

is guided to the goal. The word *daʿll* applies to all these three meanings. Thus the *daʿll* of the creator of the universe is the creator Himself (*ʾānīʿ*), for He Himself is the one (*māʾūd*) who has set up the universe as a sign or indication of His existence; the learned (*ʾālm*) is also a *daʿll* of the creator, for he tells (*dhāʾir*) the seekers of the guidance that the universe is the sign of the existence of its creator; and the universe (*ʾālm*) is also a *daʿll* of its creator, because through it one is guided to its creator (*mā bāʾir-ʾashād*).⁸

DEFINITION OF DALĪL

Daʿll has been defined by al-Sarakhsi as follows:

In the *Shawʿah* it is the name of an articulated or a logical proof, by which something hidden is revealed. Its synonyms that we mentioned before [*hujiḥ*, *bayyīn*, and others] sometimes obligate and sometimes reveal, while *daʿll* specifically means a proof which unfolds or reveals [and not that which obligates].⁹

It may be noted here that in some cases the proof (*daʿll*) is devoid of articulation and logic, still it is called a proof (*daʿll*). In such cases the word *daʿll* is used figuratively (*majāzī*) since it reveals hidden things.¹⁰ For example, smoke is a proof (*daʿll*) of fire and a building is a proof (*daʿll*) of its builder.

Another definition of *daʿll* reads:

Daʿll is that by which it is possible, through sound reflection, to arrive at the desired predicative object [command of the *Shawʿah*].¹¹

The Qurʾānic verse "And be constant in prayers" (2:43) is considered to be a *daʿll* (proof), because through reflection upon it, the jurist arrives at the obligatory character of prayer, which is a command of the *Shawʿah*. Reflection should be in accordance with the recognised principles of reasoning and its conditions. The phrase "the desired predicative object" in the definition means the command of the *Shawʿah*. After reflecting upon the Qurʾānic verse cited above, a jurist comes to the conclusion that the prayer is obligatory.

Arriving at the command of the *Shawʿah* may be by way of categorical proof or by way of conjecture and probability. The word *daʿll* applies to both of them. The texts of the Qurʾān and *mutawāṭṭiʿ* traditions (i.e. traditions transmitted by a large number of people without any break) and *Ijmāʿ* (consensus of opinion) are proofs (*adʿllah*) which entail certainty. On the other hand, solitary traditions (*alḥādīḥ al-āḥād*), and analogy (*qiyās*) are proofs which entail probability. Some jurists apply the word *daʿll* to categorical

proofs and *amānah* (sign) to probable proofs. Thus solitary traditions and analogy are *amānāt al-ahkām* (signs of commands) and not *adʿllat al-ahkām* (proofs of commands).¹² Al-Sarakhsi calls the categorical proof *mujīb ʿl-ʿilm qaʿīn* (that which entails certain knowledge), and probable proofs *mujawiz ghayr mujīb ʿl-ʿilm* (that which permits and not entails certain knowledge). He observes that he named it *mujawiz* considering the fact that an act becomes obligatory because of it though it does not entail certain knowledge.¹³

NUMBER AND HIERARCHY OF SOURCES

The classical theorists mention four sources of *ḥiḥ*: the Qurʾān, the *Sunnah*, the *Ijmāʿ* (consensus) and the *Qiyās* (analogy). The following statements of al-Shāfiʿi indicate the number of the sources and their hierarchy. His legal doctrines have influenced the classical legal theory to a great extent.

The basis of legal knowledge is the Qurʾān, the *Sunnah*, the consensus, the practice and sayings of the Companions, and the analogy based on them.... The jurist must interpret the ambiguous passages of the Qurʾān according to the *Sunnah* of the Prophet (peace be on him), and if he finds nothing in *Sunnah*, [He should interpret them] according to the consensus of the Muslims, and in the case of lack of consensus, according to the analogy.¹⁴

The basis of legal knowledge is the information contained in the Qurʾān, the *Sunnah*, the consensus, and the analogy.... Analogy is sought through arguments which are in conformity with the information already contained in the Qurʾān or the *Sunnah*, for they are the true knowledge the seeking of which is peremptory.¹⁵

The quaternion—the Qurʾān, the *Sunnah*, consensus and analogy—constitutes the cornerstone of al-Shāfiʿi's legal theory. Moreover, the hierarchy of the sources in the classical legal theory is the same as we find in al-Shāfiʿi. He considers the Qurʾān and the *Sunnah* the basic legal sources and holds the rest to be subsidiary to them.

The Qurʾān and the *Sunnah* are the two sources which God has ordained, no one opposes them. They are two entities.¹⁶

No statement is binding in any circumstance except on the basis of Allāh's Book or the *Sunnah* of His Prophet; everything else is subsidiary to them.¹⁷

The classical jurists followed al-Shāfiʿi and we find such statements in the classical works of *uḥūl al-ḥiḥ* that confirm his opinion. Illustrative of this is the following statement of al-Sarakhsi:

Let it be known that the sources or principles in respect of the proofs of the *Shari'ah* are three: the Qur'an, the *Sunnah* and the consensus. The fourth source or principle is the analogy. It is the idea or *ra'ayn d'ette* derived from these three sources.¹⁹

Al-Sarakhsi and other classical jurists group the Qur'an, the *Sunnah* and the consensus together because of certainty of knowledge, as opposed to analogy which entails conjectural and probable knowledge. Al-Shāfi'i also places three sources together calling them 'binding information', (*khabar lāzim* or *galzami*). He describes the analogy separately on account of uncertainty of its knowledge.¹⁹

These sources are called *adillah* (sing. *dalil*) because they lead to the divine primordial speech which is sustained in the innerself (*kalām naḥṣ' azāl*). They are also called *uḥūl* (roots, bases), for the commands of the *Shari'ah* are based on them. These sources are logically interlinked. They have been divided into two major categories, revelatory and non-revelatory. The revelatory, again, is of two kinds, that which is recited (*matlū*) and that which is not recited (*ghayr matlū*). The revelatory source that is recited is the Qur'an, and that which is not recited is the *Sunnah*. The non-revelatory sources, too, fall into two categories, namely the opinion on which the entire Muslim community or all the Muslim jurists are agreed, technically known as *ijmā'* (consensus), whereas, the opinion based on analogy and not corroborated by the consensus, is *qiyās* (analogy). If anything is not covered by any of these sources—not even by analogy—it is covered by *istidlāl* (reasoning). For this reason some jurists have said that the sources of *fiqh* are five:

The sources of the *Shari'ah* are the Qur'an, the *Sunnah*, consensus, analogy, and reasoning (*istidlāl*). They all return to the primordial divine speech subsisted in the innerself.²⁰

It may be noted that *qiyās* is generally mentioned separately as a source derived from the three sources. Hence some jurists have said that the sources of *fiqh* are three.

You must know that the sources of the *Shari'ah* are three: the Qur'an, the *Sunnah* and the consensus. The fourth source is analogy based on the idea derived from these sources.²¹

'Abd al-Malik al-Juwaynī does not even mention *qiyās* among the sources. He remarks:

The sources of *fiqh* are those that are authoritatively learnt from the Prophet (i.e. oral tradition). They are divisible into the text of the Qur'an, text of the *Sunnah* continuously transmitted by a large number of people and the consensus; the authority for all these sources is the word of God.²²

Al-Sarakhsi observes what the sources of *fiqh* are primarily based on what is heard from the Prophet. The Qur'an was revealed to him and he made the people listen to it by reciting it to them. The traditions uninterruptedly transmitted from him by a large number of people (*mutawāṭin*) enjoy the status of something directly heard from him, in respect of certain knowledge. Likewise the consensus of the Muslim community also is a source or proof (*hujjah*) that entails certain knowledge. According to a tradition, the Prophet said that his community will not agree on an error. Therefore, hearing from him entails certain knowledge by virtue of his infallibility and being protected from telling lies or making a false statement.²³

The bases or sources (*uḥūl*), according to the classical jurists—as we know well—are, of course, four: the Qur'an, the *Sunnah*, *ijmā'*, and *qiyās* (based on or derived from these sources). But the proofs of the *Shari'ah* (*hujaj shar'iyyah*) are divided into two major categories of certainty and probability. The proofs that are categorical entail obligation, and those which are probable, entail permissibility or legitimacy. Al-Khubbāzī, a Hanafi jurist, remarks that the proofs that entail obligation (*mujibah*) are four: the Qur'an; that which is heard from the mouth of the Prophet; tradition transmitted through *mutawāṭin* reports; and consensus of the Muslims. The proofs that entail legitimacy or permission (*mujawuzah*) are also four: the limited application of a general expression or command ('*āmm mahḥūḍ*); the interpretation of a Qur'anic verse (*lāyah mu'awwalah*); solitary tradition (*khabar al-wāḥid*); and analogy (*qiyās*). The former is based on what is directly heard from the Prophet and the latter on conjecture or derivation.²⁴

The Muslim jurists have drawn a distinction between *ayl* (source or basis), and *hujjah* (proof), although, sometimes, they refer to the sources (*uḥūl*) as *adillah shar'iyyah* (proofs of the *Shari'ah*). In logic, *dalil*, *hujjah* and other synonymous terms have their different nuances, but in jurisprudence (*uḥūl al-fiqh*) they have been loosely used for denoting identical meanings. The four proofs (*adillah*) are called *uḥūl*; for *ayl* means that on which another thing rests. A thing which is called *madlūl*, (designatum) rests on that which designates or signifies (*dālil*). The Hanafis regard *qiyās* as a root or an original source of law in one respect (*laḥan min waḥid*), for a rule of law is apparently established through it while in another respect they consider it a point of detail or a secondary source of law (*ḥar'an min waḥid alhar*), for the authority of *qiyās* itself is established through the Qur'an and the *Sunnah*.²⁵

Ahmad ibn Hanbal is reported to have said, that the guide (*dalil*) is God, the guidance or direction (*dalil*) is the Qur'an, the expounder (*mubayyin*) is the Prophet, and the seekers of guidance (*mutadallil*) are the scholars. He calls these postulates the "bases of Islam" (*qawā'id al-Islām*).²⁶

These four sources are logically inter-related. The Qur'an is the principal (*aqd*) source. The *Sunnah* is also connected with it, as it provides information about divine command, *ymā'* is based on them while *qiyās* is derived from them.²⁷

CLASSIFICATION OF THE SOURCES

The classical jurists have categorized the sources into those that are unanimously agreed upon and those which are disputed: traditional (*naqlīyah*) and rational ('*aqliyyah*); certain (*qat'iyyah*) and probable (*ẓanniyyah*); and those which indicate the rules of law by their language (*manṭiq al-naṣṣ*) and those which indicate them by their logic and rationality (*ma'qūl al-naṣṣ*). The sources, according to this classification are the following:

1. The Qur'an;
2. The *Sunnah*;
3. The consensus of opinion (*ijmā'*);
4. Analogy (*qiyās*);
5. Juristic preference (*istiḥṣān*);
6. Public interest (*maḥallāh muṣalāh*);
7. Accompanying circumstances (*istiḥāb*);
8. Custom ('*urf*);
9. Pre-Islamic divine laws (*shar' man qablana*);
10. The opinion of a Companion of the Prophet (*qawl al-Ṣahāb*);
11. Means (*dhanā'i*);
12. Reasoning in general (*istidlāl*) by methods other than the recognised sources.

Agreed Upon and Disputed Sources

The Muslim scholars and the Muslim community as a whole are agreed that the Qur'an and the *Sunnah* are the sources of *fiqh* and the majority of the Muslims (*jumhūr al-Muslimīn*) accept the Qur'an, the *Sunnah*, *ymā'*, and *qiyās* as the sources of *fiqh*. Al-Naẓām, the famous Mu'tazilah thinker and some Khawarij have rejected *ymā'* as a source of law; the Shī'ah and the Zāhiris have rejected *qiyās*. There are also some disagreements among the majority (*jumhūr*) regarding these sources. Some scholars recognise juristic preference (*istiḥṣān*), custom ('*urf*), pre-Islamic divine laws (*shar' man qablana*) and similar others as sources of *fiqh*, while others reject them.

Traditional and Rational Sources

The sources of *fiqh* refer either to tradition (*naql*) or to reason ('*aqd*), that is, considered opinion (*ra'y*) and reflection (*naẓar*). The former are the Qur'an and the *Sunnah*, and to these are added consensus of opinion (*ijmā'*), pre-Islamic divine laws (*shar' man qablana*), the opinion of a Companion (*qawl* or *madhhab*

al-Ṣahāb) and custom ('*urf*). These sources are called traditional (*naqlīyah*), because they refer to obedience to the command of the lawgiver in the form of textual law. The reason or personal opinion and reason and reflection are not involved in respect of the authority of these sources. But the use of reason and reflection is inevitable in the case of deduction based on these traditional sources. The latter is analogy (*qiyās*), to which are added the principles of juristic preference (*istiḥṣān*), public interest (*maḥallāh*), accompanying circumstances, (*istiḥāb*), means (*dhanā'i*) and reasoning in general (*istidlāl*). These sources refer to reason, individual opinion and reflection and not to the textual command. Of course, they do refer to the traditional sources when a rule of law is derived from them by using these rational sources. These sources, as the roots of proofs (*uḥūd al-adillāh*), have been divided into various categories but, in fact, they are interdependent. Al-Shāṭibī remarks:

This division is made with reference to the principles of proofs (*uḥūd al-adillāh*); otherwise each of these two kinds stands in need of the other. Reasoning based on the traditional authorities does require reflection as [is the case of] personal opinion which has no validity unless it is supported by traditional authority.²⁸

The sources of *fiqh* are, in fact, confined to the first kind, i.e. traditional authorities (*naqlīyah*), for the rational sources also owe their authority to the traditional sources, and not to reason or reflection. The authority of analogy, and the legitimacy of public interest are established on the basis of the Qur'an and the *Sunnah*. These traditional authorities are the bases and main sources of the *Shari'ah* for giving the law, but reason is not the lawgiver (*shāri'*). The second kind is merged into the first kind. Thus the traditional sources are the bases of the legal commands in a twofold manner: first, they signify the positive law or questions of detail (*lahikām juz'iyah* *ḥa'iyiyah*), such as commands regarding ritual purity, prayer, *zaka't*, *ḥajj*, contract of sale, prescribed punishments and others; and secondly, they signify the principles and general rules (*qawā'id*) by which the questions of detail are proved and established. It may be noted that the principles, like *ymā'*, *qiyās*, and other secondary sources, derive their authority as legal sources from the Qur'an and the *Sunnah*.²⁹ Furthermore, even the *Sunnah* derives its authority from the Qur'an, as the following Qur'ānic verses signify:

O you who believe, obey Allah and obey the Messenger and those in authority among you. (4:59)

And whatever the Messenger gives you, take; and whatever he forbids, give over. (59:7)

So let those who go against his (the Prophet's) command beware, lest a trial befall them, or there befall them a painful chastisement (24:63)

The repetition of the expression "Obey Allah and the Apostle" in the Qur'ān indicates obedience to the Prophet in general. Moreover, the *Sunnah* explains the Qur'ānic pronouncements. This is corroborated by the following Qur'ānic verses:

And We have sent down to thee the Reminder (i.e. the Qur'ān) that thou mayest explain clearly to men what was sent down to them; and so haply they will reflect. (16:44).

O Messenger, deliver that which has been sent down to thee from thy Lord. (5:67)

The delevtering of the divine revelation implies the conveying of the Qur'ānic verses as well as the explanation of their meaning, as the Prophet himself had done through his *Sunnah*. This shows that the *Sunnah* is the explanation of the Qur'ānic verses and it has received its authority as a source of *fiqh* from the Qur'ān. Therefore, the Qur'ān is the principal source, the goal of all the reflection of the thinkers and the intellectual activity of the jurists. Thus the Qur'ān is the source of the sources (*qaḍ al-qaḍi*).⁹⁰

Certain (*qaḍi*) and Probable (*ẓanni*) Proofs based on the Sources

The classical jurists have divided the proofs (*adillaḥ*) into certain (*qaḍi*) and probable (*ẓanni*). The certainty and probability refer either to chain of transmitters (*sanad*) or to indication (*dalālah*) of meaning. The certainty of a transmission (*qaḍi al-sanad*) is established when something is transmitted by a large number of people to such a large number of people that their agreement on a falsehood is, generally, impossible. The Qur'ān provides the best illustration. It has been transmitted to us through such a large number of memorising and writing in a *ṭawāṭū* (uninterrupted transmission), that it entails certainty. To this may be added the *Sunnah* and *ẓimā'* that are transmitted through *ṭawāṭū* (continuous chain). The probable proof in respect of transmission (*ẓanni al-sanad*) is furnished when something is transmitted or narrated by a single person or by a group of persons whose agreement on falsehood is usually possible. The examples of this kind are isolated traditions (*alḥbān alāḥād*) and *ẓimā'* which is not transmitted through *ṭawāṭū*.

The certain proof in respect of indication (*qaḍi al-dalālah*) is that which indicates a definitive and certain rule of law allowing no other interpretation of the words, as the following Qur'ānic verse: "And for you a half of what your wives leave, if they have no children" (4:12). The word *nisf* (a half) in this verse is a definitive and certain rule. It allows no other interpretation.

The probable proof in respect of indication (*ẓanni al-dalālah*) is one which indicates more than one meaning and is open to various interpretations. The following Qur'ānic verse illustrates this kind of proof, "And the divorced women shall keep

themselves in waiting for three monthly periods" (2:228). The word *quwā'* (monthly periods) denotes both meanings, menstruation and period of purity. In this sense the texts of the Qur'ān and the *Sunnah* are sometimes definitive and certain and sometimes provide only a probable and inexact indication of meaning. As for the consensus (*ẓimā'*), its indication of a rule of law is always certain. The rest of the sources, such as analogy, public interest and juristic preference, in most of the cases, entail probability rather than certainty. Only in rare cases do they indicate certainty.

It is evident from the foregoing that there are four kinds of proofs regarding certainty and probability, and transmission and indication, as detailed below:

1. Proofs certain in respect of transmission and indication (*qaḍi al-sanad wa qaḍi al-dalālah*): They are the texts of the Qur'ān and *mutawāṭiʿ* traditions and indicate a single and exact meaning, allowing no other interpretation. The examples are as follows:

And for them a fourth of what you have, if you have no children. (4:12)

And whoever lies intentionally against me should make his abode in hell-fire.⁹¹

In these examples there exists certainty of transmission (*sanad*) and indication (*dalālah*) about verse 4:12 for it is part of the Qur'ān, and the meaning or interpretation of the word *al-tubu'u* (a fourth) is also definite and certain. Similarly, there is certainty of transmission (*sanad*) and indication (*dalālah*) about the tradition quoted above for it is *mutawāṭiʿ* and there is no dispute over its meaning or interpretation.

2. Proofs probable in respect of transmission and indication (*ẓanni al-sanad wa ẓanni al-dalālah*): This kind is illustrated by the traditions transmitted by a single narrator or by a group of persons whose number does not reach the number of *ṭawāṭū* and whose wording allows various interpretations. This is illustrated by solitary traditions (*alḥbān al-āḥād*) that are open to various interpretations. Thus, "He who does not recite *ḥukāt al-Fātiḥah* (in prayer) is not credited with observing the prayer"⁹² is a solitary tradition; it may mean that prayer is not valid, or that prayer is not perfect. Hence it entails probability.

3. Proofs certain in respect of transmission and probable in respect of indication (*qaḍi al-sanad wa ẓanni al-dalālah*): This kind is illustrated by the texts of the Qur'ān and *mutawāṭiʿ* traditions which are open to various interpretations. For example, the verse "And wipe your heads" (5:6) is certain in respect of transmission, for it is part of the Qur'ān, but the jurists disagree about its meanings. It may mean wiping the complete head or part of it.

In the same manner the tradition "The Qur'an has been revealed in seven dialects. So recite of it in a way as it is easy for you" is *mutawāṭṭa* but its meaning is disputed. The words "seven dialects" have been interpreted in different ways.

4. Proofs probable in respect of transmission and certain in respect of indication (*ḡāmiḡ aḡ-samad wa qaṡ'ṡ aḡ-daḡlaḡh*): This kind consists of those solitary traditions whose meanings are defined and undisputed. The following tradition is the example: "The Apostle of Allah (peace be upon him) made a decision to give a sixth of the inheritance to a grandfather who was among us".⁵⁴ Being solitary (*khadira aḡ-wāḡhid*), the tradition is probable in respect of transmission, but the meaning of the word "the sixth" is certain and definite.

As for the proofs which involve reflection, they are probable in respect of indication, such as analogy, public interest, juristic preference and accompanying circumstances. These proofs are not taken from any tradition, but they refer to personal opinion and thinking. The opinion of a Companion of the Prophet (*qawḡ aḡ-ṡakāḡbī*) belongs to the traditional sources, for one who argues on its basis relies on the reliability of its transmission and not on evidence produced by the Companion.

Al-Shāṡīṡī thinks that the principles of *ḡiqh* (*uṡḡl aḡ-ḡiqh*) in religion are certain and not probable. He argues that these principles depend on the fundamentals and universals (*kulliyāt*) of the *ṡharīḡah*. Hence they are certain.⁵⁵ By *uṡḡl* he means the textual fundamentals (*kulliyāt manḡḡḡah*), such as the maxims "there is no damage and no causing damage", "deeds are based on intentions", "God has not put hardship in religion" and similar others. Secondly, these *uṡḡl* apply to the sources of *ḡiqh* (*adḡlāḡh*), such as the Qur'an and the *Sunnah*. Thirdly, these *uṡḡl* also refer to the general principles derived from the Qur'an and the *Sunnah* which serve as proofs for derivation of rules of law from the legal sources, known as *uṡḡl aḡ-ḡiqh*. This third kind is disputed amongst the jurists; sometimes it is certain and sometimes probable. But al-Shāṡīṡī insists that it is certain. The former two kinds are indisputably certain. In his opinion, the *uṡḡl* are not based on a single text or on one definite evidence. They are based on several texts and general proofs which entail certainty, and this is done by way of indication.

Al-Shāṡīṡī's argument is apparently correct, but considered minutely, is debatable. Suppose the Qur'an is a certain proof or a certain source of *ḡiqh* (*ḡuṡḡḡah qaṡ'iyah*). It means that it is an indisputable legal basis to which a reference is made and a legal source on which the determination of the commands (*ṡhubūt aḡ-aḡḡām*) absolutely depends. This is the general phenomenon regarding the *uṡḡl*. But when they are applied to a particular case, the Qur'an, sometimes, entails probability. The Qur'anic expressions have

been divided by the theorists into *ḡāḡḡ* (apparent of meaning) which entail probability (*ḡāmiḡ*) and *maḡḡ* (explicit of meaning) which entail certainty (*qaṡ'ṡ*). Similar is the case with the *Sunnah*. In a general sense it is a basic source of law, hence it is certain. But in application to particular cases, it may be either certain or probable, for some traditions are *mutawāṡṡa* while others are solitary (*āḡḡād*) which entail probability. Likewise, if *ḡimā'* is transmitted through solitary chain of narrators, it entails probability. A principle of law established through *ḡiyās* is probable. This shows that the legal sources, as such, are certain in authority but sometimes their application and employment in particular cases may be probable. Hence al-Shāṡīṡī himself, while discussing the principles of preference, admits that some proofs of *ḡiqh* are certain and some probable.⁵⁶

Independent and Dependent Sources (*muṡṡaqḡḡ wa ḡḡayr muṡṡaqḡḡ*):

Some of the sources of *ḡiqh* are independent (*muṡṡaqḡḡ*) whereas others are dependent (*ḡḡayr muṡṡaqḡḡ*). By independence we mean the sources which do not stand in need of any other sources or things to establish a rule of law on their basis. By dependence we mean those sources which stand in need of other sources or things to establish a principle of law on their basis. The independent sources are the Qur'an, the *Sunnah*, *ḡimā'*, custom (*'uṡḡl*), and opinions of the Companions. The dependent source is *ḡiyās*, for it needs a basis (*asḡl*) from the Qur'an, the *Sunnah*, or *ḡimā'* to establish a rule. Further, it also needs the determination of effective cause (*'adḡl*) of the original case (*asḡl*) which is a complicated process. Hence it is a dependent source.⁵⁷

Instead of dividing the sources into independent and dependent, some scholars have divided them with respect to their indication by their words (*baṡṡāḡḡīṡ*) and by their rationality (*bma'ḡūḡīṡ*). The former is known as *manḡḡiq aḡ-maḡḡ*. It is unanimously agreed that the principal sources and basic proofs of commands (*adḡllat aḡ-aḡḡām*) all refer to the texts of the Qur'an and the *Sunnah* (*Muḡḡḡ aḡ-ḡḡāḡ waḡḡ Sunnah*). These texts are indicative of a command either by their language or by their reason, i.e. by the sense gathered from their wording. For instance, the words of the Qur'anic verse: "Surely, those who devour the property of orphans unjustly, devour only fire into their bellies. And they will in time burn in a blazing fire" (4:10) indicates the unlawfulness of unjustly eating up (*akḡl*) the property of orphans while its rational content implies the unlawfulness of destroying (*adḡḡḡ*) the property of orphans by any means. What is gathered from the verse is that the destruction of the property of orphans is forbidden; this prohibition is conveyed by words as well as by its rational content.

To turn to another example: a tradition of the Prophet says: "A judge should not make a decision between the two [parties]

while he is angry".²⁸ This tradition prevents, by its wording, a judge from making a decision in the state of anger, and by its rational content from making a decision in a state when he is mentally disturbed—he is hungry or thirsty, or there is severe cold or heat, or there is a state of terror. A judge has been prohibited from arriving at a decision when he is mentally disturbed, whether this state of his mind has been caused by anger, or by some other factor. Anger, in this verse, stands for other causes of mental disturbance as well. All such instances show that a jurist should understand the obvious literal meaning of a legal text as well as the reason, expediency and public interest contained therein. Commands are derived not only from the language of a text, but also from its *ratio legis* and that is analogical deduction. Analogy (*qiyās*) is reasoning on the basis of the *ratio legis* of a particular and single text (*ma'qūl naṣṣ wāḥid*), while *maṣālahah mukallafah* (public interest not covered by any text or analogy) is reasoning on the basis of *ratio legis* of various texts in general (*ma'qūl jumlatu muḥallā*), which ensemble entail the genus of the general good involved in a particular case.

Thus, the principal sources of Islamic legislation are the texts of the Qur'ān and the *Sunnah*. Besides these texts, there are rules and principles of reasoning derived from these texts (*qawā'id al-istidlāl bi'l sunnā*). *Yimā'* also depends on the texts and derives its authority from them. When the jurists declare a command as being based on *yimā'* they, in fact, ascertain and get its proof and authority confirmed from the Qur'ān or the *Sunnah*. Hence it is not necessary to refer to the evidence in support of *yimā'* in a particular case. The reason is that *yimā'* entails certainty while the individual proof of a certain rule of law entails probability. It is *yimā'* which has raised the degree of their indication from probability to certainty. This shows that the principles of reasoning and the legal sources are interlinked.²⁹

THE ISTITHĀD EXERCISED BY THE PROPHET AND HIS COMPANIONS AS A SOURCE OF FIQH

It may be noted that the term *maṣḍar* (source) has three different meanings: Firstly, it means a creator (*muwḥid*) and originator (*mu'jid*). The *maṣḍar* (source) of a thing means that from which the thing is created or originated. The Muslim jurists assert that in this sense the lawgiver or the source of commands of the *Shari'ah* is God Himself, for He has given all the laws to mankind. In this sense the Prophet is not the source of commands of the *Shari'ah*, for he has not given the laws of the *Shari'ah* of his own accord. Those laws that he gave himself and which are not mentioned in the Qur'ān, are also based on latent revelation (*wahy khafī*). The following Qur'ānic verses show that the commands which the Prophet had delivered or the decisions he had made were based on inspiration from God.

O Messenger, deliver that which has been revealed to thee from thy Sustainer. (5:67)

Surely We have sent down to thee the Book with truth, so that thou mayest judge between the people by that Allah has shown thee. (4:105)

It is important to note that under a secular dispensation, the will of the people as represented by the elected legislature is a source of positive law; but *istihād*, in Islamic jurisprudence, in all its variety, is not a source of *fiqh* in this sense, for it does not originate the law, it merely reveals and discovers it. In other words, *istihād* is a means of revealing the law to a jurist who approaches the command of the *Shari'ah* through it.

Secondly, *maṣḍar* (source) also means a revealer (*raṣḥ*) and discloser (*muḥḥid*) of a thing. The Qur'ān and the *Sunnah* reveal the divine command and enable a jurist to realize it at the time of its inquiry and research. In this sense they are the sources of *fiqh*. They are not the creators of the commands of the *Shari'ah*. The lawgiver (*shāri'*) is God alone. The Prophet also is called the lawgiver because the Muslims have been commanded to obey him unconditionally. Although he does not originate the law like God, his explanation of the Qur'ānic commands and the laws enunciated by him on matters not mentioned in the Qur'ān are also considered part of the divine law.

As is already known, the *istihād* is of three types, namely exposition of a textual command when the case under consideration is covered by a text of the Qur'ān or the *Sunnah*; seeking a rule of law about a case which is not mentioned in the Qur'ān through analogical deduction or by some other similar method; and seeking a rule of law about a case which is not covered by analogical reasoning through general principles of Islamic law, known as *maṣālahah mukallafah* (public good). It is obvious that *istihād* of these three types or kinds cannot be named a source of *fiqh* because it serves merely as an instrument of deriving the rules of law from the Qur'ān and the *Sunnah* by a jurist. He refers to these two sources to search for a divine command and employs *istihād* as a means to find out the command. The secondary sources, such as analogy, public good, and custom are called sources of *fiqh*, only figuratively. In fact, they are the methods of reasoning based on the legal texts and the means to find out a legal rule. Since *istihād* does not reveal a divine command in itself like the Qur'ān and the *Sunnah*, it is not a source of *fiqh*.

Thirdly, *maṣḍar* (source) also signifies a means or an instrument by which one reaches or attains a thing. In this sense, *istihād* was considered the source of *fiqh* during the time of the Companions. It was not a source in the sense of creating or revealing the law, but in the sense of providing an aid or instrument to derive the rules of law from the Qur'ān and the *Sunnah*.

The *ījtihād* exercised by the Prophet and by his Companions after him was considered a source of *fiqh* in the same sense. The Prophet used to exercise *ījtihād* by explaining the meaning of the verses of the Qur'ān, by employing analogy in cases not covered by the Qur'ānic verses, and by deriving rules in the light of the general principles in cases not covered by analogy. When this derivative law of the Prophet was confirmed by divine revelation, it became textual law (*manẓūḥ 'aḥq*) and part of the *Sunnah*. Those who hold that the *ījtihād* exercised by the Prophet was a source of *fiqh*, interpret the source as a means of attaining the command of the *Shari'ah*, while those who reject it as a source of *fiqh*, interpret the source as a revealer like the direct divine revelation. The same principle applies to the *ījtihād* exercised by the Companions. The rules based on their *ījtihād* became part of the *Sunnah* when confirmed by the Prophet during his lifetime. But if he rejected it, it had no legal value. After him, the rules based on the *ījtihād* of the Companions became source of *fiqh* and were referred to by the jurists as a source next to the *Sunnah* of the Prophet.*⁸

The Hanafis regard the opinions of the Companions (*āṭhān*) as part of the *Sunnah*. Defining the *Sunnah*, al-Sarakhsi remarks: "According to us (the Hanafis), what is intended legally by it (the term *Sunnah*) is that which has been introduced by Allāh's Messenger (peace be on him) and the Companions after him. According to al-Shāfi'i 'The word *Sunnah* in its absolute sense covers only the *Sunnah* of Allāh's Messenger (peace be on him).'⁹*¹

Muḥammad ibn al-Ḥasan al-Shaybānī, a Hanafī jurist, also considers the opinions and practice of the Companions a source of *fiqh*. The following quotation indicates the early Hanafī viewpoint about the legal sources:

Ḥishām has reported Muḥammad ibn al-Ḥasan as saying: *Fiqh* applies to four (constituents): that which is contained in the Qur'ān and what corresponds to it; that which is given by the *Sunnah* and what corresponds to it; that which has come down from the Companions and what corresponds to it; and that which the Muslims consider good and what corresponds to it.*²

JUSTIFICATION OF THE SOURCES OF FIQH AND THEIR SEQUENCE

The jurists have determined the sources of *fiqh* and their sequence with reference to the Qur'ān, the *Sunnah*, and practice of the Companions. We produce below an evidence which supports the existence of these sources and their sequence:

O you who believe, obey Allāh and obey the Messenger, and those in authority among you. Then if you differ in anything,

refer it to Allāh and the Messenger, if you believe in Allāh and the Last Day: This is best and most suitable for final determination.(4:59)

This Qur'ānic verse is indicative of the four sources, and shows that the Qur'ān and the *Sunnah* are the principal authorities. In case of dispute, obedience to God, the Prophet, and the persons in authority implies that the Qur'ān, *Sunnah*, and *ījmā'* are the sources of law. Reference to Allāh and His Prophet in case of dispute shall be made through the process of analogical deduction.

When the Messenger of Allāh (peace be on him) intended to send Mu'ādh ibn Jabal to the Yemen, he asked: "How will you adjudicate when the occasion of deciding a case arises?" He replied: "I shall judge in accordance with Allāh's Book". He asked: "(What will you do) if you do not find guidance in Allāh's Book?" He replied: "(I shall act) in accordance with the *Sunnah* of the Messenger of Allāh (peace be on him)". He asked: "(What will you do) if you do not find guidance in the *Sunnah* of the Messenger of Allāh (peace be on him) and in Allāh's Book?" He replied: "I shall do my best to form (or exercise) my opinion and spare no pains". The Messenger of Allāh (peace be on him) then patted him on the chest and said "Praise be to Allāh who helped the messenger of the Messenger of Allāh (peace be on him) to find a thing which pleases the Messenger of Allāh".*³

This tradition indicates that the Qur'ān, the *Sunnah* and *qiyās* were the sources of *fiqh* during the time of the Prophet. There is no mention of *ījmā'* in this tradition, for in the presence of the Prophet there was no question of the validity of *ījmā'*. It became a source of law after his death.

Abū Bakr, the first caliph, while adjudicating upon a case, first of all used to consult the Qur'ān. If he failed to find any guidance in it, he decided the case according to the *Sunnah* of the Prophet if he had knowledge of anything relevant in it. If he did not know any *Sunnah*, he would refer the matter to the Muslims and ask them, "Such and such a case has been brought before me. Do you have any knowledge if the prophet has left a decision in such a case?" Sometimes the people who knew the Prophet's decision came to him and informed him of it. Thereupon Abū Bakr would praise God for preserving in the memory of the Companion the Prophet's sayings and decision. If he could not get any information on the *Sunnah* from the people, he gathered the chiefs of the people and the best among them (*nu'ḥās al-nās wa khuyāṭahum*) and consulted them. If they agreed on a certain opinion, he would decide the case accordingly.*⁴

Umar ibn al-Khaṭṭāb also advised the judge Shurayḥ in a letter to decide the cases according to the Qur'ān in the first

instance. If he did not find any rule of law about the case under consideration, he should refer to the *Sunnah* of the Prophet. If he did not find any rule in both these sources, he should follow the consensus of the people. If he failed to find anything in these three sources, he might exercise his opinion in the matter if he wished and go forward (*ka ta'addam*), or if he wished to go backward, he might do so (*ka ta'akhhav*). But 'Umar expressed his opinion that if he went backward that would be better for him.⁵⁵ Ibn Mas'ud and Ibn 'Abbās are also reported to have followed the same procedure.⁵⁶

The above-mentioned four sources and the order of their hierarchy are justified by such reports. They are, no doubt, legal sources as such and they have an order of gradation. But it does not mean when reasoning is being exercised on their basis, they will be treated as totally independent sources. It appears from the writings of the jurists⁵⁷ that while arguing on the basis of these sources in deriving the rules of law, one should adhere to the sequence of these sources, namely the Qur'ān is the first source, the *Sunnah* is the second source, the *ijmā'* is the third source, and the *qiyās* is the last source. A jurist cannot argue on the basis of the *Sunnah* except if he does not find the rule in the Qur'ān. Similar is the case with other two sources. This procedure is supported by the Qur'ān and the *Sunnah* and practice of the Companions, as we have shown above.

The above-mentioned is the traditional view about the order of the precedence of the sources, but in practice this is not the case. These sources are independent and hold separate positions of their own as sources of law. But it does not mean that while arguing from the Qur'ān one cannot argue from the *Sunnah*, as well until the Qur'ān is silent on the matter under consideration. The correct approach is that these sources are interlinked and while arguing from the one the others cannot be ignored. One may argue primarily from the Qur'ān, but may have to resort to the *Sunnah* and sometimes to the *ijmā'* and *qiyās* as well. The *Sunnah* is an explanatory source, *ijmā'* a confirmatory source, and *qiyās* a declaratory source. But all in the sequel return to the Qur'ān ultimately. Let us elucidate these points.

Firstly, a jurist cannot derive the rules of law from the Qur'ān until he understands its meaning and explanation in detail, and for this purpose he will have to refer to the *Sunnah* as well, simultaneously. He cannot argue from a general ('āmm) or absolute (*muṭlaq*) word of the Qur'ān unless he ascertains from the *Sunnah* that it does not limit and qualify them respectively. For instance, we find in the Qur'ān a command to amputate the hand of a thief,⁵⁸ but this much knowledge is not sufficient to act upon this Qur'ānic injunction. A jurist will have to refer to the *Sunnah* simultaneously for knowing the relevant details.

Let us take another example. The Qur'ān mentions a long list of prohibited marriage relations and thereafter it says: "And lawful for you are (all women) beyond all that" (4:24). But the following tradition indicates that the combination of a woman with her paternal or maternal aunt in marriage is forbidden. "The Prophet (peace be on him) has forbidden to marry a woman and her paternal aunt and to combine a woman and her maternal aunt in marriage".⁵⁹ But this prohibited marriage relation is not mentioned in the Qur'ān as the Qur'ānic verse (4:24) is general and does not limit.

Secondly, there is no disagreement among the jurists that *mutawāṭin Sunnah* (a tradition transmitted by a large number of people uninterruptedly) whose indication is definite and certain, has precedence over a Qur'ānic verse whose literal meaning is open to varying interpretations (*zāhir al-bāṭin*). The reason is that this particular *Sunnah* is a certain proof (*dalīl qaṭ'i*) in two of its aspects, viz. the aspect of transmission (*axnad*) and the aspect of indication (*dalālah*). The Qur'ānic verse, though obvious in its meaning and definitively established (*qaṭ'iyy al-thubūt*), may be probable in its indication (*zawāḥ al-dalālah*), such as general ('āmm), absolute (*muṭlaq*), and homonym (*muḥtarak*) words in the Qur'ān. In view of this, there is no sense in saying that one should consult the *Sunnah* when one does not find a rule of law in the Qur'ān. Besides, determining the meaning of a particular Qur'ānic verse in the light of the *Sunnah*, does not amount to abandoning the Qur'ān and giving precedence to the *Sunnah* over the Qur'ān; especially when the *Sunnah* is *mutawāṭin* and entails certainty while the Qur'ānic verse is probable and open to different meanings. In fact, the *Sunnah* determines the meaning of the Qur'ān. Therefore, one may have to resort to the *Sunnah* side by side with the Qur'ān.

Thirdly, we have shown earlier that the *Sunnah* takes precedence over *ijmā'* in the hierarchy of the legal sources. It is already established that a rule of law based on *ijmā'* is certain (*qaṭ'i*). But sometimes *ijmā'* contradicts a tradition transmitted by a single person. Will a solitary tradition which entails probability (*ẓann*) take precedence over *ijmā'*, which entails certainty? According to all jurists, the answer is in the negative. The reason is that a solitary tradition (*khābar al-wāḥid*) is indicative of a probable command while *ijmā'* is indicative of certain and definite rule of law; the jurists have agreed upon a certain rule of law after examining all the proofs of the rule and reviewing all the relevant texts *vd-ḍ-vd*, the contradictory rule established by the apparent meaning of a solitary tradition. A rule of law on which the majority of jurists agree should obviously be followed in preference to the rule based on a solitary tradition and derived by a single jurist. In such a situation, *ijmā'* will take precedence over a tradition, although the *Sunnah* comes first in the order of the sources of *ḥq*. Therefore, it is not plausible to hold the view that the *Sunnah* has absolute precedence over the *ijmā'*. However,

if a solitary tradition indicates a rule of law about an unprecedented event, the question of referring it to *kimā'* and of a close study of the opinions of the past jurists in such a case does not arise.

Fourthly, some jurists, like the Hanafīs and the Mālikīs, hold that if a solitary tradition (*khāḍir al-wāḥid*) contradicts general rules of *ḥiḳh* and analogy (*qiyās*), the tradition is not followed. For this reason the Hanafīs did not follow the tradition which required the return of animal alongwith on *ḳā'* of dates if found defective after purchase. The tradition says:

And do not tie up the udders of sheep and goats, for he who buys them after this [act] has been done, has two courses open to him after milking them: he may keep them if he is pleased with them or may return them along with a *ḳā'* of dates if he does not like them.⁵⁰

This tradition contradicts the general rules of *ḥiḳh* in a two-fold manner. Firstly, a general rule (*qiyās*) requires that the purchaser should not return the yield of the animal which he had received while it remained in his possession, for he would be responsible for its loss or destruction if it so happened. According to the general rule, profit follows responsibility.⁵¹ This rule requires that the yield of the animal shall be owned by the purchaser and he will benefit from it in lieu of the expenditure he incurred on it and the responsibility (*damān*) for it. But this tradition demands that if the purchaser finds a defect in the animal whose udders were tied up to show the yield plentiful, he may return it to the purchaser along with one *ḳā'* of dates. Secondly, another rule requires that the compensation should be paid by returning a similar thing (*mithl*) in the case of similar objects (*mithl*) or by payment of its price (*qimāh*) in the case of dissimilar objects (*qimā'*). But this tradition requires that one *ḳā'* of dates should be given in all cases. It is neither a similar object (*mithl*) nor a price of a dissimilar object (*qimā'*). Therefore it contradicts the general rules (*qiyās*).⁵²

Mālik does not follow the tradition which requires that the vessel should be washed seven times if a dog drinks the liquid contained in it, for it contradicts sound reason and general rules (*qiyās*). The tradition: "If a dog drinks (something) in the vessel of any of you, he should wash it seven times"⁵³ was narrated by Mālik himself in *al-Muwatṭā'*, but he does not act upon it. He says that he does not know what this tradition really means. He thinks that the dog is just like other beasts of prey. The vessel should be washed only with water like other impurities are washed and not seven times with dust, as another version of this tradition says. This tradition is in conflict with the following Qur'anic verse: "So eat of that which they (hunting animals) catch for you" (5:4). According to this verse, eating of the flesh of the game hunted by a hound is allowed. Hence Mālik regards the saliva of a dog as

pure. He contends that when the eating of the flesh of the game hunted by a dog is allowed, how can its saliva be abominable (impure)?⁵⁴

A large number of such examples can be cited. This shows that the analogy and general rules preferred by Mālik and Abū Hanīfah to the solitary traditions which entail probability is a reasoning on the basis of rationality that emerges from numerous legal texts which ensemble entail certainty. Analogy is thus not a source which is something extraneous to the Qur'ān and the *Sunnah*, nor is it something additional to them. It is rather a reasoning on the basis of the *ratio* of the texts of the Qur'ān and the *Sunnah* in general (*ma'qūl jumlat muḳāḍ*) on a particular subject which entail certainty. Such reasoning takes precedence over the reasoning which is based on the wording of a single legal text: i.e. a solitary tradition which is probable in its signification.

Thus, the sources of *ḥiḳh* are interlinked. A source is taken into consideration *qua* source alongwith another source in respect of inference and reasoning. The sources qualify, put limitation on and coordinate with one another in conveying the rules of law. The sources of *ḥiḳh* are not detached from one another; they are viewed as a whole and not separately as shown above.⁵⁵

NOTES AND REFERENCES

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2. Imām al-Haramayn, 'Abd al-Mālik, *al-Burhān fī Uḳūl al-Fiqh*, (Doha: al-Shaykh Khalīfah Ibn Ḥamād Alī Thānī, Amīr Qaṭar, 1399, A.H.), 1, 85; al-Shāfi'i, *al-Muwāḍa'at*, (Beirut: Dār al-Ma'rifah, 1975), 111, 5, 345.
3. Al-Mā'urūdī, Abū Mansūr, *Ma'ākhidh al-Sharā'i'*, quoted in the Introduction to *Uḳūl al-Sarakhsī* by Abū'l Waḳā' al-Afghānī, 1, 3.
4. Al-Sarakhsī, *Uḳūl al-Sarakhsī*, (Cairo: Maṭba'at Dār al-Kitāb al-'Arabī, 1372, A.H.), 1, 279.
5. Wahbah al-Zuhayrī, *Uḳūl al-Fiqh al-Isḫāmī*, (Damascus: Dār al-Fikr, 1986), 1, 417.
6. Al-Sarakhsī, *Uḳūl al-Sarakhsī*, op. cit., 1, 277-79.
7. Al-Sarakhsī, *Uḳūl al-Sarakhsī*, op. cit., 1, 278.
8. Al-Taftāzānī, *Ḥāshiyat al-Taḳāzānī 'alā Sharih al-Qaḍī 'Aḍud al-Dīn li Mukhtāṣar al-Muntahā li Ibn al-Hājjib*, (Cairo: al-Maṭba'at al-Kubrā al-Amīriyyah, 1316 A.H.), 1, 39-40.
9. Al-Sarakhsī, *Uḳūl al-Sarakhsī*, op. cit., 1, 278.
10. Ibid., 1, 278-79.
11. Al-Īrī, 'Aḍud al-Dīn, *Sharih Mukhtāṣar al-Muntahā*, (Istanbul: 1307 A.H.), 1, 7.
12. Al-Taftāzānī, *Ḥāshiyat al-Taḳāzānī 'alā Sharih al-Qaḍī 'Aḍud al-Dīn*, op. cit., 1, 40-41; Al-Baḳrī, Abū'l-Ḥusayn, *Kitāb al-Mu'tamad*, (Damascus: Institute Français de Damas, 1964), 1, 9-10.
13. Al-Sarakhsī, *Uḳūl al-Sarakhsī*, op. cit., 1, 279.
14. Al-Shāfi'i, *al-Riḍālah*, (Cairo: al-Maṭba'at al-Kubrā al-Amīriyyah, 1321 A.H.), p. 70.

15. Ibid., p. 8.
16. Al-Shāfi'ī, *Kitāb al-Umm*, (Cairo: al-Maṭba'at al-Kubrā al-Amīriyyah, 1324 A.H.), VI, 203.
17. Ibid., VII, 250.
18. Al-Sarakhsī, *Uyūl al-Sarakhsī*, op. cit., I, 279.
19. Al-Shāfi'ī, *Kitāb al-Umm*, op. cit., VII, 271, 273.
20. Ibn Hājib, *Mubtata'ayn al-Muntahā*, along with al-Jir's commentary, (Istanbul: 1307 A.H.), I, 108.
21. Al-Bazdawī, *Uyūl al-Bazdawī*, printed on the margin of *Kashf al-Awḍāq*, (Beirut: Dār al-Kitāb al-'Arabi, 1947), I, 19-20.
22. Imām al-Ḥaramayn, 'Abd al-Mālik, *al-Burhān fī Uyūl al-Fiqh*, op. cit., I, 85.
23. Al-Sarakhsī, *Uyūl al-Sarakhsī*, op. cit., I, 279.
24. Al-Khabbāzī, 'Umar ibn Muḥammad, *al-Muḡhni fī Uyūl al-Fiqh*, (Makkah al-Mukarramah: Jami'ah Umm al-Qurā, 1403 A.H.), p. 183.
25. Amīr Bādshāh, *Tayakh al-Taykh*, (Cairo: Muṣtafa' al-Baḥī al-Ḥalabi, 1351 A.H.), III, 2-3.
26. Ibn al-Lahjām, *al-Mubtata'ayn fī Uyūl al-Fiqh*, (Damascus: Dār al-Fikr, 1980), p. 33.
27. Ibid., p. 77.
28. Al-Shāfi'ī, *al-Muwāfaqāt*, (Beirut: Dār al-Ma'rifah, 1975), III, 41.
29. Ibid., III, 42.
30. Ibid., III, 43.
31. Al-Bukhārī, *al-Jāmi' al-Sahīh*, Kitāb al-'Ulm, Bāb ithm man kadhaba 'al-al-nabī (s).
32. Al-Tirmidhī, *Jāmi'*, Abwāb al-Ṣalāh, Bāb ma jā'a annahū la ṣalāta illā bi fāṭhat al-Kitāb.
33. Al-Bukhārī, *al-Jāmi' al-Sahīh*, Kitāb Fada'il al-Qur'ān, Bāb man lam yara ba'san an yaqūla sūrat al-Baqarah wa sūratu kadhā wa kadhā.
34. Ibn Mājah, *Sunan*, Abwāb al-Fara'id, Bāb Fara'id al-jadd.
35. Al-Shāfi'ī, *al-Muwāfaqāt*, op. cit., I, 29.
36. Ibid., III, 15-26; Ḥassān, Ḥuseyn Ḥāmid, *Uyūl al-Fiqh*, (Cairo: al-Maṭba'at al-'Alamiyyah, n.d.), pp. 245-48.
37. Wahbah al-Zuhayrī, *Uyūl al-Fiqh al-Ṣakānī*, op. cit., I, 418-19.
38. Al-Tirmidhī, *Jāmi'*, Abwāb al-Aḥkām, Bāb mā jā'a lā yaqūl-qādī wa huwa ghaḍbān.
39. Ḥassān, Ḥuseyn Ḥāmid, *Uyūl al-Fiqh*, op. cit., pp. 248-52.
40. Ḥassān, Ḥuseyn Ḥāmid, *al-Madkhal li dīnāyat al-Fiqh al-Ṣakānī*, (Cairo: Maktabat al-Mutanabbī, 1979), pp. 34-37.
41. Al-Sarakhsī, *Uyūl al-Sarakhsī*, op. cit., I, 113-14.
42. Ibid., p. 318.
43. Abū Dāwūd, *Sunan*, Kitāb al-qaḍā', Bāb jithād al-ra'y fī qaḍā'.
This tradition has been criticised by some doctors of *Ḥadīth* on the ground that the narrator al-Ḥārith ibn 'Amr is obscure and the Companions of Mu'ādh from Ḥimṣ also are unknown. (Ibn Ḥazm, *al-Iḥkām fī Uyūl al-Aḥkām*, [Beirut: Dār al-Ārāq al-Jadīdah, 1980], VI, 35). Against all this criticism it may be said that this tradition is supported by the statement of Abū Bakr, 'Umar, Ibn Mas'ūd, Zayd ibn Thābit and Ibn 'Abbās recorded by al-Dārimī in his *Sunan* [*Sunan al-Dārimī*, (Damascus: Maṭba'at al-'Iṭidāl, 1349 A.H.), I, 58-60]. Further, this tradition has been cited by the Muslim jurists from early times, down to this day in support of *ijtihād*. It seems unlikely that such a large number of scholars quoted a supurious tradition. Its constant transmission by the scholars since the early period is a proof of its soundness.

We find another version of this tradition in Sunan Ibn Mājah. It reads: "Do not judge and decide anything but by what you know; if you are in doubt in a case, you should wait until it becomes clear to you; otherwise write it to me". (Ibn Mājah, *Sunan*, Muḡaddimah Bāb jithāb al-Ra'y wa'l-Qiyās).

44. Ibn Qayyim is of the opinion that this tradition is sounder than the previous one in respect of chain of transmission. There is no mention of use of personal opinion in it. (Ibn Qayyim, *Tahdhīb al-Muḥammadiyyah*, 1949), V, 212.
45. Al-Dārimī, *Sunan al-Dārimī*, (Damascus: Maṭba'at al-'Iṭidāl, 1349 A.H.), I, 58.
46. Ibid., I, 60.
47. Ibid., I, 59.
48. Al-Shāfi'ī, *al-Riḍālah*, op. cit., p. 70.
49. Qur'ān, 5:38.
50. Al-Bukhārī, *al-Jāmi' al-Sahīh*, Kitāb al-Nikāh, Bāb lā tunkahū al-mar'atu 'alā 'ammathā.
51. Ibid., Kitāb al-Buyūt, Bāb al-nahy lī'l-bā'i an lā yaḥfil al-ibla wa'l-ghanama wa'l-baqarah.
This rule is also based on a tradition of the Prophet: Al-Tirmidhī, *Jāmi' al-Tirmidhī*, Abwāb al-Buyūt, Bāb mā jā'a fī man yaṣhtarī al-'abda wa yastaghliluhū thumma ya'jidu bihī 'ayban.
52. Al-Sarakhsī, *Uyūl al-Sarakhsī*, op. cit., I, 341.
53. Maṭlik, *al-Muwāṭṭa'*, Kitāb al-Jahārah, Bāb Jāmi' al-wuḍū'.
Saḥnūn ibn Sa'īd, *al-Mudawwanat al-Kubrā*, (Cairo: Maṭba'at al-Sa'īdah, 1323 A.H.), I, 5-6.
54. Ḥassān, Ḥuseyn Ḥāmid, *Uyūl al-Fiqh*, op. cit., pp. 252-58.
- 55.