A PERSPECTIVE ON ISLAMIC LEGAL METHODOLOGY IN TERMS OF OBJECTIVES OF LAW: (A COMPARATIVE ANALYSIS WITH SPECIAL REFERENCE TO ENGLISH EQUITY AND *ISTIHSĀN*)

A thesis submitted to the University of Wales Lampeter in fulfilment of the requirements for the degree of Doctor of Philosophy

by

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Year: 2010

Declaration/Statement

This work has not been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

Signed ……

Date……

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This thesis is the result of my own investigations, except where otherwise stated. With reference to new Academic Handbook 2010/11, a small section of thesis, i.e. part of short chapter 5 includes portion of my own unpublished earlier work which I had fully re-investigated and restructured for this thesis. Where correction services have been used, the extent and nature of the correction is clearly marked in a footnote(s).
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Dedication

I dedicate this humble work to my mother and late father
whose loving care and compassion made me what I am. May God Bless them.

Acknowledgement

Praise and thanks be to God Almighty and pray for peace and blessings on His Messenger and his family

It is an honour and a privilege to express my gratitude first to those who have helped me directly to make it possible to complete this study. I wish to express my sincere thanks to Dr. Dawoud El-Alami, my supervisor, who has painstakingly guided and helped me throughout my study. Not only was he always there whenever I needed him but he would stay behind long hours to make sure that I made the best use of our meetings and he would give me all the assistance needed and encouraged me in my down moments. I am also grateful to Dr. Mrs Kate El-Alami for being kind at all times and for being helpful with her valuable advice and encouragement.

I would also like to thank the University of Wales for giving me the privilege of joining their distinguished Institution in Lampeter. I thank the secretaries and the staff of every Department of the University with whom I had contact for being so kind and helpful every time I needed their assistance.

There are many people who have in one way or another inspired me towards this study. I am particularly indebted to two of my late great friends Dr. M L M Anver and Br Abu Ubaida who first instilled in me the desire to choose the path I have chosen. I also wish to express my gratitude to Dr A M M Mubarak, Br A L M Suhaib Master and Br M S M Wazeer who never fail to inspire me every time I am in their company. It is a privilege to have known Dr Jibriel Oyekan, Br Ebrahimsa Mohamed, Br Abdul Wahid, Dr Jamil Sherif, Br M H Farouqi, Br Hamard, Br Ziaudin Sardar, Ustad Salim Kiyani and Dr S L M Refai among many others and I thank them all for having had the benefit of their knowledge and experience. I express my special gratitude to Dr Jamil Sherif and Br Abdul

Wahid for being always there to help me out whenever I needed them. I also thank Br Nazeem Sheriffdeen for all his help whenever I needed it and my young nephew Omar Siddeek for being available at short notice. I am grateful to my family, sister Masooda, brothers Suhaib, Zacky and others for all their help, and grateful to my little sister, Ajmul, for her sharp and pointed questioning of my ideas. I thank my two nephews Zameel and Azmil Fauzer for their penetrating and constructive criticisms and yet being always there to help.

I express my sincere thanks to Mr Stephen Darlington who painstakingly read through my draft.

My special thanks to my wife Mareena and daughter Aisha for all their sacrifices and being so patient, and without whose help and understanding it would not have been possible to complete this study.

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Transliteration Table

Consonants. Arabic.

Initial: unexpressed medial and final.

ء ’	د: d	ض: d	ك: k
ب: b	ذ:dh	ط : t	ل : l
: t	: r	: z	: m
: th	ز: z	ع : ‘	ن: n
ج-: j	س: s	غ : gh	ه : h
ح-: h	ش: sh	ف : f	و : w
خ-: kh	ص: s	ق : q	ي : y

Vowels, dipthongs

Short: __-: a __: i _’ : u

Long: آ : ā ي _: ī و ’ : ū-

Dipthongs: و : aw

ي : ay

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Full title of thesis:

A PERSPECTIVE ON ISLAMIC LEGAL METHODOLOGY IN TERMS OF OBJECTIVES OF LAW: (A COMPARATIVE ANALYSIS WITH SPECIAL REFERENCE TO ENGLISH EQUITY AND *ISTIHSĀN*)

Abstract

This study examines the development of Islamic legal methodology in terms of the principles laid down by the Prophet and strictly followed by the companions. These principles manifest an underlying theme or objective for the development of Islamic legal methodology: the law must be interpreted in terms of human interest, for achieving benefit and avoiding harm. Islamic history has subsequently seen tensions between proponents of innovative legal methods which were not in accordance with the principles introduced by the Prophet and his companions. Accordingly, this thesis will trace to what extent the legal methodology developed in terms of this objective of law, during the three major stages which began with the Prophet followed by his companions and then up to the time of Ibn Taymiyah (d.728/1327AC), and its role in the twenty-first century.

Although the main focus of this thesis is on the overall development of the methodology in the context of the objective of its law, the subsidiary sources of Islamic law, like *istihsān* had an important role, just as equity has in the English legal system. Not surprisingly, therefore, *istihsān,* the earliest, most flexible and versatile of the subsidiary sources which have broader objectives, is claimed to be similar, if not identical, to equity. Both have contributed in different ways to the development of the respective legal methodologies. Therefore, because of their many similarities but also because they are structured differently and operating at different levels, they are also analysed here in relation to legal methodology. This allows an examination within the context of objectives of law, as to whether there is any new role for *Istihsān* in the overall development of Islamic legal methodology, to meet the challenges of the twenty-first century.

Chapter 1

Introduction

The fundamental principles of Islamic legal methodology were firmly laid down by the Prophet and unreservedly followed by his companions by setting examples and creating precedents for future generation of jurists and scholars. These principles, derived from the Qur'ān, exemplified by the Prophet and extensively applied by his companions in arriving at decisions and judgements, manifest an underlying theme: Islamic law must be interpreted and applied in terms of its objectives based on the human interest of achieving benefits and avoiding harm. Accordingly, Islamic legal methodology must be constituted to fulfil that function.

This thesis will trace the development of Islamic legal methodology during its three major stages in terms of the objectives of law since the time of the Prophet, and evaluate whether in its present form it can meet the challenges of the twenty-first century. The procedure adopted for this purpose is through an analysis of the legal methodology instead of the traditional manner of investigation, beginning with the primary sources, the Qur'ān, the Sunnah of the Prophet and then referring to the subsidiary sources and methods of reasoning, such as consensus, *ijmā,* analogical reasoning, *qiyās,* 'juristic preference', *istihsān,* public interest, *maslaha*, etc.

1.1 Searching for Islamic legal methodology

The next three chapters will examine the methodologies adopted by the Prophet, followed by his companions and then by the succeeding few generations of jurists and scholars up to about the time of Ibn Taymiyah (d.728AH/1327AC). These periods constitute three major important divisions in the development and each had a distinct form of its own. The first principles for the development of the Islamic legal methodology are stated in the Qur'ān. However, the person who laid the foundation through his practices and sayings, the Sunnah, was the Prophet. He may not have spoken in such clear terms as to create a legal theory or a legal methodology as understood in modern times, but the underlying principles are clear from the manner in which the Qur'ānic texts were introduced, interpreted and applied by the Prophet at different stages in his life.

There is clear evidence, for example, to show that the Qur'ān gave proper consideration to the existing conditions of the Arabian society at that period. Furthermore, it also took into account the various phases of that society's progress, all of which are reflected in the types of substantive law that were revealed at different times, the language used and the degree of emphasis made. For instance, at first, the consumption of alcohol was not prohibited, and prohibition was only gradually introduced. Even fighting in self-defence was at first not permitted[1] but only allowed at a later stage, and similarly the prayer of five times a day was not obligatory and the 'five times' rule was introduced later. There is sufficient evidence to show that the Prophet, in introducing these Qur'ānic texts, he emphasised some aspects, reiterated others, explained and expanded yet others, building a community based on obedience to law. In drafting constitutions, signing treaties, and in many of his sayings and actions there are clear indications that he was laying down a foundation for a methodology based on the objectives of law to emerge through further refinement and articulation by his followers.

[1] Kamali, M H., *Principles of Islamic Jurisprudence*, (Cambridge: Islamic Texts Society, 2003), pp.504, 505

The refinement and articulation needed were to take place through the Prophet's duly guided companions, particularly by the 'rightly guided Caliphs'. These companions of the Prophet, during their lives, had used extensively the fundamental principles and methods introduced by the Prophet. The most articulate and innovative as far as laying a firm and a well defined foundation for the development of the legal methodology was one of the closest companions of the Prophet and the second Caliph, 'Umar ibn al-Khattāb. Jurists and scholars of all ages have attested, on the one hand to 'Umar's unshakable commitment to the ways of the Prophet, his Sunnah, and on the other to his courage for introducing innovative ways of interpreting and applying Islamic law in terms of its overall aims and objectives. He was described as '…in managing affairs, as absolutely unique'[2]. In this period, the period of the companions, we witness in general the followers of the Prophet actively engaged in implementing the Prophet's methods, the Sunnah, in every phase of life in the way he intended. However, it could be argued that their efforts were more intense, particularly that of Caliph 'Umar, in building a firm foundation for the proper development of the legal methodology.

The next stage is concerned with the successors of the Prophet's companions, *tābiūns,* and a few successive generations of jurists. During the first phase of this third stage we witness an intensive search by jurists and scholars for a proper methodology of law. Although the standard set by the Prophet and his companions for a legal methodology based on the overall objectives of the law was accommodated to some degree, for various reasons, that standard did not occupy the place it deserved among many jurists' and scholars' legal discourse. Instead, most of them were involved in theological disputes and debates over the right form of literal and strict interpretation of the textual sources. Eventually, due to the dedication and efforts of selected individual jurists several methodologies emerged reflecting the thoughts of different jurists and their respective schools of law, the final form establishing well defined and highly

[2] As-Suyuti, Jalal ad-Din, *The History of the Khalifahs Who Took the Right Way,* (London: Ta-Ha Publishers Ltd., 2006), p.123

structured rules to interpret and explain the textual sources and derive rules from them. However, as observed by many later jurists and scholars, the methodology as formulated and which emerged did not adequately incorporate the principles of the objective based law or provide a procedure or machinery to apply such principles in arriving at judicial decisions.

In the second phase of the third stage jurists and scholars since the time of Al-Hakīm al-Tirmidhī in the third century of Hijra, to Abū Mansūr al-Māturīdī (d.333AH/944AC), Al-Juwayni, Al-Ghazālī, to Ibn Taymiyah[3], and several other jurists of this period who themselves subscribed to the established legal methodology, *Usūl al-fiqh*, were becoming increasingly concerned about this deficiency in the existing methodology of Islamic law. They were emphasising more and more the need for the methodology to take into consideration the principles initiated by the Prophet and developed by the companions. This challenge was taken seriously by the scholar and jurist Abū Ishāq al-Shātibī who produced his theory of the Higher Objectives and Intents of Islamic Law, which some argue is the way forward for the development of the law. However, some having accepted in principle the idea behind al-Shātibī's theory, have pointed out that among others the existing Islamic legal methodology, *Usūl al-fiqh* is so well structured, firmly established and therefore too valuable to be replaced.

In the fifth chapter, *istihsān* is compared with English equity in order to ensure whether it could have a future role in the development of the legal methodology. Following this, in the concluding chapter, an attempt will be made to answer the research question, and further reference to the contents of this chapter will be made later below.

Included in the theme of the thesis, as indicated earlier, is the objectives of law, the fundamental principles of which are revealed in the textual sources. These principles which were implemented by the Prophet and his companions are based on human interest, both here and in the hereafter. The Lawgiver, therefore,

[3] Raysuni, A., *Imam al-Shâtibî's Theory of the Higher Objectives and Intents of Islamic Law*, (Herndon, USA: The International Institute of Islamic Thought, 2005) , p. 33

through his revelation and his messenger, intends a wise purpose. He has amply illustrated the meaning of wise purpose in terms of human interest aimed at achieving benefit and avoiding harm, firstly through His Book, the Qur'ān and then through the teachings and practices of the Prophet. If the purpose of Islamic law is as stated above then the question immediately arises: what are the reasons for exploring the development of Islamic legal methodology?

The methodology developed by the jurists and scholars since the time of the companions of the Prophet no doubt has its root in the Islamic law, Sharī'ah. Nevertheless, the methodology has gone through several changes and refinements over the centuries and has raised issues which as some scholars have pointed out have implications for the future development of the law, particularly in today's environment. It is only with proper understanding of the past, what issues are there, how it all happened and what implications they have for the future development of the law, could one begin to evaluate what needs to be done. Furthermore, it will help to focus on the ultimate objectives of the law and not to be distracted by rapidly changing events, and take short term measures at the expense of long terms benefits. As Mahamassani points out generally[4], among historical events there are relationships that connect the present to the past and therefore it is vital to understand the events that occurred in history and the reasons for the way they developed. Similarly, in order to understand the old there is no alternative to comparing it with the new and learn the way it has progressed and the reason for its survival.

When the objectives of Islamic law, as indicated earlier, are compared with the way the methodology was later formulated, developed over the years and implemented at the present time, many jurists and scholars have expressed very differing views. They range from accepting the status quo, satisfied with the way the methodology functions to the outright replacement by alternative forms. Those who are reasonably satisfied such as Mahdi Zahraa[5] and others with the existing methodology, *Usūl al-fiqh*, point to the fact that it was developed over

[4] Mahamassani, *S.,Falsafat al-Tashri fi al-Islam, The Philosophy of Jurisprudence in Islam,* (Leiden: E.J. Brill, 1961), p.x

[5] Zahraa, M., Unique Islamic Law Methodology and The Validity of Modern Legal and Social Science Research Methods for Islamic Research, *Arab Law Quarterly*, 2003, p.215

the centuries by eminent jurists with meticulous care over how to interpret, authenticate and validate the primary sources. These jurists, according to Zahraa, have left 'no stone unturned'[6] in their effort to find solutions to all the problems Muslim societies faced. On the other hand there are those who seem to advocate replacing it with *maqāsid al-sharīah*, such as Ibn Ashur, for example, because he has concerns[7] over the issue of conventional proofs in *Usūl al-fiqh* whether they can be considered as certain or even near certain.

Usūl al-fiqh, otherwise called the Islamic legal methodology and described as having 'a rich variety of doctrines,' derives its name from Imam al-Shāfi'ī's monumental work first written on legal theory and called *al-Risāla*[8]. It has served the Muslim community well over the centuries. And as Zahraa says, no doubt, very eminent jurists have contributed to make *Usūl al-fiqh* what Hallaq has described as having 'a rich variety of doctrine'. Nevertheless, because of various alleged limitations, shortcomings, and technical difficulties over the interpretation and application of the various methods and rules developed by the subsidiary sources of law, and the complex forms of reasoning, many scholars and jurists have expressed some concern. Furthermore, the concept of *maqāsid,* which once formed the fundamental basis of Islamic law, remained at the periphery of law for a time, has now been refined and formulated as a new theory or Philosophy of Islamic law.

Amidst these debates and controversies over how the Islamic legal methodology should be constituted for the 21st century, there remain two issues beyond any doubt or controversy. First, the place of the Qur'ān and the Sunnah of the Prophet as the fundamental immutable primary sources of law, and second, the absolute need of a methodology or a subsidiary source of law to derive the rules of law from the primary sources. One of the earliest and the most versatile and flexible but sometimes unfairly criticised methods to emerge for deriving the rules was the subsidiary source, *istihsān,* believed to have been formulated by Abū Hanīfah

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[6] ibid., p. 217

[7] Ibn Ashur, M A., *Treatise on Maqâsid al- Shar'îah*, (Herndon USA:The International Institute of Islamic Thought, 2006), p. 13

[8] Hallaq, W. B., *A History of Islamic Legal Theories,* (Cambridge: Cambridge University Press, 2002), p. viii, 21

but the principles of *istihsān* themselves were in fact applied even during the time of the 2nd Caliph 'Umar ibn al-Khattāb.

In this research endeavour *istihsān* is compared with English equity, because of its close similarity,[9] its flexibility and capability for accommodation and also as representing the rest of the subsidiary sources of law. There are several other reasons for the comparison, the most obvious one being to examine the similarities and differences in spite of the nature of their origin and the method of their development. All other reasons, the most important in terms of this research aim, are first related to causes and effects of consolidation of doctrines of equity and its incorporation, as will be discussed in the concluding chapter, and secondly related to their relevance or otherwise to *istihsān* and its relationship to *Usūl al-fiqh* and *maqāsid* in terms of the possible consolidation of subsidiary sources and eventual incorporation.

1.2 Research objectives and methodology

The purpose of this study was to answer the **main research question** which is to determine:

While English common law is being supplemented by equitable doctrine, can Islamic legal methodology, supplemented by secondary sources like *Istihsān,* fulfil the objectives of law and meet the challenges of the 21st century?

During the process of my study a structured programme of research was undertaken with the limited aim of determining to what extent the Islamic legal methodology of law during the three main stages developed in terms of the objectives of law. The three stages include the period of the Prophet, followed by his companions and finally the next few generations of jurists. *Istihsān* and English equity were compared to determine if the former could assume a new

[9] Kamali, M. H., *Principles,* p. 323

role in the development of the methodology in the future.

The **method** used to achieve the objective of the research could be described as follows:

Since the major part of the study required to make reference to the development of the methodology in a historical context, most of the research is historical and analytical. For that part of my study concerned with comparing *istihsān* with English equity, the method adopted is mostly comparative and to some extent analytical and descriptive. Accordingly, libraries, books and published materials provided the sources necessary for the study. Further details about the sources are given below in the literature review.

The designed programme of study and the methods adopted enabled me to answer the following questions which are also linked to the main research question stated above. Furthermore, the chapters in this thesis, in answering these following questions will explore and analyse the issues raised.

1. Did the Prophet, when he started his mission, have a concept of what would be the objective or purpose of Islamic law or what it ought to be; or did he make a direct literal interpretation of the Qur'ānic laws and derive the rules? Did he formulate a legal methodology or at least initiate a method?

2. If the Prophet did not make a literal interpretation but had a concept of what would be the objective of the law or ought to be according to the Qur'ān, how did he manifest this and show this in his examples or actions?

3. How did the Prophet's companions and their successors who were much nearer to him than the later generations of Muslims in terms of space /time dimension, consider what the objective of the law would be or ought to be and how did they approach interpreting both the texts of the Qur'ān and the Sunnah? Did they make a literal approach or consider the overall spirit of the texts. What evidence is there for their actions?

4. What major legal developments took place during the time of the great Imams, jurists and scholars of the next few succeeding generations? What impact did they have during their own times as well as at later stage?

5. What and why were the differences in the legal methodologies formulated by the founders of the various schools of law and developed by their respective followers?

6. Were those legal methodologies showing any fundamental differences between what the Prophet and his companions conceived the object of the law to be on the one hand and what these jurists perceived it to be on the other?

7. What were the causes of different subsidiary sources of law and methods of reasoning emerging and then evolving to supplement and interpret the primary sources? Could it have been beneficial for the better development of the whole Islamic legal methodology if one form of subsidiary source of law emerged or at least they have been consolidated or unified into one.

8. What is the purpose of comparing the subsidiary source of the Islamic principle of *istihsān* with the English doctrine of equity? Why not compare another subsidiary source of Islamic law, and what is unique in the choice of *istihsān*? Are there any lessons to be learned?

9. When and why did the concept of *maqāsid* achieve its significance? What is its relationship with *istihsān* and *Usūl al-fiqh*, the Islamic legal methodology?

10. What are the fundamental principles of *maqāsid* as developed by *usūli* jurists, the followers of *Usūl al-fiqh* and how do they differ from those formulated by Imam al-Shātibī? And what are the major issues concerning *Usūl al-fiqh* vis-à-vis *maqāsid*?

11. Has the comparison made between *istihsān* and equity produced any worthwhile results considering that *istihsān* together with other subsidiary sources of law remain separate and independent whereas equity has consolidated all its

doctrines and has been absorbed into the main stream legal system by Act of Parliament?

12. Are there any serious issues in the legal methodology, *Usūl al-fiqh,,* that need to be or can be rectified or improved without any major changes or its replacement?

13. Has the research revealed any major concerns about the way *Usūl al-fiqh* is constituted which could interfere with the proper functioning of all its doctrines and methods in the 21st century?

14. Considering all the analysis and the research undertaken on various aspects of the Islamic legal methodology what short and long term proposals can be made which would be a new contribution to knowledge?

The next five chapters in this thesis will try to answer the above questions.

Chapter 1: **Introduction**

Chapter 2: The Prophet initiates legal methodology: This chapter will briefly examine the concept of methodology of law and evaluate the development of an early legal structure in terms of the objectives (*maqāsid)* of law. It will begin with the methods of the Prophet, and compare it with the early phase in the development of the English legal methodology. Accordingly, the chapter will be divided into five sections covering this period. Section 1: Identifying the law in the early Islamic legal methodology, section 2: The Qur'ān empowers the Prophet, section 3: Emergence of Islamic legal methodology based on Objectives of the Law, section 4: Methodology for deriving the objectives of the Lawgiver and Section 5: Early phase of the English legal system.

Chapter 3: Companions of the Prophet reinforce his methodology: This will explore the way the fundamental principles of Islamic legal methodology initiated by the Prophet were developed after him by his companions. The six sections into which this chapter is divided will show that the legal principles and methodology

during this period were the result of the efforts to fulfil the objectives of the law and establish justice and fairness in society. Section, 1: Islamic Legal Methodology a continuous Process, Section 2: Managing Differences in Legal Opinion, 3: Developing the methodology by the first four Caliphs, 4: The impact of regional interest and sectional factions on methodology, 5: The Islamic magistrates, the *qādī* system, 6: English legal methodology during Norman times since 1066.

Chapter 4: Period of formulation of legal methodology. This chapter will trace the development of legal methodology during and after the time of the companions. The methodology was now beginning to take a different direction and will be explored with the main focus on changes and developments in legal methodology during the Umayyad and the early Abbasid periods. Greater attention will be given to the methodologies developed by the major jurists/imams beginning with Abū Hanīfah. It will further investigate the differences in their legal reasoning, formulation of principles and their own respective approaches to developing the methodologies. Although Islamic law during this period achieved an independent status and the Caliphs of this time gave their support to the development of its methodology, law slowly began to lose its objective based progression.

The Muslims of the first few generations adopted various rational approaches to derive the rules from the primary textual sources but always adhering to the spirit and higher objectives of the law. The three most important elements they adopted and which they claimed to have been rooted in the textual sources themselves either explicitly or implicitly were the concepts of *ijtihād, qiyās and ijmā*. These concepts which were first initiated by the previous generations of Muslims have undergone several changes over the ages, and with these changes they continued to play an important role in the way the legal methodology has since developed. From the time of the Prophet himself these concepts, with or without their associated technical terms, were instrumental in one way or another in shaping the development of Islamic legal methodology. In spite of their importance, however, these concepts as applied and developed by later generations of jurists exhibited several limitations and restrictions.

In the following sections various definitions and meanings of these concepts that have been advanced, and the manner in which the following generations of jurists and scholars understood and implemented the concepts will be explored. This will be followed by an examination of the similarities and differences of various legal principles put forward by the great Imams, particularly, Abū Hanīfah, Mālik ibn Anas, Al-Shāfi'ī and his Risāla, and Ibn Hanbal. It will take a closer look at the reasons behind the varying approaches each Imam took and what impact they made at the time. What were the reasons each one gave for their differing views? How did their disciples and immediate followers receive those ideas? What were the contributions of these Imams' immediate followers and how did they treat the masters' ideas?

This chapter will examine at what stage and in what form a 'formal' legal methodology began to evolve. In terms of modern thoughts on the essential ingredients for a legal methodology, how and when did this initial phase come into effect? In what ways did the methodology adopted by the jurists of this period differ from that of the time of the Prophet and his immediate followers, particularly with respect to judicial decision making? At what stage and in what form did *ijtihād* and differing forms of imitation, '*taqlid'*, begin to affect judicial reasoning and decision making?

The chapter will be divided into six sections. Section 1: Changing phase of legal methodology, Section 2: Abbasid rule attempts to repair damage, Section, 3: *Ijtihād, qiyās* and *ijmā* guide juristic thinking, Section,4: Emergence of legal structures under four Sunni imams, Section, 5: Classsical jurists define purpose of law, and Section 6: Development towards *Maqāsid al-sharī'ah*.

Chapter 5: ***Istihsān* and equity in the development of legal methodology**. This chapter will focus on the attempt to develop a just and fair legal methodology by means of *istihsān* and equity in the Islamic and English legal systems, respectively, both supplementing their primary sources and at the same time fulfilling the aims and objectives of the law.

Even long before the formulation of Islamic legal theory there were attempts to interpret Sharī'ah in terms of its higher objective, to perform *ijtihād* (literally, exertion, juristic effort to deduce the law) to have a broader perspective and to deliver decisions which were fair and equitable. The companion of the Prophet 'Umar ibn al-Khattāb himself was exercising his own *ijtihād* and applying the principles of *istihsān* on numerous occasions. Not surprisingly, therefore, Imam Mālik has been reported as saying '*Istihsān* is nine-tenths of human knowledge', and Coulson reminding that 'Islam represents an advanced stage in the development of legal thought.'[10]

There is a general perception that *istihsān* is similar to equity, and some scholars have commented on this relationship as parallel or similar but not 'identical'[11]. There are fascinatingly, no doubt, many features common to both systems, which must be remarkable considering that each system was erected on different fundamental principles and each had its origin at different time and place. This being the case, a comparative study would provide a broader perspective of the principles and issues. As for Muslims, they were once the pioneers in the art of learning, developing and accommodating, wherever possible, new ideas from far and wide. This chapter will attempt to explore and analyse the similarities and differences between them with a view to have some understanding of each system's approach and methodology.

Both *istihsān* and equity possess voluminous materials relating to their historical process, doctrinal basis and legal decisions, and, therefore, I needed to be selective in the choice of sources for this study.

The chapter consists of five sections, and as some of the contents in each section as well as in each sub-section are related to one another they may on occasion appear to overlap. However, the way they have been arranged and analysed, it is hoped, will make it easier to appreciate the similarities and differences in their origin, development and approach.

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[10] Coulson, N .J., *A History of Islamic Law*, (Edinburgh: Edinburgh University Press, 2001), p.40

[11] Kamali, M. H., *Principles,* p.323

For instance, the origin and development of both *istihsān* and equity are treated, analysed and their differences highlighted in the first two sections. In a similar manner, the next two sections deal with the principles and practices, while the final section highlights the most distinguishing features of the two systems. In this section while distinguishing their characteristic features, I have tried to show that in spite of equity having somewhat similar aims and objectives it is not as same as *istihsān.* Their origin, conceptual basis, developmental process, methodology, and administration, are all different. I have attempted to explain how the two systems originated and what impact the Natural Law Theory had on equity, and the Sharī'ah 'Law' on *istihsān*. The aim of this chapter is to evaluate *istihsān* in relation to equity, both being early attempts at different periods in history to formulate an objective based source methodology to supplement the primary source of law.

Conclusion: In the conclusion the same theme of the last chapter will be taken up, this time in order to explore the way in which the two theories developed in their separate ways: *istihsān* along with other subsidiary sources of law remaining independent and equity consolidating all its doctrines and being incorporated by Act of Parliament into the English Legal System. However, first, drawing partly from previous chapters, the development of the objective based Sharī´ah will be investigated from the earliest times to Imam al-Shātibī's theory or the philosophy of Islamic law, *maqāsid al-sharī´ah* and secondly its implications to the traditional legal methodology, *Usūl al-fiqh* and *istihsān* will be examined. Finally, as indicated earlier, an effort will be made to answer the main question raised, taking into account the different issues under the methodology of law, *Usūl al-fiqh*, theory of *maqāsid al-sharīā´ah*, the role of *istihsān* and their possible role in the national legislature of a Muslim state.

The subject area chosen for this research interest is such that there is a wide selection of sources available to choose from but quite a few of them deal with the same topics as dealt with by other sources. Therefore, I have to be selective in my choice of sources for this research. However, I am confident that the sources chosen have been adequate for the limited purpose of the research aim.

1.3 Literature review

Among the modern Islamic scholars, the one who could be considered to have contributed the most on Islamic law, and importantly to have covered those areas of most relevance to me, namely legal theory and methodology in a historical context and, in particular, with the development of law during the formative and classical periods, is W.B. Hallaq. Some of the theoretical parts of this book were not directly relevant to my work. However, they still provided me useful information to gain a proper perspective of my area of research. Four of his major works, considered in this review, have made major contributions towards understanding the development of Islamic legal methodology in an historical context. An important work among them is ***A History of Islamic Legal Theories, An Introduction to Sunni Usūl al-fiqh***[12]**.** The choice of the term 'theories' rather than theory in the preface to his book, Hallaq explains, is deliberate because this particular work is concerned only with the essential features of a variety of ideas that emerged in the course of a long historical process of development of Islamic law and its methodology, all of which cannot be synthesised into one theory. In many ways I too faced similar difficulties in making my selection of areas for research and analysis.

The reason that only a small portion of the book is devoted to the origin of Islamic legal methodology becomes clear when one reads his separate work, ***The Origins …***that came out later and is discussed below. In '***A History…***' mentioned above he analyses some of the important methodological principles of Islamic law which contributed to the rapid development of the legal system, principles such as the role of language, the issue of authenticity and authority of Prophetic traditions, the doctrine of abrogation, and the formulation of the 'secondary sources' like *ijmā* (consensus) and *qiyās* (analogical reasoning), and of particular interest to me,

[12] Hallaq, W.B., *A History of Islamic Legal Theories, An Introduction to Sunni Usûl al-fiqh,* (Cambridge: Cambridge University Press, 2002)

istihsān, 'juristic preference'. With respect to the 'secondary sources' he has analysed their theoretical basis but not sufficiently enough about their historical developments. For a fuller understanding of each of its principles, methods and application one may need to refer elsewhere, such as to Hashim Kamali's ***Principles of Islamic Jurisprudence,*** [13] which is reviewed later in this section.

Hallaq, in the first chapter, called the 'formative' period, traces the way in which the Prophet and the companions interpreted and applied the revealed law[14], thereby laying the framework for Islamic legal methodology. In fact, in his recent book, ***The Origins and Evolution of Islamic Law*** he emphatically states that the Qur'ān did point towards elaboration of a basic legal structure. In one of the earlier works he edited, ***The Formation of Islamic Law*** he further elaborates four basic conditions that need to be fulfilled before a legal system can be formally recognised to have a legal structure. However, considering the way the Islamic legal methodology developed, many will question the appropriateness of these criteria being applied to the Islamic legal system.

In the ***A History…*** he then offers a brief survey of the legal methodological developments in other parts of the Muslim regions, particularly in Iraq, and the contributions made by the local scholars like Abū Hanīfah. He then moves on to discuss the work of al-Shāfi'i and his treatise ***al-Risāla***. Analysis of Al-Shāfi'i's contribution and his work ***al-Risāla*** takes much of the space. This is not surprising considering that Hallaq points to the report that ***al-Risāla*** was the first work written on legal theory to be described as *Usūl al-fiqh*. Many Shāfi'ites and indeed several scholars tend to the view that ***al-Risāla*** is not merely a theory; it is a methodology in its own right.

Later in the book he evaluates several theoretical works by some contemporary writers, some of which could have the potential to be considered legal methodology. He chooses some works from two areas for detailed analysis, one

[13] Kamali, M. H., *Principles of Islamic Jurisprudence*, (Cambridge: The Islamic Texts Society, 2003)
[14] Hallaq, W. B., *A History*…pp.1-13

of which he calls the 'Religious Utilitarianism' supported by Muhammad Abduh and Rashīd Ridā, and the other is called 'Religious Liberalism,' favoured by Fazlur Rahman, Muhammad Shahrūr and Muhammad Sa'īd Ashmāwī. He observes several shortcomings, for different reasons, in both theoretical frameworks when regarded as methodologies. He finds that Religious Utilitarianism relies too much on the concept of public interest, *maslaha,* and less on religious texts, whereas Religious Liberalism finds itself unable to be accepted by the majority of the Muslim community because of its novel conception of law and legal methodology. Nevertheless, a study of these areas provided me with an insight into how and why a methodology of law could fail or succeed.

He devotes over forty pages of the book to al-Shātibī's work dealing with the principle of *maqāsid al-Sharī'ah*, the objective of law as the basis of Islamic legal methodology. Hallaq considers that because al-Shātibī was surrounded by a particular culture and a social environment, his work, too, was influenced by them, and yet he grants that al-Shātibī and his theory have attracted many modern thinkers. Some others may argue that in spite of Al-Shātibī being influenced by his environment, his theory is well founded and argued, although they may reject the theory on other grounds. However, for a fuller discussion of *Maqāsid al-Sharī'ah* and the theory as presented by al-Shātibī we need to refer to three recent books.

The three books dealing with almost similar themes, *maqāsid al-Sharī'ah* as a legal methodology are, ***Shātibī's Philosophy of Islamic Law***[15] by Muhammad Khalid Masud, ***Imam Al-Shātibī's Theory of the Higher Objectives and Intents of Islamic Law***[16] by Ahmad Al-Raysuni, and ***Treatise on Maqāsid al-Sharī'ah***[17] by Muhammad al-Tahir Ibn Ashur. As can be seen from the titles of the three books all of them analyse in one way or another Islamic law in terms of its objectives or *maqāsid al-Sharī'ah*. However, there are some differences in

[15] Masud, M.K., *Shâtibî's Philosophy of Islamic Law*, (Islamabad, Pakistan: Islamic Research Institute, 1995)
[16] Al- Raysuni, A., *Imam al_Shâtibî's Theory of the Higher Objectives and Intents of Islamic law*, (Herndon, USA: The International Institute of Islamic Thought, 2005)
[17] Ibn Ashur, M al-Tahir, *Treatise on Maqâsid al-Sharî'ah*, (Herndon, USA: The International Institute of Islamic Thought, 2006)

approach in that the first two books explore the ideas of *maqāsid al-Sharī'ah* as developed by Imam al-Shātibī in several of his works, in particular ***Al-Iʿtisām*** and ***Al-Muwāfaqāt***. Whereas Ibn Ashur's work is an independent treatise on *Maqāsid* but he quotes quite frequently from and make references to al-Shātibī's work. All three trace the historical development of the principles of *maqāsid* with each author having his own points of emphasis. Raysuni's book has a useful section on objectives and the prerequisites for the practice of *ijtihād.* Although he has allocated some space to discuss the views of earlier jurists on *ijtihād*, his main focus is on al-Shātibī's view. Nevertheless, I found that it was easy to compare the old with the new in one place. Raysuni's and Ashur's works have plenty of reproduced translated versions of the original texts from several of the works of many classical jurists and scholars. I have used some of these texts in my work

Hashim Kamali's book, ***Principles***…, as the title indicates deals mostly on Principles of Islamic law and not as extensively on methodology, and in particular on the historical development. Nevertheless, a deeper study of some of these principles enabled me to have a better grasp of how the methodology was formulated in the first instance. At the end of the book the chapter on *Usūl al-fiqh* provided me some valuable information. In the other book, ***Equity and Fairness in Islam***[18], Kamali treats the subject of *istihsān* under different headings, and in particular I found the chapter on the '*Review of Methodology of Istihsān'* of particular interest to me. In chapter six, titled, '*The Argument against Istihsan'* he has presented quite eloquently his counter arguments showing the critics' weaknesses and in particular against Al-Shāfī'i's misplaced criticism of *istihsān.*

Hallaq's latest work, ***The Origins and Evolution of Islamic Law***, compared to ***A History of Legal Theories***, goes much deeper and in greater detail over the historical events that took place and affected the development of legal methodology during a limited period of three centuries after the emergence of Islam. It goes into some detail in exploring the *qādī* system that originated with the Prophet himself and developed into a fully fledged judiciary of its own. There is some duplication of materials, particularly in Chapter 6 under the title *'Legal*

[18] Kamali, M .H., *Equity and Fairness in Islam*, (Cambridge: The Islamic Texts Society, 2005)

Theory Expounded', materials already covered in the book ***A History***… A somewhat similar work limited to exploring the development of the law and its methodology during the first two years of Hijrah is Ahmad Hasan's ***The Early Development of Islamic Jurisprudence***[19]. Unlike Hallaq's ***The Origins***…this book, as the author says, is based mainly on the works of Imam Mālik, Abū Yūsuf, al-Shaybāni and al-Shāfi'i. What it does not include in any detail, and what is relevant to the study, is the development of the *qādī* system and the judiciary. But his comparative analysis of the role of *ijtihād* at various stages of legal development is very instructive.

Hallaq's book on ***Authority, Continuity and Change in Islamic Law***[20] is based on the theme that a system of law must have an underlying authority. Although the book does not deal directly with the development of legal methodology, some of the areas analysed are of fundamental importance to the legal system, like the role of *ijtihād* with particular reference to the founders of the later Schools of law and the methodologies they introduced. Similarly, the impact of *taqlid* at different levels and in different ways after the period of the companions and their followers which he traces in Chapter 4 had direct consequences to the development of the methodology.

The Formation of Islamic Law[21] edited by Hallaq consists of fourteen chapters taken out of the original source materials contributed by different scholars and published in various journals or books. The areas covered in several chapters are relevant to the methodology of Islamic law. For example, in ***The Birth-hour of Muslim Law*** by S.D.Goitein, the author questions those who claim that the Qur'ān contains very little legal matter and thereby implying that there were insufficient rules to form a legal structure and a methodology. He then shows the very extensive and wide ranging nature of the legal rules contained in the Qur'ān. In Hallaq's own two chapters, one entitled, *Was al-Shāfi'i the Master Architect of Islamic Jurisprudence* and the other, *Early Ijtihād and the Later Construction of*

[19] Hasan, A., *The Early Development of Islamic Jurisprudence*, (Islamabad, Pakistan: Islamic Research Institute, International Islamic University, 2001)
[20] Hallaq, W.B., *Authority, Continuity and Change in Islamic Law,* (Cambridge: Cambridge University Press, 2001)
[21] Hallaq, W.B., *The Formation of Islamic Law*, Ed. W.B. Hallaq, (Aldershot: Ashgate Publishing Limited, 2004)

Authority both tend to analyse issues that were relevant to Islamic legal methodology from two different perspectives.

Similarly, Christopher Melchert in his ***The Formation of Sunni Schools of Law*** traces the various steps in the formation of the schools and from such information it is possible to evaluate what possible effect they had on the development of legal methodology. On the other hand ***A History of Islamic Law*** [22] by N.J.Coulson is not a book on the methodology of Islamic law as such but, throughout the book, such as chapter 1 on *Qur'ānic Legislation*, Chapter 2 on *legal practice in the 1st Century of Islam* and chapter 6 on *Classical Theory of Law,* there are references relevant to the formation and subsequent development of the methodology.

Coulson's book remained an important text book and a source of easy reference both because of its small size and because it claims to give a complete description of the history of Islamic jurisprudence from the very beginning. But today we have high quality in-depth researched publications with detailed analysis supported by historical evidence, which could eventually take the place occupied by Coulson's work. This could also happen because Coulson's work holds some similar views to that of Joseph Schacht such as those relating to the date of origin of Islamic law, and the influence of foreign elements in its laws, all of which have since been found to be in error. The scholar who takes up some of the ideas suggested by Coulson in his '**A History**…' for the reform of the Islamic legal methodology is Norman Anderson. In his book, ***Law Reform in the Muslim World*** [23] he traces the various reform movements and the philosophy and methodology of law reforms that had taken place up to the end of the third quarter of last century. He highlights some of the tensions and conflicts that arose in different regions between the 'conservatives' and the 'reformists' that hindered the development of an effective and viable legal methodology.

[22] Coulson, N.J., *A History of Islamic Law,* (Edinburgh: Edinburgh University Press, 2001)
[23] Anderson, N., *Law Reform in the Muslim World,* (London: University of London, Athlon Press, 1976)

Although from the title of Imran Nyazee's book, ***Theories of Islamic Law***[24]**,** one would not expect it to be a work on methodology of law, there are in fact several sections devoted to evaluating important elements that make up the effective Islamic legal methodology. For example, the chapter on '*The Meaning of Usūl al-fiqh'*, while trying to define that term it shows how it came to be considered as the methodology of law. The chapter 9 on '*Common Features of Interpretation'* shows the various forms of interpretation used from the earliest times by scholars and jurists and those who were responsible in the formulation of legal methodologies. Chapter 10 on *'Theories of General Principles'* traces briefly the methodologies developed by the first four great jurist imams, beginning with Abū Hanīfah. Nyazee devotes the last four chapters to trace, analyse and discuss the 'Purpose of Law' or *maqāsid* of law and the role of *ijtihād* in legal methodology.

The book by Yasin Dutton entitled, ***The Origins of Islamic Law***[25] is based on the concept of Madinan *amal*, practice of the people of Madina. The 'practice' includes the *ijtihād;* and the 'people of Madina' includes the Prophet followed by his companions and their immediate successors. The concept of *amal* was developed by Imam Mālik who strongly argued in its favour and presented it as the most authoritative form of law because it is claimed to have been derived from the practices of the people who came directly from the same place as the Prophet and who had easy access to those most knowledgeable about the ways of the Prophet and his companions.

On the early development of English law and equity, the most comprehensive work covering from the earliest period in the history of the English legal system until the middle ages is Sir Frederick Pollock's and Frederic William Maitland's most authoritative classic, ***The History of English Law***[26], first published in 1893. From the wealth of information contained in this voluminous book which consists of over 600 pages, it takes some effort to be selective as to what is strictly relevant in order to determine how and why a certain feature of the English legal system became important to its development at a particular point in time. For

[24] Nyazee, I. A. K., *Theories of Islamic Law*, (Islamabad, : Islamic Research Institute, 1945)
[25] Dutton, Y., *The Origins of Islamic Law*, (Surrey: Curzon Press, 1999)
[26] Pollock, Sir F., Maitland, F.W., *The History of English Law,* 2nd Ed., .(Cambridge: The University Press, 1923)

example, in the first chapter dealing with the period from 300AD to the Anglo – Saxon times, which the authors call 'the dark age in legal history', there is no clear indication of unanimity on any specific legal principle or institution.

Even in the second chapter titled 'Anglo-Saxon Law', the authors confess that most of the information on law is 'so fragmentary and obscure…' However, as one proceeds further one can picture the initial elements of a legal system slowly emerging, although the elements forming part of the system are not backed up, as the authors complain, by evidence or any form of written records. Nevertheless, the quality, standard and the wide ranging nature of the information contained in this monumental work is invaluable.

A much more recent work, ***Historical Foundation of the Common Law***[27] by S.F.C. Milsom is primarily concerned with the common law and in its development at a later stage in an historical context. But, the first two chapters and some sections in other chapters explore the development of English legal methodology during its early phase. These selected chapters and sections also go into greater detail on the judicial processes and the court system as the methodology develops over time.

On the principles of equity in the English legal system, the authoritative book, ***Equity, Doctrine and Remedies***[28] by R P Meagher, W M C Gummow and J R F Lehane covers both the doctrine and principles of English equity and plenty of cases showing the application of equitable principles. A book that explains the doctrine of equity through the cases is by P. Todd, titled ***Cases and Materials on Equity and Trusts***[29]**,** while the book simply named, ***Equity***[30] by S Worthington is concerned mainly with the doctrine and principles of equity and its development. I found Worthington's book on equity quite informative

[27] Milsom, S. F. C.*, Historical Foundations of the Common Law* , 2nd Ed., (London: Butterworth, 1981)
[28] Meagher, R.P.,& Gummow, W.M.C., & Lehane, J.R.F., *Equity, Doctrine and Remedies*, (Sydney: Butterworth, 1992,)
[29] Todd, P., *Cases and Materials on Equity and Trusts*, (London: Blackstone Press Limited, 1994)
[30] Worthington, S., *Equity*, (Oxford: Oxford University Press, 2003)

and relevant, particularly those sections dealing with the dual system of English law and the nature of debate over the unification of the methodology of common law the and equity. I found them especially useful when I needed to consider the role of *istihsān* in terms of its relation with Islamic legal methodology, *Usūl al-fiqh, maqāsid* and state legislation.

There are large number of published materials on the general subject of *Usūl al-fiqh* including *istihsān*. However, since the area of my research interest is limited to the development of Islamic legal methodology in terms of the objectives of the law, I had to be selective in the choice of my sources. It was so in equity, too. Equity as a whole subject area, has a large amount of source materials but most of them concentrate on trust which is not part of my research interest. These sources on trust allocate only a small section to cover the doctrine of equity and in any case they mostly refer only briefly to the same topics covered in much more detail in the sources I have chosen to review. On the subject of *maqāsid* there have been quite a number of publications, particularly focusing on al-Shātibī's work.

The chosen sources provided me the necessary information to conduct my research satisfactorily, although I have referred extensively to various other sources in order to cover comprehensively the area of my research study.

Chapter 2

The Prophet initiates Islamic legal methodology

Introduction

Legal methodology is a 'creative process' providing a fascinating study in 'legal reasoning and using language' to get practical results.[31] This chapter, having briefly examined the concept of methodology of law, will aim to evaluate the development of an early legal structure in terms of the objectives (*maqāsid*) of law. It will begin with the methods of the Prophet, and compare them with the early phase in the development of English legal methodology. It is argued that for an adequate comparison which is important[32] it is crucial that the aspect compared fulfils similar functions[33], and as we shall see, Islamic legal methodology and its development is such an aspect.

Accordingly, the chapter will be divided into five sections covering this period. Section 1, Identifying the Law in Early Islamic Legal Methodology; Section 2, The Qur'ān Empowers the Prophet; Section 3, Emergence of Islamic Legal Methodology based on Objectives of its Law; Section 4, Methodology for Deriving Objectives of the Lawgiver; Section 5, Early Phase of the English Legal System.

Identifying legal methodology

An important aspect of a legal methodology is the creative process involving a

[31] Mcleod, I., *Legal Method*, (Hampshire: Palgrave Macmillan, 2005), p. 3
[32] Weeramantry, C.G., *Islamic Jurisprudence – an International Perspective,* (London: Macmillan, 2002), p.165
[33] Leyland, P., 'Oppositions and fragmentations: in search of a formula for comparative analysis?' in Andrew Harding and Esin Orucu, eds., *Comparative law in the 21st Century* (The Hague: Kluwer Law International, 2002), p.215. Institute of Advanced Legal Studies.

particular form of legal reasoning by taking into account matters that are not explicitly stated in a legal text, either by legislation, judicial precedent, legal reports or textbooks. Legal methodology is concerned not only with the judicial and court systems, which are important parts in themselves, but it is also concerned with all these and much more. The views of just three prominent legal theorists show the diversity of its meanings.

Oliver Wendall Holmes (1841-1935), one of the founders of American Realism, considers that what actually happens in the courts is what really matters. For Holmes, what is important is 'law in action and not so much law in books'. He says that 'the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.'[34] Something quite different is what we learn from our second theorist, Ronald Dworkin (b 1931). While agreeing with Holmes on a related aspect of methodology, i.e. that law and its methodology cannot be modelled merely in terms of concept or rules, he takes a completely different approach. He argues that there are 'standards' or ideas that exist beyond the rules that must be taken into account along with the rules 'when it is necessary to identify the law which is to be applied to a given situation.'[35] A form of synthesis of the two views is what could be legal methodology for Roscoe Pound when he argues that there are three stages to the adjudication of disputes: (1) finding the law in terms of determining the applicable rule, (2) interpreting the rule and (3) applying to the issue at hand the rule so found and interpreted.[36]

2.1 Identifying the law in early Islamic legal methodology

'Obey Allah and the Messenger…' This statement has been repeated in the Qur'ān[37] several times and in several places. The Prophet in his 'farewell address' said, '…**I have left with you something which if you hold fast to it you would never fall into error – a plain indication, the Book of God and the practice**

[34] Mcleod, *Legal Method*, p. 4.
[35] Ibid., p. 6.
[36] Pound, R., *An Introduction to the Philosophy of Law,* (New Haven: Yale University Press, 1982), p.48
[37] Al-Qur'ān, 3:32, 3:132 and 4:59

of His Prophet…'[38] Just as embedded in mathematical symbols such as F = MA, (force equals mass times acceleration), a fundamental principle of physical law, so embedded in the brief statement 'obey Allah and the Messenger' is the fundamental basis of Islamic legal methodology encompassing the two primary sources of Islamic Law. David Brown puts it another way by saying, 'The Qur'ān provides general commands, the Sunnah specifies the exact intent'.[39] However, these two primary sources which formed the bedrock of Islamic legal methodology for over 1400 years, were the subject of intense scrutiny over their authority and authenticity during the last century, particularly by western scholars.

2.1.I. Authenticity and authority of the legal sources questioned

The authority, authenticity and, therefore, the reliability of the primary legal sources too, have been questioned mainly by Western scholars, particularly during the last century. Before we proceed any further it is important to clarify these issues since the Prophet is no longer there to answer the critics and, furthermore, the premise, namely the original sources of law on which the Islamic legal methodology rests, must be established so that they can be taken to be reliable and authentic. Although the questions raised were many and varied and would need lengthy answers, only the main arguments are presented here and discussed. First, Muhammad's (peace be upon him, customary to mention) claim to Prophethood itself along with his traditions (Sunnah) were doubted, questioned or criticised and so was the Qur'ān, either in its entirety or its selected texts or both. All the criticisms are based on one or more of the following: insufficient or unreliable facts or evidence, misrepresentations, misinterpretations, misquotes, out of context, against historical evidence and so on. Criticisms revolved around the allegation that Muhammad (p b u h) falsely claimed Prophethood and that his message was a forgery or a copy from external sources.

Right through the centuries, from the very inception, the role of Islamic law in

[38] Ibn Ishāq, translated by Guillaume,A. , *The Life of Muhammad* (19th Imp., Oxford: Oxford University Press, 2006), p. 651.
[39] Brown, D., *Rethinking Tradition in Modern Islamic Thought* (Cambridge: Cambridge University Press, 1996), p. 43.

general and the Sharī'ah in particular have been the subject of the greatest scrutiny and debate among scholars. This scrutiny has been particularly intense over the last century. Many questions relating to legal technicalities were also raised. How could Sharī'ah be used as a system of law? Isn't Sharī'ah an ethical and moral code rather than a system of law? How could Sharī'ah, consisting of immutable revelations and Prophetic Sunnah, adapt itself to the changing needs of society? Did the Prophet or his companion establish, apart from the Sharī'ah texts, a legal structure or basic principles for the development of a legal methodology? Above all, how authentic and authoritative are these evidences in support of the legal principles originating from the Prophet's Sunnah and the practices of the companions. Answers to these questions are of fundamental importance before any evaluation of the legal methodology, its development and the challenges it faces today.

An attempt will be made in this section to answer some of the issues raised in the questions. It is interesting, in this connection, to refer briefly to Knut Vikor's work[40] where he traces three different 'broad currents' of views in the debate during the last one hundred years or more among Western and Muslim scholars. The first group of Western scholars were those whom he describes as the most commonly known and calls, 'revisionists'. The dominant among them was Joseph Schacht who wrote the *Origins of Muhammadan Jurisprudence* (Oxford 1950) and who criticised the earlier Western historians for accepting the Muslim historiography of the law. Knut Vikor then refers to the Muslim scholars like M. M. Azami who wrote *Early Hadīth Literature* (Beirut 1968); *On Schacht's Origins of Muhammadan Jurisprudence* (Riyad 1985) and Yasin Dutton who wrote *The Origins of Islamic Law*: *The Qur'ān, the Muwatta and Madinan Amal* (London 1999). Finally he speaks of the Western historians who 'attacked' the extreme views expressed by the first group of 'revisionists'. One among this last group who attacked the 'revisionists' is W B Hallaq who has written several books and articles, referring to prominent revisionist critics and scholars like

[40] Vikor, K., *Between God and the Sultan, A History of Islamic Law,* (London: Hurst & Company, 2005), pp.13-19

Snouck Hurgronj and others of his time. Hallaq finds [41] that Hurgronj had the greatest impact and the 'full force among young scholars' including those like Joseph Schacht. What Hallaq then goes on to say about these 'revisionists' is interesting for he vehemently criticises them for having not conducted any sort of comprehensive or near-comprehensive research to substantiate their statements[42].

Since of late, however, there is beginning to be a form of consensus among various scholars as to the origin of Islamic law in terms of the two primary sources, the Qur'ān and Sunnah of the Prophet. For instance, Hallaq holds that '…the Qur'ān originated during the lifetime of the Prophet' and argues that the events referred to therein are authentic representation of what actually happened.[43] And with respect to the second primary source, unlike the scholars Goldziher, Schacht and Juynboll of the earlier generations, modern scholars such as Goitien[44], Hallaq[45], Dutton[46], Al-Azami[47], Kamali[48] and some others, with having access to new manuscripts, fresh evidence and improved research methodologies, are of the view that the Sunnah of the Prophet was accepted and practised much earlier than it was once thought, some arguing this to be as early as immediately after his death or even during the life-time of the Prophet himself.

Knut Vikor,[49] from his own brief survey of the critics and the counter critics in the debate, appears to conclude that most of the views expressed by the early Muslim

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[41] Hallaq, W.B., *Law and Legal Theory in Classical and Medieval Islam* (London: Ashgate Publishing Limited, 1994), p. Part XII; 175

[42] For further refutation of the views of Joseph Schacht, see S D Goitein, (*The Birth-Hour of Muslim Law – An Essay on Exegesis* – see pp. 69-75, (in W.B. Hallaq's, *The Formation of Islamic Law,* (London: Ashgate Publishing Ltd., 2004) pp 23-29) , and (M.M. Mustafa al-Azami Part 1 & 2 of *On Schacht's Origin of Muhammadan Jurisprudence* (Oxford: Oxford Centre for Islamic Studies, 1996)

[43] Hallaq, W.B., *A History of Islamic Legal Theories,* (Cambridge: Cambridge University Press, 2002), p.2.

[44] Goitein, S.D., 'The Birth-Hour of Muslim Law?: An Essay in Exegesis,' (Muslim World 50, 1960) p. 29. in Hallaq, W.B., ed., *The Formation of Islamic Law,*(Hants: Ashgate Publishing Limited, 2004), p. 75.

[45] Hallaq, W. B., *The Origins and Evolution of Islamic Law*, (Cambridge: Cambridge University Press, 2006), p. 47.

[46] Dutton, Y., *The Origins of Islamic Law*, (Richmond: Curzon Press, 1999), p. 164.

[47] Al-Azami, M. M., *On Schacht's Origins of Muhammadan Jurisprudence*, (Oxford: Oxford Centre for Islamic Studies, 1996), p. 31.

[48] Kamali, H., *Principles of Islamic Jurisprudence,* (Cambridge: Islamic Text Society, 2003), p. 65.

[49] Vikor, K, pp16-19

classical historians were, after all, true in many respects including the origin and practice of Sharī'ah as law; its flexibility and adaptability; the integrity of the judges; the fairness of the judicial process and so on. Coulson is more emphatic when he argues[50] that Islamic legal history does exist, the Sharī'ah is 'an evolving legal system' and the classical concept of law is in 'its true historical perspective.' Harold Motzki argues [51] that contrary to what Schacht has said, Islamic jurisprudence began one–half or three quarters of a century earlier, and that he could not find any historical evidence for early Muslim borrowing from foreign laws.[52]

2.1.II. Principles of methodology considered in proper perspective.

Some differences among legal methodologies are real whereas some others are only apparent. English legal methodology, for example, distinguishes between public law with its rules relating to the affairs of the state with man, and private law with its rules pertaining to the relationship between man and man. Islamic legal methodology too has a dual system but the structure here is different from that of English methodology. In place of laws establishing a relationship between man and the state on the one hand, and man and man on the other, Islamic law has a system of laws governing the relationship between man and God on the one hand, and man and man on the other.

The first category of Islamic laws falls under the description of *'ibādāt',* relating to 'spiritual' matters and the second under the description of '*muāmalāt',* relating to 'worldly' matters. Even the laws governing man and God, '*ibdt',* establishes an indirect form of relationship between man and man. For example, one of the fundamental principles of '*ibdt'* is that *zakāt,* is an obligatory payment of a fixed percentage by everyone having wealth above a certain threshold, and such payment has to be made to certain specified categories of people who are facing

[50] Coulson, N.J., *A History of Islamic Law*, (Edinburgh: Edinburgh University Press,2001), p.4
[51] Motzki, H, *The role of the non-Arab converts in the Development of Early Islamic Law,* Islamic Law and Society, 6, (Leiden: Brill), 1999, p. 297,(in Hallaq, W.B, *The Formation*, p. 157)
[52] Motzki, H., *The Role,* p. 317 (in Hallaq, W.B., *The Formation*, p. 176)

hard times. In Islamic law, this particular form of payment is not strictly a charity in the sense that one pays *zakāt* out of sympathy, compassion or kindness, although there are various other forms of charitable acts that are highly recommended and praised in Islam. But z*akā*t is strictly a form of worship, which one performs simply because he is obliged to do so. Before one pays the *zakāt* he has to establish the right category of people and, strictly speaking, such people have a right to that *zakāt* too. Accordingly, an indirect relationship is created between man and man out of one's relationship with God.

Although 'public law', in the sense of constitutional law, administrative law or criminal law as understood today by the Western and English legal system, did not form a separate major part of the Islamic legal methodology during the formative period of Islamic law, even though in theory it had well defined principles covering all areas of public law and practice. However, it existed to some degree, particularly in criminal law. As the society advanced just as in the West, these laws were developed further and were flexible enough to incorporate elements of public law when appropriate. However, Western legal methodology does 'not consider appropriate to law'[53] those Islamic rules considered '*ibādāt*' by the Islamic legal system.

Victor Knut contends that the Islamic state has no responsibility in principle to prosecute criminals and that there are no separate courts to deal with private, public, or criminal cases, because Islamic law, according to him, does not make a clear distinction. Victor's contention is difficult to reconcile when it is considered that, in terms of the Islamic juristic principles and methodology developed since the earliest of times, beginning with the first Caliph Abū Bakr and his successor 'Umar ibn al-Khattāb, the state had rules to deal with criminal acts like treason, murder, rape, theft and so on. Maybe the Islamic court system was not as elaborate as it is today but then neither did any modern western state have well defined different court systems at the beginning.

What is interesting to note from this chapter and the ones following, as will be

[53] Vikor, K., *Between,..* p.3

seen, is that whereas it took a mere decade or two for Islamic legal methodology to establish certain fundamental principles of justice and a basic legal structure, it would appear to have taken some other legal systems several decades if not centuries. Yet, it would be unreasonable for one to draw general and blanket conclusions or be emphatic about the differences, as each system had its own different origin, sources of law and process of development. Some of the 'revisionists' criticisms arise as a result of trying to equate certain aspects of the Islamic legal system with that of the Western or other systems, without taking these differences into account, and then draw wrong conclusions or compare unreasonably the Islamic legal methodology at an early stage in its development with a modern Western system.

Norman Anderson has argued[54] that the orientalists' research disagree with the 'traditional view of the Islamic Jurisprudence' with respect to the 'structure of Sharī`ah,' the 'law', their origin and centre of development. Such differences of view seem to arise from using terms like 'Sharī`ah', 'Sharī`ah law', 'Islamic law', '*fiqh*' and so on without defining them and using them in different contexts. Historically, Islamic Jurisprudence differentiated 'Sharī`ah law' as consisting of only the Qur'ān and the Sunnah both originating in Arabia, while 'Islamic law', *fiqh* and the legal methodologies have all been formulated and developed both inside and outside Arabia

When evaluating the sources of Islamic legal methodology, their commandments and injunctions need to be considered in their proper perspective in order to arrive at a fair assessment. The next section will consider the manner in which the Qur'ān empowers the Prophet with wide ranging legal powers including the issue of commandments, injunctions and legal judgements, all leading to the Prophet laying the foundation for Islamic legal methodology.

[54] Anderson, N., *Law Reform in the Muslim World*, (London: University of London; The Athlone Press, London , 1976), p.8.

2.2. The Qur'ān empowers the Prophet

It is not clear what is meant when Joseph Schacht says that the Prophet's aim 'was not to create a new system of law,[55]' not clear because the Prophet in reality was empowered to create a system of law which was based on Divine revelation and supplemented by his own reasoning, *ijtihād;* and moreover, Hallaq goes further and argues that the Prophet was elaborating a basic legal structure.[56] Schacht's further statement that the Prophet had little reason to change the prevailing customary law does not tell the complete story because it has since been argued that the 'Qur'ān introduced new rules and regulations which in many cases contradicted earlier patterns of life and customs.'[57] In order to explain and show them to be beneficial in terms of human interest, the prophet was authorised to interpret texts such as the following in *sūrah al-A'rāf* saying, '**He will make lawful for them all things and prohibit them only the foul and will relieve them of their burden and fetters which were set upon them…'**[58] or in *al-Nahl,* saying, '**We have revealed unto thee the Remembrance (the Qur'ān) that you explain to mankind that which has been revealed for them in order that they may give thought'**[59]**.**

The Lawgiver who empowers the Prophet with authority also authorises allegiance to him, because authority without allegiance is meaningless. And that the Qur'ān categorically emphasises this can be seen when it says **'We have sent no messenger save that he be obeyed by Allah's leave'**[60] and the Prophet as a model to be followed, when it points out that '**You have in Allah's Messenger a noble model for all whose hopes are in Allah and the last day and who often call Allah to remembrance'**[61]. It is rightly argued that these and similar references to the Prophet and his role also indicate further that Muslims

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[55] Schacht, J., 'Pre-Islamic Background and Early Development of Jurisprudence,' *Law in the Middle East Vol 1* (Washington DC 1955), p.31. (Ed., Hallaq, W.B., *The Formation of Islamic Law*, Ashgate Publishing Ltd., Aldershot, 2004), p. 32.
[56] Hallaq, W.B., *A History*, p 5
[57] Al-Azami, M.M., *On Schacht's Origin of Muhammadan Jurisprudence,* (Oxford: Centre for Islamic Studies, 1996), p. 20.
[58] Al-Qur'ān, 7:157
[59] Al-Qur'ān, 16:44
[60] Al-Qur'ān, 4:64
[61] Al-Qur'ān, 33:21

must not make any distinction between the commands of Allah and his Prophet,[62] whatever the Prophet's role and whether it was in Macca or Madina.

2.2.I. Qur'ānic legal texts and the Prophet the 'judge-supreme'

The Qur'ān, while being a Book of Guidance, it is also a source Book of legislation with many legal texts. These texts cover wide ranging areas from civil and criminal law to the law of finance and banking, constitutional and international law and the like. Some areas of the law are dealt with extensively while others are specified by general principles and, some of which are explained by practical examples[63] by the Prophet. The texts on general principles, and what Norman Anderson calls 'legally indifferent'[64] texts, require interpretation and explanation in one form or another, some more elaborately than others. It is in the interpretation of such texts discussed further in a later chapter that many factors need to be taken into account, factors like the style of the language, the context, the time and place, and the purpose when a particular text was revealed, all of which are subject to the Lawgiver's overall intent as expressed through the entirety of Qur'ānic legislation.

One of the pre-requisites both to interpret and explain legal texts and to take into account the overall objectives of the Lawgiver is the exercise of independent legal reasoning, *ijtihād,* a term uniquely defined[65] for the purpose of textual interpretation and, as we shall see, an important tool in Islamic Jurisprudence and which Muhammad Abduh calls a 'landmark of the creative episode in Islamic law…'[66] Therefore, we need to consider first with reference to Sunnah and the Prophet's biography, the *sīrā*, whether and in what sense the Prophet exercised such reasoning, and whether he took into account the interest based objective of the Lawgiver.

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[62] Al-Azami, M.M., *On Schacht's,* pp. 14-15.
[63] Brown,D., *Rethinking tradition in modern Islamic thought,* (Cambridge: Cambridge University Press, 1999), p. 49.
[64] Anderson, N., *Law Reform*, p. 4.
[65] Hallaq,W.B., *A History*, pp 117/121.
[66] Arabi, O., *Studies in Modern Islamic Law and Jurisprudence,* (The Hague: Kluwer Law International, 2001), p. 27.

Some have argued, on the basis of the Qur'ānic text, '**Nor does he (the Prophet) speak of (his own) desire,'**[67] that the Prophet, even in the interpretation of the Qur'ānic legal texts, was being inspired.[68] A majority of the scholars, however, based on several other texts of the Qur'ān which call the Prophet and others to ponder, think, and explore the creative world, have argued that he did exercise *ijtihād,* independent reasoning, to arrive at legal judgements.[69] If the Prophet did not make such *ijtihād*, they ask, why did the Lawgiver, for an error committed by the Prophet during the time of the battle of Badr[70], reproach him in the Qur'ān? The Qur'ānic text saying, '**It is not proper for the Prophet to take prisoners (of war) until he has subdued everyone in the earth,'**[71] does indicate, they argue, that the Prophet did make his own decision.

Imam al-Shātibī points out that in general an 'irreproachable knowledge of the higher objectives of the law is a prerequisite for performing *ijtihād;'*[72] and to exercise *ijtihād* and show how it is done, who is better placed than the Prophet himself? He being the chosen messenger he had the closest relationship with the Lawgiver and must have been aware of His aims and objectives in interpreting and explaining the Qur'ānic texts. In practical terms, for example, the fact that the Prophet 'had an open mind'[73] over some of the pre-Islamic Arab culture which he incorporated into Islamic law, is an indication that he performed *ijtihād* to arrive at a right decision in order to satisfy the overall intent of the Lawgiver. When he exercised *ijtihād* in this manner, on occasions they were either confirmed by subsequent legislation or not confirmed, and in which case a better solution than the one advanced was the right one[74].

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[67] Al-Qur'ān, 53:3
[68] Coulson, N., *A History of Islamic Law*, (Edinburgh: Edinburgh University Press, 2001), p. 56.
[69] Kamali, *Principles,* p. 484.
[70] Ibid., p. 485.
[71] Al-Qur'ān, 8:67
[72] Al-Raysuni *, Imam al-Shātibī's Theory of the Higher Objectives and intents of Islamic Law,* (London: The International Institute of Islamic Thought, 2005), p.331.
[73] Hallaq, W.B., *A History,* p.12.
[74] Al-Alwānī, T. J., *Source Methodology in Islamic Jurisprudence,* (3rd ed.,London: The International Institute of Islamic Thought, 2003), p.5.

Confirmation that he exercised independent legal reasoning is evidenced by the Prophet's own approval of the often quoted reply given to him by Mu`ādh b Jabal when appointed the Governor of Yemen, a reply which encompasses several principles of law. He told the Prophet that when he could not find an answer to an issue from the Qur'ān or the Sunnah of the Prophet he would use his own legal reasoning to arrive at a judgement. The Prophet was pleased with this reply and commented, '**thank God for guiding the Prophet's deputy to that which the Prophet approves.'**[75] That the Prophet exercised *ijtihād* is further confirmed by his Sunnah which says, 'When I do not receive a revelation (*wahy*) I adjudicate among you on the basis of my opinion.'[76]

2.2.II. Prophetic intent coincides with that of the Lawgiver

Since it appears from the various sources that the Prophet did exercise, when appropriate, his own independent legal reasoning, it is relevant to enquire what indications are there to show that he was also conscious of the Lawgiver's intent or objectives. That the Prophet's objectives always coincided with that of the Lawgiver in terms of human interest and welfare can be seen from several instances in his dealings with others. For example, in relation to the event we mentioned earlier about Mu`ād b Jabal, it is pointed out by Ibn Ishāq that when Mu`ād was appointed Governor of Yemen, the Prophet instructed him, among other things, to 'deal gently and not harshly …and do not repel people.'[77] Although the human interest based objectives of the law were later developed by the Māliki School and subsequently elaborated and refined by scholars, Raysuni is emphatic that it was first 'highlighted by the Prophet's own application…'[78]

Although the Prophet, strictly speaking, did not legislate, it is because of the legal authority attained by the Prophet through giving effect to the intent of the

[75] Hallaq, W.B., *Authority, Continuity and Change in Islamic Law,* (Cambridge, Cambridge University Press, 2001), p. 196.
[76] Abū Dawud, *Sunan* (Hasan's translation) III, 1017, *hadīth* no. 3578, Kassab, Adwa, p 58 (Ref: Kamali, M H., *Principles of Islamic Jurisprudence*, (Cambridge: The Islamic Text Society, 2003), p 485
[77] Ibn Ishaq, *The Life,* p. 644.
[78] Al-Raysuni, A., *Imam al-Shātibī's Theory*, p. 52.

Lawgiver that Joseph Schacht goes to the extent of calling him a 'Prophet-lawgiver', and argues that his was 'an innovation in the law of Arabia'[79]. And Coulson puts the Prophet in the category of 'judge supreme'[80] because of the variety of rulings he made clarifying the general provisions of the Qur'ānic texts, such as those series of texts on inheritance, and making testamentary dispositions fairer and equitable between the parties, as intended by the Lawgiver. In relation to the law of marriages, the Prophet's rulings complement the Qur'ānic texts by elaborating the terms of marriage, divorce, consent of partners, witnesses to the marriage and so on, thereby making the marriage law fair and reasonable in terms of human interest. Hallaq concludes that there are a 'multitude of other regulations[81]' that the Prophet had issued to supplement the general principles of the Qur'ānic texts.

The Prophet's concern for the welfare and interest of not only the human beings but also other living beings is well documented by Imam Mālik. Imam Mālik reports in his *Muwatta* that the Prophet advises the traveller by saying 'Allah is kind and shows kindness…when you ride dumb beasts stop them in their stopping places, quicken their pace when the land is barren…Beware of pitching the tent on the road, for it is the path of animals and the abode of the snakes.' And on another occasion he said, 'travelling is a piece of torment. It prevents you from sleep, food and drink. When you have accomplished your purpose you should hurry back to your family.'[82]

Even in the early years of the Prophethood, according to the report by Ibn Ishāq, the Prophet's concern for human interest and welfare was evident. He reports that about three years after the first revelation, when the Prophet was asked by angel Jibreil to invite his relatives to accept Islam, he was so concerned about the possible 'great unpleasantness' that he would face in doing so that he 'kept silent' until Jibreil reminded him again.[83] Similarly, when the leaders of the Quraish

[79] Schacht, J., *The Introduction to Islamic Law,*(Oxford:Oxford University Press, 1988), pp. 10,11.
[80] Coulson, N. J., *A History,* p. 22.
[81] Hallaq, *A History*, p. 26.
[82] Imam Mālik B Anas, *The Muwatta of Imam Mālik*, (Karachi: Darul Ishaat, 2005), Ch 15 (1834) 49 & (1835) 40, p. 473.
[83] Ibn Ishāq, *The Life,* p.117.

found Islam was spreading fast, they decided to negotiate and send for the Prophet. When the Prophet heard this news he was pleased and delighted because, according to Ibn Ishāq, 'he was most zealous for their welfare and their wicked way of life pained him'[84]. But when the Quraish made unreasonable demands during the negotiation, the Prophet was equally firm and forthright and said that he had 'conveyed to them God's message, and they could either accept it with advantage or reject it and await God's judgement'[85]

For al-Shāfi`ī to say that the Prophet was 'placed in the position of a mouthpiece on God's behalf'[86] he must have concluded that the Prophet was acting as the sole representative of the Lawgiver with His full authority for decision making. Ibn Kathir's report that when God revealed through angel Jibriel to Muhammad (pbu h) the first revelation calling him to 'read, ' the Prophet trembled, and then Jibriel immediately told him, 'O, Muhammad! (pbuh) You are truly the messenger of Allah.'[87] This indicates that from the very beginning the Prophet had been empowered with all the legal powers and responsibilities, including the exercise of *ijtihād* as a representative of the Lawgiver giving expression to His intent.

2.2.III Methodological differences in the Maccan and Madinan periods

The Qur'ān with a multiplicity of legal matters, was revealed in Macca, and some in Madina, over an extended period under differing circumstances, and accordingly the methodology of the Prophet too was different. The nature of the Qur'ānic texts revealed in different stages was dependant on the level of development of the Arab society at that particular time. Not only the substantive law of the text but also the occasion of its revelation, the form and the style of its language, the intensity of its appeal and the psychology of its discourse,[88] all played an important part. In Macca, for example, in spite of growing hostilities

[84] Ibn Ishāq,*The life*, p. 133.
[85] Ibid., p. 134.
[86] Al- Shāfi'ī, *al-Risāla*, Translated by Majid Kadduri, (2nd ed., Cambridge: The Islamic Text Society, 2003), Para 216, p. 190.
[87] Ibn Kathir , *Tafsir Ibn Kathir*, Vol. 10, (2nd ed., Riyadh: Darussalam, 2003), p. 534.
[88] Kamali, M.H., *Principles*, p. 505.

towards the Muslim communities both within and outside Macca there was no revelation allowing the Prophet and the Muslim community to fight back, nor was there any evidence that he resorted to such activity while in Macca. But the situation changes in Madina. As the community gets bigger and stronger, the Prophet is authorised to fight in defence only, and accordingly it is only then that he organises a fighting army.

The Maccan revelations, while introducing the fundamental principles of Islam, also consisted of texts which formed the universal legal principles. Imam al-Shātibī argues that those early revelations, while being 'more general and more important', were universal and fundamental in terms of the higher objectives of the law, and they laid the foundation for Islamic law.[89] Johnston confirms that 'universals' (*kulliyāt*) are found most exclusively in the Maccan texts.[90] The Maccan texts, which we can see in retrospect, were concerned with the objective of creating, in the first instance, a community based on the acceptance of the oneness of God, prayer, ethical principles, morality, and a community; a community which refrains from harmful acts like cheating, stealing defaming and so on, and promotes good humoured, neighbourly relationship, in all of which, in Macca, the Prophet was actively involved.

Quoting the *Uthmānic* transcript of the Qur'ān, Zakaria Bashir lists in chronological order 24 early Maccan texts revealed in the first three years of the inception of Islam in which he argues that the fundamental doctrines of Islam were established,[91] which included principles of legal methodology. Rachael Anne Codd, after stating that the Maccan texts are the most fundamental, goes to the extent of saying 'present day Sharī`a may be suspended and replaced with that of the Maccan period which is more in line with the needs of today.'[92] It is not clear though what she means by 'present day Sharī`a' nor 'Shari`a may be suspended,'

[89] Al-Raysuni, A., *Imam Al-Shātibī*, p. 138.
[90] Johnston, D, A., Turn in the Epistemology and Hermeneutics of Twentieth Century Usūl al-fiqh, *Islamic Society* Vol. XI (2004), p. 250.
[91] Bashir, Z., *The Maccan Crucible*, (FOSIS, London, 1970), p. 125.
[92] Codd, R.A. A., 'Critical Analysis of the Role of Ijtihād in Legal Reforms…
Arab Law Quarterly Vol 14 Part 1 , (London: Kluwer Law International, 1999), pp. 112-131.

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although some may find it easier to agree with her comment concerning the revelations in 'Meccan period.'

When the Prophet and his followers were persecuted in Macca and a group of companions emigrated as refugees to Abyssinia, the king Negus of that country wanted to know why he should give them protection. The answer given by the émigré reflects unequivocally, among others, the human interest based guidance and training they received at the hands of the Prophet in Macca. Jāfar ibn Abī Tālib, leader of the émigré delegation said to the king:

'O, King, we were an uncivilised people, worshipping idols, eating corpses, committing abominations, breaking natural ties, treating guests badly, and our strong devoured the weak. Thus we were until God sent us an apostle whose lineage, truth, trustworthiness, and clemency we know. He summoned us to acknowledge God's unity and to worship him and to renounce the stones and images which we and our fathers formerly worshipped. He commanded us to speak the truth, be faithful to our engagements, mindful of ties of kinship and kindly hospitality, and to refrain from crimes and bloodshed. He forbade us to commit abominations and to speak lies, and to devour the property of orphans, to vilify chaste women.

'He commanded us to worship God alone and not to associate anything with Him, and he gave orders about prayer, almsgiving and fasting (enumerating the commands of Islam). We confessed his truth and believed in him, and in what he had brought from God, and we worshipped God alone without associating aught with him. We treated as forbidden what he forbade, and as lawful what he declared lawful. Thereupon our people attacked us, treated us harshly and seduced us from our faith to try to go back to the worship of idols instead of the worship of God, and regard as lawful the evil deeds we once committed…'[93] Jāfar's statement illustrates the nature of the society that was beginning to emerge during the Prophet's first few year in Macca, a society based on firm and clear religious, ethical and moral principles combined with

[93] Ibn Ishāq, *The Life,* pp. 151-152.

fundamental universal principles of justice and equity, without any form of what Hart calls a 'legal system' or the 'threats' of a superior, which he considers as necessary and sufficient conditions for law to exist and be obeyed.[94]

In general, many of the legal texts revealed in Macca introduced fundamental principles of legal methodology in terms of the overall intent of the Lawgiver either by providing answers to problems faced by the Prophet and his followers at a particular time or by guiding the Prophet to answer in the same spirit questions raised by the followers and others in the community. The Qur'ān, for example, states that **'They ask you about wine and gambling. Say, "there is great evil in them as well as benefit to man. But the evil is greater than the benefit…"'**[95]. So were the great numbers of Sunnah of the Prophet: they were either the Prophet's response to questions from the members of his community or statements made by him at the time of an incident,[96] all made in terms of human interest and welfare.

This concern of the Prophet for the overall objective of the Lawgiver was to lead him further into formulating other principles such as establishing good relations between the Muslims and the non-Muslims, both in Macca and particularly in Madina. For instance, in order to bring about peace and harmony among all the inhabitants of Madina he drafted the so-called Constitution of Madina, a draft hailed as 'pointing to a mind highly skilled in formulaic legal documents,' 'whose authenticity can hardly be contested,'[97] and in which he was 'given no special position of authority.'[98] His untiring effort to enter into such negotiation was motivated by practical considerations and his concern for the interest and welfare of all the people in Madina.[99].

As the Prophet's role and responsibility become much more complex his exercise

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[94] Hart, H.L.A., *The Concept of Law*, (London: Oxford University Press, 1961), P. 97.
[95] Al-Qur'ān, 2:219
[96] Philips, A.A.B., *The Evolution of Fiqh*, (Riyadh: International Islamic Publishing House, 2005),p. 26-27
[97] Hallaq, W.B., *A History ,* pp. 4 – 6.
[98] Encyclopaedia Britannica, 'Muhammad' by M.W.M., (15th Ed: Chicago: University of Chicago, 1981), p. 607.
[99] Ibn Ishāq, *The Life,* pp.232-235.

of *ijtihād* extends far and wide. The revelations he received in Madina were wide ranging and complex, and of the six hundred or so legal texts in the Qur'ān, the greatest number of them were revealed in Madina. Coulson points out that the Prophet, during his role in Madina, had to face 'a variety of legal problems' as a 'judge- supreme, with the function of interpreting and explaining the general provisions of divine revelation.'[100]

At the end of the 5th year of *Hijra*, Hallaq finds the Qur'ān beginning to reflect on new developments in the Prophet's career who in turn was thinking of a new Islamic community having a distinct legal system. It is more likely that because of the new and more complex environment in which the Prophet found himself the Lawgiver was providing him with a series of texts, both general and specific, with the necessary legal content, such as the family law, which Anderson argues, is very explicit.[101] Not surprisingly, about 500 Qur'ānic revelations of legal texts, which in terms of numbers were once thought to be insignificant, are now considered to be extensive.[102]

These texts in turn enabled him to create a legal system possessing laws distinct from others, a system with a list of commands, admonitions and explicit prohibitions requiring the formulation of its own philosophy with its own legal methodology. Still later, as Muslim society became more complex, the Prophet had to interpret, explain, and give judgement on a series of Qur'ānic legislations, from the taxation (*zakāt*) system to the imposition of legal penalties, to women's rights and family matters, to marriage and property laws, to finance and succession and many more. And, according to Coulson, the Prophet's position has now developed into 'one of political and legal sovereignty' holding the 'position of judge supreme, with the function of interpreting and explaining the general provisions of the divine revelation.'[103]. David Johnston is forthright in saying that the Prophet was a 'just ruler' imposing 'a just law' for the 'spiritual and material welfare of the community.'[104] The Prophet, in doing so, laid the

[100] Coulson, *A History,* P.22.
[101] Anderson, N., *Law Reform,* p. 17.
[102] Hallaq, W.B., *The Origins*, pp.21-24.
[103] Coulson, N.J., *A History,* pp. 11 & 22.
[104] Johnston, *A Turn in the Epistemology*, p.250.

foundation for the beginning of a well structured Islamic legal methodology on the basis of human interest, in terms of achieving benefits and avoiding harm, a methodology which was to be developed later by his companions and the successive generations.

2.3 Emergence of Islamic legal methodology based on objectives of the law

Some scholars have differences of opinion as to when, in the early Islamic period, the legal structure and methodology emerged: was it during the Prophet's life time, immediately after or much later in the classical period? However, when we analyse the unambiguous commandments of the Lawgiver, which are to be highlighted below together with other evidence, they show a fairly clear picture. Evidence such as the Prophet's own traditions shows his concern for justice and fairness; his methodology of legal reasoning and decision making[105]; and ways of settling disputes at individual, tribal and national levels. Forms of guidance to his companions on legal matters; the approach of his companions to legal issues and disputes based on that guidance and, last but not least, the consensus of the scholars throughout the ages on the founding of the Islamic state and of its laws by the Prophet, all point to the emergence, at the Prophet's auspices and during his own lifetime, of first elements of a legal structure and methodology. Hallaq is in no doubt that the Qur'ān showed the way 'toward elaboration of a basic legal structure'.[106] It is from such guidance in the Qur'ān, and evidence from other sources as mentioned above, one concludes that the Prophet initiated the process of laying the foundation for a legal structure and methodology. This foundation is based primarily on two fundamental principles, the principles that the Lawgiver's objectives are rooted in human interest[107] and they are aimed, first, at achieving benefit while avoiding hardships, and secondly, at establishing justice and fairness among His subjects.

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[105] Burton, J., in his book *The Sources of Islamic Law*, (Edinburgh: Edinburgh University Press, 1990), p10 argues that since the Prophet's death it has been claimed that the Prophet on the basis of 'inspired judgement' or on the basis of 'own initiative' had found solutions to difficult issues.

[106] Hallaq, W.B., *The Origins*, p.24

[107] Al –Shātibī *Al-Muwāfaqāt* Part 2 pp 6, 49-51 (Quoted by Al-Raysuni, *Imam,* p. 317)

First, from the examples of the Prophet, it is clear that he was the most conscious of the Lawgiver's intent when interpreting, explaining and applying the revealed texts of the Qur'ān. It was no different whether, in interpreting legal texts, he was acting as a jurist or a judge. After him, as we shall see, were the companions and, in particular, the rightly guided Caliphs who followed the Prophet in the same manner in determining the intent of both the Lawgiver and His Messenger when interpreting and applying the textual sources, the Qur'ān and the Sunnah of the Prophet. In the following sections an attempt will be made to examine briefly the importance of determining the intent of the Lawgiver and His Messenger in terms of its relevance to the formation of Islamic legal methodology, a detailed analysis of which will be undertaken in a later chapter.

2.3.I Human interest the primary object of the Lawgiver

The Prophet was the first to bring about peace, justice and harmony among those warring and troublesome Arab communities by interpreting and applying the Qur'ānic legal texts, because those texts themselves were aimed at establishing justice and fairness. The principles of justice and fairness enshrined in those texts were relevant and applicable in all circumstances, in all places and at all times. Indeed they are now considered to be universal principles of justice. The Lawgiver, in order to facilitate and harmonise the implementation of His desire for justice and fairness among His subjects, also revealed to His Messenger the other important principle: the principle that expresses His concern for human interest which is emphasised in the Qur'ān in the form of His objectives of desiring ease and benefit, and avoiding harm and hardships to his subjects, wherever and whenever possible. These principles formed the basis of the methodology adopted by the Prophet in arriving at any legal decisions.

The objective of desiring ease and benefit and avoiding harm and hardships is an important principle which must go hand in hand with the desire for justice and fairness. In the absence of such legislative objectives backed by rules for achieving that intent in practical ways, real justice and fairness may not be

achieved. This is because it is only when genuine intent for human welfare is manifest in the legislation that it reinforces the genuine nature of the other laws aimed at establishing justice and fairness.

More will be said on intent later but for now two such texts of the Qur'ān are: '…**Allah would not place a burden on you…'**[108] and '…**Allah desires for you ease. He desires no hardship for you…'**[109] Based on such verses al-Sarakhsī reiterates that 'avoidance of hardship is a cardinal principle of religion.'[110] Abd Allah al-Juwaynī (d 478/1085) is emphatic when he says that it is vitally important to take into account the objectives of the Lawgiver by one who wishes to formulate a basis for the establishment of law.[111] Elaborating on the theme Imam al-Ghazālī (d 505/1111) defines the Lawgiver's intent or objective in terms of 'interest', human interest based on the 'achievement of benefit or prevention of harm.'[112] He identifies the Lawgiver's intent by stipulating that the 'Law's intention for human beings is fivefold, namely, to preserve their religion, their lives, their faculty of reasoning, their progeny, and their material wealth.[113] And Adil Salahi stresses that the Prophet did not hesitate to carry out 'in letter and in spirit' every Qur'ānic text revealed to him,[114] which included the higher objective of human interest.

It is generally agreed among a majority of jurists that the intent, the purpose or the objective (*Maqāsid)* of Qur'ānic legislation is paramount and must be taken into account when giving meaning to those texts requiring interpretation. From the earliest, scholars[115] such as Al-Hakim al-Tirmīdhi who lived during the 3rd Century A.H. to al-Baqillāni (d. 403/1012) to Abū Hāmid al-Ghazālī (d. 505/1111) to Ibn Taymiyah (d 728/1327) to Abū Ishāq al-Shatibī down to

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[108] Qur'ān, 5: 6
[109] ibid., 2:185
[110] Kamali, M.H.,*Prinicples,* p. 325.
[111] Al-Raysuni, A., *Imam al-Shātibīs' Theory*, p. 13.
[112] Ibid., p. 17.
[113] Al –Ghazālī, A H., *Al-Mustasfa* Vol 1 (Dar al-Fikr, n.d), p, 287 (Translated and quoted by Al-Raysusni, A, *Imam al-Shātibīs'*), p. 20.
[114] Salahi, A., *Muhammad Man and Prophet*, (Markfield: The Islamic Foundation, 2002), p. 87.
[115] Al-Raysuni, A., *Imam al-Shātibī's Theory,* (London: International Institute of Islamic Thought, 2005), pp. 5-37.

modern scholars like Hashim Kamali and D Johnston[116] and others, it has been emphasised that when interpreting texts that are not explicit, and which constitute a greater part of the law, the interpreter paying much attention to the intent or objective of the Lawgiver becomes that much more important. Al-Shātibi, the last of the classical legal theorists and jurists, is generally accepted as the one who synthesised Islamic law in terms of the objective or purpose. Al-Shātibi might have been influenced, as Hallaq argues, [117] by a particular set of social circumstances but, as far as his theory of the law is concerned it is said[118] to be based on a clear principle: a comprehensive inductive survey of all evidence.

One of the many ways in which God achieves the objectives is not burdening all his subjects indiscriminately with obligations to perform acts irrespective of whether one is capable of performance of those acts or not. Several *sūrahs* of the Qur'ān are explicit in emphasising that God is considerate in not expecting from any one anything more than what he can give. For example, the same *Sūrah al-Baqarah*[119] quite clearly states that, **'God does not burden any human being with more than he is well able to bear…'**Again *Sūrahs Al-A'rāf* [120] and *Al-Mu'minūn*[121] reassert when they say, **'…We do not burden any human being with more than he is well able to bear…',** and so does *Sūrah At-Talāq.*[122] Commenting on *Sūrah Al-Mu'minūn* quoted above Ibn Kathir[123] reiterates that God does not impose any task on any person except according to his capacity.

Another principle closely related to avoiding hardship is the concept of necessity. A society to be fair and equitable in the treatment of its people must have rules which exempt some of its members from fulfilling an obligation due to special circumstances, or permitting a prohibited act by reason of necessity. The Qur'ān

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[116] Johnston, D., 'A turn in the Epistemology and Hermeneutics of Twentieth Century *Usūl al-Fiqh'* (*Islamic Society* Vol. XI,(2004), p., 233.
[117] Hallaq, W.B.. *A History*, p.162
[118] Refai, S.L.M., *The Legal Doctrines of Maqāsid al Sharī'ah with Particular Reference to the Works of Imam Al-Shātibī: Historical and Practical Dimensions,* (A Thesis submitted for the P h D at School of Oriental and African Studies, University of London, 2003), p. 211
[119] Al-Qur'ān, 2:185
[120] Al-Qur'ān, 7:42
[121] Al-Qur'ān, 23:62
[122] Al-Qur'ān, 65:7
[123] Ibn Kathir, *Tafsir Ibn Kathir*, Vol. 6, (Darussalam, Riyadh: Abridged by a group of scholars under the supervision of Shaykh Safi-ur-Rahman l-Mubarakpuri, 2003), Vol. 6 p. 665

is clear in emphasising this principle; for example, *Sūrah Al-Mā'idah*[124] says **'As for him however who is driven {to what is forbidden} by necessity not by inclination to sinning – behold God is much forgiving a dispenser of Grace'.**

The other major objective of the Lawgiver relevant to this discussion is the principle of justice and fairness repeatedly emphasised in several places in the Qur'ān through which He aims to achieve this objective at individual, community and global levels. For example, when a person has to make a decision or judgement which could in effect go against himself, his parents or his relatives, or alternatively such a decision could favour the rich against the poor or the poor against the rich, the Qur'ān in no uncertain terms commands him to stand firm for justice, whatever the consequences. In *Sūrah An-Nisā'*[125] God commands, **'…Be ever steadfast in upholding equity, witness to the truth for the sake of God, even though it be against your own selves or your parents or kinsfolk; whether the person concerned be rich or poor… Do not follow your own desires lest you swerve from justice…'** Furthermore, the Lawgiver repeatedly emphasises similar objectives for justice and fairness in several places in the Qur'ān, such as *Sūrahs, Al-Mā'idah,*[126] *An-Nisā',*[127] *and An-Nahl.*[128] Muhammad Asad[129] in his commentary on one of the verses states that God warns that one should refrain from favouring the rich at the expense of the poor or favouring the poor out of compassion at the expense of the rich.

Ibn Kathir[130] reminds the believers that God wants them to stand for justice and not to allow fear or blame or undue pressure to force one to deviate from doing justice. If justice demands one should not compromise even testifying against ones parents, nor should hatred of another lure one into committing injustice. The Prophet, while showing his own aversion to injustice and unfairness, reminds the people of the kind of punishment God can give when he says that, **'the people before you were destroyed because they used to inflict the legal**

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[124] Al-Qur'ān. 5:3
[125] Al-Qur'ān, 4:135
[126] Al-Qur'ān, 5:8, 42-50
[127] Al-Qur'ān, 4:105,
[128] Al-Qur'ān, 16:90
[129] Asad, M, Translated and Explained, *The Message of the Qur'ān* (Bristol: The Book Foundation, 2003), p. 149
[130] Ibn Kathir, *Tafsir* ,Vol. 2 p. 606-607

punishments on the poor and forgive the rich...' [131]

An incident showing the sense of justice among the companions who followed the Prophet closely and who were guided by him in everything they did is also an indication of the Prophet's own commitment to sense of justice, fairness and integrity. When the Prophet once sent the Tax Collector Abdullah bin Rawaha to collect tax he was offered a bribe by the Jews of Khaybar expecting some favours from him, which offer the Tax Collector firmly rejected and explained that whatever enmity or hatred he had towards them would not prevent him from being just with them.[132] The Prophet himself has said that, 'the best witness is he who discloses his testimony before being asked to do so'.[133]

Another objective closely related to justice and fairness which could produce an equitable society free of exploitation of one member of the society by another at an individual or global level relates to showing honesty and integrity in any transaction, however small or big, whether it is in trade and commerce or buying and selling. The Qur'ān is explicit in its command in emphasising this principle in *Sūrah Al-An'ām*,[134] when it says, **'And [in all your dealings] give full measure and weight with equity…'** Mohammad Asad has no hesitation in saying that the verse metonymically refers to all dealings between men, and not only to commercial transactions[135]. God reminds and warns his subjects in the Qur'ān through *Sūrah Al-Mutaffifīn*[136]as to what constitutes unfair and dishonest dealings with the statement, **'Woe unto those who give short measure: those who, when they are to receive their due from [other] people, demand that it be given in full – but when they have to measure or weigh whatever they owe to others, give less than what is due…'** Mohammed Asad again reiterates in his commentary that the statement does not refer merely to 'commercial dealings' but to 'every aspect of social relations…'

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[131] Bukhārī, *Sahīh Al-Bukhārī,* Vol. 8, Book 81, *hadīth,* 778
[132] Ibn Kathir, *Thafsir,* Vol. 2, p. 608
[133] Ibid.
[134] Al-Qur'ān. 6:152
[135] Asad, M., Translated and Explained, *The Message of the Qur'ān*., pp.226/227
[136] Al-Qur'ān, 83:1-7

In the light of these unambiguous and categorical Qur'ānic legal texts and the fact that the Qur'ān, as Hallaq notes, provides direction to construct a legal structure, it is clear that the Prophet having been guided and inspired to do so, laid the framework for Islamic legal structure and the fundamental principles for a legal methodology. The framework and the principles were derived directly from the Qur'ān and based on the overall objectives of the law stated therein. The Prophet, then affirmed and developed them further by exercising his own *ijtihād* and left behind, among others, a set of fundamental principles of law and principles of universal justice for the future development of the Islamic legal system.

2.3.II Determining the objectives of the Lawgiver

What follows is a brief analysis of what constitutes the intent or objectives of the Lawgiver and how to determine them since they are crucial to the understanding of the development of Islamic legal methodology from the very inception.

Al-Raysuni argues that 'objectives', meaning the same as 'intent', may be explained by using other terms such as 'wise purpose'[137] (*hikmah*), 'basis' ('*illa*), 'meaning' (*ma'nā*) and so on. He further contends that in relation to the Lawgiver, the term 'wisdom' or 'wise purpose' (*hikmah*) is often used. The purpose of the law as conceived by al-Shātib is to safeguard the interest of the community in terms of what Hallaq[138] calls three legal categories, *darūriyyāt* (lit. necessities), *hajiyyāt* (lit. needs) and *tahsiniyyāt* (lit. improvements), the implications of these categories will be discussed in the last chapter. Hashim Kamali[139], while agreeing in principle that the objectives of Islamic law or *maqāsid al-Sharī'ah* is a statement in terms of public interest,*maslaha* and justice, has his reservations concerning operational methodology, which will be taken up in the final chapter. However, the term objectives of law used in this section is limited to showing that the Prophet approached the Qur'ānic texts for its meaning within the overall objectives of the totality of the whole Qur'ān, and not always to

[137] Al-Raysuni,A., *Imam,* xxv
[138] Hallaq, W.B., *A History*, p. 168
[139] Kamali,M.H., *Principles*, p. 516

the literal meanings of the texts.

According to the above interpretation of al-Raysuni, if intent or objectives in Islamic law is synonymous with purpose or 'wise purpose' then the objective of the Lawgiver must always be to fulfil some goodness and to avoid causing harm. Intent or purpose in Islamic law can be expressed in positive or negative terms. For example, making it obligatory for a sick person to use water to perform his ablution or to insist that the traveller must perform all his obligatory prayers in the normal way will cause hardship. Accordingly, to alleviate such hardship a sick person is allowed to perform *tayammum*, a form of ablution without using water, and a traveller is allowed to shorten his prayer during his travel.

It is enlightening to read Abdel-Aziz al-Rabinah who further clarifies the term 'wise purpose.' After investigating the various works of the *usūliyyūn*, he concludes that there are two senses in which the term needs to be understood. First, what needs to be considered is the intention in terms of benefit that could arise as a result of a ruling or alternatively a harm that the Lawgiver intends to avoid or minimise. Secondly, the terms 'wise purpose' should be understood in relation to the circumstances in which a ruling was made, such as hardship.[140]

In expanding on this issue of hardship in relation to the Lawgiver's intent behind a ruling, al-Shātibī goes further by saying that the Lawgiver intends some hardships in the day to day life of human beings, such as the effort involved in earning a living or practising a profession or a trade which are not considered a hardship as such and people happily continue to work. When complying with the wishes of the Lawgiver, it can be argued that some element of 'inconvenience' or at worst a little hardship in return for the greater good is inevitable.

Muhammad Khalid Masud argues that for al-Shātibī the primary objective of the Lawgiver is the *maslaha* of the people and al-Shātibī goes on to emphasise that Sharī'ah's aim is to protect its objectives (*maqāsid)* which in turn protects 'the

[140] Al-Raysuni, *Imam*, p.xxvi

maslaha of the people'. Accordingly, it may appear, and it will be discussed further in the final chapters, that for al-Shātibī the terms *maqāsid* and *maslaha* are interchangeable. Al-Shātibī defines the terms *maslaha* as '…that which concerns the subsistence of human life, the completion of man's livelihood and the acquisition of what his emotional and intellectual qualities require of him in an absolute sense'.[141]

Al-Shātibī in his book *al-Muwāfaqāt,* Part 3 (or part 2 of the printed version), entitled '*The Book of Higher Objectives'* argues that the 'first aim' of the Lawgiver is to 'establish to serve human interests both in this life and in the next...'[142] Having said that he poses the question, 'but how is one to distinguish what is the Lawgiver's intent from what He does not intend?' The manner in which he answers the question is interesting in that he looks at the way different groups of people holding particular views would determine the Lawgiver's intent and he then puts them into three categories.

First, it could be said from the text that the intended meaning is hidden and only the apparent meaning is left, a view adhered to by the *Zāhirites* who hold that the intended meaning is always what is apparent and nothing more. The second view is that the intended purpose is neither what is apparent nor can it be implied from the text but something 'beyond all that', and this applies to the entire textual sources, so much so that the apparent meaning can never be relied upon to provide the intended purpose of the Lawgiver: an extreme view taken by those who would rather suspend and abolish the Sharī´ah, especially the *Bātinis* (al-*Bātiniyyah)* who held this view. The third method according to al-Shātibī, is to reconcile the two previous views so that neither the deeper meaning is excluded nor the apparent or the literal meaning is 'violated'. According to this approach al-Shātibī argues that the Sharī'ah would have 'one single coherent pattern free of any discrepancy or contradiction', a position adhered to by most scholars.

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[141] Al-Shātibī, A. I., *Al- Muwāfaqāt*, (Cairo: Mustafa Muhammad n.d.) Vol 2 page 25), (translated by M K Masud, in *Shātibī's Philosophy of Islamic Law*, 2nd ed. (Islamabad, Pakistan: Islamic Research Institute, 1995), p. 151

[142] Al-Shātibī, A. I., *Al- Muwāfaqāt* 2:5 (Trans. .Al-Raysuni, A., *Imam*., p. 108)

Al-Shātibī then goes on to explain that the intent of the Lawgiver may be expressed in different ways, which on further analysis one could argue has a higher purpose of benefiting human interest, one way or another. First, there are the commands and prohibitions which God issues if He intends that people should act upon or refrain from acting, respectively. Secondly, the commands and prohibitions may be considered in terms of underlying causes (‘*ilal*) such as procreation as the result of marriage and the accruing of benefits from the buying and selling of goods. And lastly, God in issuing commands (*ahkām*) has primary and secondary objectives, some of which are ‘explicitly stated (*mansūs*), some merely alluded to while others are to be inferred from the text’. Therefore, al – Shātibi argues that by using induction when the text is not clear one could determine what is intended by the Lawgiver.[143]

It is clear from al-Shātibī’s analysis that it does provide a methodology to differentiate between what is intended by the Lawgiver and what is not. But we also need to know, in order to form the appropriate legal opinion or judgement, how to evaluate the Lawgiver’s objectives in their proper contexts. For example, are there different forms of objectives? And if so how to differentiate them? Do time and place or other circumstances influence the Lawgiver’s objectives? When we analyse further al-Shātibī’s work we observe that he suggests four different ways to evaluate the contexts in which they are pronounced, and they are briefly as follows: Primary, explicit commands and prohibitions; circumstances giving rise to the commands and prohibitions; secondary objectives; and finally circumstances demanding a ruling while the Lawgiver maintains silence.[144] The essence of al-Shātibī’s argument is that in the ultimate analysis it is important to interpret the texts, bearing in mind the objectives of the Lawgiver, in terms of beneficial interest, as discussed; and if one fails to do so, one would in retrospect observe the intended purpose of the ruling manifesting itself when that ruling is implemented. For example Hallaq contends that granting women rights to dowry

[143] Al –Shātibī, *al-Muwāfaqāt*, Vol ½, pp 666-673 (translated by M. al-Tahir Ibn Ashur, *Treatise on Maqasid al-Sharī’ah,* (Herndon , USA: International Institute of Islamic Thought,2006), p. 20

[144] Al-Shātibī, *Al-Muwāfaqāt, Kitāb al-Maqāsid*, Part 3 (The Book of higher Objectives) (Quoted by A Al-Raysuni *in Imam al-Shātibī’s Theory of Higher Objectives and Intents of Islamic Law*, (Herndon, USA: The International Institute of Islamic Thought, 2005), p. 135

and inheritances together with the right to own property, brought into marriage or acquired through marriage, eventually gave the women 'financial independence'[145]. From this example it can be seen in retrospect that for the Lawgiver, at least one of the higher objectives of the relevant ruling concerning women's property rights, among others, is to give them greater financial security and a form of gender equality.

The above analyses and the views of jurists and scholars show that in the first instance the Qur'ān provided the Prophet with the fundamental principles of Islamic law, its objectives and the guidance towards forming a legal structure. The Prophet, then, during his life time by exercising his own *ijtihād,* developed the Qur'ānic principles further and laid the foundation for the future development of Islamic legal methodology. The next section will explore the methods for deriving the objectives of Islamic law.

2.4 Methodology for deriving the objectives of the Lawgiver

The Intent or objective of the Lawgiver played an important role in the early development of Islamic legal methodology. Because of its importance in the whole of Islamic law it is essential to establish at the outset some of the implications involved in the determination of its characteristics. Having earlier examined how to distinguish what is the intent or objective of the Lawgiver and what is not, and then examined how to evaluate their nature and characteristics, it is also equally important to the study of the development of Islamic legal methodology in the early days, to go further and see how to derive the Lawgiver's objectives from the textual sources. There is unanimity of agreement among the jurists and scholars from the earliest times onward on certain methodologies mentioned below for deriving the rules, principles and objectives of Islamic law (Sharī´ah). If there is a consensus among the jurists and scholars that such methods are legitimate means to understand and explain the Lawgiver's intent, it must be the case that the Prophet himself in interpreting the Qur'ānic laws

[145] Hallaq, W.B., *The Origins and Evolution of Islamic Law*, (Cambridge: Cambridge University Press, 2006), p. 23

followed such methodology even though the terminologies used by later jurists and scholars were not used during the time of the Prophet.

The intent of the Lawgiver may be derived broadly through three methods[146], two of which relate to making inferences from analysing the textual sources, and the third one is concerned with examining the thematic content of transmitted traditions of the Prophet.

2.4.I Searching for common ratio legis

There are several methods that can be adapted for analysis, and the outcome of these analyses will indicate that the Prophet, through various processes of reasoning and issuing judgements, was in effect laying down some of the fundamental principles for Islamic legal methodology.

The first method is concerned with a form of inference of intent or objective of a legal text by taking either of two different approaches. The first approach should be to determine a common ratio legis of a generally known effective cause by making a comprehensive analysis of the relevant texts. This is basically an inductive form of investigation by which a series of particular cases are examined in order to arrive at a general rule. An example can be based on the textual sources[147] concerning prohibition of *muzābanah*, that is the buying of certain type of goods whose quantity or weight is unknown in exchange of similar type of goods whose quantity or weight is known, such as the sale of dry dates in exchange for fresh dates. When the Prophet was asked about the validity of such a transaction he first enquired, 'Do dry dates diminish in size when they become dry'? And when it was replied that they did, he forbade that transaction.

It is clear from this decision of the Prophet that the reason for the prohibition was

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[146] Ibn Ashur, M. Al-Thahir, *Treatise*, pp. 14,15
[147] Muslim, I, *Sahīh Muslim* Vol 3, Trans. Siddiqui, A. H. (New Delhi: Kitab Bhavan, 1984), p. 809

the lack of knowledge of an important requirement governing the exchange of one commodity with another. Similar would be the case concerning the prohibition of *bay' al-juzāf bi al-makīl,* either buying or selling goods of unknown weight or measure against goods of known weight or measure or quantity. The ratio legis and the reason behind the prohibition in this case is the lack of knowledge on the quantity of one in terms of the other; and so would be the unlawfulness of deception in commercial transactions based on the Prophetic tradition, 'when you enter a transaction, say, "No trickery"'[148].

Using inductive analysis of these and similar cases based on the intent or objective behind various injunctions or prohibitions we arrive at the general rule, and a rule of legal methodology, that buying, selling or exchanging goods involving ambiguity or substantial risk with respect to the weight, quantity, price or time or place of delivery is prohibited. Another example concerns the prohibition of making a marriage proposal to someone, say X by Y when Z has already made a proposal to marry X. This prohibition on Y is imposed so that the one who first proposed to marry X is not deprived of the benefit of the opportunity of marrying X. If a second person, Z in this case, wants to make a proposal to marry in such circumstances he has to wait until the one who made the first proposal has changed his mind or withdrawn his proposal. It is clear on further analysis of this or similar prohibitions that once we work out the possible reasons we can then infer the specific intent or objective aimed through such a prohibition. In this case, among other objectives, an important one is the promotion of brotherhood.[149]

The next approach involves evaluating selected texts for arriving at a common ratio legis. Once this common ratio is established it will indicate the intent of the Lawgiver with respect to the selected texts. The objective of making foodstuffs readily available and having access to them without any restrictions can be inferred by analysing the ratio legis which prohibits the forward sale of foodstuff, a form of sale that could lead to stockpiling. The Prophet has prohibited such

[148] Ibn Ashur, M. Al-Thahir, *Treatise*, p. 15
[149] ibid., 16

stockpiling saying, 'he who hoards is a sinner'.[150]

The second method relates to the Qur'ānic texts whose meanings are certain or have a high probability of certainty and, therefore, whose objectives can be easily established. There are many examples of such texts in the Qur'ān. For example, **'God does not love corruption'**[151] or **'O , you who believe; do not devour one another's possession wrongfully'**[152], or **'God wills that you should have ease and does not will you to suffer hardship.'**[153]

The third method of determining the intent is by examining the widely transmitted traditions (*mutawātir)* of the Prophet which fall into two main categories. The legal principle derived from this method is that the form of transmission or communication of a particular practice, *amal,* and independent reasoning, *ijtihād,* of the Prophet, or more generally in the modern context, any form of authoritative communiqué, determines its degree of importance in law. The first is concerned with those traditions consisting of specific themes and relating to acts of the Prophet that were watched by many of his companions, all of whom had an exact knowledge of those acts and could verify appropriate legislation confirming those acts. The texts of this category belong mainly to transmitted knowledge concerned with religious matters which are universally known to be essential. For example, the institution of continual charity (*sadaqa jāriyah*), a form of endowment (*nabs*).

There is another category concerned with those recurrent thematic events in the life of the companions who having closely observed the Prophet's response to those events have inferred a higher objective emanating from the action of the Prophet. For example, it is reported in *sahīh al-Bukhārī*[154] from al-Azraq bin Qays that while some of the companions were fighting in a battle he saw a man abandoning his prayer and running with a struggling animal. On seeing this a Khawariji prayed to God to punish this man. The man overheard this prayer to God and after returning and completing his own prayer he then confronted and

[150] Ibn Ashur, *Treatise,* p.16
[151] Al-Qur'ān 2:205
[152] ibid 4:29
[153] ibid, 2:185
[154] Al-Bukhāri, I., *Sahīh Al-Bukhārī* Vol II Trans. Khan M.M., (Beirut: Dar al Arabia, nd), p.169

said to him that he fought several battles with the Prophet who always showed leniency in such situations. Accordingly, the man stressed that it was right to hold on to the animal rather than let it run away to the stable causing him hardship. For this companion the higher objective or intent of the lawgiver as he perceived was the Prophetic leniency in such circumstances. He considered such leniency permitted him to abandon his prayer in order to stop his animal running away and return to complete his prayer rather than continue his prayer and allow the animal to runaway and thereby cause him hardship walking back home.

2.4.II The Prophet's role and the consequences of his action in Islamic law

Words and actions of the Prophet give rise to different intents and these differences enable the jurists to formulate opinions and judgements not only based on the literal meaning of the texts but also the much deeper meaning intended by the Prophet. It is argued that the first person to appreciate the differences was the eminent scholar, Shihāb al-Dīn al-Qarāfī. In his book *Anwār al-Burūq fi Anwā' al-Furūq*[155] Al-Qarāfī differentiates the Prophet's activity broadly into three categories; A judge (*qadā'*), deliverer of legal edicts (*fatāwā)* conveying the message revealed to him, and Head of State. He then points out that when the Prophet combines one role with another there could be disagreement among scholars over the role he has taken. The Prophet acting in different capacities, and by making several forms of decisions and judgements, some binding and others non-binding, some commandments and some prohibitions and so on, was establishing a legal principle of methodology that any rule of law emanating from any authoritative body needs to be differentiated.

Generally, depending on the particular role, his words and actions have different consequences in Islamic law. Whatever he said or did as a transmitter or conveyer

of God's message is a 'binding general rule (*hukm 'āmm*) on all until the Day of

[155] Al-Qarāfī, Shihāb al-Dī, *Kitab al-Furūq* ed. Muhammad Ahmad Sarraj & Ali Jumah Muhammad (Trans. Ibn Ashur, *Treatise on Maqāsid al-Sharī'ah*, The International Institute of Islamic Thought. Herndon, , 2006, p.30), (Cairo: Dar al-Salam, 1421/2001), Vol.1, pp.349-350

Resurrection'. Commandments and prohibitions covering innumerable issues such as the prohibition from eating swine meat to theft[156] must be strictly followed by all. On the other hand if his words and actions arise from his capacity as political leader or as a judge, no one can engage in those activities without the authority of the head of state in the first case and a court judge in the second.

The activities of the Prophet in these broadly defined categories could be analysed as follows. As Head of State he could perform several acts, from despatching armies to collecting and spending the revenue of the state (*bayt al-māl*) to appointing governors and performing other functions solely as Head of State, and not in any other capacity. When he settled disputes between two or more parties based on evidence or oaths he was acting as a judge only. Whenever he was engaged in promoting or clarifying strictly spiritual issues or on matters of worship (*ibādāt*) he was performing his duties as deliverer of religious edicts (*fatāwā*) or a transmitter of the Divine message. In all these cases there is generally no room for any ambiguity with regard to the purpose or intent of the relevant ruling.

Al-Qarāfī argues that in some cases it can cause some ambiguity as to the capacity in which the Prophet is making the relevant ruling. For example, to which category does it belong when the Prophetic tradition says, 'he who cultivates land that does not belong to anybody has a greater right to it? Was it made in the capacity of Head of State so that prior permission from the State was always required before acting on that ruling as held by Abū Hanīfah; or was it made in the capacity of deliverer of religious edicts so that no prior permission was required as maintained by Imams al-Shāfi'ī and Mālik?. Again how could the ruling of the Prophet be interpreted in the case of Hind bin Urbah, the wife of Abū Sufyān. Hind complained to the Prophet that her husband was a miser and would not support her and her children, and in order to provide for herself and the children she had to take money form Sufyān without his knowledge. The Prophet told her, 'take for your needs what is just and reasonable'[157]. The question as to whether the Prophet's instruction to Hind was issued in the capacity of deliverer

[156] Hallaq, W.B., *The Origins*, p. 20
[157] Ibn Ashur, M. Al Thahir, *Treatise.* P.32

of religious edicts so that it was applicable by any one without permission, or was it issued as a judge requiring prior approval of a judge in order to act when faced with such situation.

On another occasion the Prophet said, 'whoever has killed an enemy [in battle] and has evidence of his action, can claim [the enemy's] possessions, [that is the property of the deceased such as clothes, arms, horse etc].[158]' Again al-Qarāfī argues that the scholars disagreed over whether the Prophet made this statement as a Head of State requiring prior approval of the state to claim the right to enemy's possession, or as al-Shāfi'i has held that the Prophet was acting as a conveyer and transmitter of revelation and deliverer of religious edict, so that the killer does not require the approval of the state to claim the victim's possession.

Apart from showing the emergence of a principle of legal methodology mentioned earlier, as a consequence of the Prophet's various forms of judgements delivered in different capacities, this analysis establishes another important principle. The Lawgiver, through His Legislation, or the Prophet acting in different capacities, makes pronouncements on various occasions, either indicating the specific intent or purpose of a pronouncement directly or expressing the intent indirectly and leaving it open to be interpreted as circumstances demand. Coulson by his reference to the 'general spirit of the Qur'ānic legislation'[159] and by his argument elsewhere to the effect that the flexibility of the Qur'ānic texts makes it possible for it to 'meet the particular needs of the time and place'[160], is implying the need to interpret and determine the intent of the Lawgiver. Accordingly, the two principles of the legal methodology are that when analysing the intent of the Lawgiver or any authoritative rulings it is imperative to differentiate the rulings or the rules of law, and to give proper consideration to various factors such as those discussed above so that both the apparent and the deeper meanings are taken into account before giving an opinion or judgement. A later chapter will explore this principle further when the methodologies of the great jurists/imams are examined, but in the meantime the

[158] Ibid., p.33
[159] Coulson, N.J., *A History*. p.220
[160] ibid., p. 225

following section will trace the next phase in the development of English legal methodology.

2.5 Early phase of the English legal system

The Islamic legal system, or for that matter most legal systems with a structured form of legal methodology, have roots in the past and evolve over time. The English Legal system is no different. It is argued that the laws of England and Wales have been built up gradually over centuries[161] and therefore, it took longer for a methodology to evolve. For a realistic comparison of the first stage in the development of Islamic legal methodology with that of the English legal system it is necessary to explore the latter's development through the early phase. This will take us back to at least the Anglo-Saxon period that began after Roman rule ended in 410 AD, which appropriately and interestingly too, happens to be just over a century before the fundamental principles of Islamic law began to take shape.

2.5.I Roman and Germanic influence on English law

One of the difficulties in discovering the legal methodology of the early English period is to draw any conclusion based on available sources that are said to be mostly lacking in authority or authenticity. Moreover, historically it is composed of law partly Roman and partly Germanic in origin, with contributions from Danish and Scandinavian laws. Maitland and Pollock in their authoritative and monumental work *History of English Law before the time of Edward 1* argue that the collection of Anglo-Saxon laws does not appear to give a 'complete view of the legal or judicial institution of the time' and is surrounded by 'obscurity.'[162]

Similar sentiment has since been expressed by many authorities. For example, Lloyd and Laing argue that during the fifth and sixth centuries 'historical sources'

[161] Martin, J., *The English Legal System,* (3rd ed., London: Hodder and Stoughton, 2007), p. 14.
[162] Pollock, F & Maitland, W., *The History of English Law Before the Time of Edward 1*, (2nd Ed: London: Cambridge University Press, 1923) pp. 26 & 29.

were negligible; written by non-Saxons purporting to be reporting events as they occurred, but in fact written 'long after the event they describe; or spectacularly biased and in some cases can be proved incorrect.'[163] And J Campbell referring to Anglo-Saxon law codes points out that there are '…many paradoxes about the earliest English Law.'[164] Yet, it may be argued that some of the issues raised above were inevitable considering the historical period and the circumstances in which the events were taking place. Be that as it may, and subject to what has been said earlier, we proceed to consider the methodology on the basis of what Pollock and Maitland suggest; 'how much of the world's business …has been carried on without it (written record)'.[165] What follows then are principles and practices of the early legal system drawn primarily though not exclusively from their exhaustive and illuminative work on the legal history of the period.

We will find some elements of similarity and some differences between the early Islamic and English legal systems in some aspects of their development. Seeking similarities and appreciating differences[166] are important in themselves in that, as we shall see, they lead to greater understanding of both the inner working and the broader aims of the systems. Even when what appears on the surface to be marked differences, when considered at a deeper level[167], such as their history and development, they could prove to be aimed at fulfilling similar functions:[168] developing methodology, in this case, to fulfil the needs of changing society. Speaking of difference, the main ones should, of course, be the sources from which the legal principles and practices were derived, and then the aims and objectives of those sources. In this respect more generally, it is said[169] that the western system of law differs from 'classical Sharī`ah' in two principal ways: Sharī`ah law is wider in scope and is Divine in origin.

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[163] Lloyd & Laing, J., *Anglo-Saxon England*, (London: Routledge & Kegan Paul, 1979), p. 22.
[164] Campbell, J., *Anglo Saxons*, (London: The Penguin Group, 1991), p. 98.
[165] Pollock & Maitland, *The History*, p. 25
[166] Cotterrell, R., 'Seeking Similarity, Appreciating Difference: Comparative Law and Communities' in Andrew Harding and Esin Orucu (Eds.), *Comparative Law in the 21st Century,* p. 35.
[167] Hoecke, M.V., *Epistemology and Methodology of Comparative Law*, European Academy of Legal Theory Monograph Series, (Oregon: Hart Publishing, 2004), p. 181
[168] Leyland, *Oppositions and Fragmentations*, p 215.
[169] Encyclopaedia Britannica, *'Islamic Law'* by N.J.C., (15th Ed: Chicago, University of Chicago, 1981), p. 938

In the early Islamic methodology, as we saw, the source of law was primarily derived from Divine legislation and the objective was achieving benefit and avoiding harm in terms of human interest. In the early English legal system, as we shall see, human legislation of one form or another appears to be the primary if not the only source. Although Christianity was adopted as the official religion of England in 313 AC[170] and Anglo-Saxons were converted to Christianity in the 6th and 7th centuries[171], religion appears to have had little influence on the 'temporal' legislative process. However, as Pollock and Maitland point out there were, no doubt, both secular and ecclesiastical courts[172] during this period.

2.5.II Legal methodology of the Anglo-Saxons

The rudimentary form of the early legal methodology of the Anglo-Saxons, the precursor to common law, the law of all persons and of all parts of England and Wales,[173] falls into three major divisions:[174] legal pronouncements and edicts by the king; local customs considered authoritative and recorded later by the Normans in the Doomsday Book; and the private legal rules and enactments, which played a lesser role compared to criminal law on which much emphasis was placed. However, even in criminal matters not until about the tenth century was there some form of regulated penal system and the punishment of criminals came into force. The important characteristics of the three major divisions of the methodology of law, it is argued, can be better understood if we consider them in what is called 'their archaic order of importance.'[175] First comes the law and customs relating to persons, then judicial matters followed by rules for breach of the peace and wrongful acts, and finally, the law of property. Jacqueline Martin argues that both local and general customs were recognised, the former being more important since they formed the basis for the later common law of England.[176]

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[170] Lloyd & Laing, J *Anglo-Saxon,* p. 95.
[171] Ibid., p. 89.
[172] Pollock and Maitland, *The History*, p. 40.
[173] Kiralfy, A.K.R., *The English Legal System,*(London*:* Sweet and Maxwell, 1967), p. 4.
[174] Encyclopaedia Britannica, (Micropaedia), 'Anglo-Saxon Law' (15th Ed: Chicago, University of Chicago, 1981), p. 377/378
[175] Pollock and Maitland, *The History,* p. 29.
[176] Martin. J., *The English Legal System*, pp. 14-15

In the laws and customs concerning personal conditions there is an important distinction between the freeman and the slave, with further differences in status among freemen, some of them becoming lords and the others their followers. Personal status and land holding or tenures were closely linked to each other. Lord and man were considered a 'necessary part of public order.'[177] However, a man without a lord was treated as 'suspicious if not a dangerous person.' Restriction on the freedom of the freeman was not only confined to his dependence on the lord, but kinship, or belonging to the community also played an important role. Priests belonging to religious orders were conferred not only legal freedom but also a kind of nobility.

Among those not free were not only the ones who had their attachments to the soil, in serfdom and villeinage but also those who were subject to slavery which was fully recognised until the 12th century. Even 'selling a man beyond sea' was not uncommon.[178] But through force of circumstances a freeman would voluntarily enslave himself. The methodology provided rules governing what categories of persons could be sold abroad or when and how manumission could free slaves and so on. Kiralfy argues that private law was based on 'common sense and experience' dictated by the feudal condition of the time.[179]

With respect to judicial institutions in Anglo-Saxon times, they were not in any way comparable to 'our own' time but the system was of an 'archaic type' and the proceedings were of a 'rude and simple kind'. Procedure for deciding question of fact as in modern times was non-existent; oath was the main form of proof. It is argued that if we can trust the written law, important judicial proceedings relate to 'manslaying, wounding and cattle stealing'.[180] The judicial function of the king was 'not to see justice done in an ordinary course, but to exercise a special and reserved power' to put things right when a person failed to get redress from elsewhere under existing rules. The public court system consisted of county courts, and to conduct ordinary affairs there were the courts of

[177] Pollock and Maitland, *The History*, p. 30.
[178] Ibid., p. 35.
[179] Kiralfy, *The English*, p. 4.
[180] Pollock and Maitland, *The History*, p. 38.

'hundreds'. There were also private courts conducted by the king and the lords in their own lands to provide justice to the tenants in local matters.

As for jurisdiction in the Anglo-Saxon courts, it was mainly concerned with offences and wrongs which involved violence and theft, largely of 'cattle-lifting'. Law of theft was based on local customs and usage while law of contract was 'rudimentary'. In all these matters Anglo-Saxon law is said to be 'archaic'.[181] Criminal offences were deemed to be committed against the king's peace and it was much more serious than a breach of an ordinary public order. Punishment of freemen was usually in the form of fines, and death in extreme cases. In the case of slaves, capital and other corporal punishments were imposed without any redemption. Outlaws, adulterers and murderers were subject to the death penalty under different circumstances. Personal injuries and assaults were dealt with by providing a 'scale of fixed compensation'.

With respect to the law of property, in terms of modern concepts, Anglo-Saxon law was archaic and only 'customary and unwritten, and no definite statement of it to be found anywhere' and a law of contract was virtually non-existent.[182] Property rights were recognised in terms of possession and not ownership. The term movable property was 'synonymous with cattle,' and concerning other objects there were no rules governing them nor were there rules for enforcing contracts. On land tenure though there were plenty of materials, and all of them relate to grants made by the kings to the religious houses and nobles, and known as book-land. Some Freemen also seemed to have had book-lands under a lord but with no record on what terms they had them. Folk-land is to be contrasted with book-land and one version of it says that whatever was not book-land was folk-land held by common folks without any written title. With the Norman conquest book-land was gradually merged with feudal tenures.'[183]

By the exercise of royal privilege various changes were made to property rights and were found to be incapable of giving sufficient protection. Therefore, other

[181] Pollock & Maitland, *The history*, p. 44.
[182] Ibid., p. 57.
[183] Ibid., p. 62.

regulated bodies such as guilds and townships came to take their position, while royal enactments too started to give protection to individuals.

The legal methodology of the Anglo-Saxons was primarily aimed at keeping the peace, and since the king was the ultimate authority, often stringent rules and regulations were promulgated to keep that peace. There are some similarities with Islamic legal methodology in certain aspects of law, particularly criminal law, but very little with respect to the process of the development of its legal methodology. The development itself was to be suddenly interrupted by the Norman Conquest. The next chapter will show the nature of that interruption to the English legal system by the Norman invasion, but before that we need to consider the next phase in the development of Islamic legal methodology under the companions of the Prophet, which will be the subject of next chapter.

Chapter 3

Companions of the Prophet Reinforce his Methodology

Introduction

This chapter will illustrate the way in which the fundamental principles of Islamic legal methodology initiated by the Prophet were developed after him during the time of his companions. The six sections into which this chapter is divided will show that the legal principles and methodology developed during this period were the result of the efforts to fulfil the objectives of the law and establish justice and fairness in society. Section 1 considers what constitute Islamic legal structure, textual interpretation, legal reasoning, *ijtihād* and Madinan practice, '*amal*; Section 2 looks at how they managed differences in legal opinion; Section 3 explores the methodology of the first four Caliphs; Section 4 examines the regional and sectarian impact on legal development; Section 5 evaluates the *qādī* system and Section 6 assesses the next phase of English legal development under the Normans.

3.1 Islamic legal methodology a continuous process

While modern scholars say that Islamic Jurisprudence began by around 100 AH, Hallaq argues that what was in fact happening by 100 AH was a process of continuation of the legal development which began much earlier.[184] The upsurge in intellectual legal activity throughout the Muslim community in the last quarter of the first century, Hallaq points out, was not the beginning but another stage in the development of legal methodology. This process of development, as we saw

[184] Hallaq,W.B., *A History*, p. 16

in the last chapter, really had its beginning with the Prophet himself and after his death reached another stage with his companions, and the next two generations.

3.1.I Emergence of a framework for Islamic legal structure

The Prophet before the end of his life initiated, as established in the previous chapter, several fundamental principles and thereby the framework for the future development of Islamic legal methodology and structure. He was no doubt guided and inspired in this by the various texts of the Qur'ān as well as the intent and the overall objectives of the Lawgiver as expressed through the entirety of His revelation. Hallaq's point that the Qur'ān does direct toward elaborating a basic legal structure[185] is worthy of note, in that the term 'elaborating' in this context could include to mean 'establishing', too. However, it appears from his argument that for a fully constituted Islamic legal structure or methodology to exist it must have an identifiable Islamic legal system. He contends that an identifiable Islamic legal system was formed only many centuries after the Prophet. It is true that during the time of the Prophet there was no science of jurisprudence or well structured legal methodology because there was no need for such elaborate systems at that early stage of an emerging society. However, as discussed in the last chapter, the way in which the Prophet arrived at judgements, issued regulations, organised the small community, appointed governors, *qādīs*, judges, issued guidance and instructions how to conduct themselves, all go to indicate that even in that early stage a system of law[186] was being practised.

However, Hallaq further argues[187] that the Islamic legal system through a process of development from rudimentary beginnings took many centuries to acquire an identifiable shape. For him, it is important that to 'call' it a legal system it must possess attributes which can be distinguished as clear features of that system. He differentiates between those essential attributes and 'accidental attributes' and

[185] Hallaq, W.B., *The Origins and Evolution of Islamic Law*, (Cambridge: Cambridge University Press, 2005), p. 24
[186] Hasan, A., *The Early Development,,* p. 14
[187] Hallaq, W.B., *The Formation of Islamic Law*, (Aldershot: Ashgate Publishing Limited, 2004) p. xx

only the essential attributes he identifies as 'general features' that are relevant in order to establish what is and what is not a legal system. Those 'essential attributes' that are concerned only with details about constant movements and changes could never help to 'determine formative epochs'. In order to have a clear understanding of the premise of his argument it is important to understand what he considers the 'essential attributes' of a legal system. He puts them into four categories: development of a complete judicial system; a comprehensive legal doctrine; a science of legal theory and methodology; and the emergence of legal schools. He then argues that even by the middle of the third/ninth century the third and the fourth attributes were not there in any complete form. It was only in the middle of the fourth//tenth century all of them existed.

Now, as indicated in the last chapter, the Prophet, during a period of just over two decades of revelation, was able to bring about a transformation in society. The transformation was such that at the end of his life the Muslims were able to witness a remarkable change for the better all around, and in particular, for our purpose, in law and order, administration of justice, development of legal principles, rules of evidence, judicial process and many areas of law and justice, albeit, not fully structured according to modern standards. Although a highly developed legal system was still far from reality by the time the Prophet passed away, it was no doubt, by any standard, a remarkable achievement in terms of establishing within a short period what could reasonably be described as 'general features' of an Islamic legal system.

After the passing away of the Prophet we are now entering a new phase with the companions and their successors, a phase which, as we shall witness later, is equally remarkable in that it developed in other ways the basic structure and the fundamental principles of law the Prophet initiated. The result of their approach through their contributions to the legal methodology during their period is, we witness, a great leap forward in intellectual advancement and the emergence of at least nine legal centres,[188] over one hundred legal scholars, scholarly activities,

[188] Motzki, *The Role*. P.299 (in Hallaq's *The Formation* , p. 159)

'legal specialists' and 'a body of legal doctrine'[189] with the regional legal centres having highly developed legal systems.

An important element of a legal doctrine in the development of a legal methodology is a legal philosophy. The philosophy must be in harmony with the aims and objectives of its fundamental laws and at the same time be able to accommodate the legal rulings demanded by the changing needs of the time. Principles of such a philosophy had already been established through the textual sources and the '*amal* or practices, and *ijtihād*, a form of independent thinking of the Prophet. The companions then through their *ijtihād* and various judgements elaborated and showed the relationship between Islamic philosophy and legal rulings within the spirit or objective of Sharī'ah. S L M Refai[190] in explaining its relevance to another concept, chooses one of the judgements of 'Umar ibn al-Khattāb, the second Caliph to illustrate the philosophy of Islamic law.

The Qur'ān specifically 'allows' or 'permits' marriage of a Muslim to Jewish and Christian girls. It is believed that the permission is aimed to bring about harmony between communities. When 'Umar ibn al-Khattāb became Caliph this provision was suspended at a time when Muslim men were marrying outside their own community and leaving a large number of Muslim girls without partners. In view of this, Refai argues that 'Umar's legal decision is in conformity with the general philosophy of Islamic law even though the permission to marry is provided in the Qur'ān. He claims that in order to answer the question 'how could 'Umar apply the general principle of philosophy of law' against a specific Qur'ānic text, it is important to understand the general principles of law. In other words, he seems to be saying that only by understanding the general principles of Islamic law can one reconcile 'Umar's decision with the philosophy and the general principles of law. He reminds us that 'Umar was not dealing with fundamentals of religion

[189] Hallaq, W.B., *The Formation of* , .xxvii
[190] Refai, S.L.M., *The Legal Doctrines of Maqāsid al-Sharī'ah with Particular Reference to the Works of Imam al-Shātibī: Historical and Practical Dimension* (London: Ph D Thesis submitted at School of African and Oriental Studies, October 2003), p.65

by which it could mean that 'Umar was not exercising *ijtihād* on a matter relating to *ibādāt*, a 'spiritual' act but only on an issue of *mu'āmalāt,* a 'worldly' act. He also reminds us that it was not a *harām* or *halāl* act but the subject of marriage, a permitted act (*mubāhāt*). Accordingly, Refai emphasises that 'Umar's action is in harmony with the general philosophy of Islamic law. He then points out that there are other examples, too, that can be found in the practices of the companions showing the inherent relationship between legal rulings and the purpose of the Sharī'ah. Therefore, the general philosophy of law can be understood only in terms of the 'purpose of the Sharī'ah'. This philosophy, as seen from the time of the Prophet, formed the fundamental basis of the Islamic legal structure and the legal methodology.

As Hallaq argues, with the passing away of the Prophet and a few decades later with the expansion of the Muslim community it became necessary to establish a legal methodology in the new territories. For the emerging community to deal with new situation and develop a legal methodology they had two sets of laws and principles: Pre-Islamic Arab customary law and the Qur'ān.[191] What is to be noted here is how the early Muslims' attempted to establish an Islamic legal methodology. Did the companions closely follow the methods of the Prophet and express differences of opinion and keep to the spirit of the Qur'ān and the Sunnah? Did the successors of the companions make their own independent reasoning and judgement and try to reconcile the differences when a similar case came before them for resolution? Ahmad Hassan argues that Islamic law was handled in the most professional manner by the successors. He further argues that it took its formal shape and developed as an independent subject of study in different regions.[192] This chapter will illustrate further the process of development of the legal methodology during this period and the nature of the contributions of those who made that happen.

[191] Hallaq,W.B., *A History*, p 6
[192] Hasan, A.,*The Early Development of Islamic Jurisprudence*, (Islamabad, Pakistan:Islamic Research Intitute, 2001), p. 19

3.1.II. Early forms of *ijtihād* underpin the methodology

While the Prophet was living with the companions and explaining, clarifying, advising and guiding them morally and legally to lead a life in accordance with the Will of God as expressed in the Qur'ān, it may not have been necessary, as some have argued[193] for the closely knit community to develop a comprehensive legal theory or methodology. But what the Prophet undertook to do from the very beginning was important for the future development of Islamic Law and its methodology: the Prophet through his method of dealing with problems and making judgements showed the decision making process which the companions and, after him, their immediate successors took as the model for dealing with similar problems in their later lives. Not only did the Prophet himself 'on most occasions' use his own judgements but he also permitted and, as will be seen later, encouraged his companions to exercise their own individual opinion (*ijtihād).*

The term '*ijtihād'* according to one definition[194] is 'the exertion of mental energy in the search for a legal opinion…' to the extent that no further effort is possible. A prerequisite to exercise *ijtihād,* according al-Shātibi is a 'a thorough understanding of the higher objectives of the law' and 'the ability to draw inferences based on one's understanding thereof.' [195] The authority to make decisions and the obligation on others to follow such decisions is stated unequivocally in the Qur'ān, 'Obey God, his Prophet and those in charge of your affairs'.[196] The way *ijtihād* was practised and developed during this period, as can be seen below, almost as a form of doctrine, was to become a crucial element in Islamic legal methodology. The importance attached to the role of *ijtihād* can further be seen from the legal maxim of Al-Karkhi[197]- even if some consider the maxim is a debatable one - that a legal decision based on *ijtihād* may be revoked only by a textual source.

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[193] Hasan, A, *Early Development,* p. 13
[194] Hallaq ,W.B., *Law and Legal Theory*, Group V, p. 3
[195] Al-Shātibī, *Muwāaqāt,* p. 4:105-106,. Trans by, . (Raysuni in his *Imam al-Shātibī's Theory and Higher Objectives and intents of Islamic Law*, p.326
[196] Al-Qur'ān, 4:59
[197] Al-Karkhi, *Islamic Legal Maxims based on al-Karkhis al-Usūl,* Trans. Justice Dr.Munir Ahmad Mughal (Lahore: Kazik Publications), p. 89

The methods of the companions in formulating their judgements were not different from that of the Prophet. They would first refer to the textual sources and if there were no clear rulings on an issue they would exercise *ijtihād*- make the utmost effort according to Hallaq[198] to find a legal opinion with no more effort possible - interpret, explain and issue their judgements within the overall aims and objectives of the Sharī`ah. That this was what the Prophet expected of them can be seen in the case referred to earlier when the Prophet sent Mu'ādh b. jabal as governor of Yemen. After advising him to deal with the people 'gently and not harshly' and not to 'repel' them[199], he asked him, 'according to what will you judge?' Mu'ādh replied that he would first look at the Qur'ān and then the Sunnah of the Prophet and if he could not find an appropriate ruling he said. 'I exercise my own legal reasoning,' to which the Prophet said in satisfaction, 'Thank God for guiding the Prophet's deputy to that which the Prophet approves.'[200] For Shī'ī Muslims, though, according to Muhammad Baqīr al-Sadr *ijtihād* is permissible strictly on the basis of *'usūl'* and that is only when it is in 'synonymity with the procedure of derivation.'[201]

The companions who were said to have legal 'proclivities' (acumen!) would normally discuss the implications of any legal decisions they arrived at with others and explain how their arguments led to the judgement they reached, and whether those judgements 'derived from the letter of the text or from the spirit…'[202] The companions would later explain the events to the Prophet and if he approved their *ijtihād,* that would become part of the Sunnah and if he disapproved, his alternative view would form part of the Sunnah. It is argued that the Prophet would indeed directly tell some of his companions to exercise *ijtihād,* 'probably to reinforce and establish this concept' in a given situation and he would confirm who was right and who was mistaken.[203]

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[198] Hallaq, W.B., *Law and Legal Theory*, Group V , p.3
[199] Ibn Ishāq, *Sirat Rasul Allah*, *The Life of Muhammad*, Trans. A.Guillaume (Oxford: Oxford University Press,2006) p. 644.
[200] Hallaq, W.B., *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), p. 196.
[201] Baqir al-Sadr, M., *Principles of Islamic Jurisprudence According to Shi'i Law*, (London: Islamic College for Advanced Studies Press ICAS, 2003), p 52.
[202] Al-Alwānī, T.J., *Source Methodology*, p. 12.
[203] Ibid., p. 6.

There were companions of the Prophet who interpreted the Sharī`ah law and gave legal opinion, *fatāwā* even when the Prophet was still living amongst them. These companions were in a privileged position as they had immediate access to the Prophet himself for his valuable guidance based on his understanding of the overall purpose and objectives of the Lawgiver in general and the relevant Qur'ānic text in particular. It is important to note, however, that *ijtihād* is not something that could be exercised by everyone or on every aspect of the law and it is for that reason some like Ibn Hazm thought that their *ijtihād* was not valid on *halāl* and *harām* while al-'Amīdī and Ibn al-Hajīb considered it speculative.[204] There were many companions, though, who were competent to issue *fatāwā* and, Jabair al-Alwani lists them according to the number of whose *fatāwā* would fill a great volume. For example, Ibn Abbās' *fatāwā* were collected into twenty volumes.[205] Al-Alwāni includes a further twenty companions who gave a fewer number and there were others who gave one or two *fatāwā.* All in all, the number of jurists mentioned indicates an advanced state of a society.

Coulson's statement that the Prophet and his successors developed the Qur'ānic legislation to the degree that was required by the practical problems confronting the Muslim community in Madina'[206], is unfortunate in that it does not take into account that many of the principles that were developed both in Macca and Madina were in fact of much wider scope and indeed of universal application and of eternal validity.

As seen earlier, Mu'ādh b. Jabal without any prompting from the Prophet spontaneously assuring him that he would use his own judgement when appropriate, shows that the companions were inspired by the Prophet to exercise independent reasoning and judgement. Furthermore, the incident that happened during the battle of Banu Qurayzah again shows clearly that even when the Prophet was among the companions they were boldly exercising their own reasoning and openly disagreeing with one another. The Prophet while instructing

[204] Kamali, M. H., *Principles Of Islamic Jurisprudence*, (Cambridge: The Islamic Texts Society, 2003), p. 486.
[205] Al-Alwānī,T.J., *Source Methodology…*, p.11.
[206] Coulson, N.J., *A History*, p.26

some of his companions to go to a place where the enemies were at the time of the battle he asked them to pray '*Asr* on arrival at their destination. However, when they were half way, the prayer time came and some prayed arguing that the Prophet would not have intended that they should postpone the prayer. While others, interpreting literally the Prophet's instructions opted to pray only on arrival at the destination, and when they did so it was already dark. When the incident was reported to the Prophet he remained silent and his silence was considered as giving his approval. It was argued that if he did not approve, and their action was unlawful he would have, as usual, indicated so and corrected it. These forms of actions of the Prophet were considered by the early Muslims as guidance to be followed and such practices of the followers together with those of the Prophet are generally considered the 'Madinan practice', or Madinan *amal.*

3.1.III. Madinan practice, *Amal,* and its effect on the early development of *ijtihād*

Mālik ibn Anas in his definition of *amal,* - meaning broadly, the practices established within the law and precepts of the *people* of Madina - highlights the important role *ijtihād* played in the life of the companions of the Prophet and their successors. Although the legal methodology of Imam Mālik is to form the subject of the next chapter, since *ijtihād* constitutes an important element in the present discussion it is necessary to explore briefly here the relevance of *amal* vis-a-vis *ijtihād* to the legal development during this period. *The Muwatta* of Malik is generally considered the best source to the practices and *amal* of the people of Madina during and immediately after the Prophet. Ibn Taymiyyah has emphasised that the soundest both in terms of transmission and the opinion of the people in any city is that of the Madinans.[207]

Therefore, in *The Muwatta of Imam Mālik* 'one of the earliest – if not the earliest – forms of Islamic law'[208] as Dutton argues, there is ample evidence to show that the practices together with the *ijtihād* of the companions, their successors and

[207] Ibn Taymiyyah, *The Madinan Way, The Soundness of the Basic Premise of the School of the People of Madina, Tras. Aisha Bewley,* (Norwich: Bookwok, Norwich, 2000), p.21
[208] Dutton, Y., *The Origins of Islamic Law*, (Surrey: Curzon press,1999), p.22

their successors who followed the Prophet represent the most authentic and reliable source compared to any others. This is because they all lived in the same city as the Prophet, and had easy access to his Sunnah. The life they established is referred in the *Muwatta* the *amal.* The term *amal* is distinguished from Sunnah in that *amal* is much broader concept encompassing the Qur'ān, the Sunnah and *ijtihād* and all three are 'inextricably bound together'[209] and manifest as *amal.*

What is important about the Madinan *amal i*s that it shows at least the first two generations after the Prophet, his companions and their successors exercised independent reasoning, *ijtihād,* primarily, though not exclusively, in those instances where there was no established precedent to follow; not exclusive, because, as we shall see, they established methodologies to exercise *ijtihād* and suspended the operation of some textual rulings in certain circumstances.

It is not surprising then that the first Caliph after appointing 'Umar as his successor should pray and say he 'exerted' his intellect in arriving at a decision.[210] It was both the practice of the people of Madina, *amal* and their opinion, *ra'y*, according to Schacht, that constituted the school, *madhhab,* of the people of that city. And in clarifying Schacht's statement Dutton argues by referring to the life and practice of the people of Madina that *amal* constitutes the 'necessary exercise of independent reasoning, *ijtihād,* in the absence of any clear precedent in the existing *amal'*.[211] Since the practice of the people of Madina who were the closest to the Prophet incorporated in their *amal* the teachings of the Qur'ān, the Sunnah of the Prophet including his method of reasoning, the term *ijtihād* in the context of *amal* acquires a much wider meaning. According to Imam Mālik the opinion, *ra'y,* expressed by imams are the same as those of the companions who transmitted them to their successors and, therefore they are of high authority. It is, he argues, 'an inheritance which has been passed down from one generation to another down to our times. It is really the opinion of a large group of imams who

[209] Dutton, Y., *The Origins…* p. 3
[210] As-Suyūti, J.ad-Din , *al-Khulafa'ar Rashidun from Tarikh al-Khulafa*, Trans. Abdassamad Clarke, (London: Ta-Ha Publishers Ltd.,2006), p.77
[211] Dutton, Y., *The Origins,* p. 33

have gone before'.[212]

Imam Mālik's position is that during the Prophet's time, the Qur'ān, the Sunnah and *ra'y* constituted the *amal* into which was incorporated the later *amal* along with the *ra'y* that took place during this period.[213] Imam Mālik along with other scholars like al-Layth ibn Sa'ad during his time and ibn Taymiyyah and Iyad ibn Mūsa al-Yasubi al Qadi who came later, divided the *amal* into two main categories, the ones derived from the time of the Prophet and the ones derived from later authorities. For the purpose of this thesis, the point about the existence of these two forms of *amal* confirmed by scholars from the earliest times is that expressing opinions, *ra'y* and exercising independent judgement, *ijtihād* were crucial facts during the time of the Prophet to the next few generations. From the debates among the scholars what transpires is not whether *ra'y* and *ijtihād* existed within the overall objectives of Islamic law: it did exist, as Coulson[214] argues, even as late as the Umayyad period when judges had the power to decide based on their personal opinion, and is evidenced by the rapid development of the law towards establishing a structure and a methodology. But the debate was what forms of *ijtihad* did the later generations exercise after the Prophet and how should Muslims respond to these different forms.

The first form of the *amal,* that of the Prophet, is divided into four categories; that which the Prophet said (*qawl)*; what the Prophet did (*fil*); those things of which the Prophet approved (*iqrār*); and those which he deliberately avoided doing (*tark*). Iyad argues that the *amal* of the Prophet under these four categories which are passed down to the Madinan *Ulamas* were common knowledge to Madinan Muslims. However, he also points out that the inhabitants of other towns preferred to follow the traditions of the local town on the basis that they were following the *amal* and *ijtihād* of the Prophet transmitted by his closest companions who have now settled in the local centres. This again shows that the early Muslims, living in whatever regions, were ready to exercise *ijtihād* and accept the practices of the companions as long as the opinions they arrived at were within the spirit of Islam.

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[212] Dutton, Y., *The Origins,* pp. 33-34
[213] Ibid., p. 35
[214] Coulson, N.J., *A History*, p. 30

Among the four categories of *amal* defined by Ibn Taymiyyah[215] the first one is also that of the Prophet, and of the later periods, he draws a distinction between those *amal* that originated before the death of the Caliph Uthumān (d35AH) which he termed '*amal qadim* (early *amal)* and those that arose after his death which was called *amal muta akhim.* The first type of *amal*, he argues, must be followed because they are based on a *hadīth,* 'you must hold to my Sunnah and the Sunnah of the right guided Caliphs after me'; and another *hadīth* defines the term 'right guided Caliphs' 'as those of the first 30 years'. Although the first thirty years of the Caliphate included that of Ali ibn Abī Tālib, the interpretation given by Ibn Taymiyyah is based on the Caliphate of the Madinan period and therefore does not include the time in which Ali was a Caliph in Kūfa. The third category consisted of two contradictory *hadīth* or analogies and the one originating from Madina was considered conclusive proof by a majority of imams, while the fourth category which originated still later was thought to be unreliable.

On the general question of later *ijtihād,* Iyad, however, does not make any distinction like Ibn Taymiyyah but disagrees that all the Mālikis considered each of such *amal* to be authoritative. According to some Mālikis they were not authoritative and could not even be used to give preference to one person's *ijtihād* against another. Some others thought that they were still not conclusive but could be used to determine which *ijtihād* among several was preferable. Still others considered that once there was a consensus it would be conclusive.

What can be seen in this debate among scholars is that there is a level of agreement that *ijtihād* was a fact during the period under discussion but some were questioning its characteristics: how was it performed and how authoritative they were in terms of the *amal* including the *ijtihād* of the Prophet, all of which go to show a highly developed and sophisticated form of legal reasoning, the benchmark of a rapidly developing legal methodology.

While *ijtihād* constituted a crucial element in the development of the legal

[215] Ibn Taymiyya, *Madinan way*, p.10

methodology, the Prophet's approach to the exercise of *ijtihād* made it apparent to the companions and their followers, particularly those who had to make legal judgement, that there were areas in the Qur'ānic texts, his examples and practices that needed further elaboration and interpretation.

3.1.IV. Developing rules of interpretation

The basic principles established by the Prophet through his various decisions and judgements on cases presented to him were that the textual sources were neither inflexible nor were they to be interpreted literally. The methods of interpretation were later developed into a highly sophisticated form, even as early as during the time of the companions. For example, Al-Shafi'i, commenting on the Qur'ānic verse[216] shows one instance of the companions' approach to interpretations. He argues that the reference to equal compensation in the text was interpreted by the companions to mean compensation should be 'nearest in size to the body of the game.' Shāfi'i argues that it does not mean compensation in price 'save in a farfetched interpretation' and he points out 'this [literal interpretation] is sought by *ijtihād...*'[217] Shāfi'i's comment shows that, even by modern standards, the companions were exercising a highly developed form of reasoning and interpretation to arrive at judgements that were appropriate in a given circumstance. In exceptional situations when the text is general or not very clear on an issue then, subject to conditions, the concept of intent, objective or the purpose of the Lawgiver has been the guiding principle of interpretation of texts from the time of the Prophet down to the companions and their successors.

In this connection it is interesting to note some of the modern principles of textual interpretation of legislative instruments or statutes passed by the British parliament. Three such principles[218] state that;

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[216] Al-Qur'ān, 5:95

[217] Al-Shafi'ī. M. ibn I., *al-Shahfi'ī's Risāla, Fi Usūl al-Fiqh*, Trans. Majid Khadduri, (Cambridge: The Islamic Texts Society, 2003), p.78 Pleae note: al-Shafi'i's *Risāla*, in the English translation quotes Qur'ānic verse as (Q. V,96) but the quoted verse is 95 in *Sūrah* 5,

[218] Partington M., *Introduction to the English Legal System*,(Oxford: Oxford University Press, 2000), pp. 55-57

the *literal rule* implies that the statute, wherever possible be given the literal meaning;

the *golden rule* requires the court to consider the purpose of the objectives of the legislative act in terms of the 'mischief' the act was hoping to deal with; and

the *unified common approach* implies that in the first instance the judge should consider the literal meaning and if that does not produce clear meaning or leads to absurdity then the judge should consider the purpose of the act and interpret it to give effect to the that purpose. Partington argues that such bases of interpretations do not mean that the judgements would be widely varied and without any principle. From reported cases it is clear, he points out, that the judges go to 'great length' to ensure that they arrive at decisions 'founded on rationality and principle'. It is inevitable that the different judges could reach different decisions in individual cases. Even during the time of the companions it was possible for two people to make different decisions as we saw in the case of those above during the time of the battle of Banu Qurayzah. But the decision was made after exercise of *ijtihād* and reasoning. However, in the ultimate analysis, the vast majority of the decisions reached by the judges whether under the English or the Islamic Legal system must be uniform even if the intent or objective of each Lawgiver is different.

It is significant that even the term '*fiqh*' did not have any restricted legal meaning nor was it interpreted restrictively. On the contrary it covered all aspects of Islam, namely theological, political, economic and legal[219]. Even immediately after the death of the Prophet it did not have a restricted meaning. After his death when the companions found that he was not available to make decisions and issue judgements, his companions and their successors were faced with new problems and they were forced to interpret the text and exercise their personal reasoning and judgements. Sometimes the term '*fiqh'* was 'frequently used for the exercise

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[219] Hasan, A., *The Early*, p.1

of intelligence'[220]. In those instances any personal opinion arrived at by applying knowledge acquired through intelligence was called *fiqh*. This form of unrestricted and broad interpretation indicates that the Prophet's companions and their followers used their intelligence and exercised reasoning to arrive at decisions within broader objectives. At the same time '*ilm*' came to be associated with the knowledge of the Prophetic traditions, *hadīth.*

After the passing away of the Prophet, his companions, their immediate successors and their successors followed in the footsteps of the Prophet towards developing Islamic legal theory and methodology. But it was still not a fully structured or well defined judicial system in the modern sense nor was it yet a formally recognisable system of Islamic legal theory or jurisprudence. Although they existed in practice there were no clear well organised systems of legal norms in theory. These legal norms, such as obligatory (*wājib*), recommended (*mandūb*), prohibited (*harām*), disliked (*makrūh*), neutral (*mubāh)* and so on were developed only through the use of various techniques of interpretation, exercise of *ijtihād*, and various legal and analytical principles. Accordingly, the techniques of interpretation formed an important armour in the development of legal methodology, which was further facilitated through consultations, discussions, debates and reconciliation of legal differences. The differences in opinion go back to the revelation itself because, as Izzi dien argues, the Qur'ānic texts themselves that were revealed to the Prophet differed depending on the area, time and circumstances, indicating the need for 'variation of approach'.[221]

3.2. Managing differences in legal opinion

We notice that after the Prophet there were differences of opinions even among the companions on many different matters including legal issues. Such differences were inevitable because of the freedom to exercise human reasoning and independent judgement, although they must be exercised within limits and in certain circumstances, but always subject to the overall spirit of the textual

[220] Hasan, A., *The Early,* p. 4
[221] Izzi Dien, M., *Islamic Law From Historical Foundation to Contemporary Practice,* (Edinburgh: Edinburgh University Press, 2004), p. 3

sources. Tāhā al-Alwānī points out that after the death of the Prophet they differed on many issues, for example, on the issue of burial, succession to leadership and payment of zakāt[222], differences between Abū Bakr and others on prisoners of war, distribution of liberated land and providing equality of financial provisions. There were many other legal differences including those between Ibn 'Abbās and Zayd bin Thābit.[223] These differences were constructive and not destructive as explained through two contrasting viewpoints. On the one hand Zakariyyā Kāndhlawī[224] in his book '*The Differences of the Imam,'* quoting the Prophet as saying, 'the differences of my *umma* are a source of mercy', he argues about the importance of having differences of opinion as long as they are rooted in the textual source and with good intention. On the other hand Jābir al 'Alwāni[225] in his *'Ethics of Disagreement in Islam'* quoting the Prophet's warning 'do not engage in disagreement …', points out that differences must as far as possible be reconciled before they lead to discord and division.

This freedom to exercise independent judgement was to prove very beneficial to the companions in later years when the Muslim territories expanded and new and complex legal issues on religious, cultural, social, political and economic matters needed to be resolved. This approach was to become crucial to the work of the first wave of jurists after the immediate descendants of the followers of the companions of the Prophet. If it was not the case then, as Ahmad Hasan argues, it would not have been possible for future generations to exercise reason nor frame laws to meet the needs of the time.[226] Furthermore, this approach of the companions enabled the early Muslim community to produce, during the first century of Islam, as Al-Azami argues, an extensive legal literature consisting of the companions' judgements, letters, reports and books, and he points to at least six judgements issued by the companions that are based only on the Sunnah of the Prophet.[227]

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[222] Al-Alwānī, T.J., *The Ethics of Disagreement in Islam,* Trans. Abdul Wahid Hamid, (Herndon: International Institute of Islamic Thought, 2000), pp. 42-44
[223] ibid., p.48
[224] Kandhlawi, M Z., *The Differences of the Imams*, Translated by Kadwa, M M., (California: White Thread Press, 2004), p. 36
[225] Al-Alwānī*, The Ethic*, 31
[226] Hasan, A ., *The Early,* p.13
[227] Al-Azami, M.M., *On Schacht' Origins of Muhammadan Jurisprudence* (The Islamic Text Society, 1996), pp. 23-24

Broadly, together with the Qur'ān and the Sunnah, individual opinion or reasoning were to form the fundamental basis for the development of Islamic legal methodology. After the Prophet there were occasional disagreements, *khilāf,* but mostly consensus was the norm. Indeed an elaborate doctrine based on consensus was to evolve as a principle of the legal methodology. As early as the time of the first and second Caliphs, Abū Bakr (ruled 632-634) and 'Umar (ruled 634-644) respectively, consultation and consensus were to form the basis of judicial decisions and legislative processes. For example, when Iraq came under the Muslim rule, Caliph 'Umar, before deciding the best way to manage the land, consulted the companions and decided the land should remain with the owners as they rather than the conquerors had the knowledge and experience to manage it.

3.2.I. New challenges inspire new thinking

The Companions guided by the textual sources and prompted by their *ijtihad,* gave a legal meaning to 'public interest'. Various instances in this early period make it clear that the legal issues were considered in terms of public interest. Laws of specific textual stipulations were even 'suspended' in circumstances where conforming to the 'spirit' and the objectives of the Qur'ān and the Sunnah of the Prophet was paramount compared to strictly adhering to a specific text. The following four examples[228] out of several show the forms of suspension for reasons of public interest, or to avoid undue hardship to human beings.

1. The principle underlying this rule states that when there was no need to continue with the special facilities already provided they may be temporarily taken away. Accordingly, the provision of special grants to bring about reconciliation was later suspended when the Muslim community became large and there was no further need for such grants to be made.

2. The following principle shows that under extreme circumstances laws of commands and injunction may be suspended. For example, second Caliph 'Umar

[228] Izzi Dien, *Islamic,* p.5-6

suspended the punishment of cutting the hand for theft at a time when the nation was affected by famine. This Qur'ānic obligatory punishment was suspended on the basis that 'necessity can justify what is prohibited.'

3. This example illustrates that drastic changes in the circumstances of the place or people must be taken into account before continuing with established restrictions. The Prophetic injunction to allow a lost camel to graze freely rather than confine them was suspended by Caliph Ali on the ground that the circumstances had radically changed since the time of the Prophet, with lots of camels now moving around and with many dishonest people about.

4. If there is any misuse of a provision causing serious hardship to others the following rule shows that existing provisions need to be reviewed. During the time of the Prophet, it would take many months for a divorce to take effect even if the three pronouncements were made in one day. During 'Umar's time however, he decided that once the three pronouncements were made the divorce should take immediate effect based on his reasoning that a person making such declarations must bear the consequences of his decision and thereby avoid the 'misuse of divorce pronouncements'.

These practices of the earliest companions showing individual opinions, consensus, concept of public interest and necessity were to guide their immediate successors and form part of the early development of Islamic legal methodology. Holding and expressing differences of opinion on cases within the overall spirit of the textual sources were the guiding principles for the companions of the Prophet when they became dispersed and began to hold high offices in different parts of the early Muslim world. When the local people presented their cases for decision, the companions, before considering the facts of a case, would differentiate among various valid and invalid, genuine and spurious authorities in order to arrive at a decision. This process of differentiation and making choices provided the companions and the jurists of early generation of Muslims the opportunity to exercise independent judgements.

When the science of *hadīth* and the system of authentication and transmission of

hadīth (isnād) had yet to be fully established, and the techniques of Qur'ānic interpretation had yet to be well developed, the task of differentiation - an essential prerequisite for making the right judgement and making choices - were that much difficult. Yet, following the practices and traditions of the Prophet, of his closest companions and of the rightly guided Caliphs, it was felt incumbent on the part of the later decision makers among their successors to follow their predecessors and strive to make choices and arrive at the best possible judgement. The Sharī'ah[229] stipulates that when the decision made after exercising *ijtihād* is the right one Allah rewards the person twice and when the decision made with the best effort is later found to be unfortunately incorrect, Allah still rewards him once for his genuine effort.

The following two examples[230] illustrate how the companions and their successors implemented this principle through practical applications. The issue of dower for the widow of a husband who died without specifying the dowry nor consummating the marriage, came before Ibn Masūd. On finding that at the particular moment there was no Prophetic *hadīth* to cover this eventuality he made his best effort and exercised his own judgement and suggested that the woman should be entitled to receive a sum similar to what a woman of her social standing would be entitled to. However, Ibn 'Umar (d.73AH) and Zayd bin Thābit (d.43AH) did not agree with Ibn Masūd's decision on that particular point. It is argued that the former decision was based on a possible Prophetic *hadīth* quoted by Maqīl b. Sinān (d. 63AH) whereas when the latter decision was taken the relevant *hadīth* had not reached the two jurists. However, it is very unlikely that a *hadīth* relating to an important matter such as marriage would not have reached them. It is more likely that the two different decisions were taken quite independently without basing them on any relevant *hadīth*. In either event, the decisions would have been taken in good faith making the utmost effort to be just and fair to the parties to the dispute.

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[229] Muslim, Imam, *Sahīh Muslim*, Vol 3 Trans. A H Siddiqi,(New Delhi: Kitab Bhavan, 1984), p. 930

[230] Hasan, A., *The Early*, pp.15-16

3.2.II. Differences in approach to textual sources

Differences in approach of these early Muslims to the implications of the textual source enabled them to develop the important principle of differentiation vital to the development of an Islamic legal system. The principle of differentiation may need to be applied, for example, in relation to the form, content or presentation of evidence; between acceptance or rejection of evidence; between truth and falsehood; between facts and law; between guilt and innocence and so on.

There were situations when the jurists had to decide to reject, for instance, a *hadith* that appeared to contradict the Qur'ān. When Fatimah b. Qays, a divorced woman complained to Caliph 'Umar that the Prophetic *hadīith* did not provide shelter during her waiting period nor financial support for her maintenance, 'Umar held that he could not accept a *hadīth* quoted by a woman whom he was unable to judge as reliable or not, and then that, based on what she said, he could not be expected to ignore the Qur'ān. This decision of 'Umar was reported by Abū Yūsuf and was known only to Iraqis. Imam Mālik and Shāfi'i, therefore, interpreting the Qur'ānic verse 65:6 as providing maintenance only to the divorced woman who was pregnant they went on to accept the *hadīth* 'providing maintenance to a divorced woman (in the case of an irrevocable divorce) during the period of waiting'.

The need to make independent judgement also arose among the early followers concerning the need to explain the Qur'ānic text in the light of *hadīth* some of which at this early stage were subject to clarification and authentication. All these difficulties placed a heavy demand on their independent judgements. For example al-Qur'ān[231] refers to the waiting period for women after divorce as three courses (*quru*). The term *quru* was taken by 'Umar, the second Caliph; Ali, the fourth Caliph; Ibn Masūd; Abū Mūsa al-Ashā'ri and some others to mean menstruation whereas 'Aisha, Zayd b. Thābit and Ibn 'Umar held the term to mean time between menstruations. When faced with several uncertainties, many

[231] Al-Qur'ān, 2:228

variables, and complex issues, it was not an easy task at the early stage in the development of Islamic law to make *ijtihād* so that Qur'ānic justice prevails, yet they made the effort and arrived at the best possible judgements in the circumstances.

Differences in *hadith,* too, required those early Muslims who came immediately after the companions to exercise independent judgements. For example, according to Ibn 'Abbās, on the authority of Usāmah b. Zayd, the term interest (riba) was applicable only on loans. Whereas according to others, including Abū Hurayrah based on the famous Prophetic tradition, held that there was interest on hand to hand transactions of six commodities.[232] The early jurists were also faced with the issue of unravelling the true meaning of a reported *hadīth*. For example, Ibn 'Umar reported a *hadīth* which said that a deceased would be punished because of the weeping of a relative. When Aisha heard about this report she commented that Ibn 'Umar probably forgot some part of this *hadīth* and said, 'the fact is that the Prophet once heard the relatives of a deceased Jewess weeping over her death'. On this occasion, he remarked that the relatives were mourning her demise while the deceased was being punished in the grave. And she later added that the *hadīth* quoted by 'Umar goes against the Qur'ānic text saying, "No soul bears the burden of another".[233]

From the above illustrations what can be seen is that as far as the companions were concerned there were differences among themselves with respect to the interpretation and understanding of the Qur'ān and Prophetic traditions, differences in expressing legal opinions and passing judgements. Yet, they made every effort to arrive at the best possible decision in the circumstances as required by Prophetic stipulations. By doing so they established the legal principles for the development of legal methodology and, as Ahmad Hasan argues 'they did not deviate from the spirit of the Qur'ān and the Sunnah'.[234] When it came to successors or the immediate descendants of the companions, they were faced with the task of reconciling these various different legal opinions of the companions,

[232] Hasan, A., *The Early*, p. 17,
[233] Al-Qur'ān, 6:164
[234] Hasan, A., *The Early*, p. 18-19

which they did broadly in two different ways. First, by applying their own reasoning they chose the most appropriate solution from the different legal opinions, and secondly, they exercised original thinking and formed their own independent legal judgements *ijtihād*, in both instances without deviating from the spirit of the Qur'ān and the Sunnah.

With the successors of the companion we notice the beginning of the formation of a methodology for the development of Islamic law. For this methodology to take root the initial inspiration was the Qur'ān and the guidance of the Prophet both of which encouraged using the intellect, independence of thought and expressing and reconciling differences of opinion. Furthermore, during the later period of the companions and during the time of their successors, the emergence of three great Islamic geographical centres with differences in local customs, practices and administration and differences in approach to legal reasoning facilitated the development and provided further reinforcement. But the form of reasoning, decision making and approach to the texts of the first four Caliphs who also performed the function of judges, were to have lasting impact and formed an important plank in the development of Islamic legal method.

3.3 Developing the methodology by the first four Caliphs

From the time of Abū Bakr, the first Caliph (d 13/634), Islam spread very quickly and the Muslims had suddenly to face new social systems and cultural patterns. As the Sharī`ah could not provide answers to every issue under the new set of circumstances, the rightly guided Caliphs used *ijmā`,* consensus, and *ijtihād* much more extensively than when they were companions living with the Prophet. Ann Codd implies that Caliph `Umar and Ali exercised *ijtihād* even in the presence of clear Qur'ānic and *sunni* injunctions.[235] But, as we saw earlier from Caliph 'Umar's decision on intermarriage, and shall see below, this form of *ijtihād* was exercised subject to various conditions and then only very exceptionally and for specific reasons. But even then his final judgement was

[235] Codd, R. A., 'A Political analysis of the role of *Ijtihād* in legal reforms in the Muslim world,' *Arab Law Quarterly* Vol 14 Part 1, (London: Kluwer Law International, 1999), p. 131.

always within the overall objective of the Sharī`ah.

3.3.I. Objectives and spirit of law were guiding principles

If the Caliphs could not find a solution in the Qur'ān and Sunnah they would try to get the unanimous agreement of important companions and this agreement became known as *ijmā`*. If a unanimous agreement was not possible they would seek a majority decision. If there was a wide divergence of opinion among the companions they would exercise their own *ijtihād*[236], and such decisions would become law.[237] Abū Bakr, who was the first Caliph for only two years, during which period , in spite of him being constantly occupied with the wars of ridda, still went on to issue several judgements; out of twenty references made in the *Muwatta* of Imam Mālik at least half of them are about judgements delivered by Abū Bakr.

During this short period of his Caliphate he not only diligently adhered to the letter and spirit of the Shari'ah he also instructed his generals to do likewise addressing them as follows. '…Establish a covenant with every city and people who receive you, give them your assurances and let them live according to their laws…conducting yourself carefully in accordance with the ordinances and upright laws transmitted to you from God, at the hands of our Prophet.' Caliph Abū Bakr's instruction is one example of a remarkable ingenuity shown by the first Caliph in outlining one of the principles of fair and equitable legal methodology; the ingenuity in making the connection between the obligatory duty of protecting the legal rights and the belief systems of those non-believers living within the boundaries of the Muslim community and protecting the spirit of the Qur'ān and the Sunnah of the Prophet. And Hallaq has no doubt when he says that Abū Bakr was 'adhering to the Qur'ān's letter and spirit…'[238]

Another instance of *ijtihād* was when a law introduced by Abū Bakr enforcing

[236] Al-Dihlawi, S W A., *Difference of Opinion in Fiqh,* (London: Ta-Ha Publishers Ltd., 2003), p.25
[237] Philips, A.A.B., *The Evolution of Fiqh,* (Riyadh: International Islamic Publishing House, 2005), p. 66.
[238] Hallaq W.B., *A History*, p. 7.

the prohibition of alcohol and prescribing punishment by forty lashes for contravening the prohibition laws [239] was later amended by his successors Caliphs `Umar and Ali. Finding the earlier punishment inappropriate they amended[240] them based on their own reasoning that the new penalty was the right one for the crime of breaking the prohibition as it was similar to the Qur'ānic punishment for committing adultery. This and similar decisions go to show that the rightly guided Caliphs not only exercised *ijtihād* and also used a form of analogy, but also established a precedent by being prepared to review previous rulings and judgements to ensure that they were in conformity with the aims and objectives of the Sharī`ah.

Calilph `Umar showed great steadfastness in adhering to the higher objectives of the Sharī'ah. Jābir al-Alwānī explains his commitment to this ideal in the following terms; `Umar was like a shrewd and cautious chemist whose intent was to produce medicine that would cure the disease without causing adverse side effects.[241]' No doubt 'Umar was influenced by the actions of the Prophet as it is reported that `Umar used to watch him on many occasions when the Prophet, would not issue, although it appeared right and proper to do so, an order to the people because such an order would cause hardship. On other occasions if the reason for which an order causing some hardship was given was no longer there, the Prophet would immediately withdraw such an order. And on other occasions, if the people complained of any possible hardship over a proposed order the Prophet would withdraw such an order. Furthermore, he found that whenever the Prophet had to make a choice between two decisions he would always choose the one that would be easier on the people. Accordingly, Al-Alwani rightly argues that 'Umar well understood that the Shar'iah had a purpose and an aim which must be discerned and considered.'[242]

[239] Hallaq, W.B., *A History*, 8.
[240] Ibid.
[241] Al-Alwānī, *Source Methodology*, p. 15
[242] Ibid. p. 16.

3.3.II. Caliphs introduce new ordinances and legislations

Furthermore, it is generally agreed that 'Umar was one of the closest companions of the Prophet who would not hesitate to exercise his own judgement in the interest of justice, as long as he did not deviate from the overall objective of the law. Hallaq points out that Caliph 'Umar, when he introduced various ordinances and legislations, he was doing so 'in the spirit of the Qur'ān and in accordance with what he deemed to have been the intended mission of the Prophet'. His legislation ranged from state administration, family, crime to punishment for theft and the prohibition on alcohol.[243]

When 'Umar made the ruling to set aside a Qur'ānic ruling, at a time when he found that there was no need to pay part of the zakāh fund which this Qur'ānic text[244] stipulates are for 'those whose hearts to be won over', he was exercising *ijtihād*[245]. His *ijtihād* in this instance was to ensure that his decision was to fulfil the objective of the law requiring great prudence and care in spending the zakāh fund. Similarly when Hasan al Turābi calls 'Umar's jurisprudence broad and of general interest, and based on the aims of religion[246] it shows that his judicial reasoning and decisions were aimed at fulfilling the objectives of the law. When 'Umar gave a judgement contradicting the one given many years before, and reported to have said 'it is better to return to the right path than to persist in error'[247], he was setting a precedent to overrule a decision which later transpires to be in error either based on fact or on law, another important principle of a legal methodology.

Ibn Taymiyya has confirmed that after the Sunnah of the Prophet the next largest amount of judgements and the source of Madinan Amal was that of 'Umar. He

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[243] Halllaq, W.B., *The Origins,* p.32
[244] Al-Qur'ān, 9:60
[245] Al-Raysuni, A., *Imam Al-Shātibī's Theory*, p. 343
[246] Al-Turābī, *Tajdid Usūl al-Fiqh al-Islam , 1st ed*. (Khartoum: Dar al-Fikr, 1980),p. 24 {Trans. Ahamad Raysuni, *Imam al-Shātibī's Theory of the Higher Objectives and Intents of Islamic Law,*The International Institute of Islamic Thought, 2005), p 355}
[247] Anderson, N., *Law Reform in the Muslim World*, (London: University of London, 1976), p. 78

further emphasises[248] that 180 references, nearly three quarters of approximately 250 quoted in Imam Malik's *Muwatta* can be considered as judgements. Al-'Askari[249] counts about twenty instances in which 'Umar achieved the 'first' or as the originator of important events, many of them dealing with legal and judicial matters. For instance, he was the first to be called Amir al-Muminīn, first to introduce penalty for offences, first to introduce the division of inheritances, first to forbid the sale of female slaves with children, and 'first' in many others .

Some of 'Umar's innovative ideas to which Coulson refers must be viewed in terms of 'Umar's exercise of independent reasoning, *ijtihād* and a sense of fairness in order to understand the reason behind his judgements. For example, 'Umar was laying the foundation for a fiscal system by introducing a form of *dīwān*[250] or the pay-roll register to enable easy and prompt payment of stipends. Again, his decision to leave the conquered territories in public ownership for the benefit of the whole community and thereby creating a 'new concept of land tenure' [251] and not distributing it among the soldiers alone, was based on his exercise of *ijtihād* in terms of human interest and his Islamic sense of fairness. Coulson, by referring to the methods of Caliph Abū Bakr and 'Umar, 'appears to argue and make a blanket statement that anyone with either piety or social conscience [252] could interpret the 'Qur'ānic regulation'. But, according to universally accepted Islamic traditions and practices what one has to be is not *either* pious or having a social conscience, but one needs to possess both these characteristics together. In addition, one must have qualities such as a thorough understanding of the classical Arabic language, in depth knowledge of the Qur'ān and in particular all the legal texts, the Sunnah and other hermeneutic principles relevant to Qur'ānic interpretation. A proper interpretation can be done only by a *mujtahid* who is very knowledgeable in many areas and proficient in several techniques, at least six of which according to Hallaq [253] are fundamentally important. As for the two Caliphs, they undoubtedly possessed these characteristics and many more in abundance.

[248] Dutton, Y., *Islamic Law* , p.32
[249] As-Suyūti, *al-Khulafa'* p.143
[250] Coulson, N.J., *A History*, p.23
[251] ibid.
[252] Coulson, N.J., *A History,* p.25.
[253] Hallaq, W.B., *A History*, p. 118

During the Caliphate of `Uthmān ibn `Affān, for one reason or another, he only occasionally exercised *ijtihād* and also issued only a few *fatāwā*[254] and therefore his approach to legal decision-making in terms of the broader aims and objectives of the Sharī`ah was minimal. But that does not mean he was a 'literalist' in the sense of following strictly the textual sources only. Indeed, Hallaq clarifies and argues that when the time came to appoint a successor to `Umar, `Uthmān said that when he had to make any legal decision he would also take into account 'the *sīra* of the two preceding Caliphs'[255] indicating that after the two textual sources he would exercise *ijtihād* and consider the views of his predecessors. In any case it is unreasonable to expect all those in authority to decide on issues in exactly the same manner.

When Ali became Caliph his approach to legal decision-making resembled that of `Umar in not only making his own *ijtihād* but also in relating his decisions to the broader objective of the Sharī`ah. Al-Alwānī argues that Ali applied the principles of q*iyās* (analogy), *istihsān* (juristic preference), *istishāb* (presumption of continuity) and *istislāh* (consideration of public interest) always basing his opinions on the broader aims of the Sharīa`h. [256] Eventually, the events surrounding the death of Caliph Ali, although not strictly relevant to the development of the legal methodology, nevertheless, contributed heavily to the emergence of schisms and sectarian scepticism affecting its progress.

3.4 Impact of regional interest and sectional factions

Geographical expansion of the Muslim community and the internal bickering and politics, while creating tension and conflicts, also generated some beneficial impacts on the development of the legal methodology. These benefits ranged from a rich variety of local and regional legal thinking and judicial reasoning to the art of reconciliation and conflict resolution of divergent views of what law was or ought to be, views strongly held and defended by intellectually warring factions.

[254] Al-Alwānī, T.J., *Source*, p. 17.
[255] Hallaq, *A history*, p.11.
[256] Al-Alwānī., T.J., *Source* p. 18.

After the time of the companions and particularly after the four rightly guided Caliphs some significant changes to legal progress began to take place as a result of changes elsewhere, particularly in the broader politics of the Muslims. For example, the selection of the ruler was formally changed to hereditary succession from the earliest method of election by merit. Despite the changes in the political structure, the jurists, at least for the time being, continued to develop the legal methodology based on the guidelines established by the Prophet, his companions and their successors, which led to the beginning of the class of legal specialists. This started around forty years after *Hijrah* and the specialists came from the companions and their successors. While these changes were taking place sectarian divisions in the form of Khawarij, Shī`ī and the like along with fabrication of *hadīth* were also taking root and creating problems for the preliminary structures previously laid for the building of a legal methodology.

In order to bring about some order the Caliph at the time, `Umar ibn Abd al-Azīz (99-101AH/717-719CE) took two important actions. First, he ordered the collection and writing down of all the *hadīth* in every region[257] and secondly, he restricted the issue of *fatāwā* to a well qualified selected few in each locality. Wali Allah al-Dahlawi's description of the situation shows the formation of a legal methodology in that 'the *fuqaha* (jurists) of the period took the *hadīth* of the Prophet, the decision of the early judges, and the legal scholarship of the *sahabās* (Companions), the *tābiūns* (their followers) and the third generation and then produced their own *ijtihād.*'[258]

3.4.I. Regional contributions to development of methodology

As time passed and with the Muslim community well spread over many lands and those with specialist Islamic legal knowledge scattered in different regions such as some in Madina and some in Kūfa, there was a tendency for scholars to give greater weight to legal precedents originating from their own regions. This was

[257] Hallaq, W.B., *The Origins*, p. 71.
[258] Al-Alwānī, T.J., *Source,* p. 24

based on the premise that the local scholars were better placed to verify the authenticity and narrations because of the familiarity of the narrators and the circumstances of the legal decisions. Al-Alwānī states, for example, that the people of Madina aligned themselves with the legal scholars whose thought 'was based on the opinions of `Umar, `Uthman, Ibn `Umar, A`isha, Ibn Abbās, Zayd ibn Thābit[259] and a certain number of their companions among the *tābiūn*. And among them, Izzi Dein[260] points out, Abd Allah b. 'Umar (d.73/693) and Abd Allah b. 'Abbās (d. 68/686) applied strict interpretation of the textual sources to deduce legal rules. In Basra, the jurists Abū Mūsa al-Ashari, Anas b.Mālik and Muhammad b.Sirin following the local customs and traditions introduced an element of personal opinion (*ijtihād*). It was on a similar basis that Imam Mālik formulated his legal arguments which later formed the bedrock of the Māliki school's legal methodology.

The centres like Basra and Kūfa in Iraq, Hejaz, Macca and Madina, and then Syria and also to some extent Egypt, while endeavouring to decide cases keeping to the spirit of the Qur'ān and the Sunnah, were following their own independent legal activity taking into account local customs, practices, judicial thinking and administration. Major towns in these areas had their own leader who in their own particular manner of thought and approach made substantial contributions to the future development of the legal methodology. For example, in Kūfa, there were Alqamah b. Qays (d.62AH), Masruq b. al-Ajda (d.63AH) and others of that period, most of whom were companions of the great Abd Allah b. Masūd (d.32AH). We then later have such legal men as Ibrāhīm al-Nakha'ī (d.96AH), Hammad b.Abi Sulayman al-Ashari (d120AH) and then of course Abū Hanīfah and his followers. In Basra, in addition to thirteen judges mentioned by Azami[261] there were Muslim b.Yasar (d.108AH), Muhammad b.Sirin (d.110AH), in Syria Qabisah b.Dhuwayb (d.86AH), 'Umar b. Abd al-Azīz (d.101AH) and al-Awzai (d.157AH), in Macca, there were Ata b.Abī Rabah (d.114AH) and Amr b.Dinar (d.126 AH). In Madina, apart from the celebrated 'seven jurists of Madina' like

[259] Al-Alwānī, A., *Source Methodology*, p. 25.
[260] Izzi Dien, *Islamic Law,* p. 11
[261] Azami, M.M., *On Schacht's,* pp.21-22

Said b.al-Musayyib (d.ca 94AH), Abū Bakr b. Abd al-Rahmān (d.94 or 95AH), Ubayd Allah b.Abd Allah (d.ca 98AH) and others, there were other celebrated names like Salim b.Abd Allah b. Umas (d.107 AH), Ibn Shihab al-Zuhri (d.124AH) and many more. What is to be noted among these jurists of different centres and regions is that in order to arrive at a legal decision they also referred to and quoted various companions of the Prophet. These jurists more often adopted the methodologies of those companions who originated from the same regions as the jurists themselves. For example, those in Madina followed the approach of 'Umar, Aisha and Ibn 'Umar, whereas those in Kūfa adopted the methods of Ibn Masūd and Ali. Nevertheless, what is significant is that in order to arrive at appropriate legal decisions based on the time and circumstances of each case they exercised independent thinking and reasoning and not always agreeing with the opinions of the men of their own locality. For example, some jurists of Macca disagreed with the opinions of Ata while others took a different view. In Madina, too, after deriving the rules for some time from the principles formulated by Ibn al-Musayyib they switched to the method of Imam Mālik whose ideas were later to be dropped in preference for others. In kūfa some followed Ibn Abī Layla while criticising Abū Yūsuf and others acted the other way round.

To what extent the early jurists respected and accommodated local differences can be seen from Imam Mālik's reaction when Caliph Abū Jāfar al-Mansūr (d.158) suggested that Imam Malik's *Muwatta* should be distributed in all the provinces and to be considered the only authority of law. Imam Mālik thought that it was not a good idea and advised the Caliph not to do so. He argued that the different localities had developed methodologies taking into account local customs and practices and based their decisions on their interpretations and understanding of the Qur'ān and the Sunnah; and that any interference would be counterproductive and unnecessary[262]. This reluctance on the part of a great jurist and scholar to allow his own work to form the basis of interpretation of law illustrates that in the early stage of the development of Islamic law a much more flexible approach allowing differences of opinion was the norm.

[262] Hassan, A., *The Early*, p.22

Those in Kūfa found the opinions most acceptable to them were those of Abd Allah Ibn Masūd and his companions, the judgements of Ali ibn Abī Tālib, Shurayj (d 77 AH) and al-Sha'bi (d 104 A H) and the *fatāwā* of Ibrāhīm al-Nakha`ī (d 96 AH).[263] In Syria and Egypt too local customary practices and the personalities of the scholars influenced[264] the development of legal methodologies. These differences in approach continued to the next generation without any major changes. While this regional approach had its advantages it also prevented the emergence of a unified system of Islamic legal precedents as a source of reference for the whole Muslims community and it restricted the exercise of independent thinking, *ijtihād* and the uniform development of the objective based interpretation of the textual sources at a global level. For example, Salīm, son of Abd Allah b. 'Umar, following [265] in the footsteps of his father, was once asked repeatedly to give an opinion on a legal case to which he replied again and again, 'I did not hear anything' indicating that there was no guidance from his father or other scholars. This shows that he was not prepared to express an opinion of his own in the absence of any direct authority to follow. Whereas elsewhere, like Kūfa, a town with multi-cultural communities interacting in various social and economic activities, the jurists were prepared to form independent judgements or express personal opinion on legal matters as long as they were within the spirit and objectives of the textual sources. Caliphs 'Umar and Ali were the pioneers of such methods later to be followed by the prominent scholar Ibrāhīm al-Nakha'ī (d 96AH).

With further expansion of Islam into other territories, differing legal opinions began to emerge producing legal disagreement, *khilāf*[266] in opposition to the concept of consensus. Furthermore, while the issues of fabricated *hadīth* put additional burdens on the development of the methodology, the increasing conflict and tension between the two earliest schools, *ahl al-ra'y* and *ahl al-hadth* needed to be reckoned with.

[263] Al-Alwānī, T.J., *Source*… p. 25.
[264] Izze Dien, *Islamic Law,* p.10
[265] Ibid., p. 11
[266] ibid., p. 12

3.4.II. Impact of *ahl al-ra'y* and *ahl al-hadīth* on methodology

The followers of *ahl al-hadith* and *ahl al-ra'y*, in general had no dispute over the Qur'ān as a source of law. But when it came to the *hadīth* of the Prophet and by extension to the Sunnah, *ahl al-hadīth* considered that it should form a primary source of law, whereas *ahl al-ra'y* did not.[267] However, in spite of Christopher Melchert's[268] point that the earliest sources show practically all major figures resorted to *ra'y* in jurisprudence, and from what follows it should not be taken that the Prophet's closest companions or their closely followed successors, in any way, subscribed wholly and exclusively to one school of thought or the other. The fact that they did not do so and instead made independent reasoning, but always within the bounds of the objectives of the law, became amply clear, as seen earlier, from the practices and decisions of the companions and their successors. Therefore, as far as those who made judicial decisions among the companions and their successors are concerned, Melchert is correct in arguing that it is very unlikely the traditional *ahl al-hadīth* and the rationalist *ahl al-ra'y* 'existed as distinct' and that they separated much later.

Occasionally though, based on their own *ijtihād* and from the evidence available to them two companions might have come to different opinions. But judging from the way they exercised *ijtihād* and passed judgements they did not always follow the whole doctrine of one school in preference to the other.

Islamic legal historians have stressed, Al-Alwānī argues, that the followers of *ahl al-ra`y* were subscribers to the view of the school of `Umar and Abd Allah ibn Masūd who themselves used *ra'y* and who were two of the most ardent companions of the Prophet. Their ideas in turn were said to have influenced `Alqamah al-Nakha`ī (d circa 60 AH), uncle and teacher of Ibrāhīm al-Nakha'ī. 'Ibrāhīm then taught Hammād ibn abī Sulaymān (d 120 AH) who in turn was the teacher of Abū Hanīfah. With respect to *ahl al-hadīth* the same historians have emphasised that their school of *ahl al-hadīth* followed a similar approach to

[267] Hallaq, W.B., *The Origins* p. 74
[268] Melchert, C, *The Formation of the Sunni School of Law* (First Publication), p.11 (in W.B. Hallaq's The Formation of Islamic Law, 2004), p.361

those companions who avoided making their own judgements fearing they would contradict the textual sources and adhered to the Sharī`ah literally. And that was the case with Abd Allah ibn `Umar ibn al-Khattāb, Abd Allah ibn Amr ibn al-Ās, Al-Zubayr and Abd Allah ibn Abbās.'[269]

The school of *ahl al-hadīth* became very strong in Hijaz since all political activities had been transferred out of Hijaz. There may be some truth when the Imam of Madina, Said ibn al-Mussayyab, said that the people of Macca and Madina did not forget their *hadīth* or the *fatāwās* and reports of Abū Bakr, `Umar, `Uthman, Ali as well as `A`isha, Ibn Abbās, Ibn `Umar, Zayd ibn Thābit and Abū Hurayrah, 'and they did not need to use *ra`y* in order to derive the law.'[270] Yet, considering the various opinions and judgements they passed neither group of companions referred to here could be considered to have adhered strictly to one school of thought or the other.

The school of *ahl al-ra`y* had a strong hold in Iraq. The thinking behind *ahl al-ra'y* in a broader sense was that human reason should be used in interpreting the Sharī`ah in terms of human interest. They argued that it was their duty to explore the higher meaning behind the literal meaning of the law and if any such law had become redundant because the circumstances had since changed and was therefore irrelevant, such law would no longer be valid. In many instances where reason conflicted with the Sunnah of the Prophet they would give preference to reason. It is argued that the school of *ahl al-ra`y* was influenced to a large extent by the companions who closely followed the methodologies of `Umar, although no one would argue that `Umar's action was entirely similar to that of *ahl al-ra`y*. The companions who were closely associated with `Umar were Ibn Masūd, Abū Mūsa al-Ash`arī, Imrān ibn al-Husayn, Anās ibn Mālik, Ibn `Abbās and others.[271]

The transfer of the office of Caliphs to Iraq exacerbated the growth of the school of *ahl al-ra`y,* the appearance of sects like Shī`ī and Khawārij giving rise to tension and conflicts within the community eventually leading to widespread

[269] Al-Alwānī, T.J., *Source*, p. 28.
[270] Ibid. p. 29.
[271] Ibid.

fabrication of *hadīth* for one reason or the other. Therefore, the Islamic legal scholars found it necessary to impose restrictions on the acceptability of *hadīth.* Nevertheless the tension in the community intensified and sectarian allegiance divided the community broadly into the followers or sympathisers of either of these two informal schools: *ahl al-hadīth* whose ideas were also later associated with the thoughts of Imam Mālik and the legal methodology of the Māliki School of law; and *ahl al-ra`y* with that of Imam Abū Hanīfa and the methodology of Hanafi school of law.

While the science of *hadīth* transmission and collection was being perfected the term knowledge, *ilm,* was being identified with understanding of the textual sources along with considered opinion, *ahl al-ra'y*. However, opinion based on *ilm*, although it came to be known as *ijtihād*, the term was often associated with *ra'y* and described as *ijtihād al-ra'y*.[272] This is because considered opinion was still a strong force. During the reign of ʹUmar II as Caliph things were beginning to change. He instructed that all the judges must be qualified in *ilm* and their decisions must be based on *ilm* and not *ra'y*. Yet, it took several decades after his reign for *ra'y* to lose its influence in the decision-making process.

3.4.III. Legal methodology responds to new demands

The last quarter of the first century saw an increasing tendency towards establishing a legal structure and anchoring it to the Qur'ān, the practices of the Prophet and the early Muslims who were companions and who were presumed to have intimate knowledge of the Qur'ān or the Sunnah of the Prophet. Furthermore, since Islam spread to neighbouring regions, some of the local customs and practices were incorporated as long as they did not contravene the textual sources nor the practices of the companions of the Prophet. Accordingly, Hallaq argues that the local administration and judicial practices were from the very beginning subjected to a process whereby they were 'imbued with a religious and at times ideal element'[273]. And he goes on to emphasise that such anchoring of

[272] Hallaq, W.B., *A History*, p 15
[273] ibid., p. 16

local practices with religious elements also amounted to claiming that they were 'enunciated or adopted by an earlier authority, usually a successor or a companion'.[274] Here we find the first steps towards accommodating into the Islamic methodology laws and practices which were not strictly stipulated in the textual sources but were in compliance with the aims and objectives of those sources, the authority of the Prophet and in accordance with the practices of the Prophet's companions. Accordingly, as argued by Hallaq, legists in the first two centuries considered that the doctrines they were establishing had the ultimate authority of the Prophet. Apart from those directly related to the Qur'ān, they consisted primarily of two types of legal materials from two different sources: first, Pre-Islamic Arabian laws which had the approval of the Prophet and secondly, the local customs and practices of the communities which the Muslims considered to have been derived from the Sunnah of the Prophet.[275]

Joseph Schacht, for example, argues that the successors of the Prophet continued the practices of the ancient Arab system of arbitration and Arab customary law in general.[276] However, Schacht's statement that it is not possible to separate the administrative and legislative activities of the Islamic government under the Caliphs in the first century is an indication that the Caliphs were not making a distinction between religious and temporal laws, and that they were able to fuse the two and bring about a harmonious relationship. At the very early stage in the development of Islamic law, as many authorities have argued, there was no separation between what is religious and what is not religious; there was no distinction made over what was 'fixed' or permanent and what was a 'flexible' or changeable part of the Islamic law.

However, after the period of the successors (*tabiūns*) of the companions, contradictory reports both of the Prophetic traditions and the opinion of his companions were becoming more widespread. Moreover, the exercise of personal

[274] Hallaq, A history, p.16
[275] Ibid., p.17
[276] Schacht, J., *Pre-Islamic Background and Early Development of Jurisprudence*, (ed: Majid Khadduri and Herbert Liebesney, Law in the Middle East ,Vol I (Washington D.C.,1955), p.33, (in Hallaq's , *The Formation of Islamic Law*, Ashgate Publishing Limited, Aldershot, 2004), p.34

opinion by jurists was also becoming a major issue. All of this, on the one hand, was allowing the jurists to refine their reasoning and independent thinking and contributed to the development of legal methodology, but on the other hand they were also creating tension and a source of uncertainty about the law. In order to overcome these issues and to establish some sense of order, two steps were taken: first, introducing a form of consensus (*ijmā*) of the local regions and adopting the 'agreed practice' of Madina, and secondly, with respect to the increase in contradictory and isolated *hadīth*, Abū Yūsuf, having pointed out their dangers, insisting on the importance of accepting only popular *hadīth*. With respect to the 'agreed practice' of Madina, al-Awzai preferred 'the practice of the past leaders of the Muslims'.[277] The early schools of law which originated after the successors of the companions and which pioneered in laying a broad foundation for the later development of Islamic legal methodology are associated with great names like Abū Hanīfah, Abū Yūsuf, al-Shaybāni, Imam Mālik and al-Awzai. They too like their predecessors came from different regions of the Muslim world and like their predecessors were also known for their independent mode of thinking and reasoning. Nevertheless, as mentioned earlier, they derived their legal rules from the earlier generation of jurists of the region, and for the methodology which was subsequently developed they owed a great deal to their predecessors.

Dahlawi has reported that it was during this time the scholars began to write down and keep records of their findings. Imam Mālik (d 179 AH) in Madina, ibn Abī Dhaib (d 158 AH), Ibn Jurayj (d 150 AH) and Ibn Uyamah (d 196 AH) in Macca, al-Thawri (d 161) AH) in Kūfa and Rbi ibn al-Subayh (d 160 AH) in Basra, all followed the same method in writing down.

Scholars of this period wanted to keep alive the differences in legal opinions and disliked rigidity of legal thought and the self-promotion of their ideas. When Caliph al-Mansūr and later Caliph Harūn al-Rashīd were impressed by the work of Imam Mālik they, like their predecessor mentioned earlier, wanted the rest of the Muslims to accept and act only according to the *Muwatta* of Imam Mālik. Imam Mālik was perturbed and argued as before with the Caliphs and insisted

[277] Hassan, A., *The Early,* pp.23-24

that those elsewhere in the regions who followed other scholars must be allowed to do so, pointing out that the companions of the Prophet themselves used to differ even on the Sunnah.[278] Although both Imam Abū Hanīfah and Imam Mālik maintained that '…neither of them based their arguments on the *fatāwā* of the *tabiūn,* but competed with them saying, 'they were men (of knowledge) and so are we.''[279] They were to some extent influenced by the thoughts and writings of the local descendants of the companions including the work and thoughts of the *qādīs,* the subject dealt with in the next section.

3.5 The Islamic Magistrate, the Qādī system

Another important aspect of the emerging Islamic legal methodology was the institution of the Islamic Magistrate, the *qādī.* It is important because from the very inception of the Islamic State under the Prophet, the *qādī* system was an institution of the Islamic judicial process which was endeavouring to implement at all levels the Islamic concept of justice and fairness intended by the Lawgiver. At some times and in some places, at the early stages in particular, it might not have fully succeeded in achieving its aims, but as will be seen later in the section, the fact that it continued to achieve excellence in performance in a relatively short time is something remarkable. With the expansion of the Muslim territories, the Prophet himself sent *qādī's* to administer justice to new Muslims. Before Ali became the fourth Caliph he was sent by the Prophet as *qādis* along with Mu'ādh b.Jabal and Abū Mūsā al-Ash'arī.[280]

3.5.I. *Qādīs* originate with the Prophet

Therefore the institution of *qādī* has its origin, as Al-Azami argues[281] , with the Prophet himself when he sent several judges to different parts of the regions empowering them with judicial powers. Among several of the judges the Prophet

[278] Al- Alwānī, T.J., *Source Methodology*, p. 26.
[279] Ibid.
[280] Hallaq, W.B., *The Origin,* P 34
[281] Al-Azami,M.M., *On Schacht's,* pp.20,21

sent, Azami mentions fourteen of them including the three mentioned above and others such as Abdullah b.Masūd, Amr b. al- Ās and Zaid b. Thābit.

There are continuing debates, as will be seen later, concerning the quality and competence of the *qādīs*, particularly those who were appointed at the early stage. However, from the Prophetic traditions it is clear that when he appointed *qādīs* (and it must be true with the companions and their successors, too) he unequivocally demanded of them nothing less than justice and fairness. It is quoted from the report of al-Tirmidhi and Abū Dawūd that when the Prophet sent Ali ibn Abī Tālib as *qādī,* he told him 'when two litigants sit in front of you, do not decide till you hear what other has to say as you heard what the first had to say, for it is best that you should have a clear idea of the best decision'.[282] If the tradition of the Prophet emphasises that 'a judge must not judge in a state of anger' quoted[283] as mentioned both in Bukhāri and Muslim, it highlights at least two important principles of justice: the extent of the Prophet's concern over what state of mind a judge should have while deciding a case and the extent of his concern for the quality of judgement delivered.

The *Sahīh Hadīth*, quoted earlier in which the Prophet says that the judges who exercise *ijtihād* and arrive at the correct decision would be rewarded twice and even in the case of a wrong decision they would still be awarded a single reward provided they exercise *ijtihād,* indicates at least two important principles: first they must exercise *ijtihād* which means they must be proactive in searching for the truth and secondly, they must endeavour to arrive at a decision if possible rather than leave the case undecided. A *hadīth* quoted[284] by Doi shows the concern of the Prophet over the danger in imposing a punishment on an innocent person. The *hadīth* tells a judge that if he finds some doubt in a case it is safer to release the person since it is better for the judge to err in acquitting the accused rather than erring in awarding him punishment'

[282] Ibn Ashur, M.Al-Tahir, *Treatise on Maqāsid al-Sharī'ah,* (The International Institute of Islamic Thought, 2006), p 321
[283] Ibid., p. 322
[284] Doi, A.R.I *Shari'ah: the Islamic la w,* (London: Ta-Ha Publishers, 1984), p.13

During the time of 'Umar as the Caliph a letter[285] he sent to *qādī* Abū Mūsā at the time of his appointment, shows the extent of the care the Caliph took in ensuring that the *qādīs* exercised their judicial function in a just and fair manner. He told Abū Mūsā that he should, among other things: read all depositions to see if they are valid; treat everyone in the court equally so that the rich and the powerful will not expect favours or the weak and the poor will not fear injustice; look for clear evidence; make sure that yesterday's wrong decision does not prevent you from giving the right decision today if the situation demands it because it is better to 'retract than continue in error'; exercise *ijtihād* where necessary; consider similarities of cases and arrive at decisions logically; establish a time limit to present evidence ... 'avoid weariness, fatigue and annoyance at the litigants. Allah will grant you a great reward and give good reputation for establishing justice in the courts of justice. Good bye.'

There is some debate whether the initial batches of *qādīs* spent their whole time in the administration of justice and performing judicial functions or if part of their time was devoted to the affairs of state governance. For example, Coulson points out that the *qadis* were 'delegates of the local governor' exercising only a subordinate[286] function implying that they could not have fulfilled their functions independently or effectively. With respect to their independence they exercised their judicial functions, as will be seen later, without fear or favour. And in any case independence is not absolute under any system of justice and the judge is ultimately responsible either directly or through an intermediary to the ruler/rulers who represents/represent the interest of the people. As for their effectiveness, although at the early stage they had a dual role, they had a clear mandate, a mandate, for example, from the Prophet instructing those appointed to 'base their judgements on the law…[287]

[285] Doi, A.R.I., *Sharī'ah ,* pp. 14-15
[286] Coulson, N.J., *A History*, p.28
[287] Al-Azami, M.M., *On Schacht's*, p.22

3.5.II. *Qādī s*ystem precursor to separation of powers

However, what is significant is that even as early as during the Prophet's own time there was an indication of some recognition of the importance of separation of executive and judicial powers. If it was otherwise and the judicial functions too were to remain with the executive without any separation of powers there was no need for the Prophet to introduce the *qādī* system and he could have as well appointed only the Governor with judicial powers. It is worth noting though that in the early stage of the evolution of the Islamic society one should not expect the *qādīs* to be well versed in complex legal technicalities, judicial procedures or rules of evidence. The early Islamic society, considering the harsh circumstances in which it emerged and then struggled to survive against all the odds, was in the process of developing, even immediately after the death of the Prophet, a viable legal structure and a methodology. It would be unreasonable to expect in that short period of its existence, neither an advanced legal education system nor a fully functioning judiciary with fully qualified, experienced and competent judges or magistrates, and to fulfil the needs of a very rapidly expanding society. This sudden expansion of the Muslim society into regional territories put pressure and made additional demands on the Prophet and the companions requiring the *qādīs,* magistrates, to resolve disputes among the growing number of inhabitants living under the Muslim rule. Yet, from what follows it is clear that the *qādīs* in spite of their shortcomings did possess some major qualities necessary to perform their function.

Hallaq contends that according to sources the early appointment of judges or (*qādī)* was quasi-legal in nature. They did not possess any legal training as such and were only experienced arbitrators (*Hukkam,* sing. *Hakam*) with wisdom and charisma. And furthermore, as M Khalid Masud has found by referring to the biographies of the *qādīs,* even in that early period they played a very 'intensive and creative role'.[288] While some were illiterate, Hallaq argues, they were competent enough to deal with 'legal and quasi-legal problems' in that new environment.

[288] Masud, K. *Shātibī's Philosophy of Islamic Law*, (Islamic Research Institute, 1995), p.12

There is something worth noting when Hallaq stresses that it was the intention of the Islamic central state in Madina that the inhabitants of the new territories must be allowed to be governed and their disputes resolved not by imposing the laws of the new rulers, but by applying whatever rules that prevailed before the Muslims arrived. This indicates that from the very beginning they were applying the Islamic rule of law as prescribed by original sources. Caliph Abū Bakr's instruction to his Governor is 'typical' and shows the principle followed by the Muslims towards those in the new territories under the Muslim rule. Abū Bakr required that the Muslim army entering new territories must 'establish a covenant with every city and people who receive[d] them' and give them 'assurances and let them live according to their laws'.[289] Accordingly, if the local inhabitants of the new territories were allowed to be governed by their own laws, it would not have been necessary to ensure every *qādī,* magistrate, who was appointed to those territories was qualified, experienced and competent in every aspect of Islamic law even if enough of such qualified magistrates were available in those difficult circumstances.

Another reason adduced for the appointment of quasi-magistrates or quasi-*qādī* was that they were also expected to perform other functions such as the collection of taxes, trusteeship of orphans, supervision of markets and other administrative functions not strictly related to judicial functions. And therefore, it would not be reasonable to expect those who were appointed as *qādīs* to be equally experienced and competent in these activities as well as magistrates. What is significant about the *qādī* system is that from the time of the Prophet to the time of his companions, their successors and beyond, the institution of *qādī* continued to reform and survive over time with varying degrees of separation of its judicial function from that of the executive.

Whenever appropriate and practicable the *qādīs* tended to apply the Qur'ānic laws, particularly when the texts were clear and unambiguous such as in the case of laws relating to inheritance. Hallaq reckons that the *qādīs* appear to have

[289] Hallaq, W.B., *The Origins*, p. 36

applied these Qur'ānic laws as early as the time of the Caliph Abū Bakr and 'Umar.[290] Wherever there was no clear, unambiguous and detailed provisions the *qādī*s appear to have used some element of discretion which they used often in the case of those who violated, at the initial stage, the prohibition laws relating to the use of alcohol. The *qādīs* at the beginning refrained from imposing any punishment to those who broke such Qur'ānic prohibition laws. Moreover, *qādīs'* functions also gradually widened and as early as during the first half of first century of Hijrah *qādīs* were empowered with criminal jurisdiction as 'a distinct category'.[291] As the *qādīs'* functions widened, demand on the extent of their knowledge of the Qur'ānic legal texts and Islamic law also increased. *Qādīs* were also conscious of their independence and exercised their judicial functions without fear or favour. For example, the *qādī* of Fustat, Imran b. Abd Allah al-Hasani convicted (89/707), a scribe of Abd Allah b. Abd al-Mālik, a governor of Egypt. When the governor, having accepted the verdict, did not allow the penalty to be imposed, the *qādī* resigned from his job in protest.[292]

In later years 'Umar II (r.99/717-101/720) had at least on one occasion said that *qādīs* must be cognisant of the decisions of their predecessors and all the *qādīs* resorted to the texts and 'to their own notions of reasoning and precedent'[293]. Both the Caliphs and the *qādīs* 'relied heavily on discretionary opinion' for legal reasoning and judicial rulings and as a consequence the *qādīs* felt free to have differences of opinion. Historically, since the time of the Prophet, from among those closest to him, such as the four Caliphs, the other companions and their immediate successors who had to make legal judgements, derived their authority in three different ways; textual sources for clear unambiguous ruling; when the texts are very general, unclear or completely silent on the issue at hand, very often they would consider a precedent set by a previous decision or alternatively exercise their own reasoning or exercise *ijtihād* and arrive at a judgement which would be within the overall intent or objective of the Lawgiver. With respect to following a precedent, the one set by the Caliph would be considered much more authoritative than others. Even at the time of 'Umar II this practice appears to

[290] Hallaq, W.B., *The Origins*, p. 40
[291] Ibid., p.38
[292] Ibid., p. 41
[293] Ibid., p.45

have been followed not only by the Caliphs but even by the *qādīs.*

When a case concerning criminal liability against a boy who 'violated a girl with his finger' came before Egyptian *qādī,* Iyad al-Azdi he asked 'Umar II for guidance. 'Umar answered, 'nothing has come down to me in this regard from past authorities' indicating that past precedent still formed part of the rule of law[294]. Hallaq makes the point that madinese *qādī* Abd Allah b. Nawfal followed this principle four decades after the death of 'Umar I. Several others too, including Abū Bakr b. Hamza al Ansāri and Iyas b. Muawiya, used this principle along with textual sources, their own forms of reasoning and precedent.[295] By this time the *qādīs* were appointed full time and were performing comprehensive judicial functions. They were becoming more and more knowledgeable on Islamic Law and its application as well as competent in legal and analytical reasoning in order to form independent judgements where appropriate.

Coulson, pointing to a similarity between a principle established by an Egyptian judge in the first century of Islam with English equity which was established much later in the middle ages, is interesting. The comment is made after referring to two decisions by the Egyptian judge Tauba ibn-Namin during his office (733-737) and quoted[296] from al-Kindis' account, where the judge showed great creativity and flexibility in his approach to the two cases. Coulson remarks that the principles embodied in those decisions are 'remarkably parallel to certain notions of equity introduced into English Law' much later in the medieval times. Coulson's point that Islamic equity preceded Islamic law is of course debatable depending on one's definition of 'Islamic law' and 'Islamic equity', and deciding further on what point in time did each emerge. Since that argument is outside the scope of this thesis it will not be dealt with any further. However, *qādīs* who were sent from the very start by the Prophet to various regions have some resemblance to the justices in the English legal system who were appointed by the king to various provinces immediately after the Norman conquest of England in 1066.

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[294] Hallaq, W.B., *The Origins*, p.45
[295] ibid.
[296] Coulson, N.J., *A History.* p. 32

3.6 English legal methodology during Norman times since 1066

The Norman Conquest of England in 1066 interrupted for a time the development of the emerging English legal methodology and its laws. The Normans, during their rule, experimented in introducing piecemeal some aspects of their law, but never replaced it with theirs. At the end of their reign, England had a mixture of some English and some Norman laws. As for any similarity with Islamic legal methodology, there is very little except that there is some resemblance between the appointment of their judges and the appointment of *qādīs* in the early Islamic period.

In order to understand the way the Normans managed the English legal system it is helpful to have some background information about the Normans and the country they came from, Normandy. At the time of William's invasion in 1066 not much was known about the laws of Normandy. 'By the eleventh century Normandy was the most centralised state in Europe. Its dukes extended feudal principles to increase their power'[297], which were extensive because of their association with the church and the flourishing monasteries. The most important office of that highly centralised state was 'viscount' with military, financial and judicial powers in local areas. It was this strength, both financial and legal, that allowed William the Conqueror to undertake the conquest of England in 1066.

The Norman conquest happened at a time when, as we saw in the last chapter, English legal methodology was beginning to take shape. Although the laws of Normandy was not known at the time of invasion, England had the 'Laws of Edward the Elder, Aethelstan, Edmund' and so on and a good collection of law books and writs. They had nothing, for example, like the equivalent of the 'Doomsday Book'. The language, culture and the state of law of the Normans were to have lasting influence in the development of English legal methodology. Normans were effectively Frenchmen, their language French. The Laws of

[297] Encyclopaedia Britannica, 1981 Micropaedia, Vol. VII, Norm – Norman style, p. 390-391

Normandy were mainly French and feudal, and their feudalism was more of a relationship of lord and vassal. These two aspects, the language and feudalism, were to have a great impact on the legal methodology of England. But the term feudalism is ambiguous with regards to ownership, possession, right, titles and so on. Furthermore, the term had different meaning at different times in history.[298]

3.6.I. Normans introduce piecemeal legal changes

In England, at the time of invasion it had at least 'heritable though a dependent right'. Legal procedure of the courts was the same in Normandy as it was in England.[299] Criminal law or 'some such form' was in a later stage of development in Normandy than in England. However, the Ecclesiastical law of the Normans was in an advanced stage compared to what it was in England. But unlike in England there were recurrent conflicts between the church and the state, and this, too, was to affect the legal status of the English ecclesiastical churches.

Very little was known about the ordinary people of Normandy. With respect to jurisprudence they 'had no written law to bring with them', but there were isolated individuals reasonably knowledgeable in some aspects of law, like Herluin, Abbot of Bec, learned in the law of the land, and some others who had studied ecclesiastical law and Roman law.[300] Pollock and Maitland have called the 'Norman conquest a catastrophe which determines the whole future of English law.'[301] The criticism is based more on the long term effect the conquest had on the English legal system and less on the immediate effect of the invasion; some of the short term effects were even beneficial as we shall see later.

When William conquered England he did not wish to impose the foreign law on the inhabitants of England and as a result there was never a Norman Code and they did not leave one. It did not exist in a form that could be transported to and implemented in a foreign soil and this proved to be a blessing for the English

[298] Pollock. F., and Maitland, F.W, *The History of English Law*.(London: Cambridge University Press, 1923), .66-67
[299] Ibid., p.74
[300] Ibid. p.77
[301] Ibid., p.79

because the English did have a law of their own and it did exist mostly in written form. The conquest eventually brought about change and also there was continuity. On balance the argument was in favour of change. The most important change of all was of course that England became a subordinate to the Norman aristocracy. There were many changes in land law, and the major one was that William's followers became the beneficiaries of many estates in the conquered land.[302]

With the Norman conquest, Milsom argues that any possible development in the Anglo-Saxon form of feudalism was interrupted and the renewed feudalism produced 'at once a pyramid', a pyramid dealing with economic relationships rather than state bureaucracy. It was the Norman administration that also introduced the 'manor'.[303] William tried to govern as it was done by the Anglo-Saxons, and preserve their administrative organisation, but it did not work out, and by the end of his reign all important administrative and judicial offices were held by Normans and all writs were issued in French. Local Government administration remained largely as before but with some changes. He introduced additional levies and taxes.

The administration of justice also came under his rule and he appointed local justices with somewhat similar functions in the administration of justice to that of *qādis* discussed earlier. All the high offices of the clergy came to be Normanised and fedudalised, whilst leading bishoprics passed on to continental clergy. He introduced several restrictions over the relationship between England and the Pope.

3.6.II. Norman effect on legal language and institution

One of the important changes that took place, for the purpose of this study, was in the language of the law. Many of the legal words we have today are of French origin. No doubt, in public law many of the terms used today are of English

[302] Encyclopaedia Britannica, 1981, Micropaedia, Vol VII, Norm – Norman style, p. 390-391
[303] Milsom,S.F.C., *Historical Foundations of the Common Law,* 2nd Ed.,{ London: Butterworth & Co. (Publishers) Ltd., 1981}, p.19-20

origin. For example, cash was not replaced by count, sheriff was not replaced by viscount, and king, queen, lords and knights are all of English origin. But many others, parliament and its statutes, privy council and its ordinances, peers and barons are all French. Terms like buy, sell, borrow, a will, bond, guilty of manslaughter or of theft are English, whereas contract, agreement, covenant, bill, note, tort, trespass, robbery, burglary and so on are all French. And so are many terms relating to the courts of justice, judicial procedure and parties to disputes. But all this happened not suddenly but over time.

The other important change that occurred was the influence of Latin in the legal process. Latin was the language used to keep records of innumerable legal documents and it continued to dominate the judicial process until the year 1731 when English began to replace Latin slowly.[304] But the French and English languages continued to compete with each other to occupy the dominant place.

It is argued that the most 'fatal' moment, if one is forced to choose, was not 1066 but 1166 when the decree was issued entitling every freeholder who was dispossessed remedy in a French speaking royal court. 'Thenceforward the ultimate triumph of French Law terms were secure'.[305] And Latin became the language of law and ordinances which continued until the middle of thirteenth century. However, it was not the intention of William I to replace English law with French law but only to introduce some changes.

Although there was very little legislation during the Norman period[306] some of the laws and legal institutions introduced into the English legal system by the Normans were of 'decisive importance'. Trial by jury is by far the most significant and beneficial legal institution the Normans introduced into the English legal methodology. Whether the Normans introduced any significant changes to land law has been disputed. Maitland argues that much of the English law, both in the later middle ages and at present, is French.[307]

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[304] Pollock,F and Maitland, F .W., *The History*, p.83
[305] Ibid., p.84
[306] Ibid., 94
[307] ibid.

Among the 'curious and intricate' group of writings is the one that gives the results of William's legislation. Probably still in existence is a writ issued to various counties severing ecclesiastical from the temporal courts, including ten paragraphs concerning murder, fines and the abolition of capital punishment and some others.

The term 'Curia Regis'was born during the reign of the two Williams who did not make any judgement in the court. It was only during the reign of Henry I that any judgement was issued by permanent royal tribunal composed of a group of men taking the name 'exchequer' apart from other state duties. There is again some similarity here to the *qādī* system in the early Islamic period. There is no indication that they were learned in English law but they were chosen for their experience in finance, administration and some ecclesiastical work. By the time of Henry's death there was nothing in the form of professional body to deal with justice.[308]

'Henry's death precipitated a 20 year crisis '[309] and nothing much significant in the field of law or justice happened. On the contrary the 'anarchy of Stephen's reign prevailed and after order was restored'. Maitland argues that the twelfth century was the most legal out of all others.[310]

During this period just as it was in the feudal era, an important legal 'property' of the English legal system was land. Land was the most important generator of wealth and the source of livelihood under the feudal system, providing income, family support and financial security. Accordingly, it also formed the most important or major part of law. Milsom argues that the right claimed by landed gentry was not necessarily the right over the barren land but it was the right over people working in that land or over those lower ranking lords having such rights over them. What it means in practice is that several people may have had

[308] Pollock,F., and Maitland, F.W., *The History*, p.109/.110
[309] Encyclopaedia Britannica, 1981, Vol III, by R.W.D.E/Ed, History of Britain and Ireland, Part II The Normans, 6, p 206
[310] Pollock, F and Maitland, F.W., *The History*, p. 111

different interest in a piece of land, for example, a peasant, the lord of the manor, the lord's lord and the king. In these circumstances, according to the argument, as far as the peasant and the lord of the manor were concerned they had rights in the land and jurisdiction over it in the manor court. The lord's lord however had the right on the manor which included the peasant's land and also the jurisdiction over the peasant.[311]

The legal system and its development, whether before or after the Norman conquest, were very much based on the feudal nature of the society. It is argued that 'Feudalism was clearly a system which was not designed to create social justice, and it is unsurprising that it did not'. It aimed to bring about social cohesion and it did that by assigning each member of the class a place, with the ruling class depending on each other to retain their respective position in the hierarchy.[312]

Feudalism did exist before the Norman conquest, but the conquest and its aftermath introduced new elements making it more restrictive. In Saxons times the tenants depended both on the earl and the king, whereas after conquest William the king gave land directly or indirectly, and loyalty was direct to him. His successors followed suit.[313]

It is clear from the above discussion that there is very little similarity between the two legal methodologies and in their development during this period, though, there were changes in both systems, some beneficial and some detrimental. The next phase in the development of the English legal methodology, where there are noticeable differences and similarities, is when equitable doctrine emerges as part of the English system. That is the stage, within the limited research aim of this theses, for any further discussion of the English legal system; and that is when the English Equitable doctrine is compared with the Islamic principle of *isthisan*, a form of 'juristic preference', which will be the subject of chapter five. Until

[311] Milsom, *Historical,* p . 99
[312] See, What was the Impact of the Norman Conquest in English Law, Government and Society , 1066-1135? Web page – www.donaldstark.co.uk/essays/1042-1330 neimpact.pdf –p.3, seen on 16.12.2007
[313] Web Page, What was the Impact, p.2

that stage is reached, the ‘period of formulation of Islamic legal methodology’ needs to be investigated, and this will be the subject of next chapter.

CHAPTER 4

Period of Formulation of Legal Methodology

Introduction

The development of legal methodology after the life of the Prophet and his companions was beginning to take a different direction, and it will be explored in this chapter, with the main focus on the various changes and developments in the methodology during the Umayyad and the early Abbasid periods. This survey in this chapter is intended to make a substantial new contribution through our research aim. Greater attention will be given to the methodologies developed by the major jurists/Imams beginning with Abū Hanīfah. It will further investigate the difference in their legal reasoning, formulation of principles and their own respective approaches to developing the methodologies. Although Islamic law during this period achieved an independent status and the Caliphs of this time gave their support to the development of its methodology, law slowly began to lose its objective based progression.

The Muslims of the first few generations, as we saw in earlier chapters, adopted various rational approaches to derive the law from the two primary textual sources, but always adhering to the spirit and higher objectives of the law. The three most important elements they adopted, and which they claimed to have been rooted in the textual sources themselves either explicitly or implicitly, were the concepts of *ijtihād*, *qiyās* and *ijmā.* These concepts which were first initiated by the first three generations of Muslim scholars have undergone several changes over the ages, and with these changes they continued to play an important role in the way legal methodology has since developed. From the time of the Prophet himself these concepts, with or without their associated technical terms, were instrumental in one way or another in shaping the development of Islamic legal methodology. In spite of their importance, however, these concepts, as applied and developed by later generations of jurists, exhibited several limitations and restrictions.

In the following sections various definitions and meanings of these concepts that have been advanced, and the manner in which the subsequent generations of jurists and scholars understood and implemented these concepts will be explored. This will be followed by an examination of the similarities and differences between various legal principles put forward by the great Imams, particularly, Abū Hanīfah, Mālik ibn Anas, Al-Shāfi'ī and his *Risāla,* and Ibn Hanbal. It will take a closer look at the reasons behind the varying approaches each imam took and what impact they had at their time. What were the reasons each one gave for their differing views? How did their disciples and immediate followers receive those ideas? What were the contributions of these imams' immediate followers and how did they treat their "masters'" ideas?

This chapter will examine to see at what stage and in what form a 'formal' legal methodology began to evolve. In terms of modern thoughts on the essential ingredients for a legal methodology, how and when did this initial phase come into effect? In what ways did the methodology adopted by the jurists of this period differ from that of the time of the Prophet and his immediate followers, particularly with respect to judicial decision making? At what stage and in what form did '*ijtihād'* and differing forms of '*taqlid*' begin to affect judicial reasoning and decision making?

4.1 Changing phase of legal methodology

Legal methodology, albeit in its elementary form left behind by the Prophet's companions, particularly the rightly guided Caliphs and their immediate successors, was based on real issues presented to them for judgements. The legal principles developed then were not built on solutions reached on hypothetical cases or speculative issues. Such realistic legal principles were defined in Arabic as *al-fiqh al waqiee* (realistic fiqh) as opposed to 'hypothetical *fiqh'* developed by *ahl al-ra'y,* the reasoning people.[314]

[314] Philips, A. A. B.,*The Evolution of Fiqh*, (2nd ed. Riyadh: International Islamic Publishing House, 2005), p70

The principles formulated during this period could be argued to have laid the foundation for the development of methodology built entirely on a system of case law and precedent[315] because most of the legal decisions[316] were made on the basis of actual cases presented to the Prophet[317] and his immediate followers. Indeed the Prophet held the position of 'supreme judge.'[318] However, neither the Caliphs nor the companions nor their successors went on to establish any particularly well defined and structured legal methodology or procedure. They probably did not find it necessary in that early stage of Islamic society then to record every detail of the cases or judgements. However, the fact that these early jurists refrained from laying down rules to be followed by the rest of the then Muslim world, or from recording every legal opinion and decision shows, as Bilal Philips argues, that they were very open-minded and respected freedom of opinion particularly where there were no clear textual stipulations.

Ahmad Hasan endorses this view by saying that in the early days, Islamic law 'remained flexible, allowing a wide margin for differences.'[319] This sense of open mindedness and respect for freedom of opinion were in stark contrast to the restrictive approach to legal reasoning and rigidity of thought that were to become the hallmark of some scholars who were soon to follow them. Furthermore, soon to follow was the slow disappearance of men like the companions of the Prophet, such as Abdullah ibn Masūd who would use personal opinion when there were no clear textual stipulations concerning any particular issue and take personal responsibility for any decisions made, while companions and Caliphs like 'Umar ibn al-Khattāb, as we saw earlier, were ever willing to exercise *ijtihād* in the interpretation of the textual sources and in arriving at judgements.

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[315] Abu Sulayman, A. A*, Towards an Islamic Theory of International Relations: New Directions for Methodology an Thought,* (Herndon, U SA: The International Institute of Islamic Thought, 1993), pp.7,8

[316] Mahamassani , S, *Falsafat Al-Tashri Fi Al-Islam*, (Leiden: E J Brill: The Philosophy of Jurisprudence in Islam, 1961), p. 183

[317] Hallaq,W B., *A History*, P. 5

[318] Coulson N J., *A History of Islamic Law*, (Edinburgh: Edinburgh University Press, 2001), p.22

[319] Hasan , A, *The Early Development of Islamic Jurisprudence*, (Islamabad: Islamic Research Institute, 2001), p.22

With the passing away of the Prophet, his companions, their followers, and in particular the rightly guided Caliphs, there followed the early jurists and the scholars who were bold and brave in exercising independent legal reasoning and judgement. After them the development of legal methodology was to take a different direction. Contributing to these changes of direction was the political turmoil caused after the death of the last of the four rightly guided Caliphs, Ali ibn Abī Tālib and the ensuing changes in the social and political structure of the rapidly expanding Muslim community.

4.1.I. Umayyad dynasty replaces the consensus based Caliphate

When the Umayyads replaced the previous Caliphate system which was introduced and developed by the companions of the Prophet, it was a turning point for every structure of the Islamic society. They not only replaced a consensus based Caliphal system with a kingship and a dynasty, they also created unchartered territory for the future progress of Islamic legal methodology. Under the Umayyad rule practices both legal and cultural which were alien[320] to the Islamic principles were introduced into the empire[321]. The Central Treasury, *Bayt al-Māl* which was previously considered as sacred, and public property, came to be utilised as the personal property of the rulers and their family. Taxes authorised by Islam for specific purposes were collected for their personal use. The Caliph's court was entertained by 'dancing-girls, musicians and astrologers' all of which were alien to Islamic legal practice. The office of the Caliph itself was turned into a hereditary institution. Because of these innovative practices the jurists and scholars of Islam refused to associate themselves with the ruling class and hence the dichotomy: the emergence of ruling class separate from that of the jurists. This dramatic and sudden transition was to have a lasting detrimental effect on the development of Islamic legal methodology. However, for Imran Nyazee the later Umayyad period was to produce another form of separation,

[320] Coulson, N. J., *A History,* p.27
[321] Philips, A .A. B., *The Evolution,* p. 77

separation of 'output' or laws, between what came out from the jurists and what was put out by the state. This separation of legal powers, Nyazee argues, was achieved in a harmonious way.[322] Accordingly, the judicial and executive functions of the state and the legal activities of the jurists were agreed upon by the two sides. Nevertheless, the manner of the separation was to have some beneficial but also some far reaching detrimental effects on the society at large. The detrimental effect arose as a result of prominent jurists often showing open antagonism towards the legislature while the rulers more often than not failed to consult the jurists on important matters of the state. In any case whether the new development under the Umayyads was achieved harmoniously is highly debatable and subject to much controversy, while several of the methods introduced during their period either replaced some of the practices of earlier generations or contradicted established legal principles.[323] For instance, as Ahmad Hasan argues, the Umayyad Caliphs were not concerned with continuing or preserving the 'ideal practice' of the earlier periods and instead the whole legal system became a 'private matter.[324]

Rashīd Ridā is much more emphatic when he says that Umayyads were corrupt in that they abolished a consultative form of government and replaced it with one in which 'might' was made 'right'. They were the first to 'destroy Islamic government. Later many others followed their example.'[325] The situation became so dire that directly as a result of these extraordinary practices under the Umayyads the first attempt was made to compile the legal rulings of the companions of the Prophet. When the jurists found that the Umayyad rulers often passed legislation which went contrary to the rulings of the companions of the Prophet they decided that if the earlier decisions were not recorded they would be lost to later generations of Muslims.[326] Furthermore, jurists and scholars found themselves unable to perform their functions properly, and therefore some of

[322] Nyazee, I. A. K.,*Theories of Islamic Law*, (Islamabad: Islamic Research Institute and International Insstitute of Islamic Thought, 1945, n.d. recent), p.14
[323] Philips, A A B, *The Evolution,* p.77
[324] Hasan A, *The Early,* p.94
[325] Kerr, M.H., *Islamic Reform, The Political and Legal Theories of Muhammad Abduh and Rashīd Ridā,* (Los Angeles: University of California Press, 1966), p.172
[326] Philips,A A B., *The Evolution*, p.82

them fled to neighbouring regions[327].

The extent of the Umayydads' hold on absolute power is shown when Coulson compares the role of the earlier Caliphs as the 'servant of the religion' whereas the 'Umayyads were its masters'.[328] David Brown is much more specific when he concludes from his survey that the pattern of Prophetic governance which was later implemented by the first four Caliphs was lost during the period of the Umayyads.[329] The office of Caliph was turned into a hereditary kingship during the Umayyad period, particularly after the 'forced acceptance' of Yazid as the crown prince. This in turn brought about a situation whereby the peaceful and harmonious relationship that existed previously between the state and the jurists/scholars was disturbed. And as a result the latter found it difficult to participate in the discussions and debates on legal issues that took place among the caliphs' audience. They even denied the Umayyad rulers the right to legislate.[330]

4.1.II. Regional dispersion of jurists

The situation became so unbearable for some of the scholars, it led them into self imposed departure to neighbouring Muslim lands where the Prophetic traditions, judgements and opinions of the Prophet's companions and their successors were in circulation.[331] This state of affairs not only prevented unifying the developing schools of law, *Madhbabs*, such wide dispersal of jurists and scholars in various Islamic centres also made it difficult to implement the principle of consultative government, the *Shūra*. Consequently, this movement of jurists and scholars away from the centre of the Islamic state to different regions of the Muslim world also made it almost impossible to implement the important legal principle, consensus,*ijmā,* so that no consensus in the form of unanimity of agreement could

[327] Hallaq, W B, A *History,* p.13
[328] Coulson, N, *A History,* p. 27
[329] Brown, D, *Rethinking,* p.72
[330] Kamali, M H, *Principles,* p. 503
[331] Hasan, A., *The Early,* p.24

be reached among the jurists on any point of law. In any case, under the Umayyads, as Hashim Kamali asserts, *ijmā* was practised only intermittently.[332] Previously though, it was much more harmonious between the rulers and the jurists. Hallaq is quite emphatic when he says that Caliphs of earlier times not only introduced laws and other regulations, they also gave advice on legal matters to *qādīs*, local judges, and remained as a 'mediating source' while the *qādīs* and the jurists themselves sought advice from the Caliphs.[333] Eventually, before very long, a dictatorial monarchical government alien to the Islamic spirit was to emerge now where the rulers were willing to manipulate the law and its methodology to justify their deviant ways.[334]

However, one of the unintended, in some ways beneficial, effects of this geographical dispersion of the scholars was that more and more such scholars began to exercise *ijtihad* when they were faced with new customs and issues in the newly occupied territories. Moreover, when scholars arrived in a new region, several students both from that region and from elsewhere gathered around them to study Islamic law and learn from them their methodologies which resulted in the founding of new schools of law, *madhhab* in various locations. For example, during this period, Abū Hanīfah and Sufyān ath-Thawri became well known in Kūfah, Mālik ibn Anas in Madinah, Al-Awzai in Beirut and al-Layth ibn Sa'd in Egypt.[335] In retrospect it may be argued whether the emergence of different schools of law which eventually was to lead to the appearance of followers of each respective school was, in the end, a good thing.

More generally though the environment under the Umayyads was not conducive to the development of proper and effective legal methodology. David Brown for example argues that the Umayyads even manipulated Prophetic traditions, *hadīth,* for 'propping up their rule' and used them against Ali and in favour of Muawiya'.[336] And it is no wonder that the large scale forgeries of *hadīth* began in

[332] Kamli, M. H., *Principle,* p.247
[333] Hallaq, W B.,*The Origins,* p. 68
[334] Philips, A. A. B., *The Evolution,* p. 77
[335] ibid., p.78
[336] Brown, D, *Rethinking,* p. 96

'earnest' under the Umayyads.[337] During the time of the first four Caliphs great care was taken to validate every tradition.[338]

Bilal Philips further expands on the methods of Umayyad rulers and concludes that the whole legal system was considered a 'private matter' by pointing out that the central treasury, the *Bayt al-Māl* itself was 'turned into the personal property of the Caliphs and their families.'[339] For example, in order to increase 'their fortunes' taxes not authorised by Islam were collected and spent. Under the Umayyads there was widespread increase in forgeries and spurious *hadīth,* too. Unlike the earlier period when the Sunnah of the Prophet was strictly adhered to both by the Caliph as a ruler, and the Muslims as the ruled, the Umayyads had 'unofficially stopped relying on the Sunnah of the Prophet'. Instead, as David Brown has argued, elsewhere, the Umayyads manipulated the *hadīth* to suit their own purpose.[340]Once more the unintended effect of this event on the development of legal methodology was that the scholars and jurists took great interest in ensuring that only genuine and authentic *hadīths* were collected, preserved and circulated. This in turn however led to the long term beneficial effect of compilation of *hadīth* and to the development of the science of *hadīth* criticism providing the judges and jurists with reliable sources of information to perform *ijtihīd* and pass appropriate judgements. However, the Umayyads should have, in the first instance, prevented the spread of spurious *hadīth.*

In the absence of unifying elements, but rather the confining of state authority in the hands of the central government, and with only limited legal authority in the hands of the jurists and scholars, the highly respected Caliphal law, which was once universally accepted without much questioning has now become the subject of closest scrutiny by the rapidly growing new class of independent legal specialists.[341] Since the Caliphal law now formulated by the Umayyad rulers, for the most part, was guided by political expediency and not subject to juristic evaluation, the scholars and jurists became sceptical as to how legal doctrine and

[337] Brown, D., *Rethinking*, p. 100
[338] Khan, M.H *The School of Islamic Jurisprudence,* p 25
[339] Philips, A. A. B., *The Evolution,* p. 77
[340] Brown, D*, Rethinking,* p.96
[341] Hallaq, W.B., *The Origins,* p.68

formal legal methodology could conform to such laws. These changes in legal doctrine and its methodology, and their impact on the Caliphal law, have led Hallaq to assert that the Caliphal legislation and Caliphal authority were losing ground in favour of the 'evolving culture of the *fuqahā,* the individual Muslim jurists.'[342]

One of the most significant events to have some impact in the development of Islamic legal methodology was, what Coulson calls, the Umayyad legal practice of allowing individual judges to have unrestricted power to decide cases using their 'own personal opinion', without any form of regulatory element from the central government and without any form of hierarchies of superior courts.[343] One could suggest that the exercise of personal opinion, as long as it was within the spirit and objectives of the law, would have been according to the methods and practices of the Prophet, his companions and their immediate followers. Furthermore, the absence of superior courts in this circumstance was not conducive to the proper development of the law and its methodology.

However, the exercise of personal opinion was prevalent long before the Umayyads. Because, as Hasan Ahmad argues, the Sunnah of the Prophet from the very beginning remained more in the form of general directives, and the early Muslims interpreted them in different ways using their reasoning power, but subject to limitations. The Prophet expected his followers to use their discretion and arrive at decisions 'according to a given situation'.[344] The use of discretion, a form of *ra'y* (considered opinion) was present 'during the first generation'. Nevertheless, any such decisions during the early period were not unrestricted but always subject to the overall objectives of the Sharī´ah.

It might have been the task of the Umayyads, as Coulson argues, to establish a practical legal system and not an Islamic jurisprudence and in this they might have brought about a 'synthesis of diverse influences at work', some by design and others by accident. However, the haphazard and autocratic manner in which

[342] Hallaq, W B, *The Origins,* p .68
[343] Coulson, N .J., *A, History,* p. 30
[344] Hasan, A, *The Early,* p. 13

changes were brought about by the system, conflict and tension were created among the various elements in the society, particularly between the law makers and legislators on the one hand and the legal advisers, jurists and scholars on the other. It replaced legal principles and the emerging legal methodology of the companions and the rightly guided Caliphs with principles alien to the spirit of Islam. One scholar is emphatic in stressing that the Umayyads stand 'condemned as rulers for their disregard of the fundamental principles of law…'[345] A further innovation of the Umayyads during the 'great social unrest' was when the Umayyad Caliph introduced a number of practices common in the non-Islamic states which later exacerbated the social tension[346], a point further attested by Coulson who points to the Ummayyads' practice of absorbing 'many concepts and institutions of foreign origin',[347] practices such as improper use of central treasury funds (*baitul-māl*) and imposition of taxes prohibited by the Shari'ah Law.

4.1.III. Umayyads facilitate emergence of schism

It was during the Umayyad period that the two early schools of thought, the *ahl al-hadīth* and *ahl al-ra'y*, referred to in Chapter 2 asserted their authority and created confusion both among laymen and scholars alike. Some of the prominent jurists and scholars including the great Imams who were the founders of the various schools of law lived under the Umayyads and in one way or another were influenced by the doctrines of the schools.

It is argued that those who belonged to the school of *ahl al-hadīth*, or who were sympathetic towards it, refrained from making any judgement on an issue if the Qur'ān or Sunnah did not provide a clearly defined ruling on the matter. This group maintained that position based on the Qur'ānic stipulation, 'Do not follow what you have no knowledge'.[348] Later however, some of those who subscribed to the ideal of the *ahl al-hadīth* considered that if the Qur'ān or the Sunnah or both

[345] Muslehuddin,M. *Philosophy of Islamic Law*, p. 74
[346] Philips,A A B,. *The Evolution,* pp. 75 & 77
[347] Coulson, N.J., *A History,* p. 27
[348] Al-Qur'ān, 17:36

identified the '*illa*' , or attribute relevant to a case, then the meanings of such texts could be extended to another similar case, by analogical deduction, as discussed later in the Chapter.

Among those who subscribed to the views of *ahl al-ra'y*, on the other hand, some thought that there was always an identifiable purpose behind every law revealed by Allah whether they were in fact identified or not. The scholars would make every effort and use their reasoning powers to arrive at the most plausible decision based on the circumstances of the case[349]. Once the scholars had identified the law and the reason behind it they then applied the law under different circumstances as long as the new solution had similar causes. Because this group's decision making process depended heavily on human reasoning they were called *ahl al-ra'y* (reasoning people)[350] and they claimed to have based their approach on the practices of some of the major companions of the Prophet 'who had deduced reasons for some of the Divine laws'. However, as Nyazee reminds us, the jurist who used *ra'y* would have to take extreme care and ensure that rules derived are from Divine law so that he could not be accused of making judgement based entirely on his personal opinion[351]. However, there were those who used personal opinion and decided according to their own discretion.[352] Ahmad Hasan argues that *ra'y* was used during the time of the Prophet and his companions, and the term had a generic meaning enabling it to be used in different circumstances, but later the term was to be subjected to various limitations in order to avoid the arbitrary use in judicial decisions.

[349] Philips,A A B. *The Evolution'* p 80
[350] Ibid., p 80
[351] Nyazee,I A K., *Theorie*s' p. 134
[352] Schacht, J., *The Origins of Muhammadan Jurisprudence,* (London: Oxford University Press, 1950), pp. 101-105

4.2 Abbasid rule attempts to repair damage

With the Abbasid coming to power in (132AH/750CE) the environment, both cultural and legal, started to change somewhat for the better. Indeed they claimed that their coming to power was motivated by their desire to restore Islamic principles so that the social and cultural life of the people and the legal institutions would be governed by such principles. Legal training and the administration of law and justice was encouraged and supported while under their rule Islamic law, *fiqh,* acquired an independent status. For the most part, scholars and jurists were able to discuss, practise and debate freely and as a result many were able to undertake the compilation of various *hadīth* and *fiqh* literature.[353] However, there was a gulf between the theory and practice of Sharī´ah law. Although there was an attempt at the early stage of the Abbasid rule to introduce Sharī´ah law in all aspects of life, only part of it was applied in practice.[354]

As Hallaq argues[355] the judicial system itself was centralised under the Abbasids and instead of the legal institution and legal specialists being controlled by the local governors or military men in a haphazard manner they came under the direct supervision of the Caliph himself, who was more concerned with their welfare and development.

Furthermore, legal specialists themselves welcomed Caliphal intervention in legal matters. Most of the Caliphs during the best part of the Abbasid period were competent in exercising both political and legal authority based on Islamic legal principles and therefore jurists were apparently willing participants in the legislative process itself. The centralisation policy of the Abbasids was leading

[353] Philips,A .A. B ., *The Evolution…*p. 85
[354] Anderson, J. N. D., *Law as a Social Force in Islamic Culture and History*, pp 18-21(Quoted: Liebesny, H. J., *The Law of the Near & Middle East, Readings, Cases, & Materials*,(Albany: State University of New York Press, 1975), p. 26
[355] Hallaq, W. B.,*The Origins*, pp. 184-187

towards centralisation of the legal system[356]. This centralisation was apparently based, at least in Iraq, on Madinan practice[357] rather than that of Iraq even though there was not any wide following of the Madinan practice in Iraq at this time.

However, Hallaq argues that the later Umayyads and particularly the early Abbasids refrained from using brutal military power because of its failure in the past and sought legitimacy by cooperating with the Islamic scholars and jurists. They realised that there was a mutual interest in that the religious class needed financial support while the Caliphate found that the route to legitimacy from the people lay with the scholars. Accordingly, although the jurists and scholars were granted some position of power, there was no hiding the fact that tensions and frictions continued to remain 'between worldly secular power and religious law'.

4.3 Ijtihād, qiyās and ijmā guide juristic thinking

Ijtihād, a form of independent 'legal' reasoning, *qiyās,* analogical 'legal' reasoning and *ijmā*, consensus based 'legal' reasoning, were introduced and practised during the time of the Prophet and his companions. Among all the roots of Islamic law which are used to derive the rules of law from the Qur'ān and the Sunnah of the Prophet, *ijtihād* plays an important role in every one of the subsidiary sources of law and methods of reasoning. Accordingly, all the above three forms are interrelated. The original purpose and intent of these three methods used for legal reasoning have since been eroded. Nevertheless, they still have an important role and shall therefore be discussed below in terms of their use, benefits and shortcomings in relation to legal methodology.

4.3.I. *Ijtihād*

Ijtihād, a form of independent reasoning in order to arrive at a judgement, as briefly outlined in previous chapters, was practised from the time of the Prophet but now it is to take a structured form. It was primarily exercised in order to interpret the textual sources to find solutions to new problems. Among the

[356] Hallaq,W.B., *The Origins*, p.79
[357] Ibid., pp. 106,107

companions of the Prophet and their immediate successors, those who exercised *ijtihād* took into account the overall purpose of the Sharī´ah. In other words, they had what Al-Shātibī would define as the prerequisite for *ijtihād,* 'thorough understanding of the higher objectives of the law' and the condition of having the capacity to draw inferences from such understanding[358]. However, since that period the exercise of *ijtihād* was governed by various stipulations, some of which will be analysed in this section.

Hallaq considers *ijtihād* is indispensable in legal theory because it is the only means through which the jurists may derive judicial judgements decreed by God[359]. Furthermore, he argues that *ijtihād* formed the fundamental requirement of Islamic legal methodology and the 'theory of *Uūsl al-fiqh* throughout Islamic history...' [360]. When Knut Vikor points out that *ijtihād* is '… probably the most misused concept in the discussion of Islamic law…'[361] it is not surprising that throughout history the concept has been variously interpreted and unevenly applied. One way of understanding the meaning of the term *ijtihād* is to think in terms of applying human thought process in order to 'derive and systematise the legal implication of the text,' or according to Nicholas Heer it is a process for discovering the law[362]. This is because the textual sources do not always provide the intended meaning explicitly or even implicitly. For example, they may be general commands without any particular indication as to the time, place or circumstances of their application. Or the relevant text may have been intended to be applied in particular circumstances and in which case the exercise of *ijtihād* could reveal whether the text can be extended to cases in somewhat similar circumstances, and if so in what way.

Another simple and direct way of defining the term *ijtihād* is by saying that it is a form of interpretation or rethinking and reinterpreting the law

[358] Raysuni, A *Imam,* p 326 – (*Al-Muwāfaqāt* , 4:105-106)
[359] Hallaq, WB, *Law and Legal Theory in Classical and Medieval Islam*, (Aldershot: Ashgate Publishing Limited,2000), Part V, p.4
[360] Ibid., Part V, p 5
[361] Vikor, K, *Between God and Sultan, A History of Islamic Law*, (London: Hurst & Co. , 2005), ,p. 53
[362] Heer, N. *Islamic Law & Jurisprudence*,(University of Washington Press, London, 1990) p 63

independently'[363]. This is only one possible general meaning of the term but does not explain the full significance of the Arabic term in its entirety. It involves the application of human intellectual effort in order to derive appropriate legal rules. Vikor points out that according to some, *ijtihād* is the same as *ra'y*, (established practice or personal view) and *ijtihād al-ra'y* relates to making legal rules based on jurist's 'personal opinion' independent of revelation.[364] And Hasan argues that at the beginning *ra'y* was an 'instrument' of *ijtihād*[365]. Nevertheless, Vikor does point to others who consider that *ijtihād* puts limit to human intellectual effort and independent reasoning and requires attention to revelation and making the effort to derive rules based on the revealed sources. For example, for al-Shāfi´i *ijtihād* is synonymous with *qiyās* and its analogical methods[366] and for him *ijtihād* and *qiyās* have the same meaning[367]. However, later Shāfi´ite *usūlists* like al-Juwayni, al-Ghazālī and Ibn Aqil were ardent supporters of *ijtihad*.[368] In modern times, though, both Muslim and Western scholars consider virtually any method to fall within the ambit of *ijtihād* as long as it enables the implementation of the rules of Sharī'ah in today's society. Even among the Shi'i Imams, jurists after some debates have come to accept that there is a place for *ijtihād* for the jurists.[369] Therefore, it is only by looking historically at the manner in which the jurists exercised *ijtihād* in areas such as *qiyās* and *ijmā* that one may derive legal rules based on the revelation and understand the various methods used and the definition of *ijtihād*, which is a necessity today.[370]

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[363] Hasan, A, *The Early,* p. 115
[364] Vikor, K, *Between,* p. 53
[365] Hasan, A, *The Early,* p.115
[366] Ibid., p. 200
[367] Al-Shafi'i, M I I., *al-Shafi'i's Risāla, Treatise on the Foundations of Islamic Jurisprudence*, Trans: M Khadduri (2nd ed. Cambridge: The Islamic Texts Society, 2003), p. 288
[368] Hallaq, W B., *Legal Theory in Classical and Medieval Islam*, (Aldershot: Ashgate Publishing Limited, 2000), Part V, pp.15-18
[369] Mallet, C., The *Renewal of Islamic Law, Muhammad Baqr as-Sadr Najaf and the Shi'I International,* (Cambridge: Cambridge University Press, 2003), p.34
[370] Yilmaz, Ihsan., Inter-Madhhab Surfing, Neo-Ijtihad, and Faith-Based Movement Leaders, in ed. Bearman, Peters, R & Vogel, F E., *The Islamic School of Law, Evolution, Devolution, and Progress*, (Cambridge, Massachusetts: Islamic Legal Studies Program, Harvard Law School Program, Harvard Law School, Harvard University Press, 2005), p.201

4.3.II. Role of *qiyās*

Since *qiyās* occupies an important place in Islamic legal methodology and is resorted to by almost all the jurists particularly those who belong to the Shāfi´i *madhhab*, this will be discussed in some detail in order to evaluate their benefits and shortcomings. The following sub sections will illustrate the complexities of the method which could produce unexpected and unfair results. However, such an analysis in relation to this research aim is intended to make a contribution to knowledge.

Direct translation of the term *qiyās* could mean 'analogy' or 'analogical deduction'[371]. This however gives a somewhat restricted meaning. For Hallaq, *qiyās* is a form of argument based on analogical reasoning[372] which is also said[373] to be a systematic form of *ra'y* with a difference. Although both aim at arriving at a suitable decision and both involve forms of legal reasoning, *ra'y*, as seen earlier, is 'flexible and dynamic' whereas *qiyas* is of limited scope. In this section it is hoped to illustrate how this limitation could cause difficulties in arriving at a suitable judgement and even lead to undesirable results. Vikor considers that instead of saying that *qiyas* means 'compare new cases with established ones in order to see if they are similar' it is 'equally well' to consider *qiyās* as the main instrument to formulate legal rules from the revelation[374]. What is central to *qiyās* is that the rules derived are linked to the revelation. Therefore, it restricts the process of reasoning and search for legal rules to the confines of the textual sources. What is significant in the process of analogical reasoning, according to Vikor is that whatever is specifically stated in the text in relation to the general category of cases is only one prime example[375]. Because it is only an example the rule so derived can be extended to similar cases and furthermore such expansion is permitted in the Qur'ān, and the companion of the Prophet applied it.

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[371] Vikor, K *Between God and Sultan, A History of Islamic Law*,(London: Hurst & co.,2005), p. 54.

[372] For this section, I have drawn fairly extensively though not exclusively, from Vikor's work for my analysis and conclusions. Hallaq, W. B., *A History,* p. 83

[373] Hasan, A., *The Early…*p 136

[374] Vikor, K, *Between*, p.54

[375] Ibid., p. 54

A classical case for explaining *qiyās*, which also shows the highly complex and technical method of reasoning, concerns the Qur'ānic verse which says Muslims should not drink wine (wine is satan's handiwork) and accordingly wine belongs to a category of forbidden, *haram.* But the Qur'ān uses the term *khamr,* wine[376]. The Arabs used the term *nabidh* for alcoholic drink. The question was: were all the alcoholic drinks covered by the term *khamr*? The answer could be derived by answering the question: what is the important element in *khamr* that makes it a forbidden item of consumption? It is not any one of innumerable elements such as for example, its colour, or taste, or the various complex chemicals but the most 'effective cause' of the ban. If we consider the question in terms of one of the higher principles of the Islamic law which is, in broad terms, what is beneficial to human beings is permitted and what is harmful is prohibited by God, then the 'effective cause' leading to the ban must be something harmful. The jurists have concluded that because *khamr* has the property that leads to getting drunk and intoxicated and therefore harmful it must be the 'effective cause'. This effective cause is defined as *illa.* So, any item having the property capable of making one get intoxicated based on this analysis is banned, whether that item is food, drink or something one smokes. If an *illa* that is established in relation to the original object called the *asl* can be derived from or is present in another object called *far*, then the derived object shares the same *hukm*, rule of law that made the original object forbidden[377].

What is common to both the original and the derived object is the unifying factor (*jāmi*) which could be internal as in the case of *khamr* and *nabidh* referred to earlier, or legal as in the case of the prohibition to sell a dog (*far*) a derived object because it is stipulated as forbidden to sell a pig (*asl*)[378]. Vikor argues that the prohibition is not based on anything internal to both types of animals that make the selling forbidden but the 'similarity is legal', both are 'spiritually unclean' and therefore in the same legal category. The *illa* in the pig is its uncleanness and so it is in the dog. Yet, stripped of this fine distinction, in a broader sense, the reasoning and the conclusion is based on general analogical analysis.

[376] Al-Qur'ān, 5: 90-1
[377] Vikor, K *Between,* p. 56
[378] Ibid..p57

Accordingly, although the intent of the lawgiver plays a part in this particular decision, the decision is still based on the interpretation of a particular text on the similarities of the two objects and an effective cause. It is not necessarily based on the overall higher objectives of the Sharī'ah determined through a process of inductive reasoning.

The process of *qiyās* may be presented as a flow chart:

Illa - drunkenness	Derived (*far)* – fermented grapes
Text source (*asl)* – wine	
Forbidden (*hukm*)	Forbidden (*hukm*)

Categories of *qiyās*

Qiyās could be of different degrees: a superior *qiyās* (*awla*) is when the *illa* in the derived object (*far*) is stronger than it is in the original object, *asl*. For example, while there is prohibition against using harsh words (*asl*) to one's parents there is no such prohibition of using violence (*far*) against them. In terms of the *illa* of the *asl,* using violence is a stronger *illa* and is therefore prohibited. Previous analysis concerning *khamr* and *nabidh*, on the other hand is an example of equal *qiyās*, (*musāwi*), because the *illa* is equal and similar in both *asl* and *far*. This form of analogy is valid, whereas an inferior (*adna)* analogy when *illa* is of lesser degree in *far* compared to what it is in *asl* can cause problems. This principle usually relates to the exchange of grains. Under this rule, only when the goods that are delivered and received at the same time and are of equal weight, are allowed. Because of the unpredictability of the outcome, purchase and exchange of grains at different times and still not harvested or grown is not allowed. Since only the grain of wheat is mentioned what is the position of other produce. Although some of the produce may have different properties, the consensus is that the *illa* of the

produce is its edibility. This method of reasoning often leads to dispute[379] among jurists. The Hanafis make a different approach to *qiyās* in that for example, the first two illustrations are not considered *qiyās* and only the third one is considered so. The Hanafis consider the first two, the one concerning the intoxicating substance and the other on violence against one's parents are covered directly by the textual sources and one does not need to employ the *qiyās* process to understand them[380].

The implications of *illa* for judicial decision-making

What is most crucial to *qiyās* analysis is determining the *illa* of the case mentioned in the text. This analysis will show the overall technical difficulty involved in this form of reasoning. When *illa* is considered in terms of God's intent behind the rule in the relevant text of the Qur'ān or the Sunnah there are many other terms with similar meanings, terms such as *ma'na* (meaning) *baith* (motive), *sabah* (reason). Although these terms are somewhat similar to *illa* the latter has a much more restrictive meaning. Therefore, how should one determine what is God's *illa* in the case mentioned in the textual sources.

The difficulty in determining the *illa* can be seen, for example, in the case of textual indicants. It may be mentioned directly in the text or inferred by specifying the motive in the text stating for example, 'so that…' or 'we have done this so that…' For instance, concerning the rule for sharing of the war booty among specified categories of people, the Qur'ān says, 'so that it be not a thing taken in turns among the rich among you'[381]. Or the context mentioned in the text may provide an indication as in the case of many *hadiths*. The text may specify an incident giving rise to a problem which is referred to the Prophet who gives an answer in general terms but still with reference to the context. For example, the Prophet was asked about the permissibility of exchanging dried dates for ripe dates. He then wanted to know if the ripe dates when dried lose weight. When he

[379] Heer, N., *Islamic Law and Jurisprudence*, (Seattle: University of Washington Press, 1990), p.67
[380] Vikor, K *Between,* p.58
[381] Al-Qur'ān, 59:7

was told, yes he said that such exchange is not permissible. Now, although the question and answer relate specifically with reference to dates, the context in which it is answered is the effect of drying on weight which is the *illa*, and the rule arising thereof can be transferred to any other foodstuffs that lose their weight on drying. However, care needs to be taken in searching for *illa* in context related incidents where the text does not state the circumstances surrounding the issue, but only makes a brief statement such as 'the Prophet said, "do not exchange fresh and dry dates" when it would not be possible to extract *illa* or expand *hukm* rule to other items[382]. There may also be situations where the Prophet affirms one rule while another *hadīth* refers to a similar context, but he expresses a different intention behind the ruling he makes in this second case.

Consensus over *illa*

The consensus of the jurists is another main way of discovering the *illa*. The punishment by 80 lashes for drunkenness is an example. Such a punishment is not stipulated in the texts but the Qur'ān states a similar punishment for wrongful accusation (*qadhf*). The scholars have unanimously agreed that the *illa* in this case is that of losing control of oneself which eventually leads to wild accusation without cause, a similar state a drunken person is in, and therefore the same rule is transferred.

A method known as 'derivation' (*istinbat*), provides another example of a method by which the *illa* is not derived from the text but from elsewhere. This could involve, for example, classifying all the cases mentioned in the text and then deciding on a hypothetical *illa* and a rule and then going through the textual sources to see whether there are other cases that would be covered by the same *illa* and rule. If there is none, then the *illa* and the rule cannot be true even for the first case. For example, after analysing the case we assume the hypothetical *illa* of banning the sale of dogs is based on the premise that the sale of all domesticated animals is prohibited. If the search of the textual sources show that the sale of cows, donkeys and other domesticated animals is not in fact prohibited then the

[382] Vikor, K., *Between*, pp.59-60

hypothetical *illa* that the domesticated animal cannot be sold is wrong.

Alternatively, one could start by listing all possible *illa* of a case and then deleting them one by one based on their unreasonableness, improbability or for other reason and then consider what is left on the basis that it is most probable or very likely. However, this approach might lead to controversy in deciding what is probable or what is likely. Furthermore, this method based on an exclusive principle is not foolproof, because after the excluded items the derived *illa* of the chosen case will not be valid if it does not share the same *hukm*. Also the exclusion method will work only if there is a consensus that the *illa* is not a combination of different factors. If there are several *illa*s at work, then the exclusion will be invalid.

Another method of *istinbat* is still more controversial. This is a method of choosing *illa* that is most appropriate. What is the criteria for choosing *illa* that is most appropriate? Some could argue that it should be *maslaha,* the public good; others might say that the proposed *illa* must have some connection with the original case, or some might say that *illa* must be based on God's intent or purpose known as the *maqāsid*. And yet, another method which some consider acceptable and others not is by looking at several cases and selecting what is similar. In this case where there is no textual basis and similarity of cases and *illa* is the criterion for selection to which many may object.

Sometimes 'uncommon' *illa* are excluded from the 'common' ones. For example, certain kind of liquids based on some definition could be categorised common with water and considered suitable for taking ablution, whereas under some definition the same liquid may be uncommon with water and not suitable for ablution. This kind of analysis scholars find not appropriate to determine the *illa* and reject it.

Limitations of *qiyās*

The knowledge derived through the process of *qiyās* can only be probable rather than certain[383]. Furthermore, as Hallaq argues certainty in the authoritativeness of *qiyas* is achieved only by reference to the consensus through the practice of *qiyās* by the companions of the Prophet and not direct from the authority of the Qur'ān or Sunnah of the Prophet[384]. One of the most discussed form of *qiyas* among scholars is the *a fortiori* argument based on both forms the *a minore ad maius* and the *a maiore ad minus. Qiyās* can be used only when the Qur'ān, Sunnah or *Ijmā* (Consensus) do not provide the rule. *Illa* must be based on the original text and cannot be based on another *qiyās*. *Illa* must be apparent, direct and reasonable. Objectives of the performer alone cannot be the criterion as it is not apparent and cannot be determined objectively. It must be 'direct' in the sense that it must cover all instances and not some aspects. For example, the traveller can shorten his prayer and it is allowed because of the hardship[385]. However, the 'hardship is not the *illa*' but it is the travel and all forms of travel whether or not it entails hardship. 'Reasonable' means the element that is more relevant to the rule that makes the *illa* reasonable. For example, with respect to wine, drunkenness or getting intoxicated is the most relevant element and the *illa* of the case, and not for example, the colour of the wine, its texture or its geographical origin.

Furthermore, the *illa* must not contradict a stronger cause. Positive rule must follow positive *illa* and negative rule must follow negative *illa*. The rule must produce an effect or an absence of effect. For example, the rule recognising the 'absence of objections' to honour a contract is the result of 'absence of sound mind'. But the performance of a particular action by a madman cannot constitute an *illa*.

[383] Hallaq, W . B., *A History,* p. 27
[384] ibid., pp.104-107
[385] Vikor, K *Between,* pp. 63,64

Evolution of *qiyās* methodology

Although the element of *qiyās*, analogical reasoning, was prevalent since the time of the companions of the Prophet, it was formalised by al-Shāfi´i in order to create a kind of *ra'y* based rules to the textual sources so that the influence of *ra'y* on law could be limited. Al-Shāfi´i's primary aim was to ensure that while all legislation was based on the texts there was an element of freedom to introduce new rules as long as such rules are related to the texts. Accordingly, *qiyās* could be performed only when the original case is in the text and in which case new law is created for new cases. By this process al-Shāfi'i aimed to prevent any other legal rules being introduced into the Islamic legal system. After al-Shāfi´i's methodology of *qiyās* was established it was no more possible to consider *ra'y* in its original form.

Complexities of *qiyās* lead to emergence of alternative principles

The proponents of *ra'y* did not in any case abandon their principles. Instead while they accepted in principle the *qiyās* methodology, they tried to limit its influence. One way they did this was to recognise only the 'inferior' type of *qiyās* as actual *qiyās*[386]. They argued that if the derived *qiyās* is equal to or stronger than the original one mentioned in the text, it is not necessary to go through the lengthy procedure to establish *illa* and the rule. For example, if wine is prohibited because it is intoxicating then fermented grape too must be so, and there is no need for further analysis. In so restricting the scope of *qiyās* they were opening up avenues to expand a rationalist or juristic based approach. Most importantly the Hanafis developed the principle of *istihsān* which enabled them to disregard *qiyās* outcome if it produced unreasonable or unforeseen detrimental consequences. For example, the textual sources do not provide any exemption from the rule that a thief's hand must be cut off. Hanafis on the basis of *istihsān* would argue that under extreme circumstances involving life and death situation, a preferable alternative would be a much more lenient punishment.

[386] Vikor,K *Between,* p. 65

A detailed discussion of *istihsān* is undertaken in the next chapter. While comparing it with equity in English law it illustrates that the Islamic legal methodology is not rigid but flexible and that it can be and needs to be adapted to changing circumstances of time and place while not departing from the higher aims and objectives of Islamic law.

The Māliki school, in order to overcome the restrictive rules of *qiyās*, has developed a similar principle to *istihsān* called *istislāh,* derived from the word *maslaha*, the 'common good' of the society, and *istislāh* means to seek this social good. A variant and expanded form of this principle was elaborated by the Spanish scholar al-Shātibi who died in 1388 in Granada. The philosophy he developed is based on identifying and elaborating the divine intent behind the law*, maqāsid al-Sharī´ah*. This subject will be taken up in the last chapter. For the present purpose, *maslaha* as defined above advocated by the Malikites has a limited perspective and intended to modify the *qiyās* based rules. This is termed *maslaha mursala,* the 'free *maslaha*' independent from the text. Mālikites have argued that the justification for this rule is necessity, *haja* or *darra.* The collection of the Qur'ān itself is an example because the text has not stipulated nor is there any *qiyās* based rule concerning it. The collection had been undertaken merely on the basis of necessity so that it would not be lost for the future generation if not collected and also it serves the common good[387].

While *istihsān* and *maslaha mursala* were two important principles in the classical times, another legal principle with which modern reformers were involved was '*siyasa shariya'*. This term could be loosely interpreted as 'sharīah politics', creating a link between politics and law. This rule too was developed to overcome the stringent requirements of *qiyās* just like *istihsān* and *maslaha*. However, *siyasa shariya* is less specific and has a more general meaning in terms of the 'spirit of Sharī'ah' rather than strictly adhering to the textual stipulations. Shāfi'ites and Hanafites have historically not favoured *siyasa sharia* whereas Mālikis have adopted it and some of the Hambalites too have accepted it.

[387] Vikor, K *Between,* p. 69

The *illa* and *hukm* become the rule

Once the relevant texts have been identified and the type of *hukm* categorised according to whether obligatory, prohibited or neutral, the scholars will then use *qiyās* to extend the legal validity of the texts. They do this by extracting through a process of analogical reasoning the *illa* or the reason behind the *hukm* or the rule in order to apply them to new cases. This process of extending the application of the *hukm*, the rule, to new cases in effect expands the law. This analogical method is applied not only when cases arise but also by producing *illa* for all the rules found in the text, applied generally.

The change that occurred since the formulation of the methodology have not probably been foreseen by the legal historians or by those who formulated such principles. By the time the large number of texts has been identified and the *illa* extracted covering a large number of cases, the *illa* becomes the rule, and the text remains in the background. For example, in the previously mentioned case the text referred to *khamr* as the work of satan, the rule was the prohibition and *illa*, the intoxication caused the rule. The rule established that to consume any intoxicating substance is prohibited and punishable by 80 lashes. Ultimately, the text is not stated and what is expressed is the rule, *illa* and *hukm* are the rule.

Qiyās was started in order to avoid human influence in the form of *ra'y* affecting the formulation of law. No doubt the methodology of *qiyās* established the limits to interpretation, but the rules, the various steps taken and the ultimate outcome, were the results of human activity through a process of intellectual and analogical reasoning giving rise to differences of opinion and forms of disagreement somewhat akin to the methods adopted by the followers of *ra'y* themselves[388].

4.3.III *Ijmā*

Ijmā, since the time of the companions of the Prophet, has been considered an important source of law, next to the Qur'ān and the Sunnah of the Prophet. However, in relation to our limited research aim, the issue of how, when and in

[388] Vikor, K. *Between…* p. 72

what form *ijmā* should be arrived has been the subject of continuous debate among the jurists and scholars. At one extreme there are those who deny the possibility of *ijmā* by anyone apart from the companions of the Prophet, and on the other extreme there are those who argue that *ijmā* can only come, if not through the whole body of the Muslim community, at least through the universal consensus of all the scholars of the community.

The word *ijmā* is a derivative of the term *ajmā'a* and one of its meaning is 'unanimous agreement'. *Ijmā* itself could be generally defined, according to one view[389], as the unanimous agreement of the *mujtahids* of the Muslim community at any time since the death of the Prophet on any subject. However, this definition has been qualified in number of ways by several authorities. For example, some[390]have argued that agreement is that of the 'community as represented by its *mujtahids*' while others[391] quoting classical literature that qualifies the above definition, point out that the agreement can only relate to certain issues. They further argue that the above definition, even after allowing for various qualifications, does not represent the true historical process of *ijmā* and the way it was developed from the very beginning. The definition does not, for example, allow for any differences of opinion of a single jurist[392]. Snouk Hurgronje defines *ijmā* as the 'infallible consensus of the community' and he even considers it to be 'above everything' and that it 'ends doubt'[393]

In practice, though, *ijmā* was widely used by the Prophet's companions themselves[394] in arriving judicial decisions, the concept itself most likely[395] appeared after their time. Furthermore, although Al-Shafi'i in his treatise on *Usūl al-fiqh* placed *ijmā* before *qiyās* in order of importance it is clear from the historical perspective, *qiyās* as a form of legal reasoning originated before *ijmā*

[389] Kamali, M.H., *Principles,* p.230
[390] Hallaq, W.B., *The Origins,* p. 138
[391] Hasan, A, *The Early,* p.155
[392] For a fuller discussion of the shortcomings of classical definitions of ijma when compared to the early period , please refer ibid., pp. 155-157
[393] Hurgronje, S, '*Le droit Musulman'.* In selected works of C.S. Hurgronje ed by G.H. Bousquet and J.Schacht (Leiden, E.J.Brill 1957), pp. 225-227 – extract from H.J. Liebesny, The Law of the Near East, p. 16
[394] Al-Alwānī, T. J., *Source Methodology in Islamic Jurisprudence, Usulal-Fiqh al-Islami* (Herndon, USA: The International Institute of Islamic Thought, 2003), p. 15
[395] Hasan, A, *The Early,* p.156

and was widely practised. While *ijmā* was 'widely used'[396] to arrive at judgements during the time of the companions, by the second century of Hijra it began to be firmly rooted as an 'independent science'.[397] *Ijmā* came to be applied as, what Hallaq calls, 'the ultimate sanctioning authority', of all those legal rulings which have been widely accepted by the jurists or as a methodology for verifying the 'fallibility of *Ijtihād*'[398] or as another authority[399] has emphasised, it is a 'principle of ratification'.

The issue of authenticity and authority of *ijmā* has been, no doubt, the subject of debate ever since the incident of *Saqīfah banī Saidā*. This was when immediately after the death of the Prophet some of the companions of the Prophet gathered to appoint a leader for the Muslim community. ''Umar ibn al-Khattāb proposed Abū Bakr for the caliphate which was first accepted by those present and later by the community at large[400]. However, a small section of the community, mainly represented by the *Shī'īs*, questioned whether the decision arrived at by a small number of the companions of the Prophet could be considered the *ijmā* of the community. Let that be as it may, the institution of the caliphate itself, it has been argued[401] is a matter of necessity, and therefore is based on *ijmā*. An important function of *ijmā* may be considered in relation to *ijtihād*. Since *ijtihād* is not a perfect science and can occasionally lead to erroneous judgements, the *ijmā* of the jurists or the community at large could validate, legitimise and make authoritative[402] those decisions for universal acceptance.

Although there is no direct authority governing *ijmā* from textual sources, there are several Qur'ānic verses[403] and traditions of the Prophet which are interpreted as providing authority for the exercise of *ijmā*. A most important tradition often quoted in this respect is 'my community will never agree on an error'. This is a

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396 Al-Alwānī, *Source,* p.15
397 Motzki, H., *The Origins of Islamic Jurisprudence, Maccan fiqh before the Classical period*, (trans. From German by H Katz), (Brill, Leiden, 2002,), p. 3
398 Hasan, A, *The Early,* p. 156
399 Heer, N, *Islamic Law and Jurisprudence*, (Seattle: University of Washington Press, 1990) p.183
400 Hasan, A, *The Early,* p. 157
401 Kerr, M.H., *Islamic Reform – The Political and Legal Theories of Muhammad Abduh and Rashid Rida*, University of California, Cambridge University Press, London, 1966), p .25
402 ibid., p. 80.
403 Al-Qur'ān, 3:103 and 4:115

tradition which has been reported and recorded by various authorities including the '*Sahīh Buhāry'*. Yet, there has been some debate as to how strong this tradition is in terms of the number of people reporting it.[404] However, Hallaq contends that although, when this tradition is considered individually, it may be a solitary one, taken together with other traditions they all express a single theme and that is that by the divine grace the community is protected from error. Furthermore, because of the presence of a large number of traditions pointing to a similar theme, though each one is worded slightly differently, it is a report of the *ma'nawi* concurrent type, providing 'certain knowledge,'[405] rather than a probable one, of the subject. The development of all these methods of reasoning and analysis were to lead some scholars to use them as basis to formulate legal structures and methodologies.

4.4 Emergence of legal structures under four Sunni Imams

Structured forms of legal methodologies really took shape after the *tābiūns* and with the 'founding imams' of the surviving four schools of law - other schools having failed for doctrinal reasons' [406] - beginning with Abū Hanīfah. To understand the ultimate shape of the classical methodology of Islamic law, *usūl al-fiqh,* the 'architect' of which was Imam al-Shāfi`i it is important first to examine the work and methodologies of the earlier Imams[407] who made immense contributions in their own right. What follows then is an attempt to understand the importance of the nature of initial preparations and the extent of the task the imams had to undertake in their own inimitable manner. This eventually not only led to the creation of their own legal methodology but also left a wealth of knowledge indispensable for any future study and evaluation, critical or otherwise, of Islamic legal method.

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[404] Hallaq, W.B., *A Hisory,* p. 76
[405] Ibid., p. 76
[406] Hallaq, W.B., *The Origins,* p. 169.
[407] Some of the historical details contained in this part of the discussion are taken from *Tareekh al-Madhahib al-Islamiyah* by Muhammad Abu Zahrah, Cairo and *al-Madkhal fi at-Ta'reef bil-Fiqh al-Islami,* by Muhammad Mustafa Shalabi, Beirut, 1969 quoted in *The Evolution of Fiqh* by Dr A A Bilal Philips, (Riyadh: International Islamic Publishing House, 2005)

It is intended that some insight into their different legal methodologies and the process through which they evolved will provide us with some new understanding and eventually a form of original contribution through this research analysis.

4.4.I. Abū-Hanīfah the Kūfan-revivalist Jurist

Imam Abū Hanīfah was born (d 150/767) in Kūfa, Iraq. He first studied Philosophy and dialectics known as *Ilm al Kalām,* exposure to which fields of knowledge was to have some impact in his later approach to the interpretation of Sharī`ah. His study of *hadīth* and *fiqh* over a long period was intense and deep. By the age of forty he was a prominent scholar in Kūfa and later became an outstanding legal scholar. His desire to remain independent and unattached to any official organ can be seen from his refusal to accept two offices of *qādī*, a judge, once under Umayyad Caliph and again under the Abbasid Caliph. He refused them in spite of being beaten and imprisoned for his refusal.[408] He was considered a minor successor of the companions as he met some of them and transmitted *hadīth* from them.[409]

Abū Hanīfah believed strongly in the principle of group discussion and consensus (*shūra*) and put into practice this principle in his teaching method. He made his students discuss and debate legal issues both real and hypothetical and record their unanimous decisions. Because they also debated hypothetical issues posing questions such as 'what if such and such happened' they also came to be known as 'what iffers' or '*ahl al-ra`y* (the opinion people).[410]

Abū Hanīfah has sometimes been criticised claiming 'he showed that he did not

[408] Hallaq, W.B., *The Origins,* p. 181.
[409] Philips, A.A.B., *The Evolution,* pp. 101-102
[410] Ibid,, p. 102.

feel himself bound by either the spirit or the letter of the revealed texts.'[411] Coulson makes reference to one of Imam Abū Hanīfah's decision on the issue of guardianship of a Kūfan and states that a similar rule existed under Roman Law.[412] It is not clear why the point about Roman law was made here since as Coulson says the Medinites too had a similar rule, and Abū Hanīfah most probably would have been aware of that rule when he made the decision.

Against the general criticism of Abū Hanīfah, his own statements[413] made on various occasions show how committed he was first and foremost to the textual sources; statement such as, '…I follow the Book of Allah, and if I find no solution there, I follow the Sunna of the Prophet, peace be upon him;' and then he goes on to say that only then he would consider the views of the companions and so on; or when he wrote to Caliph al Mansūr stating that '… O *Amir al-Mu'minīn*, I work according to the Book of Allah, then according to the Sunnah of the Prophet, then according to…' and then lists the others in the order in which he would consider them, after these two texts. Therefore, it is likely that the circumstances in which he had to judge certain cases were such that the textual sources were not explicit and that he had to exercise *ijtihād* and decide in terms of the 'overall' spirit and purpose of the Shārī`ah, using very simple easily understood language[414]

Abū Hanīfah's two primary sources were first the Qur'ān and then the Sunnah with some restrictions on the use of the latter. He stipulated that *hadīth,* in addition to being accurate, *sahīh,* must also be widely known (*mash-hoor*), a condition he laid down in order to avoid spurious *hadīth* being used. A third source of Islamic law for Abū Hanīfah consisted of unanimous decisions of the companions, *ijmā`,* which was given priority over his own personal decision and that of his students, in the absence of which he would choose the most appropriate opinion of a companion using his own reasoning.

[411] Hallaq ,W. B., *A History,* p. 131.
[412] Coulson, *A., History*, p. 50.
[413] Al-Alwānī, T.J., *Source Methodology*, p. 63.
[414] Shibli Nu'mani, A., *Sirat-I-Nu'man* – Imam Abū Hanīfah*, Life and Works*, (Karachi: Darul-Ishaat, 2000), p.59

When there was no clear indication of an appropriate rule from any of the above sources, he would use the principle of *qiyās*, analogical reasoning, using his own *ijtihād* on the belief that he was one among the *tābiūn.* He would also use *istihsān,* juristic preference, an important principle developed by Abū Hanīfah which will be analysed in detail in chapter five. The point to make at this stage is that although the principle of *istihsān* is closely connected in many different ways to *qiyās* and *maslaha,* it has had its critics, the most vociferous of whom was Imam al- Shāfi`i and also some later jurists and theorists.[415] Imam Abū Hanīfah would utilise `*Urf,* local customs, in places where no binding Islamic customs were applicable.[416] Imam Abū Hanīfah is followed by Imam Mālik Ibn Anas developing his own legal principles and methods.

4.4.II. Imam Mālik Ibn Anas, his legal methodology and '*amal*'

Imam Mālik was born in Madina probably[417] in (93/711). His grandfather was an important companion of the Prophet. He studied *hadīth* under the greatest *hadīth* scholar of his time and the great *hadīth* narrator, az-Zuhri and Nāffi`, respectively. He taught *hadīth* in Madina for over forty years and also wrote his monumental work *Muwatta* which contained *hadīth* and *fatāwā*, judgements of the companions and *tābiūns.* The criticism of Imam Mālik that he relied too heavily on *hadīth* from non-Madinan source and casting doubt on the reliability of his work is being counteracted by Dutton. He argues that Imam Mālik placed overwhelming reliance on Madinan traditions and this is evidenced from the *Isnād* (chain of transmission) of the *Muwatta*. There were only 22 *hadīths* of possible non-Madinan origin compared with a total of 822, less than 3 per cent.[418]

Muwatta, it is argued, 'is one of the earliest – if not the earliest – formulation of

[415] Hallaq, W.B., *A History,* p. 108.
[416] Philips,A A B., *TheEvolution,* pp. 101-104.
[417] Dutton, Y., *The Origins of Islamic Law*, (Surrey: Curzon Press, 1999), p. 11.
[418] Ibid., p. 13.

Islamic Law that we possess…'[419] The term '*Muwatta*' is the name Imam Mālik gave for his work, meaning 'the well trodden (path)'. The importance of *Muwatta* for legal methodology is not only because it is one of the earliest formulations of law but it also sets out the first steps towards the formulation of a methodology and a source of Islamic law, indicating the place of *hadīth,* judicial decisions of the Prophet, the companions and the path followed and agreed upon by the scholars of Madina.

Imam Malik was strong willed just as Imam Abū Hanīfah and he would say what he felt without fear or favour. He aimed at developing a more flexible, accommodating and less rigid legal methodology. For example, when the Abbasid Caliph Abū Jā'far al-Mansoor wanted to make *Muwatta* applicable in all the Muslim lands Imam Mālik told the Caliph that it would not be proper to do so. He argued that since the companions had gone to different parts of the Muslim regions it would not be fair to force on everybody one particular point of view. When Caliph Haroon al-Rashīd wanted to do the same Imam reacted in a similar manner.

Imam Mālik's contribution, compared to Abū Hanīfah's legal methodology and judicial decision-making process, was practical and problem solving in real life situations of the day. He would introduce *hadīths* and statements of the companions to his students for discussion and analysis or would ask the students to discuss the issues relating to a problem in their area and he could then relate *hadīths* for them to choose. When Imam Mālik completed the *Muwatta* he was reported to have discussed parts of the texts with his students, and would add or delete from the original text as and when new information was received by him.

Malik's methodology of law begins with the interpretation of different texts that are of a legal nature, by resolving any possible ambiguities and then reaching judgements based on the objectives of the Shārī`ah. For instance, in his *Muwatta*, Mālik divides the use of the Qur'ān broadly into three categories. In the first category are those texts he quotes directly, the second category consists of those

[419] Dutton, y., *The Origins*, p. 22.

texts to which he makes direct reference but does not quote, and the third category makes only implicit reference and incorporates Qur'ānic phrases and concepts into the text without giving their source. This category is the 'most pervasive and also the most indicative of Qur'ānic element in Islamic Law.'[420]

Compared to Abū Hanīfah there cannot be any apprehension in the case of Imam Mālik's use of personal opinion in legal reasoning. It is clear from the *Muwatta* that 'he was concerned not so much with presenting his own opinions as with presenting the agreed position of those before him'. Imam Mālik himself is reported to have said, 'when I say "I am of the opinion (*ara)* it is really the opinion of a large group of the Imams who have gone before"'[421] meaning Imams whose opinion was the same as that of the companions and their followers. Therefore, any reference to 'Mālik's *ra`y'* means the *amal,* practice of the people of Madina, and it is on this basis that Mālik's legal reasoning should be understood.

Imam Mālik's legal methodology and legal reasoning can in general be seen in the way *Muwatta* is laid out. For example, where the Qur'ānic text is less ambiguous he follows the same method; he states briefly what the *amal* is about on any particular issue and then he explains what constitutes that *amal* and finally closes the chapter by relating the relevant texts of the Qur'ān in support of his statement. And yet, there is the possibility of some ambiguity in the words of the Qur'ānic text or in the text itself and maybe there is a need to explain some missing part in the text. In those instances *Muwatta* makes further extension to clarify those points. But the Qur'ānic justification stated in the first instance is to indicate the nature of the initial judgement subject to clarification of the details. This approach of Imam Mālilk can be clearly seen in relation to sections on inheritance in his *Muwatta* and the relevant texts of the Qur'an. In Book 27, the Book of obligation in *Muwatta* Imam Mālik adopts the same methodology of legal reasoning in several chapters on the subject of inheritance. (See *Muwatta,* Volume 1, (p 502 – 507 – Ch 1-5). The subject of inheritance is

[420] Dutton, Y., *The Origins,* p. 62.
[421] Ibid., p. 34.

claimed[422] to be much 'more detailed and thus less ambiguous.'

With respect to judgements based on Qur'ānic texts that are unambiguous there is no disagreement among the jurists. However, when differences of opinion over judgements on the details arose, Imam Mālik's decision would be governed by Madinan *Amal* on the basis that there was no clear authority in the Qur'ān, Sunnah or *ijmā.*` He would not use *qiyās* to arrive at judgements on Qur'ānic texts where there are '…detailed provisions[423] such as inheritance…' What Imam Mālik's methodology of legal interpretation of the authoritative sources means is that he uses the Madinan *Amal* as a reference point to understand and explain the textual sources and his judgements.

When Coulson speaks [424] of Imam Mālik's practice in terms of 'legal topic' he must be referring to issues decided on the authority of the *amal* of the Madinese. In these cases Imam Mālik will initiate the process first by introducing the relevant 'tradition or precedent.'[425] Once he has stated the agreed rule based on *amal* he then identifies or relates the problem that is presented to him and makes an appropriate judgement. In this kind of situation it must be the case that the issue must be such that it should lend itself to be decided under the established rule. If there are no such rules or textual sources from which appropriate rules can be decided then he would exercise his independent reasoning, *ijtihād.*[426]

It is difficult to see how it could be said that because of Imam Mālik's desire to derive rules on a rational basis for the public good he 'adopted conclusions that appear to serve such interest without these having the support of the texts'[427] because Dutton argues[428] that the Qur'ān formed the backbone of Islamic legal methodology Imam Mālik was attempting to establish. For example, in Mālik's *Muwatta,* out of 44 sections concerned with legal subjects, over two thirds are

[422] Dutton, Y., *The Origins,* p. 71.
[423] Ibid., p.73.
[424] Coulson, *A., History*, pp. 44-45.
[425] Ibid., p. 44.
[426] Dutton, Y.,*The Origins,* p. 33.
[427] Hallaq, W.B., *A History,* p. 112.
[428] Dutton, Y., *The Origins,* p. 157.

directly related to Qur'ānic texts and the remaining sections have some form of indirect connections to the Qur'ānic source.[429]

Imam Mālik, like other Imams, considered the Qur'ān and the Sunnah as the two primary sources of Islamic law. Coulson, however, seems to think that for Mālik, in terms of Madinan *amal,* there was nothing 'sacrosanct' about Sunnah,[430] but Dutton maintains that Mālik attached 'equal importance to the Qur'ān and Sunna.'[431] Like Imam Abū Hanīfah, Imam Mālik too placed conditions for accepting *hadīth.* He rejected any *hadīth* that was contradicted by the Madinites, but unlike Abū Hanīfah, though, he was not particular in insisting that a *hadīth* should be *mash-hoor* (well-known). In addition to these two primary sources Imam Mālik also considered the popular practices of the Madinite *amal* as an authentic form of Sunnah represented by action rather than in words, actions of the people who lived with the Prophet in Madina, and their descendants whose practices, Mālik argued, would have been allowed by the Prophet.

Ijmā`* was a source of law for Imam Mālik just as it was for Abū Hanīfah. But unlike Imam Abū Hanīfah, Mālik considered that the *ijmā` of both the companions and the later scholars could form a source of law. Imam Mālik would consider opinions of the companions as a source whether they were unanimous or otherwise and he would include them in his *Muwatta.* A unanimous decision of the companions was given priority over individual opinion, and such individual opinion was given precedent over Imam Mālik's personal opinion. With respect to *qiyās*, unlike Imam Abū Hanīfah, he was cautious in using *qiyās* as he thought it was subjective. He accepted long established Madinite customs as they did not contradict *hadīth* for the reason that such customs the Prophet would have approved as common practice.

Imam Mālik too formulated a legal principle of his own and named it *istislāh*

[429] Dutton, y., *The Origins*, p. 158.
[430] Coulson, *A., History,* p. 47.
[431] Dutton, Y., *The Origins,* p. 161.

(welfare) aimed at providing relief in terms of human welfare where Sharī`ah has not provided specific provision. For example, it would be *istislāh* for a Muslim leader to impose a system of affordable taxation in addition to *zakāh* in the interest of the welfare of the whole community. In terms of the needs of the people at a particular place and time he would apply the principle of *istislāh* where *qiyās* would not provide suitable relief.

Customary practices of the Muslims in various parts of the territories where they lived were considered to be a source of law by Imam Mālik just like Imam Abū Hanīfah, provided they did not go against the letter or the spirit of the Sharī`ah.[432] The next section will examine the way in which al-Shāfi`i's methodology dealt with these issues.

4.4.III. Al-Shāfi`ī- the 'Architect' of *Usūl al-Fiqh* and his *Risāla*

Muhammad ibn Idrīs al-Shāfi`ī who was born (b 150/767) in Ghazzan in the Mediterranean coast of then named Sham at a time when there was great tension and conflict in the Muslim community. These tensions were over several issues, such as debates about the right approaches to textual sources, interpreting their meanings, formation of legal methodologies not least based on the ideas of Imams Abū Hanīfah and Mālik, and in many of areas of intellectual activity. The impact al-Shafi'i had on the juristic community had made some scholars to comment that he was the 'Colossus of Islamic history,'[433] 'Founder of the science of legal theory,'[434] 'literary giant….'[435]

Al-Shāfi`ī developed an unquenchable thirst for knowledge. In his youth al-

[432] Philips, A A B*The Evolution,* p. 108 – 112.
[433] Coulson,N J., *A History,* p .55.
[434] Hallaq, W.B., *A History,* p. 30.
[435] Melchert, C., *Studies in Islamic Law and Society, The Formation of Sunni School of Law 9th -10th Centuries CE,* (Leiden: Brill, 1997), p. 196.

Shāfi`ī travelled to Madina to study under Imam Mālik, memorised the whole of Mālik's *Muwatta* and stayed in Madina until Imam Mālik's passing away in (179/795). He complemented Imam Mālik saying that 'no one has ever done me a great favour than Mālik ibn Anas.'[436] From Madina he left for Yemen and, having taught there for a while he travelled to Iraq and studied under Imam Muhammad ibn al-Hassan, a prominent student of the other great Imam, Abū Hanīfah. Compared to other Imams, Imam Shāfi`i has the distinction of not only being the most widely travelled scholar in search of knowledge but also having had the privilege of being taught the legal principles and the methodologies of Imam Mālik by Mālik himself, and of Imam Abū Hanīfah by one of Hanīfah's distinguished students. He then travelled to Egypt to study under another famous Imam of the time, al-Layth, the founder of the Laythi *Madhhab* (school). But, finding Imam al-Layth had since passed away he continued to study under Imam al-Layth's students. He stayed in Egypt until he passed away in (204/820).

Imam Shāfi`ī with an open mind and a sense of objectivity never hesitated to be critical when necessary of another's viewpoint whether it was that of a friend or a foe. Accordingly, he expressed dissatisfaction over some of the methods of *ahl al-hadīth*, the informal school with which Imam Mālik was associated. And yet, when needed he never ceased to be grateful and was always prepared to defend and be supportive of Imam Mālik. From about 195 AH, he moved from circle to circle teaching in around forty of them, and he had such a great impact that at the end only his circle remained. It is interesting that not only great scholars like Abū Thawr, al-Za'farānī, al-Karabīsī and others belonging to *ahl al-hadīth* attended his school along with Imam Ahmad Hanbal, the founder of the Hanbali school of law. Imam Hanbal used to say later that, '*ahl al-ra`y* used to laugh at *ahl al-hadīth* until Imam Shāfi`ī taught them otherwise, and vindicated the traditionalists' position through sound arguments.'[437]

With his deep understanding of a broad spectrum of jurisprudence along with a comprehensive knowledge of the Sharī`ah , Imam Shāfi`ī was able to review all the conflicting legal theories and bring about a synthesis in those troubled times.

[436] Al-Alwānī, T.J., *Source Methodology…*, p. 31.
[437] Ibid., p. 32.

His first attempt in this was to combine Māliki *fiqh* which he learned under Imam Mālik and Hanafi *fiqh* which was taught to him by the best student of Abū Hanīfah, and he dictated to his students through his book called *al-Hujjah* (the Evidence). However, after writing *al-Hujjah*, his critical faculties led him to feel saddened that 'most people adhered strictly and unquestioningly to the opinions of Mālik,'[438] and began making critical analysis of Mālik's legal opinions.

He highlighted the legal implications of Mālik's method by pointing out that he '… formulates opinion on the basis of general principles while ignoring the specific issues, whereas at other times he gives a ruling on a specific issue and ignores the general principle.' He was also critical of him for giving preference sometimes to the opinion of a companion or a successor of the companions or to his own reasoning instead to a sound *hadīth* and found unacceptable that Mālik sometimes did this without taking the general principles into account. He was unhappy, too, to find Imam Mālik 'exceeded the proper bounds in applying his principles of *al-masālih al-mursalah* (the interest of the greater good)' or when Abū Hanīah was more concerned with particular or minor issues at the expense of basic rules and principles.[439] These and other issues, such as the controversy over Abū Hanīfah's methodology, the tension created by the conflicts between the informal schools of *ahl al-hadīth* and *ahl al-ra`y*, which continued to the beginning of the 10th Century[440], and the confusion caused by the fabrication of *hadīths,* and others, made Imam Shāfi`ī to ponder over a solution or solutions. The result was his decision to formulate a comprehensive legal methodology.

The first step towards that methodology was his book *Kitāb al-umm* (The book of Essence) under *al-Madh-hab al-Jadīd* (the new school of thought) completed in Egypt,[441] which must be differentiated from his book, *al-Hujjah*, called *al-Madh-hab al- Qadī* (the old school of thought). While in Egypt he changed many of the legal ideas he held in Iraq on the basis of new *hadīth* and his legal reasoning. Still later he revised his previous work and produced the first synthesis of all the prevailing legal opinions into fundamental legal principles,

[438] Al-Alwānī, T.J., *SourceMethodology*, p. 33.
[439] Ibid.,
[440] Melchert, *Studies in Islamic Law,* p. 1.
[441] Khadduri. M., *Al-Shāf'i'ī's Risāla*, (Cambridge: The Islamic Text Society, 2003), p. 15.

sources of law and a legal methodology of Islamic Law, *Usūl al-fiqh* of Islam in his book *al-Risāla*. His school of law formed at this time, Melchert calls, a 'traditionist' school,[442] later turned 'semi-rationalist',[443] and Coulson calls a doctrine of ' subtle synthesis'[444] and Hallaq, a 'reconciliation of the views of opposing parties.[445] Zafar Ishaq Ansari argues that long before al-Shāfi`i's arrival a number of these legal concepts of fundamental importance, without their technical terms, were in existence.[446] Scholars writing on the history of *Usūl al-fiqh* agree that *al-Risāla* was the one first written on the subject, and as a legal document it is with precision[447] and is in a rigorous form.[448] Imam Hanbal commenting on *al- Risāla* said that 'until Imam Shāfi`ī came along we never thought of things like the general and specific' (*al'amm wa al-khass).*[449]

Like other Imams, al-Shāfi`ī accepted the Qur'ān and the Sunnah as the two primary sources of law. He introduced a 'decisive argument'[450] that the Prophet was divinely inspired when giving legal decisions. With respect to the Sunnah the condition he stipulated was that it must be authentic (*sahīh*), and the Qur'ān be interpreted 'in the light of the Sunnah'[451] and rejected the other conditions set by both Imams Abū Hanīfah and Mālik. He was very cautious about *ijmā`* and even doubtful about its role in many cases. However, he thought that in few instances *ijmā`* could form the third important source of law. On individual opinions of the companions he was prepared to accept them provided there were no conflicting opinions, in which case he, like Abū Hanīfah, would accept the one closest to the Sharī`ah. However, some of his views such as that the Prophet was divinely inspired when making legal decisions, that the Qur'ān can be abrogated by the Qur'ān, and Sunnah by Sunnah only, and that *ijmā`* must be that of the whole community, have not been without controversy among jurists.

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[442] Melchert, *Studies in Islamic Law,* p. xxvi .
[443] ibid.
[444] Coulson, *A History*, p. 57.
[445] Hallaq, W.B., *A History*, p. 33.
[446] Ansari, Z.I, 'Islamic Juristic Terminology before al- shafi'ī: A Semantic Analysis with Special Reference to Kūfa', *Arabica 19* (leiden, Brill, 1972) pp. 255/300, (Ed: Hallaq,W B., *The Formation.* pp. 211/256)
[447] Hodgson, M.S.G., *Venture of Islam* (Chicago: Chicago University Press, 1977), p. 330.
[448] ibid, p. 332
[449] Al-Alwānī, T.J., *Source Methodology,* p. 34.
[450] Coulson, N.J., *A history,* p. 56.
[451] Ibid., p. 57.

Nevertheless, al-Shāfi`ī's *al-Risāla* is so highly valued by many jurists that it is being said that if al-Shāfi`ī were to have appeared after the so called 'gates of *ijtihād* had been closed' he would have been considered an eminent reforming jurist. Coulson argues that *al-Risāla* presents existing ideas most systematically.[452] But, it is commented by others that because of the period in which he produced his monumental work, it was unfortunate that he was dragged into 'controversy' between the two informal schools of law.[453] On the other hand, Hallaq has an issue when he argues that the *al-Risāla* 'did not elicit any refutation' for hundred years from the time of its publication,[454] meaning that it was not well known for a long time. Nevertheless, he stresses that *al-Risāla* is a full-fledged methodology representing 'a synthesis of reason and revelation' and confirms that it appeared at a period when a few would accept it, least of all the two camps, the two informal schools of law.[455] However, Devin Stewart is concerned that although al-Shāfi`ī's *al-Risāla* is comprehensive in the sense that it provides a methodology for deriving rules for future cases, it does not contain some of the necessary features of a *usūl al-fiqh* which are found in later works. He argues that the concept of 'a complete, finite, and ordered' list of the roots of the law probably existed during Shāfi`ī's day.[456] Legal methodology as formulated by al-Shāfi`ī, which was later modified by others, was to have, as we shall see, great impact but not without controversy. But, for now we want to look next at *al-Risāla's* claim to lay the foundation of Islamic jurisprudence.

4.4.III.i. Main ideas of *al-Risāla*

Al- Risāla, after a brief introduction on matters relating to the importance of right belief, which is vital for al-Shāfi`ī's methodology, points out that there is no liability on Muslims if there is no guidance in the Qur'ān showing the right

[452] Coulson, N.J., *A History*, p. 55.
[453] Al-Shafi'ī,M I I. *al-Risāla*, p. 7.
[454] Hallaq, W B., 'Was al-Shafi'ī the master architect of Islamic Jurisprudence,' *International Journal of Middle East Studies 25* (Cambridge: Cambridge University Press, 1003), p. 591.
[455] Ibid., p. 600
[456] Stewart, D, 'Muhammad b Da'ud al-Zahir's Manual of Jurisprudence, *al-Wasul ila Ma'rifat al-Usūl'*, in Bernard Weiss, ed., *Studies in Islamic Legal Theory* (Leiden, 2002 , pp 99-137), p104, in Hallaq, *The Formation*, p. 282.

way.[457] The second chapter deals with legal texts in the Qur'ān under the title '*al-Bayān'* defined as 'collective terms,' which includes both fundamental principles and specific rules.[458]

Al-Bayān is divided into five categories each dealing with certain legal aspects of the Qur'ān, *hadīth* and Sunnah of the Prophet and the exercise of *ijtihād* by the process of *qiyās.* The Qur'ān from a juridical viewpoint is divided into general and particulars and then subdivided further into specific particulars within general, and general within particulars, and then it goes on to explain the difference between explicit and implicit meaning and so on.[459] *Al- Risāla's* treatment of the Qur'ānic texts in this manner has been very beneficial to future generation of jurists and scholars. Imam Hanbal's comment mentioned earlier about al-Shāfi`ī's work is indicative of its significance. The impact and the critique of Shāfi`ī's work will be explored further in a later chapter.

Al-Shāfi`ī's close association with *ahl al-hadith* and his extensive knowledge of the Prophet's life (*Seerah*) and his methods have enabled him to make the 'greatest contribution'[460] to Islamic jurisprudence by bringing Sunnah into focus as the second primary source of Islamic Law. He makes the greatest contribution in this regard by clarifying in some detail and showing a methodology to understand the Qur'ānic legal texts or any ambiguous part of a text[461] with reference to the Sunnah. Al-Shāfi`ī is quite categorical in *al-Risāla* concerning opinions of the Prophet's companions and leading jurists in that he would accept them to clarify a meaning of a text but not as binding precedents.

The principle of abrogation, a process by which certain Qur'ānic verses are repealed by others at a later date, is dealt in Chapter Six. Abrogation is significant in Islamic legal methodology which enables the jurists to take space-time factors into account, such as the place of revelation and its time and circumstances. Since the question of authority and authenticity of the sources of law in any legal

[457] Al-Shafī'ī, M I I., *al-Risāla,* para 11, p. 66.
[458] ibid, para 12, p. 67.
[459] Al-Shafi'ī,M I I *al-Risāla*, paras 68 -78, pp. 97-103.
[460] Ibid., p.35.
[461] ibid,, para 79 – 85, pp. 103-108.

methodology are vitally important, Imam al-Shafi`ī takes this up in Chapter Nine. He discusses at length the authenticity of Prophetic traditions, contradictory traditions and their transmission, single and multiple transmissions, order of prohibitions in the tradition and so on, which are indispensable for an effective legal methodology.

With respect to what is termed as the secondary sources of law for retrieving or extracting rules from the two primary sources, Imam Shāfi`ī has not devoted as much space as he has done for the Qur'ān and the Sunnah. At the end of the *al-Risāla* he discusses *ijmā`* (consensus), *qiyās* (analogy), *ijtihād* (personal reasoning), *istihsān* (juristic preference) and *ikhtilāl* (disagreement).[462] Since al-Shāfi`i's time these secondary sources, no doubt, have been the subject of much debate and controversy among jurists, scholars and legislators no less theologians and religious leaders. For example, al-Shāfi`ī equated *ijtihād* with *qiyās* which later jurists ceased to do;[463] while *istihsān* which al-Shāfi`ī rejected[464] has since been widely used as a useful form of reasoning. These and other secondary sources have played an important role both in the development of Islamic legal methodologies and as sources for innovative ideas among scholars, which will be taken up in a later chapter.

Al-Shāfi`ī's view on *ijmā`* is that it must of necessity be that of the whole community.[465] Many scholars of later generations including such eminent scholars as Ghazālī (d 1111) disagreed with this view and thought that such an *ijmā`* was appropriate only for the fundamentals of Islam leaving the details to be decided by scholars. Again with *ijtihād,* although an important principle of Islamic legal methodology from the very inception of Islam, al-Shāfi`ī combines the principles of *ijtihād* with *qiyās* and gives only a limited space to both. Because he wanted to limit the exercise of personal reasoning to analogical method only, the concept of *ijtihād* for him seemed to have had the same limited meaning as *qiyās.* Many have since argued that if Islamic legal methodology is to be vibrant and capable of

[462] al-Shafi'ī, M I I, *al-Risāla*, Chapters XI –XV, pp. 285-352.
[463] Hallaq, W.B., *The Origins…*, p115
[464] ibid., p 117
[465] Al-Shafi'ī, M I I., *al-Risāla*. Paras 487, p. 287.

meeting the challenges of the time, *ijtihād* must play an important role in Islamic Jurisprudence quite independently of *qiyās.* Furthermore, although some consider[466] that *qiyās* is not relevant in a changed world, its usefulness as a form of legal reasoning many will find it difficult to dispute.

Imam Shāfi`ī's views on *istihsān* (juristic preference) is equally controversial considering that the four Caliphs and particularly Caliph `Umar ibn al-Khattāb exercised *istihsān* very widely in his capacity as a judge. However, the followers of Shāfi`ī have since come to accept the principle of *istihsān* as an important tool, while many scholars have shown that it has served well in the past[467] and can serve as a useful method if appropriately exercised to solve many issues in modern times, the subject taken up in the next chapter. In the following section we look at the methodology followed by Ahmad ibn Hanbal.

4.4.IV. Ahmad ibn Hanbal and his methods

Imam Ahmad ibn Hanbal was born in Baghdad (b 160/778). He studied both under Imam Abū Yūsuf, the most prominent student of Abū Hanīfah, and Imam al-Shāfi`i himself which opportunity should have enabled him to observe the working of Islamic legal methodology from two different perspectives. He started by being critical of the views of Mu'tazilites and was repeatedly persecuted by the Caliphs for his refusal to agree over their favourable view about Mu'tazilite philosophy. He was tortured too by order of Caliph al-Ma'moon because he would not agree with their belief that the Qur'ān was created. He continued to suffer until al-Mutawakkil became Caliph and who rejected Mu'tazilite philosophy and expelled the Mu'tazilite scholars. Until his death (d 237/855) Ahmad continued to teach.

Imam Ahmad's contribution to the legal methodology arises from his being a

[466] Johnston. D., *A Turn,* . p. 279.
[467] For example, see Rashīd Ridā, quoted in Kerr, M.H., *Islamic Reform, Political and Legal Theory of Muhammad Abduh and Rashīd Ridā* (Cambridge: Cambridge University Press, 1966), p.190
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great collector, narrator and interpreter of *hadīths*. He had a large collection of *hadīths,* almost 130,000, and various other legal opinions of the companions, too, which he used in his teachings and giving legal instructions to his students. The decisions arrived at in these discussions were applied to existing legal issues of the time. If he could not find any suitable *hadīths* or an opinion of the companions he would make his own opinion but would not allow his students to write down his decision. Accordingly, the record of his decisions passed on to us, regrettably did not come direct from him. Overall, it is argued that his jurisprudence was 'restrictive and rigid' and was not adhered to either by his later or even immediate followers,'[468] and 'ranked' below his three predecessors.[469]

Like the other Imams, Ahmad too considered the Qur'ān and the Sunnah as the two primary sources of law with the stipulation that the Sunnah must be *marfoo* that is it must be attributable directly to the Prophet himself. With respect to *ijmā`* he accepted it in principle but would only consider the *ijmā`* of the companions and no further. He did not consider the *ijmā`* of later periods could be accurate or possible because of the large number of scholars who will be scattered widely.

On individual opinions of companions, Imam Ahmad, like Imam Mālik would be prepared to recognise individual decisions, and as a result his school has transmitted different rulings on similar issues.

In the absence of any rulings from any of the above sources, he would consider a weak *hadīth* instead of using his own reasoning or *qiyās*. However, he would do this only in cases where the transmitter of the weak *hadīth* was not said to be either degenerate (*fariq*) or dishonest (*kadh-dh'ab*). In relation to *qiyās,* he was very cautious and put 'more restrictions' than Shāfi`ī[470] in applying this principle and he would do so only reluctantly when no other sources provided a ruling. His use of *qiyās* would be based on any one or more of the principles discussed above.

[468] Hallaq, W.B., *The Origins,* p. 127.
[469] Ibid., p. 159.
[470] Ibid. p. 124.

All the four Imams and their followers, as we have seen, and as Coulson stresses, have come to subscribe to a common theory of the sources of law.[471] Having said that however, after the time of the companions we see a diversity of approach, for one reason or another, trending towards a much stricter form of legal methodology of Islamic law, particularly among these four major Imams within Sunni Muslims; Imam Abū Hanīfah tending to introduce higher degree of rationality of *ahl al-ra`y* into his interpretation of the Sharī`ah; Imam Mālik adopting the thoughts of traditionalists, *ahl al-hadith;* Imam al-Shāfi`ī prescribing stricter rules and equating *ijtihād* with *qiyās* and Imam Hanbal showing even greater reluctance to exercise *ijtihād*.

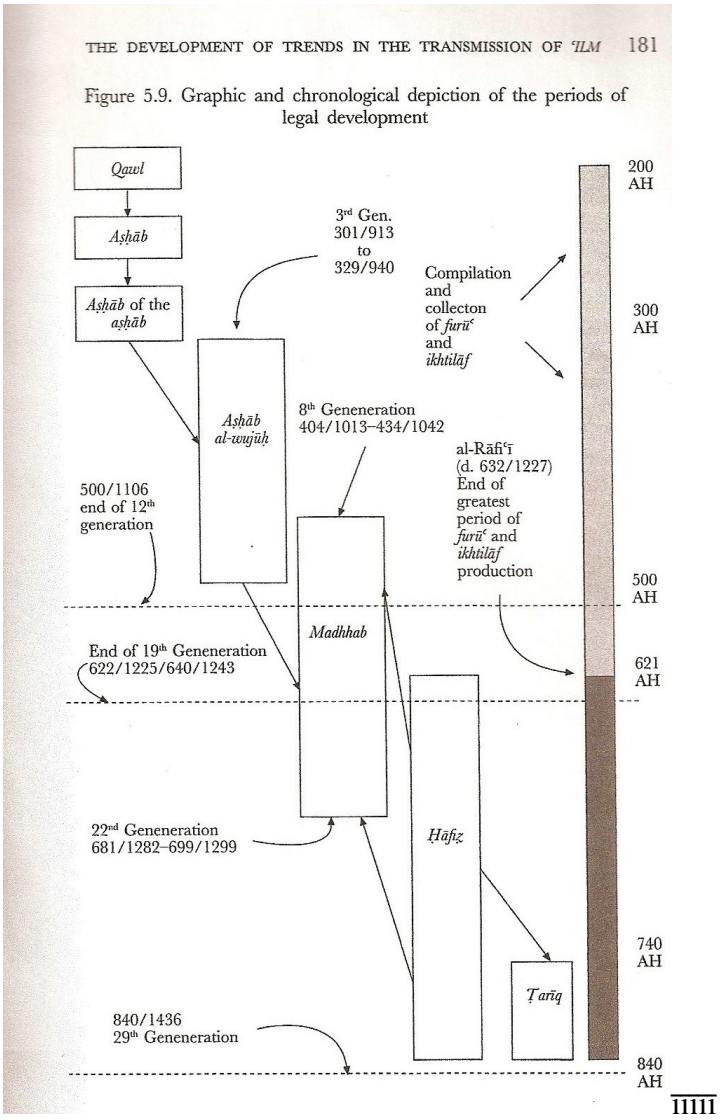
The methodologies developed by these four great Imams served the Muslim communities for several centuries which some might say was successful while others might say inadequate. There may be some truth in this because as we traced the methods of reasoning, like *ijtihād, qiyās* and *ijmā,* we found them to be on the one hand having useful principles and procedures while on the other having limitations, shortcomings and technical complexities. No doubt, some of them such as those concerning the types of new *ijmā* acceptable to the community, while unwarranted restrictions on *ijtihād,* complex *qiyās* procedures may make some find them inadequate for the present time. Yet, what is the alternative? An answer to that question must wait until it is considered in the final chapter.

The attached is a graphic and chronological depiction of the period of legal development, courtesy of an extract from the book by R Kevin Jacques, *Authority, Conflict and the Transmission of Diversity in Medieval Islamic Law,* (Leiden, Brill, 2006).

It shows the chronological order of legal development since around the time of al-Shafi'i until about 840/1436. What is significant about this graphic depiction is the continuing decline of *ijtihād*[472]*; furu, furu ikhtilāf; ikhtilaf* branches of *fiqh*;

[471] Coulson, N.J., *Conflicts and Tension in Islamic Jurisprudence*, (Chicago: The University of Chicago, 1969), p. 22.
[472] Liebesny, H J., *The Law of the Near and Middle East*, Readings, Cases, & Materials, p.

juristic disagreement[473]; legal methodology, while a growing interest in *madhhab, hafiz*, memorisation and *tariq, ashab* (disciples) and *Ashab-wajiy* (divergent opinions). The chronological depiction is that of Abū Qadi Shubbab (b.22.7.1377/1 Rabi 14, 779) born in Damascus, from a distinguished family of scholars. A historian of law, author of several works. He was a judge, and a secretary to Sultan Barsby 827/828. This graphic depiction is claimed to mirror 'al-Nawawi's hierarchies in almost every respect.'[474]



(Albany: State University of New York, 1975), p.27

[473] Rosen, L., *The Justice of Islam, Comparative Perspective on Islamic Law and Society*, (Oxford, Oxford University Press, 2000), pp.3,4

[474] Jaques, R. K., *Authority, Conflict and the Transmission of Diversity of Medieval Islamic Law*, (Leiden –Boston: Brill, 2006) p. 181

For now, the brighter side of this chapter revealed an important principle developed by Abū Hanīfah: *istihsān*, juristic preference. Its importance lies in its methodology to introduce new legal thinking based on the aims and objectives of the textual sources while complying with the stipulations of the Shari'ah. Moreover, a similar doctrine, equity, has been developed and in operation as a subsidiary system of law in England. The next chapter will compare *istihsān* with equity and we intend it to provide ultimately a new contribution to knowledge through our research. In the meantime the following sections will trace the emergence among the next few generations of jurists and scholars a new thought process for the revival of the Islamic legal methodology.

4.5 Classical jurists define purpose of law

It is in the classical jurists we detect, since the early period of Islam, the first indication of a revival of the original methodology of studying and interpreting the textual sources. We will see below an increasing number of jurists elaborating and emphasizing the need to interpret the textual sources in terms of interest and benefits. The first of those jurists whose new thinking make its appearance is Imam al-Juwayni.

Imam Abū al-ma'alī 'Abd al-Mālik ibn 'Abd Allāh al-Juwaynī (d. 478/1085) and his five principles.

Essential and necessary form was part of the five categories which Imam al-Juwaynī considered under *istislāh*, a term he used for *maslaha*. The five categories were to form part of the Islamic legal methodologies and theories advanced by eminent jurists ever since al-Juwaynī. The five categories which will be discussed later in much more details were: i. Essential necessities *(darūra*) which are inevitable, ii. General need *(al-hājat al-'āmma*), iii. This category does not belong to (i) or (ii) but something noble (*mukarrama)* eg. being clean, (iv) Something commendable, for example writing (*kitāba*) and v. Concerns with *usūl*,

'where meanings are not obvious'; its status is far below the first four categories. An example of this is 'pure physical *ibādāt'*.[475]

Al-Juwaynī, with reference to this category and explaining the difficulty in visualising it says, 'this is very difficult to 'imagine'.[476] Compared to all other rulings on Islamic law which have clear objectives, and the benefits are very easy to see, with ruling under this category it is not always possible to visualise in terms of aims or objectives. Instead, as al-Juwaynī argues, they must be considered as '…universal objectives which we must recognise as underlying the Lawgiver's commands to engage in physical expressions of worship' so that among other things, it will help us to keep away from undesirable acts.[477] The Qur'ānic text, for example, reminds that 'prayer restrains from shameful and unjust deeds'.[478] Rulings on this aspect of the Sharī'ah are called devotional or ritual practices, *ibādāt,* and is one on which there is general agreement that they are not subject to any interpretation.

Having enumerated the five categories, al-Juwaynī then fuses category three and four into one because of their similarities in rulings. The fifth category, the rulings of which have no aims or objectives that can be clearly defined, Al-Juwayni considers this 'base (*ilal*) of Islmic legal ruling' and is not included in the discussion of rulings that have aims and objectives. He, therefore, finally ends up with three categories, and it is significant to note that he was the first to introduce them as 'essentials, *darūriyyāt,* needs or complementary, *hājiyyāt* and finally enhancement or embellishment, *tahsīniyyāt,* which were to form the basis of all future discussion on *maqāsid*. It is interesting that almost a millennium later these ideas have become very important topics of much debate and discussion. No doubt, his ideas have later been developed and enhanced by other classical scholars as well as by those in modern times. Yet, as Refai argues in his recent Ph D thesis, one cannot deny al-Juwaynī's contribution from which the ideas of *maqāsid* were developed by later scholars. However, when one looks closely at

[475] Masud, M .K., *Shātibī's,* p137,138
[476] Al-Juwayni, Abū al-Ma'ali, *Al-Burhan fi Usūl al-fiqh*,(ed.) abd al-Azim al-Dib, 2nd edn. Vol. 2 (Cairo: Darr al-Ansar, 1979), p. 926 (Trans: Al-Raysuni, A. *Imam al-Shātibī's*… p. 14)
[477] Al-Raysuni, A. *Imam al-Shātibī's,* p. 15
[478] Al-Qur'ān 29:45

the basic ideas behind the concept of *maqāsid*, in spite of further refinement, they still remain the same as formulated by al-Juwaynī. Moreover, his open mindedness and good nature is revealed, when one reads what he wrote supporting the Shāfi'i school over other schools, 'Although the forerunner has the right to establish, create and lay the groundwork, the critic who succeeds him has the right to complete and perfect…Consequently, it is not the founder, but the successor who becomes more worthy of a following…'[479].

His ideas will be explored below as well as in different contexts later when the subject of *maqāid* is analysed. Their relevance to our present discussion in as much as its contribution to the development of *maqāsid al-Sharī'ah* has been immense, is also because *maqāsid* is an important element in this thesis when we come to analyse its possible relationship to the principles of *istihsān* and to Islamic legal methodology.

With respect to the three categories of *masālih* which al-Juwaynī formlated it is argued[480] that if Sharī'ah as a whole is objectively analysed one could not fail to note that it is meant to achieve one or the other of the *masālilh* categories. The first category, the essential, *darūriyyāt,* covers the absolute need of those in the community both individually and collectively. In the absence of means to satisfy those needs or their failure to realise those needs, the individual and community at large could face chaos, disintegration and ultimate destruction. These absolute need under the category of *darūriyāt* consists of five universals as indicated: preservation and safeguarding of religion, *dīn*; life, *nufūs;* intellect, '*uqūl*; property, *amwāl* and lineage, *ansāb*. Preservation of honour, *'ird,* has since been added as the sixth universal and it is attributed to Qarāfī. More recently, 'Umar F Abd Allah has put forward[481], what he calls, five core maxims with reference to the five universals: a. matters will be judged by their purpose; b. certainty will not be overturned by doubt; c. harm must be removed; d, hardship alleviated and e. custom has the weight of law. Most of the maxims appear to

[479] Al-Juwayni, Abū al-Ma'ali… *Al-Burhan*…Vol .2 p.1147 (Trans: Al-Raysuni, A. Imam al-Shātibi's) , pp. 16,17.
[480] Kamali, M.H., *Principles,* p. 356
[481] Abd Allah, U. F., Core Mxims re 5 Principles*, Los Angeles:UCLA Journal of Islamic and Near Eastern Law*,(2008-2009) ' Vol. 7, No1 (p.20)

reiterate what has been said earlier concerning the aims and objective of the Sharī'ah.

Imam Abū Hāmid Al-Ghazālī (d.505/1111)

How significant the above principles were, even during the classical period, and what importance was attached to them by the early *usūli* scholars could be seen from what Imam Ghazālī wrote:

'Preventing the loss of these five fundamentals (*usūl*) and protecting them can never be neglected in any religious community (*millah*) or legal system, (Sharī'ah) that is meant for the good and well-being, *sālih*, of human beings …and this would be a consideration of *maslaha* that we know by necessity was intended by the Sharī'ah , not on the basis of one single proof or one particular rule, but on multiple proofs that are beyond enumeration'.[482] Referring to Qur'ānic text some *usūl* scholars have commented[483] that there is some textual authority for the fundamental universals. For example, when allegiance is given to the Prophet, God says. '…they will not ascribe divinity in any way, to anyone but God, will not steal, will not commit adultery, will not kill their children and will not indulge in slander, falsely devising it out of nothingness…'[484] However, the text quoted above shows that such conclusions are not necessarily reached from one verse or from one source. It is the view of many jurists and indeed Imam al-Shātibī's theory on *maqāsid al- Sharī'ah* itself is based on an inductive reading and analysis of several sources.

[482] Al- Ghazālī, Abū Hāmid, *al-Mustasfa Min 'Ilm al-Usūl,* Vol. 1, (ed.), Muhammad Sulayman al-Ashqar (Beirut: Mu'assassat alo-Risalah, 1417/1997), pp. 417-421 (Trans: Ibn Ashur, M A., *Treatise on Maqāsid al-Sharī'ah*, (Herndon, USA: The International Institute of Islamic Thought, 2006), p.118

[483] Ibn Ashur, M .A., *Treatise on Maqāsid al-Sharī'ah*, (Herndon, USA: The International Institute of Islamic Thought, 2006), p.119

[484] Al-Qur'ān, 60:12

Imam al-Ghazālī, although a student of al-juwaynī and was influenced by his ideas, nevertheless, did not hesitate to deviate from his Shaykh's opinions and develop his own thoughts[485], both on *Usūl al-fiqh* and the objectives of Islamic law. He introduced the concept of the 'appropriateness approach of *maslak al-munāsibah'*, a form of interpreting legal rulings based on their underlying foundations, *ilal*. Here we can see clearly his attempt to give meaning to objective based understanding of the Sharī'ah. He does so by linking the legal rulings to achieving benefit or preventing harm. He states, 'appropriate meanings [objectives] are what point to the various aspects of interests and their indications, [where] …interest is based on the achievement of a benefit or the prevention of harm. Similarly, it may be said that 'appropriateness is based on consideration of an intended outcome'.[486] In the above text he further emphasises the importance of ensuring that interest based or appropriateness based interpretation must be related to the Lawgiver's objectives. With reference to unrestricted interest, *al-masālih al-mursalah*, he says 'by interest we mean the preservation of the Lawgiver's objectives…and '…it is not referred to as an analogy but rather an unrestricted interest'.[487]

The evidence for the universals are stated as follows: preservation of human life is evidenced by the law of retribution in case of murder; preserving the faculty of reason is evidenced by prohibiting the handling of alcoholic beverages; the aim of preserving chastity is evidenced by prohibiting adultery and fornication, prescribing punishment and the imposition of punishment for this offence; the aim of preserving people's wealth is evidenced by prohibiting the taking of others possessions and ordering the issue of guarantees and the amputation of thief's hand.

Al-Ghazālī reiterates al-Juwainī's classification of the three categories in the

[485] Watt, W. M., *Muslim Intellectual, Study of Al-Ghazālī*, (Edinburgh: The Edinburgh University press, 1963), p. 121, 122

[486] Al-Ghazālī, Abū Hāmid, *Shifa' al-Ghalil fi Bayan al-Shabah wa al-Mukhil wa Masalik al-Ta'lil,* (ed.) Hamad al-Kubaysi (Baghdad: Matb'at al-Irshad, 1971), p159 (Trans: Al-*Raysuni*, A. Imam al-Shātibi's…p.17)

[487] Al-Ghazālī, Abū Hāmid*, Al-Mustasfa*…Vol.1, pp. 286, 310-311 (Trans: Al-Raysuni, A, *Imam al-Shātibi's*…p. 18)

same order but much more clearly. He himself being an *usūli* jurist, the way he defined and classified the principles of objectives of Islamic law laid the guideline for the other *usuliyyūn* until Imam al-Shātibī appeared with his theory of *maqāsid*.

During the next few decades we witness the emergence of serious thinkers, such as those mentioned below who while working around the ideas expressed by Al-juwaynī and later elaborated by Al-Ghazālī, also made their own contribution. The reason for our inclusion of them here is that our research shows that they reveal some of the shortcomings in the existing form of legal methodology.

Fakhr al-Dīn al-Rāzī (d.606/1209)

Al-Rāzī was very much influenced by his predecessors, al-Juwaynī and al-Ghazālī so much so he incorporated in his *al-Mahsul* most of what was said by these two jurists. Yet, like al-Ghazālī he expressed his own approach, for example, in not following the same order in arranging the five essentials of al-Ghazālī. His important contribution was through his long study to defend the concept of *ta'lil,* searching for the effective cause of a legal ruling.

Sayf al-Dīn al-Āmidī (d.631/1233)

In addition to al-Āmidī giving a summary of the work of the three jurists mentioned above in his book, *al-Ihkām fi Usūl al-Ahkām*, he introduces the term *maqāsid al-Shari'ah* to be applied in order to make a choice between competing analogical rulings, a method which became common practice among the later *usūliyyūn.* What is becoming increasingly clear by now is that the *usūliyyūn* themselves are repeatedly emphasising the importance of *maqāsid* based interpretation of law.

Al-Āmidī spent much time in clarifying and expanding the three categories of 'essentials, 'needs' and 'enhancement' and explaining the reason for the established order of priority. Likewise, he also clarified and explained the

significance of the five 'essentials' and the reason for the existing order of their importance, and said '… The five objectives which are recognised virtually by every religion and law are: religion, human life, the faculty of reason, progeny and material wealth.' [488] However, he preferred to place the preservation of progeny and human life above the faculty of reason because he reasoned that the faculty of reason may not be protected unless the other two are first preserved. In giving priority to religion he has argued extensively in its defence quoting the Qur'ān in evidence where God says, 'I have not created the invisible beings and men to any end other than that they may [know and] worship me'.[489]

It was al-Āmidī who 'explicitly' stated that the 'essentials' must be confined to the five principles and no more. Since then the exercise of independent thinking and reasoning has been severely affected by the onset of *taqlid* and the juristic activities have not escaped its impact.

Al-Raysuni goes on to remind that since al-Rāzī and al-Āmidī, in the generation that followed any work on *Usūl al-fiqh* was no more than pure commentaries or commentaries on commentaries or summaries and not much in the way of original contributions.[490] Among those *usūliyyūn* who mostly repeated or reiterated the earlier works in different ways or emphasised or re-emphasised certain aspects of such work rather than making any original contribution, the following stand out: Ibn al-Hājib (d.646/1248), Al-Baydāwī (d.685/1286) and Ibn al-Subkī (d.771/1369).

The following scholars, however, were not merely *usūliyyūn* but also thinkers and *fuqaha* in a broader sense who were prepared to stretch beyond making commentaries on previous work and made original contributions to not only to traditional *Usūl al-fiqh* but also, among other things, to jurisprudence and the objectives of Islamic law.

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[488] Al-Āmidī, Sayf al-Din, *al-Ihkam fi Usūl al-Ahkam* Vol. 3, (Beirut: Dar al-Kutb al 'Ilmiyyah, 1983) p.394 (Trans: Al—Raysuni, A. Imam *al_shātibī's),* p.23
[489] Al-Qur'an 51-56
[490] Al-Raysuni, A. *Imam al-Shātibī's,* p. 24

What is becoming clear more and more and almost a universally accepted view among the great and the famous scholars, jurists and *usūliyyūn* for over a millennium since the time of the last of the first four Imams of the schools of law is significant, and is this: they have all agreed that the Islamic law is objective based, taking account of human interest in achieving benefit and alleviating harm. Accordingly, almost all of the scholars of this period appear to be progressively moving towards a position where Islamic legal methodology needs to be constituted in such a way that it takes into consideration the overall aims and objectives of the Sharī'ah rather than be based entirely on literal interpretation of the textual sources. This does not mean of course that there was unanimity of view that the traditional methodology of *Usūl al-fiqh* needs to be replaced or even completely revised.

'Izz al-Dīn ibn 'Abd al-Salām (d.660/1261)

Abd al-Salam's popularity grew primarily through what is described as his 'remarkable book'[491], *Qawā'id al-Ahkām fī Masālih al-Anām*, which is entirely concerned with the objectives of Islamic law. He is also reported to have authored another important work called *Shajarat al-Ma'ārif* which is allegedly comprehensive in its coverage of all aspects of Islamic legal methodology, including 'jurisprudence and Islamic law, indeed, on the foundation of jurisprudence and the philosophy of legislation encompassing all the objectives of Islamic law'.[492] Objective and human interest based analysis in his work *Qawaid al- Ahkām* could clearly be seen from the following text, 'most of the objectives of the Qur'ān are expressed either through commands to pursue that which is beneficial and the causes which contribute to it, or through prohibition against the pursuit of what is harmful and the causes which contribute to it.'[493]

Furthermore, 'Abd al-Salām expands and confirms that 'all divine commands and prohibitions are founded upon the [pursuit of] benefit for human beings both in

[491] Al-Raysuni, A., *Imam al-Shātibī,* p. 30
[492] ibid., p.31
[493] Abd al-Salām Izz al-Din ibn, *Qawā'id al Ahkām fī Masālih al-Anām*, Vol. 1 3rd ed. (Cairo: Maktabat al-Nahdah al-Misriyyah, 1966), p. 8 (Trans: Al-Raysuni, A. *Imam al-Shātibī's,*p.31,32

this world and in the next…'[494] He goes further and ventures into an area where other jurists have not, and that is stating what are the objectives of the different forms of prayers. He then goes on to indicate different kinds of objectives, the manner of their interaction with one another and the related interest covered.

Taqī al-Dīn Ahmad ibn Taymiyah (d.728/1327)

Al-Raysuni begins his discussion of this great scholar by saying, 'Nearly everything ever written by Imam Taqī al-Dīn Ahmad ibn Taymiyah has something to tell us about the law and its rulings, including explanations of their wise purposes and objectives, the interests which they serve, and the sources of harm which they seek to avert.'[495] Compared to the large extent of his writing on Islamic jurisprudence and his answers to legal questions, his writing on objectives of Islamic law may be quite small.[496] Yet, the little he wrote on the objectives or the interest based Sharī'ah was very deep and revealed many aspects of the subject. For example, he wrote that the law rests 'upon the principle that it is obligatory to realize and perfect human interests and to minimise and neutralise that which causes harm and corruption'. He further emphasised that when two interests compete, the more strong or relevant should be given preference. Likewise, when a choice had to be made, averting the greater of the two evils must be given preference instead of the lesser one.

When he talks about legal guardianship one could clearly discern his emphasis referring to those concerned to be aware of the purpose behind this rule. If those who are involved in guardianship aim to fulfill the purpose set by God they will be achieving those goals and those whose aims are at odds with that of God, they will achieve their own purposes. In relation to the appointment of guardians he warns that since most rulers have 'worldly objectives rather than the objectives of the [Islamic] religion they give priority…to those who assist them in achieving these worldly objectives'.[497]

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[494] ibid., Vol. 2, p. 73 (Trans: ibid., p.32)
[495] Al-Raysuni, A. *Imam al-Shātibī's,* p.33
[496] ibid., p. 34
[497] Ibn Taymiyah, Taqī al-Dīn, *Majmu Fatāwa ibn Taymiyah* (Rabat: Maktabat al-Ma'arif, n.d.),

Shams al-Dīn Muhammad b.Abū Bakr Ibn al-Qayyim al-Jawziyyah (d.751/1350)

Ibn al-Qayyim, like his predecessors, emphasises that Sharī'ah in its entirety is aimed at providing justice, showing mercy and full of wisdom. The aim or the purpose of sending the Prophet was to guide mankind towards success in this world and in the hereafter. In the following text he explains and elaborates the purpose of the Sharī'ah, the will of God and the aims of the Prophet. 'The foundation of Sharī'ah is wisdom and it aims to secure the interests of people in this world and the next. In its entirety, it is justice, mercy and wisdom. No rule that transfers justice to tyranny, mercy to cruelty, good to evil and wisdom to triviality belongs to the Sharī'ah. It is God's justice and mercy towards His people. He entrusted His Prophet to transmit it as the pillar of the world and the key to success and happiness in this world and the next'.[498]

Refai highlights Ibn Qayyim's attack on people who frame legal methods without taking account of the 'fundamental purposes of law'. Ibn Qayyim's repeated reference to Sharī'ah being revealed to protect human interest indicates that he follows his predecessors in stressing that the overall object of the law is to bring benefit and alleviate harm to people. Refai further points out Ibn Qayyim's insistence that proper perspective of the Islamic law is not possible by mere understanding of the Qur'ān and the Sunnah of the Prophet, but together with such knowledge one must also have a greater awareness of the 'general

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Vol. 28, p. 260(Trans: Al-Raysuni, A. *Imam al-Shātibī's,* p.36)

[498] Ibn Qayyim al-Jawziyya, Shams al-Din Muhammad b.Abū Bakr, I ;*Iam al-Muwaqqi'in 'an rabb al-'alamin* ed.S'ad. Taha A.Rauf,Vol. 2 (in 4 Vols), (Beirut: Darul Jeel, n.d.), p. 88 (Trans: Refai, S L M., Ph.D. Thesis, *The Legal Doctrines of Maqāsid al Sharī'ah with Particular Reference to the Works of Imam al-Shātibī: Historical and Practical Dimensions*, (London: School of Oriental and African Studies, University of London, 2003), p. 85

philosophy of Islamic law methodically and comprehensively'[499]

On tracing the development of ideas on Islamic law and its methodology since the fourth century after *Hijrah* it becomes clear there is a definite shift although not a complete change of view, from the thoughts of the few generations of jurists during the first and second centuries. Many of these later jurists were *usūliyyūn* themselves still subscribing to and following the principles of *Usūl al-fiqh*, and its methodology. In spite of their being *usūliyyūn* they were prepared to stretch their intellect beyond the traditional way of thinking and allow their minds to go back to the methodology of the Prophet's companions and their immediate successors. Although during that early phase of Islamic society there was no need for formal and structured legal methodology, those early Muslims' holistic way of thinking leading them to take an overall view in terms of the purpose of the Qur'an and the Sunnah of the Prophet is now beginning to inspire these later generations of jurists and scholars to do likewise.

4.6 Developments towards maqāsid al-Sharī'ah

Accordingly, as seen above al-Juwaynī and his pupil al-Ghazālā, two great *usūliyyūn* took a leap forward, though not departing from *Usūl al-fiqh* as developed during the time of al-Shāfi'ī, and remaining true to its principles, yet developing ideas which are not far removed in terms of *maqāsid al-Shari'ah*. As Nyazee has argued, although al-Ghazālī, a Shafi'īte himself was purportedly developing al-Shafi'ī's theory, in fact what he came out with was a new theory which took into account the 'essence of earlier decisions and theories'.[500] In effect al-Ghazālī formulated a far reaching theory which he calls the 'theory of the purposes of law', and argues that it is flexible enough to meet the changing needs of the times. No doubt al-Ghazālī did introduce wide ranging new thinking of his own as well as those based on his teacher al-Juwaynī, but it is probably not yet a theory comprehensive enough and fully documented enough with evidence for it

[499] Refai, S L M. Ph D Thesis, *The Legal Doctrines,* p.86
[500] Nyazee, I .A.K., *Theories of Islamic law, (*Islamabad: Islamic Research Innstitute International Institute of Islamic Thought, 1945, n.d. later publication), p. 190

to be said that it is based on the aims and objectives of Sharī'ah, *maqāsid al-Sharī'ah*. And, in any case, al-Ghazālī himself has not categorically claimed that he has produced an alternative to the existing theory. Instead he continued to remain faithful to his school. Nevertheless, his extensive work aimed at improving the existing legal methodology paved the way for later expansion and development towards, as generally claimed, an Islamic legal philosophy and a completely new and possible alternative theory[501]: theory of *maqāsid al-Sharī'ah*.

The path leading to this new theory has not been an easy one. In order to have a clearer perspective of the way the methodology reached this stage it is necessary to briefly trace in what difficult environment and changing circumstances the events took place.

By the time al-Ghazālī came out with his theory for revival of the Islamic law, the process of development, as indicated, had passed through different phases. Those who had to apply the law during the first few generations of Muslims, including the companions of the Prophet and their immediate successors, almost universally followed the examples set by the Prophet, the first four Caliphs and other leading companions. These examples showed how best to apply the provisions of the Sharī'ah, the Qur'ān, the Sunnah of the Prophet and the consensus*, ijmā* of the companions, always taking into account the overall intent and spirit of the textual sources.

The passing of the last of the first four Caliphs, and with the subsequent political turmoil and the rise of sectarian schisms, all led to debates and disputes over the right way to approach and apply the law. Consequently, we witnessed the emergence later of two early schools, *ahl al-hadīth* and *ahl al-ra'y*. While the followers of one school were making a 'rational' approach to the Sharī'ah and the other giving it a literal interpretation, the followers of Imam Abū Hanīfah and Imam Mālik were formulating principles of law, some of which, like *istihsān*, *istislāh, istishāb* etc showed, in a limited manner, how to interpret law in terms of purpose. However, with Imam al-Shāfi'ī and his followers, at the

[501] Niyazee, I A K., *Theories*, p.190

beginning, even this limited approach to the purpose based interpretation was arrested and a form of strict interpretation became the norm for a while. This produced a theory of law, *Usūl al-fiqh*, accompanied by strict rules to be followed in many areas from exercising *ijtihād* to applying the methodology developed by the earlier Imams.

About two centuries later, jurists, surprisingly, some of whom now belonged to the same Shāfi'i school revived, renewed and developed some of the general principles of law formulated earlier by Imam Abū Hanīfah, Imam Mālik and their followers. Al-Ghazālī, a Shafi'ite himself, was one of the prominent *usūlists* who as we saw defined the term, 'purpose of law', developed its principles and expanded its scope, reaching a stage in legal development that went through a long process of refining and renewing the methodology of Islamic law and *Usūl al-fiqh*. The next stage saw the formulation of what is claimed as a completely new theory of *maqāsid al-Sharī'ah*, the architect of which was Imam al-Shātibi.

4.6.I. Abū-Ishāq al-Shātibī-(d.790/1388) and his theory of *Maqāsid al-Sharī'ah*

Al-Shātibī's theory, which Hallaq calls,[502] is a reaction to a 'particular worldly and social reality' that 'also played an important role in modern legal reform'. The basic assumption behind the theory is that laws as laid down by God in the Shari'ah are in the best interest of man[503]. Al-Shātibī says, '[divinely revealed] laws have all been established to preserve human beings' interests both in this life and the life to come'.[504] How does he arrive at this conclusion? His view is that by inductive reading of the Islamic law it is inevitable that everyone will arrive only at this conclusion. In support of this contention he has quoted as examples several verses of the Qur'ān. Al-Qur'ān for instance says, 'And [thus, O Prophet] We have sent thee as [an evidence of Our] grace towards all the worlds'[505] , 'God does not want to impose any hardship on you, but wants to make you pure, and to

[502] Hallaq, W. B., *A History,* p. 162
[503] Nyazee, I.A. K., *Theories,* p.235
[504] Al-Raysuni, A., *Imam al-Shātibī's,* p.106
[505] Al-Qur'ān, 21:107

bestow upon you the full measure of His blessing, so that you might have cause to be grateful'.[506]

In al-Shātibī's theory of *maqāsid al-Sharī'ah* the objectives of the law fall into two [507] major categories, (a) higher objectives of the Lawgiver (b) human objectives relating to those responsible before the law. He then divides category (a) as having four objectives of the Lawgiver, namely (i) establishing the law, (ii) making the law understandable by the people, (iii) establishing the law as a standard of conduct and (iv) 'bringing human beings under the law's jurisdiction'. With respect to category (b), human objectives, there are further subdivision dealing with various issues.

Of the four subcategories of (a) it is interesting to note that he gives prime importance to type (i) 'human objectives of establishing law' because when he introduced these categorisations he emphasised '…the Lawgiver's higher objectives in establishing the law first and foremost.'[508] Al-Shātibī by doing so, it is argued by 'Abd Allah al-Darraz, has given 'first importance to this aim as compared to others, and the first aim is summed up in the statement that the law was established to serve human interests in both this life and the next…'.[509]

In explaining the first aim he is in a way reiterating the same theme, in a much more elaborate and detailed manner, which the earlier scholars have gone on to emphasise using different terms, phrases and in different contexts throughout the past centuries: the purpose of law is revealed in the best interest of humanity. Al-Shātibi says with reference to the initial objectives, 'the obligations entailed by the law are intended for the purpose of fulfilling its objectives among human beings. Moreover, these objectives fall under one of three categories, essentials, exigencies and embellishments'. Here again with respect to the three categories mentioned in the last sentence above are, we may recall, in many ways similar to

[506] Al-Qur'ān, 5:6
[507] Al-Raysuni, A., *Imam al-Shātibī's,* p. 107
[508] ibid., p. 108
[508] ibid.

those stated by earlier *usūliyyūn*, particularly by al-Juwayni and continued to be attested by later *usūliyyūn*.

i. Essentials (*al-darūrāt*): These are the ones absolutely required by the people for survival by satisfying their material and spiritual needs. If these are not available there will be 'imbalance and major corruption'.

ii. Exigencies (*al-hājiyyāt*): These are not absolutely necessary but need-related, and if provided they will remove any hardship and make it a little easier in their lives.

iii. Embellishments (*al-tahsiniyyāt*): These interests are of lesser importance than the other two and their availability will enable their lives to be that much more fulfilled. These include commendable customs and habits, adopting good moral standards and following good etiquette.

From an inductive reading of the sources, al-Shātibī argues - not in a manner very different from how the earlier *usūlliyyūn* articulated - that these essential interests consist of five elements, religion, human life, progeny, material wealth and human reason. And he further reminds that these elements are prescribed by every religion. Having established the objectives of the law, he introduces a method to bring the essentials into existence and then preserve them or alternatively prevent them from destruction or disappearance. For example, the case of preservation of religion is achieved through the fundamental doctrine, prayer, *zakāt*, etc or through jihad, punishment for apostates and the prohibition of innovation. Exigencies or need based interests complement the essential interests while embellishments are complementary to exigencies.

The following arguments put forward by Jasser Auda may reassure those who have issues over the traditional methodology of *Usūl al-fiqh*. However, some may have issues, as we shall see, over the reasoning itself. Auda has argued[510] that al-

[510] Auda, J. *Maqāsid al-Sharī'ah as Philosophy of Islamic Law, A Systems Approach* (Herndon, USA: The International Institute of Islamic Thought, 2008), pp. 20,21

Shātibī's theory of *Maqāsid al-Sharī'ah* is significant in three substantial ways. First, formerly *al-maqāsid* was only part of 'unrestricted interests', *al-masalih al-mursalah*, and was not treated as fundamental (*usūl*) whereas al-Shātibī showed that they are fundamental rules of law by producing evidence to show that God has purpose in creation by sending His messengers and providing laws. Consequently it is also basic rules of the law and universals of belief.

Secondly, because of the fundamentality and universality of *maqāsid* the concept of 'wisdom behind the ruling' becomes the 'basis for ruling' as a consequence of which the universals, *al-kulliyah*, of necessity, need and luxuries cannot be overridden. This is in contrast to traditional fundamentals which even those in Māliki school to which al-Shātibī belonged considered otherwise, and the 'specific' partial evidence was allowed to override the general universal evidence. Furthermore, knowledge of *maqāsid* was made a precondition for correct judicial reasoning, *ijtihād*, for any judicial office.

Thirdly, because of all the changes al-Shātibī made to *al-Maqāsid* he recognised that the inductive method brought 'certainty' (*qatiyyah)* because of the large amount of evidence to support this method. This was again contrary to the traditional approach which refused to recognise the inductive procedure as achieving 'certainty'.

Some may want to question the validity of the argument, for example, by asking how safe it is to claim 'certainty' when there is always a possibility of an exception emerging.

Al-Shātibī's arrangement of the universals is argued to be an important element of the theory as it shows the order of priority in which an interest has to be chosen particularly when one is faced with a choice. *Al-Muwāfaqāt* says. 'Every complement or auxiliary, in so far as it is a complement has a condition, namely that its consideration not cancel out the foundation entity of which it serves as a

complement'.[511]

The following examples show how important is such an arrangement of universals in order of priority so that one makes the right choice when circumstances provide one of two alternatives. It is argued, for example, that before prayer one needs to purify oneself, face the *Qiblah,* direction of prayer, etc.' and if it becomes impossible to fulfill any of these preconditions, and therefore one refrains from performing the required prayer, it amounts to 'nullification of its foundation which is not acceptable'.

If one takes the matter further into the area of commercial transactions of buying and selling, it is on condition that there are no accompanying risks or uncertainties, *gharar*. However, in connection with transactions like a sale, for example, it is not possible to avoid some element of risk or uncertainty and therefore in the circumstances the sale has to be nullified because it is accompanied by some element of risk, or alternatively continue with the sale while minimising the risk as far as possible. From an inductive reading of the law through which the above principle is derived it is pointed out that continuing with the sale is the appropriate one. This is based on the principle that while the Lawgiver has made various interests complement and serve one another they must not also be used to cancel each other out nor allow less essential interest to cancel out the more essential ones. Although the universals are put in a certain order of priority they are not to be considered in isolation because there is an important relationship among them.

Al-Shātibī in this connection elaborates by saying that the 'essentials are the foundation for exigencies and embellishment' and goes on to emphasise that any disorder in essentials will lead to complete disorder in the other two interests but any imbalance in the last two will not necessarily cause an imbalance in the essentials. However, complete imbalance in the last two interests will cause a 'partial imbalance' in essentials. Therefore he concludes that 'exigencies and

[511] Al-Shātibī Abū Ishāq, *al-Muwāfaqāat*, (ed.), 'Abd Allah Darraz (Beirut: Dar l-Ma'rifah, n.d.), p. 2:13(Trans: Al-Raysuni, A. *Imam al-Shātibī's,* p.110)

embellishments must be preserved for the sake of the essentials'.[512]

Some of the other important objectives[513] of the Lawgiver apart from what are stated above by al-Shātibī, are provided below because of their relevance to our study in so far as they help to understand the relationship between what is referred to as the primary objectives to all other important objectives mentioned in the theory.

4.6.I.i Higher objectives of the Lawgiver

Since inductive reading of the texts, as we saw, indicates that the law was introduced in the interest of human beings to bring benefits and eliminate harm; people are urged to perform beneficial acts and avoid the harmful ones; law is intended to free humans from being slaves to their selfish desires so that they might want to be God's servants as they already are by necessity; law is to subjugate human desires to the Lawgiver's objectives while at the same time allowing them to fulfill to some degree their desires and enjoyment that will not cause harm or hardship. Hardship caused by the normal activities of day to day is not something to complain about.

He continues by pointing out that law has taken into account the hardship occurring as a result of resisting human desires, and no provision is made to alleviate such hardship; giving a choice of two options to someone seeking legal advice is against the objective of the law as it will lead to seeking selfish desires whereas the objective of law is to free such desires; no commandment of law is intended to cause hardship; a certain amount of hardship caused by human effort is intended by God and on this there is universal agreement. But such hardship is not intended for 'its own sake' but what is intended is the benefit to human beings

[512] Al-Raysuni, A. *Imam al-Shātibī's,* 111
[513] ibid., pp. 317-323

of the action. Complying with the Lawgiver's objective may at first appear to be arduous but in the end it will turn out to be otherwise when all the facts are considered. And he continues further and says that a Lawgiver's objective of requiring humans to perform an action may appear beyond human ability but when analysed in terms of 'events or condition which precede, accompany or follow the action' it would turn out not to be so.

4.6.I.ii. Human objectives

Some of the human objectives referred to by al-Shātibī resemble similar objectives that the jurists have when deciding cases based on principle of *istihsān* and *maslaha*; while 'objectives are the spirit of actions' intentions of humans are 'considered' vital when actions are related to worship as well as daily transactions; the Lawgiver's objective is that human objectives should be in agreement and never be in conflict with His, and any actions aimed to seek a different end are invalid; seeking hardship for its own sake too is invalid because the Lawgiver does not require 'self torment' to get closer to him; in financial matters the type of intention is immaterial and accordingly if any error causes financial loss in whatever form, it is 'tantamount to deliberate action' and it is not necessary to achieve the outcome of a cause of action but to ensure that the act is according to the ruling.

How the higher objectives of the Lawgiver may be known.

Identifying the higher objectives of the Lawgiver is not based, for example, on opinion or on conjecture; evidence of a Lawgiver's objective may be manifested through the basis of a ruling and if the basis is known it must be acted on. Recommendation of an action indicates that it is intended to be acted upon while condemnation of one is intended that it should be avoided. The Lawgiver intends humans to receive blessings, 'take pleasure in them and give thanks for them'and is indicated in the expression of gratitude for blessings. If a principle is according to the actions of the Lawgiver and it is supported as definitive from several and

varied pieces of evidence, it is to be considered authoritative even if no text confirms it. If a course is established it requires that one (the Lawgiver) intends the outcome as well. What complements or reinforces an objective is to be considered the objective of the Lawgiver. The silence of the Lawgiver despite the need of a ruling at a certain stage is evidence that his intention for human action is limited up to the present stage and not beyond. Finally, attributing a particular wise purpose to a legal ruling does not preclude it from having several wise purposes.

Al-Shātibī's theory of *maqāsid al-Sharī'ah* has been in existence for about seven centuries and indeed the major premise of *maqāsid* much longer. Strangely, however, its impact generally and on the jurists in particular until recent times has been relatively minor. In recent times though it has received a much wider audience and there have been several calls from scholars far and wide to reform Islamic legal methodology and the *Usūl al-fiqh* in terms of *maqāsid al-Sharī'ah.* In the concluding chapter of this thesis an attempt will be made to examine the various issues involved in such calls taking into account the possibility of a role for *istihsān,* discussed in next chapter comparing it with equity.

Chapter 5

Istihsān and Equity in the Development of Legal Methodology

Introduction

The purpose of this chapter in the context of this research is not so much as to investigate the similarities or the differences between *istihsān* - a form of juristic preference, defined and explained later - and equity. The main aim of the chapter is first, to analyse the nature and the extent of the contribution in the past to the development of the two legal systems. Then, after concluding the research study, the subject will be taken up in the next concluding chapter and evaluated in terms of *istihsān's* possible new role in the future development of Islamic legal methodology.

The chapter will focus on an early attempt to develop a just and fair legal methodology in the form of *istihsān* in Islamic legal methodology and equity in the English legal system, supplementing the respective primary sources, and at the same time fulfilling the aims and objectives of the law.

From the very early stage of the Islamic society, even long before the emergence of Islamic legal theory, there were attempts to interpret Sharī`ah in terms of its higher objective, by performing *ijtihād* (literally, 'exertion', juristic effort to deduce the law) and to make judgements that were fair and equitable. 'Umar ibn Khattāb himself a companion of the Prophet and the second Caliph was exercising his own *ijtihād* and applying the principles of *istihsān,* on numerous occasions. Not surprisingly, therefore, Imam Mālik has been reported as saying '*istihsān* is nine-tenths of human knowledge', and Coulson reminding that '…*istihsān* represents a more advanced stage in the development of legal

thought'...[514]

There is general agreement among scholars that *istihsān* is similar though not equal to equity, and some scholars have referred to this relationship as parallel or similar but 'not identical.'[515] It is interesting to note that there are many features common to both systems, even though each system was developed on different fundamental principles and each had its origin at different time and place. Nevertheless, in spite of the differences, an analytical study, it is hoped, will provide a broader perspective of the principles and issues. In the past, Muslims in general ventured into many forms of learning, and developing and accommodating, wherever possible, new ideas from far and wide. Accordingly, this chapter will attempt to explore and analyse the similarities and differences between them with a view to have some understanding of each system's approach and methodology.

Both *istihsān* and equity possess voluminous materials relating to their historical process, doctrinal basis and legal decisions. Therefore, I needed to be selective in the choice of sources for this study.

The chapter consists of five sections, and some of the contents in each section as well as in each sub-section are related to one another and may, on occasion, appear to overlap. However, the way they have been arranged and analysed, it is hoped, will make it easier to appreciate the similarities and differences in their origin, development and approach.

For instance, the origin and development of both *istihsān* and equity are treated and analysed and their differences highlighted, in the first two sections. In a similar manner, the next two sections deal with the principles and practices, while the final section highlights the most distinguishing features of the two systems. In this section, whilst distinguishing their characteristic features, I have tried to

[514] Coulson, N. J., *A History*, p. 40
[515] Kamali, M.H., *Principles,* p. 323

show that in spite of equity having somewhat similar aims and objectives it is not as same as *istihsān.* Their origin, conceptual basis, developmental process, methodology, and administration, are all different. I have attempted to explain how the two systems originated and what impact the natural law theory had on equity, and the Sharī`ah 'law' on *istihsān.*

The aim of this chapter is to evaluate *istihsān* in relation to equity, both being early attempts at different periods in history to formulate an objective based source methodology to supplement the primary sources of law.

5.1. Origin and development of istihsān

Istihsān, it is argued, emerged to 'ensure harmony between the letter and the spirit of the law' addressing shortcomings in the law and suggesting exceptions to the rules or showing alternative solutions.[516] It is argued that *istihsān* did not accept the principle of strict analogy on the ground of 'public interest, convenience or similar consideration.'[517] Although this statement shows some aspects of *istihsān*, it does not reflect the whole theoretical foundation and its methodology as its success lies on these factors.

5.1.I. *Istihsān* for equitable system of justice

Istihsān, commonly described as 'juristic preference' developed as a methodology of law which was flexible in adapting legal principles to meet the challenges faced by the society. Since the time of the companions of the Prophet and indeed the Prophet himself, the flexibility of *Istihsān* was used to interpret the Islamic Law which led to the development of a form of equitable system of justice.

[516] Kamali, M.H., *Equity and Fairness in Islam*, (Cambridge:The Islamic Texts Society, 2005), pp. 3-5
[517] Schacht, J., *An Introduction to Islamic Law*, (Oxford:Oxford University Press, 1998), p. 37

Historically, the origin of *istihsān* could be traced back to the Prophet's companions and their immediate successors. Hashim Kalmali, quoting al-Khudari, says that whenever problems arose, the Prophet's companions and their successors would first consult the Qur'an and the Sunnah for a solution. If they could not find an answer, using their personal opinion *(ra'y*) they would look for an answer which would be in terms of the 'general principles and objectives of the Sharī`ah.'[518] 'Umar ibn al-Khattāb was the most strongest advocate of the principles of *istihsān*. For example, during his time as Caliph, the case of Muhammad ibn Maslamah was brought before him for his judgement. It was a case in which the neighbour claimed the right to have a water canal through the property of a man called ibn Maslamah. 'Umar ibn al- Khattāb held that it was just and proper that the neighbour should have such right to a water canal since it did not cause any harm to the owner of the property while it 'was to the manifest benefit of the neighbour.'

The companions and their successors did not look at specific texts alone for authority. Instead, they would also draw from their understanding of the general spirit and purpose of the Sharī`ah. This indicates that the principle of *istihsān* was understood and practised by the early Muslims themselves even if they did not specifically refer to this term in their discourse. It is often confused[519] with others like *istislāh* or *maslaha* although *istihsān* emerged earlier than the others. Hallaq argues that the term itself came to be used in the middle of the second century[520].

5.1.II. Response of *istihsān* to social changes

Caliph 'Umar applied the principles of *istihsān* in many different types of cases from criminal to civil to matrimonial matters, cases involving theft, the sale of slave mothers, marriage of *kitābiyyah* (Jewish and Christian women), and

[518] Kamali, M.H., *Principles*, p. 326
[519] An-Naim, A A., *Towards Islamic Reformation, Civil Liberties, Human Rights, and International Law*, (Syracuse: Syracuse University Press, 1990), p. 25
[520] Hallaq, W.B., *A History*, p. 19

inheritance. Caliph 'Umar and the other companions were able to implement them because, as a commentator put it, Islam is capable of progress and it possesses sufficient elasticity to enable it to adapt 'itself to the social and political changes going on around it.'[521]

There are many instances in which the Caliph has set aside the established law in the interest of fairness and justice. In doing so he helped to ease the hardship which otherwise would have caused if he applied the existing legal rulings. This sense of fairness in his judgements aimed at avoiding hardship must have been through his clear understanding of the Qur'ān and Sunnah of the Prophet in terms of their higher aims and objectives. In this respect, Caliph 'Umar must have been conscious of the Qur'ānic verse in *sūrah al-Baqara*[522] referring to which *sūrah* Hanafi jurist al-Sarakhsi (d.483 AH) commented that 'avoidance of hardship (*raf' al-harāj*) [is a] cardinal principle of religion…' 'Umar must have been aware of the *hadīth,* too, which says that 'the best of your religion is that which brings ease to the people.'[523]

The Caliph neither used the term *istihsān* nor did he identify his rulings as part of any methodology of Islamic law. It can be seen why those who applied the principles of *istihsān* did not refer to them as such. There was not as much technical complexity and controversy which came to surround its later development. As Moaddel points out there was no book on law or code existed until the end of the second century AH, and it was mainly the opinions of imams that constituted the jurisprudence.'[524] No doubt, at later stages wide ranging forms of opinions emerged. But as indicated in the last chapter, the Prophet and his companions when they exercised independent judgement in their judicial capacity, they made sure that such judgement conformed to the aims and objectives of the Lawgiver as conveyed to the Prophet. As a technical term and as a proof of law, *istihsān* is attributed to Imam Abū Hanīfah (d.150/767) and his

[521] Moaddel, M & Talattof, K.,*Contemporary Debates in Islam*, (New York: St. Martin's Press, 1999),p. 33
[522]l-Qur'ān,2:185
[523] Kamali, M.H., *Principles* ,p. 325
[524] Moaddel, M., *Contemporary,* p. 31

disciple Muhammad b. al-Hasan al–Shaybānī (d. 189/804).

However, the word *istihsān* had been used by other jurists even before Abū Hanīfah. The judge and jurist Iyās b.Mu`āwiyah (d.122/740) in the Umayyad period instructed others that whenever the use of *qiyās* led to undesirable results they should 'use juristic preference (*fa`stahsinu*)'[525]. During the Abbasid period, the state secretary Ibn al-Muqaffa` (d.137/756) emphasized the use of discretion when making judicial decisions on issues where textual sources are silent. He argued that in order to achieve fairness and justice within the aims and objectives of the Sharī`ah, use of discretionary powers was essential. He was cautious about *qiyās* pointing out that it was a form of evidence only and when it produces unfairness or injustice it must be rejected. Objective of law is not absolute obedience to *qiyās* but to arrive at judgement which is fair and appropriate.[526]

The founders of the schools of law and their respective followers, at later stage, subjected *istihsān* to greater scrutiny. Hanafi schools issued judgements using *istihsān* in terms of everyday life, equity, or social conditions, similar to what Mālikis followed, *istislāh* (ie: to think that something is *sālih* – in general interest, or most appropriate). It is argued that they both often disregarded *qiyās* (analogy) when they found it necessary.[527] When strict interpretation of analogy led to undesirable results, Hanafis resorted to personal opinion, (*ra'y)* under the name of 'approval' or 'preference,'[528] but always ensuring that any rulings were within the spirit of Islamic Sharī`ah.

5.1.III. *Istihsān* and early jurists with Abū-Hanīfah its architect

Istihsān, according to Weiss was strongly associated with jurists of the Hanafi tradition to the extent that Hanafi jurist al-Shaybāni (d.189/804) wrote the book

[525] Kamali, M.H., *Equity,* p. 18
[526] Ibid., p.19
[527] Juynboll, Th. W., *Istibra – Istikhara*, (First Encyclopaedia of Islam 1913-1936, Vol III, 1993), 561
[528] Schacht, J., *An Introduction*, p. 60/61

kitāb al-istihsān.'[529] He finds that Hanafi tradition must have contributed heavily in shaping the development of *istihsān* during the ninth century although the later biographical and legal sources were leaning quite heavily towards Imam Muhammad ibn Idrīs al-Shāfi`ī's (d. 204/820) work.[530]

Not only Abū Hanīfah and his jurists, others like Imam Mālik ibn Anas (d. 179/795) and Imam Ahmad ibn Hanbal (d. 239/855) and their jurists using their own methodologies contributed to the development of *istihsān.* At the beginning al-Shāfi'ī along with Dāwud b. Khalaf al-Zāhirī (d. 270/883) and the Shī'ī Ulamas and the jurists of their respective schools, showed little interest and were openly hostile to the principles of *istihsān.* Such early controversies prompted Johansen to say 'decision by equity (*istihsān*)' was said to have been arrived only by some of the schools of *fiqh*.[531] At later stages in the development of Islamic Law, however, all the schools adhered to *istihsān*. Al-Shāfi`ī himself, despite his vehement criticism, is reported to have applied the principles of *istihsān* on at least 'five occasions.'[532]

Yet even those who subscribed to *istihsān* preferred to use different terminologies. Imam Mālik called it Al-*Masālih al-Mursala*, public benefit or public welfare, and yet, he and early authorities of the Māliki school are known to have exercised *istihsān* in a number of cases.[533] And Imam Ahmad bin Hanbal called it *istislāh,* the best solution for the general interest,[534] or consideration of public interest.[535]

In spite of each of the Imams having his own perspective and interpretation of *istihsān,* Sunni Imams could be divided into two categories. Imam Abū Hanīfah and Imam Mālik b. Anas would consider issuing a ruling on the basis of *istihsān* which sometimes had no explicit authority in the Sharī`ah as long as such a

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[529] Weiss, B. G., *Studies in Islamic Legal Theory*, (Brill: Leiden, 2002), p. 134
[530] Weiss, B., *Studies* , p. 135
[531] Johansen, B., *Contingency in a Sacred Law, Legal and Ethical Norms in the Muslim Fiqh*, (Brill: Leiden, 1999), p. 30
[532] Kamali, M.H., *Equity,* p. 64
[533] Schacht J, *An Introduction to Islamic Law*, (Oxford: Oxford University Press, 1998), p. 61
[534] Doi, A. R L., *Sharī'ah: The Islamic Law,* (London: Ta-ha Publishers Limited, 1984), 81
[535] Coulson, N. J., *A History of Islamic Law*, Edinburgh: Edinburgh University Press, 2001), p. 91

ruling was within the spirit and the higher objectives of the Sharī`ah. *Weiss*, referring to *furu'* manuals of the Māliki school, says that the vast majority of Islamic laws consists of 'rules derived from non-revelatory sources.'[536] Imams al-Shāfi'ī and Ahmad bin Hanbal, on the other hand, would issue such rulings only if they were based on the Sharī`ah.

Abū Hanīfah has been both acclaimed as the architect of *istihsān* and criticised for being arbitrary in using *istihsān.* Therefore, it is pertinent to examine his personality and some of his methods. Joseph Schacht describes him as '…theoretical systematiser who achieved considerable progress in technical legal thought. His legal thought is not only more broadly based and more thoroughly applied than that of his older contemporaries but technically more highly developed, more circumspect, and more refined.'[537] And Daniel Brown called Abū Hanīfah, 'the model of pragmatic and balanced approach to sunnah is common to almost all of the revivalist authors…' and argues that before him 'there had been no systematic application of *hadīth* criticism.'[538]

5.I.IV. Arbitrary reasoning or rational argument

Some jurists and theorists of all non-Hanafi schools have heavily criticised Abū Hanīfah and his school during his time for applying *istihsān* as an 'arbitrary form of legal reasoning'[539] or 'favoured rational form of argument.'[540] Yet, considering the quality of commitment to his work and from what other scholars tell about him, it is not clear, though, to what extent, if at all, Abū Hanīfah had consciously or deliberately given any judgement which went against the spirit of the Sharī`ah.

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[536] Weiss, *Studies*, p. 164
[537] Schacht, J., *An Introduction* , pp. 44-45
[538] Brown, D., *Rethinking tradition in modern Islamic thought*, (Cambridge: Cambridge University Press, 1999), pp. 114/124
[539] Hallaq, W.B., *A History*, p. 108
[540] Watt, W. M., *Islamic Philosophy and Theology,* (Edinburgh: Edinburgh University Press, 1997), p. 42

The question often arises as to whether he belonged to one of the 'early Muslims' who accepted the revealed sources but had to use 'rational arguments' to explain a point of law and, therefore, he was unfairly criticised? As B Johansen points out, the early Muslim jurists in their 'debate with the non-Muslims had to use "rational arguments" to establish the truth of their message but when this debate with the non-Muslims gradually loses its importance' jurists probably turned more to theological arguments.[541] Or was Abū Hanīfah trying to deal with what a scholar calls 'wider concerns of Islamic Law'? J L Esposito argues that since *qiyās* is only a form of analogical reasoning with limited scope, it was found wanting to deal with Islamic laws' wider concern for human welfare, justice and equity.[542] Did such concerns lead the early Muslim jurists to many innovative principles: one among them being *istihsān* by Abū Hanīfah!

Among the Hanafi jurists the two prominent jurists and Abū Hanīfah's disciples, Abū Yūsuf (d.182/798) and al-Shaybānī, were concerned with the broader aims of Islamic law, pointing to the limited role of *qiyās* and favouring the use of *istihsān* to overcome the rigidity of *qiyās*. The cases referred to below have much wider relevance and will be taken up later in the chapter. But for now, on the restrictive nature of *qiyās* al-Shaybāni pointed out that if the residents of a fort or a town needed the protection of the Muslim army, *qiyās* would protect only the fort or town and not the contents. But Hashim Kamali points out that the 'customary understanding of words *qal`ah* and *madīnah* (fort and town)' does include contents and the inhabitants.[543] He also differentiates and upholds *istisna*, the advance sale of manufactured goods, from the normal rule prohibiting the sale of non-existent objects on the basis of necessity.

In the case of a husband of a woman who renounced Islam when she was dying, Abū Yūsuf held, applying *istihsān* that he could inherit from the deceased although Islamic law usually prohibits such inheritance from an apostate. He upheld the husband's claim based on the possibility that her malice towards the

[541] Johansen, B., *Contingency,* p.30
[542] Esposito, J. L., *Women in Muslim Family Law*,(Syracuse University Press, 1982), p.118
[543] Kamali, M.H., *Equity*, p.19

husband preventing him from exercising his rights to her property led her to renounce Islam in her death bed. In another case Abū Yūsuf found that when a labourer working for his employer digs a well and someone falls and dies in it *qiyās* would hold the labourer liable. However, he reasoned that since the labourer followed orders of his employer it was the employer's family and kin liable to pay the blood money. These instances show that Abū Hanīfah and his followers did not hesitate to use rational arguments to establish the true intent of the Sharī`ah.

Imam Mālik (d.179 AH), although preferred a different terminology, *ahabbu ilayya* (more to my liking) instead of *astahsinu* (I prefer) he too followed his predecessors in using *istihsān*. He found that *istihsān* as a 'special permission' when used it could avoid an 'evil outcome' and promote the 'well-being of people.' For example, normal rules consider a laundryman not liable for damage or loss to clothes under his custody because he is a trustee. Imam Mālik though found him liable in the interest of 'ensuring security and confidence in market transactions'. When Imam Mālik said that *istihsān* as 'nine tenths of knowledge,' it could be considered[544] that *istihsān* requires from those who apply its principles to look closely into not only the surrounding circumstances of the issues but also to all aspects of the Sharī`ah in search for a better solution.

Imam Ahamd b. Hanbal (d.241/855) had some differences of opinion over *istihsān* but in general he looked for strong evidence from textual sources before utilising *istihsān.* Ibn Taymiyyah has confirmed that Ahmad b Hanbal resorted to *istihsān* on many occasions. Imam Hanbal held that when *makarits*, an entrepreneur, buys articles against the wishes of the owner and makes a profit the owner was entitled to an amount of the profit after paying for the entrepreneur's labour. In support of this view he said 'I used to hold the opinion that the profit belonged to the owner of the money, then I changed my view and preferred otherwise.' [545] Similarly, in the case of one who usurps another's land and cultivates it is entitled for payment for his labour. His decision indicates that he

[544] Kamali, M.H., *Equity,* p. 21
[545] Ibid., p.22

prefers the ruling based on *istihsān*, a departure from the ruling of *qiyās* that states the cultivator is entitled to the crop.

The above examples indicate clearly that *istihsān* as a methodology to find an alternative and a better solution to issues was favoured and widely adopted by Imams Abū Hanīfah, Mālik b. Anas and Ahmad b Hanbal and even by its harshest critic, Imam al-Shāfi`ī.

Hanafi jurist, al-Sarakhsi (d.483 AH) has emphasized that the aims of *istihsān,* dispelling hardship and bringing ease to the people, have their roots in the textual sources, the Qur'an and Sunnah. According to al Sarakhsi, 'avoidance of hardship (*raf' al-haraj*) is a cardinal principle of religion which is enunciated in the Qur'an which says[546], '**God intends facility for you and He does not want to put you in hardship**. Al-Sarakhsi further refers to the *hadīth* which says[547], '**the best of your religion is that which brings ease to the people**'. Later, however, Hanafi jurists like Abū al-Hasan al-Karkhi (d.340 AH) is said to have adapted a much more conciliatory approach. For instance, he maintains that when an established precedent is set aside by *istihsān* it is based on a superior proof that is the Qur'ān, necessity (*darūrāh*) or a stronger *qiyās*.'[548] Modern scholars too have expressed similar views. P Owsia, for example, finds that the 'Qur'ān enjoins the application of fairness (*qist)* and justice ('*adl)*, in the general sense of the term'[549] and Hallaq emphasises that 'the validity of averting undue hardship is justified by the Qur'ān and Sunnah…'[550]

Imam Shāfi'ī, in particular, raised serious objections to *istihsān* maintaining that any difference of opinion must be 'resolved with reference to the Qur'ān and the Sunnah.'[551] The place of *istihsān,* in relation to *qiyās*, analogical reasoning, has been the subject of great debate. Al-Shāfi'ī argued that *istihsān* leads to personal

[546] Al-Qur'ān, 2:185
[547] Kamali, M.H., *principles*, p. 325
[548] Ibid., p. 327
[549] Owsia, P., *Formation of Contract, A Comparative Study*, (London:Graham & Trotman, 1994),p. 51
[550] Hallaq, W. B., *A History*, p. 109
[551] Kamali, M.H., *Principles,* pp.339/340

opinion and individual discretion, which would not be in accordance with the Qur'ānic teachings. In commenting on al-Shāfi'ī's attitude to *istihsān,* and by referring to Al-Shāfi`i's work entitled *Ibtal al-istihsān,* and his statement '*man istahsana fa-qad sharra'a* (He who adopts *istihsān* has legislated),[552] B G Weiss confirms not only of al-Shāfi`ī's rejection of '*istihsān* but also of his attempt to equate it to 'heretical usurpation of God's role as the sole determiner of the law'. However, as indicated earlier, al-Shāfi`i had utilised the principles and methodology of *istihsān* several times, at least on five occasions.

5.I.V. Fairness and justice

Early Muslims were very much influenced by two verses of the Qur'ān and two *hadīth* which Hanafi jurists have often quoted. The sense of these texts prevented them from taking the literalist approach, and instead led them to take a broader view of law in the interest of fairness and justice – the principle behind *istihsān.* In effect the Hanafi jurists traced the textual authority for *istihsān* to the two verses of the Qur'ān found in *sūrat al– Zumar* ordaining the Muslims to adapt the 'best' of what are presented based on the interpretation of the root word *hasuna* used in the two verses:

'**Those who listen to the word and follow the best of it'** (*al-Zumar,* 39:18)

'**And follow the best of what has been sent down to you from your Lord'**

(*al-Zumar*, 39:55)

Referring to the first verse A R I Doi reckons that the Qur'ān mentions *istihsān* indirectly in this verse.[553]

Hashim Kamali after referring to some of the commentators have pointed out, that by the use of the word *ahsan* (the best) and not *hasan* (the good), a higher course of conduct is intended, thereby the Qur'ān making a distinction between

[552] Weiss, B., *Studies*, p. 134
[553] Doi, A.R.I., *Sharī'ah*, p.81

superior courage of conduct and conduct that is ordinary. For example, punishing the wrongdoer is the normal practice required by the Sharī`ah, but forgiveness, a higher form of conduct, is at times a more preferable (*ahsan*) thing to do. The Qur'ān in this manner provides directives concerning the concept of *istihsān* though not in the technical sense as formulated by the later jurists. Al-Sarakhsi argues that when the Qur'ān directs the Muslims to follow its guidance to the best of their ability it could mean either, (a) arriving at judgement on aspects that are left open in the Qur'ān by exercising *ra'y* which is tantamount to *istihsān* or (b) making intellectual effort to distinguish a ruling in *qiyās* from an alternative one which is much more preferable because of stronger evidence in terms of fairness and justice, which is a form of *istihsān.*

The two *hadīths* which have been quoted in support of *istihsān* also speak of the meaning of goodness in one *hadīth,* and not inflicting harm in the other:

'**What the Muslims deem to be good is good in the sight of God'** and
'**No harm shall be inflicted or reciprocated in Islam'**

However, some of the critics find that revealed sources do not provide definite authority for the methodology of *istihsān.* They argue, for instance, that the verses referred to did not make it obligatory; there was no binding injunction, instead the verses only praise those who follow those stipulations. But surely, if the Qur'ān praises those who follow certain sets of conduct instead of certain other sets of conduct it must be the case that in the eyes of Lawgiver the first set of acts are 'preferred' instead of the second set.

Furthermore, by taking into account (a) all the verses of the Qur'an and *hadiths* mentioned earlier; (b) the higher objectives of the Sharī`ah as a whole; and (c) the methodology and the rulings of the companions and their successors, it would be hard for the critics to maintain that the general spirit and purpose of the Sharī`ah precludes exercising juristic preference based on the principles of *istihsān*.

5.1.VI. *Istihsān* a supplement to revealed sources

Professor J Schacht is of the view that however much the sense of fairness and appropriateness entered into the decision of the earlier lawyers, the fully developed system of the principle of *istihsān* (and *istislāh*) is confined to very narrow limits. He argues that it never supersedes the recognised rules of the material sources ('Koran' and Sunnah), their recognised interpretations by the early authorities and the unavoidable conclusions drawn from them; and that both in theory and in its application, *istihsān* occupies too subordinate a position for it to be able to influence positive law to any considerable degree. [554]

No doubt that the early Muslims emphasised the importance of fairness and appropriateness and in later years *istihsān* was surrounded by technical complexities and often unnecessary controversies. But it is difficult to see what Schacht means by 'positive law' in this context. If he means the same as what he calls the 'material sources (Koran and Sunnah)' then neither *istihsān* nor any other subsidiary sources of Islamic Law can influence them. On the contrary, from the nature of Islamic legal theory, it is *istihsān* which can be influenced by the 'material sources.' Although the principles of *istihsān* can never 'supersede' the Qur'an and Sunnah and can only remain as a supplement to them, the principles, as seen earlier, are based on higher objectives of achieving benefits and avoiding harm and can be used to interpret the textual sources accordingly.

5.2 Origin and development of equity

Historically, equity has acted as a 'counterweight' to the English common law and statute in order to ensure justice is done. In achieving this objective, equity has to make value judgements when faced with the need to distinguish between saying 'that one common law rule is "right" and another one "wrong"'. In the beginning, in most cases, equity was concerned with 'vague and unexceptional principles' like not allowing statute or common law to be used as a cover for

[554] Schacht, J., *An Introduction*, p.204

fraud,[555] the need to come to equity with 'clean hands' and treating something as done which ought to have been done.[556]

5.2.I. Conscience based equity

Lord Browne in the case of *Westdeutsche Landesbank Girozentrale v Council of the London Borough of Islington,* (1996) went on to define equity by saying that 'Equity operates on the conscience of the owner of the legal interest. In the case of trust the conscience of a legal owner requires him to carry out the purpose for which the property was vested in him (expressed or implied trust) which the law imposes on him by reason of his unconscionable conduct (constructive trust) [E 1996] 2 All ER 961 p. 988.[557]

In equity the conscience of the parties is of prime concern. Common law might allow a person to act 'unconscionably'[558]but equity will not. In defence of equity it has been pointed out that a statute or common law might allow, for instance, a person wearing wig and claiming falsely that he is red haired to receive payment of money. A literal interpretation at common law might allow such a claim. On the other hand, equity would deny him that right and prevent him from manipulating the statute or common law to commit a fraud. It may be recalled that a similar argument against strict literal interpretation of the primary Islamic sources, the Qur'ān and Sunnah has been advanced by many leading Islamic jurists.

[555] Todd, P, *Cases and Materials on Equity and Trust*, 3rd Ed (London: Blackstone Press Ltd., 2000), p. 236
[556] Hudson, A., *Principles of Equity and Trusts*, (London: Cavendish Publishing Limited, 1999), p.549
[557] Hudson, A. ,*Principles,* p. 3
[558] ibid.

5.2.II. 'Common Law' comes from laws common to the kingdom

Understanding history is vital to understanding the laws of any people or nation and, in this, English law just as Islamic law is no exception. Laws of England are the result of the Norman conquest in 1066 when the Normans introduced an entirely new legal system common to the whole kingdom, hence the term 'common law.' Norman kings created the Courts of King's Bench, and from these medieval courts, the principles of common law began. Rights and obligations grew from the decisions of the courts. However, in the event that common law rulings were unfair or unjust there was a right to petition the King for redress. This was because the 'King was seen as the fount of justice, personally responsible for ensuring that his subjects were treated fairly and justly.'[559]

The King or the monarch when faced with numerous petitions found it necessary to appoint a new official called the Lord Chancellor who, among other things, would hear such petitions. When petitions became still too many to handle by the Lord Chancellor a separate system of courts, Courts of Chancery were established. It was in these Courts of Chancery that the principles of equity were developed.[560] Austin is quoted as saying that 'Equity arose from the sulkiness or obstinacy of the common law courts, which refused to suit themselves to the changes which took place in the opinions and circumstances of society.'[561] Here we see one of the many indications of a demand for the interpretation of law in terms of human interest.

In the course of the fourteenth century, petitioners, instead of going to the King, would go straight to the Chancellor, address their complaints to him and 'adjure him to do what is right for the love of God and in the way of charity'.[562] The complaints, at first, referred to 'indubitable legal wrongs, assaults, batteries, imprisonments and so forth' which 'were not always redressed by courts of

[559] Worthington, S., *Equity,* (Oxford: Oxford University Press, 2003), p.8
[560] Ibid., p. 5
[561] Kelly, D. M., *History of Equity, Equitable Jurisdiction of the Court of Chancery*, (London: Cambridge University Press, & Steven & Sons Ltd, Chancery Lane, 1890), p. 11
[562] Maitland , F .W., *Equity,* (London: Cambridge University Press, Fetter Lane, 1936), p. 5

law.'[563] During this period the main reason for appealing to the Chancery Court was that the complainants were poor while their opponents were wealthy and powerful. During the course of the sixteenth century the Chancellors were administering what were known as 'the rules of equity and good conscience'[564] while maintaining that 'Equity had come not to destroy the Law but to fulfil it'[565] just as *istihsān* came to supplement Sharī`ah. There were no doubt conflicts between the two courts but they were relatively fewer after 1875.

Common law and equity are not rival systems. While common law was a self-sufficient system and equity was not and it always presupposed the existence of common law. It is argued in this thesis that with respect to *istihsān,* it too presupposes the existence of Sharī`ah and indeed depends on it. If the Legislature 'abolished' equity, society would still survive with common law although the law in some respect would be unjust but in many respects the law would protect the community and be beneficial. On the other hand if common law is 'abolished' there would be 'anarchy'. For example, if we take the trust, there is no point in saying that A is the trustee of a property unless there is some court that could say A is the owner of that property. 'Equity without common law would have been a castle in the air, an impossibility'[566] and in the same way *istihsān* without the Sharī`ah would be meaningless.

5.2.III. Rationalisation of equity

Two distinct systems of laws, common law and equity continued to exist under two different court systems. The tension between the Chancellors and the King's judges became intense, and the pressure was on equity to become 'more law-like' in the sense of being 'rational, predictable and objective.' At first, the Chancellor would interfere only when it was found absolutely necessary to avoid injustice. Eventually, his jurisdiction itself began to develop its own distinct system of legal

[563] Maitland, *Equity*, p.5
[564] Ibid., p. 6
[565] Ibid., p. 17
[566] ibid., p. 19

rules and they tried to back their decision by rational argument just as Abū Hanīfah and the Hanafite jurists used rational arguments to validate their judgements. Such reasoned decisions, from the late seventeenth century onwards, made it easy to 'systematise equity, and a body of equitable principles… developed.'[567]

However, the dualism continued, but with the greater systematisation of equity, common law's procedural methods were relaxed, and there was a tendency for convergence of common law and equitable practices. But only as late as 1873/1875 did the Judicature Acts finally fuse the King's Bench and Chancery Courts. Nevertheless, despite the fusion of the administrative aspects of both systems, with the intellectual commitment to dualism remaining strong, the two separate and independent jurisdictions – common law and equity continued to this day. Roscoe Pound finds equity as a remedial system alongside the law, taking the law for granted and giving legal rights greater efficacy in certain situations.[568] Equity was soon to be systematised by Lord Eldon and to become 'almost as fixed and settled' as the law itself.[569] However, with respect to *istihsān*, though, it may be noted that from the very nature of the law, *istihsān* may not become 'fixed and settled' as the Sharī`ah law.

Although the strict separation of powers was removed by the enactment of 1873/1875, common law and equity continued to operate under their own distinct principles and logic. For example, one of the main distinctions relates to the nature of claims and remedies: common law awards cash damages for loss whereas equity will grant an injunction. This is because equitable remedy is granted at the Court's discretion subject to well established principles, for example, when one party may be in breach of validly created contract. Whether the other party is entitled to a remedy under common law or in equity will depend on the nature of breach, whether or not cash damage under common law could be awarded or alternatively specific performance, rescission or other equitable remedy could be ordered.

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[567] Worthington, S., *Equity*, p. 11
[568] Pound, R., *Introduction to the Philosophy of Law*, (Yale: Yale University, 1982),p. 65
[569] ibid, p. 18

5.2.IV. Equity differentiated from common law

There are some major differences between common law and equity and they show that equitable principles were aimed to supplement the rules of common law and provide additional remedial measures

First, equity's substantive rules differed from common law rules in such a way that equity might deny rights which common law recognises and vice versa.

Secondly, equity recognises different remedial strategies while common law usually awards money remedies, quantification of which would be dependent on whether it relates to contract, civil wrong or unjust enrichment.

Thirdly, equity follows different enforcement techniques. At common law when one is in default of the Court's order to satisfy a money remedy he can be forcefully removed of his assets to satisfy the amount required. In equity the one in default is considered to be in contempt of court. Originally, he would be sent to prison for such contempt, but the courts now quite often ensure to enforce its orders in other ways including the transfer of right to property when the property itself is not in possession of the plaintiff.[570]

Finally, procedures for deciding cases were originally different in equity. Common law had to be commenced by writ drawn in a technical format with formal pleading and other set procedure. Equity, on the other hand, allowed actions to commence by informal procedure, relying on affidavit, avoiding juries and so on. Many of these jurisdictional differences continue to this day.

At a much broader level, while the common law was able to regulate commerce and trade in the City of London and resolve some aspects of the disputes at the common law courts, it was left to the courts of equity to develop equitable

[570] Worthington, S., *Equity,* pp. 15/16

principles in such areas as commercial fraud, misrepresentation, mistakes and so on. In family law, too, equitable rules were developed over the years to deal with many matters of family disputes with a view to reduce hardship between the parties. Traditionally, the history of English law was filled with one set of rules for the rich and another for the poor.[571] The rich made use of equity and the equitable law of trust to create and pass on family trust property to the descendants. Eventually equity developed principles and still continues to do so with a view to protect the poor from the unconscionable acts of the rich and powerful. More recently, Legislation has incorporated many of the equitable principles and they now form part of statutory laws,[572] and have expanded the equitable remedies.[573]

It may be recalled as noted earlier in this thesis *istihsān* too is a supplementary source that developed and formulated legal principles in many areas such as commerce, family law, civil and criminal matters and many others.

5.3 Practices of istihsān derived from principles

Iistihsān needs to be understood properly in the context of its well defined principles and practices, and in relation to the primary sources, the Qur'ān and the Sunnah of the Prophet along with other methodologies of *Usūl al-fiqh*, in particular, *ijmā`*, consensus and *qiyās*, analogical reasoning. *Istihsān* as a principle of jurisprudence could be considered to be of wider application than *ijmā`* and *qiyās,* and the methodology of *istihsān* enables the jurists to interpret and apply the law to the changing needs of the society in accordance with the aims and objectives of the textual sources. The Qur'an and the Sunnah are the fundamental and higher proofs of the Sharī`ah whereas *istihsān* is one of the rational proofs of *Usūl al-fiqh*, the methodology of law. While the Qur'ān and Sunnah are emphatic in broad outline the unchangeable higher objectives in terms such as the importance of justice, fairness, provision of goodness, easing of

[571] Hudson, A., *Principles,* p. 11
[572] Kiralfy, A. K. R.*, The English Legal System,* 4th Ed. (Lodon: Sweet & Maxwell,1967), p. 25
[573] Encyclopaedia, Britannica, 1981 (Micropaedia III, Colemani - Exclusi), p. 935

hardship, public interest and so on, *istihsān* aims to find within the spirit of these objectives the best solution to conflicting problems that arise in the day to day affairs of the people[574].

5.3.1 *Istihsān* – its origins and principles

The meaning of the word *istihsān* is derived from the word *hasuna,* good or beautiful and derivative, *istihsān,* literally means 'to approve or deem something preferable'. In jurisprudence terms, *istihsān* provides the methodology by which the jurists through their intellectual efforts exercise personal opinion. They do this in such a way that on the one hand they ensure that such opinions are within the spirit and purpose of the Sharī'ah and on the other they avoid any rigidity and unfairness in the application of the existing system of law. Accordingly, it has been commented that 'juristic preference is a fitting description of *istihsān*,[575] where 'freedom and flexibility of legal reasoning is the keynote'[576] Legally, *istihsān* is exercised by qualified jurists by giving preference to a set of rulings in place of existing rules or principles of law. This preference is based on the need for a fair and equitable solution to replace a rigid and unfair ruling which is contrary to the aims and objectives of the law.

There have been many definitions of *istihsān* from the earliest times. Abū Bakr al-Jassas (d. 370 AH) defines it as a 'departure from a ruling of *qiyās* in favour of another ruling which is considered favourable.' Abul-Husayn al-Basri (d. 436AH) defined it as 'abandoning one facet of *ijtihād* for another, the latter being the stronger of the two and consists of fresh evidence which is not found in the former.'[577] The widely accepted definition appears to be that of the Hanafi jurist, Abul-Hasan al Karkhi (d.340 AH) who said *'istihsān* is to depart from the existing precedent, by taking a decision in a certain case different from that on which similar cases have been decided, for a reason stronger than the one that is

[574] Kamali, M.H., *Equity,* pp. 3,4
[575] Kamali, M.H., *Principles,* p. 325
[576] Coulson, N.J., *A History* , p.91
[577] Kamali, M.H., *Equity*, p. 12

obtained in those cases.'[578] On the other hand Ibn al-Arabi's definition is very pointed when he says '*istihsān* is to abandon exceptionally what is required by the law because applying the existing law would lead to a departure from some of its objectives.' He justifies the mentioning of the term, 'departure' by reference to the use of *maslahah* or *ijmā.*

What is common to all these definitions is the need to replace an existing precedent by a different rule for a compelling reason based on (a) a subtle or hidden *qiyās* because an obvious *qiyās* is too restrictive or (b) the need to make an exception to a general rule of existing law. In order to make a departure from an existing precedent it is essential for the jurist to ensure that specific evidence, based either on the text, general consensus, necessity, public interest or custom, warrants such an action.

In spite of *istihsān,* having, within limits, the freedom and flexibility of legal reasoning, it does not act as an independent authority above the Sharī`ah. Ultimately, all the decisions arrived via *istihsān* must fall within the ambit of the overall principles, aims and ideals enshrined in the divine law. The companions and their immediate successors and later scholars and jurists have found that not only the overall spirit of the Sharī`ah permitted and provided the necessary authority but also the specific verses of the Qur'ān and the *hadīths* quoted earlier encouraged them to do so.

From the experience of the companions and their immediate successors, it is quite apparent that those who were competent and qualified to issue legal opinion (*fatwa)* did not act as literalist always looking for specific authority in the original sources to back their decisions. On the contrary, while they made sure that their rulings complied with the general principals found in the Sharī`ah they did not, wherever possible, attribute narrow and literal meaning to the textual sources, but were ever conscious of the higher objectives of the Sharī`ah.

[578] Kamali, M.H., *Equity*, p. 11

5.3.1.i. *Istihsān* rooted in *ijtihād*, *ra'y* and *qiyās*!

The question often posed in relation to the principles and practices of *istihsān* is this: is *istihsān* a form of *ijtihād*, self-exertion, or an offshoot of the old pure *ra'y,* unrestricted personal opinion of the jurist or is it another form of *qiyās,* analogical reasoning based on the Sharī`ah? Although *ijtihād*, means 'self-exertion, to exert oneself in understanding and interpreting Sharī`ah*'* it was closely associated with *qiyās* in the early stages of the development of Islamic Law. '*Ijtihād* was *ijtihād al-ra'y*; the exercise of 'opinion of personal judgement by the early *qādis* (judges).'[579] It could accordingly be argued that the principle of *istihsān* has its roots in *ijtihād.*

While *istihsān* has some elements of both *ra'y* and *qiyās*, the nature of personal opinion expressed and the method of reasoning used are very different. Unlike in *ra'y,* personal opinion arrived in the practice of *istihsān* is after much intellectual effort and then such opinion, while not contradicting the Sharī`ah, must also satisfy its higher objectives. The method of reasoning *in istihsān* is much more rigorous, while being flexible, so that it is not limited to cases already decided. [580]

However, many jurists were opposed to *qiyās* and its method of legal analogy. Shi'ite jurists such as al-Qādi al-Nūman and the Twelvers al-Shaykh al-Mufid (d.413/1022), al-Sharif al-Murtada (d. 436/1044) and al-Shaykh al-Tūsi (d. 460/1067) wrote against legal analogy in their manuals of *usūl al-fiqh,* while Sunni jurists, such as Ibn Hazm (d 456/1064) and al-Khatīb al Baghdadi (d 463/1071) severely criticised legal analogy in their works on *usūl al-fiqh*[581]. Moreover, as Bernard Weiss points out it was not a foregone conclusion among medieval Muslim jurists that analogy was to be counted among the indicators of the divine law through which the law became manifest.[582]

The supporters of *istihsān* mostly Hanafis, including 'Pazdāwi (d 482/1089),

[579] Esposito, J.L., *Women in Muslim Family Law*, (Syracuse University Press, 1982), p. 117
[580] Kamali, M.H., *Principles*, pp.334-348
[581] Weiss, B. , *Studies in Islamic Legal Theory*, (Brill: Leiden, 2002), p.134
[582] ibid.

Sarakhsi (d. 483/1090), Nasafi (709/1310) and others down to Bahr al-Ulūm (1225/1810) are said to have come to its defence, arguing that since *istihsān's* principles and practices have been systematised and formalised, arbitrary decision is hardly possible. In support of this contention it is argued that *Istihsān* is also a concealed *qiyās* (*qiyās khafī*), authorised by Shari'ah, *ijmā`* or the principles of *darūra,* and in any case it conforms to the 'generally recognised method of proof.' No doubt, there were 'differing' and 'opposed strands of thought among the Hanafites,'[583]which, of course, were healthy signs. Form of *istihsān* represented by Hanafis is also used by representatives of other *Madhabs*. It has, in practice, become the common property of all legists[584].

Istihsān, as discussed earlier, is mainly of two types, analogical (*istihsān al-qiyāsī*) and exceptional (*istihsān al-istithnā`ī*) where exceptional *istihsān,* depending on the nature of evidence, can fall into different categories. However, both types are concerned with replacing an existing rule with an alternative one, and in the case of a ruling of *qiyās,* as al-Sarakhsi said, any error or misunderstanding of it may be identified with the aid of the text and corrected through *istihsān.*

Several forms of *istihsān,* and some among several cases discussed by the jurists, mostly but not entirely during the formative period of *istihsān,* are analysed below. When comparing these with the rationale behind the principles and practices of equity which were developed almost a millennium after *istihsan* we find a great deal of similarity between the two methodologies.

5.3.1.ii. Analogical form of *istihsān (istihsān al-qiyās`ī)*

Because of some strong and possibly new evidence an alternative form of analogy (*qiyās al Khafī*) is applied to similar cases in place of an existing obvious analogy (*qiyās al-jalī*) where the alternative one is more subtle and less

[583] Watt, W. M., *The Formative Period of Islamic Thought*, (Oxford: Oneworld Publications, 2002), p. 285
[584] Paret, R., *Istihsān and Istislāh, The Encyclopaedia of Islam*, Vol 1V, New Edition, 1978, pp. 255-259

obvious. In Islamic law, under a sales contract any object that is not included is excluded. Accordingly, extending the principle to a charitable endowment (*waqf*) contract, an obvious analogy would exclude all ancillary rights such as rights of passage, water and so on from the land unless the rights are specifically stated in the instrument of *waqf*. On the basis that excluding such rights would defeat the purpose of the *waqf* property such as the proper use of the land and everything in it and thereby cause hardship, hidden analogy (*qiyās khafī*) may be invoked to generate an alternative rule. In order to do so *waqf* is equated not with the sales contract but with the lease *ijārah* under which usufruct is transferred enen without it being specified and while *ijārah* itself is approved by the Sunnah of the Prophet.

Another example which can also come under other categories of *istihsān*, concerns a contract the object of which must exist in *qiyās* and if it does not it is considered as an unacceptable risk (*gharar*). Applying juristic preference, the *araya* contract, on the authority of a *hadīth*, is allowed so that un-ripened dates on the tree could be 'bartered' against their value based on edible dry dates.[585] Again under the rules of *qiyās* a person who is fasting and then eats some food forgetfully would be breaking his fast because the crucial factor here is the entering of food whether intentionally or otherwise. Whereas *istihsān* would consider his fasting still valid because a Sunnah of the Prophet says that any food taken by mistake does not invalidate the fast.

5.3.1.iii. Textually guided *istihsān* , *al- istihsān bi'l –nass*

Under this rule the jurists departs from an existing rule to another based on the text of the Qur'an or Sunnah. An example would be a forward sales contract for payment, *salam,* which by analogical reasoning (*qiyās*) is prohibited because the object of the contract is not physically present. However, a Sunnah of the Prophet approves such a contract saying 'whoever concluded *salam* let him do so over specified measure, specified weight and specified period of

[585] Hallaq, W.B., *A History* , p.108

time.'[586] Whereas in another *hadīth* quoted in the *Sunān* of Abū Dawūd the Prophet has said, 'sell not what is not with you.'[587] In the presence of the two conflicting rules one, in this case *salam,* is approved by *istihsān* on the basis of a strong *hadīth* while abandoning the other, the *qiyās* based ruling.

5.3.1.iv. Consensus based *istihsān* – (*istihsān al-ijmā*)

Consensus or *ijmā`* could make an exception to the general rule of law and validate a rule arrived by way of *istihsān.* For example in the case of *istisna* or manufacturing contract when an order is placed and a contract is entered into there are no goods in existence and *qiyas* would invalidate it. Yet, by general consensus, *ijmā,`* such contracts are accepted and, by *instihsān al-ijmā`* a departure from the *qiyās* based restrictive rule is made.

5.3.1.v. Necessity driven

Istihsān (*Darūrāh*)

Through exceptional *istihsān,* a departure from existing rule to an alternative rule could be made on the basis of necessity. There are many examples from the earliest times where under exceptional circumstances property of one person could be dealt with by another without the owner's permission. Under Islamic law normally one is not permitted to deal with the property of another without the owner's authority. However, on the basis of necessity and in order to prevent hardship, *istihsān* could authorise a person to have access to another's property.

Although it is not normally permitted for a father or son to sell each other's property without the owner's permission they may do so when either of them is ill and only to the extent necessary to meet the medical expenses. Similarly, a travelling companion may use the co-traveller's property without permission to

[586] Al-Bukhāri, *Sahīh al-Bukhāri, Eng Trans*. Muhammad Muhsin Khan, Lahore, Kazi Publications, 1979,III, 243,hadith No.441: Kamali, Equity, p.33 or another version reading, whoever pays money in advance for dates (to be delivered later) should pay it for known specified weight and measure (of the dates)', *Al-Bukhāri*, Eng trans. By M M Khan, (Beirut: Dar Al Arabia, 1980), Vol III, *hadith* 441, p.243

[587] Kamali, M.H., *Equity*, p. 33

meet the medical expenses if the co-traveller is taken ill. A similar principle was established as far back as since the time of al-Shaybāni when a student of his died, al-Shaybāni sold the deceased's books to pay for the burial expenses.

Although the testimony of non-Muslims against a Muslim is normally inadmissible, it was held by ibn Taymiyyah that under necessity to serve justice and protect the rights of people such admission must be allowed. On the basis of necessity a ruling of *istihsān* can make an exception to the general rule that defends the complete independence of the property owner when such independence causes injury or inconvenience to others.

5.3.1.vi. Public interest in *istihsān (maslaha)*

Needs of public interest or *Maslaha* make exception to what has been determined according to *istihsān* in terms of the textual sources or other established rulings. Under normal rules of *fiqh,* a crop-sharing contract ends when one or both parties to the contract die. However, if the crop is still growing at the time of death, *maslaha* warrants that the existing rule will be abandoned and the contract is allowed to continue so that the crop is not neglected to the detriment of the parties and to the society.

Under rules governing *waqf* a neglected property is not normally exchanged even when it is not being properly utilised. But it is reported as far back as the fifteenth century by the Mufti of Palestine, Khayr al-Din Ramli that the early jurists who were concerned for the public good went so far as to exchange *waqf* property for cash.[588] A trustee is normally liable to loss or damage caused to trust property if he is negligent and not otherwise. But for reasons of *maslaha*, Hanafite jurists Abū Yūsuf and al-Shaybānī together with Imam Mālik held the trustee liable unless he could show that the loss or damage was caused by events outside his control. With respect to common employees who sell their labour on a piece-work basis, they were held by Hanafi and Mālikī jurists to be liable for

[588] Kamali, M.H., *Equity,* p. 39

property in their custody in a similar way.

5.3.1.vii. Custom (*urf*) – an element in *istihsān*

Under this form of *istihsān* Hanafi jurists, for example, have accepted as valid form a stipulation in a contract even if it is against the essence of that contract as long as such a stipulation has been accepted by customary practice. Under normal rules of *fiqh, waqf* is concerned with immovable property only, but the Hanafi jurist al-Shaybānī held by way of *istihsān* and as it was customary practice, *waqf* could be extended to movable property like books and tools. Under normal rules of sales contract the subject matter must be precisely defined. But, for example, in the case of using a public bath an exception is made on the basis of customary practice and a fixed fee is charged without specifying the precise quantity of water used. By general custom it has been considered demeaning to quantify the amount of water used.

Many commercial contracts and transactions are usually governed by custom-based *istihsān* as many of these involve some element of risk-taking and even speculation which are not normally permitted under *fiqh* rules. However, if these normal rules are applied, economic activity would either be severely restricted or even come to a stand- still, and therefore, *istihsān* based on customary practice is invoked to allow some element of risk- taking.

5.3.1.viii. Removal of hardship an aim of *istihsān*

Hanafi jurist, al-Sarakhsi (d 483 AH), views *istihsān* as a means towards dispelling hardship and bringing ease to the people. If it is necessary to make a departure from a ruling of *qiyās* in order to do so, then so be it. According to him, since Allah says in the Qur'ān that He does not want to put people into hardship (*al-Baqarah* 2:185) and that since the Prophet has said that the religion brings ease to the people, he argues that 'avoiding of hardship is a cardinal principle of

religion…'[589]. Hence *istihsān* aims to ease the hardship of people.

Istihsān based on removal of hardship has been practised from the earliest of times beginning with the second Caliph 'Umar ibn al-Khattāb. 'Umar was once presented with a case concerning a woman who died leaving her mother, husband and four brothers, two of them from the same mother but of a different father. Under the normal rules of inheritance two of the brothers would not have any claim on the deceased's property. However, after hearing the strong argument and pleading by these two brothers, the Caliph, in order to avoid hardship, permitted all the four brothers to share equally one third of the property.

Cases of hardship could arise under many circumstances. One instance of hardship referred to by W B Hallaq is when 'necessity' and 'need' are not fulfilled. For instance, under *qiyās* when impurity touches the water in a well, it is 'ritually impure.' However, since water is a regular requirement and essential to daily life, deprivation of water would constitute hardship. And, therefore, 'the use of water taken from a ritually impure well is deemed lawful…' by *istihsān.* This is the form of juristic preference, both in terms of avoiding hardship and fulfilling necessity that can be reached by differentiating textual evidence.[590]

5. 3.II. Application and differentiation of principles

When legal issues are viewed in such a perspective it becomes obvious that implementing some of the existing laws could cause hardship to the litigants. The only way of overcoming such situations would be to provide the solutions which will ease such hardship. The jurists may face one of two situations in the existing legal system which may be causing the hardship. In some instances the existing law may be too general, or alternatively it may be too specific and inflexible.[591] In these instances the jurists resorting to *istihsān* may provide solutions which will be less stringent and cause less hardship to the litigants compared to rulings

[589] Kamali, M.H., *Principles,* p.325
[590] Hallaq, W.B., *A History*, p.109
[591] Kamali, M.H., *Principles,* p.325

under existing law while ensuring such solutions will also be within the higher objectives of the Sharī`ah.

One of the earliest cases often quoted to show how beneficial it is to resort, at times, to the principle of *istihsān* concerns the ruling made by the second Caliph 'Umar ibn al-Khattāb during a period of famine in the country. As it would cause undue hardship the *Caliph* refrained from enforcing the *hadd* penalty of amputation of the hand for theft during this period of famine. Likewise, on another occasion, for a similar reason and to avoid hardship the same *Caliph* imposed a restriction on the sale of *ummahāt al-awlād,* slave-mothers, and in some cases 'marriage with *kitābiyyāhs'* [592] (Jewish and Christian women).

It is also on record that the Caliph*,* when dealing with two cases involving issues of inheritance, set aside, with respect to one of them, the normal rules of inheritance for a ruling which was just and equitable in the circumstances.[593]

According to the Māliki view, when a jurist has to decide in practice between two conflicting rulings, one based on *qiyās* and the other based on *maslaha,* public interest, 'Māliki *istihsān*' will give preference to *maslaha*. Indeed, Imam Mālik himself has commented that '*istihsān* represents nine-tenths of human knowledge.' [594] Although Māliki jurists put greater weight on *istislāh* (consideration of public interest) they approved the principle of *istihsān,* but viewed it in a broader perspective so that for the Mālikis, *istihsān* was 'less stringently confined to the Qur'ān and Sunnah than the Hanafi or Hanbali would have it.'[595]

Hanbali considered that the principles and practices of *istihsān* must be closely related to the Qur'ān and the Sunnah. One of the earliest advocates of Hanbali ideas, Ibn Taymiyyah has commented that *istihsān* would prefer one legal ruling (*Hukm*) to another if the former is found to be more in keeping with the terms of

[592] Kamali ,M.H., Principles, p.325
[593] Ibid., p. 331
[594] Ibid., p. 326
[595] ibid., p. 327.

the Qur'ān, Sunnah or consensus.

As for Imam Muhammad Idrīs al-Shāfi'ī, there are conflicting reports as to what extent he was for or against *istihsān.* No doubt, he held some strong views against *istihsān*. For example, he said that its practice is a form of 'pleasure-seeking (*Faladhdudh wa-hawa*) arbitrary law-making in religion.' M H Kerr argues that Al-Shāfi'ī 'fundamentally rejected *istihsān* fearing that its practise would lead to 'arbitrary decision.' In his *Risāla* 70, al-Shāfi'ī says, 'God has not permitted any man since his messenger to present views (*kawl*) unless knowledge that was complete before him.' Imam Gazālī (d 504/1111) and Baydāwi (d 681/1288 or later) held similar views. On the other hand, a Shāfi'ī jurist, al-Āmadī is on record as asserting that al-Shāfi'ī himself resorted to *istihsān*.'[596]

5.4 Equitable action & remedies derived from principles

Equity, unlike other branches of law, has some features unique to itself. For a start, there is 'no general theory of equity.' It is not framed to deal with any particular areas of legal regulation like contracts, torts or even civil law wrongs that give rise to legal rights and responsibilities in 'a modern society.' The best that can be said of equitable doctrine is that it is a body of rules, principles and remedies that have evolved, developed and been administered by the English High Court of Chancery before 1873.[597]

When considering the equitable maxims and judicial reasoning discussed below it may be recalled that from the earliest period in Islamic history, notably with the second Caliph `Umar ibn al-Khattāb right through history Muslim jurists formulated and applied several similar principles or developed similar judicial reasoning in their times.

[596] Kamali, M.H., *Principles*, p. 342
[597] Worthington, S., *Equity*, (Oxford: oxford University Press, 2003), pp.17-20

5.4.I. Equitable maxims and principles[598]

Fundamental principles of equity consist of aphorisms called 'the maxims of equity' all of which are said to have developed into modern equity from similar principles that already existed. Some have argued that most of the maxims in the present form were formulated only in the eighteenth century. However, it is generally believed that even if it is the case the principles underlying them were applied much earlier by the Courts of Chancery long before that'. For the proper understanding of equity, it is of considerable importance to understand some of these maxims, which are

> '*…the fruit of observation of developed equitable doctrine, or, if they can be in any way regarded as the architects of it, they were inarticulate architects. The ideas embodied in them are far older than their articulate expression. But their practical value in a scheme of arrangement is immense'.*

Chief Justice Mason and Justice McHugh in the of *Corin v Patton* (1990)169 CLR 540 at 557 said with respect to one of the maxims:

'Like other maxims of equity, it is not a specific rule or principle of law. It is a summary of a broad theme which underlines equitable concepts and principles.

One of the earliest and most important creations of equity, the Equitable Trust, because of the division of ownership and the nature of enforcement, needs to be distinguished from the following concepts with which it shares some common features. Equity used two methods to create property rights: first, by transferring 'bundles of rights', all immobile in common law but tradable in equity, and secondly, by allowing division of 'bundle of rights' which common law regarded as property. This 'repackaging of rights' created equitable ownership (express, resulting and constructive trusts) and Equitable security interests (equitable

[598] Hudson, A. , *Principles*, pp.13-17 Worthington, S*, Equity*, (Oxford University, Press, Oxford, 2003), 15, 16, 32 Meagher, R. P., Gummow, W .M.C & Lehane, J. R. F., *Equity, Doctrines and Remedies*, (Sydney: Butterworths, 1992), pp.71 – 100

charges and equitable liens),[599] allowing the beneficiaries to enjoy beneficial ownership.

With respect to the Equitable Trust, because of the highly technical and complex nature of the trust property, its administration, rights and liabilities of trustees and beneficiaries, only those aspects of the trust directly affected by the principles of equity will be discussed in this paper.

5.4.1.i. No wrong without a remedy

This maxim needs to be understood in its historical context. The plaintiff in the olden days came to equity, a court of conscience, to seek a remedy when no such remedy was possible in the common law courts. In order to do this it had to be argued how unconscionable it would be to leave the plaintiff without a remedy. When, for instance the only remedy available in common law was damages, 'the remedy of specifically decreeing the sale of land was invented.' Again, instead of the usual damages, equity ordered the specific restitution of chattels; where there was no law for accounts, equity ordered accounts to be kept. When the law provided no right to a beneficiary under the trust, equity protected him and enforced the terms of the trust.

5.4.1.ii. Equity follows the law

One implication of this maxim is that equity gives effect to legal estates, rights, interests and titles. For example, equity cannot say that it is not a legal fee simple when the common law says it is a legal fee simple. The common law rule that only parties to the contract will be bound by the contract will be recognised by equity, too. Equity will also follow Statutes in all circumstances. It can only restrain the legal owner in the unconscionable use of his legal rights. Accordingly, in one sense, it could be argued that equity may not always follow the law. Justice Cardozo in the case of *Graf v Hope Builiding Corp* (1920) 254 NY 1 at 9 said, 'Equity follows the law, but not slavishly nor always.' For example, the Statute of Limitations will not be applied by analogy if there were

[599] Worthington, S., *Equity,* p. 79

clear fraud, or by doing so inequitable result would be achieved, (*Gibbs v Guild* (1882) 9 QBD 59. The similarity with *istihsān* is that it too in principle follows the overall intent of the Lawgiver form the textual sources.

5.4.1.iii. Effects of equal equity, time or delay

On equal equity, law prevails.

If there is no clear indication as to which of the two parties has a better claim in equity, then common law will prevail. If the two people buy an item from a fraudster neither will have an equitable remedy and the common law rules of Commercial Law will be applied.

When equities are equal, first in time prevails.

Since time is vital in equity, it favours the person who acquired the right first. For instance, if each of two equitable mortgagees makes a claim, equitable remedy is normally available to the first mortgagee.

Delay defeats equity

Delay remains a very prominent form of defence in equity. This defence is based on the principle that the defendant should not be allowed to wait indefinitely with the threat of litigation hanging over his head. As time is vital the claimant who delays unduly to bring his action in equity will be deprived of any remedy. Although the Statute of Limitation and other Acts of Parliament have put time periods on many cases which the Courts of equity cannot override, there are many claims for equitable relief, such as specific performance, rescission, rectification, injunction and so on which are not covered by Statutes. Equity has two methods of intervention to give effect to this maxim.

In most cases it endeavours to apply, wherever possible, a statute by analogy respecting the maxim ‘equity follows the law.’ It does this to ensure that like situations are treated alike whether in common law or in equity. The second

method is specific to equity, and is known as the equitable doctrine of *laches.* Under this rule equity imposes a time limit usually based on the claimant's delay.

5.4.1.iv. Performing equity, having clean hands & treating equality

If seeking equity must do equity

In order to claim equitable remedy the plaintiff must satisfy that he has complied with his own legal and equitable obligations relating to the subject matter. This maxim shows the clear distinction that existed between the two systems: equity was able to give a conditional relief, whereas law provided only unconditional and non-discretionary remedy in the form of specified amount of money or an 'unconditional verdict for the defendant.' Equitable remedies were discretionary and flexible, and could therefore be awarded to suit the particular circumstances of the case, the plaintiff or the defendant.

If Seeking equity one must come with clean hands

This maxim is closely related in terms of its origin and application with the earlier one, showing, just as before, that the Courts of equity started as courts of conscience. Accordingly, where a plaintiff has acted improperly in a transaction his claim for equitable relief will be refused. "Improper" is in the legal and not merely moral sense. However, the defence of illegality, though, not strictly the same as the defence of unclean hands, if the former is available the latter defence may not be necessary.

Equality basis of equity

In general, if two people have equal claims to a specific property, equity will divide the property equally between the parties. This principle is extended to equal distribution of trust property between the parties to a marriage when the marriage breaks down. This manner of treating the parties to the marriage is based on the premise that before the marriage break-down they had an equal share of rights and responsibilities.

Considering intent and not the form

Equity, while taking note of formalities, gives effect to the substance of the transactions.

Master of the Rolls, Lord Romilly said in the case of *Parkin v Thorold* (1852) 16 Beav 59 at 66; 51ER 698 at 701:

Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and, if they do find that by insisting on the form, the substance will be defeated, they hold it to be inequitable to allow a person to insist on such form, and thereby defeat the substance.

On the basis of the above maxim, it was decided in the case of *AGC (Advances) Ltd v West* (1986) NSWLR 590 at 602 (affd 5 NSWLR 610) that although a document relating to a transaction showed a person as a principal debtor, that person could demonstrate that in substance he was really a guarantor. With some forms of trust, such as precatory trusts and 'illusory trusts'- in an appropriate case – equity will infer a trust even when there are no words to that effect, or will consider as no trust although words of trust are used.

5.4.I.v. Treating as done, intended or acted in person

Equity treats as done which ought to have been done

This maxim, an earliest known formulation in the case of *Banks v Sutton* (1732) 'is of great importance and of wide application in equity.' There are several instances of its application. One of them is where one is legally obliged whether it arises in contract, trust or otherwise to convert realty into personalty or vice versa, equity will treat the property as actually converted from the moment the obligation arose. Another application of this maxim is to contracts. If a contract refers to doing a thing then equity often treats the thing as if it were done. It could also be the case that equity will consider it is done if it believes that someone ought to have carried out an equitable act although not valid under common law .

Equity places an intention to fulfil an obligation

This doctrine is 'of very limited application.' An instance will be when a person is bound by an obligation, the court will assume an intention to carry out that obligation. This assumption will be made even though an act not strictly connected would, taking all the circumstances, tantamount to or deemed to be in performance of the obligation.

Equity acts in *personam*

Lord Chancellor, Lord Selborne summarised the doctrine as follows in the case of *Ewing v Orr Ewing* (1883) 9 App Cas 34 at 40:

The Courts of Equity in England, are, and always have been, courts of conscience, operating in personam*, and not* in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or* ratione domicilii *within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries*.

This is an important feature of equity. In arriving at a judgement the court focuses on the conscience of a particular defendant and, in theory at any rate, is not concerned with laying down general rules for the conduct of similar cases in future.

This maxim has been categorised as one 'historically of the greatest importance, theoretically most elusive…' The defendant who refused to comply with the order of a court of equity was considered to be in contempt of court, and such defendants could be put in jail for contempt. Therefore, equity in a real sense acted 'on the person', i.e *in personam,* to ensure that its orders were carried out.

Equitable doctrines, principles and the maxims referred to earlier were for the most part the result of judgements made at various times mainly in British and Commonwealth Courts. In subsequent cases these principles and maxims were applied by the courts of equity, sometimes with reservations or qualifications,

depending on the circumstances and facts of each individual case. In somewhat similar manner, the Muslim jurists developed principles of *istihsān* practised by the early Caliphs and the Imams, and then applied them to cases during their times according to the nature of the facts and circumstances of the case.

5.4.I.vi. Application of principles

Equity acts *in personam* – concerns land situated abroad

***Richard West and Partners (Investments) Ltd v Dick* {1969} 2 Ch 424 Court of Appeal**

As discussed earlier, one of the important features of Equitable jurisdiction that has continued over a long period is that equity acts *in personam.* One of the consequences of the above principle is that, even in the case of a modern trust though the action taken is against the legal owner, the fact that the trust property is based abroad becomes immaterial. In the above case of *Richard West and Partners (Investments) Ltd* the English court held that it had jurisdiction to grant a decree of specific performance of a contract for the sale of land abroad (in Scotland).[600]

As the equity developed, it had to consider not only the beneficial owner but also the legal owner, and in either case the Court is effectively acting *in personam.* In addition, as discussed in previous chapters, Legislations have affected equitable rights and interests. One such instance is that of 1925 property legislations which have treated equitable property as property interests. Yet, while some equitable rights are similar to rights in *rem*, it is still true to say that equity acts *in personam*. The decision of the Court in the above case appears to be based both on 'the conscience of the party' to the agreement and on the maxim that the court acts *in personam.*[601]

[600] Todd, P., *Cases & Materials on Equity and Trusts*, (London: Blackstone Press Limited, 1994), p.3
[601] ibid

He who comes to equity must come with clean hands

Cory and Gerteken (1816) 2 madd; 56 ER 250 and Overton v Bannister (1884) 3 Hare 503; 67

These two cases have often been referred to illustrate the maxim quoted. In these cases, the plaintiffs who were infants represented themselves as adults to the trustees. Based on that representation the trustees advanced them money from the trust fund. When the misrepresentation was later detected, the Court held that the children 'lost the ordinary protection' of infancy and were treated on the same basis as if they were adult… who instigated a breach of trust.[602]

Kettles and Gas Appliances Ltd v Anthony Horden & Sons Ltd. (1934) 35 SR (NSW) 108

This was a case where a kettle manufactured by the plaintiff was passed off by the defendants as their own. The plaintiff had always embossed the kettles with the word 'Patented. Copyrighted.' This was done with the intention of preventing others from manufacture of similar kettles of the same design, although they were aware that no patent or copyright existed at the time. In these circumstances it was held that granting an injunction to the plaintiff restraining the defendants from passing on would tantamount to the court assisting the plaintiff in their campaign to defraud the public, and accordingly, relief was refused.[603]

Equity follows the law

Re Bostock's Settlement (1921) 2 Ch 469

In this case, the Court of Equity held that as far as legal estates were concerned it would not give an interpretation of limitation different from the common law. It also decided that it would give the same interpretation the common law gives to any technical terms used.

[602] Meagher, R.P., Gummow, W.M.C & Lehane, J.R.F., *Equity, Doctrines and Remedies,* (Sydney: Butterworths, 1992), p.82
[603] ibid., p. 83

Holmes v Millage (1893) 1 QB 551

The court, in this case, refused to appoint a receiver of a judgement debtor's 'future property,' attesting the principle that no receiver would be appointed over an equitable property where the common law courts would not have done so if it had been legal[604]

Allied Arab Bank Ltd v Hajjar (1988) QB 787

The plaintiff in this case was accusing the defendant of owing him a large sum of money, and therefore was trying to prevent him from leaving the UK without furnishing a security of £36M. 'The Court, among other things, held that the plaintiff's action was for damages, not debt, whereas the equitable writ… lay only for action in debt'.[605]

Motor Terms Co Pty Ltd v Liberty Insurance Ltd (in liq)(1967) 116 CLR 177

This case illustrates the point that although the Statute of Limitation does not apply to cases in equity, in certain circumstances courts of equity will not allow a claim as time barred if there is an analogous legal right which would have been time barred in an action at common law. But in *Graf v Hope Building Corp (*1920) 254 NY 1 at 9 the court would not apply the Statute by analogy if fraud has been committed or to do so would be inequitable.[606]

[604] Meagher and others, *Equity*, p.74
[605] ibid., p.75
[606] ibid., pp. 75,76

5.4.II. Equitable Remedies[607]

Equitable remedies were first developed by the courts of equity, and those remedies were not available to the common law. But by the Common Law Procedure Act of 1854, common law was given some equitable remedies and by the Chancery Amendment Act 1858 courts of equity received some limited common law remedies to be awarded under specified circumstances.

What were once unexceptional or ethical principles, in the course of time 'hardened into judicial policy.' The principle of Specific Performance, discussed below, is a clear instance where it was subject to much scrutiny to ensure that it was both equitable and enforceable by the courts. In the end, it became clear that where there were contractual relationships such as a valid contractual obligation to perform personal service, such a contract was unenforceable because it would be 'practically impossible for the courts to ensure that the contract has been validly executed'.

5.4.II.i. Specific Performance

Specific Performance was 'developed into the most important branch of equitable jurisdiction after trusts and administration under Lord Eldon,' by the end of the eighteenth century.

Where there is a contractual obligation, equity will compel the defendant, when appropriate, to perform his obligation under the contract. This equitable remedy usually depends on whether the common law remedy of damage is either inappropriate or inadequate. 'A major difference between the two systems is that whereas common law remedies are available as of right, equitable remedies retain the discretionary nature…' The reason for this difference between equitable and common law remedies is stated by Lord Hoffman in *Co-operative Insurance v Argyll* (1997) as follows:

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[607] Hudson, A, *Principles* , pp.485, 486,497,515,529, 531, 549 Kelly, D. M., *History of Equity, Equitable Jurisdiction of the Court of Chancery*, (Cambridge: Cambridge University Press, & London: Steven and Sons Ltd., 1890), p.253 Todd, P., *Cases and Materials on Equity and Trusts,* 2nd Ed (London: Blackstone Press Ltd.,2000), p.13

'Specific performance is traditionally regarded in English Law as an exceptional remedy, as opposed to the Common Law Remedy of damages to which a successful plaintiff is entitled as of right. Specific Performance was part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the remedies available at Common Law were inadequate.'

As mentioned earlier, equity acts *in personam* and the award of Specific Performance is no exception. Accordingly, the order made is against a particular person which affects his conscience. So, if the plaintiff has acted unconscionably in some way, equity will not help him.

Specific Performance is applicable only when the subject matter of the contract has some significance, for example when referring to a particular plot of land or specific goods which cannot be easily substituted. There will not be specific performance of a contract which, for example, is illegal, immoral or has not provided any consideration, or requires special skill or which involves payment of money.

Defence to Specific Performance includes lack of an enforceable contract, misrepresentation, undue influence, unconscionable bargain, lapse of time or sufficiency of damages as a remedy.

5.4.II.ii. Injunction

Major forms of injunction can be either mandatory, requiring the respondent to act in some way, or prohibitory requiring the respondent to refrain from doing some action, or can be an injunction preventing some action which is feared might take place in the future. Mareva Injunction orders may also be issued preventing the respondent removing assets from English jurisdiction, and an Injunction known as Anton Pillar Order may be issued authorising the applicant to seize defendant's property to protect evidence in relation to future litigation.

Grant of an interlocutory or interim injunction is dependent on the comparative convenience of the parties based on the level of harm caused or not caused by granting or not granting such an injunction. Therefore, the applicant must show a

strong *prima facie* case for an injunction. The whole approach has been doubted in most recent cases.

5.4.II.iii. Rescission

This equitable remedy will enable the party to set aside a contract and restore the parties to the original neutral position. In the case of misrepresentation, the plaintiff will be able to rescind the contract and prevent the wrongdoer from benefiting from his unconscionable act. Rescission is usually available to the party who is a victim of undue influence of an unconscionable bargain. Mistakes of law and fact may both permit rescission. If it is not possible for the parties to revert to their original position, then rescission will not be available.

5.4.II.iv. Rectification

Rectification involves amending the terms of the contract to reflect the true intention of the parties to the contract. Rectification is available only in the case of a common mistake. If the mistake is unilateral, rectification is only possible in case of fraud or other unconscionable acts.

5.4.II.v. Subrogation

Subrogation is, in a way, a form of remedy of restitution which aims at replacing one claimant with another. It is based on the principle of reversing unjust enrichment. It operates in two different ways. 'First, simple subrogation permits X to take over a claim which A has against B. Secondly, reviving subrogation permits X to take over A's rights to sue B, in circumstances in which B used X's property to discharge an obligation which B owed to A. In effect X revives the obligation which B has discharged with X's property, so that B is not unjustly enriched by the use of X's property'.

5.5 Istihsān & equity – distinguishing features

This investigation has revealed certain similarities and differences between the two systems, *istihsān* and equity. The conceptual and doctrinal basis of *istihsān* and equity and the way in which the principles behind them were introduced and developed by each system will show how each one aims to ensure proper justice is done.

5.5.I. Aim is similar, approach is not

It may appear that the terms equity and *istihsān* (Juristic Preference) are interchangeable in some ways. equity could be interpreted to include the provision of justice based on 'juristic preference' and *istihsān* to give judgement based on equity and fairness. While they may have similar aims and objectives in achieving justice based on fairness, they are nevertheless not the same, nor identical. Their origin, conceptual basis, development and manner of administration are all different.

5.5.II. Natural law theories guide equity

Equity, broadly, acquired its 'legitimacy from a belief in natural rights or justice beyond positive law.' [608] Robert George argues that Germani Grisez, who originally proposed the natural law theory, and his principal followers never objected to the concept that human goodness and moral values originate from human nature. And he goes on to say that an account of practical reasonableness can be called a theory of natural law.[609] So when a judge cannot see from the established legal sources a solution to a problem, it is argued that natural law theory could show that 'natural reason can identify the one right answer'[610] and

[608] Kamali, M.H., *Principles,* p.323
[609] George, R. P., *Natural Law Theory,* (Oxford: Contemporary Essays, Oxford University Press, 1994), p.135
[610] ibid., p. 151

it explains the 'obligatory force of positive law.'[611]

Extending the role of natural law further, it is pointed out that even in matters of human right it has played an important role.[612] Roscoe Pound has advanced the proposition that natural law theory tends to answer the end purpose of equity and natural law.[613] Natural law theory shows, Greenwalt contends, that laws formulated for the good order of society embrace the 'good of the individual members of the community.'[614]

From the advocates of the natural law theory it is apparent that, in short, there is in nature a form of good and bad which can be extricated by man/woman through human reason and ingenuity. What is good for the individual is good for the society. Accordingly, for example, when a judge cannot find an answer to a question in the positive law, whether common law, statute or Civil law, he will, according to natural law theory, by the use of his reasoning power, find a solution which is fair and equitable. So, equity relies heavily on natural rights or justice. Based on the principles of natural law theories and from the above comments from scholars it appears that equity is part of natural law and therefore, in theory at least, above all other forms of legal rules.

5.5.III. 'Law' of Sharī`ah guides *istihsān*

Istihsān in Islamic Law, on the other hand, relies on the aims and objectives of the Sharī`ah. 'Sharī`ah is an embodiment of the will of God.'[615] Accordingly, the 'Laws' of Sharī`ah are for all times, all places and all people with certain immutable laws that are valid by all standards for eternity, while certain others are flexible, and still others indicative of Sharī`ah's wider concerns, like easing hardships, showing a sense of fairness, fulfilling necessity and so on. *istihsān* will

[611] Finnis, J., *Natural Law and Natural Rights,* (Oxford: Clarendon Press, 1980), p. 28
[612] Biggar,N & Black, R., *The Revival of Natural Law*, (Hants: Ashgate Publishing Limited, 2000), p. 278
[613] Pound, *An Introduction*, p. 25
[614] Greenwalt, K., *Conflicts of Law and Morality,*(Oxford: Oxford University Press, 1989)
[615] Kamali, M.H., *Principles,* 323

never consider itself an independent authority separate from Sharī`ah or above it. *istihsān* in effect is an integral part of the Sharī`ah.

It is true that like equity, *istihsān,* too, gets its inspiration from the principle of fairness and conscience and both are prepared to make a departure from the established rules of law when they find that strict adherence to the rules lead to unfairness. But with *Istihsan,* the 'inspiration' itself comes mainly from the Sharī`ah, and it does not make a departure away from the Sharī`ah but only from its rigid literal interpretation of the rule; it continues to remain within the overall spirit of the Sharī`ah. Because equity relies heavily on the concept of natural law and, *Istihsān* on the aims and objectives of the Sharī`ah, there is a difference between the two systems in their approach to issues, sources utilised, use of precedent, methodology of reasoning and analysis.

5.5.IV. Equity separated but 'follows' the law

While conceptually equity and its principles have roots in natural law, their origin, as discussed in the earlier chapters, is different from that of *Istihsān.* Equity originated, among other reasons, both because of the inadequacies and because of the rigidity of the common law principles, in addition to its primitiveness; and it was not adequate in terms of either its rules, its spirit or objectives. As one writer points out 'Equity developed because of problems in the common law.'[616] A respected scholar has put it much more strongly by saying 'Equity arose from the sulkiness or obstinacy of the common law courts which refused to suit themselves to the changes which took place in the opinions and circumstances of society.[617] One may feel tempted to admire it today but in the past 'it was primitive …'[618]

[616] Martin .J,. *English Legal System*, (London: Hodder & Stoughton, 2002), p. 16
[617] Kelly, D. M., (quoting Austin) *History of Equity, Equitable Jurisdiction of the Court of Chancery,* (Cambridge: Cambridge University Press, & London: Steven & Sons Ltd., Chancery Lane, 1890),p. 11
[618] Rivlin, G., *First Steps in the Law*, 2nd Ed. (Oxford: Oxford University Press, Oxford, 2002), p 29

It is true that later development in law and equity led some to say that equity took the law for granted and gave legal rights greater efficiency in certain circumstances[619] and to point out the maxim 'Equity follows the law.' Flexibility in the law and equity occurred in the later period but in the earlier stages the relationship was very hostile.

5.5.V. *Istihsān* independent but rooted in *Sharī`ah* 'Law'

Istihsān in Islamic Law no doubt also arose as a result of some difficulties in the manner in which the Law developed after the second and third generations of Muslims. There was, however, no question of the primary sources of Islam, the Qur'ān and the Sunnah of the Prophet, being inadequate to deal with the changing social needs of the Muslim people. The issues were primarily concerned with proper form of reasoning and interpretation in order to derive the rules from the primary sources. The flexible nature of the textual sources, its higher aims and objectives, such as relieving hardships and promoting fairness, and providing guidance for establishing supplementary sources of law, all made it possible for the harmonious co-existence of the primary and supplementary sources, *istihsān, qiyās, istislāh, istishāb* and so on.

Unlike equity which originated and developed as a separate system of 'law' retaining its duality with common law, *istihsān* depended on and was inspired by the Sharī`ah, and developed as a subsidiary and a supplementary law reinforcing the Sharī`ah 'Law'. This being the theoretical position of *istihsān* vis-à-vis Islamic Sharī`ah 'Law' indicating a harmonious relationship between the two, we have on record the earliest practical application of this principle from the examples of the companions of the Prophet. We saw in earlier chapters, no less a person than, for instance, the second Caliph 'Umar ibn al-Khattāb himself, who was one of the closest companions of the Prophet, was able to show that, in

[619] Pound, R., *Introduction,* p. 65

applying the principles of *istihsān* on numerous occasions, there was no difficulty in reconciling them with the spirit and aims of the Sharī`ah.

One of the significant contributions of equity is in the manner in which it created and developed several new and effective obligations. The nature of these obligations is quite different from the common law obligations. Firstly, these obligations imposed by equity restrict individual actions in a novel way. Common law normally restricts individual freedom of action only when it causes some form of harm to others. On those situations the law will detect the causes of the harm and award remedial damage to the claimant. Equity, on the other hand, will impose an obligation even when the action of the defendant does not cause any harm to the claimant.[620]

Compared to the methods employed in the development of common law rules, one of the most significant of the obligatory rules devised by equity concerns 'Equity's regulatory strategy of "not prescribing but proscribing."'[621] It is a principle whereby instead of stipulating what are authorised actions, it specifies a limited number of prohibited kinds of behaviour, and what is not included therein is excluded and, therefore, not prohibited. These principles have been widely applied particularly, but not exclusively, in matters relating to trust administration and management. Interestingly, long before Equitable principles were developed or even before the rules of *istihsān* came into being, one of the cardinal principles of the Sharī`ah to which the Muslim judges and jurists subscribed, from the inception of Islam, was that everything is allowed except what is prohibited, and the things that are prohibited are few and far between, compared to what is permissible.

The first *asl* or principle, as Yūsuf Al -Qaradāwi calls it, with respect to what is permissible and what is prohibited is that, in general, what the Lawgiver has created for 'man's use' and for his benefit are permissible. It follows from this that nothing is *harām* (prohibited) save what sound and clear *nāss* (primary textual source) prohibits. If the *nāss* is not strong such as weak *hadīth* or if it does

[620] Worthington, S., *Equity*, (Oxford: Oxford University Press,2003),p. 117
[621] Ibid.

not clearly prohibit an item, that item is permitted under the broad principle of permissibility.[622]

The purpose of this investigation into the relationship between *istihsān* and equity is not so much to examine the differences or the similarities as such, but to explore what lessons, if any, could be drawn from the past performance of both systems for the future development of the overall Islamic legal methodology, with *istihsān* as an effective 'subsidiary' source or a reasoning form. In particular, considering how the doctrine of equity came to be consolidated and eventually incorporated into the national legal system by Act of Parliament, how similar or different will be the issues if *istihsān* vis-à-vis Islamic legal methodology, *Usūl al-fiqh* were to be incorporated. This will be the subject along with others to be discussed in the next concluding chapter.

[622] Yusuf Al-Qaradawi, *The Lawful and the Prohibited in Islam*, (London: Al-Birr Foundation, 2003), p.3

Chapter 6

Conclusion

Old Methodology and New Developments

Introduction

In the last chapter we traced the most salient features of *Istihsān* and equity and compared the similarities and differences between the two. In this concluding chapter the same theme will be taken up later, this time in order to explore *istihsān's* future role considering the way in which the two theories developed in their separate ways: *istihsān* along with other subsidiary sources of law remaining independent and equity consolidating all its doctrines and being incorporated by Act of Parliament into the English Legal System.

However, first, drawing partly from previous chapters, the development of the purpose or the objective based Islamic legal methodology will be first investigated. This will be done from the earliest times to *usūli* Imam al-Juwaynī and beyond to Imam al-Shātibī's theory or the philosophy of Islamic law, *maqāsid al-sharī'ah;* and then its implications to the traditional legal methodology, *Usūl al-fiqh* and *istihsān* will be examined.

Finally, it is suggested that there is the possibility and the need to consolidate the different subsidiary sources of law into one, and bring about some uniformity in the administration of justice, not least because it enables the jurists, lawyers and judges to identify similar from dissimilar cases and handle them accordingly. Furthermore, most importantly, it is suggested that if *maqāsid* is brought into the fold of *Usūl al-fiqh* by way of *istihsān,* it will facilitate eventually the incorporation of the now unified whole subsidiary source of law into the national

legislature of any Muslim state.

6.1 Early methodology inspires new thinking

From the time of the Prophet and his companions the early form of the methodology for interpreting the textual sources, as we traced in Chapter one, was the objective of the law or *maqāsid al-shar'iah*. Long before[623] the emergence of various proofs of Sharī'ah or the secondary source of Islamic legal methodology or even before *istihsān* was developed, *maqāsid*, the overall intent of the law, was applied to arrive at judgements which would be fair, equitable and conscionable. It was seen in the previous chapters how the second Caliph 'Umar ibn al-Khattāb used this principle widely on several occasions.

Since the time of the early Muslims, due to various factors, such as the rapidly growing Muslim societies both within and outside Arabia and theological disputes among factions, earlier practices and methodologies in approaching, interpreting and applying the primary textual sources to legal issues were slowly being replaced by different methodology.

The early Muslims took heart that the divine law, the Qur'ān and Sunnah of the Prophet, the primary sources of Islamic Law, were sent so that the followers of Islam could implement the objectives or the intent set by the Lawgiver, God. They took heed of the Qur'ānic teachings that God sent His Guidance, the Qur'ān and chose the Prophet with His teachings so that following the methods introduced by these sources there would be peace, harmony and equity in society. They adhered to God's reminder in the Qur'ān, '**Indeed , (even afore-time) did We send forth Our apostles with evidence of (this) truth; and through them We bestowed revelation from on high, and (thus save you) a balance (where with to weigh right and wrong), so that men might behave with equity**.'[624]

[623] Auda, J. *Maqâsid al-Sharîâh as Philosophy of Islamic Law, A System Approach* (Herndon, USA: The International Institute of Islamic Research, 2008) p. 9
[624] Al-Qur'ān, 57:25

6.1.I. Determining the balance and achieving equity

How did the early generations of Muslims during the time of the Prophet, his companions and their immediate successors determine the 'balance' and how could men achieve equity? From where and through what methodology could they derive these principles? Why did it take later generations of Muslims to deviate from the examples of their predecessors? When the Qur'ān says, **'God does not want to impose any hardship on you, but only wants to make you pure, and to bestow upon you the full measure of His blessings, so that you might have cause to be grateful'**[625] how did they interpret such a compassionate statement of the Lawgiver? Or how did they interpret His warning, **'By means of intoxicants and gambling, Satan seeks only to sow enmity and hatred among you'**[626] **or 'and God does not love corruption?'**[627]

What did they make of the Qur'ān and the Sunnah of the Prophet referring to what is envisaged in terms of justice, fairness and benefits to humans in the eyes of the Lawgiver not in one verse, one chapter of the Qur'ān or one saying of the Prophet but mentioned in several places throughout the textual sources? Verses like, **'Allah does not burden a soul with more than it can bear'.**[628] **'Allah wishes for you ease and He does not wish difficulty for you…'** [629], **'He did not make any difficulty for you in the religion…'**[630] or **'Allah wishes to lighten the burden for you, for man was created weak'.**[631]

6.1.11. Textual interpretation and objective analysis

The Muslims of the early period realised that proper understanding and

[625] Al-Qur'ân, 5:6
[626] Al-Qur'ân, 5:91
[627] Al-Qur'ân, 2:205
[628] Al-Qur'ân, 2:286
[629] Al-Qur'ân, 2:185
[630] Al-Qur'ân, 22;78
[631] Al-Qur'ân, 4:28

interpretation of the Lawgiver's rulings could be achieved not necessarily by mere analysis and interpretation of every word or verse alone in isolation, although such interpretation only is often necessary at times. But it is only by examining a legal ruling in the context of the overall intent of the Lawgiver, a greater understanding of the purpose or objective could be determined. Without such an understanding, the meaning and interpretation given to a textual ruling may not necessarily be as intended by the Lawgiver. And so they did examine the textual rulings in the context of the overall objective of the law before a judgement was delivered. 'Umar ibn al-Khattāb's several rulings based on overall objectives of the law, as we traced in chapters one and two bear witness to this. But why did the later generation of Muslims follow different methodology?

As indicated earlier, Muslim territories began to expand, jurists and scholars were dispersed into various geographical regions away from Macca and they were faced with different issues from different societies and different people. Issues raised were such they could not always find direct answers from the primary sources and more often than not they exercised their own independent reasoning (*ijtihād*) and decided on solutions which they considered appropriate. Accordingly, there were wide variations in the methods they adopted to interpret the texts. Some among them went on to choose the best of two alternative solutions (*istihsān*) and some others decided on the basis of public interest.[632] Hallaq has found that before the end of the first century of *Hijra, ahl al ra'y* was approved as 'sound and considered opinion' and accepted.[633] This group *ahl al-ra'y* with its opponents *ahl al-hadīth* continued to influence legal development.

As discussed in Chapter one, after the death of most of the companions including the four great Caliphs, some of those who outlived them continued to follow the methodology in interpreting and applying the primary sources. However, at the same time some of those who belonged to either of the above two groups took extreme opposing views in interpreting the Qur'ān and the *hadīth* and dominated the community for a considerable time, *ahl al-ra'y* insisting making decision

[632] Auda, J. *Maqâsid,* p.61
[633] Hallaq, W. B., *A History*, p.15

entirely based on rational approach whereas *ahl al-hadīth* giving strictly literal interpretation of the texts. These new developments as seen earlier, led many jurists to examine the issues surrounding the emergence and rapid expansion of these extreme ideas and came out with a system or systems to prevent the society from falling into chaos. Their efforts had limited success and the groups' ideas had long lasting impact on the development of legal methodology. In those troubled times what was needed was a legal methodology or a system which in the circumstances would take into account the practices and methodology of the Prophet, his companions and their immediate followers.

6.2 Emergence of subsidiary sources

The first of the prominent jurists to develop such a system which withstood the test of time, as seen in the last chapter, was Imam Abū Hanīfah and the source methodology attributed to him, *istihsān.* It was indicated in that chapter that *istihsān* is defined in terms of juristic preference. It is generally accepted by many scholars[634] that while juristic preference is also similar it is not equal to the doctrine of equity under English legal system.

The significance of *istihsān* to our thesis is not only because *istihsān* is a most versatile and flexible methodology so that it can find solutions in terms of the higher objectives of the Sharīāh. It is argued[635] that *istihsan* is a methodology fulfilling a purpose of Islamic law.

6.2.I. Emerging *istihsān* amidst the critics

There was, however, some opposition to the methodology as originally proposed by Imam Abū Hanīfah. The strongest criticism came from the traditionists, ulama al-athar and the most vociferous of the opponents was Imam al-Shāfi'i whom

[634]Hallaq,W.B., *A history,* p108, Kamali, H. *Principles of Islamic Jurisprudence*,(Cambridge: The Islamic Text Society, 2003), p.323 and Philips, A A B., *The Evolution of Fiqh* (Riyadh: International Islamic Publishing House, 2005), P. 96 among many others.
[635] Kamali, H., *Equity and Fairness in Islam* (Cambridge: The Islamic Texts Society, 2005), p.5

Hallaq describes as having made 'a scathing criticism against early Hanafites'.[636] Hallaq argues that *istihsān,* juristic preference has been used on the basis of necessity, *darūrā,*[637]one of the three well recognised principle categories under the higher objectives of the law, *maqāsid al-sharī'ah*.[638] *Istishsān* is being applied not merely as a supplementary source but also as a principle of *maqāsid* and the great jurist Imam Mālik defines *istihsān* in terms of nine tenth of knowledge, and his own theory '*istislāh'* was considered by great scholars to be 'simply a more mature, advance form of the Hanafite *istihsān*'.[639] Apart from the Hanafi and Maliki schools others like the Hanbali, Ibādi and Mu'tazila schools accepted it as a source of legislation.[640] Moreover, as Hashim Kamali has eloquently argued, *istihsān* as a jurisprudence covers not only civil transactions *muamalāt* but also worship, strictly religious practices, *ibādāt,* all the rulings of Sharīāh and court judgements, *ahkām.* He affirms that its scope extends beyond even consensus, *ijmā,* and analogical reasoning, *qiyās,* and probably every subsidiary proofs.[641] Coulson has argued that *istihsān* reached an advanced stage in Islamic legal development.[642] It should be clear from the earlier discussion in Chapter three that the methodology of *istihsān* is a useful and effective one. Yet, opposition to the methodology of *istihsān* continues to grow and Bernard Weiss considers it to be a 'controversial procedure'.[643] The criticism levelled at *istihsān* by a few prominent scholars must have at least partly contributed towards the later emergence of other forms of legal reasoning such as reasoning in terms of public interest, *istislāh*, reasoning based on the presumption of continuity, *istishāb,* argument based on textual indicant (*dali*), *istidlāl* and public interest, *maslaha.* Out of these several forms of reasoning, along with *istihsān, maslaha* was to play an important role in the development of Islamic legal methodology.

The next section will analyse how effective was the role of *maslaha*. It is chosen because it forms an important element both in *istihsān* and *maqāsid al-sharī'ah.*

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636 Hallaq, W.B., *A History*, p.107
637 Ibid., p.110
638 Al-Raysuni, A. *Imam al-Shâtibî's Theory,* p. 108
639 ibid., p. 50
640 Auda, J. *Philosophy,* p.122
641 Kamali, M.H., *Equity,* p.3
642 Coulson, N. J. *A History,* p. 40
643 Weiss, B.G., *The Spirit of Islamic Law* (Athens: University of Georgia Press, 2006), p. 86

6.2.II. Suitability and relevance of *maslaha*

What is the significance of *maslaha* in relation to *istihsān* or *maqāsid al-sharī'ah*? As we shall see, the connection is very deep and its principles are well rooted in the concept of benefit or interest, common to *istihsān* and *maqāsid.* Furthermore, not necessarily in name alone but in its meaning too, it has its origin since the time of the companions of the Prophet in guiding them to establish appropriate legal rulings. Al-Ghazālī, for example, has pointed out[644] that '…it has been determined beyond any doubt that they (the companions of the Prophet) relied on interest' (meaning human interest).

6.2.III. *Maslaha* as prelude to *maqāsid*

It will also become clear that the concept of *maslaha* formed an important basis on which the theory of *maqāsid* was advocated by some of the eminent jurists who emerged after the time of the four great imams of leading *madhabs.* However, there is also a difference in meaning between these two terms. *Maslaha,* as Tariq Ramadan reminds,[645] is meant to safeguard the five principles, objective (*maqāsid*) of the law (*shāri*). The objective (*maqāsid*) is what is intended by creation, to seek benefit and avoid harm.

The term *'maslaha'* must be distinguished from '*maslaha mursala'* referring to unrestricted public interest not mentioned in the text and from *mu'tabarah* which are in some way rooted to textual sources, and finally those discredited by text, *mulghā.* However, it is also argued[646] that *maslaha* is no different from *istislāh*, consideration of public interest. Although the term *maslaha mursala* is not mentioned in the primary sources, it has allegedly been used by Imam Mālik

[644] Al-Ghazâlî, A. H.*, Al-Mankhul min Ta'liqat al-Usul*, 1st end, (ed. Muhammad Hasan Hitu (Damascus: Dar al-Fikr, 1980) p. 353 (Trans: Al-Raysuni, A. *Imam,* p. 45)
[645] Ramadan, T., *Western Muslims and the Future of Islam*, (Oxford: Oxford University Press, 2004), p. 39
[646] Kamali, M.H., *Principles,* p.351

which has been denied by his later followers.[647] Mālik adopted a method of reasoning based on public interest as long as that interest was suitable, *munāsib* and relevant, *mu'tabar* to a 'universal principle of law' or to some specific text. Therefore, suitability and relevance constituted the conditions necessary for considering the issue of public interest. Khalid Masud argues that traditionally the term *maslaha* was used inconsistently. For example, Imam Mālik and his followers used *maslaha* independently and not as attached to a 'source' of law while others considered it so attached, one group connecting it to the texts and others to *ijmā*. This confusion eventually led *maslaha* to be discussed at two levels, 'with reference to need and effectiveness and with reference to sources.[648]

The notion of public interest, however, appears to be the basis of some of the practices of the companions, their successors and leading jurists, thus showing that under certain exceptional circumstances without any textual evidence the concept of *maslaha* could be introduced. Some of the judicial decisions made by 'Umar ibn al-Khattāb as illustrated earlier in Chapter 4 are clear examples of when and in what circumstances he applied the principles of both *istihsān* and *maslaha*. In the case of contract of *istisna,* a contract of sale for the manufacture and future delivery of an article, many jurists accept this contract on the basis of custom, *urf*, and *maslaha* as valid even though it is against the Islamic law which stipulates the delivery must be immediate and certain. In the case of Imam Mālik, he emphasised the element of public interest by saying that it is valid, 'because the people have need of it'.[649] *Coulson* argues that Māliki legal writings generally emphasised the importance of public interest, *maslaha*, on the maxim that 'necessity makes prohibited things permissible'.[650] The term necessity is no doubt strictly defined. Also we have seen reasoning on the basis of public interest is approved by many if it could be shown that the public interest referred to was suitable, *munāsib,* and relevant, *mu'tabar,* either to a universal principle of the law or to a particular piece of textual evidence.

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[647] Hallaq, W . B., *A History,* p.112
[648] Masud, M. K., *Shâtibî's philosophy of Islamic Law*, Islamabad: Islamic Research Institute, Iinternational Islamic University, 1995), p. 137
[649] Heer, N. *Islamic Law and Jurisprudence* ed. (Seattle: University of Washington Press, 1990), p. 173
[650] Coulson, N .J., *A history,* p. 144

However, there is the possibility that rules may be relaxed unintentionally or otherwise and decisions made which could be contrary to the textual indicants. Ibn Taymiyah, for example expresses some reservation saying, 'use of *maslaha* (in Islamic law) frequently results in the enactment of laws that are not permitted by Allah'.[651] It may be noted in this respect that necessity is frequently used as evidence when the jurist exercises *istihsān*. As Hallaq points out, since necessity is allowed both by the Qur'ān and the Sunnah it is related to *istihsān* and therefore it is 'viewed as legitimised by the revealed texts'.[652]

Imam Mālik approved a person charged with theft to be imprisoned, while his immediate followers found that it would be in order to beat a thief so that the stolen property could be found and at the same time it would serve as an 'example and warning to others'.[653] Mahamassani has argued that according to Imam Mālik for the principle of *al-masālih al-mursala* to be effective it must not only be of public interest but also should satisfy the 'intent of the Sharī'ah'. Subject to these provisions, the principle can be adopted if it fulfils the following conditions. First, the case must be related to a worldly transaction, *muamalāt.* Secondly, it must be in 'harmony with the spirit of the Sharī'ah' and should not be in conflict. Thirdly, the interest referred to must be of the 'essential and necessary type'; essential such as 'preservation of religion, life, reason, offspring and property, or necessary, such as 'betterment of living'. Based on the above analysis he refers to the following examples of cases that are allowed on the ground of public interest (a) taxing the rich to fund the army to protect the nation, (b) punishing the criminal and depriving him of any property acquired through crime and (c) where non-believers in a war who shield themselves behind Muslim prisoners of war for protection, public interest permits those Muslims to be shot so that the non-believers could be fought back if doing so would defeat or force the enemy to back off and protect the whole Muslim community.[654]

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[651] Ibn Taymiyah, Taqî al-Dîn, quoted *in fatâwa*: Trans: Al-Matroudi, A H I. The Hambali School of Law and Ibn Taymiyyah, Conflict or conciliation (Abingdon, Oxon: Routledge, 2006), p. 79

[652] Hallaq, W. B., *Sharî'ah, practice Transformation*,(Cambridge: Cambridge University Press, 2009), p. 108

[653] Mahamassani, S., *Falsafat,* (Leiden: E J Brill, 1961) p. 89

[654] ibid., p. 88

6.3 Usūl al-fiqh amidst new theories

Usūl is the methodology that emerged according to many after *fiqh,* Islamic law which began with the Prophet himself. Although the Prophet and his companions adopted a form of procedure to exercise *fiqh, Usūl al-fiqh* as a structured methodology of Islamic law, is alleged to be attributed to Al-Shāfi'i's treatise, *Kitāb al-Risāla Fi Usūl al-fiqh.*[655].Hallaq considers it to have been designated as such but the compound term made its appearance much later,[656] many [657] centuries after *ijtihād* had been practised. While *ijtihād* itself was being undermined, many principles of *Usūl al-fiqh* were surrounded by complicated technicalities and continued to be controversial. In other words an inductive reading of the textual sources only will give proper understanding of the law, the theme explored by al-Shātibī

Al-Shāfi'ī equating *ijtihād* with *qiyās* was an attempt to limit the exercise of independent thinking and thereby making *qiyās* the ultimate mode of reasoning. These measures led to 'distortion of issues, arbitrariness and spread of spurious materials in the fabric of *Usūl al-fiqh*'. Alwānī calls this 'dictionary based culture' producing 'dictionary oriented interpretation' of the Sunnah and the failure of the *Usūl al-fiqh* to incorporate a system to take into account what Kamali calls 'space-time factor' relating to changes taking place at different places and different time periods, and did not allow the Ulama to take a wider perspective of issues.

6.3.I. *Usūl al-fiqh* in a historical perspective

Historically and in contemporary Muslim societies, legislative and executive functions and judicial decision-making processes have not been influenced to any significant extent by the methodology of *Usūl al-fiqh*. Such as *ijmā, qiyās*, *istihsān* and *istislāh* have neither been adopted nor have made any impact on the

[655] Kaduri, M., Translator of *Al-Shâfi'î''s Risâla, Treatise on the Foundation of Islamic Jurisprudence,(*Cambride: The Islamic Texts Society, 2003), p.21
[656] Hallaq, W.B., *A History*…p.21
[657] Kamali, M.H., *Principles,* p.502

legislative body or other governmental institutions. *Usūl al-fiqh* is sometimes defined in terms of a theory that has to be explored merely as an academic exercise instead of considering it a methodology with a set of principles and a working model which may need to be improved in order to meet the changing needs of society.

By about the fourth /tenth centuries AH/ AC Islamic scholarship was put on hold and a state of *taqlid* set in. When this happened the consequences of the changes did not fail to have an impact on the *Usūl al-fiqh*. *ijtihād* was first discouraged and then abandoned, and then the opinions and views of the schools of law, the *madhhabs,* began to dominate, first giving preference to opinions of one or the other Imam and later restricting the preference to opinion of a single imam or one particular school. As a result of these changing phases, Alwānī in his book, *'crisis of fiqh',* is quoted as saying 'the door to independent legal thought was shut and then barred'. *Usūl al-fiqh,* instead of being used as a method for independent legal thinking, began to be employed to justify *taqlid.*

Insistence on unanimity of consensus on legal principles like *ijmā,* for example, was not very helpful to introduce important rules to meet the changing needs of the times. The tension between the *Ulama* and the jurists on the one hand and the leaders and rulers on the other ultimately led to the religious classes being deprived of any role in the government or in the framing of legislation, and the rulers showing only a grudging interest in what the *Ulama* were saying.

On the *Ulama's* side their dependence entirely on the deductive method of approaching the texts for knowledge has been criticised[658] by Abu Sulayman, who also points out the absence of any empiricism in their works.

6.3.II. New challenges to *Usūl al-fiqh*

Suggestions from several quarters have come for the reform of the *Usūl al-fiqh*.

[658] Abu Sulayman, A. A., *Towards an Islamic Theory of International Relations: New Directions for Methodology and Thought,* (Herndon: International Institute of IslamicThought, 1993),p. 87

Hashim Kamalil, for example, has articulated[659] that if two factors are taken into account the conventional *Usūl al-fiqh* could be improved: first incorporating the Qur'ānic principle of *Shūra*, consultation, into *Usūl al-fiqh* and second making it flexible enough to accommodate the Qur'ānic requirement of accepting the authority of the leader of the community, *ūlū al-amr*. No doubt these two concepts, *Shūra* and *ūlū al-amr* are ingrained in any modern state. However important though these concepts are, they alone may not be sufficient for the proper development of the methodology. It still leaves out, for example, various subsidiary sources of law. Although developed over centuries and serving a useful purpose, these principles sometimes conflict with one another at other times they seem to be duplicating. What would be the position of those principles claimed to be interest or objectively based on the Sharīah, and developed since the earliest time and culminated in Al-Shātibī's theory of *maqāsid al-Sharīah?*

A methodology intended to replace the conventional *Usūl al-fiqh* is proposed by Jamal al-Din Attiyah with five sources of Sharī'ah, i. Transmitted proofs, including the Qur'ān and Sunnah, ii. Ordinances of the *ūlū al-amr*, including *ijmā* and *ijtihād*,, iii. Status quo in conformity with (i) and (ii) including custom, *urf,* and presumption of continuity, *istishāb,* iv. Rationality, *aql,* where needed in routine governmental administration and v. Original absence of liability, *al-bara'ah al-asliyyah*, absence of liability for acts not expressly prohibited. Hashim Kamali appears to consider Attiah's proposal is reasonable, subject to certain conditions which he specifies in his book, *Principles of Islamic Jurisprudence*[660]. However, there are still issues that need clarification, issues, mentioned above, such as what would be the position of some of the tried and tested principles of the present subsidiary sources of law which have been developed over several centuries, and of the principles of *maqāsid* formulated over a similar period?

One of the criticisms levelled against *Usūl al-fiqh* is that it is very much influenced by Hellinistic thought and therefore some of its principles are built

[659] Kamali, M.H., *Principles,* p.508
[660] Ibid., pp.508,509

around logic developed by alien cultures. For example, Hallaq points to two features of *Usūl al-fiqh* namely, epistemology and logic, the second of which originated in Greece. A further question posed is: since the revelation through the Qur'ān contains only part of God's knowledge, how certain or probable is it that the law of God operates in a given case when a jurist, who only interprets and does not legislate, gives an opinion in that case? Similarly, why is it a judge's ruling once assumed certain is irrevocable and cannot be reviewed?

No doubt these issues are causes for concern. Regarding the question of logic originating from Greece, one may suggest that as long as their use does not conflict with the principles of Sharī'ah many would consider that there cannot be any harm in them. Indeed, Muslim history is full of instances where over the centuries they have accommodated many cultural practices and principles as long as they do not conflict with Islamic principles. Concerning the issue of a judge's ruling one may suggest that until the issue of reviewing a judge's decision by a higher court is debated and resolved by consensus, a judge is assumed to make a decision bona fide, taking all the facts and the law into account, and with his best effort reflecting the probable intent of God in the circumstances.

Hallaq further argues that *Usūl al-fiqh* both diachronically and synchronically is not a monolithic theory. The theorists who contributed towards its development were selective both in the particular area they chose and in their emphasis and de-emphasis. Accordingly, *Usūl al-fiqh* as a whole consists of parts, each of which has distinctness depending on the type of ideas, and the jurists who contributed to it. Consequently a proper understanding of the principles of *Usūl al-fiqh* inevitably requires a deeper understanding[661] of its various parts which provide different solutions[662], a task not unachievable but not an easy one. So what is the alternative?

[661] Ramic, S. H., *Language and the Interpretation of Islamic Law*, (Cambridge: The Islamic Texts Society, 2003), p. 3

[662] Mumisa, M.*, Islamic Law, Theory & Interpretation. (*Maryland: Amana Publications, 2002), p. 183

6.3.III. Conflicting reform proposals

Over the decades and centuries jurists and scholars have come out with various theories. There were two main reformist trends of thought which Hallaq calls[663] 'religious utilitarianism' and 'religious liberalism'. Since our research interest does not go as far as delving into these trends, we simply highlight some of the main ideas behind these trends and identify some important figures who articulate those ideas.

Two among the religious utilitarianism were the notable reformers of the early twentieth century, Muhammad 'Abduh (d.1905) and his disciple Rashīd Ridā (d.1935). Although 'Abduh is a '…more important historical figure' his contribution was more to theology, through which he laid the foundation for legal ideas. 'Abduh's emphasis was on reason compared to revelation and for him coherence of religious doctrine must be attested by reason[664]. Because of this and his insistence that Muslims should concern themselves more on this world than on the hereafter and they should seek material progress for a better life, his legal theory did not go down well with most of the jurists. However, Hallaq argues that his theology, which fundamentally goes against the generally accepted principles, gave rise to a host of theories ranging from the religiously conservative to the more or less secular.

On the other hand Rashid Ridā's approach to law reform was from another angle. Rashid Ridā used the base of 'Abduh's reformist theology to formulate his own reformist theories of jurisprudence and constitutionalism. His legal reasoning, also derived from 'Abduh's ideas, is based on natural law and has *maslaha*[665] as

[663] Hallaq, W .B., *A History*…214-254

[664] Kerr, M .H., *Islamic Reform, The Political and Legal Theories of Muhammad 'Abduh and Rashid Rida,* (Los Angeles: University of California, 1966), p.103-152. Those interested in making further references to Abduh's legal theories may find Malcolm Kerr's account in these pages quite interesting.

[665] Ibid.,p.187 – 204 – Malcom Kerr gives quite a detailed account of Rida's legal ideas based on maslaha on these pages and from pp. 205-208 some account of Rida's reaction to secularism.

the guiding principle, which as Hallaq argues was 'somewhat controversial among the traditional jurists'. For Ridā pure Islam meant the Qur'ān, the Sunnah of the Prophet and the consensus of his companions. Furthermore, all the legal doctrines formulated by the jurists must be left out because of the complex technicalities and of the difficulties in the comprehension of principles. These positions held by Rashīd Ridā were not acceptable to the community at large. His doctrine, it is argued 'amounts to a total negation of traditional theory.'

Various other theories have been put forward since then. The Egyptian scholar 'Abd al-Wahhāb Khallāf (d.1956) is a representative example among those whose formulation ranged from traditional theory to the reformist ideas of Rashīd Ridā. The Moroccan scholar 'Allāl al-Fāsī (d.1973) who belonged to the group, presented a form of theory based on natural law. The Sudanese intellectual and politician Hasan Turābī, the last of the three, continued to advocate Ridā's theory but his was of a more general nature.

The second category of reformers whom Hallaq calls the religious liberalists are those whose premise is that in order to understand the relevance of a revealed textual sources to modern society they should be interpreted not literally but in terms of the spirit and intention behind those texts. It is argued that only a small number of reformers adopted their approach and there were marked differences too in their methodologies. Among them include Egyptian jurist, academic and legal professional, Muhammad Sa'īd 'Ashmāwī, Pakistani scholar and reformer Fazlur Rahman (d.1988) and Syrian engineer Muhammad Shahrūr.

The theories of the religious utilitarians like Ridā, Khallāf and others have made some impact in that they have been at least partially implemented. Their success is said to be not necessarily due to what they represent but more due to the prevailing legal trend of the times. Whereas the theories of religious liberalists such as 'Ashmāwi, Rahman and Shahrūr faced stiff opposition from strong religious movements and failed to have any real impact. What other reasons are there why the theories mentioned above have not been successful in having the desired impact or bringing about noticeable change in the legal structures? The traditional methodology of *Usūl al-fiqh* insists on textual proof of any legal

doctrine in order to validate and confirm that it is in accordance with revelation.

The doctrine of *Usūl al-fiqh* is deeply ingrained in the minds of the jurists of the classical tradition and, for good reason, it is not very easy to penetrate their thought process, unless what is presented is comprehensive and thought provoking. The idea or the philosophy of *maqāsid*, claimed to be in the form of a fully fledged legal theory by Al-Shātibī is one which has attracted much attention. Indeed, many of the reformists mentioned above were in one way or another influenced by al-Shātibi's theory. *Maqāsid al-sharī'ah*, based on the aims and objectives of the Sharī'ah as understood by an overall inductive reading of the texts, is believed to go some way in order to satisfy the requirement of textual proof. Therefore, the success or failure of a theory very much depends on to what extent it complies with that fundamental requirement[666] and in addition on how effective is the new methodology compared to the existing one in meeting the challenges of the time.

6.4 Maqāsid challenges old methodology

In recent times, with the principle of *maqāsid al-sharī'ah* receiving greater attention from various scholars and jurists, it is argued that two schools of thought have emerged on how best to accommodate the principles of *maqāsid*. One school believes that *maqāsid* must replace the existing methodology and the other considers it is more appropriate to incorporate it within the methodology of *Usūl al-fiqh*. For example among the modern scholars, Ibn Ashur and his commentators call for an independent system under the principles of *maqāsid al-sharī'ah.*

6.4.I. Methodology conflicts with philosophy

Maqāsid al-sharī'ah poses some difficulties for those advocating that it should replace the existing methodology of Islamic law which has been developed over

[666] Janin H and Kahlmeyer, A., *Islamic Law, The Sharî'a from Muhammad's Time to the Present*, (London: McFarland & Company, Inc., Publishers, 2007), p. 176

several centuries. The main issue in this respect is, as eloquently argued by Hashim Kamali[667], *maqāsid*, is more of an Islamic legal philosophy rather than a legal methodology: *maqāsid* is purely and simply a statement of goals and objectives of the Sharī'ah; such as the protection of religion, life, intellect, family and property which, as we have seen, constitute the most important elements of *maqāsid*. Yet, it does not have a methodology or 'an operational formula of its own' which could be considered different from *Usūl al-fiqh*.

Usūl al-fiqh, on the other hand, together with its variety of sources accompanied by a number of principles, has a methodology which has been well developed over several centuries, as we witnessed earlier, with contributions to its corpus from eminent jurists and scholars. However, one must take note of Ibn Khaldun's observation that the 'science of *Usūl al-fiqh* founded by al-Shāfi'i', later led the theologians to include speculative methods into jurisprudence.[668] Although the practice of independent reasoning, *ijtihād*, was once the norm, this may not now be widely practised today. Yet, *ijtihād* is a well established procedure which can be easily and quickly revived. 'The necessary standard for making *ijtihād* is the subject of agreement and will neither increase nor decrease'. [669] Furthermore, subsidiary sources like *istihsān*, *maslaha*, *istislāh, urf* etc., as our research showed, all no doubt have weaknesses and limited application of their own. Nevertheless, all of them have proved their usefulness. In these circumstances the question has been raised [670] whether it would be possible to merge the two systems so that it could be beneficial to the community rather than having an independent system of *maqasid* which could lead to controversy and conflict as happened in history between *ahl al-ra'y* and ahl *ahl-hadīth.*

The question, nevertheless, has always been how best to merge one with another especially when *maqāsid*, as its advocates claim, is a fully fledged comprehensive

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667 Kamali, M.H., *Principles,* p.516

668 Ibn Khaldun, *Al-Muqaddima*, Vol. 3, (Beirut:Maktabat Lubnan, 1970), p.21-23 (Jaques, R K., *Authority and the Transmission of Diversity in Medieval Islamic Law*,(Laiden: Brill, 2006), p.27

669 Dutton, Y.*Original Islam, Malik and Madhhab of Madina,* (Abingdon: Rautledge, 2007),p. 27

670 Kamali, M. H., *Equity,* p.120

theory but, as has been pointed out, without a methodology, while *Usūl al-fiqh* has a methodology but not a comprehensive fully fledged theory.

6.4.II *Istihsān* and equity re-examined

The suggestion of the merger of the two is based on the premise that *istihsān*[671] may be considered as an intermediary to bring together the methodology of *Usūl al-fiqh* and the philosophy of *maqāsid al-sharī'iah*. It is here we may look closely at our comparative analysis done earlier with *istihsān* in the last chapter and see if the developmental process of equity in the English legal system could throw some light. Common law in the English legal system and Sharī'ah law in Islamic legal methodology, consisting of the Qur'an and Sunnah of the Prophet, have one thing in common and that is they have accommodated subsidiary sources. Equity is supplementing common law, and *istihsān* and other subsidiary sources supplement the Sharī'ah law. One important difference between the two systems is that in the English legal system, after custom ceased to be a source of law in any significant way, equity has been the sole subsidiary source with discretionary power of judicial decision making. In Islamic legal methodology, though, several subsidiary sources have emerged each with its own principles and procedures.

6.4.III. Equity in historical perspective

Historically, the development of equity, its doctrine, court system, administrative machinery and its overall methodology were not by any means smooth or straight forward. There were periods of calmness and tension between the common law and equity judges, separation and unification of the two systems, and even after unification old ways of thinking still persist. In Islamic legal methodology, theoretically there should not be any conflict or tension among judges or the court system because they administer justice which is neither 'religious' nor secular but just and fair both in reality and in terms of the Sharī'ah. But the reality at the national level of almost all Muslim countries is that there is a division of both the court system and the legal profession[672] administering two different streams of

[671] Kamali, M.H., *Equity,* p.120
[672] Hallaq, W B., *A History,* p.260

law, 'Islamic law' and 'national law,' or having some similar names.

The most important method by which English law developed was through customs and the decisions of judges, and equity as a source of law remained separate with the Court of Chancery under the authority of the Chancellor. It is argued that the reason for remaining separate was that 'substantive rules', 'remedial strategies', 'enforcement techniques' and 'procedural' methods of equity are different from common law.[673] Although the purpose of law is to achieve justice and equity yet it is argued that it is common knowledge that these aims of the law are not necessarily achieved and therefore often criticised for not producing an outcome which is fair and equitable. The common law of England faced a similar situation and by the fifteenth century it was becoming 'excessively rigid…and out of harmony with the needs of society.' Sarah Worthington argues that the Writ system also was partly responsible for the rigidity of the common law. Until about the fourteenth century the judges used a certain amount of discretion, but since then a rigid approach prevailed.[674]

The Chancellor was the first appointed senior judge in connection with his function on equity and was called the keeper of the King's conscience, because he made his decision in terms of natural justice and fairness and what was 'right' on behalf of the King in the particular circumstances of the case. Sir Anthony, Justice of the High Court of Australia confirms that 'perhaps the overriding aim of all equitable principles is the prevention of unconscionable behaviour'.He reiterates that equitable doctrine 'has its roots in natural law origins and in the goals of justice and fairness… and its broad range of discretionary remedies…'[675] and even when he considers a document is legally binding, the Chancellor would want to ensure the 'intention' of the parties. Furthermore, even when a claimant has successfully proved all the elements of the case, equity will not act contrary to public interest.[676]

[673] Worthington, S., *Equity*, pp.13,16
[674] Ibid., p. 10
[675] Finn, P D., *Essays in Equity*, (North Ryde: Law Book Co. Ltd., 1985), p.242
[676] Worthington, S, *Equity*, (2nd ed. Oxford: Oxford University Press, 2006), p.32

Until about the fourteenth century there was no real tension between the Chancellor and common law court judges. During the fourteenth century everything changed. Common law judges surrendered their discretionary powers saying there should be no more reliance on 'conscience' and opted for rigor juris. They were reminded that 'you must not allow conscience to prevent your doing law'. [677] Accordingly, two distinct set of courts co-existed to develop and administer the two different streams.

During the Tudor and Stuart periods, 'number of distinctive characteristics' occurred: separation of law and equity strengthened; a number of 'lesser Chancery' Courts developed, but did not last long; until 1529 when Henry the VIII appointed Sir Thomas More, Chancellors were ecclesiastics not learned in common law, but from then onwards equity was not exclusively under the direction of ecclesiastics as sometimes lawyers were appointed Lord Chancellor. By the end of the period Chancellors were 'invariably lawyers' rarely ecclesiastics. Equitable doctrine 'really' emerged as 'such' and they examined the doctrinal basis on which the Chancellors dispensed their remedies. What we observe, among other things, for the purpose of this survey is that the development of equitable principles to meet the political, social and economic demands of the times.

Apart from what is stated above, one factor that concerned the equity lawyer more was the 'mounting disputes between the common law and the Chancery'. Common law saw their supremacy challenged. In a famous case, the *Earl of Oxford's case (1615),* the equity court granted an injunction restraining the plaintiff from executing an unconscionable judgement obtained at law. It led the 'celebrated confrontation' of Sir Edward Coke, as Lord Chief Justice, and Lord Ellesmere as Chancellor. At the Court of Chancery, the Chancellor 'asserted' the jurisdiction granted at the equity court; and confirming Lord Ellesmere's thought, James 1 held him correct saying, 'that when a judgement is obtained by

[677] Meagher, R P., Heydon, J D., Leeming, M J., *Equity Doctrine and Remedies*, (4th ed. hatswood: Butterworths LexisNexis, 2002) , p. 6

oppression, wrong and bad conscience, the Chancellor will frustrate and set it aside not for any error or defect in the judgement but for the hard conscience of the party'. Since then 'equitable doctrine remained unchallenged'. But dissatisfaction continued and the common law lawyers introduced a Bill to reverse the *Earl of Oxford's case* but the Parliament failed to pass it.[678]

The next period, from the Tudors and Stuarts down to 1873 was one of 'systematisation' of equity, mainly due to great Lord Chancellors, Lord Nottingham (1673-82), Lord Hardwicke (1736-56), Lord Thurlow (1778-83 and 1783–92) and most famously Lord Eldon (1801-06 and 1807-27), the most prominent among them. Equity developed positive rules. It began to have principles just as common law: systematically classified trust; developed modern rule against perpetuities; outlined doctrine of restitution; it invented the equitable doctrine governing contribution between co-sureties; it 'invented the doctrine that, in equity, covenants could run with the land when they did not at law; and in general succeeded in making equity what in fact it is today'.[679]

At the close of this period Equitable jurisdiction, much enlarged, included the following:

a. introduced several jurisdictions connected with the forms of property: Married women's separate estate; the whole law of mortgages; doctrine of priorities of estates and interests.
b. In contracts: developed injunction, specific performance.
c. In torts: introduced injunction
d. Deceased estates: satisfaction, performance etc.
e. Relieving rigidity of law: penalties, forfeiture, fraud, undue influence, accident and mistake
f. guardianship of infants: management of property of lunatics

In addition, it was vested with the common law jurisdiction. Between 1600-1900 three heads of jurisdiction were conferred on Chancery judges: bankruptcy,

[678] Meagher, R.P., and others, *Equity,* pp. 7,8
[679] Ibid., pp .8,9

companies and lunacy.[680]

We saw in the last chapter Maitland emphasising that common law and equity must not be thought of as two opposing systems nor should equity be considered as self-sufficient. It must be remembered, he reminded, that equity presupposed the existence of common law which is a self-sufficient system. Common law in spite of its short comings has served well by protecting many of our rights and if it ceases to exist, he warned that there would be 'anarchy.'[681] What is being made clear here is that equity acts only as a supplement to common law just as *istihsān* can only supplement Islamic law.

Before the Judicature Act 1873 all branches of equity were classified under three headings: the exclusive, concurrent and auxiliary.

Exclusive – self explanatory
Concurrent – power possessed by both the courts of equity and , for example, specific performance, rectification and partnership
Auxiliary - Court of equity entertaining jurisdiction in order to enable parties claiming legal rights to establish those rights more conveniently and effectively in a court of common law. For example, equity will grant relief to prevent irreparable injury pending a decision at law. But the distinction is not absolute and there are often overlaps.

6.4.IV. Changing phase of equitable jurisdiction

The Judicature Act 1873

The most famous changes concerned the 'fusion' of the administration of law and equity, and the abolition of the old courts and dividing the new High Court into five divisions: Common Pleas and Exchequer (both abolished in 1880), Chancery, Queens Bench and Probate, Divorce and Admiralty. Although business was classified for distribution between divisions, no party could start anew

[680] Meagher, R.P., and others, *Equity*, p.9
[681] Maitland, F W., *Equity*, pp. 18-19

because ‘he had come to the wrong judge’.

Section 24 of the Act stipulates that in every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court of Justice and the Court of Appeal, respectively according to the following Rules:

i. If the party would have obtained relief in any equity court before, every judge should give the relief which ought to have been given before.[682]

An interesting point included in sub section (11) side note states, ’Rules of law upon certain points’ and concluded:

ii. ‘Generally in all matters not herein before particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law the reference to the same matter, the rules of equity shall prevail’. It gives supremacy to rules of equity compared to common law rules but it only refers to common law rules being overridden but not statutory rules.

The intention of the Judicature Act in a letter from one of it draughtsmen, Sir Arthur Wilson, reported in (1875) 19 SO1 Jo 633-4 and as stated below shows clearly the role of equity under the Act:

‘The relation of equity to common law shortly is this: First it recognises and enforces rights and duties of which common law takes no notice. The two do not clash, but one takes up the matter where the other leaves it off. The common law courts give the trustees every facility for protecting the property and all their dealings with third persons; but if the husband or wife, or children wish to enforce their rights they must go to the court of Chancery. So it is in other cases. Hence the rights of the trustees as representative of the whole group of persons interested are called legal rights and the individual rights of several beneficiaries are called equitable rights…’[683]

[682] Meagher, R P., and others, *Equity,* p.45
[683] Ibid., p.51

It is argued that equity '…corrected, supplemented and amended the common law. It softened….and provided remedies where at law they were either inadequate nor nonexistent'[684]. Equitable jurisdiction of what is characterised as of enormous importance comprise the following:[685]

a. Introduced and developed trust law
b. Dealing in contracts that are not available under the common law
c. Avoiding the inflexibility of the law and allowing actions for fraud, forgery etc
d. Giving remedies unavailable at law. For example, injunction or specific performance
e. Development of the equitable action of account which are more flexible and beneficial instruments than at common law.
f. Giving remedies where it existed in theory but not in practice, for example local rebellion, violence etc
g. Granting certiorari against inferior equity courts.

The Court of Chancery and the common law courts were not merged in one High Court until 1875, and law and equity began to be applied indiscriminately in all courts. Yet, both systems of law were not altogether 'fused' as such and the lawyers still 'think in terms of common law and equity'. The principle of *istihsān*, however, along with the Sharī'ah law began to be applied during the time of the Prophet himself, and remains a separate and independent subsidiary source among many others. We could see many similarities, particularly, in matters of substantive law, if not so much in developmental and procedural matters.

By the eighteenth and nineteenth centuries when the English Parliament became strong, Acts of Parliament were the main source of new laws in England. Under the early Islamic law, although there were no similar Acts of Parliament as such, during the time of the Prophet as the Messenger of God and head of the State under the Madinan Constitution[686] his Sunnah became absolutely binding. With

[684] Meagher, R P., and others, *Equity,* p. 3
[685] ibid., p.5
[686] Ramadan, H .M., *Understanding Islamic Law from Classical to Contemporary,* (Oxford: Rowman & Littlefield Publishers, Inc., 2006), pp. 205-208

the passing away of the Prophet, the Caliphal edicts of the first four Caliphs, although not as absolutely binding as that of the Qur'ān and the Sunnah of the Prophet, nevertheless became highly respected source of law.

In Islamic legal methodology, just as the Qur'ān and the Sunnah of the Prophet form the primary or the main source of law, the *qādīs* and jurists played an important role in interpreting this main source. In the English legal system Acts of Parliament were at first the main source of new law while judicial decisions continued to be significant not only in interpreting Parliamentary Acts, Statute law, but also reviewing and differentiating judge-made law, legal precedents set by judges. Difficulties encountered in interpreting Parliamentary statutes are shown from an apt and revealing quote by a king of England, Edward VI, referred to by the Renton Committee on the preparation of legislation in a report published in 1975. Edward VI said, 'I would wish that …superfluous and tedious statutes were brought into one sum together, and made plain and short, to the intent that men might better understand them'. This report also indicates the importance of subsidiary sources of law, whether it relates to English or Islamic law, being compiled into one whole concise text easily understood by all.

When it comes to interpretation, it is argued that the tendency now is 'towards a *purposive approach'* to law (italics ours). This is somewhat similar to what the Muslims have advocated since the earliest times with respect to the purposive or *maqāsid* based interpretation of the primary sources. Interpretation in the English court system, Martin argues, is left to the individual judges and it is 'possible that one judge will prefer the literal view and another could form the opposite conclusion…the purposive rule'. In Islamic legal methodology, too, this approach of literal or purposive interpretations by the *qādīs* and jurists have not been uncommon since the classical period although the tendency has been shifting since recent times more towards purposive, objective or *maqāsid* based interpretation of the textual sources.

Since Britain became a member of the European Union it has been subscribing to European Union law and when it comes to interpreting the Union law, the courts 'must interpret it in the light of the wording and the purpose of the European law'.

Here again the emphasis is that when interpreting text the purpose behind the text must be taken into account just as it has been emphasised since the time of the Prophet and his companions, particularly, the second Caliph 'Umar ibn al-Khattāb.

As we analysed in the previous chapter, certain customary practices known as general customs and local customs became part of English law. When judges selected the best general customs other judges applied them and eventually they were used throughout the country and became the 'common law' of the land, the unwritten law. These general customs have all been absorbed into legislation and they do not constitute a source of law anymore. Whereas, with regard to local customs, although they do not form part of the law, a judge can decide whether particular customs are enforceable at law.

6.4.V. *Istihsān*/equity – consolidation of principles and doctrines

Although there is no parallel unwritten law in Islamic legal methodology, selected customary practices were incorporated into Islamic legal methodology from the time of the Prophet himself. As we analysed in Chapter 5, *istihsān* is generally described as juristic preference but in practice it is a method aimed at achieving fairness in judicial decision -making within the aims and objectives of the Sharī'ah. Equity, an important subsidiary source within the English legal system, as we examined earlier, carries the meaning 'fairness' and developed because of 'problems' in the common law. As noted earlier the purpose of the law is to achieve justice and equity but it is common knowledge that these aims of the law are not necessarily and always achieved and therefore the law was often criticised for not producing an outcome that is fair and 'equitable' and as a result the Court of equity was developed.

However, it could also be argued that equity emerged and was developed because of the changing needs of the society and the strict rules of the common law which made it impossible, at times, to provide judgements which would be fair and equitable in the common law courts. An inductive study of the common law,

even if it does indicate a clear purpose or aim of achieving 'fairness' in judgement, its strict rules prevented the courts from developing the machinery the Court of Equity was later able to develop. That need was thankfully later fulfilled, albeit slowly, and the English legal system since the Judicature Act of 1873, with the common law courts and the Court of equity together now fulfil the 'unwritten' purpose of law: to provide judgement which is fair and equitable. Since then within a relatively short period, as we traced in the last chapter, there has been improvement in the affairs of the Court of equity, its doctrines, procedures and the volume of cases being heard.

In Islamic legal methodology, because there are variety of subsidiary sources all based on somewhat different principles and methodologies, or because of the many rules of procedure, they may have continued to operate in their separate ways. On the other hand equitable principles which were first initiated and applied at the discretion of the Chancellor to provide just and fair judgement have since developed into a substantive law, incorporated by statute, uniformly applied and enforceable by the court system. Yet, the judges still have an element of discretion, but for the most part what law could be is fairly clear through well established principles, developed under equitable doctrine, statutory guidance and case law on equity.

In the case of primary sources of Islamic legal methodology, however, they were not subject to strict rules to the extent that they could not be interpreted to derive rules applicable to the changing needs of the society. It is universally accepted that the Sharī'ah contains both general laws which are meant to be interpreted and applied according to changing needs and particular laws which are not subject to interpretation and meant to be for all times. The inductive reading of the Sharī'ah on the other hand, as indicated, is based on human interest and aimed to bring benefit and alleviate harm. Accordingly, the subsidiary sources including *istihsān* were developed to interpret those general laws of the Sharī'ah and derive rules that are fair and equitable and therefore fulfil the intent of the Lawgiver. But unlike in the case of the English legal system, which officially and by statute incorporated the principles of equity and fairness into a unified system of equitable jurisdiction within the overall legal methodology of the nation, *istihsān*

together with the other subsidiary sources continue to remain independent and on the periphery of national legal systems. They have not been consolidated and neither have they been assimilated nor integrated as a unified system into the legal methodology so that the principles underlying the subsidiary sources could be easily and universally recognised and uniformly applied by the court system.

Integrated method produces uniformity of procedure leading to easy identification of both similar and dissimilar cases so that they can be treated accordingly. On the other hand when both exist separately, application of rationality or making a distinction between similar and different cases become that much more difficult. It is argued that integration '…seeks to ensure that legal developments are, as far as possible, coherent, principled, rational and properly directed to meet the underlying policy objectives.'[687] What is required for justice and fairness is a legal system which provides an easily identifiable set of laws. On the other hand a system having multiple forms of subsidiary sources of law with overlapping and supplementary principles and methodologies may lead to injustice and unfairness.

The practice of developing and administering equitable jurisdiction in one court, and providing equitable justice by one judge taking into account the various equitable principles, eventually brought about a unified system. This system seems to provide easy access to equitable law and greater awareness of what that law is both by lawyers and their clients. This process of consolidation and unifying need not prevent the jurists and scholars holding a diversity of views contributing to the development of the law in a harmonious manner. On the other hand, for example assuming that the Islamic legal methodology has continued to develop without hindrance and at national level, (which it was not) wouldn't it then be more likely that there would be ever increasing complexity of principles and ideas developed by different jurists of different persuasions and of different schools? In that situation would it not have led leading jurists to raise a similar voice to that of Edward VI as we saw earlier calling for all the subsidiary sources to be 'brought into one sum together, and made plain and short the intent that men might better understand them'?

[687] Worthington, S., *Equity*… p.321

6.5 Towards revival of Islamic legal methodology

Having considered the various issues surrounding the Islamic legal methodology, it is suggested first, that in spite of the difficulties, the methodology as a whole could still be effective provided changes could be made to its constituent parts. Secondly, in principle, the theory or philosophy of *maqāsid al-sharī'ah*, if properly constituted and methodically applied, could overcome the shortcoming of subsidiary sources of *Usūl al-fiqh*. Thirdly, as Hashim Kamali points out, *Usūl al-fiqh* needs to consider accommodating the Qur'ānic principles of consultation and consensus, *shūra,* and, not far removed from this principle, the Qur'ānic statement requiring the acceptance of the authority of the head of the community, *the ūlū al-amar*. This will necessitate not depending entirely on private *Ijtihād* but depending necessarily so in the contemporary world on the decision-making process of a body, *Shūra* of elected representatives, *Ulamās* [688] *,* scholars, specialists of particular fields etc. It is further suggested by a highly distinguished former academic, judge, international lawyer and Vice-President of the International Court of Justice at The Hague, C G Weeramantry[689] that the *shūra* can consist of two houses, *majlis i Aam* and *majlis ikhas*, one consisting of elected representatives and the other by the scholars and experts. Considering these factors and others indicated earlier, the following steps if taken may lead to the provision of a better service in terms of the objectives of the Sharī'ah.

First, *Maqāsid al-sharī'ah*, with a view to eventual accommodation into *Usūl al-fiqh,* must first be integrated via an intermediate medium such as a subsidiary source of law.

Secondly, *Usūl al-fiqh* needs to integrate the Qur'anic principle of consultation and consensus together with provision to accept the authority of the head of a community *ūlū al-amar*. It should also stipulate the role of *Usūl al-fiqh* in its

[688] Iqbal, M., *The Reconstruction of Religious Thought in Islam*, (Lahore: Sh. Muhammad Ashraf, 1962), p. 176

[689] Weeramantry, C G., *Islamic Influences on International Philosophy and Law*, (Ratmalana: Sarvodaya Vishva Lekha, n.d.), p. 47

relation to statutory laws passed by the legislature.

Thirdly, the subsidiary sources of law which complement one another and sometimes compete with another may need to be streamlined and consolidated.

Fourthly, the *maqāsid* and the subsidiary sources of law must all be brought together and integrated as a whole into *Usūl al-fiqh* and must have an Islamic legal methodology which at once will be a well structured system where all its parts could easily be identified, reasonably understood and conveniently accessed by all including the jurists, lawyers, clients and the public.

However, integrating all the subsidiary sources of Islamic law together with *maqāsid al-Shari'ah* through a subsidiary source into one unified system which is both a subsidiary source and an interpretative method is by no means an easy task. But considering the mammoth efforts made by the earlier jurists and scholars beginning with the first four Imams who formulated, often single-handedly, legal methodologies, theories and philosophies, and subsequent innovative ideas towards refining and improving the legal methodology, the task is not an unachievable one. The amount of juridical materials and principles developed over the years, no doubt, may make it that much more difficult. Yet, there is no other option available. Only by such integration and having a unified subsidiary source of law which could eventually be incorporated easily into the legislature and form part of the state legal system, could any real and substantial progress towards an effective and relevant Islamic legal methodology emerge. Hallaq reminds that '… neither Sharī'ah nor *fiqh* can ever be restored, re-enacted or refashioned (by Islamists or Ulama…) without the agency of the state… In the modern state, politics and state policy mesh with law…'[690] It is inevitable that through the process of unification some sections of the theories or certain principles that are redundant, unnecessary or ineffective may need to be replaced and revised. Some principles may have to be re-evaluated or substituted. But, at the end of the exercise, the methodology arrived at will be less complex, easily

[690] Hallaq, W B., *Sharî'ah, Theory, Transformaion,* (Cambridge: Cambridge University Press, 2009), p. 549

identified and clearly understood while becoming more effective, and thereby justice will not only be done but it will be seen to be done and done fairly and equitably.

Therefore and finally, in the first instance at least one Muslim state needs to or must be persuaded to incorporate into its statute book the integrated and unified system of *Usūl al-fiqh*, the Islamic legal methodology so that its laws are applied not as 'personal law' alone at a personal level but at all levels of society.

From this research study and the comparative analysis it would seem necessary to do further study into some of the aspects mentioned above before the eventual implementation of those steps in order to have an effective well structured legal methodology: a methodology functioning at national level in order to meet the needs of the contemporary society while complying with the rules and fulfilling the aims and objectives of the Sharī'ah. However, with the limited objective of this thesis and referring to the first step that *maqāsid* must be brought within the fold of *Usūl al-fiqh*, the rest of this chapter will explore the initial steps necessary to bring *maqāsid al-sharī'ah* eventually within the fold of *Usūl al-fiqh*.

The subsidiary source, *istihsān*, as indicated earlier is possibly the best medium in the circumstances to bring *maqāsid al-sharī'ah* within the fold of *Usūl al-fiqh*. It has both a philosophy and a methodology and moreover its philosophy is almost similar to that of *maqāsid al-sharī'ah* in the sense that both aim to achieve justice, benefit, equity and fairness, and to find means of avoiding hardship and take account of necessity and custom, *urf*.[691] In spite of these similarities between the two they continued to remain separate even though the principles of *maqāsid* as indicated earlier were articulated almost at the same time as *istihsān* and that too by *usūliyyūn* themselves. While *istihsān* emerged as one of the acceptable subsidiary sources of law *maqāsid* remained on the periphery. It is an indication, among other things, how difficult it was to introduce new thinking into an old system. Circumstances have still not changed much but there are signs among jurists that they are willing to reconsider new ideas and one of them is the place of

[691] Kamali, M.H., *Equity*... p.121

maqāsid al-sharī'ah in relation to *Usūl al-fiqh*.

Therefore, if *maqāsid* is to be integrated into *Usūl al-fiqh*, a well suited vehicle or carrier is the subsidiary source, *istihsān*. Apart from the similarity of objectives between the two, *istihsān* is generic in that its methodology can be applied to worldly transactions, *muamalāt* and religious performances, *ibādāt*. [692] Furthermore, its methodology when combined with its philosophy expects it to follow the rules of the Sharī'ah while at the same time it is also directed towards achieving the objectives of the Sharī'ah.

Istihsān's dependence on the Sharī'ah, which is its strength, can be seen from its methodology. Its methodology was first developed as juristic preference in two forms, analogical (*istihsān al-qiyāsi*) and exceptional (*istihsān al-istithnai*) and the first form was applied in terms of alternative analogy (*qiyās khāfi)* in place of obvious analogy (*qiyās jāli*) in order to give preference to alternative rules based on better evidence. Under the second form of *istihsān,* (*istihsān al-istithnai*) there are different types, and each one has its own category of evidence in support. In both forms of *istihsān* choice of evidence is ultimately related to the rules of the Sharī'ah. When this principle of *istihsān* is used to find a ruling of Sharī'ah which is better than the previous one, the chosen ruling is aimed at fulfilling one of the objectives of the Sharī'ah. Therefore, if *istihsān* accommodates *maqāsid al-Sharī'ah* which has well defined principles it will be beneficial to both. What each can contribute to the other will provide justice which is fair and equitable. Furthermore, applying the two methods of interpretation, the inductive form used under *maqāsid al-Sharī'ah* and the deductive form used in the methodology of *Usūl al-fiqh,* can only be beneficial.

This one element of change alone, by implementing the first of the five step programme, could improve the service the methodology provides. This is evidenced from our comparison of equity with *istihsān* and the beneficial effect on the legal system from consolidation and unification. It is also suggested that

[692] Kamali, M.H., *Equity,* p.121

with further study and research, if the rest of the programmes are also implemented, judging from the same experience elsewhere, in all probability, there will be marked improvement in the overall services provided in terms of the aims and objectives of the Sharī'ah.

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