Zâhir al-Riwâyah or other sources.

2. *Majma' al-Nawâzil wa'l-Wâqi'ât* by Abu al-'Abbas Ahmed ibn Muhammad al-Nâtifi (446/1054). This is a work similar to the above.

3. *Al-Wâqi'ât* or *al-Wâqi'ât al-Husâmiyyah* by Husâm-al-Dîn (or Husâm) 'Umar ibn Abd-al-'Azîz ibn Mâzah al-Sadr al-Shahid al-Bukhâri (536/1141). It combines the two previous works with the *fatwâs* of Abu Bakr Muhammad ibn al-Fa'âl and the *Fatâwâ Ahl Samarqand,* indicating the sources by letters.[170]

4. *Khulâsah al-Fatâwâ* by Tâhir ibn Ahmed Iftikhâr-al-Dîn al-Bukhâri (542/1147). This collection combines the *fatwâs* of later *mujtahids* and those of the founders. That is a select collection of great authority.[171]

5. *Dhakhîrah al-Fatâwâ* or *al-Dhakhîrah al-Burhâniyyah,* by Burhân-al-Dîn Mahmud ibn Ahmed ibn al-Sadr al-Shahid ibn Mazâh (570/1174). This is a highly esteemed work. ibn Mazâh is the author of the *Muhît al-Burhâni.*[172]

6. *Fatâwây-i Qâdhîkhan,* also called *al-Khâniyyah,* by Fakhr-al-Dîn al-Hasan ibn Manaar al-Uzjandi al-Fargâni Qâdhîkhan (592/1195). This is a standard work of enduring reputation; *The Vade Mecum of* judges and *muftîs.* It is replete with cases that commonly occur, and is, therefore, of great practical use, more especially since many of the decisions are illustrated by proofs and the reasoning on which they are founded.[173]

7. *Al-Tajnîs wal-Mazî* by Burhân-al-dïn 'Ali ibn Abu Bakr- al-Marginâni (593/1196). The author claims to have carried on the arrangement of al-Sadr al-Shahîd's work on *fatwâs* (apparently his *Wâqi'ât*) by classifying *(tartîb),* the particular opinions within the books *(kutub)* also and to have enlarged it with additions from other sources.[174]

8. The two works called the *Fusûl al-Ustrushani* (by Muhammad ibn Muhammad al-Ustrushani (625/1227)) and *Fusûl al-Imâdiyah* (by Abu al-Fath al-Marghinani (651/1253)) were incorporated into a collection called *Jâmi' al-Fusûlayn,* which is a work of some celebrity. It was compiled by Badr al-Dîn Muhammad, known as ibn al-Qâdhî Simawanah (800/1397). It deals with the practical part *of Mu'âmalât of fiqh* only and is used by judges in particular.[175]

9. *Al- Fatâwâ al-Zâhiriyyah* by Zâhiruddîn Abu BakrMuhammad ibn Ahmad al-

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[170] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 790.

[171] Kâtib Chelebi, *Kashf al-Zunûn,* vol. I, p. 551.

[172] Kâtib Chelebi, *Kashf al-Zunûn,* vol. I, p. 621.

[173] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 218.

[174] Kâtib Chelebi, *Kashf al-Zunûn,* vol. I, p. 304.

[175] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, pp. 247, 251.

Bukhâri (619/1222).[176]

10. *Qunyah al-Munyah* by Mukhtar ibn Mahmud al-Ghazmini (658/1259).[177]

11. *Al-Fatâwâ al-Walwâlijiyyah* by Abu al-Makârim Zahïr-al-Dîn Ishaq ibn Abu Bakr al-Walwâliji (710/1310). It is condensed from the *fatwâs* of Husâm al-Shahid, with additions.[178]

12. *Khizânah al-Muftiyyîn*, by Imâm Husain ibn Muhammad al-Sam'ani (740/1339).[179]

13. *Khizânah al- Fatâwâ*, by Ahmad ibn Muhammad al-Hanafî.[180]

14. *Al-Fatâwâ al-Tatarkhâniyyah*, by 'Âlim (al-A'lam) ibn Alâ'-al-Dîn (about 800/1397). This is a great work combining the *Muhît al-Burhâni*, the *Dhakhîrah*, the *Khâniyyah* and the *Zâhiriyyah*, with an introduction on science (*ilm*). It is arranged according to the chapters of the *Hidâyah*. Written by order *of* the ruler *Tâtârkhân*; hence the name. A selection was later made from these fatâwâ by Imâm Ibrahim al-Halabi (956/ 1549).[181]

15. *Al-Fatâwâ al-Bazzâziyyah* or *al-Jâmi' al-Wajîz* or *Fatâwâ al-Kardari* by Muhammad ibn Muhammad al-Bazzâzi al-Kardari (827/1423). It contains the "cream" of previous works and many rely on it.[182]

16. *Al-Fatâwâ al-Zayniyyah* is in reality essays on matters of practical interest (such as the status of the countries of Egypt, *istishâb*, land concessions, *Kharâdj*, etc.) by Zayn-al-'âbidïn ibn Ibrahim ibn Nujaym al-Misri (970/1562) as collected and arranged by his son 'Abdullah, with additions.[183]

17. *Fatâwâ Abu al-Su'ûd*, by 'Abdullah al-Su'ûd Muhammad ibn Muhammad al-'Imâdi (983/1575), in Turkish. Al-'Imâdi lived during the reign of Sultan Sulaiman the Magnificent. His *fatwâs* throw light on the adaptation of *Sharî'ah* to practical requirements, particularly as regards land. A collection of the same by Wali al-Iskilîbi Weli Yekân, also containing *fatwâs* by others, is current.[184]

14. *Mugnî al-Mustaftî 'an Su'âl al-Muftî* (or *al-Fatâwâ al-Hâmidiyyah*), by Hâmid Efendi ibn Muhammad al-Qonawi (985/1577). This is a practical work but too long. An

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[176] Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 217.

[177] Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 316.

[178] Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 220.

[179] Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 540.

[180] Kâtib Chelebi, *Kashf al-Zunûn*, vol. I, p. 540.

[181] Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 214; vol. I, p. 253.

[182] Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 214; vol. I, p. 235.

[183] Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 215.

[184] Kâtib Chelebi, *Kashf al-Zunûn*, vol. II, p. 212.

extract with modifications is *al-'Uqûd al-Durriyyah fi Tanqîh al-Fatâwâ al-Hâmidiyyah,* by Muhammad Amin ibn Abidîn (1258/1842). Ibn 'Abidîn draws on his previous works, such as the *Radd al-Muhtâr, Minhah al-Khâliq,* and essays (*Rasâ'il*). This is a useful work, in question-and-answer form.

16. *Al-Fatâwâ al-Anqarawi,* by Shaykh-al-Islam Muhammad ibn Husain al-Anqarawi (1098/1686). It gives most of the accepted decisions and is relied upon by *fuqahâ* and jurists.

17. *Fatâwâ 'Ali Effendi,* by Shaykh-al-Islam 'Ali Efendi Jatiljawi (1103/1692). In Turkish, well known; consists of actual *fatwâs.* It contains the arguments derived later by Sâlih ibn Ahmed al-Kaffawi from the Arabic sources. The *Al-Fatâwâ al-Faydhiyyah* by Shaykh-al-Islam Faydhallah Efendi was printed in the margin.

18. *Al-Fatâwâ al-'Âlemgiriyyah,* compiled on the orders of Sultan Muhyi-al-Dîn 'Alamgir Ewrengzib (ruled from 1069-1118/1659-1706) by a committee chaired by Shaykh Nizâm. The work is meant to be exhaustive and to dispense with the need to refer to other *fatwâ* collections. It enjoys the highest esteem in India. This book, with opinions and perceptions of Islamic Law, contains an immense number of law cases. Because of its comprehensive nature, this work is applicable to almost every case that arises involving points of Hanafî doctrines.

19. *Fatâwâ 'Abd-al-rahim,* by Shaykh-al-islam Menteshizâdeh 'Abdal-rahim Effendi al-Bursawi (1128/1716). An esteemed large collection in Turkish; contains many *fatwâs* on modern matters such as agrarian relations.[185]

2.2.2.2   *Fatwâ* Collections of the Shâfi'î School

1. *Fatâwâ ibn al-Salâh* by 'Uthman ibn 'Abdurrahman ibn al-Salâh (642/1244), collected by his disciples. It is very useful.[186]

2. *'Uyûn al-Masâil al-Muhimmah* by Yahya ibn Sharaf al-Nawawi (676/1277), in two sizes. It provides answers to actual cases.[187]

3. *Fatâwâ al-Zarkashi* by Badr-al-Dîn Muhammad ibn Bahâdur al-Misri al-Zarkashi (794/1392).[188]

4. *Al-Fatâwâ al-Kubrâ al-Haythamiyyah al-Fiqhiyyah* by Ahmed ibn Muhammad

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[185] Hawwa, *al-Madkhal ila Madhhab,* pp. 375-83; Sircar, *The Muhammadan Law,* pp. 50-56; Aghnides, *Islamic Theories of Finance,* pp. 184-86.

[186] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 212.

[187] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 187.

[188] Kâtib Chelebi, *Kashf al-Zunûn,* vol. II, p. 215.

ibn Hajar (973/1565). It answers actual questions with extended arguments.[189]

2.2.2.3   *Fatwâ* Collections of the Mâlikî School

1. *Al-Mi'yâr al-Mughrib wa'l-Jâmi' al-Mu'rib 'an Fatâwi A'lâm Ifriqiyah wa'l-Andalus wa'l-Maghrib* by Ahmed ibn Yahya al-Wansharisi (914/1508).

2. *Fath al-'Ali al-Mâlik fi-'l-Fatwâ 'ala Madhhab al-Imâm Mâlik*, by Abu Abdullah Muhammad ibn Ahmed 'Alish (1299/1882). The *fatwâs* given by the author are arranged according to the conventional fiqh book chapters.[190]

2.2.3   Archival Documents

By archival documents we should think first of those documents that are found in the Prime Ministerial Ottoman Archives, particularly in Istanbul. The documents in the Ottoman Archives, the number of which is estimated at approximately 170 million, are actually the concrete evidence that certifies whether the services executed by the Ottoman State were in conformity with Islamic law. Moreover, the most significant example of the application of the Islamic law, particularly in reference to administrative and constitutional law, general international law and financial law, are found in these archives. As a matter of fact, after the *Tanzîmât* (Reforms), the aforesaid archives became the primary references for Islamic law, for the originals of the legal arrangements pertaining to each branch of post-*Tanzîmât* legislation along with the rationale thereof and other related documents are stored there.

We can conclude that any study carried out on Islamic Law without any reference to these archives is definitely deficient. Likewise, any research carried out on the Ottoman legal system solely on the basis of archive documents without referring to the essential works related to Islamic Law will be also defective, for the aforesaid two references complement each other. We will now provide some brief information on the archival documents that are of such great significance.[191] Documentary sources will give us more detailed information on and deeper insight into the operation of the legal system. They exist in great quantity in the Ottoman Archives where we find a

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[189] Sircar, *The Muhammadan Law*, p. 50; Aghnides, *Islamic Theories of Finance*, p. 190.

[190] Aghnides, *Islamic Theories of Finance*, p. 194.

[191] Necati Aktaş and Binark İsmet, *Al-Arshif al-Uthmânî* (Ottoman Archives) (Amman: IRCICA, 1986), pp. 3ff; Atilla Çetin, *Başbakanlık Arşivi Kılavuzu* (Manual of Prime Ministerial Archives), (Istanbul: Basbakanlik Osmanli Arsivi, 1979), pp. 5-6; Nejat Göyünç, *Osmanlı Araştırmalarında Arşivlerin Yeri* (Place of Archives in Ottoman Researches), *Arşiv Sempozyumu* (Archives Symposium), pp. 53ff; Halil İnalcık, *Osmanlı Arşivlerinin Türk ve Dünya Tarihi için Önemi* (The Importance of the Ottoman Archives for the History of Turkey and the World), *Arşiv Sempozyumu* (Archives Symposium), pp. 31 ff; Akgunduz, *Osmanli Kanunnameleri*, 9 vols.

wealth of judicial records going back to the sixteenth century.[192]

Because we will provide information on the post-*Tanzîmât* legal arrangements later, we wish to focus here on the pre-*Tanzîmât* archival documents, among which we should take the following documents into consideration for they are very closely related to Islamic Law.

a) **Muhimmah** Books **(*Dafâtir-i Muhimmah*)**. These are the books that are kept with the *Dîwân al-Humayûn* (Imperial Council), which was the executive body of the Ottoman State. They were the records of the outstanding decrees and *firman*s that were issued regarding all the affairs of the state. These 263 *Muhimmah* books found in the Prime Ministerial Ottoman Archives for the periods 961-1323/1553-1905 are the books that contain the important administrative, judicial and political acts of the Ottoman State.[193]

b) **Legal Codes in Title-Deed Registry Books (Ottoman *Qânûnnama*s in *Dafâtir-i Tapu and Tahrîr*)**. Those countries that were annexed to the Ottoman State, the area of which was very vast, were registered by the appointed boards, on the basis of which the records of the country and properties were regularly kept. In that respect, the aforesaid books kept by officials that were called *Muharrir* or *Il-Yaziji* were called Title Deed Registry Books or *Quyûd al-Khâqâniyyah* (Imperial Records). The ones that showed the administrative organization and population and also gave detailed information were called *Mufassal* (Detailed) while those that consisted of briefer information ware called *Mujmal*, at first, especially those to which those legal codes were added that consisted of the financial and legal essentials of the countries in question. The features of the order of a civilization that earned all its wealth from the soil and the principles on which the legal and financial regulations were based that illuminates the social and economic structure of the Ottoman State were actually compiled in these legal codes. The oldest of the Title Deed Registry Books, in which legal codes are found that, are the most significant references for Ottoman financial law and land law, dates back to the era of Murad II, totaling 1094 books. What is more, there are 250 of the aforesaid books in the Archives of the General Directorate of Land Registry and Cadastre of Ankara.[194]

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[192] Cf. Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, (Cambridge: Cambridge University Press, 2005), pp. 187-88.

[193] Çetin, *Başbakanlık Arşivi Kılavuzu*, pp. 49ff; Aktaş and Binark, *Al-Arshif al-Uthmânî*, pp. 133ff.

[194] Çetin, *Başbakanlık Arşivi Kılavuzu*, pp. 83 ff; Aktaş and Binark, *Al-Arshif al-Uthmânî*, pp 329 ff; Ahmad Akgündüz, *Osmanli Qânûnnâmeleri ve Hukuki Tahlilleri* (Istanbul: OSAV, 1989-1994), vo. I-IX; Ömer Lütfi Barkan, *XV ve XVI. Asırlarda Osmanlı İmparatorluğunda Ziraî Ekonominin Hukukî ve Malî Esastarı* (Legal and Financial Principles of Agricultural Economy in the Ottoman State in the XV and XVI. Centuries) (Istanbul: Introduction, 1943), pp. Vff; Anton Minkov, "Ottoman Tapu Title Deeds in

c) On the other hand, the other archive references, apart from the aforementioned, are closely related to Islamic law. Although Books of *Majlis 'Âli-i Tanzîmât* (Assembly of *Tanzîmât*), Books of *Nizâmât* and especially the Files of Codes could be mentioned among the most important of these, since 80% of them were published in periodicals, we will not go into further detail. Nevertheless, we cannot omit mention of the forty-volume work called *Kullîyât al-Qawânin* (A Collection of Laws) by Serkiz Karakoç, who wrote valuable works on the history of the Ottoman laws, in which he intended to collect the legal arrangements between 1514 and 1914. The work is a perfect reference work for the period after 1247/1831.[195]

We should remember here that some parts of Ottoman documents are present in archives in different Muslim countries, such as Egypt, Damascus and Tunisia.

2.2.4 Legal Arrangements and Judicial Decrees (Qawânîn)

Legal arrangements or legal codes that are the most important sources of Islamic law should be perceived here broadly as a collection of judicial decisions that have been compiled by an official person or board in which sense the first legal arrangement on hand is a legal code on private law called *al-Masâil al-Mâlikshâhiyah Fil-Qawa'id al-Shar'iyyah*, which was prepared by the Seljuqid sultan Malikshah in (485/1092),[196] and was followed later by *Fatâwâ al-Tatarkhâniyyah*. But we should not forget Nizâm al-Mulk who prepared his voluminous treatise on kingship called *Siyâsatnâmah* (The Book of Government). His full name was Abu 'Ali al-Hasan al-Tusi Nizâm al-Mulk (1018 – 14 October 1092) and he was a celebrated scholar and vizier of the Seljuq Empire.[197]

After this, the earliest codification of Muslims is that of Temur, also called Emîr Timur or Amir Temur (1336/1405), among his other names, commonly called Tamerlane or Timur the Lame. He was a 14th century Turco-Mongol conqueror of much of western and central Asia and the founder of the Timurid Empire and the Timurid dynasty (1370–1405) in Central Asia, which survived until 1857 as the Mughal dynasty of India. He ordered Mir Sayyid Sharîf, one of the great *'ulamâ*, to prepare and administer legislation or *qânûn*, and Sayyid Sharîf declared Timur the innovator of the four-

the Eighteenth and Nineteenth Centuries: Origin, Typology and Diplomatics," *Islamic Law and Society*, Volume 7, Number 1, 2000, pp. 65-101(37).

[195] The work is in the Library of Turkish History Institute as a manuscript. The first volume of the chronological index has been edited by Ahmet Akgündüz, who also provided an introduction.

[196] The Comittee, *al-Urâdah Fi'l-Hikayah al-Saljuqiyyah* (Istanbul: MTM), vol.2, pp. 249ff.

[197] Muhammad Al-Buraey, *Administrative Development: an Islamic Perspective*, (Taylor & Francis, 2002), p. 280.

teenth century. We can compare his *Tuzukât-i Timur* (Decrees of Timur)[198] with the *Qânûn-i Umumî* of Muhammad the Conquerer.

It was during his reign that the *Memoirs* and *Institutes* (*Malfûzât* and *Tuzukât*) of Temür first appeared in Persian. These two works were supposed to have been dictated originally by Temur himself. The *Memoirs* are a retelling of Temur's life, differing from the standard earlier histories in a few facts, and most importantly, reinforcing the emphasis on Temur's personality and youth. The *Institutes* are a mirror for princes and present Temur's policies of rule as models. They were presented to Shah Jahan in 1637 by Abu Tâlib Husayni. Both the *Memoirs* and the *Institutes* remained popular in India, Central Asia and the Middle East into the nineteenth century. Most twentieth-century scholars have judged these works to be seventeenth-century productions designed for use in the Mughal court.[199]

We should mention here the role of Aurangzeb (al-Sultan al-Azam wal Khâqân al-Mukarram Abul Muzaffar Muhiuddîn Muhammad Aurangzeb Bahadur Alamgir I, Padishah Ghazi) (1618 - 1707), also known by his chosen imperial title Alamgir I (Conqueror of the Universe). He was the ruler, the sixth, of the Mughal Empire from 1658 until his death. His name literally means "Adorning the Crown." He espoused an interpretation of Islam and a behavior based on the *Sharî'ah*, which he set about codifying through edicts and policies. Aurangzeb took a personal interest in the compilation of the *Fatâwâ-e-Alamgiri* or *Fatâwâ Hindiyyah*, a digest of Islamic law. Aurangzeb began to enact and enforce a series of edicts with punishments. Most significantly, Aurangzeb initiated laws that interfered with non-Muslim worship. The *qânûn* of Aurangzeb is very important as a *qânûn* of Sultan Sulayman. He enacted *Ta'zirât* about *ta'zîr* crimes and administrative issues like a *Qânûnnâme* in the Ottoman State. This *Ta'zirat* has been translated into Persian, together with the *Fatâwâ-e-Alamgiri* by *Qâdhî* al-Quzat Muhammad Najmuddîn Khan in the year 1813.[200]

On the other hand, legislations that started in the era of the Anatolian Seljuqids and continued in the Ottoman State were the essential legal arrangements that were taken as the official basis at the courts and at the other state offices, including those legal codes of Fâtih (the Conqueror), Qânûni (the Lawmaker), Tawqi'i Abdurrahman Pasha (1087/1676), Ahmed the Third and Murad the Fourth should certainly not be

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[198] *Tuzukat-e Timuri*, Persian version provided by Abu-Tâlib Huseini (Oxford, 1773), pp. 18-20.

[199] Forbes Manz, "Tamerlane's Career and Its Uses," *Journal of World History* 13 (2002): 1-25; Major Davy, *Institutes, Political and Military, written originally in the Mongol Language, by the great Timour*, (Oxford, 1783); Charles Stewart, *The Malfuzat Timury, or Autobiographical Memoirs of the Moghul Emperor Timur*, (London, 1830).

[200] Sircar, *The Muhammadan Law*, pp. 55-57; Ishwari Prasad, *A Short History of Muslim Rule in India, from the Advent of Islam to the Death of Aurangzeb* (Allahabad : Indian Press, 1965), p. 609; John F. Richards, *The Mughal Empire* (Cambridge: Cambridge University Press, 1995).

overlooked. In point of fact, these legislations and the books of Islamic jurisprudence (*Qânûnnâme, Qawânîn*) were accepted as the written legal codes of the Ottoman State until *Tanzîmât* (The Reforms). While books of Islamic jurisprudence were the references for *Sharî'ah* law, the legal codes were the references for the customary laws that were based on *Sharî'ah* principles. In truth, they also served as the basis of those legal arrangements that emerged as result of the codification movements after *Tanzîmât* (Reforms).[201]

The Ottoman legal codes before *Tanzîmât* could be classified into two groups:

A) The **first** was the General legal codes known as *Qânûn al-'Uthmani* (Ottoman Law). Mehmed II (1451-81) was the first of the sultans to issue *qânûnnâme* intended to be of universal application. One of the two *qânûnnâme*s for him deals with organization of offices connected with the state, with posts held by *'ulamâ* as well as those held by the more obvious men of government, such as *wazîrs*. Second one, chiefly concerned with fines, taxes and tolls, was later subsumed in the much more comprehensive *qânûnnâme-i 'Uthmânî or Qânûnnâme-i Âl-i 'Uthmân*. Yavuz further extended that law and then published it. *Qânûn al-'Uthmani* (The Ottoman Law), which was prepared during the reign of the Lawmaker, remained in force until after *Tanzîmât*, except for several minute amendments during the time of Murad IV and Ahmed I. General laws are made up, basically, of decrees concerning *ta'zir* penalties, then the states of *ra'âyâ* (Muslim and non-Muslim subjects) and the taxes for which they were liable as well as those issues for which military organizations and similar supervisors were vested with legislative prerogative. The system of *timar* (fief) was also detailed in it.[202]

B) The **second** was the Special legal codes on provinces – around 35 – and the *sanjaqs* (principalities) affiliated with these provinces. They were the forms of the general Ottoman laws that were adapted to local conditions and numbered about 700. They regulated military, penal, agricultural and administrative principles apart from the issues of customs and *bâj*.[203]

The most important source of post-*Tanzîmât* legal texts and arrangements that is laws, regulations, directives and decrees were primary and secondary *Dustûrs* (Codes of Law). Besides, *Taqwîm al-Wakâyi'*, the first Official Gazette of the Ottoman State

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[201] The Committee, *Osmanlı Qânûnnâmeleri* (Ottoman Legislations), MTM, vol. I, pp. 49, 305, 479ff; Serkiz Karakoç, *Külliyât-ı Qavânîn* (A Collection of Laws), File No. 1, "Legislations of the Conqueror, the Lawmaker, Ahmed III and Murad IV"; cf. Akgunduz, *Osmanli Kanunnameleri,* 9 vols.

[202] Cf. Richard C. Repp, "Qânûn and Sahrî'a in the Ottoman Context," 'Azīz 'Azmah, *Islamic Law,* pp. 125-26.

[203] Old Ottoman Legal Codes, which Ahmet Akgündüz has begun to have been published. See *Osmanli Kanunnameleri ve Hukuki Tahlilleri,* vol. I, (Istanbul: OSAV, 1990).

that began to be published from 1247/1831 on, *Jarîdah al-Mahâkim* and *Majmû 'ah al-Muqarrarât al-Tamyîziyyah*, in which the decisions of the Supreme Court of Appeal were published and periodicals on legal issues such as *Jarîdah al-Adâlah* (Journal of Justice) and *Jarîdah al-Ilmiyyah* (Journal of Islamic Science) are of crucial significance. With respect to legal arrangements we should make particular mention of Penal Codes.

We should mention that laws were published on various subjects with the proclamation of *Tanzîmât* in 1839 by the Government under the title of *dustûr* (codex) and were translated into foreign languages. These codes include laws, interpratations and decrees enacted by the legislative power, as well as the regulations, contracts and the like which were prepared by authorized offices in conformity with the provisions imposed by laws, interpretations and decrees.

The *dustûr* was codified in three series.

1) The first series contained the texts previous to 1324/1906. It comprised eight volumes, four of which were appendices. It contains the laws and decrees up 1302 though it is incomplete. Laws from 1302 to 1324/1906 were not compiled and printed in the form of a *dustûr.* The compilation entitled *Mutammim* (Addenda) contains only a part of these.

2) The second series of *dustûr* contains all judicial texts from 1324/1906 to 1336/1918. Of this series, seven volumes were published at that time, containing texts up the year 1331/1912, but the part which went up to 1338/1919 was printed later in five volumes.

3) The third series of *dustûr* contains in full all laws promulgated by the Grand Natioanl Assembly and all governmental decrees of the Turkish republic in thirty-three volumes.

Laws codified before the Constitution of 1293/1876 were submitted by the Government of his Imperial Majesty for approval and were enforced by His Majesty's decree. Laws after this date were enacted by the Parlimant in accordance with provisons of the Constitution.[204]

The codifications of Islamic law in thr modern meaning started again with *Majalla*, which arranged the laws of property, loans and procedures: *Majalla-i Ahkâm-i 'Adliyyah.* This was an official Ottoman codification of Hanafîte law by a special committee *(Majalla Jam iyeti)* under the chairmanship of Ahmed Jawdat Pasha. It represents the last stage in the development of Hanafîte doctrines. The committee's report is

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[204] Abu al-Ula Mardin, "Development of the Sharia under the Ottoman Empire," Majid Khadduri and Herbert J. Liebesny, Origin and *Development of Islamic Law; Law in the Middle East,* (Clark: The Lawbook Exchange, Ltd., 2008), pp. 290-91.

worth reading. The most important commentary was *Durar al-Hukkâm Sharh Majalla al-Ahkâm,* by Khoja Emin Efendi Zadeh 'Ali Haydar, which was published in Constanti-nople, 1330, vols 1-4 (in Turkish). It is the best and most scholarly work of its kind and is used as text at the Istanbul Law School and by lawyers and judges.[205]

Last but not least, there are a great number of references in post-Islamic history of law. The aim is to reach a sound synthesis through a close study of all the refer-ences. We will try to accomplish this task on the basis of the most noteworthy of theoretical and applied references. In the meantime, we will learn that most of our knowledge of old Islamic Law is either incorrect or unfounded and that there is much of which we are ignorant.

We should mention some legislative activities in Egypt too. Egypt was under the rule of Ottoman State, but after Muhammad 'Ali Pasha it became a semi-independent state. The Ahmad Jawdat Pasha of Egypt, Muhammad Qadri Pasha, prepared three very important bills; but none of them became law officially. The *first* bill was *al-Ahkâm al-Shar'iyyah fi al-Ahwâl al-Shakhsiyyah.*[206] The translation of the code was published as *Code of Mohammedan Personal Law* by (Sir) Wasey Sterry and N. Abca-rius, printed by the Sudan Government in London 1914. The *second* bill was *Murshid al-Hayrân ila Ma'rifah Ahwâl al-Insân fil-Mu'âmalât al-Shar'iyyah,*[207] and the third was *Qânûn al-'Adl wal-Insâf lil-Kadhâ' 'ala Mushkilât al-Awkaf.*[208] At the same time a Shi'î scholar, 'Abd al-Karim al-Hillî, prepared a bill called *al-Ahkâm al-Ja'fariyya fil-Ahwâl al-Shakhsiyyah* and published in Baghdad 1342/1923-24. This is a private codi-fication of Twelver Shi'îte law, inspired by Qadri Pasha.

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[205] Cf. Siddik Sami Onar, "The Majalla," Majid Khadduri and Herbert J. Liebesny, Origin and *Develop-ment of Islamic Law; Law in the Middle East,* (Clark: The Lawbook Exchange, Ltd., 2008), pp. 292ff.

[206] Official French translation: *Droit musûlman: Du statut personnel et des successions d'après le rite hanafite* (Alexandria : 1875); official Italian translation: Alexandria : 1875; French translation also in E. Clavel, *Droit musûlman: Du statut personnel et des successions* (Paris: 1895), vol. II, 261-424; Arabic text and English translation also in A.F. Muhammad Abdur Rasman, *Institutes of Mussal-man Law* (Calcutta: 1907); commentary by Muhammad Zaid al-Ibyâni Bey, *Sharh al-Ahkâm al-Shar'îyya,* 3 vols. (Cairo: 1914).

[207] Translated into French in *Droit musûlman* as *Statut réel, traduit de l'arabe* by Abdul Azîz Kahil Bey (Cairo: 1893); cf. Akgunduz, *Külliyât.*

[208] Translated into French as *Du wakf, traduit de l'arabe* by Abdul Azîz Kahil Bey (Cairo: 1896), and U. Pace and V. Sistro, *Code annotf du waqf,* (Alexandria: 1946).

3 THE HISTORICAL PERIODS OF ISLAMIC LAW

3.1 The Period of the Prophet Muhammad

3.1.1 Legislation during the Period of Muhammad and Sources of Law

The period of Muhammad is called *Asr al-Sa'âdah* (The Age of Felicity) by Muslim scholars. We should draw attention to primarily two points.

First, prior to Muhammad, the Arabian Peninsula had no written legal system or political order. Indeed, the political system known in Yemen, as well as any other political system – whatever the term may mean or may have meant to the civilized peoples of old – was literally unknown in the areas of Tihamah, Hijaz, Najd and other broad areas that constitute the Arabian Peninsula. The sons of the desert were then, nomads who had no taste for settled life and knew no kind of permanence other than perpetual movement in search of pasture and satisfaction of the whim of the moment. In the desert, the basic unit of life is the tribe and not the state. Moreover, a tribe that is always on the move does not recognize any universal law, nor does it ever submit to any general political order. To the nomad, nothing that falls short of total freedom for the individual, the family and the tribe as a whole is acceptable. So we could say that there was no written legal system in Arabian Peninsula. There were, however, some customary laws or rules relating especially to family law and penal law. We could conclude that pre-Islamic Arab customary law was one of the secondary sources of Islamic law, as we will explain in *'urf* and *'âdah*.[1] The best example of this is the law of *qasâmah* (compurgation). That means if a body of a murdered person is found on land owned by a tribe or in a city quarter or domicile, fifty of the inhabitants are to take an oath that they neither committed the crime nor have knowledge of the murderer. By doing so, they exempt themselves of any liability but are not exempt from paying *diyah* (blood money) to the family of the victim.[2]

Second, we should separate the Meccan period (609-622) and the Medinan period (622-632) with respect to rules concerning Islamic law. The revelation in Mecca

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[1] Ali Muhammad al-Mu'awwadh and Âdil Ahmad Abdulmawjûd, *Târikh al-Tashrî 'al-Islamî,* vols. I-II, (Beirut: Dâr al-Maktabah al-Ilmiyyah, 2000), vol. I, pp. 173-83; Cf. Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnî Usûl al-Fiqh,* (Cambridge: Cambridge University Press, 1997), p. 7.

[2] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî,* vol. I, pp. 205-21; Muhammad ibn Hazm, *Mu'jam al-Fiqh,* vol. II (Damascus, Jâmi'atu Dimashq, 1966), p. 838-39; Mannâ' al-Qattân, *Târîkh al-Tashrî' al-Islamî* (Beirut: al-Risâlah, 1987), pp. 29-34.

was different from the revelation in Medina. The revelation in Mecca primarily concerned with basic faith principles like *tawhîd* (Allah's existence and unity), the next life (the hereafter), the ancient people, *Salâh* (the only rule revealed in Mecca) and some challenges. But the revelation in Medina mostly concerned the legal system, relations with the people of the book, hypocrites and international law like *jihâd*. During the second year of the *Hijrah*, the Prophet Muhammad drew up the Constitution of Medina (*wathîqah al-Madina*), defining relations between the various groups in the first Islamic community. Later generations of Islamic political thinkers paid a great deal of attention to the constitution, for Muslims believe that Muhammad created the ideal Islamic society in Medina, providing a model for all later generations. It was a society in which the integration of tribal groups and various social and economic classes was based on social justice. We could say that before migrating to Medina, Muhammad's mission was religious and ethical, calling people to humility, generosity and belief in God. But in the Medina period Qur'anic revelation began to reflect a new development in Islamic law.[3]

'Abdullahi Ahmed An-Na'im[4] claims that the Meccan *sûrahs* of the Qur'an (revealed prior to *hijrah* or before the Prophet had any political power) are a universal message valid for all times and peoples while the Medinan *sûrahs* (revealed while the Prophet was a political leader) were directed specifically to that particular time and place and those specifics are not necessarily binding for other times and places. These claims are completely baseless.[5] No Muslim can accept this claim.[6] *Sharî'ah* is the law of Islam deduced from basic sources: the Qur'an-which Muslims believe to be the final

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[3] Wael B. Hallaq, *The Origins and Evolution of Islamic Law,* (Cambridge: Cambridge University Press, 2007), pp. 19-21.

[4] Abdullahi Ahmed An-Na'im is Charles Howard Candler Professor of Law at Emory University School of Law. His specialties include human rights in Islam and cross-cultural issues in human rights, and he is the director of the Religion and Human Rights Program at Emory. He also participates in Emory's Center for the Study of Law and Religion. An-Naim was formerly the Executive Director of the African Bureau of Human Rights Watch. He argues for a synergy and interdependence between human rights, religion and secularism, instead of a dichotomy and incompatibility between them. Born in 1950, An-Naim is originally from Sudan, where he was greatly influenced by the Islamic reform movement of Mahmoud Mohamed Taha. He is a naturalized American citizen, but retains Sudanese citizenship. His research interests include constitutionalism in Islamic and African countries, and Islam and politics. He directs several research projects that focus on advocacy strategies for reform through internal cultural transformation.

[5] Some of 'Abdullahi Ahmed An-Na'im's works are: *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1996), *Islam and the Secular State: Negotiating the Future of Sharî'ah* (Cambridge, MA and London: Harvard University Press, 2008), *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002).

[6] Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 59-84.

and literal Word of God, and the living example of the Prophet Himself. *Sharî'ah* is very broad and comprehensive. It includes worship rituals, i.e. how to pray, cleanliness for worship, how to fast and rules for social etiquette, i.e. how to dress and how to wash. There is no inconsistency between these rituals, questions of human rights and universal legal norms and values.

There were two sources for Islamic law in the period of the Prophet:[7]

1) The Qur'an is considered to be the word of God received by the Prophet and uttered verbatim by him to those around him. Moreover, there is a subtle and profound relationship between Muhammad and the Qur'an. *First*, there are direct references in the Qur'an to Muhammad, his nature and his function. Notably, the Qur'an declares that he was a man and not a divine being, that he was the "seal of prophets" (*khâtam al-anbiyâ'*), that he was endowed with a most exalted character, and that God had appointed him to be the "goodly model" (*uswah hasanah*) for Muslims to follow. *Second*, Muhammad was the person who comprehended the meaning of the Qur'an best and was its first interpreter and commentator. Over the centuries all Muslims have understood the Qur'an through Muhammad's interpretation, and whenever they recite the Qur'an or attempt to put its teachings into practice, they experience his presence. Islamic sages over the ages have, in fact, insisted that God granted to the Prophet alone the understanding of all levels of the Qur'an's meaning that humans could grasp, and that those who later came to know something of the inner meaning of the Qur'an were heirs to the knowledge given to Muhammad by God.[8]

2) The deeds of the Prophet, called the *Sunnah* — which technically also embrace his sayings, or *hadîth*s — are, after the Qur'an, the most important source of everything Islamic, from law to art and from economics to metaphysics, and are the model of behavior that all pious Muslims seek to emulate. The *Sunnah* also covers a broad array of activities and beliefs, ranging from entering a mosque, practicing personal hygiene, and dealing with family to the most sublime mystical questions involving the love between humans and God. In addition, it addresses everyday activities; intimate matters of one's personal life as well as the social and economic life of Muslims have been governed over the centuries by the *Sunnah*. Even the details of all the major rites of the religion — daily prayers, fasting, the annual pilgrimage, etc. — are based on the *Sunnah* of the Prophet. The Qur'an commands believers to perform the canonical

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[7] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 265-88: Cf. Hallaq, *A History of Islamic Legal Theories*, p. 7; cf. Duncan B. MacDonald, *Development of Muslim Theology, Jurisprudence and Constitutional Theory*, (Read Books, 2007), pp. 65ff.

[8] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 275-88; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 40-58.

prayers, to fast, and to perform the pilgrimage, but it was the Prophet who taught them how to perform these acts, along with other religious rituals such as marriage and burial of the dead.[9]

The legal essence of Islam was embedded in the revelation as presented by the Qur'an and in the guidelines of the Prophet. These distinctive features of Islamic Law were inherent in the fresh legal instructions that had been given by God. Even the prophetic individual opinion was based on the revelation of God's *wahy*.[10] During the thirteen years that the Prophet spent in Mecca, the essence of the Qur'an was focused on faith and ethics, with little reference to the practical element of Islamic law. The period covered by the life of the Prophet was the most central period in the history of Islamic law, since only then was there any divine revelation. Islamic law entered a new phase subsequent to the Prophet's flight (*hijrah*) to Yathrib, when a Muslim state was established. This heralded an era in which the practicalities of legislation had to be established.[11]

The Muslim state required legal answers for all its difficulties, with regard not only to practical issues such as family, crime, *jihâd* and inheritance but also matters relevant to ritual and worship.

Islamic law was completed via two methods in this period.

A) A number of Qur'anic verses were direct answers to questions that were asked. For example, intoxicants were forbidden in the Qur'an gradually through several separate verses revealed at different times over a period of years. The circumstances accompanied the revelation of certain verses that we call *asbâb al-nuzûl*. For

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[9] Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 87-98.

[10] His status as a messenger was based on Revelation, which is of two kinds:

The *First* is explicit Revelation. In this case, the Noble Messenger is merely an interpreter and announcer, with no share in the content. The Qur'an and some Sacred Hadith are included in this kind of Revelation. The *Second* is implicit Revelation. The essence and summary of this is also based on Revelation or inspiration, but its explanation and description were left to the Messenger. When he explained and described such Revelation, he sometimes alsorelied on Revelation or on inspiration or sometimes spoke on the basis of his own insights. When he resorted to his own interpretation, he either relied on the perceptive power given him on account of his prophetic mission, or he spoke as a human being and in conformity with usage, custom and the level of common comprehension.

Thus, all the details of every *Hadith* are not necessarily derived from pure Revelation, nor should the lofty signs of his status as messengership be sought in such ideas and transactions he had that were required by his participation in the human state. Cf: Said Nursi Bediuzzmanan, *Letters*, trans. by Shukran Wahide, (Istanbul: Sozler Publications, 2004), p. 123.

[11] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 308-36; Mû'il Yûsuf 'Izz al-Dîn, *Islamic Law: from Historical Foundations to Contemporary Practice* (Edinburgh: Edinburgh University Press, 2004), pp. 3-4.

example, the case of forbidding wine is a good example. *"They ask you about wine and gambling. Say, 'There is great evil in them as well as benefit to man'. But the evil is greater than the benefit."*[12] At a second stage it was forbidden for Muslims to attend prayers while intoxicated (4:43). This was the next step in turning people away from the consumption of alcohol. Finally, "intoxicants and games of chance" were called "abominations of Satan's handiwork," intended to turn people away from God and to have them forget about prayer, and Muslims were ordered to abstain (5:90-91).[13]

Sometimes, verses were revealed because of particular incidents that took place during the life of the prophet. An example can be found in the case of Hilâl ibn Umayyah. *"And for those who accuse their wives, but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e. testifies four times) by Allâh that he is one of those who speak the truth. And the fifth (testimony) (should be) the invoking of the Curse of Allâh on him if he be of those who tell a lie (against her). But it shall avert the punishment (of stoning to death) from her, if she bears witness four times by Allâh, that he (her husband) is telling a lie. And the fifth (testimony) should be that the Wrath of Allâh be upon her if he (her husband) speaks the truth..."*[14]

B) To complete a whole legal system, some injunctions were revealed to the Prophet directly without any question or particular incidents. For example, many rules relating to family law or penal law were revealed directly to complete the divine message. [15]

During the Prophet's life and shortly thereafter his sayings were written down on media such as parchment, papyrus and shoulder bones of camels. They were also preserved orally by a people whose lengthy poetic tradition had been transmitted solely by mouth in the period preceding the rise of Islam. In the 8th and 9th centuries, however, scholars began to collect the sayings of the Prophet after devising rigorous criteria for examining the authenticity of the chain of transmission (*isnâd*). The result of this Herculean task was the Sunnî compilation of six collections of sayings known as the *al-Kutub al-Sittah* the most famous of which was compiled by al-Bukhârî. In the 10th century the Shî'ites compiled their own collection in four volumes known as The Four Books (*al-kutub al-arba'ah*), of which the most famous was by al-Kulaynî. But some Shî'ite authorities believe that Shî'ism also has six canonical collections of *Hadîth*. Most of the sayings in the Sunnî and Shî'ite collections are the same, but the chain of transmission differs. Sunnî Muslims believe that many of the sayings were

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[12] Qur'an, *al-Baqarah*, 2: 219.

[13] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 337-41.

[14] Qur'an, *al-Nur*, 6-9; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 47-57; Dien, *Islamic Law*, p. 4.

[15] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 337-41.

transmitted by Ibn al-'Abbâs and 'Â'ishah, but Shî'ites accept only members of the household of the Prophet (ahl al-bayt) as legitimate transmitters. There are also a number of prophetic sayings known as al-ahâdîth al-qudsiyyah ("sacred sayings") in which God speaks in the first person through Muhammad. In general, these sayings are of an esoteric character and have been of great importance in the development of Sufism.[16]

All schools of Islamic law (Sharî'ah) agree that the Sunnah and Hadîth of the Prophet serve as the most important source of Islamic Law after the Qur'an. In Islam, even a prophet is not a legislator on his own; rather, God is ultimately the only legislator (al-Shâri'). Muslims believe, however, that, as God's prophet, Muhammad knew the divine will as it was meant to be codified in Islamic Law. His actions and juridical decisions therefore played an indispensable role in the later codification of the Sharî'ah by various legal schools.[17] Muslims believe that Muhammad brought not only the word of God in the form of the Qur'an to the world but also a divine law specific to Islam, a law whose roots are contained completely in the Qur'an but whose crystallization was not possible without the words and deeds of the Prophet.[18]

3.1.2   The Main Features of Legislative Activities

There are three main features to the legislative activity during the time of the Prophet Muhammad.

First, Islamic law promotes simplicity and does not admit difficulty (the principle of raf' al-haraj). More than one verse from the Holy Qur'an and many Hadîths support the idea of Islamic simplicity: "Allah does not wish to place you in difficulty, but to make you clean, and to complete his favor to you, that ye may be grateful" (al-Mâ'idah 6:6). "Allah intends every facility for you. He doesn't want to put you to difficulties" (al-Qasas 28:27). The Prophet Mohammad said: "The religion is so easy and anybody enters with difficulty must be overcome."[19] God has made provisions for patients, for travelers, for those who have been oppressed, for cases of mistakes or for-

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[16]   Abdulkarim Zaidan, al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah (Baghdad: Matba'ah al-Ânî, 1977), p. 117.

[17]   Qur'an 4: 59: "O you who believe! Obey Allâh and obey the Messenger (Muhammad (peace be upon him)) and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allâh and His Messenger, if you believe in Allâh and in the Last Day. That is better and more suitable for final determination."

[18]   Zaidan, al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah, pp. 108-11; Mustafa Ahmed al-Zarqa,, al-Fiqh al-Islamî Fi Sawbih al-Jadid (Damascus: Dar al-Qalam, 1998), vol. I, pp. 165-72; ibn al-Qayyim al-Jawziyya, I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn, (Beirut: Dar al-Kutub al-Ilmiyyah, 1996), vol. I, p. 9.

[19]   Al-Bukhâri, al-Jâmi' al-Sahîh, Kitâb al-Iman.

getting.[20] Patients who suffer from chronic conditions such as incontinence must take measures with respect to purity and to allow impurities to exit during prayers in such as way that these impurities would not reach bodies or clothes.[21]

Second, Islamic law attempts to delineate the application of the legal system in relation to the gradual process over time (the principle of *tadrîj*). The application of Islamic law cannot be immediate, and that legislation must reflect a step by step development that follows the initial establishment of the creed. The prohibition of alcohol is the best example of that. The main duties of Muslims have been prescribed and prohibitions have been set gradually, as seen in practice of praying, fasting, the payment of *zakâh*, and the gradual prohibition of alcohol.[22] Wine was permitted in the Meccan period: *"From date-palm and grapes you derive alcoholic drinks, and from them you make good livelihood. Lo! There is indeed a portent for people who have sense"* (16:67). In Medina the Qur'an expressed an ambivalent sense of dislike toward alcoholic beverages. *"They ask you about wine and gambling. Say: in both there is sin, and utility for people'"* (2:219). After that, the sense of aversion increases: *"O you who believe! Do not come to pray when you are drunk, till you know what you utter"* (4:43). Finally, Muslims are ordered categorically to avoid alcohol, games of chance and idols altogether (5:90-91).[23]

Third, another main feature of Islamic law in this period is *Naskh*. The *Naskh* is an Arabic word usually translated as "abrogation"; it shares the same root as the words appearing in the phrase *al-nâsikh wal-mansûkh*, "the abrogating and abrogated [verses]". It is a term used in Islamic legal exegesis for seemingly contradictory material within or between the two bases of Islamic law: the Qur'an and the Prophetic *Sunnah*. Abrogation is applicable to both sources of Islamic law: the Qur'an and the Prophetic *Sunnah*. One Qur'anic verse may abrogate another verse, and one Prophetic *Sunnah* may likewise abrogate another. The possibility of one source, such as the Qur'an abrogating another, such as the *Sunnah*, was a more contentious issue, precipitated by the absence within a source of the appropriate abrogating (*nâsikh*) or abrogated (*mansûkh*) material necessary to harmonize it and the *Fiqh*. The principle of *naskh* is acknowledged by Sunnîs and Shî'a. The Qur'anic verse 4:43, whose more explicit disapproval of drunkenness is in turn abrogated by the Qur'anic verse 5:90, which institutes a complete ban on the consumption of alcohol. After the period of

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[20] The Committee, *al-Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah*, vol. XIV, p. 211.

[21] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 93-102.

[22] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 23-6, 102-8; 'Izz al-Dîn, *Islamic Law*, pp. 133-34

[23] Abu Ubayd al-Qasim ibn Sallam, *Kitâb al-Nasikh wal-Mansukh* (St. Edmundsburgh Press 1987), pp. 87-88.

the Prophet there is no *naskh* in Islamic Law. [24]

3.1.3   The Prophet's Ijtihâd and Interpretation

The lifestyle of the Prophet Muhammad or the way he lived in accordance with God's revelation, the Qur'an, can, in general, be called the *Sunnah*. It might also be said that this *Sunnah* of the Prophet, who was the last of the prophets and the best example for all humanity, is both a practical application of the Qur'an in a particular historical setting and a universal and meta-historical interpretation of it. For his *Sunnah* is rich enough to contain general principles and examples for human beings in all times and places, in spite of historical, geographical, human, cultural, economic and social differences. Therefore, since the early years of Islam to this day, Muslims in every corner of the world have seen the *sîrah* (biography) and *Sunnah* of Prophet Muhammad as a paradigm applicable in all matters that concern them and have tried to comply with his orders and suggestions without objection. He is a good husband, a good president, a good Imâm, and a good commander. [25] All the states and acts of the Messenger testified to his veracity and prophethood, but not all of those states and acts had to be miraculous. God Almighty sent him as human being so that he might be a guide and leader to human beings in their social affairs, and in the acts and deeds by means of which they attain happiness in both worlds.

We should not forget that Prophet Muhammad made some decisions based solely on his own judgment (*ijtihâd*), and some of these decisions were soon corrected through the verses of the Qur'an revealed later. The Prophet used his own judgment in a legislative manner and permitted his followers to do so. We cannot say that this factor plays a very important role in this issue of being "historically bound". It is not warranted to argue that Muslims have ignored the human side of Prophet Muhammad, seeing him purely as a messenger with no will of his own, isolated from his human characteristics and acting only on the basis of directives from the Qur'anic revelation. Although some characteristics and aspects of the Messenger have been described in history books and biographies, most of those qualities relate to his humanness. But in reality, the spiritual personality and sacred nature of this blessed being are so exalted and luminous that the qualities described in books fall short of his high stature. He is, indeed, the result and the most perfect fruit of the universe, the interpreter and the beloved of the Creator of the cosmos. Hence his true nature in its enti-

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[24] Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 110-14; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 111-17; ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. I, p. 29; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 26-7.

[25] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 343-59; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 98-110.

rety, and the truth of all his perfections, cannot be contained in the human qualities recorded in books of history and biography.

The fact that Muslim scholars, particularly the scholars in *Usûl al-Fiqh* (Methodology of Islamic Jurisprudence), have extensively discussed the question of the Prophet's *ijtihâd* (making a legal decision through independent interpretation) and, within this framework, classified the decisions he made on the basis of his own judgment and then evaluated these decisions in terms of their binding effect or juridical value. All this clearly shows that Muslim scholars have not seen him as a prophet whose actions are determined entirely and strictly by divine revelation completely isolated from human characteristics. Rather, they have tended to believe that the Prophet Muhammad had some practices that were rooted solely in his human nature and these practices and decisions can be a matter of discussion. Briefly put, we hold that the Prophet Muhammad was a human being who acted in compliance with Allah's revelation.

The human aspect of the Prophet becomes most apparent in the decisions and practices based on his own judgment. The Prophet Muhammad himself often remarked that, in matters not involved in the realm of purely religious convictions and about which there was no divine revelation, he was like any other human being; therefore, he could make some small mistakes (*zallah*) like everyone else among his Companions.[26]

Muslim scholars have generally agreed that the Prophet might have made some decisions based solely on his own judgment in matters of technical, i.e. administrative, political and economic affairs or in matters belonging entirely to worldly affairs. They disagree more on whether he had authority over purely religious matters such as faith, prayers and rituals. According to the majority view, the Prophet Muhammad did have *ijtihâd* authority in matters about which there was no divine revelation, regardless of the area to which they belonged.

We can classify examples of the Prophet's *ijtihâds* in terms of their essential characteristics as follows:

- Those that pertain to worship and rituals,
- Those that concern judicial matters,
- Those that concern matters of war,
- Those that pertain to worldly affairs.[27]

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[26] Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 114-117; Abdulqâdır Ali Hasan, *Nazratun Âmmah fi Târîkh al-Fiqh al-Islamî* (Cairo: Dâr al-Kutub al-Hadîsah, 1965), pp. 1-40; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 98-110.

[27] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 343-59.

1. **Worship and Rituals**. Prophet Muhammad sometimes made decisions based on his *ijtihâd* on matters of prayers and worship. One of the most well-known examples of this is the matter of the *adhân* (call to prayer and one of the most important signs of Islam). The Prophet made a decision that this call should be made to specify the exact times of prayer, thus preventing any damage to people's worldly interests should they attend prayer too early as well as the loss of other-worldly gains because they were late for prayer.

2. **Judicial Matters**. Prophet Muhammad himself stated that, in matters that pertained to judgments, he had made decisions based on his *ijtihâd*, taking into consideration the defenses of the two parties and the evidence presented to him for and against a given case. A *hadîth* on this point particularly emphasizes his human side: "*I am only a human being. When a case is presented to me, I might rule in favor of the party who presents his case in a better way, wrongly leading me to think that he is right. In this case, if I gave someone something that in fact belongs to his brother rather than himself, he should not accept it. For the thing that I gave him is nothing but a piece of fire.*"[28] Emphasizing the human side of the Prophet, this *hadîth* clearly indicates that the Prophet Muhammad was no different from any other human being in resolving problems judicially. This is because the Prophet could not access the knowledge in the realm of the unknown (*ghâib*) unless Allah wanted him to; therefore he had to make decisions based on the apparent and circumstantial evidence presented to him.

3. **Matters of War**. There are many examples of how the Prophet Muhammad made a decision on the basis of his *ijtihâd* after consulting with his Companions and taking existing conditions into account on matters and strategies of war. An example of such an *ijtihâd* is the fact that the Prophet accepted the offer of the Companion Saʿd ibn Muʿadh to command the army at the Battle of Badr.

4. **Worldly Affairs**. It is also a historical fact that from time to time the Prophet Muhammad declared his own opinions based on his own experience and judgment on some worldly affairs, and that he even made a mistake in some of his *ijtihâds*. The best example of this is the inoculation of date palms in Medina. According to a report, when the Prophet went to Medina he saw that to have a better harvest the residents fertilized the date palms by conjoining male and female pollens. He then said that, in his opinion, this would not work; upon hearing this, the residents of Medina gave up the practice. However, that year the produce turned out to be less than in earlier years. Then the Prophet said that although they should follow him strictly when he made a decision on matters of faith and religion, he was like any one of them when it

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[28] Al-Qattân, *Târîkh al-Tashrîʿ al-Islâmî*, pp. 98-110; al-Bukhari, "*Mazâlim*" 16, "*Ahkâm*" 29, 31; Muslim, "*Aqdiyah*" 5, 6.

came to worldly affairs, making decisions based on his own judgment, and added, *"You know your worldly affairs better than I do, and I know your religious matters better than you do."*[29]

In conclusion, the Prophet Muhammad was a prophet who acted first and foremost under the guidance of divine revelation. Despite this, it is also true that there are some verses in the Qur'an that emphasize his human features as well as those that indicate that he might make mistakes on some issues. In addition, he made decisions based on his own judgment and was wrong (or was at least unable to choose the better option) in some of these decisions. As such, it is clear that not all of his sayings and practices were a product of divine revelation. Muslim scholars and jurists have discussed this matter extensively, particularly in books on the methodology of Islamic jurisprudence. The majority of the *'ulamâ* (religious scholars) have argued with sound evidence that the Prophet Muhammad, like any other Muslim scholar, had the authority of *ijtihâd* and occasionally used it within the limits of his human capacity.[30]

Moreover, as a prophet who was compelled by divine revelation, the Prophet was mostly right in his *ijtihâd*-based decisions. Although they were few, in those cases where he was mistaken he was often warned by divine revelation and quickly corrected by Allah the Almighty. On the other hand, it is not possible to argue that all the mistakes the Prophet made regarding the purely worldly affairs were corrected by divine revelation or that such corrections were even necessary. In other words, Allah might not have corrected those decisions relating to purely worldly affairs that were based on expertise and experience like medicine, agriculture and technology. However, this does not affect his status as the Messenger of Allah.[31]

> There are degrees in the *Sunnah* of the Prophet: some are compulsory (*fardh*); these may not be given up. This sort is described in detail in the *Sharî'ah*. They are incontestable and can in no way be changed. Another sort is voluntary (*nâfilah*), and these are of two sorts:
>
> One sort is those Practices of the Prophet that concern worship (*sunan al-hudâ*). They too are described in the books of the Sharî'ah, and to change them is innovation (*bid'ah*). The other sorts are called "conduct" (*âdâb*), and are mentioned in the books of the Prophet's biography. Opposition to them cannot be called innovation, but it is opposition of a sort to the Prophet's conduct and means not benefiting from their light and true courtesy. This sort is to follow the Noble Prophet's actions in customary, natural acts and dealings, which are known through unanimous reports. For example, there are numerous practices showing the conduct of speaking, and explaining the principles of the conduct of eating, drinking, and sleeping, and concerning social intercourse.

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[29] Muslim, *"Fadhâil"* 139-41.

[30] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî,* vol. I, pp. 343-58.

[31] Cf. Hallaq, *A History of Islamic Legal Theories,* p. 10-15.

Practices of this sort are called "conduct." One who follows this conduct transforms his habitual actions into worship and receives significant effulgence from the conduct. Practising the smallest aspect of such conduct recalls the Prophet, and imparts a light to the heart.

The most important among the practices of the Prophet are those which are the symbols of Islam and connected with the marks of Islam (sha 'â'ir). The marks of Islam are worship, concern the community, and quite simply are general rights of a sort. As the whole community benefits from one person doing them, so on the person giving them up, the whole community is responsible. There can be no hypocrisy in the performance of marks of this sort, and they should be proclaimed. Even if they are of the voluntary sort, they are still more important than personal obligatory acts.[32]

The Prophet encouraged and praised his companions about Ijtihâd. The best example of this is the case of Mu'adh ibn Jabal. When Muhammad appointed him a ruler of Yemen he put the following question to Muadh: "According to what will you judge?" "According to the Book of God," replied Muadh. "And if you find nothing therein?" "According to the Sunnah of the Prophet of God." "And if you find nothing therein?" "Then I will exert myself (exercise Ijtihâd) to form my own judgment." The Prophet was pleased with this reply and said: "Praise be to God Who has guided the messenger of the Prophet to that which pleases the Prophet."[33] But we should add that all interpretations by the Companions had the chance to be corrected by revelation during the time of the Prophet.[34]

The Prophet Muhammad was the best follower of Islamic rules in his life.

3.2   The Period of the Companions (The Period of the Rightly Guided Caliphs=al-Khulafâ al-Râshidûn, 11-40/632-660)

The Companions were the Companions of the Prophet Muhammad. Sahâbah is plural; the singular is Sahâbi (fem. Sahâbiyyah). Most Muslim scholars regard anyone who saw Muhammad while they were in the state of faith as a Companion or Sahâbi. Their names and biographies were recorded in religious reference texts such as Muhammad Ibn Sa'd's early Kitâb al-Tabâqât al-Kabîr. The Prophet left them two main sources of Islamic law: the Qur'an and the Sunnah, but they explained and interpreted

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[32] Said Nursi Bediuzzaman, "The Eleventh Flash," The Flashes (Istanbul: Sozler Publications, 2004), pp. 85.

[33] Abu Dawud, Sunan, III, 1013, Hadîth no. 3567.

[34] Zaidan, al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah, pp. 115-16; Ali Hasan, Nazratun Âmmah fi Târîkh al-Fiqh al-Islâmî, pp. 1-40; Muhammad Beg al-Khudari, Târîkh al-Tashrî' al-Islamî (Cairo: 1939), pp. 9-10; Saaduddîn A. Alauya, Fundamentals of Islamic Jurisprudence: With Appendix, Islamic Penal Law (Manila: Rex Bookstore, Inc., 1999), pp. 196-97; 'Izz al-Dîn, Islamic Law, pp. 4-5.

these two sources. For this reason this period was called *The Age of Legal Interpreta-tion*, the *Period of the Companions*, and the *Period of the Righteously Guided Ca-liphs=al-Khulafâ al-Rashidûn*.[35]

We should add that since the great interpreters of the law among the righteous early generations of Islam lived close to the time of the Companions of the Prophet, the *age of light* and *age of truth*, they were able to receive pure light and make pure interpretations. But the interpreters of the law at present look at the book of reality through so many veils and from such a far distance that even its clearest letters they can see only with difficulty.

Following the death of the Prophet, his Companions could only fall back on their own sources. They had to evaluate and deal with social, political and economic di-lemmas. But the sources of law were determined, and they made use of these sources.

3.2.1   The Sources of Legislative Activities

During the time of the *Sahâbah*, they used four sources of Islamic law.

1. **The Qur'an**. Abu Bakr was instrumental in preserving the Qur'an in written form. It is said that after the hard-won victory over Musailamah at the Battle of Ya-mama fought in 632, 'Umar (later Caliph 'Umar) saw that many of the Muslims who had memorized the Qur'an had died in battle. Fearing that the Qur'an would be lost or corrupted, 'Umar requested Caliph Abu Bakr to authorize the compilation and pre-servation of the Book in written format. After some initial hesitation, Abu Bakr ap-pointed a committee headed by Zaid ibn Thâbit, which included those who memo-rized the Qur'an and 'Umar, to collect all verses of the Book. After collecting all Qur'anic verses from texts in the possession of various *sahâbah*, Zaid ibn Thâbit and members of his committee verified the reading by comparing it with those who had memorized the Qur'an. After they were satisfied that they had not left out any verse or made any mistakes in reading or writing it down, the text was written down as one single manuscript and presented in book form to Caliph Abu Bakr. This process hap-pened within one year after Muhammad's death, when most of his *Sahâbah* (Compa-nions) were still alive, ensuring that the text would not be corrupted in any form.[36]

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[35] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 365-92; Ahmed Akgunduz, *Turk Hukuk Tarihi*, vol. I (Istanbul: OSAV, 1995), pp. 118; al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. I, pp. 173-78; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 121-26; ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. I, pp. 9-12; The Commitee, *Mawsû'ah al-Adyân al-Muyassarah* (Beirut: Dar al-Nafâ'is, 2002), p. 327.

[36] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 428-40; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 127-30.

It was in this period that the knowledge of *asbâb al-nuzûl* emerged. As an Arabic term meaning "occasions/circumstances of revelation," this is a secondary genre of Qur'anic exegesis (*tafsîr*) directed at establishing the context in which specific verses of the Qur'an were revealed and the reasons for the revelations. This term refers to a field of study and genre of literature devoted to recounting the circumstances of the Prophet Muhammad and his followers when particular verses from the Qur'an were revealed. Perhaps the most well-known of these texts is the *Asbâb al-Nuzûl* by 'Ali ibn Ahmad al-Wâhidi, which is regularly reprinted alongside the text of the Qur'an. Legal scholars regard this study as of great importance, on the principle that sound understanding of the revelation proceeds from knowing the reasons God revealed the Qur'an and how the Prophet Muhammad applied the revelation when he received it. For example, lexically, *qurû'* can mean "time of purity," but it can also mean the menses itself. The correct meaning in the verse can be defined only by the reason for the revelation.[37]

2. **The *Sunnah*.** The Companions of the Prophet had different talents and abilities, but they did agree that the *Sunnah* is the main source of Islamic Law. This does not mean that they agreed on all the deeds and sayings as *Sunnah*, for some of them might not have heard what others had.[38]

We could say that the following are just some examples and not everything that was recorded at that time: 1) the books of the Prophet that were written to the kings and rulers of his time, such as His book to Heraclius, Emperor of Byzantine; 2) the Treaties, Covenants, and Agreements, such as the treaty with the tribe of Ghatfân during the battle of Khandaq (the trench) in the year 8 H; 3) the Agreements, the Decisions of Pardoning, and Giving Land, such as the contract of giving Tamim Ad-Dari some land in Palestine; 4) the writing of speeches and varying *Ahâdîth*, such as the writing of the *Khutbah al-Wadâ'* by Abu Shâh, narrated in the *Sahîhain* (Bukhâri and Muslim); 5) what the *Sahâbah* (Companions of the Prophet) wrote during the time of the Prophet, such as the genuine journal of 'Abdullah ibn 'Amr ibn al-'Âs, which contained one-thousand *Hadîths*.[39]

3. ***Ijmâ'***. The *Ijmâ' al-Sahâbah* is a legitimate source like the Qur'an and the *Sunnah* of the Messenger of Allah. With regard to the *Ijmâ' al-Sahâbah*, they all agreed on the necessity to establish a successor or *Khalîfah* to the Prophet after his death, and they all agreed to appoint a successor to Abu Bakr, then to 'Umar, then to 'Uthman, after the death of each. Some Muslim scholars argued that *ijmâ'* was possible only

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[37] The Qur'an, *al-Baqarah*, 2:228; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 421-22.

[38] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 440-49.

[39] Ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. I, pp. 9-12.

during the time of the Companions because of the number of Companions. We should mention that the majority of legal injunctions were formed as consultative legislation; this was so particularly with regard to cases those were relevant to public matters during the time of Abu Bakr (632-34) and 'Umar (634-44). For example, when Iraq (*sawâd al-Iraq*) was conquered, 'Umar looked to the Prophet's Companions for advice regarding the distribution and use of its land. He was unsure whether to leave it in the hands of the original owners or distribute it among the conquerors. After consultation, the decision was reached that the land should remain with the owners since they possessed the necessary skills for its future cultivation.[40]

4. *Qiyâs*. We could call *qiyâs* (legal analogy) or *ijtihâd* (exhaustive investigation) or *ra'y* (considered opinion) a source of the law and a means to tie the elaboration of the law more closely to scripture. The Prophet demonstrated *qiyâs* and considered it to be Shar'î evidence. The *Sahâbah* followed him in this regard, and they also considered *qiyâs* as Shar'î evidence for extracting rules. The *Sahâbah* clearly stated that they would use *qiyâs*, and the Prophet approved it. It is documented that the *Sahâbah* used *qiyâs* on many occasions. When Abu Bakr gave the inheritance to the maternal grandmother and not the paternal one, some of the *Ansâr* told him: *"You have given the inheritance to a woman (the maternal grandmother) of the dead person (the grandson) who, if she were the deceased person, he would not inherit from her. On the other hand, you excluded a woman (the paternal grandmother) from whom, if she died, this person would inherit. So give them one sixth of the inheritance."* When Abu Bakr heard this *qiyâs*, he changed his decision and established the new rule.[41]

When the Companions held a council to determine the punishment for drinking wine, 'Ali ibn Abu Tâlib suggested that the penalty of false accusation (*qadhf*) should be applied to the wine drinker, reasoning by analogy, "When a person gets drunk, he raves and when he raves, he accuses falsely."[42]

We should remember that only *ra'y-i memdûh* (considered opinion) is acceptable according to the Companions. *Ra'y-i Madhmûm* (wrong and refused opinion) is not a source for rules. For this reason Caliph 'Umar reviled the second kind of *ra'y*.[43]

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[40] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 449-64; 'Izz al-Dîn, *Islamic Law*, pp. 5-6.

[41] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 464-69.

[42] Zaidan, *al-Wajîz*, p. 177; al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. I, pp. 173-78.

[43] Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 118-31; Ibn'ül-Qayyim El-Jawziyye, *I'lâm'ül-Muvakqqi'in*, vol. I (Cairo: 1325-1326), pp. 7-9, 45; Ali Hasan, *Nazratun Âmmah fi Târîkh al-Fiqh al-Islâmî*, pp. 54-105; al-Khudari, *Târîkh al-Tashrî' al-Islâmî*, pp. 117-20.

3.2.2   Some Issues Relating to the Period of the Companions

The Companions cannot be matched with respect to the interpretation of the law, that is, in deducing its ordinances, in understanding what pleases Almighty God from His Word. Because that mighty Divine revolution revolved around understanding God's wishes and Divine ordinances. All minds were turned towards deducing the Divine ordinances. All hearts were eager to know "What does our Sustainer want from us?" All that happened at that time did so in a way that made this known and understood. The discussions of the time concerned them. Thus, since everything and all situations and discussions and conversations and stories occurred in such a way as to give some sort of instruction in these matters, since this perfected the Companions' capacities and illuminated their minds, and since their ability to interpret the law and deduce its ordinances was ready to be lit up like a match, no one at present, even with the intelligence and capacity of the Companions can match in ten years – or perhaps even a hundred – the level of deduction and interpretation they reached in a day or a month. The worldly happiness in our age is the focus of attention, instead of eternal happiness. The attention and gaze of humanity is directed towards different goals.

It was important to identify the Companions because later scholars accepted their testimony (the *hadîth*, or traditions) regarding the words and deeds of Muhammad, the occasions on which the Qur'an was revealed, and various important matters of Islamic history and practice (the *Sunnah*). The testimony of the Companions, since it was passed down through chains of trusted narrators (*isnâd*s), was the basis of the developing Islamic tradition.

We could mention some jurists among the Companions: 'Umar, who was famous for his letter to Abu Musa al-Ash'arî on trial law; Zaid ibn Thâbit, who was an expert in heritage law; and 'Abdullah ibn 'Umar who was a master of Abu Hanîfa.

Soon after Muhammad's death, the Muslim community, the *ummah*, was torn by conflicts over leadership. The two largest Muslim groups, the Shî'a and Sunnî, take very different approaches in weighing the value of the Companions' testimony.[44]

According to Sunnî scholars, Muslims of the past should be considered Companions if they had any contact with the Prophet Muhammad and they were not liars or opposed to the Prophet and his teachings. If they saw him, heard him, or were in his presence even briefly, they are Companions. Blind people are considered Companions even if they could not see Muhammad. Even unlearned Muslims are considered Companions. However, anyone who died after rejecting Islam and becoming an apostate is

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[44]   Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 154-75; See Hallaq, *The Origins and Evolution of Islamic Law*, pp. 29-31.

not considered a Companion.[45]

Regard for Companions (*Sahâbah*) is evident from the *hadîth*s: it was narrated by 'Abd-Allah Ibn Mas'ûd that Muhammad said: *"The best of the people are my generation, then those who come after them, then those who come after them."*[46]

Sunnî Muslim scholars classified Companions into many categories, based on a number of criteria. Al-Suyûti recognized eleven levels of companionship. However, all Companions are assumed to be just (*'udûl*) unless they are proven otherwise; that is, Sunnî scholars do not believe that Companions would lie or fabricate *hadîth* unless they were proven to be liars, untrustworthy or opposed to Islam. The *hadîth* quoted above shows the rank of *Sahâbah* (Companions), *Tâbi'în* (Companions' companions), and the *Taba 'al-Tâbi'în* (*Tâbi'în*'s companions) among general Muslims.[47]

Shî'a Muslims do not accept all Companions as just. The Shî'a believe that after the death of Muhammad, all except three, or some say twelve, Muslims turned aside from true Islam and followed leaders like the first caliphs, Abu Bakr and 'Umar. Only a few of the early Muslims followed 'Ali ibn Abu Tâlib, whom Shî'a Muslims regard as the rightful successor to Muhammad. Shî'a scholars therefore deprecate *hadîth* that are believed to have been transmitted through unjust companions, and place much more reliance on *hadîth* believed to have been related by Companions who supported 'Ali.

1. **Abu Bakr** (Abu Bakr as-Siddîq or 'Abdallah ibn Abû Quhâfah, 573–634/13 AH) was an early convert to Islam and a senior Companion (*Sahâba*) of the Islamic Prophet Muhammad. Throughout his life Abu Bakr remained Muhammad's friend and confidante. Upon Muhammad's death, he became the first Muslim ruler (632–634), regarded in Sunnî Islam as the first of the *Rashidûn* (righteously guided Caliphs). Abu Bakr had the distinction of being the first caliph in the history of Islam. He was the first caliph to nominate a successor.[48]

He was the only caliph in the history of Islam who refunded to the state treasury at the time of his death the entire amount of the allowance he had drawn during his caliphate. He was the first Muslim ruler to establish *Bayt al-mâl* and the first Muslim ruler to establish crown pasture. He was also the first Muslim ruler to establish *ijtihâd*. He has the distinction of purchasing land for al-Masjid al-Nabawi. According to Sunnî Muslims, in matters of virtue, Abu Bakr excelled all other *Sahâbah*. The Shî'a have a

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[45] Abdurrahman ibn Khaldun, *Târîkh ibn Khaldun Kitâb al-Ibar wa Dîwân al-Mubtada wal Khabar fi Ayyam al-Arab wal-Ajam wal-Barbar wa man Asarahum min Zawi al-Sultan al-Akbar*, vol. I (Beirut: Dar al-Kutub al-Ilmiyyah, 1992), p. 477.

[46] Bukhari, Muslim, Abu Dawud, at-Tirmidhi, An-Nasa'i and others.

[47] ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. I, p. 12.

[48] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 501-04.

very unfavorable view of Abu Bakr.[49]

Abu Bakr's method of arriving at legal judgments as follows: Whenever a dispute was referred to him, Abu Bakr used to look in the Qur'an; if he found something according to which he could pass a judgment, he did so. If he could not find a solution in the Qur'an, but remembered some relevant aspect of the Prophet's Sunnah, he would judge according to that. If he could find nothing in the Sunnah, he would go and say to the Muslims: "*Such and such a dispute has been referred to me. Do any of you know anything in the Prophet's Sunnah according to which judgment may be passed?*" If someone was able to answer his question and provide relevant information, Abu Bakr would say: "Praise be to Allah Who has enabled some of us to remember what they have learnt from our Prophet." If he could not find any solution in the Sunnah, then he would gather the leaders and elite of the people and consult with them. If they agreed on a matter then he passed judgment on that basis.[50]

2. **'Umar:**[51] 'Umar's recommendations to the judge, Shurayh, explain his way of deriving judgments from the available evidence. The most noticeable feature of 'Umar's methodology, however, is the fact that he often consulted the *Sahâbah* and discussed matters with them so as to reach the best understanding and find the most appropriate way to carry out judgments. In his approach to questions of legalities, 'Umar was like a shrewd and cautious chemist whose intent is to produce medicine that will cure disease without causing adverse side effects. 'Umar was a great statesman and law expert among the Companions, but 'Uthman was a shrewd businessman and had been a successful trader since his youth, which contributed a great deal to the *Rashidûn* State.[52]

3. **'Uthman:** When allegiance was given to 'Uthman, it was done on the condition that he work in accordance with the Book of Allah, the Sunnah of His Prophet, and the precedent set by the first two *Khulafâ*. This, he promised to do. 'Ali, however, indicated that when he became *Khalifah* he would be prepared to work according to the Book of Allah and the Sunnah of His Prophet, and then to do the best that his own knowledge and energy would allow. Because 'Uthman showed that he was willing to undertake to work in accordance with the precedents set by the first two *Khulafâ* he was supported by Abd al-Rahman, who had the casting vote. Thus, a third source of legislation, the precedent set by the first two *Khulafâ*; was added at the time of the

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49 Abdulmun'im al-Hashimi, *al-Khilâfah al-Râshidah* (Beirut: Dar ibn Hazm, 2002), pp. 7-35.

50 Shamsaddîn Muhammad Al-Dhahabî, *Siyar A'lâm al-Nubalâ, Siyar al-Khulafâ al-Râshidûn*, (Beirut, Al-Risâlah, 1996), pp. 7-67; Shah Waliyyullah Al-Dahlawi, *Hujjatullah al-Balighah*, (Cairo: Al-Matba'ah al-Khairiyyah, 1322), vol. I, p. 315.

51 Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 471-74.

52 Al-Dhahabî, *Siyar A'lâm al-Nubalâ, Siyar al-Khulafâ al-Râshidûn*, pp. 71-137.

third *Khalifah,* and was approved by him. Since 'Ali had reservations about this, when he himself became the *Khalifah* he acted according to his own *ijtihad* in matters for which the earlier *Khulafa* had already produced *ijtihâd.* For example, 'Ali reconsidered the issue of whether slave women who had begotten children for their masters could be sold. 'Uthman ibn Affan was one of the Sahabah who did not produce a great number of *fatâwâ,* probably because most of the matters he came across had already been dealt with by Abu Bakr and 'Umar, and he preferred to adopt their opinions. But in some cases, he had to make *ijtihâd,* just as his predecessors had done.[53]

Now we will give some comparative information.[54]

A) **Economic Regulations.** 'Umar had fixed the allowance of the people and, on assuming office, 'Uthman increased it by 25%. 'Umar had placed a ban on the sale of lands and the purchase of agricultural lands in conquered territories. 'Uthman withdrew these restrictions because under them trade could not flourish. 'Uthman also permitted people to borrow from the public treasury.

The coins were of Persian origin and bore the image of the last Persian emperor. Muslims added the inscription *Bismillah* to it. In 651 the first Islamic coins were minted during the caliphate of 'Uthman: these were the Persian *dirhams* that bore the image of the Persian emperor Yazdgerd III with the addition of the Arabic inscription *Bismillah* (in the name of Allah). However, the first original minting of the Islamic *dirham* was done in 695 in the Umayyad period.

'Umar, 'Uthman's predecessor, was very strict in the use of money from the public treasury. Apart from the meagre allowance that had been awarded him, 'Umar took no money from the treasury. He did not accept any gifts nor did he allow any of his family members to accept any gift from anyone. During 'Uthman's time, there was some relaxation in this strictness. 'Uthman did not draw any allowance from the treasury for his personal use nor did he receive a salary: he was a wealthy man with sufficient resources of his own. But unlike 'Umar, 'Uthman accepted gifts and allowed his family members to accept gifts from certain quarters.[55]

B) **Public works.** Under 'Uthman the people became more prosperous economically, and invested their money in the construction of buildings. Many new and larger buildings were constructed throughout the empire. During 'Uthman's caliphate, as many as five thousand new mosques were constructed. 'Uthman enlarged, extended and embellished the *al-Masjid al-Nabawi* at Medina and the *Ka'ba* as well. With the expansion of the army, the cantonments were extended and enlarged, more barracks

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[53] Al-Dhahabî, *Siyar A'lâm al-Nubalâ, Siyar al-Khulafâ al-Râshidûn,* pp. 149-211.

[54] Ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn,* vol. I, pp. 16-17; al-Hashimi, *al-Khilâfah al-Râshidah,* pp. 98-115, 261-80.

[55] Al-Qattân, *Târîkh al-Tashrî' al-Islâmî,* pp. 178-80.

were constructed for the soldiers, and stables for the cavalry were extended. 'Uthman provided separate pastures for state camels.

During 'Uthman's caliphate, guest houses were provided in the main cities to provide comfort for merchants from distant places. More and more markets were built and 'Uthman appointed Market Officers to look after them. Numerous canals were dug in Iraq, Egypt and Persia, which stimulated agricultural development. In the cities, particular attention was directed towards the provision of the water supply. In Medina, a number of wells were dug to provide drinking water for the people, and in Mecca the water supply was also improved. Water was brought to Kufa and Basra by canals. Shuaibia was the port for Mecca but it was inconvenient, so 'Uthman selected Jeddah as the site of the new seaport, and a new port was built there. 'Uthman also reformed the police departments in cities.

C) **Administration.** In his will 'Umar instructed his successor not to make any changes in the administrative set-up for one year after his death. For one year 'Uthman maintained the pattern of political administration as it stood under 'Umar, making some amendments later.

Under 'Umar, Egypt had been divided into two provinces, Upper and Lower Egypt. 'Uthman made Egypt one province and created a new province of North Africa. Under 'Umar, Syria had been divided into two provinces but 'Uthman turned it into one. During 'Uthman's caliphate the empire was divided into twelve provinces. These were: Medina, Mecca, Yemen, Kufa, Basra, Jazîra, Fars, Azerbaijan, Khorasan, Syria, Egypt and North Africa.

The provinces were further divided into districts (more than 100 districts in the empire) and each district or main city had its own governor, chief judge and *âmil* (tax collector). The governors were appointed by 'Uthman and every appointment was made in writing. At the time of appointment, an instrument of instructions was issued with a view to regulating the conduct of the governors. On assuming office, the governor was required to assemble the people in the main mosque and read the instrument of instructions to them. 'Uthman appointed his kinsmen as governors of four provinces: Egypt, Syria, Bosra and Kufa. The kindest explanation for this reliance on his relatives is that the Râshidûn Period had expanded so far and so fast that it was becoming extremely difficult to govern and that 'Uthman felt that he could trust his own relatives not to revolt against him. However, Shî'a Muslims did not see this as prudent but as nepotism and an attempt to rule like a king rather than as the first among equals.

D) **Concerning the Qur'an.** 'Uthman is best known, perhaps, for forming the committee that compiled the text of the Qur'an as it exists today. The reason was that various Muslim centers, like Kufa and Damascus, had begun to develop their own tra-

ditions for reciting and writing down the Qur'an. This copy of the Qur'an is believed to be one of the oldest, compiled during Caliph 'Uthman's reign. 'Uthman feared that the nascent Rashidûn Caliphate would fall apart as a result of religious controversy if everyone did not have access to a common text of the Qur'an. Towards the end of his reign, the committee, which Zaid ibn Thâbit hadheaded, finished compiling the text, and 'Uthman had it copied and sent to each of the Muslim cities and garrison towns, commanding that alternate versions of the Qur'an be destroyed, and only the official version used. 'Uthman is said to have been reviewing a copy of the Qur'an when he was assassinated.[56]

While Shî'a and Sunnî accept the same sacred text, the Qur'an, some claim that Shî'a dispute the current version, i.e. they add two additional *sûrah*s known as *al-Nûrayn* and *al-Wilâyah*. Nonetheless, Shî'as claim that they are falsely accused of this, since they believe, like Sunnîs, that the Qur'an has never been changed, and it is with reference to Sunnî *hadîth* books that this inference is drawn not only by uninformed Shî'as but Sunnî as well. Zaid ibn Thâbit was put in charge of the operation. The third caliph 'Uthman (644-655), again commissioned Zaid ibn Thâbit, said to have been the Propeht's scribe, to undertake the task of compiling a standard text, which he seems to have accomplished successfully. Several copies of this text were made and later distributed to the garrison towns; all other previous collections have reportedly been destroyed to avoid conflicts in text and recitation.[57]

4. **'Ali ibn Abu Tâlib**. 'Ali was like 'Umar ibn al-Khattab in the way he understood and applied the texts of the Qur'an and in his deep concern with linking particular issues to general principles. Prior to his assuming the office of Khalifah, he was considered the best judge in Madinah. He also advised 'Umar to set *Hijrah* as the beginning of the Islamic calendar. 'Umar used 'Ali's suggestions in political issues as well as religious ones.[58]

'Ali was a member of the electoral council appointed by 'Umar to choose the third caliph. Although 'Ali was one of the two major candidates, the council voted against him. The cousins Sa'd ibn Abu Waqqas and 'Abdur Rahman ibn 'Awf were naturally inclined to support 'Uthman, who was 'Abdur Rahman's brother-in-law. In addition, 'Umar gave the casting vote to 'Abdur Rahman. 'Abdur Rahman offered the caliphate to 'Ali on the condition that he rule in accordance with the Qur'an, the example of the Prophet, and the precedents established by the first two caliphs. 'Ali re-

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[56] Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 130-33; al-Hashimi, *al-Khilâfah al-Râshidah*, p. 280.

[57] Al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. I, pp. 173-83; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 118-31; Hallaq, *The Origins and Evolution of Islamic Law*, p. 33.

[58] Al-Hashimi, *al-Khilâfah al-Râshidah*, pp. 333-38; Ibn 'ül-Qayyim al-Jawziyye, *I'lâm 'al-Muwakqqi'in*, vol. I, p. 17; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. I, pp. 474-79.

jected the third condition while 'Uthman accepted it.[59]

We could summarize that in this period; 1) the use of *al-qiyâs* was widespread in cases where there was no relevant text in the Qur'an or Sunnah and none of the *Sahabah* objected to this. 2) *Al-Ijmâ'* was also widely used as a basis for judgment. This was facilitated by the fact that the *Sahâbah* were few, and it was easy for them to agree amongst themselves. They used *al-Ijmâ'* in many cases; for example, their decisions that the *Khalifah* or Imam should be appointed, that apostates should be fought and killed, that an apostate could not be taken as a prisoner of war, and that the Qur'an should be collected and written down in one volume.

3.2.3 Some Examples from the Opinions of the Companions

We should draw attention to other aspects of this period.

During this time some textually prescribed injunctions were suspended on the grounds that they lacked the circumstances and spirit of legislation that the Qur'an and *Sunnah* required for their application. Let us mention some examples:

a. The suspension of the share of the people whose hearts need to be reconciled (*mua'allafah al-qulûb*), on the pretext that shares used to be granted to them on the basis that they represented a threat to Muslims. When Islam increased in strength, the reason (*'illah*) for the injunction became invalid and the text was not applicable (although not canceled).

b. The suspension of the punishment for theft, which was again prescribed by the Qur'an. Accordingly, 'Umar did not amputate the hands of some poor people (*qat' al-yad*) who had stolen a female camel while working for Khatib ibn Abu Balta'a. 'Umar's justification for not applying the instruction of the Qur'an was that there was a famine at the time when the act was committed; necessity can thus justify what is prohibited.[60]

It is clear that the *Sahâbah* sometimes arrived at a consensus (*ijmâ'*) in religious rules and were sometimes in conflict. We would like to mention some examples of them having reached a consensus and their conflicts.

[59] Al-Dhahabî, *Siyar A'lâm al-Nubalâ, Siyar al-Khulafâ al-Râshidûn*, pp. 225-288; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 118-231; Ibn'ül-Qayyim al-Jawziyye, *I'lâm 'al-Mu¬vakqqi'în*, vol. I, pp. 7-9, 45; Ali Hasan, *Nadhratun Âmmah fi Târîkh al-Fiqh al-Islâmî*, pp. 54-105; al-Khudari, *Târîkh al-Tashrî' al-Islâmî*, pp. 117-20.

[60] The Qur'an, 9:60, 5:38; Dien, *Islamic Law*, p. 6.

3.2.3.1   Some Examples of Consensus among the *Sahâbah*

1. The Caliphate of Abu Bakr. The *Sahâbah* met after the death of the Prophet at the *saqîfah* (hall) of Bani Sa'ida with "one ruler from us and one ruler from you" (i.e. one from the *Ansâr* and one the *Muhâjirîn*). To this Abu Bakr replied: "It is forbidden for Muslims to have two rulers ...." Then he got up and addressed the Muslims, saying that Abu Bakr said on the day of al-Saqîfah: "It is forbidden for Muslims to have two rulers for this would cause differences in their affairs and concepts, their unity would be divided and disputes would break out amongst them. The *Sunnah* would then be abandoned, the *bid'ah* (innovation) would spread and *Fitnah* would grow, and that is in no one's interest."

Therefore Abu Bakr delivered the *Sharî'ah* verdict on the unity of the Khalîfah, stressing that it is forbidden for the Muslim *Ummah* to have more than one ruler. The *Sahâbah* heard him and approved and consented; no one disputed the verdict and all submitted to it and accepted it as a law (indication of evidence from the *Sunnah*). The *Ansâr* then conceded their claim to the Khalîfah, and al-Habbab Ibnu al-Mundhir was the first to pledge allegiance to Abu Bakr. The general consensus of the *Sahâbah* then took effect on the day of al-Saqîfah, which is an obligation for all Muslims to have one ruler only.[61]

2. Refrain from Paying *Zakâh*. The Companions discussed the case of one who refrains from paying Zakâh without denying the obligation to do so. Such an individual would be guilty of committing a sin. Yet this act does not place him outside of Islam. It is the ruler's duty to take *Zakâh* from the defaulter by force and rebuke him, provided he does not collect more than the stipulated amount.

If some people refrain from paying *Zakâh* while knowing they should and that they can afford to pay, they should be fought until they yield and pay. Al-Bukhâri and Muslim report that Ibn 'Umar heard the Prophet say: "*I have been ordered to fight people until they say that none has the right to be worshipped but Allah, and that Muhammad is His Messenger, and they uphold the prayers, and pay the Zakâh. If they do this, their lives and properties will be safe, except for what is due to Islam, and their accounts are with Allah.*"[62]

Abu Hurairah is reported to have said: "When Allah's Messenger died and Abu Bakr succeeded him as caliph, some Arabs apostatized, causing Abu Bakr to declare war upon them. 'Umar said to him: 'Why must you fight these men?' especially when there is a ruling by the Prophet: *I have been called to fight men until they say that none has the right to be worshipped but Allah, and whoever said it has saved his life*

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[61] Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 133-35; ibn al-Athir, *al-Kâmil fi al-Târîkh*, vol. II (Beirut: Dâr Sâdir, n.d.), pp. 325-32.

[62] Al-Bukhâri and Muslim; cf. the Qur'an, 2: 193.

and property from me except when a right is due in them, and his account will be with Allah. Abu Bakr replied: 'By Allah! I will fight those who distinguish between *salah* and *Zakâh* because *Zakâh* is what is due on property. By Allah! If they withhold even a young she-goat (*'anaq*) that they used to pay at the time of Allah's Messenger, peace be upon him, I would fight them.' Then 'Umar said: 'By Allah! It was He who gave Abu Bakr the true knowledge to fight, and later I came to know that he was right.'"[63]

To these problems we should add the question of the compilation of Qur'an, arranging *dîwâns* by 'Umar, and the funeral of the Prophet Muhammad.[64]

3.2.3.2   Some Examples from the Conflicts among the Companions

There are some religious issues about which the Companions were in conflict regarding their solution. We would like to mention some questions as examples.

1. **Land as War Booty** *"And know that whatever of war-booty that you may gain, verily one-fifth (/5th) of it is assigned to Allâh, and to the Messenger, and to the near relatives (of the Messenger and also) the orphans, al-Masâkîn (the poor) and the wayfarer, if you have believed in Allâh and in that which We sent down to Our servant (Muhammad (peace be upon him)) on the Day of criterion (between right and wrong), the Day when the two forces met (the battle of Badr); And Allâh is Able to do all things."*[65]

It was set down as a policy under 'Umar that the land in conquered territories were not to be distributed among the combatants but was to remain the property of the previous owners. The army felt dissatisfied about this decision, but 'Umar suppressed the opposition with a strong hand. 'Uthman followed the policy devised by 'Umar and there were more conquests, and land revenues increased considerably. The army once again raised the demand for the distribution of the land in conquered territories among the fighting soldiers, but 'Uthman turned down the demand and favored the *dhimmîs* (non-Muslims in an Islamic state). He argued on the basis of the verse from the Qur'an: *"What Allâh gave as booty (Fai') to His Messenger (Muhammad) from the people of the townships - it is for Allâh, His Messenger (Muhammad), the kindred (of Messenger Muhammad), the orphans, al-Masâkîn (the poor), and the wayfarer, in order that it may not become a fortune used by the rich among you. And whatsoever the Messenger (Muhammad) gives you, take it; and whatsoever he forbids you, abstain (from it). And fear Allâh; verily, Allâh is Severe in punishment."*[66]

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[63] Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, p. 135; al-Athir, *al-Kâmil fi al-Târîkh*, vol. II, pp. 342-49.

[64] Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 135-37.

[65] The Qur'an, *al-Anfal*, 8: 41.

[66] The Qur'an, 59:7; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 138-42.

2. **The Punishment for Drinking Alcohol (*Hadd al-Shirb*)**. There were no differences of opinion among the *Sahâbah* over punishing those who consumed alcohol, but there was some difference of opinion as to the number of lashes. The majority of Companions held that it was eighty lashes for a free people and forty for others.

There is a *hadîth* that says that a man who had drunk wine was brought to the Prophet and he had him flogged forty times with two palm branches that had been stripped of their leaves. Abu Bakr also did likewise (during his caliphate). When 'Umar was caliph, he consulted the people and 'Abd al-Rahman said, "The minimum punishment is eighty," so that is what 'Umar commanded.

Most of the *Sahâbah* agreed with 'Umar. The Council of Senior Scholars agreed that the punishment for one who drinks wine is the *hadd* punishment, which is eighty lashes.[67]

3. **Three Divorces (*Talâq Thalâthah*)**. During the time of the Prophet Muhammad and that of Abu Bakr the pronouncement of divorce three times in one sitting counted as only one divorce. Thus, if a man pronounced divorce three times in one sitting, his wife was not forbidden to him forever. They could be united again without any condition. But 'Umar started to enforce triple divorce because of its misuse by some people.[68]

3.3 The Period of the *Tâbi 'în* (Followers=Successors of the Companions, 41-120/660-738)

The *Tâbi 'în* (followers) are the generation of Muslims who were born after the death of Muhammad but were the contemporaries of the *Sahâbah*. As such, they played an important part in the development of Islamic thought and philosophy and in the political development of the early caliphate. In particular, they played a vital role in the split in the Islamic community between Sunnî and Shî'a Muslims. To this day, interpretations of their behavior and characters are highly controversial. We can define a *Tâbi 'î* as a Muslim who a) saw at least one of the Companions of Muhammad, b) was rightly guided (according to the Sunnî, one who adhered to the beliefs and actions of the *Ahl al-Sunnah wal-Jamâ 'ah*), c) one who died in that state. A good example here would be the *Khawârij*. They saw many of Muhammad's Companions but were not called *Tâbi 'în* because they were not rightly guided (a view held by both Shî'as and Sunnîs). Imâm Abu Hanîfa is included among the *Tâbi 'în*. *Taba 'al-Tâbi 'în* is the generation after the *Tâbi 'în* in Islam. Imâm Mâlik, Imâm Shâfi'î and Imâm Ja'far

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[67] Al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 143-44.

[68] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islâmî*, vol. I, pp. 524-6; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 145-46.

al-Sâdiq are among the *Taba' al-Tâbi'în*. This period starts with the Umayyad Cali-
phate. It was ruled by the Umayyad dynasty, whose name derives from Umayya ibn
Abd Shams, the great-grandfather of the first Umayyad caliph. Damascus was the cap-
ital of the Umayyad Caliphate, but after the Umayyads were overthrown by the Abba-
sid Caliphate, they relocated to al-Andalus, where they established the Caliphate of
Cordoba. Caliph Mu'âwiya (661-80) was the first ruler of the Umayyad dynasty.[69]

In this period (660-738), several developments came together to produce a dis-
tinctly new phase in the history of Islamic Law.

3.3.1   The Features of Legislative Activities

There are many factors that affected legislative activities during the time of the
tâbi'în.

1) Islamic conquests and victories extended Islamic influence in Asia, Africa and
some parts of Europe and in this way diverse cultural tradition entered the vast do-
main of Islam. When Mu'âwiya ibn Abu Sufian became caliph (662), Islamic law wit-
nessed a fundamental change in its establishment when the governmental system
was forcibly changed from selection on the basis of merit to hereditary succession
(*saltanah*). On account of this, new requirements and needs were felt, and *fiqh* was
bound to answer all of them in addition to presenting appropriate *ahkâm* that could
suit different environmental and social conditions. In the same period the Shî'a, who
formed a section of Islamic society, also encountered the new problems that faced
society. They also considered it essential to find solutions to the new problems. But
due to their particular point of view, they never came across the above-mentioned
strains when facing diverse situations. This was because when Imâm 'Ali was present,
they went to him to solve their problems. The political conflicts made way for legal
ones.[70]

By that time Islam existed not only in Mecca and Medina but had reached as far
as Egypt and Syria. Islamic legal theory was no longer purely that of the Prophet, and
the law was influenced by the theology that had developed, which reflected the polit-
ical differences.

2) At this time the transfer of *hadîth* increased due to needs arising from more

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[69] Ibn'ül-Qayyim al-Jawziyye, *I'lâm'al-Muvakqqi'în*, vol. I, pp. 18-19; al-Zarqa, *al-Fiqh al-Islamî Fi Saw-
bih al-Jadid*, vol. I, pp. 185-87; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, p. 132; al-
Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 193-98; Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-
Islamî*, vol. II, pp. 3-4.

[70] Ibn'ül-Qayyim al-Jawziyye, *I'lâm'al-Muvakqqi'în*, vol. I, pp. 7-9, 45; Ali Hasan, *Nazratun Âmmah fi
Târîkh al-Fiqh al-Islâmî*, pp. 7-9, 45-50; al-Khudari, *Târîkh al-Tashrî' al-Islâmî*, pp. 117-20; 'Izz al-Dîn
Dien, *Islamic Law*, p. 6-7.

conflicts among Muslims legally and politically. Muslims were in urgent need of *hadîth*s to solve their problems. For this reason, they asked the Companions to tell them more traditions. Even though there were around 114,000 Companions when the Prophet passed away, only 1000 or 1500 of them transmitted *hadîth*s. The companions who transmitted *hadîth*s were put in two categories in terms of the number of their narrations: those narrated few *hadîth*s are called *Muqillûn* while those who narrated many *hadîth*s are called *mukthirûn*, such as Abu Hurayra, ʿAbdullah ibn ʿUmar, Anas ibn Mâlik and ʿAisha..[71]

There are reasons for the fact that these Companions' transmitted more *hadîth*s than others. All these distinguished Companions were devoted to learning and got to know the Prophet in their youth when their memories were sharp. And they lived for a long time after the Prophet's passing. While some of the Companions were busy with worldly occupations, the *Mukthirûn* were with the Prophet most of the time because some of them were young and single and some were from *Ashâb al-Suffa*. Therefore, they were able to learn more *hadîth*s from the Prophet. Additionally, their special interest in learning *hadîth*s can be cited among the reasons for their transmission of many of them.

3) *Tadwîn al-Hadîth* (Recording and Codifying *Hadîth*s) became an urgent need for Muslims in this period. Because the need for *hadîth*s increased, the manufacturing of *hadîth*s arose due to Sunnî and Shiʿî conflicts, and the number of Companions started to decrease. The Companions played an important role in learning and teaching the *hadîth*s of the Prophet. They used all three methods applied by the Prophet to teach the *Sunnah*, and committed *hadîth*s of the Prophet to memory.

We find that many Companions recorded *hadîth*s. For example, ʿAbdullah ibn ʿAmr was permitted and even encouraged writing down *hadîth*s. In addition, some fifty Companions and many followers are said to have possessed manuscripts (*sahîfah*, Arabic plural of *suhuf*, which was used as a term to designate compendia of *hadîth*s that emerged during the century before the formation of the classical collections).

The original manuscripts have been lost, but some, very few, copies survived. An example is the manuscript of Hammâm ibn Munabbih, who learned from Abu Hurairah and wrote his manuscript containing 138 *hadîth*s. This manuscript is believed to have been written down about the middle of the first century after the *Hijrah* (seventh century).

4) Among the significant features of this period was the emergence of differences of opinion between legal scholars on a variety of matters. This was underscored by

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[71] Ibnʿül-Qayyim al-Jawziyye, *Iʿlâmʿal-Muvakqqiʿîn*, vol. I, pp. 10-11.

two decisions taken by the *Khalifah* of the times, 'Umar ibn 'Abd al-'Aziz. He ordered that practices attributed to the Prophet should be collected and written down. Accordingly, the people of every locality wrote down in books whatever they knew to be a part of the Sunnah. He restricted the authority to issue *fatâwâ*, in most districts, to a few named individuals, as he did in Egypt, when he named only three people for this purpose. Interestingly, two of them were freedmen, Yazid ibn Abu Habib and 'Abd Allah ibn Abu J'afar, and the third was an Arab, Ja'far ibn Rabi'ah. When the *Khalifah* was questioned about appointing two freedmen and only one Arab, he answered: "What fault is it of mine if the freedmen are improving themselves and you are not?" In his letter to Abu Bakr Muhammad ibn 'Amr ibn Hazm al-Ansari, the Khalifah explained his reasons for ordering that the practices attributed to the Prophet should be written down. He wrote: "Look for whatever Hadith of the Prophet, or Sunnah, or practice you can find. Then write these down for me; for I fear that this knowledge will pass away with the passing of the scholars." [72]

At the beginning of the second Hijrî century, during the caliphate of 'Umar ibn 'Abdul-'Azîz (97-101/715-19) the texts of *hadîth*s were committed to writing. During this period, great value was ascribed to the *Sunnah* and to all that is based on it. The *Sunnah* was collected in Syria, Egypt, Iraq, Yemen and Khurasan. Leading theologians uttered some warnings against unscrupulous reporters and their unreliable reports. 'Umar is reported to have rebuked one of his administrators when he came to power for not following the *Sunnah* of the Prophet and for not abandoning "the innovations that took place after the Sunnah." He is also reported to have asked Abu Bakr al-Ansari and others to "look for what there is of the *hadîth* of the Prophet and of his Sunnah." The task of coordinating the material he received from his subordinates was assigned to Imâm Zuhri. [73]

In this regard it is very important to note that there are two kinds of compilations: *musnad* and *musannaf*. In *musnad* collections, *hadîth*s are arranged alphabetically under the names of the Companions on whose authority these *hadîth*s were reported. Through all these improvements the sources of Islamic law did not change in this period. *Musannaf* hadîth collections are defined by their arrangement of content according to topic and constitute a major category within the class of all such works. There were four sources in this period: the Qur'an, the *Sunnah*, *Ijmâ'* and *Qiyâs*. [74]

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[72] Yusuf ibn Abdallah ibn Muhammed Ibn Abd al-Barr, *Jâmi' Bayân al- 'Ilm wa Fadhlihi*, (Dammam: Dar Ibn al-Jawzi, 1998), vol. I, pp. 33; this letter was narrated by al-Imam al-Bukhari in his Sahih without a formal chain of narrators (ie. *Ta'liqan*; as a *Mu'allaq* Hadith).

[73] See Hallaq, *A History of Islamic Legal Theories*, pp. 14-15.

[74] Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 132-40; Ali Hasan, *Nazratun Âmmah fi Târîkh al-Fiqh al-Islâmî*, pp. 106-220.

was that of the city of the *Hijrah*, al-Medina, with all the real imprint and symbolic lore it bore of the Prophet's practices and those of his illustrious Companions and the four Caliphs. The Hijaz School of Fiqh, whose founders included Mâlik ibn Anas al-'Asbahi (93-179/711-795), was a section of the Sunnî community that was too curious every kind of *Ijtihâd*. Others who shared this outlook were the Hanbalîs, the followers of Ahmad ibn Hanbal al-Shaybani (164-241/780-855), and the Zâhirîs, the followers of Dawud ibn 'Ali al-'Isfahani, known as Abu Sulayman Zâhirî (200 or 202-270/815 or 817-883). In the beginning, however, Mâlik did not subscribe to this outlook and approved of the practice of *ra'y*.[77]

The followers of this school drew attention to *'amal ahl al-Medina*. That means everybody should follow the people of Medina: it was where the *Hijrah* went, the Qur'an was proclaimed in Medina, permitting what is permitted and prohibiting what is prohibited. The Prophet, in their midst, the people of Medina witnesses the revelation ... the Prophet rules and they obey him; he legislates for them (*yasunn lahum*) and they abide....[78]

B) *The Baghdad (Kufic) School of Fiqh.* Kufa was the regional capital from which the Umayyads ruled 'Iraq al-'Arab (modern Iraq), 'Iraq al-'Ajam (western Persia), Pars (central and southern Persia), Khorasan (in Azerbaijan) and western India (Pakistan). The Kufans had somewhat less access to the traditions of the Prophet, but they were at the front of the challenge of ideas from the neighboring Greek, Persian, Indian and Chinese civilizations. Their masters from the Sahâbah were 'Ali ibn Abu Tâlib, 'Umar and 'Abdullah Ibn Mas'ûd and from the Tâbi'în were 'Alqamah, Aswad, Qâdhî Shûrâyh and Ibrahim al-Nakha'î who was master of Abu Hanîfa. They had to be curious about narrators and narrations, but when they could not find any true hadîth, they would appeal to *ra'y* and *Ijtihâd*. The foremost scholar of the Kufic School was Imâm Abu Hanîfa.[79]

We could summarize that the school of law based on the opinions of 'Umar, 'Uthman, Ibn 'Umar, 'A'ishah, Ibn 'Abbas and Zayd ibn Thabit, and their companions from among the Tabi'în, like Sa'id ibn al-Musayyab (93 AH), 'Urwah ibn Zubayr (94), Salim (106), Ata' ibn Yasar (103), Qasim ibn Muhammad (103), 'Ubayd Allah ibn 'Abd Allah (99), al-Zuhri (124), Yahya ibn Sa'd (143), Zayd ibn Aslam (136) and Rabi'ah al-Ra'i (d 136), was the school most acceptable to the people of Madinah. It was for this

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[77] Ibn'ül-Qayyim al-Jawziyye, *I'lâm 'al-Muwakqqi'in*, vol. I, p. 19; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 212-13; see Hallaq, *The Origins and Evolution of Islamic Law*, pp. 64-65.

[78] Al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. I, pp. 185-86; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, p. 134; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 213-15.

[79] Ibn'ül-Qayyim al-Jawziyye, *I'lâm 'al-Muwakqqi'in*, vol. I, pp. 20-23; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 132-40; Ali Hasan, *Nazratun Âmmah fi Târîkh al-Fiqh al-Islâmî*, pp. 106-220; 'Izz al-Dîn, *Islamic Law*, pp. 11-13.

reason that Imam Mâlik based his legal arguments on their teachings. In the same way, the legal opinions of 'Abd Allah ibn Mas'ud and his companions, the judgments of the Khalifah 'Ali, Shurayh (77), and al-Sha'bi (104), and the Fatâwâ of Ibrahim al-Nakha'i (96) were the most acceptable to the people of Kûfah.[80]

3.3.3   The School of Ahl al-Athar and the School of Ahl al-Ra'y

As we mentioned before, the origin of the Fiqh Schools goes back to the period of the Sahâbah. Among the Sahâbah were some who were inclined by nature to study the meanings of legal texts, to look after their distant objectives and the secrets of their legislation. Those Sahâbah were never afraid of providing legal opinions (fatâwâ) in accordance with their own opinions. These Companions included 'Umar ibn Al-Khattâb, 'Ali ibn Abu Tâlib and Abdul Allah Ibn Mas'ûd. And there were others who acted according to the surface meanings of the legal texts, and they were unable to produce fatâwâ according to their opinions, like 'Abdul Allah Ibn 'Umar, 'Abdul Allah ibn 'Amru ibn al-'As, and Al-Zubeir ibn al-'Awâm. Some modern scholars call these schools proto-traditionalism and rationalism.[81]

Over the course of time, the schools of Hijaz and Baghdad converted to schools of hadîth and ra'y. Ibn al-Qayyim has mentioned many jurists from Medina, Mecca, Basra, Damascus, Egypt, Qayrawan, Andulus, Yemen, and Baghdad.[82] This truth may become all the more intelligible when we mention the emergence of two informal schools of legal thought, the rationalists or ahl al-ra'y, and the traditionists or ahl al-hadîth, and the appearance of differences between them concerning both source methodology, and issues of case law. While it is true that both of these schools had their roots in the approaches of the preceding two generations, it was at this time that their differences in matters of fiqh become clear; and it was at this time that people began grouping themselves on the basis of their differences in deriving legal points from the sources.

3.3.3.1   The School of the People of Hadîth

The school of Ahl al-Hadith was a continuation of the school of those Sahâbah whose fear of contradicting the letter of the source texts nusûs made them circums-

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[80]   Al-Dahlawi, Hujjatullah al-Balighah, vol. I, pp. 205-308.

[81]   Abdurrahman ibn Khaldun, Târîkh ibn Khaldun, vol. I, pp. 478: al-Zarqa, al-Fiqh al-Islamî Fi Sawbih al-Jadid, vol. I, pp. 186-88; Hallaq, The Origins and Evolution of Islamic Law, pp. 74-6; al-Qattân, Târîkh al-Tashrî' al-Islâmî, pp. 215-24; Mu'awwadh and Abdulmawjûd, Târikh al-Tashrî' al-Islamî, vol. II, pp. 16-28.

[82]   Ibn'ül-Qayyim al-Jawziyye, I'lâm'al-Muwaqqi'in, vol. I, pp. 19-23.

pect to the point where they never went any further than the texts. This was the case, by and large, with 'Abd Allah ibn 'Umar ibn al-Khattab, 'Abd Allah ibn 'Amr ibn al-'As, al-Zubayr, and 'Abd Allah ibn 'Abbas.

This school was established in Medina, which was the source and cradle of the *Sunnah*, the place where the *Sahâbah* were brought up along with their followers, and the refuge of the *Fuqahâ*. We call them *ahl al-athar* (supporters of narrations) too. It was called so for the following reasons: 1) it was much more concerned with collecting the *Ahâdîth* and information along with the traditions/deeds and sayings of the *Sahâbah* and their followers; 2) it was the first school that recorded the *Sunnah* and purified it of the fabricated *Ahâdîth*.[83]

This school was characterized by the following principles: 1) reliance on the Qur'an in instances of deduction; 2) resorting to the *Sunnah* in case the legal position of a given matter is not mentioned in the Noble Qur'an; 3) working in accordance with the sayings of the *Sahâbah* and their followers when no legal text is found (in the Qur'an and the *Sunnah*) on a given matter; 4) this school did not deviate from the principle matters and did not suggest occurrences and then determine their positions. It was characterized by its *fiqh*, which was realistic, and by its *fatâwâ* which were delivered only if something came up; 5) it did not deal with *fiqh* matters in accordance with their opinions.[84]

'Umar ibn Abdul Azîz used to ask (consult) the *'ulamâ*s of Medina and to request legal opinions, and so did Abu Ja'far al-Mansûr who asked the *'ulamâ*s of Hijaz to go to Iraq to promulgate the *Sunnah*. Among those *'ulamâ*s were Hishâm ibn Urwa, Muhammad ibn Ishâq, and Yahia ibn Sa'îd al-Ansâri. The school of *Hadîth* was spread in the Maghreb and Khorasân in Persia and in many other countries.[85]

The school of *Ahl al-Hadîth* became widespread in the Hijaz for many reasons. The most important reasons perhaps were the great number of *Hadîth* and other narrations known to the people of that area, and the fact that the region was more stable after the seat of the *Khilâfah* had been moved and, as a result, most of the political activity had been transferred, first to Damascus, then to Baghdad. The Imâm of Medina, Sa'id ibn al-Musayyab, once noted that the people of Mecca and Medina had not lost much of the *hadîth* and *fiqh*, because they were familiar with the *fatâwâ* and reports of Abu Bakr, 'Umar, 'Uthman, 'Ali (before he became *Khalîfah*), 'Aishah, ibn

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[83] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 69-70; *Mawsû'ah al-Adyân al-Muyassarah* (Beirut: Dar al-Nafâ'is, 2002), p. 31; Jasser Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law* (London: The International Institute of Islamic Thought, 2008), p. 61.

[84] Abdurrahman ibn Khaldun, *Târikh ibn Khaldun*, vol. I, p. 478.

[85] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 27-8; al-Qattân, *Târikh al-Tashrî' al-Islâmî*, pp. 225-29.

'Abbas, ibn 'Umar, Zaid ibn Thâbit and Abu Hurayrah, and thus did not need to use *Ra'y* in order to derive law.

Among the well-known *'ulamâs* of this school were the following: Mâlik ibn Anas, Sufian al-Thawrî, Sa'îd ibn al-Musayyab, who was called "the *Faqîh* of the *Fuqahâ*" (the most learned of the learned people), al-Awzâ'i, El-Ayâd ibn Sa'ad, Sufian ibn 'Uyainah, Ibnu Jarir al-Tabari and Ahmed ibn Hanbal.[86]

3.3.3.2   The School of the People of Opinion (*Ahl al-Ra'y*)

Ahl ar-ra'y is an Arabic term meaning "people of opinion." *Ahl al-ra'y* is a school of law that formed aside to *ahl al-hadîth*. It first appeared in Kufa in Iraq and was called that because its *Fuqahâ* relied more on opinions and analogy in demonstrating legal positions, and they deviated from principle matters and suggested occurrences before they actually happened.[87] The school of *Ahl al-ra'y* was an extension of the school of 'Umar and Abd Allah ibn Mas'ud who, among the *Sahâbah*, were the most wide-ranging in their use of *Ra'y* (lit. opinion). In turn, 'Alqamah al-Nakha'i (70/689), the uncle and teacher of Ibrahim al-Nakha'i, was influenced by them. Ibrahim then taught Hammad ibn Abu Sulayman (120/738) who, in turn, was the teacher of Abu Hanifah.[88]

The principles upon which this school was based are: 1) reliance on the Qur'an and the *Sunnah*; 2) use of analogy (*qiyâs*) and opinion, and deepening their under-standing of the indications of the legal texts; 3) deviating from the principle matters and suggesting occurrences in order to find their positions. They consider the deeds and sayings of the *Sahâbah* a source for Islamic Law but verify them by legal criteria. Imâm Au Hanîfa summarized their methodology: "*I accept what existed in the Qur'an and Sunnah without hesitation; I should verify anything coming from the Sahâbah; but if you mention Tâbi'în I am a man and they are men too.*"[89]

The school of *Ahl al-Ra'y* gained currency in Iraq. The scholars of this group thought that legal interpretations of the *Sharî'ah* should have a basis in reason, should take into account the best interests of the people, and should be backed by discerna-

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[86]   Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 132-40; Ali Hasan, *Nazratun Âmmah fi Târîkh al-Fiqh al-Islâmî*, pp. 106-220; Hallaq, *The Origins and Evolution of Islamic Law*, pp. 74-76; Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, p. 64.

[87]   Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 70 ff; Ibn'ül-Qayyim al-Jawziyye, *I'lâm 'al-Muwakqqi'in*, vol. I, pp. 42-61.

[88]   Cf. Melchert, *The Formation of the Sunnî Schools of Law, 9th-10th Centuries*, pp. 41ff.

[89]   'Abd-al-'Azîz ibnA. al-Bukhâri, *Kashf al-Asrâr* (Beirut: Dâr al-Kutub al-Ilmiyyah, 1997), vol. I, pp. 29-33; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 132-33; Hallaq, *The Origins and Evolution of Islamic Law*, pp. 74-76.

ble wisdom. Indeed, these scholars felt it was their duty to uncover these meanings and the wisdom behind the laws, and to make the connection between them so that if the reasons for any law were to lose relevance with the passing of time and the changing of circumstances, the law would no longer be valid. If they found the reasons behind the law, they sometimes preferred to cite arguments based on an analytical treatment of those reasons. Thus, in many cases, reason would be accorded legalistic preference when such reasoning conflicted with the evidence of certain categories of *hadîth*.

Ahl al-Ra'y often used to criticize *Ahl al-Hadith* for having little intelligence and less *fiqh*-understanding; while *Ahl al-Hadith* claimed that the opinions of *Ahl al-Ra'y* were based on no more than conjecture, and that they had distanced themselves from the necessary circumspection in those matters of religious significance which could only be ascertained through recourse to the source-texts.[90]

In fact, *Ahl al-Ra'y* agreed with all Muslims that once a person has clearly understood the Sunnah, he may not reject it in favor of what is no more than someone's opinion. Their excuse in all those cases in which they were criticized for contradicting the Sunnah is simply that they did not know any *Hadith* concerning the matter in dispute, or that they did know a *Hadith* but did not consider it sound enough owing to some weakness in the narrators or some other fault they found in it (a fault which perhaps others did not consider to be damaging), or that they knew of another *Hadith* which they considered sound and which contradicted the legal purport of the *Hadith* accepted by others. Moreover, *Ahl al-Hadith* agreed with *Ahl al-Ra'y* on the necessity of having recourse to reason whenever a matter occurs for which there is no specific ruling in the source texts. Still, in spite of these areas of agreement, the conflict and tension between the two groups remained acute.

The spread of this method in Iraq was helped by the numbers of *Sahâbah* influenced by the methods of 'Umar. Among them were Ibn Mas'ûd, Abu Musa al-Ash'arî, 'Imran ibn Husayn, Anas ibn Mâlik, ibn 'Abbas and others. The spread was also assisted by the transfer of the *Khilâfah* to Iraq, and the fact that 'Ali and his supporters settled there.

Among its famous *'ulamâs* was Abu Hanîfa En-Nu'mân, Râbiah al-Ra'y, Ibn-i Abu Laila, Süfyân-ı Thawrî and disciples of Abu Hanîfa Muhammad ibn El-Hassan, Abu Yusuf and Zufar.[91]

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[90] Eerik Dickinson, *The Development of Early Sunnite Hadīth Criticism: the Taqdima of Ibn Abī Ḥātim al-Rāzī (240/854-327/938)*, (Leiden: Brill, 2001), pp. 3-5.

[91] Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 132-40; Ali Hasan, *Nazratun Âmmah fi Târîkh al-Fiqh al-Islâmî*, pp. 106-220; al-Qattân, *Târîkh al-Tashrî' al-Islâmî*, pp. 225-27; Auda,

3.4 The Period of *Mujtahidîn* (120-350/738-960)

This period fits the last years of Umayyads and the first years of the Abbasids. We should add the period of Qarakhanis as first Muslim Turkish state to this period. In this period most *fiqh* schools were found and established their principles. There were at least twelwe large and famous *mujtahid*s during this period: Sufian ibn 'Uyainah (Mecca), Mâlik ibn Anas (Medina), Hasan al-Basri (Basra), Abu Hanîfa, Süfyân al-Thawrî (Kûfah), Avza'î (Damascus), Şâfi'î, Lays ibn Sa'd (Egypt), Ishak ibn Râhuveyh (Nisâbur), Ahmed ibn Hanbel, Davud-u Zâhirî ve Ibn-i Jarir al-Tabari (Baghdad).[92]

The *Fuqahâ* of the period took the *Hadith* of the Prophet, the decisions of the early judges, and the legal scholarship of the *Sahâbah*, the *Tâbi'în* and the third generation, and then produced their own *Ijtihâd*. In this period the sources of Islamic jurisprudence were the Qur'an and the *hadîths*, along with the scholarly consensus (*ijmâ'* =based on the first two). To issue a ruling based on them, a scholar is needed to tell whether a question has been answered unequivocally by these sources, and to issue a verdict based on similar cases if it has not. To do all this, the scholar must have encyclopedic knowledge of the sciences of the Arabic language, the Qur'an, *hadîths*, and sayings from previous scholars along with their reasoning. Finally, he must be very exacting, fearful of making a mistake, and have radiating intelligence.[93] Moreover, it became their practice to cite the opinions of the *Sahabah* and *Tâbi'în* as evidence. Essentially, there were two reasons for this: 1) Such opinions were actually *Hadîth* of the Prophet which had been narrated by one of the *Sahâbah* or the *Tâbi'în* who had, for fear of misquoting, not dared to attribute the Hadîth to the Prophet. 2) The other likelihood is that such opinions were derived by the *Sahâbah* from the texts of *Hadîth*, and represented their own understanding of the Sunnah.

A scholar of this rank, called a *mujtahid*, is very rare. Moreover, because of the gravity of the task, the early generations of Muslims were extremely particular about the qualifications of such scholars. Of the Companions of the Prophet only around ten to thirty of them were *mujtahid*s.

If it was recognized among the early generations that a person was a *mujtahid*, he would naturally attract many students. Over time, however, the students of four scholars in particular, those of Abu Hanîfa, Mâlik, al-Shâfi'î and Ahmad ibn Hanbal multiplied. This was because they were the top scholars of their time; they mastered

Maqâsid al-Sharî'ah as Philosophy of Islamic Law, p. 63;The Committee, *Mawsû'ah al-Adyân al-Muyassarah*, p. 114.

[92] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 32-3.

[93] See Hallaq, *The Origins and Evolution of Islamic Law*, pp. 79-80.

the Qur'an and *hadîth*s more thoroughly than others. Their proofs and reasoning for their verdicts were impeccable.

Their top students, some of whom were *mujtahid*s themselves, relayed their sayings and reasoning to the next generation and answered new questions based on the methodology of the founder. They would also weed out the weak verdicts of the founder, if they were convinced that he would have changed his verdict based on what they had as evidence. This process continued from generation to generation. Passing through the hands of their scholars, the four schools became highly developed and documented; they had authenticated verdicts for most issues one would encounter and sophisticated and comprehensive reasoning with respect to the Qur'an and *hadîth*s.

Eventually all students of jurisprudence would learn through these schools, because they became the most effective and reliable way of learning the teachings of the Prophet. Moreover, caution dictates that one should go by the verdicts that thousands of experts on the Qur'an and *hadîth*s had scrutinized and accepted over hundreds of years within these schools.

Adherence to these schools preserves the unity among Muslims by preventing too many scattered and weak opinions or impostors claiming to be *mujtahid*s. They have now been evaluated and tested for more than 1100 years since their establishment. This means that the remaining differences of opinion between these schools exist for very good reasons; the right answer cannot be known with complete certainty.[94]

Muslim scholars have described this period as *"the Golden Age of Islamic Law," "The Age of the Codification of Fiqh,"* and the *"Blossoming Age of Fiqh."* This period had witnessed the maturation of both the judiciary and legal teachings, since all the essential features of these two areas acquired their final shape.

There are many reasons for referring to this period in that way. We would like to mention some of them:

A) The appreciation and moral support from statesmen to scholars constitute the main reason. For example, Imâm Mâlik (179/795) was the first to undertake the comprehensive and systematic compilation of *hadîth*. His work is known as *al-Muwatta'*. Abbasid Caliph al-Mansûr asked him to declare his book an official law book for Muslims, but he declined. And Caliph Harun al-Rashid appointed Imâm Abu Yusuf Qâdhî al-Qudhât and requested that he record all Islamic financial rules as *Kitâb al-Kharâj*.[95]

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[94] Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah*, pp. 141-45; al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. I, pp. 199-202; Ali Hasan, *Nazratun Âmmah fi Târîkh al-Fiqh al-Islâmî*, pp. 106-220.

[95] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 35-6.

B) During this period there was no strict affiliation with any legal school and everybody was busy discovering the religious and legal principles of Islam. There was perfect freedom of thought (*hurriyah al-ra'y*). Everybody would express his opinion within methodology of Islamic law.[96]

C) Muslim scholars were discussing the problems among themselves and with their disciples everywhere. For example, *fiqh* or Islamic Law was systematically studied by Abu Hanîfa's students under his expert guidance. A large number of his devoted and highly intelligent students (at least more than forty) worked under him for thirty years, and it is the labor of these students that gave us the Hanafî school of law. Imâm Abu Hanîfa was the first of the Imâms to advocate the use of "reason" in the consideration of religious questions based on the Qur'an and the *Sunnah*. He was also the first Imâm to arrange all the subjects of Islamic law systematically.

D) The borders of the Muslim state spread eastward to China and westward to the Atlantic Ocean, and this large area saw several conflicts and questions about problems. Plus, Islam's encounters with different cultures and faiths have encouraged improvements in every field.

E) Their ways of dealing with the *Sunnah* underwent a great deal of change. Essentially, this difference was the outcome of political differences that accompanied the emergence of various sectarian and philosophical factions, such as the *Shî'ah* and *Khawârij*, whose attitude to the Sunnah was different. The more important reason for improvements was that the codification of the *hadîth*s was completed. For this reason, the narration of Hadith and Sunnah became popular, whereas this had not previously been the case. For example, in *musannaf* collections, *hadîth*s are recorded under various headings dealing with juridical subjects such as *al-Sihâh al-Sittah* (The Six Authentic Books of *Hadîth*), namely the compilations of al-Bukhâri (256/870), Muslim (261/874), An-Nasa'i (303/916), Abu Dawud (275/889), At-Tirmidhi (279/892) and Ibn Mâjah (273/886).[97]

F) Owing to the divisions which had arisen, *Ijmâ'* was no longer a possibility in this period. Basically, this was because every group mistrusted the scholars of every other group, and would no longer accept any of their opinions, whether they agreed or disagreed with them. In addition, the *Fuqahâ* from among the *Sahâbah* had become scattered all over the Islamic world, so that it was no longer possible for them to meet in order to discuss matters.

G) At that time, since people's minds, hearts and spirits were directed with all their strength towards understanding the wishes of God, the discussions, conversa-

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[96] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 37-8.

[97] Mu'awwadh and Abdulmawjûd, *Târikh al-Tashrî' al-Islamî*, vol. II, pp. 39-40.

tions, events, and circumstances of social life were all concerned with that. Since they occurred in accordance with those wishes, whoever had high ability, his heart and nature unconsciously received instruction in knowledge of God from everything. He received knowledge from the circumstances, events, and discussions that took place at that time, as though everything became a teacher for such a person, and inculcated his nature and disposition with the preparatory knowledge for independent judgments. That natural instruction illuminated him to such a degree that he was almost capable of interpreting the law without acquiring the knowledge to do so, to be illuminated without fire. Thus, when a capable person who had received such natural instruction in this way began to work at interpreting the law, his capacity, which had become like a match, manifested the mystery of *Light upon Light*; he became qualified to interpret it (*mujtahid*) swiftly and in a short time.[98].

It is for the above reasons that Islamic law blossomed and many schools of law and thought arose.[99]

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[98] Bediuzzaman, *Words,* Twenty-Seventh Word, pp. 496-7.

[99] Akgunduz, *Turk Hukuk Tarihi,* vol. I, pp. 122-23; Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah,* pp. 141-45; al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid,* vol. I, pp. 199-202; Ali Hasan, *Nazratun 'Ammah fi Târîkh al-Fiqh al-Islâmî,* pp. 106-220.

4 LAW ('*AMALÎ*) SCHCOOLS AND THEOLOGICAL SCHOOLS (*I'TIQÂDÎ*) IN ISLAM (*MADHHABS*)

4.1 General Considerations

The verbal noun of *madhhab* is a "way of thinking, persuasion" or "a method" that is followed and, more specifically, the opinion or idea that one chooses to adopt. As a term of Islamic law, we could say that it is a method of interpreting religious material in the three major areas: belief, religious practice and law. The discussions that raged in the early period of Islam with regard to religious and legal questions, such as the use *of qiyâs,* or political issues, like the caliphate, resulted in grouping along certain lines. We call those lines *madhhab. Madhhab* literally means road; but, as an Islamic term, it means school of thought or law, religious sect, denomination.[1]

We should be aware of and not confuse the two kinds of schools: schools of thought *(I'tiqâd)* and schools of law *(fiqh).*[2] Most Muslims – and some scholars as well – are confused about this subject.[3] Therefore, we will first divide all schools in Islam into two groups:

A) **Schools of thought** (*al-madhâhib al-I'tiqâdiyyah*) are the paths people follow to the Holy Qur'an and the Holy Prophet Muhammad. Obviously, these schools of thought were founded a considerable time after the death of the Prophet and, in fact, never took shape until the time of the Umayyad Caliphate. But after the time of *Khulafâ al-Rashidûn,* new common phrases arose and Muslims divided into two groups on *usûl al-dîn,* e.g. basics of faith:

1) *Ahl al-sunnah wal-jamâ'ah* schools that have been described by Sunnî scholars as *al-Madhhab al-Haq* (Righteous School).

2) *Ahl al-Bid'ah* schools that are described as heretical or *al-Madhhab al-Bâtil* by Sunnî Muslim scholars. To describe these schools of thought as Sunnî or Shi'î is possible; but one cannot describe schools of law as either Sunnî or Shi'î.

B) **Schools of Law** (*al-madhâhib al-'amaliyyah-fiqhiyyah*) are Islamic schools of law or *fiqh* (religious jurisprudence). There were many such "schools" in the first 150 years of Islam. In fact, several of the *Sahâbah,* or Companions of Muhammad, are

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[1] Jasser Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law: A Systems Approach (London: The International Institute of Islamic Thought,* 2008), pp. 69-70; Nicolas Aghnides, *Islamic Theories of Finance: With An Introduction to Islamic Law and a Bibliography* (New York: Columbia University, 1916), pp. 133-35.

[2] Cf. Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law,* pp. 69-70.

[3] See Christopher Melchert, *The Formation Of The Sunnî Schools Of Law, 9th-10th Centuries CE* (Leiden: Brill, 1997). The term "Sunnî Schools" is technically incorrect.

credited with founding their own. The prominent Islamic jurisprudence schools of Damascus in Syria (often called *Awza'iyya*), Kufa and Basra in Iraq, and Medina in Arabia survived as the Mâlikî *madhhab,* while the other Iraqi schools were consolidated into the Hanafî madhhab. The Shâfi'î, Hanbalî, Zâhirî and Ja'farî schools were established later.

We should, again, remember that nobody can describe any law school as Sunnî or Shî'î, *bâtil* or *haqq* or otherwise because the question of *fiqh* does not have any relation with faith. A Muslim may be Mu'tazilî in faith but Hanafî in *fiqh,* like Zamakhshari, the author of *al-Kashshâf* and *Al-Jassâs* the author of *Ahkâm al-Qur'an.*[4] There are exceptions only with respect to Shî'a and some *Fiqh Schools.* Shî'a is a school of thought, whereas Ja'fariyyah and Zaidiyyah are *Fiqh Schools.* But everybody who was affiliated with Shî'a was also affiliated with either the Ja'fariyyah or Zaidiyyah schools. Wrong descriptions of schools can often be found in books, articles and websites. For this reason we have divided schools in Islam into groups and will explain each sub-group with respect to its appropriate place in these groups. That is, each group acted appropriately according to their own *Ijtihâd.* That is why none of them can be held to account. Those who erred received one *thawâb.* Those who discovered what was right received two *thawâb*s. It is not even right to say they erred. Those who erred should also be remembered in a favorable way. In a matter on which the judgments of the four *madhhab*s differ from one another, only one of the judgments is correct. Those who do this correctly will be given two *thawâb*s, and those who act according to one of the incorrect judgments will be given one *thawâb.*[5]

We should acknowledge that all the different law schools and schools of thought in Islam have a righteous point in their views as a nucleus even if we classify them as *ahl al-bid'ah.* However, they have exceeded this righteous point for political or personal reasons. For example, *shî'ah* love *ahl al-bait* due to Qur'an commanding Muslims to love *ahl al-bait.* This is a righteous point. Yet, their love exceeded the limits of Qur'an and depended mostly on the hate of Abu Bakr and 'Umar. Likewise, Wahhabites and Khârijites adhered to the pure sacred texts and defended the pure unity of God (*tawhîd*); but they have exceeded the limits of Qur'an and *Hadith,* and thus, destructed many sacred places.[6]

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[4] Cf. Christopher Melchert, *The Formation of the Sunnî Schools of Law, 9th-10th Centuries,* (Leiden: E.J. Brill, 1997), pp. XIII-XV.

[5] Ahmed Akgunduz, *Turk Hukuk Tarihi,* vol. I (Istanbul: OSAV, 1995), p. 124; *Sahîh Muslim,* Kitâb Fada'il al-Nabi.

[6] Bediuzzmanan, Said Nursi, *Mektûbât,* Twenty-Eighth Letter, Sixth Section, (Istanbul: Sozler Publications, 2004).