doubtful intercourse (*waty-i bi al-shubha*). So, if (for example) the man inseminated a woman, imagining that she is his wife, and it then becomes clear that she was not his wife, the child belongs to the owner of the sperm (donor) and the woman. However, if insemination takes place consciously and with intent there would be a problem in making such a connection, although there is a weak probability (*ashbah*) in that. But the issue is difficult and precaution must be observed. The rules of inheritance in the case of doubtful insemination are the same as the rules of inheritance in doubtful intercourse, and in the case of forbidden insemination, when it takes place intentionally, precaution (regarding the inheritance rules) must be observed.[30]

Unlike the *Shi'i fuqaha*, the majority of the Sunni *fuqaha* hold that any child born through proscribed methods should be considered as an offspring born of adultery. According to them the AID child is considered an offspring of the mother only and cannot claim the father's paternity (as they hold in the case of adultery). So,

---

[30] R. M. al-Khomeini, *Tahrir al-Wasilah*, op. cit. pp. 621-2, issue 3.

according to them, nobody, even the donor, can be considered as the legal father of the child.[31]

7.2.6 Artificial Insemination and Some Related Rules (*ahkam*)

According to Islamic law, it is forbidden for a man ever to marry the mother or daughter of a woman with whom he has had an unlawful relationship (adultery). It is also forbidden for a man ever to marry a woman with whom he has had an unlawful relationship (adultery) while she was married or was in the waiting period of revocable divorce. The question remains whether the same rules may be applied regarding the donor and a woman other than his wife who is inseminated by his sperm.

One possibility is to say that, since in such an insemination no bodily sexual contact exists and it is thus not regarded as adultery, these rules are not applicable. So, according to the rule of *al-bara'a* (everything is permissible unless it is known to be forbidden) marriage with such a woman is permissible for a donor.

Another possibility is that, since the result of adultery is the same as that of insemination by the introduction of semen into the womb of a stranger, all the related rules should be applied. This possibility is confirmed by the view that, regarding marriage and family life, the rule of precaution must be applied, not the rule of *bara'a* as explained above. According to this principle, if the donor does not know the precise identity of the recipient but is aware that, for example, one or more women

---

[31] See Muhammad Ibn Ibrahim, *al-Ijtihad wa Qadaya al-'Asr* (Bardu, Tunesi: dar al-Turki li al-Nashr, 1995), p. 155; Gamal Abu Serour, "Artificial Insemination: Research and Practice (Islam Viewpoint), in *Ethical Implications of Modern Research in Genetics*, op. cit., P. 231.

that he knows have received his sperm, he should avoid marriage with their mothers and daughters, or with them if they were married when they received his semen.

There are also some other issues related to artificial insemination which are worthy of discussion. For example, according to Islamic law, if a husband divorces his wife before consummation, he should repay half of her dowry, the divorce is irrevocable and she has no waiting period and can remarry immediately. The question might arise, what should happen if he divorces his wife before consummation but after lawful insemination? Should he pay half of the dowry or the full amount? Also, is the divorce revocable or irrevocable? Should she observe the waiting period or not? Would her becoming pregnant make a difference? These are some of the issues which are not discussed by the *fuqaha* in the books of jurisprudence, but some Iranian legislators have paid attention to their development and bringing Islamic family law into the Code.[32]

7.3 *In Vitro* Fertilisation (IVF), Egg Donation and Surrogacy

Using a technical procedure, scientists can collect a woman's egg, fertilise it outside the body and replace it into her uterus. The procedure is called *in vitro* (literally, "in glass") fertilisation as opposed to *in vivo* (within the living body).

A woman undergoing an IVF procedure is usually treated with drugs which stimulate the development of several eggs within the ovary at one time. The development of these eggs is closely monitored and at the appropriate time they are

---

[32] For a study of some of these issues see Seyed 'Alavi Qazvini,"The outcomes of the Artificial human sperm implantation" in *Nameh-ye Mufid*, A Quarterly Journal of the Mufid University Vol. I, No. 3 (Autumn 1995), pp. 165-196.

collected, either by laparoscopy[33] or with the aid of ultrasound. Once collected, the eggs are placed in laboratory glass and semen is added. If fertilisation is successful, up to three fertilised eggs are replaced in the woman's uterus, where they may implant and then develop as normal.

IVF is most frequently used for women whose fallopian tubes are blocked or damaged. But it may also be employed as part of a surrogacy arrangement where the commissioning mother provides the ovum. The ovum is fertilised *in vitro* with her husband's sperm and gestated in the surrogate's uterus. This type of surrogacy, which may be described as "full" surrogacy or womb-leasing, differs from the common type of surrogate arrangement in which the carrying woman, who herself is the provider of the ovum, is fertilised by the semen of the commissioning father.

Considering the legal opinion of the *fuqaha* on artificial insemination, it is clear that there is no problem in permitting of IVF when it is used strictly between a married couple to help them have a child of their own. If, for example, the egg of a woman is taken out of her body, fertilised with her own husband's sperm in the laboratory and then replanted into her own uterus, this is permissible, although it is necessary to avoid prohibited actions such as are mentioned by Imam Khomeini in his

---

[33] Laparoscopy "is a surgical procedure which requires a woman to undergo a general anaesthetic. The surgeon makes an incision in the woman's abdomen, which has been filled with carbon dioxide gas to allow easier access to her internal organs. A long, thin optical tool, a laparoscope, is inserted so that the surgeon can view the woman's ovaries and control the 'collection' of her eggs. When, and if, the surgeon locates any follicles containing mature eggs, a second incision is made in her abdomen below the first; ...The surgeon then passes a hollow needle through the woman's abdomen and punctures her follicles containing eggs. The follicular fluid containing her eggs is sucked into a syringe and the needle is removed from her abdomen" (See Maureen McNeil, Ian Varcoe and Steven Yearley (eds.), *The New Reproductive Technologies* (London: The Macmillan Press Ltd., 1990), p. 30).

fatwa regarding AIH. The permissibility of IVF, however, is debatable when a woman other than the wife provides the ovum, or when the parents rely on another woman to carry their genetic offspring (gestational mother). The following are some questions (*istifta'at*) and answers in this regard:

> Question: [What if] the sperm of the husband and the egg of another woman who is not his wife are taken for fertilisation, and are then transferred to the wife's womb?
>
> Answer: This in itself is permissible as such.
>
> Question: To whom is the child attributed in this case? To the provider of the egg or to the woman in whose womb it reached full term? I mean, who would be his genealogical mother?
>
> Answer: There are two possible responses to this question, and it is necessary to exercise precaution in both of them. [34]
>
> Question: As a result of scientific advancement, now fertilisation of sperm and ovum outside the body is possible. In the case where the mother has no womb, is it permissible (after observing all the rulings of the *Shari'a*) to gestate the fertilised ovum in the womb of the grandmother, or in the womb of other relatives or relatives-in-law, or in the womb of a stranger (employed for this purpose)? What would be the status of the child (regarding inheritance and other rights)?
>
> Answer: This is not permissible and is contrary to the rulings of the *Shari'a*. [35]

It is not clear why, according to Ayatollah Seestani, using a donated egg is permitted while using donated sperm is strongly forbidden. If the reason is that there is nothing in the text of the Qur'an or Sunna to indicate its prohibition, then it should be said

---

[34] See 'Abd al-Hadi Muhammad Taqi al-Hakim (ed.), *al-Fatawa al-Muyyassara*, op. cit., p. 433.

[35] See Hadi Hujjat and Muhammad Hadi Tal'ati, (eds.), *Ahkam-e Pezeshkan wa Mashaghel-e Marbut beh Pezeshki* (Qum: Islamic Propagation of the Islamic Seminary of Qum, 1996), p. 130, an independent request for a fatwa from the office of Ayatollah Araki.

that the same rule (the rule of precaution) forbidding the use of donated sperm is applicable here, because sperm and egg together cause pregnancy and both of them have a role in reproduction.

If we agree with Ayatollah Seestani on the permissibility of using a donated egg, then there should be no problem in saying that the second wife of a Muslim man can serve as a surrogate mother for the foetus of the first wife since she is not a stranger to the sperm. This possibility was initially authorized by the Sunni *fuqaha* during their meetings to examining the rulings of the *Shari'a* on artificial insemination and "test tube babies". The members of the Council of Islamic *fiqh* in their seventh session held in Mecca in January 1984 decided that:

> The seventh method, involving in vitro fertilisation of the wife's ovum by the sperm of her husband, then implantation of the resulting zygote in the uterus of the same husband's second wife, if she agrees to carry it for the first wife, appears to the Council to be an authorized method if absolutely necessary and if all the general precautions are respected. ... The Council has decided that the parentage of the child devolves to the two parents who contributed the sperm and ovum. Inheritance and all other rights follow the demonstration of parentage. ... The woman who bore the child during pregnancy is considered as a breast-feeding mother, for the child benefits from her body more than a breast-feeding mother, which consequently effects kinship restrictions.[36]

The permissibility of using the IVF techniques when the second wife agrees to bear the child, however, was cancelled in a resolution of the eighth session of the Council in 1985. The reason given was that, according to scientists, it may happen that the ovum of the wife who is to be only the gestational mother is fertilised by the sperm of

---

[36] See *Majallah Majma' al-Fiqh al-Islami*, op. cit., p. 266, No. 4 and 5.

the husband during normal intercourse with her shortly before the implantation of the fertilised egg of the first wife. So, she may bear two gestates without knowing which one is hers. Sometimes it may occur that one of them dies and is not aborted before the birth of the other child. This could result in confusion of kinship and compromised maternity and therefore the Council avoided giving a ruling regarding IVF where the second wife agrees to bear the gestate.[37]

From this argument one can come to the conclusion that if, for example, scientists, by means of a blood test or other method (DNA, for example) can clearly identify the genetic mother of the child, or if the husband abstains for a certain period from having intercourse with the wife who is supposed to bear the gestate, then there should be no problem in permitting the second wife of a Muslim to serve as a surrogate mother for the foetus of the first wife. Since, according to the *Shi'i fuqaha*, temporary marriage is permissible, then there should be more opportunity for *Shi'ites* to benefit from "assisted conception" as a treatment for a wife's infertility when the fertile man does not intend to marry a second woman permanently. But, all these depend on the permissibility of implanting an egg (either unfertilised or fertilised by the sperm of the husband) in the uterus of a woman who herself is not the provider of it. *Fuqaha* are not unanimous on such a permissibility. In one request for a fatwa from Ayatollah Araki we read:

> Question: A stranger's egg is taken out and replaced in the womb of a married woman who herself has an egg and can be fertilized. But to strengthen the womb and prevent abortion she needs the egg of another woman. Is it permissible?
>
> Answer: It is doubtful.[38]

---

[37] See *Ibid.*, pp. 323-4.

[38] See Hadi Hujjat and Muhammad Hadi Tal'ati, (eds.), *op.cit.*, p. 130.

7.3.1 *In Vitro* Fertilization and Maternity

There is a historically recognised principle that "the woman who gives birth to the baby is his legal mother". This principle is well established because "naturally" the woman who gives birth is also biologically related to the child. But the use of donated ova or donated embryos calls this principle into question; though some of the *fuqaha*, as is apparent from the following, still insist on a narrow interpretation of it.

> Question (a): A man plants his semen in the womb of a stranger by medical means; they have agreed that the woman carrying the foetus be paid, because his wife's womb cannot carry a foetus. The embryo consists of his semen and the egg of his own wife. Accepting that the action is not permissible because it confuses kinship, the problem which occurs later is that the carrying woman requests custody of the child who has grown in her body. What is your opinion?
>
> Answer: The woman in whose womb the sperm is placed is the legal mother because the mother is the one who gives birth. This is based on God's saying: "(As for) those of you who put away their wives by likening their backs to the backs of their mothers, they are not their mothers; their mothers are none other than (*illa*) those who gave them birth" (The Qur'an: 58:2), and the owner of the sperm is the father of the child but his wife is not the mother of the child. Based on this, the woman you speak of has the right to take the child for two years because of the custody right that she has. God knows.
>
> Question (b): What is the rule of inheritance and lineage regarding this child?

Answer: All the rules, concerning relatives and relatives-in-law, regarding

his father and mother are applicable to him. God knows.[39]

It appears that Ayatollah Khoei, in determining the parentage of a child who is born

through womb-leasing, has relied on the verse of the Qur'an which apparently

confines maternity to the woman who actually gives birth to the child. But such an

argument is not sufficient for our purpose. This is because, firstly, the verse is not

about maternity and filial relations. Secondly, the exceptional word (*illa*) in the verse

cannot be used in the limiting sense.

The verse was revealed to prohibit that kind of pre-Islamic divorce in which

a man repudiated his wife for ever by reciting the words "You are to me like my

mother's back." Islam prohibited this kind of divorce, which was known as *zihar*.

According to Islamic law, a man who intentionally recites these words to his wife

must pay a fine and, until he pays, it is forbidden for him to have sexual intercourse

with his wife. According to the *fuqaha*, the rule pertaining to *zihar* is not limited to

the case of likening the wife to the mother and is applicable even if one likens his

wife to his sister or other relatives with whom marriage is forbidden. By using the

words "their mothers are none other than those who gave them birth" the verse

emphasises that the more recitation of the words of repudiation by the husband is no

way places his wife in the same category as his mother regarding the prohibitory

rules of marriage.

In one verse of the Qur'an the wives of the Prophet are called the mothers of

the believing man, meaning that marriage with them is forbidden.[40] The rule is also

applicable regarding the breast-feeding mother (if the condition of feeding is

---

[39] Abu al-Qasim al-Musawi al-Khoei, *al-Masa'il al-Shar'iyyah, Istifta'at*, op. cit., pp. 319-20.

[40] See the Qur'an, 33: 6.

established). If the argument is accepted that the word "mother" refers only to the one who gives birth, then the rules of marriage ought not to be applied regarding the breast-feeding mother and the wives of the Prophet. But it is clear that the word "mother" in the language of the Lawgiver is not restricted to the one who gives birth: she may indeed be the one who gives birth, or she may be considered a mother without having any part in reproduction. If the limitation is cancelled, the provider of the ovum, who is actually the origin of the existence of the child, might be held to be the real mother or at least the one who is legally considered as the mother of the child. It is perhaps in connection with this possibility that Ayatollah Seestani on the issue comments:

> If a fertilized egg of a woman were transferred into the womb of another woman and grew there and she gave birth, does the child belong to the first or to the second? There are two possibilities: the first seems to be justified, although precaution ought not to be abandoned.[41]

Imam Khomeini in this regard says:

> If the gestate were transferred into the womb of another woman while it is a clot ('alaqa) or a lump of flesh (mudghah), or after the entrance of the spirit, and grew there and she gave birth, is he the child of the first or the second? There is no doubt that he is from the first if he is transferred after the completion of creation and the entrance of the spirit, as there is no problem in this (connecting the child to the first woman, who is the provider of the ovum) if he is extracted and replanted in an artificial womb. But, if it is extracted before this (before the completion of creation and the entrance of

---

[41] Ayatollah al-Sayyid al-Seestani, *al-Mustahdathat min al-Masa'il al-Shar'iyyah*, op. cit., p. 77, No. 68.

the spirit) while it is a lump of flesh there is a problem of connection. Yes; if

it is ensured that both the sperm and the egg of the couple are the origin of

the child it seems (*al-zahir*) that the child belongs to them (the couple) and

there is no difference if it is transferred to the womb of another woman or an

artificial womb.

As we can see, according to Imam Khomeini, giving birth in itself is not enough to

connect the child to the carrying woman or to prevent the provider of the ovum being

regarded as the mother of the child. However, he has made a statement regarding

those children whose origins are completely artificial (an artificial embryo, for

example, although this is at present, and may always be, science fiction) and carried

by the same woman. In this case Imam Khomeini holds that all of them are sisters and

brothers and cannot marry each other or the other children of the mother, just as one

is forbidden to marry an aunt or uncle.[42] From this one may understand that, although

the carrying woman is not considered as the real mother, the act of gestation itself

can affect the rules of marriage.

Since, according to Ayatollah Khoei, it is giving birth and not providing the

ovum which plays the main part in determining maternity, it is not surprising to see

that, regarding a child born using an artificial womb, he holds:

If the semen of a man is placed in an artificial womb[43] (called a baby tube)

the action is permissible and apparently the father of the child will be the

person whose semen it was and all orders applicable to a father and a child

---

[42] R.M. al-Khomeini, *Tahrir al-Wasilah*. op. cit., p. 623, No. 7.

[43] This is not yet possible.

will be applicable to them. The difference between such a child and other children is that such a child does not have a mother.[44]

In this case, however, it seems that Ayatollah Khoei assumes that the semen in itself is the origin of the child, and the role of the ovum is ignored. The same assumption is made by Imam Khomeni when determining the paternity of a child born from an artificial womb, as he says: "If, from the semen of a man in an artificial womb, a girl or a boy comes out, they would be the sister and brother of each other from the father's side and there should be no mother for them...".[45]

But since, according to physicians, semen without combination with the ovum cannot be generative, this assumption remains inapplicable, although, as I will show below, it can give a clue in determining the parenthood of a child born through cloning.

7.4 Human Cloning

As scientists explain, each sperm and each egg (called a germ cell) in humans contain twenty-three chromosomes. During fertilization sperm and egg unite and produce a zygote that contains pairs of each chromosome type. The human fertilized egg containing forty-six chromosomes can then develop into an embryo. Every human body cell (called a somatic cell) also contains forty-six chromosomes: twenty-two pairs plus two each of the sex chromosome (XX in the female and XY in the male). Each member of a chromosome pair carries the same genes.[46]

---

[44] See *Imam Khoei's Fatawa, Articles of Islamic Acts,* op. cit., p. 643.

[45] R.M. al-Khomeini, *Tahrir al-Wasilah,* op. cit., p. 622, No. 7.

[46] See Carl Drlica, *Understanding DNA and Gene Cloning: A Guide for the Curious,* Third Edition (New York: Wiley, 1997), p. 254.

Cloning researchers try to make a somatic cell develop into an embryo, which means that to reproduce a human being there is no need to fertilize the egg with the sperm. Dolly is the first result of cloning research in animals. "She was created not out of the union of a sperm and egg but out of the genetic material from an udder cell of a six-year-old sheep. Wilmut fused the udder cell with an egg from another sheep, after first removing all genetic material from the egg. The udder cell's genes took up residence in the egg and directed it to grow and develop."[47]

A brief explanation of the process of human cloning is necessary at this point: "Theoretically, to clone a human they would take a single cell from a person and induce it to begin dividing so that it would produce an adult organism genetically identical to the parent. There are several experimental methods of doing this. One calls for destruction of the egg nucleus, which contains the genetic information. This is termed enucleation and could be done by a laser or ultraviolet beam. The nucleus is then replaced with a cell taken from almost anywhere in the body. Finding itself with the full forty-six chromosomes, the egg is tricked into believing itself fertilized. It begins to divide. At an early stage, it would be transferred into a woman's uterus, using the technique IVF clinics have developed. Or, in the far future, it might be placed in an artificial womb. The genetic makeup of the resulting offspring would be that of the cell donor."[48]

Asexual reproduction, or the cloning of an individual through the exact replication of one of his cells containing his entire genome, is not yet possible in man, but according to at least one scientist, "the birth of a human clone might now be only

---

[47] Gina Kolata, *Clone: The Road to Dolly and the Path Ahead* (London: Penguin, 1998), p. 4.

[48] See Gena Corea, *The Mother Machine, Reproductive Technologies from Artificial Insemination To Artificial Wombs* (London: The Women's Press, 1988), pp. 260-1.

weeks away".[49] It is reported by South Korean scientists that they have taken a big

step towards human cloning. "Researchers at Kyunghee University in Seoul said they

had cultivated the early stage of a human embryo using a single cell implanted in an

ovum."[50]

7.4.1 Attitudes to Human Cloning

Following the successful experiment in animal cloning which resulted in the

birth of Dolly in 1997 in Edinburgh, politicians in many Western countries, including

President Clinton of the United States, asked scientists to halt research into human

cloning; indeed, the United States has refused to fund such research. In some

countries legislators have warned their scientists against continuing this research and

passed laws making actions resulting in human cloning illegal. Recently "a British

scientist has called for an urgent international conference to ban human cloning world

wide."[51]

Human cloning has also been proscribed by Jewish, Catholic Christians and

some Muslim scholars. When Dr. Tantawi, the head of the Azhar University in Egypt,

was asked about the human cloning, he cited some Qur'anic verses: *He it is who*

shapes you in the wombs as he likes (the Qur'an,3: 6); *And that He created pairs, the*

---

[49] "Dr. Patrick Dixon said the birth of a human clone might now be only weeks away and urged a
ban on new research" (BBC Ceefax, December 1998).

[50] BBC Ceefax, December 1998.

[51] *Ibid.*

male and female, from the small seed (the Qur'an,53:45-6); he holds that using methods other than these are forbidden.[52]

.. *Shi'i fuqaha* are not unanimous regarding the rulings of the *Shari'a* on human cloning. Whereas some hold that human cloning is forbidden because it leads to confusion in many affairs, others take the view that there is no objection to it. The following are the opinions of two well-known *mujtahids: al-shaykh* Mirz Jawad al-Tabrizi (who lives in Qom, Iran) and *al-sayyid* Muhammad Sa'id al-Tabatabaei al-Hakim (who lives in al-Najaf, Iraq). In a request for a *fatwa* from Ayatollah al-Hakim he was asked:

> Question: Following extensive scientific research and with the latest advance in technology, a new procedure was developed to facilitate the production of living things. When scientists announced that this method could be applied to human beings, following its success with plants and animals, world public opinion was divided sharply between supporters and opponents. Some European countries banned it, and both the Church and Al-Azhar prohibited it, while some scholars defended it. This process has been called "cloning". It takes place by taking an ovum, and after removing the nucleus from the ovum, the nucleus of another ordinary cell from the body is taken and placed in the now vacant ovum. The ovum with its changed nucleus then inserted into the uterus of a female. With the aid of an electric impulse, the ovum starts to divide, producing a new creature. A feature of the new creature is that it will be perfectly identical to the owner of the nucleus. In fact it does not require a male and female for its creation, but only the female. This leads to a reproductive process outside a family setting. The technique is called "cloning",

---

[52] Quoted from *al-Nur* magazine, No. 73 in Hasan al-Sayyid 'Izz al-Din Bahr al-'Ulum, *Al-Istinsakh al-Bashari wa Mawqif al-Shari'ah al-Islami* (Human Cloning and standpoint of the *Shari'a*), (Kuwait: Maktabat al-Alfayn, 1997), p. 18.

because it is not at all possible to differentiate between the new creature and the old one. It has been said that this procedure may cause many moral difficulties. For instance it can be used by criminals to escape justice, as if there were two clones, one of whom committed a crime, it would be not be possible to know who was the perpetrator.

In fact a sheep has already been produced according to this procedure after 277 failed attempts.

(One) What is the legal judgment (in *Shari'a*) as to permissibility or prohibition for such a procedure?

(Two) If human beings were produced according to this procedure, who then would be the father and who would be the mother?

Answer (One): On the face of it, it appears permissible to produce a living creature by this method or a similar one, which uses the normal laws and properties that Allah has made inherent in the Universe. Through exploration of such inherent laws and properties, more knowledge is gained of the signs of Allah, his wonderful power and his perfect creation. This further serves to strengthen the argument and confirm the truth of the message, as Allah says in the Qur'an: "We shall show them our portents on the horizons and within themselves until it will be manifest unto them that it is the truth. Doth not thy lord suffice, since he is witness over all things?"

However, nothing of these methods is unlawful (*haram*) except that which Allah has made explicitly unlawful, e.g. adultery (*zina*). To this category is added as an obligatory precaution the fertilisation of a female ovum with the sperm of a foreign male, artificially outside the uterus, so that the resulting being is attributed to two alien parents illegitimately outside wedlock.

Methods other than the stated exception are not unlawful in themselves, unless they are attached to something that is unlawful, e.g. looking at something which it is unlawful to look at.

Reference was made in the question to matters that may be cited as jurisprudential danger signals to be guarded against which give the misconception of prohibition.

1) Production of a living being outside a family setting. It is not clear how to make a case for prohibition, because there is no evidence in *Shari'a* for confining Man's life narrative to the way he is produced and his entire conduct within the familiar natural methods. Indeed, Man's advance lies in developing other ways, and the usage of the natural laws inherent in the Universe, which Allah almighty calls inquiry, endeavour and search for further knowledge. Also there is no evidence for confining Man's reproduction within a family setting. This is especially so, as the first man was created initially from mud, and then the creation of the Prophet of Allah, Isa (p.b.u.h) without a father, and again the creation of the she-camel of Salih and its offspring in a similar way as was narrated.

2) The concern that this method will create great moral problems as criminals may abuse it to escape from justice. Again this argument does not entail prohibition because even though crime is prohibited, doing that which a criminal can abuse is not illegal or prohibited. How many other means have been developed throughout the world, that they are used by criminals to their benefit more than this method? It didn't even cross anybody's mind to prohibit it. It is possible that criminals may benefit from plastic surgery more than they might from this latest method. Shall plastic surgery then be prohibited for that reason?

3) The success of this method may come after a few failed attempts that may damage the ovum before producing the required living being. It seems what is implied here is that the production of a living being is prohibited if it is liable to fail, because such a

failure would entail the inevitable destruction of the "failed" ovum and, like abortion, this is prohibited. The answer is, that which is prohibited is destroying a living being whose blood is respected and inviolable, or damaging the ovum that is prepared for fertilisation before life enters and settles in the ovum, as this resembles deliberate abortion. However, it is not prohibited for anyone addressed with the obligations to produce a creature that dies before it fulfils the conditions of life, if he did not have a hand in its death. So it is permissible for a man to have intercourse with his wife if she is ready for pregnancy, even if that pregnancy is liable to abortion as a result of the lack of fulfilling the conditions of life therein. This could be due to a deficiency in the sperm or the ovum, or the absence of the right circumstance for the embryo to complete its development and to begin its life.

Anyway, we see no objection to the stated procedure, except if it became reliant on an external prohibited factor, e.g. looking at something it is prohibited to look at, or touching something it is prohibited to touch, and so on.

Answer (Two): If the product is produced in the way described above, then obviously it will have no father. This is because attribution to a father requires the living being to be a product of a father's sperm and an ovum. In the present case there would be neither a sperm and nor a father. As to the mother, she is relevant as the living being is produced from her ovum. However, in this case it is not produced from a complete ovum, but one whose nucleus was removed. This may cause a problem in attributing it to her. So, yes, it is necessary out of precaution to avoid marriage between the product of such a procedure and the one from whose ovum or cell he was created. This appears to be supported by texts revealed about the beginning of creation, albeit

somewhat weakly, where it indicated objection to a person marrying what is produced by part of him. However, this may be supported by the fixed principles.[53]

Ayatollah Jawad al-Tabrizi introduces a different opinion on human cloning by holding that:

It is not permissible to clone human beings, because differentiation and differences between Mankind are necessities for human societies, ordained by the wisdom of Allah Almighty. He says: "And of his signs is the creation of the Heavens and the Earth and the differences of your languages and colours . . ." and says, " and have made you nations and tribes that ye may know one another." This is because the general order relies on this. Whereas cloning of humans, in addition to its requirement of other prohibited acts, e.g. intimacy between unlawful partners and looking at private parts, it further disrupts order and spreads chaos and anarchy. So in marriage a great confusion occurs between who is the wife and who is not, and who is *mahram* (i.e. a non-marriable relative) and who is not. It will not be possible also to distinguish between the two kinds of contract; that which is offering and that which is accepting. Or in law between plaintiff and defendant, and between these and the witnesses. Nor will it be possible to distinguish rightful owners from others. Similarly in schools, factories, administrations and exams where it would be possible to send the clone instead of the original, rights will be lost. Likewise in genealogy and inheritance, it will not be possible to differentiate between child and alien. Furthermore the clone is not counted a legitimate child to his father who donated the cell nucleus, hence relations and inheritance are lost. However, this is just a drop in

---

[53] The original (Arabic) text of the *istifta* ' (request for fatwa) and answer (*fatwa*) is quoted in Hasan al-Seyyid 'Izz al-Din Bahr al-'Ulum, *op. cit.*, pp. 141-3.

the ocean, if we compared all the rest of the possible scenarios, where all order and society itself will fall. God knows.[54]

Studying carefully the opinions of Ayatollah al-Hakim and Ayatollah Jawad al-Tabrizi, we can come to the conclusion that the primary rule regarding human cloning relates to its permissibility. But if it is proved that human cloning will cause confusion and corruption in society, then it should be prohibited according to the secondary commandment.

7.4.2 Parentage of Clone

Since sperm is not used, Ayatollah al-Hakim holds that the child has no father, and since the whole egg is not used it is difficult to attribute the child to the mother. So, any criterion which reliably connects the child to its parents, according to Ayatollah Al-hakim, must involve the use of both sperm and egg.

But such reasoning may be changed if we consider the role of the sperm and egg in providing the genetic material, as previously explained. It is this genetic material which is crucial in attributing the child to the parents and which normally is provided by the sperm and egg together. In human cloning, the person being cloned would be the provider of all the genetic material (which would be taken from his/her somatic cells) and should therefore be regarded as the genetic parent; thus all the rules regarding marriage would be applicable. For example, it should be understood that a clone (if male) could not marry his sister or (if the clone is female) the brother of the provider of the genetic material. If the provider intentionally offered the genetic material, then the rules of custody, access or even inheritance might be

---

[54] For the original (Arabic) text see Hasan al-Sayyid 'Izz al-Din Bahr al-'Ulum, *op. cit.* p. 144.

applicable, especially if it were accepted that human cloning is permissible; except that we might insist that the rule of inheritance, for example, is applicable only when a child is born as a result of marriage.

If the provider were also the carrier then the clone would have only one parent (mother). But if the provider and carrier were different the child would have one genetic parent (father or mother) and one carrying mother. Then, all the rulings regarding a carrying mother would be also applicable. If in the future an artificial womb were to be used then the child would have just one genetic parent (mother or father).

It is not at present possible to create the genetic material of the human body from non-human sources or other material. If this were to happen the rule would be different. In one of his *fatwas* Imam Khomeini speculates:

> If a boy and a girl are born from an artificial seed and artificial womb, apparently there is no relation between them, they can marry each other, they do not inherit from each other even if the seed is taken from one apple, for example.[55]

It must be explained that this *fatwa* written in *Tahrir al-Wasilah* was issued many years ago, before the successful experiment to create an animal (Dolly) without the union of sperm and egg. The creation of a human being from non-human DNA (the apple seed) is a hypothetical case which is likely to prove impossible since it is supposed that genetic material for human cloning must be taken from a human cell.

In fact, hypothetical cases are commonly discussed by the *fuqaha* in investigating the rulings of the *Shari'a* in different situations. Although this shows, and may increase, the ability of the *fuqaha* to deal with new questions, it may also

---

[55] R.M. al-Imam Khomeini, *Tahrir al-Wasilah*, op. cit., p. 623.

cause neglect of real subjects, giving instruction on which is more effective and important in developing Islamic law.

7.5 Assessment

Like all other religions Islam pays great attention to marriage and family law. Since the new reproductive technologies challenge the principle of family law, Islamic jurists have an obligation to determine the Islamic viewpoint in this regard. Basically, family law is regulated on the assumption that reproduction occurs within the marital relationship and through sexual intercourse. By separating reproduction from sex or introducing a third party into the procreative process such "assisted conceptions" call for a new investigation and the development of family law.

Any discussion of the legality of these techniques must first focus on the permissibility or prohibition of each according to the rulings of the *Shari'a*. Basically there is no problem in benefiting from reproductive technologies if they are restrictedly employed between the married couple. The intervention of a third party, however, leads to prohibition. This includes donor insemination and surrogacy arrangements.[56] The main reason for prohibiting these methods is that the principle of precaution should be observed in reproduction.

---

[56] It must be mentioned here that in the more common type of surrogate arrangement, the carrying woman provides the ovum and the commissioning father provides the sperm. Since according to the *Shi'ites* temporary marriage is permitted and the partners may agree not to have sexual intercourse, it is possible to legitimize a surrogacy arrangement within the temporary marriage. In this case, however, the child will belong to the father and surrogate mother and not to the permanent wife of the husband.

Jurists apparently consider that sperm is more critical in generation since they strongly forbid donor insemination, although some of them permit the use of a donated egg or the employment of the second wife to serve as gestational mother. These dispensations are, however, controversial because according to scientists both sperm and egg play an equal role in reproduction. So the necessity of observing precaution in reproduction should be also applied to the use of a donated egg.

Where the second wife is supposed to carry the child for the first wife as gestational mother, it may happen, as is confirmed by scientists, that during normal intercourse her own ovum might be fertilized shortly before the implantation of the fertilized egg of the first wife. This will result in confusion of kinship and maternity. It was by considering this fact that the members of the Council of Islamic *Fiqh* established by Sunni *fuqaha* cancelled the permissibility of using IVF techniques when the second wife agrees to bear the child, which was legitimised before by the same Council. It might be also argued that if, for example, scientists, by means of blood or DNA tests, can clearly identify the genetic mother of the child, then there should be no problem in removing the prohibition of the mentioned case.

In attempting to determine the maternity of a child who is born through womb leasing, some *fuqaha*, invoking certain verses of the Qur'an, have held that the carrying woman should be regarded as the mother of the child. This view is, however, debatable because, firstly, the verses in question are not about filial relations and, secondly, although the carriage itself can effect the rules of marriage, the provider of the ovum is actually the origin of the existence of the child and is therefore its real and biological mother, a fact which is ignored by these *fuqaha*.

Whereas al-Azhar and some *Shi'i fuqaha* argue that human cloning should be prevented, some others hold that according to the *Shari'a* there is no objection to it. But it appears, according to the rule of precaution, that its permissibility should be limited to cases where the carrying woman is related by marriage to the person who is to be cloned (if is male) or where the provider of the genetic material (if female) is the carrying woman or where an artificial womb is employed (although this is not possible yet). If it is proved that human cloning will cause confusion and corruption in society then it may be prohibited by a secondary commandment.

On the question of determining the parentage of the clone it is argued that since sperm is not used the child has no father. But such reasoning may be changed if we consider the role of the sperm in providing some of the genetic material. In human cloning , the person being cloned would be the provider of all genetic materials and should be regarded as the genetic father (if is male).

All these show how other branches of knowledge can affect the determination of the rulings of the *Shari'a* on a particular subject. In fact today *ijtihad* without familiarity with other scientific subjects is not possible. By studying only the traditional texts or relying on general principles and deducing the rules of hypothetical cases *mujtahidun* cannot be sure that they are doing their duty. Besides all the necessary qualifications, having precise knowledge of the subject must play an important part in *ijtihad* and deducing the rulings of the *Shari'a*, which call for cooperation between *mujtahidun* and scientific authorities on various subjects.

Conclusion

The purpose of this study is to investigate whether Islamic laws, while reflecting or, at least, not opposing the essential teachings of the *Shari'a*, could be subject to extension and change so as to meet the requirements of Muslim societies in the modern age.

Since, according the *Shi'i Usuli* school of law, *ijtihad* and *mujtahidun* play important parts in the discovery, extension, interpretation and application of the *Shari'a*, it was necessary to discuss the meaning and development of *ijtihad* and examine its methodology (*usul al-fiqh*) which, in fact, constructs the basis of Islamic law. These issues were briefly raised in the first three chapters, where it was concluded that:

(a) Although the Shi'ites initially avoided the term *ijtihad* because it was used by the Sunnis to denote speculative ways (*ra'y* and *qiyas*) of discovering the *Shari'a*, they exercised it as a means of deriving precepts for particular and actual cases through applying the general rules of the *Shari'a*. This was encouraged by their infallible Imams, as it was recorded from the sixth Imam that he said to his followers

"Our duty is to give you the principles and yours is to derive the details and branches"[1].

(b) During the period when the Sunni *'ulama* generally claimed that the door of *ijtihad* must be closed, it remained an open process among Shi'ite scholars which renewed and produced an elaborate and refined literature on *fiqh* and *usul al-fiqh*. In addition to the rules of interpretation of the written sources (the Qur'an and the *Sunna*), the Shi'ite *usul al-fiqh* is distinguished by the acceptance of "human intellect" or "reason" (*'aql*) as one of the main sources of the law, and also by the four procedural principles (*usul al-'amaliyyah*), rebuilt by al-Shaykh al-Ansari on a rational base and designed to be used in formulating decisions in doubtful cases.

It appears, however, that although *'aql* is theoretically accepted as one of the main sources of the *Shari'a*, in practice there is little possibility of its functioning independently. This is because in very few cases can the jurist discover with certainty the effective cause (*'illa*), or the "good" (*masliha*) and "evil" (*mafsida*), according to which, as the Shi'ites and Mu'tazilates believe, the Divine law is revealed. To formulate the rules in the many cases where there is no textual evidence to cover them the Shi'ite *'ulama* use procedural principles (*usul al-'amaliyyah*), among which especially the principle of "exemption" (*asl al-bara'a*)[2] is helpful in allowing some rules and developed legal systems resulting from scientific researches to be accepted as legitimate, as long as no contradiction to the *Shari'a* can be found.

---

[1] "*'Alayna ilqa' al-usul ilaykum wa 'alaykum al-tafri'*"(al-Hurr al-'Amili, Muhammad ibn al-Hasan, *Wasa'il al-Shi'a ila Tahsil Masa'il al-Shari'a* (CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran), Vol. 27, chapter (bab) 6, p. 62, Riwayah 33202).

[2] See Chapter Three, 3.4.1.

(c) Another important issue referred to throughout these chapters was the position of the *mujtahidun* during the Occultation in carrying out the functions of the hidden Imam. According to a broad interpretation of some *hadith* recorded from the Prophet and the Shi'ites' infallible Imams, the learned and faithful *fuqaha* are authorised to both formulate and apply the laws.[3]

The "authority of the *faqih*", which was also emphasised by Imam Khomeini during the establishment of the Islamic government in Iran, can play a role in adapting the law to the requirements of the Muslim societies of every era. This, however, as was discussed in the other chapters, necessitates the *fuqaha* of modern times to have a proper grounding in all issues which on the one hand come under *ijtihad* and on the other fall within an area of specialisation such as sociology, economics, politics, medicine, and so on. Since it is not possible for a single individual to be sufficiently knowledgeable in all subjects, it is reasonable to suggest that the branches of jurisprudence be specialised so that those who train to be qualified *mujtahidun* are given the opportunity of education in specific branches and, bearing in mind the relevant rules of the *Shari'a*, of discussing the actual problems in detail and with the help of scientific research. To support this notion, which is also called "partial *ijtihad*", we may refer to the opinion of those *fuqaha* who authorise the judgement of those who are knowledgeable in some parts (related to the cases in dispute) of the jurisprudence, but not all.[4]

---

[3] See Chaptere One, 1.4.

[4] See for example R. M. al-Khomeini, *Al-Rasa'il*, Qom: Mu'ssese-ye Matbu'ati-e Isma'iliyan, Rabi'al-Awwal, 1385, Vol. 2, pp. 107-8. His opinion here differs from what he holds in his *Tahiri al-Wasila*, mentioning *al-ijtihad al-mutlaq* as a necessary condition for those who pass judgement.

Unfortunately, there is no encouragement from the traditional *fuqaha* to put this suggestion into practice in the religious centres. They still insist that only full-fledged *mujtahidun* (*al-mujtahid al-mutlaq*: those who have exercised *ijtihad* in all subjects) are authorised to be followed. Another impediment is the method they use in examining and developing the law: repeating the same issues which were discussed by previous *'ulama* (usually without any new outlook), and discussing hypothetical cases.[5] This causes the results of their efforts to be less and less used and gaps to appear in the law regarding concrete cases. Requests for *fatwa* by laymen play a more important role in extending the *fiqh* than of their own investigations, which would be more effective if they searched scientifically.

As the fourth chapter shows, both Sunnis and Shi'ites hold that there is no objection to the legal system of Islam's being developed according to the conditions of the time, because within the Islamic teachings there are principles which allow such development and some changes in the law in order to fulfil the requirements of the Muslims of every period. This is also in conformity with the comprehensiveness, the universality and the eternality of the *Shari'a*, which is revealed to provide the necessary guidance for the human race and its prosperity in this world and hereafter. In an attempt to adapt Islamic law to cultural change and modern needs various scholars have suggested different approaches. While some modernists try, through new readings of the revealed texts, to justify the legal systems of the non-Muslim developed countries, which in some cases contradict the *Shari'a* as established by the founding jurists, the *'ulama* hold that any changes that might be made in the field of Islamic law should be through the methodology accepted by the authoritative

---

[5] See for example Chapter Seven, 7.4.2.

schools. This, however, should not be taken as preventing any change in the methodology, since the way of *ijtihad* even in *usul al-fiqh* must remain open.

Through the arguments set forth in the fifth chapter, three acceptable ways were found to justify change and innovation in Islamic law.

(1) Change is justified by some governing rules expressed in the Qur'an or the *Sunna* or accepted by *'aql*, whose function is to control the other rules in special circumstances. These principles permit legislators to enact regulations whenever needed where there is no opposing textual evidence (*asl al-bara'a*), and to neglect the primary commandments if they cause a great amount of harm or are extremely burdensome (the principle of "no harm and no injury" and the principle according to which there should be no burden and impediment)[6] or unduly constrain the individual.[7]

(2) Justification occurs through governmental rulings endorsed by the leader of the Muslim society. If the leader is a faithful and qualified *mujtahid* all legislation and governmental rulings will be considered legitimate. This is validated by considering two positions regarding the prophecy and guardianship of the Prophet, and holding that besides the commandments ordained by the Prophet as the messenger, which are eternal, there are also commandments which are ordained by him as the governor of the Muslim community. These were designed especially for the people of the Prophet's own day, and each age should be reregulated by authoritative people (*ulu al-amr*) according to social justice and the requirements of the time. This argument might be considered the main key for adapting Islamic law to

---

[6] See Chapter Five, 5.4.3 and 5.4.1.

[7] See *Ibid.*, 5.4.2.

the requirements of the time, provided that we have clear criteria to distinguish the two types of commandments from each other.

A noteworthy point regarding governmental rulings is that, while most of the *fuqaha* hold that the authority of the *faqih* as governor or leader is limited within the subsidiary laws and where there is no obligation or prohibition from the Lawgiver - that is, in the field called by al-Sadr *mantaqa al-firagh*[8] - Imam Khomeini comments that the authority should be more extensive. According to him, Islamic government may enact regulations, on the basis of expediencies, which must be preserved even if they contradict some of the Islamic rules regarded as absolute and constant.[9] This may be justified on the basis of the rule "the most important and the important" (*al-ahamm wa al-muhimm*)[10] which allows *mujtahidun* to relax some rules of the *Shari'a* which are of lesser importance in comparison with others, or on the basis of *masliha* (public interest), although it is not theoretically accepted by the Shi'ites as a mean of formulating the rules.

Moreover, Imam Khomeini holds that, in recognition of the expediencies and requirements of the Islamic regime, experts in different branches, such as economists, sociologists, and so on should be consulted.[11] This point, sanctioning the intervention of other kinds of knowledge in legal matters, confirms that today *ijtihad* is not possible, especially if the authority of the *faqih* is expected to cover all temporal matters, without the aid of scientific knowledge and the advice other experts. In fact, if the *mujtahidun* themselves, in formulating the rules, consider the requirements and

---

[8] See *Ibid.*, 5.2.2.

[9] See *Ibid.*, 5.3.1.

[10] See *Ibid.*, 5.4.5.

[11] The body known as the National Excigencies Council (*Majma'-e Tashkhis-e Maslehat-e Nezam*) fulfills this function in Iran.

279

conditions of the time and, being well qualified, examine and discuss the current subjects in the light of scientific research, then there would be little need to reregulate them on the basis of *masliha* which is usually relied on in the process of codification of Islamic law in Iran.

(3) Changes to the subject matters of the precepts, changes in the circumstances in which the laws are to be executed, and the birth of new subjects are also elements which require the *mujtahidun* to constantly renew their *fatwa* and give fresh opinions. These elements were explicitly referred to by Imam Khomeini in his discussion of "the role of the time and place in *ijtihad*" and also in his letter to a concerned scholar, encouraging debate on the new subjects resulting from scientific developments and also consideration of the change and alteration of the subject matters of the rules when expressing *Shari'a* rulings.[12]

In investigating the stages through which a *mujtahid* may find out the rulings of the *Shari'a* on a particular subject, some new issues of *fiqh* were introduced in the sixth and seventh chapters, whose argument showed that, together with the knowledge of the sources of the law, which play the basic role in *ijtihad*, scientific knowledge has an effect on the understanding of the subject matters of the rules, which are in close relation with the rules themselves, and also on the assessment of the result of the rules, which may lead in some cases to the issuing of a secondary commandment. For example, according to physicians sperm and ovum have an equal role in reproduction. If one is unaware of this fact, he may ignore the role of the ovum, restrict the role of the mother to providing a suitable place for the growth of the foetus and to giving birth and suckling the infant, and assume that sperm in itself

---

[12] See chapter 4, 4.2.3.4.

280

is generative. This assumption will affect the formulation of the rules regarding egg donation, maternity and the parentage of a child born through IVF (*in vitro* fertilisation) or womb-leasing, and so on. Regarding human cloning it is observed that Ayatollah al-Hakim, while permitting the practice, denies the parentage of the clone because the sperm and the whole egg are not utilised. But considering the role of the sperm and the egg in providing the genetic materials (as we understand from the biologists), which in human cloning theoretically would be provided by the somatic cells of the person being cloned, this view may be changed to recognise the paternity or maternity of the provider, especially if an artificial womb were used (which may be a future possibility) or if during the period of cloning the provider (male) marries the carrying woman. It appears that Ayatollah Jawad al-Tabrizi, who forbids human cloning, considers the results of permitting such a practice which, according to Ayatollah al-Hakim, is not contrary to the *Shari'a*. If, through scientific research, it becomes clear that human cloning will cause corruption and confusion in society, then according to the secondary commandments it should be prohibited or at least its employment should be restricted to special circumstances.

So, to find out the rulings of the *Shari'a* on new subjects the *mujtahidun* need to be aware of recent developments in different fields, besides possessing the accomplishments necessary to be a qualified *mujtahid*. Specialisation in different areas appears to be necessary if it is held that the *fuqaha* should take part in giving practical instruction regarding different problems. This requires authorisation of division in *ijtihad*, and cooperation between *mujtahidun* and scientific authorities on various subjects. Consideration of the change and alteration of the subjects or change in their use and of the conditions of the time, is necessary when examining and

repeating the opinion of the previous *'ulama*. It is by observing all these that

mujtahidun may reflect the true teachings of the *Shari'a*, and be able to bring the

Islamic laws successfully into harmony with the requirements of the time.

Appendix I: Biography of Muhammad 'Abduh

Muhammad 'Abduh, one of the reformers of modern Islam, was born in 1849 in a village in the Egyptian delta into a family belonging to the peasant class. His father was from a family of Turkish origin and his mother from an Arab family related originally to the family of Bani 'Adi, one of the early heroes of Islam. Both families had long been settled in Egypt.

When he was ten years old, after having learned to read and write, 'Abduh was sent to the home of a professional Qur'an-reciter for two years. When he was about thirteen years old he was sent to study at the Ahmadi mosque in Tanta, in order to complete the memorising of the Qur'an and learn to recite or intone it according to the determined rules. After about two years he was initiated into Arabic grammar, but this experience was unfortunate because of the wrong methods by which he was initially taught. Despairing of success in his studies, he ran away from school and hid for three months with some of his uncles. He married, in 1865 at the age of sixteen. Forty days after his marriage his father compelled him to return to school in Tanta, but on the way he hid himself among relatives in the village of Kanayyisate Adrin. There he chanced upon Shaykh Darwish Khadr, an uncle of his father, who taught him "how to seek learning from its nearest point of approach". Shaikh Darwish was a follower of the Shadhali order of Sufis, and was proficient in reciting the Qur'an and also in understanding it. 'Abduh spent two weeks with him. The Shaikh instructed him in Sufi doctrines and practices, gave him his first lessons in properly understanding the Qur'an, and taught him some of the reality of belief which lay behind the stiff phrases of the books of grammar and doctrine. He went back to Tanta with a different spirit and different outlook on life. After a few months he went on to the Azhar in Cairo, where he stayed from 1866 to 1877 and finished his studies with the degree of 'alim.

From the time that he began his studies in the Azhar he was under the influence of Sufism. For a while he lived a life of extreme asceticism, fasting during the day and spending the night in prayer. He shunned contact with other human beings and moved in an imaginary world where he thought that he held converse with the spirits of men of former generations. From the danger of this he was rescued first

by another intervention of Shaikh Darwish, during a visit which 'Abduh made to him, then by his meeting with Jamal al-Din al-Afghani, who travelled up and down the Muslim world and Europe preaching his revolutionary message of religious revival and pan-Islamic political activism. 'Abduh, in company with Shaikh Hasan al-Tawil, visited Jamal al-Din al-Afghani, who was passing through Cairo for the first time on his way to Constantinople. During their conversation, Jamal al-Din asked them questions about certain verses of the Qur'an and what the commentators said about them. He discussed with them what the orthodox interpreters had to say on certain passages, and what the mystical interpretation of the same passages was. Al-Afghani attracted the attention of 'Abduh because Qur'anic interpretation and mysticism were his favourite studies. When al-Afghani returned to Cairo from Constantinople in 1871, 'Abduh began to study regularly with him the subjects of mysticism, logic, philosophy, jurisprudence and astronomy. The method of al-Afghani's teaching was very different from that of the Azhar. He would often examine the meaning of a point under discussion using reasoning and logical proof. Al-Afghani introduced his pupils to a number of modern works which had been translated into Arabic and thus opened the world of western scientific thought to 'Abduh. He also trained his pupils in writing articles for the press and gave them practice in public speaking. 'Abduh was under his influence for about eight years, period of al-Afghani's residence in Egypt, and was the most devoted of his students.

After having received his degree as *'alim* from the Azhar, 'Abduh entered upon the work of teaching. He gave lectures in the Azhar and also in his own house to a number of Azhar students on a wide range of subjects, applying the methods of al-Afghani to the teaching of theological subjects. In 1878 'Abduh was appointed through the influence of Riad Pasha to be a teacher of history in the school called *Dar al-'ulum*, where he began a course of lectures on the *Prolegomena* of Ibn Khaldun, and at the same time was appointed as a teacher of Arabic language and literature in the Khedivial school of languages. His teaching career was interrupted in 1879 by Tawfiq Pasha, who expelled the sayyid al-Afghani from Egypt and ordered 'Abduh, as his disciple, to retire to his village. But by 1880 he was back in Cairo, appointed by the Prime Minister, Riad Pasha, as one of three editors, then as the chief editor, of the official gazette, *Al-Waqa'i' al- Misriyya* ("Egyptian Events"), in which

he published a series of articles calling for various political, religious and social reforms.

After the British occupation of Egypt and the restoration of the Khedive's power in 1882, 'Abduh was arrested , kept in prison for a time, and sentenced to exile for three years. After a short stay of about one year in Beirut he joined al-Afghani in Paris, helping him produce the famous journal, *Al-'Urwah al-Wuthqa*, until it was discontinued in 1884. At the beginning of 1885, he returned to Beirut, where he found a welcome from his former friends and remained for three and a half years, giving lectures in his house on the life of the Prophet, and in two mosques of the city on the exposition of the Qur'an. He was also invited to teach in a religious school where he delivered the lectures on theology which later formed the basis of his famous work *Risalah al-Tawhid.*

In 1888 he was allowed to return to Egypt and soon was appointed a judge in the "native courts" (*al-mahakim al-ahliyya*) created to apply the newly established codes of law (essentially non-Islamic and modelled on the French Code) . In 1895 he became a member of the newly formed administrative council of Al-Azhar University and remained its most prominent member for ten years, during which time he carried out some reforms of its organisation. In 1899 the Khedive appointed him Grand *Mufti* of Egypt and a member of the Legislative Council. As *Mufti* he could do something to reform the religious courts and the administration of the *awqaf* as well as giving formal advisory opinions to the government on matters involving Islamic laws. He issued a number of controversial *fatwas* on problems of personal belief and practice. In regard to public questions his *fatwas* helped to reinterpret the religious law in accordance with the needs of the age. 'Abduh delivered a series of lectures on the Qur'an in the al-Azhar University according to the method of his interpretation. These lectures, with the collaboration of his famous disciple, Rashid Rida, began to appear in *al-Manar* as the Commentary of Muhammad 'Abduh. After 'Abduh's death in 1905, Rashid Rida continued the *Commentary* until Surah xii in the manner of his master.

Appendix II: Biography of Imam Khomeini

Imam Ruhullah al-Musawi al-Khomeini (1902-1989) was born in a small town known as Khomein (south-west of Tehran) into a strongly religious family. Due to the early death of his father (Ayatollah Sayyid Mustafa Musawi), he was brought up under the loving care of his mother and his aunt. When he was fifteen years old his aunt came to an untimely end, and shortly afterwards his mother also passed away. So his elder brother, known as Ayatollah Pasandida, took on the task of supervising his education.

At the age of nineteen, after receiving his elementary education in Arabic literature, logic, theology and Islamic jurisprudence, he was sent to continue his study of the religious sciences in the nearby town of Arak at a theology institute there, and a year later he moved to the city of Qom. There, in addition to completing his previous studies with the religious experts and authorities of the time, he also learned mathematics, astronomy and philosophy and attended lectures on ethics and Islamic mysticism, and for a period of six years he studied the most advanced levels of applied and theoretical mysticism (*'irfan*) under Ayatollah Aqamirza Mohammad 'Ali Shahabadi. When twenty-seven years old he wrote a treatise in Arabic on these subjects, named *Misbah al-Hidayah*.

When Reza Khan established the Pahlavi regime, the Iranian monarchy turned into a dictatorship trying to eliminate Islam. Reza Khan's efforts were continued by his son, Mohammad Reza Pahlavi (Shah). In 1941, making what is considered to be his first public political statement, Imam Khomeini wrote and published a book, *Kashf al-Asrar*, which is essentially a detailed, systematic critique of an anti-religious tract, containing also political passages and criticism of the Pahlavi regime. It is in this book that the idea of an Islamic government, and the need for an uprising to establish it, is propounded.

The Imam's overt struggle against Mohammad Reza's regime began in 1960 (1341 HS) with his opposition to the Provincial and District Councils Bill which essentially sought the eradication of Islam. With the approval of the Shah's government, the Islamic stipulations concerning voters and candidates were dropped and the pledge of allegiance was changed from swearing "on the Holy Qur'an" to

swearing "on the Holy Book". The Imam rose up in opposition to the bill and invited the other *maraji'*, and the people to rise up with him. His warnings to the government in the form of telegrams to the prime minister, along with his revelatory speeches and trenchant declarations and coupled with the support given by the *maraji'* as well as the widespread demonstrations of the people in Qom, Tehran and other cities, forced the Shah's regime to retreat from its stance and rescind the bill. The struggle continued, and the regime, in a precipitous move on March 22, 1963, attacked the Feyziyeh theological centre in Qom. The Imam's messages and speeches on this tragic incident were distributed throughout Iran.

On the Day of Ashura (June 3, 1963 / Khordad 13, 1342 HS), Imam Khomeini delivered a historic speech in Qom, repeating his denunciations of the Shah's regime and warning the Shah not to behave in such a way that the people would rejoice when he should ultimately be forced to leave the country. Two days later he was arrested at his residence and taken to confinement in Tehran. The response of the people was immediate. As news of Imam's arrest broke around the country, the people took to the streets on June 5 (Khordad 15) and, as soldiers intervened, large numbers of people were martyred. The pressure of public opinion and the protests of the *'ulama* eventually forced the regime to free the Imam after a ten-month period of imprisonment.

The Imam's struggle continued with the delivery of revelatory speeches and the publication of disclosing messages. His opposition to the approval of the "Capitulation Bill" by the government, according to which American political and military advisers would receive judicial immunity, led once again to his arrest. On November 4, 1964, the Imam was sent into exile in Turkey. His enforced stay of about eleven months, gave him an invaluable opportunity to compile his great work *Tahrir al-Wasilah*. In this book, which is in fact his practical treatise (*Risalah*), for the first time in that period, opinions governing holy war (*jihad*), defence, enjoining the good and forbidding that which is wrong, and current issues were presented.

On October 5, 1965 the Imam, accompanied by his son Hajj Aqa Mustafa, left Turkey for his second place of exile: Iraq. There, he took up residence in the city of Najaf. In addition to his engagement in the teaching of courses in the advanced study of Islamic jurisprudence (*fiqh*) and presenting the theoretical bases of Islamic rule,

which were later published in a book entitled *Wilayah al-Faqih,* and despite his continuing difficulties, Imam Khomeini assiduously monitored the political affairs of Iran and the world of Islam whilst in Najaf and maintained contact in various ways with the Iranian revolutionaries.

The martyrdom of the Imam's son, Ayatollah Hajj Aqa Mustafa, on October 23, 1977 was a watershed in the movement in Iran. Imam Khomeini dealt with his son's death in a surprising manner, accepting it as one of God's blessings in disguise. In revenge for the holding of large memorial ceremonies in religious centres in Qom, and the attacks which were made on the Shah in them, the regime published a scurrilous article against the Imam in one of the country's state-run newspapers. Opposition to this article culminated in the uprising by the people of Qom on January 9, 1978, during which a number of revolutionary religious students were killed. Once again the uprising had begun in the city of Qom; within a short space of time it had spread to the rest of the country. Imam Khomeini called on the people to be steadfast and continue with their uprising until the foundations of the monarchical regime had been destroyed and an Islamic government established.

In a meeting between the Iranian and Iraqi foreign ministers in New York, the decision was made to expel the Imam from Iraq. On September 24, 1978 the Imam's home in Najaf was surrounded by Iraqi police. It was announced that his remaining in Iraq now depended on his stopping his political activities and relinquishing his struggle. Consequently, the Imam's decision to continue with the fight led to his leaving Najaf on October 4, 1978, after thirteen years in exile there, and heading for Kuwait. On arriving at the border, however, the Kuwaiti authorities refused him entry. On October 6 the Imam entered Paris and two days later took up residence in Neauphle-le-Château on the outskirts of the city. Representatives from the Élysée Palace communicated to him the French President's wish that he refrain from any kind of political activity while in France. The Imam reacted sharply, making it clear that such restrictions were contrary to democratic principles and stating that even if he had to travel from airport to airport and country to country, he would not relinquish his aims.

The Imam's four-month stay in France changed Neauphle-le-Château into the most important news centre in the world. On receiving the guidance of the Imam, the

Iranian nation intensified its demonstrations and, through widening their strikes, the people paralysed governmental organs and organisations. The replacement of one prime minister with another and then another; the Shah's repentance for past offences; the regime's arrest and trial of old, infamous pawns; the freeing of political prisoners, and so on, did nothing to stop the spread and intensification of the revolution.

The Imam set up a Revolutionary Council and informed the nation of its members. The Shah, on the pretext of feeling ill and needing a rest, fled the country on January 16, 1979. The news of the Shah's departure filled the nation with joy and strengthened the people's resolve to continue the movement until the regime collapsed completely. The Imam's decision to return to Iran created a wave of happiness and optimism that swept through the nation. On February 1, 1979 (Bahman 12), after fourteen years in exile, the Imam returned to his homeland. The unprecedented welcome given to the Imam by the people of Iran was so huge and unequivocal that Western news agencies put the figure of those attending at four to six million.

On 11 February 1979 (Bahman 22), the Shah's regime finally collapsed and, less than two months after the victory of the revolution, the Iranian people, in one of the freest elections ever held in the history of Iran, approved the establishment of an Islamic republican system by an overwhelming 98.2% of the votes.

After the revolution the Imam continued to play a central role in confronting the crises that assailed the Islamic republic: Iraq's invasion of Iran, the decimation of the leadership and the continuing dislocation of society and the economy.

Among the important acts Imam Khomeini carried out in the last months of his life, was the dispatch of a letter to Mr. Gorbachev, the last head of the Union of Soviet Socialist Republics. In this letter, sent on January 1, 1989, while analysing the changes in Russia, he pointed out the inability of the atheist system of communism to manage the affairs of society and declared Russia's main problem to lie in its leaders' lack of belief in God. In so doing, he also warned the Russian leadership against turning to the Western capitalist system and being deceived by America. Propounding deep philosophical and Gnostic matters and pointing out the failure of the communists in their anti-religion policies, Imam Khomeini asked Mr. Gorbachev to

turn to God and religion instead of pinning hopes on the materialism of the West. On June 3, 1989 he passed away and after a great funeral procession (attended by more than 10 million people) procession was buried in Tehran.

The Literary Works and Compilations of Imam Khomeini

Dozens of valuable books and literary works by Imam Khomeini on such subjects as ethics, gnosticism, jurisprudence, principles of religion, and philosophy, as well as political and social matters remain, a number of which have not yet been published. Unfortunately, some of his valuable treatises and compilations were lost during removal from one rented accommodation to another, and as a result of the attack of the Shah's SAVAK agents on his house and library. The following is a list of some of his works and compilations.

1. *Al-Rasa'il* (two volumes)

2. *Tahrir al-Wasilah* (two volumes)

3. *Kitab al-Bay'* (five volumes)

4. *Manahij al-Wusul ila 'Ilm al-Usul* (two volumes)

26. *Ta'liqat al-Urwah al-Wuthqa*

27. *Makasib al-Muharrama* (two volumes)

1. *Sharh-e Du'a-ye Sahar*

5. *Sharh-e Hadith-e Junud-e 'Aql wa Jahl*

6. *Misbah al-Hidaya ila Khalafa wa al-Wilayah*

9. *Sharh-e Chehel Hadith*

10. *Sirr al-Salat (Salat al-'Arifin wa al-Mi'raj al-Salikin)*

11. *Adab al-Salat*

12. *Risalah Liqa' Allah*

14. *Kashf al-Asrar*

15. *Anwar al-Hidayah fi al-Ta'liqat al-Kafiyah* (two volumes)

16. *Risalah Najah al-'Ibad*

17. *Wilayah al-Faqih*

18. *Kitab al-Khilal fi al-Salat*

19. *Jihad-e Akbar ya Mubariza ba Nafs*

20. *Tafsir-e Sura-ye Hamd*

21. *Istifta'at*

22. *Divan-e Shi'r*

23. *Last Will and Testament*

In addition to the above works, Imam Khomeini has presented his opinions, and guidance on political, social and religious matters in hundreds of sermons, messages, decrees, and letters in the course of years of challenge both before and after the victory of the Islamic Revolution. These have been published in various forms under scores of headings. The 22 volumes of *"Sahifa-ye Noor"*, plus one volume entitled "Key to the Sahifa", are the most comprehensive books thus far published. In this book (the "key"), all works are arranged chronologically. There are as yet many unpublished letters, decrees and statements that will take several more volumes.

The complete edition of the political and social works of Imam Khomeini is being published gradually by the Institute for the Compilation and Publication of the Works of Imam Khomeini under the general title of *"Kawthar"*.

Bibliography

A. Arabic and Persian

1. Books

The Quran (Arabic text).

Akbari, M.T. & Others. *A Glossary of Islamic Technical Terms, Persian-English.* Translation Department, Islamic Research Foundation, Iran: Meshhad.

al-Ansari, al-Shaykh al-Murtada. *Al-Makasib al-Muharama,* copy in the handwriting of Tahir al-Khushniwis), 1375 H.Q.

Bahr al-'Ulum, Hasan al-Sayyid 'Izz al-Din. *Al-Istinsakh al-Bashari wa Mawqif al-Shari'ah al-Islami* (Human Cloning and the Standpoint of the *Shari'a*), Kuwait: Maktabat al-Alfayn, 1997.

Ghafarzadeh, 'Ali. Zendegani-ey Nuwwab-e Khass-e Imam Zaman, Qum: Intesharat-e Nubugh, 1377 H.S.

al-Gharawi al-Tabrizi, al-Mirza (ed.). *Al-Tanqih fi Sharh al-'Urwah al-Wuthqa: al-Ijtihad wa al-Taqlid,* Representation (*al-taqrirat*) of Ayatollah Abu al-Qasim al-Musawi al-Khoei's Discussion on *fiqh,* Qom: Ansariyan Publications.

al-Ghazali al-Shafi'i, Abu Hamid Muhammad. *al-Mustasfa min 'Ilm al-Usul* (with explanation by Dr. Muhammad al-Ashghar), 2 vols., Beirut: Mu'assisah al-Risalah.

al-Hakim, 'Abd al-Hadi Muhammad Taqi (ed.). *Al-Fatawa al-Muyyassara (al-Ibadat - al-mu'amalat),* According to *fatawa* Ayatollah al-Sayyid 'Ali al-Husaini al-Seestani, Qom: Maktab Ayatollah al-'Uzma al-Sayyid al-Seestani, 1416, *Jamadi al-awla - al-ukhra.*

Hujjat, Hadi and Tal'ati, Muhammad Hadi, (eds.). *Ahkam-e Pezeshkan wa Mashaghel-e Marbut beh Pezeshki*, Qom: Islamic Propagation of the Islamic Seminary of Qom, 1996.

al-Hulw, 'Amir (ed.). *Ahkam al-Din bayn al-Sa'il wa al-Mujib*, Vol (*al-halqa*) Four: Fataw Haditha li Samaha Ayatollah al-'Uzma al-Sayyid 'Ali al-Seestani, Vienna: Manshurat Markas Ahl al-Beyt al-Thiqafi al-Islami, 1995.

al-Hurr al-'Amili, Muhammad Ibn al-Hasan. *Wasa'il al-Shi'a ila Tahsil Masa'il al-Shari'a*, Vols. 2, 20, 27, 29, CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran.

Ibn Ibrahim, Muhammad. *Al-Ijtihad wa Qadaya al-'Asr* Bardu Tunesi: dar al-Turki li al-Nashr, 1995.

Ibn Kathir al-qurashi, Abu al-Fida' Isma'il (d. 774 A.H.). *Tafsir al-Qur'an al-'Azim*, Vol. 2, Beirut: Dar al-Qalam.

Ibn Manzur. *Lisan al-Arab*, Tome III, Beirut - Lebanon: Dar Sader Publishers.

Ibn Manzur. *Lisan al-Arab*, Tome. VIII, Beirut - Lebanon: Dar Sader Publishers.

Ibn Quddamah. *al-Mughni, Waylahu al-Sharh al-Kabir li Ibn Qudamat al-Muqaddasi* (with explanation by Ibn Qudama.....), Tahqiq al-Duktur al-Sayyid al-Ustad Sayyid Ibrahim Vol. 13, al-Qahira (Cairo): Dar al-Hadith.

Ihtemami, Bahram, *Musawwabat-e Majama'-e Tashkis-e Maslahat-e Nezam 1367* (H.S)-*1376* (H.S.), Intisharate Mushiri, First Edition, 1376 H.S.

al-Kulayni al-Razi, Muhammad Ibn Ya'qub Ibn Ishaq. *Al-Kafi*, Vols. 1, 5 and 8, CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran.

al-Khurasani, al-Akhund al-Shaykh Muhammad Kazim. *Kifayat al-Usul*, Vols.1 and 2 Baghdad: Matba'at al-Shabandar, 1328 H.

al-Majlisi, Muhammad Baqir. *Bihar al-Anwar*, Vols. 2, 5, 26, 92, 93, CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran

Maududi, Abul A'la. *The Meaning of the Qur'an*, Vol. VI, Lahore: Islamic publications.

Muhammad, Yahya. *al-Ijtihad wa al-Taqlid wa al-Itba'i wa al-Nazar: Bahth Istidlali Muqarin Yu'na bi tahdid al-Mawqif al-Shar'i li al-Muthaqqaf al-Muslim*, UK.: al-Rafid Distribution and Publishing, 1996.

al-Musawi al-Khoei, Abu al-Qasim. *al-Masa'il al-Shar'iyyah, Istifta'at*, Volume 2: al-Mu'amalat, Second Edition, Manshurat Mu'assisa al-Imam al-Khoei al-Khayriyyah, 1996.

Al-Musawi al-Khomeini, Ruhullah. *Al-Rasa'il*, Qom: Mu'ssese-ye Matbu'ati-e Isma'iliyan, Rabi'al-Awwal, 1385, Vols. 1 and 2.

al-Musawi al-Khomeini, Ruhullah. *Risala: Tawdih al-Masa'il*, Qom: Kanun-e Intisharat-e Mehrab, 1366 H.S.

Al-Musawi al-Khomeini, Ruhullah. *Tahrir al-Wasilah*, Vol. 2, Dar al-Sirat al-Mustaqim.

Mutahhari, Murtada. *Ashnaei ba 'ulum-e Islami (part 3, usul al-fiqh, fiqh)*, Tehran: Intisharat-e Sadra, Tenth Edition, 1372 H.S. For English translation see *Principles of Islamic Jurisprudence and Jurisprudence* in section B.

Mutahhari, Murtada. *Dah Guftar*, Tehran: Intisharat-e Sadra, First Edition, 1361 H.S.

Mutahhari, Murtada. *Islam wa Muqtaziyat-e Zaman*, Vol. 1., Eleventh Edition, Tehran/Qom: Intisharat-e Sadra, 1374 H.S.

Mutahhari, Murtada. *Islam wa Muqtaziyat-e Zaman*, Vol. 2., Sixth Edition, Tehran/Qom: Intisharat-e Sadra, 1374 H.S.

Mutahhari, Murtada. *Nezam-e Huquq-e Zan dar Islam*, Eighth Edition, Tehran: Intisharat-e Sadra, 1357 H.S.

al-Muzaffar, Muhammad Rida. *Usul al-Fiqh*, 2 vols., Second Edition, Beirut: Manshurati Mu'assisati al-A'alami li al-Matbu'at, 1990.

al-Muzaffar, Muhammad Rida. *Usul al-Fiqh*, Vol. 2., Beirut: Dar al- Ta'aruf, 1983.

al-Muzaffar, Muhammad Rida. *Usul al-Fiqh*, Vol. 2, Nashr-e Danesh-e Islami.

al-Seestani, Ayatollah al-Sayyid. *al-Mustahdathat min al-Masa'il al-Shar'iyyah*, London: Mu'assissa al-Imam 'Ali, 1996.

al-Shafi'i. *al-Risalah*, Second Edition, Maktabatu Dar al-Turath, 1979.

al-Shahid al-Thani, Hasan ibn Zayn al-Din. *Shatr al-Usul min Kitab al-Ma'alim al-Din wa Maladh al-Mujtahidin*, Tehran: Matba'at al-Rushdiyyah 1378 H.

Safi Golpaygani, Ayattullah Lotfullah. *Istifta'at-e Pezeshki*, Qom: Dar al-Qur'an al-Karim, Sha'ban 1415.

Sharaf al-Din al-Musawi, Sayyid 'Abdu al- Husain. *Al-Nass wa al-Ijtihad*.

Tabari; *Jami' al-bayan 'an ta'wil al- Qur'an*, Vol.16, Turath al-Islam.

Tabarsi, al-Shaykh Abu 'Ali al-Fasl Ibn al-Hasan. *Majma' al-Bayan fi Tafsir al-Qur'an*, Vol. 3 of 5, Iran, Qom: Manshurat Maktabat Ayat al-lah al-'Uzma al-Mar'ashi al-Najafi, 1403. A.H. , Sada (Syria), Matba'at al-'Irfan, 1936.

Tabatabaei, 'Allamah Sayyid Muhammad Husayn. *Al-Mizan* Vols. 1, 5, 14, 18, CD of Noor, Produced by Computer Research Center of Islamic Sciences, Qom, Iran.

al- Tabatabaei, 'Allama Sayyid Muhammad Husayn. *al-Mizan*, Vol. 18, Tehran, Dar al-Kutub al-Islamiyya, 1390 A.H.

Tabatabaei, 'Allamah, *et al.* (eds.). *Bahthi dar bareyeh Marja'iyyat wa Ruhaniyyat*, Second Edition, Tehran: Sherkat-e Sahami-e Intisharat.

al-Tusi, Shaykh al-Ta'ifah Abi Ja'far Muhammad ibn Hasan. *Al-Mabsut fi Fiqh al-Imamiyyah*, Tehran: al-Maktabat al-Murtadawiyyah, Ihya' al-Athar al-Ja'fariyyah, 1387 H.

al-Tusi, Shaykh al-Ta'ifah Abi Ja'far Muhammad ibn al-Hasan. *Kitab al-Ghaybah*, Tehran: Maktabat Ninawi al-Haditha, n. d.

al-Tusi, Shaykh. *Kitab al-Khilaf*, Vols. 1-3., Maktabat al-Kutub al-Mutinawi'a min Khadim al-Ma'sumin wa Turab Aqdamihim.

Shaltut, Mahmud. *al-Fatawa: Dirasa al-Mushkilat al-Muslim al-Mu'asir fi Hayatihi al-Yawmiyya al-Mu'asir*, Cairo: Dar al-'Ilm.

Sahifa-ye Noor, (a collection of Imam Khomeini's messages, speeches, interviews, decrees, and letters), Vols. 20, 21.

2. Articles and Seminar papers

Alavi Qazvini, Seyed Ali. "The Outcomes of Artificial Human Sperm Implantation" (Farsi Text), *Nameh-Ye Mufid: A Quarterly Journal of the Mufid University*, Vol. I, No. 3, Autumn 1995, pp. 165-196

al-Bar, Muhammad 'Ali. "al-Talqih al-Sina'i wa Atfal al-Anabib" (Artificial Insemination and Test-Tube Babies), *Majallah Majma' al-Fiqh al-Islami*, Second Circle, No. 2, Part 1, Jeddah, 1986.

Ma'rifat, Muhammad Hadi. "Shayestegy-e Zanan Baray-e Mansab-e Qedawat wa Manaseb-e Rasmi" (The Eligibility of Women to Judge and take official Positions), *Hukumat-e Islami: wizhe-ye andishe-ye feqh-e siyasi-e Islam*, Year 2. No. 2. pp. 39-54.

Rahmani, Muhammad. "Ahkam-e Hukumati wa Zaman wa Makan", *Majmu'e-ye Maqalat (Majmu'e-ye Athar-e kongare-ye barrasi-e mabani-e feqhi-e hazrat-e Imam Khomein: Naqsh-e Zaman wa Makan dar Ijtihad:* The Collection of Works of the Congress for Investigating the Basis of Imam Khomeini's Juridical Thought: The

Role of the Time and Place in *Ijtihad*), Qom: Mu'assase-ye Chap wa Nashr-e 'Uruj, 1374 H.S. Vol. 7: *Milakat-e Ahkam-e Hukumati*, pp. 211- 262. This article is one from a collection of about 122 articles on the theme of *ijtihad and the role of the time and place in it*, published in 1996.

Shafi'i Sarwastani, Ibrahim. "Sayr-e Tatawwur-e Qawanin dar Nezam-e Jumhuri-e Islami-e Iran" in *Majmu'e-ye Maqalat*, Vol. 2: *Ijtihad wa Zaman wa Makan (Part two)*: pp. 323-412.

B. English

1. Books

The Qur'an, Translated by M.H. Shakir, Fifth Edition, New York: Tahrike Tarsile Qur'an, Inc.,1988.

Imam Khoei's Fatawa, Articles of Islamic Acts, London: Cultural and Guidance Section, Al-Khoei Foundation, 1991.

Nahj al-Balaghah, Selection from Sermons, Letters and Sayings of Amir al-Mu'minin, 'Ali ibn Abi Talib, selected and compiled by al-Sayyid Abdu'l-Hasan Muhammad ibn Husayn al-Radi al-Musawi, English Translation from Arabic text by Sayyid Ali Reza, Karachi, 1971.

The Constitution of the Islamic Republic of Iran.

Human Fertilization and Embryology Act 1990, Chapter 37.

Human Fertilization and Embryology (Disclosure of Information) Act 1992, Chapter 54.

Adams, Charles C. *Islam and Modernism in Egypt: A study of the Modern Reform Movement Inaugurated by Muhammad 'Abduh*, London: Oxford University Press, 1933.

Algar, Hamid. *Islam and Revolution: Writings and Declarations* (of) *Imam Khomeini* (translated and annotated), England: Mizan Press, 1981.

An-Na'im, Abdullahi Ahmed. *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, Syracuse, NewYork: Syracuse University Press, 1990.

Bakhtiar, Laleh. *Encyclopedia of Islamic Law: A Compendium of the Major Schools*, Chicago: ABC International Group, Inc., 1996.

Berkes, Niyazi. *Turkish Natinalism and Western Civilization: Selected Essays of Zia Gokalp*, London: George Allen and Unwin Ltd., 1959.

Brown, Daniel W. *Rethinking Tradition in Modern Islamic Thought*, Cambridge (UK): Cambridge University Press, 1996.

Burton, John. *The Sources of Islamic Law - Islamic Theories of Abrogation*, Edinburgh (UK): Edinburgh University Press, 1990.

Corea, Gena. *The Mother Machine, Reproductive Technologies from Artificial Insemination To Artificial Wombs*, London: The Women's Press, 1988.

Douglas, Gillian. *Law, Fertility and Reproduction*, London: Sweet and Maxwell, 1991.

Drlica, Carl. *Understanding DNA and Gene Cloning: A Guide for the Curious*, Third Edition, New York: Wiley, 1997.

Edwards, Jeanette; Eranklin, Sarah; Hirsch, Eric; Price, Frances and Strathern, Marilyn (eds.). *Technologies of Procreation*, Manchester and New York: Manchester University Press, 1993.

Ezzati, A. *An Introduction to Shi'i Islamic Law and Jurisprudence: With an Emphasis on the Authority of Human Reason as a Source of Law according to Shi'i Law*, Lahore: Ashraf Press, 1976.

Gleave, R. and Kermeli, E. *Islamic Law, Theory and Practice*, London and New York: I.B.Tauris & Co. Ltd., 1997.

Golpaigani, Ayatollah Ozma, *Resalah (Epistle): Concise Commandments of Islam* (A Translation of "Mokhtasarol Ahkam" with notes From "Towdeehol-Masa-el") According to the verdicts of Hadrat-e Ayatollah Ozma Sayyed Mohammad Reda Musavi Golpaygani

Hallaq, Wael B. *A History of Islamic Legal Theories, An Introduction to Sunni usul al-fiqh*, Cambridge: Cambridge University Press, 1997.

Hourani, Albert. *Arabic Thought in the Liberal Age: 1798-1939*, Cambridge, Cambridge University Press, 1984.

Howard, I.K.A. (trans.). *kitab al-irshad: The Book of Guidance by Shaykh al-Mufid*, with a preface by Seyyed Hossein Nasr, Qom: Ansariyan publications.

al-Husaini al-Seestani, Sayyid 'Ali. *Islamic Laws*, English Version of Tawdih al-Masa'il, Stanmore, UK: The World Federation of K.S.I. Muslim Communities, 1994.

Iqbal, Allama Muhammad. *The Reconstruction of Religious Thought in Islam*, Pakistan: Lahore, Ashraf Press, 1975.

Jafri, S. Husain M. *Origins and Early Development of Shi'a Islam*, London and New York: Longman, 1979.

Jansen, J. J. G. *The Interpretation of the Koran in Modern Egypt*, Leiden, Netherlands: E. J. Brill, 1974.

Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, Revised Edition, Cambridge: The Islamic Texts Society, 1991.

Keddie, Nikki R. *Sayyid Jamal al-din "al-Afghani": A political Biography*, Berkeley, Los Angles and London: University of California Press, 1972.

Kerr, Malcolm H. *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashid Rida*, Berkeley and Los Angeles: University of California Press, 1966.

Khadduri, Majid (trans.), *Al-Shafi'i's al-Risala fi Usul al-Fiqh: Treatise on the Foundations of Islamic Jurisprudence*, Translated with an Introduction, Notes, and Appendices, Second Edition (Cambridge: Islamic Text Society, 1987.

Kohlberg, Etan (ed.). *Belief and Law in Imami Shi'ism*, Hampshire (UK): Variorum, 1991.

Kolata, Gina. *Clone: The Road to Dolly and the Path Ahead*, London: Penguin, 1998.

al-Kulayni al-Razi, Muhammad Ibn Ya'qub Ibn Ishaq. *Al-Kafi: Al-Usul*, English Translation with Arabic Text, Vol. 1, Part 1, No. 2 of "The Book of Excellence of Knowledge", First Edition, Tehran: World Organization for Islamic Services.

Kurzman, Charles (ed.), *Liberal Islam, A Sourcebook*, New York-Oxford, Oxford University Press, 1998.

Lee, Robert and Morgan, Derek (eds.). *Birthrights, Law and Ethics at the Beginnings of Life*, London and New York: Routledge, 1989.

Mallat, Chibli. *The Renewal of Islamic law, Muhammad Baqir as-Sadr, Najaf and the Shi'i International*, Cambridge: Cambridge University Press, 1993.

McNeil, Maureen; Varcoe, Ian and Yearley, Steven (eds.). *The New Reproductive Technologies*, London: The Macmillan Press Ltd., 1990.

Mernissi, Fatima. *Women and Islam: An Historical and Theological Enquiry*, Oxford: Basil Blackwell, 1991.

Momen, Moojan. *An Introduction to Shi'i Islam: The History and Doctrines of Twelver Shi'sm*, New Haven and London: Yale University Press, 1985.

Murtahhari, Morteza. *Jurisprudence and its Principles*, Translated by Mohammad Salman Tawheedi, New York (Elmhurst): Tahrike Tarsile Qur'an, Inc., c. 1982.

Murtahhari, Morteza. *Jurisprudence and its Principles*, Translated by Mohammad Salman Tawheedi, New York (Elmhurst): Tahrike Tarsile Qur'an, Inc., c. 1982.

Mutahhari, Murtada, *The Rights of Women in Islam*, Translated and Published by World Organization for Islamic Services, Fourth Edition, Tehran, 1991/1412.

Nasr, Sayyid Husayn (trans.). *Shi'a* (of Tabatabaei, Muhammad Husayn). Qom, Iran: Ansariyan Publications, 1989.

Nasr, Seyyed Hossein; Dabashi, Hamid; and Nasr, Seyyed Vali Reza (eds.). *Shi'ism: Doctrines, Thought, and Spirituality*, Albany, New York: State University of New York Press, 1988.

Qutb, Muhammad. *Islam the Misunderstood Religion*, Sixth Edition, Rome: Islamic European Cultural Centre, 1984.

Rida, Rashid. *al-Manar*, Second Edition, Beirut: Dar al-Fikr. Vol. 6.

Rispler-Chaim, Vardit. *Islamic Medical Ethics in the Twentieth Century*, Brill Academic Publishers, 1993.

Robinson, Neal. *Islam: A Concise Introduction*, Surrey: Curzon Press, 1999.

Sachedina, Abdulaziz Abdulhussein. *The Just Ruler (al-sultan al-'adil) in Shi'ite Islam: The Comprehensive Authority of the Jurist in Imamite Jurisprudence*. New York & Oxford, Oxford University Press,1988.

Sachedina, Abdulaziz Abdulhussein. *Islamic Messianism: The Idea of Mahdi in Twelver Shi'ism*, Albany: State University of New York Press, 1981.

as-Sadr Muhammad Baqir, *Iqtisaduna (Our Economics)*, English translation, Vol. One, Part Two, Second Edition, Tehran: World Organization for Islamic Services, 1994/1414.

as-Sadr Muhammad Baqir, *Iqtisaduna (Our Economics)*, English translation, Vol. Two, Part One, Second Edition, Tehran: World Organization for Islamic Services, 1994/1414.

as-Sadr Muhammad Baqir, *Iqtisaduna (Our Economics)*, English translation, Vol. Two, Part Two, Second Edition,Tehran: World Organization for Islamic Services1994/1414.

Schacht , Joseph. *The Origins of Muhammedan Jurisprudence*, Oxford, 1959.

Schellen, A. M. C. M. *Artificial Insemination in the Human*, Translation by Miss M.E. Hollander (London), Amsterdam: Elsevier Publishing Company, 1957.

Schimmel, Annemarie. *Gabriel's Wing: A Study into the Religious Ideas of Sir Muhammad Iqbal*, Second Edition, Lahore: Iqbal Academy, Pakistan,1989.

Sirriyeh, Elizabeth. *Sufis and Anti-Sufis: The Defence, Rethinking and Rejection of Sufism in the Modern World*, Richmond: Curzon Press, 1999.

Snowden, Robert and Elizabeth. *The Gift of a Child: A Guide to Donor Insemination*, Second Edition, Exeter: University of Exeter Press, 1993.

Tabataba'i Modarresi, Hossein, *An Introduction to Shi'i Law: A Bibliography Study*, London: Ithaca Press, 1984.

Taha, Mahmoud Mohamed, *The Second Message of Islam*, Translation and Introduction by Abdullahi Ahmed An-Na'im, New York: Syracuse, Syracuse University Press, 1987.

Yann, Richard. (trans.). *Shi'ite Islam*, translated by Antonia Nevill, Oxford (UK.) & Cambridge (USA): Blackwell, 1995.

Wahid, Wafaa H. *The Ordinances of Government: A Translation of al-Ahkam al-Sultaniyyah wa al-Wilayah al-Diniyyah*, The Center for Muslims' Contribution to Civilization, 1996.

Weeramantry, C.G. *Islamic Jurisprudence: An International Perspective*, Hong Kong :Macmillan Press Ltd. 1988.

2. Articles and Seminar Papers

Abu Serour, Gamal. "Artificial Insemination: Research and Practice (Islamic Viewpoint) in Genetics" in *Ethical Implications of Modern Research in Genetics*, Proceedings of Seminar Organized by the Islamic Educational, Scientific and Cultural Organization and the World Islamic Call Society with the Cooperation of the Faculty of Science, University of Qatar, 13-15 February, 1993, Rabat, Morocco: Islamic Educational, Scientific and Cultural Organization, pp. 227-238.

Affandi Abd. Rahim, Rahimin. "The Historical Development of the Shi'i Doctrine of Ijtihad", *Hamdard Islamicus*, Vol. XVII, No. 4, pp.11-25.

Akhtar, Wahid. "An Introduction to Imamiyyah Scholars: Al-Sayyid al-Murtada: Life and Works", *Al-Tawhid*, Vol. IV, No. 1, Muharram-Rabi' al-Awwal 1407, pp. 125-152.

Akhtar ,Wahid. "An Introduction to Imamiyyah Scholars: Shaykh al-Ta'ifah al-Tusi: Life and Works", *Al-Tawhid*, Vol. IV, No. 2. Rabi' al-Thani-Jamadi al-Thani, 1407, pp. 126-167.

Awliya'i, Mustafa. "Outlines of the Development of the Science of Hadith", *Al-Tawhid*, Vol. I, No.1., Muharram 1404, pp. 27-35.

Bhat, Abdur Rashid. "Iqbal on the Problem of Ijtihad", *Hamdard Islamicus,* Vol. XV, No. 1, 1992, pp. 95-104.

Hallaq, Wael B. "Was the Gate of Ijtihad Closed?", *International Journal of Middle East Studies,* Vol. 16, 1984, pp. 3-41.

Hasan, Ahmad. "The Justification of Qiyas", *Islamic studies,* Vol. xx, Autumn 1981, No. 3, pp. 201-224.

Hasan, Ahmad. "The Definition of Qiyas in Islamic Jurisprudence", *Islamic Studies,* Vol. XIX, Spring 1980, No. 1, pp. 1-28.

Hasan, Ahmad. "The Critique of Qiyas", *Islamic studies,* Vol. XXII, Autumn 1983 July to September, No.3. pp. 45-69.

Hijawi, Sheikh Saeed Abdul Hafeez Assad (Acting Grand Mufti of the Hashemite Kingdom of Jordan), "Human Infertility" in *Ethical Implications of Modern Research in Genetics,* Proceedings of Seminar Organized by the Islamic Educational, Scientific and Cultural Organization and the World Islamic Call Society with the Cooperation of the Faculty of Science, University of Qatar, 13-15 February, 1993, Rabat, Morocco: Islamic Educational, Scientific and Cultural Organization, pp. 213-225.

Iqbal, Zubayr and Mirakhor, 'Abbas. "Islamic Banking", *Al-Tawhid,* Vol. IV, No. 3, Rajab - Ramadan 1407, pp. 90-168.

Jannati, Muhammad Ibrahim. "The Meaning of Ijtihad" in *Al-Tawhid,* Vol. V, Nos. 3 & 4, Rajab - Duu al-Hijjah, 1408, pp. 179-200.

Members of the Staff of the Central Bank of the Islamic Republic of Iran, "Monetary Resources and Banking Facilities under the Law for Usury-Free Banking", *Al-Tawhid,* Vol. III, No. 4, Shawwal - Dhu al-Hijjah 1406, pp. 60-77.

Members of the Staff of the Central Bank of the Islamic Republic of Iran, "The Impact of the New Banking System in Iran on the Instruments of Monetary and Credit Policy", *Al-Tawhid,* Vol. III, No. 4, Shawwal - Dhu al-Hijjah 1406, pp. 78-89.

Mutahhari, Murtada. "The Role of *Ijtihad* in Legislation", *Al-Tawhid,* Vol. IV, No. 2, pp. 21-52.

Yaseen, Mohammad Naeem. "The Rulings for the Donation of Human Organs in the Light of Shari'a Rules and Medical Facts", *Arab Law Quarterly,* Vol. 5, 1990, pp. 49-87.