گزارش نهایی پروژه ارزیابی اصالت رساله‌ی دکتری آقای حسن روحانی

از ۴ سال پیش مکرراً[۳۲۱] ادعاهایی از جانب رسانه‌های غربی، با تکیه بر چکیده‌ی رساله‌ی دکتری آقای حسن روحانی در دانشگاه کلدونین گلاسگو در بریتانیا، در مورد اصالت متن رساله‌ی ایشان[۴] مطرح شده بود. ادعا کنندگان اظهار داشته بودند که آقای حسن روحانی (که رساله‌ی خود را با نام حسن فریدون تحویل داده است) بخش‌هایی از چکیده‌ی پایان نامه را از یک مرجع دیگر کپی نموده و اخلاق علمی را رعایت نکرده است. به دلیل عدم شفافیت آقای روحانی در پاسخ به این ادعاها و نیز عدم شفافیت مسئولین دانشگاه کلدونین گلاسگو در انتشار کامل متن این رساله، در ابتدا راستی‌آزمایی اینگونه ادعاها ممکن نبود.

سرانجام با فراهم شدن امکان دسترسی به متن اصلی رساله از طریق موسسات دانشگاهیِ دارای دسترسی کامل به سامانه پایگاه اطلاعات علمی ایران (ایران‌داک) –که یک نسخه از پایان‌نامه‌های دانشجویان داخل و خارج را نگهداری می‌کند– این امکان فراهم شد که صحت و سقم این ادعاها بررسی شده و در صورت خطا بودن آن‌ها، از رئیس جمهور اسلامی ایران اعاده‌ی حیثیت شود. برای این منظور تیمی از دانشجویان کارشناسی و تحصیلات تکمیلی داخل و خارج از کشور تشکیل شد و تلاش گردید با تقسیم کار گروهی، متن رساله ایشان مورد بررسی دقیق قرار گیرد.

روش‌شناسی کار به این صورت تعیین شد که از بین انواع و اقسام مختلف سرقت علمی (ادبی)[۵،۶] «ضابطه حداقلی» مورد اجماع استفاده شود. این ضابطه مقرر می‌دارد که: استفاده از عین جملات و پاراگراف‌ها از منابع دیگر بدون قراردادن متن در داخل علامت نقل‌قول (کوتیشین مارک یا گیومه) سرقت علمی است. براساس این ضابطه، دو روش مهم در انجام سرقت ادبی/علمی احصاء شد. این دو شیوه عبارتند از:

- سرقت موزاییکی (Mosaic plagiarism) به معنای کپی کردن سطور مختلف از متون مختلف برای تشکیل یک پارگراف،
- سرقت کامل کلمه به کلمه (Verbatim plagiarism) به معنای کپی کردن کل یک پارگراف یا چند جمله‌ی طولانی از متون دیگر بدون رعایت اصول نقل قول

با تقسیم کار انجام شده تلاش شد کار بررسی رساله، همزمان از دو طریق بررسی ماشینی (نرم افزاری) و غیرماشینی (انسانی) انجام شود. سپس با مقایسه نرم افزارهای مورد استفاده در محافل دانشگاهی، نرم افزار معتبر و پیشتاز iThenticate[۷] برای بررسی رساله انتخاب شد. نرم افزار مذکور به دلیل دقت بالا، توسط مهمترین انتشارات، ژورنال‌ها و پایگاه‌های علمی و آکادمیک در جهان از جمله

Nature, Springer ،ELSEVIER, EBSCO ،IEEE, ProQuest, Pearson, Pub Med, Mc Graw Hill

و بسیاری از دانشگاه‌های معتبر در امریکای شمالی و اروپا مورد استفاده قرار می‌گیرد. به دلیل گران‌قیمت بودن نرم افزار مذکور، تلاش شد از دانشجویان ایرانی دارای دسترسی به این نرم افزار استمداد شود. در تاریخ ۶ اردیبهشت ماه ۱۳۹۶، دسترسی به این نرم افزار فراهم گردید و با تقسیم کار انجام شده و با استفاده از نرم افزار تشخیص سرقت علمی iThenticate، متن کامل رساله که ممهور به مهر تایید سازمان اطلاعات و مدارک علمی ایران است،[۸] تهیه و وارد این نرم افزار شد. سپس تلاش گردید، نتایج نرم افزار به صورت دستی نیز مورد بررسی دوباره و چندباره

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[۱] http://www.telegraph.co.uk/news/worldnews/middleeast/iran/10143799/Iranian-president-Hassan-Rouhani-plagiarised-PhD-thesis-at-Scottish-university.html
[۲] http://www.universityherald.com/articles/3685/20130627/
[۳] http://foreignpolicy.com/2013/06/25/did-irans-new-president-plagiarize-in-his-ph-d-thesis-abstract/
[۴] Feridon, H., 1998. The flexibility of Shariah (Islamic law), with reference to the Iranian experience (Doctoral dissertation, Glasgow Caledonian University).
[۵] http://isites.harvard.edu/icb/icb.do?keyword=k70847&pageid=icb.page342054
[۶] https://www.princeton.edu/pr/pub/integrity/pages/plagiarism/
[۷] عرضه شده توسط کمپانی iParadigms واقع در آوکلند کالیفرنیا
[۸] دانشجویان و محققین جهت بررسی صحت متن منتشر شده به عنوان رساله‌ی دکترای آقای روحانی می‌توانند به محل «پایگاه اطلاعات علمی ایران (گنج) (ganj.irandoc.ac.ir) واقع در تهران، خیابان انقلاب، ابتدای خیابان فلسطین جنوبی یا دانشگاه‌ها و مراکز پژوهشی دارای قرارداد با این پایگاه مراجعه نمایند.

قرار بگیرند. در فرایند کار علاوه بر همکاران پروژه، متن به صورت دسته جمعی و از طریق مخاطبان پایگاه در دانشگاه‌های مختلف بررسی گردید. در نهایت، نتایجی مطابق جدول ۱ به دست آمد.

جدول ۱. نتایج بررسی اصالت متن رساله دکتری آقای حسن روحانی[۱]

عنوان	حداقل درصد سرقت علمی
چکیده و مقدمه	۳۹
فصل ۱	۴۷
فصل ۲	۵۷
فصل ۳	۴۹
فصل ۴	**۹۰**
فصل ۵	**۹۰**
فصل ۶	–

نتایج مورد بررسی و درصدهای مذکور در جدول فوق به صورت حداقلی می‌باشند، چرا که رساله آقای روحانی در سال ۱۹۹۸ میلادی تحویل شده و بسیاری از منابع مورد استفاده در آن قدیمی بوده و در دیتابیس مورد استفاده نرم افزار موجود نبوده و ممکن است تیم بررسی نیز نتوانسته باشد در بررسی غیرماشینی برخی از آنها را پیدا کند (چنانکه برخی منابع مورد استفاده، پس از تلاش‌های شبانه‌روزی و صرف صدها نفر–ساعت کار گروهی در پروژه، از کتابخانه‌های شهرهای مختلف یا مراجعی که معمولا در اینترنت فهرست نمی‌شوند یافت و یا خریداری شد اما دسترسی به بقیه فراهم نبود).

شایان ذکر است که شدیدترین نوع سرقت علمی آن است که مقاله یا کتاب نوشته شده توسط فردی، به نام دیگری ثبت گردد. در وهله‌ی بعد سرقت علمی کلمه به کلمه قرار دارد که در سطح نهم از ۱۰ نوع سرقت علمی شناخته شده قرار دارد. این قسم از سرقت علمی، رایج‌ترین نوع مشاهده شده در رساله‌ی مورد بررسی بوده و طبق معیارهای پذیرفته شده، هنگامی که ضوابط نقل قول رعایت نشود، چه نویسنده به منبع ارجاع دهد چه خیر، مرتکب این سطح شدید از سرقت علمی شده است. در رساله‌ی دکترای آقای روحانی، از ده‌ها کتاب و مقاله‌ی مختلف، سرقت کلمه به کلمه یا موزائیکی انجام شده و به برخی از منابع ارجاع داده و به مابقی هیچ‌گونه ارجاعی نداده‌اند؛ کتاب‌ها و مقالاتی از آیت الله علی‌اکبر کلانتری، ضیاءالدین سردار، نوئل کالسون، حمید عنایت، وائل حلاق، سید ابوالاعلی مودودی، پاتریک بنرمن، هاشم کمالی و ویلیام مونتگومری وات از جمله پر تکرارترین قربانیان این سرقت کم‌سابقه اند.

در حالی که در محیط آکادمیک کشورهای غربی حتی یک صفحه سرقت علمی در کل متن یک رساله‌ی چند صد صفحه‌ای می‌تواند منجر به رد آن و پس گرفتن مدرک تحصیلی گردد، در ابتدای امر، درصد بسیار بالای سرقت علمی در چکیده و معرفی رساله‌ی آقای روحانی حیرت‌انگیز بود. بسیاری از متون، پاراگراف‌ها و صفحات این رساله به صورت مستقیم و با کمترین تغییرات از روی مراجع، کتب و مقالاتی که پیش از سال ۱۹۹۸ چاپ شده بودند کپی غیر مجاز شده بود. با ورود به فصول بعدی، درصد سرقت‌های علمی نه تنها کمتر نشد بلکه شاهد افزایشی خیره کننده در فصل ۴ و۵ بودیم. برای نمونه بیش از ۹۰ درصد[۲] فصل ۴ رساله‌ی آقای روحانی با عنوان «احکام ثانویه» مستقیماً ترجمه شده‌ی کتابی فارسی با

[۱] معمولاً یک بازه‌ی خطاب ۵ درصدی در اعلام درصدها وجود دارد، چرا که می‌توان از برخی سرقت‌های کوتاه (مثلاً کمتر از ۳۰ کلمه) چشم پوشید یا آن‌ها را به حساب آورد. نکته‌ی دوم این است که درصدها با اضافه شدن منابع و مراجع جدید به دیتابیس نرم‌افزار قابلیت افزایش دارند.

[۲] به این علت که نرم‌افزار از زبان فارسی پشتیبانی نمی‌کند، این بازه به صورت حدودی محاسبه و بیان شده است.

RouhaniThesis.com
A non-partisan crowd-sourced project to evaluate the originality of the doctoral thesis of Mr. Hassan Rouhani
یک پروژه‌ی جمع سپاری شده‌ی بیطرفانه برای ارزیابی اصالت رساله‌ی دکتری آقای حسن روحانی
دیده‌بان شفافیت و عدالت
انجام شده توسط:
گروهی از دانشجویان در دانشگاه‌های داخل و خارج ایران

عنوان «حکم ثانوی در تشریع اسلامی»[1] نوشته‌ی آیت الله علی‌اکبر کلانتری[2] می‌باشد. شایان ذکر است که نه در مراجع فصل ۴ و نه در کتابنامه، آقای حسن روحانی هیچگونه ارجاعی به این کتاب و به این نویسنده نداده‌اند[3] در حالی که در این فصل و در صفحات ۲۰۹-۲۸۶ بیش از ۷۴ صفحه به شکل محض و مستقیم و بدون هیچگونه ارجاعی از اثر آیت الله کلانتری که عضو فعلی مجلس خبرگان است، سرقت شده است. با شواهدی که از سرقت بزرگ و فاحش فصل ۴ رساله‌ی دکترای آقای روحانی به دست آمده، حال با قطعیت می‌توان گفت که این رساله‌ی دکترا بنا به تمامی معیارها، به طور کامل مردود و متقلبانه است.

تاسف بارتر اینکه طبق شواهد موجود، حتی در ترجمه‌ی انگلیسی از کتاب آیة الله کلانتری نیز پای افراد دیگری به جز آقای روحانی در میان بوده و حتی ترجمه نیز توسط ایشان انجام نشده است. تیم پروژه به کمک نرم‌افزار سرقت‌یاب، به مقاله‌ای انگلیسی[4] دارای همپوشانی بسیار بالا با متن فصل ۴ رساله‌ی آقای روحانی در وب‌سایتی به نام The Islamic Seminary دست یافت. با پیگیری‌های بیشتر معلوم شد که این پایگاه اسلامی متعلق به عالمی شیعی به نام «شیخ محمد سرور»[5] می‌باشد. طبق اظهار صریح ایشان طی تماس با تیم پروژه، پیش از برگزاری کنفرانس سران کشورهای اسلامی در تهران[6] متنی به زبان فارسی توسط آقای کمال خرازی[7] به ایشان داده و خواسته شده برای استفاده در این کنفرانس به انگلیسی ترجمه شود. این امر توسط شیخ سرور انجام شده اما در سال بعد از آن، قسمت اعظم این ترجمه (بیش از ۷۰ درصد آن) از تز دکترای آقای حسن روحانی سر در آورده و در قالب یکی از فصول به دانشگاه اسکاتلندی تحویل داده شده است. این اتفاق عجیب و تاسف‌آور می‌تواند سرنخ‌های بیشتری جهت بررسی‌ها به نهادهای ذی‌ربط بدهد تا تیم متخلف تهیه‌کننده‌ی رساله‌ی آقای روحانی شناسایی شوند.

به طور خلاصه می توان گفت، از مجموع حدود ۱۰۱۵۰۰ کلمه در کل این پایان نامه دکتری (شامل متن کل رساله به همراه ارجاع‌ها و توضیح‌های موجود در پی‌نوشت‌های فصول مختلف و بدون لحاظ فهرست مطالب و فهرست منابع)، محتوای زیر فاقد اصالت بوده و از منابع دیگر کپی [بدون ارجاع] شده اند:

۱- از علی‌اکبر کلانتری (ایرانی): تقریباً ۱۶۷۰۰ واژه (۱۵۲۰۰ واژه در متن فصل ۴ + ۱۳۰۰ واژه ارجاعات + ۲۰۰ واژه در نتیجه نهایی)
۲- از احمد حسن (پاکستانی): تقریباً ۱۱۰۰۰ واژه (۱۰۳۰۰ واژه در فصول ۱، ۲، ۳ و نتیجه نهایی + ۷۲۵ واژه ارجاعات)
۳- از هاشم کمالی (افغانستانی): تقریباً ۹۴۰۰ واژه (۸۷۵۰ واژه در فصول مختلف + ۶۵۰ واژه ارجاعات
۴- از سید عباس صالحی (ایرانی): تقریباً ۵۴۰۰ واژه (۵۰۰۰ واژه از متن فصل ۵ + ۴۳۰ واژه ارجاعات)
۵- از جمعه مقدادی (تانزانیایی): تقریباً ۳۰۰۰ واژه (۲۸۰۰ از متن فصل ۵ + ۱۰۰ واژه ارجاعات + ۱۲۵ واژه در مقدمه، فصل ۳ و نتیجه نهایی)
۶- از پاتریک بنرمن : تقریباً ۳۰۰۰ واژه (فصل ۵)
۷- از وائل حلّاق (فلسطینی): تقریباً ۲۲۵۰ واژه (۲۱۰۰ واژه از متن فصل ۱ + ۱۵۰ واژه ارجاعات)

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[1] برگزیده شده به عنوان کتاب سال حوزه در سال ۱۳۷۸ – تاریخ اتمام نگارش این کتاب در سال ۱۳۷۶ و تاریخ درج شده در مقدمه‌ی آن ۲۰ آبان ۱۳۷۶ می‌باشد.

[2] محقق نمونه و مجتهد شناخته شده، عالم حوزوی و نماینده‌ی کنونی مردم فارس در مجلس خبرگان رهبری http://aliakbarkalantari.ir/fa/?page_id=۸٤

[3] مدارک و مستندات این سرقت بزرگ در پیوست درج می‌گردد. در این مستندات، متون انگلیسی فصل ۴ رساله‌ی آقای روحانی به دقت با مطالب کتاب آقای کلانتری تطبیق داده شده اند.

[4] http://www.theislamicseminary.org/wp/the-secondary-laws-of-sharia/

[5] شیخ محمد سرور اصلیت پاکستانی داشته و ساکن در شهر نیویورک امریکاست، در حوزه‌های علمیه‌ی ایران و عراق درس خوانده و ترجمه‌های انگلیسی وزینی از قرآن کریم و کتب حدیثی تشیع از جمله اصول کافی و بحار الانوار به جای گذاشته است.

[6] برگزار شده در آذرماه ۱۳۷۶

[7] نماینده‌ی وقت جمهوری اسلامی در سازمان ملل متحد

۸- از شبلی ملّاط (لبنانی): تقریباً ۲۰۷۵ واژه (۲۰۰۰ واژه از متن فصل ۶ + ۷۵ واژه ارجاعات)
۹- از شهید مرتضی مطهری (ایرانی): تقریباً ۱۶۰۰ واژه (۱۴۰۰ واژه در فصل ۲ + ۱۲۵ واژه در فصل ۴ + ۱۱۰ واژه در نتیجه نهایی)
۱۰- از بهمن بختیاری (ایرانی): تقریباً ۱۱۰۰ واژه (فصل ۶)
۱۱- از حسین غفاری ساروی (ایرانی): تقریباً ۸۵۰ واژه (فصل ۲)

در ادامه گزارش مستندات سرقت از این ۱۱نفر به ترتیب آورده شده است.

متون کپی شده از ۱۱ نفر بیش از ۶۰ درصد کل رساله‌ی دکتری آقای روحانی را تشکیل می‌دهد و تقریباً ۴۲ درصد کل رساله از ۴ نفر نخست (کلانتری، احمد حسن، کمالی و صالحی) کپی شده است. همچنین، با احتساب سایر مراجع خرد متعدد، درصد عدم اصالت به حدود سه پنجم (شصت درصد) رسیده است. حجم عدم اصالت در برخی فصول تا ۹۰ درصد نیز می‌رسد.

پاسخ به دو سوال رایج این روزها در مورد پروژه‌ی بررسی رساله‌ی دکترای حسن روحانی: آیا دانشگاه اسکاتلندی مدارک و اسناد سرقت علمی شما را رد کرده؟ چقدر احتمال دارد که دانشگاه، مدرک دکتری را باطل نماید؟

دانشگاه کلدونین گلاسگو تاکنون در خصوص مدارک موضع‌گیری نکرده و برداشت رسانه‌های دولتی و شبه دولتی از سخنان دکتر سید حسن امین مبنی بر تایید اصالت رساله توسط دانشگاه در هفته‌ها و ماه‌های اخیر کذب است. آقای امین (که به نام استاد راهنمای تز آقای روحانی شناخته می‌شود) خود یکی از متهمین ردیف اول این فساد آکادمیک است. ایشان سالیانی‌ست که تدریس و حضور در دانشگاه کلدونین را رها کرده و اگر ادعایی مبنی بر بررسی مدارک گسترده‌ی افشا شده در خصوص این سرقت علمی توسط دانشگاه و رد آن‌ها دارند، بایستی منبعی رسمی که چنین مطلبی را اعلام نموده منتشر نمایند؛ در غیر این صورت ادعای ایشان هیچ‌گونه سندیت و اهمیتی نخواهد داشت و در راستای ابهام‌آفرینی با قصد تطهیر فساد تفسیر و ارزیابی می‌شود.

اما پر تکرارترین سوالی که این روزها مطرح می‌شود این است که «آیا امیدی به اقدام قاطع دانشگاه می‌توان داشت؟» خودتان را جای مسئولین دانشگاه بگذارید: با توجه به پیام تبریکی که در سال ۲۰۱۳ توسط رئیس دانشگاه (پملا گیلیس) برای انتخاب حسن روحانی به عنوان یک فارغ التحصیل نمونه و موفق دانشگاه داده شده و این پیروزی را یک «دستاورد بزرگ» دانسته‌اند، قضیه برای دانشگاه حیثیتی شده است. در آن سال رئیس دانشگاه گفته بود امیدوار است دوره‌ی حضور حسن روحانی به عنوان «محقق» در GCU بتواند برای مسئولیت جدید وی مفید باشد. دانشگاه در پیام تبریک خود اضافه کرده بود که ستاد انتخاباتی «دکتر» حسن روحانی تصاویر و فیلم‌هایی از دانشگاه کلدونین گلاسگو را منتشر کرده و یکی از دانشجویان سابق این دانشگاه، به گرمی از مدت حضور حسن روحانی در شهر گلاسگو سخن گفته بود!

با تمام این اوصاف واضح است که علی‌القاعده دانشگاه زمانی حاضر به ابطال مدرک دکترای این «دستاورد بزرگ» خود خواهد شد که به حدی فشار رسانه‌ای و قانونی به آنان وارد شود که در ترازوی هزینه و فایده، چنین اقدامی (یعنی ابطال مدرک) قابل توجیه باشد. هزینه‌ی دومی که دانشگاه با ابطال مدرک پرداخت خواهد کرد، اعتراف به ناشی‌گری خود در رد ادعاهای رسانه‌های غربی ناظر به سرقت علمی در سال ۲۰۱۳ است. با این حساب،پس از اعتراف بعه سرقت علمی، اعتبار دانشگاه و اظهارات مقامات آن به شدت پایین آمده و چنین امری مسلماً به وجهه‌ی داخلی و بین‌المللی این دانشگاه تازه تاسیس لطمه خواهد زد. با این حال تیم پروژه در حال انجام پیگیری‌هایی جهت وادار نمودن دانشگاه به بررسی تز و ابطال این مدرک دکتراست.

سرقت علمی رخ داده در رساله‌ی دکتری آقای حسن روحانی را می‌توان از چشم‌انداز مساله آفرینی آن برای نظام جمهوری اسلامی در سطح بین‌المللی، به عنوان معبر نفوذی بر قوه‌ی مجریه از سوی پادشاهی متحده‌ی بریتانیا نگریست. اگر این مساله به شکل داخلی حل و تعیین تکلیف نشود، چه تضمینی است که بریتانیا آن را به عنوان اهرم فشار بر قوه‌ی مجریه‌ی کشور استفاده نکرده و تهدید ننماید که اگر فلان اتفاق به نحو مطلوب ما نیفتد، مدرک تحصیلی را ابطال و رئیس دولت را در سطح داخلی و بین المللی با چالش مواجه می‌کنیم؟ این مساله در کنار ابعاد فراوان و مساله‌مند مدرک دکتری آقای حسن روحانی، نیاز به رسیدگی به عنوان یک چالش امنیت ملی دارد.

ما با تقدیم مدارک و مستندات، خواهان ورود هر چه سریع‌تر مراجع رسمی از جمله وزارت علوم، دانشگاه‌ها و مراکز آموزش عالی، مجلس شورای اسلامی و کمیسیون آموزش و تحقیقات این مجلس، شورای نگهبان قانون اساسی و شورای عالی انقلاب فرهنگی به موضوع بوده تا با اثبات بی‌چون و چرای وقوع سرقت علمی در رساله‌ی دکترای آقای حسن روحانی، عنوان و مزایای دکتری از ایشان خلع شده، ضررهای مادی و معنوی قربانیان این سرقت به خصوص محققین ایرانی و مسلمان جبران، از دانشگاه کلدونین گلاسگو و دولت انگلستان بازخواست و از صدمه‌ی بیشتر به آبروی ملی و دانشگاهی ایران جلوگیری شود.

بدیهی‌ست که با تعلل نهادهای مربوطه، دست‌اندرکاران پروژه و تمامی ایرانیان پایبند به اخلاق علمی در محیط‌های دانشگاهی داخل و خارج از کشور، درخواست جدی از دانشگاه انگلیسی و تحت فشار گذاشتن مسئولین آن توسط نهادها و رسانه‌های غربی جهت بررسی کامل و باز پس‌گیری و ابطال مدرک دکترا[1]ی حقوق آقای حسن روحانی را در دستور کار خود خواهند گذاشت. نیک به یاد داریم که مدرک دکترای تقلبی در سال‌های نه چندان دور موجب استیضاح و برکناری یکی از وزرای دولت نهم شد و دور از انتظار نیست که خلع مدرک دکتری از آقای روحانی نیز به چنین سرانجام ختم شود[2]. لذا برای مصلحت کشور لازم است که حکم رسمی و نهایی در این خصوص هر چه سریع‌تر اعلام گردد.

و آخر دعوانا أن الحمد لله رب العالمین
تیم پروژه‌ی بررسی رساله‌ی حسن روحانی
متشکل از جمعی از دانشجویان داخل و خارج
با مدیریت تیم رسانه‌ای @K1inUSA
و با حمایت دیده‌بان شفافیت و عدالت

[1] Revoke Ph.D. certificate for plagiarism

[2] در سال‌های اخیر، مقامات ارشد (از جمله رئیس جمهور و وزرا) برخی کشورهای اروپایی به دلیل افشای تقلب در تدوین رساله‌های دکتری خود در چند دانشگاه اروپایی، از منصب خود برکنار شده یا استعفا داده‌اند.

Plagiarism of Rouhani's Ph.D. Thesis from Kalantari

Approximately 90 percent of chapter 4 of Rouhani's Ph.D. thesis word by word has been translated and plagiarized from the "The Secondary Laws", originally authored by Ali Akbar Kalantari. Also, conclusion section of Rouhani's chapter ۴ has been translated and plagiarized from "Islam and requirements of the time" by Morteza Motahhari.

فصل ۴ پایان نامه آقای حسن روحانی تقریبا به طور کامل از کتاب «حکم ثانوی در تشریع اسلامی» تالیف آیت‌الله علی اکبر کلانتری، ترجمه کلمه به کلمه بدون اشاره به منبع شده است. در بخش نتیجه نیز از کتاب استاد شهید مرتضی مطهری ترجمه کلمه به کلمه بدون ارجاع انجام شده است.

Chapter 4

Al Ahkam Al Thanaviiah

(The Secondary Laws)

Islamic laws and rules due to the conditions in which the people qualified to fulfil their responsibilities and the circumstances prevailing and governing, are divided into two categories:

a. Al Ahkam Al avvaliiah

(the Primary Laws and rules or the Original Laws)

The primaries are those laws and rules that remain the same and are for normal conditions. They are called The primary or the original laws.

b. Al Ahkam al thanaviiah

(the Secondary or the Alternate Laws)

The Secondary laws and rules are those sanctioned with due effect but are enforceable for a limited time and in exceptional cases and conditions.

Such laws are called the secondary and alternate laws.1 In other words, the laws and rules that are sanctioned without having in consideration the special and

exceptional conditions are called the primary and original laws and those that are sanctioned for exceptional conditions are called the secondary laws.2

احکام ثانوی ناظر به حالات عارضی و استثنایی مکلف، و احکام اولی ناظر به حالات طبیعی و وضعیت عادی او هستند.

It is the responsibility of a Muslim to practice and follow the primary laws and rules of *Shariah* unless it becomes impossible to do so. Such impossibility and reason may come into existence due to the circumstances prevailing and governing the society, such as birth control (to control the population) when population explosion would cause huge social, economic and educational hardships in the society. In such cases it becomes obligatory to control the exploding population. There is also the need to see that prices for much needed marketable commodities are reasonable and to see that harmful monopoly of goods in public demand is controlled. This is so if non-intervention of government would lead to the deprivation of the disadvantaged groups of people in the society. Sometimes the reason for the inability to follow the primary laws may come from ones personal conditions and circumstances such as unbearable hardships and impasses (*osr and haraj*) or harms (*zarar*) related to ones own circumstances, which will be discussed, in greater details later.3

As a matter of fact, the case that the emergence of certain conditions and elements or new issues could become reasons for changing the primary laws and rules existed in the very early days of the history of Islam. The Muslims were aware of the criteria of *Shariah* knew them because the general principles such as abolishment of hardships and extreme harms are founded on the basis of the text from the *Quran* and the *Sunnah*.4

این نکته که عارض شدن برخی عناوین بر بعضی امور، موجب دگرگونی در حکم‌شرعی آن‌ها می‌شود، از همان صدر اسلام در ارتکاز مسلمانان متشرع و آگاه به موازین شرعی بوده‌است؛ چرا که قواعدی، مانند قاعده نفی حرج، نفی ضرر، تقیه و... ریشه در کتاب (قرآن) و سنت دارد و از همان سال‌های نخست، مسلمانان این دو منبع را در اختیار داشته‌اند.

The fact that the emergence of certain conditions and circumstances may become the reason for change in the good (*Husn*) and the evil (*Qubh*) of certain facts is also one of the issues that since a long time has been considered by the

scholars. Allamah Helly in the topics dealing with the issue of *Husn* and *Qubh* as factors based on grounds of reason has said the following:

این مطلب که پیش آمدن برخی حالات و پیدایش بعضی عناوین نیز حسن وقبح برخی امور را دستخوش تغییر و تبدیل قرار می‌دهد، از دیرباز مورد توجه ومطالعه دانش‌مندان بوده‌است. علامه حلی در مبحث حسن و قبح عقلی می‌نویسد:

"The theologians of the *Shia* and the *Mu'tazilah* maintain that the grounds for the validity and genuineness of the existence of *Husn* and *Qubh* in human deeds are based on the decision and the judgment of reason. They also maintain that such issues can sometimes be made clear and plain with a simple and normal consideration of reason. Sometimes They are very complex and exist in certain cases and conditions such as exacerbating truth or expedient lies''5

ذهبت الامامیهٔ و من تابعهم من المعتزلهٔ الی أنّ من الأفعال ما هو معلوم الحسن و القبح بضرورهٔ العقل کعلمنا بحسن الصدق النافع، و قبح الکذب الضار... و منها ما هو معلوم بالاکتساب انّه حسن أو قبیح کحسن الصدق الضار و قبح الکذب النافع و منها ما یعجز العقل عن العلم بحسنه أو قبحه فیکشف الشرع عنه کالعبادات؛ دیدگاه امامیه و به دنبال آنان معتزله این است که حسن و قبح برخی از کارها، به حکم بدیهی عقل، آشکار است، مانند علم ما به حُسن راست گویی سودمند و قبح دروغ گویی زیان آور... و حسن و قبح برخی از کارها، با نظر و فکر معلوم می شود، مانند حسن راست گویی زیان آور و قبح دروغ گویی سودمند. پاره ای از کارها نیز، عقل از علم پیدا کردن به حسن یا قبح آن ها، ناتوان است و این شرع است که حسن و قبح آن ها را آشکار می سازد، مانند عبادات.

However, the terms such as the secondary laws, or the secondary responsibility do not have a very long history.

ولی تعبیر حکم ثانوی یا تکلیف ثانوی پیشینه زیادی ندارد.

These terms are mostly found in the works of the *Shia* scholars. The Muslim scholar who first made use of the term "the secondary laws" was Sheikh Muhammad Taqi Isfahani (d. in 1248 H.). In *Hedayat Al Mustarshedin*, he has called the fatwa of a *Mujtahid* that may not concede the actual rule of *Shariah* for a case, a secondary law and responsibility .

Today the scholars call such a case the apparent rules (*Al-Ahkam Al-Zaheriiah*) as opposed to the actual rule not a secondary law and rule.

بر اساس جست‌وجویی که انجام گرفت، نخستین دانش‌مند شیعی که سخن از حکم ثانوی به میان آورده، شیخ محمدتقی اصفهانی (متوفای ۱۲۴۸ق.) است. وی در مبحث صحیح و اعم در صورتی که حکم صادر از مجتهد مخالف با واقع باشد و مجتهد خطا کرده‌باشد را نسبت به خود مجتهد و مقلدان او «تکلیف ثانوی» شمرده‌است.

ولی همان طور که پیداست این سخن و تعبیر، درباره حکم ظاهری است نه حکم ثانوی مصطلح که مورد بحث ما است.

Following him Muhammad Hussein Ibn Abdurrahim (d. 1250 H.) the author of *Fusul* expressed the primary and the secondary laws by the expression and terms as the original and temporary responsibilities.

پس از وی، به شیخ محمدحسین‌بن عبدالرحیم (متوفای ۱۲۵۰ق.) مؤلف کتاب فصول می‌رسیم که از احکام اولیه و ثانویه به «التکالیف الأصلیهٔ و العارضیهٔ» تعبیر کرده‌است

In his discourses on the issues of *Ijtihad* where he has a short discussion about the primary laws, hinted to the secondary laws. He divides the applicable rules and laws into the actual and primary and the actual non-primary laws.[۷]

در مبحث اجتهاد و تقلید نیز به گفتاری کوتاه از ایشان درباره احکام اولیه، همراه با اشاره‌ای به احکام ثانویه برمی‌خوریم. وی در این مبحث، احکام فعلی را به دو دسته احکام واقعی اولی و واقعی غیر اولی تقسیم می‌کند

In fact, the beginning of the investigations and verifications of the issue of the secondary laws was the time of Sheikh Ansari (d. 1281 H.).8

ولی آغاز بحث و تحقیق در مورد این احکام را باید از زمان شیخ مرتضی انصاری (متوفای ۱۲۸۱ق.) دانست.

The previous scholars of *Fiqh* have made certain presentations on the issue of the secondary laws and principles but within such presentations what exist are discussions on the issue without specifying the title of the issue.

دانش‌مندان متقدم بر این بزرگان نیز به گونه پراکنده مباحثی را در مورد احکام و قواعد ثانویه ابراز داشته‌اند، ولی آن‌چه در آثار آنان می‌یابیم بحث درباره مصادیق حکم ثانوی است بدون آن‌که به عنوان مزبور تصریح کنند.

On examining the works of the *Sunni* scholars I did not find anyone writing about the secondary laws in *Shariah*, although there are certain precedents in the works of a number of earlier Sunni scholars.10

در میان صاحب نظران عامه به کسی که در جوانب حکم ثانوی و کلیات مربوط به آن به بحث پرداخته‌باشد برنخوردیم. ... تحقیق و تألیف در مورد مصادیق احکام و قواعد ثانویه در میان دانش مندان سنی نیز پیشینه ای دیرینه دارد.

Malik Ibn Anas (d. ۱۷۹ H.) in "*Al-Modavvanah-Al-Kobra*" about the secondary titles of vows, covenants and oath has some discourses.11

مالک بن‌انس (متوفای ۱۷۹ق.) درباره عناوین ثانوی نذر، عهد و قسم، بحث نموده‌است

Muhammad Ibn Idris Shafei (d. ۲۰٤ H.) also towards the end of the book *Al-Omm* has some discourses on this issue.12 He under the heading "what may become lawful due to necessity" has dealt with the issues of necessity, which are of the secondary laws.'4 Abul Qasim Kharafi (d. 334 H.) also under the heading, "coercion" (Ikrah) has dealt with such discourses.14

محمد بن‌ادریس شافعی (متوفای ۲۰۴ق.) نیز مطالبی در این زمینه دارد .وی‌هم‌چنین زیر عنوان «ما یحلّ بالضرورة» مباحثی در مورد عنوان ثانوی ضرورت، طرح نموده‌است. ابوالقاسم خرقی (متوفای ۳۳۴ق.) نیز مباحثی درباره عنوان اکراه، پیش کشیده‌است.

The Views of the Foqaha on the Definition of the Secondary Laws

In the works on *Osul-Al-Fiqh* and *Fiqh* one may find such terms as Secondary Rules, Secondary Legislation, Secondary Principles, and the Secondary Order. Such terms in some respects are similar and in other respects they are different.

فصل دوم: حکم ثانوی چیست؟

در کتب اصولی و متون فقهی، به اصطلاحاتی هم‌گون، مانند حکم ثانوی، تشریع ثانوی، اصل ثانوی، امر ثانوی، قاعده ثانویه و... برمی‌خوریم. این اصطلاحات از برخی جهت‌ها مشابه یک‌دیگر هستند و از جنبه‌های دیگر با هم متفاوت‌اند.

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are such laws that are sanctioned for certain cases in normal conditions such as the obligation of prayers, unlawfulness of drinking intoxicating substances. The secondary laws are such laws that are sanctioned for certain cases in abnormal conditions such as emergencies, coercion etc. Such as fasting in the month of *Ramadhan* for one who may suffer harms due to fasting.١٥

١- بر اساس آن‌چه میان فقها مشهور است: حکم اولی، حکمی است که بر افعال و ذوات به لحاظ عناوین اولی آن‌ها بار می‌شود، مانند وجوب نماز صبح و حرمت نوشیدن شراب؛ حکم ثانوی، حکمی است که بر موضوعی به وصف اضطرار، اکراه و دیگر عناوین عارضی بار می‌شود، مانند جواز افطار در ماه رمضان در مورد کسی که روزه برایش ضرر دارد

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differently. They say that the primary laws are those that are permanently applicable at all times and conditions and the secondary laws are those that are of a general nature not in the absolute sense but with conditions and restrictions. In this way the proposition comes out of permanency and assumes a timely nature.16 One of the contemporary scholars has a similar view and he says, “Those Islamic Laws that are based on permanent needs of human beings are the primary laws”.١٧ On this basis, the laws that are sanctioned for timely needs are called the secondary laws.

۲- برخی برخلاف تعریف رایج و مشهور، احکام اولیه و ثانویه را به گونه دیگری توضیح داده و گفته‌اند: احکام اولیه عبارت‌اند از آن دسته از احکام که بر موضوعات خود به نحو اطلاق و دوام بار می‌شوند؛ یعنی احکامی که به صورت قضیه دائمه، همه مصادیق خارجی خود در جمیع زمان‌ها و مکان‌ها و حالت‌ها را در بر می‌گیرد، و احکام ثانویه عبارت‌اند از آن دسته از احکام کلی که دارای عناوین و موضوعاتی عام هستند، ولی نه به گونه مطلق، بلکه همراه با تقیید و توصیف به چیزی؛ بدین ترتیب، قضیه از حالت اطلاق و دوام بیرون می‌آید و به صورت قضیه حینیه وصفیه مادامیه، نمایان می‌شود. برخی از صاحب‌نظران معاصر نیز در این زمینه سخنی مشابه گفتار بالا دارند: آن‌قسمت از احکام اسلامی که برمبنای نیازهای ثابت وضع شده‌است، احکام‌اولیه است.(۳) بر اساس این بیان، احکامی که با توجه به نیازهای ناپایدار وضع می‌شود، احکام ثانویه نام دارد.

۳- [illegible]

sanctioned on the basis of the benefits and harms or the good (*Husn*) and the evil (*Qubh*) that exist in certain cases to which such laws apply. The secondary laws are those that are sanctioned on the basis of the existence of a conflict between a benefit and harm, a good and evil and for certain conditions.۱۸

۳- بعضی دیگر چنین گفته‌اند: حکم اولی به آن دستوری گفته می‌شود که شارع اسلام بر مبنای صلاح و فساد اولی موجود در موضوع یا متعلق، حکم نموده‌است و حکم ثانوی، در موردی است که شارع بر مبنای تزاحم صلاح و فساد حالت عارض و موقت،با مصلحت‌و مفسده ثابت‌اولی، حکم می‌کند.

Sheikh Ansari has said, the primary laws are sanctioned regardless of the possibility for its applicability to other cases. What follows it is that there will be no conflict between such laws and those that may come into being due to certain conditions.

شیخ انصاری در مبحث خیارات، هنگام بحث از شروط صحت شرط می‌گوید: گاهی حکم، برای موضوع فی حدّ نفسه و با قطع نظر از عنوان عارضی دیگر، ثابت می‌شود و لازمه چنین وضعیتی این است که میان این حکم و حکم دیگری که به سبب عنوان عارضی برای آن موضوع پیدا می‌شود، تنافی نباشد.

For example, consuming meat for food in normal conditions are permissible (*Mubah*), however, if one would swear not to consume it for food it becomes unlawful (*Haram*) for him to consume it for food. Or it may become obligatory to consume it. For example one may have made a vow to consume meat for food.۱۹

مانند خوردن گوشت که شرع آن را فی نفسه مباح اعلام کرده‌است، به گونه‌ای که اباحه مزبور منافاتی با این ندارد که در صورت خوردن سوگند بر ترک آن یا امر پدر به ترک آن، خوردن آن حرام شود، یا اگر این خوردن، مقدمه عملی واجبی شد آن را نذر نموده، واجب شود

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relative conditions. When laws are sanctioned regardless of other conditions they are called primary laws but if they are sanctioned with a view to certain conditions and cases they are called secondary laws.20 For example *vozu* (ablution) is a case that has a special status in *Shariah* and its primary rule is that it is a preferable act and in certain cases it becomes obligatory. In some cases if *vozu* would be harmful to a person or cause suffering to one its status changes into a harmful and hardship causing status as its secondary name and title and accordingly to avoid it becomes permissible (*Mubah*) and even performing *vozu* may become unlawful (*Haram*).

۴- و بالاخره دیدگاه برخی دیگر چنین است:» اولیت و ثانویت» اموری نسبی هستند. وقتی حکمی بر عنوانی از موضوعات بار می‌شود، اگر بدون عنایت و نظر به عنوان دیگری لحاظ شود، آن را حکم اولی می‌نامند، اما چنان‌چه حکم یک عنوان که بر ذاتی رفته‌است، با عنایت و فرض این‌که عنوان دیگری نیز بر همین ذات، وجود دارد، بار شود، آن حکم ثانوی است، مثلاً وضو یک عنوان شرعی است که حکم نفسی آن استحباب، و حکم غیری آن وجوب است. ذاتِ شستنِ دست و صورت و مسح سر و پا، به همراه قصد عنوان وضو، به علاوه نیت قربت -یا بدون آن بنا بر اختلافی که در این مورد هست- ذاتی است که عنوان شرعی وضو بر آن رفته‌است. اکنون اگر وضویی برای مکلفی ضرری یا حرجی باشد، عنوان ضرر و حرج که با عنایت و نظر به عنوان وضو و در طول آن لحاظ می‌شود، عنوان ثانوی وضو خوانده می‌شود که حکم جواز ترک یا حرمت ارتکاب را برای آن ذات، به دنبال خود می‌آورد .

The Differences between the primary and Secondary Laws

From the above details it becomes clear that the differences between the secondary and the primary laws are as follows:

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a longitudinal line with primary laws not at the same time and simultaneous which means that as long as it is possible to observe the primary laws there is no need to apply the secondary laws. The secondary laws are followed only when one is not able to follow the primary laws.

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temporary. According to certain *Hadith* (format tradition deriving from the Prophet (S.a.w.)) the primary laws remain valid until the Day of Judgement. As the sixth Imam[٢١] has said, "Whatever Prophet Muhammad (S A W.) made lawful (*Halal*) will be lawful to the Day of Judgement and whatever he made unlawful (*Haram*) will be unlawful to the Day of Judgement".[٢٢]

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primary laws the secondary laws will have priority because the secondary laws would have the effect of an exception to and limiting the primary laws. Just as a particular rule comes before the general rule in the same way the secondary laws come before the primary laws.

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laws but a change has taken place in the case or subject to which they apply in that case in the terminology of the Foqaha they are called the secondary laws. Therefore the difference between the two comes from the change and difference in the case and subject to which they apply.

The Kinds of the Secondary Laws

After considering the secondary laws of every case or subject and its primary laws it is possible to picture a great number of the secondary laws. For example with a view to the five categories of rules, namely the obligatory (Wajeb), the desirable

(Mandub), the prohibited (Haram), the detestable (Makruh), and the allowable (Mubah), if the primary rule of a case would be permissible the secondary rule may become cither one of the five therefore five multiplied by five would result into twenty five cases.

گونه های حکم ثانوی

می‌توان با سنجیدن حکم ثانویِ هر چیزی با حکم اولی آن، گونه‌های فراوانی از حکم ثانوی تصویر کرد. بدین ترتیب در نگاه نخست، تصور می‌شود ۲۵ قسم حکم ثانوی داشته‌باشیم و این عددی است که از ضرب نمودن احکام پنج گانه اولیه؛ یعنی وجوب، حرمت، استحباب، کراهت و اباحه در شکل ثانوی همین احکام به دست می‌آید

There is, however, one exception: Both the primary and secondary rules can not become of the same nature like both being obligatory or prohibited. Based on this five out of twenty five will become exceptional and the remaining twenty cases will remain valid possibilities.

پنج قسم از میان گونه‌های متصور بیرون می‌رود، مثلاً نمی‌شود حکم اولی یک چیز وجوب و حکم ثانوی آن نیز وجوب باشد، و با این حساب بیست صورت دیگر باقی می‌ماند.

There are also some other examples that do not seem to have clear applications in Shariah, this may happen when the primary rule for a case would be a prohibition and its secondary rule would be a desirable one or that the primary rule would be detestable and its secondary rule would be a desirable one or vice versa.

برای برخی از این صور نیز مثال و مصداق روشنی در احکام شرعی نیافتیم، مانند این‌که حکم اولی چیزی، حرمت و حکم ثانوی آن استحباب باشد، یا حکم اولی آن کراهت و حکم ثانوی‌اش استحباب باشد و برعکس.

The rest of the possibilities may have certain applications and one may find real examples in Shariah for them.23

به هر حال بیش‌تر این گونه‌ها، ممکن به نظر می‌رسد و می‌توان برای هر کدام از آن‌ها مثال یا مثال‌هایی در احکام شرعی جُست.

Some Examples of the Secondary Laws.

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secondary rule would be a prohibited one (Haram). One example is hoarding of in-public-demand-commodities, which is considered as detestable in normal

conditions by a group of Foqaha. However, in the other conditions such as when famine would exist and people would direly need the commodity, hoarding is prohibited and the Islamic government will make the hoarder sell such commodity.24

برای روشن شدن مطلب چند مثال می آوریم:

۱- حکم اولی کراهت و حکم ثانوی حرمت، مانند مورد احتکار که گروهی از فقها آن را در وضعیت عادی مکروه می‌دانند، ولی به سبب عارض شدن برخی حالت‌ها و شرایط آن را حرام می‌شمارند، مثلاً موقع قحطی و تنگ‌دستی مردم و احتیاج آنان به کالای مورد احتکار که در این فرض محتکر از سوی حاکم اسلامی وادار به فروختن کالای خود می‌شود.

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secondary would be obligatory (Wajeb). An example of such case is learning industrial skills according to the primary rules is only permissible (Mubah), however, if the protection and the security of the Islamic system would depend on it, then as being an introductory step for the fulfillment of an obligation it becomes obligatory (Wajeb).

۲- حکم اولی اباحه و حکم ثانوی وجوب، مانند اشتغال به امور صنفی که به عنوان اولی آن مباح است، ولی در صورتی که حفظ نظام بر آن متوقف باشد، از باب مقدمیت واجب می‌شود.

Muhaqqiq Khoei in this matter has said, “learning all industrial skills are of the permissible tasks. It is not even desirable thus; there is no question about its being an obligatory task. However, if ignoring to learn it would cause huge losses to the system then its learning becomesnecessary”.25

آیتالله خوئی در این زمینه می‌گوید:

اما الصناعات بجميع أقسامها فهی من الامور المباحة و لا تتصف بحسب انفسها بالاستحباب فضلاً عن الوجوب فلايكون التكسب بها الا مباحا. نعم انما يطرء عليها الوجوب اذا كان تركها يوجب اخلالاً بالنظام و حينئذ يكون التصدی لها واجباً كفائياً أو عينياً، و هذا غير كونها واجبة بعنوان التكسب.

Another example of this nature is the case of drinking or eating in normal conditions as a permissible act and an obligatory act when preserving one's life would depend upon eating and drinking.

مثال دیگری که می‌توان برای این‌گونه آورد، نوشیدن آب و صرف طعام است که در موقعیت عادی، مباح و در صورت تشنگی و گرسنگی مفرط به خاطر حفظ جان، واجب می‌باشد.

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its secondary rule a permissible one (Mubah). An example of such case is consuming for food of carcasses or pork as a permissible act to preserve one's life, while in normal conditions and as a primary rule it is prohibited. This example, however, would only hold when following the laws for emergencies would only be permissible (Mubah) and not obligatory (Wajeb).

۳- حکم اولی حرمت و حکم ثانوی اباحه، مانند خوردن مردار و گوشت خوک و شراب و چیزهایی از این قبیل که در شرایط معمولی، حرام و در صورت پیدایش حالت اضطرار و درماندگی، مباح می‌باشد. البته این اباحه در صورتی است که عمل نمودن به قاعده اضطرار را رخصت بدانیم، نه عزیمت

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its secondary rule an obligation (Wujub). An example of such case is the same as the one in 3 when following the rule for emergency is obligatory, (in such a case the opinion of the Foqaha are different).[۲۶]

۴- حکم اولی حرمت و حکم ثانوی وجوب، مانند مثال فوق، در صورتی که عمل نمودن به قاعده مزبور را عزیمت بدانیم، البته در این مورد اختلاف است که بحث آن خواهد آمد.

۵. □□□ □□□□ □□□□□□□ □□□ □□□□□□□ □□□□ □□□□□ □□ □□ □□□□□□□□□□ □□□ □□□

secondary rule a prohibited one. An example of such a case is obeying parents as an obligation according to many of the Foqaha. This is obligatory as long as it would not lead to an unlawful act and disobedience to God in which case it becomes prohibited.

۵- حکم اولی وجوب و حکم ثانوی حرمت، مانند اطاعت از والدین که از دیدگاه بسیاری واجب است، ولی این وجوب تا وقتی است که تبعیت از آن، موجب معصیت خداوند نشود که در صورت عارض شدن چنین عنوانی، حرام می‌گردد.

۶. □□□ □□□□ □□□□□□□ □□□ □□□□□□□ □□□□ □□□□□ □□ □□□□□□□□□□□ □□□ □□□

secondary rule a prohibition. An example of this case is consuming the flesh of lamb or cow and other animals for food while if such animals would feed solely on human waste, as a secondary rule consuming their flesh for food becomes prohibited.

۶- حکم اولی اباحه و حکم ثانوی حرمت، مانند خوردن گوشت گوسفند و گاو و دیگر حیوانات حلال گوشت که در صورت نجاست‌خوار شدن یا مورد نزدیکی قرار گرفتن آن‌ها، حرام است.

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secondary one would be a desirable rule. An example of such case would be making people to smile for fun, which is a permissible act but it may become a desirable act when it would make people happy.

۷- حکم اولی اباحه و حکم ثانوی استحباب، مانند بذله‌گویی در صورتی که به حدّ لغو نرسد و نیز خواندن شعر در فرضی که مکروه نباشد، مثل آن‌که در خواندن آن زیاده‌روی نکند و نیز در شب نخواند. همین دو کار مباح، در صورتی که بر آن‌ها عنوان ادخال سرور بر مؤمنان صدق کند، حکم استحباب پیدا می‌کنند.

The Difference between the Secondary Laws and the Abrogation of the Laws

Apparently people who have discussed the abrogated and the abrogating verses of the Quran they have taken the verses indicating the primary laws as the abrogated and those indicating the secondary rules and laws as.

تفاوت حکم ثانوی با نسخ

ظاهر گفتار برخی از کسانی که در زمینه آیات ناسخ و منسوخ قرآن بحث نموده‌اند این است که ایشان در پاره‌ای موارد، آیه دال بر حکم اولی را منسوخ و آیه دال بر حکم ثانوی را ناسخ پنداشته‌اند.

It is very possible that the words of Hibbatullah Ibn Salaraah (d. 410 H.) in "Al-naskh va Almansoukh"28 and those of Abdurrahman Ibn Ata'eqi (a scholar of the eighth century) in their discourses about the Quran may have such implications.29 The interpretation of the first and last part of the verse 2:173 is being considered as abrogated and abrogating ones. In the first part of this verse pork is prohibited (He has only forbidden you what dies of itself, and blood, and flesh of swine).30 and in

the second part in an emergency it is permissible (But whoever is and in the second part in an emergency it is permissible (But whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him).31

thus, these scholars have called the first part as abrogated and the second part of the verse as abrogating.

شاید بتوان گفت کلمات هبةالله بن‌سلامه (متوفای ۴۱۰ق.) و عبدالرحمن‌بن محمد عتائقی (از علمای قرن هشتم) ظهور در چنین پنداری دارد؛ زیرا این دو، بخش نخست آیه ۱۷۳ سوره بقره؛ یعنی جمله «انّما حرّم علیکم المیتة و الدم و لحم الخنزیر» و بخش پایانی آن؛ یعنی جمله «فمن اضطرّ غیر باغ و لا عاد فلا اثم علیه» را جزو آیات ناسخ و منسوخ برشمرده‌اند

One of the contemporary scholars has considered this opinion as the one to apply to all the works Obviously, there is a fundamental difference between the abrogation and secondary laws.

In the definition of abrogation it is said, "Abrogation means the removal of the previously existing law by the law and a rule that is sanctioned later. The relations between the two laws would be as such that both laws would not possibly exist together".33

یکی از محققان معاصر این پندار را به بسیاری از کسانی که در باب نسخ قلم‌زنی کرده‌اند نسبت می‌دهد ولی همان‌گونه که روشن است صدور حکم ثانوی از سوی شارع با وقوع نسخ از ناحیه وی، تفاوتی اساسی دارد؛ زیرا در تعریف نسخ گفته اند:

رفع تشریع سابق بتشریع لاحق، بحیث لا یمکن اجتماعهما معاً، اما ذاتاً اذا کان التنافی بینهما بیّنا او بدلیل خاص من اجماع او نص صریح؛ نسخ عبارت است از، از میان برداشتن تشریع پیشین به وسیله تشریع پسین، به گونه‌ای که اجتماع آن دو با هم ممکن نباشد.

In the case of emergencies, coercion and sever hardships and such other secondary status the previously sanctioned laws do not become obliterated only their subjects change because the subjects of the previously sanctioned laws are for normal conditions and subjects of the secondary laws are for unusual conditions.

و این در حالی است که با پیدایش حالاتی، مانند اضطرار و اکراه و حرج و دیگر عناوین ثانوی، تشریع پیشین از بین نمی‌رود، بلکه تنها موضوع تغییر می‌یابد، مکلف با حالت طبیعی موضوع تشریع پیشین است، ولی در حکم پسین، مکلف با حالت غیر طبیعی موضوع است

In the case of consuming carcasses for food a prohibition is for normal conditions and permissibility is for the case of emergency.

مثلاً حرمتِ خوردن مردار، انسان مختار و موضوع حلیت آن، انسان مضطر است

In other words, an abrogation is thinkable only in the case of such two laws that would be of totally opposite nature and as such they would not exist together at the same time. Secondly, the subject for both laws would be the same.

به دیگر سخن، نسخ در مورد دو حکمی متصور است که اولاً: میان آن دو تنافی باشد به گونه‌ای که نتوان در زمان واحد بین آن دو جمع نمود و ثانیاً: موضوع هر دو حکم، یکی باشد.

Such conditions do not exist in the case of the secondary laws. It is possible in the case of a primary and secondary law to exist at the same time.

این دو شرط در مورد حکم ثانوی منتفی است؛ زیرا اجتماع حکم چیزی به عنوان اولی‌اش با حکم همان چیز به عنوان ثانوی‌اش در زمان واحد، هیچ محذوری ندارد.

The author of "Haqa'eq Al Osul" also says it clearly, "Naskh or abrogation means obliteration of the primary or the secondary laws of a subject".

چنان‌که صاحب حقائق‌الاصول نیز به این نکته تصریح می‌کند. وی در شرح این سخن صاحب کفایه که می‌گوید: «ان النسخ و ان کان رفع الحکم الثابت» می‌نویسد :ای رفعا للحکم الواقعی الاولی او الثانوی

Therefore, although the secondary laws are for accidental and unusual conditions they in such conditions have the due force of validity. It is possible that the Shariah for some reason in a later time abrogates them just as is the case with primary laws.

توضیح این‌که، حکم ثانوی کلی گرچه برای حالت‌های عارضی و غیر طبیعی تشریع شده‌است، ولی به هر حال نوعی ثبوت و دوام دارد.شارع می‌تواند ترک عمل واجبی را در موقع بروز حرج، تجویز کند، و آن را به خاطر برخی مصالح برای همیشه مباح اعلام کند

The Criteria to Discern the Primary and the Secondary Laws

According to many of the Foqaha the secondary laws are associated with exceptional conditions and the primary laws are associated with the normal conditions. On this basis the text of verse 173 of chapter 2 gives a secondary status to an emergency.

"He has only forbidden you what dies of itself and blood, and flesh of swine, and that over which any other (name) than (that of) Allah has been invoked; but whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him" 35

فصل چهارم: معیار شناخت حکم اولی از حکم ثانوی

... بر اساس بیان مشهور، احکام ثانوی ناظر به حالات عارضی و استثنایی مکلف، و احکام اولی ناظر به حالات طبیعی و وضعیت عادی او هستند، مثلاً با توجه به همین تعریف، از آیه «انما حرّم علیکم المیتهٔ و الدّم و لحم‌الخنزیر، و ما أُهلّ به لغیرالله فمن اضطرّ غیر باغ و لا عاد فلا إثم علیه» به وضوح،عنوان ثانوی بودن «اضطرار» استفاده می‌شود

Just because a status of a law is secondary it can not be considered a secondary law. This is true because it is a fact in the case of the apparent, as opposed to actual, laws such as the laws on the basis of bar'aoh (freedom from responsibility on the basis of the absence of sufficient reason to prove responsibility) and emergencies. This also applies to the cases of the primary laws for emergencies like the obligation of Tayammum (particular ablution with pure earth)36 for a person who does not have any water for vozu or using water would be harmful for him.

به صرف ثانوی بودن عنوان یک حکم، نمی‌توان آن حکم را ثانوی، به معنای مصطلح شمرد؛ چرا که در احکام ظاهری، مانند احتیاط و برائت و نیز در احکام اولی اضطراری، مانند وجوب تیمم برای کسی که آب در اختیار ندارد، یا استعمال آب برایش زیان‌آور است، نیز عناوین ثانویه، مأخوذ است.

For this reason some of the Foqaha have considered these two kinds of laws as the secondary laws. Of such Foqaha is Muhaqqiq-e-Naeeni who calls the primary laws for emergencies as the secondary laws.۳۷

Allamah Muzaffar also has considered such rules as the apparent ones (Al Ahkam Al Zaheriiah) as opposed to the actual ones like precaution and freedom from responsibility as the secondary laws.

از همین رو برخی از اصولی‌ها و فقها بر این دو نوع حکم نیز «حکم ثانوی» اطلاق نموده‌اند. از جمله محقق نائینی که بر حکم اولی اضطراری، حکم ثانوی اطلاق نموده‌است مرحوم مظفر نیز بر حکم ظاهری وجوب احتیاط یا برائت، حکم ثانوی اطلاق نموده‌است

The task of discerning the primary laws from the secondary ones although may not seem to be difficult, but in some cases it may not be that easy. Of such examples are the cases wherein the primary laws would have several possibilities. One such case comes in the sections of the laws of worships (Ibadat). For one who may have access to water, the rule is to have a Ghusl (a shower) or vozu, but for one who may not have access to water for good reasons such as when using water would be harmful for him he must perform Tayammum.

شناخت احکام ثانویه از احکام اولیه، در بسیاری‌موارد آسان به نظر می‌رسد، ولی با این وجود ممکن است در برخی موارد، این کار به راحتی ممکن نباشد و آن مواردی است که حکم اولی، اَشکال و صوری چند داشته‌باشد، از باب مثال در باب عبادات، حکم شخص حاضر، نماز تمام خواندن و روزه تمام گرفتن است، ولی حکم شخص مسافر، نماز شکسته خواندن و و افطارکردن است؛ یا مثلاً حکم کسی که آب در اختیار دارد، وجوب غسل و وضو است، ولی مکلفی که فاقد آب است یا استعمال آب برایش زیان‌آور است، باید تیمم‌نماید.

At first, it may seem as if the law therein is a secondary one but there is no doubt that the law in this case also is a primary law.

در نگاه نخست ممکن است تصور شود، در این موارد، نماز شکسته، افطار و تیمم از احکام ثانوی است، در حالی که بی‌تردید این‌ها از احکام اولی هستند

In certain cases the Shariah pictures several conditions for the people qualified to shoulder a responsibility and on such basis it has classified, or has categorized such people. For example, a person is not on a journey or is on a journey. A person not on a journey must pray in full and a person on a journey must shorten the prayers (qasr). Or that a person who intends to pray he may have access to water or does not have access to water or that the use of water is harmful for him or it is not harmful for him. All the laws in such cases are the primary laws.39

با مراجعه به مصادر تشریع، روشن می‌شود، در برخی موارد، خود شارع برای مکلف، حالات گوناگونی در نظر گرفته و به اصطلاح تنویع نموده‌است، مثلاً فرموده‌است مکلف یا حاضر است یا مسافر، حاضر باید برخی نمازها را تمام بخواند. مسافر نیز یا سفرش، سفر معصیتی است و یا نیست، در فرض نخست نیز برخی نمازها، تمام خوانده می‌شود و در فرض دوم همان نمازها شکسته به جا آورده می‌شود، یا مثلاً مکلفی که می‌خواهد

نماز بخواند، یا برای ساختن وضو، آب پیدا می‌کند یا پیدا نمی‌کند، یابنده آب نیز یا استعمال آن برایش مضر است یا مضر نیست و... تمام احکامی که شارع در این‌گونه موارد دارد، احکام اولی هستند

For some cases in Shariah there are certain rules without categorization and dividing methods and for certain conditions other laws are declared. In such instances the second law is a secondary law.40 In other words in the first examples the laws from the very beginning are introduced in categories and in divisions but in the second examples such laws are introduced in the form of exceptions.

در مواردی نیز، شارع به طور مطلق و بدون تنویع، احکامی را انشا می‌کند، سپس در جمله دیگری، یا به صورت متصل و یا به گونه منفصل، حکم حالت عارضی را ابراز می‌دارد، که در چنین فرضی، از حکم دوم، تعبیر به حکم ثانوی می‌کنیم. به‌بیانی کوتاه، در دسته اول سخن از تقسیم و تنویع است و در دسته دوم، مسئله‌تبصره و استثنا مطرح است.

The task of discerning and properly identifying the cases and the subjects to which such laws apply is also very important. A lower degree of carefulness and proper expertise may lead a Faqih to confusion and instead of a more important case he may give more consideration to what is less important, or in a crucial time the Islamic system and its protection may be exposed to dangers and insecurity.

بر اهمیت موضوع شناسی و تعیین مصادیق خارجی برای عناوین ثانویه، بیش‌تر از آن جهت پا می‌فشاریم که اگر این مرحله، با دقت و ظرافت و کارشناسی لازم، همراه نباشد، چه بسا کار بر فقیه مشتبه شود، مثلاً به جای اهتمام و توجه به امر اهم و صدور حکم بر طبق آن، توجه او به مهم معطوف شود و بر آن تأکید ورزد، یا مثلاً به دلیل عدم آگاهی عمیق از شرایط حاکم بر جامعه نتواند به موقع، اموری را که حفظ نظام بر آن‌ها مبتنی است، تشخیص دهد.

The significance of this task for the leader and the Imam of the society is of a much greater degree. The position of the Imam and leader is one that, in order to manage and supervise the system properly, requires discerning precisely all the laws and cases related to the management of the state. It is very important to discern what is important and more beneficial for the state and what is not important and beneficial for it. The leader and the Imam may even need the help of the experts in certain fields related to the management of the state.

اهمیت این مرحله در مورد حاکم اسلامی که مسئولیت امامت و هدایت سیاسی و اجتماعی جامعه را بر عهده دارد، بیش‌تر احساس می‌شود؛ چرا که به اقتضای این مسئولیت، شناسایی موضوعات آن دسته از احکام ثانوی که به اداره جامعه و وظایف حکومتی مربوط می‌شود، در حیطه کار او است. البته بسیار روشن است که تشخیص همه موضوعات مسائل حکومتی و تعیین اهم و مهم آن‌ها و بررسی مصالح و مفاسد همه امور کشوری، در سعه و توان شخص حاکم اسلامی نیست. از این‌رو چه بسا وی لازم بداند در زمینه‌های یاد شده از کارشناسان و متخصصان مربوط کمک بگیرد.

Imam Khomeini with a view to such task has said:

"Ii is possible, based on the fact that the running of the government is only for the just Foqaha, an objection or question may arise in the minds. One may say that Foqaha are not capable of running the state. This question and objection does not have a strong base because we see that in every state the affair are managed with cooperation of a great many of the experts and knowledgeable people. The kings and the Chief Executives a long time ago until our times did not know all the issues related to the running and management of the state. The expens of every field managed the affairs of the state. If the head of the government is a just person he finds the just or trustworthy ministers and officers and in this way he brings injustice, transgression and corntption in the public treasury\ against people's lives, honor and properties under control. Just as during the government of Imam Ali all the affairs of the government were not managed by him alone, instead the governors, the judges and commanders of the army were involved. Today also we see that the management of the political issues, the army and defence of the solidarity and the independence of the country each post and position is assigned to qualified persons.

امام خمینی در اشاره به این نکته می‌نویسد:

ان ما ذکرنا من ان الحکومة للفقهاء العدول قد ینقدح فی الاذهان الاشکال فیه بانهم عاجزون عن تمشیة الامور السیاسیة و العسکریة و غیرها، لکن لا وقع لذلک بعد ما نری ان التدبیر و الادارة فی کلّ دولة بتشریک مساعی عدد کبیر من المتخصصین و ارباب البصیرة. و السلاطین و رؤساء الجمهور من العهود البعیدة الی زماننا الّا ما شذّ منهم لم یکونوا عالمین بفنون السیاسة و القیادة للجیش، بل الامور جرت علی ایدی المتخصصین فی کلّ فنّ، لکن لو کان من یترأس الحکومة شخصاً عادلاً فلا محالة ینتخب الوزراء و العمّال العدول او صحیح العمل، فیقل

الظلم و الفساد، و التعدی فی بیت مال المسلمین و فی اعراضهم و نفوسهم.

کما انّ فی زمان ولایهٔ امیرالمؤمنین –علیه‌السلام– لم یجر جمیع الامور بیده الشریفهٔ، بل کان له ولاهٔ و قضاهٔ و رؤساء الجیش و نحوهم. و الآن تری ان تمشیهٔ الامور السیاسیهٔ او العسکریهٔ و تنظیم البلاد و حفظ الثغور کل موکولهٔ الی شخص او اشخاص ذوی الصلاحیهٔ بنظرهم. ممکن است نسبت به این گفته ما که حکومت از آن فقهای عادل است، اشکالی در ذهن بیاید و آن این که فقها توانایی اداره امور سیاسی و نظامی و... را ندارند، ولی این اشکالی است بی اساس؛ زیرا می بینیم در هر دولتی، تدبیر و اداره امور، با تشریک مساعیِ شمار بزرگی از متخصصان و آگاهان به امور، انجام می گیرد و پادشاهان و رؤسای جمهور از زمان های دور تا دوران ما، به جز تعداد کمی از آن ها، آگاه به فنون سیاست و رهبری سپاه نبوده اند، بلکه کارها به دست متخصصان هر فنی انجام می گرفته است، لکن اگر شخصی که در رأس حکومت قرار می گیرد، فردی عادل باشد، وزرا و کارگزارانی عادل یا درست کار برمی گزیند و بدین ترتیب ظلم و فساد و تجاوز به بیت المال مسلمانان و عرض و جان آن ها تقلیل می یابد. همان گونه که در دوران زمام داری امیرالمؤمنین –علیه السلام– نیز همه کارهای حکومتی به دست آن حضرت انجام نمی گرفت، بلکه آن حضرت دارای والیان، قاضیان، سران سپاه و... بود. امروزه هم می بینیم که اداره امور سیاسی یا نظامی و تنظیم امور بلاد و حراست از مرزها، هر کدام به شخص یا اشخاص صلاحیت دار واگذار می شود.

It is certain that if the secondary status of a rule would become an individualized matter in such a case the task of discerning the cases to which such rules and laws may apply will not be very difficult.

البته اگر عناوین ثانویه، جنبه فردی پیدا کند، تشخیص موضوعات آن‌ها در بسیاری از موارد کار دشواری نخواهد بود.

Obviously and very often the individuals easily discern what is difficult, harmful and a case of emergency for him or her. Although in some cases even individuals need the help of an expert of the field to which the case is related such as the physicians etc., especially when the level and degree of difficulties and hardships would he such that is judged by commonsense not according to the individuals standards.

چه این‌که غالباً هر شخصی، اضطرار و عسر و حرج خود را به راحتی تشخیص می‌دهد، گرچه در بعضی موارد نیز این کار بدون رجوع به متخصص مربوط، مانند پزشک، میسر نیست، مخصوصاً اگر معیار در این موارد عسر و حرج نوعی باشد.

The Procedures to Enforce or Practice the Secondary Laws

In general, three stages can be presumed for the secondary laws:

The initiation;

The discernment;

The enforcement stage.

The first stage is of the functions of the legislative authorities in Shariah. When there is a need and there is no obstacle the Shariah may sanction a law, which will be addressed to all Muslims universally and not individually, like the following verse of the Quran:

"Allah has not laid upon you any hardship (haraj) in religion. The second stage, which can also be called the stage of discernment, is when the people study the individual case to find which rule is applicable to it. The ordinary people themselves can, sometimes, carry this task. One example of such a case is the case of one who finds himself in a difficult position of consuming pork or carcasses for food or in the month of Ramadhan one is convinced that fasting is harmful for him due to a certain illness.

In some cases the leadership or the legislative body carries the task of the stage of discernment. This is when the government, in order to solve social problems, would need to benefit from the secondary laws. If the leadership or the advisors would see that standardizing the prices of in-public-demand commodities would help to overcome certain difficulties they may do so for the protection of the system. The author of Al-Jawahir in the section on "unlawfulness of wages for obligatory acts" writes:

"It is not an offense to receive wages for teaching certain industrial skills that are needed in the society because running of٤٣ the social order and the lives of industrialist depend on it.

به طور کلی می‌توان برای احکام ثانویه، مراحل سه‌گانه انشا، تشخیص و اجرا را در نظر گرفت. مرحله نخست که از شئون شارع است و به دستگاه تشریع، مربوط می‌شود، زمانی است که مصلحت و مقتضی برای صدور حکم، موجود و مانع از آن مفقود باشد. حکمی که در این موقعیت از ناحیه شارع صادر می‌شود، کلی و خطاب او به مکلفین به گونه قانونی است نه شخصی، مانند این‌که می‌فرماید: «ما جعل علیکم فی الدین من حرج » .مرحله دوم که می‌توان آن را مرتبه تطبیق نیز نامید، زمانی است مابین جعل حکم ثانوی و عمل به آن. در این مرحله، شخص واقعه مورد ابتلا را مورد مطالعه قرار می‌دهد تا معلوم شود آن واقعه، مصداق کدام عنوان است. این کار در پاره‌ای موارد توسط مکلف معمولی (مقلّد) انجام می‌گیرد، مثلاً چنین فردی در شرایطی ویژه خود را نسبت به استفاده از گوشت خوک یا گوشت حیوانی که ذبح شرعی نشده، مضطر می‌بیند، یا در ماه رمضان، روزه گرفتن را برای سلامتی خود مضرّ تشخیص می‌دهد.

در برخی موارد نیز تشخیص و تطبیق، از سوی حاکم اسلامی یا ابزار ولایی او، مانند قوه مقننه انجام می‌گیرد و آن زمانی است که حکومت، در حل معضلات اجتماعی و مشکلات جامعه نیازمند بهره‌گیری از احکام عناوین ثانویه شود.

از باب مثال، ممکن است حاکم یا کارگزاران او تشخیص دهند آزاد بودن قیمت‌ها و عدم نرخ‌گذاری، در شرایطی ویژه، موجب هرج و مرج و اختلال نظام می‌شود و بدین ترتیب نرخ‌گذاری، از باب مقدمیت داشتن برای حفظ نظام، لازم می‌شود. گاهی نیز این‌کار، توسط فقیه و مفتی دیگر غیر از حاکم انجام می‌پذیرد و آن زمانی است که فتوای او بر اساس عناوین ثانویه باشد، مثلاً صاحب جواهر در تعلیل این حکم که «جهت حل و فصل خصومات، تحصیل مرتبه اجتهاد، واجب است» می‌نویسد: «لتوقف النظام علیها(۴۲).» هم چنین در مبحث «حرمة التکسب بما یجب علی الانسان فعله» عبارتی دارد که حاصل آن چنین است: مانع ندارد انسان بر انجام دادن واجب‌های کفایی، مانند صنایع، اجرت بگیرد؛ چرا که بدیهی است نظام جامعه بر آن توقف دارد

The author of "Miftah al Keramah" in his discussion on the barren and unutilized lands points out to one of the cases to which the rule of no hardships (la-haraj) applies, and says:

"By utilizing the unutilized land (Mavat) one becomes the owner of such land. Because of the fact that people need to live in civilized manners if utilizing the

land would not give one the right to become the owner it will cause huge hardships (haraj) to the ٤٤society.

صاحب مفتاح الکرامه، هنگام بحث از اراضی موات، یکی از موارد قاعده نفی حرج را مورد اشاره قرار داده و می‌نویسد:

زمین‌های موات به اجماع امت، به وسیله احیا به ملکیت احیا کننده در می‌آید، به شرط این‌که موانعی در کار نباشد... و برای این‌که احیای موات مورد نیاز واقع می‌شود و به آن ضرورت شدید پیدا می‌شود؛ زیرا انسان مانند چهارپایان نیست، بلکه مدنی الطبع و نیازمند مسکن و مکان اختصاصی است، بنابراین اگر احیای موات مشروع نباشد، حرج بزرگ پیش می‌آید.

Obviously the task of deducing the secondary laws from the texts of Shariah is the task of a Mujtahid just as deducing the primary laws and the branches of such laws is.٤٥ Those of the secondary laws that in regards to their applicability are not of limited nature are dealt with only in the section to which such laws belong as branches in a process jurisprudential accepted. Those of the secondary laws that arc dealt with in several sections of Fiqh are treated as the rules of Fiqh, such as the principle of no harm (la-zarar) and no hardships (la-haraj). The task of a Faqih is to study the basis of such rules in regards to their authority and authenticity and clarify their limits and domain.46

البته روشن است که استنباط خود احکام ثانویه و استخراج آن‌ها از ادله نقلی و عقلی نیز کار مجتهد است، همان‌گونه که استنباط احکام اولیه و بحث در فروع این احکام، از شئون او است؛ منتها آن دسته از احکام ثانوی که جنبه جزئی و موردی دارد و تنها در یک یا دو باب فقه، مطرح می‌شود، در همان باب به صورت فروع فقهی مورد بررسی قرار می‌گیرد، مانند بحث در مورد حرمت استفاده از گوشت حیوانی که نجاست‌خوار شده‌است، ولی آن دسته از احکام ثانوی که در بیش‌تر یا همه ابواب فقه جریان می‌یابد، به عنوان قواعد فقهی مورد بررسی واقع می‌شود، مانند لاضرر و لاحرج. کار فقیه این است که قواعد مزبور را از جهت مستند و دلیل مشروعیت، مورد مطالعه قرار دهد و حدود و ثغور آن‌ها را تبیین نماید.

In regards to the third stage, namely the application and execution stage, in general, one may say that it is the task of the people or the government and from this aspect there is no difference between the secondary and the primary laws.47

One very important point to note in this regard is the fact that the secondary rules are often involved in the social issues and it, obviously, in the first place, is the duty of the government to see it executed properly. For this reason it is important to consider the secondary laws from two angles:

در مورد مرحله سوم؛ یعنی مقام اجرا، به طور کلی می‌توان گفت: مسئولیت اجرای احکام ثانویه، بر عهده «مکلفین» است و از این حیث، تفاوتی میان احکام اولیه و ثانویه نیست. آن‌چه در این‌جا در خور توجه می‌باشد این است که مقصود از مکلفین، برخلاف آن‌چه به ذهن پیشی می‌گیرد، تنها آحاد معمولی جامعه نیست؛ زیرا همان‌گونه که در فصل سوم گذشت، بسیاری از احکام ثانویه، ارتباطی تنگاتنگ با مسائل اجتماعی و کلی جامعه دارد و روشن است که اهتمام به این مسائل در وهله نخست، وظیفه حکومت اسلامی است. از این‌رو مناسب است اجرای احکام ثانوی را در دو قسمت مورد توجه قرار دهیم:

(a) The Secondary Laws Applicable to the individuals only:

Examples of such laws are the obligations of fulfilling one's vows, covenants, oaths, the conditions set along with a contract, involvement in certain prohibited matters due to emergencies, coercion and missing certain obligations due to an emergency. Such cases are of the ones for which people and individuals are responsible to fulfil and the government or the leadership does not play any role therein.

احکام ثانوی فردی

مانند وجوب وفا به نذر، عهد، قسم، شرط در ضمن عقد و جواز ارتکاب پاره‌ای از محرمات در هنگام اضطرار و اکراه. اجرای این دسته از احکام، از جمله تکالیف افراد مکلف است و به طور مستقیم هیچ مساس و ارتباطی با حاکم و مدیریت جامعه ندارد.

(b) The Secondary Laws that are Applicable to the Social Issues:

Just as discernment of the secondary laws applicable to the social issues is the duty of the government so also is its application and execution. The reason for this is also clear. Of such reasons are disruption and chaos that may follow due to ignoring the duty of enforcing such laws.49

احکام اجتماعی

همان‌گونه که تشخیص احکام ثانوی اجتماعی، مربوط به حاکم و ولی‌امر است، اعمال و اجرای آن‌ها نیز در وهله نخست به او و ابزار ولایی او مربوط می‌شود، دلیل این امر هم روشن است و آن این‌که اگر افراد خود سرانه این احکام را اِعمال کنند، اختلال نظام و هرج و مرج اجتماعی لازم می‌آید.

For example, adjustment of prices of certain commodities and controlling them and controlling the activities of hoarding urgently needed commodities are all of the duties of the government and no one would have the right to interfere with such issues. Of such examples are the issues related to the export and import of the commodities, during peace or war times if they would affect the security of the state.

مثلاً نرخ‌گذاری کالاها و کنترل قیمت‌ها، جلوگیری از احتکار یا واردات و صادرات برخی کالاها، اعلان صلح یا جنگ، تعطیل نمودن حج و زیارت عتبات عالیات و... در صورت توقف داشتن نظام جامعه و مصلحت اسلام بر آن‌ها از جمله وظایف حکومت اسلامی است و کسی حق ندارد خودسرانه به این امور اقدام کند.

Imam Ali in one of his instructions to Malik-e Ashtar has considered the tasks of controlling hoarding of needed commodities and of maintaining proper prices for the needed goods among the duties of the governor.

The Imam has said:

"Do not allow hoarding of in-public-demand goods because (he Holy Prophet (S.A.W.) would not allow it. The dealings of the people must be based on justice and fairness. In the exchange of the goods no harm or loss should be caused to the buyers or sellers. After wanting people against the evil of hoarding you may bring such people into account through balanced penalties".5

علی –علیه‌السلام– در عهدنامه خود به مالک اشتر، جلوگیری از احتکار و نظارت بر قیمت‌ها را از جمله وظایف او دانسته و می‌فرماید:

پس، از احتکار جلوگیری نما، چرا که رسول‌الله –صلی‌الله علیه و آله از آن جلوگیری نمود و باید معامله، آسان و بر اساس موازین عدالت باشد و نرخ کالاها به گونه‌ای باشد که به هیچ کدام از فروشنده و مشتری اجحاف نشود. و اگر کسی پس از این‌که او را از احتکار منع نمودی، به آن مبادرت ورزید، بدون زیاده‌روی، کیفر و مؤاخذه نما.

One of the contemporary jurists after giving some explanation about the secondary rules, says: “How many great problems which were solved in the light of the

secondary rules and how many sophisticated and difficult problems will be solved by these rules; the secondary rules are the greatest instrument available in the Islamic government for solving the problems of the society".

یکی از فقهای معاصر پس از توضیحاتی چند در مورد احکام و قواعد ثانویه می‌نویسد:

چه بسا مشکل‌های بزرگ و دشواری‌های پیچیده و تاریک که به کمک این قواعد و احکام و در پرتو آن‌ها حل و روشن می‌گردد. از این‌رو احکام عناوین ثانویه، از مهم‌ترین اسباب حکومت اسلامی، برای حل مشکلات است.

Certainly, one should not exaggerate the usefulness of the secondary rules and with the emergence of every problem resort to them. The expediency of the Islamic society is that its problem resort to them. The expediency of the Islamic society is that its difficulties should be solved as much as possible by the primary rules except in the emergency times; only when the primary rules are not useful, the secondary rules should be used.

نکته مهمی که باید در این‌جا خاطرنشان شود این است که نباید در راه‌گشا دانستن احکام ثانوی به جانب افراط رفت و با پیدایش هر مسئله و مشکلی بی‌درنگ به سراغ این احکام رفت. مصلحت جامعه اسلامی در این است که در حد امکان، مشکلات آن را با احکام ثابت و اولیه، مرتفع نمود و تنها در مواقع ضرورت و هنگامی که احکام اولیه، جواب‌گو نیستند، به سراغ احکام ثانویه رفت.

Recognition of the criteria of the secondary rules requires awareness. The criteria of the secondary rules is the impossibility of acting upon the primary rules and following them. Recognition of this and recognition of the instances and cases requires religious knowledge; for example wherein *zarar* and *haraj* is instance of the secondary rule, or distinguishing of the most important matter from more important ones *(Ahamm and Mohemrn)*, requires the religious expertise.[٥١]

Categories of the Secondary Laws

None of the *Foqaha* in their investigations and works have specified the number of the titles for the categories of the secondary laws. Only the following are the well-known titles for the categories of such laws.

١. Protection of the Islamic system. (*Hefz alnedam)*

٢. The Urgencies and Pressing Needs. (*Izterar)*

٣. Losses. (*zarar)*

٤. Hardships and Constraints *(Osr and haraj)*

٥. Coercion *(fkrah)*

٦. Being a lead, or Introductory (*Muqaddimah-Al-Wajeb or Hararn*)

٧. Important and more important *(Ahamm and Mohemm)*

Initially, each of the above mentioned titles seems independent titles but a careful study and proper consideration of these titles reveal that many of them are very closely related to the others. These relations are as such that in some cases two of them can be considered as one and the same.

تاکنون در کاوش ها و پژوهش های مربوط به فقه اسلامی، هیچ عددی از عناوین ثانویه، ذکر نشده است. آن چه در میان اصولی ها و فقها و حقوق دانان به نام «عناوین ثانویه» مشهور است، امور زیر است:

- ۱حفظ نظام؛

- ۲مصلحت نظام؛

- ۳اضطرار (ضرورت)؛

- ۴ضرر؛

- ۵عسر و حرج؛

- ۶اکراه؛

- ۷مقدمیت؛

...۱۴ – اهم و مهم.

به حسب ظاهر و در نگاه نخست، تصور می شود هر یک از عناوین مزبور، متباین و مستقل از دیگری است و هر کدام جای گاه و قلمرو ویژه خود را دارد، ولی با تأمّل در مفاهیم آن ها و غور در ادله و موارد کاربرد آن ها در متون فقهی، روشن می شود که برخی از این عناوین، ارتباطی وثیق با برخی دیگر دارد، به گونه ای که شاید بتوان در برخی موارد دو تا از آن ها را یکی دانست.

In the views of some of the scholars of *Shariah* urgency (*Izterar*) is a universal title and the issues of hardships and constraints are some of the examples of urgency and pressing needs. The author of *Al-Jawahir* in the section of the *Taharat* dealing with rules of cleanliness has said this:

"It is not permissible to have Vozu or Ghusl with unclean water nor is it

permissible to drink such water except in the case of urgency. Hardships and extreme constraints are of such examples" [۵۲]

برخی عبارت های فقهی نشان می دهد از دیدگاه برخی فقها «ضرورت» عنوانی عام است که «عسر و حرج» و «تقیه» از مصادیق آن هستند، مثلاً صاحب جواهر در کتاب طهارت می نویسد:

اذا حکم بنجاسة الماء لم یجز استعماله فی الطهارة مطلقاً حدثاً و خبثاً عند الضرورة و عدمها و کذا لایجوز فی الاکل و الشرب الّا عند الضرورة و المدار علی تحققها و منها العسر، الحرج و التقیة و نحو ذلک. هر گاه آب، محکوم به نجاست باشد، استفاده از آن در طهارت به طور مطلق، جایز نیست، هم در رفع حدث و هم در زدودن خبث، و در هر دو حالت ضرورت و نبود ضرورت. هم چنین نمی توان از این آب در خوردن و آشامیدن استفاده نمود، مگر هنگام *ضرورت. مدار، پیدایش ضرورت است و عسر و حرج و تقیه و مانند این ها، از مصداق های آن هستند.*

In some cases he considers the case of losses *(Zarar)* the same as an urgency. In the section of the law about food and drinks he has the following expressions, "In all cases wherein eating or drinking is not permissible, in all such cases due to urgency it all becomes permissible. Proof for such rules are the verses of the Quran, the principle of no harm, no constraints *(la-haraj)* and that Islam is an easily practicable religion *(Al Shariah Al samhah)* [۵۳]

وی در برخی موارد، حصول «ضرر و ضرار» را نیز از موارد ضرورت دانسته است، از جمله در کتاب اطعمه و اشربه عبارتی دارد که حاصل آن چنین است:

کلّ ما قلنا بالمنع من تناوله فالبحث کان فیه مع الاختیار و اما مع الضرورة فلا خلاف فی انّه یسوغ التناول لقوله تعالی: «فمن اضطرّ غیر باغ و لا عاد فلا اثم علیه»(۷) مضافاً الی قاعدة نفی الضرر و الضرار و نفی الحرج و ارادة الیسر و سهولة الملّة و سماحتها. بحث در هر چیزی که خوردن آن را ممنوع بدانیم، مربوط به صورت اختیار است اما اگرضرورت ایجاب کند، اختلافی نیست در این که خوردن آن جایز است، زیرا خداوند می فرماید: «فمن اضطر غیر باغ و لا عاد فلا اثم علیه» افزون بر وجود قاعده نفی ضرر و ضرار و قاعده نفی حرج و این که آسانی و سهولت شریعت و راحتی آن، مورد نظراست.

Although, hardships and constraints *(Osr and Haraj)* may be considered the same

as "urgency" (*Izterar)* each one is dealt with separately as an independent principle and rule. The existence *oiAhadith* in the *Shariah* is the reason for such separation. In some of these *Ahadith* the title "urgency" *(Izterar)* and in some of them "hardships" and "constraints" *(osr* and *haraj)* or "losses" (*zarar)* are mentioned. One of the contemporary *Foqaha* also points out saying:

"Coercion may also be considered an other example of "urgency". Some of the scholars have even considered both titles; (coercion and urgency) as one and the same as in the interpretation of verse 173 of chapter two wherein a compelled person ('moztarr) is considered as a coerced one *(mokrah)*[54]

می بینیم علی رغم این که تقیه و عسر و حرج می تواند از مصادیق «ضرورت» باشند، هر یک جداگانه مطرح شده و به عنوان قاعده ای خاص معنون گشته اند. علت این تمایز و تفکیک، ورود ادله گوناگون در لسان شارع است. در برخی از این ادله روی عنوان تقیه تکیه شده است و در بعضی از آن ها عنوان اضطرار و در دسته ای از آن ها عنوان عسر و حرج و... مطرح شده است.

... یکی از فقهای معاصر این نکته را خاطرنشان می کند و می نویسد:

... می توان «اکراه» را از مصادیق اضطرار نیز محسوب داشت. حتی برخی –آن طور که از نوشته هایشان ظاهر می شود– این دو عنوان را یکی دانسته اند، از جمله در تفسیر ابن عربی ذیل آیه ۱۷۳ بقره می خوانیم:

ان المضطرّ هو المکلف بالشی ء الملجأ الیه المکره علیه؛ مضطر کسی است که به چیزی مکلف و مجبور باشد و مورد اکراه قرار گرفته باشد.

The *Foqaha* have considered the titles such as "important and more important" *(Ahamm and Mohemm)* as the secondary titles side by side with the other secondary titles such as extreme "hardships and constraints" and it seems as if it is not a separate title. In fact, urgency should, with a view to the following, be considered a basic standard for the practice of the secondary laws. Although the primary laws from the point of view of the *Shariah* are important and in normal conditions it is necessary to obey such laws but in certain cases obedience to the secondary laws is more important. In the *Quran* and *Sunnah* also there are no such captions. It is only the decision of reason that when facing an important and more important *(Ahamm and Mohemm)* issue the more important must be given priority.

بعضی عنوان اهم و مهم را عنوان ثانوی شمرده و آن را در عرض دیگر عناوین ثانویه، مانند عسر و حرج دانسته اند، ولی مقتضای تحقیق این است که این عنوان جدا از دیگر عناوین تحقق ندارد، بلکه باید آن را مناط جواز عمل به بسیاری از احکام ثانویه دانست، به این بیان که گرچه از نظر شرع، حکم اولی، مهم و عمل به آن در صورت عادی بودن شرایط، لازم است، اما در پاره ای موارد، عمل نمودن بر طبق احکام ثانویه، اهم است. در کتاب و سنت هم، چنین عنوانی دیده نمی شود و این حکم عقل و عقلا است که هنگام دوران امر میان اهم و مهم باید جانب اهم مراعات گردد.

Therefore, the law of "important and more important" is the criteria and standard that dictates to obey the secondary laws, in certain cases, before the primary laws. On this basis one may say that giving priority to the secondary laws before the primary laws for practical reasons is because of the fact that a more important case has priority over an important case. Some scholars have also stressed on this point.[55]

حاصل سخن این که قانون اهم و مهم، مناط مقدم نمودن احکام ثانویه بر احکام اولیه است و بعید نیست بگوییم در همه مواردی که حکم ثانوی بر حکم اولی مقدم می شود از باب تزاحم میان این دو و تقدیم اهم بر مهم است.

می توان کلمات برخی از محققان را نیز اشاره به این نکته دانست .

The law of "important and more important" is not limited to the cases of the secondary laws. In the case of a conflict between two laws of primary nature also this law is followed. For example, in the case of saving a life from drowning the *Foqaha* consider it permissible to walk on a piece of land that is currently under the control of some one due to usurpation, if saving a life may require it. It is very likely that in those cases wherein making an untrue statement or a statement that involves backbiting is considered permissible is based on this law.[۵۶]

قانون اهم و مهم، اختصاص به احکام ثانویه ندارد؛ چرا که هنگام وقوع تزاحم میان دو حکم اولی نیز به این قانون عمل می شود؛ از باب مثال فقها هنگام بحث از حکم دخول در زمین غصبی به منظور نجات دادن غریق، به این قانون توجه نموده اند. شاید بتوان حکم فقها به جواز دروغ و غیبت در مواردی ویژه را نیز از همین قبیل دانست.

However, the number of the secondary laws can not be limited to a known number

of cases, even though the idea about the applicability of the popularly known secondary laws may be considered a good possibility. It is not so in the cases of the secondary laws that are not so popular because there are no known rules to follow in discerning and distinguishing such laws. Such secondary laws are found only in scattered sections of the law where one may face them.

It seems necessary to conduct more precise and profound studies to discern, distinguish and analyze the issues of the principles of jurisprudence and issues of jurisprudence. It is also necessary to deduce and infer secondary laws for the newly emerging issues and cases that require the application of such laws.

نتیجه

نمی توان شمار قواعد و احکام ثانویه را در عددی معین محصور دانست. برفرض هم که این کار در مورد قواعد ثانویه ممکن باشد، درباره عناوین ثانویه جزئی و غیرمشهور، میسور نیست؛ چرا که در شناخت و تبیین آن ها، هیچ ضابطه ای در دست نیست و تنها در مسائل و فروع پراکنده فقه به آن ها برمی خوریم. بله چنین کاری در مورد قواعد کلی ثانوی میسر است، مشروط به این که تتبعی کامل و دقیق در همه ابواب و مباحث فقه، صورت گیرد. البته در صورت انجام چنین کار بزرگی، تنها قواعد ثانویه موجود، شناسایی و ارائه می گردد؛ زیرا چه بسا با مطالعات دقیق تر و کاوش های بیش تر و تنقیح بهتر مبانی و مسائل اصولی و فقهی و نیز با پیدایش مقوله ها و مسائل نوظهور فقهی، قواعد ثانویه دیگری نیز استنباط و ابداع شود.

Titles of the Popularly Known Secondary Laws: Protection of the System

Of the most important issues, according to the *Shariah*, one is the protection of the Islamic system *(Hefz-al-Nedam*).

This caption and title implies sometimes (a) the preservation and protection of the sovereignty of the Islamic system and the prevention of confusion and uncertainty from creeping into the system at the hands of the internal and external enemies. For this reason Naeeni considered the protection of the sovereignty of the country against the hostile intentions of the foreigners and their plots to mobilize the defence capabilities as preservation and protection of the Islamic system. In other words he considered preserving the sovereignty and independence of Muslim lands.

فصل اول: حفظ نظام

حفظ نظام، از موضوعات بسیار مهم فقهی است. ...

نگاهی به متون و نوشته‌های فقهی نشان می‌دهد این عنوان به دو معنا استعمال می‌شود؛ زیرا گاهی مقصود از آن، حفظ و نگه‌داری حاکمیت اسلامی و جلوگیری از خدشه‌دار شدن آن به وسیله دشمنان داخلی و خارجی اسلام است که می‌توان عنوان «حفظ بیضه اسلام» را نیز به همین معنا یا دارای معنایی نزدیک به این دانست و به همین جهت، مرحوم نائینی «تحفظ از مداخله اجانب و تحذّر از حیل معموله در این باب و تهیه قوه دفاعیه و استعدادات حربیه» را در لسان متشرعین، حفظ بیضه اسلام، و در بیان دیگران «حفظ وطن» نامیده‌است

(b) Sometimes it means to enforce and bring about law and order within the Muslim society. It is to enforce the rules of discipline among the people, the establishments and institutions of the society. Protection of the system in this sense is opposed directly to chaos and anarchy.

گاهی هم مراد از آن، حفظ نظم در درون جامعه اسلامی و برقراری انضباط میان مردم و سازمان‌ها و دستگاه‌های اجتماعی است. حفظ نظام به این معنا، در مقابل اختلال و هرج و مرج، استعمال می‌شود.

The caption "protection and preservation of the system" in the majority of cases, applies to its meaning in case (b), the author of *Jawahir*, on the issue and discourse that in order to settle the court cases and disputes among people, and it is obligatory to acquire the qualification of a *Mujtahid*, has said this: "The basis and proof for such necessity is that the Islamic system needs it."[59]

کلمه مورد بحث، در بیش‌تر موارد، در معنای دوم به کار رفته‌است، از باب مثال صاحب جواهر، در تعلیل این حکم که جهت حل و فصل خصومات، تحصیل مرتبه اجتهاد، واجب است، می‌نویسد: «لتوقف النظام علیها

According to Imam Khomeini, prevention of chaos and anarchy from creeping into the society is the basis of the philosophy to establish a government.[٦٠]

امام راحل، جلوگیری از هرج و مرج و حفظ نظام به معنای دوم را یکی از فلسفه‌های تشکیل حکومت می‌داند

According to Naeeni, in a discourse on preservation and protection of the system it indicates and refers to both meanings of the phrase preservation and protection of the system, mentioned in (a) and (b). Naeeni has said:

"In *Shariah*, the protection and preservation of the Islamic system is one of the most important obligations. Evidently, all of the aspects related to the foundation of the government, protection of the honor and the rights of the people are based on two principles:

مرحوم نائینی در گفتاری، حفظ نظام به هر دو معنای گفته شده را مورد توجه قرار می‌دهد و می‌گوید:

در شریعت مطهره، حفظ بیضه اسلام را اهم جمیع تکالیف و سلطنت اسلامی را از وظایف و شئون امامت، مقرر فرموده‌اند... و واضح است که تمام‌جهات‌راجعه به‌توقف نظام‌عالم، به اصل سلطنت و توقف حفظ شرف و قومیّت هر نوعی به امارت نوع خود انسان، منتهی به دو اصل است

(a) The maintenance of law and order as means of progress in the society is one of such principles. It is the protection of the people's rights, maintaining justice and other obligations related to the welfare of the country and people, (b) The other such principle is *defending the country against the invaders and intruders "*[61] Both tasks of the safeguard and protection of the system in the sense mentioned in (a) or (b) are obligatory tasks according to *Shariah* and according to reason. The scholars consider this issue and principle a firmly and already settled one, free from any need of further analysis. They have based many rules on this principle.

اول: حفظ نظامات داخلیه مملکت و تربیت نوع اهالی و رسانیدن هر ذی‌حقی‌به حق خود و منع از تعدی و تطاول آحاد ملت بعضهم علی بعض الی غیر ذلک، از وظایف نوعیه راجعه به مصالح داخلیه مملکت و ملت؛ دوم: تحفظ از مداخله اجانب و تحذر از حیل معموله. نکته قابل توجه در این زمینه این‌که، حفظ نظام، به هر دو معنا، از واجبات شرعیه و عقلیه است. نگاهی به ابواب مختلف فقه نیز نشان‌دهنده مسلّم بودن این مطلب در میان همه فقها است. این دانش‌وران در موارد فراوانی، با مفروغ عنه گرفتن این حکم، احکام و آثار گوناگونی را بر آن مبتنی کرده‌اند که با نمونه‌هایی از آن آشنا شدیم،

For example Naeeni writes:

"The **Shariah** does not agree with causing anarchy and chaos in the society is clearly evident and all the duties related to the protection and safeguarding of the system and the country are of the urgent obligations beyond any doubt

از این‌رو محقق نائینی به مناسبتی می‌نویسد:

چون عدم رضای شارع مقدس به اختلال نظام و ذهاب بیضه اسلام، بلکه مهم‌تر بودن وظایف مربوط به حفظ نظم مملکت اسلامی از تمام امور حسبیه، از اوضح قطعیات است، پس ثبوت نیابت فقها و نوّاب عام عصر غیبت، در اقامه وظایف مذکور، از قطعیات مذهب خواهد بود

The reason that these laws are considered as the secondary ones is because of the fact that in many cases the protection and the safeguarding of the system involves doing or otherwise of certain acts. Such acts that may have been permissible in

normal conditions may be due to the efforts of providing security to the system have become obligatory or otherwise. Therefore, the title and caption of being a secondary law is an introductory and a step towards some other tasks and because of this they have become obligatory or otherwise Al-Khoei has said:

"Learning all artistic abilities are of the permissible activities and they do not even come under the desirable activities far from being obligatory or otherwise ones. However, if ignoring to learn such skills would lead to the emergence of chaos in the society and the system then learning such skills becomes an obligation (*Wajeb*).[63]

ظاهراً آن چه موجب ثانوی شمردن این حکم شده، این است که در بسیاری موارد حفظ نظام، متوقف بر انجام یا ترک برخی امور است. اموری که ممکن است فی نفسه و به حسب ذات مباح باشند، ولی به سبب توقف مزبور، واجب یا حرام شوند. همین امر سبب این تصور شده که عروض ثانوی حفظ نظام بر امور مزبور، موجب تغییر حکم اولی آن ها شده است، حال آن که باکمی دقت معلوم می شود آن چه بر این امور عارض شده، عنوان ثانوی مقدمیت است؛ یعنی چون این امور، انجام یا ترکشان، مقدمه حفظ نظام -که واجبی اولی است- می شود، واجب یا حرام شده اند.

می‌توان عبارتی از مرحوم آیتالله خویی در مباحث «مکاسب محرمه» را نیز اشاره به همین نکته دانست:

اما الصناعات بجمیع اقسامها فهی من الامور المباحة و لا تتصف بحسب انفسها بالاستحباب فضلاً عن الوجوب، فلا یکون التکسب بها الا مباحاً، نعم انما یطرء علیها الوجوب اذا کان ترکها یوجب اخلالاً بالنظام و حینئذ یکون التصدی لها واجباً کفائیاً او عینیاً؛

همه اقسام صنایع، از امور مباح محسوب می‌شوند و فی‌نفسه به استحباب متصف نمی‌گردند چه رسد به این‌که متصف به حکم وجوب شوند، پس تکسّب با این امور، حکمی جز اباحه ندارد، بله هرگاه رها نمودن این صنایع سبب اخلال به نظام شود، حکم وجوب بر آن‌ها عارض می‌شود و در این صورت تصدی برای انجام آن‌ها واجب کفایی یا عینی خواهد بود.

Hardships and Constraints

One *of* the important rules and principles that apply very frequently in *Fiqh* and the Islamic law is the principle of "no hardships and no constraints". (*La-haraj*)

The fact that so many of the *Foqaha* apply it in so many sections of the law to

various cases is proof of the significance and usefulness of this principle.
In most of the issues related to the government and the society and some of the newly emerging complex cases that require ruling from *Shariah* this principle may provide key answers and solutions.

فصل سوم: عسر و حرج

یکی از قواعد مهم و کثیر الاستعمال در فقه و قانون اسلامی «قاعده نفی عسر و حرج» است. تمسک فقها به این قاعده، در ابواب گوناگون و مسائل متنوع فقه، دلیل بر اهمیت و فواید فراوان آن است. در بسیاری از مسائل حکومتی و اجتماعی و پاره‌ای از معضلات و مشکلات نوپیدای فقهی نیز، چنان‌که در بخش نخست کتاب اشاره نمودیم می‌توان این قاعده را راه‌گشا و مؤثر دانست.

There is another point that reveals the significance of more investigations into this principle. It is the fact that some people, despite the existence of solid evidence to prove “hardships” authority and authenticity and the fact that so many of the *Foqaha* have applied this principle to so many cases, they have considered its nature and applicability unclear. They have limited its authority to the obligations whose fulfillment is beyond human capabilities. Thus, practically they have denied its authority unaware of the fact that in such cases reason independently negates the responsibility and there will be no need on the part of *Shariah* to declare such a principle. Of such people one may name Sheikh Hurr Ammili".[٦٤]

نکته دیگری که اهمیت بحث از این قاعده را روشن‌تر می‌کند این است که برخی علی‌رغم ادله محکم و متقن این قاعده و استفاده فراوان فقها از آن، مفاد آن را مجمل دانسته، و با محدود ساختن حجیت آن به موارد تکلیف ما لایطاق، عملاً حجیت آن را مورد انکار قرار داده‌اند، غافل از این‌که در چنین مواردی، خود عقل به‌طور مستقل به نفی تکلیف، حکم می‌کند و دیگر حاجت به تأسیس این قاعده امتنانی از سوی شارع نیست. در این زمینه می‌توان از مرحوم شیخ حر عاملی نام برد

Hardships and Constraint are of Four Kinds

(١) Hardships and Constraints beyond human capabilities to bear.

(٢) Hardships and Constraints of a smaller degree than the one mentioned, but they would cause disruption in the society.

(٣) Constraints that would be to none of the degrees mentioned above, but they would cause loss of life, property or honor.

(٤) The degree of constraint that is not beyond human capabilities to bear and would not cause disruption or losses in the social system, but to endure and bear it would cause a great deal of suffering.

عسر و حرج در کارها، دارای چهار قسم است:

۱- عسر و حرج به اندازه‌ای که مکلف طاقت تحمل آن را نداشته‌باشد

۲- عسر و حرجی که از مقدار فوق کم‌تر است، ولی با این وجود تحمل نمودن آن موجب اختلال نظام می‌شود؛

۳- حرجی که به هیچ یک از این دو پایه نرسد، ولی به حدی باشد که مستلزم ضرر جانی یا مالی یا آبرویی شود؛

۴- حرجی که تحمل آن فوق طاقت و مستلزم اختلال نظام و ضرر نباشد، بلکه در تحمل آن، تنها مشقت و تنگنا باشد.

From the *Foqaha* point of view, the first kind of constraints and hardships are not of the cases to which the secondary laws may apply. It is obvious that the *Shariah* does not impose a responsibility beyond peoples' capabilities.

در این‌که قسم نخست از محل بحث بیرون است، هیچ شبهه و تردیدی نیست. جای بحث از آن، کتب کلامی و برخی از کتب اصولی است که در آن‌ها جواز و استحاله «تکلیف به ما لا یطاق» را مورد بررسی قرار داده‌اند. البته تمام کسانی که در این زمینه، بحث نموده‌اند، بر این نکته اتفاق نظر دارند که چنین تکالیفی در شریعت، وجود خارجی ندارد.

The second kind of hardships and constraints is just like the first one because the expressions and the pronouncements of *Foqaha* on the issue of hardships and constraints do not include this kind. Evidence to this is the fact that the unreasonableness of imposing an obligation that would cause disruption in the social system is obvious and without any shred of doubt. We all know that the goal of *Shariah* for having such laws is not to disrupt and destroy the social orders and paralyze the sound and peaceful way of life of individuals. The final goal of the *Shariah* is to, in most of the rules, safeguard and protect society to the highest level of excellence and decency. With the view to this, how could it be acceptable on the part of the *Shariah* to command people for the duties that would disrupt social order?

قسم دوم نیز مانند قسم نخست، از محل بحث بیرون است؛ زیرا کلمات و عبارات‌علما، از این قسم، انصراف

دارد، و دلیل آن هم این است که قبح تکالیفی که موجب اختلال نظام می‌شود، آن چنان روشن و ظاهر است که حاجت به استدلال ندارد. زیرا بدیهی است که مقصود شارع مقدس از تشریع نمودن احکام، ابطال نظام‌جامعه و تعطیل نمودن زندگی افراد آن نیست، بلکه غرض نهایی او از تشریع بسیاری از تکالیف، تنها حفظ این نظام به بهترین وجه است. با این حساب چگونه‌می‌توان پذیرفت شارع مردم را به اموری تکلیف نماید که موجب اختلال نظام شود؟!

As far as the case in (٣) is concerned, it may fall under the laws of the "principle of no harm" and that the "principle of no constraint" does not apply to it, although in many cases of no harm one could present evidence from both principles. Therefore, the fundamental argument in the "principle of no constraint" is only related to the fourth kind of hardships and constraints, mentioned above.[٦٥]

در مورد قسم سوم نیز باید گفت این قسم، داخل در تحت قاعده لاضرر است و از مجاری ویژه قاعده نفی حرج به حساب نمی‌آید، گرچه می‌توان در بسیاری از موارد ضرر، به هر دو قاعده، استدلال نمود. از آن‌چه گفتیم روشن می‌شود که محل بحث در قاعده نفی حرج، تنها قسم چهارم از اقسام عسر و حرج است.

Evidence of the Authority and Sources of this Principle

(a) Evidence of the Authority of this Principle from The verses of the Holy *Quran*

١. "Allah has not laid upon you any hardship (haraj) in religion[66]

٢. "Allah does not desire to put on you any difficulty" (haraj).

٣. "Allah desires ease for you, and He does not desire for you difficulty (Osr) "[68]

٤. "Allah does not impose upon any soul a duty but to the extent of its ability" [٦٩]

دلیل های قاعده

... الف – آیات

١– و ما جعل علیکم فی الدین من حرج؛(٢)

و خداوند در دین حرجی بر شما قرار نداده‌است.

٢– ما یرید الله لیجعل علیکم من حرج؛(٥)

اراده خدا این نیست که بر شما حرجی قرار دهد.

۳- یرید الله بکم الیسر و لا یرید بکم العسر؛(۶)

خداوند درباره شما، آسانی را اراده کرده و سختی را اراده نکرده‌است.

۴- ربّنا و لا تحمل علینا اصراً کما حملته علی الذین من قبلنا؛(۷)

پروردگارا هیچ بار گرانی بر (دوش) ما مگذار همان‌گونه که آن را بر (دوش) پیشینیان ما نهاد.

(b) Evidence of the Authority of this Principle from *Ahadith*

۱. "A man asked Imam Ali, my fingernail came off in an accident. How should I make vozu ? "Wipe it from the surface a piece of cloth and you do not have to wash itReplied Imam Ali.[70]

ب - روایات

۱- روایت معروف عبدالاعلی مولی آل‌سام:

قلت لابی‌عبدالله -علیه‌السلام-: عثرت فانقطع ظفری فجعلت علی اصبعی مرارة فکیف أصنع بالوضوء؟ قال - علیه‌السلام-: یعرف هذا و اشباهه من کتاب‌الله عزّ و جلّ قال‌الله عزّ و جلّ: «ما جعل علیکم فی الدین من حرج» امسح علیه

۲. "Imam Ali was asked about the use of a jacket made of the leather from an animal that is not known as regards being slaughtered properly according to the instructions of the Shariah or not. The Imam considered its use lawful even during prayers on the basis that Islam is a religion that does not impose hardships on people[71]

۲- مضمره محمد بن‌ابی‌نصر:

سألته عن الرجل یأتی السوق فیشتری جبهٔ فراء لا یدری أذکیهٔ هی أم غیر ذکیهٔ، أیصلّی فیها؟ فقال نعم، لیس علیکم المسئلهٔ، ان اباجعفر -علیه‌السلام- کان یقول: ان الخوارج ضیقوا علی انفسهم بجهالتهم ان الدین اوسع من ذلک؛ از او در مورد مردی پرسیدم که به بازار می‌رود و ردایی از جنس خزّ می‌خرد، در حالی که نمی‌داند آن خزّ، تذکیه شده یا نه، آیا می‌تواند در آن ردا نماز بخواند؟! حضرت فرمود: بله، این پرسش بر شما لازم نیست. امام باقرعلیه السلام- می‌فرمود: خوارج به‌سبب نادانی، زندگی را بر خود تنگ کردند. دین، وسیع‌تر و آسان‌تر از

چیزی است که آنان می‌گویند.

Muhaqqiq-e Bujnurdi also writes in this regard

"The evidence for relieving people from the burden of the laws that cause constraints on the Muslims is the kindness and the grace of Lord God on His servants. He wanted the religion to be easy to follow for Difficulties the people and without The Meaning and the Implications of this Principle under consideration are indicative of the fact that God has not sanctioned any law that would cause constraints on the people.

محقق بجنوردی، پس از توضیح دلیل‌های این قاعده (آیات و روایات) با اشاره به قلمرو گسترده آن می‌نویسد:

و هذه الآیات تدلّ دلالة واضحة علی انالله تبارک و تعالی لم یجعل فی دین الاسلام احکاماً حرجیة بحیث یکون امتثال احکامه و اطاعة اوامره و نواهیه شاقاً و حرجاً علی المسلمین و المؤمنین بهذا الدین

این آیات به روشنی بر این نکته دلالت دارند که خداوند تبارک و تعالی، در دین اسلام، احکام حرجی، جعل نفرموده، احکامی که امتثال آن‌ها و اوامر و نواهیی که اطاعت آن‌ها، برای مسلمانان، مشقت‌بار و حرجی باشد.

For example, in the case of a person whose injured finger is bandaged and difficult to remove such bandages for *Vozu*, no obligation that would make him have *Vozu* as in normal conditions is sanctioned Also, if severe weather would cause a great deal of constraints, compared to normal conditions, no law that would obligate him to have *Ghusl* in such condition is sanctioned.

از باب مثال، بر کسی که جبیره بر دست دارد و برداشتن آن مستلزم حرج و عسر است وجوب وضوی معمولی، جعل نشده، و بر شخصی که در برودت هوا گرفتار آمده و غسل نمودن در آن وضعیت، مستلزم حرجی است که عادتاً تحمل نمی‌شود، وجوب غسل، جعل نشده‌است.

Therefore, all the Islamic responsibilities of the people at first relates to conditions free from constraints as if all the laws and religious rules initially are sanctioned with the stipulation of freedom from hardships and difficulties.[۷۳]

The Meaning of Hardships and Constraints

Constraint, in its dictionary definition is narrowness and impasse.

مفهوم عسر و حرج

حرج در اصل به معنای تنگنا و ضیق است

In *Hadith*, sometimes it refers to sin and unlawful matters.

حرج، در اصل به معنای تنگنا است، و به گناه و حرام [نیز] حرج گفته می‌شود... و در حدیث، حرج به این معنا زیاد آمده‌است

The author of Sihah al Lughah and Ibn Manzur say "Constraint means sin, difficulty and narrowness".[75]

ابن‌منظور نیز می‌گوید: الحرج: الاثم و الضیق... الحارج: الآثم. حرج؛ یعنی گناه و تنگنا... و حارج، به معنای گناه‌کار است.

Talking this into consideration, the original meaning of "constraint" is narrowness. Also sin and unlawful matters are called constraints (*Haraj)* because of this aspect, sins and unlawful matters committed in this world will cause constraints and narrowness in the next world and life.

می‌توان با توجه به این کلمات گفت، معنای اصلی حرج، همان ضیق است و اگر هم به گناه و حرام، حرج گفته می‌شود، از باب اطلاق مسبب بر سبب و بدین لحاظ است که گناه و امر حرام، در دنیا و آخرت سبب پیدایش ضیق می‌شود.

In the following verses of the *Quran* the word *Haraj* (constraints) is used to mean sins and unlawful matters:

> *"It shall be no crime (haraj) in the weak, nor in the sick, nor in those who do not find what they should spend (to stay behind)*[76]

> *"There is no blame (haraj) on the blind man, nor is there blame on the lame, nor is there blame on the sick, nor on yourselves that you eat from your houses, or your fathers' houses or your mothers' houses, or your brothers' houses, or your sisters' houses ..."*

Also in these two following verses *"haraj"* has been used in its main meaning*:*

> *"Therefore (for) whomsoever Allah intends that He would guide him aright, He expands his breast for Islam, and (for) whomsoever He intends that He should cause him to err, He makes his breast strait (haraj) and narrow".*

A book revealed to you - so let there be no constraints (haraj) in your breast on account of it - that you may warn thereby, and a reminder close to the believers

در قرآن کریم نیز گاهی حرج، به معنای اثم و گناه استعمال شده‌است، مانند دو آیه زیر:

لیس علی الضعفاء و لا علی المرضی و لا علی الذین لا یجدون ما ینفقون حرج اذا نصحوا للّه و رسوله؛ بر ضعیفان و بیماران و کسانی که چیزی برای انفاق در اختیار ندارند (انفاق نکردن) گناه نیست آن گاه که ایشان خیرخواه خداوند و پیامبر باشند.

لیس علی الأعمی حرج و لا علی الأعرج حرج و لا علی المریض حرج؛ بر نابینا گناهی نیست، و بر شل گناهی نیست، و بر بیمار گناهی نیست.

چنان که در دو آیه زیر نیز حرج به همان معنای اصلی خود آمده است:

فمن یرد الله أن یهدیه یشرح صدره للاسلام و من یرد أن یضلّه یجعل صدره ضیقاً حرجاً؛ پس هر کس را خدا بخواهد هدایت کند، سینه اش را به پذیرش اسلام می گشاید، وهرکس را بخواهد گمراه نماید، سینه اش را سخت تنگ می گرداند.

کتاب أنزل الیک فلا یکن فی صدرک حرج منه؛ (این قرآن) کتابی است که بر تو فرو فرستاده شد، پس در سینه ات نسبت به آن تنگی نباشد.

According to the linguists one may find a meaning for the word Osr *(hardships) very close to that of the word* Haraj *(constraints).*

In *Al-Nihayah,* Ibn Athir has said, "The word *Osr* (hardships) is opposite of the word *Yusr* meaning ease and comfort. *Osr* means hardships and narrowness.[٨٠] In *Lisan Al-Arab* it is recorded, *"Osr* is opposite to *Yusr* that means ease and comfort".[81]

بر اساس آن‌چه لغت‌دانان گفته‌اند، می‌توان برای «عسر» نیز معنایی نزدیک به‌معنای «حرج» در نظر گرفت. در نهایه ابن‌اثیر آمده‌است:

العسر: ضدّ الیسر، و هو الضیق و الشدّة و الصعوبة .

جوهری نیز می‌گوید: العسر: نقیض الیسر .

و در لسان‌العرب می‌خوانیم: العُسْر و العُسُر: ضدّ الیسر

From the above one may have the understanding that *Osr* and *Haraj* both have the

same meaning or very closely similar meanings as such that to draw a fundamental distinction is not possible. A further evidence to this is the fact that the *Foqaha* in many cases have placed the two next to each other.

می‌توان از مجموعه این گفته‌ها استفاده کرد که حرج و عسر، به یک معنا هستند، یامعنایی بسیار نزدیک به هم دارند به نحوی که نمی‌توان فرق جوهری میان آن دو تصور نمود، شاهد بر این نکته نیز آن است که فقها در موارد فراوانی، این دو را درکنارهم آورده و به نفی هر دو استدلال نموده‌اند.

Cases to which this Principle may apply

The evidence related to the principle of "no hardships" and "no constraints" clearly show that this principle has a vast field for application. Verse ۷۸ of chapter ۲۲, which is the fundamental evidence[۸۲] to prove its authority requires many *Ahadith* to take it in due consideration.

The above verse considers what is outside the limits of "no constraints" law as the field of application for the religious laws, and it negates the existence of narrowness and constraint from religion. Therefore, the domain of this principle extends to all the laws applicable to both the individual and the society.

مجاری قاعده

دلیل‌های قاعده نفی عسر و حرج، به وضوح نشان می‌دهد که این قاعده میدانی گسترده دارد و قلمرو آن تا جایی است که شارع بما انّه شارع، حق جعل و تقنین دارد. آیه «ما جعل علیکم فی الدین من حرج «که در حقیقت، دلیل اصلی این قاعده محسوب می‌شود و بسیاری از روایات مربوط نیز به آن نظر دارند، محدوده نفی حکم حرجی را «دین» معرفی می‌کند. بر اساس مضامین بالا، مجاری این قاعده را همه احکام دین و شریعت می‌دانیم، اعم از احکام فردی و اجتماعی، ظاهری و باطنی، سیاسی، اقتصادی و....

Muhaqqiq-e Bujnurdi, has explained the supporting evidence for the authority of this principle in the form of the verses of the *Quran* and *theAhadith* He has pointed out the domain of this principle. He has said, "The verses of the Holy Quran and the Ahadith have clearly stated that this religion, Islam, is not a religion to impose hardships and constraints upon people, and God did not want Muslims to suffer hardships in following the laws of this religion".[۸٤]

محقق بجنوردی، پس از توضیح دلیل‌های این قاعده (آیات و روایات) با اشاره به قلمرو گسترده آن می‌نویسد:

و هذه الآیات تدلّ دلالة واضحة علی ان الله تبارک و تعالی لم یجعل فی دین الاسلام احکاماً حرجیة بحیث

یکون امتثال احکامه و اطاعة اوامره و نواهیه شاقاً و حرجاً علی المسلمین و المؤمنین بهذا الدین؛ این آیات به روشنی بر این نکته دلالت دارند که خداوند تبارک و تعالی، در دین اسلام، احکام حرجی، جعل نفرموده، احکامی که امتثال آنها و اوامر و نواهیی که اطاعت آنها، برای مسلمانان، مشقت‌بار و حرجی باشد.

The *Foqaha* have based their decision of applying this law only in the case of the obligations of the form of compulsory or prohibitions not the desirable or the detestable ones. It is because of the fact that the kindness and grace o*i Allah* come to relieve people from "hardships" and "constraints". In the case of the detestable and desirable duties because such duties do not force one to suffer hardships and constraints the rules of this law do not apply to them. As a result of this, if one would engage himself in non-compulsory duties due to extra-ordinary attention and carefulness towards one's duty that may cause him suffering and hardships, under the application of this law he can not be subjected to any admonition and objections.

فقها، تنها در محدوده واجبات و محرمات، به این قاعده تمسک می‌کنند، به این سبب که هدف از امتنان شارع و جعل این قاعده از سوی او، رفع مشقت و تنگنا از بندگان است و بدیهی است که از ناحیه مستحبات و مکروهات که رعایت آنها الزامی نیست، هیچ‌گونه تنگنا و مشقتی متوجه مکلف نمی‌شود. نتیجه‌ای که از این رهگذر عاید می‌شود این است که اگر شخصی، به خاطر اهتمام فوق‌العاده به این‌گونه احکام و عمل بدانها، در عسر و حرج افتاد، نمی‌توان او را با استناد به قاعده مورد بحث، سرزنش نمود

Some Examples of the Inference of ***Foqaha*** in the Light of this Principle

۱. In *Miftah Al-Keramah*, in the discourse over the issue of the unutilized land in relation with the fact that people need food and shelter, Amily writes this:

"The unutilized lands become the property of those who revive and utilize them because of such act. Otherwise, it will become the cause of suffering from hardships and difficulties *"[86]*

صاحب مفتاح الکرامه، هنگام بحث از اراضی موات، یکی از موارد قاعده نفی حرج را مورد اشاره قرار داده و می نویسد:

و المیت منها ای الاراضی یملک بالاحیاء باجماع الامة اذا خلت عن الموانع... و لان الحاجة تدعو الی ذلک و تشتد الضرورة الیه، لان الانسان لیس کالبهائم، بل هو مدنی بالطبع لابد له من مسکن یأوی الیه و موضع یختص

به، فلو لم یشرع لزم الحرج العظیم؛ زمین های موات به اجماع امت، به وسیله احیا به ملکیت احیا کننده در می آید، به شرط این که موانعی در کار نباشد... و برای این که احیای موات مورد نیاز واقع می شود و به آن ضرورت شدید پیدا می شود؛ زیرا انسان مانند چهارپایان نیست، بلکه مدنی الطبع و نیازمند مسکن و مکان اختصاصی است، بنابراین اگر احیای موات مشروع نباشد، حرج بزرگ پیش می آید.

۲. Allamah Helli has considered the mental and psychological sufferings due to hardships and constraints as the cases to which this principle applies.

Therefore, if a duty would cause mental and psychological hardships and sufferings to one he may benefit in such duties under this principle.

مرحوم علامه حلّی، حرج روحی و شخصیتی را نیز، مشمول قاعده نفی حرج می‌داند

۳. The author of *Al-Jawahir*, in a discourse on the issue of *Tayammum* (the process of purification for prayers when water is not available) when the cause would be fear from thieves or wild beasts or the loss of life or property has said this:

"The statement of the author of Al-Hadaeq on the issue that fear for loss of property does not become a good cause to give up one's duty is opposed to the evidence in support of the law of "no constraints". This law is universal. The evidence from religion clearly say that there is no constraints and hardships in religion".[88]

صاحب جواهر ضمن بحث تیمم به عنوان یکی از مسائل عبادی و فردی و پس از این‌که تیمم را هنگام ترس از دزد یا درنده یا از بین رفتن مال، جایز می‌داند، می‌نویسد:

لکن أشکل الحال علی صاحب الحدائق بالنسبة للخوف علی المال، قال لعدم الدلیل لظهور الروایات فی الخوف علی النفس و معارضته نفی الحرج و وجوب حفظ المال بما دل علی وجوب الوضوء و الغسل، و فیه ان ادلة العسر و الحرج غیر قابلة للتخصیص لظهورها ان لیس فی الدین ما فیه حرج؛ ولی صاحب حدائق در این مسئله، نسبت به ترس بر مال دچار مشکل شده و سبب آن، نیافتن دلیل بر این حکم و ظاهر دانستن روایت در ترس بر جان است ....

From this it appears that the author of Jawahir considers the evidence in support of this law an evidence from reason, which does not accept any exceptions.

از این عبارت استفاده می‌شود که صاحب جواهر قاعده نفی حرج را قاعده‌ای عقلی و تخصیص ناپذیر می‌داند که در این زمینه توضیحی خواهیم داشت.

٤. Also the author of *Jawahir* in a discourse on the issue of whether or not it is necessary for a person praying to keep his mind all the time during prayers on his intention to pray. He says:

"The idea that it is necessary to keep one's mind on the act all the time during an act of worship such as prayers etc., is against the law of "no hardships" and "constraints". This law is universal. The evidence from religion clearly say that there is no constraints and hardships in religion".[88]

... صاحب جواهر هنگام بحث از باطل نشدن نماز به خاطر استحضار نیت، عبارتی دارد که حاصل آن چنین است:

اما النیة فلانها القصد الی الفعل، و هو ان لم یکن استحضاره مؤکّداً لم یکن مفسدا، بل قد عرفت سابقاً ان الذی تقتضیه الضابطة استحضار هذا القصد فی تمام الفعل، لکن لمکان العسر و الحرج اکتفی بالاستدامة الحکمیة؛ نیت که همان قصد انجام کار است، اگر استحضار آن، تأکید کننده عمل نباشد، فاسد کننده آن هم نیست، بلکه پیش از این دانستی که مقتضای ضابطه، استحضار این قصد در همه کار است، ولی به خاطر عسر و حرج، به ادامه حکمیِ آن، بسنده شده است.

٥. In a discourse on "justice of witnesses" he has also said:

"**The Foqaha of the past would also consider the proper appearance of the people as sufficient proof of one's justice. If one would not openly and publicly commit sins he would have been considered a just person. In search for a just person to the extreme limits would cause hardships and constraints.**

٣٤ . ... همچنین وی ضمن بحث درباره عدالت شهود نیز عبارتی دارد که حاصل آن چنین است:

«ان حال السلف یشهد بثبوت العدالة اذا لم یعرف الشاهد بشی ء من اسباب الفسق و بانه لا یکاد تنظیم الاحکام للحکام خصوصاً فی المدن الکبیرة، و القاضی القادم الیها من بُعد من عدم خلطته و اختباره لهم؛ ضرورة اقتضاء اعتبار غیره تعطیل کثیر من احکام حتی یختبرهم او یکون عنده من هو یختبرهم و مخالطهم، و لا ریب فی کونه حرجاً و عسراً و تعطیلاً، و کیف و الناس فی کثیر من الامکنة لا یتمکنون من ذلک فی طلاقهم و دیونهم و غیر ذلک مما یحتاجون الیه» (همان، ج ١٣، ص ٢٨٣)..

٦. A divorce is possible in the following cases: If the husband of a woman disappeared and she knows that he is alive but she is not able to live alone patiently

and even in the case of woman whose husband has not disappeared but is somewhere and unable to come home such as being in jail etc. This also applies if he is at home but is so poor that is not able to provide sustenance for her and she can't tolerate it. For such cases he has said, "In all of such cases under the law of "no hardships" and "no constraints" the court is authorized to issue her a divorce especially if she is a young woman"

سیدمحمدکاظم طباطبائی درباره زنی که می داند شوهر مفقودش زنده است، ولی نمی تواند با این حالت صبر کند، بلکه درباره زنی که شوهرش مفقود نیست، ولی می داند او در جایی محبوس است که هیچ وقت امکان آمدنش نیست و هم چنین در مورد مردی که مفقود نیست، ولی آن چنان تنگ دست است که نمی تواند نفقه همسرش را بدهد و زن هم بر این حالت صبر نمی کند، می نویسد:

ففی جمیع هذه الصور و أشباهها، و ان کان ظاهر کلماتهم عدم جواز فکّها و طلاقها للحاکم لان الطلاق بید من اخذ بالساق لانه انه یمکن ان یقال بجوازه لقاعدهٔ نفی الحرج و الضرر خصوصاً اذا کانت شابّهٔ و استلزم صبرها طول عمرها وقوعها فی مشقهٔ شدیدهٔ؛ در همه این موارد و مانند این موارد، اگرچه ظاهر کلمات فقها، این است که حاکم نمی تواند این زن را طلاق دهد و عقد آن دو را منحل نماید، ولی می توان گفت این کار برای حاکم، جایز است، به دلیل قاعده نفی حرج و ضرر، به ویژه آن گاه که زن، جوان باشد و اگر بخواهد تا پایان عمر بر این حالت صبر کند به مشقت شدید می افتد.

One of the contemporary *Foqaha* includes another case to the above ones. It is the case of a woman whose personal safety and her sexual needs would depend on having a husband in such a case one may consider it unnecessary on her part to wait for four years. If her husband has disappeared in such a case a Muslim judge may issue her a divorce so she can marry another man. [92]

یکی از فقهای معاصر، مصداق دیگری به موارد فوق اضافه می‌کند و آن در مورد زن جوانی است که امنیت شخصی و عفت او منوط به داشتن شوهر است، که در این صورت ممکن است بگوییم چهار سال انتظار برای او لازم نیست و حاکم اسلامی می‌تواند او را طلاق دهد و زن ازدواج نماید

With a view to the meaning and implications of the law of no hardships and no constraints a question may rise that in the Islamic system there are many instances that involve hardships and difficulties. An example of such a case is becoming a member of the army for defence, the prohibition of fleeing from the battle field, fasting in the month of *Ramadhan* in summer, surrendering to judicial penalties,

applying *hudud* (punishment)[93] and *qesas* (law of equality)[94], leaving the country when one feels that it is necessary etc. How could all such cases be reconciled with the universal nature of the law of "no hardships and no constraints"? The Holy *Quran* (22: 78) says in a very general manner that "He has nor sanctioned any hardships upon you in religion *"*

درباره قاعده عسر و حرج با توجه به مفاد و مضمون آن، این شبهه پیش می‌آید که بی‌تردید در اسلام احکامی تشریع شده که امتثال آن‌ها، همراه با سختی و مشقت است، مانند جهاد، حرمت فرار از میدان نبرد، وضو ساختن با آب سرد در زمستان، روزه ماه رمضان خصوصاً در تابستان، تسلیم نمودن خود برای اجرای حدود و قصاص، هجرت از وطن برای تحصیل مسائل دینی و از همه بالاتر، مبارزه با نفس و جهاد اکبر و... پس چگونه قرآن به نحوی فراگیر، می‌فرماید: «و ما جعل علیکم فی‌الدین من حرج

Can one say that the above law has priority over so many of the obligations and prohibitions? Or that certain cases due to their greater significance such as the cause of defence, prayers, saving lives and unlawful sexual activities, have a particular status in the Islamic system. Just because this law exists, such cases cannot be over looked even though this law has a priority over less significant obligations and duties.

آیا قاعده نفی حرج، بر اطلاقات و عمومات ادله همه واجبات و محرمات، حکومت و تقدم دارد، با این‌که در میان این احکام الزامیه، به اموری بسیار مهم، مانند جهاد، نماز، قتل نفس، زنا و... برمی‌خوریم که شارع نسبت به آن‌ها، اهتمام ویژه‌ای دارد و به مجرد حصول عسر و حرج، راضی به مخالفت با آن‌ها نمی‌شود، یا این‌که قاعده مزبور، تنها بر ادله برخی واجبات که نسبت به واجبات دیگر، اهمیت کم‌تری دارند

The author of *Fusul* has said in this regard.

"What is required as to the degree of hardships is what the majority of people normally would not bear. A small degree of hardships do not justify the case. There is no doubt that in the cases such as defence, in order to repulse evil from oneself and protect the property, family, tribe and compatriots is a job that most people stand up as a matter of honor and dignity and it is not considered difficult. It is not so especially in the case of Muslims who expect great rewards for such heroic deeds in the life to come[۹۵]

پاسخ صاحب فصول

وی در این زمینه می‌نویسد:

ان المعتبر فی المقام ما یکون فیه حرج و ضیق علی اغلب الانام، فلا عبرة بالنادر منهم نفیاً و اثباتاً، و لا ریب ان الاقتحام فی الحروب مما یستسهله و یتعاطاه اکثر الناس لدفع العار عن نفسه و حمایة ماله او من ینتسب الیه من اهله و عشیرته او... و لا ریب ان هذه الدواعی متحققة فی نفس المؤمن بالنسبة الی جهاد الکفار مع ما له فیه من رجاء الفوز بعظیم الأجر و جسیم الذخر؛ آن چه در این جا معتبر است، این است که در کار، حرج و ضیق بر بیش تر مردم باشد و حرج ناچیز نفیاً و اثباتاً، مورد اعتبار نیست و تردیدی نیست در این که وارد شدن در جنگ ها، به منظور دفع ننگ از خود و حمایت از مال و اهل و عشیره خود و... کاری است که بیش تر مردم، آن را آسان می شمارند و به آن تن درمی دهند و شکی نیست در وجود این انگیزه ها در شخص مؤمن نسبت به جهاد با کفار، علاوه بر امید رستگاری به سبب نیل به اجر عظیم و ذخیره بزرگ.

The author of Jawahir has said, "In the case of very important duties like defence matters such obligations never fall under the law of "no hardships and no constraints" because of the great benefits of these duties". In the book of Tciharat, after applying the law of no hardships he has said, "For one who can acquire water only through buying and it would be, in such conditions, difficult for him he must perform Tayammum (particular ablution with pure earth) instead of vozu".[۹۶]

He further adds, "In some of the very important duties such as defence matters the law of no hardship and no constraints do not apply because of the very important benefits involved in such matters, however, in the cases that do not have such significance this law is applicable".[97]

آن‌چنان که از چند موضع جواهر الکلام استفاده می‌شود ... در مورد تکالیف پر اهمیت، مانند جهاد نیز نظر ایشان این است که این گونه تکالیف اصلاً حرجی نیست به خاطر مصالح و فواید با ارزشی که بر آن ها مترتب می شود. وی در کتاب طهارت، پس از این که با تمسک به قاعده نفی حرج می گوید: «بر کسی که آب بیابد، اما باید برای آن ها قیمت بپردازد، و این کار برای او در حال حاضر مضرّ است، تیمم واجب است» می نویسد:

فلعلّ العسر و الحرج یختلف بالنسبة للتکالیف باعتبار المصالح المترتبة علیها، فمنها ما لا عسر و لا حرج فی بذل النفوس له فضلاً عن الاموال کالجهاد لما یترتب علیه من المصالح العظیمة التی یهون بذل النفوس لها، و منها ما لا یکون کذلک مثل ما نحن فیه؛ شاید بتوان گفت عسر و حرج نسبت به تکالیف و مصالحی که بر آن ها بار می

شود فرق می کند، بدین ترتیب که در مورد پاره ای از تکالیف، مانند جهاد، بذل جان و به طریق اولی بذل مال، هیچ گونه حرجی به دنبال ندارد؛ زیرا آن چنان مصالح بزرگی بر انجام این گونه تکالیف بار می شود که بذل جان را آسان می سازد، ولی دسته ای از تکالیف، مانند آن چه اکنون مورد بحث ما است، چنین نیستند.

It can, however, be said that the existence of hardships and constraints in difficult matters like defence is very obvious. Just because some people due to their expectation of reward in the next life and for the sake of spiritual accomplishments do not dislike such hardships does not remove the hardships from such matters.

تحقق عسر و حرج در مورد کارهای دشواری، مانند جهاد و مبارزه با نفس، امری است وجدانی، و صرف این که گروهی از مردم به امید نیل به پاداش و کمالات نفسانی، متحمل آن می شوند، موجب سلب حرجیت از آن ها نمی شود؛

According to Muhaqqiq-e Bujnurdi, the verse of the Holy Quran that says, "God has not sanctioned any thing that would cause you hardships "[۹۸] from the meaning of this verse that is obvious and apparent that, it is of a universal nature.

پاسخ محقق بجنوردی

وی در پاسخ شبهه مزبور، می‌نویسد: ظاهر آیه شریفه «ما جعل علیکم فی الدین من حرج «که اساس قاعده نفی حرج است، عموم است و هر حکم شرعی حرجی را در بر می‌گیرد؛

It includes all the laws of Shariah that involve hardships and constraints, i.e. all the obligations and prohibitions." However, the Foqaha have not dealt with it in this way, especially, when the hardships and constraints would be of a personal nature not one for a whole species.

یعنی همه واجبات و تمامی محرمات، اعم از کبیره و صغیره، اما ظاهراً فقها و اصحاب به این عموم عمل و اخذ نکرده‌اند، مخصوصاً اگرمقصود از حرج و ضیق، حرج شخصی باشد

Staying away from most of the prohibited matters does cause hardships and constraints to some people, and no Faqih would issue a fatM>a in favor of such case.

ترک اغلب محرمات کبیره، مانند زنا با زن شوهردار و نظیر آن برای اشخاص، حرجی و همراه با مشقت است و بدون تردید فقیه راضی نمی‌شود به جواز چنین کاری فتوا دهد.

With a view of the evidence supporting the authority of this law and opinions of

the scholars in this matter it is possible to fmd several categories of the issues that cause hardships and constraints:

با توجه به ادله این قاعده و مجموعه کلمات صاحب‌نظران در مورد آن، در حل اشکال مزبور می‌توان گفت :(۵۴)برای عسر و مشقت، اقسامی متصور است

١. There are the kinds of hardships and constraints that do exist in certain duties but they are normally tolerated. It is obvious that this law does not apply to such cases.

مشقت و کلفتی که در انجام و ترک نوع واجبات و محرمات یافت می‌شود، ولی این مشقت به حدی است که عرفاً و عادتاً قابل تحمل است، تردیدی نیست که ادله قاعده، از چنین مشقت و عسری انصراف دارد. توضیح بیش‌تر در این باره خواهد آمد.

٢. There are also the kinds of duties that normally do not cause any hardships and constraints. Although many people consider them of such nature such as paying *Zakat* (taxes), but due to the social benefits and the service for the well being of the society they arc not of the duties that cause hardships and constraints.

برخی امور، عادتاً حرجی نیست، گرچه بسیاری آن‌ها را حرجی دانسته‌اند، مانند ادای خمس و زکات که پس از کسر نمودن مخارج و هزینه‌های مصرف شده، انجام می‌گیرد. در انجام این‌گونه وظایف مالی، مخصوصاً با لحاظ این‌که این‌گونه اموال برای رفع نیازهای جامعه و عمران و آبادی آن و تأمین دیگر مصالح آحاد مردم از جمله خود پرداخت کننده، هزینه می‌شود، عسر و حرجی نیست

٣. Some of the obligations, without any doubt, involve great degrees of hardships and constraints but because they are the outcome of the wrong doings of the people themselves, such as the judicial penalties, compensations and punishments for such crimes they do not fall under this law. Such hardships are exceptions to this law.

پاره‌ای از تکالیف نیز گرچه اجرای آن‌ها بی‌تردید مستلزم عسر و حرج شدید است، ولی آن‌ها ناشی از سوءاختیار خود مکلف است، مانند قصاص و حدود و دیات که نتیجه بزه‌کاری‌ها و جنایات برخی مکلفین است.

٤. There is another category of duties that cause hardships and constraints to some people only and they are not as such for the others such as fasting during

summer. In such cases the law is applicable to some and it is not applicable to the others. The degree of the hardships and constraints, however, must be to the degree that is not normally tolerated.

برخی از تکالیف را نیز می‌توان، در حق بعضی حرجی و در حق بعضی دیگر غیر حرجی دانست، مانند وضو گرفتن با آب سرد در سرمای شدید و روزه گرفتن در گرمای سوزان تابستان. بعید نیست در این‌گونه موارد قاعده لاحرج را در حق گروه نخست جاری بدانیم، البته به شرطی که مشقت در این‌گونه تکالیف به حدی باشد که عادتاً تحمل نمی‌شود و مقصود از حرج نیز حرج شخصی باشد، چنان‌که مختار هم همین است.

۵. There are the duties that involve a great degree of hardships and constraints such as serving for defence matters and even the Holy *Quran* also acknowledges such hardships despite this, this law does not apply to them:

"Fighting is made mandatory for you, but you dislike it. You may not like something which, in fact, is for your good and something that you may love, in fact, may be evil. God knows, but you do not *know*".[100]

"Eyes became dull and hearts almost reached the throat when they attacked you from above and below and you started to think of God with suspicion. There (he believers were tested and tremendously shaken[۱۰۱]

God pardoned the Prophet (S.A.W.), the Emigrants, the Helpers, and those who followed them, when the hearts of some of themalmost deviated (from the truth) in their hour of difficulty. God forgave them because of His Compassion and Mercy.[۱۰۲]

برخی از تکالیف هم تردیدی در حرجی بودن آن‌ها نیست، مانند دفاع از دین و جهاد با دشمنان خدا، چنان‌که قرآن می‌فرماید:

کتب علیکم القتال و هو کره لکم. جنگ بر شما واجب شده، و آن بر شما امری ناپسند است.

در جای دیگر درباره جنگ احزاب می فرماید:

اذ جاؤوکم من فوقکم و من أسفل منکم و اذ زاغت الابصار و بلغت القلوب الحناجر. و هنگامی که دشمنان از بالای [سر] شما و از پایین [پای شما] آمدند، و آن گاه که چشم ها خیره شد و جان ها به گلوگاه ها رسید.

چنان که در مورد بعضی از غزوات، تعبیر به «ساعة العسرة»(۵۷) شده است. ...

Some Points in the Law of "No hardships"

۱. ***Azimah*** or ***Rokhsah*** (obligation or Permission)

The fact that the application of the law "no hardships and no constraints" is

obligatory or permissible. Some of the scholars consider it an obligation. The author of *Al-Jawahir* is one of such scholars who in the issue that "fasting is not obligatory for very old people" has said, *"In* such a case the application of this law is obligatory because of the no hardships[۱۰۴]

چند نکته

نکته اول

آیا عمل بر اساس قاعده نفی حرج واجب است یا جایز؟

در پاسخ این سؤال دسته‌ای وجه نخست را اختیار کرده‌اند از جمله صاحب جواهر که در ذیل مسئله «سقوط الصیام عن الشیخ و الشیخة و ذی العطاش» می‌گوید:

ان الحکم فی المقام و نظائره من العزائم لا الرخص، ضرورة کون المدرک فیه نفی الحرج و نحوه مما یقضی برفع التکلیف. حکم مورد نظر در این مقام و مانند آن، عزیمت است نه رخصت، زیرا بدیهی است که مدرک آن نفی حرج و مانند آن است

Some scholars have decided according to the second form, the permissibility. Among them is Muhaqqiq-e Hamedani, who writes:

" Tayammum in the conditions wherein it is permissible is based on the law of "no hardships" as a permissible duty' and not an obligatory one. As a result of this if one would bear great hardships and instead of Tayammum make vozu or Ghusl his choice is acceptable. "[105]

Proof for this is the fact that the evidence supporting the authority of the law of "no hardships" are to provide ease and to facilitate, for this reason such evidence are qualified for the negation of obligation not for non-permission.

گروهی نیز وجه دوم را برگزیده‌اند، مانند محقق همدانی که در مبحث تیمم می‌نویسد:

تیمم نمودن در مواردی که جواز آن به دلیل نفی حرج ثابت شده، رخصت است نه عزیمت، در نتیجه اگر مکلف، تحمل مشقت شدید نمود و به جای تیمم، به طهارت آبی (وضو یا غسل) روی آورد، طهارت او صحیح است.

وجه نکته مزبور این است که ادله نفی حرج به منظور امتنان و بیان توسعه در دین وارد شده‌اند، از این‌رو تنها برای نفی وجوب، صلاحیت دارند، نه رفع جواز

The author of *Orvah* in the section on *Tayammum* points out to this viewpoint

and considers a *vozu* made with suffering hardships and constraints as a valid one.[106]

The fact that removal of hardships from the servants of God is a favor from Him, can not become evidence for the validity of the very desirability of the act, it, in fact, can become evidence of its undesirability. It, in fact, is a form of disregard for the favor like the act of ignoring the rule of shortened prayers on a journ ey and instead praying a complete prayers and fast during a journey which indeed is an undesirable act. [107]

صاحب عروۀ نیز در مبحث «مسوغات التیمم» می نویسد: ...

امتنانی بودن نفی حرج نیز نه تنها دلیل بر بقای اصل مطلوبیت عمل نیست، بلکه می تواند شاهدی بر نامطلوبیت آن باشد؛ چرا که این کار، نوعی بی احترامی به امتنان و تفضل مولا و شارع محسوب می شود، نظیر این که مسافر به تخفیف و تفضل شارع، اعتنا نکند و در حالت سفر، نماز را تمام بخواند و روزه بگیرد که بی تردید کاری نکوهیده است.

Muhaqqiq-e Hamedani, defending his view has said, The reason for exception in choosing the primary laws instead of following the secondary laws in the kind of duties such as *Vozu* and *Gusl* are the constraints in them without having any evil in performing such acts. On this basis, the exception is because of "no necessity" not because of "undesirability" of the duty[108]**.**

محقق همدانی، در دفاع از دیدگاه خود، گفته‌است:

منشأ تخصیص – تخصیص ادله اولیه با ادله نفی حرج – حرجی بودن تکالیفی، مانندوضو و غسل است بدون آن‌که مفسده‌ای در انجام این‌گونه تکالیف باشد. ازاین‌رومقتضای تخصیص، تنها رفع مطلوبیت به گونه الزام است، نه رفع مطلوبیت ومحبوبیت عمل

As a result if one would bear the hardships and perform the act that was not required of him he has performed an act that was desirable in the sight of God.

در نتیجه چنان‌چه مکلف، متحمل حرج و مشقت شود و آن کار را انجام دهد، چیزی را انجام داده‌است که در واقع محبوب مولا است

Quite opposite of this is what one of the scholars of our time believes:

"The imposition of heavy duties causes disobedience and opposition in people and this by itself is a great evil. For this reason, some of the scholars have maintained that the law of "no hardship" due to the kindness of God towards people is based on an obligatory' **ground**".[109]

به گفته یکی از صاحب‌نظران معاصر، حرجی و سنگین بودن تکلیف برای مکلفین، سبب کثرت مخالفت و نافرمانی می‌شود و این خود، مفسده‌ای بزرگ است؛ لذا برخی، نفی حرج را از باب وجوب لطف، بر خداوند حکیم، لازم دانسته‌اند.

۲. Is the Criteria in the Law of "No Hardships" Hardships for Individuals or for a whole Species?

نکته دوم

آیا معیار در قاعده لاحرج، حرج شخصی است یا حرج نوعی؟

Some of the scholars have for two reasons affirmed the hardships for individuals

۱. **All the captions and titles that are mentioned in the *Ahadith,* like "constraints" "losses" and "emergency" etc. are related to individuals cases.**

برخی از محققان به دو دلیل، وجه نخست را تقویت کرده‌اند:

- ۱تمام عناوینی که در لسان ادله، به کار می‌رود، مانند حرج، ضرر، اضطرار و... ظهور در مصادیق شخصی آن‌ها دارد

۲ . □□□ □□□□□□□□ □□□ □ □□□□□ □□□□□□□ □□ □□□ □□□□□□□□ □□□

distinguishable because it does not say whether the species of people of

all times are the criteria or those of a particular time and place.[110]

- ۲حرج نوعی، مشخص و ضابطه‌مند نیست؛ زیرا روشن نیست ملاک در آن، نوع مکلفین در همه زمان‌ها و مکان‌ها است یا مناط در آن اهل یک عصر یا اهل یک مکان یا صنف خاصی از آن‌ها یا... می‌باشد

Another reason that could be added to this would be the case of a commander that may issue an order for his subordinates to follow with a choice that in the

case of hardships they may disregard it. In such a case if one of them did not follow the orders due to such reasons he could be excused even if it would not be hard for others.

دلیل دیگری که می‌توان در این زمینه افزود، این است که هرگاه در محیط عقلا و موالی عرفیه، صاحب منصبی، به اشخاص تحت فرمان خود، دستوراتی بدهد و سپس به آن‌ها بگوید: «در صورت حرجی بودن برخی از این دستورات می‌توانید آن را امتثال نکنید» در چنین فرضی اگر یکی از این اشخاص، دستوری را به خاطر حرجی بودنش، اجرا نکند و در مقام اعتذار بگوید این کار برای من حرج‌آور بود، عذر او پذیرفته می‌شود، گرچه همان کار برای دیگران، خالی از عسر و حرج باشد

The hardships in individuals cases may be considered as the criteria but it is possible that such law would apply to the Islamic government in which case consideration of the welfare of the whole species and society would have to be studied.

حرج شخصی تنها در محدوده تکالیف فردی و آن‌جا که مجری قاعده لا حرج، شخص باشد می‌تواند معیار باشد، ولی همان‌گونه که در بخش نخست کتاب نیز گفتیم، گاهی ممکن است مجری این قاعده، حکومت و دولت اسلامی باشد، بدیهی است که در این صورت، معیار، حرج نوعی و مراعات مصالح توده مردم است.

۳. Does the Law of "No hardships" Apply to Negativities also?

Sometimes the negativity and absence of something may become the cause for hardships and constraints. For example not removing certain buildings from the road areas may cause traffic congestion, not broadening roads may also cause delays for the emergency services such as ambulances and fire fighting machines, leaving certain shops and stands may cause bad congestion on the footpaths and sidewalks. It seems that in such cases also the law of "no hardships" applies very well. As discussed above the meaning of the evidence supporting the authority of this law is the removal of all kinds of rules that would cause hardships, regardless of their applicability to the positive matters or those of negative nature.

نکته سوم

آیا قاعده نفی حرج، در امور عدمی نیز جاری می‌شود؟

گاهی ممکن است برخی امور عدمی، موجب عسر و حرج شود، از باب مثال خراب نکردن ساختمان‌هایی که در مسیر خیابان قرار گرفته‌اند، موجب کندی و اختلال در تردد مردم و افزایش ترافیک می‌شود، عریض نکردن کوچه‌ها، سبب دیر رسیدن آمبولانس‌ها و نیز دیر رسیدن ماشین‌های آتش‌نشانی، یا توقف خدمات آن‌ها می‌شود، تعطیل نکردن برخی دکان‌ها و دست‌فروشی‌ها، سبب راه‌بندان و ازدحام جمعیت می‌شود و.... به نظر می‌رسد این‌گونه موارد نیز می‌تواند مجرای قاعده نفی حرج باشد؛ زیرا چنان‌که گذشت مفاد ادله این قاعده، نفی احکام است، خواه این احکام به امور وجودی تعلق بگیرند یا به امور عدمی.

In the matters of the above cases it is possible to say that non-permissibility of doing any thing to the properties of the others may cause huge hardships and the *Shariah* does not agree with it. This is in addition to the evidence in the Holy *Quran* that has clearly removed all kinds of hardships. [111] In *Ahadith*, also one finds such expressions as “there is no religion more facilitating than Islam”.[112] Islam is a very easy system to follow".[113] Without any doubt such expressions include the negativity and absence of some thing also.

بر این اساس در مثال های بالا می توان گفت: حکم به عدم جواز تصرف در اموال و املاک مردم، مستلزم عسر و حرج فراوان است و چنین حکمی از ناحیه شارع، نفی شده است. ... افزون بر این، دلیل قاعده، منحصر به آیه مزبور نیست، بلکه در برخی از روایات دلالت‌کننده بر این قاعده، به تعبیراتی مانند «ان الدین لیس بمضیق» یا «الدین اوسع من ذلک» یا «الحنیفیهٔ السمحهٔ السهلهٔ» بر می‌خوریم، که تردیدی در عمومیت مضمون آن‌ها نیست.

٤. How much Hardship Justifies the Applicability of this Law?

The existence of any degree of hardships and constraints may not justify the application of this law. It must be as such and to the degree that normally people would not agree to bear.

The evidence supporting the authority of this law also does not support its applicability to the smaller degrees of hardships, otherwise, most of the religious duties would fall under this law because almost all the obligations in religion involve some degree of hardships.

Therefore, this does not agree with the fundamentals of religion. It is for this reason **that the *Foqaha* whenever discussing this issue have included in their expressions the words like "great", "sever" and "huge" hardships. Sheikh Ansari has said, "Whenever there are huge "hardships" and "constraints" this law may be applied".** [114]

نکته چهارم

چه مقدار حرج، مجوّز تمسک به این قاعده است؟

همان گونه که در ضمن مباحث گذشته اشاره شد، هر اندازه حرج و مشقت - گرچه ناچیز - نمی تواند مجوّز تمسک به این قاعده باشد، بلکه حرج و تنگنا، باید به حدی باشد که به حسب عادت و عرف تحمل نمی شود. ادله قاعده نیز انصراف به چنین حرجی دارد. باید گفت در غیر این صورت لازم می آید همه یا بیش تر تکالیف شرعی را، مشمول قاعده و مرفوع دانست؛ زیرا کم تر تکلیفِ الزامی است که امتثال آن خالی از اندازه ای مشقت باشد و این سخنی است که نمی توان به آن تفوّه نمود.

به همین سبب فقها، هنگام تمسک به این قاعده، در موارد فراوانی، کلمه حرج را همراه با قید «عظیم» و «شدید» و مانند آن وارد آورده اند. شیخ انصاری در رساله «المواسعهٔ و المضایقهٔ» می نویسد: الخامس من حجج القائلین بالمواسعهٔ لزوم الحرج العظیم الذی یشهد بنفیه الادلهٔ الثلاثهٔ بل الاربعهٔ.

Losses (Zarar)

Another caption and title for the secondary laws that has been discussed very often in* Fiqh *and applied is the law of "no losses" (*la-Zarar*). The* Foqaha *have been applying this law for a long time. For example, Sheikh-e Tusi in* Al-Khilaf *in the section on the contracts of exchanging certain merchandise in which losses have taken place against one of the parties, expresses his belief in the nullification of such contract. It is based on a* Hadith *from the Holy Prophet (S.A.W.) that says, "There is no losses in Islam".[115]

فصل چهارم: ضرر

یکی دیگر از قواعد ثانوی مهم و کثیر الاستعمال در فقه اسلامی، قاعده نفی ضرر است .فقها از دیر باز به این قاعده تمسک و استدلال نموده‌اند، از باب مثال شیخ در مبحث خیار غبن می‌گوید: دلیلنا ما روی عن النبی – صلی‌الله علیه و آله– انه قال: «لاضرر و لاضرار.

Also Ibn Zuhra in the section of *Fiqh* dealing with the "choice" to revoke the contract due to the defect in the merchandise, writes: "The evidence supporting this fact is the *Hadith* from the Holy Prophet (S.A.W.) that says, "There is no losses in Islam".[116]

Allamah Helli also in Tadhkirah in the section on losses has based his decision on the above Hadiih from the Holy Prophet (S.A.W.).

ابن‌زهره نیز در مبحث خیار عیب، می‌نویسد: و یحتج علی المخالف بقوله: «لاضرر و لاضرار»؛ در رد کسی که خیار عیب را قبول ندارد، به حدیث «لاضرر و لاضرار» استدلال می‌شود.

علامه نیز در مبحث خیار غبن به این جمله تمسک می‌کند

The evidence proving the authority of this law is the same hadith the, "no (suffering) losses" and "no (causing) losses". This hadith is **recorded in the books like *Sunan* Ibn Dawud,**[117] ***Sahih-e Termezi,***[118]**and *Sunan* Ibn *Majeh*.**[119] **Some of the *Foqaha* along with this law have discussed another law that says, "The losses are to be abolished". The two laws are dealt with separately. Of these scholars is Abdul Karim Zeydan who has discussed it in *Al-Madkhal*.** [120] **Others like Ibn Najim have considered the two laws as one.** [121]

Najmuddin Tufi also gives preference to the supporting proof of this law over those of the primary law. [122]

مدرک این قاعده نیز؛ یعنی حدیث لاضرر و لاضرار از کتب حدیثی مختلف نقل شده است. برخی از نویسندگان اهل سنت در کنار قاعده نفی ضرر، از قاعده دیگری با عنوان «الضرر یُزال» نیز بحث نموده اند و این

دو را متمایز از یک دیگر مطرح کرده اند، مانند عبدالکریم زیدان در کتاب «المدخل لدراسة الشریعة الاسلامیة». بعضی نیز، مانند ابن نجیم، این دو را یکی محسوب داشته اند.. ... نجم الدین طوفی حنبلی، مانند شیخ انصاری و دیگر علمای شیعه، دلیل این قاعده را بر ادله احکام اولیه مقدم می دارد.

The Evidence Proving the Authority of this Law

The evidence proving the authority of this law are many *Ahadith* which contain the very popularly known expression, "no losses and no suffering losses". Fakhral Muhaqqiqin has stated that this *Hadith* is *Mutawaitir*, **(unanimously reported).**[123]

دلیل های قاعده

ادله قاعده، روایات فراوانی است که در بسیاری از آنها جمله معروف «لاضرر و لاضرار» آمده‌است. این روایات گرچه برخی از لحاظ سندی، قابل مناقشه است، ولی کثرت آنها موجب اطمینان است، حتی فخر المحققین قائل به تواتر حدیث لاضرر و لاضرار شده‌است

The *Ahadith* Narrated from the Holy Prophet (S.A.W.) about this Matter.

Samrat Ibn Jundab had a palm tree inside the compound of the house of a man who belonged to Ansar, (of the people of Madina who helped the Prophet (S.A.W.)). Anytime he wanted he would enter the man's house without permission to see his palm tree. The Ansari man complained about it before the Holy Prophet (S.A.W.). The Holy Prophet **(S.A. W.) asked Samrat Ibn Jundab to ask permission from the Ansari man any time he wanted to see his palm tree but Jundab did not agree. The Holy Prophet (S.A.W.) said, "I am ready to buy this tree for whatever price you would ask". Jundab did not agree. The Holy Prophet (S.A.W.) said, "For this tree God in the next life will give you a tree in Paradise". Jundab did not accept the offer. The Holy Prophet (S.A.W.) then told the Ansari man to uproot the palm tree and throw it away because there is no causing losses in Islam.** **124**

ان سمرة بن جندب کان له عذق فی حائط لرجل من الانصار و کان منزل الانصاری بباب البستان، فکان یمر به الی نخلته و لا یستأذن، فکلّمه الانصاری ان یستأذن اذا جاء، فأبی سمرة، فلما تأبی، جاء الانصاری الی رسول الله –صلی الله علیه و آله– فشکا الیه وخبّره الخبر فأرسل الیه رسول الله –صلی الله علیه و آله– و خبره بقول

الانصاری وماشکا، و قال: اذا أردت الدخول فاستأذن، فأبی فلما أبی ساومه حتی بلغ به من الثمن ماشاءالله، فأبی أن یبیع فقال: لک بها عذق یمد لک فی الجنهٔ، فأبی ان یقبل، فقال رسول الله –صلی الله علیه و آله– للانصاری: اذهب فاقلعها و ارم به الیه فانه لاضرر ولاضرار؛ شاخه‌ای از درخت سمرهٔ بن‌جندب در درون منزل مردی از انصار بود و منزل شخص انصاری در درب باغ قرار داشت. سمرهٔ بدون اذن انصاری به نخل خود سرکشی می‌کرد، از این‌رو، او با سمرهٔ صحبت کرد و از او خواست هنگام آمدن به آن‌جا اذن بگیرد، ولی سمرهٔ از این کار خودداری ورزید. شخص انصاری که چنین دید، نزد پیامبرصلی‌الله علیه وآله– رفت و از این بابت به آن حضرت شکایت نمود. پیامبرصلی‌الله علیه وآله– هم به دنبال سمرهٔ فرستاد و شکایت انصاری را با او در میان نهاد و به او فرمود: هرگاه خواستی وارد شوی اجازه بگیر، ولی سمرهٔ از این کار خودداری نمود. پیامبر که چنین دید به قصد خریدن درخت سمرهٔ با او گفت‌وگو نمود و قیمت بالایی به او پیشنهاد کرد، ولی سمرهٔ از فروختن آن ابا ورزید. در این هنگام پیامبر به او فرمود: (اگر به فروختن این درخت رضایت دهی) در مقابل آن درختی پر برکت در بهشت خواهی داشت. باز هم سمرهٔ از فروختن آن سر باز زد. این‌جا بود که رسول خدا به شخص انصاری فرمود: برو درخت او را بکن و به پیش او انداز؛ زیرا که ضرر و ضرار، مردود است

۲. The Holy Prophet (S.A.W.) declared to the people of Madina that no one must create obstacles on the way of irrigating the palm trees, or prevent others from utilizing the excess waters because according to *Shariah* "no (suffering) losses" and "no (causing) losses is the law" . [۱۲۵]

قضی رسول الله –صلی الله علیه وآله– بین اهل المدینهٔ فی مشارب النخل انه لا یمنع نفع الشی ء، و قضی بین اهل البادیهٔ انه لا یمنع فضل ماء لیمنع کلاء، فقال: «لاضرر و لاضرار»؛ پیامبر –صلی‌الله علیه وآله– بین مردم مدینه در مورد آبشخورهای خرما حکم فرمود: نباید از نفع شیء جلوگیری شود و حکم آن حضرت در میان بادیه نشینان این بود که نباید مانع از زیادی آب شد تا این‌که از چراگاه، جلوگیری شود [مقصود حضرت این است که اگر دسته‌ای از مردم، پس از این‌که زمینشان سیراب شد، مانع از رسیدن آب زیادی به زمین دیگران شوند، آنان نیز به منظور تلافی، مانع از چریدن حیوانات آن مردم در چراگاه خود می‌شوند. از این‌رو نباید آن کار انجام پذیرد]. پس حضرت فرمود: ضرر و ضرار، مردود است.

۳. The Holy Prophet (S A W.) also declared that there must be sufficient distance between two water tunnels so that they would not effect each other in

reducing or increasing of the amount of water that would normally come out of each of them.[126]

۴. The Holy Prophet (S.A.W.) was asked about a canal through which water would flow for a certain distance in a field and between the which water would flow for a certain distance in a field and between the source of water and the field there would be palm trees that belong to people other than the owner of the canal. Can the owner of the canal create another canal to let the water flow to his field away from the palm trees that exist on the old canal? "Have fear of God and do not cause any losses to your brethren". Replied the Holy Prophet (S.A.W.).

قال كتبت الى أبى محمد -عليه السلام-: رجل كانت له قناة فى قرية فاراد رجل ان يحفر قناة اخرى الى قرية له، كم يكون بينهما فى البعد حتى لا تضر احداهما بالأخرى فى الارض اذا كانت صلبة او رخوة؟ فوقع -عليه السلام-: على حسب ان لا تضر احداهما بالأخرى ان شاءالله؛ به امام عسكرى عليه السلام- نوشتم: صاحب قناتى در يک روستا بود، شخص ديگرى تصميم گرفت در كنار قنات او، براى خود قناتى حفر نمايد، ميان اين دو قنات در زمين سفت و نرم چقدر فاصله باشد تا كار يكى از اين دو سبب زيان ديگر نشود؟

حضرت در پاسخ نوشت: به گونه اى كه يكى از اين دو به ديگرى ضرر نرساند، ان شاءالله.

The Meaning of this Law

The *Foqaha* within the limits of this law have expressed differing opinions.

مفاد قاعده

فقها و اصولی‌ها در مورد مفاد این قاعده، اقوال و نظریات متعددی ابراز داشته‌اند

The Theory Of Sheikh Ansari

From Sheikh Ansari's point of view, the meaning of the law "no (suffering) losses" and "no (causing) losses" is the negation of any rule in *Shariah* that would involve losses to people. Any such rule is declared none existent, i.e. if a contract which would cause losses to one party would have been considered binding and irrevocable it would be contrary to the above-mentioned law, but no such law is sanctioned in *Shariah*. The same is true in the case of a person who can not have any water without a great deal of difficulties or expenses. In such case he is not required to find water for *Vozu*. He has emphatically relied on this law in many instances in the books on Fiqh and the principles of jurisprudence.[128]

۱ – نظریه شیخ انصاری

از دیدگاه شیخ اعظم، مفاد جمله «لاضرر و لاضرار» عبارت است از نفی احکام شرعیه ضرریه و عدم جعل آن‌ها از ناحیه شارع؛ یعنی شارع با این بیان، جعل هر حکمی را از سوی خود که منشأ ضرر باشد، منفی اعلام نموده‌است. از باب مثال می‌توان گفت حکم نمودن شارع به لازم بودن بیع غبنی، موجب تضرر مغبون می‌شود، بنابراین چنین حکمی، در شریعت اسلامی جعل نشده‌است و از همین قبیل است وجوب وضو گرفتن بر شخصی که فاقد آب است و چاره‌ای جز خریدن آن با قیمت گزاف ندارد. وی این مضمون را در چندین موضع از آثار فقهی و اصولی خود مورد تأکید قرار می‌دهد

The Theory Of Sheikh Al-Shariah Isfahani

From this scholar's point of view, the meaning of this law amounts to an imperative prohibition. According to him any act that involves losses is prohibited and people must not involve themselves in such acts.

نظریه شیخ الشریعهٔ اصفهانی

از دیدگاه این محقق، نفی ضرر در قاعده مورد بحث، به معنای نهی از ضرر است.

As evidence to prove this he points out a great deal of expressions from the Holy *Quran* and the *Sunnah* which are very similar to what the law of no losses states.[129]

وی برای تثبیت این دیدگاه، به جملات فراوانی از کتاب و سنت استشهاد می‌کند و همه آن‌ها را نظیر جمله «لاضرر و لاضرار» می‌داند.

Of such expressions is this, " ... *after commencing the* acts of Hajj, he is not allowed to have carnal relations or to lie or to Swear by the Name of God".[130] *He (Moses) said:*

"Go away; throughout your life you will not be able to let anyone touch you. This will be your punishment in this life. The time for your final punishment is inevitable. You will never be able to avoid it. Look at your god, which you have been worshipping. We will bum it in the fire and scatter its ashes into the *s e a* . [131]

. جملاتی از قرآن مانند: «فلا رفث و لا فسوق فی الحج «و «لک فی الحیاة ان تقول لا مساس«

From the Sunnah he quotes the following Hadith: Obedience to **someone that would lead you to disobey the Creator is prohibited". That cheating Muslims is prohibited.** [۱۳۲]

از سنت، مانند جملات زیر که از پیامبرصلی‌الله علیه و آله- نقل شده‌است:

»لا اخصاء فی الاسلام و لا بنیان کنیسة»، «لا طاعة لمخلوق فی معصیة الخالق» و «لا غش بین المسلمین.«

The Theory Of Imam Khomeini

He maintained that the law of "no losses" falls under the governmental commandments. It is on this basis that the Holy Prophet (S A W.) served as the administrator of the government and commander of the Muslim nation.

نظریه امام خمینی

از دیدگاه امام راحل -قدس سره- نفی در حدیث «لاضرر و لاضرار» به معنای نهی‌است، ولی این نهی، حکم شرعی الهی، مانند نهی از غصب و کذب نیست، بلکه نهی در این‌جا، حکم مولوی سلطانی است. وجه صدور آن از پیامبر -صلی‌الله علیه و آله- نیز این است که ایشان حاکم و سلطان بر امت اسلامی بوده‌است.

He sanctioned such laws to abolish corruption not that they were the Divine laws. The following are of the evidence to establish this theory.

معظم‌له پس از بیان مقدمات بالا می‌افزاید: جمله «لاضرر و لاضرار» به عنوان حکم سلطانی وبر این اساس که

پیامبر، مدیر و حاکم امت اسلامی است و به منظور قطع ریشه‌های فساد، از سوی آن حضرت، صادر شده‌است، نه به عنوان حکم الهی شرعی و اموری چند بر این سخن دلالت دارد.

(a) Ahmad Ibn Hanbal has mentioned the expression of "no losses" among the rulings and judicial decrees of the Holy Prophet (S.A.W.). He has narrated it from Ubadah Ibn Samit saying. "Judging is no (suffering) losses and no (causing) losses". It is a fact that this expression is not a ruling to settle a dispute between two parties. Therefore, it must be of one of the commandments of the Holy Prophet (S A W.) that he issued to declare that no one has the right to cause losses to others and cause sufferings and constraints to others and that Muslims must also obey this commandment.

احمد بن‌حنبل، جمله نبوی «لاضرر و لاضرار» را در ضمن بیست‌واندی قضا و حکم، از قول عبادهٔ بن‌صامت نقل نموده و گفته‌است: «قضی لاضرر و لاضرار» و از آن‌جا که مورد، از موارد قضاوت نیست؛ چرا که در این‌جا جهلی نسبت به حکم و موضوع، وجود ندارد، صحیح نیست آن را حمل بر قضاوت و فصل خصومت نماییم. پس آن‌چه تعیّن می‌یابد این است که جمله مزبور را حمل کنیم بر حکم سلطانی که از آن حضرت به منظور دفع فساد، صادر شده‌است و مفاد آن این است که پیامبر حکم فرمود به این‌که کسی حق ندارد به دیگری ضرر وارد نماید و او را در ضیق و حرج بیندازد، و بر امت نیز اطاعت از این نهی مولوی سلطانی، واجب است.

(b) The case (of Jundab and the Ansari man mentioned above) that lead to the issuance of such commandment is another evidence to prove this point.

جریانی که سبب صدور این جمله از پیامبر شد، نیز دلیل دیگری بر این مدعا است

The complaint of the Ansari man to the Holy Prophet (S A W.) was due to the fact that he was the head of the government of the Islamic system capable of abolishing the evils of a transgressor.

مرد انصاری که از آمد و رفت سمرهٔ بن‌جندب و سر زدن او به درخت خرمایش، به ضیق و مشقت افتاده بود، شکایت نزد پیامبر برد و از آن حضرت یاری طلبید، و این دادخواهی او از باب این بود که پیامبر، سلطان و رئیس وحاکم و مقتدر است و می‌تواند شرّ و ضرر انسان متجاوز را دفع کند

Samrat Ibn Jundab was summoned and was informed of the complaint against him and that because he did not obey the commandment of the head of the government an order was issued to uproot his palm tree. This was to make a point that no one

has the right to disobey the Islamic government and cause losses to others. The step taken by the Holy Prophet (S A W.) in this case was an order of the government to establish a fact that people do not have the right to cause losses to each other.[133]

حضرت نیز سمره را احضار و شکوه مرد انصاری را به اطلاع او رسانید، و چون آن شخص، به دستور پیامبر وقعی ننهاد و از آن پیروی ننمود، آن حضرت دستور به کندن درختش داد و حکم نمود به این‌که کسی حق ندارد در حوزه فرمان‌روایی و حکومت او، به دیگری ضرر وارد نماید.

پس آن‌چه در این جریان از پیامبر صادر شد، یک حکم سلطانی بود به این مفاد که رعیت و مردمان حوزه حکومت اسلامی حق زیان رسانیدن به یک‌دیگر را ندارند

۴. □□□ □□□□□□ □□ □□□□ □□ □□□ □□□□□□□□□□□□ □□□□□□

Some of the contemporary scholars have come up with a new theory about the law of "no losses". They maintain that this law is related to the relations among the people and not to the rules of *Shariah* and the Divine duties.

نظریه برخی از فقهای معاصر

برخی از محققان معاصر، پس از بیان ایراد یا ایرادهایی که بر هر یک از نظریات چهارگانه پیش داشته‌اند، خود نظریه جدیدی ارائه داده‌اند که در زیر خلاصه آن می‌آید:

در قاعده لاضرر، «لا» به معنای نفی است نه به معنای نهی (برخلاف دو نظریه اخیر که در آن دو، «لا» به معنای نهی گرفته شد) و مصدر و فاعل ضرر، خود مردم، بعضی نسبت به بعضی دیگر هستند، نه شارع و تکالیف او.

With a view to the fact that in the society some times losses are found, the objective of this law is to inform people of the unacceptability of the activities that cause losses. The apparent meaning of this law indicates the negation of losses. It should be considered a metaphorical expression of discrediting all the activities that cause losses.

غایت و هدف از این قاعده، با توجه به این‌که در جامعه بالوجدان، ضرر یافت می‌شود خبر دادن از عدم امضای ضرر تکلیفاً و وضعاً است. معنای ابتدایی این قاعده، اخبار از عدم وجود ضرر در خارج است، ولی چون چنین چیزی، مراد جدّی نیست، باید آن را کنایه از عدم امضای ضرر دانست.

Thus, the goal is to teach people that causing losses according to *Shariah* is prohibited and any thing that would cause losses or sufferings to others such as

neighbors is unlawful. That the transactions that cause losses to one party are invalid.

پس هدف از ابراز این قاعده، تفهیم این معنا است که زیان وارد نمودن به دیگری، به لحاظ شرعی، ممنوع است و مورد امضای شارع نیست. بر این اساس هر کار ضرری که از فردی، متوجه فرد دیگری شود، مانند آزار و اذیت نمودن همسایه به همسایه، حرام است و نیز معاملات ضرری، مانند بیع غبنی، باطل و غیر نافذ است.

This theory, although in some respects, in regards to the results, is the same as some of the above-mentioned ones, however, in the matters of the acts of worship such as *Vozu* and fasting, it is different from them. According to those theories on the basis of the existence of hardships and losses such acts of worships could be negated but on the basis of this new theory this can not be done on the basis of the law of "no losses". An act that would cause losses may be negated by this theory because the meaning of losses according to this theory is the losses that are caused by the people not the losses because *of Shariah.*[134]

این *نظریه گرچه به حسب نتیجه*، با برخی از نظریات پیش، توافق دارد، ولی در مورد عبادات ضرریه، مانند وضو و روزه ضرری، با آن‌ها تفاوت دارد؛ زیرا بر اساس برخی از آن نظریات می‌توان با استناد به قاعده لاضرر، وجوب این‌گونه عبادات را نفی کرد، ولی بر اساس این نظریه، نمی‌توان چنین کاری انجام داد؛ زیرا گفتیم در این نظریه، مقصود از ضرر، زیان وارد نمودن بعضی از مردم به بعضی دیگر است نه ضرر شارع، و چنین معنایی در عبادات ضرریه یافت نمی‌شود.

Coreion and Compulsion (Ikrah)

Coercion is one of the titles and captions that appears in various sections of the *Fiqh* with various kinds of effects and consequences and in most cases the rules of this law receives priority over the primary laws. According to the dictionary it means compelling and coercing some one to do something. [135]

فصل پنجم: اکراه

از جمله عناوین ثانویه که در ابواب گوناگون فقه، احکام و آثار ویژه ای بر آن بار می شود و در بسیاری موارد احکام آن بر احکام اولیه تقدم دارد، عنوان اکراه است. ...

مفهوم اکراه

صاحب مصباح المنیر می گوید:... و اکرهته علی الامر اکراهاً، حملته علیه قهراً. بر اساس این سخن ... به معنای وادار کردن کسی به کاری از روی قهر خواهد بود.

The Evidence proving the Authority of this Law

In order to prove the authority of this law the *Foqaha* have mentioned some verses of the Holy *Quran* and some *Ahadith* as proof.

1. *"No one verbally denounces his faith in God - Unless he is forced but his heart is confident about his faith. But those whose breasts have become open to disbelief will be subject to the wrath of God and will suffer a great torment*[136]

This does not apply to people like Ammar-e Yasir. *It applies to those who with open hearts became unbelievers. It is they who are subject to the anger of God.*

دلیل های قاعده

علمای شیعه و سنی در اثبات حجیت قاعده اکراه، به آیات و روایات متعددی استناد نموده اند از جمله:

- ۱آیه ۱۰۶ سوره نحل:

من کفر بالله من بعد ایمانه الا من أکره و قلبه مطمئن بالایمان و لکن من شرح بالکفر صدراً فعلیهم غضب من الله و لهم عذاب عظیم؛

کسانی که پس از ایمان به خداوند کافر شدند، البته نه کسی که [به زبان] از روی اکراه کفر ورزید، در حالی که ایمان قلبی او پابرجا بود [مانند عمار یاسر] بلکه کسانی که از روی شرح صدر [و اختیار] کافر شدند، بر آن ها خشم و غضب خداوند و عذاب بزرگ او خواهد بود.

۲."Do not force your girls into prostitution to make money if they

want to be chaste. If they have been compelled to do so,
God will be all merciful and all forgiving to them".[137]

- ۲آیه ۳۳ سوره نور:

و لاتکرهوا فتیاتکم علی البغاء ان اردن تحصناً لتبتغوا عرض الحیوة الدنیا و من یکرههن فان الله من بعد اکراههن غفور رحیم؛

کنیزان خود که مایل به عفت و پاکدامنی اند را به طمع مال دنیا به زنا وادار منمایید که هر کس آن ها را به این کار وادار نماید خداوند پس از این اکراه، نسبت به آنان بخشنده و مهربان است.

۳. □□□ □□□□ □□□□□□□ (□ □ □.)□□□□□□□□□□ □□□ □□□□□□□□□ □□□□, □Mistakes, forgetting and all that is due to coercion, ignorance, inability and due urgency are forgiven (there is no sin for such acts) ۱۳۸

قال رسول الله –صلی الله علیه و آله– رفع عن امتی تسع: الخطأ و النسیان و ما اکرهوا علیه و ما لا یعلمون و ما لا یطیقون و ما اضطروا الیه و الحسد و الطیرة و التفکر فی الوسوسة فی الخلق ما لم ینطق بشفه؛ رسول خداصلی الله علیه وآله– فرمود:نه چیز از امت من برداشته شده است:خطا، فراموشی، آن چه بر آن اکراه شوند، آن چه را ندانند، آن چه از طاقت آنان بیرون باشد، آن چه به آن اضطرار پیدا کنند، حسد، فال بد و اندیشه وسوسه در مردم تا وقتی که ابراز نشود.

The kinds of Coercion and Compulsion (Ikrah)

There are two kinds of coercion and compulsion:

۱. The use of force against someone who is not able to counter such force such as water being forced to enter one's throat while he is fasting. This kind is called a complete compulsion (*Iljaei)*

۲. The other kind of compulsion is like the case wherein one is threatened to imprisonment or physically hurt if he would not do a certain act. In this case one still may have the ability not to do it. This kind of[139]
compulsion is called an incomplete compulsion, *(gheir -lljaei).*

اقسام اکراه

بر اساس آن چه از کلمات فقها، در موارد مختلف استفاده می شود، اکراه بر دو قسم است:

۱- اکراهی که شخص مکرَه، به خاطر آن، نه رضایت به انجام کار مورد اکراه دارد و نه اختیار، مانند این که به زور دهان شخص روزه دار را باز کنند و در حلق او آب بریزند. به این قسم، اکراه الجایی و تام، گفته می شود.

- ۲اکراهی که به خاطر آن، شخص مکرَه، رضایت به انجام عمل مورد اکراه ندارد، ولی با این وجود نسبت به انجام یا ترک آن، اختیار دارد؛ مثل این که شخصی را تهدید کنند و بگویند اگر فلان کار را انجام ندهی، تو را حبس می کنیم، یا ضرب و شتم خواهیم نمود. این قسم، به اکراه غیر الجایی و اکراه ناقص، موسوم است.

The Difference between the Compulsion and Urgency

Compulsion (*Ikrah)* is used when some one else would force one to do something or not to do some thing. In this case there are three elements, compulsion, compelling and compelled. Urgency (*Izterar),* however, is often used in a case wherein someone without the involvement of others is compelled to do or not to do something.

تفاوت اکراه با اضطرار

به حسب استعمال عرفی، اکراه، در مواردی اطلاق می شود که شخص دیگری، انسان را به انجام یا ترک کاری وادار نماید، که در این صورت، سه عنوان مکرِه، مکرَه و اکراه پیدا می شود، ولی اضطرار بیش تر در جایی استعمال می گردد که خود شخص بدون تحمیل دیگری، به ارتکاب یا ترک عملی وادار و ناچار شود

The Rules for Compulsion (Ikrah)

The rules for compulsion and coercion are scattered in various sections of the law without any proper categorization and order and to show a certain order for it is not an easy task. Because of this reason for one case of compulsion different kinds of *Fatwa* and legal opinion may come into existence. All that could be stated in such a case is that the ruling for an incomplete compulsion in terms of effects is different from those for a complete compulsion and coercion. In some cases both kinds of compulsion may have the same kind of rule. Along with the rule for an act under compulsion its primary rule should also be taken into consideration. This will help to find out if such rules could be removed due to compulsion or not and if so it then should be considered whether it is so due to complete compulsion or even incomplete compulsion would require such rules.

حکم اکراه

همان گونه که اشاره کردیم احکام گفته شده برای اکراه در ابواب گوناگون فقه، بسیار پراکنده است و ارائه ضابطه در این مورد بسیار مشکل به نظر می رسد و به همین سبب گاهی درباره یک عمل اکراهی، فتاوای گوناگونی، دیده می شود.

آن چه می توان در این زمینه گفت این است که در برخی موارد، اکراه الجایی، احکام و آثاری متفاوت با احکام و آثار اکراه غیر الجایی دارد. در مواردی نیز این دو قسم اکراه، دارای آثار یک سانی هستند. ...

به هر حال فقیه لازم است صورت اکراهی هر کاری را با ادله حکم اولی همان کار بسنجد و با توجه به قراین و شواهدی که در دست رس دارد، معلوم کند که آیا آن حکم، به سبب اکراه رفع می شود یا نه؟ و در صورت رفع شدن، تأمل کند که آیا در این رفع، اکراه تام لازم است یا اکراه ناقص هم برای این منظور کافی است؟

For example one may consider the case of the contracts for certain transactions in which the invalidity of a contract incomplete compulsion is sufficient because of *Ahadith* and the Holy *Quran* consent of parties for the validity of a contract is one condition. "*Believers, do not exchange* your property in wrongful ways unless it is in trade by mutual agreement[۱۴۰]

Since the consent of parties is a condition for the validity of the contract even incomplete compulsion would invalidate it. Also from the *Shariah* one may have an understanding that in the case of the unlawfulness of murder and injuries to Muslims... due to the seriousness of such cases an incomplete compulsion would not justify it to follow the rules for compulsion. In such a case the rules for "important" and "more important" matters play their role.[141]

از باب مثال بعید نیست از ادله برخی معاملات استفاده کنیم برای رفع صحت و عدم لزوم و مترتب نشدن آثار آن ها، اکراه ناقص، کافی است؛ چرا که به حکم ادله ای مانند آیه: «الا ان تکون تجارة عن تراض»(۱۱) در صحت معامله، رضایت و طیب نفس طرفین معامله، شرط است و روشن است که این شرط، با اکراه ناقص نیز منتفی می شود.

چنان که می توان از مذاق شارع و ادله برخی احکام، مانند حرمت هدم خانه کعبه، حرمت تخریب قبور پیامبر – صلی الله علیه و آله– و ائمه –علیهم السلام–، حرمت قتل و جرح مسلمان و... استفاده نمود که این احکام به

دلیل اهمیتی که دارند، به صرف اکراه ناقص و عدم طیب نفس، منتفی نمی شوند؛ یعنی در این گونه موارد نیز، پای قاعده اهم و مهم پیش می آید.

Urgency or Exigency (Itferar or Zarurah)

Izterar literally and linguistically means to become compelled to do something.[142] It also means dire need for something.[142] To become compelled in doing something or to have a dire need for something may be considered as a cause and reason as when one urgently needs to sale his house due to a need. The first meaning is in consideration of the meaning of exigency and the second meaning is in consideration of the cause of the emergence of the exigency.[144] The great exegete (Tabari,) in the interpretation of verse ۱۷۳ chapter two writes: *"Izterar*, is a condition from which man can not escape like hunger that is not avoidable.[143]

فصل ششم:اضطرار

مفهوم اضطرار

جوهری می گوید:

قد اضطرّ الی الشی ء ای ألجی ء الیه؛ به چیزی اضطرار پیدا کرد؛ یعنی به آن مجبور شد.

در لسان العرب آمده است:

الاضطرار: الاحتیاج الی الشی ء. سبب این که انسان به کاری مجبور می شود و به تعبیر جوهری به آن الجاء پیدا می کند، احتیاج و نیاز او است؛ مثلاً انسان به خاطر احتیاج مالی، به فروختن خانه خود اضطرار پیدا می کند. از این رو می توان کلام ابن منظور را ناظر به سبب پیدایش اضطرار دانست و سخن جوهری را ناظر به خود اضطرار. ...

شاید بهترین تعریف برای اضطرار، تعریف مرحوم طبرسی در ذیل آیه مزبور باشد:

الاضطرار کل فعل لا یمکن المفعول به الامتناع منه و ذلک کالجوع الذی یحدث للانسان فلا یمکنه الامتناع منه؛

اضطرار، هر کاری است که شخص مبتلا به آن نتواند از آن خودداری نماید، مانند گرسنگی که برای انسان پیش می آید و شخص نمی تواند از آن امتناع ورزد.

The Evidence Proving the Authority of the Law of Exigency

All the *Foqaha* agree on the issue that the secondary title like exigency may become the cause for the inapplicability of some of the primary laws. Certain verses of the Holy Quran and certain Ahadith are cited as evidence in this matter.

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slaughtered, blood, pork, and the flesh of any animal which has not been consecrated with a mention of the Name of Allah, God.. However, in an emergency, without the intention of transgression or repeating transgression, one will intention of transgression or repeating transgression, one will not be considered to have committed a sin. God is all **forgiving and all merciful".**[146]

دلیل های قاعده

در این که عروض عنوان ثانوی اضطرار، موجب می شود پاره ای از احکام اولی، واجب الاتباع نباشند، بحثی نیست. آیات و روایاتی که بر این مطلب دلالت دارند، برخی، در مواردی خاص وارد شده اند، برخی نیز مجرایی عام دارند. در زیر به مهم ترین آیات و روایات وارده در این زمینه، اشاره می کنیم:

- ۱آیه ۱۷۳ سوره بقره:

انما حرّم علیکم المیتهٔ و الدم و لحم الخنزیز و ما أهلّ به لغیر الله فمن اضطرّ غیر باغ و لا عاد فلا اثم علیه ان الله غفور رحیم؛

خداوند تنها، مردار و خون و گوشت خوک، و هر چه که به اسم غیر خدا ذبح شده باشد را حرام نمود. پس هر کس به خوردن آن ها، اضطرار پیدا کند، در صورتی که ستم گر نباشد و از حد تجاوز ننماید، بر او گناهی نیست. خداوند بخشنده و مهربان است.

۲. □□□ □□ □□□□□□□□□ □□□ □□□ □□ □□□□□□□ □□□ □□□□□□□□□□ □□ □□□□: □□ □□□□□□ □□□□ □□□ □□□

been properly slaughtered, blood, pork, an animal slaughtered and consecrated in the name of someone other than Allah ... If anyone not (normally) inclined to sin is forced by hunger to eat unlawful substances instead of proper food, he may do so to spare his life. God is

all forgiving and all merciful.[147]

- ۲آیه ۳ سوره مائده:

حرّمت علیکم المیتهٔ و الدم و لحم الخنزیر و ما اهلّ لغیر الله به و... فمن اضطرّ فی مخمصهٔ غیر متجانف لاثم فان الله غفور رحیم؛

بر شما، مردار و خون و گوشت خوک و آن ذبیحه ای که به نام غیر خدا کشته شود و... حرام شده است پس هرکس از روی اضطرار درایام تنگی و قحطی، نه به قصد گناه،چیزی ازآن چه حرام شده بخورد [مورد مؤاخذه واقع نمی شود، چراکه] خداوند بخشنده و مهربان است.

۳. **"If you have faith in God's revelations, eat the flesh of the animal, which has been slaughtered, with a mention of His Name. Why should you not eat such flesh when God has told you in detail what is unlawful to eat under normal conditions.**
Most people, out of ignorance, are led astray by their desires. Your Lord knows best those who transgress" [148]

- ۳آیه ۱۱۹ سوره انعام:

و ما لکم الّاتأکلوا مما ذکر اسم الله علیه و قد فصّل لکم ما حرّم علیکم الا ما اضطررتم الیه...؛

و چرا شما از آن چه به آن – موقع ذبح – نام خدا، برده شده نمی خورید و حال آن که بی گمان خداوند به تفصیل بیان نمود آن چه را بر شما حرام شده، مگر این که به آن اضطرار داشته باشید.

۴. The Holy Prophet (S.A.W.) has said:
"If one would not spare his life even by consuming carcasses for [۱۴۹]
food until he dies he will die without faith

روایت احمد بن یحیی از امام صادق –علیه السلام:-

من اضطر الی المیتهٔ و الدم و لحم الخنزیر فلم یأکل شیئاً من ذلک حتی یموت فهو کافر؛ هر کس به خوردن مردار و خون و گوشت خوک اضطرار پیدا کند، ولی از آن ها نخورد تا این که از گرسنگی بمیرد، کافر است.

۵. "The Holy Prophet (S A W.) has said:

"If you are compelled, God has announced it lawful ",[150]

حدیث معروف رفع که متن آن گذشت و در آن جمله «و ما اکرهوا علیه» آمده بود.

۶. Imam Ali has said:

"There is not anything that God has made unlawful but that He Cases to which this Law may apply

- ۶روایت از علی علیه السلام:-

کلما اضطرّ الیه العبد فقد اباحه الله له و احلّه؛ خداوند مباح و حلال فرموده است برای بنده، هر آن چه را که به آن اضطرار یابد.

The *Foqaha* have applied this law to cases wherein there is an order or prohibition from *Shariah.* Only when there is an obligation or prohibition then this law is applied. In cases of desirable, detestable or permissible matters there is no need for the application of this law because acting against such cases is permissible any way.

Although the evidence supporting the authority of this law such as the verses (in 1 and 2) above are indicative of certain prohibited matters only, however, the indications in the *Sunnah* on this issue is rather of a general expression. They include all that is a must to do or to avoid.

Some of the *Foqaha* have considered this quite beneficial in the cases

wherein dangers to lives are involved[۱۵۲]

فقها این عنوان را در جایی به کار می برند که نهی و منعی در کار باشد؛ یعنی تنها در محدوده احکام الزامی حرمت و وجوب، و در مورد احکام غیر الزامی، گرچه این عنوان قابل تحقق است، مثل این که انسان به ارتکاب عملی مکروه یا ترک کاری مستحب، اضطرار پیدا کند، ولی از آن جا که مخالفت نمودن با این گونه احکام، بدون اضطرار نیز جایز است، فقها از آن بحثی به میان نیاورده اند.

پس از بیان این دو نکته می گوییم، گرچه مورد برخی از ادله این قاعده مانند آیه اول و دوم، تنها اضطرار به برخی محرمات است، ولی لسان بسیاری دیگر از ادله آن مطلق یا عام است و به حسب ظاهر تمامی احکام الزامی را در بر می گیرد.

با این وجود از عبارت شیخ طوسی در نهایه استفاده می شود که وی جواز ارتکاب برخی محرمات مانند خوردن مردار به خاطر ضرورت را تنها مربوط به موردی می داند که خطر جانی در میان باشد.

. Imam Khomeini has said this on this issue, "All the unlawful matters become lawful in exigencies either because of saving lives, the body from decease or other such dangerous conditions wherein not acting in an unlawful manner would cause such a degree of hardship, e.g. in the case of hunger that normally is not bearable".[153]

امام خمینی نیز با نگرشی وسیع، در این زمینه می نویسد:

همه محرمات مزبور، در حالت ضرورت، مباح می باشد، یا به سبب این که حفظ جان و باقی ماندن رمقش، بر خوردن آن ها توقف دارد، یا به خاطر پدیدار شدن بیماری شدیدی که در صورت نخوردن شی ء حرام، عادتاً تحمل نمی شود، یا به این سبب که با ترک چنین کاری، به ضعف مفرطی که منجر به بیماری می شود مبتلا می گردد، یا منجر به جدا افتادن از کاروان می شود....

و از جمله موارد اضطرار، موردی است که نخوردن محرمات، منجر به چنان گرسنگی و تشنگی شود که عادتاً قابل تحمل نباشد.

The Exceptional Cases

Although it may appear that all unlawful matters due to an exigency become lawful, however, as mentioned in the discourse on negation of hardships, this law is not applicable to those cases that the *Shariah* treats them in a special way. In those cases to which the indications of the verses of the Holy *Quran* and the *Sunnah* point out that even in exigencies one must not act in such an unlawful way, the *Foqaha* in such cases benefit from and apply the law of "important" and "more important". One example is taking the life of another human being due to an exigency. From the *Shariah's* point of view, without any doubt, to save one's own

life or the lives of one's children one can not endanger the lives of other human beings.[154] Of some of the rules of the law of exigency, which by itself may be treated, as a very important subsection in *Fiqh* is this: "Acting against the primary law due to an exigency is permissible until it is over and not more".[155]

موارد استثنا

دلیل های قاعده مورد بحث، همان گونه که گذشت اطلاق دارد، به نحوی که در برداشت ابتدایی از آن ها، هر کار حرامی باید به سبب اضطرار، حلال باشد، اما همان گونه که در مورد برخی قواعد دیگر هم گفتیم، بی تردید این اطلاق، از پاره ای محرمات، انصراف دارد؛ یعنی محرماتی که شارع نسبت به آن ها اهتمام ویژه دارد و از مذاق او استفاده می شود که حتی در حالت اضطرار هم راضی به ارتکاب آن ها نیست.

در این گونه موارد نیز فقیه باید به سراغ قاعده اهم و مهم برود و از تتبع و بررسی ادله، مذاق شارع را به دست آورد، از باب مثال می دانیم نمی توان اموری، مانند قتل، مجروح کردن، و بریدن اعضای دیگران را به خاطر ضرورت و اضطرار، جایز دانست و انسان نمی تواند به هدف نجات دادن خود یا بستگانش، دیگران را در معرض نابودی قرار دهد، مثلاً اگر کشتی و قایق، به سبب سنگینی محموله اش، در حال غرق شدن باشد، کسی از سرنشینان آن حق ندارد به منظور سبک شدن محموله و نجات جان خود، دیگری را به آب اندازد.

از جمله احکام قاعده اضطرار، که خود می تواند به عنوان یک قاعده فرعی، ولی مهم در فقه مطرح شود، این است که مخالفت با احکام الزامی اسلام در ظرف اضطرار، تنها به مقدار رفع اضطرار، جایز است.

The *Foqaha* have considered this rule as a rule whose authority is self-evident and as a rule of reason. In other words, the law of exigency has two conditions: One is quantity, e g. in the case of hunger one is allowed to use inedible substances as much as it spares one's life and not more. The other condition is time. This rule is applicable only until the exigency exists. As soon as it is over the primary law will apply.

The application of this law in social issues and the issues that relate to the government also is subject to the two above-mentioned conditions.

فقها برای این حکم، دلیلی اقامه نکرده اند. سبب آن نیز وضوح مطلب است؛ زیرا به حکم بدیهی عقل، هرگاه مولا به سبب اضطرار بنده اش، به او، در مخالفت برخی از احکام الزامی خود، رخصت داد، این ترخیص تا وقتی است که عذر باقی باشد و با ارتفاع عذر، رخصت نیز برداشته می شود.

به دیگر سخن، این جواز مخالفت، به حکم عقل، دارای دو تقیید است. یکی تقیید به حسب مقدار، مثلاً انسان مضطر تنها می تواند به مقدار ضرورت و رفع اضطرار، از مردار یا گوشت خوک، استفاده نماید.

و یکی هم تقیید به حسب زمان؛یعنی این اباحه و ترخیص،مادامی است که حالت اضطرار باقی باشد، و به محض رفع این حالت، اباحه مزبور نیز برداشته می شود.

این قاعده، علاوه بر این که باید در زمینه های فردی، مورد اهتمام باشد، در امور اجتماعی و احکام حکومتی نیز لازم الاجرا است،

For example if the Islamic government due to an exigency would assign definite prices for certain commodities, firstly, it should be only to the limit of getting over with a dire need. Such a step would only be necessary in the case of the goods, which are being sold with excessive prices. Secondly, as soon as the conditions would turn to normal controlled prices should be abolished because the primary law in *Shariah* is for an open market and free competition in trade.
About the permissibility of inedible substances for food in an exigency, Sheikh Tusi has said this, "If one would fear for his life, he may consume inedible substances for food only to spare his life but not a bellyful of it".[157]

از باب مثال هرگاه دولت اسلامی از باب اضطرار، اقدام به نرخ گذاری کالاها نمود، اولاً: باید این کار را تنها به مقدار رفع ضرورت انجام دهد؛ یعنی این کار را تنها در مورد کالاهایی انجام دهد که قیمت آن ها از حد متعارف فراتر رفته است و ثانیاً: به محض عادی شدن اوضاع، از آن رفع ید نماید؛ زیرا شارع در وضعیت عادی، مصلحت جامعه اسلامی را در عدم نرخ گذاری کالاها دیده است ...

شیخ طوسی در مورد خوردن مردار هنگامی که جان در خطر باشد می نویسد:

فاذا خاف ذلک أکل منها ما أمسک رمقه و لا یمتلأ منه؛ هرگاه بر جان خود بترسد، به اندازه سد رمق، نه در حد سیری، از مردار بخورد.

An Introductory Condition {Muqaddimah-Al- Wajeb/Haram)

(Something leading to an obligatory or prohibited act)

The issue of being a lead or an introduction to something is one of the secondary titles that has produced a great deal of lengthy discourses in the works on *Fiqh* and the principles of jurisprudence.

فصل هشتم: مقدمیت

دیگر از عناوین ثانویه، که اصولی ها در مورد آن بحث های فراوان و عمیقی کرده اند و فقها در ابواب گوناگون فقه بدان استدلال نموده اند، عنوان «مقدمیت» است.

An act that in relation to the primary laws falls under one of the three of the universal categories such as being desirable, detestable and permissible may, for certain reasons, become an introductory act. And as such it may become an obligation or a prohibition when it becomes a lead and an introductory factor towards the completion of another act that is a must to do or otherwise. Therefore, a change in the status comes into existence in the form of an obligatory or prohibited act That was only a desirable, a detestable or permissible before. This comes into existence as an introductory or a leading relationship with something. An introductory or being a lead means to be as such that completion of an obligatory or a prohibited one etc. would depend on it and without it such obligation etc. would not come into existence. Because of such relationship the lead or the introduction also under a secondary title becomes either obligatory or prohibited.

ثانوی بودن عنوان مقدمیت

مقصود از ثانوی بودن عنوان مزبور، این است که ممکن است عملی فی حدنفسه و به لحاظ حکم اولی، مباح یا مکروه یا مستحب باشد، ولی چون انجام دادن عملی واجب بر آن مبتنی و متوقف است، مقدمه اش نیز واجب باشد، یا چون مقدمه فعل حرامی واقع می شود، حرام باشد. ...

The Evidence Proving the Authority of this Law

Most of the *Foqaha* have considered such evidence to come from reason only. They do not accept the fact that *Shariah* has given it an obligatory or prohibited status. Muhaqqiq-e Naeeni has said, "If completion of some act would depend on something else the latter also becomes obligatory because of the decision of reason. It is so because of the fact that the existence of such relation, both from the point of views of reason and common sense, the lead and introduction also become obligatory. All scholars agree on this issue".

البته در مورد واجب بودن مقدمه واجب، بحث و گفت وگوی زیادی است، جمعی وجوب شرعی آن را انکار کرده اند، بعضی نیز در این مسئله، تفصیل داده اند. تفصیل نیز به گونه های مختلف است، هم چنان که در مورد مقدمه حرام نیز، علما، دیدگاه واحدی ندارند، ولی به هر حال این اندازه مورد پذیرش همه است که مقدمه واجب به حکم عقل واجب است.

مرحوم نائینی در این باب می نویسد:

هم چنان که امور غیر واجبه بالذات به تعلق نذر و عهد و یمین و امر آمر، لازم الاطاعه و اشتراط در ضمن عقد لازم و نحو ذلک، واجب و لازم العمل می شود، همین طور هم اقامه واجبی هم بر آن متوقف شود، لا محاله عقلاً لازم العمل و بالعرض واجب خواهد بود، چه اتّصاف مقدمه واجب بر آن عقلاً موجب لازم اتیان است، و این مقدار از لزوم مقدمه فیمابین تمام علمایِ اسلامی، اتفاقی و از ضروریات است .

Some of the *Foqaha* instead of considering something as a lead and an introduction to a prohibited act have called it (*sadd-e zara'i)* which is one of the established principles and it literally implies blocking the means to an expected end. Imam Malik and Ahmad Ibn Hanbal have considered this to be one of the principles in the fundamentals of religion. Ibn Qayyim has said that *Sadd-e Zara'i* is one fourth

of religion. He has refercd to about one hundred verses and *Ahadith* as being the evidence for its authority. Abu Hanifah and Shaft'i also have applied this principle in some cases.[159]

دکتر وهبه زحیلی در این زمینه می گوید:

وسیله به حرام، نیز حرام است و وسیله واجب، واجب است، و این موضوع بر اساس قاعده مشهور وجوب مقدمه واجب است (ما لا یتمّ الواجب الّا به فهو واجب). مالک و احمد، اصل ذرایع را اصلی از اصول حقه دانسته اند، خواه وسیله، به غایت معین شده باشد و خواه معین نشده باشد که بیش تر علما نسبت به حالت اول، اتفاق نظر دارند. ابن قیم در این باره گفته است: «ان سدّ الذرایع ربع الدین» آن گاه حدود صد دلیل از آیات و احادیث در مورد معتبر بودن وسیله ذکر می کند. ابوحنیفه و شافعی، در برخی زمینه ها، به این اصل عمل کرده،

From the point of view of these scholars anything that would serve as lead to and introduction for a prohibited act and the spread of evil must be stopped from taking place so that evil would not spread in the society and among the people.
On the other hand anything that would become the lead to and an introduction for an obligatory act is obligatory. It has called *Fath-e Zara'i* (opening the way). However, the term *Zara'i* is used more often for the first case, (i.e. the acts that would lead to evil). 160

از نظر کسانی که در ابواب فقه، به موضوع سد ذرایع تمسک جسته اند، وسایل و مقدماتی که زمینه ساز تحقق حرام و موجب فساد در بین مردم و جامعه می شوند، حکم حرمت پیدا می کنند و از این رو سدّ نمودن آن ها، واجب است و باید از آن ها ممانعت به عمل آورد تا ماده و ریشه فساد، قطع شود.

البته عکس این مطلب هم صادق است؛ یعنی اموری که وسیله تحقق مطلوبی از مطلوبات شارع، و مصلحتی از مصالح جامعه شوند، حکم وجوب پیدا می کنند و راه آن ها باز گذاشته می شود (فتح ذرایع)، ولی در بیش تر موارد، کلمه ذرایع، در مورد افعال و طرقی که منجر به شر و فساد و زمینه ساز تحقق مفسده می شوند، به کار می رود.

The following verses of *Quran* and *Ahadith* are pointed out to be evidence of the authority of this view.

١. **"Believers, do not say bad words against the idols lest they (pagans) in their hostility and ignorance say such words against God. We have made every nation's deeds seem attractive to them. One day they will all return to their Lord**
who will inform them of all that they have done".[161]

٢. □□□□□□□□□□, □□ □□□ □□□□□□□ □□□ □□□□□□□ (□.□.□.) □□ □□□□□□ (□□□□□□□ □□□

Jews, in their own accent, meant: Would that you would never hear), but call him unzurna (meaning: P,ease sPeak 1° slowly so that we understand), and then listen. The unbelievers will face a painful torment".[162]
In this verse it is prohibited to use the word because the unbelievers would use this word in a slandering manner.

کسانی که سدّ ذرایع را معتبر دانسته اند، برای اثبات این اعتبار به کتاب و سنت و عمل صحابه استدلال نموده اند.

از کتاب به آیاتی مانند: «و لا تسبّوا الذین یدعون من دون الله فیسبّوا الله عدواً بغیرعلم»(۴) و آیه «یا ایّها الذین آمنوا لا تقولوا راعناً و قولوا انظرنا و اسمعوا»(۵) استدلال کرده اند.

در آیه اخیر خداوند از این که مسلمانان، کلمه «راعناً» را به کار ببرند، نهی فرموده است؛ زیرا یهود همین تعبیر را جهت ناسزاگویی به پیامبرصلی الله علیه وآله- استعمال می کردند و قرآن نیز به منظور سدّ نمودن ذریعه فساد، از آن نهی فرمود.

٣. From *Hadith*, those *Ahadith* that prohibit hoarding of goods are considered to be *sadd-e zara'i* (to remove the ladder to evil)[163]

٤. The *Ahadith* of the Holy Prophet (S.A.W.) prohibiting to accept gratuity from an indebted person is considered as *sadd-e zara 'i* so that people would not become involved in accepting usury.[164]

در استدلال به سنت نیز می گویند:

پیامبر –صلی الله علیه و آله– به منظور سد نمودن وسیله تضییق بر مردم، از احتکار نهی فرمود، و نیز به هدف سد کردن ذریعه رباخواری، از این که طلب کار از بده کار خود قبول هدیه کند نهی فرمود، می گویند صحابه نیز به این اصل عمل نموده اند، و در این زمینه، برخی امور را نیز شاهد می آورند.

The Effects of this Law on Social Issues

The existence of this law in *Fiqh* has a great deal of favorable effects. Many of the obligations and prohibitions of social nature related to the society and the government are based on this law. It is a fact that the prosperity of an orderly social life depends on the existence of people educated and skillful in different social enterprises such as industries, education, the army, medicine and agriculture. The *Foqaha* have also issued the *Fatwa,* that if there is not enough people with such skills it is an obligation on the whole society in the form of a social obligation to acquire such skills and know-how. They must do so until enough people are educated for such tasks, even though, regardless of the social nature of these obligations, they by themselves are not obligatory. Many of the commandments that come from the Islamic government are based on this law. The instructions and the commandment of the Holy Prophet (S A W.) to manage and maintain the social order all may have been based on this law.

Conclusion

Without any doubt, the Islamic society due to new changes and developments in all walks of life is facing new problems and the *Shariah* must accommodate such issues and solve such problems according to its own standards.

بی‌تردید، جامعه اسلامی در گذر زمان و به موازات پیشرفت‌ها و دگرگونی‌های شگرف در ابعاد مختلف زندگی بشر، با مسائل نو و معضلات جدیدی روبه‌رو است که باید فقه اسلامی برای آن‌ها راه‌حل‌های مناسب و منطبق با موازین دینی بیابد.

In such a case it is the task of the *Faqih* who is well aware of the conditions of the time to take two steps: First, he must clarify properly the basics that *Fiqh* requires and rectify all the complexities through the skills of being a *Faqih* It is very much possible to solve a case with the application of the primary laws without resorting to the secondary laws.

بنابراین بر فقیه آگاه به زمان لازم است که اولاً: احکام و قواعد و مبانی فقهی را به خوبی تنقیح و تبیین نماید و نقاط نامنقح و مبهم آن‌ها را با سرانگشت فقاهت روشن نماید؛ زیرا چه بسا معضلات و مشکلات جدیدی که با همان احکام و قواعد اولیه قابل حل است

Secondly, he must carefully study the cases and subjects to which the secondary laws could be applied so that when necessary after inapplicability of the primary laws the secondary laws would be applied. Through such process it becomes possible to find proper Islamic solutions to all the issues and the problems of the society in all times and circumstances.

ثانیاً: بر احکام و قواعد ثانویه و مجاری آن‌ها به خوبی وقوف یابد تا در صورت لزوم، معضلاتی را که از طریق احکام اولیه قابل حل نیستند، با این قواعد و احکام مرتفع نماید و بدین ترتیب جاودانی بودن اسلام حنیف و توان‌مندی آن برای اداره جوامع در همه زمان‌ها را به منصه ظهور برساند

The secondary laws are beneficial utilities for the government. The Islamic government may study any newly emerging case and find proper solutions for the key issues such as balancing the economy, curbing inflation, controlling the population, regulating prices of goods, issues related to currencies, banking issues, taxes, internal and external affairs of trade etc.

احکام عناوین ثانویه، ابزار کارآمدی است که ولی‌فقیه می‌تواند به کمک آن‌ها، حوادث واقعه و مشکلات حکومت اسلامی را رسیدگی نماید و در امور مهم و کلیدی، مانند ایجاد توازن اقتصادی، مهار تورم، کنترل نفوس، تعیین و کنترل قیمت‌ها، پول و ارز، بانک‌داری، مالیات، تجارت داخلی و خارجی و... از آن‌ها بهره گیرد.

The secondary laws, however, must not be carried out to their extremities and with the emergence of every new case the secondary laws must not, before proper studies, be declared as solutions. Proper discernment of the cases and subjects to which a secondary law could be applied requires a sound degree of knowledge and awareness. The basis for the application of the secondary laws is when it would not be possible to apply the primary laws.

نکته مهمی که باید در این‌جا خاطرنشان شود این است که نباید در راه‌گشا دانستن احکام ثانوی به جانب افراط رفت و با پیدایش هر مسئله و مشکلی بی‌درنگ به سراغ این احکام رفت. مصلحت جامعه اسلامی در این است که در حد امکان، مشکلات آن را با احکام ثابت و اولیه، مرتفع نمود و تنها در مواقع ضرورت و هنگامی که احکام اولیه، جواب‌گو نیستند، به سراغ احکام ثانویه رفت.

To explore this and the case to which the secondary laws could be applied, as just mentioned, requires a sound degree of knowledge of the Islamic resources. For example when and to which case the rules of no harm and no hardships are applied or that which case is important and which one is more important all require proper knowledge of the *Shariah.*

The secondary laws come from very high grounds in the *Shariah* and that such laws play very significant roles in the law. In many cases the primary laws do not have the necessary force, especially, the social issues. In such fields the secondary laws work as the key to solve difficult problems. Taking into consideration the availability of such sources of laws to the Islamic social system in all times and places it will have proper laws for all cases. In reality the secondary laws are complimentary to the primary laws.

The existence of the secondary laws in the Islamic system is not due to shortages of legal resources. On the contrary, it is the sign of its richness and the vastness of its resources. These laws exist due to the unavoidable emergence of changes that take place in human life and in certain circumstances and surroundings. The presence of such categories of laws in the Shariah of Islam are significant factors in dealing with changes. It is a degree of flexibility for variously changing needs of all times and locations.

باید گفت نه تنها وجود این احکام در فقه اسلامی، بیان‌گر نقصان و عدم غنای آن نیست، بلکه نشانه کمال و بالندگی آن نیز هست؛ چرا که وجود این احکام، لازمه حتمی و غیر قابل گریز تحول و تغییر در زندگی انسان‌ها و بروز حالات و موقعیت‌های غیر عادی در جهات مختلف حیات بشری است. وجود این عناوین و احکام در متن فقه اسلامی، عاملی بسیار مهم در پویایی و انعطاف‌پذیری و تطبیق آن بر نیازهای گوناگون و متحول هر زمان و مکان است.

Islam is a religion with preciseness of mathematical characteristics. It calculates with accuracy and balances that which is important and which is more important. According to the Islamic system in times of need, an issue of vitality could and should be sacrificed for that of greater vitality. This factor has bestowed proper flexibility to the system. We have not introduced such a factor into the system. The system has been made this way and in this form it has been given to us. Even if we wanted to make the system flexible, we did not have such a right in the first place. Flexibility is a component part of the nature of this system, and it is an equating

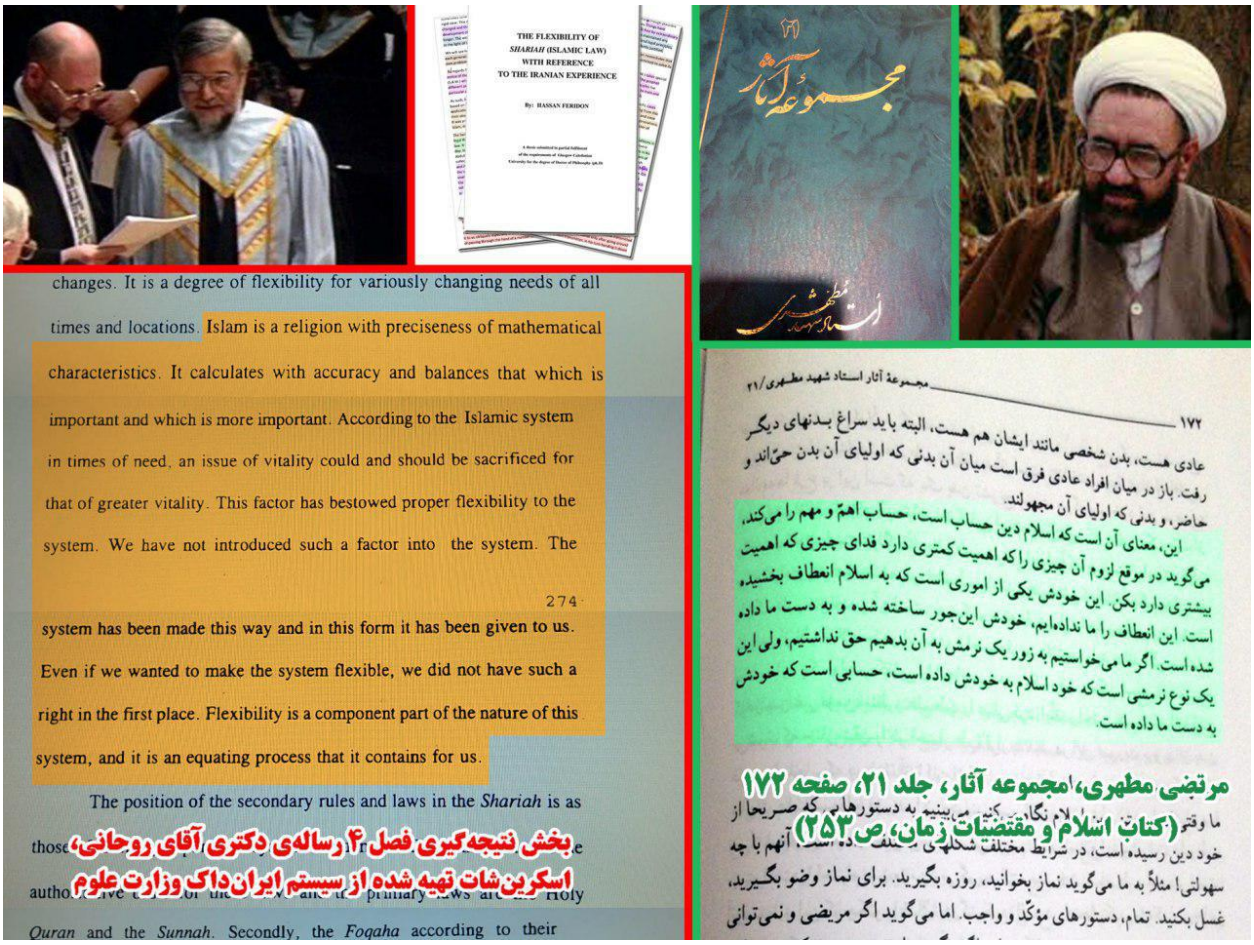
process that it contains for us.

Word by word Plagiarism from Morteza Motahari's book:

اسلام دین حساب است، حساب اهم و مهم را می‌کند، می‌گوید در موقع لزوم آن چیزی را که اهمیت کم‌تری دارد فدای چیزی که اهمیت بیش‌تری دارد بکن. این خودش یکی از اموری است که به اسلام انعطاف بخشیده‌است. این انعطاف را ما نداده‌ایم، خودش این‌جور ساخته شده و به دست ما داده شده‌است. اگر ما می‌خواستیم به زور یک نرمش به آن بدهیم حق نداشتیم، ولی این یک نوع نرمش است که خود اسلام به خودش داده‌است، حسابی است که خودش به دست ما داده‌است

The position of the secondary rules and laws in the *Shariah* is as those of an integral part in a system. Evidence to this is the fact that the authoritative basis for these laws and the primary laws are the Holy *Quran* and the *Sunnah*. Secondly, the *Foqaha* according to their methodology of reasoning have dealt with the secondary laws along with the primary laws. They have not dealt with the secondary laws in a separate chapter.

... حال آن که احکام و قواعد ثانویه نیز بخشی از فقه است به شهادت این که اولاً: ادله و مبانی این احکام نیز، مانند ادله و مبانی احکام اولیه در خود کتاب و سنت یافت می شود و ثانیاً: سنت همیشگی فقها بحث و بررسی این احکام، در ضمن بررسی احکام اولیه بوده است و هیچ گاه برای آن ها، باب جداگانه ای نگشوده اند.



Left: Conclusion section of Rouhani's chapter 4
Right: Morteza Motahari's book

Notes :

١. Hakim Muhssen, *Haqaq Al-Osul*, Najaf, 1968, Vol.l, P. 504.

٢. The laws which have been laid down irrespective of the special and extraordinary circumstances are called Al ahkam al avvaliiah; and the laws which have been laid down for the special and extraordinary circumstances are called *Al ahkavi al* thanaviiah (Makarem. Alqavaed Al Fiqhiiah. Vol. 1. P 147).

٣. Khoei Abolqasim, *Mesbah Al-Fiqahah*, Najaf, 1973, Vol. 1, P. 23.

٤. Makarem Naser, *Al-Qavaed Al* Fiqhiiah, Qom, 1966, Vol. 1,
Allameh Helli, *Nahaj Al Haqq*, Tehran, 1990, P. 82.
Isphahani Muhammad Taghi, *Hedayat Al-Mustarshedin*, Qom, 1951, P. 112.
Muhammad Hussein, *Fusul*, Tehran 1948, P. 335.

In his book *"Makasib"* and also in *"Fraed Al Osul"*, when he discusses about *la-zarar* rule has put forth some precise and valuable subjects about *Al ahkam al thanaviiah*. (Ansari Mortaza, *Al-Makasib* Vol.2, P. 58).

Mohaqqiq Khorasani (d. 1329) in his book *" Kef ayah-Al-usul"* when discussing about *la-zarar* rule makes some remarks about the secondary rule (Khorasani Kadem, *Kefayal Al-Osul*, Vol.l, P.348).

وی در کتاب مکاسب مبحث «شروط صحت شرط»(۵) ونیز در رساله «المواسعة و المضایقة»(۶) و هم چنین در کتاب فرائد الاصول هنگام بحث از «قاعده لاضرر»(۷)، مباحث دقیق و ارزنده ای درباره حکم ثانوی مطرح نموده است. پس از ایشان، محمد کاظم خراسانی (متوفای ۱۳۲۹ق.) در کتاب کفایة الاصول هنگام بحث از «قاعده لاضرر» هم چنین در آغاز مبحث «تعارض الادلة و الامارات» مطالبی درباره احکام ثانویه طرح نموده است.

۹. For example, Allameh Majlesi (d. 1111) in his account of the *hadith "la-zarar and la-zarar"* writes: This *hadith* has been reported by all the *ulama* and has become an important legal principle (Majlesi, *Behar al Anvar*, Vol. 92, P.75).

از باب مثال، علامه محمدباقر مجلسی (متوفای ۱۱۱۱ق.) در شرح حدیث «لاضرر و لاضرار» می نویسد: هذا المضمون مروی من طرق الخاصة و العامة بأسانید کثیرة فصار أصلاً من الأصول و به یستدلّون فی کثیر من الاحکام .

Ibn Hazam Andolosi (d. 456) in his book "Al-Mohalla" has discussed about "Ikrah" and its kinds in several pages. He also has some remarks about oblation, promise and oath in this book. Ahmad ibn Hussein Beihagqi (d. 458) in his book "Al-Sonanal- kobra' has discussed in detail about oblation, promise and oath.

پس از وی به ابن حزم اندلسی (متوفای ۴۵۶ق.) می رسیم که در مورد اکراه و اقسام آن بحث نموده است.(۱۴) وی هم چنین مباحثی درباره نذر، عهد و قسم دارد. احمد بن حسین بیهقی (متوفای ۴۵۸ق.) نیز بحثی مفصل در مورد نذر، عهد و قسم مطرح کرده است.(۱۶)

Abu Bakr ibn Masoud in his book "Badae'Al- Sanae"' under the heading of Ikrah has discussed about literary and legal sense of Ikrah and its kinds, conditions and rules in several pages. He has also some remarks about oblation, promise and oath. Also Ibn Qudameh (d. 620) in the 5th and 8th volume of his book "Al- moqni" has discussed about Izterar (emergency) and Ikrah and the conditions for their

realization and their rules. He has some remarks about oblation, promise and oath in the 1 lih volume of this book.

ابوبکر بن مسعود درباره مفهوم لغوی و شرعی اکراه، انواع، شرایط و احکام آن بحث نموده است.(۱۷) هم چنین در مورد نذر و عهد و قسم مباحثی دارد . ابن قدامه حنبلی (متوفای ۶۲۰ق.) نیز در مورد اضطرار، اکراه، شروط تحقق و احکام آن (۱۹) و نذر، عهد و قسم بحث نموده است.

Abd-Al-Aziz ibn Abd-Al-Salam (d. 660) in his book *"Qava 'ed Al Ahkam"* has discussed about *Ikrah, Izterar, Ahamm* and *Mohemm* (important and more important) law and lesser of two evils law. he discusses about the matter of how a *Haram* (prohibited) action becomes *Mubah* (permitted) and considers it a case of "victimize an expediency for a more important one". Mohie Al-din Novi (d 676) in his book *"Sharh Al Mohazzab*", in several instances resorts to the *La-zarar* rule and in the ۱۳th volume of this book in the subject of mortgage, have a brief explanation about the hadith of la-zarar *and la-zarar*. In the 9th volume of this book, we encounter some issues about *Ikrah* and *Izterar*. Suiuti (d. 911) in his book *"Al-Ashbah and Al-nazae'r"* has discussed about the negation of *haraj* rule and the negation of Zarar rule and about Ikrah respectively in 9 pages.

عبدالعزیز بن عبدالسلام (متوفای ۶۶۰ق.) درباره اکراه، اضطرار، قانون اهم و مهم، و قانون دفع افسد به فاسد مباحث مبسوطی دارد. وی مباح شدن کار حرام به خاطراضطرار را از مصادیق قاعده «الجمع بین احدی المصلحتین و بذل المصلحۀالاخری» می گیرد. محیی الدین نووی (متوفای ۶۷۶ق.) که شافعی مذهب است، در موارد فراوانی به قاعده «لاضرر» تمسک می کند و در مبحث رهن، توضیح فشرده ای در مورد حدیث «لاضرر و لاضرار» دارد. هم چنین مباحثی در مورد اکراه و اضطرار مطرح کرده است.

پس از نام بردگان بالا، می توان از جلال الدین سیوطی (متوفای ۹۱۱ق.) یاد کرد که درباره قاعده نفی حرج بحث نموده و به «المشقّۀ تجلب التیسیر» تعبیر می کند. قاعده نفی ضرر و به تعبیر او «الضرر یُزال» و اکراه از دیگر مباحث است.(۲۳)

۱۱. □□□□□ □□□ □□□□, Almodavvanah-Al-Kobra, Birut, 1931, Vol.2, PP. 291-292.

۱۲ □□□□□□, *Al-Omm*, Birut, 1959, Vol 1, P 254

۱۳. Ibid, P. 252.

١٤. Ibn Qudameh, *Al-Moglini*, Birut, 1989, Vol. 5, P. 273.

١٥. Meshkini Ali, *Estelahat Al-Osul*, Qom 1969, P. 121.

١٦. Sharabiani Abd Al-Majid, *Majmueh* Author, Tehran, 1996, Vol.9, P. 290.

١٧. Jafari Muhammad Taqi, *Majmueh Aathar*, Tehran, 1996, Vol. 3, P. 91.

١٨. Yazdt Muhammad, *Nor-e-ilm*, Qom, 1981, Vol. 9, P. 86.

١٩. Ansari, *Al-Makaseb*, Tabriz, 1940, P. 278.

٢٠. Makarem Naser, op.cit., Qom, 1966, Vol 1, P. 169.

٢١. Imam Jafar Sadeq, the son of the fifth Imam, was born in 83/702. He died in ١٤٨/٧٦٥ □□□□□□□□□□ □□ □□□□□□ □□□□□□□□□□. □□□□□□ □□□ □□□□□□□ □□ □□□ □□□□□

Imam greater possibilities and a more favorable climate existed for him to propagate religious teachings. This came about as a result of revolts in Islamic lands, especially the uprising of the Muswaddah to overthrow the Umayyad caliphate, and the bloody wars which finally led to the fall and extinction of the Umayyads. The greater opportunities for Shiite teachings were also a result of the favorable grounds the fifth Imam had prepared during the twenty years of his imamate through the propagation of the true teachings of Islam and the sciences of the Household of the Prophet (S.A.W.). The Imam took advantage of the occasion to propagate the religious sciences until the very end of his imamate, which was contemporary with the end of the Umayyad and beginning of the Abbasid caliphates. He instructed many scholars in different fields of the intellectual and transmitted sciences.

Word by word Plagiarism from *Shi'ite Islam* (شیعه در اسلام) Written by Allamah Muhammad Husayn Tabatabai, with the translation and introduction by Seyyed Hossein Nasr.

٢٢. Koleini Muhammad, Osul-e-ATa/t, Birut, 1987, Vol. 2, P. 327.

٢٣. Saremi, *Majmueh Aathar*, Tehran, 1996, Vol. 7, P. 337.

٢٤. Allameh Helli, *Mokfualaf Al-Shia*, Qom, 1995, Vol. 5, P. 41.

٢٥. Khoei Abolqasim, *Mesbah Al-Feqahah*, Najaf, 1973, Vol. 4, P. 93.

٢٦. Ansari Mortaza, *Almakaseb*, Bimt, 1995, Vol. 2, P.17.

٢٧. Allameh Helli, *Sharaie Al Ahkam,* Tehran, 1977, Vol. 2, P. 331.

٢٨. Ben Salameh Hebatollah, *Al-naskh va Al mansookh,* Cairo, 1983, P.15.

٢٩. Ata'eqi Abd-Al-Rahman, *Tafsir Ata'eqi,* Qom, 1980, Vol. 1, P. 142 .

٣٠. The *Quran* 2: 173.

٣١. Ibid.

٣٢. Mareft Hadi, *Talkhis al Tamhid,* Qom, 1994, Vol. 1, P. 412.

٣٣. Ibid.

٣٤. Hakim Muhseen, *Haqa'eq Al-Osul,* Najaf, 1968, Vol. 1, P. 542.

٣٥. The *Quran 2:* 173.

٣٦. The word *" Tayammum"* is derived from "amma": he repaired a thing and *"Tayammum", therefore,* means, originally, betaking oneself to a thing and, since the word is used here is connection with betaking oneself to pure earth, *"Tayammum"* has come technically to mean this particular practice of touching the earth and then wiping over the face and hands.

Word by word Plagiarism from *Ṣaḥīḥ Muslim*, written by Muslim ibn Ḥajjāj al-Qushayrī, with english translation, Kitab Bhavan, **1971**, p. 200 (or Plagiarized from some other book).

٣٧. Naeeni Muhammad Hussein, *AlTaqrirat,* Najaf, 1951, Vol. 1, P. 194.

Mozaffar Muhammad Reza, *Osul-AI-Fiqh,* Tehran, 1968, Vol. 1, P.6.

The *Quran,* 5: 6; 4: 43.

The *Quran* 6: 119; 2:173; 5:3 .

Imam Khomeini, *Al Beia,* Qom, 1980, Vol. 2, P. 498.

The *Quran* 22:78.

Najafi Muhammad Hassan, *Jawahir Al-Kalam,* Birui, 1981, Vol. 21, P. 404.

٤٤ □□□□□□ □□□□□, *Miftah al Keramah*, Qom, 1973, Vol. 7, P. 3.

٤٥. □□□□□ □□□□□□□□□ □□□□□ □□□□□ □□□ □□□□□□□□□□□ □□ □□□ □□□□□ □□ □□□ □□ □□□

chapter of fiqh, are surveyed in the same chapters such as the discussion about the prohibition of eating the meat of an animal who eats nejasat, but those secondary rules which flow in the majority or all of the chapters of *fiqh* are surveyed as main rules, such as the *la-zarar* and *la-haraj* rule.

آن دسته از احکام ثانوی که جنبه جزئی و موردی دارد و تنها در یک یا دو باب فقه، مطرح می شود، در همان باب به صورت فروع فقهی مورد بررسی قرار می گیرد، مانند بحث در مورد حرمت استفاده از گوشت حیوانی که نجاست خوار شده است، ولی آن دسته از احکام ثانوی که در بیش تر یا همه ابواب فقه جریان می یابد، به عنوان قواعد فقهی مورد بررسی واقع می شود، مانند لاضرر و لاحرج.

۴۶. □□□□□□ □□□□□□□, *Faraed Al-Osul*, Tabriz, 1932, P 279. Montazeri, *Velaiat Al Faqih*, Qom, 1985, Vol. 2, P. 194.

Ibid.

Ansari Mortaza, *Al-Makaseb*, Birut, 1995, Vol. 1, P. 392.

Imam Ali, *Nahjul Balaghah*, Rome , 1984, P.542.

Makarem Naser, *Anvar Al Fiqahah*, Vol. 1, P. 546.

Najafi Muhammad Hassan, *Jawahir al Kalam*, Birut, 1981, Vol. 1, PP. 289-290.

۵۳. Ibid, Vol. 36, PP. 424-425.

۵٤. Makarem Naser, *Al Qavaed Al Fiqhiiah* Qom, 1966, Vol. 1, P. 393.

۵۵. Therefore, "the most important and important" rule is the criterion and reason for precedence of the secondary rules in relation to the primary rules. Thus, it is not very unusual to say that the precedence of the secondary rules in relation to the primary rules practically is placed under the heading of the precedence of the most important in relation to an important case.

حاصل سخن این که قانون اهم و مهم، مناط مقدم نمودن احکام ثانویه بر احکام اولیه است و بعید نیست بگوییم در همه مواردی که حکم ثانوی بر حکم اولی مقدم می شود از باب تزاحم میان این دو و تقدیم اهم بر مهم است.

۵٦. Ansari Mortaza, *Al Makaseb*, Birut, 1995, Vol. 2, P. 452.

۵۷. Naeeni Muhammad Hussein, *Tanbih al Ummah*, Tehran, 1961, P. 5.

۵۸. Najafi Muhammad Hassan, *Jawahir Al-Kalam*, Birut, 1981, Vol.l, P. 404 .

۵۹. Ibid. Vol. 22. P. 119.

٦۰. Imam Khomeini, *Al Beia'*, Qom 1980, Vol.2, P. 461.

٦۱. Naecni Muhammad Hussein, *Tanbih al Ummah*, Tehran, 1961, P. 5.

٥٨. Ibid, P. 46.

٥٩. KJioei Abolqasim, *Mesbah Al-Fiqahah*, Najaf, 1973, Vol. 1, P. 27.

٦٠. Some jurists in spite of strong reasons for this rule and its frequent use by the jurists, considers its content ambiguous and by limiting its authencity (*hojiyyat)* to the obligatory cases that are out of the power of the human beings, actually have denied its authencity, neglecting this fact that in these cases the reason itself independently rules the negation of obligation and *Shariah* no longer needs this rule. (A'meli, *Al Fosul al Muhemmah*, P. 249).

برخی علی‌رغم ادله محکم و متقن این قاعده و استفاده فراوان فقها از آن، مفاد آن را مجمل دانسته، و با محدود ساختن حجیت آن به موارد تکلیف ما لایطاق، عملاً حجیت آن را مورد انکار قرار داده‌اند، غافل از این‌که در چنین مواردی، خود عقل به‌طور مستقل به نفی تکلیف، حکم می‌کند و دیگر حاجت به تأسیس این قاعده امتنانی از سوی شارع نیست. در این زمینه می‌توان از مرحوم شیخ حر عاملی نام برد که به سبب نیافتن پاسخی مناسب برای اشکالی که به زودی به طرح و حل آن خواهیم پرداخت، گفته‌است: نفی الحرج مجمل لا یمکن الجزم به فیما عدا التکلیف بما لا یطاق، و الا لزم رفع جمیع التکالیف [حر عاملی، *الفصول المهمة*، ص۲۴۹.]

٦١. Makarem Naser, *Al qavaed al fiqhiiah*, Qom, 1966, Vol. 1, P. 160.

٦٢. The *Quran*, 22: 78

٦٣. Ibid, 5: 6.

۶۸ □□□□, ۲: ۱۸۵.

٦٩. Ibid, 2: 286.

٧٠. A'meli, *Vasael Al Shia*, Birut, 1983, Vol.l, P. 326.

٧١. Ibid, Vol. 2, P. 1072.

٧٢. Bujnurdi Hassan, *Alqavaed Al Fiqhiiah*, Najaf, 1979, Vol. 1, P. 211.

٧٣. Ibid, P. 183.

٧٤. Ibn Al Athir, *Al Nehaialt*, Cairo, 1967, Vol. 1, P. 251.

٧٥. Ibn Manzur, *Lesan Al Arab*, Birut. 1970, Vol. 2, P. 233; Jowhari, *Sehah Al Lugha/i*, Birut, 1956, Vol

٧٦. The *Quran*, 9: 91.

٧٧. Ibid, 24:61.

٧٨. Ibid, 6: 125.

٧٩. ٧٩. Ibid, 7: 2.

٨٠. Ibn Athir, *Al Nehaia,* Cairo, 1967, Vol. 1, P. 342.

٨١. Jowhari, *Sehah Al Lughah,* Birut, 1956, Vol. I, P 42; *Lesan al Arab,* Vol. 2, P. 314.

٨٢. "And strive hard in (the way of) Allah, (such) a striving as is due to Him; He has chosen you and has not laid upon you any hardship in religion" (the Quran, ٢٢: ٧٨).

٨٣. A'meli, op.cit., Vol. 1, P.179.

٨٤. Bujnurdi Hassan, *Al Qavaed al fiqhiiah,* Najaf, 1979, Vol. 1, P. 209.

٨٥. □□□□, □□. ٢١١–٢١٤.

٨٦. A'meli, *Miftah-Al-Keramah,* Birut, 1981, Vol. 7, P. ٣.

٨٧. Bahrani, *Hadaeq-Al-Nazereh,* Birut, 1985, Vol. 12, P. 473.

٨٨. Najafi Muhammad Hassan, *Jawahir-Al-Kalam,* Birut, 1981, Vol. 5, PP. 102-١٠٣.

٨٩. Ibid, Vol. 12, PP. 250-251.

٩٠. Ibid, Vol. 13, P. 283.

٩١. Tabatabaii, *Al Orvah Al Wuthqa,* Najaf, 1974, Vol.2, P. 75.

٩٢. "Hadd" punishment only given when there is a violation of people's Rights. The word Hudud is the plural of an Arabic word Hadd, which means prevention, restraint or prohibition, and for this reason, it is a restrictive and preventive ordinance, or statute, of Allah concerning things lawful (Halal) and things unlawful (Haram). Hudud of Allah are of two categories. Firstly, those statutes prescribed to mankind in respect of foods and drinks and marriages and divorce, etc., what are lawful thereof and what are unlawful; secondly, the punishments, prescribed, or appointed, to be inflicted upon him who does that which he has been forbidden to do. In Islamic jurisprudence, the word hudud is limited to punishments for crimes

mentioned by the Holy *Quran* or the *Sunnah* of the Prophet (S A W) while other punishments are left to the discretion of the *Qaz.i* or the rule which are called *Taazir* (disgracing the criminal).

The word "*qesas*" is derived from an Arabic word *qessa* meaning he cut or he followed his track in pursuit, and it comes therefore to mean Law of Equality or equitable retaliation for the murder already committed. The treatment of the murderer should be the same as his horrible act, that is, his own life should be taken just as he took the life of his fellow man. This does not mean that he should also be killed with the same instrument or weapon. The injunctions on qesas in the *Quran* are based on the principles of strict justice and equality of the value of human life.

Word by word Plagiarism from …

در اینترنت در چند کتاب و مقاله و ... عین این عبارات موجود هست. مثلاً در

Shariah: Islamic law, written by Abdur Rahman I. Doi, Abdassamad Clarke, p. ۳۴۱

مطمئنا برخی از این منابع قبل از این تز هستند ...

۹٤. The *Quran*, 22: 78.

۹٥. Muhammad Hussein, *Al Fosul*, Qom, 1932, P. 334.

۹٦. Najafi, *Javaher Al Kalam*, Birut, 1981, Vol. 5, P. 103; Vol.21,

.

P. 62.

۹۷. Ibid.

۹۸. The *Quran*, 22:78.

۹۹. Bujnurdi, *Qavaed Al Fiqhiiah*, Najaf, 1979, Vol. I, P.74.

۱۰۰. The *Quran*, 2: 216.

۱۰۱. Ibid, 33: 10.

۱۰۲. Makarem Naser, *Al Qavaed Al Fiqhiiah*, Qom, 1966, Vol. 1, P. 194 .

۱۰۳. The *Quran*. 9: 117.

۱۰٤. Najafl, *Jawahir Al Kalam*, Birut, 1981, Vol. 17, P. 150.

۱۰٥. Hamedani Reza, *Mesbah Al Faqih*, Qom, 1941, P. 463.

١٠٦. Tabatabaii, *Al Orvah Al Wuthqa,* Birut, 1990, Vol. 1, P.
١٠٧. A'meli, *Vasael Al Shia*, Birut, 1983, Vol. 5, P. 417.
١٠٨. Hamedani, *Mesbah-Al-Faqih,* Qom, 194, P. 463.
١٠٩. Makarem Naser, *Al Qavaed al Fiqhiiah*, Qom, 1966, Vol. 1, P. 198.
١١٠. Andari, *Al Fraed Al Osul,* Tabriz, 1932, Vol. 1, P. 198.
١١١. Al A'meli, *Vasael Al Shia,* Birut, 1983, Vol. 2, P. 512.
١١٢. Ibid, P. 995.
١١٣. Kolani, *OsulalKafi,* Birut, 1985, Vol. 2, P. 512.
١١٤. Ansari, *Al Makaseb,* Birut, 1995, P. 360.
١١٥. Tosi Muhammad Hassan, *Al Khelaf,* Qom, 1989, Vol. 1, P.552.
١١٦. Ibn Zohreh, *Qonyah Al Nuzua',* Cairo, 1995, P 588.
J17. Ibn Dawud, *Al Sunan,* Cairo, 1971, Vol. 3, P.315, *hadith* no. 3035.
١١٨. Termezi, *Al Sahih,* Cairo, 1968, Vol. 4, P. 332, *hadith no.* 1940.
١١٩. Ibn Majeh, *Al Sunan,* Birut, 1981, Vol. 2, P. 5800.
١٢٠. Zeydan Abdulkarim, *AI Madkhal le derasah al Shariah,* PP. 98-99.
١٢١. Ibn Najim, *Al Ashbah va Al Nazaer,* Cairo, 1988, P. 85.
١٢٢. Abd al Munem, *Al Ijtihad,* Cairo 1995, P. 106.
١٢٣. Fakhr Al-Muhaqqiqin, *Izah-Al-Favaed,* Qom, 1991, Vol. 2, P. 48
١٢٤. A'meli, *Vasael Al Shia,* Birut, 1983, Vol. 17, P. 256.
١٢٥. Ibid, P. 179.
١٢٦. Ibid, P. 324.
١٢٧. Ibn Athir *Al Nehaiah,* Cairo. 1978. Vol. 3.
١٢٨. Ansari, *Faraeci Al Osul,* Tabriz, 1932, Vol.
١٢٩. Meshkini, *Astelahaiol Osul,* Qom, 1969, P.
١٣٠. The *Quran,* 2: 197.
١٣١. Ibid, 20:97.
١٣٢. Koleini, *OsulAlKafi*, Biait, 1995, Vol. 2, P. 183.

١٣٣. Imam Khomeini, *Tahzib Al Osul*, Qom 1959, Vol. 2, PP. 112-١١٧.

١٣٤. Makarem Naser, *Al QavaedAl Fiqhiiah*, Qom, 1966, Vol. 1, PP. 61-65.

١٣٥. Ibid, P.68.

١٣٦. The *Quran*, 16:106.

١٣٧. Ibid, 24: 33.

١٣٨. Saduq, *Al Khesal*, Tehran, 1948, Vol. 2, P. 45.

١٣٩. Ansari, *Alma Kaseb*, Birut, 1995, Vol. 2, P. 87.

١٤٠. The *Quran* 4: 29.

١٤١. Imam Khomeini, *Al Rasael*, Qom, 1948, Vol. 2, P. 65.

١٤٢. Jowhari, *Al Sehah*, Cairo, 1973, Vol. 3, P. 72.

١٤٣. Ibn Manzur, *Lesan Al Arab*, Birut , Vol. 6, P. 94.

١٤٤. *Ikrah* is used in the cases that the other person forces an individual to implement or abandon a job, in this event, three headings of *mokreh, mokrah* and *Ikrah* are found, but *Izterar* is used often where the person without imposition by the other person is forced to implement or abandon a job.

به حسب استعمال عرفی، اکراه، در مواردی اطلاق می شود که شخص دیگری، انسان را به انجام یا ترک کاری وادار نماید، که در این صورت، سه عنوان مکرِه، مکرَه و اکراه پیدا می شود، ولی اضطرار بیش تر در جایی استعمال می گردد که خود شخص بدون تحمیل دیگری، به ارتکاب یا ترک عملی وادار و ناچار شود.

١٤٥. Tabari Fasl Ibn Hassan, *Majma' al Baian*, Birut, 1995, Vol. I, P. 257.

١٤٦. The *Quran, 2:* 173.

١٤٧. Ibid, 5: 3.

١٤٨. Ibid. 6: 119.

١٤٩. A'meli, *Vasael Al Shia'*, Birul, Nori Hussein, *Mostadrak al* P.166.

١٥٠. *Vasael*, Birut, 1993, Vol. 16.

١٥١. Ameli, *Vasael Al Shia'*, Birut, 1983, Vol. 2, P. 690.

١٥٢. Tosi Muhammad Hassan, *Al Nehaiah,* Birut, 1980, P. 586.
١٥٣. Imam Khomeini, *Tahrir al Vasilah,* Najaf, 1966, Vol. 2, PP. 169-170.
١٥٤. Helli, *Sharaea Al Islam,* Tehran, 1977, Vol. 2, P 418.
١٥٥. Makarem Naser, *Anvar Al Fiqahah,* Qom, 1983, Vol. 2, P.199.
١٥٦. Ibid, PP. 199-202.
١٥٧. Tosi Muhammad Hassan, *Al Nehaiah,* Birut, 1980, P. 586.
١٥٨. Naeeni, *Tanbih Al Ummah,* Tehran, 1961, P. 50.
١٥٩. Zohalei, *Ijtihad,* Cairo 1982, P. 37.
١٦٠. Zeydan Abdulkarim, *Al Madkhal,* Cairo, 1981, P. 204.
١٦١. The *Quran,* 6: 108.
١٦٢. Ibid, 2: 104.
١٦٣. Zeydan Abadul Karim, *Al Madkhal,* Cairo, 1981, P. 201.
١٦٤. Ameli, *Vasael Al Shia*', Vol. 18, Birut, 1983, PP. 152-159.

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Approximately 10200 words of Rouhani's Ph.D. Thesis word by word have been plagiarized from Ahmad Hasan:

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It is important to say that in the notes of chapters 1, 2 and 3 there is no reference to the works of Ahmad Hasan.

سرقت علمی تز دکتری روحانی از احمد حسن

تقریباً ۱۰۲۰۰ واژه از تز دکتری روحانی کلمه به کلمه از احمد حسن سرقت علمی شده است؛ بدین صورت که:

تقریباً ۵۱۰۰ واژه در فصل ۲ (یعنی صص ۷۹–۷۸ و صص ۱۳۸–۱۱۸) کلمه به کلمه از این کتاب احمد حسن سرقت علمی شده است:

Hasan, Ahmad (1986), *Analogical Reasoning in Islamic Jurisprudence*

و تقریباً ۵۱۲۰ واژه نیز در فصول ۱، ۲ و ۳ (یعنی صص ۲۲–۲۱ و ص ۲۶ در فصل ۱ (=۳۲۰واژه) و صص ۷۵–۷۳ و ۸۸–۸۷ و ص ۹۵ و صص ۱۰۸–۹۸ در فصل ۲ (=۳۶۰۰ واژه) و صص ۱۸۲–۱۷۹ و صص ۲۰۰–۱۹۹ در فصل ۳ (=۱۲۰۰ واژه)) کلمه به کلمه از این کتاب احمد حسن سرقت علمی شده است:

Hasan, Ahmad (1970), *The early development of Islamic jurisprudence*, Islamic Research Institute

گفتنی است در پی‌نوشت‌های فصلهای ۱، ۲ و ۳ هیچ ارجاعی به آثار دکتر احمد حسن وجود ندارد.

Rouhani's PhD Thesis, p. 21

The Proof of Ijtihad

Ijtihad derives its validity from divine revelation. The primary source of law in the early era was the Quran. The Quran was elaborated and interpreted by the Sunnah.[16] Thus the Quran and the Sunnah constituted the primary sources of Islamic law However, the society in which the Quran was revealed was naturally to develop further by the expansion of Islam Most of the problems that confronted the Muslims living in the time of revelation were bound to differ from those of the coming generations in the wake of the interplay of Islam and other neighboring cultures with which they came in contact As such, the law furnished by the Quran-Sunnah source in the time of the Prophet (S.A.W.) had to be supplemented and sometimes reinterpreted and elaborated to

Plagiarized from Ahmad Hasan, *The early development,* p. 115

The most fundamental source of law in the early phase was the Qur'an—as elaborated, exemplified and interpreted by the *Sunnah.* Thus, the *Qjir'&n-Sunnah* constituted one source of law. The society in which the Qur'an was revealed was naturally to develop further by the outward expansion of Islam. Most of the problems that confronted the Muslims living in the time of Revelation were bound to differ from those of the coming generations in the wake of the interplay of Islam and other neighbouring cultures with which they came in contact. As such, the law furnished by the Qur'an- *Sunnah* source in the time of the Prophet had to be supplemented and sometimes reinterpreted and elaborated to

Rouhani's PhD Thesis, p. 22

cover new problems in order to find answers for them.[١٧] Islamic law, therefore, developed with the emergence of new problems from time to time since the days of the Prophet (S.A.W.), and was examined and reexamined. interpreted and reinterpreted, in accordance with the varying circumstances of the age. The process of rethinking and reinterpreting the law independently was carried out through *Ijtihad*.

Plagiarized from Ahmad Hasan, *The early development,* p. 115

cover new problems in order to find answers for them. Islamic law, therefore, developed with the emergence of new problems from time to time since the days of the Prophet, and was created and recreated, interpreted and reinterpreted, in accordance with the varying circumstances. The process of rethinking and reinterpreting the law independently is known as *Ijtihdd*.

Rouhani's PhD Thesis, p. 22

Intellectual development and maturity in judgement had been since

long a criterion of dynamism The Quran itself time and again exhorts to deep thinking and meditation over its verses.[18] It invites to the exercise of reason and personal opinion (Ijtihad) in legal matters

Plagiarized from Ahmad Hasan, *The early development*, p. 117

This implies that intellectual perfection and maturity in judgement had been since long a criterion of greatness. The Qur'an itself time and again exhorts to deep thinking and meditation over its verses.[10] It invites to the exercise of reason and personal opinion in legal matters.

Rouhani's PhD Thesis, p. 26

On the occasion of Badr. to give an instance, the Prophet (S.A.W.) chose a particular place for the encampment of the Muslim forces. A companion. Hubab Al-Munzcr. asked him whether he had chosen (hat place on his own judgement (ra'y) or on revelation from God The Prophet (S.A.W.) replied that he had done so on his own judgement. When the Companion suggested a more suitable place, the Prophet (S.A.W.) told him:

"You have made a sound suggestion".[33]

Examples are abundant where the Prophet (S.A.W.) consulted the Companions and accepted their opinions. The Quran's insistence on consulting the Companions in different matters presupposes its approval of exercise of personal opinion in deciding problems.[34]

Plagiarized from Ahmad Hasan, *The early development*, p. 117

On the occasion of Badr, to give an instance, the Prophet chose a particular place for the encampment of the Muslim forces. A Companion, Hubab b. al-Mundhir, asked him whether he had chosen that place on his own judgement *(ray)* or on revelation from God. The Prophet replied that he had done so on his own judgement. When the Companion suggested a fitter place, the Prophet told him: "You have made a sound suggestion *(laqad asharta bi'l-ray)"*[11] Examples are abundant where the Prophet consulted the Companions and accepted their opinions. The Qur'an's insistence on consulting the Companions in different matters presupposes its approval of exercise of personal opinion in deciding problems.

Rouhani's PhD Thesis, p. ٧٣

The Features of the Quranic Injunctions

The *Quran* is the primary source of legislation in the Islamic law. Numerous Quranic verses explicitly indicate that it is the basic and main source of law in Islam ^ The type of guidance, which the Muslims required at Medina, was not the same as they had needed at Mecca. That is why the Medinese *suvar* (PI. of *Surah)* differ in character from those revealed at Mecca. The latter are comparatively small in size, and generally deal with the basic beliefs of Islam. The Medinese *Suvar,* on the other hand, are rich in laws relating to civil, criminal, social, and political problems of life.^ We do find the term *Zakat* in several Meccan *Suvar*;[10] but *Zakat* was not in existence at Mecca in its institutional form. In Mecca, the term *Zakat* denoted voluntary financial help or ethical purity. It was not an obligatory social duty of the opulents. Moreover, at Mecca no administrative staff was recruited for this purpose. From this observation, we can infer that the laws of the *Quran* were issued appropriate to the circumstances and new conditions.

Plagiarized from Ahmad Hasan, *The early development,* pp. 42-43

p. 42

The Qur'an, as we said before, is the primary source of legislation. Several Qur'anic verses expressly indicate

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that it is the basis and main source of law in Islam.[32] The Prophet lived at Mecca for thirteen years and at Medina for ten years. The period after the *Hijrah,* unlike that of Mecca, was no longer a period of humiliation, and persecution of the Muslims. The type of guidance which the Muslims required at Medina was not the same as they had needed at Mecca. That is why the Medinese *surahs* differ in character from those revealed at Mecca. The latter are comparatively small in. size, and generally deal with the basic beliefs of Islam. They provide guidance to an individual soul. The Medinese *surahs,* on the other hand, are rich in laws relating to civil, criminal, social, and political problems of life. They provide guidance to a nascent social and political community. We do find the term *zakah* in several Meccan *surahs*;[33] but *zakah* was not in existence at Mecca in its institutional form. At Mecca, this term has been used in the sense of monetary help- on a voluntary basis or in the sense of moral purity. It was not an obligatory social duty of the opulents. Moreover,, at Mecca no administrative staff was recruited for this purpose.

Rouhani's PhD Thesis, p. ٧٣

Rather than presenting meticulous or unimportant details, the *Quran* specifies fundamental principles that guide a Muslim to a specific direction, where he has to strive to get the answers.

Moreover, it presents the Islamic values in a general form, suited to the changing circumstances in all ages. The *Quran* calls itself "guidance", and not a code of law.[١١]

Plagiarized from Ahmad Hasan, *The early development*, p. 45

The Qur'an, however, instead of giving the minutiae, indicates basic principles that lead a Muslim to a certain direction, where he can find the answer by his own effort. Moreover, it presents the Islamic ideology in a general form, suited to the changing circumstances in all ages and climes. The Qur'an calls itself 'guidance' and not a code of law.

Rouhani's PhD Thesis, p. ٧٣

It goes without saying that the *Quran* does not seek to lay down once and for all the details of life. Broadly speaking, it should be borne in mind that the legislative part of the *Quran* is the illustration for

Plagiarized from Ahmad Hasan, *The early development*, p. 44

Further, it goes without saying that the Qur'an does not seek to be pan-legistic, i.e. to lay down once and for all the details of life. Broadly speaking, it should be borne in mind that the legislative part of the Qur'an is the model illustration for

Rouhani's PhD Thesis, p. ٧٤

future legislation and does not constitute a legal code by itself. History tells us that the revelation came down when some social necessity arose, or some companion consulted the Prophet (S A W.) in connection with certain significant problems.[١٢]

A common reader begins to read the *Quran* as a versatile code and an all-embracing law book. He does not find in detail the laws and bylaws relating to the social life, culture, and political problems. Further, in the *Quran* he reads numerous verses to the effect that everything has been mentioned in this Book and nothing has been left out.[١٣] Besides, he notices that the *Quran* lays great emphasis on saying prayers and giving *Zakat*, but at the same time he finds that it does not mention their specific definitions or details. Questions, therefore, arise in the mind of the layman as to the nature of the comprehensiveness of the *Quran*. The difficulty arises from ignoring the fact that God did not reveal the *Quran* in a vacuum, but as a guide to a living community with certain characteristics.

Plagiarized from Ahmad Hasan, *The early development*, p. 44

future legislation and does not constitute a legal code by itself. History tells us that the revelation came down when some social necessity arose, or some Companion consulted the Prophet in connection with certain significant problems. Thus, the specific rules, the legal norms, and the juridical values furnished by the Qur'an •constitute its legislative side which, however, is in no way less important than its purely ethical side.

A common reader begins to read the Qur'an with an idea that it is a versatile code and a comprehensive book of law. He does not find in detail the laws and by-laws relating to the social life, culture, and political problems. Further, in the Qur'an he reads numerous verses to the effect that everything has been mentioned in this Book and nothing has been left out. Besides, he notices that the Qur'an lays great emphasis on saying prayer and giving *Zakah*, but at the same time he finds that it does not mention their specific definitions or details. Questions, therefore, arise in the mind of the layman as to the nature of the comprehensiveness of the Qur'an.

The difficulty arises from ignoring the fact that God did not reveal the Qur'an in a vacuum, but as a guide to a living.

Rouhani's PhD Thesis, p. ٧٤

As such, the Islamic law evolved such that exegesis of the *Quran* became more sophisticated as time went by. The legal rules not derived from the specific verses of the *Quran* in the early period were sought to be so drawn later on. This was a continuous activity .[١٤] The methodology of inference from the *Quran* grew more and more intricate and philosophical in the wake of the deep and minute study of the *Quran* by jurists in the later ages.[١٥] The corpus of Islamic law is rich in examples where, with regard to a problem, some jurists argued on the basis of the

Plagiarized from Ahmad Hasan, *The early development*, p. ٤٦

It is needless to say that Islamic law underwent a long process of evolution. The interpretation of the Qur'an in the early period was not so complex and sophisticated as it developed in the later ages. The legal rules not derived from the specific verses of the Qur'an in the early period were sought to be so drawn later on. This was a continuous activity. The methodology of inference from the Qur'an grew more and more intricate and philosophical in the wake of the deep and minute study of the Qur'an by jurists in the later ages. The corpus of Islamic law is rich in examples where, with regard to a problem, some jurists argued on the basis of the

Rouhani's PhD Thesis, p. ٧٥

Quran, while the others did so on the basis of traditions or personal opinion, for these latter did not think the *Quranic* verse relevant to the point at issue.

Plagiarized from Ahmad Hasan, *The early development*, p. ۴۶

Qur'an, while the others did so on the basis of traditions or personal opinion, for these latter did not think the Qur'anic verse relevant to the point at issue.

Rouhani's PhD Thesis, p. ۷۵

Although, generally, the legal verses of the *Quran* are quite definite, nevertheless all such verses are open to interpretation, and different rules can be derived from the same verse on the basis of *Ijtihad*.[16] According to one jurist, a law can be deduced from some verse but the same verse is silent on the same problem according to the other. Thus, one argues on the same point on the basis of the *Quran*, while the other on the basis of the *Sunnah*.

Plagiarized from Ahmad Hasan, *The early development*, p. 47

Although, generally, the legal verses of the Qur'an are quite definite, nevertheless all such verses are open to interpretation, and different rules can be derived from the same verse on the basis of *Ijtihad*. This is the reason for the difference of opinion among the jurists in the cases mentioned by Prof. Schacht. According to one jurist, a law can be deduced from some verse but the same verse is silent on the same problem according to the other. Hence, one argues on the same point on the basis of the Qur'an, while the other on the basis of the *Sunnah*.

Rouhani's PhD Thesis, p. ۷۵

The doctrine of abrogation *(Naskh)* of the individual verses in the *Quran* is significant in Islamic jurisprudence.[۱۷] The classical concept of this doctrine affirms that a number of verses in the *Quran*, having been repealed, are no longer operative. These revealed verses are no doubt part of the *Quran* but they carry no practical value. This verifies the point that some of the Quranic verses in the form of decrees were appropriate to certain circumstances and necessities of the time. 18

[**Rouhani's PhD Thesis, p. 161,** Endnote 18.

۱۸. □□□□□□ □□□ □□□□□ □□□□ □□□ □□□□□□□ □□ □□□□□□□□□□ □□ □ □□□□□ □□□□□□ □□ □□□ □□□□ Al-Risalah. He maintains that the Quranic commands can be abrogated only by the Quran, and those of the Sunnah only by the Sunnah. He is opposed to the view that the Sunnah can abrogate

the Quran and vice versa. In support of his view, he adduces the Quranic verse 2:106 which explicitly speaks, according to him, the abrogation of the Quran by the Quran. He argues that the Prophet was ordered by God to follow the revelation and not to change the Quran himself. He quotes several Quranic verses, which indicate that God alone, can change revelation. (Shafii, Al-Risalalah. P 17)]

Plagiarized from Ahmad Hasan, *The early development*, p. 48 & p. 75

p. 48

The doctrine of abrogation (*naskh*) of the individual verses in the Qur'an is also significant in Islamic jurisprudence. The classical concept of this doctrine affirms that a number of verses in the Qur'an, having been repealed, are no longer operative. These repealed verses are no doubt part of the Qur'an, but they carry no practical value.

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Al-Shafi*'I* has dealt with the problem of abrogation at a greater length in his work *al-Risalah.* He maintains that the Qur'anic commands can be abrogated only by the Qur'an, and those of the *Sunnah* only by the *Sunnah.* He is opposed to- the view that the *Sunnah* can abrogate the Qur'an and vice versa. In support of his view, he adduces the Qur'anic verse 2:106 which explicitly speaks, according to him, of the abrogation of the Qur'an by the Qur'an. He argues that the Prophet was ordered by God to follow the revelation and not to change the Qur'an himself. He quotes several Qur'anic verses which indicate that God alone can change revelation.[75]

Rouhani's PhD Thesis, p. 78

The Quran in such cases candidly approves of the exercise of individual opinion, employment of personal judgement, and employing the faculty of speculation, conjecture, deep thinking and contemplation in affairs. It provides a wide latitude for variant approaches to a problem. The divergent views on a problem, provided they stand on a sound basis, are to be accommodated. One point of view cannot be declared right and the other absolutely wrong. Since no absolute certainly can be claimed in such decisions, various opinions on a single point shall be entertained. It will be shown somehow Quranic verses provide religious sanction for the use of reason and analogical deductions in formulating fresh laws. The Quran reads:

"Mothers shall suckle their children two years completely, for such as desire to fulfil the suckling. It is for the father to provide them and cloth (clothe) them honourably.... But if the couple desire by mutual consent and consultation to wean, then it is no fault in them".27

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 32 & p. 29

p. 32

The Qur'an in all such verses candidly approves of the exercise of individual opinion, employment of personal judgement, and employing the faculty of speculation, conjecture, deep thinking and contemplation in religio-social affairs. It provides a wide latitude for variant approaches to a problem. The divergent views on a problem, provided they stand on a sound basis, are to be accommodated. One point of view cannot be declared right and the other absolutely wrong. Since no absolute certainty can be claimed in such decisions, various opinions on a single point shall be entertained. The ijma' may be held on any of them, but that cannot be universal. As qiyas stands on some sound basis, it does not allow idiosyncracy in one's judgement. In the following paragraphs we shall briefly show how the verses cited above by the classical jurists provide religious sanction for the use of reason and analogical deductions in formulating fresh laws.

p. 29

Mothers shall suckle their children two years completely, for such as desire to fulfil the suckling. It is for the father to provide them and cloth (clothe) them honourably …. But if the couple desire by mutual consent and consultation to wean, then it is no fault in them (2 : 233).

Rouhani's PhD Thesis, pp. 78-79

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Based on this verse, a mother breast-feeding her child should be honorably or customarily be furnished with food and clothing. The verse does not qualify food and clothing. It gives liberty in providing maintenance honourably or according to the prevalent custom. Moreover, mutual consultation and agreement require freedom of opinion in making a decision for weaning the child. Both these points are to be settled by

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One's own choice and judgment. Another verse reads as follows:

"There is no fault in you, if you divorce women while as yet you have not touched them nor appointed any dower for them; yet make provision for them, the affluent according to his means, and the needy according to his means, a fair provision"[28]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 29-32

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Verse 2 : 233 contains the commandment of providing food and clothing to the suckling mother honourably or according to the custom. Further, it allows the couple to wean the child by mutual agreement. The verse does not qualify food and clothing. It gives liberty in providing maintenance honourably or according to the prevalent custom. Moreover, mutual

consultation and agreement require freedom of opinion in making a decision for weaning the child. Both these points are to be settled by one's own choice, judgment and probability *(ghalib al-fcam).*

p. 29

There is no fault in you, if you divorce women while as yet you have not touched them nor appointed any dower for

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them ; yet make provision for them, the affluent according to his means, and the needy according to his means, a fair provision (2 : 236).

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The verse recommends that the husband must make some provision for the divorced woman in addition to the dower. The Quran is silent on the quality and quantity of the provision. This will be determined hv hushand's fair iudement provision for the divorced woman in addition to the dower. The Quran is silent on the quality and quantity of the provision. This will be determined by husband's fair judgment.

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 33

Verses 2 : 236, 241 and 33 : 49 recommend that the husband should make some provision for the divorced woman in addition to the dower. The Qur'an is silent on the quality and quantity of the provision. This will be determined by husband's fair judgment (ijtihad) and conjecture (ghaiib al-zanri).

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The Quranic commandment that the Prophet (S.A.W.) should hold consultations with his companions on significant issues justifies the use of individual opinion and reason in legal reasoning.[٢٩] The Prophet (S A W.) used to consult his Companions in questions not decided by revelation. He then adopted the opinion, which was sound and reasonable in his eyes. This shows that mutual consultation was designed to elicit public opinion. The Prophet (S A W.) himself exercised Ijtihad along with them.30 The mutual consultation of the Prophet (S.A.W.) with the Companions was in fact an implementation of the Quranic commandment.

The Quran Says:

"So pardon them, and pray forgiveness for them, and take counsel with them in the affair; and when you are resolved, put thy trust in God" [31]

A Quranic commandment may have a speculative and a definitive meaning at the same time. The two meanings will, nevertheless, present two totally independent rulings.[٣٢] An example of this is the injunction

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 30 & p. 33

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The direction of the Qur'an to the Prophet to consult his Companions and to take counsel with them in matters of concern (3 : 159) justifies the use of reason and individual opinion in legal reasoning. The Prophet used to consult his Companions in questions not decided by revelation. He then adopted the opinion which was sound and reasonable in his eyes. This shows, al-Jassa? contends, that mutual consultation was designed to elicit public opinion. The Prophet himself exercised ijtihad along with them. AI-Jas§a§ cites instances where the Companions ques¬tioned him whether he commanded in a certain case by his personal opinion or on the basis of revelation. The mutual consultation of the Prophet with the Companions was in fact an implementation of the Qur'anic commandment.

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Rouhani's PhD Thesis, pp. 87-88

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There are many passages in the Meccan *suvar* that ask the Muslims to be patient and to tolerate the aggression of the infidels.

"And be patient and your patience is not but by (the assistance of) Allah, and grieve not for them, and do not distress yourself at what they plan" [60] [p. 162, Endnote 60. Ibid, 16: 126.]

On the contrary, the Medinese *surahs* consist of a few verses that call upon the Muslims to launch an attack on the infidels and kill them wherever they are found.

"So when the sacred months have passed away, then slay the

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idolaters wherever you find them, and take them captives and besiege them and lie in wait for them in every ambush, then if they repent and keep up prayer and pay the poor-rate, leave their way free to them, surely Allah is Forgiving,Merciful."[61] [p. 162, Endnote 61. Ibid, 9:5.]

When these two verses are compared, one may jump to the conclusion that the verses are contradictory. However, the two different attitudes ordered reflects the different circumstances of time and space. The Meccan verses containing the order of tolerance were revealed in a situation when the Muslims were weak and could not retaliate the aggression of the infidels, while the verses containing the command of Jihad belong to a period when the strength of the Muslims had grown considerably. Thus, these different types of rulings belong to different Situations. Hence, there is no contradiction between them. From this it may be inferred that, in the first place, if the Muslims any where are weak, they may tolerate the aggression of the non-Muslims temporarily. But simultaneously they are duty-bound to make preparations and make themselves powerful. Secondly, when they grow powerful they are required to live in a state of preparedness and to shatter the power of the enemies of Islam. It is, therefore, clear that the rulings of the Quran revealed in different situations may be implemented in view of their perspective and situational context.

Plagiarized from Ahmad Hasan, *The early development*, pp. 78-79

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There are many passages in the Meccan *surahs* that ask the Muslims to be patient and to tolerate the aggression of the infidels.[83] [p. 83, Endnote 83. Qur'an, 16 : 126, 127.] On the contrary, the Medinese *surhas* consist of a few verses that call upon the Muslims to launch an attack on the infidels and kill them wherever they are found.[84] [p. 83, Endnote 84. Qur'an, 9:5.] There is apparently a contradiction between these two sets of verses. It seems that the commentators could not reconcile them and, therefore, held that the former had been abrogated by the latter. But the question arises: Are the Meccan verses in question actually abrogated ? In other words, should the Muslims never tolerate the aggression of the non-Muslims in all conditions; •or, should they always fight and kill them whatever the circumstances

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may be? We do not think this is the purpose of the Qur'an. It is a known fact that the Meccan verses containing the order of tolerance were revealed in a situation when the Muslims were weak and could not retaliate the aggression of the infidels, while the verses containing the command of *Jihad* belong to a period when the strength of the Muslims had grown considerably. Thus, these different types of rulings belong to different situations. Hence, there is no contradiction between them. From this it may be inferred that, in the first place, if the Muslims anywhere are weak, they may tolerate the aggression of the non-Muslims temporarily. But simultaneously they are duty-bound to make preparations and make themselves powerful.

Secondly, when they grow powerful they are required to live in a state of preparedness and to shatter the power of the enemies of Islam. It is, therefore, clear that the rulings of the Qur'an revealed in different situations may be implemented in view of their perspective and situational context

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The flexibility of the Quran through the Sunnah

The Ouran was descended within a 23-year period. Each revelation was descended based on particular social conditions. The Quranic revelations kept a breast of the developments of the Muslim society. The revelations that came earlier and in certain circumstances were modified or enlarged or amended later. Thus, to implement the Quranic rulings in different times and places, one must study the historical context of each revelation and then the Quran in its totality must be implemented. As a consequence, it can be generalized that Quranic commandments descended in given situations.

Plagiarized from Ahmad Hasan, *The early development,* p. 78

The Qur'an was revealed piecemeal in twenty three years. Each revelation generally came down in the context of specific social conditions. As the nascent Muslim society was developing, the Qur'anic revelations also kept pace with the changing conditions and environment. The revelations that came earlier and in certain circumstances were modified or enlarged or amended later cannot be said to have been strictly abrogated. Thus, to implement the Qur'anic rulings in different times and places, one must study the historical context of each revelation and then the Qur'an in its totality must be implemented. We can, therefore, generalize that the Qur'anic injunctions were revealed in a given situation.

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Secondly, an argument was raised whether the Sunnah could annul Quranic commands and vice versa in accordance with the exigencies of time and place and to seek solutions to emerging problems.[95] The opinion of the jurists is divided on this point.[96] One of them is the well-known dictum which says: "The Sunnah decides upon the Quran, while the Quran does not decide upon the Sunnah"[97] All-Amidi has listed a number of examples where the Quran had abrogated the Sunnah.[98]

A glance on earlier literature on the subject suggests that the posing of this issue itself is a result of the rigid formalization of the juristic doctrines and the absolute fixation of the relative position of the Quran and the Sunnah therein. What seems to be the case is that where long standing customs, particularly those including fundamental policy, were sought to be changed

whereby great opposition was feared, the Quran had to intervene, and this may, in a loose sense, be regarded as an abrogation of the Sunnah by the Quran. This leaves little doubt that the Quran wielded higher authority than the Prophetic sayings themselves. However, there are many cases in which the precise sense and the manner of application of the Quranic injunctions and statements was determined by the Sunnah the question whether in some case it was done rightly and in others wrongly is irrelevant here. There are cases like the Quranic law

Plagiarized from Ahmad Hasan, *The early development,* p. 74

Another problem relating to *naskh* is whether any Qur'anic command can be annulled by the *Sunnah* and vice versa. The opinion of the jurists is divided on this point. Al-Ash'arl gives four different opinions,[71] while al-Nahhas gives five.[72] One of them is the well-known dictum which says: "The *Sunnah* decides upon the Qur'an, while the Qur'an does not decide upon the *Sunnah*".[73] Al-AmidI has listed a number of examples where the Qur'an had abrogated the *Sunnah.*[74]

Having studied the earlier literature on the subject one cannot help feeling that the posing of this problem itself is a result of the rigid formalization of the juristic doctrines and the absolute fixation of the relative position of the Qur'an and the *Sunnah* therein. What seems to be the case is that where long standing customs, particularly those including fundamental policy, were sought to be changed whereby great opposition was feared, the Qur'an had to intervene; and this may, in a loose sense, be regarded as an abrogation of the *Sunnah* by the Qur'an. This leaves little doubt that the Qur'an wielded higher authority than the Prophetic sayings themselves. However, there are many cases in which the precise sense and the manner of application of the Qur'anic injunctions and statements was determined by the *Sunnah*— the question whether in some case it was done rightly and in others wrongly is irrelevant here. There are cases like the Qur'anic law

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of evidence on the point of minimum number of witnesses being two and on the question whether the evidence of two women is equal to that of one man. On these and many other points, the Sunnah apparently determined the application of the Quran, and in some cases went against the literal meaning of the Quran. This process was also inevitable. In the face of this situation and when we take into account both sides of the picture, the whole complexion of the problem changes.

"Al-Shafi has dealt with the Problem of abrogation at a greater length in his work Al-Risalah. He maintains that the Quranic commands can be abrogated only by the Quran, and those of the Sunnah only by the Sunnah. He is opposed to the view that the Sunnah can abrogate the Quran and vice versa. In support of his view, he adduces the Ouranic verse 2:106 which explicitly speaks, according to him, of the abrogation of the Ouran by the Quran. He argues that the Prophet (S.A.W) was ordered by God to follow the revelation and not to

change the Quran himself. He quotes several Quranic verses which indicate that God alone can change revelation".[99]

Why does Al-Shafii believe that the Quran cannot abrogate the Sunnah? He argues that in case of the Quran's abrogation of any Sunnah, this means that all Prophet's commands that do not conform to the Quran is regarded as abrogated by the Quran. For the abrogation of a Sunnah he thinks it necessary that the Prophet (S.A.W.) should have informed the people specifically, even if it is abrogated by the Quran. Thus, he takes this information by the Prophet as abrogation of the Sunnah by the

Plagiarized from Ahmad Hasan, *The early development*, p. 75

of evidence on the point of minimum number of witnesses being two and on the question whether the evidence of two women is equal to that of one man. On these and many other points, the *Sunnah* apparently determined the application of the Qur'an, and in some cases went against the literal meaning of the Qur'an. This process was also inevitable. In the face of this situation and, when we take into account both sides of the picture, the whole complexion of the problem changes.

Al-Shafi^{c}i has dealt with the problem of abrogation at a greater length in his work *al-Risalah.* He maintains that the Qur'anic commands can be abrogated only by the Qur'an, and those of the *Sunnah* only by the *Sunnah.* He is opposed to- the view that the *Sunnah* can abrogate the Qur'an and vice versa. In support of his view, he adduces the Qur'anic verse 2:106 which explicitly speaks, according to him, of the abrogation of the Qur'an by the Qur'an. He argues that the Prophet was ordered by God to follow the revelation and not to change- the Qur'an himself. He quotes several Qur'anic verses which indicate that God alone can change revelation.[75]

Let us now see why the Qur'an cannot abrogate the *Sunnah* according to al-ShafTi. He contends that if the Qur'an abrogates any *Sunnah* of the Prophet, while the Prophet himself does not point to its abrogation, this means that all the commands from him not conforming to the Qur'an would be taken as abrogated by the Qur'an. For the abrogation of a *Sunnah* he thinks it necessary that the Prophet should- have informed the people specifically, even if it is abrogated by the Qur'an. Thus, he takes this information by the Prophet as abrogation of the *Sunnah* by the

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Sunnah. He gives several illustrations of how a host of rules framed by the Prophet (S.A.W.) would be abrogated if the Quran was accepted to abrogate the Sunnah. He says that various types of sale which the Prophet (S.A.W) had made unlawful would be considered to be abrogated by the Quranic verse: "Whereas Allah permitted trading and forbidden usury".[100] Again, the Sunnah with regard to stoning the adulterer and the adulteress would be regarded as repealed by the verse:

"The adulterer and the adulteress, scourge each one of them (with) a hundred stripes".[101]

In like manner, he notes that the Quran abrogates one-fourth of a Dinnar as minimum amount for amputation of a thief's hand. "As for the thief, both male and female, cut off their hands".[102] For this he gives the reason that the Quran does not lay down any minimum value of theft. But Al-Shafii also believes that no Sunnah of the Prophet (S.A.W.) contradicts the Quran; on the contrary it elaborates it.[103] Therefore, the Quran does not abrogate any Sunnah.

"Likewise, no Sunnah of the Prophet (S.A.W.), according to Al Shafii, abrogates the Quranic injunctions. He contends that the function of the Sunnah is to point out which of the Quranic passages are abrogating and which abrogated. Again, he argues that the Sunnah follows the spirit of the Quran. In cases of the clear-cut injunctions it follows the Quran, while in case of general 104 or ambiguous commands, it explains and elaborates them".[104]

In this way, the Sunnah's abrogation of the Quran is out of the question

Plagiarized from Ahmad Hasan, *The early development,* pp. 75-76

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Sunnah. He gives several illustrations of how a host of rules framed by the Prophet would be abrogated if the Qur'an is accepted to abrogate the *Sunnah.* He says that various types of sale which the Prophet had made unlawful would be considered to be abrogated by the Qur'anic verse: "Whereas Allah permitteth

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trading and forbiddeth usury.[5,76] Again, the *Sunnah* with regard to stoning the adulterer and the adulteress would be regarded as repealed by the verse: "The adulterer and the adulteress, scourge ye each one of them (with) a hundred stripes.[5,77] Similarly, he contends that one-fourth of *dinar* as minimum value for amputating the hand of a thief would be taken for abrogated by the Qur'anic injunction: "As for the thief, both male and female, cut off their hands."[78] For this he gives the reason that the Qur'an does not lay down any minimum value of theft. But al-Shafi'i also believes that no .*Sunnah* of the Prophet contradicts the Qur'an; on the contrary it elaborates it.[79] Therefore, the Qur'an does not abrogate any *Sunnah.*

Likewise, no *Sunnah* of the Prophet, according to al- ShafTl, abrogates the Qur'anic injunctions. He contends that the function of the *Sunnah* is to point out which of the Qur'anic passages are abrogating and which abrogated. Again, he argues that the *Sunnah* follows the spirit of the Qu r'an. In cases of the clear-cut injunctions it follows the Qur'an *in toto;* while in case of general or ambiguous commands, it explains and elaborates them.[80] As such there is no question of the abrogation of the Qur'an by the *Sunnah.*

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He, moreover, furnishes examples of the way the Sunnah refers to abrogation of individual Quranic verses. He says that the Quran, in verse 2:180, commands to leave a will in favour of the parents and other near relatives at the time of death. Similarly, in passage 2:240 it commands the husbands to bequeath in favour of their wives before their death. Simultaneously, the Quran prescribes respective shares in the inheritance of the deceased for his parents, widows, and the near relatives. Now, Al-Shafi says that there may be a twofold meaning of these passages. Firstly, the bequest and their shares of inheritance as determined by the Quran are granted to parents and wives. Secondly, the Quranic verses that name the share of the wives and parents in the inheritance may be treated as abrogating (Naskh) the injunction about making a will contained in the passages 2:180, 240. But of these two alternatives, he chooses the latter in the light of the Sunnah. He quotes a hadith, which states that no will is valid in favour of a legal heir. This hadith shows, according to him, that the injunction with regard to leaving a will at the time of death had been abrogated by the fixation of the shares in the inheritance.[105] It should be noted that Al-Shafii does not regard the hadith quoted above as repealing the Quranic injunction about leaving a will at the time of death, as held by the classical jurists. According to him, the Quranic rulings, as we explained earlier, can be abrogated only by the Quran and not by the Sunnah (hadith).

The idea that the Quran has some abrogated verses is the cornerstone of all these contentions. Al-Shafii was no exception either but

Plagiarized from Ahmad Hasan, *The early development,* pp. 76-77

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Further, he gives several examples of how the *Sunnah* points to the abrogation of the individual verses. He says that the Qur'an, in verse 2:180, commands to leave a will in favour of the parents and other near relatives at the time of death. Similarly, in passage 2 : 240 it commands the husbands to bequeath in favour of their wives before their death. Simultaneously, the Qur'an prescribes respective shares in the inheritance of the deceased for his parents, widows, and the near relatives. Now, al-ShafTi says that there may be a twofold meaning of these passages. Firstly, the parents and the wives may receive the bequest together with their shares from the inheritance fixed by the Qur'an. Secondly, the Qur'anic verses that name the share of the wives and parents in the

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inheritance may be treated as abrogating *(nasikh)* the injunction about making a will contained in the passages 2: 180, 240. But of these two alternatives, he chooses the latter in the light of the *Sunnah*. He quotes a *Hadith* which states that no will is valid in favour of a legal heir. This *Hadith* shows, according to him, that the injunction with regard to leaving a will at the time

of death had been abrogated by the fixation of the shares in the inheritance.[81] It should be noted that al- Shafi*'I* does not regard the *Hadith* quoted above as repealing the Qur'anic injunction about leaving a will at the time of death, as held by the classical jurists. According to him, the Qur'anic rulings, as we explained earlier, can be abrogated only by the Qur'an and not by the *Sunnah {Hadith).*

This whole edifice, however, has been erected on the concept that the Qur'an contains some abrogated verses. In this respect al-Shafi*'I* was no exception. But

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his difference with other may lay in the verses he deemed abrogated. They can be shown to be operative if interpreted in a different manner. Suppose the parents of a deceased are non-Muslim, he can leave a will in their favour at the time of his death. Malik holds that a person can bequeath in favour of his legal heirs with the permission of other heirs.[106] Similarly, there is no harm if the husband leaves a will for the maintenance of his wife for one year, as the Quran is clear on this point. The matter, however, depends on adequate interpretation of the Quranic Passages.

Plagiarized from Ahmad Hasan, *The early development,* p. 77

one may differ from him on the verses held by him as abrogated. They can be shown to be operative if interpreted in a different manner. Suppose the parents of a deceased are non-Muslim, he can leave a will in their favour at the time of his death* Malik holds that a person can bequeath in favour of his legal heirs with the permission of other heirs.[82] Similarly, there is no harm if the husband leaves a will for the maintenance of his wife for one year, as the Qur'an is clear on this point. The matter, however, depends on adequate interpretation of the Qur'anic passages.

Rouhani's PhD Thesis, pp. 103-104

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The Question of Nass

The exercise of the principle of Ijtihad was not confined only to cases where there are no injunction in the Quran and the Sunnah. Even in the presence of the Quranic verses and traditions on a certain problem the employment of Ijtihad could not be avoided. The reason for this is obvious. The Quranic verses and traditions are to be interpreted by the Muslims in order to be definite whether a certain verse or tradition is applicable to a certain situation. Interpretation and application, therefore, presuppose exercise of personal judgement. Hence, since the early days of Islam, there has been perpetual conflict between the letter and the spirit of the law. Thus,

it is not correct to say that Ijtihad was exercised only in the absence of the Quranic verses or traditions on a problem. The opponent of Shafii contends that in the absence of Quranic injunctions or Sunnah, differences appear over the problems. However, Shafii, in response, stresses that even when explicit rules of the Quran or the

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Sunnah exist, differences will appear as well. Thereafter Shafii recounts a number of the Quranic verses and traditions on which the Companions and the early jurists differed because of their interpretation.[111]

Plagiarized from Ahmad Hasan, *The early development*, p. ١١٨

In this connection we may refer to the internal criticism of Ibn 'Abbas and 'A'ishah on a number of traditions known to the students of *Hadith*. Consequently, even in the presence of the Qur'anic verses and traditions on a certain problem the employment of *ray* could not be avoided. The reason for this is obvious. The Qur'anic verses and traditions are to be interpreted by the Muslims in order to be definite whether a certain verse or tradition is applicable to a certain situation. Interpretation and application, therefore, presuppose exercise of personal judgement. Hence, since the early days of Islam, there has been perpetual conflict between the letter and the spirit of the law. Thus, it is not correct to say that *ray* was exercised only in the absence of the Qur'anic verses or traditions on a problem. Al-ShafiTs opponent argues that difference exists over the problems where no Qur'anic injunction or *Sunnah* is available. Al-ShafPi replies that difference of opinion exists even on points on which there are explicit rules in the Qur'an or the *Sunnah*. Thereafter al-Shafi'I recounts a number of the Qur'anic verses and traditions on which the Companions and the early jurists differed because of their interpretation.[12]

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Can *Ijtihad* be used when there is *nass* on some point?" Classical legal theory leaves no room for Ijtihad when there is nass.[112]

We have previously pointed out that every command, whether in the Quran or hadith, requires interpretation and application to a given situation. That is why the Companions differed in the interpretation of the Quranic verses. Therefore, we think, there is no escape from the use of Ijtihad even in the presence of nass. But it is worthy of note that where there is no allowance of any interpretation except in one aspect, the decision will naturally be taken on the basis of nass. Nevertheless, the point of subtle significance is that the issue of time and space still hold valid regarding the *nass* verses as well. As a matter of clarification, we can consider the verse of the holy Quran reading as follows:

"And prepare against them what force you can and horses tied at the frontier, to frighten thereby the enemy of Allah and your enemy and others besides them, whom you do not know

(but) Allah knows them, and whatever thing you will spend in Allah's way, it will be paid back to you fully and you shall not be dealt with unjustly."[114]

The verse specifies that the Muslims must be prepared against the enemy by having horses. However, today, horses are of no avail when fighting against the enemy. Thus, even the nass verses of the Quran are subject to interpretation appropriate to the time and place. What we

Plagiarized from Ahmad Hasan, *The early development*, pp. 121-122

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The problem is whether *ra'y* can be employed in taking some decision in the presence of a *nass* on some point. According to the classical legal theory, there is no room for *rd?y* in the presence of a *nass.* We have previously pointed out that every command,, whether in the Qur'an or *Hadith*, requires interpretation and application to a given situation. That is why, as we saw in

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Chapter III, the Companions differed in the interpretation of the Qur'anic verses. Therefore, we think, there is no escape from the use of *rcCy* even in the presence of *naff.* But it is worthy of note that where there is no allowance of any interpretation except in one aspect, the decision will naturally be taken on the basis of *naff.*

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understand from this verse is that we should be prepared to defend ourselves against the enemy with a view to the fact that technology has now superseded horses.

Nass has been defined in the classical literature on jurisprudence as "the text which conveys only one meaning", or "whose interpretation is the text itself."[175] Based on such definition, nass can be applied only to a few texts. In addition, texts which do not lend themselves to different interpretations are rarely found. It seems that the definition of nass, as stated above, is a development from its original meaning. Al-Shaybani's Al-Siyar Al-Kabir is cited, indicating the existence of different interpretations of *nass* in his own time. Discussing the problem of giving protection to the enemy he remarks that the protection given by a free Muslim man, whether he be an upright person (adel) or a profligate (fasiq), will be binding on all Muslims. He justifies this view by quoting a hadith from the Prophet, which says:

"Muslims are equal in respect of blood and they are like one hand over against all those who are outside the Community. The lowest of them is entitled to give protection on behalf of them."[116]

Commenting on the word adna (translated here as "lowest") he says that, if it means "minor" as in the Quranic verse[117], it is a textual evidence that protection given by one man is valid. But, if it is a derivative of dunuw which means "nearness" as in the Quranic verse[118], then it would be taken as (textual) evidence for giving protection by a Muslim who resides in the border area (on the enemy's territory) being

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close to the enemy. Further, he observes that if it is derived from *dana 'ah* which means lowliness, it would be textual evidence for the validity of giving protection even by a profligate *(fasiq)* Muslim.[119]

Plagiarized from Ahmad Hasan, *The early development,* p. 122

Naff has been defined in the classical literature on jurisprudence as 'the text which conveys only one meaning[3], or 'whose interpretation is the text itself.'[21] We think that *naff* by this sort of definition can apply only to a few texts; texts where different interpretations are not possible are rarely found. It seems that the definition of *naff*, as stated above, is a development from its original meaning. We give below an illustration from al-Shaybani[3]s *al-Siyar al-Kabir* which shows that in his time *naff* could be interpreted differently. Discussing the problem of giving protection to enemy he remarks that the protection given by a free Muslim man, whether he be an upright person (*□□□*) or a profligate (*fasiq*), will be binding on all Muslims. He justifies this view by quoting a *Hadith* from the Prophet which says: "Muslims are equal in respect of blood and they are like one hand over against all those who are outside the Commurity. The lowest of them is entitled to give protection on behalf of them." Commenting on the word *ᶜadna'* (translated here as "lowest") he says that, if it means 'minor[5] as in the Qur'anic verse 58 : 7, it is a textual evidence (*tanfif*) that protection given by one man is valid. But, if it is a derivatine of *dunuw* which means 'nearness[5] as in the Qur'anic verse 53 :9, then it would be taken as (textual) evidence for giving protection by a Muslim who resides in the border area (on the enemy's territory) being close to the enemy. Further, he observes that if it is derived from *dana'ah* which means lowliness, it would be textual evidence *{tanfif)* for the validity of giving protection even by a profligate *{fasiq)* Muslim.[22]

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For Shafii, *nass* stands in opposition to *Ijtihad*, which had appeared among the traditionalists prior to Shafii but which Shafii took as a principle of law.[12U] The cases to which Shafii applies the principle ot *nass* or which are regarded by him as being clear injunctions are not open to reasoning, whether they be in the *Quran* or in *hadith.* He himself explains the idea of *nass* to his opponents. This, too, implies that his opponents, who represents the early schools, is not perfectly aware of the concept of *nass* now developing by degrees. Shafii says that on the emergence of fresh problems (*Waqeah*), the *Quran* directs explicitly *(nass)* or implicitly

(mojmal). Further, he remarks that *nass* means whatever had been ordered or forbidden by God in plain words (*nass*).[121] He then cites cases, which fall under *nass* and *mojmal* respectively.

Under *nass* he mentions the relatives with whom marriage is forbidden, prohibited edibles like blood and pork, and the ritual purity. *Mojmal*, according to him, stands for the duties made obligatory by God like *salah*, *Zakat*, and *hajj*. These duties, he says, were explained and elaborated by the Prophet (S A W.)[122] Of the cases which he mentions under *nass* he remarks that the *Quran* is enough for them and no further argumentation is needed.[١٢٣] This means that Shafii validates the employment of *Ijtihad* in cases which fall under *mojmal.*

In his *Al-Risalah*, Shafii uses the term *nass* in different forms.

Plagiarized from Ahmad Hasan, *The early development,* p. 123

Indeed, al-Shafi^{c}I uses the term *naff* in opposition to *ray,* which we believe must have developed somewhat prior to al-Shafi^{c}I among the circle of the traditionists but which al-Shafi^{c}i adopted as a principle of law. The concept of *naff* seems to be a reaction against .*ra'y* in al-ShafTi. The more *roHy* was discarded and the scope of *Ijtihad* narrowed, the more the concept of *nass* dominated and was extended in its application.

The cases to which al-Shafi^{c}I applies the principle of *nass* or which are regarded by him as being clear injunctions are not open to reasoning, whether they be in the Qur'an •or in *Hadith.* He himself explains the idea of *nass* to his opponent. This, too, implies that his opponent, who represents the early schools, is not perfectly aware of the concept of *naff* now developing by degrees. Al-Shafi*'1* says that on the emergence of fresh problems (*nazilah*), the Qur'an •directs explicitly *[naffan)* or implicitly (*jumlatan).* Further, he remarks that *nasf* means whatever had been ordered or forbidden by God in plain words *{naffan).* He then cites cases which fall under *naff* and *jumlah* respectively. Under *naff* he mentions the relatives with whom marriage is forbidden, prohibited edibles like blood and pork, and the ritual purity. *Jumlah,* according to him, stands for the duties made obligatory by God like *falah*, *zakah*, and *hajj*. These duties, he says, were explained and elaborated by the Prophet. Of the cases which he mentions under *naff* he remarks that the Qur'an is enough for them and no further argumentation is needed.[24] This means that al-Shafi^{c}i validates the employment of *ra'y* in cases which fall under *jumlah.*

In his *al-Risalah,* al-Shafi'i uses the term *naff* in different forms

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In these different places in the *Risalah* he seems to mean by *nass* the direct textual evidence whether in the *Quran* or in the *Sunnah* .[١٢٤]

At times, he distinguishes *Nass Al-Kitab* from the *Sunnah* in places where he particularly lays stress on the text of the *Quran.'*[25] He devotes a chapter to duties specified by the *Quran* for

which the *Sunnah* of the prophet (S.A.w.) offers details. Some Quranic verses on ritual purity are cited in this chapter, together with several prophetic traditions expounding there. This chapter is followed by another one entitled the duty laid down in the text of the *Quran* limited and particularized by the *Sunnah.* Shafii discusses, in this chapter, several problems, namely, heritage, homicide, and usury. From the wordings of the Quranic verses dealt with in this chapter it appears that the injunctions contained in them were of general nature. But he, by quoting the traditions from the Prophet, explained that they had specific and definite meaning.[126] This implies that *nass* requires details, elaboration and amplification. Hence, there can be allowance for the difference of opinion. That is why we find that usury, homicide and heritage are cases subject to legal differences, although Shafii describes them as *niansos*.[127] Shafii's detailed discussion of *nass* indicates the novelty of this problem for the early schools and his attempt to fully familiarize them with it. The theory of *nass* later on became a dogmatic instrument for justifying one's own views on some legal problems and for rejecting those of others. Moreover, emphasis on *nass* closed the door to the use of *Ijtihad* in law in some periods.

Plagiarized from Ahmad Hasan, *The early development,* pp. 123-124

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In these different places in the *Risalah* he seems .to mean by *naff* the direct textual evidence whether in the Qur'an or in the

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Sunnah.[٢٥]

Occasionally, he distinguishes *naff al-Kitab* from the *Sunnah* in places where he particularly lays stress on the text of tire Qur'an.[26] He has written a chapter captioned 'the duties laid down plainly in the text of the Qur'an (*al-fra'id al-mansusah),* for which the Prophetic *Sunnah* provided details. In this chapter he mentions some verses from the Qur'an regarding ritual purity and quotes several traditions how the Prophet elaborated them. This chapter is followed by another one entitled 'the duty laid down in the text of the Qur'an (*al-fard al mansus)* limited and particularized by the *Sunnah.* Al-Shafi'i discusses, in this chapter, several problems, namely, heritage, homicide, and usury. From the wordings of the Qur'anic verses dealt with in this chapter it appears that the injunctions contained in them were of general nature. But he, by quoting the traditions from the Prophet, explained that they had specific and definite meaning.[27] This implies that *nass* requires details, elaboration and amplification. Hence, there can be allowance for the difference of opinion.. That is why we find that usury, homicide and heritage are cases subject to legal differences, although al-Shafi'I describes them as *mansus.* Moreover, from the detailed discussion of *nass* by al-Shafi'! we conclude that this problem was more or less new for the early schools and he wanted to acquaint them with it in full detail. The theory of *nass* later on became a dogmatic instrument for justifying one's own views on some- legal problems and for rejecting those of others. Moreover, emphasis on *naff* closed the door to the use of *ray* in law.

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The early authorities' regular issuance of ra'y in law sparked

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disorder in various areas. In case it had continued, Islamic law would not have arrived at any unity. The necessity for basic unity in law was felt to overcome such diversity and dissensions.

"Ibn Al-Muqaffa, having been fed up with the differences in law, suggests a method to bring about unity He assigns the right of exercising Ijtihcid, only to the Imam, i.e. the political authority. He maintains that people can make suggestions to the Caliph but have no right to stick to and implement their personal opinion This was indeed a reaction against the free interpretation of law by individual lawyers. He rejects the idea of a "total law" which, he thinks, would make religion too rigid for the people. Therefore, he appreciates the exercise of reason and personal opinion in religion. On account of the differences caused by Ijtihad he occasionally attacks it, but does not want to eliminate its employment. He perhaps intends to restrict it in order to avoid chaos in law".[128]

Plagiarized from Ahmad Hasan, *The early development*, p. 134

The frequent exercise of *ra'y* in law by the early authorities- created a state of chaos in different regions. Had it continued, Islamic law would have never reached any state of unity. This diversity argued for some mainstay to eliminate- these dissensions and to forge a basic unity in law. This was done through *Ijma'* about which we shall speak in the next, chapter. Ibn al-Muqaffa', having been fed up with the differences in law, suggests another method to bring about unity. He assigns the right of exercising *ra'y* only to the *Imam*$_y$ i.e. the political authority. He maintains that people can make suggestions to the Caliph but have no right to stick to and implement their personal opinion. This was indeed, a reaction against the free interpretation of law by individual, lawyers. He rejects the idea of a "total law" which, he; thinks, would make religion too rigid for the people. Therefore, he appreciates the exercise of reason and personal opinion, in religion. On account of the differences caused by *ra'y* he occasionally attacks it, but does not want to eliminate its- employment. He perhaps intends to restrict it in order to avoid chaos in law.[58]

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Qiyas attempts to establish the law of the original case for the parallel case on the basis of their common legal cause (illah). Qiyas in its early stages was simple and used in its rudimentary form.155

The Quran uses many similitudes employing words "mathal", to denote similarity between various cases. These similes cannot be

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 9 & p. 15

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Qiyas means to establish the law of the original case for the parallel case on the basis of their common legal cause {'illah).1

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Qiyas in its early stages was simple and used in its rudimentary form. Literally, it means 'to measure', 'to compare' and 'to weigh up'. It might have been derived from the word *qaws* (bow) used for measurement iq Arabia. The Qur'an uses many similitudes employing words *'mathal*, *mithl' ka* (like) to denote similarity between various cases. These similes cannot be

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called Qiyas in strict sense of the term. It seems however plausible that such Quranic expressions might have contributed to the emergence of the notion of Qiyas. Reasoning based on similarity of parallel cases is also noticed in hadith literature. It shows the frequent use of Qiyas in the early phase of Islam. We find its technical use in Umar's well-known letter addressed to Abu Musa Al-Ashari***".***[156]

It was also used in the reasoning of the companions. As an instance, Ibn Abbas reportedly determined the compensation for the injury of teeth to be analogous to that of the fingers. The fourfold confession of Muaz before the Prophet, apart from the variety of its versions and criticism upon it, indicate the non-technical use of Qiyas in its early stages.157 The principle of fourfold confession of the accused in the absence of four witnesses as required by the Quran is followed by the Iraqis basing themselves on the tradition of Muaz. The examples of the use of Qiyas in its rudimentary form by the Iraqis can be cited endlessly.158 The starting point seems to be, as Schacht observes, the fixing of the minimum value of dower by drawing an analogy with the minimum value of stolen goods for hadd. This is based on the traditions reported from the Prophet (S.A.W.), Umar, and Ibn Masud. 159

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 9-10

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be , called *qiyas* in strict sense of the term. It seems however plausible that such Qur'anic expressions might have contributed to the emergence of the notion of *qiyas.*[22] Reasoning based on similarity of parallel cases is also noticed in hadith literature. It shows the frequent use of *qiyas* in the early phase of Islam. We find its semi-technical use in 'Umar's well-known letter addressed to Abu Musa al-Ash'ari.

The Companions are also reported to have employed it in their reasoning. Ibn 'Abbas, for example, , reportedly fixed the same compensation for the injury of all types of teeth by analogy with the compensation of fin gers. He uses the word i'tibar (comparison) which points to, its technical usage in the early stages.2 3 V The four-fold confession of Mq'iz before Jhe Prophet, apart froth the. variety, of its versions and criticism upon it,-indicate ,the non-technical use of qiyas in its early stages.24 The principle of four¬fold1 confession of the accused in the absence of four witnesses as required by the Qur'^p?^ is foltowed by. The 'Jraqts basing themselves opthe. traditioq of Md'iz. The same doctrine is applied to the hadd punishment for theft as reported by 'All, though not recognized by the 'Iraqis in general.26 The examples of the use of qiyas in its rudimentary form by the 'Iraqis can be cited endlessly. The starting point seems to be, as Dr. Schacht observes,

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the fixing of the minimum value of dower by drawing an analogy with the minimum value of stolen goods for hadd punishment. This is based on the traditions reported from the Prophet, 'Umar, 'Uthman, 'All and Ibn Mas'ud.27

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Qiyas, as used earlier, is general and closer to ra'y than to technical Qiyas. The frequent use of words such as mathal in Malik's Muwatta reflected the similarity of parallel cases. 160 They are at times9

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accused of inconsistency in Qiyas by Shafii for their inclination towards ra'y.161 It appears that the use of Qiyas was a part of their individual reasoning (ra'y).

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 10-11

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Like the ‘Iraqis, the Medinese use of qiyas is of general nature and more akin to ra’y than to technical qiyas. Words like mathal, kd and bimattzilah have been frequently used in the Muwattd’ of Malik to indicate similarity between parallel cases. They are at times

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accused of inconsistency in qiyas by al- Shafi‘1 for their inclination towards ra’y. It appears that the use of qiyas was a part of their individual reasoning {ra’y).

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At the time of the Prophet (S.A.W.) when the companions asked the Prophet about religious decrees, the Prophet (S.A.W.), while answering their questions, taught them the application of Qiyas. On being asked about the performance of hajj by proxy the Prophet (S.A.W.) replied to the questioner: "What do you think if your father runs into debt and you pay it off on his behalf, would it be valid? .... Likewise the religion of God is more deserving".162

According to a tradition Umar kissed his wife while he was fasting. When the matter was reported to the Prophet (S.A.W.) he said that there was no harm in kissing the wife while one was fasting, just as there was no harm in rinsing the mouth during the fast.

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 40

On being asked about the performance of hajj by proxy the Prophet replied to the questioner, “What do you think if your father runs into debt and you pay it off on his behalf, would it be valid? Likewise the religion of God is more deserving.”

According to a tradition ‘Umar kissed his wife while he was fasting. When the matter was reported to the Prophet he said that there was no harm in kissing the wife while one was fasting, just as there was no harm in rinsing the mouth during the fast.13

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We adduce some illustrations of Qiyas to elucidate its definition and application in legal cases.163 According to the Quran, the orphans who are weak in understanding cannot be guardians of property. Only when they come of age and attain intellectual maturity are they allowed guardianship of property.164 From this verse a law has been derived by analogy that all transactions of a minor are not valid without the permission of the guardian. The legal cause (illah) is the immaturity of understanding.

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 15

We adduce presently some illustrations of qiyas to elucidate its definition and application in legal cases. The Qur'an forbids the guardians to make over property to those orphans who are weak of understanding, and it allows to give them the property when they come of age and attain maturity of intellect (4:5). From this verse a law has been derived by analogy that all transactions of a minor are not valid without the permission of the guardian. The legal cause {'illah) is the immaturity of understanding.

Rouhani's PhD Thesis, p. ١٢١

Drinking wine is forbidden according to the *Quran.*[١٦٥] □□□ □□□□□□□□ □□□□□□ *nabiz* and similar other drinks which are intoxicant are also unlawful on the basis of analogy. According to the Quranic verse,[166] all transactions or sale are forbidden after the call to Friday prayers. On the analogy of this injunction all kinds of business, such as hiring, borrowing, working in the factories and offices and similar other engagements which prevent a man from offering Friday prayers are forbidden.

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 15-16

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Drinking wine is forbidden according to the Qur'an. The beverage called *nabidh* and similar other drinks which are intoxicant are also unlawful on the basis of analogy.

According to the Qur'anic verse 62:9 all transactions of sale are forbidden after the call to Friday prayer. On the analogy of this injunction all kinds of business, such as hiring, borrowing, working

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in the factories and offices and similar other engagements which prevent a man from offering Friday prayer are forbidden.

Rouhani's PhD Thesis, p. ١٢١

Several examples of earlier *Qiyas* are presented here. The minimum dower of a woman, as fixed by the people of Medina, was one fourth of a Dinnar by analogy to the minimum value of stolen goods for enforcing *hadd.* Malik says that the dower of a woman should not be less than one-fourth of a Dinnar, the minimum value for which a hand is mutilated for theft. Further, they fixed the compensation of the fingers of a woman at ten camels each, despite variety of their size

and number. Malik does not follow the doctrine narrated by Ibn Al-Musayyib where the compensation is fixed at ten camels for one finger, twenty for two, and thirty for three, but twenty for four. Ibn Al-Musayyib calls this doctrine *Sunnah*, but Rabi'ah expresses his astonishment, as the doctrine goes against *Qiyas*.[١٦٧]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 10-11

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Let us give a few examples of Medinese *qiyas*. The Medinese fixed the minimum amount of dower of a woman at one-fourth of a dinar by analogy with the minimum value of the stolen goods for applying h*add* punishment. Malik says that the dower of a woman should not be less than one-fourth of a dinar, the minimum value for which a hand is mutilated for theft.[31] Further, they fixed the compensation of the fingers of a woman at ten camels each despite variety of their size and number. Malik does not follow the doctrine narrated by Ibn al-Musayyib where the compensation is fixed at ten camels for one finger, twenty for two, and

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thirty for three, but twenty for four, Ibn al-Musayyib calls this doctrine *Sunnah*, but Rabfah expresses his astonishment, as the doctrine goes against *qiyas*, i.e., reason.

Rouhani's PhD Thesis, pp. 121-122

p. ١٢١

"From the various examples of Qiyas it is manifested that the doctrine in the early schools of law was under development. It carried the sense of parallel, precedent, reason and established rule. Minor resemblance was sufficient to employ Qiyas by the early authorities. There were no hard and fast rules for its

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employment. By degrees it was substituted by logical Qiyas in later times. Shafii theorized it in the early period". [168]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 11

From the various examples of *qiyas* that we considered earlier if is manifest that the doctrine in the early schools of law was under development. It carried the sense of parallel, precedent, reason and established rule. Minor resemblance was sufficient to employ *qiyas* by the early authorities. There were no hard and fast rules for its employment. By degrees it was substituted by logical *qiyas* in later times. Al- ShafPi theorized it in the early period.

Rouhani's PhD Thesis, p. ١٢٢

Shafii's adduced reflection of the legitimacy of *Qiyas* allows the jurist to resort to *Ijtihad* on issues not taken up by the *Quran* and *Sunnah.* A man who wants to offer his prayers but does not know the right direction of the *kabah* makes strenuous efforts to search it by means of signs and indications.[169] Likewise, a jurist who is confronted with a legal problem but does not know its answer tries to find confirmatory evidence. This example given by Al-Shafii underlines a methodology for legal reasoning.[170] A jurist, as a researcher, tries to find the relevant material on a given subject thinks over the problem, and interprets his evidence to prove his proposition. The conclusion thus reached may vary from person to person. This also justifies disagreement and divergence of opinion on a disputed question.

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 12

This illustration for the legitirhacy of *qiyas* adduced by al-Sh&ffi provides a beacon light to a jurist for exercising *ijtikacf* on questions not covered by the Qur'an and *Sunnah.* A man who wants to offer his prayers but does riot know the right direction of the Aa'&aA makes strenuous efforts to search it by means of signs and indications. Likewise, a jurist Who is confronted with a legal problem but does not know its answer fries to find confirmatory evidence. This example given by al-Sh5fi'i underlines a methodology for legal reasoning. A jurist, as a researcher, tries to find the relevant material on a given subject thinks over the problem, and interprets his evidence to prove his proposition. The conclusion thus reached may vary.from person to person^ This also justifies disagreement and divergence of opinion on a disputed question.

Rouhani's PhD Thesis, p. ١٢٢

There are four parts to every *Qiyas:* 1) The original case covered by the text. This is known as *asl* (the original). 2) The parallel or fresh case which is not covered by the text. A jurist finds out a rule of law for *this* case by the exercise of *Qiyas.* This is known as *fora* (parallel case). 3) The *ratio legis of* the law. This is known as *ellah* (cause of the textual law of the original case). ٤) [illegible] *nabiz,* the original case *(asl)* is wine forbidden by the *Quran;* the parallel case *(fara)* is *nabiz* for which a rule of law is sought; the cause *(illah)* or *ratiolegis* of the law is intoxication which is common to both cases; and the rule of law of the

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 16

Every *qiyas* is composed of four parts :

(a) The original case covered by the text. This is known as *asl* (the original) or *maqls 'alayh* (the case from which analogy is drawn).

(b) The parallel or fresh case which is not covered by the text. A jurist . finds but a rule of law for this case by. the exercise of *qiyas.* This is known as *far* * (parallel case), or *maqls* (the. case; which is analogically compared with a textual rule).

(c) The *ratio legis* of the law. This is known as *'illah,* (cause of the textual law of the original case).

(d) The law of the original case covered by the text. This is known

as *hukm al-asl.* This law applies to the parallel case by analogical extension.

In the illustration of prohibition of *nabidh* mentioned above, the original case *(asl)* is wine forbidden by the Qur'an; the parallel case *(far[1])* is *nabidh* for which a rule of law is sought; the cause *('illah)* or *ratio legis* of the law is intoxication which is common to both cases ; and the rule of law of the

Rouhani's PhD Thesis, p. ١٢٣

original case is the prohibition of drinking wine. [172] Shafii considers *Qiyas* and *Ijtihad* identical, being two separate terms carrying the same meaning. [173] The reason seems to be that *Qiyas* was in its rudimentary form during the time of Shafii. As the Islamic legal thinking developed with the passage of time, *Qiyas* became an independent doctrine having its own characteristics and uses other than *Ijtihad.*

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 16-17

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original case *(hukm al-asl)* is the probifeitoin of drinking wine.

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Qiyas is sometimes called *ijtihad*. Al-Shafi'I considers them identical, being two separate terms carrying the same meaning.[6] The reason seems to be that *qiyas* was in its rudimentary form during the time of al- Shafi'1. As the Islamic legal thinking developed with the passage of time, *qiyas* became an independent doctrine having its own characteristics and uses other than *ijtihad'*.

Rouhani's PhD Thesis, p. ١٢٣

Actually, *Qiyas* serves as one of the several modes of *Ijtihad.* Every *Qiyas* is *Ijtihad*, but the opposite is not true. *Ijtihad* is based on the literal interpretation of the *Quran*, the *Sunnah* and on personal opinion not grounded on systematic reasoning. In point of fact, *Ijtihad* is a best possible attempt at seeking the truth by any means of reasoning. Before the development of the systematic

reasoning known as *Qiyas*, all modes of reasoning leading to the discovery of truth were termed *Qiyas*.[١٧٤]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 17-18

p. 17

We think that *qiyas* is one of the several modes of *ijtihad*. Every *qiyas* is

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ijtihad but not vice versa. *Ijtihad* can be exercised by literal interpretation of the Qur'an and the *Surnah*, and by employing individual opinion not based on systematic reasoning/ In point of fact, *ijtihad* is a best possible attempt at seeking the truth by any means of reasoning. Before the developihent of the systematic reasoning known as *qiyas*, all modes of reasoning leading to the discovery of truth were termed *qiyas*.

Rouhani's PhD Thesis, p. ١٢٣

"Ibn Rushd draws a distinction between Qiyas and Ijtihad. According to him, Ijtihad applies to a case which can be returned to the original, (asl) and also to a case which cannot be returned to the original, such as determining the compensation of injuries, maintenance of wives, and the bloodwit imposed on the clan of the murderer. Qiyas, on the contrary, applies only to a case which can *be returned to the original. It is in fact a mode of Ijtihad. Thus Ijtihad is general and Qiyas is particular".* [١٧٥]

Another paramount issue is the condition for *Qiyas* validity as determined by most Islamic scholars to be as follows:

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 19

Ibn Rushd also draws a distinction: between[1] *qiyas* and *ijtihad* According to him, *ijtihad* applies to a casewhich can be returned to the original, *(flsl)* and also to a case which cannot be returned to the original, such as determining the compensation of injuries, maintenance of wives, and the bloodwit imposed on the clan of the murderer. *Qiyas*, on the contrary, applies only to a case which can be returned to the original. It is in fact a mode *of ijtihad*. Thus *ijtihad* general and *qiyas* is particular.

… We may now discuss the conditions for the validity of *qiyas*.

Rouhani's PhD Thesis, pp. 123-124

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Firstly, to be valid, *Qiyas* should be based on a non-exceptional textual injunction about an original case.

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The reason is that the legal cause of the law of the original case is determined for generalization. If a certain injunction is exceptional and confined to a particular case and situation, that cannot be evaluated rationally and generalized. Al-Sarakhsi has cited a number of examples of such *Qiyas.* [176] According to the *Quran* two males or one male and two females are required to bear witness in a case of evidence. [177] But the Prophet (S.A.W.) accepted the evidence of Khuzaymah alone in a certain case for his merit and eminence known to the Prophet (S.A.W.). This case of Khuzaymah, being exceptional, cannot be logically evaluated and generalized. In other words, as against the general law of evidence, the case of Khuzaymah cannot be made an original basis for analogy. It will not be valid to produce only one witness in a suit by drawing an analogy with the exceptional case of Khuzaymah. [178]

Secondly, the original case's law should not be in contradiction to human reason, since a law's causation extends it analogically to other parallel cases. However, a law open to rational evaluation cannot be generalized. In case human reason rejects the application of a law to a parallel case, analogical extension will not be valid. [179]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 19-20

p. 19

Firstly, it is necessary for the validity of *qiyas* that the textual injunction about the original case should not be exceptional. The, reason is that the legal cause of the law of the original case is determined for generalization. If a certain injunction is exceptional and confined to a particular case and situation, that cannot be evaluated rationally and generalized. Al-SarakhsI has cited a number of examples of such *qiyas.* According to the Qur'&n two males or one' male and two females are required to bear witness in a case of evidence. But the Prophet accepted the evidence of Khuzaymah alone in a certain case for his merit and eminence known to 'the Prophet. This case of. Khuzaymah, being exceptional, cannot be logically evaluated and generalized. ' In other words, as against the general law of evidence* the case of Khuzaymah cannot be made an original basis for analogy. It will not be valid to produce only one witness in a suit by drawing an analogy with the exceptional case of Khuzaymah.

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Secondly, the law of the original case should not contradict human reason. This is because the causation of a law is designed to extend it to other parallel cases by analogical comparision. But if a law enunciated by the text is not causal, i.e. subject to rational evaluation, that cannot be

generalized. In case human reason rejects the application of a law to a parallel case, analogical extension will not be valid.

Rouhani's PhD Thesis, pp. ١٢٤-١٢٥

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For example, the ritual ablution becomes void in case one laughs loudly during prayers.[180] The breach of ablution by laughing is not rationally intelligible. Reason requires that only prayers should break by laughing and not ablution. Hence the law cannot be rationally evaluated

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and generalized. It is, therefore, not extendible to the funeral prayers and prostration for thanks giving. If a man laughs loudly in the funeral prayer or in the prostration for thanks - giving, his ablution will not become void. One more example is given: The fast does not become void by eating or drinking in forgetfulness. Human reason requires that the fast should become void by eating or drinking because prevention from eating and drinking is an essential condition of fasting. Rationally there should be no fast if this condition is not present. But as a tradition of the Prophet says that the fast is not affected by eating or drinking, this injunction becomes rational. There will be no causation of this rule for analogical extension to eating and drinking during fast by mistake, under duress, and during sleep. The fast will become void by eating or drinking in all such conditions. [181]

Thirdly, a law must be applied on legal - and not lexical or medical - grounds. In addition, the law should be extendible in tune with the extension of the original case, as put forward by the Hanafis. But according to the Shafii jurists its extendibility is not necessary. Moreover, the parallel should be similar to the original case. In other words, if the original case is not extendible after causation of the law, the original and the parallel case will be equal. Hence analogy will not be operative therein. Analogy operates in two similar and equal cases. In case the original and the parallel are varying, they cannot be made corresponding by the process of causation. Hence in such a position analogy will not work.[182]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 20-21

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Take another example. The ritual ablution becomes void in case one laughs loudly during pfayer. The breach of ablution by laughing is not rationally intelligible. Reason requires that only prayer should break by laughing and not ablution. Hence the law cannot be rationally evaluated

and generalized. It is, therefore, not extendible to the funeral prayer and prostration for thanksgiving. If a man laughs loudly in the funeral prayer or in the prostration for thanks-giving, his ablution will not become void. Let us

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give one more example. The fast does not become void by eating or drinking in forgetfulness. Human reason requires that the fast should become void by eating or drinking because prevention from eating and drinking is an essential condition of fasting. Rationally there should be no fast if this condition is not present. But as a tradition of the Prophet says that the fast is not affected by eating or drinking, this injunction becomes supra-rational. There will be no causation of this rule for analogical extension to eating and drinking during fast by mistake, under duress, and during sleep. The fast will become void by eating or drinking in all such conditions. [s]

Thirdly, it is necessary that a law should be extended on legal grounds (*shar'l*) and not on lexical (language) or medical grounds. Further, if the original case is liable to extension, it should be extendible too according to the Hanafis. But according to the Shafi‘1 jurists its extendibility is not necessary. Moreover, the parallel should be similar to the original case. In other words, if the original case is not extendible after causation of the law, the original and the parallel case will be equal. Hence analogy will not be operative therein. Analogy operates in two similar and equal cases. In case the original and the parallel are varying, they cannot be made corresponding by the process of causation. Hence in such a position analogy will not work.

Rouhani's PhD Thesis, p. ١٢٦

Fourthly, the textual law of the original case must not be changed after causation and after extension to the parallel case. According to the Hanafis, a man who is punished for false accusation of adultery *(qazf)* cannot give evidence even after repentance as required by the Quranic verse. [183] In all other affairs if the offender is punished or repents, his evidence is valid. In case the law of *qazf* is compared with other offenses by causation, the law of the original case *(asl)* will be changed. [184]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 22

The fourth condition is that after causation the textual law of the original case should not be changed. It should remain the same after its extension to the parallel case. According to the Hanafls, a man who is punished for false accusation of adultery *(.qadhf)* cannot give evidence even after repentence as required by the Qur'anic verse 24 : 4. In all other affairs if the offender is punished or repents, his evidence is valid. In case the law of *qadhf* is compared with other offences by causation, the law of the original case (as/) will be changed.

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Finally, the law's workings should not change after causation, since a textual injunction is, in letter and spirit, prior to *Qiyas* which is invalid in the presence of a textual law. Similarly, it is not valid if the words of the law of the original case are changed. For example the Prophet has allowed to kill only five reptiles specified by him within the premises of *haram* (sacred territory at Mecca). The analogy of these reptiles cannot be extended to other animals because the causation changes the words of the text. As such, the number of animals exempted by the Prophet will be more than five. Hence this cannot be allowed.[185]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 23

' The fifth condition for the validity of *qiyas* is that the wordings of law of the original case should not be changed after causation. The reason is that a textual injunction is prior to *qiyas* in respect of letter and spirit. *Qiyas* is not valid in the presence of a textual law. Similarly, it is not valid if the words of the law of the original case are changed. Let us consider a few examples. The Prophet has allowed to kill only five Teptiles specified by him within the premises of *haram* (sacred territory at Mecca). The analogy of these reptiles cannot be extended to other animals because the causation changes the words of the text. As such, the number of animals exempted by the Prophet will be more than five. Hence this cannot be allowed.

Rouhani's PhD Thesis, p. ١٢٦

It is unanimously agreed that *Qiyas* reveals the law, which already exists; it does not originate it. The rule of law exists in the original case and *Qiyas* merely indicates that the divine command is so and so. Thus the law is originated by God and discovered by *Qiyas.*

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 24

It is unanimously agreed that *qiyas* reveals the law (*mu?hir al-frukm)* which already exists ; it does not originate it (*muthbit*). The rule of law exists in the original case and *qiyas*J merely indicates that the divine command *(hukm Allah)* is so and so. Thus the law is originated by God and discovered by *qiyas*.[١٥]

Rouhani's PhD Thesis, pp. 128-129

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On the basis of the verse of the *Quran* that reads thus:

"Indeed we see the turning of your face to heaven, so we shall surely turn you to a qiblah which you shall like; turn then your face towards the Sacred Mosque, and wherever you are, turn your face towards it".[١٩٥]

When the *Ka'bah* is in sight, one should face it in prayer, Shafii stresses, noting that when it is away or out of sight, one should pray in the direction of the *Ka'bah*, not *Ka'bah* itself. The Ka'bah's direction can be determined by the indications. The indicators, which point to the

p. ١٢٩

direction, are the sun, the moon, the stars, the seas, the mountains and the wind. People exercise their reasoning power to know the right direction of the Ka'bah by means of certain indications.[197]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 27-28

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Al-ShafiT proffers the following Qur'anic verses in support of Qiyas:

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١. From whatsoever place thou issuest, turn thy face towards the Holy Mosque; and wherever you may be, turn your faces towards it (2 : 145).
٢. O believers, slay not the game while you are in pilgrim sanctity; whosoever of you slays it wilfully, there shall be recompense— the like of what he has slain, in flocks as shall be judged by two men of equity among you, an offering to reach the Ka'bah (5 :96).

From the first verse (2 : 145) he argues that one should face the Ka'bah in prayer when it is in sight. But when one is away from it or it is out of sight, one should face the direction of the Ka'bah and not the Ka'bah itself. To determine the direction of the Ka'bah one has to depend on indications. The indicators which point to the direction are the sun, the moon, the stars, the seas, the mountains and the wind. People exercise their reasoning power to know the right direction of the Ka'bah by means of certain indications.

Rouhani's PhD Thesis, p. ١٢٩

Arguments over Husn and Qubh

With the development of the systematic reasoning in law there arose the question of authority. It became an important point of discussion in Islamic law. The problem is whether the good *(Husn)* or the evil *(Qubh)* of actions is determined by reason or by authority, i.e. the

lawgiver. There are two major points of view about this question. The Mu'tazilah[198] maintain that the determinant of the good and evil of actions is reason.[199] Their contention goes that the *Shariah* commanded to do an action because it is good by itself, and prohibited an action because it is evil by itself. The actions are good or bad by themselves and not by the commandment or prohibition of authority. Hence reason is an obligating authority. There are a number of actions that are taken as good or bad on rational grounds. The knowledge about the creator of the universe, thankfulness to God for His bounties, saving the life of a drowning or a burning man is good actions by themselves. Ignorance about God, ingratitude to His bounties, doing injustice and telling a lie are actions condemned by human reason. The legal causes are not the real causes, which obligate or prohibit actions by themselves. Instead, they are

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 154

With the development of the systematic reasoning in law there arose the question of authority. It became an important point of discussion in theology. The problem is whether the good or evil of actions is determined by reason or by authority, i.e. the law giver *{shari').* There are three points of view about this question. The Mu‘tazilah maintain that the determinant of the good and evil of actions is reason. Their contention goes that the *Sharl'ah* commanded to do an action because it is good by itself, and prohibited an action because it is evil by itself. The actions are good or bad by themselves and not by the commandment or prohibition of authority. Hence reason is an obligating authority (*mujib*). There are a number of actions that are taken as good or bad on rational grounds. The knowledge about the creator of the universe, thankfulness to God for His bounties, saving the life of a drowning or a burning man are good actions by themselves. Ignorance about God, ingratitude to His bounties, doing injustice and telling a lie are actions condemned by human reason. The legal causes *{‘ilal sharHyyah*) are not the real causes which obligate or prohibit actions by themselves. Instead, they are

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virtually symbols subject to change and abrogation. Reason, on the contrary, is an autonomous authority, which obligates or prohibits actions on the basis of their intrinsic values. Hence it is superior to the legal values or causes.[200]

On these grounds the Mu'tazilah did not accept any religious doctrine, tenet or a rule of law which ran counter to reason. They also substantiated their stand on the basis of such Quranic verses as ask man to look into the portents of God in the universe and from the anecdote of Abraham who argued logically to prove the existence of God. [201] A person, according to them, who does not exercise his reason to believe in God in the absence of divine revelation, and passes away, will not get salvation and will go to hell. [202]

The Asharis, [203] hold that the values of the legal injunctions or moral values are not objective. There is nothing good *(Husn)* or bad *(Qubh) per se*. The good or evil of actions is known through authority. There is no intellectual ground for goodness or badness of divine things. Whatever God commands is good, and whatever He forbids is evil. Hence it is the

authority (the *Shariah)* which obligates or prohibits an action, and not reason. Reason plays no role in determining the goodness or badness of actions. The legal injunctions are therefore arbitrary; they are binding because they spring from authority. The *Shariah* is authority-based. The dictates of reason are not binding on God — a view contrary

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 154

virtually symbols subject to change and abrogation. Reason, on the contrary, is an autonomous authority which obligates or prohibits actions on the basis of their intrinsic values. Hence it is superior to the legal values or causes. On these grounds the Mu‘tazilah did not accept any religious doctrine, tenet or a rule of law which ran counter to reason. They also substantiated their stand on the basis of such Qur'anic verses as ask man to look into the protents of God in the universe and from the anecdote of Abraham who argued logically to prove the existence of God.[١٣] A person, accorcding to them, who does not exercise his reason to believe in God in the absence of divine of revelation, and passes away, will not get salvation and will go to hell-fire,[١٤]

The Asha'ris, being atomists, hold that the values of the legal injunctions or moral values are not objective. There is nothing good or bad *per se.* The good or evil of actions is known through authority. There is no intellectual ground for goodness or badness of divine things. Whatever God commands is good, and whatever He forbids is evil. Hence it is the authority (*sam',* the law or the *SharVah*) which obligates or prohibits an action, and not reason. Reason plays no role in determining the goodness or badness of actions. The legal injunctions are therefore arbitrary ; they are binding because they spring from authority. The *SharVah* or the law is authority-based. The dictates of reason are not binding on God — a view contrary

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to the stand of the Mu'tazilah. [204]

They maintain that this point of view is also justified on the basis of the Quran. The Asharis adduce such verses from the Quran as indicates that God will not punish any person or nation unless He sends a Prophet (S.A.W.) to them. 205 They are of the opinion that in the absence of revelation if a man does not exercise his reason to have his faith in God, and consequently dies, he will not be punished by God, even if he believed in polytheism. Since orthodoxy was influenced by Asharism, Islam ultimately became the religion of authority. The tremendous emphasis on authority divested the Muslims of the Medieval period of rational thinking and approach to Islam. Asharism held, in its radicality, that it was permissible for God to forbid an action which He commanded to do and vice versa. 206 The advocates of this view were questioned whether God could prohibit prayer, Zakat and fasting. They replied that it would have been permissible for Him if He had done so.207

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 154-155

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to the stand of the Mu‘tazilah. This point of view is also justified on the basis of the Qur’an. The Ash'aris adduce such verses from the Qur’an as indicate that God will not punish any person or nation unless He sends a Prophet to them.[١٧] They are of opinion that in the absence of revelation if a man does not exercise his reason to have his faith in God, and consequently dies, he will not be punished by God, even if he believed in polytheism.[١٨]

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The Ash‘arls, like the Mu‘tazilah, are obviously on the other extreme. The latter took reason as the sole authority while the former altogether rejected it. Since orthodoxy was influenced by Ash'arism, Islam ultimately became the religion of authority. The tremendous emphasis on authority divested the Muslims of the Medieval period of rational thinking and approach to Islam. Ash’arism held, in its radicality, that it was permissible for God to forbid an action which He commanded to do and vice versa. The advocates of this view were questioned whether God could prohibit prayer, *zakat* and fasting. They replied that it would have been permissible for Him if He had done so.

Rouhani’s PhD Thesis, p. 131-132

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The Mu'tazilah maintain that reason obligates or forbids actions by itself, just as man creates his actions by himself. But orthodoxy rejected this view. The determining authority, according to them, is God alone. Reason is an instrument of recognition of what is good or evil, or what is obligatory and forbidden. As God is the real authority through the Prophet (S.A.W.), He is also a guide and authority through reason. Reason, however, does not stand as a self-sufficient authority, even if it is combined with

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traditional authority *(dalil sam'i).* In case reason is not combined with traditional authority, it stands only as an instrument and cannot obligate anything by itself. If it is combined with traditional authority, the act of obligation will be attributed to the traditional authority and not to

reason. [208]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 156

The Mu‘tazilah maintain that reason obligates or forbids actions by itself, just as man creates his actions by himself. But orthodoxy rejected this view. The determining authority, according to them, is God alone. Reason is an instrument of recognition of what is good or evil, or what is

obligatory and forbidden. As God is the real authority through the Prophet, He is also a guide and authority through reason. Reason, however, does not stand as a self-suffiicient authority, even if it is combined with traditional authority (*dalil sam'i).* In case reason is not comined with traditional authority, it stands only as an instrument and cannot obligate anything by itself. If it is combined with traditional authority, the act of obligation will be attributed to the traditional authority and not to reason.[21]

Rouhani's PhD Thesis, p. 132

"Among the Islamic scholars who argued against the stand of the Mu'tazilah Imam Razi is the most important. Fakhr Al-Din Al-Razi (d. 606 A. H) maintains that God has not taken into account any public interest in divine injunctions. Arguing from verse 5:64 he remarks that the verse shows that the revelation enhanced the contumacy and unbelief of the most infidels. If the actions of God had been based on certain motives, and public weal were considered in His commands, He would have surely discontinued the revelation, particularly after realizing the consequences".[209]

Al-Razi refutes the stand of the Mu'tazilah that all divine injunctions have some purpose and objective behind them. They base themselves on the Quranic verse 14:1 which shows that the Quran was revealed for the guidance of the people. [210] This is not a correct view in the opinion of Al-Razi. He contends that if a person adopts some means to achieve his end, it signifies that he needs the means and he cannot secure his objective without it. How can it be true of God? He needs no means to achieve the end. The verse in question therefore should be interpreted in a different way. It is already established that actions of God have no motives.[211]

It may be pointed out that Al-Razi's argument from verse 5:64 is

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. ١٦٣

Fakhr al-Din al-RazI (d. 606 A.H) maintains that God has not taken into account any public interest *(ma$lahaH)* in divine injunctions. Arguing from verse 5:64 he remarks that the verse shows that the revelation enhanced the contumacy and unbelief of the most infidels.[46] If the actions of God had been based on certain motives, and public weal were considered in His commands, He would have surely discontinued the revelation, particularly after realising the consequences.[47] He refutes the stand of the Mu'tazilah that all divine injunctions have some purpose and objective behind them; They base themselves on the Qur'anie yesre 14:1 which shows that the Qur'an was revealed for the guidance of the people.[4 8] This implies that the injunctions are means to an end and not an end themselves. This is not a correct view in the opinion of al-Razi. He contends that if a person adopts some means to achieve his end. it signifies that he needs the means and he cannot secure his objective without it. How can it be true of God? He needs no means to achieve the end. The verse in question therefore should be interpreted in a different way. It is already established that actions of God have no motives.[49]

It may be pointed out that al-Razi's argument from verse 5:64 is

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untenable. The *Quran* never tells us that the divine revelation causes the enhancement of contumacy and unbelief of the infidels. Instead, it portrays their perverted nature and persistent obstinacy. Similarly, his refutation of the Mu'tazilah does not hold well. We observe in our daily life the causal connection in the functioning of nature throughout the whole universe. Moreover, no action of man is purposeless and futile. It is ridiculous to think about God that His actions are arbitrary, having no objective behind them. It goes without saying that God has sent down revelation for the guidance and welfare of mankind.

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. ١٦٣–١٦٤

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Since the *Quran* puts so much emphasis on rational approach to the injunctions, a number of the traditions of the Prophet were not accepted as genuine by some of the Companions. Ibn Abbas, for example, is reported to have rejected a tradition, which suggests that ablution becomes void by eating anything cooked with fire. He asked the

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. ١٥٣

As a result of the emphasis laid by the Qur'an on rational approach to the injunctions, a number of the traditions of the Prophet were not accepted as genuine by some of the Companions. Ibn 'Abbas, for example, is reported to have rejected a tradition which suggests that ablution becomes void by eating anything cooked with fire . He asked the

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narrator whether one should perform the ablution again, if one washes with hot water. Similarly, he is reported to have questioned the tradition which says that if anyone carries the bier *(janazah),* he should perform ablution, because it becomes void by touching it. He asked the reporter whether the ablution becomes void by carrying a few wood sticks.[212] Aishah also is reported to have doubted such traditions as conflicted with reason. This happened in the early decades of Islam. [213]

In the wake of the development of the science of traditions, differences emerged among the scholar on the possibility of questioning any genuine prophetic tradition by recourse to reason. The Hanafis formulated a principle that if a tradition contradicts reason, but it is narrated by a Companion who has deep understanding in law, it will be recognized. In case it is reported by a Companion who is devoid of legal acumen, it will be rejected. On the basis of this principle they rejected a number of traditions reported by Abu Hurayrah, but validated many others transmitted by the Companions who were taken as lawyers by them.[214]

Shafii, though he criticized a number of traditions logically, validated all such traditions as were sound according to the principles formulated by him.[215]

"Malik had his own criterion to judge the traditions. He, however, did not give much weight to reason in this respect.

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. ١٥٣

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In an attempt to reconcile between reason and authority, the Islamic scholar, Ibn Taymiyah also took an important step towards the reconciliation.

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He argued that there was no conflict between reason and tradition. *He devoted a voluminous work to establish this theory. "* [٢١٦]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. ١٦٢

Ibn Rushd could not succeed in his attempt to reconcile faith with reason Ibn Taymlyah also took a step towards the reconciliation. He thought that there was no conflict between reason and tradition. He devoted a volumnious work to establish this theory.[38]

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Malik maintains that there is a harmony between the divine law and reason. The rules of law based on the *Quran* and the *Sunnah* never conflict with reason. No true dictates of reason contradict the revealed law except the doubtful and confused points. Such points are based on sheer speculation bearing ambiguous meaning and words. But when such equivocal points are examined, it is revealed that all that which appeared to conflict with the law was sophistication and not rational demonstrative proofs.[217]

A thing being legal (*sharei)* is not antithetical to being rational *(aqli).* One point can be legal as well as rational. The legal is opposite to heretical *(bid'a)* and not to rational. The quality of legality is praised whereas the quality of heresy is condemned. Sometimes a legal point may be traditional and sometimes rational. The legality of a point means that the law has established and disclosed it. A legal question may be understood by means of reason, but it is revealed by means of the law. Thus a question may be legal and rational because it is understood by reason and revealed by the law.[218] This can be illustrated by a variety of proofs from the *Quran.* They are, for instance, the unity of God, truthfulness of the Prophets, divine attributes and the life hereafter. They are legal as the *Quran* mentions them. They are rational because their truth is understood by reason.[219] To exclude the legal from the rational

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 162-163

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In point of fact, there is a harmony between the divine law and reason. The rules of law based on the Qur'an and the *Sunnah* never conflict with reason. No true dictates of reason contradict the revealed law except the doubtful and confused

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points. Such points are based on sheer speculation bearing ambiguous meaning and words. But when such equivocal points are examined, it is revealed that all that which appeared to conflict with the law was sophistication and not rational demonstrative proofs.[41] A thing being legal *(shar'i)* is not antithetical to being rational (*'aqli*). One point canbe legal as well as rational. The legal is opposite to heretical *(bid'i)* and not to rational. The quality of legality is praised whereas the quality of heresy is condemned. Sometimes a legal point may be and traditional sometimes rational. The legality of a point means that the law has established and disclosed it. A legal question may be understood by means of reason, but it is revealed by means of the law. Thus a question may be legal and rational because it is understood by reason and revealed by the law[42]. This can be illustrated by a veriety of proofs from the Qur'an. They are, for instance, the unity of God, truthfulness of the prophets, divine attributes and the life hereafter. They are legal as the Qur'an mentions them. They are rational because their truth is understood by reason.[43] To exclude the legal from the rational

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and from the traditional is wrong. As the *Quran* uses rational as well as traditional proofs, both are legal. They may be classified as legal- traditional and legal-rational. [220] Further, Ibn Taymiyah observes that it is not necessary that anything, which is rationally wrong, must be recognized as unbelief by the law. Similarly, anything, which is rationally right, may not be recognized necessarily in law. [221]

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 163

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What the *Quran* says about the use of reason in understanding the religion must be taken as the criterion for answering questions and clarifying any ambiguity. The *Quran* addresses itself to human mind. It does not require that people may believe in its teaching blindly. It appeals to both

believers and infidels to "reflect", "understand", "ponder", and use their reason and sense and not to lock their hearts while believing in the divine message. It appears that the *Quran* does not want a blind faith before entering the fold of Islam. [222] Instead, it inveighs against the blind

allegiance to ones forbears. [223] Its repeated pronouncements like "haply you will understand", what, have you no reason? "Unto a people who understand" [224], Succinctly indicate that its teachings, moral or legal, must be purposive and logical.

"The Quran invokes reason before it invites man to have a faith. We find a multitude of verses, which provide a discursive reasoning for the unity of God. The most significant of them is the verse which substantiates this belief by saying that the whole universe would

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 152

At the outset let us see what the Qur'an says about the use of reason in understanding the religion. The Qur'an addresses itself to human mind. It does not require that people may believe in its teaching blindly. It appeals to both believers and infidels to * reflect ', ' understand * ponder and use their reason and sense and ' not to lock their hearts ' while believing in the divine message. It appears that the Qur'an does not want a blind faith before entering the fold of Islam.[1] Instead, it inveighs against the blind allegiance to ones forbears.[2] Its repeated pronouncements like * haply you will understand,' ' what, have you no reason ? ' unto a people who understand,'[3] succinctly indicate that its teachings, moral or legal, must be purposive and logical.

The teachings of the Qur'an about faith, law and ritual are not arbitrary. They of course stem from an authority, but they are not brute, aimless and void of purpose. The Qur'an invokes reason before it invites man to have a faith. We find a multitude of verses which provide a discursive reasoning for the unity of God. The most significant of them is the verse which substantiates this belief by saying that the whole universe would

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have perished if there existed several Gods beside Allah ".[225]

The *Quran* also expatiates on the arguments for the truthfulness of the Prophet (S.A.W.). It refers to his pious life which he had led in the society before the revelation came down to him.[226] Belief in the life hereafter has also been explained logically in the *Quran* at greater length. It is replete with the argumentation about the resurrection of man and his accountability. The *Quran* exhorts man to understand the spirit and purpose of these injunctions. The prayer and many other forms of rituals enunciated by the *Quran* aim at the good and benefit of man himself. Hence the *Quran* is not content to pronounce certain laws; in a number of cases it also gives their teleological explanation. While prescribing prayer it points out that the prayer forbids indecency and dishonour. Man remembers God by the offering of prayer — a sort of communion of man with God. [227] The purpose of fasting is that man may become God-fearing and pious in

his life. [228] *Zakat*, though not a ritual, was prescribed in order to arrest the concentration of wealth in the hands of the few and to generate and economic equilibrium in Muslim Society. [229] It also gives an explanation of *Hajj* by saying that they may witness things profitable to them and mention God's name.[230]

The *Quran* explains certain principles about its conception of law. The legal injunctions prescribed in the *Quran* are meant for "the ease and comfort of man" and there is "no intention of hardship" to him by

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, pp. 152-153

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have perished if there existed several gods beside Allah.[٤] The Qur'an also expatiates on the arguments for the truthfulness of the Prophet. It refers to his pious life which he had led in the society before the revelation came down to him.[٥] Belief in the life hereafter has also been explained logically in the Qur'an at greater length. It is replete with the argumentation about the resurrection of man and his accountability. These three articles of faith constitute the basic dogma of Islam.

The rituals mentioned in the Qur'an are also grounded in reason. Indeed, it requires unquestioning obedience to God and the Prophet, the supreme authority and the lawgiver. But, at the same time, it exhorts man to understand the spirit and purpose of these injunctions. The prayer and many other forms of rituals enunciated by the Qur'an aim at the good and benefit of man himself. Hence the Qur'an is not content to pronounce certain laws ; in a number of cases it also gives their teleological explanation. While prescribing prayer it points out that the prayer forbids indecency and dishonour. Man remembers God by the offering of

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prayer—a sort of communion of man with God.[٤] The purpose of fasting is that man may become godfearing and pious in his life.[٧] *Zakdt,* though not a ritual, was prescribed in order to arrest the concentration of wealth in the hands of the few and to generate an economic equilibrium in Muslim Society.[٨] It also gives an explanation of *ffajj* by saying * that they may witness things profitable to them and mention God's name.'[9]

The Qur'an proffers certain principles about its conception of law. The legal injunctions prescribed in the Qur'an are meant for * the ease and comfort of man' and there is ' no intention of hardship ' to him by

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them.[231] Moreover, the Quranic legislation takes into consideration the nature and faculties of human and the social conditions. [232] The aim of the *Quran* in its legal prescriptions, though the legal element, in the strict sense of the term, is small in quantity, is the common weal and the good of man. It aims at building up an ideal man and society based on morality more than on law. Hence sometimes it gives an explanation of its injunctions in terms of reason and purpose, though an absolute authority is not required to do so. This is why the genre and tone of the Quranic legislation is general and rational so that it may be adaptable to the changing conditions.

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 154

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That is the reason why the understanding of the Islamic law becomes necessary before its compliance. One can obey the law in a better way if one understands its purpose, too. The Quranic teachings, law and pronouncements are not arbitrary; they are to be followed with careful and deep understanding. The eternity of the Quranic message requires that emphasis should also be laid on the spirit, value, and ethos of divine commands along with their letters. The injunctions are obviously limited, while the situations are unending. The law therefore is to be applied by evaluation and not by literal adherence.

Plagiarized from Ahmad Hasan, *Analogical Reasoning*, p. 165

Besides, understanding of the law becomes sometimes necessary before its compliance. One can obey the law in a better way if one understands its purpose, too. The Qur'anic teachings, law and pronouncements are not arbitrary; they are to be followed with careful and deep understanding. The eternity of the Qur'anic message requires that emphasis should also be laid on the spirit, value, and ethos of the divine commands along with their letters. The injunctions are obviously limited, while the situations are unending. The law therefore is to be applied by evaluation and not by literal adherence.

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Ijtihad in the Caliphs' Era

On going through the cases of *Ijtihad* of several Companions we find that *Ijtihad* was exercised even in the presence of the injunction in the *Quran* or the *Sunnah* The fact is that one Companion singled out one verse or tradition for a situation while another pointed to quite a different verse. We give below a few cases where Umar exercised his personal opinion, although instructions on these very points can he taken to have already existed in the texts of the *Quran* or the *Sunnah.*

Umar is known to have abolished a share of Zakat which was given to certain Muslims or non-Muslims for conciliation of their heart, as ordained by the Holy Quran.[1] The Prophet (S.A.W.) used to give this share to chiefs of certain Arab tribes in order to attract them to embrace Islam or to prevent them from doing harm to the Muslims. This share was given also to the neo-Muslims so that they might remain steadfast in Islam. But Umar discarded the order, which Abu Bakr had written in his caliphate for donation of certain lands to some persons on this basis. He argued that the Prophet (S A W.) had given this share to strengthen Islam;

but as the conditions had changed, this share ceased to be valid. Umar's action seems apparently contrary to the Quran. But, in fact he considered the obtaining situation and followed the spirit of the Quranic injunction. His personal judgement led him to decide that if the Prophet

Plagiarized from Ahmad Hasan, *The early development,* pp. 118-119

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On going through the cases of *Ijtihad* of several Companions, especially of 'Umar, the second Caliph, we find that *ray* was exercised even in the presence of the injunction in the Qur'an or the *Sunnah.* The fact is that one Companion singled out one verse or tradition for a situation while another pointed to quite a different verse. We give below a few cases where 'Umar exercised his personal opinion, although instructions on these very points can be taken to have already existed in the texts of the Qur'an or the *Sunnah.*

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It is a well-known fact that 'Umar abolished a share of *zakah* being given to certain Muslims or non-Muslims for "conciliation of their heart" as required by the Qur'an.[13] The Prophet used to give this share to chiefs of certain Arab tribes in order to attract them to embrace Islam or to prevent them from doing harm to the Muslims. This share was given also to the neo-Muslims so that they might remain steadfast in Islam. But 'Umar discarded the order which Abu Bakr had written in his caliphate for donation of certain lands to some persons on this basis. He argued that the Prophet had given

this share to strengthen Islam; but as the conditions had changed, this share ceased to be valid.[14] 'Umar's action seems apparently contrary to the Qur'an. But, in fact, he

considered the obtaining situation and followed the spirit of the Qur'anic injunction. His personal judgement led him to decide that if the Prophet

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(S.A.W.) had lived in similar conditions he would have done the same. Umar b. Abd Al-Aziz, during his caliphate, had given this share to a certain person to the same purpose for which the Prophet (S A W.) used to give in his lifetime.[9] Both these examples show how Ijtihad decided where to apply a Quranic injunction and where not.

The point is further illustrated by Umar's decision not to distribute Iraqi and Syrian lands among the companions, in the face of Muslim insistence that the land should be distributed among them in tune with the practice of the Prophet (S A W). To all their contentions Umar replied that if he kept on distributing the lands, from where he would maintain the army to protect the borders and the newly conquered towns. The Companions, therefore, finally agreed with him and remarked: "Yours is the correct opinion". Umar later on found the justification of this decision in the Quranic verses ٥٩:٦–١٠ □□□□□ □□□□□□□□ □□□ *Muhajirun*, the Ansar, and the coming generations to receive the Share from booty *(ghanimah*).[10] Umar apparently departed from those Quranic verses which contain the injunction of distributing booty among the Muslims. According to the rule and practice, the lands, too, should have been distributed like other articles of *ghanimah.* But Umar preferred the general benefit of the Muslims to that of the individuals. Social justice demanded that these conquered lands should not be distributed among the army. This illustration provides an important example of early */jtihad* It is documented in history that some slaves had stolen a camel, slaughtered and eaten it. When the matter was referred to Umar, he in the first instance ordered the cutting of the hands of the thieves, but after

Plagiarized from Ahmad Hasan, *The early development,* pp. 119-120

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had lived in similar 'Conditions, he would have done the same. 'Umar b. 'Abd al-'Aziz, during his caliphate, had given this share to a certain person for the same purpose for which the Prophet used to •give in his lifetime.[15] Both these examples show how *ra'y* decided where to apply a Qur'anic injunction and where not.

Another important illustration for the point in question is 'Umar's decision not to distribute the lands of Iraq and Syria among the Companions. The Muslims insisted on ■distributing the land among them according to the Prophet's practice. To all their contentions 'Umar replied that if he kept on distributing the lands, from where he would maintain the army to protect the borders and the newly conquered towns. The Companions, therefore, finally agreed with him •and remarked: "Your's is the correct opinion (*al-ra'y ra'yuka).*" 'Umar later on found the justification of this decision in the Qur'anic verses 59:6-10 which entitled the *Muhajirun,* the

Ansar, and the coming generations to receive the share from *ghanimah.*[16] 'Umar apparently departed from those Qur'anic verses which contain the injunction of dis

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tributing booty among the Muslims. According to the- rule and practice, the lands, too, should have been distributed, like other articles of *ghanimah.* But 'Umar preferred the general benefit of the Muslims to that of the individuals. Social justice demanded that these conquered lands should, not be distributed among the army. This illustration provides an important example of early *Istihsan,* i.e. departure. from the established rule in the interest of equity and public welfare.

According to a report, some slaves had stolen a she-camel,, slaughtered and eaten it. When the matter was referred to- 'Umar, he in the first instance ordered the cutting of the hands of the thieves, but after

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a moment's reflection he said, addressing the slaves' master: "I think you must have starved these slaves out". He, therefore, ordered the master of the slaves to pay double the price of the camel and withdrew his order for the cutting of the thieves' hands.[11] Another story runs that a man stole something from *Bayt Al-Mal* (an Islamic treasury) but Umar did not amputate his hand .[12] That Umar desisted from cutting the hands of thieves during the days of famine is a well-known fact of history. In these cases Umar apparently contravened the Quranic verses which contain the injunction of cutting the hands of a thief. But it should be noted that the *Quran* is silent on the details of the punishment of the amputation of hands. It is for the *Sunnah* or *Ijtihad* to decide where and when to cut the hand and where or when not

Umar, as recorded in history, banned the sale of the slave mother- of-the-child *(Umm Al-Walad)* or offering her as a gift or inheritance. After the death of her master, he declared her to be free.[13] On this problem he discontinued the practice rampant during the lime of the Prophet (S a w.) and the predecessor, Abu Bakr. Of course, it may be objected that he changed the *Sunnah* through his personal opinion. Here it may be remarked that Umar was faced with a social situation which was radically different from that of his predecessors. People used to keep slave-girls, who abounded in Umar's time because of conquests, with them for some time Then these slave-girls fell into the hands of another master with the result that none took the responsibility to look after these women's children. Moreover, this practice was giving an impetus to the growth of the institution of slavery The following remarks of Umar

Plagiarized from Ahmad Hasan, *The early development,* pp. 120-121

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a moment's reflection he said, addressing the slaves' master: "I think you must have starved these slaves out". He, therefore, ordered the master of the slaves to pay double the price of the she-camel and withdrew his order for the cutting of the thieves' hands.[17] Another story runs that a man stole something from *Bayt al~ Mai* but 'Umar did not amputate his hand.[18] That 'Umar desisted from cutting the hands of thieves during the days, of famine is a well-known fact of history. In these cases 'Umar apparently contravened the Qur'anic verses which contain the injunction of cutting the hands of a thief. But it should be noted that the Qur'an is silent on the details of the punishment of the amputation of hands. It is for the *Sunnah* or *ray* to decide where to cut the hand and where not.

It is reported that 'Umar imposed a ban on the sale of the mother-of-the-child *(umm al-walad)*, or giving her away as. a gift or in inheritance. After the death of her master, he. declared her to be free.[19] On this problem he discontinued the practice rampant during the time of the Prophet and the. predecessor, Abu Bakr. Of course, it may be objected that he changed the *Sunnah* of the Prophet and established a new *Sunnah* through his personal opinion. Here it may be remarked that 'Umar was faced with a social situation which

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was radically different from that of his predecessors. People used to keep slave-girls—who abounded in 'Umar's time because of conquests—with them for some time. Then these - slave-girls fell into the hands of another master with the result that none took the responsibility to look after these women's children. Moreover, this practice was giving an impetus to the growth of the institution of slavery. The following remarks of 'Umar

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show how grave the situation had become, and how seriously he was taking this problem. According to *Al-Muwatta'*, he remarked: "why is it that people have intercourse with their slave-girls, and why then abandon them to go out freely? If any slave-girl comes to me and her master confesses cohabitation with her, I shall assign her child to him Henceforth, cither set them free or keep hold of them" .[14]

During the life time of the Prophet (S A W.), the holy Prophet (S A W.) had imposed *Znkai* on nine pieces of property as follows: gold, silver, camel, cow, sheep, wheat, barley, date and raisin.[15] When Imam Ali became the head of the state he imposed *Zakat* on horses as well. The companions of the Prophet (S A W.) questioned the policy of Imam Ali. He replied that firstly, at the time of the Prophet (S A W) the number of horses were limited; secondly, at the time of the Prophet (S.A.W.) it was possible to run the affairs of the society on the basis of *Zakat* on those nine pieces of property while the income was no longer sufficient .[16]

From these it is clear that this problem had become acute for the caliphs and they were forced to take these stern measures due to the changed social conditions. Similar considerations

explain exercising *Ijtihad* in the other cases mentioned above. These are a few examples where the caliphs apparently departed from the clear injunctions or the previous practice. But it should be noted that this was not really a departure but true adherence to the spirit and intention of the command based on their personal judgements *(Ijtihad)*

Plagiarized from Ahmad Hasan, *The early development*, p. 121

show how grave the situation had become, and how seriously he was taking this problem. According to *al-Muwatta',* he remarked: "Why is it that: people have intercourse with their slave-girls, and why then abandon them to go out freely? If any slave-girl comes tome and her master confesses cohabitation with her, I shall assign her child to him. Henceforth, either set them free or keep hold of them.[20] From this it is clear that this problem had become acute for him and he was forced to take this- stern measure due to the changed social conditions. Similar considerations explain 'Umar's exercising *Ijtihad* in the other cases mentioned above.

These are a few examples where 'Umar apparently departed from the clear injunctions or the previous practice. But it should be noted that this was not really a departure: but true adherence to the spirit and intention of the command, based on his personal judgement.

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The term qurra' was prevalent among the Muslims living during the Prophet's time Through contact with new cultures and civilizations, the Arabs later spread knowledge and progressed in different branches of learning. Now- that Islamic law was perfected and other branches of Islamic learning had developed, the *Quran* readers were no longer called *qurra'* but w'ere known as *Mujtahids* and Islamic Jurists.

During the Prophet's life, *Ijlihad* was lawful for the companions

Plagiarized from Ahmad Hasan, *The early development*, p. 9

In the Prophet's time the term *qurra'* was also current among the Muslims. As reading was not common in Arabia, it was applied to those persons who could read the Qur'an. The seventy persons whom the Prophet had deputed to the newly converted Muslims for teaching the Qur'an and the essentials of Islam came to be known as *qurra'*.[26] Later, when the Arabs came in contact with new cultures and civilizations, knowledge spread among them, and they advanced in various fields of learning. Now that Islamic law was perfected and other branches of Islamic learning had developed, the Qur'an readers, according to Ibn Khaldun, were no longer called

qurra' but were known as *fuqaha*' and *'ulama'* [21]

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The Prophet (S.A.W.) while laying down a law, primarily considered the value and spirit of the action and not the form of the action itself.

Plagiarized from Ahmad Hasan, *The early development,* p. 14

The above example shows that the Prophet while laying down a law, primarily considered the value and spirit of the action and not the form of the action itself.

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The companions formed an opinion by looking to the *Shariah* value, which led the Prophet (S A W.) to take a decision.

Plagiarized from Ahmad Hasan, *The early development,* p. 15

Often they formed an opinion by looking to the SharVah-value which led the Prophet to take a decision.

Rouhani's PhD Thesis, p. 200

People did not know the details of many problems even in the lifetime of the Prophet (S A W). Of course, the Prophet (S.A.W.) laid down certain regulations, but the jurists elaborated them with more details. The reason for this further addition to the laws enunciated by the Prophet (S. A W *)* by interpretation is that he himself had made allowances in his commands. He left many things to the discretion of the community to be decided according to a given situation.

Plagiarized from Ahmad Hasan, *The early development,* p. 13

People did not know the details of many a problem even in the lifetime of the Prophet.[4] Of course, the Prophet laid down certain regulations, but the jurists elaborated them with more details. Thereason for this further addition to the laws enunciated by the Prophet by interpretation is that he himself had made allowances in his commands. He left many things to the discretion of the community to be decided according to a given situation.

Plagiarism of Rouhani's Ph.D. Thesis from Kamali

Approximately ٨٦٠٠ words of Rouhani's Ph.D. Thesis word by word have been plagiarized from the following book of Kamali (chapter 1 approximately 980 words, chapter 2 approximately 5650 words, chapter 3 approximately 90 words, chapter 5 approximately 1550 words and chapter 6 approximately 310 words):

Kamali, Mohammad Hashim, 1991, *Principles of Islamic Jurisprudence*

It is important to say that in the notes of chapters 1, 2, 3, 5 and 6 there is no reference to the plagiarized from *Principles of Islamic Jurisprudence.* In the whole dissertation, only in notes 6 and ٧ in chapter ٢ (i.e. p. ١٥٩) there are references to ٢ quotations from *Principles of Islamic Jurisprudence.*

سرقت علمی تز روحانی از کمالی

در فصلهای مختلف روی‌هم‌رفته تقریباً ۸۶۰۰ واژه (فصل ۱ تقریباً ۹۸۰ واژه، فصل ۲ تقریباً ۵۶۵۰ واژه، فصل ۳ تقریباً ۹۰ واژه، فصل ۵ تقریباً ۱۵۵۰ واژه و فصل ۶ تقریباً ۳۱۰ واژه) از این کتاب آقای محمد هاشم کمالی سرقت کلمه به کلمه شده است:

Kamali, Mohammad Hashim, 1991, *Principles of Islamic Jurisprudence*

گفتنی است در پی‌نوشت‌های فصول مختلف هیچ ارجاعی به کتاب آقای کمالی وجود ندارد؛ جز این‌که در فصل ۲ در پی‌نوشت ۶ و پی‌نوشت ۷ مستقیما از کتاب آقای کمالی مطلبی نقل شده و در همین پی‌نوشت‌ها نیز تنها به همین ۲ نقل قول ارجاع داده شده است که علی‌القاعده این ۲ نقل قول در این گزارش سرقت به شمار نیامده است.

Chapter 1

Rouhani's Ph.D. Thesis, p. 18

Ijtihad is defined as the total exercise of effort made by a jurist in order to infer the rules of Shariah from their detailed evidence in the sources. Some Islamic Jurists have defined Ijtihad as the application by a jurist of all his faculties either in inferring the rules of Shariah from their sources, or in implementing such rules and applying them to particular fresh issues".4

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Ijtihad is defined as the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of Shari'ah from their detailed evidence in the sources.[2. Amidi, Ihkam, IV, 162; Shawkani, Irshad, p. 250; Khudari, Usul, p. 367.] Some ulema have defined ijtihad as the application by a jurist of all his faculties either in inferring the rules of Shari'ah from their sources, or in implementing such rules and applying them to particular issues/3' Abu Zahrah' Usul' p301]

Rouhani's Ph.D. Thesis, p. 19

Thus a person who knows the rules of Shariah in detail but is unable to exercise his judgement in the inference of the decree direct from their sources is not a Mujtahid (qualified Islamic lawyer), Ijtihad, in other words, consists of the formulation of an opinion in regard to a religious decree. The presence of an element of speculation in Ijtihad implies that The result arrived at is a human effort and therefore the possibility of its being erroneous is not excluded.5

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Thus a person who knows the rules of Shari'ah in detail but is unable to exercise his judgment in the inference of the ahkam direct from their sources is not a mujtahid. Ijtihad, in other words, consists of the formulation of an opinion in regard to a hukm shar'i. The presence of an element of speculation in ijtihad implies that the result arrived at is probably correct, while the possibility of its being erroneous is not excluded.

Rouhani's Ph.D. Thesis, pp. 19-20

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"The essential unity of the Shariah lies in the degree of harmony that is achieved between revelation and reason. Ijtihad is the

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principal instrument of maintaining this harmony The various sources of Islamic law that feature next to the Quran and the Sunnah are all manifestations of Ijtihad. In this way, consensus of opinion (Ijmai, analogy (Qiyas). juristic preference (Istihsan), considerations of public interest (maslahah), etc., are all interrelated under the main heading of Ijtihad".10

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The essential unity of the Shari'ah lies in the degree of harmony that is achieved between revelation and reason. Ijtihad is the principal instrument of maintaining this harmony. The various sources of Islamic law that feature next to the Qur'an and the Sunnah are all manifestations of ijtihad, albeit with differences that are largely procedural in character. In this way, consensus of opinion, analogy, juristic preference, considerations of public interest (maslahah), etc., are all inter¬related not only under the main heading of ijtihad, but via it to the Qur'an and the Sunnah.[L Amin Islahi (Islamic Law, p. 109)

Rouhani's Ph.D. Thesis, p. 21

The distinction between Ijtihad and the revealed sources of the Shariah lies in the fact that Ijtihad is a continuous process of development whereas divine revelation and Prophetic legislation discontinued upon the demise of the Prophet (S.A.W.).15 In this sense. Ijtihad continues to be the changing conditions of the Muslim communities. In this thesis, Ijtihad is being examined in its modern sense i.e. a dynamic device which deduces laws from the Islamic sources (the Quran, the Sunnah, Ijma, Aql and Urf).

The Proof of Ijtihad

Ijtihad derives its validity from divine revelation.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The main difference between ijtihad and the revealed sources of the Shari'ah lies in the fact that ijtihad is a continuous process of development whereas divine revelation and prophetic legislation discontinued upon the demise of the Prophet. In this sense, ijtihad continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community in its aspirations to attain justice, salvation and truth. Since ijtihad derives its validity from divine revelation, its propriety is measured by its harmony with the Qur'an and the Sunnah.

Rouhani's Ph.D. Thesis, pp. 24-25

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There is a very important hadith related to the holy Prophet (S.A.W.) which reads thus: "When a judge exercises Ijnhad and gives a righi judgement, he will have two rewards, but if he errs in his judgment, he will still have earned one reward ".26

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This hadith implies that regardless of its results, Ijtihad never partakes in sin. When the necessary requirements of Ijtihad are present, the result is always meritorious and never blameworthy. In another hadith, the Prophet (S.A.W.) is reported to have said: "Strive and endeavour, for everyone is ordained to accomplish that which he is created for".27

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

According to another Hadith, 'When a judge exercises ijtihad and gives a right judgment, he will have two rewards, but if he errs in his judgment, he will still have earned one reward.' [22 Abu Dawud Sunan'm' 1013 Hadith na 35671

This Hadith implies that regardless of its results, ijtihad never partakes in sin. When the necessary requirements of ijtihad are present, the result is always meritorious and never blameworthy!23. Ghazalii Mustasfa, ii, 105; Amidi, ihkam, w 186] In another Hadith, the Prophet is reported to have said: 'Strive and endeavour, (ijtahidu), for everyone is ordained to accomplish that which he is created for.' [24' Bukhan- Sahlh (Istanbul ed.), VI, 84; Amidi, Ihkam, IV, 209.]

Rouhani's Ph.D. Thesis, p. 25

There is also the hadith which reads thus: "When God favours on of his servants, He enables him to acquire knowldge in religion".30 The Islamic Juriststs of Osul have also quoted in this connection two other ahadith from the holy Prophet (S.A.W.), one of which makes the pursuit of knowledge and understanding on obligation of every Muslim, man or woman. "All Muslims must aspire after knowledge".31 And the other declares the Islamic Jurists to be the successors of

the Prophets: "The Islamic Jurists are the successors of the Prophets". 32 The relevance of the last two ahadith to Ijtihad is borne out by the fact that Ijtihad is the main instrument of creativity and knowledge in Islam.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

There is also the Hadith which reads: 'When God favours one of His servants, He enables him to acquire knowledge *(tafaqquh)* in religion.' [25 Bukhari, *Sahih* (Istanbul ed), I, 25,,26]

The ulema of *usul* have also quoted in this connection two other *ahadith,* one of which makes the pursuit of knowledge an obligation of every Muslim, man or woman, and the other declares the Ulema to be the successors of the Prophets [26 Ibn Majah> Sunan■ I> 81 Hadith no_ 224; Amidi. *Ihkam*, IV, 23o, 234 s^{h}a^{tibi}, *Mmafaq^*, rv, i^{40}.]

The relevance of the last two *ahadith* to *ijtihad* is borne out by the fact that *ijtihad* is the main instrument of creativity and knowledge in Islam.

Rouhani's Ph.D. Thesis, pp. 26-27

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The rational argument in support of Ijtihad is to be sought in the fact that while the nusus (texts) of Shariah are limited, new experiences in the life of the community continue to give rise to new problems It is

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therefore, imperative for the learned members of the community to attempt to find solutions to such problems through Ijtihad.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The rational argument in support of ijtihad is to be sought in the fact that while the nusus of Shari 'ah are limited, new experiences in the life of the community continue to give rise to new problems. It is therefore imperative for the learned members of the community to attempt to find solutions to such problems through ijtihad}29'Cf Kassab Adwa'p 20]

Rouhani's Ph.D. Thesis, p. 54

Ijtihad should be in accordance with the Quran and the Sunnah to insure validity. The sources of Islamic law are therefore essentially monolithic. The essential unity of the Shariah lies in the degree of harmony that is achieved between revelation and reason Ijtihad is the principal instrument of maintaining this harmony.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Since ijtihad derives its validity from divine revelation, its propriety is measured by its harmony with the Qur'an and the Sunnah. The sources of Islamic law are therefore essentially monolithic, and the commonly accepted division of the roots of jurisprudence into the primary and secondary is somewhat formal rather than real. The essential unity of the Shari'ah lies in the degree of harmony that is achieved between revelation and reason. Ijtihad is the principal instrument of maintaining this harmony.

Rouhani's Ph.D. Thesis, p. 54

Ijtihad is enforced in connection to three types of evidence: 1. authentic but speculative in purport; 2. authenticity doubted but meaning definite; 3. speculative in both authenticity and meaning. The practice of Ijtihad is a religious duty. The Islamic Jurists are in agreement that Ijtihad is the collective obligation (Wajeb-al Kefa'ei) of all qualified jurists in the event where an issue arises but no urgency is encountered over its ruling. The duty remains unfulfilled until it is performed by at least one mujtahid.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

But ijtihad can validly operate in regard to any of the remaining three types of evidence, as the following illustrations will show:

١) An example of ijtihad concerning evidence which is definite of proof but speculative of meaning …

٢) Ijtihad in regard to the second variety of evidence relates mainly to Hadith material, which may have a definitive meaning but whose authenticity is open to doubt. …

٣) To give an example of ijtihad concerning evidence that is speculative in both authenticity and meaning …

the practice of ijtihad is a religious duty. The ulema are in agreement that ijtihad is the collective obligation (fard kafa'i) of all qualified jurists in the event where an issue arises but no urgency is encountered over its ruling. The duty remains unfulfilled until it is performed by at least one mujtahid.

Rouhani's Ph.D. Thesis, p. 54

Many ayat in the Quran lend support to the conclusion that it is the duty of the learned to study and investigate the Quran and the teachings of the Prophet (S.A.W.).

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

These and many similar ayat in the Qur'an lend support to the conclusion that it is the duty of the learned to study and investigate the Qur'an and the teachings of the Prophet.

Rouhani's Ph.D. Thesis, p. 55

The Mujtahid must be a highly qualified person of sound mind, enjoying superb intellectual faculty, possessed of knowledge of different religious disciplines for independent judgment. He must be knowledgeable in Arabic that enables the scholar to enjoy a correct understanding of the Shariah's texts, and he must also be a knowledgeable in the Quran and the Sunnah

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The mujtahid must be a Muslim and a competent person of sound mind who has attained a level of intellectual competence which enables him to form an independent judgment. …; he must therefore be a Muslim, and be knowledgeable in … (a) Knowledge of Arabic to the extent that enables the scholar to enjoy a correct understanding of the Qur'an and the Sunnah.

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he must also be a knowledgeable in the Quran and the Sunnah especially that part of it which relates to the subject of his Ijtihad. The Mujtahid must also know the substance of the furu works and the points on which there is an ijma

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

the *mujtahid* must possess an adequate knowledge of the *Sunnah*, especially that part of it which relates to the subject of his *ijtihad*. ... The *mujtahid* must also know the substance of the furu' works and the points on which there is an *ijma'*.

Rouhani's Ph.D. Thesis, p. 55

Though Ijtihad has no uniform procedure, it should primarily be based on the Quran and the hadith, as two sources with highest priority over any other evidence Should there be no nass on the matter, then he must find out if there is a ruling of ijma, Qiyas or other sources available on the problem in the works of the renowned jurists.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Should there be no manifest text on the subject in the Qur'an and the verbal Sunnah, the mujtahid may resort to the actual (fi'li) and tacitly approved (taqriri) Sunnah. Failing this, he must find out if there is a ruling of ijma' or qiyas available on the problem in the works of the renowned jurists.

Rouhani's Ph.D. Thesis, p. 55

Today the former conditions of Ijtihad practiced by the earlier Islamic Jurists are not extant. For one thing, the prevalence of statutory legislation as the main instrument of government in modern times has led to the imposition of further restrictions on Ijtihad. The revival of Ijtihad in our times would necessitate efforts, which the government must undertake. Since education is the business and responsibility of modern governments, it should be possible to provide the necessary education and training that a mujtahid would need to possess, and to make attainment to this rank dependent on special qualifications

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The conditions under which ijtihad was formerly practiced by the ulema of the early periods are no longer what they were. For one thing, the prevalence of statutory legislation as the main instrument of government in modern times has led to the imposition of further restrictions on ijtihad. ...

The revival of ijtihad in our times would necessitate efforts which the government must undertake. Since education is the business and responsibility of modern governments, it should be possible to provide the necessary education and training that a mujtahid would need to possess, and to make attainment to this rank dependent on special qualifications.

Chapter 2

Rouhani's Ph.D. Thesis, pp. 79-80

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An example of this is the injunction

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concerning the requirement of ablution for prayers which reads in part .. and wipe your heads ".33 This text is definitive on the requirement of wiping (mash) of the head in wuzu, but since it does not specify the precise area of the head to be wiped, it is speculative in regard to this point. Hence we find that the jurists are unanimous in regard to the first, but have differed in regard to the second aspect of this injunction.34 There are sometime instances where the scope of disagreement over the interpretation of the Quran is fairly extensive. At times seven or eight different juristic conclusions have been arrived at one and the same issue.35 These are Ijtihad opinions. The great Islamic scholars have practice Ijtihad because they believe that Ijtihad is not only permissible but is obligatory.36 For the Shariah does not restrict the liberty of the individual to investigate and express an opinion. The diversity of opinion offers a range of choice from which one can select the view it deems to be most beneficial.37

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

An example of this is the injunction concerning the requirement of ablution for prayers which reads in part ' . . . and wipe your heads' (al-Ma'idah, 5:6). This text is definitive on the requirement of wiping (mash) of the head in wudu', but since it does not specify the precise area of the head to be wiped, it is speculative in regard to this point. Hence we find that the jurists are unanimous in regard to the first, but have differed in regard to the second aspect of this injunction. [Badran> Usul p- 66]

There are sometime instances where the scope of disagreement over the interpretation of the Qur'an is fairly extensive. Mahmud Shaltut, for example, underlines this point by noting that at times seven or eight different juristic conclusions have been arrived at on one and the same issue. And he goes on to say that not all of these views can be said to be part of the religion, nor could they be legally binding. These are ijtihadi opinions; ijtihad is not only permissible but is encouraged. For the Shari'ah does not restrict the liberty of the individual to investigate and express an opinion. They may be right or they may be wrong, and in either case, the diversity of opinion offers the political authority a range of choice from which to select the view it deems to be most beneficial to the community.

Rouhani's Ph.D. Thesis, pp. 80-81

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So far, the study of the Islamic law's evolution corroborates the fact that interpretation of the decisive verses is also possible. This broadens the scope of Ijtihad even more. For example, the penance (kaffarah) of a false oath according to textual ruling of the Quran38 is of three types, one of which is to feed ten poor persons. This is a specific ruling in the sense that ten poor persons has only one meaning But even so, the Hanafis have given this text an alternative interpretation, which is that instead of feeding ten poor persons, one such person may be fed ten times. The majority of Islamic Jurists, however, do not agree with the

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Hanafis on this point. This example will serve to show that the scope of Ijtihad is not always confined to the A 'mm (general) but that even the khass (specific) and definitive rulings may require elaboration which might be based on speculative reasoning 39

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

For example, the penance (kaffarah) of a false oath according to a textual ruling of the Qur'an (al-Ma'idah, 5:92) is of three types, one of which is to feed ten poor persons. This is a specific ruling in the sense that 'ten poor persons' has only one meaning. But even so, the Hanafis have given this text an alternative interpretation, which is that instead of feeding ten poor persons, one such person may be fed ten times. The majority of ulema, however, do not agree with the Hanafis on this point. Be that as it may, this example will serve to show that the scope of ijtihad is not always confined to the Amm but that even the Khass and definitive rulings may require elaboration which might be based on speculative reasoning.

Rouhani's Ph.D. Thesis, p. 81

In addition, it is noteworthy that the Islamic jurists have deduced the rules of Shariah not only from the explicit words of the Quran, which is referred to as the mantoq, but also from the implicit meanings of the text through inference and logical construction, which is referred to as the meaning, or mafhum.40 Therefore, the deduction of the rules of Shariah by way of inference from the implied meaning of a text partakes in speculative reasoning and ljtihad.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Furthermore, the ulema have deduced the rules of Shari'ah not only from the explicit word of the Qur'an,, which is referred to as the mantuq, but also from the implicit meanings of the text through inference and logical construction, which is referred to as the implied meaning, or mafhum. Once again, this subject has been discussed in a separate chapter under al-dalalat, that is, textual implications. The only purpose of referring to this subject here is to point out that the

deduction of the rules of Shari'ah by way of inference from the implied meaning of a text partakes in speculative reasoning and ijtihad.

Rouhani's Ph.D. Thesis, pp. 81-82

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Therefore, a speculative indication in the text of the Quran or hadith may be supported by a definitive evidence in either, in which case it is as valid

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as one which was definitive in the first place. All the "Wahed" ahadith (narrated by only a single individuals) which elaborate the definitive Quranic prohibition of usury (riba)46 are speculative by virtue of being Wahed. Nevertheless, as the definitive text of the Quran supports their substance, they become definitive not withstanding any possible doubts about their authenticity. Thus as a general rule, all Wahed ahadith whose authenticity is open to speculation are elevated to the rank of qata; if they can be substantiated by clear evidence in the Quran.47

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

As stated above, a speculative indication in the text of the Qur'an or Hadith may be supported by a definitive evidence in either, in which case it is as valid as one which was definitive in the first place.

To illustrate this, all the solitary (ahad) ahadith which elaborate the definitive Qur'anic prohibition of usury (riba) in sura 2:275 are speculative by virtue of being Ahad. But since their substance is supported by the definitive text of the Qur'an, they become definitive despite any doubt that may exist in respect of their authenticity. Thus as a general rule, all solitary ahadith whose authenticity is open to speculation are elevated to the rank of qat'i' if they can be substantiated by clear evidence in the Qur'an. [Shatibi>Muwafaqat-m. 9; Qattan. Tashn • p- 82]

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the Quran is specific on matters which are deemed to be unchangeable (values and ultimate human goals), but in matters which are liable to change, it merely lays down general guidelines and the details is left to the knowledgeable scholars of the time to provide solutions to the problems through Ijtihad.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Broadly speaking, the Qur'an is specific on matters which are deemed to be unchangeable, but in matters which are liable to change, it merely lays down general guidelines.

Rouhani's Ph.D. Thesis, pp. 82-83

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The Quran itself warns the believers against seeking the regulation of everything by the express terms of divine revelation, as this is likely to lead to rigidity and cumbersome restrictions: "O you believers, do not keep asking about things which, if they were expounded to you, would become troublesome for you ...".48 In this way, the Quran discourages the development of an over- regulated society. What the Quran has left unregulated is meant to be devised, in accord with the general objectives of the Lawgiver, through

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mutual consultation and Ijlihad. A careful reading of the Quran further reveals that on matters pertaining to belief, the basic principles of morality, man's relationship with his Creator, and transcendental matters which are characteristically unchangeable, the Quran is clear and detailed, as clarity and certainty are the necessary requirements of belief.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The Qur'an itself warns the believers against seeking the regulation or everything by the express terms of divine revelation, as this is likely to lead to rigidity and cumbersome restrictions: 'O you believers, do not keep asking about things which, if they were expounded to you, would become troublesome for you. . .' (5:104). In this way, the Qur'an discourages the development of an over-regulated society. Besides, what the Qur'an has left unregulated is meant to be devised, in accord with the general objectives of the Lawgiver, through mutual consultation and ijtihad. A careful reading of the Qur'an further reveals that on matters pertaining to belief, the basic principles of morality, man's relationship with his Creator, and what are referred to as ghaybiyyat, that is transcendental matters which are characteristically unchangeable, the Qur'an is clear and detailed, as clarity and certainty are the necessary requirement of belief.

Rouhani's Ph.D. Thesis, p. 83

The relationship between the Quran and Sunnah is largely specified by the fact that Quranic legislation is presented briefly and generally. Since the general, the ambiguous and the difficult portions of the Quran were in need of elaboration, the Prophet was expected to provide the necessary details and determine the particular focus of the general rulings of the Quran. It was

due to these and other such factors that a unique relationship was forged between the Sunnah and the Quran in that the two are often integral to one another and inseparable.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Once again the fact that legislation in the Qur'an mainly occurs in brief and general terms has to a large extent determined the nature of the relationship between the Qur'an and Sunnah. Since the general, the ambiguous and the difficult portions of the Qur'an were in need of elaboration and takhsis (specification), the Prophet was expected to provide the necessary details and determine the particular focus of the general rulings of the Qur'an. It was due to these and other such factors that a unique relationship was forged between the Sunnah and the Qur'an in that the two are often integral to one another and inseparable.

Rouhani's Ph.D. Thesis, pp. 91-92

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Clear understanding of the Quran and the Sunnah is the prerequisite for deduction of legal rules from them. In order to use these sources, the Mujtahid must be well versed with the words and their exact implications.6_ For this purpose, the Islamic Jurists include the classification of words and their usages in the methodology of Osul-AlFigh.6_ The rules which govern the origin of words, their usages and classification are primarily determined on linguistic grounds and, as such, they are not an integral part of the law or religion. But they are instrumental as an aid to the correct understanding of the Shariah.70 When the text is self-explanatory and clear, the Mujtahid will not **p. 92**

make use of interpretation. Yet a major part of fiqh is based on rules which interpretation and Ijtihad yield. Ijtihad can take a variety of forms, and interpretation which aims at the correct understanding of the words and sentences of a legal text is of crucial significance to all forms of Ijtihad.71

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

To interpret the Qur'an or the Sunnah with a view to deducing legal rules from the indications that they provide, it is necessary that the language of the Qur'an and the Sunnah be clearly understood. To be able to utilise these sources, the mujtahid must obtain a firm grasp of the words of the text and their precise implications. For this purpose, the ulema of usul include the classification of words and their usages in the methodology of usul al-fiqh. The rules which govern the origin of words, their usages and classification are primarily determined on linguistic grounds and, as such, they are not an integral part of the law or religion. But they are instrumental as an aid to the correct understanding of the Shari'ah.

Normally the mujtahid will not resort to interpretation when the text itself is self-evident and clear. But by far the greater part of fiqh consists of rules which are derived through interpretation and ijtihad. As will be discussed later, ijtihad can take a variety of forms, and interpretation which aims at the correct understanding of the words and sentences of a legal text is of crucial significance to all forms of ijtihad.

Rouhani's Ph.D. Thesis, p. 92

Interpretation aims at realizing the lawgiver's intention from his words and deeds. Discovery of that which is not self-evident is the task of interpretation. Thus the object of interpretation in Islamic law, as in any other law, is to ascertain the intention of the Lawgiver with regard to what has been left unexpressed as a matter of necessary inference from the surrounding circumstances.72 Words fall into two categories based on their lucidity, scope, and capacity to convey a specific meaning. With reference to their conceptual clarity, the Islamic Jurists of Osul have classified words into the two main categories of "clear" and "unclear" words.73 The main purpose of this division is to identify the extent to which the meaning of a word is made clear or left ambiguous and doubtful. The significance of this classification can be readily observed in the linguistic forms and implications of commands and prohibitions. The task of evaluating the precise purport of a command is greatly facilitated if one is able to ascertain the degree of clarity (or of ambiguity) in which it is conveyed. Thus the manifest (Zaher) and explicit (Nass) are "clear" words, and yet the jurist may abandon their primary meaning in favour of a different meaning as the context and circumstances may require, Words are also classified, from the viewpoint of their scope, into homonym, general, specific, absolute and qualified. Based on this categorization, the grammatical application of words to concepts is clarified

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The function of interpretation is to discover the intention of the Lawgiver - or of any person for that matter - from his speech and actions. Interpretation is primarily concerned with the discovery of that which is not self-evident. Thus the object of interpretation in Islamic Law, as in any other law, is to ascertain the intention of the Lawgiver with regard to what has been left unexpressed as a matter of necessary inference from the surrounding circumstances/1' Cf' Abdur Rahim' Juns^Pru'knce- p- 78]

From the viewpoints of their clarity, scope, and capacity to convey a certain meaning, words have been classified into various types. With reference to their conceptual clarity, the ulema of usul have classified words into the two main categories of 'clear' and 'unclear' words. The main purpose of this division is to identify the extent to which the meaning of a word is made clear or left ambiguous and doubtful. The significance of this classification can be readily observed in the linguistic forms and implications of commands and prohibitions. The task of evaluating the precise purport of a command is greatly facilitated if one is able to ascertain the degree of clarity

(or of ambiguity) in which it is conveyed. Thus the manifest (Zahir) and explicit (Nass) are 'clear' words, and yet the jurist may abandon their primary meaning in favour of a different meaning as the context and circumstances may require. Words are also classified, from the viewpoint of their scope, into homonym, general, specific, absolute and qualified.

This classification basically explains the grammatical application of words to concepts:

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"The strength of a legal rule is to a large extent determined by the language in which it is communicated. To distinguish the clear from the ambiguous and to determine the degrees of clarity/ambiguity in words also helps the jurist in his efforts at resolving instances of conflict in the law. When the Mujtahid is engaged in the deduction of rules from indications which often amount to no more than probabilities, some of his conclusions may turn out to be at odds with others. Ijtihad is therefore not only in need of comprehending the language of the law, but also needs a methodology and guidelines with which to resolve instances of conflict in its conclusions".75

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

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The ahadith fall into yet another classification based on the continuity and completeness of the chain of their transmitters. Continuous (mottasel) and discontinued.76 A continuous hadith is one which has a complete chain of transmission from the last narrator all the way back to the Prophet (S.A.W.). A discontinued hadith, also known as Morsal, is a hadith whose chain of transmitters is broken and incomplete. The majority of Islamic Jurists have divided the continuous hadith into the two main varieties of MotaWater and Wahed. To this the Ahadith have added

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an intermediate category, namely the well-known, or Mashhoor.77 Motawater means a report by many people presented in a way to prevent any collusion and machination to lie. This possibility is beyond conception due to the huge number and diverse residence and reliability of those relating it.78 A report would not be called Motawater if its contents were believed on other grounds, such as the rationality of its content, or that it is deemed to be a matter of axiomatic knowledge.79 A report is classified as Motawater only when it fulfills the following conditions: A) In each period or generation, there should be a large number of reporters to prevent any collusion in presenting a falsehood. In case the reporter's number does not make a reliable multitude, their report will not lead to positive knowledge and is therefore not Mutawatir.80

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

From the viewpoint of the continuity and completeness of their chains of transmitters, the Hadith are once again classified into two categories: continuous (muttasil) and discontinued (ghayr muttasil). A continuous Hadith is one which has a complete chain of transmission from the last narrator all the way back to the prophet. A discontinued Hadith, also known as Mursal, is a Hadith whose chain of transmitters is broken and incomplete. The majority of ulema have divided the continuous Hadith into the two main varieties of Mutawatir and Ahad. To this the Hanafis have added an intermediate category, namely the 'well-known', or Mashhur.

I. The Continuous Hadith

١. The Mutawatir

Literally, Mutawatir means 'continuously recurrent'. In the present context, it means a report by an indefinite number of people related in such a way as to preclude the possibility of their agreement to perpetuate a lie. Such a possibility is inconceivable owing to their large number, diversity of residence, and reliability.[94 Shawkam'Irshad p 46; Abu Zahrah Usul p ٨٣□□□□□□□□□□□ □□□□□□□□ (□□□□□□□□ □□□□□–□–□– ٧٣–]

A report would not be called Mutawatir if its contents were believed on other grounds, such as the rationality of its content, or that it is deemed to be a matter of axiomatic knowledge. [95Khudari' Usul p 214; Aghmdes'Muhammedan Theore p 4a] A report is classified as Mutawatir only when it fulfills the following conditions:

a. The number of reporters in every period or generation must be large enough to preclude their collusion in propagating falsehood. Should the number of reporters in any period fall short of a reliable multitude, their report does not establish positive knowledge and is therefore not Mutawatir!96 Shawkam-Irshad p 47; Hltu- Wa]lz-p 294

Rouhani's Ph.D. Thesis, p. 94

Some Islamic Jurists have attempted to specify a minimum, varying from as low as four to as many as twenty, forty and seventy up into the hundreds. All of these figures are based on analogies: The requirement of four is based on the similar number of Witnesses which constitute legal proof, twenty is analogous to the Quranic ayah in sura Al-Anfal81 which reads: "If there are twenty steadfast men among you, they will overcome two hundred fighters". The next number, that is seventy, represents an analogy to another Quranic passage where we read that "Moses chose seventy men among his people for an appointment with us".82 B)

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Some ulema have attempted to specify a minimum, varying from as low as four to as many as twenty, forty and seventy up into the hundreds. All of these figures are based on analogies: the requirement of four is based on the similar number of witnesses which constitute legal proof; twenty is analogous to the Qur'anic ayah in sura al- Anfal (8:65) which reads: 'If there are twenty steadfast men among you, they will overcome two hundred [fighters].' The next number, that is seventy, represents an analogy to another Qur'anic passage where we read that 'Moses chose seventy men among his people for an appointment with Us' (al-A'raf 7:155).

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B) According to some Islamic Jurists, the reporters should be equitable people (A 'del), indicating that they should not be infidels or

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profligates. The correct view, however, is that neither of these conditions are necessary. What is essential in Motawater is the attainment of certainty, and this even can be obtained through the reports of non-Muslims.83

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

c. Some ulema have advanced the view that the reporters must be upright persons ('udul), which means that they must neither be infidels nor profligates (kuffar wa-fussaq). The correct view, however, is that neither of these conditions are necessary. What is essential in Mutawatir is the attainment of certainty, and this can be obtained through the reports of non-Muslims,

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C) That the reporters are not based in their cause and are not associated with one another through a political or sectarian movement. And finally, all of these conditions must be met from the origin of the report to the very end.84

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

d. That the reporters are not biased in their cause and are not associated with one another through a political or sectarian movement. And finally, all of these conditions must be met from the origin of the report to the very end. [10L GhazaIh Mustasfa 1 86; Shawkani Irshad p48]

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… that the Quran is mainly concerned with general principles borne out by the fact that its contents require a great deal of elaboration, which must be provided by the Sunnah. To give an example, the following Quranic ayah provides the textual authority for all the material sources of the Shariah, namely the Quran, the Sunnah, Ijma and Qiyas. The ayah reads: "O you who believe, obey God and obey the Messenger, and those of you who are in authority, and if you have a dispute concerning any matter refer it to God and to the Messenger.85

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

That the Qur'an is mainly concerned with general principles is borne out by the fact that its contents require a great deal of elaboration, which is often provided, although not exhaustively, by the Sunnah. To give an example, the following Qur'anic ayah provides the textual authority for all the material sources of the Shari'ah, namely the Qur'an, the Sunnah, consensus and analogy. The ayah reads: 'O you who believe, obey God and obey the Messenger, and those of you who are in authority; and if you have a dispute concerning any matter refer it to God and to the Messenger . . .' (al-Nisa', 4:58).

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The word "obey" in this verse has two references: the Quran as the first source and the Prophet's Sunnah, and those of you who are in authority pertains to the Islamic Jurists' consensus. The last portion of the ayah (and if you have a dispute...) validates Ijtihad. For a dispute can only be referred to God and to the Messenger by extending the rulings of the Quran and Sunnah through analogy to similar cases. In this sense one might say that the whole body of

Osul-Al-Fiqh is a commentary on this single Quranic ayah.86 Al-Shatibi further observes that wherever the Quran Provides specific details it is related to the exposition and better understanding of its general principles.87 Most of the legal contents of the Quran consist of general rules, although it contains specific injunctions on a number of topics**.**

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

'Obey God' in this ayah refers to the Qur'an as the first source, 'and obey the Messenger' refers to the Sunnah of the Prophet, 'and those of you who are in authority' authorises the consensus of the ulema. The last portion of the ayah ('and if you have a dispute. . .') validates qiyas. For a dispute can only be referred to God and to the Messenger by extending the rulings of the Qur'an and Sunnah through analogy to similar cases. In this sense one might say that the whole body of usul al-fiqh is a commentary on this single Qur'anic ayah. [Sabuni'Muwafaqat R ٣١ □□□ □ □□□□□□□□ □□□□□□□□□□□ □□ □□□□ □□□□ □□□ □□□□□ □□ □□□ □□□□□□□□ □□ □□□□ □□□□ □□ □□□ □□□□□□!,□□

Sunnah, ^ and ^ Al-Shatibi further observes that wherever the Qur'an provides specific details it is related to the exposition and better understanding of its general principles. [Shatibi, Muwafaqat, m, 217] Most of the legal contents of the Qur'an consist of general rules, although it contains specific injunctions on a number of topics.

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There are numerous examples of this, such as the words salah, zakat, hajj, riba, which occur in the following ayat: "Perform the salah and pay the Zakat".89 "God has enacted upon people the pilgrimage of hajj to be performed by all who are capable of it".90 "God permitted sale and prohibited usury (riba). 91 The brief references of the Quranic verses to salah, Zakat, haij and riba do not shed light on the juridical meanings of these terms. Hence the Prophet (S.A.W.) provided the necessary explanation in the form of both verbal and practical instructions. In this way the text which was initially ambivalent (mujmal) became unequivocal (Mufassar). With regard to salah, for example, the Prophet (S.A.W.) instructed his followers to perform the salah the way you see me performing it.92 And regarding the hajj he ordered them to "take from me the rituals of the hajj".93 And there are also many ahadith which explain the Quranic prohibition of riba in specific and elaborate detail.94

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

There are numerous examples of this, such as the words salah, zakah, hajj, riba, which occur in the following ayat:

Perform the salah and pay the zakah (al-Nahl, 16:44)

God has enacted upon people the pilgrimage of hajj to be performed by all who are capable of it (Al-'Imran, 3:97).

God permitted sale and prohibited usury (riba) (al-Baqarah, 2:275).

The juridical meanings of salah, zakah, hajj and riba could not be known from the brief references that are made to them in these ayat. Hence the Prophet provided the necessary explanation in the form of both verbal and practical instructions. In this way the text which was initially ambivalent (mujmal) became Mufassar. With regard to salah, for example, the Prophet instructed his followers to 'perform the salah the way you see me performing it', and regarding the hajj he ordered them to 'take from me the rituals of the hajj [21' Tabrizi,Mishkat, I, 215, Hadith no. 683; Shatibi,Muwafaqat III, 178; Khallaf, flm, p.167; Badran, , p. 405.]

There are also many ahadith which explain the Qur'anic prohibition of riba in specific and elaborate detail.

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For the abrogation of a Sunnah he thinks it necessary that the Prophet (S.A.W.) should have informed the people specifically, even if it is abrogated by the Quran.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Al-Shafi'i considers it necessary for the abrogation of Sunnah that the Prophet should have informed the people specifically about it. If the Qur'an were to abrogate the Sunnah, while the Prophet …

Rouhani's Ph.D. Thesis, p. 102

An example is when we refer to the Quranic proclamation that "God has permitted sale but prohibited usury"107. This is a general ruling in the sense that sale, that is any sale, is made lawful. But there are certain varieties of sale, which are specifically forbidden by the Sunnah. Consequently, the Amm of this ayah is specified by the Sunnah to the extent that some varieties of sale, such as sale of unripened fruit on a tree, were forbidden and therefore excluded from the scope of this ayah.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

To give another example of the 'Amm which can be clearly seen in its capacity as zanni we refer to the Qur'anic proclamation that 'God has permitted sale but prohibited usury' (al-Baqarah, ٢:٢٧٥). □□□□ □□ □ □□□□□□□□ □□□□□□□ □□ □□□ □□□□□ □□□□ □□□□, □□□□ □□ □□□ □□□□, □□ □□□□ □□□□□□□. □□□ □□□□□ are certain varieties of sale which are specifically forbidden by the Sunnah. Consequently, the 'Amm of this ayah is specified by the Sunnah to the extent that some varieties of sale, such as sale of unripened fruit on a tree, were forbidden and therefore excluded from the scope of this ayah.

Rouhani's Ph.D. Thesis, p. 108

Ijma is defined as the unanimous agreement of the mujlahidun of the Muslim community of any period following the demise of the Prophet Mohammad (S.A.W.) on any matter.130

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Ijma' is defined as the unanimous agreement of the mujtahidun, of the Muslim community of any period following the demise of the Prophet Muhammad on any matter!2'

Rouhani's Ph.D. Thesis, p. 108

In this definition, the reference to the mujtahidun precludes the agreement of laymen from the purview of Ijma.131

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

this definition, the reference to the mujtahidun precludes the agreement of laymen from the purview of ijma'.

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Ijma can only occur after the demise of the Prophet. For during

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his lifetime, the Prophet alone was the highest authority on Shariah, hence the agreement or disagreement of others did not affect the overriding authority of the Prophet. In all probabilities, Ijma occurred for the first time among the Companions in the city of Madinah. Following the demise of the Prophet (S A W.), the Companions used to consult each other over the problems they encountered, and their collective agreement was accepted by the community. After the Companions, this leadership role passed on to the next generation, the Successors (tab'iun) and then to the second generation of Successors. When these latter differed on a point, they naturally referred to the views and practices of the Companions and the Successors.132 In this way, a fertile ground was created for the development of the theory of Ijma.133 The essence of Ijma lies in the natural growth of ideas. It begins with the personal Ijtihad of individual jurists and

culminates in the universal acceptance of a particular opinion over a period of time. Before a consensus is reached, differences of opinion are tolerated. During the process for a consensus, compulsion and imposition of views on the people are ruled out. Ijma plays a crucial role in the development of Shariah.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

It is clear from its definition that ijna' can only occur after the demise of the Prophet. For during his lifetime, the Prophet alone was the highest authority on Shari'ah, hence the agreement or disagreement of others did not affect the overriding authority of the Prophet. In all probability, ijna' occurred for the first time among the Companions in the city of Madinah. Following the demise of the Prophet, the Companions used to consult each other over the problems they encountered, and their collective agreement was accepted by the community. After the Companions, this leadership role passed on to the next generation, the Successors (tabi'un) and then to the second generation of Successors. When these latter differed on a point, they naturally referred to the views and practices of the Companions and the Successors. In this way, a fertile ground was created for the development of the theory of ijna'}-6' Cf' Aghnides,Muhamrmdun Theories, pp. 37-38] The essence of ijna' lies in the natural growth of ideas. It begins with the personal ijtihad of individual jurists and culminates in the universal acceptance of a particular opinion over a period of time. Differences of opinion are tolerated until a consensus emerges, and in the process there is no room for compulsion or the imposition of ideas upon the community.

Ijna' plays a crucial role in the development of Shari'ah.

Rouhani's Ph.D. Thesis, pp. 109-110

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The existing body of fiqh is the product of a long process of Ijtihad and Ijma. Since Ijma reflects the natural evolution and acceptance of ideas in the life of the community, the basic notion of Ijma can never be expected to discontinue. "The idea that Ijma came to a halt after the first three generations

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following the advent of Islam seems to be a by-product of the phenomenon known as the closure of the gate of ljtihad. Since Ijma originates in Ijtihad, with the closure of the gate of ljtihad, it was expected that Ijma also came to a close. This is, however, no more than a superficial equation, as in all probabilities Ijma continued to play a role in consolidating and unifying the law after the supposed termination of Ijtihad".135

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The existing body of fiqh is the product of a long process of ijtihad and ijma'. Since ijna' reflects the natural evolution and acceptance of ideas in the life of the community, the basic notion of ijna' can never be expected to discontinue. The idea that ijna' came to a halt after the first three generations following the advent of Islam seems to be a by¬product of the phenomenon known as the closure of the gate of ijtihad. Since ijna' originates in ijtihad, with the closure of the gate of ijtihad, it was expected that ijna'also came to a close. This is, however, no more than a superficial equation, as in all probability ijna' continued to play a role in consolidating and unifying the law after the supposed termination of ijtihad17 Cf Ahmad Hasan Early Devel°Pnent' p160ff]

Rouhani's Ph.D. Thesis, p. 110

lima warrants the sound Quranic interpretation, the Sunnah's faithful understanding and transmission, and the authorized application of Ijtihad.136 The question as to whether the law, as contained in the divine sources, has been properly interpreted is always open to a measure of uncertainty and doubt, especially in regard to the deduction of new rules by way of analogy and Ijtihad. Only Ijma can put an end to doubt, and when it throws its weight behind a ruling, this becomes decisive and infallible. Ijma provides Islam with a potential for freedom of movement and a capacity for evolution.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Ijma' ensures the correct interpretation of the Qur'an, the faithful understanding and transmission of the Sunnah, and the legitimate use of ijtihad. The question as to whether the law, as contained in the divine sources, has been properly interpreted is always open to a measure of uncertainty and doubt, especially in regard to the deduction of new rules by way of analogy and ijtihad. Only ijma'can put an end to doubt, and when it throws its weight behind a ruling, this becomes decisive and infallible.

Rouhani's Ph.D. Thesis, pp. 110-111

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Ijma is authorized mainly on the basis of a hadilh quoted from the holy Prophet (S A W.). The hadilh reads thus: "My community shall never agree on an error" 137 There are other ahadith[U in support of Ijma including the following: "God will not let my community agree upon an error"139 And:

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"Whoever separates himself from the community and dies, dies the death of before Islam (jahiltyyah)*.140 and; "Those who seek the joy of residing in Paradise will follow the community. For Satan can case an individual but he stands farther away from two people"141

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

the Hadith which is most frequently quoted in support of ijma' reads:

'My community shall never agree on an error/37 Ibn Majalh Sunan' 11 1307 Hadith na 3950 This and a number of other ahadith on i]ma' …

udhayfah and others have reported ahadith which include the following:

١. □□ □□□□□□□□□□ □□□□□□ □□□□□□ □□□□□□ □□□□□ □□ □□□□□□ (□□–□□□□□□□):

٢. God will not let my community agree upon an error:

٣. I beseeched Almighty God not to bring my community to the point of agreeing on dalalah and He granted me this:

٤. Those who seek the joy of residing in Paradise will follow the community. For Satan can chase an individual but he stands farther away from two people.

… 8. Whoever separates himself from the community and dies, dies the death of ignorance

(jahiliyyah):

Rouhani's Ph.D. Thesis, p. 113

It is strange, Iqbal writes, that this important notion rarely assumed the form of a permanent institution. He then suggests that the transfer of the power of Ijtihad from individual representatives of schools to a Muslim legislative assembly is the only possible form of Ijma can take in modern times.147 The Islamic Jurists should have a pivotal role in such an assembly which must, nevertheless, include laymen who normally have keen insight into the affairs. Furthermore Iqbal draws a distinction between the two functions of Ijma as discovering the law and implementing the law. He maintains that the former function is related to the question of facts and the latter relates to the question of law. In the former case, as for instance, when the

question arose whether the two small suvar known as Mu'awwazatain formed part of the Quran or not, and the Companions unanimously decided that they did, we are bound by their decision, obviously because the Companions alone were in a position to know the fact. In the latter case, the question is one of interpretation only, and so one ventures to think that later generations are not bound by the decision of the Companions148.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

'It is strange,' Iqbal writes, that this important notion 'rarely assumed the form of a permanent institution'. He then suggests that the transfer of the power of ijtihad 'from individual representatives of schools to a Muslim legislative assembly [...] is the only possible form ijma' can take in modern times'/80' Iqbal' Reconstructwn pp- 173, 174] In such an assembly, the ulema should play a vital part, but it must also include in its ranks laymen who happen to possess a keen insight into affairs. Furthermore Iqbal draws a distinction between the two functions of ijma', namely:

Discovering the law and implementing the law. The former function is related to the question of facts and the latter relates to the question of law. In the former case, as for instance, when the question arose whether the two small suras known as 'Mu'awwazatain' formed part of the Qur'an or not, and the Companions unanimously decided that they did, we are bound by their decision, obviously because the Companions alone were in a position to know the fact. In the latter case, the question is one of interpretation only, and I venture to think, on the authority of Karkhi, that later generations are not bound by the decisions of the Companions. [8L Iqbal' Reconstructlon' p175

Rouhani's Ph.D. Thesis, pp. 114-115

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Clearly, Iqbal considers Ijma binding in as much as it relates to facts but not when it is based on juridical Ijtihad. This distinction between the factual and juridical Ijma will not apply to the Ijma that Iqbal has proposed: the collective decisions of the legislative assembly will naturally be binding on points of law. Iqbal's proposed reform has been widely supported by other scholars.149 It is a basically sound proposal. But to relate this to the idea of a distinction between the factual and juridical Ijma seems questionable. Apart from the difficulty that might be involved in distinguishing a factual from a juridical Ijma one can expect but little support for the view that the Ijma of the Companions on Ijtihad matters is not binding. Criticism of Iqbal's views has been rife for other reasons.150 The critics blast Iqbal's attempt to turn Ijma into a modern legislative institution. They argue that Ijtihad and Ijma have never been the prerogatives of a political organization, and any attempt to institutionalize Ijma is bound to alter the nature of Ijma and defeat its basic purpose. For Ijtihad is a non-transferable right of every competent

scholar, and a rnujtahid is recognized by the community by virtue of his merits known over a period of time, not through election campaigns or awards of

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official certificates. The process of arriving at Ijma is entirely different from that of legislation in a modern state assembly. Ijma passes through a natural process, which resembles that of the survival of the fittest. No attempt is made in this process to silence the opposition or to defeat the minority opinion. Opposition is tolerated until the truth emerges and prevails. Ijma is a manifestation of the conscience of the community, and it is due mainly to the natural strength of Ijma and the absence of rigid organization that no one is able to lay his hands on Islam. 151

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

It is thus clear that Iqbal retains the binding character of ijma' only insofar as it relates to points of fact, but not with regard to ijma' that is based on juridical ijtihad. This distinction between the factual and juridical ijma' will presumably not apply to the ijma' that Iqbal has proposed: the collective decisions of the legislative assembly will naturally be binding on points of law.

Iqbal's proposed reform has been fairly widely supported by other scholars. It is a basically sound proposal. But to relate this to the idea of a distinction between the factual and ijtihadi ijma' seems questionable. Apart from the difficulty that might be involved in distinguishing a factual from a juridical ijma'one can expect but little support for the view that the ijma' of the Companions on ijtihadi matters is not binding.

Iqbal's views have, however, been criticised on other grounds. S. M. Yusuf has observed that Iqbal was mistaken in trying to convert ijma' into a modern legislative institution. Yusuf argues that ijtihad and ijma' have never been the prerogatives of a political organisation, and any attempt to institutionalise ijma' is bound to alter the nature of ijma' and defeat its basic purpose. For ijtihad is a non-transferable right of every competent scholar, and a mujtahid is recognised by the community by virtue of his merits known over a period of time, not through election campaigns or awards of official certificates. The process of arriving at ijma' is entirely different from that of legislation in a modern state assembly.

Ijma' passes through a natural process which resembles that of the 'survival of the fittest'. No attempt is made in this process to silence the opposition or to defeat the minority opinion. Opposition is tolerated until the truth emerges and prevails. Ijma' is a manifestation of the conscience of the community, and it is due mainly to the natural strength of ijma' and the absence of rigid organisation 'that no one is able to lay his hands on Islam;

Rouhani's Ph.D. Thesis, p. 115

Iqbal's suggested reform is criticized on the dubious supposition that an elected legislative assembly will not represent the community's collective conscience and will be a tool of power politics. Although the cautious advice of this approach may be persuasive, the assumption behind it goes counter to the spirit and theory of Ijma which endows the community with the divine trust of having the capacity and competence to make the right decisions. According to the ahadilh stated earlier, one must trust the community itself to elect only persons who will honour their collective conscience and interest. In addition, such critique of Iqbal merely suggests that nothing should be done to relate Ijma to the realities of contemporary life. The critic is content with the idea of letting Ijma and Ijtihad remain beyond the reach of the individuals and societies of today. On the contrary, the argument for taking a positive approach to Ijma is overwhelming. The gap between the theory and practice of Shariah law has grown to alarming proportions, and any attempt at prolonging it further will have to be exceedingly persuasive. The main issue in institutionalizing is that freedom of opinion should be vouchsafed the participants of Ijma. This is the essence of the challenge, which has to be met through Ijtihad and Ijma.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Dr Yusuf's criticism of Iqbal's proposed reform is based on the dubious assumption that an elected legislative assembly will not reflect the collective conscience of the community and will unavoidably be used as an instrument of power politics. Although the cautious advice of this approach may be persuasive, the assumption behind it goes counter to the spirit of maslahah and of the theory of ijma' which endows the community with the divine trust of having the capacity and competence to make the right decisions. If one is to observe the basic message of the textual authority in support of the 'ismah of the community, then one must trust the community itself to elect only persons who will honour their collective conscience and their maslahah. In addition, Dr Yusuf's critique of Iqbal merely suggests that nothing should he done to relate ijma' to the realities of contemporary life. The critic is content with the idea of letting ijma' and ijtihad remain beyond the reach of the individuals and societies of today. On the contrary, the argument for taking a positive approach to ijma' is overwhelming. The gap between the theory and practice of Shari'ah law has grown to alarming proportions, and any attempt at prolonging it further will have to be exceedingly persuasive. While the taking of every precaution to safeguard the authentic spirit and natural strength of ijma' is fully justified, this should not necessarily mean total inertia. The main issue in institutionalizing ijma', as Shaltut has rightly assessed, is that freedom of opinion should be vouchsafed the participants of ijma'. This is the essence of the challenge which has to be met, not through a laissez-faire attitude toward ijtihad and ijma',

Rouhani's Ph.D. Thesis, p. 116

Ijma has proved itself an outstanding factor in the adaptability of Islam152

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

It has proved itself, at least in the past, an outstanding factor in the adaptability of Islam.'[8' Goldziher> *Introduction*. p52]

Rouhani's Ph.D. Thesis, p. 144

Bara'ah means freedom from obligations until the contrary is proved. No person may, therefore, be compelled to perform any obligation unless the law requires so. For example, no one is required to perform the pilgrimage (hajj) more than once in his lifetime, because the Shariah imposes no such liability. Similarly, no one is liable to punishment until his guilt is established through lawful evidence.252

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

٣) Presumption of original freedom from liability (bara'ah al dhimmah al-asliyyah), which means freedom from obligations until the contrary is proved. No person may, therefore, be compelled to perform any obligation unless the law requires so. For example, no-one is required to perform the hajj pilgrimage more than once in his lifetime, or to perform a sixth salah in one day, because the Shari'ah imposes no such liability. Similarly, no-one is liable to punishment until his guilt is established through lawful evidence [25' Shawkani, Irshad, p. 238; Mahmassani, Falsafah, p. 90.

Rouhani's Ph.D. Thesis, pp. 146-147

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For the Shaft and the Hanbalis, esteshab denotes continuation of that which is proven and the negation of that which had not existed. 258 Esteshab, in other words, presumes the continuation of both the positive and the negative until the contrary is established by evidence. In its positive sense, esteshab requires, for example, that once a contract of sale is concluded, it is presumed to remain in force until there is a change.

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Thus the ownership of the purchaser, and the marital status of the spouses, are presumed to continue until a transfer of ownership, or dissolution of marriage, can be established by evidence. Since both of these contracts are permanently valid under the Shariah and do not admit of any time limits it is reasonable to presume their continuity until there is evidence to the contrary. A mere possibility that the property in question might have been sold, or that the marriage might have been dissolved, is not enough to rebut the presumption of esteshab. 259

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

For the Shafi'is and the Hanbalis, istishab denotes 'continuation of that which is proven and the negation of that which had not existed'. Istishab, in other words, presumes the continuation of both the positive and the negative until the contrary is established by evidence. In its positive sense, istishab requires, for example, that once a contract of sale (or of marriage for that matter), is concluded, it is presumed to remain in force until there is a change. Thus the ownership of the purchaser, and the marital status of the spouses, arc presumed to continue until a transfer of ownership, or dissolution of marriage, can be established by evidence. Since both of these contracts are permanently valid under the Shari'ah and do not admit of any time limits it is reasonable to presume their continuity until there is evidence to the contrary. A mere possibility that the property in question might have been sold, or that the marriage might have been dissolved, is not enough to rebut the presumption of istishabV Ibn al-Qayyim" I'lam, I, 294; Badran, Usui, p. 218; Abu Zahrah, Usui, p. 234.]

Rouhani's Ph.D. Thesis, p. 147

"Esteshab also presumes the continuation of the negative. For example, someone purchases a hunting dog from another one with the proviso that it has been trained to hunt, but then the purchaser claims that the dog is untrained. His claim will be acceptable under esteshab unless there is evidence to the contrary". 260

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Istishab also presumes the continuation of the negative. For example, A purchases a hunting dog from B with the proviso that it has been trained to hunt, but then A claims that the dog is untrained. A's claim will be acceptable under istishab unless there is evidence to the contrary.

Rouhani's Ph.D. Thesis, p. 147

Because eteshab consists of a probability, namely the presumed continuity of the status quo ante, it is not a strong ground for the deduction of the rules of Shariah. Hence when esteshab comes into conflict with another proof, the latter takes priority. When the jurist is asked about the ruling of a particular case, he must first search for a solution in the Quran, the Sunnah and consensus of opinion. If a solution is still wanting, he may resort to esteshab in either its positive or negative capacities. Should there be doubt over the non-existence of something, it will be presumed to exist, but if the doubt is in the proof of something, the presumption will be that it is not proven.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Since istishab consists of a probability, namely the presumed continuity of the status quo ante, it is not a strong ground for the deduction of the rules of Shari'ah. Hence when istishab comes into conflict with another proof, the latter takes priority. As it is, istishab is the last ground offatwa: when the jurist is asked about the ruling of a particular case, he must first search for a solution in the Qur'an, the Sunnah, consensus of opinion, and qiyas. If a solution is still wanting, he may resort to istishab in either its positive or negative capacities. Should there be doubt over the non-existence of something, it will be presumed to exist, but if the doubt is in the proof of something, the presumption will be that it is not proven.

Rouhani's Ph.D. Thesis, pp. 147-148

p. 147

With regard to the determination of the rules of law- that may be applicable to a particular

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issue, the presumption of esteshab is also guided by the general norms of the Shariah. 261

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

With regard to the determination of the rules of law that may be applicable to a particular issue, the presumption of istishab is also guided by the general norms of the Shari'ah.

Rouhani's Ph.D. Thesis, p. 148

"Esteshab is supported by rational (aql) evidences. Reason tells us that in God's order of creation and in popular custom, it is normal to expect that pledges, contracts and laws will probably continue to remain operative until the contrary is established by evidence. It is equally normal to expect that things, which had not existed, will probably remain so until the contrary is proved. When reasonable men (oqala) and men who comply with the accepted norms of society, have known of the existence or non-existence of something ". 262

P**lagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)**

Istishab is supported by both shar'i and rational ('aqli) evidences. Reason tells us that in God's order of creation and in popular custom, it is normal to expect that pledges, contracts and laws will probably continue to remain operative until the contrary is established by evidence. It is equally normal to expect that things which had not existed will probably remain so until the

contrary is proved. When reasonable men ('uqala') and men who comply with the accepted norms of society (ahl al-'urf) have known of the existence or non-existence of something

Rouhani's Ph.D. Thesis, p. 148

From the viewpoint of the nature of the conditions that are presumed to continue, esteshab is divided into three types, as follows: 1) Presumption of original absence (esteshab-e-adam) which means that a fact or rule of law which had not existed in the past is presumed to be non-existent until the contrary is proved. Thus a child and an uneducated person are presumed to remain so until there is a change in their status.263

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

From the viewpoint of the nature of the conditions that are presumed to continue, istishab is divided into four types as follows:

١) Presumption of original absence (istishab al-'adam al-asli), which means that a fact or rule of law which had not existed in the past is presumed to be non-existent until the contrary is proved. Thus a child and an uneducated person are presumed to remain so until there is a change in their status

Rouhani's Ph.D. Thesis, p. 148

٢) □□□□□□□□□□□□ □□ □□□□□□□□□ □□□□□□□□□ (□□□□□□□□□-□-□□□□□□) □□□□□□□□ □□ □□□□□□□□□ □□□□□□

for granted the presence or existence of that which is indicated by the law or reason. For example when the presumption of original presence, the purchaser is presumed liable to pay the purchase price by virtue of the presence of the contract of sale until it is proved that he has paid it. By the same token, a husband is liable to pay his wife the dower (mahr) by virtue of the existence of a valid marriage contract.

In all these instances, esteshab presumes the presence of a liability or a right until an indication to the contrary is found. The Islamic Jurists are in agreement on the validity of this type of esteshab, which must prevail until the contrary is proved. 264

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

٢) Presumption of original presence (istishab al-wujud al-asli). This variety of istishab takes for granted the presence or existence of that which is indicated by the law or reason. For

example, when A is known to be indebted to B, A is presumed such until it is proved that he has paid the debt or was acquitted of it. Provided that B's loan to A is proven in the first place as a fact, this is sufficient to give rise to the presumption of its continuity and B need not prove the continuity of the loan in question every day of the month. Similarly, under the presumption of original presence, the purchaser is presumed liable to pay the purchase price by virtue of the presence of the contract of sale until it is proved that he has paid it. By the same token, a husband is liable to pay his wife the dower (mahr) by virtue of the existence of a valid marriage contract. In all these instances, istishab presumes the presence of a liability or a right until an indication to the contrary is found. The ulema are in agreement on the validity of this type of istishab, which must prevail until the contrary is proved/11 Khallaf' Ilm- p 92]

Rouhani's Ph.D. Thesis, p. 149

As for the three types of esteshab, which relates to the attributes, whether new or well established, it is a subject on which the jurists have disagreed. The Shafii and the Hanbali schools have upheld it absolutely, whereas the Hanafi and Maliki schools accept it with reservations. 265

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

As for the fourth type of istishab, which relates to the attributes, whether new or well-established, it is a subject on which the jurists have disagreed. The Shafi'i and the Hanbali schools have upheld it absolutely, whereas the Hanafi and Maliki schools accept it with reservations.

Rouhani's Ph.D. Thesis, pp. 149-150

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Defined as a principle of evidence, esteshab mainly establishes or rebuts the facts, and for this reason it bears greater relevance to the rules of evidence. The application of esteshab to penalties and to criminal law

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in general is to some extent restricted by the fact that these areas are mainly governed by the definitive rules of Shariah or statutory legislation. The jurists have on the whole advised caution in the application of penalties on the basis of presumptive evidence only. Having said this, however, the principle of the original absence of liability is undoubtedly an important feature of

esteshab which is widely upheld not only in the field of criminal law but also in constitutional law and civil litigations generally. This is perhaps equally true of the principle of baraah, which is an essential component of the principle of legality, also known as the principle of the rule of law. This feature of esteshab is once again in harmony with the modern concept of legality in that permissibility is the norm in areas where the law imposes no prohibition.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Istishab is often described as a principle of evidence, as it is mainly concerned with the establishment or rebuttal of facts, and as such it is of greater relevance to the rules of evidence. The application of istishab to penalties and to criminal law in general is to some extent restricted by the fact that these areas are mainly governed by the definitive rules of Shari'ah or statutory legislation. The jurists have on the whole advised caution in the application of penalties on the basis of presumptive evidence only. Having said this, however, the principle of the original absence of liability is undoubtedly an important feature of istishab which is widely upheld not only in the field of criminal law but also in constitutional law and civil litigations generally. This is perhaps equally true of the principle of ibahah, which is an essential component of the principle of legality, also known as the principle of the rule of law. This feature of istishab is once again in harmony with the modern concept of legality in that permissibility is the norm in areas where the law imposes no prohibition.

Rouhani's Ph.D. Thesis, p. 150

The collective practice of a large number of people is normally denoted by Urf. Thus the habits of a few or even a substantial minority within a group do not constitute "Urf". 267 Urf is defined as recurring practices which are acceptable to people of sound nature. This definition is clear on the point that custom, in order to constitute a valid basis for legal decisions, must be sound and reasonable. Hence recurring practices among some people in which there is no benefit or which partake in prejudice and corruption are excluded from the definition of Urf. 268

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

It is the collective practice of a large number of people that is normally denoted by ' urf. The habits of a few or even a substantial minority

[1. Badran, Usui, p. 224; Ziadeh, ' 'Urf and Law p. 60; Isma'il, Adillah, p. 389.1

within a group do not constitute 'urf. 'Urf is defined as 'recurring practices which are acceptable to people of sound nature.' This definition is clear on the point that custom, in order to constitute a valid basis for legal decisions, must be sound and reasonable. Hence recurring practices among some people in which there is no benefit or which partake in prejudice and

corruption are excluded from the definition of 'urf12 Mahmassani' Falsafah (Ziadeh's trans)- p ١٣٢

Isma il, AMm, p. 388; Badran, Usui, p. 224]

Rouhani's Ph.D. Thesis, p. 151

Surah-Al-Araf which reads thus: "Exercise forgiveness, enjoin "Urf" and bear with the ignorant".269 According to this Surah Urf is clearly upheld in the Quran as a proof of Shariah and an integral part of it.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

… 'urf occurs in sura al-A'raf (7:199), but although this has a direct reference to 'urf, difficulties have been encountered in identifying it as its main authority.

This ayah, to which a reference has already been made, enjoins the Prophet to 'keep to forgiveness, and enjoin 'urf, and turn away from the ignorant'. According to the Maliki jurist Shihab al-Din al-Qarafi, this ayah is explicit and provides a clear authority for 'urf. According to this view 'urf is clearly upheld in the Qur'an as a proof of Shari'ah and an integral part of it.-19 Qarafl Furuq' II' 85; SabuniMadkhaI'p 143; Badrain Usulp 226]

Rouhani's Ph.D. Thesis, pp. 153-154

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"Some other Islamic jurists argue that Urf is not an independent proof in its own right and that it has not played a significant role in the development of the Shariah '.275 However, the reluctance of the Islamic jurists in recognizing Urf as a proof has been partly due to the circumstantial character of the principle, in that it is changeable upon changes of conditions of time and place. This would mean that the rules of fiqh which have at one time been

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formulated in the light of the prevailing custom would be liable to change when the same custom is no longer prevalent. The different fatwas that the later Islamic Jurists of different schools have occasionally given in opposition to those of their predecessors on the same issues are reflective of the change of custom on which the fatwa was founded in the first place. In addition, since custom is basically unstable it is often difficult to ascertain its precise terms.

These terms may not be self-evident, and the frequent absence of written records and documents might add to the difficulty of verification.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The upshot of this whole debate over the authoritativeness of 'urf seems to be that otwithstanding the significant role that it has played in the development of the Shari'ah, it is not an independent proof in its own right. The reluctance of the ulema in recognising 'urf as a proof has been partly due to the circumstantial character of the principle, in that it is changeable upon changes of conditions of time and place. This would mean that the rules offiqh which have at one time been formulated in the light of the prevailing custom would be liable to change when the same custom is no longer prevalent. The differential fatwas that the later ulema of different schools have occasionally given in opposition to those of their predecessors on the same issues are reflective of the change of custom on which the fatwa was founded in the first place. In addition, since custom is basically unstable it is often difficult to ascertain its precise terms. These terms may not be self-evident, and the frequent absence of written records and documents might ass to the difficulty of verification/23' Cf' Badran Usu1, p 233]

Rouhani's Ph.D. Thesis, p. 154

the foqaha are on record as having changed the rulings of the earlier jurists which were based in custom (Urf) owing to subsequent changes in the custom itself.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The fuqaha of the later ages (muta'akhkhirun) are on record as having changed the rulings of the earlier jurists which were based in custom owing to subsequent changes in the custom itself.

Rouhani's Ph.D. Thesis, pp. 154-155

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The Islamic jurists have generally accepted Urf. though reluctantly, as a valid Quranic commentators have referred to Urf in determining the precise amount of maintenance that a husband must provide for his wife. This is the subject of sura Al-Talaq276 which provides: "Let those who possess the means pay according to their

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means". In this ayah, the Quran does not specify the exact amount of maintenance, which is to be determined by reference to custom. Similarly, in regard to the maintenance of children, the Quran only specifies that this is the duty of the father, but leaves the quantum of maintenance to be determined by reference to custom (Al-Baqarah).277 "The Shariah has, in principle, accredited approved custom as a valid ground in the determination of its rules relating to halal and haram. This is in turn reflected in the practice of the foqaha, who have adopted Urf, whether general or specific, as a valid criterion in the determination of the ahkam of Shariah". 278 The rules of fiqh which are based in juristic opinion (ra'y) or in speculative analogy and Ijtihad have often been formulated in the light of prevailing custom; it is therefore permissible to depart from them if the custom on which they were founded changes in the course of time. The rules of fiqh (Ijtihad) are, for the most part, changeable with changes of time and circumstance. To deny social change due to recognition in the determination of the rules of fiqh would amount to exposing the people to hardship, which the Shariah forbids. Sometimes even the same mujtahid has changed his previous Ijtihad with a view to bringing it into harmony with the prevailing custom. It is well-known, for example, that Imam Al- Shafii laid the foundations of his school in Iraq, but that when he went to Egypt, he changed some of his earlier views owing to the different customs he encountered in Egyptian society.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The ulema have generally accepted 'urf as a valid criterion for purposes of interpreting the Qur'an. To give an example, the Qur'anic commentators have referred to 'urf in determining the precise amount of maintenance that a husband must provide for his wife. This is the subject of sura al-Talaq (65:7) which provides: 'Let those who possess means pay according to their means.' In this ayah, the Qur'an does not specify the exact amount of maintenance, which is to be determined by reference to custom. Similarly, in regard to the maintenance of children, the Qur'an only specifies that this is the duty of the father, but leaves the quantum of maintenance to be determined by reference to custom (bi'l-ma'ruf) (al-Baqarah, 2:233). The Shari'ah has, in principle, accredited approved custom as a valid ground in the determination of its rules relating to halal and haram. This is in turn reflected in the practice of the fuqaha', who have adopted 'urf, whether general or specific, as a valid criterion in the determination of the ahkam of Shari'ah/6 Sabuni'Madkha1,p 138; Ismail Ad>llah,p. 403] The rules offiqh which are based in juristic opinion (ra'y) or in speculative analogy and ijtihad have often been formulated in the light of prevailing custom; it is therefore, permissible to depart from them if the custom on which they were founded changes in the course of time. The ijtihad rules offiqh are, for the most part, changeable with changes of time and circumstance. To deny social change due recognition in the determination of the rules offiqh would amount to exposing the people to hardship, which the Shari'ah forbids. Sometimes even the same mujtahid has changed his previous ijtihad with a view to bringing it into harmony with the prevailing custom. It is well -known, for example, that Imam al- Shafii laid the foundations of his school in Iraq, but that when he went to Egypt, he changed some of his earlier views owing to the different customs he encountered in Egyptian society/7 Abu Zahrah' Usul' p 217' Aghnides, Muhammedan Theories, p. 82.]

Rouhani's Ph.D. Thesis, p. 155

On the whole, the Islamic jurists have accepted Urf as a valid basis of Ijtihad . 279

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

the jurists have on the whole accepted *'urf* not only as a valid basis of *ijtihad* but also as the key indicator of the need for legal reform

Rouhani's Ph.D. Thesis, p. 156

Conclusion

Four types of flexibility have been identified in the Shariah. Firstly, the primary source of the Islamic law (the Quran) is, in itself, flexible on the basis of the analysis that the Quranic legislation leaves room for flexibility in the evaluation of its injunctions. The Quran is not specific on the precise value of its injunctions, and it leaves open the possibility that a command in the Quran may sometimes imply an obligation, a recommendation or a mere permissibility.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

This style of Qur'anic legislation, and the fact that it leaves room for flexibility in the evaluation of its injunctions, is once again in harmony with the timeless validity of its laws. The Qur'an is not specific on the precise value of its injunctions, and it leaves open the possibility that a command in the Qur'an may sometimes imply an obligation, a recommendation or a mere permissibility.

Rouhani's Ph.D. Thesis, p. 156

Commands and prohibitions in the Quran are expressed in a variety of forms, which are often open to interpretation and Ijtihad. The question as to whether a particular injunction in the Quran amounts to a binding command or to a mere recommendation or even permissibility cannot always be determined from the words and sentences of its text.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

As a characteristic feature of Qur'anic legislation, it may be stated here that commands and prohibitions in the Qur'an are expressed in a variety of forms which are often open to interpretation and ijtihad. The question as to whether a particular injunction in the Qur'an

amounts to a binding command or to a mere recommendation or even permissibility cannot always be determined from the words and sentences of its text.

Rouhani's Ph.D. Thesis, p. 157

For example, as the most part of the Sunnah has been narrate and transmitted in the form of solitary or Wahed and only a small portion of the Sunnah has been transmitted in the form of Mutawatir,

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The entire text of the Qur'an has come down to us through continuous testimony (tawatur) whereas the Sunnah has in the most part been narrated and transmitted in the form of solitary, or Ahad, reports. Only a small portion of the Sunnah has been transmitted in the form of Mutawatir.

Rouhani's Ph.D. Thesis, p. 158

Endnote 5

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The latter is perhaps closer to "interpretation", whereas tafsir literally means "explanation". "Allegorical interpretation" is an acceptable equivalent of ta'wil. Tafsir basically aims at explaining the meaning of a given text and deducing a hukm from it within the confines of its words and sentences. The explanation so provided is, in other words, borne out by the content and linguistic composition of the text. Ta'wil, on the other hand, goes beyond the literal meaning of words and sentences and reads into them a hidden meaning which is often based on speculative reasoning and Ijtihad. The norm in regard to words is that they impart their obvious meaning. Ta'wil is a departure from this norm, and is presumed to be absent unless there is reason to justify its application. Ta'wil may operate in various capacities, such as specifying the general, or qualifying the absolute terms of a given text. All words are presumed to convey their absolute, general, and unqualified meanings unless there is reason to warrant a departure to an alternative meaning. Juridically, Ta'wil and Tafsir share the same basic purpose, which is to clarify the law and to discover the intention of the Lawgiver in the light of the indications, some of which may be definite and others more speculative. Both are primarily concerned with speech that is not self-evident and requires clarification." (Allameh Tabatabaii, Tafsir-Al-Mizan, Vol.5, PP. 64-65)

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

there are two common words for 'interpretation', namely tafsir and ta'wil. The latter is perhaps closer to 'interpretation', whereas tafsir literally means 'explanation'. The English equivalents of these terms do not convey the same difference between them which is indicated in their Arabic usage. 'Allegorical interpretation' is an acceptable equivalent of ta'wil, but I prefer the original Arabic to its English equivalent. I propose therefore to explain the difference between tafsir and ta'wil and then to use 'ta'wil' as it is.

Tafsir basically aims at explaining the meaning of a given text and deducing a hukm from it within the confines of its words and sentences. [2' Badran' Bayan p 124 ff] The explanation so provided is, in other words, borne out by the content and linguistic composition of the text.

Ta'wil, on the other hand, goes beyond the literal meaning of words and sentences and reads into them a hidden meaning which is often based on speculative reasoning and Ijtihad. The norm in regard to words is that they impart their obvious meaning. Ta'wil is a departure from this norm, and is presumed to be absent unless there is reason to justify its application/3' Khallaf> 'Ilm• pp 167-68] Ta'wil may operate in various capacities, such as specifying the general, or qualifying the absolute terms of a given text. All words are presumed to convey their absolute, general, and unqualified meanings unless there is reason to warrant a departure to an alternative meaning.

From a juridical perspective, ta'wil and tafsir share the same basic purpose, which is to clarify the law and to discover the intention of the Lawgiver in the light of the indications, some of which may be definite and others more remote. Both are primarily concerned with speech that is not self-evident and requires clarification.

Chapter 3

Rouhani's Ph.D. Thesis, p. 199

Conclusion

The divine revelation guides the Prophet (S a w.) and that is the basis of all his utterances. In other words, the Prophet's rulings are based on Divine revelation and not on Ijtihad The majority of Islamic Jurists have, however, held that the Prophet (S A W.) in fact practiced Ijtihad just as he was allowed to do so, such as temporal and military affairs The Prophet (S A W) often resorted to reasoning by way of analogy and Ijtihad, and did not postpone all matters until the reception of divine revelation.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

This ayah is quite categorical on the point that the Prophet is guided by divine revelation and that all his utterances are to be seen in this light. This would mean that all the rulings of the Prophet consist of divine revelation and that none would occur in the form of ijtihad.[55 Shawkani Irshad- p. 255]

The majority of ulema have, however, held that the Prophet in fact practiced ijtihad just as he was allowed to do so. … Besides, the Prophet often resorted to reasoning by way of analogy and ijtihad, and did not postpone all matters until the reception of divine revelation [56. Shawkani, Irshad p. 256; Zuhayr, Usui, IV, 227.]

Chapter 5

Rouhani's Ph.D. Thesis, p. 288

After realizing the Maslaha and failing to find an explicit ruling in the Quran and Sunnah (or nusus), the Mujtahid has to take the required steps to come up with it. This is justified by saying that God's purpose in revealing the Shariah is to promote man's welfare and to prevent corruption in the world. This is, as Shatebi points out, the purport of the Quranic a'yah in Sura Al-Anbiya10 where the purpose of the prophethood of Muhammad (S. A. w.) is described in the following terms: "We have not sent you but as a mercy for all creatures". In another passage, the Quran describes itself, saying: "O mankind, a direction has come to you from your Lord, a healing for the ailments in your hearts".11 The message here transcends all barriers that divide humanity; none must stand in the way of seeking mercy and beneficence for human beings. Elsewhere, God describes His purpose in the relevation of religion, saying that it is not within His intentions to make religion a means of imposing hardship.12 This is confirmed elsewhere in Sura Al-Ma'idah13 where we read, in more general terms, that "God never intends to impose hardship upon people".14 These are some of the Quranic objectives which grasp the essence of Maslaha; they are permanent in character and would be frustrated if they were to be subjected to the kind of restrictions that the opponents of Maslaha have proposed. Several ahadith (pi. of hadilh) have been quoted by the Islamic Jurists to allow acting upon Maslaha, but none is a clear nass on issue. Particular attention is given, in this context, to the hadilh which provides that "No harm shall be inflicted or reciprocated in Islam".15

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

When the maslahah is identified and the mujtahid does not find an explicit ruling in the nusus, he must act in its pursuit by taking the necessary steps to secure it. This is justified by

saying that God's purpose in revealing the Shari'ah is to promote man's welfare and to prevent corruption in the earth. This is, as al-Shatibi points out, the purport of the Qur'anic ayah in Sura al-Anbiya' (21:107) where the purpose of the Prophethood of Muhammad is described in the following terms: `We have not sent you but as a mercy for all creatures.' In another passage, the Qur'an describes itself, saying: `O mankind, a direction has come to you from your Lord, a healing for the ailments in your hearts [...]' (Yunus, 10:75). The message here transcends all barriers that divide humanity; none must stand in the way of seeking mercy and beneficence for human beings. Elsewhere, God describes His purpose in the revelation of religion, saying that it is not within His intentions to make religion a means of imposing hardship (al-Hajj, ٢٢:٧٨). □□□□ □□ □□□□□□□□□□ □□□□□□□□□□ □□ □□□□ □□–□□□□□□□□ (٥:٦) □□□□□ □□ □□□□, □□ □□□□ □□□□□□□□ terms, that `God never intends to impose hardship upon people.'[8. Cf. Shatibi, Muwafaqat, II, ٣□ □□□□□□□□ □□□□, □□□□□□□□□, □. ٢٥.] □□□□□ □□□ □□□□ □□ □□□ □□□□□□□□ □□□□□□□□□□ □□□□□ □□□□□ □□□ essence of maslahah; they are permanent in character and would be frustrated if they were to be subjected to the kind of restrictions that the opponents of maslahah have proposed. … The ulema have quoted a number of ahadith which authorise acting upon maslahah, although none is in the nature of a clear nass on the subject. Particular attention is given, in this context, to the Hadith which provides that `No harm shall be inflicted or reciprocated to Islam'.[9. Ibn Majah, Sunan, Hadith no 2340.]

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The substance of this hadith is upheld in a number of other ahadith, and it is argued that this hadith encompasses the essence of Maslaha in all of its varieties.16 Al-Tufi (d. 716 A .H .), has gone so far as to maintain that this hadith provides a decisive nass on istislah. Aiesheh said that "the Prophet (S A W.) only chose the easier of two alternatives, so long as it did not amount to a sin".17 According to another hadith, the Prophet (S.A.W.) is reported to have said that "Muslims are bound by their stipulations unless it be a condition which turns a haram into halal or a i o halal into a haram" 18 Thus the Muslims are given freedom to insure their benefits, on condition that they abide by the Shariah. In yet another hadith, the Prophet (S A W.) is quoted to have said: "God loves to see that His concessions (rukhsah) are observed, just as He loves to see that His strict laws (azimah) are obeyed".19 This would confirm the doctrine that no unnecessary rigour in the enforcement of the ahkam is recommended, and that the Muslims should avail themselves of the flexibility and concessions that the Lawgiver has granted them and utilise them in pursuit of their Maslaha.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The substance of this Hadith is upheld in a number of other ahadith, and it is argued that this Hadith encompasses the essence of maslahah in all of its varieties.[10. Khallaf, `Ilm, p.90; Abu Zahrah, Usul, p. 222.] Najm al- Din al-Tufi, a Hanbali jurist (d. 716 A.H.), has gone so far as to maintain, as we shall further elaborate, that this Hadith provides a decisive nass on

istislah. The widow of the Prophet, A'ishah, is reported to have said that "the Prophet only chose the easier of two alternatives, so long as it did not amount to a sin'.[11. Muslim, Sahih Muslim, p.412, Hadith no. 1546.] According to another Hadith, the prophet is reported to have said that 'Muslims are bound by their stipulations unless it be a condition which turns a haram into halal or a halal into a haram.' [12. Abu Dawud, Sunan (Hasan's trans.), III, 1020, Hadith no 3587.]

This would seem to be granting Muslims the liberty to pursue their benefits and to commit themselves to that effect provided that this does not amount to a violation of the explicit commands and prohibitions of the Shari'ah. In yet another Hadith, the Prophet is quoted to have said: 'God loves to see that His concessions (rukhas) are observed, just as He loves to see that His strict laws (aza'im) are observed.' [13. Ibn al-Qayyim, I'lam, II, 242; Mustafa Zayd, Maslahah, p. 120.] 'this would confirm the doctrine that no unnecessary rigour in the enforcement of the ahkam is recommended, and that the Muslims should avail themselves of the flexibility and concessions that the Lawgiver has granted them and utilise them in pursuit of their masalih.

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The Polemics over Maslaha

Contrary to most jurists, who reject the use of istislah when a textual ruling exists, Najm Al-Din Al-Tufi, a celebrated jurist, allows the use of Maslaha irrespective of the presence or absence of nass. In a treatise entitled Maslaha which is a commentary on the hadith that "no harm shall be inflicted or reciprocated in Islam", Al-Tufi argues that this hadith provides a clear nass in favour of Maslaha. It enshrines the first and most important principle of Shariah and enables Maslaha to take precedence over all other considerations. Al-Tufi precludes devotional matters, and

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Al-Tufi's View of Maslahah Mursalah Whereas the majority of jurists do not allow recourse to istislah in the presence of a textual ruling, a prominent Hanbali jurist, Najm al-Din al-Tufi, stands out for his view which authorises recourse to maslahah with or without the existence of nass. In a treatise entitled al-Masalih al-Mursalah, which is a commentary on the Hadith that `no harm shall be inflicted or reciprocated in Islam', al-Tufi argues that this Hadith provides a clear nass in favour of maslahah. It enshrines the first and most important principle of Shari'ah and enables maslahah to take precedence over all other considerations. Al-Tufi precludes devotional matters, and

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specific injunctions such as the prescribed penalties, from the scope of Maslaha. In regard to these matters, the law can only be established by the nass and Ijma. If the nass and Ijma endorse one another on ibadat (worship), the proof is decisive and must be followed. Should there be a conflict of authority between the nass and Ijma, but it is possible to reconcile them without interfering with the integrity of either, this should be done. But if this is not possible, then Ijma should take priority over other indications. 28

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

specific injunctions such as the prescribed penalties, from the scope of maslahah. In regard to these matters, the law can only be established by the nass and ijma`. If the nass and ijma' endorse one another on `ibadat, the proof is decisive and must be followed. Should there be a conflict of authority between the nass and ijma', but it is possible to reconcile them without interfering with the integrity of either, this should be done. But if this is not possible, then ijma` should take priority over other indications.[33. Tufi, Masalih, p.139.]

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As for transactions and temporal affairs {Al-Muamalat and Al- Siyasiyyat), Al-Tufi maintains that if the text and other proofs of Shariah happen to conform to the Maslaha of the people in a particular case, they should be applied forthwith, but if they oppose it, then Maslaha should take precedence over them. The conflict is really not between the nass and Maslaha, but between one nass and another, the latter being the hadith of "la-zarar wa la-zararfi Al-Is/am ",29 One must therefore not fail to act upon that text which materialises the Maslaha. This process would amount to restricting the application of one nass by reason of another nass and not to a suspension or abrogation thereof, it is a process of specification and explanation, just as the Sunnah is sometimes given preference over the Quran by way of clarifying the text of the Quran. 30 AT-Tufi, moreover, notes that in transactions and state affairs, Maslaha serves as the goal while other proofs constitute the means.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

As for transactions and temporal affairs (ahkam al-mu'amalat wa al-siyasiyyat al-dunyawiyyah), al-Tufi maintains that if the text and other proofs of Shari'ah happen to conform to the maslahah of the people in a particular case, they should be applied forthwith, but if they oppose it, then maslahah should take precedence over them. The conflict is really not between the nass and maslahah, but between one nass and another, the latter being the Hadith of la darar wa la dirar fi'l-Islam.[34. Tufi, Masalih, p. 141; Mustafa Zayd, Maslahah, pp. 238-240. This book is entirely devoted to an exposition of Tufi's doctrine of Maslahah.] One must therefore not fail to act upon that text which materialises the maslahah. This process would amount to

restricting the application of one nass by reason of another nass and not a suspension or abrogation thereof. It is a process of specification (takhsis) and explanation (bayan), just as the Sunnah is sometimes given preference over the Qur'an by way of clarifying the text of the Qur'an.[35. Cf. Mustafa Zayd, Maslahah, p. 121; Abu Zahrah, Usul, p. 223. A discussion of Tufi's doctrine can also be found in Kerr, Islamic Reform, p. 97ff.] In the areas of transactions and governmental affairs, al-Tufi adds, maslahah constitutes the goal whereas the other proofs are like the means;

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The goal must be prioritized over the means. The rules of Shariah on these matters have been enacted in order to secure the Maslaha of the people, and therefore when there is a conflict between a Maslaha and nass, the hadith "la zarar wa la zarar" clearly dictates that the former must take priority. 31

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

the end must take precedence over the means. The rules of Shari'ah on these matters have been enacted in order to secure the masalih of the people, and therefore when there is a conflict between a maslahah and nass, the Hadith la darar wa la dirar clearly dictates that the former must take priority.[36. Tufi, Masalih, p.141; Mustafa Zayd, Maslahah, p. 131-132.]

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Types of Maslaha

The masalih (PI. of Maslaha) in general are divided into three types, namely, the "essential" (zaruriiah), the "complementary" (ha'jiiah), and the "embellishment" (tahsiniiah). The Shariah in all of its parts aims at the realisation of one or the other of these masalih. The "essential" masalih are the groundworks for the people's lives. Disregard for them leads to complete disruption and chaos. The five essential values namely religion, life, intellect, offspring, and property - comprise the "essential" masalih. These must not only be promoted but also protected against any real or

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unexpected threat, which undermines their safety.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Types of Maslahah

The masalih in general are divided into three types, namely, the 'essentials' (daruriyyat), the 'complementary' (hajiyyat), and the `embellishments' (tahsiniyyat). The Shari'ah in all of its parts aims at the realisation of one or the other of these masalih. The `essential' masalih are those on which the lives of people depend, and whose neglect leads to total disruption and chaos. They consist of the five essential values (al-daruriyyat al-khamsah) namely religion, life, intellect, lineage and property. These must not only be promoted but also protected against any real or unexpected threat which undermines their safety.

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Altogether, the hajiiah supplement the five basic values and point to interests whose disregard brings about hardship, not collapse, for the community. Thus in the area of ibadat the concessions that the Shariah has granted to the sick and to the traveler, permitting them not to observe the fast, and to shorten the salah (prayers), are aimed at preventing hardship. Similarly, the basic permissibility regarding the enjoyment of victuals and hunting is complementary to the main objectives of protecting life and intellect.40

The "embellishment" (tahsiniiah) denotes interests whose realisation lead to improvement and the attainment of that which is desirable. Thus the observance of cleanliness in personal appearance and ibadat, moral virtues, avoiding extravagance in consumption and moderation in the enforcement of penalties fall within the scope of tahsiniiah 41

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The hajiyyat are on the whole supplementary to the five essential values, and refer to interests whose neglect leads to hardship in the life of the community although not to its collapse. Thus in the area of a 'ibadat the concessions (rukhas) that the Shari`ah has granted to the sick and to the traveler, permitting them not to observe the fast, and to shorten the salah, are aimed at preventing hardship. Similarly, the basic permissibility ('ibadah) regarding the enjoyment of victuals and hunting is complementary to the main objectives of protecting life and intellect. [21. Shatibi, Muwafaqat, II, 5; Mustafa Zayd, Maslahah, pp.54-55.]

The `embellishments' (tahsiniyyat, also known as karahiyyah) denote interests whose realisation lead to improvement and the attainment of that which is desirable. Thus the observance of cleanliness in personal appearance and 'ibadat, moral virtues, avoiding extravagance in consumption, and moderation in the enforcement of penalties fall within the scope of tahsiniyyat.

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Maslaha is further classed in three groups based on availability or textual authority advocating it. First, the Maslaha explicitly propounded by the lawgiver and enforced through the enactment of a law. This is called Maslaha Al-Muiabarah, or accredited Maslaha, such as protecting life by enacting the law of retaliation (Qisas), or defending the right of ownership by penalising the thief, or protecting the dignity and honour of the individual by penalising adultery and false accusation. The Lawgiver has, in other words, upheld that each of these offenses constitutes a proper ground for the punishment in question. The validity of Maslaha in these cases is definitive and no longer open to debate. The Islamic Jurists are in agreement that promoting and protecting such values constitutes a proper A1 ground for legislation.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

From the viewpoint of the availability or otherwise of a textual authority in its favour, maslahah is farther divided into three types. First, there is maslahah which the Lawgiver has expressly upheld and enacted a law for its realisation. This is called al-maslahah al-mu'tabarah, or accredited maslahah, such as protecting life by enacting the law of retaliation (qisas), or defending the right of ownership by penalising the thief, or protecting the dignity and honour of the individual by penalising adultery and false accusation. The Lawgiver has, in other words, upheld that each of these offences constitute a proper ground (wasf munasib) for the punishment in question. The validity of maslahah in these cases is definitive and no longer open to debate. The ulema are in agreement that promoting and protecting such values constitutes a proper ground for legislation.

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But the masalih that have been validated after the divine revelation came to an end fall under the second class, namely the Maslaha mursalah. Although this too consists of a proper attribute to justify the necessary legislation, but since the Lawgiver has neither upheld nor nullified it, it constitutes Maslaha of the second rank.43

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

But the masalih that have been validated after the divine revelation came to an end fall under the second class, namely the maslahah mursalah. Although this too consists of a proper attribute (wasf munasib) to justify the necessary legislation, but since the Lawgiver has neither upheld nor nullified it, it constitutes maslahah of the second rank.

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The third variety of Maslaha is the discredited Maslaha, or mulghah, which the Lawgiver has nullified either explicitly or by an indication that could be found in the Shariah. The Islamic Jurists are in agreement that legislation in the pursuance of such interests is invalid and no judicial decree may be issued in their favour.44

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The third variety of maslahah is the discredited maslahah, or maslahah mulgha, which the Lawgiver has nullified either explicitly or by an indication that could be found in the Shari'ah. The ulema are in agreement that legislation in the pursuance of such interests is invalid and no judicial decree may be issued in their favour.

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Despite their different approaches to Maslaha, the leading Islamic Jurists of the Islamic schools are in agreement, in principle, that all genuine Maslahci which do not conflict with the objectives of the Lawgiver must be upheld.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Conclusion

Despite their different approaches to maslahah, the leading ulema of the four Sunni schools are in agreement, in principle, that all genuine masalih which do not conflict with the objectives (maqasid) of the Lawgiver must be upheld.

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The changing conditions of life never cease to generate new interests. If legislation were to be confined to the values, which the

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Lawgiver has expressly decreed, the Shariah would inevitably fall short of meeting the Maslaha of the community. To close the door of Maslaha would be tantamount to enforcing stagnation and unnecessary restriction on the capacity of the Shariah to accommodate social

change. As for the concern that the opponents of Maslaha have expressed that validating this doctrine would enable arbitrary and self-seeking interests to find their way under to banner of Maslaha, they only need to observance of the conditions that are attached to Maslaha will ensure that only the genuine interests of the people which are in harmony with the objectives of the Shariah would qualify.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The changing conditions of life never cease to generate new interests. If legislation were to be confined to the values which the Lawgiver has expressly decreed, the Shari'ah would inevitably fall short of meeting the masalih of the community. To close the door of maslahah would be tantamount to enforcing stagnation and unnecessary restriction on the capacity of the Shari'ah to accommodate social change. … As for the concern that the opponents of maslahah mursalah have expressed that validating this doctrine would enable arbitrary and self-seeking interests to find their way under the banner of maslahah, they only need to be reminded that a careful observance of the conditions that are attached to maslahah will ensure that only the genuine interests of the people which are in harmony with the objectives of the Shari'ah would qualify.

Chapter 6

Rouhani's Ph.D. Thesis, p. 392

Firstly, the primary source of the Islamic law (the Quran) is. in itself, flexible in that the Quranic verses specific to positive legislation, leave room for interpretation in the evaluation of its injunctions. The Quran is clearly elastic on the precise value of its injunctions. It allows for possibility that a command in the Quran may sometimes imply an obligation, a recommendation or mere permissibility.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

This style of Qur'anic legislation, and the fact that it leaves room for flexibility in the evaluation of its injunctions, is once again in harmony with the timeless validity of its laws. The Qur'an is not specific on the precise value of its injunctions, and it leaves open the possibility that a command in the Qur'an may sometimes imply an obligation, a recommendation or a mere permissibility.

Rouhani's Ph.D. Thesis, p. 394

For example, as the bulk of the corpus to the Sunnah has been narrated and transmitted in the form of solitary or Wahed traditions and only a small portion of the Sunnah has been transmitted in the form of Mutawaiir

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

the Sunnah has in the most part been narrated and transmitted in the form of solitary, or Ahad, reports. Only a small portion of the Sunnah has been transmitted in the form of Mutawatir.

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This concept can play an outstanding role in the adaptation of Islamic law to the changing needs of the society.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Istihsan is an important branch of ijtihad, and has played a prominent role in the adaptation of Islamic law to the changing needs of society.

Rouhani's Ph.D. Thesis, p. 398

Despite their different approaches to Maslaha, the leading of Islamic jurists are in agreement, in principle, that all genuine Maslaha or questions of public expediency which do not conflict with the objectives of the Lawgiver, must be upheld.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

Conclusion

Despite their different approaches to maslahah, the leading ulema of the four Sunni schools are in agreement, in principle, that all genuine masalih which do not conflict with the objectives (maqasid) of the Lawgiver must be upheld.

Rouhani's Ph.D. Thesis, p. 398

The evolution of human life never ceases to generate new interests. If legislation were to be confined to the values which the Lawgiver has expressly decreed, the Shariah would inevitably fall short of meeting the utilitarian needs of community. To close the door of Maslaha, would be

tantamount to encouraging stagnation and enforcing unnecessary restrictions on the capacity of the Shariah to accommodate social change. As for the concern that the opponents of Maslaha have expressed:

As for the concern that the opponents of Maslaha have expressed: namely that empowering this doctrine would enable arbitrary and self - interested points of view to emerge from under the umbrella of Maslaha, they need only be reminded that a careful observance of the conditions that are attached to Maslaha, will ensure that only the genuine interests of the general public which are in harmony with the objectives of the Shariah, are the objectives at issue.

Plagiarized from Kamali (1991, *Principles of Islamic Jurisprudence*)

The changing conditions of life never cease to generate new interests. If legislation were to be confined to the values which the Lawgiver has expressly decreed, the Shari'ah would inevitably fall short of meeting the masalih of the community. To close the door of maslahah would be tantamount to enforcing stagnation and unnecessary restriction on the capacity of the Shari'ah to accommodate social change. 'Abd al-Wahhab Khallaf is right in his assessment that any claim to the effect that the nusus of the Shari'ah are all-inclusive and cater for all eventualities is simply not true. The same author goes on to say: 'There is no doubt that some of the masalih have neither been upheld nor indicated by the Shari'ah in specific terms.'-58. Khallaf' Ilm'p 88]

As for the concern that the opponents of maslahah mursalah have expressed that validating this doctrine would enable arbitrary and self-seeking interests to find their way under the banner of maslahah, they only need to be reminded that a careful observance of the conditions that are attached to maslahah will ensure that only the genuine interests of the people which are in harmony with the objectives of the Shari'ah would qualify.

Plagiarism of Rouhani's Ph.D. Thesis from Salehi

pp. 304-325 (i.e. approximately 5000 words) of Rouhani's Ph.D. Thesis word by word have been Plagiarized from the following paper of Seyyed Abbas Salehi:

صالحی، سید عباس (۱۳۶۷) «مکتب و مصلحت [۱]»، مجله‌ی حوزه، شمارهی ۲۸

Such is the plagiarism report:

Rouhani's PhD Thesis, p. 304

Maslaha in the Prophet (SAW) and Caliphs era :

The era of the Prophet (S.A.W.) and caliphs are shared in some points:

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socio-political system; 3) the stability of government; during this period the government did not transform into a monarchy. Although, there were also serious differences in these two periods, such as changes in the social system and leadership system; however, altogether, these two periods can be observed as a homogeneous society. Many attempts in this era have been implemented in terms of "Maslaha".

عصر نبوت و خلافت:

دوره نبوت و خلافت خلفای راشدین در نکاتی مشترکند:

۱.التزام نسبی جامعه دینی به مکتب

۲.بساطت نظام سیاسی اجتماعی

۳.تبدیل نشدن حکومت به ملوکیت و پادشاهی

و....

گر چه تفاوتهای جدی نیز دراین دو دوره وجود داشته اند: نظام اجتماعی تغییراتی یافته است و نظام رهبری

دگرگونیهائی را در خویش پذیرفته است اما در مجموع ببیننده خارجی این دو دوره را با صورت واحد می بیند

و نکات مشترک یاد شده حجاب رویت مفترقاتند....

دراین بخش محورهائی ازاعمال واحکام و تغییرات که به اعتبار مصلحت انجام یافته اند ...

Rouhani's PhD Thesis, p. 305

Using the human experiences:

In the first half of the first century in Islamic history, there was a great enthusiasm in acquiring experiences and techniques. Although, these contacts were not extensive. In the beginning of the Islamic civilization, there was not a great opportunity for using the experiences; enmities and suspicions constrained the room for acquiring the sciences from non- Muslim nations; however, partly this productivity is observed. In the era of the Prophet (S.A.W.), which is considered the beginning of the Islamic civilization, these communications were established in the lowest possible level. The policy of enmity, which was pursued by the pagans (Mush- rekin), slowed the speed of the communications; but at the same time, there were examples of the Prophet (S A W.), which showed encouragement in acquiring human experiences.

۲استفاده از تجارب بشری

در نیم قرن اول تاریخ اسلامی دراخذ تجارب و فنون استقبال جدی مشاهده می شد. گر چه این تماسها وسیع و گسترده نبود دوره تکوین و گسترش حوزه تمدن اسلامی مجال وسعت استفاده از تجارب را نمی داد. عداوتها و سوءظن ها زمینه اخذ علوم بشری رااز ملل و فرق غیرمسلمان محدود می ساختند اما در حدود ممکن نمونه های این بهره وری رویت می شوند. در عصر پیامبر[ص] که دوره تکوین تمدن اسلامی محسوب می گردد این ارتباطات در حداقل ممکن انجام می یافت. سیاست عداوت که از ناحیه مشرکان واهل کتاب تعقیب می شد مجال ارتباطات را کند می ساخت اما دراین اوضاع و شرایط از پیامبر[ص] نمونه هائی رویت می شوند که نشانه تشویق و ترغیب دراخذ تجارب بشری را نشان می دهند.

Of these, we can indicate using the moat methods which was the common method in Iranian's defense system, and using the expertise of

Salman Farsi in Ahzab war. In Ta'ef war, for breaching the castle,

catapults (ballistas) were used. Salman told the Prophet (S A W.) that "in my opinion, we should use catapults for attacking the castles which serve as refuges We. in the Pars territory (Iran) mounted the catapults on top of the castles and used them; if catapults were not used, surrounding the castles would last long"; then the Prophet (S.A. w.) used this method.51 The

دراین میان می توان به استفاده از شیوه خندق که روش معمول در سیستم دفاع ایران ساسانی بود اشارت داشت و نیز به اشارت تخصصی سلمان فارسی در جنگ طائف که برای گشودن قلعه از منجنیق سود جویند. وی اظهار داشت:

]یا رسول الله اری ان تنصب المنجنیق علی حصنهم فاناکنا بارض فارس فنصب المنجنیقات علی الحصون... وان لم یکن المنجنیق طال الثواء] ۱

پیامبر عقیده ام بر آن است که : بر قلعه های که در آن پناه گرفته اند از منجیق استفاده کنیم. ما در سرزمین فارس منجنیق بر قلعه ها نصب می کردیم و بکار می گرفتیم...اگراز منجنیق استفاده نشود اقامت گرد قلعه به درازا می انجامید.

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other example is to allow the Jews of Khaibar to remain in their lands: the Prophet (S.A.W.) after the war of Khaibar, envisaged the emigration of Jews, and intended that the policy of exile to be executed in their case; but the Jews of Khaibar said that: "We have knowledge and expertise in managing and maintaining palms, thus keep us in this land".52 The Prophet (S.A.W.) who considered their view right, agreed that they remain in their lands and signed a treaty with them so that the Islamic society could use the expertise and knowledge of this group.

نمونه دیگر را درابقای یهودیان خیبر دراراضی شان می توان دید: پیامبر[ص] پس از جنگ خیبر به کوچ یهودیان نظر داشت و قصد آن نمود که : سیاست تبعید یهودیان را که در حق یهود بنی نضیر و بنی قینقاع اعمال کرد در حق آنان نیز ملزم ندارد اما یهودیان خیبر اظهار داشتند:

]ان لنا بالعماره والقیام علی النخل علما فاقرنا] ۲

ما در عمران و حفظ نخلستانها آگاهی و تخصص داریم پس ما را در این سرزمین نگاه دارید.

پیامبر[ص] که دراین نکته نظر آنان را به صلاح دید به ابقای آنان نظر دارد و با آنان معاهده بست واز تخصص واطلاع این گروه جامعه اسلامی را بی بهره نساخت.

These instances are not plenty in the era of the Prophet (S.A.W.) The weakness of the government and repeated enmities did not bring about a fertile ground for acquiring experiences and techniques; but in the period of the development of Islamic civilization, productivity increased. For example, we can refer to the problem of financial administration: in the beginning of the Islamic government, the limitation of income resources was too high, so that there was no need to regulate financial affairs. The Prophet (S.A.W.) distributed rapidly the limited incomes and there was no difficulty in distribution; but the development of the scope of Islamic civilization and growing incomes made this method impossible. In the period of second caliph the experience of Iranians through an Iranian frontiersman whose name is "Hormozan" according to Mawardi was used for formulating a financial administration.54 Using Persian language in the

این گونه موارد در عصر پیامبر[ص] فراوان نیستند. ضعف حکومت و عداوتهای مکرر زمینه اخذ سالم تجارب و فنون را چندان ممکن نمی ساخت اما در دوره گسترش تمدن اسلامی زمینه های بهره وری فراهم آمد.

به عنوان نمونه به ترتیب دیوان مالی می توان اشارت داشت : درابتدای حکومت اسلامی اوضاع جذب درآمد و منابع آن چندان نابسمان و غیر مستمر بود که نیازی به تنظیم امور مالی نبود. پیامبر[ص] درآمدهای منقطع و محدود را به سرعت تقسیم می کرد و در توزیع دشواریی نداشت اما گسترش حوزه تمدن اسلامی وازدیاد درآمد این شیوه را غیر ممکن ساخت. در عصر خلیفه دوم ... ضرورت تنظیم و ترتیب دیوان مالی به اشاره مرزبانی ایرانی انجام یافت ۳. ماوردی در احکام السلطانیه نام وی را[هرمزان] مرزبان اهواز معرفی می کند ۴. استفاده از زبان فارسی در

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financial administration until the period of Hajjaj which is the period of transformation of the above mentioned administration into Arabic,55 shows

that, the administrators of financial order in Islamic state have used the experiences of Iranian civilization and made them the basis of affairs.

Also, we can mention the regulation of taxes in the domain of Islamic civilization. Although, in this field, the serious developments occurred, but these developments took place on the cornerstone of existing regional civilizations. On this issue Spiuler says: "In practice, both in Egypt and Iraq, all kinds of tribute and other taxes which were common in Byzantium and ancient Iran, including forced labor and in older times particularly included obligation to naval services, were kept during the long periods, because maintaining an orderly financial administration

without using the existing authorities and files was impossible."56

دیوان مالی تا عصر حجاج ۵ که دوران تبدیل دیوان مذکور به زبان عربی است نشان می دهد که ... ترتیب دهندگان نظام مالی تمدن اسلامی از تجارتب تمدن ساسانی سود جسته اند و آن را اساس کار قرار داده اند. همچنین از تنظیم و تنسیق مالیاتها در حوزه تمدن اسلامی می توان یاد کرد. گر چه در زمینه مذکور تحولات جدی رخ داد امااین تغییرات بر سنگ بنای تمدنهای رائج و موجود منطقه ای انجام یافت. بی تردید از صحت نسبی ادعای ذیل از[اشپیولر] نمی توان اغماض کرد:

]در عمل هم در مصر و هم در بین النهرین انواع خراجها و سایر عوارض که در بیزانس و ایران قدیم متداول بود واز جمله شامل کاراجباری و درادوار قدیمی تر مخصوصا شامل الزام به خدمات دریائی بود طی ادوار طولانی همچنان محفوظ و معمول ماند زیرا که نگهداری از یک دستگاه منظم مالی بدون استفاده از مقامات و پرونده های موجود غیر ممکن بود]. ۶

These events and similar instances show that in acquiring the human experiences and techniques, Muslim administrators in the era of the Prophet (S A W.) and Caliphate tried hard. The observance of expediency (Maslaha) of Islamic Ummci, called them up for learning these experiences and techniques; even in some cases, the non-Muslim advisors were employed. Belazari in his book, titled Ansab-AI-

Ashraf cites the letter of the second caliph to the governor of Syria: "Send us a Roman for undertaking the tribute and heritage affairs.57

این وقایع و نمونه های مشابه نشان می دهد که : دراخذ تجارب و فنون بشری کارگزاران مسلمان در عصر نبوت و خلافت بی تلاش نبوده اند. رعایت مصلحت امت اسلامی آنان را به این اخذ و تعلم فرا می خوانده است حتی در پاره ای از موارد استفاده از مستشاران غیرمسلمان انجام می یافته است. بلا ذری در[انساب الاشراف] از نامه خلیفه دوم به کارگزار شام نقل می کند:

]یک تن رومی را پیش ما بفرست که برای ما حساب رسی امور خراج و میراث را عهده دار باشد]. ۷

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Sources of Budget

Despite that Islamic state was not very extensive in the first half of the first century and was not forced to meet special requirements of a great body of personnel but the improvement of the economic situation of the society required sources for income. In these cases, the element of Maslaha was remarkable. On the amount of the governmental taxes, a serious variety was observed; its basis was the different expediencies of time and place. For example, we mention two cases of making taxes:

منابع تامین بودجه

با آن که دولت اسلامی در نیم قرن اول عریض و طویل نبود و نیازمندیهای ویژه تامین پرسنل وسیع را نداشت اما بهبوداوضاع اقتصادی جامعه به منابع تامین درآمد نیازمند بود. ... دراین موارد عنصر [مصلحت] قابل رویت است. در میزان و مقدار مالیاتهای حکومت تنوعی جدی دیده می شود که اساس آن را مصالح مختلف زمانی و مکانی ساخته و پرداخته اند.

برای نمونه به سه مورداز جعل مالیاتها نظر می افکنیم:

(1) - **Land-tax (kharaj)**

With the development of conquests, the problem of conquered territories was among the matters that the Islamic government should decjde about them. The

Prophet (S.A.W.) had distributed lands and instituted sharing among Muslims in several cases. After the war of Khaibar, the Prophet (S.A.W.) divided the lands of region in 36 shares and allocated 18 shares as source of income for general problems of the Islamic society and distributed the rest among Muslims; each 100 persons received a sharer8 or after the war with Bani Nazir, the Prophet (S A W.) divided their lands between immigrants and two persons of"Ansar"59; but,

خراج

با توسعه فتوحات مساله اراضی مفتوحه جزءاموری بود که حکومت اسلامی بایستی درارتباط با آن تصمیم می گرفت. پیامبر[ص] در مواردی به تقسیم اراضی و یا جعل سهام بین مسلمانان پرداخته بود. پس از جنگ خیبر پیامبر[ص] اراضی آن منطقه را به ۳۶ سهم تقسیم کرد و ۱۸ سهم آن را به عنوان منبع در آمد برای مسائل عمومی جامعه اسلامی قرار داد و سهم باقی را بین مسلمانان تقسیم کرد هر صد نفر یک سهم ۲۶ یا پس از جنگ با بنی نضیر پیامبر[ص] اراضی آنان را بین مهاجرین و دو نفرازانصار تقسیم کرد ۲۷اما

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in the period of second caliph and the extension of government and territories he rejected the proposal of dividing the conquered territories. Despite the expectation of mujahedin (participants in the wars); he explained his theory as such: "Land-tax should be laid down in the conquered territories and their habitants should pay "Jeziah" (poll-tax)60 so that all the Muslims, warriors and their children can benefit of them". The second caliph for making his view rational, says: "within these frontiers, there should be individuals to protect them. These cities and great regions (Syria, Jazirah, Kufa, Basra, Egypt) should be protected by soldiers, and they should receive salaries. If these lands were distributed, how should their expenditures be earned".61

در عصر خلیفه دوم و بسط حکومت و قلمرو وی با پیشنهاد تقسیم اراضی مفتوحه به شدت مخالفت. با آن که مجاهدان و شرکت کنندگان در جنگها به شدت درانتظار تقسیم بودند اما وی نظریه خویش را چنین تبیین می کند

]در قرآن اراضی مفتوحه خراج وضع شود و ساکنان آن جزیه بپرازدند... و جمیع مسلمانان – جنگاوران و

فرزندان آنان و آیندگان – از آن بهره ببرند....[

خلیفه دوم در تعلیل نظر خویش ابراز می کند:

]دراین مرزها بایستی کسانی باشند که حفاظت از آن را بر عهده گیرند.این شهرها و مناطق بزرگ (شام جزیره کوفه بصره مصر و...) باید با لشگریان حفاظت شود و به آنان باید شهریه و عطیه ای تعلق گیرد.اگراین اراضی تقسیم شود مخارج آنان از چه راهی تحصیل شود].۲۸

In this way, social Maslaha prevents the land distribution and by keeping the lands in the hands of indigenous habitants and receiving tributes, makes them a special source of income.

Environmental and regional differences influenced the amount of land-tax. For example, Mogheira-ibn Shubah, the agent of second caliph in Kufa, exempted the palms from tribute.

بدینگونه مصلحت اجتماعی زمان از تقسیم اراضی ممانعت می کند و باابقاء آن دراختیار ساکنان محلی و جعل خراج آن را به عنوان منبع ویژه درآمد در می آورد. در مقدار و میزان خراج نیز تفاوتهای محیط و منطقه تاثیر داشته اند. به عنوان نمونه : مغیره بن شعبه عامل خلیفه دوم در کوفه نخلستانها رااز خراج معاف داشت ۳۰.

Othman ibn Honaif, the agent of second caliph in Iraqi territories laid down such a kharaj: "for every acre of grape, 10 derhams, for every acre of date, 8 derhams, for every acre of sugar cane, 6 derhams, for every acre of wheat, 4 derhams and for every acre of barley 2 derhams" ,63 Belazari cites that "Ali ordered his agent in Iraq: The territories

عثمان به حنیف عامل خلیفه دوم براراضی عراق چنین خراج وضع کرد:

]بر هر جریب انگور ده درهم در هر جریب خرما هشت درهم. در هر جریب نیشکر شش درهم. در هر جریب گندم چهار درهم. در هر جریب جو دو درهم]. ۳۲

بلاذری نقل می کند که : حضرت علی(ع) به عامل خود در عراق دستور داد:[اراضی

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which are irrigated by Euphrates, for every acre of land whose harvest is good and excellent, 1.5 derhams, and for every acre of wheat which has a mediocre harvest, 1 derham, and for every acre whose harvest is lower than mediocre, 1/3 of derham, and for the lands planted with barley, the half of what is determined for that of wheat, and for every acre of palm, 10 derhams, and for every acre of grape garden which has entered its fourth year and yielded products, 10 derhams was to be determined. The palms (in the form of individual tree and not a garden), vegetables, beans and cotton should be exempted from kharaj".

که از فرات مشروب می گردند بر هر جریب زمین محل کشت گندم که محصولش خوب و عالی باشد یک در هم و نیم و یک صاع و بر هر جریب گندم که محصول متوسطی داشته باشد یک در هم و بر هر جریبی که محصول پایین تراز متوسط داشته باشد یک سوم در هم و براراضی محل کشت جو نصف آنچه براراضی کشت گندم مقرر شد و بر هر جریب نخلستان ده درهم و بر هر جریب باغ انگور که وارد چهار سال شده و به محصول نشسته باشد ده درهم خراج تعیین کند. درختان نخل (به شکل تک درخت و نه نخلستان) و سبزیجات و حبوبات و پنبه از خراج معاف است]. ۳۳

In this way, the clear and serious changes are observed in determining the amount and limit of tribute. The major factor in these changes and differences has been the temporal and regional Maslaha and the general requirements of the government which by their interaction have determined the amount and limit of kharaj.

بدینگونه تغییرات روشن و جدی در تعیین مقدار و محدوده خراج رویت می شوند.

عامل اساسی این تغییرات و تفاوتها مصلحت منطقه ای زمانی و نیازهای عمومی حکومت بوده اند که با تاثیر و تاثر در یکدیگر مقدار و محدوده آنرا تعیین می کرده اند.

(2) - Alms-tax (*Zakat*)

The properties which are placed under the regulation of *Zakat* are not confined to certain cases and therefore, the Prophet (S A W.) ordered to collect 1/10 as " *Zakat* " for honey;65 but in this very case (Zakat of honey), it is observed that in the period of the second caliph, a governor writes to the Caliph that: the owners of

honey, refuse to pay what they were paying in the lime of the Prophet (S.A.W.). The Caliph responded "if they paid

زکات

... اموالی که مورد تعلق زکات قرار می گیرند در موارد نه گانه محصور نیستند.... پیامبر[ص] در مورد عسل ۱۰,۱ به عنوان زکات می گرفتند ۳۶اما در همین مورد (زکات عسل) مشاهده می شود که در عصر خلیفه دوم والی خلیفه به وی می نویسد که : صاحبان عسل از پرداخت آنچه در زمان پیامبر[ص] انجام می دادند دریغ دارند. خلیفه در پاسخ نوشت:

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the same amount that they were paying to the Prophet (S.A.W.), protect the deserts in which they put their beehives; and if they didn't pay that amount don't do this"66. In this way, the second Caliph conditions services of the Islamic government by paying honey tax.

ان ادواالیک ما کانوا یودونه الی النبی فاحسم لهم اودیتهم وان لم یودواالیک ماکانوا یودونه الی النبی فلاتحسم لهم. ۳۵

اگر مشابه آنچه به پیامبر[ص] پرداخت می کردند ادا کنند از بیابانهائی که در آن کندوی عسل می نهند حفاظت کن واگر آن میزان را پرداخت نکردند این کار را نکن.

بدینگونه خلیفه دوم پرداخت مالیات عسل را در مقابل ارائه خدمات دولت اسلامی قرار می دهد.

In the case of the "Zakat of horse"67, it is cited from the Prophet (S.A.W.) that "I forgave the Zakat of horse". But, in the period of Imam Ali, he collected Zakat for horses.68 This variety in regulations refers to the Maslaha. Imam Sadeq69 says about the Zakat of rice: "Madina, in the time of the Prophet (S.A.W.) had no lands for planting rice, therefore there was no rule about it; however, at the present the Zakat of rice is obligatory because the major part of the Iraqi kharaj and Zakat is provided from it. 70

در مورد زکات اسب از پیامبر[ص] نقل شده است:

قد عفوت عن الخیل والرقیق... ۳۶

زکات اسب و برده را عفو کردم.

مشاهده می شود که در دوران حضرت علی[ع] نقل شده است که : وی از اسبان زکات اخذ می کرد ۳۷.

این تنوع در قانون را به مصالح رائج بازگردانده اند. ...

امام باقر[ع] راجع به زکات برنج نظر مثبت می دهند و می گویند:

ان المدینه لم تکن یومئذارض ارزفیقال فیه ولکنه قدجعل فیه و کیف لایکون فیه و عامه خراج العراق منه ۳۸.

مدینه، در هنگام حضور پیامبر (ص) ، زمین کشت برنج نداشت، تا در آن زمان، در این مورد قانونی اظهار شود

ولکن زکات در برنج هست. چگونه چنین نباشد با آن که عمده خراج و مالیات عراق ، از آن تأمین می‌شود.

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Organization change

In the first half of the first century, changes were observed in the organizational and administrative framework:

تغییر تشکیلات و تحول سازمانها

در نیم قرن اول تنوع و تحول در بافت تشکیلاتی واداری دیده می شود.

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powers. They had the right to appoint agents within their jurisdiction, without referring to the central government. They could act as a judge and execute legal punishments. They undertook receiving and collecting taxes. These extensive powers imply a kind of federal government

.۱**اختیارات والیان** : فرمانداران ایالات و ولایات گاه بااختیارات وسیع منصوب می شدند. آنان حق انتخاب کارگزاران در محدوده امارت خویش بدون مراجعه به حکومت مرکزی را داشتند.از منصب قضاوت واجرای حدود و مجازاتهای قانونی بهره مند بودند ... اخذ و جمع مالیاتها را عهده دار بودند و...این وسعت اختیارات نوعی حکومت فدرال را تداعی می کند

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in which the central government intervenes with little powers in the affairs of provinces. For instance, we can refer to the existing and valid document to "Malek Ashtar" who was appointed by Imam Ali as the governor of Egypt and was given extensive powers.71 In this document we find that Imam Ali has given to Malek responsibilities such as: commanding military and police forces of that region, appointing the judges, selecting governmental agents, preparing and collecting taxes.. ,72

که حکومت مرکزی بااختیاراتی اندک درامور ولایات دخالت می کند ...

به عنوان نمونه می توان به سند موجود و معتبر عهدنامه مالک اشتر اشاره داشت. که امام وی را با چنین دامنه وسیع اختیارات والی مصر گردانیدند. دراین عهدنامه می بینیم که :امام مسوولیتهائی چون : فرماندهی نیروهای نظامی وانتظامی منطقه انتخاب قضات گزینش کارگزاران حکومتی تهیه و جمع مالیات اقامه نماز جماعت و... را بر عهده مالک اشتر نهاده اند.

Also, from the letter of second caliph to Abu Obeideh Jarrah, the governor of Syria and that of Abu Mousa-Al-Ashari, the governor of Kufa, we infer that: Caliph has considered the two as responsible for appointing judges in their respective jurisdictions 73

But, in some cases, it is observed that the central government intervenes directly in regional problems. For example, second caliph appointed Abdollah ibn Masoud as the judge of Kufa,74 Othman ibn Honaif as responsible for measuring the lands of Iraq and collecting taxes of that region,75 and Shoraih as the judge of kufa.76

These changes arose from necessities and expediencies (masalih) which intervened in decision - making. For example: the executive power of Malek and the long distance of Egypt and other factors were probably among factors that Imam Ali envisaged when appointing the governor with extraordinary powers.

همچنین از نامه خلیفه دوم به ابوعبیده جراح والی منطقه شامات وابوموسی اشعری والی کوفه استفاده می شود که : خلیفه آن دو را مسوول انتخاب قضات در محدوده ایالتی شان دانسته است. ۴۱

در مواردی مشاهده می شود که حکومت مرکزی درامر مسائل منطقه ای مداخله مستقیم می کند.

به عنوان نمونه : خلیفه دوم عبدالله بن مسعود ۴۲ را به عنوان قاضی کوفه عثمان بن حنیف را برای مساحی اراضی عراق و نیز مسوول جمع مالیات آن دیار ۴۳ و یا شریح قاضی را به مسند قضاوت کوفه ۴۴ بر می گزیند. این تنوع و تغییر از ضرورتها و مصالحی بر می خاست که در تصمیم گیری دخالت داشت.

به عنوان نمونه : قدرت اجرائی مالک و بعد مسافت منطقه مصر و عوامل دیگر احتمالااز عللی بودند که امام علی[ع] به انتخاب والی بااختیارات فوق العاده نظر دادند.

2- **Establishing new institutions**: The evolution of Islamic state required the Maslaha of establishing new institutions, including:

۲.تاسیس موسسات جدید: تکامل دولت اسلامی ضرورت و یا مصلحت تاسیس نهادهای نوین رااقتضا داشت.از آن جمله :

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establishing of police institutions which were responsible for the security of cities. In the era of the Prophet (S A W.) except in fighting camps or when Madina was under the siege of enemy, protecting Muslims were not observed, but after the increase in the population of Madina, the idea of "night-patrol" appeared in the era of the first caliph. It is cited that " Abdollah ibn Masoud was appointed to patrol the streets and alleys of Madina every night. In the era of second caliph, there are also stories about night-patrol.77

به ایجاد نهادهای انتظامی و مسوول امنیت شهرها می توان اشاره داشت. در عصر پیامبر[ص] جز درارودوهای جنگی و یا شرایطی که مدینه در محاصره دشمن بود (جنگ خندق) حفاظت و یا حراست از مسلمانان و یا شهر روایت نشده است. با رشد جمعیت مدینه اندیشه[گشت شب] در عصر خلافت ابوبکر شکل می گیرد. نقل شده است که : عبدالله بن مسعود مامور بود که شبها در خیابانها و کویهای مدینه پاسداری کند. در دوران خلافت خلیفه دوم نیز از گشت شبانه خلیفه دوم ... حکایاتی در دست است ۴۵.

In the era of Imam Ali the institution of the security of city was improved and found a more complete form and constabulary organization 78 was formed, and Imam Ali appointed someone to be responsible for it. It seems that this institution was not confined to the center of government (kufa), but had been developed in the other Islamic cities, at least major cities. In the letter of Imam Ali to Malek Ashtar, we read: "hold a session for your guardians and police, so that they will report whatever happened without any fear". In this way, the security of city and government found a separate and independent organization and the creation of this institution has been nothing except the requirement of Maslaha and resulted necessities. In the document of Imam Ali to Malek Ashtar, other new units and institutions are also observed that were created on the basis of the Maslaha of Islamic society in those days. Units such as: officers who supervised the acts of agents, governmental correspondence, advisors of the governors etc.

نهادامنیت شهر در عصرامام علی[ع] به شکل متکامل آن ترقی می یابد و سازمان شرطه (شهربانی) شکل می گیرد ۴۶ وامام مسوولی را برای آن تعیین می کند.

به نظر می رسد که این نهاد مختصص به مرکز حکومت[کوفه] نبوده بلکه در دیگر شهرهای اسلامی لااقل شهرهای عمده بسط یافته است. در فرمان امام علی[ع] به مالک اشتر می خوانیم:

]برای نگهبانان و شرطه های خود نشستی بگذار تا بی هراس آنچه می گذرد باز گویند.[

بدینگونه امنیت شهر و حکومت سازمان مجزا و مستقل پیدا می کند و پیدایش این نهاد جزاقتضای مصالح و ضرورتهای حاصله نبوده است.

مرور به عهدنامه امام به مالک اشتر از واحدها و نهادهای نوین دیگر ما را نیز مطلع می کند که براساس

مصلحت جامعه آن روزاسلامی پدید آمده بودند. واحدهائی چون : مامورین نظارت براعمال کارگزاران رسائل و مکاتبات حکومت مشاوران والی و...

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۳- **Evolution of old units and institutions**: with extension of Islamic civilization in the first half century, the familiar and old institutions of society dramatically changed. For example, we can refer to the evolution of "prison" in the first half century of the era of the Prophet (S.A.W.) and Caliphs. Despite that "detention" {hobs) is mentioned as one of the punishments in the Quran, but in the era of the Prophet (S.A.W.), there was no special place for criminals. What is cited in that era is temporary detention.

۳.**تکامل واحدها و نهادهای قدیم** : با بسط تمدن اسلامی در نیم قرن اول واحدهای آشنا و کهن جامعه تحول جدی یافتند به عنوان نمونه می توان به تحول[زندان] در نیم قرن اول عصر نبوت و خلافت اشاره داشت. با آن که[حبس] به عنوان یکی از مجازاتهای در قرآن ذکر شده است و جامعه عربی با مفهوم آن بیگانه نبودی اما در عصر پیامبر[ص] از مکان خاص به عنوان جایگاه مجرمین خبر نیست. آنچه در آن دوره نقل شده حبسهای شخصی است که حق دار همراه مدیون باشد تااو نگریزد.

In some cases, a particular house as a temporary prison had been selected by the Prophet (S A W.). For example, the men of Bani-Quraizeh, from the time of imprisonment until the execution of verdict, were detained in a house of Bani-Najjar tribe upon the order of the Prophet (S A W.).79 Also, the prisoners of war of Badr were divided among Muslims and were detained.80

در مواردی نیز خانه خاص به عنوان حبس موقت توسط پیامبر[ص] انتخاب می شد. به عنوان نمونه مردان بنی قریظه از موقع اسارت تا موقع اجرای حکم به دستور حضرت پیامبر[ص] در خانه ای از قبیله بنی نجار محبوس بودند. ۴۹ همچنین اسرای جنگ بدر در میان مسلمانان تقسیم شدند و محبوس گشتند. ۵۰

All of these cases show that in the era of the Prophet (S.A.W.), there was no particular place as "prison", although, the imprisonment as a punishment existed. With the extension of Islamic regions and growing urban population and consequently the emergence of professional criminals, the idea of selecting particular places for detaining the criminals was borne. It is cited that: In Mecca, second caliph, bought the house of Safvan ibn Omayyeh at the price of 4000 derharns and allocated it for detainees.81 Of course, some historians ascribe the building of the first prison to the era of the government of Imam Ali who built two prisons

تمام این موارد به اضافه تصریح مورخان نشان می دهد که در دوره پیامبر[ص] مکان خاص به نام[زندان] رویت نمی شود. هر چنداصل [حبس] به عنوان مجازات مطرح بوده است. با گسترش مناطق اسلامی و افزایش جمعیت شهری و بالتبع مجرمان حرفه ای اندیشه انتخاب اماکن خاص برای حبس مجرمان پدید آید. نقل شده است که : در مکه خلیفه دوم خانه صفوان بن امیه را به چهار هزار درهم خریداری کرد و آن را برای حبس مجرمان اختصاص داد ۵۱.

البته بسیاری از مورخان ساخت اولین زندان را به دوران حکومت امام علی[ع] منتسب می دارند که دو زندان

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known as "Nafea'" and "Mokhayyes" in Kufa. These evidences show that the institution of "prison" has found a more complete form in the period of government of Imam Ali; so that Imam Ali has been known as the founder of this institution.82 Therefore, it is clear that the establishment or evolution of social institutions, have depended directly on the social necessities and expediencies (masalih),

[ناقع] و[مخیس] را در کوفه بنا نهاد. ۵۲این تصریحات نشان می دهد که نهاد[زندان] در دوره حکومت امام علی[ع] شکل تکامل یافته تری داشته است بگونه ای که امام را موسس این نهاد دانسته اند. بااین مقدمات روشن می شود که چگونه تاسیس و یا تکامل نهادهای اجتماعی بستگی مستقیم به ضرورتها و مصالح اجتماعی داشته ...

Enmities and Treaties

In the first half of the first century, peace and war were the main problems of Islamic society. Here, also Maslaha was a determining factor:

1. Decisiveness and moderation; attention to the Maslaha element caused that variety was created in dealing with problems For example: the tough decision of the Prophet (S.A.W.) about the Jews of Bani-Quraizeh is comparable with his soft approach to the pagans of Mecca, after its conquest. Leaders and aristocrats of Quraish even benefited from Zakat. In the period of extension of Islam, similar differences are also seen, for example, the soft approach of second caliph in response to the people of Beit-Al-Muqaddas who asked him to travel to their city for signing the peace treaty; the second caliph, despite all the difficulties of the journey, accepted their request and went from Madina to 83 Beit-Al-Muqaddas and signed the peace treaty with them.

2- War regulations; battles are subject to regulations, but

مخاصمات و معاهدات

در نیم قرن آغازین صدراسلام جنگ و صلح مساله اصلی داخلی و خارجی جامعه اسلامی بودند. دراین مقدمه نیز مصلحت عنصر تعیین کننده بود. ...

۱.قاطعیت و ملایمت : توجه به عنصر[مصلحت] موجب می شد که تنوع در برخورد پدید آید. به عنوان نمونه : روش پی گیر و شدید پیامبر[ص] با یهودیان بنی قریظه با روش نرم خویانه حضرت[ص] با مشرکان مکه پس از فتح قابل مقایسه نیست. رهبران واشراف قریش حتی از بهره های ویژه ای چون سهم مولفه قلوبهم بهره مند گردیدند. در دوره بسط فتوحات نیز مشابه این گونه تفاوتها را می بینیم به عنوان نمونه : برخورد ملایم خلیفه دوم را در پاسخ مردم بیت المقدس بنگرید که در مقابل تقاضای آنان که از وی خواسته بودند برای قرارداد صلح خلیفه به آن سامان سفر کند خلیفه دوم با تمامی دشواریهای سفر آن را پذیرفت واز مدینه به بیت المقدس شنافت و قرارداد صلح را با وی تنظیم کردند. ۵۳

۲.مقررات جنگ : نبردها تابع مقرراتند اما

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expediencies (masalih) and necessities overshadow particular regulations. The Prophet (S A W.) in the war of Bani-Nazir ordered cutting and setting to fire the trees around the castle.84 Also, in the war of Taef in which Thaqeaf tribe was deployed in the natural fortification of castle and by shooting killed Muslims, the Prophet (S.A.W.) said: "for every Muslim cut five trees". By this method, the natural fortification of the pagans of Taef was removed.85 The order of the Prophet (S A W.) for cutting trees was a temporary order and out of the Maslaha, because the Prophet (S A W.) has prohibited cutting trees in normal and unnecessary circumstances.

مصلحتها و ضرورتها مقررات خاص را نیز تحت الشعاع قرار می دهند. پیامبر[ص] در غزوه بنی نضیر دستور قطع و آتش زدن درختان اطراف قلعه را داد. ۵۴ همچنین در جنگ طائف که قبیله ثقیف در حصار طبیعی قلعه بودند و با تیراندازی مسلمانان رااز پائی می انداختند پیامبر(ص) فرمودند: هر مسلمان پنج درخت را قطع کند. بااین روش حصار طبیعی مشرکان طائف از بین رفت. ۵۵

دستور پیامبر مبنی بر قطع درختان طائف یک دستور موقتی و بخاطر مصلحت بود زیرا پیامبر[ص] در شرائط طبیعی و غیرضرور از قطع درختان منع فرموده است

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acceleration and delaying the state of peace and war. For example: after surrounding Antakiiah and giving up of its people and signing the peace treaty, habitants of the city rebelled after the commander of Muslim forces left, Abu Obeideh Jarrah. Ibn Khaldoun says: "Abu Obeideh sent Ayyaz ibn Ghanam and Habib ibn Muslemah for entering the city and its people were forced to sign the peace treaty under the previous conditions. Antakiiah was a famous city in the view of Muslims".8 In this way, repeated rebellion of habitants did not overshadow the idea of peaceful approach, and the peace treaty was signed under the previous conditions. The cause of this lenience is seen in the speech of Ibn Khaldoun: The situation of "Antakiiah" in Byzantium Empire was such that it was not compatible with severity and harshness. Seizure of the city and holding it

۳.زمان جنگ و صلح : شرایط و مصالح در تسریع و یا تاخیر حالت جنگ یا صلح تاثیری اساسی داشتند. به عنوان نمونه : پس از محاصره شهر انطاکیه و تسلیم مردم آن و عقد پیمان صلح اهالی شهر پس از عزیمت فرمانده نیروهای مسلمان ابوعبیده جراح شورش کردند.ابن خلدون نقل می کند:

]ابوعبیده عیاض بن غنم و جیب من مسلمه را بر سر آنان فرستاد. آنان شهر را گشودند و با همان قرار نخستین صلح کردند.انطاکیه در نظر مسلمانان شهر پرآوازه بود]. ۵۷

بدینگونه شورش مجدد ساکنان شهر اندیشه برخورد صلح جویانه را تحت الشعاع قرار نداد و با همان شرایط پیشین صلح منعقد شد.این تسامح احتمالا ناظر به تعلیلی است که در ذیل کلام ابن خلدون شاهد آن هستیم : موقعیت شهر[انطاکیه] درامپراطوری بیزانس چندان بود که با سخت گیری و شدت سازگار نبود. تصرف شهر واختیار داشتن آن

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had a special importance that the peace treaty ensured. The above mentioned approach is comparable with the kind of confrontation with rebellions in some places like the cities of Khurasan; in some of these go cities, after signing the peace treaty, some rebellions took place.

برای مسلمانان اهمیت ویژه ای داشت که معاهده صلح تضمین کننده آن بود.

برخورد یاد شده را با نوع مقابله با شورشهای نقاطی مانند شهرهای خراسان مقایسه کنید در پاره ای از آن شهرها پس ازانعقاد پیمان صلح شورشهائی به وقوع پیوست.

4. Terms of treaties; formulation of peace treaties were varied. General conditions, strength and weakness of Muslims and the power of the adversary were the major factors, which determined the content of treaty. For example, the peace of Hudabiieh, despite its future interests had a humiliating appearance. Specially its fifth clause was such: those from Quraish who become Muslim and come to the Prophet (S.A.W.), he is obliged to return them, but if people from Madina took refuge in Quraish on tribe, Quraish and habitants of Mecca had not such an obligation. This article of treaty was implemented on the same day of signing the treaty. Because Soheil-ibn-Omar, the son of the representative of pagans, who

converted to Islam, took refuge to Muslims; but under the treaty, he was returned to the pagans.

۴.شرایط معاهدات : تنظیم پیمان نامه صلح یکسان نبودند. شرائط عمومی قوت و یا ضعف مسلمانان و نیز قدرت طرف مقابل و...اهرمهای اصلی تعیین مفاد قراردادها بودند. به عنوان نمونه : صلح حدیبیه علیرغم منافع آتی آن ظاهری تحقیر کننده داشت.

بویژه بند پنج آن قرار چنین بود: کسانی که از قریش مسلمان شوند و پیش پیامبر[ص] بیایند حضرت[ص] موظفند که او را بازگردانند امااگر ازاهالی مدینه به قریش پناهنده شدند چنین التزامی را قریش و ساکنان مکه نداشته باشند. ۵۹

این ماده قرارداد در همان روزامضای قرارداد مورد یافت زیرا سهیل بن عمر فرزند نماینده مشرکان درامضای قرارداد که مسلمان شده بود به مسلمانان پناهند شد اما طبق قرارداد وی را به مشرکان باز گرداندند.

The above mentioned peace treaty is comparable with examples like signing treaty with Najran Christians. The Prophet (S.A.W.) in the treaty has written: The habitants of Najran should keep my agents for a month and if Muslims had feared and were threatened by any deception 90 from the region of Yaman, lend 30 armors and 30 horses to Muslims. This decisiveness and moderation in determining the terms of treaty were

صلحنامه مذکور را با نمونه هائی چون معاهده با مسیحیان نجران مقایسه کنید. پیامبر[ص] در عهده نامه با آنان نوشته اند:

]اهل نجران عاملین من را به مدت یک ماه باید نگاه دارند و آنان را بیش از یک ماه معطل نگذارند و در فرضی که از ناحیه یمن خوف و مکری بر مسلمانان باشد سی زره سی اسب و.. به مسلمانان عاریت دهند و]... ۶۰.

این گونه قاطعیتها و یا ملایمتها در تعیین شرایط معاهده

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done on the basis of different circumstances. The other example of flexibility based on expediency can be observed in the letter of the Prophet (S.A.W.) to Najran

Bishop. We read in this letter: "from Muhammad, the Prophet (S.A.W.) of God to Bishop Abelhareth and Najran Bishops and their monks. All of their affairs, more or less, and their religious sites should be kept at their hands. No rights and powers should be denied of them and all their manners should be kept untouched, until they have not diverted from goodness and truth" .91 The study and survey of the text of treaties in the era of the Prophet (S A W.) and Caliphs shows that Maslaha element is the cornerstone of other elements.

براساس مصلحت جامعه دینی انجام می یافتند. نمونه دیگرازانعطافهای مصلحت آمیز را می توان در نامه پیامبر[ص] به اسقف نجران مشاهده کرد. دراین نامه می خوانیم:

من محمدالنبی الی الاسقف ابی الحارث واساقفه نجران و کنتهم و من تبعهم و رهبانهم ان لهم ما تحت ایدیهم من قلیل و کثیر من بیعهم و صلواتهم و رهبانیتهم... ولایغیر حق من حقوقهم ولا سلطانهم ولاشی من کانوا علیه مانصحوا و صلحوا.۶۱

از محمد پیامبر خدا به اسقف ابی الحارث واسقفان نجران و کاهنان و راهبان آنان. تمامی امور که در دست آنان است چه اندک و بسیار از اماکن مذهبی و صومعه ها... دراختیار آنان باشد. هیچ حقی و قدرتی از آنان سلب نخواهد شد و تمامی روشها که برآنند پایدار خواهد ماند تا آن زمان که از خیرخواهی و صلاح دریغ نورزد.

مطالعه و بررسی متن معاهدات و قراردادهای عصر پیامبر[ص] و خلفاء موضوعی مستقل و مبسوطاست و در مجموع نشان دهنده این نکته که عنصر مصلحت به عنوان ثقل جدی جای داشته است.

5- Prisoners of war; There are many different approaches to this matter. In the battle of Badr, the Prophet (S A W.) consulted with his advisors about the fate of prisoners.92 This point shows that in this position, Maslaha element has an importance. In final decisions about the Badr captives, there were no similar methods. Some people like Nazr ibn Hareth, Aqabah-ibn-abi-Moit was murdered.93 Some people paid money (fedyeh). The amount of this money was not alike; it varied from 2000 derhams to 4000 derhanis9A In some cases, people were not forced to pay any money. In other cases, those pagans who could read and write were ,95 freed as a reward for teaching several Muslims But, in cases

such as Bani-Quraizeh prisoners of war, all the men of tribe were killed; in some cases the prisoners of w-ar were exiled (Bani-

۱۵.اسرای جنگ : تفاوت برخوردها دراین زمینه بسیار بوده است. نقل شده است که : در جنگ بدر پیامبر[ص] در زمینه سرنوشت اسیران با اصحاب خویش به مشورت پرداخت. ۶۲این نکته نشان دهنده آن است که در این مقام عنصر مصلحت یابی اهمیت داشته .... در تصمیم گیری نهائی نیز در زمینه اسیران بدر به یک شیوه عمل نشد. بعضی چون : نضر بن حارث عقبه ابی معیط و... در راه مدینه به قتل رسیدند. ۶۳ از گروهی نیز فدیه گرفته شد.ازاینان نیز به یک میزان نبود از دو هزار درهم تا چهارهزار درهم نوسان داشت.۶۴ ازبرخی نیز هیچ فدیه ای اخذ نشد. در مواردی مشرکانی که با خواندن و نوشتن آشنا بودند در پاداش تعلیم آن جان خویش را می رهاندند. ۶۵

اما در مواردی چون اسرای جنگ بنی قریظه مردان قبیله به تمامی به قتل رسیدند و در مواردی حکم به تبعیداسیران جنگی داده شد

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Nazir and Bani Qinqa'); in other cases; initially, the captives were sentenced to exile, then this sentence was cancelled, and all the captives were freed (the battle of Bani-Hovazen) and sometimes from the beginning of dominance, freedom sentence was issued (like the seizure of Mecca). In the period of Caliphs, we see also some of these masalih: Sometimes all the prisoners of war have been killed, sometimes they have been exiled and sometimes they have been freed by paying money (fedyeh). Also in the time of Imam Ali, it is seen different approaches to the prisoners of 96

(بنی نضیر و بنی قینقاع) و در مواردی درابتداء حکم به بردگی اسیران داده شد و سپس آن حکم لغو گردید و تمامی اسیران آزاد شدند (جنگ بنی هوازن) و گاه ازابتدای غلبه حکم به آزادی داده شد (چون فتح مکه.) در دوران خلفاء نیز ازاین سیاستهای مصلحت آمیز مشاهده می شود: گاه تمامی اسیران جنگی به قتل رسیده اند گاه به بردگی کشیده شده اند و گاه در مقابل جزیه و... آزاد زیسته اند. در دوران خلافت علی[ع] برخورد آفت آمیز بااسیران جنگ را مشاهده می کنیم.

Juridical Problems

In judicial system and executing the judicial decisions variety of approaches as well as methods of execution are observed. Appointment of judges sometimes was done by the central government and sometimes by provincial government, in some cases, the governor of province was committed to appoint a certain judge in the region. The second caliph ordered Amr-Ibn-AI-A'ss, the agent of government in Egypt, that Kaab ibn Zanneh be selected as the judge of that region.9
The jurisdictions of judges were also different. For example, in the period of second caliph, the judge of Egypt, Qeis-ibn-A'ss was also the judge of Sham region (Syria, Jordan, Palestine and Lebanon) and Sham

مسائل قضائی

در سیستم دادرسی واجرای احکام تنوع برخورد و نیز شیوه اجرا را مشاهده می کنیم. تعیین قضات گاه توسط حکومت مرکزی انجام می یافت و گاه توسط حکومت ایالتی در مواردی حاکم ایالت مامور می شد که قاضی خاصی را در منطقه بگمارد. نقل شده است که : خلیفه دوم به عمر و عاص کارگزار حکومت در مصر دستور داد که : کعب بن ضنه را به مقام قضاء آن منطقه برگزینند. ۷۰
منطقه و محدوده قضاوت قاضیان نیز متفاوت بود. به عنوان نمونه : در عصر خلیفه دوم قاضی مصر به نام قیس بن العاص قاضی منطقه شام نیز بوده است

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was under the judicial system of Egypt.98 Separation of leadership from judgement position, because of the extension of tasks, occurred in the period of second caliph, something which was required by common maslaha in Islamic Society. The selection of judges have taken place by the expedient vision {Maslaha) of caliphs and governors. In the letter of Umar to Abu Musa we read: do not select as judge no one other than the rich and aristocrats, because the rich don't look forward to the people's property and the aristocrat is not fearful of his status among people. This approach and advice was not anything but the perception of the caliph was from the Maslaha of selection among these two groups.

و دادرسی شام تحت پوشش دادرسی مصر بوده است. ۷۱

تفکیک منصب ولایت و قضاوت بواسطه وسعت حوزه کاری هر یک از دو مسئوولیت در عصر خلیفه دوم پدید آمد و مصلحت رائج در جامعه اسلامی آن را می طلبید.

درانتخاب به قضات نیز نکاتی را مشاهده می کنیم که براساس بینش مصلحت گرایانه خلفا و والیان انجام یافته اند. قطان بن سفیان از پدرش نقل می کند: در نامه عمر به ابوموسی چنین خواندم : کسی جز توانگران و نژادگان اصیل زادگان به قضاوت مگمار زیرا توانگران به مال مردم رغبت نمی کنند و نژاده اصیل زاده از موقعیت خود در میان مردم بیمناک نمی شود. ۷۲

این تلقی و توصیه چیزی جز درک خلیفه از مصلحت انتخاب این دو گروه نبود.

Also, the vast spectrum of tasks of judges required that this work was regarded as a job. If in the beginning of the rise of Islam, the judgement of judges was the gratis task, development of Urban and civil society created many differences and conflicts and called for judges whose permanent job would be judgement. In this view', the problem of salary of judges is advanced. The second caliph writes to Abu Obeideh and Moa/. that: "Watch and select some men to act as judges and set a salary for them".101 Imam Ali in the Malek Ashlar document has advised: "be generous so that the judge will not be in hardship and feel no need to the people".101 In the method of execution of sentences is also observed varieties

همچنین وسعت حوزه کار قضاوت ایجاب می کرد که این کار به عنوان یک شغل در نظر گرفته شود.اگر درابتدای ظهوراسلام قضاوت قاضیان امری منقطع و تفننی در زندگی آنان بود اما توسعه جامعه شهری و مدنی اختلافات و تنازعات فراوان را پدید آورد و دادرسانی را می طلبید که دراین کار زندگی خویش را بنهند و تمام فرصت را دراختیار آن قرار دهند. بااین توجه است که مساله مقرری قضات مطرح می شود.

خلیفه دوم به ابوعبیده و معاذ می نویسد:[بنگرید مردانی نیکوکار را برگزینید و به قضاوت بگمارید و برای آنان مقرری تعیین کنید]. ۷۳ امام علی[ع] در عهدنامه مالک اشتر توصیه فرموده اند:[وافسح له فی البذل ما یزیل علته و ثقل مع حاجته الی الناس] ۷۴ چندان براو گشاده دست باش تااز حیث معیشت در تنگنا نیفتد واز مردمان بی نیاز گردد.

در نحوه اجرای حکم نیز تنوعات

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based on social and governmental masalih. It is cited that the second caliph wrote to all Islamic regions that nobody should be excuted without his order.102 This historical citation shows a kind of higher court in the center of the government which addressed the sentence of death and regional judges did not have such right personally without the signature of caliph who in fact had the role of high judicial institution to execute the sentences of death Preferably, judgments such as addressing the crime of Moqeirah-ibn Shoabah, the governor of Kufa, in Madina shows that the problematic cases (such as addressing the crime of governors) was referred to the center of government and regional judges did not intervene in them. In some cases, delaying of penal sentences has been done for masalih.

مبتنی بر مصالح اجتماعی و حکومتی رویت می شوند. نقل شده است که : خلیفه دوم به تمامی مناطق اسلامی نوشت که هیچکس را بدون فرمان او نکشند ۷۵.

این نقل تاریخی – درفرض صحت – نوعی دادرسی عالی را در مرکز حکومت نشان می دهد که به حکم قتل رسیدگی می کرده است و قضات مناطق حق نداشته اند که شخصااحکام اعدام محکومین را بدون امضای خلیفه که در حقیقت نقش نهاد عالی قضائی را داشت به اجرا برسانند.اوارجاح قضاوتهائی چون : رسیدگی به جرم مغیره بن شعبه والی کوفه به مدینه نشان می دهد که دادگاههای مساله آفرین (چون رسیدگی به جرم والیان حکومت) به مرکز حکومت ارجاع می شدند و قضات منطقه خود را در آن وارد نمی کردند. در مواردی نیز تاخیراحکام جزائی بواسطه مصالح انجام و یا توصیه شده اند.

Specific Regulations

In the government of the Prophet (S.A.W.) and caliphs, we encounter cases which have been dealt with based on Maslaha :

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not be cut and nobody should hunt in that region and punish the aggressors.103

This rule, undoubtedly has been a special Maslaha which was required in that region and that period. Doubtless, we can not regard it an eternal rule for Taef region rather, it is a rule which was issued out

مقررات خاص

دراین فصل به فهرست اموری می پردازیم که براساس مصلحت انجام یافته اند ...

۱. پیامبر دستور دادند که : درختان منطقه وج طائف قطع نگردند و هیچکس در آن منطقه صید نکند.... ۷۶

این حکم بی گمان مصلحت ویژه ای بوده است که در آن عصر و در آن منطقه ایجاد می کرده است بی تردید نمی توان آن را حکم ابدی برای منطقه طائف دانست بلکه به اقتضای

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of a particular expediency (Maslaha).

2. **The rule of Zarar mosque**: despite that the primary rule about mosques is that they should be respected, but after descending the Quran verse about a particular mosque, the Prophet (S A W.) ordered to destroy it and some people were committed to set that place on fire and after that, the Prophet (S.A.W.) ordered that place should become a garbage can.104

مصلحت خاص جعل شده است.

۲. حکم مسجد ضرار: با آن حکم اولی مساجد تکریم واحترام آن اماکن است اما پس از نزول آیه[والذین اتخذوا مسجدا ضرارالله] پیامبر[ص] دستور تخریب وانهدام آن را دادند.

افرادی مامور شدند که آن مکان را آتش بزنند و سپس پیامبر[ص] دستور دادند که مکان آن مزبله در آید. ۷۷.

۳. [illegible]

in the battle of Tabuk, it is cited that: Some people guarded him in the Muslim Camp. "A group of Muslims were awake during the nights and guarded him. Therefore, circumstances and masalih forced the Prophet (S.A.w.) to accept personal guards.105

۴. با آن که پیامبر[ص] از گزیدن وانتخاب محافظان شخصی امتناع داشت اما در جنگ تبوک نقل شده است که : عده ای از آن حضرت – در ارودگاه مسلمانان – حفاظت می کردند. فیقوم الناس من المسلمین فیحرسونه... ۷۹

گروهی از مسلمانان شبها بیدار بودند واز حضرت محافظت می کردند.

بنابراین شرائط و مصالح پیامبر[ص] را به پذیرش محافظان شخصی واداشتند.

۴- In returning from the battle of Tabuk, the event of "Aqabah" occurred and some of the "Munafeqein" (hypocrites) decided to kill the Prophet (S.A.W.). Despite the fact that the Prophet (S.A.W.) recognized them, he refused to punish and explained as such: "I do not consider it good to say people, since the war between Muhammad (S.A.W.) and the pagans have been finished, he began to kill his friends". In this way, the Maslaha of preventing the circulation of this accusation forced the 106 Prophet (S A W.) to not persecute and punish them.

۵. در بازگشت از جنگ نبوک [واقعه[عقبه] پدید آمد و عده ای از منافقان تصیم به قتل حضرت گرفتند. پیامبر[ص] با آن که آنان را شناخت امااز عقوبت آنان خوداری کرد واین گونه تعلیل فرمود:

انی اکره ان یقول الناس :ان محمدا لماانقضت الحرب بینه و بین المشرکین وضع یده فی قتل اصحابه ۸۰.

من ناپسند می دارم که مردمان بگویند چون جنگ محمد و مشرکان تمام شد به کشتار یاران خویش مشغول شده است.

بدینگونه مصلحت عدم رواج این اتهام پیامبران[ص] رابه عدم پیگیری و مجازات ملزم داشت.

۵- Abdollah Ibn Obii was the chief of the "Munafeqein" in Madina and from the beginning of emigration was involved in disrupting affairs and his presence in the majority of internal and external plots was felt.

۶. عبدالله بن ابی رئیس منافقان مدینه بود واز آغاز هجرت کارشکنی داشت و دراغلب توطئه های داخلی و خارجی حضوراو محسوس بود.

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The Prophet (S.A.W.) did not have a harsh contact with him and his friends. This kind of approach was nothing other than understanding the Maslaha of Islamic society and doing on the basis of attracting his tribe.107

۱... پیامبر[ص] برخورد مماشات گونه با وی و یارانش داشت.

این گونه برخورد چیزی جز به اقتضای درک مصلحت جامعه اسلامی و عمل به آن و جذب نیروها و تالیف دلهای قبیله وی ... انجام نیافته است.

6- The Prophet (S A W.) initially prohibited people from eating sacrificed meat after 3 days, so that there would be enough meat for the poor and not be preserved for them. But after that because the situation of the Muslims had improved, he allowed its preservation.108

۸. پیامبر[ص] ابتداءاز خوردن گوشت های قربانی پس از سه روز منع می کند ولی پس از آن اجازه استفاده و ذخیره سازی آن را صادر می کنند. ۸۴

7- The second caliph had ordered that the agents of government, should not enter Madina at night.109 This order was so that they could not exploit the darkness of night for transferring their illegitimate properties to Madinah. Also, he had ordered that before going to the governmental district, the properties of governors should be noted, so that they could be confiscated in the case of disproportional increase.110

۹. خلیفه دوم دستور داده بود که کارگزاران حکومت نباید شبانگاه وارد مدینه شوند. ۸۵

این دستور برای آن بود که آنان نتوانستنداز تاریکی شب برای انتقال اموال نامشروع خویش به شهرشان (مدینه)استفاده کنند.

همچنین وی دستور داده بود که : قبل از عزیمت به منطقه حکومتی اموال حکمرانان و والیان یادداشت شود تا در فرض افزایش غیرمعقول مصادره گردد ۸۶.

8- The second caliph when building the cities of Basra and Kufa ordered that nobody should build more than three rooms or increase the height of the houses.111 The existence of Maslaha element in this order is clear. The caliph issued this order to prevent luxury Thus, in continuance of this order, we read: "you observe the Sunnah so that you always have power."

۱۱. خلیفه دوم در هنگام بنای شهر بصره و کوفه دستور داد که : هیچ کس بیش از سه اتاق نسازد و به ارتفاع خانه ها نیفزاید. ۸۸

حضور عنصر مصلحت دراین دستور علنی و بی نیاز به تصویراست. خلیفه برای جلوگیری از جو رفاه گرایانه و تجمل پرستانه به این دستور دست یازید ازاین روی درادامه آن فرمان می خوانیم : شما سنت را رعایت کنید تا دولت همراه شما باشد.

۹- The second caliph arrived in Mecca in 17 H. and decided to enlarge the "Masjid-Al-Haram", ordered that those who agree to sell their

۱۲. خلیفه دوم درسال ۱۷ هجری به مکه آمد و به توسعه مسجدالحرام تصمیم گرفت. آنان که رضایت به فروش خانه هایشان دادند

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houses, the houses should be bought and those who refuse to sell their houses, the houses should be demolished and be added to Masjid-Al- Haram.112 This decision was made because that caliph considered that the space of "Masjid-Al-Haram" was not enough for the large number of people and there was no solution except its expantion.

از آنان خرید و کسانی که امتناع کردند خانه هایشان راخراب کرد و به مسجدالحرام افزود. ۸۹

این تصمیم بی تردیدازاین باور بر می خواست که خلیفه محدوده مسجدالحرام را برای حکومت بزرگ اسلامی غیر کافی می دید و جز توسعه آن راه حلی نمی دید.

10- The Prophet (S.A.W.) has said to the companions that: "change the color of your white hair and do not make yourself similar to the Jews". Imam Ali was asked about this order, he said: the reason for this order was that the followers of Islam were few, but today Islam has developed and the security is established everyone has the right to do it or not. 113

۱۳. پیامبر[ص] به یاران فرموده بودند:

غیرواالشیب ولا تشبهوا بالیهود.

موهای سفید خود را تغییر بدهید و خود را شبیه یهود نکنید.

ازامام علی[ع] درباره این دستور سوال شد ایشان فرمودند: علت این دستور به این خاطر بود که : پیروان اسلام کم بودند امامروز که اسلام توسعه یافته وامنیت حکمفرماست هر کسی مختاراست که این کار را بکند یا نکند. ۹۰

11- After Madina was the center of Islamic caliphate for about 35 years, paying attention to economic, political and military expediencies, Kufa was selected as the base of the Islamic government.114

۱۴. پس از آن که مدینه حدود ۳۵ سال مرکز خلافت اسلامی بوده است با توجه به مصالح اقتصادی سیاسی و نظامی کوفه را به عنوان پایگاه حکومت اسلامی برگزیدند. ۹۱

The above mentioned points and examples show that the Maslaha element in social problems had clear existence. The case of evaluation of expediency in the period of the Prophet (S.A.W.) and Caliphs is the clear reason for the role of Maslaha in the social problems. What is important in this matter is that paying attention in formulating the methods of action has not been criticized by the Prophet (SAW) and caliphs and they have not monopolized this method for themselves and have not prohibited it for others. Their method was such that the expediency point of view should be

نکات و نمونه های یاد شده نشانگر آنند که : عنصر مصلحت در مکتب و حکومت حضوری جلی داشته اند. ...

اما آنچه دراین میان مهم جلوه می کند این نکته است که : توجه به مصحلت در تنظیم شیوه و روش عمل مورد تنقیص و نقد پیامبر[ص] وامام علی[ع] قرار نگرفته است. آنان این اسلوب را درانحصار خود ندانسته اند و دیگران رااز آن برحذر نکرده اند. بر خلاف آنچه در مورد [قیاس] مشاهده می کنیم روش تقریری وارشادی پیامبر وامام علی[ع] آن بوده است که به دید مصلحت شناسی جامعه

Rouhani's PhD Thesis, p. 325

respected and the views which are based on them should be paid attention to, such as: exit from Madina in the battle of "Ohod" and using the "moat" which both were done according to the people's view. Thus, we can not confine Maslaha to the Prophet (S.A.W.) alone.

حرمت نهند و به نظریاتی که بر آن مبتنی است توجه کنند مانند: خروج از مدینه در جنگ احد استفاده از خندق و...ازاین رو نمی توان توجه به مصلحت را در انحصار مقام عصمت نهاد. ...

Plagiarism of Rouhani's Ph.D. Thesis from Mtupah's Ph.D. Thesis

Approximately 2800 words of Rouhani's Ph.D. Thesis in chapter 5 word by word have been plagiarized from Ph.D. Thesis of Mtupah:

Omari Mtupah, Juma Mikidadi (1990), *Theory of Al-Masalih Al-Mursalah in Islamic Law*, A Thesis Presented for The Degree of Doctor of Philosophy (Ph. D) in The Faculty of Arts, University of Edinburgh.

https://www.era.lib.ed.ac.uk/handle/1842/19169

Rouhani's Ph.D. Thesis, pp. 287-288

In the *Quran* various derivatives of the root of *Maslaha* (*Saluha*) are used, the word *Maslaha*, however, does not appear there. The Quran uses *zalama* (he did wrong) 4 and *fasada* (he/it is corrupted) 5 as opposite terms to *Saluha*. *Saleh* the active participle of *Salulia* occurs very frequently in the *Quran*. On one occasion the meaning of this term is elaborated textually as follows:

> **"They believe in God and in the last day and enjoin goodness and forbid evil and hasten to do good deeds and these are the righteous ones (*salehin*)"[۶]**

Whereas it is clear that its use in the early period and in the Quran was essentially related to the meanings of good and utility, there can be no doubt that the word had not yet become a technical term.

Plagiarized from Mtupah's Ph.D. Thesis, p. 20

In the Qur'an various derivatives of the root "s-l-h" are used, the word maslahah, however, does not appear there. The Qur'an uses "zalama" (he did wrong)[۳۰] and "fasada" (he/it corrupted)[۳۱] as opposite terms to "saluha". "Salih" the active participle of "s-l-h", occurs very frequently in the Qur'an. On one occasion the meaning of this term is elaborated textually as follows:

> **"They believe in God and in the last day and enjoin goodness and forbid evil and hasten to do good deeds and these are the righteous ones (*salihin*).[۳۲]**

Whereas it is clear that its use in the early period and in the Qur'an was essentially related to the meanings of good and utility, there can be no doubt that the word had not yet become a technical term.

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For the term Maslaha some scholars use other terms. Some call it as Maslaha mursalah (considerations of public interest), others use the term istislah (seeking the better) and still others use the term istihsan (equity). Although these terms may seem different, in reality they imply the same objective. Yet, each term looks at the same objective from a different angle. [۷]

Plagiarized from Mtupah's Ph.D. Thesis, p. 21

For the term "al-masalih al-mursalah" some Muslim lawyers, jurists and scholars use other terms. Some call it as "al-munasib al-mursal" (unrestricted suitability), while others use the term "istislah". (seeking the better) and still others use the term "istidlal" (seeking proof). Although these terms may seem different, in reality they imply the same objective. Yet, each term looks at the same objective from a different angle.

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Obviously, the Maslaha is not a primary source of the Shariah and cannot be used alone in legislation unless dictated by the existing certain conditions. Some Islamic jurists have outlined nineteen sources for Islamic law in which Maslaha could be described as one of these sources.[8]

pp. 330-331 endnote 8:

٨. □□□□□ □□□□□□□ □□□: (١) □□□ *□□□□□*, (٢) □□□ *Sunnah;* (3) *Ijma* of the Islamic Ummah; (4) *Ijma* of the Madinah people; (5) Qiyas; (6) A saying of the Companion of the Prophet (S.A W.); (7) *Al- miaslaha* (8) *Istishab* (continuation of a practice); (9) *Al-Bara' Al-Asliyyah* (original exemption); (10) *Al-Urf* (customs); (11*) Al- istiqra'* (induction); (12) *Sadd Al-Zarai* (preventive measures); (13) *Istidlal* (deducation); (14) *Istihsan* (equity); (15) *Ikhtiyar Al- Aysar* (taking the simple); (16) *Al-ismah* (immunity from sins); (17) *Ijma* of the people of Kufah; (18) *Ijma* of *Al-Itrah* (the house of the Prophet (S.A.W.)); and (19) *Ijma* of the four caliphs. (Abd Al-Wahhab, *masader Al-Tashriih, P.* ١٠٩)

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Some of these sources are accepted by all Islamic jurists and lawyers and some of them are disagreed upon.

Plagiarized from Mtupah's Ph.D. Thesis, pp. 23-٢٤

p. 23

al-masalih al-mursalah is not a primary source of the Sharicah, hence it cannot stand alone in legislation except by conditions. Some Islamic jurists have outlined nineteen sources for Islamic law in which al-masalih al-mursalah could be described as one of these sources. These sources are: (i) The Qur'an; (ii) The Sunnah; (iii) Ijmac of the Islamic Ummah; (iv) Ijmac of the Medinah people; (v) Qiyas; (vi) A saying of the Companion of the Prophet; (vii) al-Masalih al-Mursalah; (viii) Istishab (continuation of a practice); (ix) Al-Bara' al-asliyyah (original exemption); (x) Al-Cawaid (customs); (xi) Al-istiqra' (induction); (xii) Sadd al-dharaic (preventive measures); (xiii) Istidlal (deduction); (xiv) Istihsan (equity); (xv) Ikhtiyar al-aysar (taking the simple); (xvi) Al-Cismah (immunity from sins); (xvii) Ijmac of the people of Kufah; (xviii) Ijmac of al-GItrah (the house of the Prophet) for Shicas; and (xix) Ijmac of the four caliphs.[37]

٣٧ □□□ □□□□ □□-□□□□□□ □□□□□□□, □□□□□□□ □□-tashrlc al-Islami fi ma la nass fih, p. 109

p. 24

Some of these sources are accepted by all Muslim jurists and lawyers and some of them are disagreed upon.

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Clearly the strongest of these nineteen sources are the Quran and Sunnah, which are the prime origins of the Shariah. As far as Maslaha is concerned, it is derived from the the Quranic a'yat and the sayings of the Prophet (S.A.W.).9

Plagiarized from Mtupah's Ph.D. Thesis, p. 24

Clearly the strongest out of these nineteen sources are the Qur'an and Sunnah, which are the prime origins of the Sharicah. As far as al-masalih al-mursalah is concerned, it is derived from the saying of the Prophet which states: "Do not inflict injury, nor repay one injury by another"

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This indicates the importance of confirming the consideration of benefits and the negation of injuries; and since the injuries are detested in the *Shariah* and benefits are confirmed it thus formulates the basis of the theory of *Maslaha.*

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The nature of the theory of Maslaha

In the strict sense of Maslaha the terminology is limited within the environment of benefits, which have not been dealt with by the main origins of the Shariah. The benefits should be independently judged by a Mujtahid and weighed out without referring to previous experience, simply because when new cases are referred to old ones bearing the same causes, the whole exercise develops into analogy and ceases to work under the theory of Maslaha. The Islamic understanding is that God has made rules in the best way to fit the lives of people by providing general principles and guidance and has left out the details of things to be discovered by the people themselves through observation and the use of common sense. He has dealt with the primary issues of life in general and has left the secondary ones to be tackled by the human beings themselves (as a mercy to them and not through forgetfulness or failure). The Quran says:

> **"O ye who believe! Ask not questions about things which may cause trouble. But if you ask about things when the Quran is being revealed, they will be made plain to you, God will forgive those: for God is oft forgiving, Most Forbearing. Some people before you did ask such questions, and on that account lost their faith" [20]**

Plagiarized from Mtupah's Ph.D. Thesis, pp. 25-٢٦

Plagiarized from Mtupah's Ph.D. Thesis, p. 24

This indicates the importance of confirming the consideration of benefits and the negation of injuries; and since the injuries are detested in the Sharicah and benefits are confirmed it thus formulates the basis of the theory of al-masalih al-mursalah.

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the nature of the theory of al-masalih al-mursalah in the strict sense of the terminology is limited within the environment of benefits which have neither been dealt with by the main origins of the Sharlcah nor cancelled by them. The benefits should be independently judged by a mujtahid and weighed out without referring to previous experience, simply because when new cases are referred to old ones bearing the same causes, the whole exercise develops into analogy and ceases to work under the theory of al-masalih al-mursalah. The Islamic understanding is that God has made rules in the best way to fit the lives of people by providing general principles and guidance and has left out the details of things to be discovered by the people themselves through observation and the use of common sense. He has dealt with the primary issues of life in general and has left the secondary ones to be tackled by the human beings themselves (as a mercy to them and not through forgetfulness or failure). The Qur'an says:

> **"O ye who believe! Ask not questions about things**

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> **which may cause trouble. But if you ask about things when the Qur'an is being revealed, they will be made plain to you, God will forgive those: for God is Oft-forgiving, Most Forbearing. Some people before you did ask such questions, and on that account lost their faith". [40]**

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The Prophet (S.A.W.) is also reported to have said:

> **"... And (God) has kept silent over some things as a mercy to you without forgetting them, so do not ask about them". [21]**

Whenever the Quran and the Sunnah are reticent on any issue, the theory of Maslaha can be resorted to. Actually, the Quran and the Sunnah's ordinances on legal issues are very few in comparisons to injections pertinent to other aspects of life in general. The main purpose of this is to give enough room to accommodate every benefit possible without the need of altering anything in the main structure of the Shariah. The Quran, for instance, has not gone into detail of laying each and every rule, but instead it has just laid down general principles for the legislation.[22]

pp. 331-332 endnote 22:

٢٢.For example, in trade the Quran has limited its rules to four things only:

(1) its legality: " … And God has permitted trade and forbidden usury ...";" (the Quran 2: 275)

(2) The condition of mutual agreement: "O ye who believe! Eat not your property among yourselves in vanities: but let there be amongst you traffic and trade of mutual good-will..." (the Quran 4: ٢٩)

(3) The act of witnessing: .. And take witnesses whenever ye make a commercial contract..." (the Quran 2: 282);

and (4) its prohibition:

"O ye who believe! when a call is made for the prayer of Friday, rush for the rememberance of God, and leave trade ..." (the Quran 62:9).

Plagiarized from Mtupah's Ph.D. Thesis, pp. 26-٢٧

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The Prophet is also reported to have said:

> **"...And (God) has kept silent over some things as a mercy to you without forgetting them, so do not ask about them". [41]**

١.١٠ □□□□□ □□□□□□□□□□ □□ □□□ □□□□□□ □□□ □□□□□□

It follows that the sphere in which the theory of al-masalih al-mursalah could operate is that in which the Qur'an and Sunnah are silent. In actual fact the ordinances of the Qur'an and Sunnah which deal with legal issues are quite scanty compared to the injunctions which deal with other aspects of life in general. The main purpose of this is to give enough room to accommodate every benefit possible without the need of altering anything in the main structure of the Sharicah. The Qur'an, for instance, has not gone into detail of laying each and every rule, but instead it has just laid down general principles for the legislation of practical rules whether in matters concerning civil rights, constitution, criminology or economics. We see, for example, in trade the Qur'an has limited its rules to four things only:- (i) its legality:

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> **"...And God has permitted trade and forbidden usury...";42**

(ii) the condition of mutual agreement:

> **"O ye who believe! Eat not your property among yourselves in vanities: but let there be amongst you traffic and trade of mutual good-will...";43**

(iii) the act of witnessing:

> **"...And take witnesses whenever ye make a commercial contract...";[44]**

and (iv) its prohibition:

> **"O ye who believe! When a call is made for the prayer of Friday, rush for the rememberance of God, and leave trade...".[45]**

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The Legal Definition of Maslaha

The Islamic jurists have differing definitions of Maslaha and its specifications. To Al-Ghazali (d. 1111) the word Maslaha denotes "obtaining benefit and preventing injury". he goes further adding after that,

> **"We do not mean by interpreting Maslaha as obtaining benefit and preventing injury only because these are human aims concerned with human welfare in human terms only, whereas what we actually mean by Maslaha is the preservation of the aims of the Shariah. The aim of the Shariah in regard to man is fivefold: viz: (i) to preserve his religion, (ii) to preserve his life, (iii) to preserve his**

Plagiarized from Mtupah's Ph.D. Thesis, p. 52

٣.١ □.□□□ □□□□□ □□□□□□□□□□ □□ □□□□□□□□

The Muslim lawyers have differing definitions of maslahah and its specifications. To al-Ghazali (d. 1111) the word "maslahah" denotes "obtaining benefit and preventing injury". He goes further adding after that,

> **"We do not mean by interpreting maslahah as obtaining benefit and preventing injury only because these are human aims concerned with human welfare in human terms only, whereas what we actually mean by maslahah is the preservation of the aims of the Shariuah. The aim of the Sharicah in regard to man is fivefold: viz: (i) to preserve his religion, (ii) to preserve his life, (iii) to preserve his**

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> **mind (reason), (iv) to preserve his offspring and (v) to preserve his material wealth. Everything which secures the preservation of these five elements is a Maslaha, and everything which jeopardizes them is a "mafsada" (injury), the prevention of which is a Maslaha. [23]**

Apparently, the general meaning of Maslaha cannot be clearly distinguished from the definition put forward by Al-Ghazzali, since the Shariah actually fosters the attainment of benefit and the preclusion of injury and loss. Still, there is not anything which brings benefits and repels injuries that is not encompassed in the intention of the Shariah and is directly or indirectly connected with religion, or life, or mind, or offspring, or material wealth. Nevertheless, does it not happen that an individual person considers a thing to be beneficial to him while the Lawgiver considers it the other way round? We read, for instance, in the Quran:

> **"Fighting is prescribed for you, and ye dislike it. But it is possible that ye dislike a thing, which is good for you, and that ye love a thing, which is bad for you. But God knoweth and ye know not". [24]**

On the other hand, Al-khwarizmi (d.850) defines Maslaha by saying:

> **it is the preservation of the objective of tire Shariah to prevent injuries to human beings".[25]**

Maslaha, or protection of the Shariah's objectivity, does not solely signify preclusion of injuries to human beings, and this is only one side

Plagiarized from Mtupah's Ph.D. Thesis, pp. 52-٥٣

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> **mind (reason), (iv) to preserve his offspring, and (v) to preserve his material wealth. Everything which secures the preservation of these five elements is a ma _ slahah, and everything which jeopardizes them is a "mafsadah" (injury), the prevention of which is a maslahah.[1]**

It could be said that there is no clear cut difference between the general meaning of maslahah and the definition given by al-Ghazali, because the obtaining of benefit and the prevention of injury is the real intention of the Sharlcah. Still, there is not: anything which brings benefits and repels injuries that is not encompassed in the intention of the Sharicah and is

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directly or indirectly connected with religion, or life, or mind, or offspring, or material wealth. Nevertheless, does it not happen that an individual person considers a thing to be beneficial to himself while the Lawgiver considers it the other way round? We read, for instance, in the Quran:

> **"Fighting is prescribed for you, and ye dislike it. But it is possible that ye dislike a thing which is good for you, and that ye love a thing which is bad for you. But God knoweth and ye know not".[2]**

On the other hand, al-Khwarizml (d.850) defines maslahah by saying:

> **"It is the preservation of the objective of the Sharicah to prevent injuries to human beings".[3]**

Maslahah or the preservation of the objectivity of the Sharlcah does not only mean the prevention of injuries to human beings because this is one aspect of it only.

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and aspect of it. The other aspect, which is equally important, is the positive side of Maslaha - the obtaining of benefits. Although the Islamic juristic principle has stressed the prevention of injury more than the attainment of benefit by saying: "Prevention of injury precedes the attainment of benefit", in reality they are two different things altogether and are therefore not the same; nonetheless it is necessary, in order to understand them both, that they should be considered as complementary.

However, in defining Maslaha Ibn Abd Al-Salaam (d. 1263 A.H.) puts a check and says:

> **"He who wants to know the rights, the benefits and the injuries, strong amongst them as well as the weak, has to review his mind with a visualization as to why the Shariah hasn't mentioned the solution or judgment of a particular problem he is confronted with in spite of the fact that the Shariah manifested rudes in which every single rule demands the subservience of human beings to their Creator and has not necessarily informed them of the benefit or injury of a thing in particular".**

Then he goes on to define benefits and injuries saying:

> **"Benefits are four kinds: needs and their causes; and happiness and their causes. Injuries are also of four kinds: pains and their causes and worries and their causes".[26]**

Ibn Abd Al-Salam elsewhere depicts real and allegorical benefits, noting that benefits fall into two categories: "real (happiness and desire)

Plagiarized from Mtupah's Ph.D. Thesis, pp. 53-٥٤

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this is one aspect of it only. The other aspect which is equally important is the positive side of maslahah - the obtaining of benefits. Although the Islamic juristic principle has stressed the prevention of injury more than the attainment of benefit by saying: "Prevention of injury precedes the attainment

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of benefit", in reality they are two different things altogether and are therefore not the same; nonetheless it is necessary, in order to understand them both, that they should be considered as complementary. However, in defining maslahah cIzz al-Din ibn cAbd al-Salam (d.660/1263), the Egyptian scholar, puts a check and says:

> **"He who wants to know the rights, the benefits and the injuries, strong amongst them as well as the weak, has to review his mind with a visualization as to why the Sharlcah hasn't mentioned the solution or judgment of a particular problem he is confronted with inspite of the fact that the Sharlcah manifested rules in which every single rule demands the subservience of human beings to their Creator and has not necessarily informed them of the benefit or injury of a thing in particular".**

Then he goes on to define benefits and injuries saying:

> **"Benefits are four kinds:- needs and their causes; and happinesses and their causes. Injuries are also of four kinds:- pains and their causes and worries and their causes".[4]**

Elsewhere, cIzz al-Din ibn cAbd al-Salam discusses real benefits and the allegorical ones in which he says:

"Benefits are two types: real (happinesses and desires),

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and allegorical (their causes)". At times, the causes of benefits crate injuries; nevertheless, they are commanded or allowed since they serve as a means to insure benefits, for instance, amputating the hand of a thief to safeguard the wealth of the people and issuing warning ahead of Jihad to safeguard the lives of the people. As is also the case with all legal punishments which are in actual fact not pleasant due to their injury, nonetheless, they are enforced to attain peace and security which is in one way or the other meant to attain benefits such as killing the transgressors, stoning the married adulterers and lashing or deporting the unmarried adulterers etc. All these injuries have been legalised in the Shariah to attain real benefits, and they are called allegorical benefits, although this seems to be calling them "means" when it is "ends" that is really meant. [27]

Plagiarized from Mtupah's Ph.D. Thesis, pp. 54-٥٥

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and the allegorical (their causes). Sometimes the causes of benefits inflict injuries, they are commanded or allowed, not because they are injuries "per se" but they are a means to secure benefits, such as the amputation of

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a thief's hand to protect people's wealth and the warning before jihad to protect people's lives. As is also the case with all legal punishments which are in actual fact not pleasant due to their injury, nonetheless, they are enforced to attain peace and security which is in one way or the other meant to attain benefits - such as killing the transgressors, stoning the married adulterers and lashing or deporting the unmarried adulterers etc. All these injuries have been legalised in the Sharicah to attain real benefits, and they are called allegorical benefits, although this seems to be calling them "means" when it is "ends" that is really meant.[5]

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One of the contemporary jurists says: the Maslaha has pre-eminence over all the proof of the Shariah. He goes on to say: "The consideration of Maslaha is in actual fact a support of the nusus (the Quran and the Sunnah) and Ijma in the acts of worship whereas its consideration in transactions, customary law and general social obligations, it is a basic condition".32 In connection with acts of worship he says the rules and judgments are verified either by single clear cut proofs or by a variety of proofs which are congruent in meaning, or by contradicting proofs which could be grouped together without affecting the nusus. But if the contradicting proofs could not be grouped together, then nusus take precedence over the rest of the proofs.

Plagiarized from Mtupah's Ph.D. Thesis, pp. 176 - ١٧٧

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He goes on to say: "The consideration of maslahah is in actual fact a support of the nusus (of the Qur'an and Sunnah) and ijmac in the acts of worship whereas its consideration in transactions, customary law and general social

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obligations, it is a basic condition". In connection with acts of worship says al-Tufi, the rules and judgments are verified either by single clear cut proofs or by a variety of proofs which are congruent in meaning, or by contradicting proofs which could be grouped together without affecting the nusus. But if the contradicting proofs could not be grouped together, then ijmac takes precedence over the rest of the proofs,

Rouhani's Ph.D. Thesis, pp. 297-298

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Whereas in connection with transactions and practices the established norm is the consideration of Maslaha of people in the first

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place before all else, then if any other proof agrees with it, no word is to be added as is the case with the five fundamentals where nass, Ijnia and Maslaha have all agreed together - e g., to kill the killer, or to amputate the hand of a thief, in the case of divergence between the Quran and the Sunnah when there is the possibility of merging some of the proofs into others in some judgments or conditions while excluding the others or of taking into account the consideration of Maslaha, then they could be grouped together. If grouping them together is not possible, Maslaha takes precedence over the rest of the proofs due to the fact that the hadith "la-zarar wa la-zarar" states categorically the negation of injury which prompts the consideration of Maslaha, and thus it must take precedence due to the fact that Maslaha is the main objective as far as people are concerned in the legislation of laws, whereas the rest of the proofs are in reality a means to this objective. Logically, the ends should take pre-eminence over the means.[33]

Plagiarized from Mtupah's Ph.D. Thesis, pp. 179-١٨٠

p. 179

Whereas in connection with transactions and practices the established norm is the consideration of maslahah of people in the first place before all else, then if any other proof agrees with it, no word is to be added as is the case with the five fundamentals (al-ahkam al-khamsah) where nass, ijmac and maslahah have all agreed together - eg, to kill the killer, or to amputate the hand of a thief, or to flog or stone an adulterer... In the case of divergence between the Qur'an and the Sunnah when there is the possibility of merging some of the proofs into others in some judgments or conditions while excluding the others or of taking into account the consideration of maslahah, then they could be grouped together. If grouping together is not possible, maslahah takes precedence over the rest of the proofs due to the fact that the hadith "la darar wala dirar" states categorically the negation of injury which

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prompts the consideration of maslahah, and thus it must take precedence due to the fact that maslahah is the main objective as far as people are concerned in the legislation of laws, whereas the rest of the proofs are in reality a means to this objective. Logically, the ends should take pre-eminence over the means...

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The Shariah has comprehensively dealt with the conservation of religion as a salient benefit. The Shariah has obliged able Muslims to fight for the cause of God (jihad) to preserve religion, so that the doctrine of monotheism should reign supreme and eradicate all the impediments and shackles confronting humanity at large. [34]

p. 332 endnote 34:

٣٤ □□□□ □□□□□ □□□□ (□□□ □□□□□□□□□□□□□) □□□□□ □□□□□

is no more tumult or oppression, and there prevail justice and faith in God. But if they cease, let there be no hostility except to those who practise oppression". (the Quran, 2:193).

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The Shariah has fully dealt with the conservation of life as a legal benefit. The Shariah ordains a severe penalty for illegitimate murder to protect man's life and preclude the extinction of the human race. The rule of legal retaliation (Qisas) has been laid down by the Shariah in order to prevent any hostility among human beings. [35]

p. 332 endnote 35:

35."And if anyone is slain wrongfully, we have given his heir (next of kin) authority (to demand qisas or to forgive); but let him not exceed bounds in the matter of taking life; for he is helped (by the Law)", (the Quran, 17:33).

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In order to assure the security of mankind and the right to life for every human being the Quran has laid underlying principles for the preservation of human life, prevention of committing sins, removal of severity in duties, in addition to the ^legalization of committing suicide; all these show clearly that the Shariah is deeply concerned with the preservation of life.[36]

p. 333 endnote 36:

٣٦. "O ye who believe! the law of equality is prescribed to

you in cases of murder: Tlte free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty", (the Quran 2: 178)

Plagiarized from Mtupah's Ph.D. Thesis, pp. 71-72

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The Sharicah has obliged able Muslims to fight for the cause of God (jihad) to preserve religion, so that the doctrine of monotheism should reign supreme and eradicate all the impediments and shackles confronting humanity at large. The Qur'an says:

> "**And fight them (the transgressors) until there is no more tumult or oppression, and there prevail justice and faith in God. But if they cease, let there be no hostility except to those who practise oppression**".[23]

The preservation of life is a legal benefit which has been dealt with by the Sharicah at length; and a severe penalty has been specified by the Sharlcah for those who illegitimately take life in order to secure the life of mankind and preserve it from extinction. The rule of legal retaliation (qisas) has been laid down by the Sharlcah in order to prevent any hostility among human beings. The Qur'an says:

> " **And if anyone is slain wrongfully, we have given his heir (next of kin) authority (to demand qisas or to forgive); but let him not exceed bounds in the matter of taking life; for he is helped (by the Law)".**[24]

In order to assure the security of mankind and the right to life for every human being and to crush cruelties and transgressions the Qur'an says:

> "**O ye who believe! the law of equality is prescribed to you in cases of murder: The free**

p. 72

> **for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty".**[25]

The Qur'an has laid underlying principles for the preservation of human life, prevention of committing sins, removal of severity in duties, in addition to the illegalization of commiting suicide; all these show clearly that the Sharlcah is deeply concerned with the preservation of life.

Rouhani's Ph.D. Thesis, p. 299

In order to preserve a balanced mind, the Shariah has prohibited intoxicants and has enjoined the Muslims to refrain from all activities, which make the mind vicious, and speculative.[37]

p. 333 endnote 37:

٣٧."O ye who believe! Wine and gambling, (dedication of) stones, and (divination by) arrows, are an abomination of Satan's handiwork; Eschew such (abomination), that ye may prosper", (the Quran 5:90)

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The Shariah ordains marriage as a positive act preserving offspring, which is deemed by certain scholars as the preservation of

Plagiarized from Mtupah's Ph.D. Thesis, pp. 72-٧٣

p. 72

In order to preserve a balanced mind, the Sharlcah has prohibited intoxicants and has enjoined the Muslims to refrain from all activities which make the mind vicious and speculative. The Qur'an says:

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"O ye who believe! Wine and gambling, (dedication of) stones, and (divination by) arrows, are an abomination of Satan's handiwork; Eschew such (abomination), that ye may prosper".[27]

… In connection with the preservation of offspring, which is named by some scholars as - the safeguarding of kinship and chastity - the Sharicah has ordained the act of marriage as a positive measure …

Rouhani's Ph.D. Thesis, p. 300

kinship and chastity. To the Same end, the Shariah has prohibited adultery and fornication and laid down a painful punishment to those who do it and has legislated it in order to close all the doors leading to this sinful act which, in the long run, breaks down the bonds of kinship and demolishes good character and generates recklessness and irresponsibility in society.[38]

p. 333 endnote 38:

٣٨.The Prophet (S.A.W.) of Islam said:

"Intermarry extensively and spread so that / may stand proudly with you as the best of the nations on the Day of Judgment", (Al-Bukhari hadith no. 4157)

p. 300

Concerning the preservation of material wealth, the Shariah has imposed a severe punishment to thieves and robbers and laid down various rules to enable people to earn their living legally, and prohibited them from plundering the belongings of others.[39]

p. 333 endnote 39:

٣٩."As to the thief, male or female, cut off his or her hand; a punishment by way of example from God for their crime; and God is Exalted in Power", (the Quran ٥:٣٨)

Plagiarized from Mtupah's Ph.D. Thesis, pp. 73-٧٤

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as - the safeguarding of kinship and chastity - the Sharicah has ordained the act of marriage as a positive measure. We read in the saying of the Prophet of Islam:

"Intermarry extensively and spread so that I may stand proudly with you as the best of the nations on the Day of Judgment".[29]

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To the same end, the Sharicah has prohibited adultery and fornication and laid down a painful punishment to those who do it and has legislated it in order to close all the doors leading to this sinful act which, in the long run, breaks down the bonds of kinship and demolishes good character and generates recklessness and irresponsibility in society. Concerning the preservation of material wealth, the Sharlcah has imposed a severe punishment to thieves and robbers and laid down various rules to enable people to earn their living legally, and prohibited them from plundering the belongings of others. The Qur'an says:

"As to the thief, male or female, cut off his or her hand; a punishment by way of example from God for their crime; and God is Exalted in Power".

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Conclusion

The rules or laws in Islam are not established for an individual or a particular family or for a specific group, but they are generally promulgated for all individuals; because one of the most important qualities of the nature of Islamic legislation is universality.

Plagiarized from Mtupah's Ph.D. Thesis, p. 62

A rule or law in Islam is not established for an individual or a particular family or for a specific group, but it is generally promulgated for all individuals; because one of the most important qualities of the legislating nature of Islam is universality.

Rouhani's Ph.D. Thesis, p. 328

The Quran and Sunnah have given broad lines to the tackling of the legal problems leaving so much space to accommodate every sensible legislation which considers public interest in the strict sense of the word. In this way the

Plagiarized from Mtupah's Ph.D. Thesis, pp. 31-٣٢

p. 31

the Qur'an and Sunnah have

p. 32

given broad lines to the tackling of the legal problems leaving so much space to accommodate every sensible legislation which considers public interest in the strict sense of the word. In this way

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theory of Maslaha has a great role to play. It stands as a useful tool to a faqih without which his potential to solve new problems according to the Shariah could not work. The Quran and Sunnah have not mentioned all legal cases known to mankind and thus have not given ready made answers to all possible problems, which could occur. This gives scope for a Mujtahid to find answers to the daily questions of the society. For the very nature of the theory of Maslaha demands that a Mujtahid has to consider the unrestricted benefits in the light and according to the intentions of the lawgiver.

Plagiarized from Mtupah's Ph.D. Thesis, p. 32

the theory of al-masalih al-mursalah has a great role to play. It stands as a useful tool to a faqih without which his potential to solve new problems according to the Sharlcah could not work. The Qur'an and Sunnah have not mentioned all legal cases known to mankind and thus have not given ready made answers to all possible problems which could occur. This gives scope for a mujtahid to find answers to the daily questions of the society. For the very nature of the theory of al-masalih al-mursalah demands that a mujtahid has to consider the unrestricted benefits in the light and according to the intentions of the Lawgiver.

Rouhani's Ph.D. Thesis, p. 329

The lawgiver (God) has considered each and every benefit in the Shariah in a sense that all benefits are connected, whether directly or indirectly, to the preservation of the five fundamentals, viz: religion, life, mind, offspring and material wealth. There is no difference of opinion between the Islamic scholars in that whatever preserves these fundamentals is a benefit and therefore must be taken into consideration, and whatsoever jeopardizes them has to be eradicated.

Plagiarized from Mtupah's Ph.D. Thesis, p. 56

the Lawgiver (God) has considered each and every benefit in the Sharicah in a sense that all benefits are connected, whether directly or indirectly, to the preservation of the five fundamentals, viz: religion, life, mind, offspring and material wealth. There is no difference of opinion between the Muslim scholars in that whatever preserves these fundamentals is a benefit and therefore must be taken into consideration, and whatsoever jeopardizes them has to be eradicated.

Plagiarism of Rouhani's Ph.D. Thesis from Bannerman

Approximately 1250 words of Rouhani's Ph.D. Thesis in chapter 1 and Glossary word by word have been plagiarized from Patrick Bannerman:

Bannerman, Patrick (1988) *Islam in Perspective: A Guide to Islamic Society, Politics and Law*, Routledge

سرقت علمی تز دکتری روحانی از بنرمن

تقریباً ۱۲۵۰ واژه از تز دکتری روحانی در فصل ۱ (تقریباً ۶۵۰ واژه) و واژه‌نامه (تقریباً ۶۰۰ واژه) از این کتاب پتریک بنرمن سرقت علمی کلمه به کلمه شده است:

Bannerman, Patrick (1988) *Islam in Perspective: A Guide to Islamic Society, Politics and Law*, Routledge

Chapter 1

Rouhani's PhD Thesis, p. 18

The scope of Ijtihad ranges from textual interpretation, assessing the authenticity of a hadith (a saying of the Prophet (S.A.W.)), to systematic deductive reasoning from first principles.2 It therefore allows for logical reasoning to deduce a rule where no precedent exists. If properly applied. Ijtihad bridges the apparent gap between theory and practice.3

Plagiarized from Bannerman, *Islam in Perspective*, p. 38

Ijtihad covers a much wider range of mental activity, ranging from textual interpretation, to assessing the authenticity of a *hadith*, and to systematic deductive reasoning from first principles. It therefore allows for logical reasoning to deduce a rule where no precedent exists. … a vivid example of the manner in which *ijtihad*, if properly used, bridges the apparent gap between doctrine and practice.

Rouhani's PhD Thesis, pp. 20-21

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Most authorities state that the use of Ijtihad died out in the tenth century on the grounds that its creative force had become exhausted and that there was in any case no requirement for further interpretation. Thus, they assert that the "door of Ijtihad" was closed for good and the era of Taqlid (following of previous authorities) set in. 11 It is generally but erroneously asserted that, ever since the codification of the doctrine of Islam by the four great orthodox imams, this door of Ijtihad has been closed so that Muslims must conform their opinions strictly to the opinions enumerated by these imams without seeking to arrive by means of their own reasoning at a personal opinion about the tenets of Islam.12 Throughout the centuries. Mujtahids (qualified Islamic lawyers) have incessantly contributed to the further development of positive law and legal theory. This is an important point, since most leaders of

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reformist movements necessarily claim the right to practice Ijtihad.

Legal activity, whether in theory or in practice, continued unceasingly. The vast bulk of fatwas (legal opinions) that have appeared and continued to grow quite rapidly from the tenth century onwards is a telling example of the importance of fatwas as personal legal opinions and precedents and tacit proof of the continuation of the use of Ijtihad.13 It is in this large body of material that one may look for positive legal developments.

Plagiarized from Bannerman, *Islam in Perspective*, pp. 38-39

p. 38

Most authorities state that the use of ijtihad died out in the tenth century on the grounds that its creative force had become exhausted and that there was in any case no requirement for further interpretation. Thus the 'gate of ijtihad' was closed for all time and the era of taqlid set in.20

It is generally admitted that, ever since the codification of the doctrine of

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Islam by the four great orthodox imams, this door (of ijtihad) is closed and that Muslims must conform their opinions strictly to the opinions enumerated by these imams without seeking to arrive by means of their own reasoning at a personal opinion about the tenets of Islam.21

However, one observer has recently argued convincingly that the orthodox view is incorrect, that the concept has been misinterpreted, and that throughout the centuries, mujtakids (and others) have contributed to the further development of positive law and legal theory.22 This is an important point, since most leaders of reform¬ist or renewalist movements necessarily claim the right to practise ijtihad. However, since they do so on the basis of discarding or ignoring the developments he describes, they are unlikely to accept his argument. Nevertheless his argument does provide a continuity of practice and a possible means of according legitimacy to the claims irrespective of the time-scale. He implies that the stream of fatwas (legal opinions) issued over the centuries presents a more incorporated (into the state system, that is), and tacitly approved continuation of the use of, ijtihad. He is cautious about the long¬term implications, but is in no doubt about the significance. He states that

Legal activity, whether in theory or in practice, continued unceasingly. The vast bulk of fatwas (legal opinions) that appeared and continued to grow rapidly from the fourth/tenth century onwards is a telling example of the importance of fatwas as legal decisions and precedents. It is in this large body of material that one may look for positive legal developments.23

Rouhani's PhD Thesis, p. 35

Shia theory on the sources of the law and on the nature of the law provides a dynamic form of law.63

Plagiarized from Bannerman, *Islam in Perspective*, p. 46

Moreover, Shi'a theory on the sources of the law and on the nature of the law provides a more dynamic form of law.

Rouhani's PhD Thesis, p. 35

By elevating Aql (reason) to the status of a source of the law. they have given deductive reasoning a more important place than it occupies in Sunni theory.64 In the case of the Sunnah. the Shia accept only those hadith transmitted through one or more of the twelve impeccable Imams, and some believe that traditions of the holy Prophet (S.A.W.) should be accepted through the channel of narrations by the people of the holy Prophet's Progeny.65 The Shia conccpt of Aql is closely linked to Ijtihad, since the Shia jurist uses Aqi supported by the other three sources of the law.66

Plagiarized from Bannerman, *Islam in Perspective*, pp. 46-47

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Furthermore, by elevating aql (reason) to the status of a source of the law, they reject the Sunni disavowal of ijtihad and have given deductive reasoning a more important place than it occupies in Sunni theory.

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For the Shi'a, the sources of the law are the Qur'an, the Sunna, aql, and ijma '. Qiyas is rejected as unreliable if not false. However, the Shi'a definition of the Sunna and of ijma ' differ from the Sunni definition. In the case of the Sunna, the Shi'a accept only those hadith transmitted through one or more of the Imams, and some 'believe that traditions of the Holy Prophet should be accepted through the channel of narrations by the people of the Holy Prophet's Pro¬geny'37 — that is, only hadith transmitted through the line of Imams are acceptable. The modem view, however, adopts the first, more liberal definition and also holds that the sunna of the Imams is also binding on the rational grounds that the Imams are, like the Prophet, sinless and infallible. The Shi'a concept of aql is closely linked to ijtihad, since 'the Shi'i jurist uses 'aql, usually supported by the other three sources of the law ... to arrive at legal decisions and this process is called ijtihad'.38

Rouhani's PhD Thesis, pp. 36-37

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The theory set out briefly above is essentially that of ihe Osuli school and was largely in place by the tenth century. However, an opposing school, the Akhbari (Traditionalist), rose to prominence and doctrinal development paused until the controversy between the two was finally resolved in favour of the Osulis towards the end of the eighteenth century In essence. Akhbari theory rejected the rationalist basis of the Osuli view in favour of heavy reliance upon the Quran and the Sunna as explained by the Imams and upon a much larger corpus of hadith than that accepted as valid by the Osulis. It follows that the Akhbaris rejected the Osuli linkage between the sources of the law and rational principles and they equally reject Ijtihad in favour of taqlid.68 The Osul victory was followed by a resurgence of theoretical development, with the main contribution coming from Sheikh Murtaza Ansari in his definition of the principles to be

followed in reaching a decision in eases where there was doubt. In such cases he argued, the principles to be applied were al-bara'a (freedom from obligation or liability in the absence of proof); At-Takhir (freedom to select the opinion of other jurists or even other schools if these seem more suitable). Al-Istishab (the continuation of any

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state of affairs in existence or legal decisions already accepted unless the contrary can be proved); and Al-Ihtiyat (prudent caution whenever in doubt). 69

Plagiarized from Bannerman, *Islam in Perspective*, p. 38

The theory set out briefly above is essentially that of the usuli school (a rationalist use of the sources) and was largely in place by the sixteenth century CE. However, an opposing school, the akhbari (traditionalist), rose to prominence and doctrinal development paused until the controversy between the two was finally resolved in favour of the usulis towards the end of the eighteenth century CE. In essence, akhbari theory rejected the rationalist basis of the usuli view in favour of heavy reliance upon the Qur'an and the Sunna as explained by the Imams and upon a much larger corpus of hadith than that accepted as valid by the usulis. It follows that the akhbaris rejected the usuli linkage between the sources of the law and rational principles and they equally reject ijtihad in favour of taqlid — but a restricted form of taqlid in which it is the Hidden Imam who must be emulated.

The usuli victory was followed by a resurgence of theoretical development, with the main contribution coming from Shaikh Murtaza Ansari (1799-1864) in his definition of the principles to be followed in reaching a decision in cases where there was doubt. In such cases, he argued, the principles to be applied were:

al-bara'a (allowing the maximum possible freedom of action); at-takhir (freedom to select the opinions of other jurists or even other schools if these seem more suitable); al-istishab (the con¬tinuation of any state of affairs in existence or legal decisions already accepted unless the contrary can be proved); and al- ihtiyat (prudent caution whenever in doubt).41

Glossary

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Akhbari

One of the two schools of thought in Shio. The Akhbaris opposed the use of ijtihad and sought to base Shia jurisprudence on the use of hadith in place of the rationalist principles advocated by their opponents the usulis.

Plagiarized from Bannerman, *Islam in Perspective*, p. 240

akhbari

One of the two schools of thought in Shi'a Islam which fought for supremacy in Iran during the seventeenth century. The ***akhbaris*** opposed the use of ***ijtihad*** and sought to base Shi'a jurisprudence on the use of ***hadith*** in place of the rationalist principles advocated by their opponents the ***usulis.***

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Ansar

"Helpers" or "adherents". The term is normally applied to those inhabitants of Medina who supported and assisted the Prophet (S.A.W.) after he moved from Mecca to Medina in 622

Plagiarized from Bannerman, *Islam in Perspective*, p. 241

ansar

'Helpers' or 'adherents'. The term is normally applied to those inhabitants of Madina who supported and assisted the Prophet after his move from Mecca to Medina in 622.

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Aql

Intellect or reason. For the Shia, however, aql has been elevated to primary source of doctrine and law.

Plagiarized from Bannerman, *Islam in Perspective*, p. 241

'aql

Strictly, intellect, intelligence, or reason. For the Shi'a, however, 'aql has been elevated to a primary source of doctrine and law.

Rouhani's PhD Thesis, p. 409

Bara 'ah

Exemption from a duty, from an accusation, and from responsibility, etc. The term has acquired a technical meaning in doctrine and law: in the absence of proof to the contrary, the natural presumption is freedom from obligation or liability.

Plagiarized from Bannerman, *Islam in Perspective*, p. 241

bara ’a

Strictly, release or exemption from a duty, from an accusation, and from responsibility, etc. The term has acquired a technical meaning in doctrine and law: in the absence of proof to the contrary, the natural presumption is freedom from obligation or liability.

Rouhani’s PhD Thesis, p. 409

Caliph

Literally, a successor or one who comes after. In Islam the title was applied to the successors to the Prophet's temporal authority over the community.

Plagiarized from Bannerman, *Islam in Perspective*, p. 250

khalifa

Strictly, a successor or one who comes after. In Sunni Islam the title was applied to the successors to the Prophet’s temporal authority over the community.

Rouhani’s PhD Thesis, p. 410

Fatva

(Pl. Fatava) Deduction by the Islamic jurist on a point of law or legal problem from Islamic sources. A Fatva may deal with social issues, ritual matters and political issues.

Plagiarized from Bannerman, *Islam in Perspective*, p. 243

fatwa

Opinion of a jurist on a point of law or legal problem. A fatwa may deal with a weighty point of law, but may also deal with social issues, e.g. the legality or otherwise of abortion and birth control; with ritual matters, e.g. the permissibility of using stunning devices before the ritual slaughter of cattle; and political issues, e.g. the legitimacy of a ruler.

Rouhani’s PhD Thesis, p. 410

Fiqh

Originally, understanding or intelligence, the term has become the technical term for jurisprudence, the science of Muslim law, which covers all aspects of religious, political, and civil life.

Plagiarized from Bannerman, *Islam in Perspective*, p. 244

fiqh

Originally, ‘understanding, knowledge, or intelligence’, the term has become the technical term for jurisprudence, the science of Muslim law, which covers all aspects of religious, political, and civil life.

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Hadd (pi. hudud)

Literally, "limits". The term has acquired a narrow technical meaning Punishments laid down in the Sharia for specified crimes.

Plagiarized from Bannerman, *Islam in Perspective*, p. 244

hadd, pi. hudud

Literally, ‘limits’. The term has acquired a narrow technical meaning: punishments laid down in the Qur’an or the Sunna for specified crimes.

Rouhani’s PhD Thesis, p. 411

Hadith

Tradition of the Prophet (S.A.W.), being an account of what the Prophet (S.A.W.) said and did, and of his tacit approval or disapproval of things said or done in his presence.

Plagiarized from Bannerman, *Islam in Perspective*, p. 244

hadith, pi. ahadith

Tradition of the prophet, being an account of what the Prophet said and did, and of his tacit approval or disapproved of things said or done in his presence.

Rouhani's PhD Thesis, p. 412

Ihtiyat

Literally, "caution". When there is a difference of opinion between mujiahids on the correct ruling on a particular issue, the rulings of the most eminent mujiahids should be examined and the strictest of those rulings adopted.

Ijma

Literally, consensus. Ijma is one of the recognized sources of the law in both Sunni and Shia doctrine.

Plagiarized from Bannerman, *Islam in Perspective*, p. 244

ihtiyat

Strictly, 'caution'. Though not unknown in Sunni Islam, ihtiyat is more a Shi'a concept. When there is a difference of opinion between mujtahids on the correct ruling on a particular issue, the rulings of the most eminent mujtahids should be examined and the strictest of those rulings adopted.

ijma'

Strictly, consensus. Ijma' is one of the recognized sources of the law in both Sunni and Shi'a doctrine

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Imam

The spiritual leader of the community.

Plagiarized from Bannerman, *Islam in Perspective*, p. 247

imam

For Sunnis, the imam is the spiritual leader of the community.

Rouhani's PhD Thesis, p. 413

Istihsan

Literally, choosing for the better, the term is variously translated "juristic preference" and "favourable construction". In dealing with legal issues which are not covered by a clear and incontrovertible authority in the Shariah.

Plagiarized from Bannerman, *Islam in Perspective*, p. 248

istihsan

Literally, choosing for the better, the term is variously translated ‘juristic preference’ and ‘favourable construction’. In dealing with legal issues which are not covered by a clear and incontrovertible authority in the Qur’an, the hadith, or ijma ’,

Rouhani’s PhD Thesis, p. ۴۱۶

Maslaha

The public interest. A legal principle based on the maxim that necessity makes prohibited things permissible.

Plagiarized from Bannerman, *Islam in Perspective*, p. 251

maslaha

The public interest. A legal principle based on the maxim that necessity makes prohibited things permissible.

Rouhani’s PhD Thesis, p. 418

Qazi (pi. Quzat)

Normally translated "judge". However, his function is to dispense justice in accordance with the revealed law.

Plagiarized from Bannerman, *Islam in Perspective*, p.

qadi

Normally translated ‘judge’. However, his function is to dispense justice in accordance with the revealed law.

Rouhani's PhD Thesis, p. 418

Quran

Muslims believe that the Quran is the Word of God, that it is the last and most perfect of a series of revelations transmitted by God through a series of Prophets, and that it contains God's commands to man covering all aspects of man's behaviour.

Plagiarized from Bannerman, *Islam in Perspective*, p. 255

… Qur'an itself. Muslims naturally believe that the Qur'an is the Word of God, that it is the last and most perfect of a series of revelations transmitted by God through a series of prophets, and that it contains God's commands to man covering all aspects of man's behaviour.

Rouhani's PhD Thesis, p. 419

Riba

The taking of interest, usury. Riba is forbidden in Muslim law.

Plagiarized from Bannerman, *Islam in Perspective*, p. 255

riba

The taking of interest, usury. Riba is forbidden in Muslim law

Rouhani's PhD Thesis, p. 419

Shafi 'i

One of the four recognized Sunni schools of law and doctrine.

Plagiarized from Bannerman, *Islam in Perspective*, p. 256

Shafi'i

One of the four recognized Sunni schools of law and doctrine.

Rouhani's PhD Thesis, p. 419

Shia

Those who believed that Ali was the rightful successor to the Prophet

Plagiarized from Bannerman, *Islam in Perspective*, p. 257

Shi'a

Strictly shi'at Ali, the party of Ali, i.e. those who believed that Ali was the rightful successor to the Prophet.

Rouhani's PhD Thesis, p. 420

Shura

Consultation. Modernists have translated the concept into a form of democratic Assembly (the Majlis al Shura).

Plagiarized from Bannerman, *Islam in Perspective*, p. 257

Shura

Consultation. Classical theory held that a ruler should consult the leaders of the community who had a duty to give advice. Modernists have translated the concept into a form of quasi-democratic assembly, the Majlis al Shura

Rouhani's PhD Thesis, p. 420

Sunnah

The practice of the Prophet, inclusive of his sayings and actions, as recorded in the hadilh. The Sunnah of the Prophet is one of the primary sources of the Islamic law.

Plagiarized from Bannerman, *Islam in Perspective*, p. 258

sunna

Habitual practice or customary procedure. Initially, the term meant the habitual practice of Muslims in a particular area, but was later applied more restrictively to mean the practice of the

Prophet, inclusive of sayings and actions, as recorded in the hadith (q.v.). The Sunna of the Prophet is one of the four sources of the law.

Rouhani's PhD Thesis, p. 420

Sunni

"Orthodox" Muslims. Those who accept the legitimacy of the line of Caliphs who succeeded the Prophet (S.A.W.).

Plagiarized from Bannerman, *Islam in Perspective*, p. 258

Sunni

'Orthodox' Muslims. Those who accept the legitimacy of the line of khalifas who succeeded the Prophet.

Rouhani's PhD Thesis, p. 420

Tafsir

Commentary or interpretation, particularly of the Quran.

Plagiarized from Bannerman, *Islam in Perspective*, p. 258

tafsir

Commentary or interpretation, particularly of the Qur'an.

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Tazir

Literally, deterrence. The term describes those punishments for transgression of the law which were not perscribed in the Quran and were therefore left to the discretion of the judge.

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Ulama (Pl. of a'lim)

People of learning, scholars. More narrowly, the term is normally applied to those who are learned in Muslim theology, doctrine, law, etc.

Plagiarized from Bannerman, *Islam in Perspective*, p. 260

ta ’zir

Strictly, deterrence. The term describes those punishments for transgression of the law which were not prescribed in the Qur’an and were therefore left to the discretion of the judge. Hence, discretionary punishment, whose purpose was corrective, as distinct from the hadd (q.v.) punishments which were retributive.

ulama, sing, ’alim

People of learning, scholars. More narrowly, the term is normally applied to those who are learned in Muslim theology, doctrine, law, etc.

Plagiarism of Rouhani's Ph.D. Thesis from Hallaq

Approximately 2100 words of Rouhani's Ph.D. Thesis in chapter 1 word by word have been plagiarized from the following paper of Wael B. Hallaq:

Hallaq, Wael B. (1984) "Was the Gate of Ijtihad Closed?", *International Journal of Middle East Studies*, Number 16, pp. 3-41

سرقت علمی تز دکتری روحانی از حلاق

تقریباً ۲۱۰۰ واژه از تز دکتری روحانی در فصل ۱ کلمه به کلمه از این مقاله‌ی دکتر وائل حلاق سرقت علمی شده است:

Hallaq, Wael B. (1984) "Was the Gate of Ijtihad Closed?", *International Journal of Middle East Studies*, Number 16, pp. 3-41

گفتنی است در فهرست منابع هیچ ارجاعی به این مقاله‌ی حلاق وجود ندارد؛ در پی‌نوشت‌های مربوطه‌ی فصل ۱ که در گزارش زیر آورده‌ایم نیز ارجاعی به این مقاله‌ی حلاق وجود ندارد.

Rouhani's PhD Thesis, p. 30

Diverse elements - including extremist legal groups demanding Taqlid or denouncing Qiyas - rejected Ijtihad all through the third, fourth and fifth centuries after hijrah (A.H.) These groups came mainly from the lines of the "people of hadith", or Traditionalists, who were primarily concerned with the stud) of transmitted sources and their literal interpretation, while denying human reason in Ijtihad or in the process of legal reasoning. 47 A distinction among different groups of Traditionalists seemed in point, as they ranged from moderates opting for co-existence with the "people of ra'y" to extermists denouncing Qiyas even if it was totally reliant on the Book.

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", pp. 7-8

p. 7

Throughout the third, fourth and fifth Islamic centuries, ijtihad, the only channel of legal development, was rejected by various elements. (Among these were extreme legal and theo-political groups (or sects) that called for taqlid or condemned the principle of qiyas - a principle that constituted the backbone of Ijtihad. These groups came mainly from the lines of the 'people of hadith1, or

p. 8

Traditionalists,'٢٥ who were primarily concerned with the study of transmitted sources and their literal interpretation, while denying human reason any right to be exercised in ijtihad or in the process of legal reasoning. It is necessary to distinguish between types of hadlth upholders, since within this vast heterogeneous body of Traditionalists there existed diverse groups ranging from those moderate scholars who were somewhat willing to co-exist with the 'people of ra'y' (who employed qiyas), to those extremists who rejected the strict procedure of qiyas even when based solely on scripture.

Rouhani's PhD Thesis, pp. 30-31

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More than two centuries later, when all legal schisms became well defined Mawardi described the status of this

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extreme Traditionalist party vis-a-vis Ijtihad as follows:

"There are two kinds of people who reject analogy. Some reject it, follow the text literally and are guided by the sayings of their ancestors if there is no contradiction to the text in question

They reject completely the independent Ijtihad and turn away from individual contemplation and free investigation No judgeships may be entrusted to such persons since they apply the methods of jurisprudence insufficiently. The other category of people does reject analogy, but still uses independent judgement in legal deduction through reliance on the meaning (spirit) of the words and the sense of the address Al-Shafii's followers are divided as to whether or not such theologians may be entrusted with a judgeship".49

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 8

More than two centuries later, when all legal schisms became well-defined, the Shafici jurist Mawardi (d. 450/1058) described the status of this extreme Traditionalist party vis-a-vis Sunnism as follows:

There are two kinds of people who reject analogy. Some reject it, follow the text literally and are guided by the sayings of their ancestors if there is no contradiction to the text in question. They reject completely the independent ijtihad and turn away from individual contemplation and free investigation.

No judgeships may be entrusted to such persons since they apply the methods of jurisprudence insufficiently. The other category of people does reject analogy, but still uses independent judgement in legal deduction through reliance on the meaning (spirit) of the words and the sense of che address. The ahl al- Zahir belong to the latter. Al-ShafiCI's followers are divided as to whether or not such theologians may be entrusted with a judgeship25

Rouhani's PhD Thesis, pp. 31-32

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Scholars of all schools, in early fourth century A.H., came to the conclusion that all major questions had been duly addressed and resolved. Little by little, a consensus appeared regarding disqualification of individuals for independent reasoning in law Based on the same consensus, explication, application and interpretation of the final doctrine were determined as the main tasks ahead for the years to come The closing of the door of Ijtihad. as it was called, amounted to the demand for Taqlid, a term which had originally denoted the kind of reference to Companions of the Prophet (S.A.W.) that had been customary in the ancient schools of law. and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities.50 According to Anderson and many other scholars, the gate of

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Ijtihad was believed to have been shut by the late third century A.H.51 And to confirm that this closure was a fail accompli. Gibb asserted that the early Muslim scholars held that "the gate was closed, never again to be reopened".52

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 3

By the beginning of the fourth century of the hijra (about A.D. 900;, however, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all. This 'closing of the door of ijtihad as it was called, amounted to the demand for taqlid, a term which had originally denoted the kind of reference to Companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities. A person entitled to ijtihad is called mujtahid, and a person bound to practice laklfd, mukallid} J. N. D. Anderson remarked, as did many others, that about the end of the third/ninth century it was commonly accepted that the gate of ijtihad had become closed.3 And to confirm that this closure was a fait accompli, H. A. R. Gibb asserted that the early Muslim scholars held that the gate "was closed, never again to be reopened."4

Rouhani's PhD Thesis, p. 32

Depending on the particular subject of their discussion, many scholars would have believed that the closure of the gate had an impact on, or was influenced by, this or that element in Islamic history. The closure of the gate of Ijtihad had dual applications On the one hand, it served to immunize the Shariah against government interference On the other hand, it was used to demonstrate the problem of retrogression in Islamic institutions and culture Some date the closure at the beginning of the fourth Islamic century and others advance it to the seventh, depending on the facts and analyses involved in each study Thus, on the basis of this alleged closure, aspects of Islamic history were reconstructed and interpreted time after time The baselessness and inaccuracy of the said approaches toward the history of Ijtihad following the second century A.H. come to the fore through meticulous survey of the original legal sources

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", pp. 3-4

p. 3

Depending on the particular subject of their discussion, many scholars would have us believe that the closure of the gate had an impact on, or was influenced by, this or that element in Islamic history. Some use it to explain the immunity of the Sharica against the interference of government, and others to illustrate the problem of decadence in Islamic institutions and culture.6 Some date the closure at the beginning of the fourth Islamic century and others advance

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it to the seventh,7 depending on the facts and analyses involved in each study. Thus, on the basis of this alleged closure, aspects of Islamic history were reconstructed and interpreted time after time. A systematic and chronological study of the original legal sources reveals that these views on the history of ijtihad after the second/eighth century are entirely baseless and inaccurate.

Rouhani's PhD Thesis, pp. 32-33

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Interestingly, traditional attempts to root out Ijtihad were thwarted, primarily because of the firm establishment of Osul-Al-Fiqh (principles of jurisprudence) which included the indispensable component of Ijtihad In fact, an examination of the writings of jurists alter the third century will

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demonstrate that Ijtihad was exercised with no interruption. 54

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 10

That these groups failed to impair to the least degree the foundations of ijtihad was due mainly to the institutionalization of the science of usul al-fiqh, of which ijtihad was an indispensable ingredient. It is difficult to assume that at the time the theory of usul was finalized—about the beginning of the fourth/tenth cen-tury—Muslims had decided to 'close the gate of ijtihad'. In fact, an examination of the writings of jurists after the third/ninth century will demonstrate that ijtihad was exercised with no interruption.

Rouhani's PhD Thesis, pp. 34-35

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Discovery of God's law is of paramount importance in Islamic legal theory, as it allows man to realize the behavior, which Allah approves of It is exactly for the purpose of finding the rulings decreed by God that the methodology of Osul-AI-Fiqh was established.59 The Quran and the Sunnah of the Prophet (S.A.W.) do not, as a rule, specify the law as it might be stated in specialized law manuals, but only contain rulings and indications that lead to the causes of these rulings. On the basis of these indications and causes the mujtahid may attempt, by employing the procedure of Qiyas to discover the judgement of an unprecedented case But before embarking on this original task, he must first search for the judgement in the works of renowned jurists If he fails to find a precedent in these works he may look for a similar case in which legal acts arc different but legal facts are the same Failing this he must turn to the Quran. the Sunnah. or Ijma

for a precedent When this is reached he is to apply the principles of Qiyas in order to reach the rulings of the case in question. This ruling may be one of the following the obligatory (wajib), the forbidden (haram), the recommended (mandub), the

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permissible (mubah), or the disapproved (makruh).60

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p.

IJTIHAD IN LEGAL THEORY (USul al-fiqtl)

In Islamic legal theory, discovering the law of God was of crucial significance, for it was the law that informed man of the conduct acceptable to Allah. It is exactly for the purpose of finding the rulings decreed by God that the method¬ology of usul al-fiqh was established.

The Quran and the Sunna of the Prophet do not, as a rule, specify the law as it might be stated in specialized law manuals, but only contain some rulings (ahkam; pi. of hukm) and indications (dalalat or amarat) that lead to the causes (cz7fl/; pi. of cz//a) of these rulings. On the basis of these indications and causes the mujtahid may attempt, by employing the procedure of qiyas (analogy) to discover the judgement {hukm) of an unprecedented case (farc; pi. offuruc). But before embarking on this original task, he must first search for the judgement in the works of renowned jurists. If he fails to find a precedent in these works he may look for a similar case in which legal acts are different but legal facts are the same. Failing this he must turn to the Quran, the Sunna, or ijmac (consensus) for a precedent that has a cilla identical to that of the farc. When this is reached he is to apply the principles of qiyas (analogy) in order to reach the ruling of the case in question. This ruling may be one of the following: the obligatory (wajib), the forbidden (mahzur), the recommended (mandub), the permissible (mubah), or the disapproved (makruh).8

Rouhani's PhD Thesis, p. 35

As such, development of a system of principles based on which competent jurists could issue verdicts for new cases was vested with legal theory Jurists, since the third century A.H., have unanimously regarded this as the lofty objective of Osul-Al-Fiqh.61 Legal theory in all its parts is sanctioned by divine authority, that is. it derives its authority from revealed sources. It is partly for this reason and partly for the reason of man's duty to worship his Creator in accordance with divine law that the practice of Ijtihad was declared to be a religious duty incumbent upon all qualified jurists whenever a new case should appear Until Ijtihad is performed by at least one mujtahid, the Muslim community remains under the spell of this unfulfilled duty Legal theory has played a rather significant role in favor of Ijtihad. Thus, the practice of Ijtihad was the primary objective of the methodology and theory of Osul-Al-Fiqh throughout Islamic history

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 5

The primary objective of legal theory, therefore, was to lay down a coherent system of principles through which a qualified jurist could extract rulings for novel cases. From the third/ninth century onwards this was universally recognized by jurists to be the sacred purpose of usul al-fiqh.9

Legal theory in all its parts is sanctioned by divine authority, that is, it derives its authority (hujjiyya) from revealed sources. It is partly for this reason and partly for the reason of man's duty to worship his Creator in accordance with divine law that the practice of ijtihad was declared to be a religious duty (fard kifaya) incumbent upon all qualified jurists whenever a new case should appear.10 Until ijtihad is performed by at least one mujtahid, the Muslim community remains under the spell of this unfulfilled duty.

In theory at least there is certainly nothing to indicate that ijtihad was put out of practice or abrogated. In due course it will become clear that legal theory played a rather significant role in favor of ijtihad. Thus, if the practice of ijtihad was the primary objective of the methodology and theory of usul al-fiqh throughout Islamic history,

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The investigation of the ways of hadith transmission and the trustworthiness of transmitters is necessary for verifying the credibility of hadith. Basri particularly underlines the indispensabilily of Qiyas for Ijtihad He also holds that Ijtihad hinges on knowledge of rules of illah (cause), asl (fundamental case), fara (parallel case), and hukm (legal competence).75 In the process of deducing the illa from the asl, the text, with its inner contradictions and linguistic-legal complications, has to be analyzed To solve these contradictions and to understand intricate exegetical matters the jurist must have a thorough knowledge of the principles of majaz (metaphors), particularization, and Naskh (abrogation). Familiarity with the Arabic language, particularly with the khass (particular) and the a'mm (general), is a prerequisite Basri regards familiarity with customary law (Urf) as a qualification required for Ijtihad, for it is essential, he argues, to determine God's law in the light of the exigencies of human life.76

The jurist should, in addition, be versed with the attributes of God to safely come up with a sound awareness of His Will as specified in the Book Basri. moreover, argues that a case with a ruling cannot be taken up by any other jurist

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 5

The investigation of the ways of hadith transmission and the trustworthi¬ness of transmitters is necessary for verifying the credibility of akhbar (prophetic reports). The overall emphasis of Basri falls especially on qiyas as an indispensible tool in any undertaking of ijtihad, which in turn involves the practical knowledge of all rules related to cilla, asl (the legal part in the texts), farc, and hukm. In the process of deducing the cilla from the asl, the text, with its inner contradictions and linguistic-legal complications, has to be analyzed. To solve these contradic¬tions and to understand intricate exegetical matters the jurist must have a thor¬ough

knowledge of the principles of majaz (metaphors), particularization, and abrogation. Familiarity with the Arabic language, particularly with the khass (particular) and the camm (general), is a prerequisite. Curiously, Basri regards familiarity with customary law (curf) as a qualification required for ijtihad, for it is essential, he argues, to determine God's law in the light of the exigencies of human life.

Much the same, the jurist must acquaint himself with God's attributes, which are the only guarantee for arriving at a correct understanding of His intentions as expressed in scripture. Equally important is the doctrine of the infallibility of the Muslim community to which the Prophet had attested. Although Basri makes no demands on the mujtahid to know the positive rulings (Juruz) that had been subject to ijmac, he asserts that no jurist is allowed to reinvestigate a case the ruling of which has already been derived.

Rouhani's PhD Thesis, p. 39

This implies that whoever intends to practice Ijtihad to solve a specific case must first be certain that it was not treated before, and this consequently requires of him to know the furua of at least his school. Basri mitigates the rigorousness of these requirements in the law of inheritance In a single case of inheritance and without possession of the aforementioned skills, a jurist may be allowed to practice Ijtihad According to Basri, this is justified on the grounds that methodical principles and textual subject matter related to inheritance are independent of and unconnected with, other parts of the law. Otherwise the jurist must not attempt Ijtihad in any other area of law until he is well equipped with the necessary tools.78 Shirazi (d. 467) is of the view that only those parts of the Quran and the Sunnah with direct relevance to the Shariah should he known to the jurist This provision allows for the omission of the inapplicable parts The principles of Arabic language, views of the former generations, and Qivas are the fundamentals of Osul The jurist must know the texts from which he can extract the illah and must possess the methods to do so Given the fact more than one illah may be deduced in a single case, he must be able to distinguish between a variety of ilat and to determine which deserves to be advanced over the others.79 Ghazali (d. 505). commenting on the qualifications for Ijtihad, asserted that a jurist should just know - not memorize the 500 verses required in law to become a Mujtahid.80

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 6

This implies that whoever intends to practice ijtihad to solve a specific case must first be certain that it was not treated before, and this consequently requires of him to know the furuc of at least his school.14

Finally, Basri mitigates the rigorousness of these requirements in the law of inheritance. Whenever a jurist is capable of practicing ijtihad in a single case of inheritance and has no access to the above-mentioned skills, he may still be allowed to do so. According to Basri, this is justified on the grounds that methodical principles and textual subject-matter related to

inheritance are independent of, and unconnected with, other parts of the law. Otherwise, the jurist must not attempt ijtihad in any other area of law until he is well equipped with the necessary tools.15

Shirazi (d. 467/1083) limits the knowledge of the Quran and the Sunna to those provisions that have a direct relevance to Sharia, thus omitting irrelevant parts such as proverbs, tales, etc.16 Principles of the Arabic language, points of agreement and disagreement among previous generations, and qiyas are all necessary usul rudiments. The jurist must know the texts from which he can extract the cilla and must possess the methods to do so. Given the fact that more than one cilla may be deduced in a single case, he must be able to distinguish between a variety of cilal and to determine which deserves to be advanced over the others.

When discussing the requirements of ijtihad, Ghazali (d. 505/1111) maintained that in order to reach the rank of mujtahid the jurist must:17

١. Know the 500 verses needed in law; committing them to *memory* is not a prerequisite.

Rouhani's PhD Thesis, p. 40

He must also know the methods by which legal evidence is derived from the texts and know the Arabic language, complete mastery of its principles is not a prerequisite The jurist should, moreover, be versed with the rules of the doctrine of Naskh (abrogation), and not the details, to determine the authenticity of hadith The Mujtahid must be able to investigate the authenticity of hadith If the hadith has been accepted by Muslims as reliable, it may not be questioned If a transmitter was known for probity, all ahadith related through him are to be accepted.81 According to Ghazali, a jurist wishing to engage in Ijtihad in all branches of substantive law must have all these qualifications. Those who want to practice Ijtihad in one area, e.g., family law. or only in a single case say a case of divorce, need not fulfill all the conditions but are instead required to know the methodological principles and the textual material needed to solve that particular problem.82

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 6

٤. Know the methods by which legal evidence is derived from the texts.

٥. Know the Arabic language; complete mastery of its principles is not a prerequisite.

٦. Know the rules governing the doctrine of abrogation. However, the jurist need not be thoroughly familiar with the details of this doctrine; it suffices to show that the verse or the hadith in question had not been repealed.

٧. Investigate the authenticity of hadith. If the hadith has been accepted by Muslims as reliable, it may not be questioned. If a transmitter was known for probity, all hadiths related through him are to be accepted. Full knowledge of the science of al-tacdil wal- tajrlh (hadith criticism) is not required.

These qualifications, Ghazali remarks, are required from jurists who intend to embark on ijtihad in all areas of substantive law. Those who want to practice ijtihad in one area, e.g., family law, or only in a single case, say a case of divorce, need not fulfill all the conditions but are instead required to know the method¬ological principles and the textual material needed to solve that particular problem.18

Rouhani's PhD Thesis, p. 41

Ghazali's legal doctrine was almost fully followed by his successors such as Baydawi, Subki, Isnawi, and Ibn Abd Al-Shakur. Some of these authors, such as Baydawi, demanded encompassing knowledge of the Quran The more important point is that the divisibility of Ijtihad was recognized to be lawful and thus a limited knowledge of the principles of Ijtihad was sufficient to allow a jurist to practice Ijtihad in an individual case.83 However, only Basri and Shirazi did not consider the divisibility of Ijtihad permissible in all areas of law.84 Though Muslim legal texts presented difficult qualifications for Ijtihad, prominent Islamic jurists embarked on Ijtihad

[**p. 63**, Endnote 84

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for example, Shawkani. Irshad, P.237.]

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 7

Only space here prevents us from discussing later jurists' writings on this issue, but to be sure, the successors of Ghazali and Amidi, such as Baydawi (d. 685/ 1286), Subki (d. 771/1369), Isnawi (d. 772/1370), Ibn al-Humam (d. 861/1456), Ibn Amir al-Hajj (d. 879/1474), Ansari (d. ١١١٩/١٧٠٧) □□□ □□□ □□□□ □□–□□□□□□ (□. ١٢٢٥/ ١٨١٠),٢١ □□□ □□□ □□□□□□ □□□□□□□□□□□□□ □□□□ □□□ established Sunni legal doctrine propounded by Ghazali. Some of these authors, such as Baydawi, demanded encompassing knowledge of the Quran and some others like Ibn al- Humam and Ibn Amir al-Hajj reduced the number of hadiths required to 1,200.22 The more important point is that the divisibility (tajzPa) of ijtihad was recognized to be lawful in Sunni law and thus a limited knowledge of usul was sufficient to allow a jurist to practice ijtihad in an individual case.23 Basri and Shirazi are nearly alone in not specifying that the divisibility of ijtihad is permissible in all areas of law.

It would therefore be implausible to maintain that the qualifications for ijtihad as set forth in Muslim legal writings made it impossible for jurists to practice ijtihad.

[**p. 35**, Endnote 23

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See Shawkani, Irshad, p. 237.]

Rouhani's PhD Thesis, p. 20

Further investigation of the role of Ijtihad and Mujtahids (qualified Islamic lawyers) in Islamic legal history following the eleventh century will show that Ijtihad remained an integral part of the Islamic legal system and that those who opposed it were virtually pushed to the corner as minorities.85

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 7

Further discussion of the role of ijtihad and mujtahids in Islamic legal history after the second/eighth century will show that ijtihad remained an integral part of the Sunni legal doctrine and that those who opposed it were finally excluded from Sunnism.

Rouhani's PhD Thesis, pp. 41-42

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For them taqlid is to be used only by the commoner and by those for whom the exercise of Ijtihad is impossible Ibn Abd Al-Barr devoted a whole chapter in refutation of taqlid. He maintained that on the basis of many Quranic verses an

p. 42

agreement among scholars has been reached on the nullity of taqlid. The works of these scholars reflect the conviction of Muslim lawyers with regard to matters of religious and legal practices

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 12

For them taqlid is to be used only by the commoner ifammiyy) and by those for whom the exercise of ijtihad is impossible.61 The views of cAbd al-Jabbar and Basri on ijtihad and taqlid, al¬though essentially Muctazili, express the standard doctrine of Sunni Islam. Ibn cAbd al-Barr (d. 463/1070) devoted a whole chapter in refutation of taqlid. He maintained that on the basis of

many Quranic verses an agreement among schol¬ars has been reached on the nullity of taqlid.62 Al-Khatib al-Baghdadi (d. 463/ 1070) and al-Mawardi (d. 450/1058) expressed similar views.63 The works of these scholars reflect the conviction of Muslim lawyers with regard to matters of religious and legal practices.

Rouhani's PhD Thesis, p. 42

The influence of Ijtihad transcended law to embrace the political thought of medieval Islam An account of the transforming 11th century politics sheds light on the essential role of Ijtihad in the political institution dominated by the Islamic Jurists. Such a discussion will also demonstrate that whereas political theory, which was the product of juristic thought, recognized the failure of Caliphs to meet the requirements of Shariah by their incompetence to practice Ijtihad

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 12

The importance of ijtihad exceeded the domain of law to penetrate the political thought of medieval Islam. A discussion of the changing politics in relation to ijtihad in the fifth/eleventh century will show the extent to which ijtihad was indispensable to the political institution in which the ulama played a prominent role. Such a discussion will also demonstrate that whereas political theory (which was, in the final analysis, the product of juristic thought) recognized the failure of Caliphs to meet the requirements of Sharica by their incompetence to practice ijtihad,

Rouhani's PhD Thesis, p. 42

In his discussion of the qualifications of the Imam, Baghdadi considers the ability to practice Ijtihad as one of the four conditions that the Imam (or Caliph) must satisfy in order to rule efficiently.87

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 13

In his discussion of the qualifications of the Imam, Baghdadi (d. 429/1037) considers the ability to practice ijtihad as one of the four conditions that the Imam (or Caliph) must satisfy in order to rule efficiently.66

Rouhani's PhD Thesis, p. 42

The analysis presented thus far makes it clear that in practice and in theory the activity of Ijtihad during the period under discussion was uninterrupted. Furthermore. Mujtahids, proved to have existed at all times, a tact which finds full support in the ample material available from the period itself.89

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 20

From all this it becomes clear that in practice and in theory the activity of ijtihad during the period under discussion was uninterrupted. Furthermore, muj- tahids proved to have existed at all times, a fact which finds full support in the ample material available from the period itself.

Rouhani's PhD Thesis, p. 43

As a result the methodology of Ijtihad was practically enforced but without reference to its designation. Many jurists admitted that it was indispensable, and so it but they were convinced that very few contemporary jurisis posesssed the qualification to practice it

Plagiarized from Hallaq, "Was the Gate of Ijtihad Closed?", p. 32

In practice, therefore, the methodology of ijtihad continued to be employed but mostly without being recognized under its proper name. Many jurists admitted that it was indispensable, and so it was, but they were convinced that no contemporary jurist possessed the qualification to practice it.

Plagiarism of Rouhani's Ph.D. Thesis from Mallat

Approximately 2000 words of Rouhani's Ph.D. Thesis in chapter 6 word by word have been Plagiarized from the following book of Chibli Mallat:

Mallat, Chibli (1993). *The Renewal of Islamic Law, Muhammad Baqer as-Sadr, Najaf and the Shi'i International*, Cambridge University Press.

Here is the plagiarism report:

Rouhani's Ph.D. Thesis, p. 343

The main articles on the Council of Guardians form part of chapter six of the Constitution, on "the Legislative Power", and complement the dispositions dealing with Parliament and its prerogatives. One could presume that, on the surface, the Council of Guardians is no more than a corrective to possible exaggerations of the Majlis, or eventual gross departures from accepted principles of the Shariah. But the reality is different. As appears from Article 94, the Council of Guardians was destined to play a major role in the definition of the functions of Islamic law. But important as that was, this supervision did not constitute the sole significant prerogative of this body. In other texts of the Constitution, the Council of Guardians was entrusted with the scrutiny, not only of Parliament's acts, but of the other important institutions of the country.[30]

Plagiarized from Mallat, p. 80

The main articles on the Council of Guardians form part of chapter 6 of the Iranian Constitution, on 'the Legislative Power', and complement the dispositions dealing with Parliament and its prerogatives. One could presume that, on the surface, the Council of Guardians is no more than a ' corrective' to possible exaggerations of Parliament, or eventual gross departures from accepted principles of the *shariah.* But the reality is different. As appears from Article 94, the Council of Guardians was destined to play a major role in the definition of the functions of Islamic law. But important as that was, this supervision did not constitute the sole significant prerogative of this body. In other texts of the Constitution, the Council of Guardians was entrusted with he scrutiny, not only of Parliament's acts, but of the other important institutions of the country.

Rouhani's Ph.D. Thesis, pp. 343-344

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The dispositions in Art. 94 give an extremely wide role to the Council of Guardians in the legislative process, and these powers are

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further comforted by Articles 95 to 98, which allow the Council of Guardians, inter alia, to attend the sessions of the Majlis while a draft law is being debated, and for its members to express their views if an urgent Bill is on the floor.[31] Thus, on the one hand, the Council of Guardians bears resemblance to some of the constitutional systems of the West, particularly in France and in the United States. With France, it shares the immediate scrutiny of legislation discussed in Parliament.[32] With the United States, a similar scrutiny is carried out by the Judiciary, but it is only after a [33] protracted process that it reaches the Supreme Court. On the other hand, the Council of Guardians is set apart by the systematic and automatic revision power through which the Constitution empowers it to examine, and possibly undermine, all legislation. Furthermore, the Council of Guardians can allow itself ten extra days if it deems the first period insufficient for its analysis.[34] With such unparalleled power, the Council of Guardians was bound to become a Super- Legislature. and its extraordinary prerogatives have been compounded by the vagueness of its mandate. The "tenets of Islam" and the "constitutional law" of the land are vast categories, which encompass virtually any area which the Council deems prone to its intervention, scrutiny, and possible rejection. [35]

Plagiarized from Mallat, pp. 82-83

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The dispositions in Art. 94 give an extremely wide role to the Council of Guardians in the legislative process, and these powers are further comforted by Articles 95 to 98, which allow the Council of Guardians, inter alia, to attend the sessions of the Majlis while a draft law is being debated, and for its members to express their views if an urgent bill is on the floor. Thus, on the one hand, the Council of Guardians bears resemblance to some of the constitutional systems of the West, particularly in France and in the United States. With France, it shares the immediate scrutiny of legislation discussed in Parliament. With the United States, a similar scrutiny is carried out by the Judiciary, but it is only after a protracted process that it reaches the Supreme Court.

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On the other hand, the Council of Guardians is set apart by the systematic and automatic revision power through which the Constitution empowers it to examine, and possibly undermine, all legislation. Furthermore, the Council of Guardians can allow itself ten extra days if it deems the first period insufficient for its analysis (Art. 95). With such unparalleled power, the Council of Guardians was bound to become a Super-Legislature, and its extraordinary prerogatives have been compounded by the vagueness of its mandate. The 'tenets of Islam' and the 'constitutional law' of the land are vast categories, which encompass virtually any area which the Council deems prone to its intervention, scrutiny, and possible rejection.

Rouhani's Ph.D. Thesis, p. 357

Formation of the Expediency Council
(Majma-e- Tashkhis-e-Maslaha)

The conflict between the Council of Guardians and the majority of Parliamentarians and Ministers continued to run over the new social problems. The debate was anchored in the most delicate issues of economic freedom and the social balance which the State should or shouldn't establish. To that extent, the problems between the Council of Guardians and its critics was eminently social.[64]

The importance of social issues for the determination of the nature of the Islamic revolution carries the investigation away from the formal- constitutional domain in which it expressed itself, to the deeper background relating to complex themes like social justice, the state role in the economy, freedom of contract, property rights and duties, and land and labour reform.[65]

The articulation of "social justice" themes on the constitutional

Plagiarized from Mallat, pp. 102-103

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The conflict between the Council of Guardians and the majority of Parliamentarians and

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Ministers had been running for years over the ' social' significance of the Revolution. The debate was anchored in the most delicate issues of economic freedom and the social balance which the State should or shouldn't establish. To that extent, the problems between the Council of Guardians and its critics was eminently social.

The importance of social issues for the determination of the nature of the Islamic Revolution carries the investigation away from the formal-constitutional domain in which it expressed itself, to the deeper background relating to complex themes like social justice, the state role in the economy, freedom of contract, property rights and duties, and land and labour reform. The articulation of ' social justice' themes on the constitutional

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controversy must be made clear, for the issue was generally muted in the formal debate. In itself, the constitutional controversy was a major event in Iranian history, and led to fundamental institutional changes. The deadlock reached in 1979 was broken by the redrafting of the 1988 Constitution.66 Those persons in the system who were reeling from the extraor-dinary powers of the Council of Guardians - the President, the Speaker, and the members of Cabinet - were eager to read into Imam Khomeini's letter the important "clarification" needed to break the ties imposed by the Council of Guardians as an institution. One way to achieve their means with the new theory would possibly have been to push forward with the bills held in abeyance until then, and pass them immediately, while the effects of the new theory had not yet dissipated. In fact this course was started, but it was not deemed sufficient in the long run from an institutional point of view, probably because nothing prevented the Council of Guardians from regaining its former power under other circumstances. But the choice of a more drastic measure against the constitutional review was rooted also, no doubt, in the twisted way in which the weakening of the Council of Guardians had taken place. A formal decision was needed to do away, for good, with the problem that the Council of Guardians represented. On February 6, 1988. a letter was sent to the Leader by a high-powered group. In it, Imam Khomeini was asked to solve "the problem which remains, i.e. the method

Plagiarized from Mallat, p. 103

Controversy must be made clear, for the issue was generally muted in the formal debate. In itself, the constitutional controversy was a major event in Iranian history, and led to fundamental institutional changes. The deadlock reached in 1988 was broken by the redrafting of the 1979 Iranian Constitution. Those persons in the system who were reeling from the extraordinary powers of the Council of Guardians - the President, the Speaker, the Prime Minister, and the members of Cabinet - were eager to read into Khumaini's letter the important ' clarification' needed to break the ties imposed by the Council of Guardians as an institution. One way to achieve their means with the new Khumainist theory would possibly have been to push forward with the bills held in abeyance until then, and pass them immediately, while the effects of the new theory had not yet dissipated. As mentioned earlier, this course was started, but it was not deemed sufficient in the long run from an institutional point of view, probably because nothing prevented the Council of Guardians from regaining its former power under other circumstances. But the choice of a more drastic measure against the constitutional review was rooted also, no doubt, in the twisted way in which the weakening of the Council of Guardians had taken place. A formal decision was needed to do away, for good, with the potential threat that the Council of Guardians represented. On 6 February 1988, a month after Khumaini's letter and the subsequent national debate, a letter was sent to the Leader by a high-powered group … . In it, Khumaini is asked to solve 'the problem which remains, [i.e.] the method

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of implementation of the Islamic sovereign right with regard to Government ruling".67 The signatories then complained about the operation of the separation of powers in the legislative field: "At present, government bills are discussed in the relevant cabinet committees and then in the cabinet itself. After being read in the Majlis, they are usually examined twice in the specialized committees. These examinations are carried out in the presence of government experts and the views of the experts are also taken into account. These views are usually communicated to the committees after having been stated and published. Usually, a single government bill is examined in several committees depending on its content. Then it has two readings in plenary session, in which all the Majlis deputies and cabinet ministers, or deputy ministers in the relevant ministries, participate. They will explain their views in line with their specialization; in the same manner they also make amendment proposals. If it [a piece of legislation] originates as a private member's bill, although initially it does not benefit from the expert view of the Government, in committee and in plenary session it is discussed like a government bill, and the relevant experts express their views on it. And after final ratification, the Council of Guardians announces its views in the framework of theological rulings or the Constitution. In some cases the Majlis accords with its view, but in others it cannot do so. In such a case the Majlis and the Council of Guardians fail to

Plagiarized from Mallat, pp. 103-104

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of implementation of the Islamic sovereign right with regard to Government ruling'.[39]

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Rouhani's Ph.D. Thesis, p. 360

come to an understanding The deadlock, the signatories suggest, is then complete: "It is here that the need arises for intervention by the faqih to clarify the subject matter of the government ruling. Though many of these examples are due to differences of view among experts, they concern the issue of Islamic rulings and the generalities of the Constitution.[69]

The problem of the confrontation between the Council of Guardians and the other branches could not be explained in a clearer way. For the personalities who signed the letter, the question can be summarized in the following manner: what is the point of a Majlis and a Cabinet that spend years preparing bills to have them repeatedly destroyed by the Council of Guardians over generalities of the Constitution? Why should the members of parliament, who are elected by the people, and who claim no less expertise and Islamic truthfulness than the Council of Guardians' members, bow to that unelected body's decisions? Yet, Imam Khomeini was hesitant to take the final step, and tip the balance clearly against the Council of Guardians. So the signatories tried to force the game by insisting on the urgency of breaking the deadlock. They wrote that they were "informed that Imam Khomeini has decided to appoint an authority to state the decision of the sovereign body in case of failure to solve the differences between the Majlis and the Council of Guardians". They urged him "speed of action ... since at the present numerous issues of importance to society are left undecided".

Plagiarized from Mallat, p. 104

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The answer of Imam Khomeini can be considered to have led to the most important constitutional development since the 1979 Constitution. Along with his letter on January 6th, to which it is an almost inescapable conclusion, Imam Khomeini's edict of February 6th represents a significant contribution to the whole theory underlying the Constitution, Velaiah Al- Faqih.[70] Imam Khomeini assented to the signatories' suggestion : In case the Majlis and the Council of Guardians should fail to come to an understanding on theological and legal points, then a council must be set up consisting of the honourable theologians of the Council of Guardians and holders of the title Hujjat Al-Islam Messrs Khamene'i, Hashemi Rafsanjani, Ardebili, Tavasoli, Musavi Khoiniha and Mir Hoseyn Musavi and the relevant minister. The council is to discuss the interests of the Islamic state. In case of need, other experts can also be invited. After the necessary consultations, the decision of the majority of those present in the Council must be complied with.[71] Thus was born a new institution in the Islamic Republic of Iran, which came to be known as Majma-e-Tashkhis-e-Maslaha (the Expediency Council). The structure of the original de jure members is such that the majority "government" members can override the decisions of the six members belonging to the Council of Guardians, to whose detriment the deadlock was broken.[72]

Plagiarized from Mallat, pp. 104-105

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Khumaini's edict of 6 February represents a significant contribution to the whole theory underlying the Iranian Constitution, *wilayat al-faqih*,... But he reluctantly assented to the signatories' suggestion: In case the Majlis and the Council of Guardians should fail to come to an understanding on theological and legal points, then a council must be set up consisting of the honourable theologians of the Council of Guardians and holders of the title *Hujjat al-hlam* Messrs Khamene'i, Hashemi [Rafsanjani], Ardebili, Tavasoli, Musavi, Khoiniha and His Excellency Mir Hoseyn Musavi and the relevant minister.

The council is to discuss the interests of the Islamic regime. In case of need, other experts can also be invited. After the necessary consultations, the decision of the majority of those present in the Council must be complied with.[42]

Thus was born a new institution in the Islamic Republic of Iran, which came to be known as 'Majma'-e Tashkhis-e Maslahat' (Council for the discernment of [the Republic's] interest). The structure of the original *dejure* members is such that the majority 'government' members can override the decisions of the six members belonging to the Council of Guardians, to whose detriment the deadlock was broken.

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The fact that the newly established council was not given an official name of its own by the Leader,[73] as well as the designation of the government members personally rather than under their official positions, increases the sense that Imam Khomeini's wish was not to see the new Council perpetuated as an institution. Furthermore, the Council is considered to meet on the condition that an unbridgeable dispute between the Majlis and the Council of Guardians has emerged. Thus, in theory, it is only after a repeated deadlock between the Majlis and the Council of Guardians that Council meets. Thirdly, the Council cannot be considered as a fixed institution in so far as some members can be ad hoc experts who are invited for one specific bill.[74]

Plagiarized from Mallat, p. 105

The fact that the newly established council was not given an official name of its own by the Leader, as well as the designation of the government members personally rather than under their official positions, increases the sense that Khomeini's wish was not to see the new Council perpetuated as an institution. Furthermore, the Council is considered to meet on the condition that an unbridgeable dispute between the Majlis and the Council of Guardians has emerged. Thus, in theory, it is only after a repeated deadlock between Parliament and the Council of Guardians that the Council meets. Thirdly, the Council cannot be considered as a fixed institution in so far as some members can be ad hoc experts who are invited for one specific bill.

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Endnote 5

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5. One of the contemporary foqaha develops a three-stage theory in Islamic law-making: "The first stage is to elucidate the general issues which have been revealed through inspiration to the Prophet (S.A.W.) by God. All laws and ordinances, even the important laws regarding the absolute velaiah of the Prophet and the pure Imams and the fully qualified, have been revealed by God. Regarding the absolute velaiah of the Holy Prophet (S A W.), the Quran clearly states: "The Prophet (S A W.) is closer to the Believers than their own selves. After himself, the Prophet (S.A.W.) of Islam conferred this position on the holy Imams, and

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the immaculate Imams passed it on to the fully qualified foqaha, and the necessary conditions for it are based on the Book and on the Sunnah. If the [leading] faqih,who enjoys the position of vice-regent on behalf of the immaculate Imams, issues a decree or an order, it is incumbent upon all individuals and strata, even other foqaha, to obey it.

The stage of implementation and deciding on appropriateness, which is performed by the Majlis and the Council of Guardians. It is as this stage that the needs and requirements of each time and each region should be investigated and the appropriateness of the laws which have been legislated will be decided upon and clarified. The needs and requirements of various times and places have been registered in different books of jurisprudence and opinions of the faqihs, such as Jcnvahir and Tahrir. (Montazerei, Velaiah-Al-Faqih, vol.l, p. 79).

Plagiarized from Mallat, pp. 92-93

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Muntazeri develops a three-stage theory in law-making:

The first stage is to elucidate the general issues which have been revealed through inspiration to the Prophet by God. All laws and ordinances, even the important laws regarding the absolute *wilayat* of the Prophet and the pure Imams and the fully qualified *faqihs*, have been revealed by God. Regarding the absolute *wilayat* of the Holy Prophet (S), the Qur'an clearly states: 'The Prophet is closer to the Believers

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than their own selves.' After himself, the Prophet of Islam conferred this position on the holy Imams, and the immaculate Imams passed it on to the fully qualified *faqihs*, and the necessary conditions for it are based on the Book and on the *Sunnah*. If the [leading] *faqih*, who enjoys the position of vice-regent on behalf of the immaculate Imams, issues a decree or an order, it is incumbent upon all individuals and strata, even other *faqihs*, to obey it.[22]

the' third stage', which is defined by Muntazeri as the stage of implementation and deciding on appropriateness, which is performed by the Islamic Consultative Assembly [Parliament] and the Council of Guardians. It is at this stage that the needs and requirements of each time and each region should be investigated and the appropriateness of the laws which have been legislated will be decided upon and clarified. The needs and requirements of various times and places have been registered in different books of jurisprudence and opinions of the faqihs, such as *Jawahir* and *Tahrir*.*23*

Rouhani's Ph.D. Thesis, pp. 384-385

Endnote 31

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31. In the case of urgent drafts, they were even allowed to intervene in the debate. It is generally after a long process of discussions and arguments that the deadlock intervenes. Nor is this surprising, considering that the power of the Council of Guardians in the

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supervision of the laws, being automatic, is so large. It is a legitimate question to wonder what in these circumstances remains of the power of a Parliament under permanent, immediate and total scrutiny, and what is left of the legislative power of the Legislature. With article 4 of the Iranian Constitution gives the Council of Guardians a quasi-absolute legislative mandate. All civil, penal, financial, economic, administrative, military and political laws, shall be based on the Islamic standards. This article shall generally govern all the articles of the Constitutional law and also other laws and regulations and this shall be at the discretion of the religious jurists who are members of the Council of Guardians. (Amid, The first decade of the Iranian Constitution, P- 95).

Plagiarized from Mallat, p. 95

in the case of urgent drafts, they were even allowed to intervene in the debate. It is generally after a long process of discussions and arguments that the deadlock intervenes. Nor is this surprising, considering that the power of the Council of Guardians in the supervision of the laws, being automatic, is so large. It is a legitimate question to wonder what in these circumstances remains of the power of a parliament under permanent, immediate and total scrutiny, and what is left of the legislative power of the Legislature. With Article 96ff., Article 4 of the Iranian Constitution gives the Council of Guardians a quasi-absolute legislative mandate:

All civil, penal, financial, economic, administrative, military and political laws, shall be based on the Islamic standards. This article shall generally govern all the articles of the Constitutional law and also other laws and regulations and this shall be at the discretion of the religious jurists who are members of the Council of Guardians.

Plagiarism of Rouhani's Ph.D. Thesis from Mutahhari

Approximately 1400 words of Rouhani's Ph.D. Thesis in chapter 2 have been plagiarized from the following book of Morteza Mutahhari:

Mutahhari, Morteza (1982) *Jurisprudence and Its Principles (Fiqh and Usul ul-Fiqh)*, Translated by Mohammad Salman Tawheedi, New York: Tahrike Tarsile Quran.

And approximately 125 words of Rouhani's Ph.D. Thesis in chapter 4 have been plagiarized from the following book of Morteza Mutahhari:

Mutahhari, Morteza (?) *The Collected Works*, Vol. 21, Tehran: Sadra

سرقت علمی تز روحانی از شهید مطهری (ره)

تاکنون تقریباً ۱۵۰۰ واژه از سرقت علمی تز روحانی از شهید مطهری (ره) را پیدا کرده‌ایم. بدین صورت که:

۱. در فصل ۲ حدوداً ۱۴۰۰ واژه بدون ارجاع از ترجمه‌ی انگلیسی کتاب *اصول فقه* شهید مطهری (ره) سرقت علمی کلمه به کلمه شده است:

Mutahhari, Morteza (1982) *Jurisprudence and Its Principles*, Translated by Salman Tawheedi, New York.

البته در چند موضع از تز نیز از همین کتاب *اصول فقه* با ارجاع – ولی برخلاف اصول تحقیق – کپی شده است که فعلاً به مشکلات آن نمی‌پردازیم و در این گزارش آن چند مورد را سرقت علمی به شمار نمی‌آوریم.

۲. در بخش نتیجه‌ی فصل ۴ نیز حدود ۱۲۵ واژه از کتاب *اسلام و مقتضیات زمان* شهید مطهری (ره) سرقت علمی کلمه به کلمه شده است.

Rouhani's PhD Thesis, p. 127

The binding testimony of reason is proved by the law of reason and also by the confirmation of the Shariah. …

Plagiarized from Mutahhari, *Jurisprudence and Its Principles*, p.

The binding testimony of reason is proved by the law of reason ("the sun is shining, hence the proof of the sun" - meaning that with the existence of reason no other proof is needed), and also by the confirmation of the Shari'ah.

Rouhani's PhD Thesis, pp. 139-140

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Thus, if we suppose that in some case no law of the Shariah has been communicated to us, particularly by means of narration, but reasoning absolutely traces with certitude the particular wisdom of the other judgments of the Shariah, then it automatically discovers the law of the Shariah in this case too. In such instance reasoning forms a chain of logic: First, in such and such a case, there exists such and such a best interest which must necessarily be met. Second, wherever there exists a best

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interest that must necessarily be met, the Legislator of Islam is definitely not indifferent, rather He commands the meeting of that best interest. Third, so, in the quoted instances, the law of the Shariah is that the best interests must be met. 236

[p. 175, Endnote 236

٢٣٦. □□□□□□□□□□ □□□□□□□□, □□.□□□., □ ٤٧.]

Plagiarized from Mutahhari, *Jurisprudence and Its Principles*, p.

Thus, if we suppose that in some case no law of the Shari'ah has been communicated to us, particularly by means of narration, but reasoning absolutely traces with certitude the particular wisdom of the other judgments of the Shari'ah, then it automatically discovers the law of the Shari'ah in this case too. In such instance reasoning forms a chain of logic: First, in such and such a case, there exists such and such a best interest which must necessarily be met. Second, wherever there exists a best interest that must necessarily be met, the Legislator of Islam is definitely not indifferent, rather He commands the meeting of that best interest. Third, so, in the quoted instances, the law of the Shari'ah is that the best interests be met.

Rouhani's PhD Thesis, pp. 140-141

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The jurists call reason and the Shariah inseparable from each other. They say that whatever law is established by reason is also established by the Shariah. 239 However, this of course is provided that reasoning traces in an absolute, certain and doubtless way those best interests which must be attended to and those worst interests or forms of

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corruption that must be shunned. If not, the name reasoning cannot be given to the use of opinion, guesswork and conjecture. Analogy for this very factor is void for it is more opinion and imagination rather than reasoning and certitude.240 Therefore, Some Shia jurist have argued that whatever is a law of reason is a law of the Shariah and whatever is a law of the Shariah is a law of reason.241

[p. 175, Endnotes 239-241

٢٣٩. □□□□□□□. *□□□□□□□–□□–□□□□*, □□□□□□, ١٩٦٠, □□□ ٤, □ ١٤٤

٢٤٠. □□□□, □□ ١٤٥–١٤٨

٢٤١. □□□□.]

Plagiarized from Mutahhari, *Jurisprudence and Its Principles*, p.

The 'usuliyyin and the mutakalimin call reason and the Shari'ah inseparable from each other. They say that whatever law is established by reason is also established by the Shari'ah.

However, this of course is provided that reasoning traces in an absolute, certain and doubtless way those best interests which must be attended to and those worst interests or forms of corruption that must be shunned. If not, the name reasoning cannot be given to the use of opinion, guesswork and conjecture. Analogy for this very factor is void for it is more opinion and imagination rather than reasoning and certitude.

… Therefore, in the same way it is said that whatever is a law of reason is a law of the Shari'ah, it also said that whatever is a law of the Shari'ah is a law of reason.

Rouhani's PhD Thesis, p. 143

In the above mentioned examples, it is reasoning with its precise calculations which clarifies our specific duties, and in the study of Principles these issues and issues like these are all discussed and the way of properly determining the answers is learned. (Asl-Al-Ahamm-wa-Al-Mohemm). The jurists refer to the Islamic sources for their deducing of the laws of the Shariah. Sometimes in his referrals the jurist is successful and sometimes he is not. That is, sometimes (of course predominately) he attains the actual law of the Shariah in the form of certitude or a reliable probability, which means a probability that has been divinely endorsed. In such cases, the duty becomes clear and he realizes with certitude or with a strong and permissible probability what it is the Shariah of Islam demands. Occasionally, however, he is unable to discover the duty and the Divine Law from the sources, and he remains without a defined duty and in doubt. 249

[p. 175, Endnote 249

٢٤٩. □□□□□□, □□.□□□., □□□. ۴, □. ١۴٩–١۵٣.]

Plagiarized from Mutahhari, *Jurisprudence and Its Principles*, p.

In the above mentioned examples, it is reasoning with its precise calculations which clarifies our specific duties, and in the study of Principles these issues and issues like these are all discussed and the way of properly determining the answers is learned.

… We have learned that the jurisprudents refers to four sources for his deducing of the laws of the Shari'ah. Sometimes in his referrals the jurisprudent is successful and sometimes he is not. That is, sometimes (of course predominately) he attains the actual law of the Shari'ah in the form of certitude or a reliable probability, which means a probability that has been divinely endorsed. In such cases, the duty becomes clear and he realizes with certitude or with a strong and permissible probability what it is the Shari'ah of Islam demands. Occasionally, however, he is unable to discover the duty and the Divine Law from the four sources, and he remains without a defined duty and in doubt.

Rouhani's PhD Thesis, pp. 143-144

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In these cases what must be done? Has the Legislator of Islam or reason or both specified a certain duty in the case of the actual duty being out of reach? And if so, what is it? The answer is that yes, such a duty has been specified. A system of rules and regulations has been specified for these types of circumstances. Reason too, in certain circumstances, confirms the law of the Shariah, for the independent law of (aware)

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reasoning is the very same as the law of Shariah, and in certain other instances it is at least silent. 250 In the part of Principles which concerns Ijtihad, we learn the correct and valid method

of deducing the laws of the Shariah, and, in the part concerning the principles of Application, we learn the correct way of benefiting from the rules that have been introduced for the kind of situation mentioned above, and of putting them into practice. The general principles of application that are used in all the sections of Islamic Jurisprudence are four: 1) The principles of Exemption (bara'ah); 2) The Principle of Precaution (ehtiat); 3) The Principle of Option (takhir); ۴) □□□ □□□□□□□□□ □□ □□□□□□□□□□ (□□□□□□□□). ۲۵۱

[**p. 175, Endnotes 250-251**

۲۵۰. □□□□.

۲۵۱. □□□□□□, □□.□□□., □. ۱۲۱.]

Plagiarized from Mutahhari, *Jurisprudence and Its Principles*, p.

In these cases what must be done? Has the Legislator of Islam or reason or both specified a certain duty in the case of the actual duty being out of reach? And if so, what is it?

The answer is that yes, such a duty has been specified. A system of rules and regulations has been specified for these types of circumstances. Reason too, in certain circumstances, confirms the law of the Shari'ah, for the independent law of (aware) reasoning is the very same as the law of Shari'ah, and in certain other instances it is at least silent, meaning that it has no independent law of its own and accords to the Shari'ah.

In the part of Principles which contains the Principles of Deducing we learn the correct and valid method of deducing the Shari'ah, and, in the part concerning the Principles of Application, we learn the correct way of benefitting from the rules that have been introduced for the kind of situation mentioned above, and of putting them into practice.

The general principles of application that are used in all the sections of Jurisprudence are four:

۱. The Principles of Exemption (bara'at)

۲. The Principle of Precaution (ihtiyat)

۳. The Principle of Option (takhyyir)

۴. The Principle of Mastery (istishab)

Rouhani's PhD Thesis, p. 144

The Principle of Option (takhir) is that we have the option to choose one of two things, whichever we like. Esteshab is the principle that which existed remains in its original state - or masters the doubt that opposes it - while the doubt is ignored. Ehtiat is the principle that it is possible for both possible duties to act. 253

[**p. 175, Endnote 253**

٢٥٣. □□□□□□□ □□□□□□□, *□□□□-□□-□□-□□□□*, □□□□□□□, ١٩٥١, □□. ٢٢١-٢٢٢.]

Plagiarized from Mutahhari, *Jurisprudence and Its Principles*, p. & p.

p.

The Principle of Option is that we have the option to choose one of two things, whichever we like, and the Principle of Mastery is the principle that that which existed remains in its original state - or masters the doubt that opposes it - while the doubt is ignored.

p.

… precaution, meaning that it is possible for both possible duties to be performed

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The question may arise in what circumstances the bara 'ah applies and in what circumstances the ehtiat,

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takhir and esteshab apply. Each of these has its particular instance. 254

"Sometimes the jurist remains unable to deduce the law of the Shariah and is unable to trace a particular necessity and remains in a state of doubt, and it might be that the doubt is linked to some general or broad knowledge. The doubts of the jurists about an obligation either are linked to some general knowledge or are primary doubts. If they are linked to some general knowledge it is either possible to act in accordance to ehtiat, meaning that it is possible for both possible duties to be performed, or it is not possible to act in precaution. If ehtiat is possible, it must be acted in accordance with, and both of the possible duties must be performed, and such an instance calls for the Principle of ehtiat. Sometimes, however, precaution is not possible, because the doubt is between obligatory and forbidden. " 255

[**p. 175, Endnotes 254-255**

٢٥٤. □□□□□□.□□.□□□., □.١٢٩.

٢٥٥. □□□□□□, *□□□□□□□□□□□□*, □□□. ٤, □□. ١٥٣١٥٤, □□□□□, ١٩٦٠.]

Plagiarized from Mutahhari, *Jurisprudence and Its Principles*, p.

Now we will see in what circumstances the Principle of Exemption applies and in what circumstances the Principles of Precaution, Option and Mastery apply. Each of these has its particular instance and the study of Principles teaches us these instances.

Sometimes the jurisprudent remains unable to deduce the law of the Shari'ah and is unable to trace a particular necessity and remains in a state of doubt, and it might be that the doubt is linked to some general or broad knowledge …

So the doubts of the jurisprudents about an obligation are either linked to some general knowledge or are primary doubts. If they are linked to some general knowledge, it is either possible to act in accordance to precaution, meaning that it is possible for both possible duties to be performed, or it is not possible to act in precaution. If precaution is possible, it must be acted in accordance with, and both of the possible duties must be performed, and such an instance calls for the Principle of Precaution. Sometimes, however, precaution is not possible, because the doubt is between obligatory and forbidden.

Rouhani's PhD Thesis, p. 145

Assuming that our doubt is a primary doubt not linked to any general knowledge, the instance is either that we know the previous condition and the doubt is as to whether the previous law stands or is changed, or the instance is that the previous condition has not been established either. If the previous condition is established the situation calls for the Principle of esteshab and if the previous condition is not established the situation calls for the Principle of bara'ah. 256

[p. 175, Endnotes 256

٢٥٦. □□□□□□, *□□□□□□–□□–□□□□*, □□□□□□, ١٩٥١, □□. ٢٢١–٢٢٢.]

Plagiarized from Mutahhari, *Jurisprudence and Its Principles*, p.

Assuming, however, that our doubt is a primary doubt not linked to any general knowledge, the instance is either that we know the previous condition and the doubt is as to whether the previous law stands or is changed, or the instance is that the previous condition not been established either. If the previous condition is established the situation calls for the Principle of Mastery (mastery of the known previous condition over the doubt), and if the previous condition is not established the situation calls for the Principle of Exemption.

Rouhani's PhD Thesis, pp. 145-146

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These four principles are not particular to Mujtahids for under_standing the laws of the Shariah. They are also relevant to other subjects. People who are not Mujtahids can also benefit from them at the time of certain doubts. For example, imagine that an unweaned baby boy takes

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milk from a woman other than his mother, and when that boy grows up, he wants to marry the daughter of that woman, and it is not known whether as a baby he drank so much milk from that woman's breast that he is to be counted as the "wet-nurse son" of that woman and her husband or not. That is, we doubt whether the boy drank milk from her breast fifteen consecutive times, or for a complete day and night, or so much that his bones grew from her milk (in which cases the boy becomes counted as her son and thus similar to the daughter's brother are forbidden for her). This instance calls for the Principle of Mastery, because before the boy drank the woman's milk he was not her "wet- nurse son", and now we doubt whether or not he is. By the Principle of Mastery, we conclude that there is no question of a wet-nurse relationship. 257

[**p. 175, Endnotes 257**

٢٥٧. □□□□□□ □□□□□□□, □□.□□□., □□. ٢٤١–٢٤٢.]

Plagiarized from Mutahhari, *Jurisprudence and Its Principles*, p.

These four principles are not particular to mujtahids for understanding the laws of the Shari'ah. They are also relevant to other subjects. People who are not mujtahids and who must therefore imitate (taqlid) a mujtahid can also benefit from them at the time of certain doubts.

For example, imagine that an un-weaned baby boy takes milk from a woman other than his mother, and when that boy grows up, he wants to marry the daughter of that woman, and it is not known whether as a baby he drank so much milk from that woman's breast that he is to be counted as the "wet-nurse son" of that woman and her husband or not.

That is, we doubt whether the boy drank milk from her breast fifteen consecutive times, or for a complete day and night, or so much that his bones grew from her milk (in which cases the boy becomes counted as her son and thus similar to the daughter's brother are forbidden for her). This instance calls for the Principle of Mastery, because before the boy drank the woman's milk he was not her "wet-nurse son", and now we doubt whether or not he is. By the Principle of Mastery, we conclude that there is no question of a wet-nurse relationship.

Rouhani's PhD Thesis, p. 146

A mujtahid must, as the effect of frequent application, have great power of discernment in the execution of these four types of principles; discernment that sometimes is in need of exactitude, and if not he will encounter mistakes. Of these four principles, the Principle esteshab has been uniquely established by the Shariah. For the Shaft is and the Hanbalis, esteshab denotes continuation of that which is proven and the negation of that which had not existed. 258

[p. 175, Endnotes 258

٢٥٨. □□□□□□□□□, □□.□□□., □□. ٢٣٦–٢٣٩.]

Plagiarized from Mutahhari, *Jurisprudence and Its Principles*, p.

A mujtahid must, as the effect of frequent application, have great power of discernment in the execution of these four types of principles; discernment that sometimes is in need of hair-splitting exactitude, and if not he will encounter mistakes.9

Of these four principles, the Principle of Mastery has been uniquely established by the Shari'ah

Rouhani's PhD Thesis, pp. 274-275

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Islam is a religion with preciseness of mathematical characteristics. It calculates with accuracy and balances that which is important and which is more important. According to the Islamic system in times of need, an issue of vitality could and should be sacrificed for that of greater vitality. This factor has bestowed proper flexibility to the system. We have not introduced such a factor into the system. The

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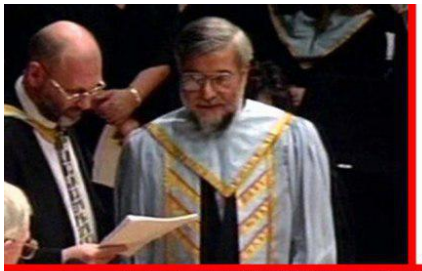
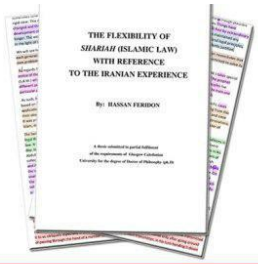
system has been made this way and in this form it has been given to us. Even if we wanted to make the system flexible, we did not have such a right in the first place. Flexibility is a component part of the nature of this system, and it is an equating process that it contains for us.

Plagiarized from Mutahhari, *The Collected Works*, Vol. 21, p. 172

اسلام دین حساب است، حساب اهم و مهم را می‌کند، می‌گوید در موقع لزوم آن چیزی را که اهمیت کم‌تری دارد فدای چیزی که اهمیت بیش‌تری دارد بکن. این خودش یکی از اموری است که به اسلام انعطاف بخشیده‌است. این انعطاف را ما نداده‌ایم، خودش این‌جور ساخته شده و به دست ما داده شده‌است. اگر ما می‌خواستیم به زور یک نرمش به آن بدهیم حق

نداشتیم، ولی این یک نوع نرمش است که خود اسلام به خودش داده‌است، حسابی است که خودش به دست ما داده‌است.




THE FLEXIBILITY OF
SHARIAH (ISLAMIC LAW)
WITH REFERENCE
TO THE IRANIAN EXPERIENCE

By: HASSAN FERDOS

changes. It is a degree of flexibility for variously changing needs of all times and locations. Islam is a religion with preciseness of mathematical characteristics. It calculates with accuracy and balances that which is important and which is more important. According to the Islamic system in times of need, an issue of vitality could and should be sacrificed for that of greater vitality. This factor has bestowed proper flexibility to the system. We have not introduced such a factor into the system. The

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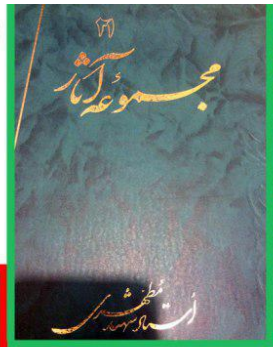
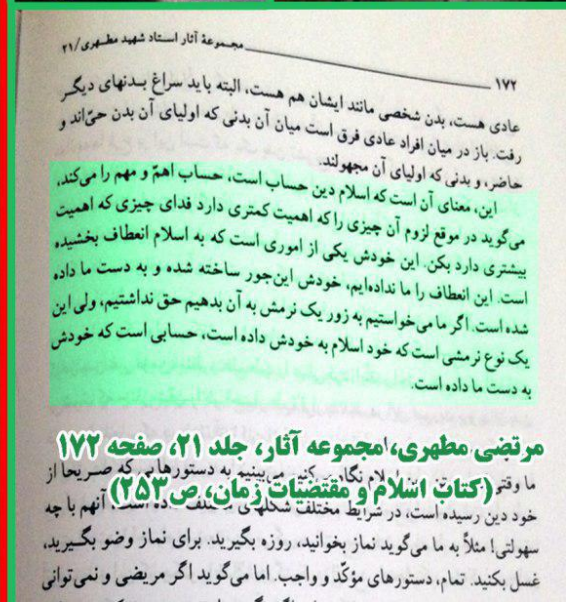
system has been made this way and in this form it has been given to us. Even if we wanted to make the system flexible, we did not have such a right in the first place. Flexibility is a component part of the nature of this system, and it is an equating process that it contains for us.

The position of the secondary rules and laws in the *Shariah* is as those [illegible] authoritative [illegible] primary laws are [illegible] Holy *Quran* and the *Sunnah*. Secondly, the *Foqaha* according to their

بخش نتیجه‌گیری فصل ۴ رساله‌ی دکتری آقای روحانی، اسکرین‌شات تهیه شده از سیستم ایران‌داک وزارت علوم




مجموعهٔ آثار استاد شهید مطهری/ ۲۱

۱۷۲

عادی هست، بدن شخصی مانند ایشان هم هست، البته باید سراغ بدنهای دیگر رفت. باز در میان افراد عادی فرق است میان آن بدنی که اولیای آن بدن حیّ‌اند و حاضر، و بدنی که اولیای آن مجهولند.

این، معنای آن است که اسلام دین حساب است، حساب اهمّ و مهم را می‌کند، می‌گوید در موقع لزوم آن چیزی را که اهمیت کمتری دارد فدای چیزی که اهمیت بیشتری دارد بکن. این خودش یکی از اموری است که به اسلام انعطاف بخشیده است. این انعطاف را ما نداده‌ایم، خودش این‌جور ساخته شده و به دست ما داده شده است. اگر ما می‌خواستیم به زور یک نرمش به آن بدهیم حق نداشتیم، ولی این یک نوع نرمشی است که خود اسلام به خودش داده است، حسابی است که خودش به دست ما داده است.

مرتضی مطهری، مجموعه آثار، جلد ۲۱، صفحه ۱۷۲
(کتاب اسلام و مقتضیات زمان، ص ۲۵۳)

Plagiarism of Rouhani's Ph.D. Thesis from Baktiari

Approximately 1100 words of Rouhani's Ph.D. Thesis in chapter 6 word by word have been Plagiarized from the following book of Bahman Baktiari:

Baktiari, Bahman (1996) *Parliamentary Politics in Revolutionary Iran*, University Press of Florida.

Here is the plagiarism report:

Rouhani's Ph.D. Thesis, p. 345

By October 1981, the Majlis had not been able to agree on any proposal. Frustrated by the lack of progress, the speaker of the Majlis sent a letter to the Leader "seeking consultations on the property question" In the letter, the speaker explained to the Leader that a sizable number of the Majlis' members believe that the institution of Majlis does not have the authority to act on this issue. According to the letter, the speaker said that these members think that the property question is in the purview of the Faqih (the Leader). "He is the guardian of the community, he can exercise his authority in situations of extreme importance" 37 The Speaker's reservations on whether the institution of Majlis is suited to deal with this sensitive issue was compounded by the views from foqaha. The powerful senior clerics did not remain on the sideline. A senior religious leader in Qom, had issued a statement opposing land reform. A member of the Couneil of Guardians believed any 38 interference in property ownership by the state is against Islamic tenets. The society of seminary foqaha in Qom also issued a declaration warning

Plagiarized from Baktiari, p. 87

By October 1981, the Majles had not been able to agree on any proposal. Frustrated by the lack of progress, Rafsanjani sent a letter to Khomeini "seeking consult3;~ons on the property question." In the letter, Rafsanjani explained to Khomeini that a sizable number of the Majles's members be" lieved that the institution of Majles did not have the authority to act on this issue. According to the letter, Rafsanjani said that these members thought that the property question is in the purview of the faqih, Khomeini: "He is the guardian of the community, he can exercise his authority in situations of extreme importance."81 Rafsanjani's reservations on whether the institution of Majles was suited to deal with this sensitive issue were compounded by the views from Qum. The powerful senior clerics did not rem;n on the sideline. Ayatollah Golpaygani, a senior religious leader in Qum, had issued a statement opposing land reform. Ayatollah Sa'fi- a member of the guardianship council and the son-in-law of Ayatollah Golpaygani-believed that any interference in property ownership by the state was against Islamic tenets. 82 The Society of Seminary Teachers in Qum also issued a declaration warning

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against bills "damaging to the interests of the oppressed, which appear in the dress of Islam." 39 Therefore, the Speaker was fully aware of how divisive this issue can be, and did not want to bring the Majlis into this unless the Leader made his position more clear. Following the Speaker's meeting with the Leader, the government submitted a land reform bill to the Majlis on October 24, 1981. It was drafted by the officials in the ministry of agriculture. The bill was similar to the previous one enacted by the revolutionary council with some technical change in the language regarding compensation, as well as a more flexible time-limits for the owners of fallow lands to begin cultivation. Another proposal submitted by 16 deputies gave more emphasis to whether any property was acquired "illegally" as well as the properties of those owners which had "increased their wealth by oppressing the peasant". The sponsors of this proposal thought that this is what the Leader wanted since the latter repeatedly had mentioned the plight of the peasants in regard to confiscations of land. The proposal called for the creation of investigatory bodies to review the acquisition manners of land. After a year, both proposals had failed to gain enough support in the Majlis. Some accused the government of having a different motive: the identifications of the landlords and tenants for tax purposes. Finally, on December 28, 1982, the Majlis passed a measure called the Agrarian Reform Law. It was by far the most favorable to the

Plagiarized from Baktiari, pp. 87-88

p. 87

against bills "damaging to the interests of the oppressed, which appear in the dress of Islam. "83 Therefore, Rafsanjani was fully aware of how divisive this issue could be, and he did not want to bring the Majles into this unless Khomeini made his position clearer. Following Rafsanjani's meeting with Khomeini, the government submitted a land-reform bill to the Majles on 24 October 1981. Drafted by the officials in the ministry of agriculture, the bill was similar to the one previously enacted by the revolutionary council, with some technical changes in the language regarding compensation as well as more flexible time limits for the owners of fallow lands to begin cultivation. Another proposal submitted by sixteen deputies gave more emphasis to property that had been acquired "illegally" as well as to properties whose owners who had

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"increased their wealth by oppressing the peasants." The sponsors of this proposal thought that this is what Khomeini wanted, since the latter repeatedly had mentioned the plight of the peasants in regard to confiscations of land. The proposal called for the creation of investigatory bodies to review the manner in which land was acquired. After a year, both proposals had failed to gain enough support in the Majles. Some accused the government of having a different motive: the identification of the landlords and tenants for the purpose of collecting taxes. 84

Finally, on 28 December 1982 the Majles passed a measure called the Agrarian Reform Law. It was by far the most favorable to the

Rouhani's Ph.D. Thesis, p. 347

landlords. It allowed them to select their own lessees, including if they wanted, their children. It excluded dairy farms, livestock, and mechanized farms. Owners of fallow lands were given one year to bring the land into cultivation, and the absentee landlords could retain the land so long as they were engaged in agriculture. Contrary to its title, the Agrarian Reform measure of 1982 did not envisage any distribution of land. Instead, it consolidated the leasing system. Even this moderate attempt was deemed to be in violation of Islamic principles by the Council of Guardians, which vetoed the law on January 18, 1983.41 This brought all the efforts of the past two years to a sudden halt. The measures that did pass into law, such as a law envisaging compensation for agricultural losses caused by pests or plant illness (7 April 1983) and a measure that provided rice farmers with a special bonus (15 October 1993) were the Council of Guardians allowed.

Plagiarized from Baktiari, p. 88

landlords. It allowed them to select their own lessees, including if they wanted, their children. It excluded dairy farms, livestock, and mechanized farms. Owners of fallow lands were given one year to bring the land into cultivation, and the absentee landlords could retain the land so long as they were engaged in agriculture. Contrary to rts title, the Agrarian Reform Law of 1982 did not envisage any distribution of land. Instead, it consolidated the leasing system. i Even this moderate attempt was deemed to be in violation of Islamic \ principles by the guardianship council, which vetoed the law on 18 January \ 1983 85 and thus brought all the efforts of the past two years to a sudden halt. The measures that did pass into law-such as a law specifying compensation for agricultural losses caused by pests or plant illness (7 April 1983) and one that provided rice farmers with a special bonus (15 October 1983)-were the most the guardianship council allowed.

Rouhani's Ph.D. Thesis, p. 348

Over the next several months, the Majlis came under increasing pressure to address the foreign trade issue. In March 1981, twenty deputies successfully organized the passage of a resolution that gave the government two months to submit a proposal for the nationalization of foreign trade. Conservative elements in the Majlis were pushed aside, and those who argued for a "reasoned approach" were accused of representing the profiteers:

Plagiarized from Baktiari, p. 90

Over the next several months, the Majles came under increasing pressure to address the foreign trade issue. In March 1981, twenty deputies successfully organized the passage of a resolution that gave the government two months to submit a proposal for the nationalization of foreign trade. Conservative elements in the Majles were pushed aside, and those who argued for a "reasoned approach" were accused of representing the profiteers

Rouhani’s Ph.D. Thesis, p. 348

In May 1981, the government submitted a nationalization bill to the Majlis. The bill had three amendments concerning purchase, export, and commerce service centers that were to be submitted later. The bill for the nationalization of foreign trade also entailed a plan for the formation of liaison offices and information centers in foreign countries. The deputy minister for foreign trade stated that the bill was prepared with the help of the trade ministry's experts, "some of these experts have attached their views regarding the risks associated with this bill so that the deputies in the Majlis can study the ramification of this bill more accurately"44. Six committees in the Majlis re-worked the bill for a vote in November 1981, and in April 1982, the Majlis overwhelmingly passed the nationalization of foreign trade bill. The Majlis' version called for the creation of consumption cooperatives to take over the task of domestic distribution of

Plagiarized from Baktiari, p. 91

In May 1981, the reluctant Raja'i government submitted a nationalization bill to the Majles. The bill had three amendments concerning purchase, export, and commerce service centers that were to be submitted later. The bill for the nationalization of foreign trade also entailed a plan for the formation of liaison offices and information centers in foreign countries. The deputy minister for foreign trade, Hossein Kazempour Ardabili, stated that the bill was prepared with the help of the trade ministry's experts: "Some of these experts have attached their views regarding the risks associated with this bill so that the deputies in the Majles can study the ramification of this bill more accurately. "92 Six committees in the Majles reworked the bill for a vote in November 1981, and in April 1982, the Majles overwhelmingly passed the nationalization of foreign trade bill. The Majles's version called for the creation of consumption cooperatives to take over the task of domestic distribution of

Rouhani's Ph.D. Thesis, p. 349

commodities. The parliamentarians' attempt to nationalize the foreign trade was dealt a blow by the Council of Guardians which vetoed the bill on the grounds that it was contrary to Islamic law. The Council maintained that by specifying total nationalization, the bill excluded privately financed imports altogether, something contrary to Islamic tenets which hold private trading sacrosanct.45 The Council recommended that the foreign currencies earned by the private sector should be allocated to finance direct imports by traders' guilds.

Plagiarized from Baktiari, p. 91

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Rouhani's Ph.D. Thesis, pp. 383-384
Endnote 23

23. One element within the Majlis that they borrowed from the past was a body called the Council of Guardians. The 1906 Constitution envisaged a council of senior religious leaders assigned to the Majlis to make sure that legislation passed would not conflict with Islam. In article 2 of the supplementary fundamental laws of 7 October 1907, it is stated:

At no time must any legal enactment of the sacred National Consultative Assembly be at variance with the sacred principles of Islam or the laws established by His Holiness the Best of Mankind [the Prophet Muhammad (S.A.W.)]... It is therefore officially enacted that there shall at all times exist a committee composed of not less than five mujtahids or other devout theologians, cognizant also of die requirement of the age, [which the committee shall elect], in this manner. The Islamic Jurists shall present the names of twenty of the Islamic Jurists possessing the attributes mentioned above, and the members of the National Consultative Assembly shall, either by unanimous acclamation, or by vote, designate five or more of these as members, so that they may carefully discuss and consider all matters proposed by the Assembly. (Browne, The Persian Revolution, pp. 372-373).

Plagiarized from Baktiari, p. 60

one element within the Mailes that they borrowed from the past was a body called the Council of Guardians. The 1906 Constitution envisaged a council of senior religious leaders assigned to the Majles_ to make sure that legislation passed would not conflict with Islam, In Article 2 of the Supplementary Fundamental Laws of 7 October 1907, it is stated:

At no time must any legal enactment of the Sacred National Consultative Assembly be at variance with the sacred principles of Islam or the laws established by His Holiness the Best of Mankind [the Prophet Mohammad]. ... It is therefore officially enacted that there shall at all times exist a Committee composed of not less than five mujtahids or other devout theologians, , cognizant also of the requirement of the age, [which the committee shall elect], in this manner. The ulama shall present the names of twenty of the ulama possessing the attributes mentioned above, and the Members of the National Consultative Assembly shall, either by unanimous acclamation, or by vote, designate five or more of these as Members, so that they may carefully discuss and consider all matters proposed by the assembly.25 [p. 284, 25. Cited in Browne, The Persian Revolution, 372-73.]

Plagiarism of Rouhani's Ph.D. Thesis from Ghaffari

pp. 84-87 (i.e. approximately 850 words) of Rouhani's Ph.D. Thesis in chapter 2 have been plagiarized from this original paper of Hossain Ghaffari Saravi:

غفاری ساروی، حسین (۱۳۷۴) «قرآن و نقش زمان و مکان در اجتهاد»، *مجموعه آثار کنگره بررسی مبانی فقهی حضرت امام خمینی (س) «نقش زمان و مکان در اجتهاد»*، جلد ۳، صص ۵۶-۸

در فصل ۲ حدوداً ۸۵۰ واژه (= pp. ۸۷-۸٤) از این مقاله‌ی بکر و اصیل (original) حجت‌الاسلام حسین غفاری ساروی (۱۳۳۳-۱۳۹۰) - بدون هیچ گونه ارجاعی - سرقت محتوایی واضحی شده است:

غفاری ساروی، حسین (۱۳۷۴) «قرآن و نقش زمان و مکان در اجتهاد»، *مجموعه آثار کنگره بررسی مبانی فقهی حضرت امام خمینی (س) «نقش زمان و مکان در اجتهاد»*، جلد ۳، صص ۵۶-۸.

از آن‌جا که سرقت از این مقاله بیش از آن‌که «کلمه به کلمه» باشد «محتوایی» است، مقدمتاً به چند نکته اشاره می‌کنیم. می‌دانیم که ذکر مسائل دینی مسلم و مشهور به‌عنوان تحقیق ارزش علمی ندارد. مثلا اگر کسی در اثری تحقیقی بگوید روزه واجب است و بعد به آیه‌ی «كُتِبَ عَلَيْكُمُ الصِّيَامُ» استناد بکند، این مطلب - در عین درستی - فاقد هر گونه ارزش پژوهشی خواهد بود؛ و کسانی نیز که به مناسبتی به تکرار چنین مباحث مسلم و مشهوری بپردازند به سرقت علمی محتوایی متهم نمی‌شوند. ولی مطالبی که در pp. ۸۷-۸٤ مطرح شده و به آیاتی از قرآن استناد شده است به هیچ وجه از این قسم نیست. قرآن‌پژوه فقید یادشده با مسأله‌ای نو (که کنگره پیشنهاد کرده) مواجهه شده است: «این موضوع از دیدگاه قرآن برای نخستین بار مورد کاوش و بررسی قرار می گیرد» (غفاری ساروی، ۱۳۷۴، ص ۱۸) ایشان در پژوهشی نظام‌مند به بررسی «کل» آیات قرآن می‌پردازند تا پاسخی تحقیقی برای این مسأله‌ی نو استخراج کنند: «قرآن کریم ـ از آغاز تا پایان ـ به همین منظور و برای یافتن نکته ها، پیامها و رهنمودهای آن در موضوع مورد بحث، مطالعه گردید ... .» (همان، ص ۱۲) در این بررسی نظام‌مند ایشان آیات متعددی را متناسب با مسأله‌ی اصلی تحقیق می‌یابند ولی بسته به شیوه‌ی علمی خاص خود به «چهار» آیه به‌عنوان نمونه‌ی اعلای آیات مربوط به بحث متمرکز می‌شوند: «در این نوشتار، از میان موارد گوناگون، چهار مورد به عنوان نمونه و شاهد، مورد ارزیابی قرار گرفته ... .» (همان، ص ۱۲)

اکنون اگر کسی حتی نگاهی سرسری به pp. ۸۷-۸٤ بیاندازد، مشاهده می‌کند که دقیقا همین «چهار» آیه و درست به همان ترتیب در تز آقای روحانی مطرح شده است و همان توضیحاتی که آن مقاله ذیل این «چهار» آیه آورده است با اندکی جابجایی در صدر این آیات به طور خلاصه مطرح شده است. البته در این تلخیص اندکی در عبارات تصرف شده است. به نظر می‌رسد نویسنده‌ی این تز دکتری – برخلاف سایر کپی‌کاری‌ها – بیش‌تر به این خاطر اندکی در این عبارات تصرف کرده که مطالب مقاله به خاطر جدید بودن مسأله نیاز به تنقیح داشته، چنان‌که خود مرحوم غفاری ساروی به نوعی اشاره می‌کند که این مباحث بی‌نیاز از

چنین تهذیب‌هایی نیست: «آنچه این نوشتار در صدد اثبات آن بر آمده، در حدّ یک نظریّه است و هرگز به این معنا نیست که این ادّعا، با این گفتار کوتاه، ۱۰۰٪ (درصد) به اثبات خواهد رسید، زیرا این موضوع از دیدگاه قرآن برای نخستین بار مورد کاوش و بررسی قرار می گیرد.» (ص ۱۸) کوتاه این‌که اگر یک قرآن‌پژوه یا فقیه یا حتی شخصی که با علوم دینی و معنای پژوهش آشنایی نسبی دارد این مقاله را بخواند و با pp. ۸۷-۸٤ بسنجد ذره‌ای تردید نخواهد کرد که کل pp. ۸۷-۸٤ از همین مقاله سرقت محتوایی بسیار واضحی کرده است. جهت سهولت در فهم این سرقت محتوایی و برای صرفه‌جویی در وقت خوانندگان غیرحرفه‌ای، ما تلاش می‌کنیم بخش‌هایی از این مقاله را که از نظر الفاظ نیز به عبارات تز آقای روحانی نزدیک‌تر است در زیر آن عبارات ذکر بکنیم:

Rouhani's PhD Thesis, pp. 84-85

The examination of the verses of the Quran provides the best witness to the dynamic feature of the Quran. For example, the Quran in the seventh year of the Hijrah orders that the hypocrites should leave Medina otherwise they will be killed. This verdict did not exist in Medina before. The reason for issuing such a verdict was that the hypocrites had adopted strict policies against the Muslims on the one hand and the Muslims were then strong enough to execute the order on the other hand. The verses read thus:

"If the hypocrites and those in whose hearts is a disease and the agitators in the city do not desist, We shall most certainly set you over them, then they1 shall not be your neighbors in it but for a little while" 51

" Cursed: wherever they are found they shall be seized and murdered, a (horrible) murdering. " 52

Plagiarized from Ghaffari, pp. 19-22

ص ۱۹

نمونهٔ اوّل: آیات ۶۰ ـ ۶۲ سورهٔ مبارکه احزاب

لَئن لَم یَنتَهِ المُنفِقُونَ وَ الَّذینَ فی قُلوبِهِم مَّرَضٌ وَ المُرجِفُونَ فِی المَدینَةِ لَنُغرِیَنَّکَ بِهِم ثُمَّ لا یُجَاوِرُونَکَ فِیها الاَ قلیلاً ۶۰ مَّلعُونِینَ اینَمَا ثُقِفُوا اخذُوا وَ قُتِّلوا تَقتیلاً ۶۱ ...

اگر منافقان و بیماردلان و آنها که اخبار دروغ و شایعات بی اساس در مدینه پخش می کنند دست از کار خود بر ندارند، تو را بر ضد آنان می شورانیم، سپس جز مدّت کوتاهی نمی توانند در کنار تو در این شهر بمانند!

و از همه جا طرد می شوند، و هر جا یافته شوند گرفته خواهند شد و به سختی به قتل خواهند رسید! ...

ص ۲۰

با عنایت به مطالب یاد شده چگونگی استدلال و استشهاد به آیات فوق، در خصوص موضوع «نقش زمان و مکان در اجتهاد» روشن خواهد شد ...

ص ۲۱

حکام مربوط به منافقان در برهه ای از زمان (سال هفتم هجری) و در مکانی مشخص و محدود (شهر مدینه) با احکام سابق آن تفاوت چشمگیری پیدا کرد؛ حکم محاصرهٔ همه جانبه و دستگیری آنان در هر کجای شهر مدینه و قتل و کشتن همهٔ آنان، حکمی بود جدید که برخاسته از شرایط زمانیِ ویژه و موقعیت مکانی خاص بود، زیرا همین منافقان با چنین اوصافی حدود هفت سال در شهر مدینه زندگی می کردند، ولی چنین حکمی دربارهٔ آنان صادر نشده بود. ...

ص ۲۲

بی تردید می توان گفت تنها عامل تاثیر گذار در تبدّل موضوع واحد، شرایط زمانی و مکانی است و هر کجا که آن شرایط به وجود آید، موضوع و حکم تغییر می یابد، چونکه پیش از این، پیامبر (ص) و مسلمانان در شرایط و موقعیتی به سر می بردند که توانایی چنین برخوردی را نداشتند و از دیگر سو، چهرهٔ کریه این دشمنان تزویرگر برای مردم شناخته نشده بود که تا با صدور یک فرمان از جانب خداوند، بی چون و چرا با آنان برخورد نمایند و حاضر شوند تا همه را سرکوب کرده و به قتل برسانند. ولی در سال هفتم هجری ـ هنگام نزول این آیات ـ شرایط از نظر زمانی و موقعیت مکانی کاملاً به نفع مسلمان بود.

Rouhani's PhD Thesis, p. 85

At the time when the family of the Prophet (S.A.W.) were followed by the Muslims as good examples, the enemies of the Prophet (S.A.W.) were trying to find faults with the family of the prophet (S A W.) so that they will use them as malicious. Therefore, the Quran ordered the family of the holy Prophet (S A W.) thus:

"O wives of the Prophet! whoever of you commits an open indecency, the punishment shall be increased to her doubly; and this is easy to Allah".53

"And whoever of you is obedient to Allah and His Apostle and does good, We will give to her reward doubly, and We have prepared for her an honorable sustenance "54

Plagiarized from Ghaffari, pp. 23-27

ص ۲۳

نمونهٔ دوّم: آیات ۳۰ و ۳۱ سورهٔ مبارکه احزاب

يا نِسآءَ النَّبِيِّ مَن يَاتِ مِنكُنَّ بِفَحشَةٍ مُّبَيِّنَةٍ يُضعَف لَهَا العَذَابُ ضِعفَينِ وَ كَانَ ذلِكَ عَلَى اللهِ يَسِيراً ۳۰
وَ مَن يَقنُت مِنكُنَّ للهِ وَ رَسُولِهِ وَ تَعمَل صلِحاً نُّوتِهَا اجرَهَا مَرَّتَينِ وَ اعتَدنَا لَهَا رِزقا كَرِيماً ۳۱. [۲]

ای همسران پیامبر! هر کدام از شما گناه آشکار و فاحشی مرتکب شود، عذاب او دو چندان خواهد بود؛ و این برای خدا آسان است.

و هر کس از شما برای خدا و پیامبرش خضوع کند و عمل صالح انجام دهد، پاداش او را دو چندان خواهیم ساخت، و روزی پر ارزشی برای او آمده کرده ایم. ...

ص ۲۵

دشمنان ... پیامبر (ص)، به ترور شخصیت و ضربه زدن به حیثیت الهی او در میان اجتماع پرداختند و چون در شخص رسول خدا نقطهٔ ضعف قابل ارائه و کارساز نیافتند، این مقصود را با افترا و انگ زدن به خاندان و بستگان و همسران او دنبال کردند. ... علی رغم این تلاش مذبوحانه، پیامبر خدا و

ص ۲۶

خانوادهٔ او ـ روز به روز ـ در دل مردم نفوذ بیشتری پیدا کردند و از منزلت اجتماعی بالاتری برخوردار شدند. مردم نه تنها عیبی در آنان نمی دیدند، بلکه آنها را به عنوان الگو و سرمشق زندگی خود می نگریستند...

ص ۲۷

(۱ ـ ۲ ـ ۲) همهٔ مفسران و قرآن پژوهان ـ بی استثنا ـ در فلسفه و چرایی احکام مربوط به همسران رسول خدا اظهار داشته اند که چون آنان از نظر اجتماعی و شرایط زمانی در موقعیتی به سر می بردند که دوست و دشمن و خوبان و بدان جامعه، به رفتار و کردار فردی و مواضع اجتماعی آنان با حساسیت خاصی می نگریستند. دشمنان در صدد خورده گیری و پیدا کردن نقطهٔ ضعفی بودند که تا به وسیلهٔ آن به حیثیت و موقعیت مردمی و معنوی پیامبر (ص) ضربه وارد سازند

Rouhani's PhD Thesis, pp. ۸۵-۸۶

Before the Muslims conquered the city of Mecca they followed certain rules and regulations. After the conquest of Mecca in the eighth year of the Hijrah, the laws regarding the sacrifice for the sake of God and charities given to the poor all underwent change. The reason was that the status of the Muslims before the conquest was different from that after the conquest. As a result and with a view to different circumstances of time and space, the Quran modified the regulations. The Quran reads thus:

"And what reason have you that you should not spend in Allah's way? And Allah's is the inheritance of the heavens and the earth; nor alike among you are those who spent before the victory and fought (and those who did not): they are more exalted in rank than those who spent and fought afterwards; and Allah has promised good to all; and Allah is Aware of what you do" ۵۵

Plagiarized from Ghaffari, pp. 35-37

ص ۳۵

نمونهٔ سوّم: آیات ۱۰ و ۱۱ سورهٔ مبارکه حدید

وَ مَالَکُم الا تُنفِقُوا فِی سَبِیلِ اللهِ وَ لله مِیرَثُ السَّمَوتِ وَ الارضِ لا یَستَوِی منکُم

ص ۳۶

مَّن انفَقَ مِن قَبلِ الفَتحِ وَ قَتَلَ اولئکَ اعظَمُ دَرَجَةً مّنَ الَّذِینَ انفَقُوا مِن بَعدُ وَقَتَلُوا وَ کُلاًّ وَ عَدَاللهُ الحُسنَی وَاللَهُ بِمَا تَعمَلُونَ خَبِیرٌ[۱۱] ...

چرا در راه خدا انفاق نکنید در حالی که میراث آسمانها و زمین همه از آنِ خداست (و کسی چیزی را با خود نمی برد)! کسانی که قبل از پیروزی انفاق کردند و جنگیدند (با کسانی که پس از پیروزی انفاق کردند) یکسان نیستند؛ آنها بلند مقام تر از کسانی هستند که بعد از فتح انفاق نمودند و جهاد کردند؛ و خداوند به هر دو وعدهٔ نیک داده؛ و خدا به آنچه انجام می دهید آگاه است.

موضوع در آیات فوق، انفاق و جنگ در راه خدا و برای احیای دین و نابودی جبههٔ کفر است. انفاق و جنگ که یک موضوع و مساله بیشتر نیستند، امّا در شرایط زمانی و موقعیت سیاسی ـ اجتماعی مختلف تفاوت اساسی پیدا کردند و جنگاوران و انفاقگران از نظر برخورداری از مزایای اجتماعی و حقوقی و... از یکدیگر متمایز شدند. و به دیگر سخن، به یک عمل و موضوع در شرایط زمانی خاص با دیدی نگریسته شده و در شرایط زمانی دیگر با دیدگاهی کاملاً متفاوت به آن می نگریم. انفاق و جنگ در شرایط سخت و طاقت فرسا، حکمی دارد که همان مقدار انفاق و جنگ و جهاد در شرایط آسان و کم رنج و زحمت، حکم دیگری خواهد داشت. ...

ص ۳۷

اما شان نزول و شرایط زمانی و اجتماعی حاکم به وقت نزول آیه: ... برخی آن را فتح مکه در سال هشتم هجرت می دانند ...

Rouhani's PhD Thesis, pp. 86-87

A point of reference which clearly illustrates the role of time and space in the teachings of the Quranic verses are those verses regarding the gains Muslims achieved from wars. First, the rule was established to the effect that four fifth of the booty should be given to the soldiers who took pan in the wars. The Quran reads thus:

"And know that whatever thing you gain, a fifth of it is for Allah and for the Apostle and for the near of kin and the orphans and the needy and the wayfarer, if you believe in Allah and in that which We revealed to Our servant, on the day of distinction, the day on which the rwo parties met; and Allah has power over all things"56

However, in the war of Baninazir, as a result of different circumstances, the ruling was changed and a new ruling was established to the effect that all the war booty must be delivered to the public treasury' to be used for the benefit of the needy and welfare of the Islamic society. The verses read thus:

"Whatever Allah has restored to His Apostle from the people of the towns, it is for Allah and for the Apostle, and for the near of kin and the orphans and the needy and the wayfarer, so that it may not be a thing taken by turns among the rich of you, and whatever the Apostle gives you, accept it, and from whatever he forbids you, keep back, and be careful of (your duty to) Allah; surely Allah is severe in retributing (evil):"57

"(It is) for the poor who fled, those who were driven from their homes and their possessions, seeking grace of Allah and (His) pleasure, and assisting Allah and His Apostle: these it is that are the truthful." 58

"And those who made their abode in the city and in the faith before them love those who have fled to them, and do not find in their hearts a need of what they are given, and prefer (them) before themselves though poverty may' afflict them, and whoever is preserved from the niggardliness of his soul, these it is that are the successful ones." 59

The new ruling was established due to different circumstances of time and space. The war of Baninazir was actually settled by peaceful negotiations and Muslims did not suffer any hardship. Moreover, the war was emerging in a situation where the Muslims' welfare was relatively good and the new ruling prevented the accumulation of wealth in the hands of only a few Muslims.

Plagiarized from Ghaffari, pp. 44-47 & 53-54

ص ۴۴

(۴ ـ ۲) نمونهٔ چهارم: آیات ۶ ـ ۹ سورهٔ مبارکه حشر

و مَا افَآءَ اللهُ عَلَی رَسُولِه منهُم فَمَآ اوجَفتُم عَلَیهِ من خَیلٍ وَ لا رِکابٍ وَلَکنَّ اللهَ یُسَلِّطُ رُسُلَهُ عَلَی مَن یَشَآءُ وَاللهُ عَلَی کُلِّ شَیءٍ قَدیرٌ ۶ مَّآ افَآءَ اللهُ عَلَی رَسُولِه من اهلِ القُرَی فَلله وَ للرَّسُولِ وَ لِذی القُربی وَ الیَتمی وَ الَمسکَینِ وَابنِ السَّبِیلِ کَی لایَکُونَ دُولَةً بَینَ الاغنِیَآءِ منکُم وَ مَآءَ اتَئکُمُ الرَّسُولُ فَخُذُوهُ وَ مَا نَهَئکُم عَنهُ فَانتَهُوا وَ اتَّقُوا اللهَ انَّ اللهَ شَدیدُ العقَابِ ۷ للفُقَرَآءِ المُهَجِرِینَ الَّذینَ اخرِجُوا من دیرِهم وَ اموِلهم یَبتَغُونَ فَضلاً مِّنَ اللهِ رِضوَاناً وَ یَنصُرُونَ اللهَ وَ رَسُولَهُ اولَئکَ هُمُ الصَّدِقُونَ ۸ وَ الَّذینَ تَبَوَّءُ وَ الدَّارَ وَ الایمَنَ من قَبلِهم یُحِبُّونَ مَن هَاجَرَ الَیهِم وَ لا یَجِدُونَ فی صُدُورِهم حَاجَةً مِّمَّآ اوتُوا وَ یُوثِرُونَ عَلَی انفُسِهم وَ لَو کَانَ بِهِم خَصَاصَةٌ وَ مَن یُوقَ شُحَّ نَفسِه فَاولَئکَ هُمُ المُفلِحُونَ ۹

و آنچه را خدا از آنان [= یهود] به رسولش باز گردانده (و بخشیده) چیزی است که شما برای به دست آوردن آن (زحمتی نکشیدید،) نه اسبی تاختید و نه شتری؛ ولی خداوند رسولان خود را بر هر کس بخواهد مسلط می سازد؛ و خدا بر هر چیز توانا است!

آنچه را خداوند از اهل این آبادیها به رسولش بازگرداند، از آن خدا و رسول و خویشاوندان او، و یتیمان و مستمندان و در راه ماندگان است (تا این اموال عظیم)

ص ۴۵

در میان ثروتمندان شما دست به دست نگردد! آنچه را رسول خدا برای شما آورده بگیرید (و اجرا کنید)، و از آنچه نهی کرده خودداری نمایید؛ و از (مخالفت) خدا بپرهیزید که خداوند کیفرش شدید است!

این اموال برای فقیران مهاجرانی است که از خدا و کاشانه و اموال خود بیرون رانده شدند در حالی که فضل الهی و رضای او را می طلبند و خدا و رسولش را یاری می کنند؛ و آنها راستگویانند!

و برای کسانی است که در این سرا [= سرزمین مدینه] و در سرای ایمان پیش از مهاجران مسکن گزیدند و کسانی را که به سویشان هجرت کنند دوست می دارند، و در دل خود نیازی به آنچه به مهاجران داده شده احساس نمی کنند و آنها را بر خود مقدم می دارند هر چند خودشان بسیار نیازمند باشند؛ کسانی که از بخل و حرص نفس خویش بازداشته شده اند رستگارانند!

ص ۴۶

... جنگ آغاز شد و به مدّت سه روز قلعهٔ «بنی نضیر» به محاصرهٔ مسلمانان در آمد. رسول الله برای پرهیز از خونریزی به آنان پیشنهاد کرد تا سرزمین مدینه را ترک گویند. آنان به ناچار پذیرفتند و مدینه را ترک کردند. ...

در آن موقعیت خاص اجتماعی، آیات فوق نازل گشت و تکلیف همه را روشن ساخت و با صراحت اعلان نمود: چون برای این غنایم، جنگی نشده و مسلمانان زحمتی نکشیده اند، تمامی آنها به پیامبر (ص) (رهبر حکومت اسلامی) تعلق دارد و هر گونه که او صلاح بداند تقسیم خواهد کرد و یا به مصرف می رساند و سپس خداوند موارد خاص را برای مصرف آن اموال تعیین و به پیامبر (ص) ابلاغ

ص ۴۷

کرد و فرمود: همهٔ آن اموال از آن خدا و برای پیامبر(ص) و خویشان او، یتیمان، مستمندان و در راه ماندگان است و باید به مصرف اینان برسد. آنگاه خداوند در فلسفه و چرایی این نوع تقسیم فرمود: تا چنین اموال انبوهی میان ثروتمندان جامعه دست به دست نگردد و تنها در انحصار دولتمندان شما قرار نگیرد ...

مسلمانان از نظر موقعیت سیاسی، اجتماعی و اقتصادی در اوضاعی به سر می بردند که روز به روز بر فتوحات و پیروزیهای آنان در صحنه های سیاسی، اقتصادی و نظامی افزوده می شد و از این رهگذر، ثروتها و امکانات اقتصادی بسیاری میان آن تقسیم می شد. ...

ص ۵۳

می توان از این آیه، بر موضوع «نقش زمان و مکان در اجتهاد» استشهّاد کرد. ...

موضوع در آیات فوق عبارت است از: «دست به دست شدن حجمی از اموال در میان اغنیا و برخورداران جامعه». این موضوع از دو رکن تشکیل یافت:

الف ـ «دولة» یعنی حجمی از اموال که میان اغنیا و توانگران جامعه دست به دست می شود.

ب ـ اغنیا و ثروتمندان جامعه.

تحقق و عینیت پیدا کردن هر دو رکن، بستگی کامل با زمان و مکان و اوضاع زمانی و مکانی (وضعیت جغرافیایی) دارد ...

ص ۵۴

بنابراین، عنصر زمان و مکان و به دیگر سخن، اوضاع زمانی و موقعیت جغرافیاییِ موضوع و مسالهٔ دارای نقش تعیین کننده در اجتهاد و استنباط است.