metown of Musailamah al-Kazzâb from 1143/1730 onwards. The Arabs of Najid, who were illiterate and nomadic in all aspects, did not think much at first of the scholar who was one of their own and studied at such educational centers as Damascus and Cairo. In fact, aside from some who had confirmed him, some regarded him as Musailamah al-Kazzâb.[119]

Muhammad ibn Abd al-Wahhâb, known as the Shaikh of Najd, began to declare that people had been corrupted for six hundred years, that those who were called Muslims were in fact *mushrik*s (polytheists), and that therefore their goods and blood were lawful and had to be rejected. In 1766 he applied to Muhammad ibn Su'ûd, Emîr of Najd and Shaikh of Dar'iyyah, who had been appointed by the Ottoman State for thirty-nine years. He enticed the Emîr by telling him that he would gain a great sultanate if he abided by his *madhhab* and gave his daughter to him in marriage.

The fundamental beliefs of the Wahhâbites are as follows. It is compulsory to worship Allah directly; accordingly, one cannot appeal to anything as an intermediary (the principle of *Tawhîd*, the Oneness of Allah), according to which those who ask any prophet or a saint of Islam for spiritual aid and those who show respect to tombs through votive offerings, alms and similar methods are all polytheists. While Muhammad ibn Abd al-Wahhâb was writing books to defend his views, he was also sending letters around to communicate his cause. In the meantime, the scholars of Ahl al-Sunnah (moderate Islam) were writing books replying to and rejecting his opinions.

The views the Wahhâbites took with reference to themselves were the *fatwâ*s (rulings) by Ibn Taimiyya and ibn al-Qayyim, his pupil, who deviated from the *via media* and went to extremes on some matters. Ibn Taimiyya issued severe judgments against visiting graves, also defending the view that it was by no means permissible to perform ritual prayers at the tombs of either prophets or Muslim saints or to ask for their spiritual assistance. On the other hand, ibn al-Qayyim – in subjection to his master – related in an insistent and strict manner that it was definitely unlawful to visit or butcher animals for sacrifice at graves or to ask for spiritual aid from the dead. In short, against the extreme respect of the public for tombs, both Ibn Taimiyya and ibn al-Qayyim also exaggerated to such an extent that they deemed such practices to be *shirk* (polytheism).[120]

The Shaikh of Najd, Muhammad ibn Abd al-Wahhâb, deviated extremely from the

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[119] Cf. The Committee, *Mawsû'ah al-Adyân al-Muyassarah*, p. 496; Natana J. DeLong-Bas, *Wahhâbi Islam: from Revival and Reform to Global jihad*, (Oxford: Oxford University Press, 2004), pp. 7-40..

[120] Abdul Hamid Siddiqi, "Renaissance in Arabia, Yemen, Iraq, Syria and Lebanon: Muhammad ibn 'Abd al-Wahhab and His Movement," in M.M Sharîf, *A History of Muslim Philosophy*, vol. II, pp. 1446-55; Natana J. DeLong-Bas, *Wahhâbi Islam*, pp. 41-90; Cf. Nasr Abu Zaid, *Reformation of Islamic Thought. A Critical Historical Analysis*, WRR Verkenning no. 10 (Amsterdam: Amsterdam University Press, 2006), p. 18.

right course as regards to those issues and began to declare that such issues as had been deemed unlawful by Ibn Taimiyya and ibn al-Qayyim in accordance with *Sharî'ah*, as acts of total disbelief. They even began declaring that those who refused to regard those who did such acts as disbelievers were themselves disbelievers. As a matter of fact, that same Shaikh of Najd not only accused all those Islamic scholars of all ages of disbelief but also accused a great number of the Companions of Muhammad the Last Prophet of misconduct. Again, that Shaikh of Najd, who claimed to be a *Mujtahid al-Mutlaq* (absolute expounder of Islamic laws) and had the graves of those Companions (*Ashâb*) of the Prophet who had been martyred during the battle fought against Musailamah al-Kazzâb torn down, also claimed – to gain public support – that any tax to be collected from citizens other than *zakâh* (poor dues) would be unlawful. Then when the Emîr of Najd, Muhammad ibn Su'ûd, also professed the Wahhâbite sect in 1745, the Wahhâbite sect turned out to be both religious and political.

As is well known, during the Ottoman State Arabia was governed by native dynasties and local governors called *sheikh*s and *emîr*s as their heads. The western region of Arabia was administered by the Ottoman beglerbegi, who lived in Jeddah, while the eastern region was administered by the beglerbegi of Basra and Baghdad and for a time by the beglerbeg of Lahsa. These governors only coordinated the native Emîrs and sheikhs. But Mecca was governed by administrators called *sharîf*s who definitely came from the generation of the Hâshimîds.

The Ottoman State did not react to the Wahhâbite movement in the first place because their policy was one of complete religious freedom. *First*, they asked for permission to make *hajj* (the major pilgrimage to Mecca); nevertheless, the Meccan scholars studied them, and rejected their demands because their beliefs deviated from mainstream Islam. As a matter of fact, the Ottoman State was not aware of the gravity of the situation. Even some scholars who had risen to the position of *qâdhî 'askar* lacked the ability to perceive the nature of the Wahhâbite movement. In essence, the danger was fully visible, but it did not occur to anybody to take appropriate measures. Even the fact that the Wahhâbites engaged in attacks at times and that the suzerain of Morocco was related to them failed to prove the seriousness of the issue. The counter struggles of the Meccan *sharîf*s, like Sharîf Gâlib, were temporary measures. In fact, in 1798 an agreement was signed between Sharîf Gâlib and 'Abdul Azîz regarding *hajj*. The movements of Sharîf Gâlib against the Wahhâbites in 1790, 1795 and 1798 yielded no noteworthy results. When 'Abdul 'Azîz ibn Su'ûd was at last appointed to replace Emîr Muhammad, the situation changed; and the Wahhâbites managed to establish an independent government in Arabia. Finally, they occupied Hejaz in 1803 and captured Taif and Mecca. Although Sharîf Pasha, the beglerbeg of Hejaz, soon recaptured Mecca, that act led to their recognition in the Islamic World.

In November 1803, 'Abdul 'Azîz died and was replaced by his son Su'ûd ibn al-

Su'ûd, the leader of the Wahhâbites who had been his father's deputy ever since 1787. Unfortunately, because his government grew increasingly stronger, he ruled Medina for seven years from 1805 to 1812 and Mecca for seven years from 1806 to 1813. In July 1805, the Ottoman State appointed Mehmed 'Ali Agha to Mehmed 'Ali Pasha's position, the former promising to exterminate the Wahhâbite movement as the beglerbegi of Egypt. Having solved the Wahhâbite problem when his son Mehmed oghlu Ibrahim Pasha invaded Dar'iyyah in 1830, Mehmed 'Ali Pasha himself rebelled in 1831. In short, the Wahhâbite movement that had in the first place begun as a simple intellectual movement became the official *madhhab* (school) of the Saudi Arabian government during the First World War when the grandchildren of the aforementioned Su'ûdis took the control of the country.[121]

Salafism is used in so many different ways that it has become very confusing. The term is used either to identify important characteristics of many Muslim groups that are known by other names or else for some distinct orientations. One of the most commonly accepted ways to use the term is in reference to Wahhabism, although the Wahhâbis themselves employ another term, *Muwahhidîn*.[122]

When *Salafism* is used as an actual name, it refers to the moderate, modernist reorientation of Islam as defined by the Egyptian *muftî*, Muhammad 'Abduh, early in the 20th century. He used the principle of the pious forefathers, the *salafiyyah*, to create his understanding of Islam in a modern world. He asserted that they represented a rational and practical understanding of the society. On this basis, he claimed that Islam both had the capacity to and was compelled to adjust to modernity. He claimed that *Ijtihâd* (a legal independent judgment based on case law or past precedent) could still be performed. Despite being a moderate of his time, his teachings seem to have been taken up by the founders of *Salafism*, transforming them into a strict and rigid system without the will to compromise.[123]

This understanding of Salafism involves imitating every aspect of the lives of the first Muslims to a very great extent. Being oriented to asceticism as such, the movement focuses very much on laws and punishments, with the claim that correct actions of an entire society will lead to rewards in terms of safety, stability, welfare and progress.

Understanding the confusing variation of using the term is linked principally to

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[121] Ahmed Jawdat Pasha, *Waqâyi' al-Dawlah al-'Aliyyah* (A History By Ahmed Jawdat Pasha) I-XII, (Istanbul: Matba'ah al-Âmirah, 1301/1884), vol. VIII, pp. 282-325; Yilmaz Öztuna, *Osmanli Devleti Tarihi*, vol. I (Istanbul: Fey Vakfi, 1986), pp. 470-71.

[122] Cf. Malise Ruthven, *Islam in the World*, (Oxford: Oxford University Press, 2006), pp. 367-70.

[123] Osman Amin, "Renaissance in Egypt: Muhammad Abdu and His School," in M.M Sharîf, *A History of Muslim Philosophy*, vol. II, pp. 1490-1511.

the different understandings of how and why the earliest Muslims acted. Judging from Muslim sources, they can be interpreted as acting in perfect guidance from God or as acting as normal humans resolving normal problems of society but with first-hand knowledge of divine truth. We will explain below that *salaf-i sâlih* and *salafism* should be distinguished.[124]

4.3.4 Ahmadiyyah (Qâdhiyaniyyah and Lahoriyyah)

Ahmadiyyah is a religious movement that was founded toward the end of the 19th century and originated with the life and teachings of Mirza Ghulam Ahmad (1835-1908). The movement is devoted to the revival and peaceful propagation of Islam. Ghulam Ahmad was an important religious figure who claimed to have fulfilled the prophecies about the world reformer of the end times who was to herald the Eschaton as predicted in the traditions of various world religions and bring about the final triumph of Islam. He claimed that he was the *Mujaddid* (divine reformer) of the 14th Islamic century, the promised Messiah (Second Coming of Christ) and the *Mahdi* awaited by the Muslims.[125]

The *Ahmadiyyah* views on certain beliefs in Islam have been controversial to most mainstream Muslims since its birth. A majority of mainstream Muslims do not consider Ahmadîs to be Muslims, citing, in particular, the Ahmadiyyah view of the death and return of Jesus, the Ahmadiyyah concept of *jihâd* and the community's view of the finality of Muhammad's prophethood with special reference to the interpretation of Qur'an 33:40. Ahmadîs, however, consider themselves Muslims and claim to practice Islam. Mirza Ghulam Ahmad founded the movement in 1889 and called it the *Ahmadiyyah Muslim Jamâ'at* (community), envisioning it to be a revitalization of Islam. The Ahmadîs were among the earliest Muslim communities to arrive in Britain and other Western countries.

Ahmadiyyah emerged as a movement within Islam in India over against the Christian and Arya Samaj missionary activity that was widespread in the 19th century. The Ahmadiyyah faith claims to represent the latter-day revival of the religion of Islam.

At the end of the 19th century, Mirza Ghulam Ahmad of Qadian proclaimed himself to be the "Reformer of the Age" (*Mujaddid*), the promised Messiah and the *Mahdî* awaited by the Muslims. He claimed to have fulfilled the prophecy of the return of Jesus. He and his followers claim that his advent was foretold by Muhammad,

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[124] Samir Amghar, Amel Boubekeur, Michaël Emerson, *European Islam: The Challenges for Society and Public Policy*, (Brussel: Center for European Policy Studies, 2007) pp. 38-46; http://looklex.com/e.o/salafism.htm.

[125] The Committee, *Mawsû'ah al-Adyân al-Muyassarah,* Beirut 2002, Dar al-Nafâ'is, pp. 400-01.

the Prophet of Islam, and by many other religious scriptures of the world as well.

The split in 1914 resulted in the formation of the Ahmadiyyah Muslim Community and the Lahore Ahmadiyyah Movement, also known as *Anjuman Ishâ'at-e-Islam*. The reasons for the split were ideological differences as well as differences regarding the suitability of the elected *Khalîfah* (2nd successor), Mirza Bashîr al-Dîn Mahmud Ahmad (the son of Mirza Ghulam Ahmad). The Lahori Group held that the *Khalîfah* could not be one of Mirza Ghulam Ahmad's family members. But every *Khalîfah* after the first *has* been a family member. The third and fourth *Khalîfah* were his grandsons and the current *Khalîfah* is the great grandson of the founder.[126]

As a result the different claims made by Mirza Ghulam Ahmad his followers broke up into different groups. The first main group consists of those who believe that Mirza Ghulam Ahmad is a prophet. They are called *Qâdhiyaniyyah*. The second group is made up of those who believe that Mirza Ghulam is the promised Messiah and a reformer. They separated from the main group of the Qâdiyânis after the death of Mirza Ghulam Ahmad. They are known as the Lahori Ahmadîs.

a) *Qâdhiyaniyyah*: The *Ahmadiyyah Muslim Community* believed that Mirza Ghulam Ahmad had indeed been a "non-law bearing" prophet and that mainstream Muslims who rejected his message were guilty of unbelief. The Ahmadiyya Muslim Community, however, maintained that caliphs (successors of Ghulam Ahmad) should continue to be in charge of the community and should be given overall authority. Soon after the death of the first successor to Ghulam Ahmad, the movement split into two groups over the nature of Ghulam Ahmad's prophethood and his succession. The Ahmadiyyah Muslim Community is the larger community of the two, arising from the Ahmadiyyah movement founded in 1889 by Mirza Ghulam Ahmad of Qâdiyan (1835-1908). The original movement split into two factions soon after his death. The Community is led by the *Khalîfah al-Masih* ("successor to the Messiah"), currently Khalîfah al-Masih V, who is the spiritual leader of the Community and the successor to Mirza Ghulam Ahmad.[127]

b) *Lahoriyyah*: The Lahore Ahmadiyyah Movement, however, affirmed the traditional Islamic interpretation that there could be no new prophet after Muhammad and viewed itself as a reform movement within the broader *Ummah*. The question of succession was also an issue in its split from the Ahmadiyyah movement. The Lahore Ahmadiyyah Movement believed that an *anjuman* (body of elected people) should be

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126 Zahid Aziz, *A Survey of the Lahore Ahmadiyya Movement: History, Beliefs, Aims and Work*, (Wmebly: Ahmadiyya Anjuman Lahore Publications, 2008), pp. 38-42; Simon Ross Valentine, *Islam and the Ahmadiyya Jama'at: History, Belief, Practice*, (New York: Columbia University press, 2008), pp. 31-75.

127 Ghulâm Ahmad, *The Philosophy of the Teachings of Islam*, (Surrey: Raqeem Press, 1996), pp. 3-23.

in charge of the community. Leaders of of the Lahore group include Maulana Muhammad 'Ali, a religious scholar and the first Muslim author of an English language translation of the Qur'an, and Khwaja Kamal-ud-Din as a lawyer, the founder of the Working Muslim Mission in UK, founder of *The Islamic Review*, and companion of Mirza Ghulam Ahmad.[128]

Although the central values of Islam (prayer, charity, fasting, etc.) and the six articles of belief are shared by Muslims and Ahmadîs, distinct Ahmadiyyah beliefs include the following.

1. *The rejection of the finality of [Muhammad's] prophethood.* Ahmadîs believe that their founder was a prophet of God, that Muhummad was the last lawbearing prophet for humankind, and that the religion of Islam is a perfect religion for humankind, Ahmadîs Muslims believe that the door of revelation from God to humans can never be closed.

2. The prophecies concerning the second coming of Jesus were metaphorical in nature and not literal. Mirza Ghulam Ahmad himself had fulfilled these prophecies and was the second coming of Jesus, and the promised *Mahdî* and Messiah.

3. The Qur'an has no abrogated verses, (i.e. no verse of the Qur'an abrogates or contradicts another). All Qur'anic verses have equal validity in keeping with their emphasis on the "unsurpassable beauty and unquestionable validity of the Qur'an." The harmonization of apparently incompatible rulings is resolved through their juridical deflation in Ahmadî *fiqh*, so that a ruling (considered to have applicability only to the specific situation for which it was revealed), is effective not because it was revealed last but because it was most suited to the situation at hand. In this way Ahmadîs were able to contend that Qur'an 9:5 (the sword verse) had not abrogated all verses calling for peaceful co-existence with the non-Muslims.

4. The continuation of divine revelation. Although the Qur'an is the final message of God to humankind, He continues to communicate with his chosen individuals in the same way He is believed to have done in the past. All of God's attributes are eternal.

5. That Jesus, contrary to mainstream Islamic belief, was crucified and survived the four hours on the cross. He was later revived in the tomb after having passed out. Ahmadîs believe that Jesus died in Kashmir of old age while seeking the lost tribes of Israel. Jesus' remains are believed to be entombed in Kashmir under the name Yuz Asaf. According to Ahmadîs, Jesus foretold the coming of Muhammad after him, which Christians have misinterpreted.

6. Jesus Christ did not introduce a new religion or law, i.e. he was not a law bearing prophet but was last in the line of Israelite prophets who, like David, Solomon,

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[128] Zahid Aziz, *A Survey of the Lahore Ahmadiyya Movement*, pp. 6-30.

Jeremiah, Isaiah etc., appeared within the dispensation of Moses.

7. *Jihâd* as force can only be used under exceptional circumstances to protect Muslims from extreme religious persecution.

8. The Messiah and the Imâm *Mahdî* are the same person, and it is through his teachings, influence, his prayers and that of his followers that Islam will defeat the Anti-Christ or *Dajjâl* in a period similar to the time it took for nascent Christianity to rise (300 years). The *Dajjâl*'s power will slowly melt away like the melting of snow, heralding the final victory of Islam and the age of peace.

9. The history of religion is cyclical and is renewed every seven millennia. The present cycle from the time of the biblical Adam is split into seven epochs or ages, parallel to the seven days of the week, with periods of light and darkness. Mirza Ghulam Ahmad appeared as the Promised Messiah at the sixth epoch, heralding the seventh and final age of humankind, as a day in the estimation of God is like a thousand years of man's reckoning (Qur'an 22:48). According to Ghulam Ahmad, just as the sixth day of the week is reserved for Jumu'ah (congregational prayers) so his era is destined for a global assembling of humankind in which the world is to unite under one universal religion that, according to him, is Islam.

10. The two Ahmadiyyah groups have varying beliefs regarding the finality of the Prophethood of Muhammad. The Ahmadiyyah Muslim Community believes that Muhammad brought prophethood to perfection and was the last lawbearing prophet and the apex of humankind's spiritual evolution. New prophets can come but they must be subordinate to Muhammad, cannot exceed him in excellence, alter his teaching nor bring any new law or religion. The Lahore Ahmadiyyah Movement believes that Muhammad is the last of the prophets and that no prophet, new or old can come after him.

India has a significant Ahmadiyyah population. The Pakistani parliament has declared Ahmadîs to be non-Muslims and in 1974 the government of Pakistan amended its constitution to define a Muslim "as a person who believes in the finality of the Prophet Muhammad." [129]

4.3.5 Ismâ'iliyyah and Aga Khan

Ismâ'ilîs are a sect of Shi'îte Muslims whose reached the height of their influence from the 10th to the 12th century. They emerged out of a dispute in 765 over the succession of Ja'far al-Sâdiq, whom Shi'îtes acknowledged as the sixth Imâm or spiritual successor to Muhammad. The Ismâ'ilîs recognized Ismâ'il, the eldest son of Ja'far, as

[129] Maulana Muhammad Ali, *The Founder of the Ahmadiyya Movement*; http://www.ahmadiyya.org/books/f-ahm-mv/ch4.htm.

his legitimate successor. Upon Ismâ'il's death they acknowledged his son Muhammad to be the seventh and last Imâm, who is expected to return on Judgment Day. The Ismâ'ilîs are also known as Seveners, because they accept only seven Imâms rather than the twelve recognized by other Shi'îtes.[130]

Although Ismâ'ilîs subscribe to basic Islamic doctrines, they also hold to esoteric teachings and corresponding interpretations of the Qur'an. Developed in the 9th and 10th centuries under the influence of Gnosticism and Neoplatonism, they posit the creation of the universe by a process of emanation from God.

In the late 9th century an Ismâ'ilî state was organized according to communistic principles in Iraq by Hamdan Qarmat; his followers became known as Qarmatians. His state soon disintegrated, but some of his followers combined with other Ismâ'ilî groups to form the Fatimid dynasty of North Africa in the 10th century. The Fatimids conquered Egypt in 969 and developed a strong and culturally brilliant state that flourished until the 12th century. During the reign of the Fatimid dynasty the Ismâ'ilîs gradually lost their original revolutionary fervor. A splinter group of Ismâ'ilîs, known to Westerners as the Assassins, established a stronghold in the mountains of northern Iran in the 12th century and carried out terrorist acts of assassination against important religious and political leaders of Sunnî Islam.

Like other Shi'îte traditions, the Ismâ'iliyyah accepts the spiritual authority of the Imâm. However, unlike the mainstream Twelver Shî'as (also known as Imâmiyyah), the Ismâ'ilîs regard Muhammad's [the sixth Imâm] son Ismâ'il as the seventh Imâm and continue the line of Imâms through Isma'il and Muhammad's descendants. (The Twelver Shi'îtes regard Ismâ'il's younger brother, al-Must'alias, as the seventh Imâm and the line of Imâms to continue from him.)

Ismâ'ilî doctrine considers history to be divided into seven periods. Each period begins with a prophet who is then followed by six infallible Imâms. The first six prophets were Adam, Noah, Abraham, Moses, Jesus and Muhammad. Each Imâm was accompanied by an interpreter who taught the secret meaning of the Imâm's teaching to a small circle of initiates. The previous six interpreters were Seth, Shem, Isaac, Aaron, Simon Peter and 'Ali. The six Shî'a Imâms (from al-Hasan to Ismâ'il) followed Muhammad and his interpreter 'Ali. The seventh Imâm Muhammad, did not die but went into hiding, and will appear as the *Mahdî*, inaugurating an era in which the old traditions, including Islam, will become obsolete.

Although the Ismâ'ilîs claimed that they submitted to the basic Islamic pillars, they believe that Islamic Law (the *Sharî'ah*) should be repealed. They reject the Qur'an and all forms of prayers in the main Sunnî Islamic tradition. They interpret Islamic

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[130] Al-Khatîb, *al-Harakât al-Bâtiniyyeh*, pp. 55-134.

teachings spiritually, which frees them from adhering to the laws and obligations such as prayer, fasting, and *hajj*.

The two main branches of Ismâ'ilîs today are the Bohras, with its headquarters in Mumbai (formerly Bombay), India, and the Khojas, concentrated in Gujarât State of India. Another subsect, headed by the Aga Khan, has followers in Pakistan, India, Iran, Yemen and East Africa.[131]

Aga Khan is the hereditary title of the Imâm of the Nizârî Muslims, the largest branch of the Ismâ'ilî followers of the Shi'ah faith. The Ismâ'ilî branch of Shî'a Islam holds to the Imâmate of the descendents of Ismâ'il ibn Ja'far, eldest son of Imâm Ja'far al-Sâdiq's eldest son, while the mainstream Twelver branch of Shî'ism follows Ismâ'il's younger brother Musa al-Kâzim and his descendants.

In the 1850s the honorary title of Aga Khan was bestowed on Aga Hasan 'Ali Shah, the 46th Imâm of the Ismâ'ilîs, by Fath 'Ali Shah Qajar, the Shah of Persia. Etymologically, the title combines the Turkish military title Agha, meaning "noble" or "lord," with the Altaic title Khan for a local ruler, so the combination means roughly "Commanding Chief." In Persia's Qajar court protocol, the khan (and Emîr) was usually a commander of armed forces and a provincial tribal leader who ranked fourth among the eight title classes for non-members of the dynasty.

In 1887 the colonial rulers of India, the British Raj, gave the Aga Khan rank and nobility in recognition of his help in suppressing a Muslim rebellion against the British. The Aga Khan was hailed as a great leader by the British and thus became the only religious or community leader in British India who was given a personal gun salute; all other so distinguished were either rulers of princely states or political pensioners who held ancestral princely titles in states abolished by the Raj. Prince Karîm al-Hussainî became the present Aga Khan IV upon assuming the Imâmat of the Nizarî Ismâ'ilîs on July 11, 1957 at the age of 20, succeeding his grandfather, Sir Sultan Muhammad Shah Aga Khan (Aga Khan III).[132]

4.3.6 Ibâdhiyyah

Ibâdhiyyah is a school of thought in Islam and is the dominant sect in Oman. There are Ibâdhîs in Algeria, Tunisia, East Africa, and Libya as well. Believed to be one of the earliest schools, it is said to have been founded less than 50 years after the death of the prophet Muhammad. Some historians think that the group developed

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[131] The Committee, *Mawsû'ah al-Adyân al-Muyassarah* (Beirut: Dar al-Nafâ'is, 2002), pp. 83-84; Ismail Senay, "Isma'iliyyah," http://www.mb-soft.com/believe/txh/Ismâ'ilî.htm (Accessed 7/7/2009).

[132] They have a huge network throughout the world and are rich. See http://www.iis.ac.uk/home.asp?l=en.

out of the seventh-century Islamic sect known as the Khawârij or Khârijîtes. Nonetheless, Ibâdhîs see themselves as a separate group from the Khawârij. The school derives its name from Abdullah ibn Ibâdh at-Tamîmî. Followers of this sect, however, claim its true founder was Jâbir ibn Zaid al-Azdi from Nizwa in Oman.[133]

Ibâdhî communities are generally regarded as conservative. For example, the Ibâdhiyyah rejects the practice of *qunût* or supplications while standing in prayer. Sunnî Muslims traditionally regard the *Ibâdiyyah* as a Khârijîte group, but Ibâdhîs reject this designation. Ibâdhîs regard other Muslims not as *kâfir* (unbelievers) (like most Khârijîte groups did) but as *kuffâr an-ni'mah* (those who deny God's grace), although this attitude has relaxed nowadays.

They believe that the attitude of a true believer to others is expressed in three religious obligations. The first is *walâyah*, friendship and unity with the practicing true believers, and with the Ibâdhî Imâms. The second is *barâ'ah*, dissociation and hostility towards unbelievers and sinners, and those destined for Hell. The third is *wuqûf*, reservation towards those whose status is unclear. Unlike the Khârijîtes, the Ibâdhî shave abandoned the practice of not associating with other Muslims.[134]

4.3.7 Sunnî Theological Schools and Their Views on Fiqh

4.3.7.1 Salaf al-Sâlihîn

We should distinguish two things. *First*, the terms *salaf*, *as-Salaf al-sâlih* or *mutaqaddimûn* are used to express the pure Islamic way of the *Sahâbah*, *Tâbi'în* and *Taba' al-Tâbi'în*. *Second*, *Salafism* is a movement that arose especially in the last two centuries. Unfortunately, the Western scholars sometimes confuse the terms *salaf*, *salafism*, *ahl al-sunnah* and *Sunnî*, especially after 9/11. For this reason we will explain these terms briefly:

a) *Salaf* or *as-Salaf al-sâlih* can be variously translated as "(righteous) predecessors" or "(righteous) ancestors." In Islam it is generally used to refer to the first three generations of Muslims:

1. Sahâbah: The Companions of Muhammad, i.e. those who had met or had seen him while in a state of *îmân* (belief) and died in that state;

2. Tâbi'în: The Successors, i.e. those who had met or had seen the Sahâbah while in a state of îmân and died in that state;

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[133] Nasser al-Braik, "al-Ibâdhiyyah in the Islamic Political Thought and its Role in State Building," *al-Ijtihâd* (Beirut, 1991): 129 (in Arabic).

[134] *Mawsû'ah al-Adyân al-Muyassarah* (Beirut: Dar al-Nafâ'is, 2002), pp. 19-20; Amr Khalifa al-Nami, *al-Ibâdhîyah* (Sultanate of Oman: Ministry of Awqaf & Religious Affairs), pp. 23-69; see http://www.tawalt.com/monthly/Nami_Ibâdhîya/Ibâdhîa_1.pdf (Accessed 8/7/2009).

3. *Tâbaʿ al-Tâbiʿîn*: The Successors to the Successors, i.e. those who had met or had seen the tâbiʿîn while in a state of îmân and died on that state. In a hadîth (prophetic tradition) Muhammad says of the salaf, *"The best people are those living in my generation, then those coming after them, and then those coming after (the second generation)."*[135] Abu Hanîfa, Rabiʿah al-Ra'y and Imâm Mâlik ibn Anas are included among the salaf.[136]

In this sense, following the *salaf* is the way that was laid down in the Qur'an and the *Sunnah*, the very sources of Islam. The Prophet said to his daughter Fâtimah: *"Indeed, I am for you a blessed Salaf."* When asked about which was the correct and acceptable way of understanding Islam, the Prophet replied by saying: *"The way that I and my companions are one."*

All of the Sunnî scholars of Islam followed the way of the *salaf* in understanding religion. Early scholars such as Imâm al-Awzaʿî, who died 157 years after the Prophet's move to Medina, said: *"Be patient on the Sunnah, and stop where the people stopped, and say what they said, and refrain from what they refrained from, and follow the path of your righteous Salaf; for verily, sufficient for you is what was sufficient for them."*[137]

b) *Salafî*, "predecessors" or "early generations," is a Sunnî Islamic school of thought that takes the pious ancestors (*salaf*) of the patristic period of early Islam as exemplary models. Early usage of the term appears in the book *al-Ansâb* by Abu Saʿd Abd al-Karim al-Samaʿni, who died in the year 562 /1166. *Salafî*s view the first three generations of Muslims, consisting of Muhammad's Companions, and the two succeeding generations after them, the *Tâbiʿîn* and the *Tabaʿal-Tâbiʿîn*, as examples of how Islam should be practiced.[138]

As stated above, Salafism and "Wahhâbism"are often used as synonyms. This is wrong and we should distinguish between *Salaf* or *as-Salaf al-sâlih* and *Salafism*. *Salafism* adherents usually reject this term because it was considered derogatory and because they believe that Muhammad ibn Abd al-Wahhâb did not establish a new school of thought or describe themselves as such. Typically, adherents used terms like *"Muwahhidûn," "Ahl al-Hadîth"* or *"Ahl al-Tawhîd."*

Salafism as a new term is a movement like the Sufis. Salafîs can come from the Mâlikî, the Shâfiʿî, the Hanbalî, or the Hanafî schools. Salafîs are divided on the ques-

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[135] Al-Bukhari, *al-Jâmiʿ*, 3:48:819 and 820; Muslim, *al-Jâmiʿ*, 31:6150 and 6151.

[136] Cf. B. A. Roberson, (2003), "The Shaping of the Current Islamic Reformation," Barbara Allen Roberson, *Shaping the Current Islamic Reformation*, (New York: Routledge, 2003), pp. 7-8.

[137] Al-Bukhari, *al-Jâmiʿ*, Hadith Number: 2652.

[138] For more information see Elizabeth Sirriyeh, *Sufis and Anti-Sufis: The Defense, Rethinking and Rejection of Sufism in the Modern World* (Surrey: Curzon Press, 1999) pp. 95-98.

tion of adherence to the four recognized schools of legal interpretation (*Madhhabs*).

Salafîs must base their jurisprudence directly on the Qu'ran and the *Sunnah* and the first three generations of Muslims. They believe that literal readings of the Qur'an and the *hadîth* and the *ijmâ'* (consensus) of the *'ulamâ* constitute sufficient guidance for the believing Muslim. Virtually all Salafîs scholars support this position.

Salafîs also attribute many of their teachings to the 14th-century Syrian scholar Ibn Taimiyya, and his students ibn al-Qayyim, ibn Kathir and Muhammad ibn Abd-al-Wahhâb in the 18th century.

Some Salafîs rely on the jurisprudence of one of the four famous *madhhabs*. For example, Ibn Taimiyya followed the Hanbalî *madhhab*. Some of his students (such as *ibn Kathir* and *al-Dhahabi*) followed the Shafi'î *madhhab*, whereas others (such as ibn Abu al-'Iz) follow the Hanafî madhhab. However, none of the *madhhab* are to be followed blindly, and in some cases Salafîs may choose views that differ from any of them.

As we explained concisely, from a perspective widely shared by scholars of Islam, the history of *Salafism* started in Egypt in the mid-19th century among intellectuals at al-Azhar University, the preeminent center of Islamic learning, in Cairo. Prominent among these intellectuals were Muhammad 'Abduh (1849-1905), Jamal al-Dîn al-Afghani (1839-1897) and Rashîd Ridhâ (1865-1935). These early reformers recognized the need for an Islamic revival, noticing the changing fortunes in the Islamic world following the Enlightenment in Europe. Al-Afghani was a political activist, whereas 'Abduh, an educator and head of Egypt's religious law courts, sought gradual social reform and legal reform in order "to make Sharî'ah relevant to modern problems." 'Abduh argued that the early generations of Muslims (the *salaf al-Sâlihîn*, hence the name *Salafiyya*, which is given to 'Abduh and his disciples) had produced a vibrant civilization because they had creatively interpreted the Qur'an and *hadîth* to answer the needs of their times.

Many self-described Salafî today point instead to Muhammad ibn Abd-al-Wahhâb as the first person in the modern era to push for a return to the religious practices of the *Salaf al-sâlih* or "righteous predecessors".[139]

4.3.7.2 The Ash'arî School (Ash'arîtes)

The Ash'arî School (*al-ashâ'irah*) is a school of early Muslim theology founded by the theologian Abu al-Hasan al-Ash'arî (324/936). The disciples of the school are known as Ash'arîtes, and the school is also referred to as the Ash'arîte School. Al-

[139] Elizabeth Sirriyeh, *Sufis and Anti-Sufis*, pp. 95-8.

Ash'arî was born in Basra, Iraq, a descendant of the famous companion of Muhammad and an arbitrator at Siffîn for 'Ali ibn Abu Tâlib, Abu Musa al-Ash'arî. He spent the greater part of his life in Baghdad. Although he belonged to a Sunnî family, he became a pupil of the great Mu'tazilîte teacher al-Jubba'I (915) and remained a Mu'tazilîte until he was forty. In 912 he left the Mu'tazilites and became one of its most distinguished opponents, using the philosophical methods he had learned. Al-Ash'arî then spent the remaining years of his life developing his views and composing polemics and arguments against his former Mu'tazilîte colleagues.

Muslims consider him to be the founder of the Ash'arî tradition of *Aqîdah* with followers such as Abu al-Hassan al-Bahili, Abu Bakr al-Baqillani, Imâm al-Haramain Abu al-Ma'âli al-Juwaini, al-Razi and al-Ghazzali and adherents of the Shâfi'î *madhhab* and Sufis. Some Muslims contend, however, that toward the end of his life al-Ash'arî adopted the *Atharî* creed of Ahmad ibn Hanbal, even affirming that Allah "rose above his throne" and possesses a "face" and "hands" as stated in the Qur'an (although not with a face or hands resembling anything in creation). *Al-Ibânah*, one of the last books that he wrote, is especially notable in that here al-Ash'arî accepted the Atharî creed entirely.

The Ash'arî scholar ibn Furak numbers Abu al-Hasan al-Ash'arî's works at 300, but only a handful of these works, in the fields of heresiography and theology, have survived. The three main ones are the following. 1) *Maqâlât al-Islâmiyyîn* comprises not only an account of the Islamic schools but also an examination of problems in *kalâm*, or Islamic theology, and the names and attributes of Allah. The greater part of this works seems to have been completed before his conversion from the Mu'tazilîtes. 2) The second is *Kitâb al-Luma'*. 3) *Kitâb al-Ibâna 'an Usûl al-Dîyânah* is an exposition of the theological views and arguments he developed against Mu'tazilîte doctrines.

In contrast to the Mu'tazilîte school, the Ash'arîte view held that comprehension of unique nature and characteristics of God were beyond human capability and that, while humans had free will, they had no power to create anything. This was a *Taqlîd*-based view that did not assume that human reason could discern morality. A critical spirit of inquiry was far from absent from the Ash'arîte school. Rather, what they lacked was a trust in reason itself, independent of a moral code, to decide what experiments or what knowledge to pursue.[140]

4.3.7.2.1 The Main Doctrines of al-Ash'arî

We will list the main doctrines of al-Ash'arî, which are aimed at defending the basic principles of the *Ahl al-Sunnah* or at attempting to justify their beliefs rationally.

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[140] Sa'd-al-Dîn Mas'ud ibn'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. I, pp. 375-94.

1. The Divine Attributes, contrary to the belief of the Mu'tazila and the philosophers, are not identical with the Divine Essence; but are also not external to Allah (*lâ 'ayn wa lâ ghair*).

2. The Divine Will is all-embracing. Divine providence and predestination encompass all events (this belief, too, is contrary to the view held by the Mu'tazila, although it is in agreement with those of the philosophers).

3. All evil, like good, is from God (of course, this view is a logical corollary, in al-Ash'arî's view, of the above belief).

4. Humans are not completely free in their acts, which are created by God (this belief, too, in al-Ash'arî's view, follows necessarily from the doctrine of the all-embracing nature of the Divine Will).

5. Acts are not intrinsically good or evil, i.e. the *husn* or *qubh* of deeds is not intrinsic but determined by the *Sharî'ah*. The same is true of justice. What is "just" is determined by the *Sharî'ah*, not by reason (contrary to the belief of the Mu'tazila). This is very important in relation to the source of Islamic law. We will explain this in detail.

6. Grace (*lutf*) and the selection of the best for creation (*al-aslah*) are not incumbent on God (contrary to the belief of the Mu'tazila).

7. The power of human beings over their actions does not precede them (there is no *istitâ'ah qabl al-fi'l*) but is commensurate and concurrent with the acts themselves (contrary to the belief of Muslim philosophers and the Mu'tazila).

8. Absolute deanthropomorphism (*tanzîh mutlaq*), or the absolute absence of similarity between God and creatures does not hold (contrary to the Mu'tazilîte view).

9. The doctrine of acquisition: Human beings do not "create" their own acts; rather they "acquire" or "earn" them (this in justification of the *Ahl al-Sunnah*'s belief in the creation of human acts by God).

10. Possibility of the beatific vision: God will be visible to human eyes on the Day of Resurrection (contrary to the view of the Mu'tazila and the philosophers).

11. The *fâsiq* is a believer (*mu'min*) (contrary to the view of the *Khawârij* who consider him *Kâfir* and contrary to the Mu'tazilîte doctrine of *manzilah bayna al-manzilatayn*).

12. There is nothing wrong if God pardons someone without repentance. Similarly, there is nothing is wrong if God subjects a believer to chastisement (contrary to the Mu'tazilîte position).

13. Intercession (*shafâ'ah*) is justifiable (contrary to the Mu'tazilîte position).

14. It is impossible for God to tell a lie or break a promise.

15. The world is created in time (*hadîth*) (contrary to the view of the philosophers).

16. The Qur'an is pre-eternal (*qadîm*); however, this is true of *al-kalâm al-nafsî* (meaning of the Qur'an), not *al-kalâm al-lafzî* - the spoken word (this in justification of the *Ahl al-Sunnah*'s belief in the pre-eternity of the Qur'an).

17. The Divine Acts do not follow any purpose or aim (contrary to the view of the philosophers and the Mu'tazila).

18. God may impose a duty on a person that is beyond his power (contrary to the belief of the philosophers and the Mu'tazila).[141]

4.3.7.2.2 The Problem of Reason and Revelation and the Criterion of Good and Evil

The Ash'arîtes differ from the Mu'tazilîtes on the question if reason or revelation should be the basis or source of truth and reality: Both schools admit the necessity of reason for the rational understanding of faith, but they differ with regard to the question of which – revelation or reason – is more fundamental and, in case of a conflict, which is to be preferred. The Mu'tazilîtes held that reason is more fundamental than revelation and is to be preferred to revelation. Revelation merely confirms what is accepted by reason and, if there is a conflict between the two, the reason is to be preferred and revelation must be so interpreted as to be in conformity with the dictates of reason.

The Ash'arîtes, on the other hand, held that revelation is more fundamental as the source of ultimate truth and reality and that reason should merely confirm what is given by revelation. The Ash'arîtes prefer revelation to reason if there is a conflict between the two and the reason hundred precent certain. As a matter of fact, this is one of the fundamental principles on which the rational *kalâm* of the Mu'tazilîtes differs from the *ahl al-sunnah kalâm* of the Ash'arîtes. If pure reason is made the sole basis or source of truth and reality, including the truth and reality of the most fundamental principles or concepts on which Islam is based, it would be a pure speculative philosophy or, at best, a rational theology in general and not a doctrinal theology of a particular historical religion, i. e., that of Islam in particular. Islam is based on certain fundamental principles or concepts that, since some of them are suprasensible in nature and are incapable of rational proof. These principles must first be believed in on the basis of revelation. Revelation, thus, is the real basis of the truth and reality of these basic doctrines of Islam. This faith, based on revelation, must be rationalized. As

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[141] Sa'd-al-Dîn Mas'ud Ibn 'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. I, pp. 375-94; Sharîf, *A History of Muslim Philosophy*, vol. I, pp. 220-43.

a religion no doubt, Islam admits the necessity of seeking rational grounds for its faith. But to admit the necessity of seeking rational grounds for its faith is not to admit pure reason or analytic thought as the sole source or basis of Islam as a religion. No doubt, reason has the right to judge Islam and its basic principles, but what is to be judged is of such a nature that it cannot submit to the judgment of reason except on its own terms. Reason must, therefore, be subordinated to revelation. Its function is to seek rational grounds for faith in the basic principles of Islam and not to question the validity or truth of the principles established on the basis of revelation as embodied in the Qur'an and the *Sunnah*. The problem of the criterion of good and evil follows as a corollary to the problem of reason and revelation. The issue of good and evil is one of the most controversial problems of Islamic theology. The Mu'tazilîtes held that reason, and not revelation, is the criterion or standard for moral judgment, i.e. of the goodness and badness of an action. The truth and moral value of things and human actions must be determined by reason. They contended that the moral qualities of good and evil are objective; they are inherent in the very nature of things or actions and as such can be known by reason and determined to be good or bad.

In contrast to the Mu'tazilîtes, the Ash'arîtes held that revelation and not reason was the real authority or criterion for determining what is good and what is bad. The goodness and badness of actions *(husn wa qubh)* are not qualities inherent to them; these are mere accidents (*'aradh*). Actions – in themselves – are neither good nor bad; rather, it is Divine Law that makes them good or bad. Mu'tazilites state: "Actions and things for which a person is responsible are either, of themselves and in regard to the hereafter, good, and because of this good they were commanded, or they are bad, and because they are bad they were prohibited. That means, from the point of view of reality and the Hereafter, the good and bad in things are dependent on the things themselves and the Divine command and prohibition follows this." According to this school of thought, the following scruple arises in every action which a person performs: "Was my action performed in the good way that it in essence is?" But the Sunnî School, the Ash'arîtes, say: "Almighty God commands something, and then it becomes good. He prohibits a thing, and then it becomes bad." Therefore, an act is good because it is commanded and bad because it is prohibited.. They look to the awareness of the one who performs the action and establish the act's goodness or badness according to that. And this goodness or badness is not found in the one who looks to this world but in the one who looks to the hereafter.

For example, one could perform prayers or take ablutions while not being aware that there was something that might spoil those prayers and ablutions. If one was completely unaware of it, one's prayers and ablutions would, therefore, be both sound and acceptable. However, the Mu'tazilites say: "In reality it was bad and unsound. It may be acceptable because the individual was ignorant and did not know."

Therefore, according to the Sunnî School, one cannot ask with regard to an act that is in conformity with the externals of the Sharî'ah as to whether it was sound?" Rather, one should ask if it was accepted and not become proud and conceited![142]

To clarify even more the ground of controversy between the Mu'tazilîtes and the Ash'arîtes we should understand that there are three senses in which these two terms, good and evil, are used. The first two are the following.

1. Good and evil are sometimes used in the sense of perfection and defect respectively. When we say that a certain thing or action is good or bad (for instance, knowledge is good and ignorance is bad), we mean that it is a quality that makes the possessor of such a quality perfect or implies a defect in him.

2. The terms are also used in a utilitarian sense meaning gain and loss in worldly affairs. Whatever in our experience is useful is good, and the opposite of it is bad. So whatever is neither useful nor harmful is neither good nor bad.

Both the Ash'arîtes and the Mu'tazilîtes agree that in the two senses mentioned above reason is the criterion or standard of good and evil. There is no difference of opinion with respect to the above two senses. But good and bad in the second sense may vary from time to time, from individual to individual, and from place to place. In this sense there will be nothing permanently or universally good or bad; what is good to one may be bad to others and *vice versa.* This implies that good and evil are subjective rather than objective and real. Hence, acts are neither good nor bad. Rather experience or workability make them so and, therefore, they can be known by reason without the help of revelation.

3. Good and evil are also used in a third sense of commendable and praiseworthy or condemnable in this world and rewardable or punishable, as the case may be, in the other world.

The Ash'arîtes maintained that good and evil in this third sense can be known only through revelation, not by reason as the Mu'tazilîtes held. According to the Ash'arîtes, revelation alone decides if an action is good or bad. What is commanded by *Shar'* is good, and what is prohibited is bad. *Shar'* can turn that which has been previously declared good into bad and vice versa. Since actions by themselves are neither good nor bad, there is nothing in them that would make them rewardable (good) or punishable (bad). They are made rewardable or punishable through the revelation or *Shar'*. Since there is no quality of good or evil intrinsic to the very nature of an act,

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[142] Said Nursi, *The Words*, Twenty-First Word - Second Station, pp. 283-84.

there can be no question of knowing it by reason.[143]

Despite being named after Ash'arî, the most influential work of this school was *Tahâfut al-Phalâsiphah* (The Incoherence of the Philosophers), by al-Ghazzali (1111). He laid the groundwork for "shut[ing] the door of *Ijtihâd*" in the subsequent centuries in all Sunnî Muslim states. It is one of the most influential works ever produced. ibn Rushd (Averroes), a philosopher, famously responded: "[T]o say that philosophers are incoherent is itself to make an incoherent statement." ibn Rushd's book, *Tahâfut al-Tahâfut* (The Incoherence of the Incoherence), attempted to refute al-Ghazzali's views, even though the latter had not been well received in the Muslim community. His book *The Revival of the Religious Sciences in Islam (Ihyâ 'Ulûm al-Dîn)* was the cornerstone of this school's thought and combined theology, skepticism, mysticism, Islam and other ideas. The important figures of this school include ibn al-Haytham (1039), al-Biruni (1048), Fakhr al-Dîn Razi (1209) and ibn Khaldun (1406).[144]

4.3.7.3 Mâturidî Theology

4.3.7.3.1 General Information

Muhammad ibn Muhammad ibn Mahmud Abu Mansur al-Samarqandi al- Mâturidî al-Hanafî (333/944) was a Muslim theologian. Born in Mâturid near Samarqand, he was educated in Muslim theology and the juridical sciences. He wrote mostly against other schools, mainly Mu'tazilîs, Qarmatî, and Shî'a. His theology is almost identical to that of the Ash'arîs, and his followers are found chiefly in areas where the Hanafî school is dominant, such as Turkey, Central Asia, Pakistan and India. Imâm Mâturidî's works include *Kitâb al-Tawhîd* (Book of Monotheism); *Radd al-Tahdhîb fi al-Jadal*, another refutation of a Mu'tazilî book; *Kitâb Bayân Awhâm al-Mu'tazila* (Book of the Exposition of the Errors of Mu'tazila).[145]

In Islamic history a Mâturidî is one who follows Abu Mansur al- Mâturidî's theology, which is a close variant of the Ash'arî theology (*Aqîdah*). The Mâturidîs, Ash'arîs and Atharis are all schools of Sunnî Islam, which constitutes the overwhelming majority of Muslims.

The Mâturidîs differ from the Ash'arîs on the questions of the nature of belief and the place of human reason. The Mâturidîs state that belief (*îmân*) does not in-

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[143] Sa'd-al-Dîn Mas'ud ibn 'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. I, pp. 375-94; Sharîf, *A History of Muslim Philosophy*, vol. I, p. 220-37.

[144] Abu Hamid al-Ghazzâlî (1058-1111), *Tahâfut al-Falâsifa (*The Incoherence of the Philosophers*)* (Croydon Park, N.S.W: Adam Publications, 2007); ibn Rushd, *Tahâfut al-Tahâfut li-ibn Rushd*, ed. Muhammad al-'Arîn (Beirut: Dar al-Fikhr al-Lunbani, 1993), p. 296.

[145] Nasr, *Islamic Philosophy from its Origin to the Present*, pp. 126-27.

crease or decrease but remains static; it is piety (*taqwâ*) that increases and decreases, whereas the Ashʿarîs say that belief does in fact increase and decrease. The Mâturidîs say that the human mind is able to determine that some of the more major sins such as alcohol or murder are evil unaided by revelation. The Ashʿarîs say, in contrast, that the unaided human mind is unable to know if something is good or evil, lawful or unlawful, without divine revelation.

Another point on which Ashʿarîs and Mâturidîs differ is that concerning divine amnesty for certain non-Muslims in the afterlife. The Ashʿarî view stated by Imâm al-Ghazzâlî says that a non-Muslim who was not reached by the message of Islam or was reached by a distorted version of it is not responsible for this in the afterlife. The Mâturidî view states that the existence of God is so obvious that one with intellect and time to think (i.e. not those with intellectual disability, etc.) and was not reached by the message of Islam and does not believe in God will end up in Hell. Divine amnesty is available only to those non-Muslims who believed in God and were not reached by the message.

We can summarize the differences between the two Sunnî schools as follows.

1. One of the principal theological questions with which both schools engaged concerned the role of human reason in religious faith. Unlike the school of al-Ashʿarî, which claimed that knowledge of God derives from revelation through the prophets, Mâturidiyyah argues that knowledge of God's existence can be derived through reason alone.

2. Another major issue that concerned both schools was the relationship between human freedom and divine omnipotence. Mâturidiyyah claims that, although humans have free will, God is still omnipotent and in control of history. It is humanity's ability to distinguish between good and evil that makes humans responsible for whatever good or evil actions are performed.

3. Al-Ashʿarî held that human reason was incapable of determining what is good and evil and that acts became endowed with good or evil qualities through God's declaring them to be such. Al-Mâturidî takes an opposite position; human reason is capable of determining good and evil, and revelation aids human reason against the sway of human passions.

Reason, according to al-Mâturidî, is the most important of all other sources of knowledge because without its assistance, there can be no real knowledge. Knowledge of metaphysical realities and moral principles is derived from this source. It is reason that distinguishes human beings from animals. Al-Mâturidî pointed out many cases where nothing but reason can reveal the truth. This is why the Qur'an repeatedly enjoins human beings to think, to ponder and to judge through reason in order to find the truth. In refuting the ideas of those who think that reason cannot give true

knowledge, he states that they cannot prove their doctrine without the use of reason.[146]

4.3.7.3.2 Reason, Knowledge and Law

Reason, no doubt, occupies a very eminent place in al-Mâturidî's system, but it cannot give, he argued, true knowledge concerning everything we need to know. Like the senses, it has a limit beyond which it cannot go. Sometimes the true nature of the human intellect is dimmed and influenced by internal and external factors such as desires, motives, habits, environment and association and, as a result, it even fails to give us true knowledge of things that are within its own sphere. Divergent views and conflicting ideas of the learned concerning many problems are mentioned by al-Mâturidî as evidence supporting of his statement. Hence, reason often requires, he asserts, the service of a guide and helper who will protect it from straying, lead it to the right path, help it understand delicate and mysterious affairs and know the truth. This guide, according to him, is the divine revelation received by a prophet. If anyone denies the necessity of this divine guidance through revelation and claims that reason alone is capable of giving us all the knowledge we need, then he will certainly overburden his reason and oppress it quite unreasonably.

The necessity of the divine revelation is not restricted, according to al-Mâturidî, to religious affairs only, but its guidance is required in many worldly affairs too. The discovery of the different kinds of foodstuffs, medicines; the invention of arts and crafts, etc., are the results of this divine guidance. The human intellect cannot provide any knowledge about many of these matters, and if humans had to rely solely on individual experience for their knowledge of all these things, then human civilization could not have made such rapid progress. Bearing in mind the verse, "*Nor anything fresh or dry but is [inscribed] in a Record Clear,*"(6:59) and supported by the facts that the Qur'an both offers humankind clear statements and evidences, and teaches humankind through signs and indications, we could conclude from the masterly signs and indications of the Qur'an's miraculousness in the stories of the prophets and their miracles that it is encouraging humankind to attain similar achievements. It is as if, with these stories, the Qur'an is pointing to the main lines and final results in the future of humanity's efforts to progress, for the future is built on the foundations of the past, while the past is the mirror of the future. Also, it is as if the Qur'an is clapping humanity on the back, urging and encouraging them, saying: "Exert yourselves to the utmost [and discover] the means to achieve some of these wonders!" It can surely be recognized that it was the source of miracles that first gave humanity the clock and

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[146] Sa'd-al-Dîn Mas'ud ibn'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. I, pp. 405-18; 'Abd-al-'Azîz ibnA. al-Bukhâri, *Kashf al-Asrâr* (Beirut: Dâr al-Kutub al-Ilmiyyah, 1997), vol. I, pp. 272-313; Sharîf, *A History of Muslim Philosophy*, vol. I, pp. 259-71.

the ship.[147]

Al-Mâturidî refutes those who think that the individual mind is the basis of knowledge and criterion of truth. He also does not regard inspiration *(ilhâm)* as a source of knowledge. Inspiration, he argues, creates chaos and conflict in the domain of knowledge, makes true knowledge impossible and is ultimately responsible for leading humanity into disintegration and destruction for want of a common standard of judgment and universal basis for agreement.

On the basis of the principle of divine wisdom (*hikmah*) al-Mâturidî tried to reconcile the conflicting views of the Determinists (*Jabrîtes*) and the Mu'tazilîtes, and to prove that human beings have a certain amount of freedom without denying the all-pervading divine will, power, and decree. Wisdom means placing a thing in its own place; so divine wisdom comprises justice (*'adl*) on the one hand and grace and kindness (*fadhl*) on the other. God possesses absolute power and His absoluteness is not subject to any external laws but only His own wisdom. al-Mâturidî applied this principle also to combat the Mu'tazilîtes' doctrine of *al-aslah* (best) on the one hand and the Sunnî view that God could overburden his servants (*taklîf mâ lâ yutâq*) on the other. It is inconsistent with divine wisdom, which includes both justice and kindness, to demand that humans perform an act that is beyond his power. It is like commanding a blind man to see, or one who has no hands to stretch out his hands.

Similarly, it would be an act of injustice if God would punish believers in hell forever or reward infidels with paradise forever. He agreed with the Mu'tazilîtes on these questions, but he strongly opposed the former's doctrine that God must do what is best for human being. This Mu'tazilîte doctrine, he argues, places God under compulsion to do a particular act at a fixed time for the benefit of an individual and denies His freedom of action. It only proves the right a human being has over God and not the intrinsic value and merit of an action that the divine wisdom keeps in view. Moreover, this doctrine cannot solve the problem of evil. Al-Mâturidî, therefore, maintains that divine justice consists not in doing what is salutary for an individual but doing an action for its own sake and giving something its own place.

The basis of human obligation and responsibility (*taklîf*), al-Mâturidî maintains, does not consist in the possession of the power to create an action but is the freedom to choose (*ikhtiyâr*) and the freedom to acquire an action (*iktisâb*), which freedom is conferred on the human being as a rational being, which make him both responsible and accountable.

It is evident from this brief account that reason and revelation both occupy a

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[147] Cf. Bediuzzaman, Said Nursi, *Signs of Miraculousness: The Inimitability of the Qur'an's Conciseness.* Trans. by Shukran Wahide. (Istanbul: Sozler Publications, 2007), pp. 271-75.

prominent place in al-Mâturidî's system. The articles of religious belief are derived, according to him, from revelation, and the function of reason is to understand them correctly. There can be no conflict between reason and revelation if the real purport of the latter is correctly understood. His method of interpreting Scripture may be outlined in the following words: The passages of the Holy Qur'an that appear to be ambiguous or of which the meanings are obscure or uncertain *(mubham* and *mushtabah)* must be taken in light of the verses that are self-explanatory and precise *(muhkam).* Where the apparent sense of a verse contradicts what has been established by the "precise" *(muhkam)* verses, it must then be believed that the apparent sense was never intended, because there cannot be any contradiction in the verses of the Holy Qur'an, as God has repeatedly declared. In such cases, it is permissible to interpret the particular verse in the light of the established truth (*ta'wîl*) or to leave its true meaning to the knowledge of God *(tafwîd).*

The difference between the attitude of al-Mâturidî and that of the Mu'tazilîtes in this respect is quite fundamental. The latter formulated certain doctrines on rational grounds and then tried to support their views by verses from the Holy Qur'an, interpreting them in light of their doctrines. As regards the traditions of the Prophet, their attitude was to accept those that supported their views and to reject those that opposed them.

The doctrines of al-Mâturidî became submerged in the course of time under the expanding popularity of the Ash'arîte School because of the influential activity of the theologian al-Ghazzâlî. This theology is popular where the Hanafî school is followed, viz. in Turkey, Afghanistan, Central Asia, Pakistan, Bangladesh and India. Today nearly 53% of Sunnî Muslims are Hanafîtes, and the majority of Hanafîtes are Mâturidîtes. Mâturidiyyah is now present in Turkey, the Balkans, Central Asia, China, India, Pakistan and Eritrea.[148]

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[148] Sa'd-al-Dîn Mas'ud ibn'Umar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. I, pp. 405-18; 'Abd-al-'Azîz ibnA. al-Bukhâri, *Kashf al-Asrâr*, vol. I, pp. 272-313; Sharîf, *A History of Muslim Philosophy*, vol. I, pp. 259-71.

5 THE PERIOD OF ISLAMIC LAW AFTER THE TURKS PROFESSED ISLAM (960-1923)

The Turks, who had led a nomadic life but possessed important legal principles and institutions, became the new supproters of Islamic Law after they became Muslims. We shall here summarize, though briefly, the stages Islamic Law underwent under the influence of the Turks. We will go into actual detail when we look at the related branches of law.

5.1 The Age of Qarakhanids (from 329/940 onward) and the Codification of Theoretical and Applied Islamic Law

The Qarakhanids rescued the Islamic world from invasion by the Qarmatids. They were agreed with Zoroastrianism and were also known as the *Kings of Turkistan, al-Afrasyab* or the *First Khans* in Islamic books. They adopted the Hanafî school, which is the largest school of Islamic *fiqh*. On the other hand, with respect to faith, they were followers of Muhammad Mâturidî (333/944), the founder of the *Mâturidiyyah* School, who was one of them. According to the classification of 'Ali Chelebi Qınalızâdah, the following two Turkish jurists enjoy a position that is distinctively different from the others among the first generation of Jurists. One of them is Muhammad Mâturidî, whom we have just mentioned and whom we also discussed in the previous chapter. He also influenced the Jurists of Islam in Baghdad and wrote two noteworthy works on the theoretical law of Islam.[1] The other is Abu al-Fadhl Muhammad al-Hâkim al-Shahîd (334/945), who compiled and summarized the basic works of Imâm Muhammad systematically. Again, this jurist compiled the six books of Imâm Muhammad, known as *Dhakhîra al-Riwâyah*, in his book *al-Kâfî*, which has been annotated by a great number of jurists.[2]

During the time of the mighty ruler of the Qarakhanids, Bughra Khan (425-448/1033-1056), Abd al-'Azîz ibn Sâlih al-Halwânî (449/1057), who studied law in Bukhâra and was a Turkish jurist to whom all Hanafî jurists referred, merited the title of *Shams al-A'immah = The Sun of Imâm*s. If we may say so, he was the second Imâm al-A'zam of the Hanafî school and taught hundreds of jurists. In fact, those pupils edu-

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1 Ali Chelebi Qinalizâdah, *Tabaqat al-Mujtahidîn*, SK, manuscript, Baghdad, No. 2172, Doc. 59ff; Tashkopruzadeh, *Miftâh al-Sa'âdah we Misbâh al-Siyâdah,* vol. 2 (Beirut: Dâr al-Kutub al-Ilmiyyah, 1985), pp. 236-58.

2 Qinalizâdah, Ali Chelebi, *Tabaqât al-Müjtehidîn*, Sül. Library, Yazma Bağ: No: 2172, Doc. 59ff; Ahmed Akgündüz, Akgündüz, *Mukayeseli Islam ve Osmanli Hukuku Kulliyâti*, (Diyarbakır: Dijle University, 1986), p. 24.

cated by the *Madrasah of Halwânî* became the peerless teachers of Hanafî jurisprudence for centuries. According to Qinalizâdah, 'Abd al-'Azîz ibn Sâlih al-Halwânî was Head of the VIII.th generation of Hanafî Jurists. Indeed, the *Madrasah of Halwânî* was at least as important as the *Nizâmiyyah Madrasah*. The contributions of this *madrasah* to the history of Islamic Law could be summarized as follows:

A) Abu Zaid Dabbusi (432/1040), who was born in the city of Dabbus, between Samarkand and Bukhâra, who first studied the abstract rules of Law in form of *Majalla* as Comparative Inter-*Madhhab* Law and wrote a book on the issues called *Ta'sîs al-Nazar*, was actually a student at this *Madrasah*. Islamic jurists called the Comparative Inter-*Madhhab* Law *'Ilm al-Khilâf* and accepted this eminent person as the founder of the aforesaid science.[3]

B) Again, Abu al-Laith al-Samarqandi (393/1002), who first compiled the rulings *(fatâwâ)* for such issues (*Wâqi'ât*, events) regarding which no decisive solutions had been narrated by the Imâms of the *madhhab*s and had been solved by the jurists who came later in his work *Kitâb al-Nâwazil*, was one of those educated in that *madrasah*. In fact, this work forms the first nucleus of the series called *Majmû'ah al-Fatâwâ* (*Fatwâ* Magazines).[4]

C) As we mentioned earlier in the chapter on references, the Science of Islamic Law consists of two parts. The first is called *Furû' al-Fiqh*, i.e. Applied Islamic Law; works in this area are systematic works that compile legal decrees. The second is *Usûl al-Fiqh*, which studies theoretical legal issues or, rather, the basic principles on which legal decrees are based, i.e. books on theoretical Islamic Law. The most significant and essential works on both branches of the science of Law were written by the jurists who were educated in that *madrasah*. In fact, the following three basic works on which Hanafî jurists rely in the field of *Usûl al-Fiqh* were produced by that *madrasah*.

1) *The first* is *Taqwîm al-Adillah*, written by Dabbusi in very plain language, is included among our basic references.[5] 2) *The second* is the two-volume work called *Usûl* (Methodology), written by Shams al-A'immah Muhammad al-Sarakhsi (482/1089) who was born in the city of Sarakhs of Mawarâ' al-Nahr and succeeded his teacher as Head of all the Hanafî Jurists.[6] 3) *The third* is the work called *Usûl* (Methodology),

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[3] Halil Edhem, *Duwal-i Islamiye* (Istanbul: Matba'a-i Âmirah, 1927), pp. 179-82; Qinalizâdah, *Tabaqât al-Müjtehidîn,* Doc. 59ff; Tashkopruzadeh, *Miftâh al-Sa'âdah,* vol. 2, pp. 236-58.

[4] Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58; Qınalızâdah, *Tabaqât al-Müjtehidîn*, Doc. 65ff; Akgündüz, *Külliyât*, p. 24.

[5] Qınalızâdah, *Tabaqât al-Müjtehidîn*, Doc. 65ff; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

[6] Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

written by Fakhr al-Islam 'Ali Pazdawi who was buried in 482/1089 in Samarqand.[7] Again, the essential works of the Hanafî school in the field of applied law were written in that epoch. The thirty-volume work, *al-Mabsût*, which Sarakhsi had dictated to his students in jail, having been imprisoned because of the harsh advice by the Emîr of Khorasan, ranks among the best of these. This work is a *Mudallal* book on Islamic jurisprudence, annotating the work called *al-Kâfî* by al-Hâkim al-Shahîd. Actually, the examples of works here are too many for the size of this book,[8] so we will suffice with the examples that have been mentioned above.

In short, during the Age of Qarakhanids, cities in Turkistan such as Semerqand, Kash, Bukhâra and Serakhs were centers of science where the basic principles of the Hanafî *madhhab* were studied in the minutest detail, in which the compliments of Muslim Turkish civil servants to jurists played a great role. The majority of the aforementioned jurists were invested with the capacity for *Ijtihâd* (interpretation). They also mentioned the references for legal decrees in their works. As for the issues on which no legal decrees were found, they performed *Ijtihâd*, faithfully keeping to the basic principles of the Hanafî madhhab. For that reason, jurists such as Sarakhsi and Halwânî were called m*ujtahid*s in issues. Because of that, all the historians of Islamic legislation consider the Age of Qarakhanids to be the Age of *Mujtahid* Imâms. In turn, the Age of Imitation is said to begin after that period.[9]

5.2 Legal Developments in Other Turkish States before the Ottomans (The Age of Imitation = *'Asr al-Taqlîd*

5.2.1 Developments in the Seljuqid Period

The Seljuqid period represents a significant era with respect to the aspects not only of Islamic Law but also of Islamic history. On the other hand, the Seljuqids both eliminated the growing danger of Shi'îte Islam and revived the diminishing zeal of the Muslims and routed the Byzantines. The date when the first sultan of the Seljuqids, Tughrul Beg, proclaimed their independence was 432/1040, and that state became famous as the Seljuqids of Khorasan and the Great Seljuqids. The Great Seljuqids, who had lost their previous glory after Sultan Melikshah (485/1092), continued their politi-

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[7] Qınalızâdah, *Tabaqât al-Müjtehidîn*, Doc. 65ff; Tashkopruzadeh, *Miftâh al-Sa'âdah,* vol. 2, pp. 236-58; Abdul Hayy ibn Abdul Halim al-Laknawi al-Ansari, *al-Fawâid al-Bahiyyah Fî Tarâjim al-Hanafiyyah,* (Beirut: Dâr al-Ma'rifah, d.n.), pp. 124-25.

[8] Seyyid Bey, *Hilâfet ve Hâkimiyet-i Milliye,* (Caliphate and National Sovereignty), (Ankara: d.n.), pp. 66ff.

[9] Qınalızâdah, *Tabaqât al-Müjtehidîn*, Doc. 59ff; Muhammad Ali Es-Sâyis, *Târîkh 'ul-Fiqh 'il-Islâmî* (Cairo: d.n.), p. 119.

cal existence under various names until the beginning of the 14th century. The sovereignty of the group that was known as *Anatolian* Seljuqids or *Rum* Seljuqids, the capitals of which were Qonya or Sivas passed to the Ottoman State in the course of time. The first founder of that dynasty was Sulaiman the First (470/1077). In the meantime, we should mention the Seljuqids of Damascus and Iraq who were known as *Atabekliks.*[10]

During the Seljuqid period, Islamic Law was accepted as the legal system. With certain exceptions, all decrees of Islamic Law were applied in accordance with the views of the Hanafî madhhab. Thanks to the Seljuqid Sultans, the Hanafî madhhab was the main school in Persia, Anatolia and Russia. From the aspect of belief, with some exceptional periods, the Seljuqids supported *Mâturidiyyah*, of the representatives of the Sunnîte *Madhhab.*[11]

The legal developments in that period could be summarized as follows.

a) Sultan Malikshah (1072-1092), of the rulers of the Great Seljuqids, who led a Sunnîte policy against the Shi'îte and *Bâtinîte* (a school attributing special importance to the interpretation of the hidden meanings of the Holy Qur'an) movements, with political provocation, convened the leading Islamic jurists at the time, also on the recommendation of his vizier Nizâm al-Mulk. He had them prepare a legal code that included clear and decisive decrees concerning certain issues that led to great disputes at the time, in which he demanded that the code that concerned private law in particular be applied in all the countries of the State. Six to seven articles of that code called *al-Masâ'il al-Mâlikshahiyyah Fil Qawâ'id al-Shar'iyyah* are narrated in history books. Again, this work, which we can say was the first official legal code prepared by Muslim Turks in the field of Islamic law, dealt with certain basic matters, clarifying especially fictitious contracts, real estate trading, testifying against women and debtors' falling into arrears to protect Muslims from those who would take advantage of them.[12]

b) The most significant legal progressions in that age were, needless to say, the monumental works left behind by the esteemed vizier of Sultan Melikshah, Nizâm al-Mulk (1485/1092), *the first* of which, *Siyâsatnâmah*, is among the noteworthy references for Seljuqid public law and is also included among our essential references. The *second* outstanding work of his were those jurists educated at the Nizâmiyyah Madrasah he founded in Baghdad, which Nizâm al-Mulk established not to promote any par-

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[10] Khalil Edhem, *Duwal-i Islamiye,*(Istanbul: 1327/1909), pp. 208-17; Osman Turan, *Selçuklular Tarihi Ve Türk İslâm Medeniyeti*, (Istanbul: Dergah Publications, 1968), pp.66ff.

[11] Najmuddîn Abubakr al-Rawandi, *Rahat al-Sudûr wa Ayat al-Surûr,* (London: 1921), pp. 17-18; Nizâm al-Mulk, *Siyâsatnâmah* (Paris: 1891), p. 7; Turan, *Selçuklular Tarihi*, pp.332ff.

[12] The Committee, *al-'Urâdah Fi al-Hikâyah al-Saljuqiyyah, MTM*, vol. 1, pp. 495-96; vol. 2, pp. 249-51.

ticular *madhhab* but to sponsor and improve the sciences. That historical *madrasah* proved to be the place where Shâfi'î and Hanafî jurists negotiated their views and at times went to extremes. Imâm al-Ghazzâlî and his teacher Imâm al-Haramain Abu'l-Ma'âli occupied the position of Head of the Shâfi'îs. Those Seljuqid sultans who were offended by the declarations of Imâm al-Haramain against Imâm al-A'zam – which was in fact the greatest reason for their lack of reverence for him – turned the love for sciences and law into a symbol. Imâm al-Ghazzâlî, who had insulted Imâm al-A'zam in the first place under the influence of his teacher, made respectful mention of him in all the books he wrote during his period of maturity. The work *al-Mustasfâ* by Imâm al-Ghazzâlî and *al-Burhân* by Imâm al-Haramain were among the basic works on the principles of Islamic law. On the other hand, the three works by al-Ghazzâlî called *Basît*, *Wasît* and *Wajîz* on applied law became the fundamental books for the Shâfi'î law.[13] Still, Abu Ishaq al-Shirazi, the author of *al-Muhadhdhab*, of the most remarkable references for the Shâfi'î *Madhhab*, was a member of that *Madrasah*. Yet al-Mâwardi (450/1057), the writer of the most valuable work on Islamic public law, i.e. *al-Ahkâm al-Sultaniyyah*, was among the most eminent jurists during the Age of Seljuqids, although he was not from that *Madrasah.*[14]

c) During the Age of the Seljuqids, the activities of *Ijtihâd* that occurred during the Age of the Qarakhanids ended to a certain extent. As the *madhhabs* became distinct and some were officially accepted by the State, current legal views were preferred to new ones.

The most significant legal activities in that period are as follows:

aa) Jurists, and especially the Hanafî jurists, dedicated their time to the analysis and deduction of the current decrees in the work of Imâm Muhammad. The most noteworthy rivals of the Hanafîs in that field were Shâfi'î jurists.

bb) The legal views narrated from the founders of *Madhhab*s in that period were subjected to certain classification and preference if there were more than one view. The jurists of that period did not do *Ijtihâd* but explained the current views of the former *Mujtahid*s and explained narrations that pointed to several probabilities, which ibn al-Kamal called *Sâhib al-Takhrîj*. Ahmed al-Quduri (428/1037), the author of *al-Mukhtasar*, a legal textbook, and *al-Tajrîd*, on comparative law, and Abu Hafs al-Kabîr of Bukhâra, are among the Turkistani jurists included in this group.

cc) One of the most important activities in that period was that every jurist felt obliged to defend his own *Madhhab* and concentrated on that. Through the insistent inculcations of al-Shâshi, a Shâfi'î jurist of Turkistan, Sultan Mahmud, the son of Sa-

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[13] Turan, *Selçuklular Tarihi*, p. 250ff.; Es-Sâyis, *Târîkh'ul-Fiqh'il-Islâmî*, p.119ff; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

[14] Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

buktekin, abandoned the Hanafî madhhab for the Shâfi'î *Madhhab.*[15]

Due to all these fluctuations in the fields of belief and law and the disputes in politics, the legal developments in the Age of *Mujtahid* Imâms ceased, and, according to the statements of several legal historians, the Age of Imitation (*taqlîd*) in Islamic law began, in which there was support and development of one of the current schools rather than the establishment of a new legal school. When Baghdad, the center of science in the Islamic World was invaded by the Mongols in 656/1258, the Age of Interregnum began in law as it did in social, economic, cultural and religious issues.[16] However, this should not be understood as the cessation of all scientific activity.

5.2.2 Developments after the Mongol Invasion (656/1258)

5.2.2.1 Characteristics of the Age and Activities Conducted

The Mongol Invasion devastated the Islamic World not only politically but also scientifically and intellectually. Historians of Islamic Law have qualified the period after that invasion as an age of absolute Imitation (*taqlîd-i mahdh*). It is quite remarkable that the Mongols, who first devastated the Islamic World and then became Muslims, did not abandon their former customs and traditions in a very short time and retained decrees that opposed Islamic Law during the first periods. The Ilkhanate, which later became a Muslim state completely, modified the organization of *Tarhan* and *Ulush (iqtâ')* in accordance with the principles of Islam and thus ensured that it would remain in force. However, despite all these facts, the legal systems of all the Muslim Turkish states were established after the Mongol Invasion and maintained their sovereignty until the foundation of the Ottoman State was again Islamic Law.[17]

Accordingly, studies on the Islamic Law should be summarized as follows:

Islamic Law became an established system of law in that period. The jurists of that period duly executed such tasks as compiling the rules of the established law, shortening them as texts of law and annotating them. Furthermore, unlike former periods, significant changes were made in the writing styles of the written legal works. The objective in earlier works was that the legal issues in them be written in the

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[15] Muhammad Ali al-Sâyis, *Târîkh 'ul-Fiqh 'il-Islâmî,* (Cairo: d.n.), pp. 119-25.

[16] Al-Sâyis, *Târîkh 'ul-Fiqh 'il-Islâmî,* pp. 119ff; Abdulkarim Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah* (Baghdad, Matba'ah al-Ânî, 1977), pp. 146-49; al-Khudarî, Muhammad. *Târikh al-Tashrî' al-Islâmî,* (Cairo: 1390/1970), pp. 275-311; Abdulqâdır Ali Hasan, *Nazratun Âmmah fi Târîkh al-Fiqh al-Islamî* (Cairo: Dâr al-Kutub al-Hadîsah, 1965), pp. 310ff; Sava Pasha, *İslâm Hukuku Nazariyatı Hakkında Bir Etüd,* Turkish: Baha Arıkan, (Ankara: 1955-56), vol. 1, pp. 107-22.

[17] İbrabim Kafesoğlu, *Türk Millî Kültürü,* (Istanbul: 1983), pp. 341ff; Togan, *Umumî Türk Tarihine Giriş* (Introduction to General Turkish History), (Istanbul: Istanbul University, 1946), pp. 277ff; al-Sâyis, *Târîkh 'ul-Fiqh 'il-Islâmî,* p. 126.

clearest and simplest fashion. Now, however, the works written in this period were intended to transform the current comprehensive works into manuals for legislation and chose to summarize them.

In this period 80% of the Islamic legal corpus was probably an exploration, preservation and explanation of the remaining 20%. The hypothesis does not mean undervaluing the creativity or questioning the originality of the classical legal texts. Rather, it merely purports to indicate that what is chiefly believed to be a tradition of Islamic law may alternatively be understood as a tradition of literature transmitting Islamic legal philosophy as a distinguishable part of the discussion.

The complexity, like the genre itself, is multidimensional, and its theological character has to be explored with respect to its significance. A modern reader can easily lose interest and question the priorities of traditional writers. The following remark by Sayyed Qutb is perhaps a good example of this kind of growing unease:

The genre available to us as *Fiqh* may principally be experienced as a literary discourse rather than a legal one. A contemporary mind dwelling into it should understand that classical jurists might not have a sensible and workable corpus of law in their minds all the times. The aim varies according to a particular jurist's inclination, keeping in view the end he wanted to achieve. The purpose is sometimes to produce a concise text for swift committal to memory, a commentary to explicate a condensed text or a super-commentary to elaborate an existing commentary. Rather than getting repulsed by the exorbitant quantity of seemingly outdated written word, it is more objective and feasible for students of knowledge to classify the texts according to their degree of originality and concentrate first on the most original ones for exploration of traditional Islamic law.[18]

It is possible to categorize the legal works of that period into four groups.

*5.2.2.1.1 Texts (*al-Mutûn*)*

The jurists of this period abbreviated the major legal references written by their predecessors into legal texts and prepared manuals of law. The works prepared according to that tradition, which also continued during the Ottoman State, were actually used by jurists as unofficial legal books in courts and assemblies of *Fatâwâ*. The work called *al-Hidâyah*, which was authored by al-Marghinani (593/1197), one of the eminent jurists of Turkistan, can be regarded as the main source for the aforesaid texts.

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[18] Akgunduz and Cin, *Turk Hukuk Tarihi,* vol. I, p. 142; http://hangingodes.wordpress.com/category/traditional-islam.

It seems somewhat too complex to discover and disentangle the different layers of these texts, since they covered overlapping periods of history. A cursory analysis alone of any school's (Hanafî, for instance) textual history would reveal that we are dealing with immense amounts of texts with innumerable commentaries, interpretations and elucidations. We could make the effort to analyze the more famous ones by Nasafi, Kasani, Mosali, ibn Nujaim and ibn Abidîn butonlly to investigate the chains of origins.

We should mention here the following four books as examples from the Hanafî school, which were respected and accepted as *al-Mutûn al-Arba'ah al-Mu'tabarah (The Four Authorized Texts)* by all the Turkish Muslim states, including the Ottoman State:

1) *al-Mukhtâr* by Majduddîn 'Abdullah (683/I284) from Mosul;

2) *al-Wiqâyah* authored by Taj al-Sharî'ah Mahmud (680/1281), a jurist from Turkistan;

3) Majma' al-Bahrain by ibn al-Sa'âti (694/1294);

4) *Kanz al-Daqâ'iq* by Hafiz al-Dîn of Nasaf (710/1310), was among the most recognized legal texts.[19]

*5.2.2.1.2 Annotations and Exegeses (***Shurûh***)*

Since the above-mentioned texts were not fully understood by everybody, they were annotated by jurists who came after them to explicate them, which, as we stated above were written as *Mudallal* or *Ghair al-Mudallal*. For instance, the *Mudallal* exegesis called *Fath al-Qadîr*, which was written by ibn al-Kamal of Sivas (861/1457) to explain the text of *al-Hidâyah*, and the work *Ghâyah al-Bayân*, written by the Emîr Kâtib al-Itqâni (758/1356) of the City of Farab in Turkistan, may be mentioned as examples.[20]

We should mention here that the 20% includes four to six juridical works by Muhammad ibn Hasan al-Shaibani, Abu Hanîfa's famous student who recorded his teacher's opinions, decisions and writings which are now extinct. These books are 1) *al-Jâmi' al-Kabîr* 2) *al-Jâmi' al-Saghîr* 3) *Kitâb al-Asl* or *Mabsût* 4) *Ziyâdât* 5) *al-Siyar al-Kabîr* and 6) *al-Siyar al-Saghîr*. The condensed version of all six works was first prepared by another Hanafî jurist, Hâkim Marwazi, who called it *al-Kâfî fi Furû'u al-Fiqh*. The complete three volumes of *al-Kâfî* were expanded into a thirty-volume commentary by Shams al-Dîn al-Sarakhsi. Burhanuddîn Marghinâni carried out a comparative

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[19] Akgündüz, *Külliyât*, pp. 38, 77; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

[20] Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

study of Quduri's *Mukhtasar* (a precise text of Hanafî *fiqh* produced long after Shaibani's works) and Shaibani's *al-Jâmi' al-Saghîr*, producing another work called *Hidâyah*

Marghainâni than wrote a sixty-volume exegesis of his own work called *Kifâyah al-Muntahî*. The famous *Hidâyah*, which is still taught as a Hanafî text in most of the religious shools is a condensed readable version of this *Kifâyah*, also prepared by the same author for students. More than 100 years later, an exegesis of *Hidâyah* was written by Muhammad ibn Sadr, known generally as *Wiqâyah*, a condensed explanation of which is still included in the current curriculum.[21]

*5.2.2.1.3 Footnotes (***Havâshî*)

These works aim either to explicate certain matters in annotations written for texts (called *ta'lîqât*) or to criticize the views explicated in the annotations. Those works written on annotations as exegesis or criticism are called *hashiyah*s (footnotes). Let us now give some good examples of three types of such works. The Hanafî jurist, Shaikh al-Islam Timurtashi (1004/l595), was inspired particularly by the book *al-Durar wa al-Gurar* authored by Molla Khusraw, which was kind of a text and interpretation, and wrote a legal text called *Tanwîr al-Absâr*. Ala'uddîn al-Khaskafî (l088/1677) explicated that work with his own *al-Durr al-Muhktâr*. Then ibn al-'Âbidin, one of the outstanding jurists of the Ottoman Age (19th century), wrote a *Hashiyah* called *Radd al-Muhtâr*. This example evidences that the tradition of texts, exegesis and footnotes continued during the Ottoman Age as well as prior to it.[22]

5.2.2.1.4 Books of Fatâwâ

Books of *fatâwâ* are very important products of this period. Among the books of *fatâwâ* pertaining to that period we should mention in particular *Fatâwâ al-Qâdhîhan*, authored by Fahruddîn Qâdhîhan (592/1196).[23]

Since the legal works in that period bore the same characteristics as they did, with certain minute changes, until the fall of the Ottoman State, looking at them from the point of view of the history of Islamic law will be very helpful. Of those jurists in that period who published on the principles of Islamic legislation, the following should be definitely mentioned, according to *Madhhabs*: the Hanafîs included Abu al-Barakah al-Nasafi (710/1310), Zaila'i (743/1342), Kamal ibn al-Humâm (861/1456), 'Ayni (855/1451), ibn al-Nujaim (969/1561); the Mâlikîs included Khalil (776/1374), al-

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[21] See Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 556-59.

[22] Akgündüz, *Külliyât*, p. 39.

[23] Akgündüz, *Külliyât*, pp. 39, 78-79; Tashkopruzadeh, *Miftâh al-Sa'âdah,* vol. 2, pp. 236-58.

Hirashi (1101/1689); among the Shâfi'îs were Nawawi (676/1277), Subki (683/1284), ibn al-Hajar al-Haithami (909/1503); the Hanbalîs included ibn al-Taimiyya (728/1327) and ibn al-Qayyim (751/1350).[24]

Apart from the studies by jurists mentioned above, some official activities that are significant from the point of view of Islamic law merit our attention also.

5.2.2.2 Contributions of Chagatai Khans and the Babur State to the History of Islamic Law

We need to indicate two legal codes prepared by Muslim jurists that are very important from the point of view of Islamic Law:

A) ***Fatâwâ al-Tatarkhâniyyah.*** The *first* are the studies that were carried out during the Chagatai Khanate of the Mongolian states. That area, the majority of whose subjects and public officers were Turkish although its administrators were Mongolians, became a Muslim state during the reign of Sultan Ala'addîn Tarmashirin (722/1322). The jurists of Islam, who were supported by the state, wrote quite valuable works in a very short time. Still, the jurists of that state accepted the Hanafî madhhab as the official *madhhab* of the state as did the states of Altınordu and Ilkhanids that had professed Islam earlier.[25]

The Mongols, who were known in the Islamic world as Tatars, had the latter name inscribed in gold in history by preparing a very famous code of Islamic Law. Tatarkhan was a nobleman at the court of Muhammad II. Tughlak (Tughluk Timur Khan, 726-752/1324-1351), of the Chagatai Khanate, invited an eminent Turkish jurist named 'Âlim ibn 'Alâ al-Hanafî to the palace and ordered him to prepare a code of Islamic Law that would include all the legal issues. That jurist then prepared the 3000-plus-page collection of laws that became known as *Fatâwâ al-Tatarkhâniyyah*. That work, which was not given a title since it was dedicated to Tatarkhan, was mentioned by that title in the history of Islamic Law. This work, which was a systematic law book, differs from the usual books on *Fatâwâ*. Aside from exceptional issues, to which we will later refer, this work shows that Islamic Law was implemented fully in the Turkish states of Mongolian origin as well.[26]

B) ***Fatâwâ al-'Âlemgiriyyah.*** The *second* noteworthy legal activity to be mentioned here is the Islamic legislative code that was prepared under the sponsorship of the state during the Islamic state known as the Babur State or the Indian Mongols.

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[24] Akgündüz, *Külliyât*, pp. 39, 78-79; Tashkopruzadeh, *Miftâh al-Sa'âdah*, vol. 2, pp. 236-58.

[25] Edhem, *Duwal-i Islamiye,* pp. 377ff.

[26] *Istanbul Müftülüğü Yazma Eserler Bölümü* (Muftî's Office of Istanbul, Chamber of Manuscripts), Alim ibn Alâ, *Fatâwâ al-Tatarkhâniyyah*, vol. I, Doc. I-2; Akgündüz, *Külliyât*, pp. 36-37.

Sultan Muhyi-al-Dîn Avrangzib 'Âlemgir (1658-1707) of that state in India attributed great importance to science and law and initiated noteworthy attempts to codify the whole of Islamic law. In fact, this great codification of Islamic law known as *Fatâwâ al-Hindiyyah*, *Fatâwâ al-'Âlemgiriyyah* or *Fatâwâ al-Jihangiriyyah*, which took the views of Hanafî school as its basis, was prepared by a Commission by order of the sultan. This work was compiled by a commission under the chairmanship of Sheikh Nizâm of Burhanpur (1679) in association with four assistants of his, Sheikh Wajihuddin, Sheikh Jalaluddîn Muhammad, Qâdhî Muhammad Hussain and Molla Hamid, each of whom worked with a team made up of ten jurists. The sultan spent a total of 200,000 rubles (1 ruble = between 60-70 cents) for this compilation. The work consists of 52 books, 515 chapters, hundreds of sections and 6 volumes. Priority was given to the definite and reliable views narrated from Abu Hanîfa *(Zâhir al-Riwâyah)*, and if no judgment was found there, narrations were also made from other sources. The legal decrees were given along with the original texts in the references from which they were taken, including the names of references, while the views of the other *Madhhab*s were ignored. This work, which was the most important reference in the implementation of Islamic law in India until English rule, was reprinted many times and was translated into several languages.[27]

Although the legal activities carried out in these states are not restricted to these, we have mentioned these two because they influenced Ottoman legislation.

5.2.3 Legal Developments in Dhulqâdirids, Aqqoyunids and Other Muslim Turkish States

The Ottoman period was the longest of Turkish Islamic history. Nevertheless, this does not signify that there were no important legal developments in other Turkish states. Our conclusions differ from those reached by some other researchers. The legal activities during the first period of the Ilkhanids look the same from all points of view. The tradition of codification in the Ottoman State was not particular to this state, for the same tradition existed in the other Turkish states as well. Since Muslim Turkish states did not stop at anything with respect to the protection of rights, they not only applied the books of Islamic jurisprudence, which form the basis of Islamic Law, as an official legal code but also used the limited legislative power granted by Islamic Law to *Ulu al-Amr* (the rulers) and carried out certain organizational tasks. Since the foundation was the same, the legal arrangement prepared by an earlier

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[27] The Committee, *Al-Fatâwâ al-Hindiyyah* (Beirut: 1400/1980), vol. I, pp. 2-3, 574-76; Ali Himmet Berki, *İslâm Türk Ansiklopedisi* (Islamic Turkish Encyclopedia), vol. I, p. 277; J. Schacht, *Introduction to Islamic Law* (Oxford: Clarendon, 1986), p. 249; Akgündüz, *Külliyât*, pp. 40, 70ff; Edhem, *Duwal-i Islamiye*, pp. 498-509.

state was applied by the latter Muslim Turkish state with very few amendments. Because we will elaborate upon this issue in detail later, we will only supply certain historical information here.[28]

Historical research shows that the studies of Islamic jurists continued in the Age of Principalities (*'asr tawâ'if al-mulûk*) as well with regard to Islamic Law, resulting in texts, annotations, footnotes and *fatwâs*. Moreover, we can see that some codifications were legislated and implemented on the basis of hollow legislative power. We can illuminate this matter by citing two significant examples of this.

5.2.3.1 The Codification (*Qânûnnâme*) of Ala'uddawlah Beg

First, there are the Codifications of the Principality of Dhulqâdirids, a dynasty that ruled the area around the cities of Marash, Malatya and al-'Aziz for 190 years between 740-928/1339-1521. One of the codifications, which were transferred into the Title Deed Registry Books (*Tapu-Tahrîr Defterleri)* written during the reign of Sultan Sulaiman the Lawmaker exactly as they were without any change and which remained in force for a long time during the Ottoman period, was prepared during the reign of the Dhulqâdhî rid Beg 'Ala'uddawlah Beg (884-921/1479-1515) and became famous as the Codification (*Qânûnnâme*) of Ala'uddawlah Beg. It was composed of 51 Articles and consisted of provisions rather than criminal law.[29]

This codification preserved such Sharî'ah penalties like cutting off hands (*qat' al-yad)*, stoning (*rajm*), retaliation (*qisâs*) and the like exactly. Again, the penalties (politics) were determined case by case if the required conditions for executing such a punishment were not met. In other words, it had the qualities of a legal organization of the offences and *Ta'zîr* penalties. Moreover, this codification included provisions related to price-fixing and certain taxes, which concerned finance law. As an example of the provisions found in the said Codification, we will quote Article-10, which is related to the offence of adultery: *"If one commits the crime of adultery and this is decided by Sharî'ah or Customary law, and if one is an adult and if no had punishment is impelemted, thirteen gold coins shall be taken as ta'zîr. If one is married and is not stoned, fifteen gold coins shall be taken."* Close study will reveal that this codification deter-

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[28] *Fâtih Qânûnnâmesi* (Codification of Muhammad the Conqueror); Serkiz Karakoç, *Kulliyât al-Qavânin* (Collection of Codifications), File 1, "Atam, dedem kanunudur" (These are the codes of my ancestors) in TTK Library.

[29] PA (*Başbakanlık Osmanlı Arşivi) Tapu Tahrîr Defteri* (Prime Ministerial Ottoman Archives Title Deed Registry Book), No. 735 (hereafter BOA); Edhem, *Duwal-i Islamiye*, pp. 308-l2; Ömer Lütfi Barkan, *XV. ve XVI. Asırlarda Osmanlı İmparatorluğunda Ziraî Ekonominin Hukukî ve Malî Esasları* (Legal and Financial Principles of Agricultural Economy in Ottoman Empire in the XVth and XVIth Centuries) (Istanbul: Istanbul Üniversitesi Edebiyat Fakültesi Yayınları, l945), pp. 119-24.

mines the *Ta'zîr* penalties, if the penalties determined by Islamic Law are not implemented.[30] Again, it is understood that the Code, which ends with the statement, *"Those that oppose the provision of this Code are guilty and deserve punishment. Let them know this,"* was officially binding.[31]

Again, another codification found in the same Title Deed Registry and known as *the Bozoq Codification* belongs to the Age of the Dhulqâdirids. This codification, which consists of provisions concerning theft, forestallment, adultery and similar offences against chastity (*'irdh*), offences committed against individuals and the related indemnities (ransoms and fines), the responsibilities of government officials and tax law, also summarizes the decrees of Islamic Law related to these matters and introduces certain regulatory decrees based on the power vested in the *Ulu al-Amr* (rulers) by *Shar' al-Sharîf*. In fact, this codification is in such a form that those empty sections of the related chapters of the books of Islamic jurisprudence were filled in with this.[32] The *Bozoq Codification* contains fifty-seven articles.

5.2.3.2 Legal Codes of Padishah Hasan (*Qânûnnâme-i* Hasan Pasha)

Again the Aqqoyunids state, the capital of which was first Diyarbakir and then Tebriz between 806-914/1403-1508, had certain codifications that were of great importance for the history of Islamic law, and are found in Ottoman archives. These legal arrangements that pertain to the Age of the Aqqoyunid state became famous as the Codes of Padishah Hasan or Hasan Pasha, in reference to the famous sultan of that state, Uzun Hasan (882/1478). These codifications, the originals of which are found in the Title-Deed Registry Books in the Prime Ministerial Ottoman Archives, remained in force for a long time in the Ottoman State as well. The subjects of the codifications, which were known by the names of places like Âmid (Diyarbekir), Mardin, Si'ird, 'Arabgir, Çüngüş, Çermik, Ergani, Hasankeyf and the like – unlike the codifications of the Dhulqâdirids – were decrees related to finance law and the administrative law. The majority of the types of taxes mentioned were also adopted in Ottoman tax law precisely as they were found. As reflections of the customs and orders that had been executed by the principalities of Asia Minor and were also preserved by the Ottoman

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[30] PA, *Tapu-Tahrîr Defteri*, No. 735.

[31] PA, *Tapu-Tahrîr Defteri*, No. 735; Akgunduz, *Osmanli Qanunnameleri*, vol. III, p. 215-83; Barkan, *Qânûnlar*, p. 124.

[32] PA, *Tapu-Tahrîr Defteri*, No. 735; *Tapu-Kadastro Genel Müdürlüğü Arşivi* (Title-Deed Cadastre General Directorate Archives), Defter No. 101 (dated 970); Akgunduz, *Osmanli Qanunnameleri*, vol. III, p. 215-83; Barkan, *Qânûnlar*, pp. 124-29.

State for a long time, these codifications are of great significance.[33]

It was actually no different in Muslim Turkish states other than those mentioned above. The Tolunids, whose capital was Egypt, the Ayyubids and the Mamlukids also took Islamic law as their basis to which they made every effort to improve. On the other hand, the academic center of the Muslim states established in Egypt was the *Madrasah of Azhar*, which had from time immemorial taught the sciences and law in Cairo. In fact, this *Madrasah* was an academic center where all kinds of legal affairs were negotiated and where Shâfi'î and Hanafî jurists held discussions at times. Of the jurists who were educated during the age of the Ayyubids, who supported sciences and scholars, (569-650/1174-1252), we should mention in particular the Turkistani Hanafî jurists 'Alâ'addîn and Fâtimah Kashanî (who merited the title of the most distinct jurist of the time because of his work *Badâyi' al-Sanâyi'*), Imâm Nawawi, Shâfi'î jurist, (676-1277); and ibn al-Qudamah, Hanbeli jurist, (620/1223). The statesmen of the Ayyubid state, who themselves preferred the Hanafî madhhab, also referred to the views of the other *madhhabs* whenever public interest so required.[34]

The political sovereigns of the Azhar *madrasah* after the Ayyubids were the Mamlukids. The Mamlukids, who preferred the Hanafî madhhab, also respected the other *madhhabs*. In fact, we see that Zâhir Baybars, a mighty sultan of the Mamlukids (648-792/1250-1390), appointed four *Sheikhulislam* from four different *madhhabs*, and formed academic commissions made up of those *Sheikhulislams* and other eminent jurists to advice on disputable issues. On the other hand, that method of quadripartite appointment with Hanafî, Shâfi'î, Hanbeli and Mâlikî *Qâdhîs* continued, with some failures, during the time of the Circassian Mamlukids and even during the Ottoman period. It will suffice here to give only the names of some of those scholars who contributed to law to a considerable degree during the Mamlukids period, also guiding the statesmen of the time: Akmaluddîn Babertî of Bayburt, who often traveled to Istanbul (886/1484); ibn al-Humâm of Sivas, regarded as a *Mujtahid* (861/1457); ibn al-Shihnah, the Hanafî *Qâdhî* of Qansu Ghawri; Mahmud 'Aynî of Ayntâb (855/1451); the Shâfi'î jurists Zarkashi, Zakariyyah al-Ansari and ibn al-Hajar al-Haithami.[35]

Having thus outlined the legal developments in states other than the Ottoman, we will now glance briefly at the legal developments during the period of the Ottoman State, with the provision that detailed information will be given in the related sections.

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[33] PA, *Tapu Tahrîr Defteri* (Title Deed Registry Book), Nos. 64 (840), 558, 735; Barkan, *Qânûnlar*, pp. 130-80; Edhem, *Duwal-i Islamiye*, pp. 407-12; Akgunduz and Jin, *Turk Hukuk Tarihi*, pp. 145-8.

[34] Edhem, *Duwal-i Islamiye*, pp. 88-97.

[35] For some historical information see Edhem, *Duwal-i Islamiye*, pp. 107-18.

5.2.4 Legal Developments in Ottoman State (1299-1926)

Our purpose here is to outline the course of legal development from the beginning in the Ottoman Period. In a sense the main topic will be introduced here. In order to be able to give historical information about this era, the Ottoman State can be divided into two periods.

5.2.4.1 Legal Developments until the *Tanzîmât* Reforms (699-1255/1299-1839

5.2.4.1.1 General Information

Before the proclamation of the Imperial Decree of Reform of 1839 (*Khatt-i Sharîf* of Gulkhane), there were different aspects to the legal system of Ottoman State: *First,* there were principles of private law, or rules of civil law which in turn taken completely from Hanafi *fiqh.* The necessity of abiding by these principles was stressed in a special decree sent by Saljuk ruler Alâ'addin to the founder of the Ottoman state, Osman I, which conferred upun him due authority and power and acknowledged his independence. According to this letter-patent, the administrative law was to remain in the hands of the existing judges, thus insuring that the sharî'ah law remains the law of the principality. Thus, in matters concerning personal law, family law, inheritance, contracts, real estate laws, the principles of *fiqh* were observed and enforced. In penal law, the rules of fiqh pertaining *al-'uqûbât* (crimes and punishments) were applied in cases of *hudûd* and *jinâyât.* But in ta'zîr crimes and penalties, the authority was given to *ulu al-amr* (state authorities and judges).[36]

Since it was an Islamic state, the Ottoman State also began to implement the decrees of Islamic Law from the very first years of its foundation. As a matter of fact, the first state officials appointed by 'Uthman Beg were *Qâdhîs* and *subashis* who were vested with the authority to execute the judgments decreed by *Qâdhîs.*[37]

Although Islamic law became the official legal system of the Ottoman State, it was influenced to a certain extent by the particular features of such a large state. That influence has been interpreted in different ways. According to some, the Ottoman State applied the decrees of Islamic Law only in certain branches of private law in a

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[36] 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. 279-80.

[37] Osman Nuri Ergin, *Majalla-i Umur-i Baladiyyah* (Istanbul: 1922), vol. I, pp. 265ff; cf. Ebulula Mardin, "Development of the Sharia under the Ottoman Empire," pp. 279-84.

symbolic fashion, while following customary law in other fields, which meant the sultan's will. Yet, according to others, Islamic Law was abandoned in the field of public law especially, or rather, since no suitable decrees were found in the books of Islamic jurisprudence in that field, the customary law was applied.[38]

In our opinion, none of these options reflects the precise truth, and those who hold these opinions cannot base those views on archival documents. The Ottoman state did not follow a different path from other Muslim states in implementing Islamic Law. In those fields where Islamic Law decreed clear judgments, applications were based on Hanafî views in books of Islamic *fiqh*. Leaving aside the application of any opinion against Islamic law, they even bound the implementation of such views against the Hanafî *madhhab* to very strict formal conditions. Nevertheless, in those fields where Islamic Law attributed limited legislative power to superior authorities and officials *(ulu al-amr)*, they followed certain legislative formalities and thus determined the laws, which were also known as customary law. They looked to the *"affairs of the servants of Allah upon the basis of* Sharî'ah *and Laws"* and settled all the legal disputes in reference to the *"Holy* Sharî'ah *and the Blessed Decrees of Laws."*[39] Since we will study the details of the subject comprehensively in the section on public law, here we will only make brief reference to certain historical developments.

In our view, the most noteworthy features of Islamic Law in that period are the following.

a) The method of teaching *fiqh*, viz. Islamic Law, and settling legal disputes on that basis which had also been followed by the earlier Turkish Muslim states, continued to be applied as it had been before. Again, the major references of the courts (*Qâdhîs*) as law were the books on *fiqh* (Islamic law). The *Qâdhîs* were chosen from those who had been educated at *madrasah*s and were well versed in *fiqh*. Moreover, eminent scholars of Islamic law were appointed to the Office of *Qâdhî 'askar*, to which the Ottoman State appointed *Qâdhîs* for a long time. For that reason, the method of studying books on Islamic jurisprudence like texts, annotations and footnotes continued in the same way as it had. The text *al-Ghurar*, written by Molla Khusraw (885/1480) a jurist during the time of Muhammad the Conqueror, and his work *al-Durar*, which interpreted the former, were used at court as manuals. On the other hand, the legal text *Multaqâ al-Abhur* by Ibrahim al-Halebi, one of the Imâms of the Fâtih Mosque, and a book called *Majma' al-Anhur* by Shaikh al-Islam Abdurrahman

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[38] Barkan, *Qânûnlar*, pp. iv-xxv.

[39] *Tawqi'i Abdurrahman Pasha Qânûnnâmesi* (Codes of Tawkii Abdurrahman Pasha) MTM, vol. I, pp. 498-500; cf. Barkan, *Qânûnlar*, pp. IXff; Ergin, *Majalla-i Umur*, vol. I, pp. 273ff.; Kafesoglu, *Türk Millî Kültürü*, pp. 346ff; *İlmiye Salnâmesi*, , (Istanbul: Mashikhat-i Islamiye, 1334/1916), pp. 316ff.

(Dâmâd) Effendi, as an exegesis of the former, are examples of this type of book.[40]

As a matter of fact, the latter text, i.e. *Multaqâ al-Abhur*, was accepted as the official legal code of the Ottoman State by the imperial edicts issued in 1648 and 1687.[41]

b) The codification of *fiqh* during the Ottoman period passed to another field. Since there were a sufficient number of systematic books on Islamic jurisprudence, the Ottoman jurists occupied themselves with the codification of books of *Fatâwâ* in which legal answers were compiled in response to questions submitted rather than with systematic *fiqh* books. Although examples of these had existed previously, books on *Fatâwâ* increased in number to a remarkable degree during the Ottoman period and had the function now assumed by decrees on application by the Supreme Court. Accordingly, every jurist who was appointed to the official position of *Fatâwâ* or actually executed important judicial offices compiled their *Fatâwâ* as special books according to the system of *fiqh* books. The method of *Fatâwâ* books, which also consisted of decrees for legal issues for which no solution had been given in books of *fiqh*, is generally that of a catechism. In most of them those legal texts that serve as the legal bases for *Fatâwâ* are provided. Some journals on *Fatâwâ* such as the *Fatâwâ* of Abu al-Su'ûd Effendi and Abdurrahim (Menteshizade) Effendi remain the most significant references for Islamic law today.[42]

c) Another noteworthy feature of that period is that the *Dîwân al-Humayûn* (the Imperial Council) and the *Padishah*, who functioned as *Ulu al-Amr* (Rulers), implemented certain important legal arrangements in certain areas under the name of *Qânûnnâme* (legal code) with the legislative power vested in them by Islamic Law. Actually, some weak views of Islamic Law falling under the authority of the authorized party, i.e. the *Wali al-Amr* (caliph, president, etc.), such as restricting certain *Sharî'ah* decrees and implementation, were preferred and applied – if necessitated by the public good – thus turning a weak view into a strong view through the preference of the authorized party. As a matter of fact, the principle those certain legal decrees may change with time points to this type of decree. Moreover, when the *Ulu al-Amr*, viz. the ruler, issued an order regarding an issue of *Ijtihâd* (opinion), in other words on a matter that was not overtly against the established decrees of *Sharî'ah*, it was adopted in Islamic Law as a principle that was to be obeyed like a law. The Majalla has explained this principle as below:

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[40] The Committee, *'İlmiye Salnâmesi*, pp. 308ff.

[41] PA, *Ottoman Archives*, YEE-14-1540, p. 14.

[42] The Committee, *İlmiye Salnâmesi*, pp. 314ff; Barkan, *Qânûnlar*, pp. XXXIVff; Mustafa Ahmed Zarkâ, *Al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. I (Dimashq: Dâr al-Kutub, 1964), pp. 201-02.

1801. The jurisdiction and powers of the judge are limited by time and place and certain matters of exception.

If an order is issued by the sovereign authority, those actions relating to a particular matter shall not be heard in the public interest; the judge may not try such action. Action, the judge may be authorized to hear certain matters only in a particular court and no other. The judge may try only those cases he is authorized to hear and judge,

An order is issued by sovereign authority to the effect that in a certain matter the opinion of a certain jurist is most in the interest of the people, and most suited to the needs of the moment, and that action should be taken in accordance therewith. The judge may not act in such a matter in accordance with the opinion of a jurist that is in conflict with that of the jurist in question. If he does so, the judgment will not be executory[43]

The Ottoman legislators who took the aforementioned legal principles as their basis actually legislated more than one thousand codes that included detailed provisions in such fields as property issues, prescription and *ta'zîr* penalties. The codifications by Muhammad the Conqueror, Sulaiman the Lawmaker and Ahmad III were among the general and most well-known examples. We will refer to these codifications, which were actually complementary parts of Islamic Law, from time to time.[44]

d) Prior to the *Tanzîmât* Reforms there were also some legislation movements that started due to the close relationship with the legal and economic life of Europe. Nevertheless, the actual date of the codification movements in today's sense was the date of the promulgation of the *Tanzîmât* Movement.

Although some researchers hold that the legal progressions display a customary law (*'urfî huqûq)* that was completely distinct from Islamic law, we should understand that that was not the case, given the information we will provide regarding public law.[45]

5.2.4.1.2 The Branches of Law Arranged by the Legal Codes (Qanunnâmes)

Indicating those branches of law arranged by the Legal Codes also means indicat-

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[43] The Committee, *Majalla-i Ahkâm-i 'Adliyyah*, (The Ottoman Courts Manual (Hanafi)), Article: 1801.

[44] Akgunduz, *Osmanli Qanunnameleri ve Hukuki Tahlilleri,* vol. I-IX (Istanbul: OSAV, 1989-1992); Muhammad Amin ibn 'Umar ibn al-'Âbidin, *Redd al-Muhtâr Alâ al-Dürr al-Mukhtâr*, Vols. I-VI, (Cairo: Maktaba al-Halabi,1967), vol. I, pp. 55, vol. 3, pp. 395-96; Zarkâ, *Al-Fiqh al-Islâmî,* 1/202ff; Barkan *Qânûnlar*, pp. IXff; PA, *Tapu Tahrîr Defterleri* (Title-Deed Office Registry Books); Karakoç, *Kulliyât -i Qawanin*, File 1; MTM, vol. I, pp. 49ff.

[45] Cf: Herbert J. Liebesny, *The Law of the Near and Middle East: Readings, Cases, & Materials*, (Albany: New York State University Press, 1975), pp. 46-63; Akgunduz and Jin, *Turk Hukuk Tarihi,* vol. I, pp. 148-50.

ing the legislative authority granted to the state by the religion in the Ottoman State and relations in that sense as well as revealing if the Ottoman Law was secular.

Because it would take too much space to expound the legal decrees, contents and *Sharî'ah* bases of the Legal Codes, here we will only look at the two most comprehensive examples of this in order to clarify what the Ottoman Legal System actually was. It is possible to classify all the Ottoman Laws into two main exemplary categories.

First, there is the essential *Ottoman law*, which covers various decrees pertaining to different branches of law. Here we will use Sultan Sulaiman the Lawmaker's law basis for our analysis since it is the most comprehensive and regular.

Second, there is Sultan Muhammad the Conqueror's Law for Organization arranging the questions of constitutional and administrative law.

Sultan Sulaiman the Lawmaker's Law consisted of three chapters.

The first chapter arranged the penalties of *ta'zîr* (reproof) pertaining to criminal law, or rather punishments of fines and beating with a stick conveyed to rulers (*Ulu al-Amr*) in four sections. Seven types of crimes and penalties of *hadd*, principles pertaining to all the crimes committed against an individual and their penalties were not included in the Law, for they had been arranged through the *Sharî'ah* rules codified in books of Islamic jurisprudence. In other words, this part of the Law dealt with only one fifth of criminal law. The source in the part that formed four fifths of that arranged by *Sharî'ah* rules was constituted by books of jurisprudence.

The second chapter arranged some decrees regarding *land law*, viz. property law and financial law. The basis of the second chapter was constituted by state property, i.e. land subject to *kharâj* (tribute), and excise taxes collected in return for the *kharâj* tax (land tax paid by non-Muslim subjects). The topic, called "*bâj*," covers the details of the chapter of '*âshir*' (tithe collector) in the books of Islamic jurisprudence. As consequence, this chapter arranges an issue of property law (land law), the origin and essence of which are based on the *Sharî'ah*, and some topics on financial law. But issues like *yaya* (infantry), *musallam* (recruits engaged in military service in lieu of tax payments) and the like pertain to "military law," which is not very important among the branches of law.

The third chapter arranged some private topics concerning "military" and administrative law. As a consequence, this general "law," which formed a basis for 90% of the Ottoman Legal Codes, codifies one fifth of criminal law, military law, solely state land under property law, some matters concerning administrative law.

Our second example is the Conqueror's Administrative Law, which arranged only some issues concerning administrative law and, by exception, "constitutional law." On the basis of these brief explanations, the following questions ought to be posed:

Were the "Ottoman Legal Codices" composed only of criminal law, finance law, property law, a single issue of property law, administrative law and "military" law? Of course not. Then what was the real legal system? It is possible to find the answer to this question through a brief scrutiny of *Shar'iyyah Records*, which were examples of applied law.

Nevertheless, it could be stated that the Ottoman Legal Codices were – with the mere and exclusive exertion of the authority Islam granted to the state – composed of military law, administrative law, certain fields of financial law, and such principles of criminal law with respect to crimes and punishments that were not contrary to Islam.[46]

5.2.4.1.3 The Ottoman Legal System According to Sharî'ah Court Records

The most significant evidence that will help us determine the most accurate view of the Ottoman legal order are the *Shar'iyyah* Records (*al-Sijillat al-Shar'iyyah*), i.e. decrees of the Ottoman courts.

Scrutiny of these records will allow us to see clearly the sources of Ottoman law, to what extent the Ottomans applied *Sharî'ah* (Islamic law), which they called *Shar'-i Sharîf*, the restricted legislative power of sultans and state officials called *ulu'l-amr*, the practical fields of consuetudinary laws, which were not definitely mentioned either in the Qur'an or in *Sunnah* (the Traditions of Muhammad) and were left, through interpretation, to the limited legislative power of those state officials of the time, viz. issues that were arranged by the Legal Codes. The adoption of any opinion on Ottoman Law without studying these records would be merely prejudicial and unscientific. Accordingly, we are now going to study closely which branches of law were arranged by *Shar'-i Sharîf* in those judgments in the *Shar'iyyah* Court Records.

A) From the exemplary records with respect to personal Law, a branch of private law, we are informed that Ottoman Law recognized natural and legal persons, and the Sharî'ah decrees regarding competence, disappearance, personal rights and similar issues were applied precisely. The essential reference in this topic is the *Sharî'ah* rules in the books of Islamic jurisprudence (*fiqh*).

Again, those exemplary records regarding *family law* informs us how Muslim family structure, becoming engaged and married, and similar institutions were formed in conformity with *Sharî'ah* rules, and the right to divorce, which is thought to have been merely at the husband's discretion, was also used by women. But such issues that were related to offspring, guardianship, and maintenance allowance, etc. were

[46] Topqapı Palace Museum Library, no. R. 1935, doc. 10/B-14/a.

judged in accordance with books of Islamic Law (*fiqh*).

The majority of those records concerning inheritance law are composed of inheritance contracts (*tahâruj*), the state's right of inheritance, heritage divisions, and exemplary wills, in all of which the principles of *Ilm al-Fara'idh* (the science of dividing an inheritance) were strictly observed. The only exception is the transfer of the disposal right for public estate, which was left to legal codes.

In the *Shar'iyyah* Records, judgments that were related to *the laws of commodities, loans and trade and*, in which the decrees of "transactions" (*mu'âmalât*) in the books of Islamic law were followed precisely, in which respect the exception was again the disposal right for public estates, which was arranged via legal codes.

Again, those examples inform us that the *Sharî'ah* rules on *states' private law* were applied; the *dhimmî* (non-Muslim subjects) were also judged – at their own discretion – by the decrees of *Shar'-i Sharîf* (*Sharî'ah*) in issues other than civil status (*al-ahwâl al-shakhsiyyah*) and devotions (*ibâdah)*.

B) Since discussions about the Ottoman law focus on civil law especially, it will be useful to study the subject in detail from the perspective of the *Shar'iyyah* Records.

In essence, we learn from those *Shar'iyyah* Records regarding criminal law that the Ottoman State applied the decrees of *Shar'-i Sharîf*. Nevertheless, the issue should be evaluated well within the frame of its own features. As is well known, crimes and penalties are classified into three main groups in Islamic Law:

a) Those crimes and penalties of *hadd*, whose degrees and elements are clearly determined in the Qur'an and *Hadiths* (Traditions of the Prophet Muhammad), which are *hadd al-qadhf* (accusing a virtuous woman of inconstancy), robbery *(hadd al-sirqah),* banditry (*qat' al-tarîq),* adultery *(hadd al-zinâ),* drinking *(hadd al-shirb)* and insurgence *(hadd al-baghy, hirâbah)*. The *Shar'iyyah* Records evidence that the Ottoman State applied *Sharî'ah* punishments fixed for these crimes exactly if the elements of those crimes were found.

b) *They are crimes that are committed against individuals*. Again, from the *Shar'iyyah* Records we know that retaliation (*al-qisas*), blood money (*al-diyah*) and other penalties determined by *Sharî'ah* rules had been precisely applied unceasingly for 500 years. Even the work of 'Umar Hilmi Effendi on this issue, called *Mi'yâr al-Adâlah* (Criteria of Justice), was adopted as a semi-official penal code towards the end of the Ottoman State.

c) There are crimes and punishments that fall outside the ones mentioned above, which in Islamic and Ottoman Law are called *jazâ al-ta'zîr, jazâ al-siyâsah al-Shar'iyyah* or *jazâ al-siyâsah*, whose degrees and methods of application are transferred to senior officials (*ulu'l-amr*). Here those decrees mentioned in the first sections of the general legal codes pertaining to Sultan Muhammad the Conqueror,

Bayezid II, Selim the Excellent and Sulaiman the Lawmaker arrange these crimes and penalties. In the *Shar'iyyah* Records the term used for penalties of that kind was *"punishment of reproof following the code."*

Those *Shar'iyyah* Records with reference to the law of trial procedure evidence that, while the Ottoman State applied *Sharî'ah* rules in this matter as well, in *rasm al-qismah* and similar exceptional issues they acted in conformity with the traditions, customs and the social and economic conditions of the time, the most outstanding example of which is the issue of deeds. Since the issue is very explicit, we will not look at the details here.

On the other hand, the judgments of Execution and Bankruptcy were arranged according to *Sharî'ah* principles. Also, records are found regarding the law of finance in Sharî'ah records which show that many problems regarding laws of finance were solved in conformity with essentials of *Sharî'ah* law.

As for administrative and constitutional law, we see various imperial edicts (*firmans*), codes of law (*yasaqnamahs*), *adâlatnamahs* and rescripts that had been arranged within the framework of the limited legislative power assigned by Islamic Law to state officials.

The most important evidence of what we have said up to this point are the *Shar'iyyah* Records we inherited from the Ottoman State. The researches recently carried out on these records by historians, jurists and theologians prove the above-mentioned facts exactly. Let us now conclude this issue with an example. The doctoral thesis of Fethi Gedikli called *Mudârabah* Partnership in the Ottoman *Shar'iyyah* Records in the XVI and XVII Centuries: The Example of Galata shows that the decrees in the Ottoman *Shar'iyyah* Records were in complete accordance with the Sharî'ah rules in the books of Islamic jurisprudence.[47]

5.2.4.1.4 Ottoman Law as a Whole

The analysis of the two essential sources of information as regards to the Ottoman Law, viz. Legal Codices and *Shar'iyyah* Records leads to the following conclusions:

A) Ottoman Law only and solely comprised administrative law, exceptionally various subjects of constitutional law, those subjects of property law with respect to state land, military law, financial law, and the crimes of *ta'zîr* (punishment by way of

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[47] Nu'man Effendi Dabbaghzadah, *Jâmi'al-Sak*, (Istanbul: 1214), pp. 288-91, 298-310, 312, 335; Ahmed Akgündüz, *Shar'iyyah Sijilleri*, vol. I (Private Law), vol. II (Public Law) (Istanbul: Turk Dunyasi, 1989); Fethi Gedikli, *XVI. ve XVII. Asır Osmanlı Şer'iyye Sicillerinde Mudârebe Ortaklığı: Galata Örneği*, PhD diss., Istanbul University, 1996.

reproof) of criminal law and penalties, and decrees regarding some exceptional issues of private law. In the issuance of decrees on the above-mentioned subjects it codified *Sharî'ah* principles –, since matters transferred to the rulers' arrangements would be decided in consideration of such secondary sources as the public good, customs and traditions. Since it could never be alleged that a state's legal system consists only of the above-mentioned subjects, it could not be claimed that those issues were arranged in disregard of *Shar'-i Sharîf*. Our explanations below will clarify this. Moreover, looking at those legal codes that form merely around 15% of the Legal Order and without examining, their contents does not allow us to call a legal system secular or anything else.

B) The study of the Shar'iyyah Records prove that in the Ottoman State Sharî'ah decrees were taken as the basis for personal law, family law, inheritance law, jus obligationum, commodity law, financial law, and for all the branches of private law regarding international private law, for the whole of procedural public law, for 80% of penal law, the majority of financial law, and the general principles of jus gentium, administrative law, and constitutional law. Those we have mentioned average 85% of all legislation.[48]

5.2.4.2 Legal Developments in the Post-*Tanzîmât* Period (1255 -1345/1839-1926)

Detailed information will be given on post-*Tanzîmât* legal developments in the sections on those developments. Therefore, we will concentrate here on certain information that indicates the course of these developments. A completely new page was opened in Ottoman history of law with *Gulkhane Khatt-i Humayûnu* (imperial edict) promulgated at the Gülkhane Park on Sunday, 26 *Sha'ban* 1255/1839. The Westernization Movement in the Ottoman State, which started with Sultan Selim III and continued with Sultan Mahmud II, began to yield fruit with the *Tanzîmât Firman* (imperial decree) that was promulgated during the reign of Sultan Abdulmajid. According to that *Firman*, *"Some new codes must be introduced so that the Ottoman State can be governed in the best way. These codes will be legislated particularly in the fields of the security of lives, property and chastity, tax Law and the army."* These laws would be prepared "in perfect pursuance to" *"Sharî'ah Law and the Decrees of Holy Qur'an."*[49] Nevertheless, despite all these statements, it is certain that there was

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[48] Ibn al-Qayyim Al-Jawziyya, *I'lam al-Muwaqqi'in*, vol. pp. 372-78; PA, YEE, no. 14-1540, p. 12ff; Cin-Akgündüz, *Turk Hukuk Tarihi,* vol. I, (Konya: Selcuk University, 1989) pp. 140, 157.

[49] *Gülkhane Khatt-i Humayûnu* (Imperial Edict of Gülhane), *Dustûr* I. Tartîb, vol. I, pp. 4-7; Halil Cin, *İslâm ve Osmanlı Hukukunda Evlenme* (Marriage in Islamic and Ottoman Codes), (Ankara: Ankara University, l974), pp. 285ff.

some duality in Ottoman law after 1839, for the Supreme Authorities, called *Ulu al-Amr*, exceeded the limits of the limited authority appointed to them through Islamic law from time to time, and they discriminated between legal regulations as codes with religious and national bases and codes with a European basis. Because we will discuss the information on those codes regarding that discrimination in the sections concerned with that issue, here we will merely indicate the outstanding features of this period:

a) The *Sharî'ah* decrees in books on *fiqh* began to be codified in consideration of the requirements of the time in the form of codes, instructions and regulations through legal arrangements. *Majalla*, which was studied in books on jurisprudence under the topic of *Mu'âmalât*, and arranged decrees regarding loans, property and procedures into a code of 1851 articles, and the Land Law, which consisted of *fatwâs* and *Irâdahs* (sultan's edicts) regarding land, are the most typical examples of this.[50]

b) On the other hand, the field of codification movements was expanded and the reasons for codification increased. Codification movements gained speed due to factors such as the development and increase of economic relationships in domestic and foreign fields, the emergence of new legal institutions because of that increase, growing companies in Europe, e.g. insurance and brokerage companies, the severe requirement for certain contractual conditions, of which the Hanafî school did not approve, such as *Pey Akcha='Urbûn* (Earnest Money), the fact that the state wanted to regulate real estate, the requirement for title deed registration and similar formal conditions, and the decrease in the number of wise Muslim jurists who were able to find *Sharî'ah* solutions to recently emerging legal problems. The limits of the legislative power appointed by Islamic Law to *Ulu al-Amr* (rulers) in the commercial law, real estate law and the law of procedures were excessive to the extreme, and some codes – like the law of criminal procedures – were adapted from Europe word for word.[51]

In our opinion, the codes that were introduced after *Tanzîmât* were of two types with respect to quality:

First were codes consisting of legal provisions that were directly related to the quintessence of the law and required systematic changes – such as if it is permissible to sell a piece of real estate in the possession of a junior, or the issue of *'Iddah* (Period). Jurists endeavored to follow the principles of Islamic Law in codifications pertaining to the aforesaid type of decrees. In criminal law they did not interfere with the penalties of *Hadd* and *Qisâs* (retaliation) but only arranged *Ta'zîr* penalties that were

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[50] Akgündüz, *Kulliyât* , pp. 364ff; Zarkâ, *Al-Fiqh al-Islâmî*, vol. 1, pp. 208-12; Karakoç, *Tahşiyeli Qavanin* (Codes with Footnotes), I/Aff; Osman Öztürk, *Majalla*,(Istanbul: 1973), pp. 10-I23.

[51] Akgunduz and Jin, *Turk Hukuk Tarihi*, vol. I, pp. 150-2; Cf. Liebesny, *The Law of the Near and Middle East*, pp. 46-63.

left to *Ulu al-Amr* (rulers). Nevertheless, it has been observed that some violations took place in that field, too.

The *second* were formal laws in which changes did not necessitate any changes in the system. The Law of Criminal Procedures, dated 1296/1879 and the Trade Law as well could be considered within this group. In the meantime, we ought to mention here that legal arrangements were also realized in such fields as insurance and interest, about which either no decree had been issued or the practice had been forbidden in Islamic law. We could say that a lot of the laws borrowed in this meaning from the West after the proclamation of *Tanzîmât*. [52]

c) That implementation by Muslim Turks who had been taking the views of the Hanafî *madhhab* for centuries as their basis began to change after *Tanzîmât* Reforms and particularly during the period close to the Republican Age. Those jurists that studied different codes in the world, especially European civil law, worked at similar domestic codes that were to be introduced from the perspective of their system and content and at preparing such issues as were in conformity with the perception and requirements of the century. That work required jurists to look at the views of the other *madhhab*s of Islamic Law that were in concordance with the requirements of the age. From then on, jurists began to refer not only to the books on jurisprudence from the Hanafî *madhhab* but also to those of the other *madhhab*s in preparing new codes, which was actually the case, though very little, in *Majalla*. On the other hand, the Decree for Family Law of 1917 became the first and most significant example of those qualities. Yet we observe that the committees of *al-Ahwâl al-Shakhsiyyah* and *Wâjibat*, which were established in the Republican Age, took that method of working as their basis. Furthermore, we see that those committees went even further and aimed to integrate European laws with the principles of Islamic law.[53]

On the other hand, the laws that were introduced by *Majlis al-Mab'ûsân* (Parliament), which became the legislator of Ottoman Law, with the constitutional monarchy promulgated after *Tanzîmât* Reforms, were disputed from the point of view of their conformity with *Sharî'ah*, which produced diverse opinions.[54]

We could summarize that the history of Islamic law in the Ottoman state can be

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[52] Mustafa Ahmed al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid* (Damascus: Dar al-Qalam, 1998), vol. 1, pp. 212-19; Cin, *Evlenme*, pp. 289ff; Öztürk, *Majalla*, pp. 10ff.

[53] Mecelle Esbâb-ı Mûcibe Mazbatası (Report on the Raison d'Etre of Majalla), Akgündüz, *Külliyât*, pp. 375ff; Hukuk-u Aile Kararnamesi Mazbatası (Report on Decree of Family Law), Akgündüz, *Külliyât*, pp. 313ff; Ukûd ve Vâcibât Komisyonları Çalışma Esasları (Working Principles of Commissions of Uqud and Wâjibat), *Jarida-i Adliye* (Judicial Gazette), 2nd Series, Issues 12-21, Supplementary Sheets, pp. 3ff; Issue I6, Supplementary Sheet, Vâcibat Komisyonu Zabıtları (Minutes of Wâjibat Commission); al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. 1, pp. 219ff.

[54] Akgunduz and Cin, *Turk Hukuk Tarihi,* vol. I, p. 152.

divided into periods. As we mentioned before, the first period runs from the foundation of the Ottoman state until Tanzîmât (1839). Fiqh books and texts of the laws (*qânûn*s and *fatwâ*s) are sources of this period. Texts of the laws put into force during the first period are recorded in the *Dîwân-i Humâyûn* (the record of the state). But with the publication of the *Taqwîm-i Waqâyi'* (an official paper giving in full all laws and decrees in 1247/1831, these texts were printed and announced therein. There followed the period from *Tanzîmât* to 1324/1906 when the constitutional system of government was reinstituted. It is also possible to classify the laws promulgated after reinstitution of constitutional government to the end of the First World War as a third period.[55]

5.2.4.3 The Ottoman Civil Law: Majalla

We will give more detailed information about *Majalla* in the fourth book (on Private Law); but we need to give here general information relating to history of Islamic law.

The full name of the Ottoman Civil Code, for which we will use the short form *Majalla* was *Majalla-i Ahkâm-i 'Adliyyah*, and was known in Europe as *Qawânîn al-Mulkiyyah li al-Dawlah al-'Aliyyah* (The Civil Code of the Ottoman State). As is evident from its name, *Majalla* was the law book that codified those *Sharî'ah* decrees concerning loans, effects and law of procedure existing in books on *fiqh* (Islamic jurisprudence) based on the restricted power of the *Ulu al-Amr* (ruler), which was expressed as legislating *Sharî'ah decrees*. As a matter of fact, the term *Majalla* means: a book comprising diverse issues. Since it is out of the question that *Majalla* would include the opinion of anyone other than those involved in Islamic law, no view concerning different *madhhab*s was stated, with the exclusion of some exceptional issues contrary to the views of Hanafîte School. Due to the reasons we will indicate below, those *Sharî'ah decrees* in *Multaqâ*, which had been adopted as a law book for centuries was developed into a law book comprised of 1851 articles, also in close reference to other books on *fiqh* (Islamic jurisprudence) and *fatâwâ* (judgments), and that law book was called *Majalla*..

The first reason for the preparation of *Majalla* was that courts, viz. *Mahkama-i Nizâmiyyah* (civil courts), had been established. But, in particular, the second reason was the fact that the judges of the Nizâmiyyah courts were incompetent. As was the case in all the post-*Tanzîmât* (Reforms), arrangements, there was pressure from the West and Western countries regarding this. Because *Tanzîmât Firman* (Edict of Reforms) had been promulgated in consultation with the West, their demands were al-

[55] Abu al-Ula Mardin, "Development of the Sharia under the Ottoman Empire," p. 290.

ways a driving force in arrangements as well. According to the Protocol of *Majalla*, another reason for the preparation of *Majalla* was the fact that there were several views on some matters in the Hanafîte School that had been officially applied by Muslim Turkish states for centuries and had, therefore, were widespread. Accordingly, it became hard to single out and apply the strongest view.

Judgments arising from *ijtihâd* (jurisprudence) may change with changing customs and traditions, the public good and smiliar circumstances; the principle here was expressed in *Majalla* as *"The amendment of some legal decrees cannot be denied with the changing times."*[56] And, truly, the social, legal and economic changes before and after *Tanzîmât* actually necessitated the preparation of a civil law. *Majalla* attempted to respond to the newly emerging requirements within the frame of Islamic Law and therefore -although in several exceptional cases- abandoned the dominant opinion in the Hanafîte School and codified one of the other views. Nevertheless, reference was made to the other schools= views in the amendments of *Majalla* as well.

The reasons we have mentioned briefly above show that legislation movements in the West and in the preparation of *Majalla* underwent similar developments in the social, economic and legal fields. There was, in fact, no similarity with respect to the other reasons. Unlike the West, *Majalla* in the Ottoman State was caused neither by developments in the science of law nor any novel movements in philosophy or law. Rather, several reasons, which we mentioned above and which were not related to the quintessence of the issue, led to the codification of the existent *Sharî'ah* decrees. This point is worth mentioning.

Deficient as it might have been, *Majalla* truly merited being the civil law of the Ottoman State, in which those *Sharî'ah* decrees concerning the procedures in books on *fiqh* (Islamic jurisprudence) were codified through the use of the restricted legislative authority granted to *Ulu al-Amr* (ruler) by Islamic Law. That legislative power was only a formal power, and the power of *Ulu al-Amr* was reflected merely in some disputed matters. Furthermore, all the *Sharî'ah decrees* bound all the Muslims in the Ottoman State as result of its ratification by *Ulu al-Amr* from the position of jurisdiction, which was indicated in its Protocol. While the fact that *Majalla* lacked chapters on such matters as family and inheritance law – which prevented it from becoming an absolute civil code – actually originated from the fact that Islamic Law granted privileges to minorities regarding civil status, the fact that *Majalla* consisted of procedural decrees was caused by the characters of that time and the structure of the Ottoman judicial institution.

The system of *Majalla* was that found in the books on *fiqh* (Islamic jurisprudence). In other words – contrary to the allegations of some – it was not casuistic.

[56] The Committee, *Majalla-i Ahkâm-i 'Adliyyah,* The Article: 39.

Perhaps, since they went into details on some issues in connection with the tradition of the codification, at the time a mixed method, which could be called *abstract /casuistic,* was taken as its basis. Its expressions are accurate and fluent, in perfect Turkish. The objection as to how a civil code could be composed of 1851 articles – aside from those on family and inheritance – is not justified, for *Majalla* consisted of decrees on not only effects and loans but also procedure. If 400-odd articles deal with procedure, 200 with commerce and 100 with general principles, there are still 1100 articles left over. In fact, the Turkish Civil Code and the Law of Obligations have more than 900 articles on goods and loans. We hold that a difference of 200 articles does not necessarily require any methodical differentiation.

The sources of *Majalla*, as were mentioned in the Protocol of Rationale, were books on *fiqh* (Islamic jurisprudence) written in conformity with the Hanafîte School, the explications and footnotes of them and books of *fatâwâ* (judgments), in brief Islamic Law. As a matter of fact, the work called *Mir'ât al-Majalla* was written to prove that very fact and to show the sources of the articles of *Majalla* in books on *fiqh*. Claims that *Majalla* was prepared under the influence of *Code Napoleon* or Roman law are false.

Majalla was a legal code comprised of 1851 articles, and it consisted of a prologue and sixteen books. The first 100 articles cover general law principles under the category *Qawâ'id al-Fiqhiyyah* (The General Rules of Islamic Jurisprudence to shed light on the general spirit of Islamic law and to serve as an exclusive guide for judges. Since these ensured easy comprehension of individual legal issues, they also constituted the sources and rationale of legal decrees. The General Rules are consistent with natural law and principles at which modern law had arrived after quite a few disputes and phases of progression. The said rules might be classified as the rules of legal interpretation, procedure, prescription, obligation, participation, administrative disposals, wrongs, and the like. Most of the remaining sixteen books of pertained to loans, and then goods and law of procedure. Yet the chapter concerning incorporations was considerably significant.

At that time the French attempted to have the Ottoman State adopt their civil law, a proposal cautiously submitted to the sultan for consideration by Grand Vizier 'Ali Pasha in 1284/1867, whereas the sultan had already instructed the grand vizier to have the *Code Civile* translated from Arabic into Turkish. Our view here is supported by the endeavors by the then charge d'affaires of France in Istanbul. In fact, Jawdat Pasha mentions in his work *Ma'rudhât* the role of the French Ambassador De Bourre, who stated plainly that various Ottoman civil servants had been made into tools of French policy. Consequently, the French ambassador convinced 'Ali Pasha on that subject, whereupon 'Ali Pasha started preparations. Nevertheless, those efforts proved to be of no avail; and in a dispute in the Council of Ministers, the motion for the adop-