

THE SOURCES OF ISLAMIC LAW

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I

According to Islam, the ultimate authority of law-making belongs to God alone. In the ideal of Islamic law, everyone including the Prophet and ruling authorities, is subordinate to God, working under His direct or indirect guidance. Islamic law, irrespective of the variety of its sources, emanates from God and aims at discovering and formulating His will. God's will is not defined once for all and it is not a static system. It is, on the other hand, dynamic and progressively reveals itself in history. As Islam gives guidance for all walks of life, *Fiqh*, the law of Islam, as developed from the beginning, comprehends the religious, social, economic, and political aspects of human existence. That is why a man acting according to the Islamic law is, in all circumstances, deemed as fulfilling God's will. Thus, Islamic law is the manifestation of God's will.

The term "law" in this context, however, includes both the moral law as well as the legal enactments particularly and more properly the first one. It would thus be more accurate to say that, while the law was revealed in the specific context of the Qur'ān and the *Sunnah*, the Muslims' duty is to embody it in legal enactments suited to the genius of the times. Indeed, a number of legal rules have been given by the Qur'ān which embody the will of God. The Qur'ānic rulings may be divided into two broad categories, namely *ḥalāl* (permissible) and *ḥarām* (forbidden). The classical legal categories owe their origin to these two terms frequently used by the Qur'ān.¹ The Qur'ān itself does not lay down the various degrees of permissibility and prohibition. These degrees came into existence later when *Fiqh* developed as an independent science. The terminology used by the early jurists is a little different from the five categories evolved later. Today we hear the terms *wājib*, *ḥarām*, *makrūh*, *mandūb* and *mubāḥ*. The classification is based on moral assumptions and is not primarily legal. Since every act of a Muslim must fall, according to the late *Fiqh* literature, under a certain legal category, this sort of classification became essential. The early works on *Fiqh* indicate that there were no such fixed categories. For example, Al-Awzā'ī uses the terms *lā bā'sa*, *ḥalāl*, *ḥarām* and *makrūh* in his writings.

The terms *lā bā'sa* and *makrūh* have been used by him in the sense of permissible and disapproved acts respectively. While discussing the case of selling prisoners of war, he remarks that the Muslims did not consider it objectionable (*lā bā'sa*) to sell female prisoners of war. They disapproved (*yakrahūna*) of the sale of male prisoners, but approved of their exchange for Muslim prisoners of war.² It seems that these two terms conveyed a sense more literal than legal. The terms *ḥalāl* and *ḥarām* recur in his writings. He uses these two terms even for those cases which are disputed and not categorically permitted or prohibited in the Qur'ān or the *Sunnah*.³

The five legal categories (*al-ahkām al-khamsah*) are not traceable in Mālik too. His terminology is similar to that of al-Awzā'ī. The terms *lā bā'sa* (no harm) and *makrūh* (disapproved) have been used by him in an antithetical sense. The terms *ḥalāl* and *ḥarām* are not very frequent in his work. He also uses the term *wājib* in the sense of obligatory, but does not draw any distinction between *fard* and *wājib* as the Ḥanafī jurists do. Of course, he distinguishes *wājib* from *Sunnah*. For instance, he says that the sacrifice of animals (on the occasion of 'Id) is *Sunnah* (recommended) and not *wājib* (obligatory).⁴ The term *makrūh* or *yukrahu* has been used by him sometimes in the sense of forbidden acts and sometimes in the sense of disapproved acts.⁵ The terms *ḥasan* (good) and *astahibbu* (I like) are also traceable in his writings. They convey the sense of recommendation—categories below *wājib*. All such terms as indicate recommendation fall under *mandūb* according to late classification.

The 'Irāqīs avoid the use of the terms *ḥalāl* and *ḥarām* except for the case permitted or prohibited categorically in the Qur'ān. That is why the use of the terms *lā bā'sa* and *makrūh* is frequent in their writings. Abū Yūsuf criticizes al-Awzā'ī for his careless use of the terms *ḥalāl* and *ḥarām*, particularly his statement: 'this is *ḥalāl* from God'. He says that he found his teachers to have disliked the practice of saying in their legal decisions: 'this is *ḥalāl* (lawful) and this is *ḥarām* (unlawful)', except when these terms were mentioned expressly in the Qur'ān without any qualification. He quotes Rabī' b. Khaytham, a Successor, who is said to have remarked: "One should not say that God made it (*ḥalāl*) or liked it, then God would tell him that He did not make it lawful nor did He like it. Similarly, one should not say that God made it unlawful (*ḥarām*); then God would say that he told a lie; He did not make it unlawful (*ḥarām*) nor did He forbid it." He adds that Ibrāhīm al-Nakha'ī is reported to have mentioned about his companions that

whenever they gave some legal decision, they used to say: "This is disapproved (*makrūh*), and there is no harm in so and so (*lā bā'sa bihī*)". Concluding, he remarks: "If we say 'this is lawful (*halāl*)' and 'this is unlawful (*harām*)' what a tall talk would it be"!⁶ But it is remarkable that Abū Yūsuf does not strictly follow this rule himself. He uses the term *halāl* even in a case which is not categorically mentioned in the Qur'ān. For instance, he says: "If a Muslim, in the enemy territory, has no animal for riding, while the Muslims there have no animals except those of *ghanimah*, and he cannot walk on foot, it is not lawful (*lā yaḥillu*) for the Muslims to leave him behind".⁷ It should be noted that this sort of prohibition is not found in the Qur'ān, yet he uses *lā yaḥillu* which generally occurs, in his writings, for explicit prohibition like *ribā'* and marrying more than four women etc.⁸ The terms *yajūzu* and *lā yajūzu* are also found in Abū Yūsuf's works.⁹

Al-Shaybānī frequently uses the terms *jā'iz* and *lā bā'sa bihī* for 'allowed' and *lā khayra* for 'forbidden'.¹⁰ He does not make any clear distinction between forbidden proper (*harām*) and disapproved (*makrūh*). The term *makrūh* or *yukrahu* recurs in his writings standing sometimes for forbidden acts and sometimes for disapproved acts.¹¹ The terms *halāl* and *harām* are no doubt used occasionally in certain cases but not so frequently.

The term *Sunnah* in the sense of recommended or as denoting a degree between *farḍ* and *wājib* according to traditional categories is rarely used in this period. In a certain case al-Shaybānī says that the recitation of *al-Fātiḥah* in the last two *rak'ahs* of prayers is *Sunnah*; but not doing so is also valid.¹² The *Sunnah* prayer said before or after *farḍ* prayers is known as *taṭawwu'* and not *Sunnah* or *nafl*¹³ as the name came to be established later. Moreover, the divisions of the *Sunnah* into emphatic and non-emphatic had not yet come into existence. Quoting a tradition from the Prophet that bathing on Friday is obligatory (*wājib*) for Muslims, al-Shaybānī remarks: Taking a bath on Friday is better (*afḍal*) and not obligatory (*wājib*).¹⁴ Since the term (*wājib*) has occurred in *Ḥadīth* with reference to the Friday bath, it is to be inferred that al-Shaybānī takes it in a non-technical sense. Hence he considers it to be *Afḍal* (better). It may be noted that taking a bath on Friday is *Sunnah* according to the classical legal categories.

Both *farḍ* and *wājib* have been used by al-Shaybānī for 'obligatory'.¹⁵ But *farḍ* has been generally used for those rules that are based on the Qur'ānic injunctions.¹⁶ This seems more technical than *wājib*. The term *wājib* no doubt stands for obligatory, but sometimes it is used in a

non-technical sense denoting that which is 'essential' or 'necessary'. So far it had not assumed its position after *farḍ* in sense and usage. There is a clear distinction between *fariḍah* and *Sunnah* in his writings. He calls 'Id prayer *Sunnah* and Friday prayer *fariḍah* and remarks that none of them should be left.¹⁷

We find the term *ḥasan* being used most frequently in al-Shaybānī's writings. It seems that this was a non-technical word used in a general sense. It stands sometimes for the approved, often for the recommended, and occasionally for the imperative.¹⁸ We think that later on this term was divided into several categories, e.g. *wājib*, *sunnah*, *mustaḥab* etc. In most places al-Shaybānī uses this term along with the term *afḍal* (better). He says, for instance, it is better (*afḍal*) if the *mu'adhḥin* puts his fingers in his ears, but in case he does not do so then it is good (*ḥasan*).¹⁹ The use of *mustaḥab* is not frequent in al-Shaybānī's works. It is mostly used in its literal sense.²⁰

In the late legal categories there appeared a clear distinction between *fāsīd* and *bāṭil*. *Fāsīd*, according to the late terminology, stands for 'corrupt' while *bāṭil* for 'null and void'. Al-Shaybānī uses these terms in several contexts, but the distinction is not very clear. Sometimes in one and the same problem he uses both these terms interchangeably which implies that he draws no such distinction between them.²¹

When we come to al-Shāfi'ī, we notice a great deal of development in categories both by way of their sub-division and by way of introduction of new categories. This sub-division is not found in Mālik's or al-Shaybānī's works. Prohibition, for example, is of two kinds according to al-Shāfi'ī. The first is forbidden proper (*ḥarām*) for intrinsic reasons, and the second is forbidden for extrinsic reasons (*tanzīhan*). He explains the distinction between them with full illustrations.²² Similarly, he divides *wājib* into two sub-categories: *wājib* proper and *wājib* optional (*fi'l-ikhtiyār*). According to him, taking a bath on account of *janābah* (major impurity) is *wājib* proper, while a bath for the purpose of cleanliness is *wājib* optional. He says that the *wājib* which occurs in the *ḥadīth* for Friday bath possibly denotes two things. First, obviously it means that Friday bath is as obligatory as the bath for a major impurity. Secondly, it might refer to the desirability of maintaining good morality and cleanliness. He refers to the example of Uṭmān b. 'Affān who is said to have offered his Friday prayer without taking a bath. Further, he argues on the basis of a *ḥadīth* of the Prophet and a tradition (*athar*) of 'Ā'ishah which indicate

that Friday bath was not meant for the validity of Friday prayer but for cleanliness. Therefore, al-Shāfi'ī does not hold that taking bath on Friday is *wājib* proper.²³

The term *mubāḥ*²⁴ which stands for actions in relation to which the Sharī'ah is neutral, appears for the first time in al-Shāfi'ī. He elaborates it and shows its implications. He mentions several prohibitions made by the Prophet in *mubāḥ* actions. For instance, he says that the Prophet forbade wearing *ṣammā'* (single robe), sitting in *ih̄tibā* condition (leaning against a single cloth by drawing together and confining one's back and shanks with it), and commanded to take food at one's own side from the plate and prohibited from taking food from the middle, and forbade halting on the road at night. He draws a distinction between such prohibitions in *mubāḥ* acts and the prohibitions proper. He thinks that this sort of prohibition was made for etiquette. Therefore, these prohibitions, according to him, do not render these *mubāḥ* acts *ḥarām*, while the prohibition in sale and marriage contracts make them *ḥarām*. Nevertheless, he regards violation in both the cases as disobedience, but disobedience in the latter is greater than in the former.²⁵

Al-Shāfi'ī also introduced the term *farḍ kifāyah* which was not used before him. He defines it as 'the *farḍ* which if performed by a sufficient number of Muslims, the remaining Muslims who did not perform it would not be sinful.' He justifies this sort of *farḍ* on the basis of the Qur'ānic verses 9: 5, 36, 41, 111, 122 and 4: 95 concerning *Jihād*. He regards *Jihād*,²⁶ saying funeral prayers of a Muslim, his burial, and return of salutation (*salām*) as *Kifāyah*. He thinks that in this category of *farḍ* the intention is sufficiency. As regards *farḍ 'ayn*, he does not use this term in his writings. But it seems that the concept is there. He divides legal knowledge into '*āmmah* and *khaṣṣāh*. Under '*āmmah* he describes five prayers, fasting during *Ramaḍān*, *Ḥajj* and *Zakāh*, and prohibition of murder, usury, theft and drinking. He remarks that for these acts the servants of God are responsible (*kullifa*). This concept, we presume, appeared in the form of *farḍ 'ayn* in the late *Fiqh* literature.²⁷

The process of development of these categories from the early schools to al-Shāfi'ī and from him onward is not very much clear from the early literature. It is, however, clear that these categories began to take their formal shape from al-Shāfi'ī and resulted in five fixed values (*al-ahkām al-khamsah*) after him with the passage of time.

II

The above categories are based on four foundations (*uṣūl*). According to the classical legal theory they are: the Qur'ān, the *Sunnah*, *Ijmā'* and *Qiyās*. The works on Islamic jurisprudence composed from the time of al-Shāfi'ī (d. 204 A.H.) onward, and certain reports seek to create the impression that the present sequence of the sources of Islamic Law was in existence in the earliest days of Islam. It is, however, difficult to accept that the present order of the *uṣūl* dates back to the time of the Companions. There are various reasons for our doubt. Firstly, the existing legal theory, is the result of historical development starting from the time of the Companions. Secondly, the technical order of the sources of law, as the reports show, is a later product; hence such reports cannot be genuine. Thirdly, the idea of the rightly-guided leaders (*a'immat al-hudā*) must have emerged after the first four Caliphs. As such, the reports showing the use of this word by 'Umar, the second Caliph, in his instructions to the judges, seem to be doubtful. Fourthly, the concept of *Ijmā'*, particularly the *Ijmā'* of the Companions, must have appeared after the first generation (i.e. the Companions). Hence the question of its existence in the legal theory in the days of the Companions does not arise. Fifthly, *Qiyās* developed in its technical form during the second and third generations, although the idea was present in the form of *ra'y* (considered opinion) during the first generation. From al-Shāfi'ī's discussions with his opponents it appears that the jurists of the early schools placed *Qiyās* before *Ijmā'*. The change in the order of the sources of law first appeared in al-Shāfi'ī; though the ground seems to have been prepared long before him. We analyse a few examples in order to illustrate that before Shāfi'ī *Ijmā'* was placed after *Qiyās*.

While discussing the principle of *Ijmā'*, al-Shāfi'ī's opponent seeks to establish the authority of *Ijmā'* in opposition to the isolated traditions advocated by Shāfi'ī. The opponent remarks that *Ijmā'* of the scholars (*'ulamā'*) on the points of detail should be followed, because they alone have the legal knowledge and are agreed upon an opinion. *Ijmā'*, according to him, stands as an authority for those who have no legal knowledge, provided the scholars are agreed. But if the scholars differ, their opinions do not constitute authority. Further, he suggests that the unsettled points in which there is difference of opinion should be referred back to *Qiyās*.²⁹ This implies that, according to him, *Qiyās-Ijmā'* process should go on simultaneously, and that *Qiyās* precedes *Ijmā'*.

In addition to al-Shāfi'ī's controversies, we find numerous other instances that confirm our view. Ibn al-Muqaffā' (d. 140 A.H.) suggests to the Caliph that he should apply his own reason to the past discussions taken on the basis of the *Sunnah* or *Qiyās*. Concluding, he remarks that the collection of these practices (*siyar*) along with the personal opinion of the Caliph may likely form the nearest approach (*qarīnah*) for agreement.³⁰ This argument indicates that Ibn al-Muqaffā' puts *Ijmā'* in the last category and assigns the third position to *Qiyās* after the *Sunnah*.

Further, Wāṣil b. 'Aṭā' (d. 131 A.H.) is reported to have said that a right judgement can be arrived at through four sources: the express word of the Book, unanimously recognized traditions, logical reasoning, and consensus of the Community.³¹ Here, too, we notice that *Qiyās* is given priority over *Ijmā'* and *Ijmā'* comes last. Ample evidence can, however, be produced to prove that a change occurred in the order of the *uṣūl* later, and the early procedure was reversed.

From a purely theoretical point of view also the interaction of *Qiyās* and *Ijmā'* is absolutely essential. If there were no *Qiyās* (*Ijtihād*) how can *Ijmā'* be conceivable? For *Ijmā'* can only be arrived at through the difference of opinion as a result of the exercise of *Qiyās* by several persons. Out of these diverse opinions, one accepted general opinion emerges through a process of gradual integration. This means that *Qiyās* (*Ijtihād*) and *Ijmā'* are two complementary factors of a continuous process. Since *Ijmā'* is an agreed and accepted opinion, it means that *Ijmā'* carries more weight and force than other unaccepted individual opinions based on *Qiyās*. This might be the reason why al-Shāfi'ī and the late jurists gave priority to *Ijmā'* over *Qiyās*. The process, however, requires that *Qiyās* must precede *Ijmā'*.

The first original source of Islamic legislation is the Qur'ān. The *Sunnah* elaborates and explains the Qur'ān. Undoubtedly it constitutes an independent source; nevertheless, it is closely linked with the Qur'ān. *Qiyās* is the systematic form of *ra'y* (considered opinion) and is based on the Qur'ān, and the *Sunnah*. *Ijmā'* is nothing but individual opinion, however it receives the universal acceptance of the Community. In a word, the Qur'ān, the *Sunnah*, *Qiyās* and *Ijmā'* are interlinked with each other; the same spirit runs through these sources for which the final authority is the Qur'ān. It is clear, therefore, that the *Qiyās* and *Ijmā'* are instruments or agencies for legislation on new problems for whose solution a direct guidance from the Qur'ān and the *Sunnah* is not available. Therefore,

Qiyās and *Ijmā'* can be considered as authoritative sources of law subservient to the Qur'ān and the *Sunnah*. The authenticity of these auxiliary sources shall be determined only by the degree of their consonance with the other two original and unchallenged sources of law.

III

We may now discuss briefly each of these sources of law. The Qur'ān, as we said before, is the primary source of legislation. Several Qur'ānic verses expressly indicate that it is the basic and main source of law in Islam.³² The Prophet lived at Mecca for thirteen years and at Medina for ten years. The period after the *Hijrah* was no longer a period of humiliation, and the persecution of the Muslims had ceased. The guidance which the Muslims required at Mecca was not the same as the one they needed at Medina. That is why the Medinese *sūrahs* differ in character from those revealed at Mecca. The latter are comparatively small, and generally deal with the basic tenets of Islam. They provide guidance to the individual soul. The former are rich in laws relating to civil, criminal, social and political problems of life. They provide guidance to a nascent social and political community. We do find the term *zakāh* in several Meccan *sūrahs*,³³ which shows that this institution was in existence at Mecca but not in its systematic and usual form. In the Meccan period this word has been used in the sense of monetary help on a voluntary basis or in the sense of moral purity. It was not an obligatory duty on the rich. Moreover, at Mecca no administrative staff was recruited for this purpose.

Apart from the controversy over the number of the legal verses in the Qur'ān, it is clear that the Qur'ān is neither a legal code in the modern sense nor is it a compendium of ethics. The primary purpose of the Qur'ān is to lay down a way of life which regulates man's relationship with God but the Qur'ān legislates equally for man's social life as it does for his communion with his Creator. The laws of inheritance, rulings for marriage and divorce, provisions for war and peace, punishments for theft, adultery and homicide, are all meant for regulating the ties of man with his fellow beings. In addition to these specific legal rules, the Qur'ān abounds in moral teachings. Therefore, it is not correct to say, as Coulson declares, that "the primary purpose of the Qur'ān is to regulate not the relationship of man with his fellows but his relationship with his Creator."³⁴

The Qur'ānic legislation is not couched in purely legal terms.

There is an amalgam of law and ethics. The Qur'ān, in fact, addresses itself to the conscience of man. That is why the legal verses were revealed in the form of moral exhortation, sometimes exhorting people to the obedience of God and occasionally instilling a keen sense of fear of God in the minds of Muslims. Hence it contains emphatic statements about certain specific attributes of God at the end of its verses, e.g. God is all-hearing, all-seeing and the like. Further, it goes without saying that the Qur'ān does not seek to be pan-legistic, i.e., to lay down all the details of life. Broadly speaking, it can be said that the legislative part of the Qur'ān provides a model for further legislation and does not constitute a legal code by itself.

A common reader begins to read the Qur'ān with the idea that it is a comprehensive book of law. But he does not find in it detailed laws and bye-laws relating to the social life, culture, and political problems, etc. Further, he reads numerous verses in the Qur'ān that lead him to believe that everything has been mentioned in this Book and nothing has been left out.³⁵ Besides, he notices that the Qur'ān lays great emphasis on saying prayer and giving *zakāh*, but at the same time he finds that it does not mention their details, the result is that many questions arise in the mind of a layman while studying the Qur'ān.

The difficulty arises from ignoring the fact that God did not reveal the Qur'ān in a vacuum, but as a guide to a living Prophet, who was engaged in a living struggle. The Qur'ān, however, instead of mentioning the minutiae, talks of basic principles. Moreover, it presents the Islamic ideology in a general form, suited to the changing circumstances in all ages and climes. It should be noted that the Qur'ān sometimes explains itself, and as a book of guidance (*hidāyah*) it did not leave untouched anything relating to the fundamentals. As regards the practical shape of life to be led by a Muslim and the community as a whole, it shows and demarcates the borders of the various aspects of life. It is the task of the Prophet to present the ideal practical life in the light of the limits enunciated by the Qur'ān. The Prophet was, in fact, sent primarily to exemplify the teachings of the Qur'ān. That is why the *Sunnah* never goes against the Qur'ān, nor the Qur'ān against the *Sunnah*.

In his work, '*The Origins of Muhammadan Jurisprudence*,' Prof. Joseph Schacht holds that "apart from the most elementary rules, norms derived from the Koran were introduced into Muhammadan law almost invariably at a secondary stage." He illustrates this by

quoting the cases of divorce, the maxim that spoils belong to the killer, and the policy of not laying waste the enemy territory, the oath of the plaintiff in confirmation of the evidence of one witness and the evidence of minors, etc. From the difference of opinion among the early jurists in the aforesaid cases, he draws the conclusion that those people argued on the basis of their personal judgements and then sought to justify their personal decisions through the Qur'ān.³⁶ This, however, appears to be incorrect, as it stands. Prof. Schacht, of course, admits that the clear rules provided for in the Qur'ān—for example, those of inheritance, evidence, punishment, etc.—were from the very beginning operative, and, in fact, formed the nucleus of the *Shari'ah*. What causes him to reach his conclusions is that, in cases where the Qur'ān did not provide any explicit guidance, the Muslims formed their own opinion. However, this considered opinion was never expected to be opposed to the spirit of the Qur'ān and if someone, at a later stage, thought of a verse which could have possible reference to this question, the opinion was revised in the light of new findings. But this certainly does not show that the norms derived from the Qur'ān were introduced at a secondary stage.

It is needless to say that Islamic law underwent a long process of evolution. The interpretation of the Qur'ān in the early period was not so complex and sophisticated as in the later ages. The legal rules not derived from the Qur'ān in the early period were sought to be drawn from it later on. The methodological inference from the Qur'ān grew more and more intricate and philosophical in the wake of the deep and minute study of the Qur'ān by the people in the later ages. The corpus of Islamic law is rich in the examples where in the same problem some jurists argued on the basis of the Qur'ān, while the others did so on the basis of traditions or personal opinion. Such differences do not imply that "in every single case the place given to the Koran" as Prof. Schacht says, "was determined by the attitude of the group concerned to the ever-mounting tide of traditions from the Prophet;" and that "the Koran taken by itself, apart from its possible bearing on the problem raised by the traditions from the Prophet, can hardly be called the first and foremost basis of early legal theory."³⁷

Prof. Schacht does admit that "a number of legal rules, particularly in family law and law of inheritance, not to mention cult and ritual, were based on the Koran from the beginning."³⁸ It is significant to note that the position of the Qur'ān as the first and foremost basis for

legal theory does not mean that it treats every problem meticulously. The Qur'ān, as we know, is not basically a code of law, but a document of spiritual and moral guidance. The presentation of the details of legal rules does not fall under the basic objectives of the Divine Book. The instances quoted by Prof. Schacht relate mainly to the cases, whose detailed manner of application has not been mentioned by the Qur'ān. Although the legal verses of the Qur'ān are quite specific; nevertheless, such verses are open to interpretation, and different rules can be derived from the same verse on the basis of *Ijtihād*. That is the reason for the difference of opinion among the jurists in the cases mentioned by the author. According to one jurist, a law can be deduced from some verse but the same verse is silent on the same problem according to the other. Hence, one argues on some point on the basis of the Qur'ān, while the other on the basis of the *Sunnah*. It is reported, for example, that during the caliphate of Abū Bakr a grandmother approached him asking her share from the heritage of her deceased grandson. Abū Bakr reportedly replied: "Neither in the Book of Allah is there anything for you nor do I know anything in the *Sunnah* of the Prophet."³⁹ Abū Bakr's reference in the first instance to the Qur'ān clearly shows that this practice owes its origin from the earliest days of Islam.

Let us take another example. A slave of Ibn 'Umar, who deserted him, committed theft. He sent him to Sa'īd b. al-'Ās, the governor of Medina, for amputating his hand. But the latter refused to do so on the plea that it is not permissible for the hand of a deserting slave to be amputated. Thereupon, Ibn 'Umar reportedly remarked: "In which Book of Allah did you find it."⁴⁰ This sort of report shows the attitude of the early generations towards the Qur'ān, and its position in the process of law-making.

The doctrine of abrogation (*naskh*) of the individual verses in the Qur'ān is also significant in Islamic jurisprudence. The classical concept of this doctrine affirms that a number of verses in the Qur'ān having been repealed are no longer operative. These repealed verses are no doubt part of the Qur'ān, but carry no practical value. This raises a very serious question: When the Qur'ān is eternal and its injunctions are valid for all ages, how can it be plausible that some of its passage have lost their practical value? It seems that this concept was not in existence in the lifetime of the Prophet. It must have emerged sometime later for reasons not definitely known to us.

IV

Another important source of Islamic law is the *Sunnah*. *Sunnah* essentially means the exemplary conduct of some person. In the context of Islamic jurisprudence, it refers to the model behaviour of the Prophet. The Islamic concept of the *Sunnah* originates with the advent of the Prophet. Since the Qur'ān enjoins upon the Muslims to follow the conduct of the Prophet, which is described as 'exemplary and great,'⁴¹ *Sunnah* became the 'ideal' for the Muslim Community.

The Qur'ān asks the Prophet to decide the problems of the Muslims according to the Revelation.⁴² As such, the basic authority for legislation, as we have already pointed out, is the Qur'ān. Nevertheless, God declared the Prophet to be the interpreter of the Qur'ānic texts. Moreover, it describes the functions of the Prophet, namely, announcing of the revelation before people, giving moral training to them, and teaching them the Divine Book and wisdom. The *Sunnah* is, therefore, closely linked with the Qur'ān and it is rather difficult to say that these are two separate sources. It is the *Sunnah* that gives concrete shape to the Qur'ānic teachings. The Qur'ān, for instance, mentions *ṣalāh* and *zakāh* but does not lay down their details. It is the Prophet who explained them to his followers in a practical form. Moreover, the Divine Book made obedience to the Prophet obligatory; therefore the *Sunnah* i.e., model behaviour of the Prophet, be it in the form of sayings or deeds, became ultimately a source of law. The Qur'ān says: "But nay, by thy Lord, they will not believe (in truth) until they make thee judge of what is in dispute between them and find within themselves no dislike of that which thou decidest, and submit with full submission."⁴⁵ This shows that voluntary submission to the decisions of the Prophet was made an essential part of the Muslim's faith.

The source of law is the "ideal *Sunnah*" or the model behaviour of the Prophet. *Ḥadīth* is the index and vehicle of the *Sunnah*. The early schools of law, as we pointed out previously, generally accepted those traditions that were well-known and practised by the Muslims. That is why the early jurists arguing on the basis of the *Sunnah* differed from one another. Their differences were mainly due to the differences in the interpretation and application of a particular case. One jurist might consider one particular incident in the life of the Prophet as more relevant than others to a given situation; while another jurist might single out another incident. Through this activity more or less

regional interpretation of the *Sunnah* came into existence. They were all termed *Sunnah* but each one of them was associated with the *Sunnah* of the Prophet and ultimately based on it.

According to al-Shāfi'ī, the *Sunnah* coming direct from the Prophet in the form of *Ḥadīth* through a reliable chain of narrators is a source of law, no matter whether it was accepted by the people or not, and even if it came in the form of an isolated tradition. He emphasised the value of the traditions from the Prophet in preference to the opinions of the Companions or their practice (*ʿamal*). In some cases, the early jurists followed the practice or the opinion of the Companions even in the presence of a tradition from the Prophet. But al-Shāfi'ī vehemently opposed this practice. He contended that in the presence of the Prophet's tradition no other authority can stand. He tried to convince his opponents that they should not set aside a *Ḥadīth* from the Prophet even if it came through a single narrator, unless another *Ḥadīth* on the same subject carried over by a chain of reliable narrators is available. In case of a conflict between two reports from the Prophet, the one which is more authentic must be preferred.⁴⁶

'Al-Shāfi'ī interprets the word '*ḥikmah*' occurring in the Qur'ān together with 'the Book' as the *Sunnah* of the Prophet.⁴⁷ He argues that since God made obedience of the Prophet obligatory on people, this means that what comes from him comes from God.⁴⁸ He tends to prove that the *Sunnah* of the Prophet is revelation from God. He reports that Ṭā'ūs, a Successor, possessed a document which contained a list of wergilds (*uqūl*) which were divinely inspired. Again he says: "Whatever the Prophet made obligatory he did so with divine revelation, because there is a kind of revelation which is recited (*mā yutlā*) and there is another kind which is sent to the Prophet but is not recited. This revelation forms the substance of the *Sunnah*." He elaborates this point by quoting several reports to show that there used to come to the Prophet revelations in addition to the Qur'ān.⁴⁹ It appears that the concept of two kinds of revelation, namely, *jalī* (potent) and *khafī* (assumed), begins from al-Shāfi'ī, rather earlier, as the reports quoted by him indicate. We do not think he was non-committal in regarding the *Sunnah* of the Prophet as revelation, as Prof. Schacht claims.⁵⁰

The next important basis of law which is, in fact, a supplement to the *Sunnah*, is the opinions and practice (*āthār* and *amal*) of the Companions. From the early days of Islam the Muslims have treated the legal decisions of the Companions as one of the major sources of Islamic law. The reason for this is that the Companions were the immediate

observers of the *Sunnah* of the Prophet. Having been in association with him for years together they were acquainted not only with his sayings and behaviour but also with the spirit and character of the ideal *Sunnah* left by him for the coming generations. Their legal opinions, despite differences, represented the spirit of the Prophetic *Sunnah*. That is the reason why the jurists of the early schools frequently argued on the basis of their legal decisions. The practice and opinions of the Companions were so important a source of law that Mālik sometimes sets aside a tradition from the Prophet in their favour. Al-Shāfi'ī, for instance, reports a tradition on the authority of Mālik that Sa'd b. Abī Waqqāṣ and Ḍaḥḥāk b. Qays were once discussing the problem of performing 'Umrah along with *Hajj*. Ḍaḥḥāk said that only a man who was ignorant of God's commands would do so. Further, he remarked that 'Umar b. al-Khattāb, the second Caliph, had forbidden this practice. Rejecting his opinion, Sa'd replied that the Prophet had performed 'Umrah along with *Hajj*, and he himself did so with him. Mālik reportedly said that the opinion of Ḍaḥḥāk was more to his liking than that of Sa'd, and that 'Umar knew the Prophet better than Sa'd.⁵¹ Why the Medinese sometimes follow the opinion of the Companions or the local practice and set aside Prophetic traditions is a serious question.

The Companions played a vital role in establishing the *Sunnah* of the Prophet. Hence it became more or less customary with the early schools to argue on the basis of the practice of the Companions. They must have thought that the action of the Companions was based on the Prophetic *Sunnah* or they were better equipped to take decisions in the light of the *Sunnah*. But al-Shāfi'ī was strongly opposed to this view. He does not regard the sayings of the Companions or their practice as necessarily the *Sunnah* of the Prophet unless there exists a tradition from the Prophet. In the absence of a tradition from the Prophet, he no doubt follows the opinions of the Companions. In case of difference of opinion among them, he prefers the opinion of the first four Caliphs to those of others, or the opinion which coincides with the Qur'ān, or the *Sunnah* or *Ijmā'* or the opinion which is correct according to *Qiyās*.⁵² His utmost endeavour, however, was to adhere to the *Sunnah* of the Prophet to which he gave absolute priority and which he radically distinguished from the subsequent practice and opinions.

The Successors, too, played a major role in the development of Islamic law. Since they were closely associated with the Companions, their opinions carried weight in law. Their legal decisions constituted

a source of law for the early schools. We find cases where the opinion of a Successor was even preferred to that of the opinion of a Companion.⁵³ Early works on *Fiqh* are replete with the legal opinions of the Successors. The early schools quote their opinions in support of their doctrines, and occasionally make them the sole basis of their arguments. After quoting traditions from the Prophet and the Companions, Mālik quotes the practice and opinion of the Successor. But it does not follow that he always adheres to them, because on occasions he does not act upon the traditions from the Companions too. Abū Yūsuf clearly bases the principle of 'abstaining from infliction of *ḥadd* punishment on the accused in case of doubt on the opinions of the Companions and the Successors.⁵⁴ As the practice and opinions of the Companions and the Successors reflected the *Sunnah* of the Prophet, the early schools regarded them as an important source of law.

We have previously shown that al-Shāfi'ī regards the opinions of the Companions as a source of law. Sometimes he calls it *taqlīd* to follow their practice.⁵⁵ But he does not make any mention of the Successors in his theory of law. It appears from *Kitāb al-Umm* that he follows the opinions of the Successors in support of his thesis and not as the basis of his argument. He quotes, for instance, Shūrayh, al-Shabī, Sa'īd b. al-Musayyib 'Atā', Ṭā'ūs and Mujāhid in cases where the evidence given by a slanderer (*qādhif*) is accepted.⁵⁶

V

Another source of Islamic law is *Qiyās* (analogical deduction). It is, in fact, a systematic and developed form of *ra'y* (considered opinion). The most natural and simple mode of reasoning is *ra'y* which played a paramount role prior to the prevalence of *Qiyās*. In the early days of Islam, *ra'y* was a generic term that covered practically different modes of *Ijtihād*. We find its use in the Prophet's time as well as after him by the Companions. The Qur'ān and the *Sunnah* no doubt provide us with legal rules with regard to the individual and social life of Muslims. But human life, being dynamic, requires laws that should change with the changing circumstances. *Ra'y* is an instrument that enables the coverage of diverse situations and enables Muslims to make new laws according to their requirements. The period of 'Umar's Caliphate abounds in such instances.

We first meet with a semi-technical use of the term *Qiyās* in the

letter of 'Umar b. al-Khaṭṭāb, the second Caliph, to Abū Mūsa al-Ash'arī (d. 44 A.H.). 'Umar is reported to have advised him to acquaint himself with the parallels and precedents (of legal cases) and then to weigh up the cases (*qis al-umūra*), deciding what in his judgment would be the most pleasing to God and nearest the truth.⁵⁷ From such beginning as the reported advice of 'Umar, *ra'y* appears to have developed later into the legal and technical concept of *Qiyās*, viz. to find out a common factor between two similar cases and to apply one to the other. It is, however, noteworthy that the result after the application of *Qiyās* by different persons is not necessarily one and the same. The reason is that the actual location of the common factor (*illah*) is open to difference of opinion. As such, a rule inferred by applying *Qiyās* is always subject to challenge, and can be rejected by any opposed group.

Qiyās, according to al-Shāfi'i, comes last in the order of the *uṣūl*. He regards it as weaker than *Ijmā'*. He does not permit the use of *Qiyās* in the presence of a tradition (*kh̄abar*). He treats *Qiyās* as a thing permitted for the sake of need (*manzilatu darūratin*). As *tayammum* is allowed, he argues in the absence of water during a journey, so is the case with *Qiyās*. Further, he contends that since no *tahārah* is valid with *tayammum* when water becomes available, similarly use of *Qiyās* is invalid in the presence of *kh̄abar*.⁵⁸ He seeks to prove the validity of *Qiyās* on the basis of the Qur'ānic verse: Whencesoever thou comest forth turn thy face toward it so that men may have no argument against you.⁵⁹ From this verse he infers that the use of *Qiyās* in reasoning is obligatory on Muslims. Explaining this verse he remarks that the man who is far away from the *Ka'bah* depends on indications (*dalā'il*) like stars and mountains. Similarly, he says, one should depend on the indications to reach a certain conclusion.⁶⁰ These pro-*Qiyās* and pro-*Ijtihād* arguments are, in fact, directed towards the refutation of the use of unrestricted *ra'y* which he thinks arbitrary and subjective.

VI

The last source of Islamic law, according to the process, is *Ijmā'*. Previously, we have explained its position in the order of the legal theory. *Ijmā'* is a principle for guaranteeing the veracity of the new legal content that emerges as a result of exercising *Qiyās* and *Ijtihād*. It is, in fact, a check against the fallibility of *Qiyās*. There are points which have been universally accepted and agreed upon by the entire

Community. This sort of *Ijmā'* that allows no difference of opinion is generally confined to obligatory duties (*farā'id*). This is known as *Ijmā'* of the Community. On the contrary, there are certain rules which we may call positive law that are agreed upon by the learned of a particular region, but they do not carry the force of the consensus of the Community. This is known as *Ijmā'* of the learned (*Ijmā' al-Khāṣṣah*). The *Ijmā'* of the learned (*Ijmā' al-Khāṣṣah*), in early schools, was a mechanism for creating a sort of integration among the divergent opinions which arose as a result of the individual legal activity of jurists. It seems that the whole system of law in the pre-Shāfi'i period was held together and strengthened by this institution. It represents the average general opinion of each region in respect of the positive law. It sets aside the stray and 'unsuccessful' opinions circulating in each locality. It is remarkable that the *Ijmā'* of the learned is not the name of the decisions on legal issues taken by an assembly of Muslim jurists. It emerges, in fact, by itself through a process of integration, and creates for itself a position in the Community.

It is significant to note that the concept of al-Shāfi'i about *Ijmā'* is different from that of the early schools. He holds, as is evident from his writings, that *Ijmā'* is something static and formal having no room for disagreement. That is why he is reluctant to accept the validity of the *Ijmā'* of the learned as a source of law due to the differences among them. Only the *Ijmā'* of the Community is valid according to him. In support of his argument he says that the Community at large cannot neglect the *Sunnah* of the Prophet. However, the individuals may neglect. Further, he contends that the Community—God willing—can never agree on a decision opposed to the *Sunnah* of the Prophet nor on an error.⁶¹ As such, he restricted *Ijmā'* only to the *farā'id*. *Ijmā'*, therefore, according to al-Shāfi'i, became merely a theoretical source of law rather than a practical one.

According to al-Shāfi'i, legal knowledge may be derived primarily from the Qur'ān and the *Sunnah* of the Prophet, then from the *Ijmā'* of the Community. In cases these sources are silent on some point, he follows first the agreed opinion of the Companions. Then in case of differences among them he adopts the opinion of one of the first four Caliphs. He argues finally on the basis of *Qiyās* which is strictly based on the Qur'ān and the *Sunnah* of the Prophet alone.⁶² In fact, al-Shāfi'i confines legal knowledge to the two basic sources, namely, the Qur'ān and the *Sunnah* which he calls *aṣlān* (two bases). He regards

these two sources as independent entities ('*aynān*), while *Ijtihād*, according to him, is not '*ayn* (entity), but something created by human intelligence.⁶³ He believes that the Qur'ān and the *Sunnah* provide answers to all possible problems concerning religion.⁶⁴ Thus, the whole emphasis throughout his writings centres around these two sources.

NOTES

1. Qur'ān, 2 : 173, 275; 4 : 19; 5 : 3, 96.
2. Abū Yūsuf, *al-Radd'alā Siyar al-Awzā'i*, Cairo, n.d., pp. 61-62.
3. *Ibid.*, pp. 70; 96.
4. Mālik, *al-Muwattā'*, Cairo, 1951, Vol. II, p. 487.
5. *Ibid.*, Vol. I, p. 230, and Vol. II, p. 984.
6. Abū Yūsuf, op. cit., pp. 72-73.
7. *Ibid.*, p. 15. His remark كيف يدل هذا مادام في المعصية و يحرم بعد ذلك is significant. See also p. 66.
8. *Ibid.*, pp. 97, 105.
9. *Ibid.*, p. 70.
10. Al-Shaybānī, Muḥammad b. al-Ḥasan, *al-Aṣl*, Cairo, 1954, pp. 3, 4, 5, 6 passim.
11. Al-Shaybānī, *al-Jāmi' al-Ṣaḡhūr*, Lucknow, 1291 A.H., pp. 8, 9, 10, 92 passim.
12. Al-Shaybānī, *al-Muwattā'*, Deoband, n.d., p. 104.
13. *Ibid.*, pp. 162, 192.
14. *Ibid.*, pp. 72-73.
15. *Ibid.*, pp. 16, 76, 103.
16. Al-Shaybānī, *al-Siyar al-Kabīr* (with commentary by al-Sarakhsī), Cairo, 1957, Vol. I, pp. 23, 94, 187.
17. Al-Shaybānī, *al-Jāmi' al-Ṣaḡhūr*, op. cit., p. 20.
18. Al-Shaybānī, *al-Jāmi' al-Ṣaḡhūr*, op. cit., pp. 10, 37 and *al-Muwattā'*, op. cit., pp. 105, 110, 123 passim.
19. Al-Shaybānī, *al-Jāmi' al-Ṣaḡhūr*, op. cit., p. 10.
20. *Ibid.*, pp. 112, 149, and *al-Siyar al-Kabīr*, op. cit., Vol. I, p. 226.
21. Al-Shaybānī, *al-Aṣl*, op. cit., pp. 3, 6, 20, 86 and 100 passim.
22. Al-Shāfi'i, *Kitāb al-Umm*, Cairo, 1325 A.H., Vol. VII, p. 265. Cf. *al-Risālah*, Cairo, 1321, p. 46 f.
23. Al-Shāfi'i, *al-Risālah*, op. cit., p. 43.
24. The term *mubāh* has been used by al-Shaybānī in non-technical sense. See his *al-Siyar al-Kabīr*, op. cit., Vol. I, pp. 191, 318.
25. *Ibid.*, p. 49.
26. It appears that the term '*kifāyah*', a subdivision of obligatory, was first introduced by al-Shāfi'i, yet the concept of *farḍ 'ayn* and *kifāyah* was already in existence before him. For, al-Shaybānī regards *Jihād* as obligatory (*wājib*) on all the Muslims in case of emergency, and insists that this struggle should continue at all times. In case the Muslims *en masse*, he adds, abandon this struggle, all will be sinful. Further he remarks that if the purpose of *Jihād* is fulfilled by some of them, the rest will be exonerated from the performance of this duty. This view has been

attributed by him to Abū Ḥanīfah Al-Shaybānī, *al-Siyar al-Kabīr*, op. cit., Vol. I, pp. 187, 189.

It seems that institutions like funeral prayer, *Jihād*, return of salutation in a gathering, must have been performed by some of the Muslims and not by all and sundry from the early days of Islam. This practice has been described by al-Shāfi'ī as *kifāyah* in legal terminology.

27. Al-Shāfi'ī, *al-Risālah*, op. cit., pp. 50-51.

28. Ibn Ḥazm, *al-Aḥkām fi Uṣūl al-Aḥkām*, Cairo, 1345 A.H., Vol. VI, p. 29 f.

عن الشعبي قال : كتب عمرالى شريح : اذا اتاك امر في كتاب الله فاقض به ولا يلفتك عنه الرجال - فان لم يكن في كتاب الله فيما في سنة رسول الله صلى الله عليه وسلم - فان لم يكن في كتاب الله ولا سنة رسول الله صلى الله عليه وسلم ناقض بما قضى به ائمة الهدى فان لم يكن في كتاب الله عزوجل ولا في سنة رسول الله صلى الله عليه وسلم ولا فيما قضى به ائمة الهدى فانت بالخيار ، ان شئت ان تجتهد رأيك وان شئت ان توأمرني ، ولا أرى مؤامرتك اياي الا خيرا لك -

Cf. Ibn 'Abd al-Barr, *Jāmi' Bayān al-'Ilm wa faḍlīhi*, Cairo, n.d., Vol. II, pp. 56-57.

29. Al-Shāfi'ī, *Kitāb al-Umm*, op. cit., Vol. VII, p. 255.

30. Ibn al-Muqaffa', *Risālah fi'l-Ṣahābah* in *Rasā'il al-Bulaghā'*, Cairo, 1954, p. 127.

31. Abū Hilāl al-'Askari. *Kitāb al-Awā'il* quoted in the article '*Islām mayn 'ilm wa hikmat ka āghāz'*' (beginning of learning and philosophy in Islam), by Shabbīr Aḥmad Khān Ghawrī, *Ma'ārif*, 'Azamgarh, April, 1962, Volume LXXXIX, No. 4, p. 278.

وهو اول من قال : الحق يعرف من وجوه اربعة : كتاب ناطق ، وخبر مجتمع عليه ، وحجة عقل ، والاجماع من الامة -

32. Qur'ān, 5 : 47, 48, 49, 50.

33. Qur'ān, 7 : 156; 23 : 4.

34. Coulson N. J., *A History of Islamic Law*, Edinburgh, 1964, p. 12.

35. Qur'ān, 6 : 98; 7 : 52; 12 : 111.

36. Schacht, Joseph, *The Origins of Muhammadan Jurisprudence*, Oxford, 1959, pp. 224, 226.

37. *Ibid.*, p. 224.

38. *Ibid.*, p. 224.

39. Mālik, op. cit., Vol. II, p. 513.

40. *Ibid.*, p. 833.

41. Qur'ān, 33 : 21; 68 : 4.

42. Qur'ān, 5 : 48, 49.

43. Qur'ān, 16 : 44.

44. Qur'ān, 3 : 164.

45. Qur'ān, 4 : 65.

46. Al-Shāfi'ī, *Kitāb al-Umm*, op. cit., Vol. VII, pp. 177, 179, 184 passim.

47. Al-Shāfi'ī, *al-Risālah*, op. cit., p. 13.

48. *Ibid.*, p. 7.

49. Al-Shāfi'ī, *Kitāb al-Umm*, op. cit., Vol. VII, p. 271.

50. Schacht, Joseph, op. cit., p. 16.

51. Al-Shāfi'ī, *Kitāb al-Umm*, op. cit., Vol. VII, p. 199.

52. *Ibid.*, p. 246. Cf. al-Shāfi'ī, *al-Risālah*, op. cit., p. 82.

53. Al-Shaybānī, *al-Siyar al-Kabīr*, Hyderabad Deccan, 1335, Vol. II, p. 260.
54. Abū Yūsuf, *Kitāb al-Kharāj*, Cairo, 1302 A.H., p. 90.
55. Al-Shāfi'ī, *Kitāb al-Umm*, op. cit., Vol. VII, pp. 221, 246.
56. *Ibid.*, p. 41.
57. Al-Mubarrad, *al-Kāmil*, Cairo, 1936, Vol. I, p. 14.
- ... الفهم الفهم فيما تلجلج في صدرك مما ليس في كتاب ولا سنة ثم اعرف الاشباه
والامثال فقس الأمور عند ذلك ، واعمد الى اقربها إلى الله واشبهها بالحق ...
58. Al-Shāfi'ī, *al-Risālah*, op. cit., p. 82.
59. Qur'ān, 2 : 150.
60. Al-Shāfi'ī, *al-Risālah*, op. cit., p. 66 passim; Cf. *Kitāb al-Umm*, op. cit., Vol. VII, p. 272 f.
61. Al-Shāfi'ī, *al-Risālah*, op. cit., p. 65.
62. Al-Shāfi'ī, *Kitāb al-Umm*, op. cit., Vol. VII, p. 246.
63. *Ibid.*, Vol. VI, p. 203.
64. *Ibid.*, p. 271; Cf. *al-Risālah*, op. cit., p. 4.