Fatwâ: Its Role in Sharî ‘ah and Contemporary Society with South African Case Studies

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Praise be to Allah who in his infinite mercy has endowed me with the ability to undertake and complete this work on fatwā, a topic which has hitherto been neglected. Confusion regarding the concepts of fatwā, aqīfa, mufti, qādi and ḥākim abounds in the South African Muslim community. In consequence the entire Shari'ah is misunderstood and misrepresented. It is my fervent hope that this study redresses this problem to some extent and induces others to produce further work on this topic.

The Prophet (may peace be upon him) has reported to have said, “He who does not thank man has not thanked Allah.” It is with these words of our master in mind that I acknowledge the efforts of all those who made this task possible.

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May Allah reward you greatly.
Abstract

Shari‘ah the Islāmic “legal system” has been studied and depicted in many ways. Schacht writes, “Islāmic law is the epitome of thought, the most typical manifestation of the Islāmic way of life, the core and kernel of Islām itself.” Shari‘ah can be described as “law” or as a “legal system” in as far as it provides for the ordering of society. Laws however, do not state what ‘is’ but what rational human beings ‘ought’ or ‘ought not’ to do - ‘norms’ (from the Latin norma meaning yardstick or rule). Thus laws change and differ with the differing ‘norms’ or yardsticks of society. The Shari‘ah differs from the various legal systems in that it provides a means of governance wherever it is correctly applied without changing in its essential fundamentals. This sound ordering of society that it provides, prevails over the Muslim community which consists of a vast multiplicity of diverse nations and cultures. The question that confounds scholars is how did a single body of law based on divine revelation, the Qur‘ān and Sunnah, deal with social contingencies and how does it remain relevant and effective in the twentieth century?

The answer, to a large extent, lies in fatwā. These are non-binding opinionated legal rulings derived by an astute scholar of Islām, i.e. a muftī. Muftiyūn have received very little attention in both contemporary Islāmic and Western scholarship, since their practice is far less institutionalised when compared to a judge in a Western court of law. The role of the jurisconsult is unfamiliar to the Western mind and inadequately presented by Muslim scholars. The rulings of a judge in a Shari‘ah court are called aqḍiya. Fatwā and aqḍiya are similar in that the principles applied in deriving the Shari‘ah law in both instances are the same. They differ essentially in that aqḍiya are legally binding and are executed by the state whilst fatwā are not.
This study examines the role played by *fatwā* as the catalyst of *ijtihād* and the facilitator that infuses dynamism in the *Shari’ah*. Its role from the time of the Prophet and the righteously guided caliphs is established as a rebuttal to the assertion that Islamic legal rules were only established from the time of the *Umayyads* – the second century of Islam. The study then moves on to its role in contemporary society and the *fatwā* on gelatin issued by the various *fatwā* issuing bodies of South Africa demonstrates its articulation in a localised sense.

My conclusions establish the dynamic nature of the *Shari’ah* as a dual natured "legal system" with interacting fixed and flexible conceptual spheres of the law and the pivotal role played by *fatāwa* in enabling it to cope with social change.
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Introduction

Statement of the problem.
Islam is the misunderstood religion. It arguably possesses the greatest “legal system” known to man - the Shari'ah. It is unique in that it is not only binding towards external human actions but also towards one’s internal conscience. All of Islamic law emanates directly either from Qur'an or Sunnah. All its other sources can be traced contemporaneously to this essential base. The Shari'ah has been studied by various scholars, and depicted differently according to the background, understanding and methodology of the scholar. It has been successful wherever it has been correctly applied for the past 1400 years. The first task would then be to examine the Shari'ah as a “legal system” and to understand its essential components.

The question then arises of how does a single body of law ensuing from divine revelation maintain its relevance as a means of sound ordering in the twenty first century? How does Islam survive in a global cultural milieu without being assimilated into it? A localised focusing of the problem would translate the question to how does the Shari'ah be effective in a minority Muslim community living in a non-Islamic state such as South Africa? The Shari'ah has always been a living law. It possesses an essential dynamism located in its sources. It maintains vitality through the mechanism of “fatwa”. These are verdicts or rulings derived by an astute and competent scholar of Islam through the vigorous application of the principles of derivation of laws of Islam. These rulings over the centuries are the written evidence of how the Shari'ah has been applied in the lives of Muslims. Fatwa have been recorded from the time of the Prophet to the present day. This study investigates the role played by fatwa in Shari'ah and contemporary society. To understand the role of fatwa necessitates a knowledge of the source
methodology for the derivation of Shari'ah laws. For the purpose of this study we investigate the history of certain fatāwa issued in South Africa, ascertain the bodies responsible for them, discuss how the source methodology of fiqh has been applied, the impact these fatāwa have had on South African Muslim society, and the greater populace at large. Focusing on these aspects demonstrates how the laws of Shari'ah have been applied locally and the degree with which they contend with social exigencies.

Chapter one begins with the explicit purpose of redefining certain terms in order to overcome conceptual inaccuracies or rigidities caused by imprecise and inappropriate translations of the original Arabic in which they occur. The terms Shari'ah, ḍīn, fiqh, 'ilm, etc. are defined from a perspective of the usage of these words in the classical Arabic or in the Qur'ān and ḥadīth. The study then proceeds to outline the functions of the practitioners of fiqh viz. The faqīh, qādi, ḥākim and mufti. Fatwā is then defined and the categorisations of the types of mufti according to their methodology are assessed. The works of the classical scholars serve as the source of the entire discipline of fatwā. The regulations concerning the mufti in passing fatwā, its format, and the etiquette of the mustafti (the person seeking the fatwā) are all elucidated. These form a standard by which the practice of the earlier juris-consults and the contemporary ones can be comparatively analysed. Iḥtīād is then defined together with its preconditions and validity to examine the interrelationship between it and fatwā.

Chapter two presents historical evidence of the Prophet's role as well as the roles of the companions and the rightly guided caliphs as ḥukamā, quḍātāt, and mustiyyūn. Orientalists have attempted to portray the Prophet and the companions as moralists and not as lawmakers. There is a total denial of the legal activities of the
Prophet and the companions during the first and early second centuries of Islām. In the case of ‘Umar the second caliph of Islām the institutionalisation of the functions of aqūṭiya and ḥiṣā into formalised state departments took place. Evidences of the fatwā and the aqūṭiya of the Prophet are also sourced from ḥadīth. The chapter ends with the collections of fatwā of the first century of Islām and a chronology of major works of fatwā from the early second century.

Chapter three seeks to locate the interrelationship between fatwā and Shari‘ah. Fatwā, the rulings of the juris-consults and aqūṭiya, the judgements passed by jurists, are within themselves an exposure of the ‘working’ of Shari‘ah. The Shari‘ah is then conceptualised as having a fixed central core, itself possessing an inherent dynamism, which interfaces with a number of flexible sources. A differentiation is made between the conceptually fixed and flexible sources of the Shari‘ah. Fatwā is identified as a source of Shari‘ah law that is operative in both these spheres. The notions of immutability and adaptability of the law emanating from these sources are examined together with the modernist and post-modernist concepts of re-interpretation.

Having conceptualised Shari‘ah, located the fulcrum of fatwā, expounded its functioning we test the result of its application. Chapter four thus examines its role in contemporary society. Many varying scenarios arise:

(i) Its role in an Islāmic state.
(ii) Its role when the Shari‘ah law of a quasi-Islāmic state has to be applied to non-Muslims who are under a contractual obligation.
(iii) Its role as a vehicle of accessibility to Shari‘ah.
(iv) Its role in a Muslim country which does not implement the Shari‘ah.
(v) Its role in a non-Muslim country.

(vi) Its role when a minority Muslim community coexists in a non-Muslim country.

The case of the South African Muslim community would be that of the last category. Since *futūḥa* are a physical manifestation of the application of *uşūl al-fiqh*, the principles of derivation or source methodology of *Shari'ah*, the variances in the sources of the law translate into the differences between the legal systems of the West and the *Shari'ah*. The sources of both systems of law are examined and compared. The primary source of *Shari'ah*, i.e. the *Qur'ān* and *Sunnah* are analysed to exhibit their inner dynamism. To maintain relevance the South African legal system is considered as a Western one. South African legal cases are cited as examples of contentious issues wherein the synergism or divergence between the sources of *Shari'ah* and South African law, are highlighted. This study does not endeavour to fully elucidate the sources of both *Shari'ah* and Western legal systems but delimits itself to a comparison only. This comparison is an exposition of the workings of *Shari'ah* and the Western legal systems. The comparative analysis then proceeds to the other sources of *Shari'ah* namely *ijmāʾ*, *qiyās*, *urf*, *istiḥsān* and *istiḍlāḥ* or *maṣlaḥah mursalah*. The case of the repealing of the death penalty as a form of punishment for pre-meditated murder is used to illustrate a *Shari'ah* right established in the *Qur'ān* but not in the South African Bill of Rights. A correctly issued *fatwā* concerning the case of pre-meditated murder would be in direct conflict with South African law if the victim exercises his right to *qiṣāṣ* or *diyyah*.

The study then presents an historical perspective of South African *fatwā*. An attempt is made to trace the first written *fatwā* issued in South Africa, and the
earliest works of *fiqh* in South Africa. The development of the *fatwā* issuing bodies is briefly discussed. I chose the *fatwā* on gelatine issued by the various *fatwā* issuing councils in South Africa to demonstrate the validity of the application of the source methodology of *Shari'ah* and the *ijtihād* of the South African *fuqahā*. Furthermore these *futuḥā* are comparatively analysed against the classical theory of *fatwā* and its preconditions and discipline as established in the first chapter of this study.

My conclusions establish the dynamic nature of the *Shari'ah* as a “legal system” consisting of the interacting fixed and flexible sources. The principal mechanism that *Shari'ah* deploys for this overlapping or interfacing is *fatwā*. It is the catalyst for *ijtihād* that enables the *Shari'ah* to remain effective in any era. It has always played the role of the facilitator of *Islāmic* law, and continues to do so in contemporary South Africa. This is established by its role in the first and second centuries of *Islām*, throughout the history of *Islām* and its ability to temper human behaviour in accordance with the Divine Will in the South African Muslim community.
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Chapter One

Fatwâ: definition and practice

1. Introduction

Westerners, Orientalists and modernist Muslims are confounded with a global Islāmic resurgence. An ever-increasing tide of people from Muslim countries are clamouring for the implementation of Islāmic Shari‘ah law. The Muslim society is experiencing unprecedented growth through the rapid spread of Islām in traditionally Westernised communities. Westerners consider this as a threat to the dominance of their culture over all others and tend to label all Islāmic reformism activity as fundamentalist and extremist thereby portraying puritan Islām as an outdated emotional cult. Esposito states that Islāmic values and democratic values are inherently antithetical and argues for re-interpretation as has occurred in the Judeo-Christian tradition in order to accommodate the democratic ideal. The thrust of Western society is thus the thrust of "liberalism" which literally means “neutral to value”.

The dichotomy exists whereby an evolved man-made liberal value system which, forms the basis of Western democracies, sits in judgement of, feels threatened by and seeks to denigrate a way of life based totally on transcendental authority. In Islām legislative authority is vested with the Divine Legislator and the society enjoys “only a derivative rule making power and not an absolute law creating prerogative.” Here Shari‘ah is to be defined as the way to conduct one’s life in order to fulfil Divine Will. It encompasses faith and practice, all physical, mental or spiritual behaviour, legal, social, political economical and personal interactions. It is a comprehensive ideology of the total way of life. Western scholars in their analyses attempt to reduce Islām to a religion similar to Christianity. Religions are portrayed as a mass of rituals totally alienated from political activity, a divorce of the spiritual and temporal aspects of life, just as has
occurred between church and state. When confronted with Islamic revivalism, which presents itself as a fusion of spiritual, moral and political positivism, they are confounded. The following questions arise:

[a] How did the Islamic legal system, i.e. the Shari'ah, maintain relevance through its history?

[b] Why does it continue to do so in a modern, rapidly changing technological society?

[c] How has it traversed the vast cultural and ethnic diversity of its adherents?

In essence all legal systems maintain a balance between certainty and the need for flexibility. The law must be constant so that people can rely on it. A system of laws that is constantly changing causes confusion. On the other hand the system has to have such a degree of flexibility that its laws remain relevant to all its adherents. The Shari'ah is a legal system which possesses both these attributes. The Shari'ah is fixed and immutable to a degree at its central core, its primary source, but both its primary and subsidiary sources have provided it with a mechanism by which it evolves into a legal system capable of providing governance to humanity in any era. The mechanism is that of fatwá. The law can be conceptualised as being operational in spheres, a fixed one and other flexible ones. The fixed sphere consists of immutable laws established directly from nass (explicit text) of either Qur'án or hadith. These textual injunctions possess an inherent dynamism. The flexible sphere consists of laws derived through ijtihád. Fatwá in its role as a source mechanism then becomes the only agent to straddle both the conceptually flexible and immutable spheres of Shari'ah.
Fatwā, a juristic opinionated ruling, can be based directly on the fixed immutable conceptual sphere of the law, i.e. the Qur'ān and Sunnah and in some instances *ijmāʿ*. It could also be based on an application of the sources of Shari'ah that could be subsumed under the conceptually flexible sphere, i.e. *qiyyās*, *urf*, *istiḥsān*, or *maṣlaḥah mursalah*. In this chapter we will closely examine and define the prerequisites and the essential components of fatwā, viz. the *mustafti*, the *mufti* and *ifā*. Through a clear lack of study, *futūḥ* or *fatāwa* (the plural of fatwā) are often confused with *aqdiya*, a verdict issued by an appointed judge, the *qādi*. The parallelisms and divergence between the functioning of the *qādi* and the *mufti*, the person responsible for issuing fatwā, are elucidated.

2. Fatwā defined

*Islam* is the prescribed *din* of Allah. A Muslim believes in Allah through submission to his Shari'ah or Divine Will. A Muslim cannot contradict the right of Islam in belief, sayings or actions. Before a Muslim performs an action or makes a statement it is incumbent on him to question himself whether this action is in accordance with, or contradicts the Islamic Shari'ah. If he knows the answer then he chooses whether to commit the particular act or not, but if he does not know it becomes compulsory on him to seek the Shari'ah verdict from those who possess the knowledge so that he may know. This injunction is contained in the verse:

"So ask the people of knowledge if you do not know".

If he acts or makes a statement without knowing or attempting to know the Shari'ah ruling on the matter he either commits an act of disobedience or he innovates into the *din*. This is contrary to the spirit of Islam. Ibn Ṣalāh states:
"The questioning of the scholar by the ignorant, and the answers presented by the learned to them has a few standpoints attached to it:
1. The position of the ignorant who asks the question.
2. The position of the scholar who answers.
3. The nature of the compulsion of the questioning and answering, whether it is absolutely compulsory, or preferred or optional.
All these combined is what is understood in Islamic Shari'ah as the process of issuing fatwa."

The classical authors of works of fiqh always adopted the mode of defining terms first literally and then terminologically. Depending upon syntactic context, various meanings may be ascribed to the noun fatwa.

(i) Literally
The words afthhu fi al-amr means “he solved a particular problem”. The clause afth al-raju fi al-mas’ala means, “a man adduced a ruling pertaining to a particular situation”. Faftani ifti’an means “he decreed a verdict for me”. Aftaitu fulanan ru’yan means “I interpreted a dream for someone”, and “afthhu fi al-mas’ala” means “he ruled on an issue”. The terms futyah, futwa, and fatwa are all synonymous and refer to that which the faqih has adduced. The tenth form of the verb, i.e. istifd, meaning to seek a ruling or fatwa is used in the Qur’an:

“They seek your fatwa (yastaftuha-ka) concerning women, Say
Allah does instruct you (yuffi-kum) concerning them”.

Istifd is thus the questioning on an issue or the process of inquiry regarding an injunction. The person making the inquiry is the mustafii, the person who answers is the mufti, the process of answering is ifta, and the answer is the fatwa. Ifta
therefore necessitates the presence of all four components, the mustafti, mufti, the iftā itself and the fatwā.

(ii) Judicial Terminology:
Dr. Abdul Karim Zaidānī writes, “The terminological meaning of iftā is the same as the literal meaning of the word, that it consists of a mustafti, a mufti, the iftā itself and the fatwā with the proviso that the matter on which the question is raised is considered a Shari‘ah matter and that the ruling or verdict is a Shari‘ah verdict.”

2.1 Prerequisites of the mufti for issuing fatwā
The two most essential prerequisites of a mufti are fiqh and fahm, which allude to the inherent qualities of an individual mufti. The individual possesses these both instinctively or as a result of training and experience in issuing futwa that he receives from an experienced mufti.

2.1.1 Fiqh
The mufti or faqih is the person that issues fatwā which are applications of the source methodology of Shari‘ah. The foremost essential prerequisite of these individuals is that they should be proficient in fiqh. During the lifetime of the Prophet the basic methodology of adducing a Shari‘ah law was identified, but the terms fiqh and ‘ilm were used as correlates. Both implied a general understanding of Islâm. Fiqh was used in a broad sense extending to the tenets of Islâm as well as law and asceticism. It is reported that Sufi Farqad (d 131AH) while discussing certain questions said to al-Ḥasan al-Basri that the fuqahā would oppose him on it.
Al-Hasan replied that a real faqih, as a matter of fact, was a person who despised the world, was interested in the hereafter, possessed a deeper knowledge of religion, was regular in his prayers, pious in his dealings, refrained from disparaging Muslims and was the well-wisher of the community. 12 Abu Hanifa’s book, *Al-fiqh Al-Akbar*, is devoted entirely to theological and dogmatic issues. He discusses the concept of Allah, his nature and attributes, the un-created status of the Qur’an (the word of Allah), Prophethood, the nature of eschatology etc. This science was later called ‘ilm al-kālam.13 With the development of Islamic methodology, the term fiqh became restricted to the science of law. Fiqh became a structured discipline and one could ‘learn’ fiqh. This restricted conceptualisation of fiqh belies its true meaning and function, for it could easily be demonstrated that a faqih or mufti is called on to rule on any Islamic issue whether it concerns belief, dogma, trade, social, political, economic and personal interactions. Therefore there exists a discrepancy between what is taught as fiqh and the onerous role of the faqih or mufti in the Islamic community.

2.1.2 *Fiqih* technically defined

(a) Abu Ḥanifa’s definition although conceived before the year 150 AH is considerably more in conformation with regard to the contemporary practice of the fuqahā than other definitions of the term. He has defined fiqh as

"the understanding of a person’s rights and obligations". 14

This definition has three different facets:

(1) The knowledge of the tenets of faith covered by ‘ilm al-kalām.

(2) The knowledge of ethics and mysticism (taṣawwuf).

(3) Knowledge pertaining to acts (termed as fiqh). 15
Therefore if we have to confine the definition to the third aspect, i.e. *fiqh* alone then the word *‘amalan* has to be added at the end of the aforementioned definition of Abū Ḥanifa. The definition would thus read “a person’s understanding of his rights and obligations [with respect to his acts]”. This implies that what is commonly termed as *fiqh* would be *al-fiqh al-asghar* (the smaller *fiqh*). The jurists however used the term in its technical sense restricting *fiqh* to Islāmic law alone.

(b) Al-Shafī‘ī has defined *fiqh* as

“*The knowledge of the shar‘ī *ahkām* (*Shari‘ah* injunctions), pertaining to conduct (*‘amaliyya*) that have been derived from their specific evidences.*”

The first word in this definition is *‘ilm* which means knowledge. The knowledge is confined to that knowledge which pertains to the laws of *Shari‘ah*. This is furthermore qualified by the word *‘amaliya* which refers to those *ahkām* pertaining to conduct. Conduct in a *Shari‘ah* sense is the performance of those deeds which one has been commanded to do, and the abstention from that which is prohibited.

These are divided into three categories:

- Those, which pertain to physical acts, like the acts of prayer (*salāh*) or those constituting the use of limbs and external organs like speech in the acceptance of a verbal contract.
- Those, which concern the heart, like sincerity of intention, love, hate or jealousy.
• Those that arise through speculative reasoning of the individual like the choice of religion etc.

The knowledge of laws with respect to belief is excluded. The next confinement of *fiqh* in the definition is *muktasab min adillatih al-tafsiliyyah*, which may be translated as "being derived from their specific detailed evidence". The emphasis on specific evidences precludes the knowledge of the *muqallid*. The *muqallid* acquires his knowledge from a jurist and not from the specific evidences in the *Qur'an* and *Sunnah* as does the *faqih*. Thus *ijtihad* is an essential component of the science of *fiqh*. In later times the word *faqih* was used for a jurist who derived his knowledge from the manuals of the opinions of the *mujtahid*, but according to the above definition he would be classified as a *muqallid* and not a *faqih*. The *muqallid* relies on the proof of one jurist generally for all his actions and makes a demand on the *faqih* and thus it becomes compulsory for him to follow the verdict of the jurist once he resolves a matter. *Fiqh* can also be defined as:

"The understanding of the prevalent law from the text, or derived according to one of the (fiqhî) schools of thought". 17

The above definitions identify two distinct methods of gaining the understanding of the law. The first is through direct juristic effort or *ijtihad*, whilst the second is through reliance on the *fatwâ* of another *mujtahid*.

2.1.3 *Fahm* and *tafaqquh*

The word *fiqh* is derived from the verb *faqîha*. The lofty status of *fiqh* in Islâm is established by the *Qur'an*:

*It is not (proper) for the believers to go forth (in jihâd) all together, there should be a contingent from every expedition that*
goes forth to devote themselves to understand (liyatafaqqahu) religion, and admonish the people when they return to them, so that perhaps they will guard themselves (against evil). 18

The verb faqiha appears in this verse in the second form, faqqaha-yatafaqqahu and the phrase liyatafaqqahu literally means “so that they are made to understand”. The verse emphasises the necessity of producing people of tafaqquh (insight) of din. These are the fuqahā. The act of producing fuqahā or muftiyūn has a pivotal role in Islām and is placed on the same level as jihād, for the verse suggests that even when the Islāmic community is at war or under attack a special group should be devoted to the understanding of din. The primary function of the faqih (singular of fuqahā) is also specified that he admonishes the community that he is responsible for. The word used here is nadrara and the Qur’ān in other verses has described the Prophet as a nadrir, a warner or admonisher. 19 So the task of the faqih is an extension of the task of prophethood in that just as the Prophet established the community of Madina to enact it’s way of life in accordance with Shari’ah, a faqih does the same in his community. Jihād is used to remove the political impediments that hinder the physical spread of Islām whilst fiqh ensures the advancement of the spirituality of the community in that it induces the entire Islāmic community to adhere to the Shari’ah. The word fiqh used in other verses of the Qur’ān suggests that this understanding or insight is not only a function of the intellect, it is also a spiritual function and its seat is the heart:

“They have hearts wherewith they understand not (lā yafqahún)” 20

“That is because they believed then they rejected (faith) and their hearts were sealed so they do not understand (fa-hum lā yafqahún)” 21
"but the hypocrites do not understand (lá yafqahûn)"

Thus the word fiqh is an understanding borne of belief, conviction, intellect and inspiration. This is further corroborated in a narration of the Prophet:

It is reported from Mu‘âwiya that he heard the messenger of Allah say, “Whosoever Allah wishes good upon, He gives him insight into dîn”.

The concept of fiqh, ‘ilm, and fahm have been identified as prerequisites of fatwâ and elucidated. The verb faqiha means to understand, comprehend or have knowledge of. If it appears in the second or forth form, it means to instruct or make one understand. The verb fahima means to understand, comprehend take cognisance of etc. in the second and forth forms it also means to instruct. Fiqh and fahm are synonymous.

3. An application of fahm and tafaqquh: the fatwâ of Solomon

The word fahima is used only once in the Qur’an, it is used in the second form fahhama which means to make one understand.

“To Solomon we inspired the right understanding (fa-fahhamnâ) of the matter”

The word fa-fahhamnâ used in this context is equivalent to the meaning for which the word fiqh is used today. The preceding verse describes the matter in which understanding was bestowed to the prophet Solomon. The sabab al-nuzîl of this verse demonstrates the use of both fiqh and fahm by the prophets David and
Solomon in their rulings. Sheep, on account of the negligence of the shepherd, got into a cultivated field or vineyard by night and ate up the young plants or their tender shoots, causing damage to the extent of perhaps a whole year's crop. David was the king and in his seat of justice he considered the matter so serious that he awarded the owner of the field the sheep themselves in compensation for his damage. His son Solomon a mere boy of eleven, thought of a better decision where the penalty would be commensurate with the offence. The loss was the loss of the fruits or produce of the field of vineyard; the corpus of the property was not lost. Solomon's suggestion was that the owner of the field or vineyard should not take the sheep altogether but only detain them long enough to recoup his actual loss, from the milk, wool, and possibly the young of the sheep, and then return the sheep to the shepherd. David's merit was that he accepted the suggestion even though it came from a young boy. Solomon's merit was that he distinguished between corpus and income. 27

This is a clear demonstration of the preferential analogy istihâsan applied by the prophet Solomon as he was inspired to do. 28 Therefore the one instance in which the word fahima is used in the Qur'an its meaning is synonymous with fiqh. In the above incident we observe the harmonious complimentary interplay between the functions of the judge and the juris-consult, the qâdi and the mufti. If we consider David as the king and the supreme judge over his subjects then the role of Solomon would be that of the mufti or faqih. The judge in this incident acknowledges the better ruling of the juris-consult and uses his ruling as the final verdict. Another pertinent issue relating to the disciplines of both fatwâ and aqdiya is that the decisions of the judge and the juris-consult are both considered correct after having applied their respective ijtihâd.
4. Differentiation between *fatwā* and *aqdīya*

The *Shari'ah* the Islamic “legal system” functions through two distinct parallel streams of applicability of the law. The first one is the institute of the court presided over by the judge *qādi* who adduces the law from its sources and through the executive powers vested in him enforces his verdict. The second is the process of *fatwā* whereby persons approach a competent juris-consult *muftī* and seek the *Shari'ah* law pertaining to a particular issue. The *muftī* does not possess the power of execution. Both *muftiyīn* and *qawwādin* interpret the *Shari'ah*, but their *futya* and *aqdīya* differ in orientation according to the relationship between law and fact.

In a *fatwā* the information given by the *mustafī* (the person seeking the *fatwā*) is considered as the point of departure for engaging the interpretative process, whilst the thrust of an *aqdīya* is the assessment of the competing evidences presented by the litigants to ascertain the facts and then to apply the law. *Futyā* are the determination of the law assuming a set of facts whilst *aqdīya* are the application of a set of laws after determining the facts. The biography of the Prophet abounds with incidences in which he acted as a *qādi* and as a *muftī*. The process of adducing the law is the same in both streams and during the lifetime of the Prophet there was considerable overlapping of the functions. Then a gradual differentiation appeared until the reign of 'Umar the second caliph of Islām.

The case of the prophets David and Solomon demonstrate how *fiqh* and *fahm* are continuously applied through the agencies of *fatwā* and *aqdīya* in order to ascertain the law. They are applied by the “practitioners” of the law, the *faqih*, *muftī*, *qādi*, and the *hākim*. These terms have been used interchangeably in many studies. There exist considerable variation in their respective roles and certain
areas of overlapping of their functions. This study now proceeds to define the practitioners of fiqh and outline their respective functions.

5. Mufti

A mufti is a juris-consult. He is called upon by the general masses, other scholars or sometimes even a qādi for his ruling (fatwā) on a matter. The mufti differs from the qādi in that his rulings are of a persuasive nature whilst the qādi has executive authority and his verdict must be carried out. A mufti therefore has to be a faqih. The terms faqih and mufti imply scholars endowed with fiqh. Both issue fatwā and are synonymous except the term mufti would refer to a faqih who specialises in issuing fatwā.

5.1 Mufti defined

Shâtabî defines a mufti thus, “The status of a mufti in the Islāmic community is like the status of the Prophet in the first community of Islâm…….”

Ibn Ḥamdânî’s definition is: “The mufti: is the person informed of the injunctions of Allah, the exalted, through his knowledge of its proofs. He reports the injunction from Allah. It is said he has proficiency in independently identifying with substantiation the Shari’ah verdict concerning incidences through his knowledge of fiqh.”
Ibn al-Qayyim writes, “The *mufti* is the one who informs on the law of Allah without seeking loopholes.”

The definitions do not confine a *mufti* to either a professional or academic status but rather emphasise the immense social and spiritual responsibilities associated with his functions.

5.2 *Mujtahid* and *Mufti*

A *mujtahid* is a person who exercises *ijtihād* (juristic effort). The *mufti* in giving his *fatwā* has to exercise *ijtihād* and similarly the *fiqh* of any scholar is a result of his *ijtihād*. The majority of the scholars concur that there is no difference between a *mufti* and a *mujtahid* i.e. a *mufti* is a *mujtahid* and vice-versa.

Ibn Hamāma writes,

“*Inna al-mufti huwa al-mujtahid wa-huwa al-faqih*”

“Indeed the *mufti*, he is the *mujtahid* and he is the *faqih*.”

Al-Mahālāwī writes,

“Inna al-mufti ḍinda al-‘ushūliyyīn huwa al-mujtahid al-muṭlaq”

“Indeed the *mufti* according to the scholars of *fiqh* is the unrestricted *mujtahid*”

whilst Al-Shawkānī writes,
"Inna al-mufti huwa al-mujtahid... wa mithluhu qawl man qâla inna al-mufti huwa al-faqih lianna al-murâd bihi al-mujtahid fi muṣṭalâh al-uṣūl"

"Indeed the mufti, he is the mujtahid... and for example if someone says, 'Indeed the mufti he is the faqih,' he intends by it the mujtahid because that is its meaning in the terminology of the principles [of fiqh]."

This is also the view of Ḥâfiz Ibn Salaḥ for when he discusses the topic, 'The mujtahid; his qualities, rulings and ethics', he uses the sub-title "The conditions regarding a muftî in his qualities, rulings and ethics' and his saying that "a mujtahid is an unrestrained (mustaqîl) muftî". 36

The terms mujtahid and muftî are interchangeable but since the modes of ijtiḥâd differ, the types of muftî also differ. Scholars like Ibn Ṣalâḥ have listed the different types of muftî whilst Zuḥailî categorises them as the different types of mujtahid. 37

5.3 Types of muftî

A muftî must be a reliable and trustworthy practising Muslim, unblemished from moral depravity or any decline in honour. Whosoever does not possess these qualities is unfit for the position although he might exercise ijtiḥâd. 38 He must be of sound intellect, sagacious, a firm disposition, vigilant in his derivation of the rulings and have attained a level of competence in fiqh that enables him to make an independent judgement. The position of the muftî is then divided into two major categories: the independent (mustaqîl) and the dependent (ghair mustaqîl).
5.3.1 The independent (mustaqil) mufti

This person must possess all the qualities described previously and must further understand the proofs of Shari'ah injunctions from Qur'ân, Sunnah, ijmâ', qiyâs, and what they incorporate in detail, as explained in the manuals of fiqh. He must be a scholar of the source methodology of Shari'ah, i.e. the manner in which rulings is adduced. He should be able to utilise his understanding of the knowledge of Qur'ân, the sciences of hadith, his knowledge of abrogating and abrogated verses and ahâdîth, Arabic grammar and linguistics, the knowledge of the divergence of opinion and consensus of the scholars to such a degree of proficiency that enables him to distinguish which ruling fulfils the preconditions of derivation. He must be experienced and trained in the usage of his knowledge, decisive in the most important issues and unsurpassed in the facilitating the completion of the decision. A person who fulfils the aforementioned requirements is an independent and unrestricted mufti or mujtahid; he possess the ability of recognising the Shari'ah injunction from its proof independently, without following any other scholar or restricting himself to one school of thought. It is compulsory for a community to have and consult with a mustaqil mufti. The nature of the compulsion is such that if some members of the community fulfil it, the rest of the community is absolved from the responsibility. Ibn Juwainî, the Imam al-Ḥaramain has added another aspect in his summarisation of the qualities of a mufti. He considers a (mustaqil) mufti to be one who is proficient in identifying the Shari'ah ruling with ease and without recourse to further study. However he does not list this as a precondition for being a mustaqil mufti. Abu Ishâq al-İsfarânî and Abu Mansûr Bagdadî have made the “ḥifz” the knowing ‘off the cuff’ of the solutions to fiqhî matters and a proficiency in accounting as preconditions of a mustaqil mufti whilst other scholars consider it sufficient that a mustaqil mufti has the ability to decree in some matters ‘off the cuff’ and with exhaustive juristic...
jurisdictive effort in others. Muftiyūn in this category are the imāms of the various fiqhi schools of thought. 42

5.3.2 The mufti who is not independent (ghair mustaqil)

This is the mufti in whom the preconditions of ijtihād which are characteristic of the independent mufti are found, except that he is not the first to embark on deriving the law by himself, but he follows the pathway of one of the imāms from the various schools in his manner of ijtihād. He is totally associated with his school of thought and not independent. Examples of this type of mufti or mujtahid are the students of the founders of the four schools of fiqh. Abu Yusuf, Muḥammad and Zufar from the Ḥanafis, Ibn Qāsim, Ashab and Asad ibn al-Farāt from the Mālikis, Al-Buwaitī and Al-Mazani from the Shafi‘is, Abu Bakr al-Asram and Abu Bakr al-Maruzī from the Ḥanbalis. These muftiyūn or mujtahidūn were capable of extracting the injunctions from their proofs according to the principles of derivation established by their teachers. They sometimes differed in some injunctions but followed the established principles. However there exist areas of convergence between the mustaqil mufti and this category. If we take the Ḥanafi school as a case in point many instances can be cited wherein the ruling of the ṣāḥibain (Yusuf and Muḥammad) or sometimes the ruling of either Yusuf or Muḥammad is given preference over the ruling of Abu Ḥanifa himself and thus becomes the ruling of the school. A similar position exists in the Shafi‘i school wherein the ruling according to the school is the ruling of Nawawi and not Imām Shafi‘i himself. In certain instances the original ruling (qawāl al-qadīm) of Shafi‘i differs with that of the other schools but his later ruling (qawāl al-jadīd) concurs...
with the opinion of Yusuf. Therefore a divergence of opinion exists between the Shafi’is and Hanafis as to whether Abu Yusuf and Muhammad, Al Muzani and especially Ibn Soraij could be considered as independent mujtahidün or mujtahid according to their schools of thought.

5.3.3 The restricted muftī (muqayyad)

This type of juris consult is confined to a particular school of thought and ratifies the proofs of his particular school. He does not delve beyond the proof established by the school of thought that he belongs to. He could be deficient in certain specific sciences that are requirements of a mustaqil muftī, e.g. the science of hadith or linguistics. He therefore bases his analysis on the texts of the authors of his school. These jurists are referred to as the ašhāb al-wujuh of a particular school of fiqh. However in the absence of any text by the authors of the school he exercises his own ijtihād and functions similar to a mustaqil muftī. It is also permissible for this type of juris consult to issue rulings on a specified area of fiqh only, e.g. he restricts himself to the laws of inheritance. Examples of muftiyūn in this category from the four major schools of thought are Kašṣaf, Taḥāwi, Kirkhī, Ḥalwānī Al-Sarkasī, Basdawī and Qāḍī Khan, from the Hanafis; Al-Abhari and Ibn Abī Zaid from Mālikīs; Abu Ishāq al-Shirāzī, Al-Marwazī, Muḥammad ibn Jarīr, Abu Naṣr and Ibn Kuzaimah from the Shafi’īs; Qāḍī Abu Ya‘lā and Qāḍī Abu ‘Ali ibn Abī Mūsā from the Ḥanbalīs.
5.3.4 The mufti of contradistinction (tarjih)

This type of mufti accesses the verdict of the imam of his school of thought and compares it with the others. He then gives preference to a particular verdict through his analysis of the proofs of each school. He also accesses the ruling of the leader of the school and compares them with those of his students, sometimes giving preference to the opinion of a particular student. Through his thorough knowledge of the source methodology of fiqh and the strengths of proofs he differentiates between the strong and weak rulings of the jurists. Examples of these types of muftiyun are Al-Quduri, and al-Marginani the author of al-Hidaya of the Hanafis; Allamah Khalil of the Malikis; Al-Rafi’i and Al-Nawawi of the Shafis; and Qadi ‘Ala al-din the refiner of the Maliki school.

5.3.5 The mufti of precedence (futya)

This mufti has the ability to differentiate between strong and weak and preferred rulings but uses the previous rulings of his school as precedence. He does not have the ability of ratifying the proofs of the former jurists or examining their analogies. Examples of these are, the authors of Kanz, Al-Dar al Muktar and Al-Wiqaya of the Hanafis and al-Rafi’i and al-Nawawi of the Shafiis.
5.3.6 The muqallid

This category of scholar does not have the ability to differentiate between strong and weak opinions and there exists a considerable variance of opinion amongst the scholars as to whether he could practise as a mufti or not. He does not fulfil the essential prerequisites of a mujtahid. The great Shafi'i scholar Abu ʿAbdullah Al-Ḥalimiyi and Qādi Abu Al-Muḥāsin, the author of “Al-Bahr al-Madhhab (The Sea of the Schools [of thought]), rule that it is not permissible for a muqallid to pass a fatwā by that which he follows. Sheikh Muhammad al-Juwaini in his Sharḥ li Risālah Al-Shafiʿi (An elucidation of the Risālah of Al-Shafiʿi) quotes from his teacher that it is permissible for a person who has memorised the texts of scholars of a school of thought to pass a fatwā, even if he does not understand its finer subtleties and realities.

Ibn Ṣalāḥ writes, “Those that say that it is not permissible for the muqallid to pass fatwā imply that it is not permissible if he presents his ruling as if it originates from himself, but if he mentions the ruling and states that it is in accordance with the ruling of the scholar or school of thought that he follows, we regard him in the category -The muftī from the muqaddidin- they are not in reality from the muftiyūn but are their representatives and as such considered amongst them, and their rulings should thus read “the ruling according to the Shafiʿi school of thought is thus......”

If there is no mufti from the aforementioned categories in a particular locality and it is not possible to communicate with one from a nearby locality, it is permissible to rely on the fiqh of a person who has studied the works from a school of thought rather than leaving the community in abeyance on an issue.
6.1 Faqih

The term faqih alludes to the scholar endowed with fiqh. He has the understanding and the qualities to enable him to correctly adduce the Shari’ah law from its sources and to substantiate his assessments by providing specific Shari’ah proof for his rulings. The term is used generally and describes the ability of this special individual but does not subject him to a structured application of his knowledge. A faqih may be a scholar otherwise engaged in teaching, writing, etc. It does not necessitate that his speciality in the vast field of Islamic knowledge be that of fiqh. He could be a specialist of hadith (muḥaddith), linguistics (adīb), Qur’ān (mufassir), or of any other branch of religious science, but it is the combination of all these aspects together with his personal integrity, piety and experience that would render him with an ‘understanding’ befitting the term faqih. According to the narration of the Prophet this understanding is a special favour from the creator to those upon whom He wishes to favour:

“for whomsoever Allah wishes good, he gives him the understanding (taffaquh) of din”.

There are numerous narrations which exemplify the fiqh or superior understanding of Islâm possessed by ‘Aiesha, the young wife of the Prophet. Many companions sought clarification on issues from her after the demise of the Prophet. Laws concerning the personal cleanliness of individuals regarding when a bath is compulsory or how to cleanse oneself after urinating or defecating, or after sexual relationship with one’s spouse have all been adduced from narration by ‘Aiesha as to the manner in which the Prophet carried these out.

The terms faqih does not connote a rank, status or degree conferred on an incumbent, rather it is the Islamic community and more particularly its scholars that bestow this status on an individual through their recognition of his or her
abilities which manifest themselves in the fatâwa or judgements that he or she passes. The ruling passed by the faqîh or muftî is not necessarily binding on those seeking the verdict. The faqîh or muftî acts as a consult and in the cases of dispute both parties voluntarily agree to abide by his or her decision.

6.2 Qâdi

6.2.1 Preconditions for appointment

A qâdi is a Shari‘ah judge and his judgements must be executed. He is appointed either directly by the amîr or by his deputies (wuzarâ) in other provinces. Qâddât were appointed during the lifetime of the Prophet, after his demise by the rightly guided caliphs, then by the respective caliphs and presently wherever Shari‘ah law is implemented. Al-Mawardi 56 has stated many necessary preconditions for appointment to this post.

- He must be a mature man, i.e. one who has attained the age of puberty. Since no judgement is made on the pronouncement of a minor he is thus precluded from the right of passing judgement on others. 57 A women may not take up office as she is not suited to this function. The verse

“Men have been given authority (qawwâmûna) over women by what Allah has favoured them over the later” 58

is cited as proof. Abu Hanifa, however says that a woman may make judgements concerning matters which she is able to make testimony, but that she may not whenever her testimony is unacceptable. 59
There is consensus of opinion that it is not enough that his (the qâfi'i's) intellect be merely such that his basic powers of perception render him responsible for his actions, but he is also competent in his faculty of discrimination, of sagacious understanding, removed of any lapses of intellect and from moments of inattentiveness, and that he is able to arrive at an elucidation of any problem by his perspicacity, and capable of reaching decisions in cases of complexity.

He must be a free man. A slave cannot pass a judgement but can give a fatwâ or narrate a hadith as there is no compulsion of execution of authority in either of these.

He must be a Muslim for it is not permissible to appoint a non-Muslim as a judge over Muslims. "Allah will never give the non believers a way over the believers". According to Abu Ḥanifa a non-Muslim may be appointed as a judge over people of his own creed. However these appointments were made in order to establish the individual as a leader amongst his people rather than arbitrator or judge. His judgement over them is binding by virtue of their obligation towards him, and not by any obligatory characteristic of his judgement. If they refuse to accept him as their judge, they are not to be coerced and the judgement of Islâm is then carried out in preference. He must be true in speech, manifest in his fulfilment of a trust, free from all doubt and abstain from all forbidden acts, equitable both when content and when angry, chivalrous and vigorous both in his spiritual and worldly affairs.

He has to be sound of hearing and sight in order to fulfil his duties assiduously. Mâlik permits the appointment of a blind person to such an authority.

His knowledge of Shari'ah must extend to a thorough comprehension of its principles and to the execution of legal decisions based on these principles. His knowledge must embrace the source methodology of Shari'ah with complete
details of the primary and secondary sources. He has to be mujtahid, a person capable of issuing fatāwa and judgements. If he is deficient in these his judgements are annulled.65

Even if the above preconditions are met, it is not permitted to appoint someone to the judiciary until it is known, either by prior knowledge or by way of examination and interrogation, that these qualities are contained in the incumbent. The messenger of Allah interrogated Mu‘âdh (d. 18 A. H.) prior to sending him to Yemen as a governor. It is reported from Ḥaris ibn Amr from a companion of Mu‘âdh that when the prophet sent Mu‘âdh to Yemen

He asked, “How would you administer justice?”

He (Mu‘âdh) replied, “I will judge by what is in the book of Allah.”

He (the Prophet) then asked, “If you do not find it in the book of Allah?”

He (Mu‘âdh) replied, “Then by the Sunnah of the Prophet.”

The Prophet then asked, “If it is not in the Sunnah of the Prophet.”

He (Mu‘âdh) replied, “Then I would exercise my individual opinion. (ijtihād bi ṭa’yi)”

He (the Prophet) said, “Praise be to Allah who has made the messenger of the Messenger of Allah consistent.” 66

The above dialogue establishes the source methodology of adducing a Shari‘ah verdict. It demonstrates the legal activity of the Prophet for he appointed governors and judges (quḍā‘ī) during his lifetime and also discussed their roles.
6.2.2 Appointment and jurisdiction

The qādi is either appointed directly by the amīr or by his wuzarā or governors in the various areas. The appointment of a qādi is either contracted verbally or in writing. The expression by which the contract of appointment is concluded is a manifest and explicit declaration. The manifest expressions used are ‘I give you authority’, or ‘I make you my representative’, ‘I make you my deputy’ or ‘I have named you as my representative’. Expressions such as ‘I put my confidence in you’ or ‘I rely on you’ are ambiguous and too weak to effect appointments. The completion of the appointment is dependent on acceptance by the appointed qādi and is guaranteed by four conditions:

1. The person being appointed must know that the person making the appointment has the authority and capacity to appoint him thus.

2. He must have knowledge of how the person appointing him has assumed this responsibility and that the reciprocal responsibility is not binding on either of them, i.e. the appointed qādi may withdraw from the arrangement if he so wishes or vice-versa. 67

3. The scope of his responsibilities has to be clearly outlined. Does the appointment entail judicial authority, the governance of an area, the collection of kharāj tax or a combination of these tasks. 68

4. The physical area over which he has jurisdiction has to be demarcated.

If a qādi arrives at a judgement and the same case comes up later, he should again make ijtihād and pronounce a judgement according to his new ijtihād even if his conclusion is opposite to his initial verdict. It is prohibited for a qādi to accept a gift from a litigant or anyone else working within the judiciary. If it is not possible for him to return the gifts to the donor, the gifts become the property of the bait al-māl (the public treasury). 69 It is also prohibited for him to pass a judgement in the
state of anger. He cannot bear testimony against any litigant. He is not allowed to judge in favour of one of his parents, nor of his children, because of the suspicion of favouritism. He may however judge against them for then the suspicion is removed. If a qādi dies his deputies are removed from office. If there is a change of leadership, i.e. a new amīr, the qādi should not continue in office. However all his previous judgements are valid.

The jurisdiction of a qādi is either specific or general. His competence may be conferred to specified matters, and his power of investigation may be constrained within limits. His jurisdiction may be confined to a particular case between two litigants, in which case he may not investigate any further cases involving these two persons and a third party. His appointment could also be restricted to certain days of the week, e.g. if his contract of appointment was verbal and the expression “I give you jurisdiction every Saturday” was used. If his jurisdiction is general it usually constitutes the following:

- He decides in disputes and reconciles between parties to their mutual satisfaction either by considering possible solutions to the affair or by enforcing an irrevocable Shari'ah judgement.
- He ensures that those delaying their obligation towards others fulfil them to the benefit of those entitled to them.
- He has guardianship over those who have diminished capacity due to them being young of age or insane. He also imposes restrictions on people who are bankrupt or through foolishness, irresponsible. He validates the laws of contract pertaining to their wealth.
- If no specific person has been appointed to inspect trusts then it becomes the qādi's responsibility to examine waqf properties and funds to ensure that these funds are used to fulfil the purposes for which they were intended.
• He ensures that all inheritance is distributed according to the *Shari‘ah*. He expedites the transfer of ownership to the beneficiaries who have been allocated their shares by law and those upon whom a bequeathal has been made according to the wishes of the testator.

• He acts as a legal guardian to effect the marriages of women who do not have one. Abu Ḥanifa considers it permissible for women to make a marriage contract themselves under such circumstances.

• He applies the *ḥudād* (the *Islāmic* penal code). If it is a violation of the *ḥuqūq Allah*, the right that Allah the creator has on his subjects, then the *qādi* has to ensure the execution of the punishment as long as proof exists either by confession or by the testimony of witnesses, without the necessity of a plaintiff. If it is a civil matter and involves the rights of people, then it is subject to the petition of the plaintiff.

• He oversees matters of public benefit and ensures no impediments or encroachment of public ways bridges and drinking wells. He has the right to evict persons causing harm to the aforesaid and undertakes random inspections.

• He appoints his deputies according to their abilities and replaces them if he finds them deficient.

• He has to remain totally equitable, and unbiased. He has to apply the *Shari‘ah* and not follow his whims and fancies in any way.

It was common practice of the *amīr* to appoint the foremost *faqih* as a *qādi*. This was done in accordance with the *Sunnah* of the Prophet. The Prophet appointed Mu‘ādh as the governor of Yemen because he was one of the companions blessed with a high level of *fiqh*. The caliph ‘Umar once remarked, “Let him who desires
knowledge of *fiqh* go to Mu‘ādh ibn Jabal. The Prophet himself prayed for the famous scholar-jurist ‘Abdullah ibn ‘Abbas (d.68 A. H.) saying:

“Oh Allah give him deeper understanding in religious sciences.”

Thus ideally every person appointed as a *qādi* has to be a *faqīh*. This however does not imply that every *faqīh* has to be a *qādi*.

The next practitioner of *fiqh* is the ḥākim.

### 6.3 Ḥākim

The verb ḥakama means to judge or decree, to impose or pass a verdict or sentence. The active participle ḥākim may be literally interpreted as “the one who passes the judgement.” It thus refers to a sovereign, ruler, governor, or judge. The terms ḥākim as-ṣulh refers to the Justice of the Peace, ḥākim an-nābiya to a district magistrate, muḥākama to judicial proceedings or a trial, ḥākimiya to an area over which there is jurisdiction, and maḥkūm ‘alayhi to the person on whom the judgement is passed.

The term is used generally to denote a person who has been given authority as a judge, sovereign ruler etc. However in a Muslim’s conceptualisation of Allah we find that Allah is referred to as the Absolute Sovereign, The Absolute Just and *Al-Ḥakam* or Absolute Judge. These are from the ninety-nine attributes that Allah has assigned to Himself and are sourced from a narration of the Prophet to that effect.
Allah is the supreme source of all justice and the Ḥākim. The word is used in the plural form (ḥākimīn) in many verses of the Qur'ān wherein Allah is referred to as the wisest of all judges or the best of all judges:

“Is not Allah the wisest of all judges (ahkam al-ḥākimīn)?”

“So be patient until Allah judges between us and He is the best of judges (khair al-ḥākimīn)”

The term is also used in a general sense. In the following verse derivatives of the verb ḥakama and qaḍā are used. The word yuḥakkimūka is used with the word qaḍaita implying the correlative usage of the terms ḥākim and qaḍī.

“But no by your Lord, they do not believe until they make you a judge (yuḥakkimūka) in all disputes between them and do not find within themselves any resistance against your verdicts (qaḍaita) but accept them with the fullest conviction.”

The terms are thus interchangeable and a qaḍī could be considered as a ḥākim and visa-versa. So too with a muftī and a faqih.

7. Regulations concerning the muftī in passing fatwā

- Unlike the essential prerequisites of a narrator of ḥadīth, or a qaḍī being a free person and male are not essential preconditions for a muftī. However he or she is similar to a narrator in that he remains unaffected by familiarity or antagonism, he derives benefit and wards off harm since a muftī according to
his mandate, is the person who informs on the Shari'ah ruling through the sphere of authority vested in him by the person seeking the ruling and unlike a judge does not possess any executive power. If a mufti ostracises a specific person who disputes the verdict stubbornly, the fatwā is void, similar to the testimony of a judge against any party. Sight and speech are not essential prerequisites of a mufti.

77

- The fatwā of a licentious person is unacceptable even though he is an independent mujtahid because if in spite of his own ijtihād he arrives at a ruling but cannot apply it to himself, he precludes himself of the right to issue verdicts concerning others.

78

- The fatwā given by a qāḍī is similar in status to those given by other categories of mujtahid but it is considered abominable. Abu Bakr ibn al-Munzir opines that it is abhorrent for a qāḍī to issue fatwā except in the areas where the scope of his judgement is inconsequential like matters concerning worship, cleanliness etc. The famous jurist Qāḍī Shuraih is reported to have remarked “I pass a judgement but I do not issue fatwā (ana aqḍi wa-lā ʾufi).”

80

- If fatwā is sought from a mufti in the absence of other muftiyūn in his area then he is designated to answer. If there are others in the area and the fatwā is sought from them together then it becomes compulsory for them to arrive at a decision together. According to Ḥalimī if the mufti is alone it is not permissible for him to evade the question or to pass it on to others. However this does not apply to the layman for it has been reported from 'Abd al-Rahmān Abi Lailā: “I approached one hundred and twenty companions of the prophet from the Ansār and sought a ruling from each one of them, the one returned me to the other and the other to the next
one until I returned to the first person to whom I phrased the question." 82

- If a mufti passes a fatwâ on an issue and then retracts it, and the person who sought the ruling is informed of the retraction and he has not yet acted on the ruling it is incumbent on him not to do so. If he has already acted according to the retracted ruling and it is contrary to what is established by absolute proof (dalil qaṭ'iyyî) then it is compulsory for him to rectify his action with immediate effect, if it is an ijtihâdi matter then it is not compulsory for him to rectify his action. 83 Ibn Śalâḥ states that “If a mufti arrives at his ruling according to a specific school of thought and then retracts the ruling because it is in absolute contradiction to the text of the imâm of his school of thought, then it is compulsory on him not to apply the ruling, for the text of the imâm of his school of thought is like the text of the Legislator (Allah) to an independent mufti. 84 It has been reported of Ḥasan ibn Ziyâd Al-Lu’lu’î the contemporary of Abu Ḥanîfa that he was asked for a fatwâ pertaining to a matter, he gave an erroneous ruling, but could not ascertain who the person who sought the ruling was. So he hired a person to announce that “Indeed Ḥasan ibn Ziyâd was questioned on such and such a day regarding this particular matter and he erred in his ruling. Whosoever sought this fatwâ from Ḥasan should consult him”. He waited for many days and refrained from issuing fatwâ until he found the person who originally sought the ruling from him and informed him that he had erred and that the correct ruling was thus. 85

- If the person who sought fatwâ acts according to it and as a result of adhering to the ruling is harmed or suffers damage to his property or loss of wealth, and then it is later explained to him that the ruling is incorrect, that it is contrary to that which is established by absolute proof (dalil qaṭ'iyyî), then according to
Abu Ishaq Al-Isfarayini, the mufti is liable. If the person who passed the ruling is not competent in issuing fatwā then he is not responsible since the one seeking the fatwā was negligent. 86

It is not permissible for a mufti to be negligent and if he is known for his negligence it is not permissible to seek a fatwā from him. This is so because he does not corroborate the facts put to him but hastens to a verdict before ascertaining the reality of the situation. Perhaps his suspicions induce him to think that speed is decisive and that deliberation is a defect and weakness, and this is ignorance for it is more befitting to deliberate and not to falter rather than to hasten and lead astray and be led astray. 87

Fatwā should not be sought from a mufti when his emotional state dominates his character and prevents him from investigating and contemplating on the issue. These are the states of anger, hunger, thirst, grief, overpowering joy, tiredness, boredom, illness, discomforting heat, bitter cold, at gunpoint or any emotional state which will cause him to transgress the bounds of justice essential for the fatwā. If he passes a fatwā in any of the above-mentioned conditions and is confident that these have no bearing on his ruling his fatwā is valid even if he errs. 88

It is preferable for a mufti undertaking the issuing of fatwā to do so voluntarily. 89 It is permissible for him to receive a stipulated amount from the public treasury (al-bait al-māl) if he has been appointed as a mufti. However the preferred ruling is that no form of remuneration is permissible. The stipulated amount from the public treasury is considered an allowance and not remuneration. 90 If he has any other forms of income it is also not permissible for him to seek remuneration for issuing fatwā. 91 Abu Al-Qasīm Al-Saymariyī states that it is permissible for the people of a locality to decide on stipulating an amount for a mufti so that he may dedicate all his time solely for the purpose of issuing fatwā. 92 Unlike a qādi it is permissible for a mufti to receive
gifts except in the case where it could be used as a bribe in order to attain a biased ruling in favour of the person seeking the fatwâ. 93

- It is not permissible for a muftî to pass fatwâ concerning oaths or confession or in matters where colloquialisms are used except if he is from the locality wherein these terms are used or he is familiar with them and has the ability to interpret them according to their usage. If he does not possess this ability experience has shown that many errors arise. 94

- It is not permissible for a muftî whose fatwâ is a transcription from the text of the imâm of his school of thought to rely on any books except those whose authenticity has been verified.

- If a muftî passes a fatwâ in one instance and the same occurs again, if he recalls his original verdict and evidences of the matter directly from the Shari'ah in the case of the independent muftî or from the works of the scholars of his school of thought in the case of the dependent muftî, he should decree by it. If he recalls only his ruling but not the evidences and no new contingency that would compel him to retract his ruling develops, then he should pass the fatwâ according to his original ruling but should do so with a review of the case. It is reported that Abu Ḥusain ibn Al-Qatân 95 that he never used to issue a fatwâ without ascertaining the proof of his ruling, the same applies to others. It is necessary for any muftî who does not pass a fatwâ from the works of the independent muftî to furnish proof of his ruling.

- It is related to us from Al-Shafi’î (may Allah have mercy on him) that he said, “If you find anything in my book contrary to the Sunnah of the Prophet (may the peace and blessings of Allah be upon him) then you should rule by the Sunnah of the Prophet (peace be upon him) and set aside my opinion.” 96 Whilst addressing Ahmad ibn Ḥanbal he said, “You are more knowledgeable about hadîth than I, so when a hadîth is sahih, inform me of it, whether it be
from Kufah, Baṣrah, or Syria, so that I may take the view of the hadith as long as it is sahih.”

The imāms of the other schools of thought have expressed similar sentiments. “When a hadith contrary to the madhhab (school of fiqh) is found to be sahih, one should act on the hadith and make that his madhhab. Acting on the hadith will not invalidate the follower being a Ḥanafī, for it is authentically reported that Abu Ḥanifa has said ‘When a hadith is found to be sahih then that is my madhhab’, and this has been related by Imām Ibn ‘Abd al-Barr from Abu Ḥanifa and other imāms.”

It is related from Imām Muḥammed that Abu Ḥanifa has said, “When I say something contradicting the Book of Allah the Exalted or what is narrated from the Messenger (ṣalla Allahu ʿalaihi wa sallam), then ignore my saying.”

The following have been narrated from Imām Mālik ibn Anas, “Everyone after the Prophet (ṣalla Allahu ʿalaihi wa sallam) will have his sayings accepted and rejected - not so with the Prophet (ṣalla Allahu ʿalaihi wa sallam).” Ibn Wahb said “I heard Mālik being asked about cleaning between the toes during ablution. He said, “The people do not have to do that.” I did not approach him until the crowd had lessened, I then said to him, “We know of a Sunnah about that.” He asked, “What is it?” I said, “Laith ibn Saʿd, Ibn Lahīʿah and ‘Amr ibn Al- Ḥārith narrated to us from Yazīd ibn ‘Amr al-Māʿāfiri from Abu ‘Abdur-Raḥmān al-Ḥubūlī from Mustawrid ibn Shaddād al-Qurashi who said “I saw the Messenger of Allah (ṣalla Allahu ʿalaihi wa sallam) rubbing between his toes with his little finger” He said, “This hadith is sound I have not heard of it at all until now”. Afterwards I heard him being questioned about the same thing, on
which he ordered cleaning between the toes.\textsuperscript{101} Imam Ahmad ibn Hanbal was the foremost amongst the imams in ensuring that his madhab is in adherence with the Sunnah and he was meticulous in collecting the Sunnah. He has reported to have said, “Do not follow my opinion, neither follow the opinion of Malik, nor Shafi’i, nor Awzâ’i, nor Thawri, but take from where they took”.\textsuperscript{102} Once he said: “Following means that a man follows what comes from the Prophet (salla Allahu ‘alayhi wa sallam) and his Companions; after the Successors, he has a choice.”\textsuperscript{103} Therefore there are clear lucid directives of the imams concerning adherence to authentic Sunnah even if it contradicts their rulings. A mufti that rules thus does not stray from the path of his school of thought and fulfills the wish of his imam.\textsuperscript{104}

- It is permissible for a mufti associated with a particular school of thought to sometimes decree according to another school. If he is a scholar of ijtihâd and his ijtihâd is conducive with the ruling of the imam of another school of thought, he should follow it. If his ijtihâd is confined or intermixed with a degree of following (taqlid), then, he should mention the madhab that he is following and explain this in his fatwa.\textsuperscript{105} Imam Abu Bakr al-Qaffâl Al-Murwaziyyi states “When I exercise ijtihâd and it concurs with the ruling of the school of thought of Abu Hanifa, I say the ruling according to the Shafi’i school of thought is such and such, but in this matter I decree according to Abu Hanifa.\textsuperscript{106} Since the person seeking the fatwa desired the ruling of Imam Shafi’i on the matter it is imperative for me to explain to him that I have passed the fatwa according to the school of thought of Abu Hanifa. An interesting incident occurred between two of the most prominent muftis of Islam.
Imâm Ahmad Al-Khawâfî once remarked to Al-Ghazâlî concerning a question on which he (Al-Ghazâlî) had just issued a *fatwâ*. “You have erred in the *fatwâ*.”

Al-Ghazâlî replied “How is it so since there exists no texts on this matter.”

Al-Khawâfî: “It is in Al-Madhhab al-Kabîr”

Al-Ghazâlî: “It is not in it.” It was not listed under the topic, which he sought. So Khawâfî found it in a quotation of the author under another topic. Then Ghazâlî said to him after that, “I do not accept this and rule according to my *ijtihâd*.”

Al-Khawâfî: “This is another matter, you were asked for a ruling according to the Shafi‘î school of thought not according to your own *ijtihâd*. It is therefore not permissible for you to pass a ruling according to your own *ijtihâd*."

- It is not permissible for a *muftî* who follows the Shafi‘î school of thought to choose between two rulings in cases where such rulings exist. He cannot decree by any of the two rulings without the knowledge of their chronological order. He has to choose the latest verdict (*qawl al-jadid*) since it abrogates all former verdicts. If Imâm Al-Shafi‘î has mentioned them together, i.e. one does not precede the other but he gave preference to one over the other then the preferred ruling should be chosen. However there are about seventeen issues on which Imâm Al-Shafi‘î has two rulings but does not give preference to any particular ruling and they are mentioned together. In these cases the *muftî* exercises his *ijtihâd* according to the principles of his school of thought and arrives at a preferred ruling.

- A *muftî* cannot be deficient in his ruling in that he mentions the variance of opinions on an issue and states that there are two rulings but does not reveal
which is the preferred one. The ensuing result is that he has not passed a fatwā on anything. 110

The aforementioned regulations concerning the mufti have been adhered to by the muftiyān throughout the centuries. This has ensured the pivotal role that futya has played in enabling Shari'ah to contend with social exigencies. However since fatwā are opinionated and require speculative reasoning, the functioning of the mufti is open to abuse if he does not strictly adhere to all the regulations in passing fatwā. See chapter four of this study.

8. Fatwā: its format and discipline

It is incumbent on a mufti in the cases that are compulsory for him to answer, to disclose all possible manifestations of his ruling. He could do so verbally and use an interpreter in the case of him not knowing the language of the person seeking the fatwā. It is preferable for him to issue a written fatwā to prevent the possibility of error in certain detailed rulings. It is reported that Shaikh Abu Ishaq al-Shirāzi used to write the question of the mustafti (the person seeking the fatwā) on a page and answer the question on the same piece of paper. 111

If the question is ambiguous and requires further explanation, the mufti should seek the information from the mustafti if he is present. If this is not possible then he should confine the question to a particular theme and answer accordingly. In some instances it is better to divide the question into differing scenarios and provide a ruling for each set of circumstances especially if the mufti feels that this
will be of relevance to the mustafti. However certain muftiyün are in disagreement with this type of approach. Abu al-Ḥasan al Qābisī, the Mālikī jurist is of the opinion that presenting a fatwā with a variety of scenarios and verdicts will confuse the layman if there is no scholar available to explain the various implications of the rulings. 112

If the mustafti is weak in understanding through advanced age, then it is necessary for the muftī to be compassionate and forbearing towards him and to repeatedly explain his fatwā seeking the reward of the hereafter.

The muftī has to ponder on deeply into every single word of the mustafti's question especially the concluding words. If he comes across any ambiguity he should question the mustafti about it, so as to correct and quantify it for himself and as a reference for those who pass fatwâ after him. 113

If the mufti is in the company of other fuqahā, then it is preferable for him to discuss the matter with the others and arrive at a ruling through consultation and consensus. If those in his company are not of sufficient calibre, e.g. his students, he should then instruct them to research particular aspects which would assist him in issuing the fatwâ. This was the example of the Prophet, the companions of the Prophet the successors and the pious predecessors. The fatwâ has to be expressed in clear un-ambiguous diction devoid of hidden subtleties, jargon and fiqh terminology such that it could be easily comprehended by a layperson. 114

The muftī usually writes the following expression on the top left hand corner of the page: “Al-jawāb wa bi-Allah al-tawfīq.” (The answer; and with Allah is all correctness). If this expression is omitted then it appears after the concluding statement of the fatwâ. Sometimes the expressions “Allahu Al-Mawfiq” (Allah - The Being that makes things correct) or “Allahu ‘a ‘lam” (Allah knows best). It is
reported that both Makhūl and Màlik never issued fatwā without reciting “La hāula wa la quwata illā bi-Allah” (there is no movement nor power except with Allah). There are other customary supplications that a mufti utters before commencing his fatwā. “Glory be to you (Oh Allah) we have no knowledge except what you have taught us (La ‘lima lanā illa ma ‘allamtanā). Indeed you are the All Hearing All Knowing.” Another verse which applies is:

“Oh my lord expand my breast and make the matter easy for me, and untie the knot in tongue so that they may understand me.”

It has been reported that Qādi Abul Ḥasan Al-Mawardi the author of Al-Ḥāwī states: “Indeed it suffices the mufti that he confines his answer to whether a thing is permissible or not, or valid or invalid, or yes or no for it is not necessary for him to elaborate or vindicate his stance. The fatwā should not be a literary work. If he allows a little latitude it will increase and the mufti will become a teacher”. When a mufti is questioned on a matter regarding inheritance it is not customary for him to mention the factors that prevent one from inheriting like becoming an apostate or being guilty of the murder of the testator. If the mustafii does not specify the heirs with regard to brothers and sisters whether they are consanguine or uterine, or uncles whether paternal or maternal, then it becomes incumbent on the mufti to specify these in his answer. Imam Abu Qasim Al-Saimari opines that it a mufti should solve all proportionate shares according to their common factor and not mention “the remainder will be divided amongst the brothers and sisters of the deceased in the ratio the share of each male being twice that of each female”. If the mustafii did not include certain important factors in his written question and the mufti knows that these are pertinent to the matter, the mufti can add to his
fatwā verbally only. His written answer should only be in response to whatever is contained in the written question.

If the mufti answers he should preferably begin his answer on the same page as the question. The answer should not start at the bottom of a page neither should there be huge blank spaces or lines omitted.

If the mufti observes that an answer has been attempted by a layperson not qualified to issue fatwā, he should return the document to the mustafii and refrain from answering the question. 119

If it becomes apparent to the mufti that the answer is contrary to the purpose of the mustafii and the mustafii does not desire the fatwā in writing, then the mufti should answer only verbally.

If a mufti finds another fatwā issued by another mufti written on the paper on which a question is put to him, and this ruling can be proved incorrect by dalil qat‘iyi (absolute proof), it is not permissible for the mufti to desist from issuing his fatwā on account of this. He should warn the mustafii of the mistake of the previous mufti and with his permission he should both delete the incorrect ruling and write the correct one, or destroy the piece of paper totally. If however he finds a fatwā which is contrary to his opinion but cannot be proved incorrect by absolute proof, then he should write down his ruling without interfering with the other fatwā in any way. 120

It is permissible for a mufti to pass a fatwā on certain aspects of the question and to defer others to a suitable time by which he will be able to further research the matter.
A mufti could mention the proof of his ruling if it is confined to a concise explicit text of either Qur’ān or ḥadīth, e.g. if he was questioned as to whether a skin of a dead animal becomes pure with tanning, he could answer in the affirmative and quote the following narration of the Prophet in substantiation. “Whichever hide is tanned it becomes pure.”

If a mufti has several requests for fatwā he should process them according to the order in which they were presented to him similar to the way a qādi deals with several disputes presented to him for arbitration. It is permissible for the mufti to give preference to women or travellers or the aged in that he could deal with their enquiries before others.

The mufti has to be careful in the matters of disputes in that he should clearly mention both the rights and the obligations of the mustafti.

If the mufti passes a fatwā on issues of dogma like imān etc, it is not necessary for him to explain these in detail since these concepts are regarded, as those ordinarily understood by all Muslims.

9. Qualities and etiquette of the mustafti

Any person who does not reach the rank of a mufti fulfils the role of a mustafti (the person who seeks the fatwā) since it is compulsory on him to seek answers on Shari‘ah matters from the mufti. This does not preclude a mufti from seeking the fatwā of another mufti. Thus even a mufti acts as the mustafti when he seeks the
ruling of another mufti. The mustafti then acts on the fatwâ and implements its ruling in his daily life. The fatwâ is only persuasive and the mustafti is not compelled to act on it. However being a Muslim and the fact that the fatwâ is the manifestation of the Shari'ah ruling and the Divine Will, the mustafti acts according to it not in obedience to the mufti but to the Creator Himself.

It is not necessary for a mustafti to seek out the most prominent mufti but it is sufficient that he seeks fatwâ from one whom he is confident in. He should not seek fatwâ from anybody who has knowledge but could rely on the person that most of the people follow. If there is more than one person or a large group of scholars capable of issuing fatwâ then it is necessary for the masses to consult the most prominent and proficient mufti available so that even others would follow his ruling. It is permissible for the mustafti to follow the ruling of a mufti who has died. The death of an individual juris consult does not imply the death of an entire fiqhi school of thought (madhhab).

The question arises as to whether it is permissible for a lay person to chose to follow whichever madhhab he pleases. The scholars are at a variance as to whether this person possesses a madhhab or not. Qâdi Husain is of the opinion that the lay person does not have a madhhab, for the following of a particular madhhab necessitates an understanding of the proofs of the rulings according to the applied juristic principles. He is thus of the opinion that the lay person can thus seek fatwâ from a mufti following the Shafi'i school or the Hanafi school or any other. He makes an exception in the case of concessions, i.e. it is prohibited for a lay person to follow a particular madhhab in order to take advantage of a concessionary ruling of the particular madhhab. The preferred view is that of Al-Qaffâl Al-Marwazi that the madhhab of a lay person is the one he is connected to for he believes in it and follows it albeit understanding its proofs. The mustafti
who is a follower of the Shafi‘i school should thus only seek *fatwâ* from a *muftî* who belongs to the Shafi‘i *madhhab* and not contradict the *imâm* of his *madhhab* since the *muftî* (dependent or restricted) who follows a particular school of thought cannot pass a *fatwâ* in contradiction to his *madhhab*. The same would apply to all the other schools of thought (*madhâhib*). 125

If there is a divergence of opinion in the *futya* of different *muftiyyûn* then the *mustasfi* can exercise one of the following options:

(i) He should exercise precaution and apply the weightier option, e.g. if according to one ruling he has to feed sixty poor people and according to the other it is optional, then he should chose to feed the poor.

(ii) He should exercise the easier option because of the narration of the prophet that he "was sent with the true tolerant and easy religion."

(iii) He should exercise effort in confirming the most correct view by considering the ruling of the most knowledgeable and proficient *muftî*.

(iv) He could seek the *fatwâ* of another *muftî* and apply the one, which concurs with any of the other rulings.

(v) He could choose and apply any of the *fatwâ* that he finds suitable. 126

If a *mustasfi* seeks a *fatwâ* regarding a matter and the same recurred, the situation then arises as to whether he should rephrase the question to the *muftî* or not. There are two opinions on this matter:

1. It is necessary to rephrase the question to the *muftî* because with further research his opinion might differ.

2. It is not necessary to rephrase the question since the prevailing set of circumstances is the same as the previous and the verdict remains the same. The author of *Al-Shâmil* has added that it is not necessary to rephrase the *fatwâ* if the *muftî* is dead. If he is alive it is necessary to seek his *fatwâ* once more. 127
A mustafti could ask the question himself. He could also authorise a reliable person to ask on his behalf. It is also permissible for him to rely on the written fatwā after a reliable person has informed him that it is indeed the writing of the mufti.

It is necessary for the mustafti to approach the mufti with the correct etiquette and to respect him during conversation and questioning. He should not question him thus, “what is the ruling according to the Shafi’i madhhab on this matter.” Or mention “Such and such a mufti has given me the following ruling.”

The mustafti should write his question on a large sheet of paper and present it to the mufti so that he could write the fatwā on the same sheet. The piece of paper should only contain the question and information pertaining to it. It is unethical for the mustafti to include an invitation to the mufti or a group of scholars with his request for a fatwā. 128

It is not becoming of a mustafti to insist on the proofs of a ruling that a mufti issues at the time of issuing the fatwā. If he desires to know the proofs of the ruling then he should consult the mufti privately after accepting the fatwā without knowing the proof. Al-Samâniyî has written that the aforementioned does not prevent the mustafti from seeking substantiation of a fatwā as a matter of precaution. It is incumbent on the mufti to present the proofs of his ruling if they are of an absolute and essential nature (qat’î), but if his proof relies on ijtihād it is not necessary for him to furnish the details of them nor explain them to the lay person. 129

The etiquette of the mustafti has a secondary function in relation to the effectiveness of fatwā since the mustafti is a lay person and the mufti a scholar.
Thus a *mufti* could easily ensure that a *mustafii* has a particular etiquette when seeking *fatwā*.

10. *Fatwā* as the vigorous application of *ijtihād*

The discipline of issuing *fatwā* is intrinsically an exercise in *ijtihād* for it is not possible to adduce a *Shari'ah* ruling without exerting contrived effort on the part of the *mufti*. However, the term, *ijtihād* has been defined both in a broader and confined sense. If we accept the broader definition (the definitions of Al-Ghazālī or Al-Zarkashi) then it is totally compatible with our definition of *fatwā*. In its confined definition, *ijtihād* becomes synonymous with *fatwā* that rely on the flexible sources of *Shari'ah*. The words *mujtahid* and *mufti* are synonymous, in consequence *iftā* (the process of *fatwā*) and *ijtihād* are correlates. The seeking of the *Shari'ah* ruling from a *mufti* or *mujtahid* is fundamentally an essential element in the functioning of the Islamic community. It is established by the Qur'ānic injunction

"So ask the people of knowledge if you do not know."

It is this seeking or questioning that induces the *ijtihād* which results in the issuing of the *fatwā*. A *fatwā* therefore is the physical manifestation, the product or the fruit of the *ijtihād* of the scholar. However, certain differences exist, a *fatwā* could be an answer to a simple enquiry, which is proved by an explicit text. The ruling is explicit, a mere statement of the text is regarded as sufficient proof and no inferring or speculation (ṣann) was required in attaining the ruling. This type of effort is precluded from *ijtihād*. The *fatwā* is usually confined to an answer.
without elaboration of sources and proof, whilst the thrust of *ijtihād* is on derivation from the sources which require extensive analysis and comparisons of proofs. A *faqīh, qādi, hākim*, and a *muftī* are all *mujtahidūn* and exercise *ijtihād* but usually only the *muftī* issues *fatwā*. The scope of *fatwā* in inducing *ijtihād* is unlimited for every time a Muslim buys a commodity, hires a house, rents out a property, books in into a hotel, marries, divorces, borrows or lends money, prays, eats, uses public transport, undergoes medical treatment and even dies the *Shari‘ah* ruling on all these matters exists and can be adduced. Therefore questions raised by the *mustafī* throughout the ages have ensured the continuity of the exercise of *ijtihād* and the subsequent issuing of *fatwā*. It has also made a considerable input into the calibre of the *mujtahid* and placed greater demands on him. In the last chapter of this study, examples of *fatwā* issued in South Africa will be cited wherein the *muftī* has to research aspects of Chemistry, Bacteriology, Hydrolysis etc. in order to derive the correct *Shari‘ah* ruling. *Fatwā* were issued by the Prophet himself, then by the Companions and the Successors and continued to be issued until the present time.

10.1 *Ijtihād*

10.1.1 Literally

The word *ijtihād* is the eight form of the verb *jahada* meaning to strive, take pains, exhaust etc. In the eight form it means to apply extreme effort in order to achieve one’s goal. The term *ajhadu fikrahu fi* means “he concentrated on” or “applied his mind to”. The noun *al-jahda* means a combination of aptitude and capacity. 131 Ibn
Athir writes “al-jahdu (with a fatha) means a strain or difficulty while al-juhdu (with a dammā) means aptitude and capacity in their extremities or in exaggeration.132 When the word is used with a fatha it denotes extreme difficulty.133 The term jahda is used in the Qur’ān to mean extreme applied effort.

“and those who believe will say ‘are these the men who swore their strongest oaths (jahda aymānihīm) by Allah that they are with you?’” 134

The phrase jahda aymānihīm referring to the hypocrites describes their exaggeration in their oaths. Thus it could be said that it was their ijtihād in taking these oaths. The term al-tajāhud implies the exertion of oneself to the utmost. Thus ijtihād literally is the exhaustive application of one’s faculties or abilities in order to achieve a prescribed goal.

10.1.2 Terminology of the fuqahā

The scholars of fiqh are conformative in their definitions of ijtihād.

Al-Ghazālī has defined ijtihād as “To exert oneself in the quest of that in which one perceives deficiency through a lack of application.” 135

Al-Zarkashī: “Ijtihād: the exertion of effort in order to obtain the Sharī‘i ruling through the application of a particular method of derivation.” 136

Al Baidāwī: “To exert oneself to the utmost in order to obtain the Sharī‘ah ruling.” 137
Ibn Hammâm: "Ijtihâd: The exertion of one's abilities in fiqh in order to ascertain a speculative Shari'ah ruling."  

Malâkasru "Ijtihâd: To exert all effort in deriving the Shari'ah injunction from secondary sources."

The definitions of Ghazâli, Al-Zarkashi and Baijâwî are all generalised whilst the definitions of Ibn Hammâm and Malâkasru confine ijtihâd to matters of secondary and speculative proofs. Some scholars have considered ijtihâd as the most important source of Islamic law. It is a continuous process and the main instrument of interpreting the divine message and applying it to the changing conditions of the Muslim community. Others have argued that it is not a source in the true sense of the term, it is a creative but disciplined intellectual effort to derive legal rulings from the accepted juridical sources while taking into consideration the variables imposed by the fluctuating circumstances of Muslim society. This aforementioned definition is more comprehensive since it includes all the juridical sources and does not confine ijtihâd to only the textual ones. Two distinct modes of ijtihâd emerge from the definitions:

(i) The exertion of intellectual effort in applying the Shari'ah laws to a particular changing set of circumstances.

(ii) The effort in inferring the rules of Shari'ah from its sources. An inference is speculative (zanni) and the ijtihâd if carried out with its preconditions fulfilled is probably correct, while the possibility of it being incorrect is not excluded.

Since ijtihâd consists of the elements of speculation (zann) and personal reasoning (raî) decisive rules of Shari'ah are excluded from it. There is no ijtihâd within an
explicit rule in the texts (lā ijtihāda ma‘a al-nāṣ). When a rule stated in the texts is so clear that only one meaning can be derived from it, it is not permissible for any scholar to undertake ijtihād in it. Sometimes clarity of meaning of certain Qur‘ānic terms is established from the texts of the Qur‘ān or the Sunnah. When this clarification is thus attained the meaning becomes the legal meaning, and has to be followed irrespective of its conformity to the literal meaning. In the absence of this clarification the jurist considers the literal meaning and uses his personal reasoning to arrive at an appropriate solution. The types of proof from Qur‘ān and Sunnah are divided into four basic types:

1. *Qat‘ī al-subūt wa qat‘ī al-dalāla,* absolute in respect of authenticity and meaning.
2. *Qat‘ī al-subūt wa zanni al-dalāla,* absolute in authenticity but speculative in meaning.
3. *Zanni al-subūt wa qat‘ī al-dalāla,* its authenticity is speculative but its meaning is decisive.
4. *Zanni al-subūt wa zanni al-dalāla,* its authenticity and meaning are both speculative.

Ijtihād validly operates in the last three categories and does not apply to the first category since these are cases in which clear *nusus* prescribe the injunctions. All the sources of Shari‘ah that operate within the conceptually flexible sphere of Shari‘ah are manifestations of ijtihād. These are *qiyyās,* (analogy), *istihsān* (utility), and ‘urf (custom), *maṣlaḥah mursalah,* ta‘zir, *siyasiya shari‘ah,* and *fatwā.* *Ijmā‘* is also a manifestation of the ijtihād of the scholars that arrived at the consensus but it is raised to the status of absolute proof and therefore is operative in the fixed conceptual sphere of the law. The strength of a *fatwā* is thus...
correlated directly to the extent of *ijtihād* and the category of proof from the aforementioned. The term “strength” has been used to denote the acceptability of the *fatwā* by the Islāmic Community and the extent to which the community adheres to the ruling.

10.1.3 Homogeneity between the preconditions of *ijtihād* and of *fatwā*

The person who exercises *ijtihād* is referred to as the *mujtahid*. Certain scholars make no differentiation between the terms *mufti* and *mujtahid*. A *mujtahid* or *mufti* is the person who has achieved the ability which enables him to derive the laws from their sources. The scholars of *fiqh* have compiled accounts of the qualifications of a *mujtahid*. The earliest account is that of Abul-Ḥusain al-巴斯rī (d. 436/1044) in his work *al-Mu’tamad fi Uṣūl al-Fiqh*. His principles were later elaborated on by al-Shirazi (d. 467/1083), al-Ghazālī (d.505/1111) and al-Âmîdî (d.632/1234). Although no written compilation on the prerequisites of a *mujtahid* can be cited before al-巴斯rī, the history of the companions, the successors and the *imāms* of the various schools of *fiqh* thought bears sufficient testimony to the quality of the individuals assigned to exercise *ijtihād*. The prerequisites of the *mujtahid* have been constantly adopted by the *‘ulamā* of *usūl* through the centuries and have become a standard feature of *ijtihād*. The *mujtahid* must be a competent, intelligent Muslim scholar whose has attained a level of competence, which enables him to derive or infer what the *Sharī’ah* ruling is from the various sources.

(i) He must have a sufficient level of proficiency in the Arabic to clearly comprehend the texts of the *Qur’ān* and *Sunnah* so as to accurately deduce the injunctions from them. This necessitates an understanding of the various
components of the language of the Qur'ān such as the diction, linguistics, epistemology, grammar, eloquence i.e. the usage of similes, metaphors and imagery, and the literature at the time of revelation. An understanding of the Shari'ah meaning requires an understanding of the different implications of the words used by the Legislator, e.g. the word ʿalāt literally means an invocation but in the terms of Shari'ah it refers to a specific act of ritual worship. The language of the Qur'ān and the Sunnah is a key to their comprehension and scholars such as Al-Shatibi has excluded anyone being deficient in it from ijtihād. The ruling of a mujtahid although persuasive is authoritative for the lay person and this necessitates direct access to the sources which is only possible with a full competence in the Arabic language.

(ii) The mujtahid must have an in depth knowledge of all the sciences related to Qur'ān and hadith, the Meccan and Madinite content, the circumstances in which certain verses were revealed (ashbāb al-muzīl), the knowledge of which verses abrogate others and the abrogated verses (nāṣik wa al-mansūk) and a full grasp of the ayāt in which injunctions are mentioned. He must also know the parables in the Qur'ān for sometimes he may have to infer a legal rule from them. With regard to ahadith he must know the incidences of abrogation in the Sunnah, the strength of the narration and their categorisation, the texts containing aḥkām (injunctions) referred to as aḥadith al-aḥkām, the general and the specific (ʿāmm and khas̲s), and the absolute and the qualified (mutlaq and muqayyad).

(iii) He must be able to identify all the issues on which consensus has been achieved so that he may be guarded against the possibility of issuing an opinion contrary to ijmāʿ. He must have a complete mastery of the science of usūl al-
fiqh, the source methodology of Shari‘ah, and be able to derive laws or infer to them from all the sources. Al-Ghazâli has placed a special emphasis on qiyâs and emphasised that although ijtihâd has been equated to qiyâs, it is broader than it for it consists of reasoning other than analogy.

(iv) For the purpose of ijtihâd in the flexible conceptual sphere of Shari‘ah the mujtahid has to be fully conversant with the objectives (maqâsid) of Shari‘ah, the masâlih (plural of maṣlaḥah), the protection of the five essentials, viz. life, religion, property, intellect, and lineage. He must be able to distinguish the essentials (darûriyyât) of the maṣâlih from the complementary (hâjiyyât) and the embellishments (taḥsîniyyât). The mujtahid must know the general maxims of fiqh such as Al-‘Asî fi kulli shayr Al-‘ibâḥah ("the original rule of everything is permissibility.") or raf’ al-haraj ("the removal of hardship") which prevent rigidity in a ruling and at the same time be guarded against whimsical desires influencing his decisions.

(v) Since the advent of the industrial and information ages, humankind exists in an increasingly specialised and highly technological environment. In the contemporary situation the mujtahid has to fully understand the nature of the problem presented to him. This might involve research into varying fields of study before enabling him to adduce a suitable Shari‘ah ruling for the matter. Examples of these can be demonstrated by the diversity of topics on which fatwâ are issued.

Ijtihâd is validated by the Qur‘ân and the Prophet himself authorised it. It was in practice during his lifetime, after his death and continues to be so today both in Muslim countries and in areas where Muslims coexist with other communities as a
minority. Many scholars have incorrectly asserted that the “doors of *ijtihad* were closed”, that its practice was abandoned because of a “tightening up” through a rigid code of strictures. Other scholars have observed, “the qualifications required of a *mujtahid* would seem to be extremely moderate, and there can be no warrant of supposing that men of the present day are unfitted to acquire such qualifications.” In practice however the *fatwa* that are continuously issued are examples of *ijtihad* and of its present day relevance. This continuity of the practice of *ijtihad* and *fatwa* were facilitated by the *hadith* which absolves the *mujtahid/mufti* or *qādi* who commits an error from sin, and instead entitles him to a reward. If his *ijtihad* is correct it entitles him to twice the reward. Furthermore if a jurist fulfilled part of the qualifications then this did not inhibit him from exercising *ijtihad* in the areas of the *Shari'ah* in which he specialised. It is therefore manifest that in essence all the practitioners of *fiqh* whether it be the *faqih, qādi, ḥākim* or *mufti* are mujtahidan exercising somewhat different modes of *ijtihad* when they issue *fatwa*. In consequence the preconditions for *ijtihad* are the same as those for issuing *fatwa*.

10.1.4 Validity of using *ijtihad* when issuing *fatwa* or *aqdiya*

The validity of *ijtihad* is established in the *Qur'ān*. The verses quoted previously in this study, establish the necessity of people with “*tafqaq*” (insight) of *din*. This means the *mufti, faqih* or *mujtahid*. The *Sunnah* is very specific in validating *ijtihad*. The conversation between the Prophet and Mu'âdh ibn Jabal clearly

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demonstrates how the Prophet authorised Mu'adh to exercise *ijtihād*. This incident has many assailant features, which affect the way *ijtihād* is currently practiced. 154

- When the Prophet asked “*If it is not in the Sunnah of the Prophet?*” He (Mu'adh) replied, “Then I would exercise my individual opinion. The Arabic expression used by Mu'adh was “*ajtahidu ra'yi*” in which both the words *ijtihād* and *ra'yi* are mentioned. This establishes *ijtihād* and confirms personal reasoning as an essential component of it. *IJtihād* by its very nature is opinionated and not necessarily correct. It also outlines the methodology of *ijtihād* and *fatwa* in their early rudimentary forms, one starts with the *Qur'ān* and Sunnah and after having applied exhaustive effort one resorts to *ijtihād*.

- The incident is reported to have occurred during the lifetime of the Prophet and clearly indicates the legal activity of the Prophet. Mu'adh died in the year 18 AH. The Prophet send judges to different provinces and entrusted them with the administration of *Shari'ah* law.

- Mu'adh was chosen as the judge because of his knowledge and competency in *fiqh*. This is corroborated by the statement of 'Umar at Jabiya, “*let him who desires to seek the knowledge of fiqh go to Mu'adh bin Jabal*”. 155 Historical evidences show that the Prophet personally educated and trained him so that he could fulfil the role of a mujtahid. Therefore the lay person is excluded from being a mujtahid.

- The answer that the Prophet exacted from Mu'adh has become the procedural standard for *ijtihād*. Jurists first consider the rasūls of *Qur'ān* and *hadith* which they give priority over all other evidences before exercising *ijtihād*.

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• The act of sending a faqih of the calibre of Mu‘ādh to the province of Yemen indicates that the spread of Islam necessitated a mufti or mujtahid in the different areas. He would be able to apply the Shari‘ah in a diverse geographical and cultural situation, demonstrating the ability of Shari‘ah to exert governance and act as a living law.

• The functions of the governor were that of the qâdi, hâkim, mufti and faqih. At this stage there seems to be a fusion of the functions and no complete differentiation between the institutes of aqdiya and fatwâ.

• Finally the Prophet’s expression of pleasure and his invocation to Allah indicate the lofty status of the mujtahid in Islam.

In a hadith the Prophet is reported to have said:

“Strive and endeavour (ijtihâd) for it is easy for anyone to accomplish that which he is created for.” 156

The Prophet exhorted people to exercise ijtihad and implies that those who are endowed with the ability to do so will always easily accomplish it. In another hadith the Prophet has exonerated the mujtahid from sin if he errs in his ijtihad.

“When a judge exercises ijtihâd and arrives at a correct decision, he will be rewarded twice, but if he exercised ijtihâd and then erred, he would still earn one reward. 157

Furthermore the following hadith confirms that the ability of the true mujtahid is that which Allah himself confers on him:
"When Allah favours one of his servants, He enables him to acquire an insight in religion". 158

11. Fatwâ and jurisprudence

The term *fiqh* as used by the classical Muslim jurists has been translated by many scholars both Western and Muslim, to mean jurisprudence. The term *fiqh* has a broad and comprehensive meaning for it is a science, or an acquired understanding based on the *faqih's* ability to draw on all the aspects of knowledge ('ilm), experience and piety in order for him to adduce the law. The evolution of the science of *fiqh* into this vast science was a direct result of *fatwâ*. The Muslim community continuously endeavours to enact the Divine Will. The cog or the essential link between the community and its creator is thus the persons entrusted with guiding the community to its goal. Therefore the *faqih* or *mufti* and his science, *fiqh* are the pivots around which the community rotates in order to fulfil its purpose that is the enactment of its *din* life transaction according to the dictates of *Shari'ah*. The meaning of *fiqh* has been distorted by its translation as jurisprudence. Every word in a language has its particular nuance and has to be understood according to the paradigm in which it is used. The Arabic term *fiqh* conveys a particular concept with regard to *Shari'ah* and if translated by an equivalent term from a different language and a different legal system it looses many of its characteristics. Western scholars with the purpose of exposition and analysis have confused and distorted Islamic concepts by using terms familiar to themselves as exact equivalents of the Arabic terms that describe specific *Shari'ah* concepts. 159

The term jurisprudence as used in the English language is vaguely defined. It alludes to diverging concepts when applied in a legal system. In French law it
means the jurisdiction of the courts interpreting and developing the codes. Holland defines it as “the formal science of positive law”. Salmond defines it as,

“jurisprudential - the knowledge of law - and in this sense all law books are books of jurisprudence. By law in this connection it meant exclusively the civil law, the law of the land, as opposed to those other bodies of rules to which the name of law has been extended by analogy.”

He then subdivides jurisprudence into three:
(i) legal exposition
(ii) legal history and
(c) the science of legislation.

The purpose of the first is to set forth the contents of an actual legal system as existing at any time whether past or present. As regards the Shari‘ah this task was completely achieved by the Prophet during his lifetime. The books of sirah and Islamic history provide clear evidence of ījmā‘, qiyās, ijtihād istihsān and mašlaḥah mursalah being practised in the time of the khulafā‘ al-rāshīdūn (the rightly guided caliphs). The assertion therefore that the formalisation and systematisation of Islamic law took place after the first century is untrue.

The purpose of the second is to set forth the historical process whereby any legal system came to be what it is or was. The historical process by which Shari‘ah was established is embedded in the Qur‘ān and Sunnah. However if we consider the science of uṣūl al-fiqh which are the principles by which the Shari‘ah laws are adduced and trace the historical development of the juristic principles that are
applied in the absence of *naṣṣ*, then the exercise would be one of jurisprudence according to (b) of Salamonds definition.

The purpose of the third is to set forth the law, not as it has been but as it ought to be. The *Shari‘ah* laws of the fixed sphere are always as it ought to be for they are either directly ascertained from texts or based on principles derived from the texts. The texts themselves are a direct consequence of revelation. For further consideration of the law as it ought to be, the sources of the law that depend on the juristic principles operate in the conceptually flexible sphere, and through the mechanism of *fatwā* extend the aforementioned principles to contend with all exigencies. Thus *fatwā* on *ijtihād* matters fulfils this aspect of jurisprudence.

Other authors have defined jurisprudence as being analytical, historical, ethical and comparative. None of these definitions can fit the term *fiqh* with complete accuracy. Professor Schacht states that "during the greater part of the first century Islamic law, in the technical meaning of the term, did not as yet exist as has been the case in the time of the Prophet, and as far as there were no religious and moral objections to specific transactions or modes of behaviour, the technical aspects of the law were a matter of indifference to the Muslims". He therefore implies that the legal activities of the Prophet did not exist. He denies the discipline of *fatwā* and the science of *fiqh* in its comprehensiveness. Many examples of the Muslims seeking the technical aspects and details of the law in the early first century of *Islām* through *fatwā* can be cited.

12. *Fatwā* and *aqḍiya*: the interlink between *Shari‘ah* and *din*

The verb *shara‘a* literally means to begin, to start. Introduced with the *ṣilā* 164 *li*, it means to prescribe to make laws etc. Derivatives of the verb have been used in
the Qur'an with its *ṣilā, li* to mean to legislate. When it appears as the eight form i.e. *ishṭara 'a* it means to introduce, enact or outline. The word Shari'ah literally means the ‘approach or way to a watering place’. It is the pathway chalked out by Allah the supreme legislator through his messenger Prophet Muhammad (p.b.u.h.) as a guidance to all mankind and mentioned once in the Qur'ān.

*We have made for you a law (ṣhar'ātān), so follow it, and not the fancies of those who have no knowledge.*

This is addressed to the Prophet and the Muslim community. Another derivative of the verb *shara 'a*, the verbal noun *shir'atan* has been used in the Qur'ān to describe the laws prescribed to the community of the previous prophets.

“To thee we sent the scripture in truth, confirming the scripture that came before it, and guarding it in safety: So judge between them by what Allah has revealed, and follow not their vain desires, diverging from the truth that had come to thee. To each among you we have prescribed a law (ṣhir'atan) and an open way. If Allah so wished he would have made you a single ummah, but to test you in what he has given you. So vie with each other in good deeds. To Allah is your return and it is He that will show you the truth of the matters in which you dispute.”

The first part of this verse confirms the Islamic concept of the greater ummah being the entire mankind. Allah the legislator has set out the pathway for every prophet and this spiritual and moral progression of mankind terminated with the final Shari'ah prescribed by Allah the supreme legislator through the Prophet
Muḥammad (p.b.u.h), the seal of prophethood. The Shari‘ah thus establishes certain textual laws of both the Bible and the Torah and abrogates others. A fact attested to by the Qur‘ān itself. Since the legislator for all the previous pathways and of the Shari‘ah is Allah, a sense of respect has been induced into the psyche of a Muslim for the “peoples of the book” i.e. the Christians and the Jews. However this unity of the purpose of divine revelation has been exploited by the Orientalist for they have construed the Qur‘ān to be nothing more than a mixture of borrowed teachings of the previous scriptures. The converse attitude will never be upheld by a Muslim, for he may argue that changes have occurred to the previous books of revelation or that certain injunctions have been replaced by others of this Shari‘ah, but will never deny the divine origins of the books themselves.

The verb dāna means to owe or to be indebted to, if followed by the preposition ‘bi’ it means to profess a religion, to have a conviction or to adhere to a particular path. The word din as used in the Qur‘ān refers to the conviction or belief systems of both Muslims and other religions.

It is He who has sent his messenger with guidance and the religion of truth to make it prevail over all religion and sufficient is Allah as a witness.

The word din used in this clearly demonstrates this. However when the word is used in the Qur‘ān to mean the correct path or the path ordained by Allah it is qualified as din al-ḥaq or din al-Allah. The din of a person or community can thus be regarded, as the extent to which the community enacts the Divine will by adhering to the Shari‘ah. Shari‘ah is the ordaining of the way and is the sole prerogative of Allah, whilst din is the following or submitting to the path which is left to the discretion of man. When the din or life transaction of a community
becomes coherent with the dictates of Shari‘ah, then the community is described as the ideal Islamic community. This was achieved initially in the city-state of the Prophet, al-Madina al-Munawwara and spread throughout the Muslim world during the glorious era of the rightly guided caliphs.

The word *din* also has the nuance of being indebted to. The behavioural norms of an individual or community are the fulfilment of its indebtedness to the creator. If however the community enacts a way of life other than that of Shari‘ah it is a weakness of the *din* of the community and cannot be projected as a weakness of Shari‘ah or Islam itself. Therefore if the laws or administration of justice of a Muslim ruler were in accordance with Shari‘ah, it is termed *siyāsah ʿādilah*. If the ruler violates these principles then it is termed as a tyrannical administration or *siyāsah ẓālima*. It would be incorrect to regard the practices of the caliphs of the latter Umayyad period as a starting point of “Muhammedan Jurisprudence” for the practices of these caliphs have to be assessed in terms of the Qur’ān and Sunnah. What evolved from the latter Umayyads was a system of administration, which could be subsumed under *siyāsah Shari‘ah*. The revival of Islam takes place continually in the ummah. It is no more than the community’s effort to enact its life transaction (*dīn*) according to the dictates of Shari‘ah. Therefore it is the *dīn*, the extent to which the Islamic community adheres to Shari‘ah which is a manifestation of the Islamic way of life. Schacht misses this differentiation for he writes,

> “Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.”

It is not the law which is the epitome of Islamic thought but the perpetuation, development and evolution of it by the extent to which the community seeks the
law and adheres to it. If the Islāmic community wants to enact the Shari'ah the question then arises how is the Shari'ah ascertained? The Shari'ah is only ascertained through fatwā. If however an Islāmic state or some possibility of applying the Shari'ah through a coercive authority existed, then a Shari'ah court would be instituted and the rulings would be converted to judgements, the fatwā to aqdiya and the Shari'ah could be accessed and applied through this means. It would then be the institute of aqdiya, which directly correlates the extent to which the community enacts the din. Thus fatwā and in the specific case of Islāmic courts aqdiya are the links between the din of a community and the Shari'ah.

Professor Schacht and many Orientalist scholars who cling to his theory deny the legal activity of the Prophet. They deny any existence of a system by which the Shari'ah laws were adduced prior to the advent of al-Shafi‘i. Schacht also asserts that the Islāmic law was based on Umayyad practice which was based on materials and institutions drawn from Roman and Jewish law. This is linked to his thesis on the apocryphal nature of traditions, whereby he claims that the Umayyad practice was converted into traditions and then into law. Fazlur Rahmān echoes this same sentiment in his work Islāmic Methodology in History. Scholars such as Fuat Sezgin, Ā‘zamī and Nabia Abbott have clearly refuted Schacht through analysis of his arguments. Ā‘zamī’s exceptional rebuttal is through the defence of the science of traditions and a comprehensible conceptualisation of the Sunnah. It is my humble contention that a summary of the legal activities, the judgements, the ijtihād and fatwā issued by the Prophet, the Companions and the Successors in the first century of Islām provides overwhelming evidence to lay this theory to rest.
Notes for chapter one


6. Nyazee asserts the concept of two interacting spheres of law, one fixed and the other flexible. He regards *ta'zir* and *siyāsah* as a function of the flexible sphere. I extend this by conceptualising many flexible spheres. The *istiḥsān* based on Qurʾān, Sunnah and sometimes even *urf* can be regarded as a manifestation of laws operative in a flexible sphere. The *qanūn* of an Islamic state can be regarded as another, the verdict of a judge using his *iṣlah* and the ruling (*fatwā*) of a faqīh or juris-consult especially concerning Muslim minorities living in a secular non-Muslim country, can also be regarded thus. Nyazee, Imran Ahsan Khan, n.d. *Theories of Islamic Law.* Islāmabad: Islamic Research Institute; Publication no. 97. See Chapter 8 - The Spheres of Islamic Law p. 111.

7. *Qurʾān* S.16 v. 43.


10. *Qurʾān* S.4 v.127.


14. *Qurʾān* S.4 v.127.


17. This later definition is fully expounded by Al-Zarkashi Imam Badruddin Muḥammad ibn Bihādīr, Al-


20. Ibid. S.7 v.179.

21. Ibid. S.63 v.3.

22. Ibid. S.63 v.7.

23. Bukhārī. Kitāb al-‘ilm, ḥadīth no. 69; Muslim. Kitāb al-Zakāt, ḥadīth no. 1719; Sunan Ibn Māja.
Muqaddimah, ḥadīth no. 217; Sunan Dārāmī. Muqaddimah, ḥadīth no. 227; Muwatta Imam Mālik.


26. Sabab al-muẓāl - imply the circumstances around which the verse was revealed. These are very
valuable to the scholars of tafsīr for it assists in the correct interpretation of the verse. See Al-Ŵāhīdī

27. Although the decision of Solomon who was a very young boy is different to that of David, it became
the preferred decision and was implemented. This does not imply that the juristic decision of David
was incorrect. This incident forms the basic premise of the muftī when there is a divergence (ikhtilāf)
in their rulings. Both Solomon and David were prophets acting as judges in this incident, they
exercised their individual ijtiḥād and in the end the better ruling prevailed. A narration of the Prophet
states “ If a judge passes a verdict and after ijtiḥād it is found to be correct, he has two rewards: If he
passes a judgement and after ijtiḥād it is found to be incorrect he receives one reward.” This has
particular significance to this study for we discuss the ikhtilāf of the scholars in issuing the fatwā on
gelatine. See chapter four of this study. The second significant aspect is the permissibility of a judge
or a muftī to change his ruling by accepting the judgement of another. This aspect is discussed in this
study under chapter one. See Regulations concerning the muftī in passing fatwā. Qurtubi discusses
sixteen pertinent issues sourced from this verse. See Qurtubi, ‘Abdullah Muḥammad ibn Aḥmad al-

28. See chapter three of this study, Fatwā: a manifestation of the principles of derivation of Shari‘ah.

29. See last chapter of this study, the role of fatwā in contemporary society. The operation of the parallel
streams of Shari‘ah are analysed with regard to an ideal Islamic state, a Muslim country that does not
have the Shari‘ah as its statutory law, and in a non-Muslim country wherein the Muslim community
coeists with a vast majority non-Muslim populous.

4 p. 244.


49. Most contemporary mujtahīdīn follow this methodology. The modern works of fiqh discuss the proofs of the four major schools of thought and then the rajīḥ qawl or preferred ruling is issued. See Al-Zuhailī. 1979. Al-Fiqh al-Īslām wa Adilatuḥā Damascus: Dār al-Fikr, vol. 2 p.96.


53. His teacher was Abū Bakr ‘Abdullāh ibn Ahmad ibn ‘Abdullāh known as al-Marwāzī. For a biographical account see Tābaqāt Al-Shafī” vol. 5 p.53.


57. A minor in Ṣar‘ī’ah is a person who has not yet attained the age of puberty. He is not considered liable for his actions and therefore cannot sit in judgements of others.

58. Qur’an S.4 v. 34.


60. See chapter four 3.1 of this study of the British insisting on appointing judges trained in English courts to preside in cases between Muslims and apply Anglo-Muhammadan Law. Also paragraph 4.1 on the
Palm Tree Mosque dispute wherein Abu Bakr Effendi was used merely to render expert testimony and not as a judge.

61. Qur’an S.4 v. 140.


63. Further evidences of the legal activity of the Prophet can be cited through the direct link between the etiquette of a judge and the prophetic narration concerning them. See Šâhiḥ Muslim, the chapter entitled, A judge should not pass judgement whilst he is angry. It is reported from ‘Abdur Raḥmân the son of Abû Bakr: My father dictated while I wrote for him to ‘Ubaydullah the son of Abû Bakra while he was a judge in Sahiṣtan: ‘Do not judge between two people while you are angry for I have heard the Prophet (peace be upon him) say: “None of you should judge between two persons whilst you are angry.”’ Muslim ḥadith no. 1055. The book of judgements and testimony. Al-Mundhiri, Ḥâfiz Zaki al-dîn ‘Abd al-‘Azam. 1996. Mukhtaṣar Šâhiḥ Muslim. Riyadh: Dâr al-Salâm, p.293.


68. The appointment of Anas ibn Sirîn by Ibn al-Zubayr was restricted to that of a tax collector of Ubûllah only. See the incident wherein Anas ibn Sirîn seeks clarification on the terms of his appointment, Ibn Sa’d Muḥammad, Kitâb al-Ṭabaqât al-Kabîr, vol.7 p.62.

69. This law applied to qâḍî as well as tax collectors. The incident of the Prophet returning the gifts of the tax collector to the baṭî al-mâl:‘


71. Šâhiḥ Muslim. Kitâb al Qaḍâ wa al-Shahâdât, ḥadîth no. 1051.


74. Qur’ân S.95 v. 8.

75. Ibid. S.7 v. 87.
76. Ibid. S.4 v. 65.


78. Ibid. p 75.


82. Sunan Al- Dārami, vol.1 p. 50-51.


86. Ṣifat al-fatwā, op. cit. p. 31. Also see Ilām al-Muʾqiʿīn, op. cit. vol.4 p.225.


91. Ibid. vol. 4 p. 232.


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Shaîkh Saleh al- Futânî in Ieqâz al-Hîmâm, p.50, traces this to a report by Imâm Muhammad and then says “This does not apply to the muḥtahâd, for he is not bound by their views anyway, but it applies to the muqâllîd”.


Abû Dâwûd in Masā‘îl of Imâm Ahmad, pp. 276-7.


See chapter four, 5 fatwâ on gelatine and 5.1. A manifestation of the application of this principle being applied by the muṣfiyûn in South Africa with regard to the gelatine issue. The muṣfiyûn of the Shafi‘î school of thought ruling according to the principle of tabdîl al mahîyyâh, a juristic principle established by Imâm Muḥammad the great Ḥanâfî jurist.

He is Imâm Abûl Muẓaffar Ahmad ibn Muḥammad ibn Muẓaffar al-Kawâfî known as al-Kawâfî a village in the vicinity of Nishapûr. He died in the year 500AH. For biographical reports see Hâfîz Ibn al-Kâthîr Abûl Fidâ al-Damashkari.1996. Al-Bidâya wa al-Nihâyâh. Damascus: Maktabah al-


110. Șifat al-fatwâ, pp.42-43.

111. Ibid. p.57. This practise is still prevalent amongst contemporary mufîyan. The archives of the fatwa departments of present day South African Dâr al-‘Ulûms contain copies of many fatwâs wherein the answer is on the flip side of the page.


113. Al-Majmû‘ah, vol.1 p.84; Șifat al-fatwâ, p. 57.


117. This is the reason for fatwâ being a concise answer concerning the legality of the issue in terms of the Shari‘ah. However certain mufîyun prefer to elaborate on their proofs whilst others consider it essential.

118. Unlike Western Legal Systems the statement of a law involves the usage of a specialised terminology and jargon, the Shari‘ah Law induced through fatwâ is stated in the most simplest unambiguous terms in order to afford accessibility to the layman without the necessity of intermediaries, i.e. specialist lawyers.


121. Şâfi‘ Muslim. The Chapter the Purification of the hide of dead animals, hadîth no. 322; Abu Dawûd. Book on Clothing, Chapter on Tanning, hadîth no. 4123; Thîmidî. Book on clothing, The Chapter on what happens to the hide of a dead animal when it is tanned, hadîth no.1728; Mâlik in Muwaṭṭî vol. 2. p. 497.

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125. Ibn Šalāḥ. 1972. *‘Adab al-Muṣṭafī wal Mustafī*. Madina: Maktabah al-‘Ulūm wal Hikm, pp. 162-163. Ibn al-Qayyim holds the view that it is not obligatory on the layman to follow any madhhab because Allah and His messenger did not make it compulsory to follow anyone but the Prophet. He further asserts that the layman has no madhhab even if he professes to follow one, since the following of a madhhab is for one who has some perception of *ṣharīʿi* proofs. See *Iʿtim al-Muʿqiʿ In An Rabb al-Alamin*, Makka: Dār al-Bāz, vol. 4 p. 262.

126. Ibid. pp. 164-165.


130. Qurʾān S. 16 v. 43.


134. Qurʾān S. 5 v. 53.


142. This is the case only if we adhere to a confined definition of ijtihād. There are many verses of the Qur’ān wherein the language of the text allows for ijtihād termed as mujtahid fihi. See chapter three of this study for examples.


145. See chapter three of this study, Fatwā: a manifestation of the principles of derivation of Shari‘ah.


148. These are known as the qawā‘id al-fiqhīyyah, which in themselves have developed into a science see Zarqā Sheikhd Aḥmad ibn Muḥammad. 1979. Sharḥ al-Qawā‘id al-Fiqhīyyah. Damascus: Dār al-Qalam.

149. Examples of these in this study are the gelatine issue and the fatwā on the death penalty.

150. Zuhayli attributes this to the medieval jurists who developed ways of insulating ijtihād from abuse by formally prescribing necessary preconditions. See Zuhayli W. ‘Uṣūl, pp.349-353. Also Schacht. Ijtiḥād, Encyclopaedia of Islam, vol.4 p.1029.


153. Qur‘ān S.9 v.122

154. The fatwā on gelatine in chapter four of this study illustrates how the South African fuqahā‘ āfirṣi rely on Qur‘ān, ḥadīth, before exercising their ijtihād.


156. Sunan Tharmidhi, Kitāb al-Qadar, ḥadīth no. 2062.
157. Bukhari. Kitab Al-'tisam bil kitab wa al-Sunnah, hadith no. 6805; Muslim. Kitab al Qada'i wa al-Shahaddat, hadith no. 3240; Sunan Ibn Maja. Kitab Al-Ahkam, hadith no. 2305; Musnad A'had. Munadalal-Mukassiran, hadith no.6466.

158. Bukhari. Kitab al-'ilm, hadith no. 69; Muslim. Kitab al-Zakat, hadith no. 1719; Sunan Ibn Maja. Muqaddamah hadith no. 217; Sunan Darami. Muqaddamah hadith no. 227; Muwatta' Imam Malik. Kitab al-Jam'a, hadith no. 1400, Musnad A'had. Musnad Shamiyyin, hadith no.16246.


161. Sirah, is the history of Islaam confined to the biography of the Prophet. The Arabic term used for the general history is tarikh.


164. Sitala is the preposition accompanying a verb. One verb occurring with its sita express a particular meaning. If it is followed by another sita it could take on the opposite meaning. The word roghibat followed by the preposition fi means to be accustomed to or attracted to whilst roghibat followed by the preposition 'an means to turn away from.


166. Ibid. S. 45 v. 18. In this verse the verbal noun Shari'at'tin' derived from the eight form of the verb shara'a is used.

167. The verbal noun is the noun derived from the verb. They differ and vary according to the form of the verb used. The different forms of the verb either display different meanings or sometimes different nuances of the verb.


169. This concept is established by many verses of the Qur'an. Qur'an. S. 23 v. 52; S. 43 v. 22; S. 21 v. 92.

170. Qur'an. S. 3 v. 50. “(I have come to you) to attest the Torah which was before me, and to make lawful to you part of what was forbidden to you............."
171. "And you do not dispute with the people of the book except in the best way, except if it be with those amongst them who are oppressive, but say ‘We believe in the revelation that had come down to us and in that which came down to you, our God and your God is one, and it is to Him we submit in Islam.’ Qur'an S. 29 v. 46.


175. “There is no compulsion in din, ..................” Qur’an S.2 v. 256.


CHAPTER TWO
The role of fatwâ and aqîqa in the early first century of Islâm

1. Legal activity of the Prophet (peace be upon him) and the Companions (May Allah be pleased with them) in the first century of Islâm.

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5.7 Institution of the Juris-consults (muftiyūn)

6. Futyā of 'Uthmān ibn 'Affān and 'Ali ibn Abī Talib

6.1 Some futawa issued by Uthmān.

6.2 Futyā of 'Ali ibn Abī Talib

7. Muftiyūn amongst the followers.

8. Famous collections of fatāwa.

8.1 Fatāwa of the early first century.

8.2 Chronology of the major works on fatwā from the early second century.

9. Notes for chapter two
CHAPTER TWO

The role of fatwa and aqdiya in the early first century of Islâm

This chapter presents the historical evidences, which demonstrate the formative role of fatwa and aqdiya with regard to the Shari‘ah. Prophet Muḥammad (peace be upon him) was the foremost and greatest faqih of Islâm. He acted as a practitioner of fiqh in all its various manifestations. Historical accounts and ḥadīth are replete with examples of the prophet acting as a faqih, ḥākim, qāṣī and a mufti. The Prophet (peace be upon him) also trained his ṣaḥāba (companions) in this regard and appointed them as qudūdī, muṣīyūn or governors of different localities after they had reached a sufficient proficiency in fiqh. The chapter concludes with a chronology of the major works of fiqh from the second century of Islâm to the present day.

1. Legal activity of the Prophet (peace be upon him) and the companions (May Allah be pleased with them) in the first century of Islâm

Fatwā, the issuing of a Shari‘ah law or ruling through an enquiry is the essential forerunner of the Shari‘ah legal system. Aqdiya is the issuing of a Shari‘ah law in order to settle a matter between two disputants. During the lifetime of the Prophet fatwā and aqdiya were prolifically issued. These activities were later formalised into a legal system. Schacht has stated that "The first caliphs did not appoint
“qaḍīs” and that the “Umayyads took the important step of appointing qaḍīs”. Historical evidence forcibly demonstrates the weakness of his position. Fatāwa were sought, muftiyūn and judges were appointed in the first century, legal codes were drawn up and Islamic law existed and was adduced from its four principle sources i.e. the Qur’ān, Sunnah, ījmāʿ and qiyyās. Examples of the companions usage of these sources as their methodology of derivation of a Shari‘ah ruling are predominant in this era. Therefore the advent of Shafi‘î and his Risālah are but a codification of an already established and practised legal methodology and he was by no means the initiator or formulator of the new Islamic legal theory.

2. The Prophet Muḥammad (peace be upon him) the first ḥākim of Islâm

A feature common to all law is the principle of order and regularity. The great English jurist, Sir William Blackstone has described it thus:

“Law in its most general and comprehensive sense, signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational.”

If law is thus defined and it is equally applicable to both rational and irrational action, then it’s applicability to moral and amoral actions cannot be denied. Man made laws reflect values current in a society at a given time and often a dichotomy between religious values and those of a society at a given time exist. There is no such dichotomy in Islâm. Schacht, however would have us believe that only morality and not law is subsumed under Shari‘ah as it was in the early first century of Islâm. He writes:
“Generally speaking, Muhammad had little reason to change the existing customary law. His aim as a Prophet was not to create a new system of law; it was to teach men how to act, what to do and what to avoid in order to pass the reckoning on the day of judgement and enter into paradise.”

The *fatāwa* of the Prophet, however are sometimes detailed legal rules concerning issues such as the *zakāt* payable on livestock, the rights to water for irrigation or the proportionate share of a particular heir in the estate of a deceased person etc. Schacht also states regarding the authority of the Prophet that “it was not legal, but for the believers, religious and for the lukewarm, political”. His position cannot be reconciled with essential Islamic belief. The *Qur'ān* itself testifies to the legal role of the prophet for he is the first *ḥākim*-judge in *Islām*.

“The verse begins with an oath on Allah. This emphasises the severity of the matter. The words *lā yu 'mina hand yubakkīmu* (they do not believe until they make you a judge) and the last part of the verse, *lā yajidei barajan mimma gāḍaita* (they do not find within themselves any resistance against your verdicts) is a negation of essential belief unless two conditions are fulfilled:

(a) The Prophet is regarded as a judge in all matters of dispute that arise between believers.

(b) His judgement is accepted unreservedly after it has been passed.
Another verse also links belief to the unrestricted obedience of the verdicts of Allah and his messenger:

"It is not fitting for a believing man or woman, when a verdict on a matter has been passed by Allah and His Messenger, to have any option regarding their decision."

and Allah states:

"Whosoever obeys the Prophet has already obeyed Allah." 

Historical evidences confirm the role of the Prophet as a judge and an astute political leader. This extends from before the advent of Islam, during the Meccan period and more so in the city-state of Madina. His role as a judge also extended to peoples of other faith that approached him to act as a judge in their matters.

2.1 Judgements of the Prophet before the advent of prophethood

The Prophet acted as a judge and arbitrator for the different sects of the Quraisy tribe when they disputed as to whom would rebuild the Ka'ba after it had been destroyed in a flood. Although his selection as a judge was coincidental, his judgement and wisdom averted bloodshed and was readily accepted by all. Ibn Ishāq reports it thus:

The tribes of Quraisy gathered stones for the building, each tribe collecting them and building by itself until the building was finished up to the black stone, where controversy arose, each tribe wanting to lift it to its place, until they went their several ways, formed alliances, and got ready for battle. The Banū 'Abd
al-Dār brought a bowl full of blood; then they and the Banū ‘Adiy bin Ka‘b bin Lu‘ayy pledged themselves unto death and thrust their hands into the blood. For this reason they were called the blood lickers. Such was the state of affairs for four or five nights, and then Quraish gathered in the mosque and took counsel and were equally divided on the question.

A traditionist alleged that Abū Umayya bin al-Mughīra bin ‘Abdullah bin ‘Umar bin Makhzūm who was at that time the oldest man of Quraish, urged them to make the first man to enter the gate of the mosque umpire in the matter in dispute. They did so and the first to come in was the apostle of God. When they saw him they said, “This is the trustworthy one. We are satisfied. This is Muḥammad (Peace be upon him)”. When he came to them and they informed him of the matter he said, “Give me a cloak”, and when it was brought to him he took the black stone and put it inside it and said that each tribe should take hold of an end of the cloak and they should lift it together. They did this so that when they got it into position he placed it with his own hand, and then building went on above it.

If the Holy Prophet was called upon for his opinion or ruling in this matter, then it would unconditionally be a question of him issuing a fatwā on the issue. Since the disputing parties had formerly agreed to abide by the ruling this type of fatwā could be considered a qaḍā, i.e. a judgement although the authority of execution of the verdict is not vested in the individual issuing the ruling. This transformation from fatwā to aqdiyā is also prevalent in contemporary society. It is the area of overlapping whereby the mufti performs the function of a qaḍi. In contemporary
South-Africa many a mufti is requested to mediate between dissenting parties, and consequently the archives of the local fatwâ issuing bodies contain records of both fatâwa and aqdiyâ. 10

The Prophet participated in initiating the confederacy of the fu'dul (chivalry) for the purpose of establishing justice in Mecca. The tribes of the Quraish decided to make a convent and assembled in the house of ‘Abdulla ibn Jud‘ân because of his seniority and the reputation he enjoyed. They decided, after some deliberation, that it was imperative to found an order of chivalry for the furtherance of justice and the protection of the weak. They went in a body to the Ka‘ba where they poured water over the Black Stone, letting it flow into a receptacle. Then each man drank from the water thus blessed and with their right hands above their heads they bound themselves by a solemn agreement that if they found that anyone, either a native of Mecca or an outsider, had been wronged they would take his part against the aggressor and see that the stolen property was restored to him. A merchant from the Yemeni port of Zabid had sold some merchandise to a notable of the clan of Shâm. The Shâmite after having taken possession of the goods refused to pay the price that was agreed upon. The merchant being a foreigner had no patron in Mecca, to whom he could go to for help, he appealed to the Quraish to see that justice was done. The Shâmite was then compelled to pay the debt and none of the tribes, which abstained from the covenant, offered him any assistance. The Prophet remarked years later,

"I was present in the house of ‘Abd Allah ibn Jud‘ân at so excellent a pact that I would not exchange my part in it for a herd of red camels; and now in Islâm, if I were summoned unto it, I would gladly respond."

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These two historical incidents are examples of both the legal and political activity of the Prophet prior to prophethood. Since these occurred before the advent of revelation, the Prophet had to issue rulings based exclusively on his judgement. The situations were resolved equitably and all the dissenting parties expressed satisfaction and confidence in his verdicts. Thus Muhammad (peace be upon him) ibn ‘Abdullah, (the son of ‘Abdullah) was a proficient judge even before becoming Muhammad al-rasūl al-Allāh, (the messenger of Allah).

2.2 Judicial activity of the Prophet

The establishment of justice is a fundamental Islamic principle mentioned in many verses of the Qur’an. From the advent of the first revelations being revealed until the time of his death, the Prophet was called upon to act as a judge:

“ And we send down to you the advice (Qur’an) so that you may explain to the people what has been sent down to them, perhaps they may ponder.”

The Prophet therefore had to interpret and explain the injunctions of the Qur’an to the Arabs. He then had to ensure that the laws are adhered to and the penalties and punishments executed. The first step of explaining the law is the step of ḥadāth for it is in response to questioning, whilst the second of implementation is that of ḥaḍāth. Obedience to the Prophet only as a sovereign was not enjoined on the Muslims. His authority is that of the seal of prophethood and therefore extends to the day of judgement. Since the teachings of the Qur’an encompass specific injunctions relating to sale, credit and cash transactions, purchase, loans, mortgage, partnership, inheritance, crimes and punishments, matrimonial laws,
political affairs and matters of war and peace, the Prophetic authority in Islām extends to almost every facet of life.

In the book Aqṭiyāt Rasūlillah (Judgements of the Prophet) the fifth century Spanish scholar Ibn Ṭallā‘ (404-497AH.), collected sufficient cases which record the judicial activities of the Prophet. The traditions abound with examples of the judgements of the Prophet. The following ʿiyah concerns equability in administering judgement:

"Oh you who believe stand out firmly for justice, as witnesses for Allah, even as against yourselves, or your parents, or your kin, and whether it be against rich or poor: for Allah can best protect both. Follow not your desires lest you may be led astray, and if you distort (the facts) or decline to do justice, verily Allah is well acquainted with all that you do."

The injunction to establish justice is not only confined to a physical duty in the worldly life. The verse emphasises accountability to the Creator for failure to establish justice and the imposing Divine authority. The following incident clearly outlines how the Prophet applied Qur'ānic injunctions and how scrupulously he upheld its spirit:

It is reported from ‘Aisha (May Allah be pleased with her) that the Qurāish were perturbed about the verdict regarding a woman from the Banū Makzumīya who had stolen. They enquired, "Who will approach the Prophet on her behalf?" They agreed, "No one will be able to carry it out except Ūsāma ibn Zaid, the beloved of the Prophet. Ūsāma spoke to the Prophet. The Prophet replied "are you interceding for someone in the penalties established by Allah?" He then stood up and delivered
The following sermon, “Indeed the peoples before you were destroyed because when one of the nobility amongst them stole they sparred him, and if a downtrodden person stole they would apply the penalty. By Allah (ayyamillah), even if Fatima the daughter of Muhammad stole I would have cut off her hand.”

The incident of Usâma’s attempted intercession displays the justice and equality in Islam. According to another narration anger became apparent on the face of the Prophet, his complexion changed and his eyes became reddened at the suggestion of Usâma for in the execution of justice there can exist no differentiation between strong and weak, peasant and nobleman, rich and poor, Arab and non-Arab, the family of the Prophet and others. Furthermore Usâma was the son of Zaid who was the adopted son of the Prophet. He was loved intensely by the Prophet and therefore the people considered him the ideal candidate for intercession. The oath that the Prophet took at this juncture is one of the severest types. The Arabic term “aymanillah” which was assimilated to “ayyamillah” is an oath on the existence of Allah.

All the preconditions and etiquette of a mujtahid, mufti and qâdi listed by the jurists can be traced to narrations of the Prophet.

It is reported from Ummi Salama, the wife of the Prophet that the Prophet heard the clamour of a dispute at his door. He approached the disputants and said, “Indeed I am human, and disputes are brought to me, perhaps some of you are more eloquent than others (in presentation of your arguments), and I consider him to be truthful and pass a verdict in his favour, so whatever I have decreed for him from the right of another Muslim is a piece of the fire; either he takes it or abandons it.”

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The following aspects of the Prophet’s judicial principles can be deduced from the above:

(i) The Prophet had to judge by the apparent evidence presented during the case. In spite of his eminence and nearness to Allah he is not All-Knowing and if the unseen was not revealed to him he could be misled by false representation. Furthermore even if he received Divine inspiration on the issue, he had to pass a judgement by what is apparent.

(ii) If a wily litigant presents false information and succeeds in securing a verdict of the qādi in his favour he does not become the legitimate master of the right. He is a usurper and whatever he attains through his devious ploy is a means of him being punished in the hereafter.

(iii) Judgements are to be based on reliable evidence and not the whims of the qādi.

(iv) If a qādi after strenuous exertion to arrive at a correct decision errs, the liability for the error does not lie upon the qādi but rather the persons who misled him.

It has been earlier stated in this study under the etiquettes of a qādi and mufti that neither should issue a fatwā or a verdict under emotionally overpowering circumstances. This can be traced to the following narration, which moreover displays the judicial activities of the companions during the lifetime of the Prophet.

It is reported from ʿAbd al- Raḥmān ibn Abī Bakra, “My father dictated and I wrote for him to ʿUbaidullah bin Abū Bakra while he was the qādi of Sjistān that he should not judge between two parties when he is angry for I have heard the Prophet say;
"None of you should judge between two persons when he is angry." 17

The *ahādīth* of the Prophet show him to have been a judge in matters concerning all walks of life. In this study *ahādīth* have been cited in which the judicial activities of the Prophet are manifest. The rationale follows thus:

(a) The *ahādīth* have been subject to a strict code of scrutiny through the system of *isnād* and are more valuable as documented evidence than any other forms of historical reports. Many scholars have done sterling work on the *isnād* system and transmission of *ahādīth*. The most notable of these is Al-Azami’s in his chapter on *The isnād system its validity and authenticity* in his refutation of Schacht’s “Origins’. 18

(b) The *ahādīth* chosen are of such a nature that by no stretch of the imagination can they be assumed to have been fabricated in order to serve the political motives of the *Umayyad* rulers of the time for they concern matters that do not directly affect the political circumstances during the early second century.

(c) If the narratives which explain detailed legal rules with regard to zakāt were considered to be fabrications introduced into *Islam* in the early second century, then:

- All the historical evidences of these rules being strictly followed by the four righteous caliphs and the other companions during the first century are by implication false and the honesty and integrity of all scholars of the history of this period in doubt.
- No other corroborating historical evidence of the application of the rules in the different far-flung provinces would have been evident.

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• The strict rules, details and equitability of the laws quoted from the narrations would have politically disadvantaged the Umayyad dynasty rather than enhance it.

2.3 Committing of the fatâwa of the Prophet to writing

There are evidences of the Prophet issuing decrees which were subsequently written, containing specific Shari‘ah rules concerning for example details on the zakât levy on different types of wealth. The historical time-set of these narratives is even before the completion of the revelation of the Qur‘ân. Therefore these specific legal rules that the Prophet outlined in response to the questions posed to him is analogous to a mufti issuing a fatwâ on the issue. The point of departure being that a muftî would rely on evidences from the Qur‘ân and hadîth whilst the Prophet in these instances issued the rulings relying on Divine inspiration (wahy).

During the conquest of Mecca (8AH.), the Holy Prophet delivered a sermon concerning the sanctity of Mecca and mentioned other Shari‘ah rulings. A certain Yemenite person requested a written account of the sermon and he was provided the same in a written form.

1. It has been reported from Abû Huraira that the Holy Prophet said, “Allah the most exalted has forbidden killing in Mecca or saved it from the elephants, (the narrator has a doubt between the words alqatla and alfila) and he has given His messenger and the believers authority over it. Behold! It was not made permissible for anyone before me, and would not be
made so for anyone after me. Indeed it has been made permissible for me for a few hours of a particular day. No doubt it is at this moment a sanctuary, do not uproot its thorny shrubs or uproot any tree or pick up any lost or abandoned property except by a person who will look for its owner by announcing it publicly. If someone is killed then his closest relative has two options, either he claims the blood money in recompense or the life of the perpetrator. A man from Yemen came and said, “Oh Allah’s apostle get that written for me.” The Prophet then ordered his companions to write that for him. Then a man from Quraish said “Except al-idhkhir (a type of scented grass) Oh Allah’s apostle for we use it in our houses and graves.” The Prophet said, “except al-idhkhir except al-idhkhir”

Another example of the written directives of the Prophet is the scroll which was in the possession of ‘Ali the fourth caliph and cousin of the Prophet.

2. Al-Sha’bî narrates that Abî Juḥaifa said, “I asked ‘Alî ‘Have you got any book (which has been revealed to the prophet apart from the Qur’àn?’ ‘Alî replied ‘No except Allah’s book or the understanding (fiqh) that Allah bestows on a Muslim and what is written in this scroll.’ Abû Juḥaifâ said, ‘I asked, What is written on that scroll?’ ‘Alî replied: ‘It deals with the diyyah (compensation or blood money paid by the killer to the relatives of the victim), the ransom for the releasing of captives from the hands of the enemy, and the law that no
Muslim should be killed in *qisāṣ* (equitable retribution) for the killing of a disbeliever.”

The following narration demonstrates the extent and fine detail in which the Prophet expounded the legal rules concerning *zakāt* on livestock. Abū Bakr the first of the righteous caliphs wrote them down for Anas when he dispatched him to Bahrain to collect the *zakāt*. This is clear evidence that the rules concerning the levying and collection of *zakāt* were directly from the Prophet and passed on to the companions and then to those after them. These examples clearly negate any notion that Ummayad practise in the early second century of Islam diffused into *Shari‘ah* rulings and demonstrates the legal activities of both the Prophet and the Companions in the first century of Islam.

3. Anas narrated “When Abu Bakr sent me to Bahrain to collect *zakāt*, he wrote the following for me. ‘In the name of Allah, the Beneficent, the Merciful. These are the orders for *zakāt* (compulsory charity) which Allah’s apostle had made obligatory for every Muslim, and which Allah had ordered his apostle to observe: Whoever amongst the Muslims is asked to pay *zakāt* accordingly, he should pay it (to the *zakāt* collector), and whoever is asked more than that (what is specified in this document) he should not pay it; for twenty-four camels or less sheep are to be paid as *zakāt*; for every five camels one sheep is to be paid, and if there are between twenty five and thirty-five camels, one bint *makhād* is to be paid; and if there are between thirty six to forty-five camels, one bint *labūn* is to be paid, if there are between forty-six to sixty camels, one *hiqqa* is to be paid; and if the number is between sixty-one to seventy-five camels one *jad‘ah* is
to be paid; and if the number is between seventy-six to ninety camels two *bint labûn* are to be paid; and if there are from ninety one to one hundred and twenty camels, two *hiqqas* are to be paid; and if there are over one hundred and twenty camels, for every forty (over one hundred and twenty) one *bint labûn* is to be paid, and for every fifty camels over one hundred and twenty, one *hiqqâ* is to be paid; and whoever has got only four camels, has to pay nothing as zakât, but if the owner of these four camels wants to give something, he can. If the number of camels increases to five the owner has to pay one sheep as zakât. As regards the zakât for the flock of sheep; if they are between forty and one hundred and twenty one sheep is to be paid; and if they are between one hundred and twenty to two hundred (sheep), two sheep are to be paid; and if there are between two hundred to three hundred sheep, three sheep are to be paid; and for over three hundred sheep, for every extra hundred sheep, one sheep is to be paid as zakât, and if somebody has got less than forty sheep, no zakât is required, but if he wants to give he can. For silver: the zakât is one-fortieth of the lot, and if the value is less than two hundred dirhams, zakât is not required, but if the owner wants to pay he can”.

There are other accounts of this *hadith* and other instances which clearly indicate the Prophet’s habit of appointing governors and issuing written directives to them. The Holy Prophet dictated the rules of *Shari‘ah* about zakât in a specific document which was named, “*Kitâb al-Şadaqah*” (the Book of Şadaqa).
‘Abdullah ibn ‘Umar reports “The Holy Prophet dictated the ‘Book of Ṣadaqah’ and was yet to send it to his governors when he passed away. He had it attached to his sword. When he passed away Abû Bakr acted according to it until he passed away, then ‘Umar acted according to it until he passed away. It was mentioned in his book that one goat is leviable on five camels…….”

The remainder of the text of the narration is similar to the details mentioned in the narration of Anas. When the renowned hadith scholar Imam Zuhri used to teach this document to his pupils, he used to say:

“This is the text of the document dictated by the Holy Prophet about the rules of Ṣadaqah. Its original manuscript is with the children of ‘Umar. Salim the grandson of ‘Umar had taught it to me. I had memorised it. ‘Umar ibn ‘Abd al-‘Aziz had procured a copy of this text from Salim and ‘Abdullah, the grandsons of ‘Umar. I have the same copy with me.”

When the Holy Prophet dispatched Abu Hurairah and Ala’ ibn al-Hazrami as envoys to the Zoroastrians of Hajar, he dictated to them a directive containing the rules of Shari‘ah about zakāt and ‘ushr which were recorded in writing. Similarly when Mu‘âdh ibn Jabal was sent to Yemen he had in his possession a written document containing certain Shari‘ah rules which were dictated to him by the Holy Prophet.
2.4 Appointment of *quḍḍāt*

The Prophet during his lifetime sent judges to the different provinces to administer justice under the governors. Among the judges were:

1. `Abdullah ibn Mas'ūd
2. Abū Mūsā al-Asḥ’āri
3. `Ali ibn Abī Talib
4. `Amr bin al-'As
5. `Amr bin Ḥazm
6. `Attāb bin Asīd
7. Diḥyā al-Kalbi
8. Ḥudhaifa bin al-Yamān
9. Ma'qal bin Yasār al-Muzānī
10. Mu‘ādh bin Jabal
11. Ubai bin Ka‘b
12. ‘Umar ibn Kaṭṭāb
13. ‘Uqbah bin ‘Amr al-Juhani
14. Zaid bin Thābit

These judges based their judgement directly on the revealed law or on the Sunnah of the Prophet. Only in the absence of these sources did they resort to *ijtihād*. The method of applying *ijtihād* namely *qiyyās* can also be sourced from the Sunnah. There are many instances in which the Prophet used analogy to arrive at a ruling and examples of these and the usage of analogy by the companions are cited in the following chapters of this study. However the Prophet issued both *qāḍā* verdicts and *fatwā* juristic opinions. He acted at times as a *qāḍī* and at others, as a *muftī*.

3. The Prophet as a *muftī*

There exists a clear demarcation in the historical evidences from the narrations, of the Prophet’s role in issuing rulings. One can easily differentiate between the *quḍḍā*, the pronouncements of the Prophet as a judge, and the *fatwā*, the *fatwā* issued by the Prophet. Some rulings are in the cases of disputes or the application...
of the *hudúd* (penal code). These are usually termed *al-aqṣiyá*. The *futya* (plural of *fatwá*) are those cases in which the Prophet acted as a consult. Ibn al-Qayyim in *Ilám al-Muʾqíʿin* has divided the *fatwá* of the Prophet into twenty-three categories. He then cites examples for every category. 26

### 3.1 Fatáwa of the Prophet

Bukhári in his book of knowledge has a chapter entitled: *Al-Futýâ wahunwâ wâqifun ʿalâ al-dâbbati wa ghairahā* “The *fatwá* whilst he (the Prophet) was on his mount and at other times”. He then quotes the following *hadith*:

1. It is narrated by ‘Abdullah ibn ‘Amr bin al-ʿĀṣ that the prophet stopped at Mina so that the people could question him. A man came to him and said, I did not know so I shaved my hair off before slaughtering. The Prophet said, “Slaughter and there is no harm”. Another person came and said, “I did not realise so I slaughtered before pelting”. The Prophet said, “Pelt, there is no harm”. Whenever the Prophet was questioned on the order of the rituals, he answered, “Do the act, for there is no harm”.”

In the same book *Kitáb al-ʾIlm* of his *Ṣaḥíḥ*, Bukhári quotes the following narration under the caption “*bābun: dhikr al-ʾilm wa al-futýâ fi al-masjid*”. “Chapter: The dissipation of knowledge and the issuing of *fatwá* in the masjid.”

‘Abdullah ibn ‘Umar narrates that a man stood in the masjid and said: “From which point onwards should we don the *ihrám*?” The Messenger of Allah said, “The people of Madīna
should wear it at *Dhīl-Hulaifa*, the people of Syria from *Al-Juḥfa* and the people of Najd from *Qarn.*” Ibn ‘Umar further said, “The people consider that Allah’s apostle also said, The residents of Yemen should assume *ihram* from Yalamlam.” Ibn ‘Umar used to say, “I do not remember whether Allah’s apostle had said the last statement or not.”

There are instances where the Prophet would give *fatwā* to women on the matters of personal cleanliness.

3. It is narrated from Asmâ that a woman came to the Prophet and said, “If anyone of us gets the blood of menstrual bleeding onto our clothes, What should she do?” He replied, “She should take hold of the soiled area, rub it, immerse it in water, and repeat the process until the traces of the blood is removed and then pour water over it. Then she can pray in it.”

The *ahādīth* literature abounds with examples of the judicial activities of the Prophet. Many works of *ahādīth* and *fiqh* were compiled in the first century. These narrations are to be found in the famous works of *ahādīth* compiled in the second and third centuries of *Islām*. Of particular relevance is the tangible evidence of the existence of these texts presented by Dr. Muḥammad Ḥamīḍullah. Ḥammām ibn Munabbih, a pupil of Abu Huraira prepared a book containing the *ahādīth* he heard from Abu Huraira. This book is known as the *Al-Ṣaḥīfa al-Ṣaḥīḥah*. All the *ahādīth* of this book were included in the *Musnad* of Imām Ahmad. Dr. Ḥamīḍullah discovered two manuscripts of this book in libraries in Berlin and Damascus. He edited these manuscripts added an introduction and
compared them with the text of musnad of Imám Ahmad. He found only minor differences of a negligible nature as those of two manuscripts of the same book. 30

3.2 Fatâwa of the Companions
The fatwâ of the companions bears testimony to the legal activity of the first century of Islâm. It also confirms the application of Ùsûl al-fiqh, the source methodology of deriving a Shari‘ah ruling. The hadith of Mu’âdh provides clear evidence of the Prophet instructing and training the companions in the methodology of adducing the Shari‘ah which essentially is the methodology of issuing fatwâ. Many other instances regarding other companions could be cited wherein the Prophet encouraged them to exercise ijtihâd. The Sahâba (companions) issued fatwâ during the lifetime of the Prophet. They are divided into categories according to the number of fatwâ issued.

(a) The mukassirûn: These are the companions that issued many futuâ. They number about one hundred and thirty persons. The most famous of them are ‘A’îshah, ‘Umar ibn Al-Khaṭṭâb, his son ‘Abdullah, ‘Ali ibn Abi Ṭâlib, ‘Abdullah ibn Abbâs, and Zaid ibn Thâbit. The fatwâ issued by any one of these would fill volumes. Ibn Ḥazm has stated that Abu Bakr Muḥammad ibn Mûsâ ibn Ya‘qûb ibn Ma‘mmûn collected the fatwâ of Ibn-Abbâs in twenty volumes.

(b) The mutawassifûn (intermediate category): These are the Companions who issued lesser fatwâ than the former. If the fatwâ of each were compiled it would fill a small book. They are Abû Bakr, Umm Salmâ, Anas ibn Mâlik, Abu Sa‘îd al Khudari, Abû Huraira, ‘Uthmân ibn Affân, ‘Abdullah ibn Amr ibn al-Âs, ‘Abdullah ibn Zubair, Abî Mûsâ al-Âsh’ârî, Sa‘îd ibn Abî Waqqâs, Salmân al

(c) The Muqillūn: The saḥāba that issued very few fatwā. The famous Companions in this category are Abū Dardā, Ubay ibn al-Kāb, Umm ‘Atiyyah, and Abū ‘Ubaidah ‘Āmir ibn al-Jarrāh.”

The use of qiyās (analogy) was prevalent amongst the Companions. They first used to resort to Qur'ān and Sunnah. Then they used to compare a given set of circumstances with similar ones for which judgements had been given in the texts of the Qur'ān and the Sunnah. These early jurists never stopped researching a question until they arrived at a decision and felt certain of it. There are many instances in which they would accept the decision of a particular scholar, his line of reasoning and achieve consensus (ijmā’). These decisions then received the consensus of the community. They were so adept at ijtihād that, especially in the case of ‘Umar, Qur’ānic injunctions which were later revealed contain the same ruling as to the one he had arrived at through his ijtihād. This confirms the abilities of the Companions to adduce the Shari‘ah law both according to literal wordings and the spirit of the texts. After the demise of the Prophet the responsibility of issuing of both aqdiya and futiya passed on to the four rightly guided caliphs (khulafā’ al-rāshidin) and the Companions. This period lasted from 11A.H. to 40A.H. The term qurra’ is used in the narrations to describe the saḥāba who were responsible for acting as judges or muftiyūn.

4. Judgements and fatwā at the time of Abū Bakr

The fulfilment of the message of the Prophet Muḥammad (peace be upon him) was achieved by himself and the noble personalities that Allah had chosen as his
companions. In Islam they occupy a position second only to the prophets. The greatest of the companions was the Prophet’s successor, the first of the rightly guided caliphs, Abü Bakr. His name was ‘Abdullah ibn Abi Quhâfah ‘Uthmân ibn ‘Amir ibn ‘Amr ibn S’ad ibn Taym ibn Murrah ibn K‘ab ibn Lu’ayy ibn Ghâlib, Al-Qurashi, Al-Tayyimi. His genealogy connects to that of the Prophet from Murrah. He was the first man to accept Islam.35 His special status is attested to by the verses of the Qur’an that have been revealed relating to him especially the verse relating to him and the Prophet when they spent three nights in hiding in a cave during the migration from Mecca to Medina. His lofty status is also borne out by the narrations of other companions concerning him.

Muḥammad ibn ‘Abd al-Rahmân ibn ‘Abdullah ibn al-Ḥusayn al-Tamimi narrated that the messenger of Allah said, “I have never invited anyone to Islam except that he had an aversion to it, and irresolution and deliberation, except Abû Bakr. He did not delay when I reminded him and he was not irresolute.” 36

Al-Baihaqi asserts this to Abû Bakr having witnessed the signs of the prophethood of the Messenger of Allah long before the advent of prophethood.37 He was the most knowledgeable of the Companions concerning both the Qur’ân and the Sunnah. On several occasions when the Companions referred matters to him, he produced in substantiation of his rulings transmissions of the Sunnah from the Prophet which he had memorised and they did not have in their possession. The most pivotal futâ of Abû Bakr were those made immediately after the death of the Prophet and then throughout his very short caliphate which lasted for only two years. He passed away in 13A.H.- two years after the death of the Prophet. His capability of assessing a situation and passing the correct Shari‘ah ruling is unprecedented and he surpassed all the Companions in this respect. His actions at the time of the death of the Prophet not only bear testimony to this but were also
crucial in assuring the continuation of the harmonious functioning of the Islamic community after the death of the Prophet.

4.1 Fatâwa of Abû Bakr at the death of the Prophet

The Prophet suffered a long illness, after a while his health improved and he seemed to be recovering. The Muslims had seen him in the mosque that morning. He passed away whilst his head lay in the lap of 'A'ishah, she laid his head down on a pillow and began to cry with the other women of the house in bereavement and sorrow. 'Umar on hearing the news went straight to the house of the Prophet, uncovered the face of the prophet and looked at it for a while. He however refused to accept the fact of the Prophet’s death. Al-Mugira tried in vain to convince him. The two of them went to the mosque together and 'Umar proclaimed at the top of his voice,

"Some hypocrites are pretending that the Prophet of Allah has died. By God I swear that he did not die: that he has gone to join his lord just as Moses went before. Moses was absent from his people for fourteen consecutive nights and returned to them after they had declared him dead. By Allah, the prophet of Allah will return just as Moses returned. Any man who dares to perpetrate a false rumour such as Muḥammad’s death, shall have his arms and legs cut off by this hand". 38

A great confusion ensued as the people wavered between believing 'Umar and the indubitable meaning of the crying of the women of the household of the Prophet. Abû Bakr entered the house of the Prophet amidst all this confusion. He uncovered the face of the Prophet and kissed his forehead and said, “How wholesome you
are whether alive or dead! What would I have not sacrificed for you! The one death that Allah has decreed for you, as for any other man to taste, you have now tasted. Henceforth, no death shall ever befall you.” He then proceeded to the mosque where ‘Umar was still proclaiming loudly that the Prophet had not died. The crowds made way for him to come to the front. When he was close to ‘Umar he said, “Be silent! Oh ‘Umar” but ‘Umar would not stop talking and continued repeating the same claim. Abû Bakr rose and indicated to the people that he would wish to address them. In these trying circumstances no one would have dared to oppose ‘Umar and impose himself on the congregation except Abû Bakr. He ascended the pulpit and after having praised and thanked Allah he delivered the following short sermon:

“Oh Men! If you have been worshipping Muḥammad then know that Muḥammad is dead, but if you have been worshipping Allah then know that Allah is alive and never dies.” He then recited the Qur’anic verse “Muḥammad is but a prophet before whom many prophets have come and gone. Should he die or be killed will you abjure your faith? Know that whoever abjures his faith will cause no harm to Allah, but Allah will surely reward those who are grateful to him.”

The people were dumbfounded by the words of Abû Bakr. ‘Umar fell silent and listened attentively to Abû Bakr’s speech. Upon hearing Abû Bakr recite the Qur’anic verse ‘Umar being shattered by the certainty of the Prophet’s death fell to the ground.“ Abû Bakr’s decision at this juncture and his quotation of the most appropriate verse of the Qur’an in substantiation of his stance attest to his unrivalled knowledge of Shari‘ah and the appropriate application. Abû Bakr the mufti of his time issued his fatwâ concerning the death of the Prophet from the pulpit of the Prophet’s mosque and in doing so averted a major catastrophe. Abû
Bakr also had to provide a ruling when the controversy arose as to where the Prophet should be buried and concerning his heirs and their inheritance.

`A’ishah has reported to have said, “When the messenger of Allah died, hypocrisy raised its head, the Arabs reneged and the Ansār secluded themselves. If that which descended upon my father had descended on the immovable mountains it would have destroyed them. My father was prompt with his judgements and utility whenever they disagreed on a point. They asked, ‘Where should the Prophet be buried?’ We could not find anyone with knowledge of that. Then Abū Bakr said, I heard the messenger of Allah say,

“ No prophet dies but that he is buried beneath the bed upon which he died”. 41

Some of the men of knowledge said; this was the first disagreement, which happened among the Companions. Some said, “We will bury him in Mecca, his city in which he was born, and others said, ‘No, in his mosque,’ and others said, ‘No in al-baqi’ (the graveyard of Madīna) and others said, ‘In al-bait al-maqdis, the burial ground of the Prophets; until Abū Bakr told them of the knowledge he had. Ibn Zanjawayh said, This Sunnah was one which was uniquely Aṣ-Ṣiddiq’s among all of the muhajirīn and Ansār and they had recourse to him for it.

There was a dispute concerning what the daughters of the Prophet should inherit. Abū Bakr once again drew his ruling from his superior knowledge of the saying of the Prophet himself. ‘A’ishah narrates: they disagreed about the estate of the Prophet and could find no one with knowledge on that point, then Abū Bakr said, “

I heard the Messenger of Allah say,
“We the company of the prophets, we are not inherited from.

What we leave is *sadaqah*.”

Therefore neither the wives of the Prophet nor his daughters inherited anything from him after his demise.

4.2 Abū Bakr’s methodology of *fatwâ* and his *ijtihâd*

The above examples show how Abū Bakr applied his knowledge of the *Qur’ān* and *Sunnah* to resolve many issues. If he did not know of any *Sunnah* then he would enquire from the other Companions, and if nothing could be found in the *Sunnah* then he would sit in consultation with the scholars and pass a ruling after having achieved consensus. Maymūn ibn Mahrân summed up Abū Bakr’s method of arriving at a legal judgement as follows, “Whenever a dispute was referred to him, Abū Bakr used to look in the *Qur’ān*; If he found something according to which he could pass a judgement he did so. If he could not find a solution in the *Qur’ān*, but remembered some relevant aspect of the Prophet’s *Sunnah*, he would judge according to that. If he could find nothing in the *Sunnah*, he would go and say to the Muslims, “Such and such a dispute has been referred to me. Do any of you know anything in the Prophet’s *Sunnah* according to which judgement may be passed?” If someone was able to answer his question and provide relevant information, Abū Bakr would say, “Praise be to Allah Who has enabled some of us to remember what we have learnt from our Prophet.” If he could not find any solution in the *Sunnah*, then he would gather the scholars and the leaders of the people and consult with them. If they agreed on a matter then he passed judgement on that basis. ‘Umar used to first look in the *Qur’ān* and the *Sunnah*. If he could not find anything to base his judgement upon, he would look to see if Abū Bakr had passed a judgement on it. If he found that Abū Bakr had already passed a
ruling on the matter, he would base pass judgement on the basis of it. If not he would call the leaders of the Muslims and if they would unanimously agree on a matter, he would give judgement on that basis.

The methodology adopted by Abu Bakr are clearly the first three steps in deriving a \textit{Shari'ah} verdict namely \textit{Al-Qur'an}, \textit{Sunnah} and \textit{ijmā'} which later formed the essential parts of Al-Shāfī’i’s treatise. The fourth step \textit{qiyyās} is a form of \textit{ijtihād}. Many matters required the personal \textit{ijtihād} of Abū Bakr.

4.3 Abū Bakr’s \textit{fatwā} regarding war against those who refused to pay \textit{zakāt}

Abū Bakr waged war against the tribes that claimed to remain in \textit{Islām} but refused to pay \textit{zakāt} (the compulsory contribution to the poor). ‘Umar questioned Abū Bakr about his decision. Al-Dhahabī reports the incident thus:

\begin{quote}
When the death of the Prophet became well known, many groups of Arabs reneged on their belief (\textit{Islām}), and refused to pay \textit{zakāt} so Abū Bakr al-Siddīq prepared to fight them. ‘Umar and others counselled him to avoid fighting them, so he said, “By Allah, if they refused me a hobbling cord or a young she-goat, which they used to pay to the Messenger of Allah, I would fight them over its refusal. ‘Umar said, “How can you fight these people when the Messenger of Allah said, ‘I have been ordered to fight the people until they declare There is no god but Allah and Muḥammad is the Messenger of Allah, and whosoever declares this, then his
\end{quote}
property and his blood is safe from me except by the rights due on it (punishment for crimes, recompensation) and his accountability is to Allah.” Abû Bakr said, “By Allah I will fight whoever makes a distinction between ṣalât and zakât, for zakât is what is due on property, and he said ‘except by the rights due on it (illâ bi ḥaqqihi).’ ‘Umar said it was only then that I understood why Allah had expanded the breast of Abû Bakr to fighting and I knew that he was right.”

This same report with similar wording appears in the Ṣahîh of Bukhârî and Muslim, the narrator of the ḥadîth is Abû Hurairâ. Al-Nawawi in Taḥdîh suggests that this is proof of the vastness and superiority of the knowledge of Abû Bakr over the other Companions. Abû Isḥâq in Ṭabaqât expresses similar sentiments. There are many more examples of the ijtihâd of Abû Bakr, and in every case his fûtiyâ were pivotal to the Shari‘ah and Islâm itself since many other rulings which were later issued are based on them. If drastic action was not taken against the tribes, which refused to pay zakât, others would have emulated their actions and as Islâm spread to the far-flung areas of the world, a fundamental essential pillar of it would have been lost and become obsolete.

4.4 Other fatâwa wherein Abû Bakr exercised ijtihâd

The following are further examples of the fatwâ of Abû Bakr:

- Abû Bakr was questioned about kalâlah. He replied, “I will mention my view on it, if it is correct, it is from Allah, and if it is wrong, then it is from myself and from Shaytân (Satan). A kalâlah is one who has neither ascendants or descendants.”
He first issued a ruling that a maternal grandmother and not the paternal one should inherit. The Ansār then said, “You allow a woman to inherit from the deceased while he would not inherit from her if she were deceased, whilst you have left with nothing the woman from whom he would inherit were the situation reversed.” Abū Bakr decided in that both maternal and paternal grandmothers would share one-sixth of the inheritance.

The incident concerning his ordering of the compilation of the Qurʾān: Zaid ibn Thābit narrates: “Abū Bakr sent for me at the time of the slaughter of the people of Al-Yamāmah and 'Umar was with him.” Abū Bakr said, “'Umar came to me and said, “The slaughter of people was extensive on the day of al-yamāmah and I fear that the killing will extend to the qurrā (the fiqahā) in these engagements, so a lot of the Qurʾān will disappear unless it is gathered. I believe that the Qurʾān should be gathered.” Abu Bakr said, “I said to 'Umar, How can I do something that the Messenger of Allah did not do?” 'Umar said, “By Allah! It is good.” and 'Umar persisted on the matter until Allah expanded my breast to that and I came to hold the view that 'Umar held. Zaid said 'Umar was sitting by my side, not speaking. Then Abū Bakr said to me “You are an intelligent young man and we have no doubt in you. You used to write the revelation for the Messenger of Allah; search out the Qurʾān and compile it.” “By Allah! If he had imposed on me the responsibility of removing one of the mountains it would not have been heavier for me than what they ordered me with the collecting of the Qurʾān.” I said, “How can the two of you do something which the Prophet did not do?” So Abū Bakr answered, “By Allah! It is good, and he continued insisting on it until Allah expanded my breast to that which he had expanded the breasts of Abū Bakr and 'Umar. I searched out the Qurʾān to collect it all together, from pieces of paper, shoulder bones, palm branches and from the breasts of men, until I found two āyāt (verses) from
Surah al-Tawbâ (the Chapter of Repentance) which I found with no one else:
“There has come to you a messenger from among yourselves…..” (S. 9 v, 128-129).

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Qais ibn Abi I-Jazim said, “A man came to Abû Bakr and said, “My father wants to take my property, all of it and he will squander it.” Abû Bakr said to his father, “You can only have of his property that which will be sufficient for you.” He (the father) said, “Khalifah of the Messenger of Allah, did not the Messenger of Allah say “You and your property belong to your father?” So he (Abû Bakr) said, “Yes, and he (the Prophet) meant by that only expenditure or maintenance.”

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‘Atâ’ narrated from Abû Bakr that he said, “The grandfather has the same degree as the father as long there is no father, and the son’s son takes the place of the son as long there is no son apart from him.”

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Al-Muhâjîr ibn Abî Umayyah, who was the Amir of al-Yamâmah, had two women singers brought before him. One of them had sung abuse of the Prophet, so the amir ordered her hand to be cut off and her teeth to be pulled out. He did likewise with the other who ridiculed the Muslims in song. Abû Bakr wrote to him, “It has reached me that which you have done with the woman who sang abusing the Prophet. If it were not that you have preceded me I would have told you to have her killed, because the hadd (penal code) for crimes against the Prophets is unlike the ordinary hadd (penal code). Whosoever from amongst the Muslims dares to do that has become an apostate and if he is a non-Muslim who has a covenant with the Muslims then he is a treacherous and hostile enemy. As for the one who sang in ridicule of the Muslims; if she was one who claims to be Muslim then she should be
disciplined and punished but not mutilated. If she was one of the dhimmah (people of the book living under the governance of Muslims), then, by my life, that shirk which she has turned away from is greater (as a crime than the ridicule of Muslims). If I had previously commanded you in a case similar to this, (and later you had done what you did) you would have reached affliction, so accept that I will let things be, and beware of mutilating people because it is a crime and should be avoided, it is only justifiable in the case of equivalent retaliation claimed by a victim (qisāṣ).

• Abī İmran al-Juni said that Abū Bakr sent troops to Syria and put Yazid ibn Abî Sufyân in command over them and said, “I counsel you with ten qualities: Do not kill a woman, nor a child, nor a feeble old man; do not cut down a fruit tree; do not ruin cultivated land; do not slaughter a camel or a sheep except for its owner; do not destroy the date-palm nor burn it; do not conceal booty; and do not display cowardice.”

• Al-Qâsim ibn Muḥammad said that a man from Yemen, who had a hand and a foot cut off, came and stayed with Abū Bakr. He complained to him that the governor of Yemen had wronged him, and he used to pray at night. So Abû Bakr would say, “By your father! Your night is not the night of a thief. Then later they missed some jewellery belonging to Asmâ bint Umays, the wife of Abû Bakr. He began to go around with them saying, “Allah, You must take whoever plotted against the people of this righteous house.” Then they found the jewellery with a jeweller who claimed that the man with the amputated foot had brought it. The thief then confessed or someone bore testimony against him. Abû Bakr passed judgement and his left hand was cut off. Abu Bakr said, “By Allah! His supplication against himself, for me is stronger and more severe than his theft.”
Abu Bakr appointed 'Umar as his successor: When Abû Bakr became seriously ill, he called for 'Abd al-Rahmân ibn 'Auf and said, "Tell me about 'Umar ibn al-Khattab." He said, "you do not ask me of any matter except you are more knowledgeable of it than me." So Abû Bakr said, "and even if .........?" 'Abd al-Rahmân ibn 'Auf said, "He, by Allah! Is better than your view of him." Then he summoned 'Uthmân ibn Affân and said, "tell me about 'Umar" He replied, "You, of all of us knows best." Abû Bakr said, "Tell me that." So he said, "Oh Allah! My knowledge of him is that his inward is better than his exterior and that there is no one like him amongst us." Abû Bakr included in his counsel along with the two of them, Sa‘îd ibn Zaid, Usayd ibn al-Hudayr and others of the Muhâjirûn and Anṣâr. Usayd said, "By Allah! I know him ('Umar) to be the best after you (Abû Bakr). He is pleased for the pleasure of Allah, and displeased for the displeasure of Allah. What he conceals is better than what he makes public. No-one stronger for this command than him will ever have authority over it." Some of the companions entered upon him and one of them asked, "What will you say to your lord when he asks you about appointing 'Umar as khalifah over us when you have seen his toughness?" Abû Bakr said, "By Allah! Are you trying to frighten me? I will say, Oh Allah, I have appointed as a khalifah over them the best of your people. Convey this from me to those who are not present". Then he summoned 'Uthmân ibn Affân and said, "Write, In the name of Allah the Merciful, the Compassionate. This is the testament of Abû Bakr ibn Abi Quhafah at the end of his time in the world, as he was leaving it, and at the beginning of his time in the âkhirah as he was entering it, where the disbeliever will believe, the wicked will be certain, and the liar will tell the truth. I have appointed after me as khalifah over you 'Umar ibn al-Khattab, So listen to him and obey him. I have not fallen short in my duty to Allah and his Messenger"
and his *din* and to myself and to you. If he is just, then that is my opinion and knowledge of him. If he changes things, then every soul is liable for what it earned, I intended good, and I do not know the unseen,

"...and the ones who do wrong shall know what place of transformation (‘aya munqalibin) they will be transferred to (yanqalibūn)." (Qur'an S. 26 v. 227)

Peace be upon you and the mercy of Allah and His blessings." He asked for the paper and sealed it. Then he ordered Uṭmān to proceed to the people with it, the people pledged allegiance and were pleased with it. Abī Bakr then summoned ‘Umar and advised him in private. After ‘Umar left Abī Bakr raised his hands and said, “Oh Allah! I only meant by that their good and feared dissension for them, and I have done for them what You know best, and I have exerted my intellect for them in arriving at a decision, and have appointed the best of them over them, and the strongest of them, and the most eager of them for true guidance, and there has come to me of your command what has come to me (death), so put another in my place over them, for they are your slaves, their forelocks are in Your hand. Oh Allah! Put right their rulers, and make him one of the rightly guided caliphs and put right his subjects for him.” 54

The verdicts, *futūḥa* of Abū Bakr al-Ṣiddīq and his deployment of *ijtihād* and the primary and secondary sources shaped the way in which the *Shari‘ah* was to be understood. He was undoubtedly the greatest *faqih* after the Prophet. His decisions bear testimony to his superiority over all his colleagues in *fiqh* and the immense legal activity in the early first century of Islām.
5. The role of fatwâ during the caliphate of ‘Umar

‘Umar succeeded Abû Bakr and became the second of the four rightly guided caliphs. His name was ‘Umar ibn al-Khaṭṭab ibn Nufail ibn ‘Abdul ‘Uzza ibn Riyah ibn Qart ibn Razah ibn ‘Adi ibn K‘ab ibn Lu’ayy. His caliphate heralded the rapid expansion of Islam to far-flung lands. This called for statesmanship of a level never required before and any lesser person than ‘Umar would have been unable to fulfil this daunting task. His genius as a military strategist, a just and efficient administrator was blended with a toughness, stark simplicity and humble personal disposition. These attributes together with the strength of his faith in Allah and consciousness of accountability to The All-Mighty endowed him with prophet-like characteristics.

‘Uqbah ibn ‘Amir said: “The Prophet (may Allah bless him and his family and grant them peace) said, ‘If there were to be a prophet after me it would be ‘Umar ibn al-Khaṭṭab.’”

5.1 Incidences in which ‘Umar’s fatwâ were later confirmed by revelation

There are many instances in which revelation confirmed the fatwâ of ‘Umar or were the direct result of the supplications he made to Allah seeking a ruling for a prevailing circumstances. When he supplicated to his Lord for a ruling and revelations bearing the injunctions, which were received by the Prophet, he played a role analogous to that of the mustaftî. Nawawi in al-Thadhî” mentions four instances, namely concerning the prisoners of the battle of Badr, on the hijâb, on the station of Ibrahim, and on the prohibition of wine. Al-Shaybâni has listed
twelve situations in his book Faḍāil al-Imāmain in which revelations confirmed the fatwa of `Umar. After the battle of Badr the contention arose as to what should be done with the prisoners of war. The prophet sought the council of the Companions. Abū Bakr was in favour of releasing them on the payment of a ransom since they were their own kith and kin. `Umar on the other hand suggested that since kinship had nothing to do with the matter of the survival of Islām, that the prisoners be killed in such a fashion that each person from amongst the Muslims should kill his own kinsman. The Prophet preferred the opinion of Abū Bakr and set the prisoners free after making them pay the ransom money. Then the following verse was revealed:

"It does not become an apostle that he should have prisoners in custody until he has thoroughly subdued the land ..."

This verse confirms the view of `Umar to be correct. The following narration is to be found in the Šāhīh of Bukhārī, the Book of Commentary (interpretations of the Qur’ān): `Umar said, “I agreed with Allah in three things” or said, “My Lord agreed with me in three things. I said, ‘Oh! Apostle of Allah, would that you took the station of Abraham as a place of prayer.’ I also said, ‘Oh! Apostle of Allah, Good and bad persons visit you, would that you ordered the mothers of the believers to cover themselves with veils.’ So the divine verses of ḥijāb were revealed. I came to know that the Prophet had blamed one of his wives so I entered upon them and said, ‘You should stop (troubling the Prophet), perhaps Allah will give his apostle better wives than you.’ When I came to see one of his wives she said to me, ‘Oh `Umar! Does Allah’s apostle not have what he can advise his wives with, that you try to advise them?’ Thereupon Allah revealed:

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“It may be, if he divorced you all, his Lord will give him instead of you, wives better than you.”

5.2 Portentous reliance of `Umar on Divine Intervention after issuing a fatwâ

It is an essential part of Islamic belief that miracles are only assigned to prophets. The extra-ordinary feats of saintly persons and all persons other than prophets are termed kirâmah. `Umar was not a prophet. The manner in which he acted in the following two cases indicate the strength of his belief and his total reliance on divine intervention.

1. Ibn `Umar reports, "Umar sent out an army under the leadership of a man called Sâriyah. While `Umar was delivering the sermon, he suddenly stopped and cried out "Sâriyah the mountain!" three times. Then later the messenger of the army came and said, "Oh `Umar, 'Amîr al-Mu'minîn, we were being defeated and in that situation we heard a voice crying out, 'Oh Sâriyah, the mountain!' three times." We put the mountain to our rear, and then Allah defeated them. Someone said to `Umar, 'You cried out those words.' That mountain where Sâriyah was is close to Nahawand in the land of the non-Arabs (Persia).

2. Qais ibn al-Hajjâj narrates: "When Egypt was conquered, its people came to `Amr ibn al-Âş on the first day of one of their months and said to him, 'Amîr, this Nile of ours has a year in which it does not flow without a particular act.' He asked, 'And what is that?' They said, 'When eleven nights have elapsed of this month we seek a young virgin from her parents, then we dress her in the best possible clothing and ornaments and we throw her into the Nile.' So `Amr said to them, 'This will never be in Islâm. Islâm nullifies what precedes it.'
They left and the Nile did not flood. When `Amr saw that they intended to emigrate he wrote to `Umar ibn al-Khattab about it. He wrote back to him. “You were right in what you said, Truly Islam nullifies what precedes it” He sent a slip of paper inside the letter and wrote to `Amr, ‘I have sent you a slip of paper inside my letter so throw it into the Nile.’ When `Umar’s letter reached `Amr ibn al-Âş, he took the slip and opened it, it read, ‘From the slave of Allah `Umar ibn al-Khattab, Amir al-Mu’minin to the Nile of Egypt. Now, if you used to flow before, then don’t flow! If it was Allah that made you flow, then I ask the Overwhelming One to make you flow.’ He threw the slip into the Nile the day before (the Festival of) the Cross. They woke up in the morning and Allah the Exalted made it flow. It rose sixteen cubits in one night and Allah cut off the custom of the people of Egypt right up to this day”.

This incident occurred after the conquest of Egypt by `Amr ibn al-Âş, The Copts continued with their customary practices under Muslim rule. There is a clear conflict between the Shari’ah ruling and the custom of the people in that the Shari’ah upholds the sanctity of life. No life can be taken through a ritual sacrifice. If it were any custom that did not violate a basic tenet of Shari’ah, then only could it be termed ‘urf and subsumed under Shari’ah. 62 `Umar was thus placed in a dilemma, on the one hand he had to issue a Shari’ah ruling which was against the customary practices of the people and the other was to ensure that he did not repel them from Islam. `Umar’s response, his letter to the Nile and appeal to it as an equal servant of Allah, demonstrates an unusual trait of the first century Islamic leadership in that their gnosticism and self effacement reached such a level that they transcended the world of cause and effect and were assured of divine intervention in their matters. It was this characteristic that was prevalent amongst
all the Companions and the many Muslim reformers throughout the history of Islam.

5.3 Role of Fatāwa in the administration of the first Islamic state

The Islamic world during the reign of ‘Umar ibn al-Khaṭṭāb, the second caliph of Islam was governed as a single country which had to be divided into provinces and localities under different authorities. This period is often described as the golden era of Islam. ‘Umar’s governance was a glorious example of the successful application of the Shari‘ah over the diverse multitudes of peoples that formed the Islamic community of his time. It is also the period which saw the formal differentiation between the functions of a qādi and ḥākim, between fatwā and aqādīyā and other administrative authorities. During the lifetime of the Prophet the governor acted as the tax collector, the mufti, the chief qādi, the chief of the army etc. ‘Umar was the first to identify and categorise these duties as functions of different departments. He initiated the formalisation of the function of issuing fatwā under his department of juris-consults. Thus the governor appointed both muftiyān and quḍātāt.
5.4 Fatwâ and the Consultative Assembly

The short two-year caliphate of Abû Bakr settled vital issues such as the tribes who became apostate and those who refused to pay zakât. During the caliphate of 'Umar the Muslim armies conquered the whole empire of Chosroes and parts of the Eastern Rumis (Byzantine) Empire. Countries both from the East and the West were under the sway of the Muslims. This necessitated the development of a complete network of civil administration with administrative departments of the state. The most fundamental element of 'Umar's administration was the initiation and instalment of the Majlis al-Shura or the Consultative Assembly. The principle was by no means innovative since both the Prophet and Abû Bakr used to consult with the ahl al-ra'y (people of opinion) in all important matters. However there was an absence of a formalisation of a body to fulfil such a purpose. The body politic of Islam was initially divided into Muhâjirûn and Anṣâr. Members of both these groups took part in the shûrâ. Some of the members were 'Uthmân, 'Alî, 'Abd al-Rahmân ibn 'Auf, Mu‘âdh ibn Jabal, Ubay bin K‘ab and Zaid ibn Thâbit. This assembly presided over the most important issues concerning the Islamic community. On general issues of lesser importance 'Umar sometimes consulted the whole community. A public crier went out in Madîna calling the people to assemble at the mosque. 'Umar would then enter offer two rak‘ât of prayer with them, ascend the pulpit and address them on the matter at hand. The Consultative Assembly at the time of 'Umar consisted of five leading men from the Aus and five from the Khazraj. The deliberations of the assembly lasted for several days on end. 'Umar addressed the assembly on the issue of the powers and prerogatives of the caliph thus, " I have given you the trouble to assemble here in order that you might participate in the burdens put upon me in respect of the state, for I am only one from among yourselves, and I do not desire that you should follow my wishes." The Consultative Assembly decided on the matters of the pay of soldiers,
organisation of the secretariat, appointments of civil officers, freedom of trade of
foreigners, the levying of jizyah (tax on free non-Muslims), imposition of road
tolls, assessment of import duties etc. 'Umar once remarked "La khilâfah illa 'an
mashûrah (There is no khilâfah without consultation)". The matters presented to
the assembly were such that Shari'ah rulings on them were sought. Therefore the
majlis al-shura of 'Umar consisted of the best muftiyûn of his time. The
consultative assembly therefore was an amalgamation of the fuqahâ under the
directive of the amîr. This body thus functioned as a fatwâ issuing body but was
enhanced by the authority vested in the amîr who ratified these fatâwa into
directives.

5.5 Appointment of the muftî as a state official

'Umar divided all the areas under his control into administrative units such as
provinces, districts and sub-sections of districts. In many cases he retained the
divisions as they had been before conquest. He divided the empire into eight
provinces, viz. Makkah, Madinah, Syria, Jazirah, Basrah, Kufah, Egypt and
Palestine. The eastern territories of Fars, Khozistan and Kirman also had
provincial status. All the provinces were further divided into districts, for example
Egypt was divided into two provinces. Upper Egypt called Sa'id by the Arabs,
comprising of twenty eight districts was under the jurisdiction of 'Abdullah ibn
S'ad ibn Abi Sarah, lower Egypt comprising of fifteen districts was placed under
another office. 'Amr ibn al-Âş was the governor general. 'Umar retained the
original divisions of the Persian empire. They were Khurasân, Adharbaijân and
Fars comprising of fourteen, sixteen and seventeen districts respectively. The
officers appointed in each province were:

1. Wali or governor.
2. **Kāṭib** or chief secretary.

3. **Kāṭib-al-Diwān**: The chief of the army secretariat.

4. **Ṣāḥib-al-Kharāj**: The collector of revenue.

5. **Ṣāḥib-al-Ḥdāth**: The chief of the police.


7. **Qādi**: The chief justice.

8. **Muftiyūn**: The juris-consults.

If we take Kufah as an example, ‘Ammar ibn Yāsir was the governor, ‘Uthmān ibn Ḥanīf collector of revenue, ‘Abdullah ibn Mas‘ud the treasury officer, Shurahib the qāḍī and ‘Abdullah ibn Khalaf was the Chief of the army secretariat. In many cases the appointments were made by the Consultative Assembly. In order to avoid corruption ‘Umar ensured that the highest salaries were paid to the office bearers. Whenever a person was appointed he would be handed a document which would state his appointment and jurisdiction. This would be read out to the people on the arrival of the officer. The terms of his appointment often imposed on him a frugal lifestyle and that he had to remain totally accessible to the people. A complete inventory of his possessions was kept in record and he was called upon to explain any unusual increase in his wealth. It was compulsory for every office-bearer to avail himself of the time of ḥaḍr to face any complaint or accusation made against him by the masses. Muḥammad ibn Maslamah Ansārī was the head of the special office established for the investigation of complaints against officers. Evidence in these investigations was led in public. ‘Umar once dispatched Muḥammad ibn Maslamah Ansārī to Kufah to investigate a case against Sā‘ad ibn Abī Waqqas. After having gathered evidence he returned with Sā‘ad to Madīnah, where he faced the charges. A complaint against the governor of Baṣrah Abū Mūsā al-As‘ārī was
lodged with ‘Umar in Madīna. ‘Umar recorded the complainant’s statement with his own hand and summoned Abū Mūsā al-Ash‘ari to Madīna to answer the charges levelled against him. The charges were:

(i) The governor had retained sixty prisoners of war in his personal service.
(ii) He had a slave maid whose provisions were more than what an average Muslim could afford.
(iii) He appointed Ziad bin Samiyyah as an administrator who acted irresponsibly.

On investigation the first charge was found to be false, Abū Mūsā could provide no satisfactory reply to the second allegation and the maid was taken away from him. On the third charge Abū Mūsā responded that Ziad was the most efficient administrator. ‘Umar examined Ziad and found him truly to be so. The caliph himself then instructed the authorities of Baṣrah to consult Ziad in all affair of the state.

Shibli Nu‘mānī has listed some of the appointments that ‘Umar made in the form of a table. 64 The table thus reflects the vast legal and judicial activity established during the khilāfah of ‘Umar.

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<tr>
<th>Name</th>
<th>Place</th>
<th>Post</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abū ‘Ubaidah</td>
<td>Syria</td>
<td>Governor</td>
<td>Ṣaḥābā from ‘Ašharah Mubashsharah</td>
</tr>
<tr>
<td>Yazid ibn Abī Sufyān</td>
<td>Syria</td>
<td>Governor</td>
<td>The most proficient governor of the Umayyads.</td>
</tr>
<tr>
<td>Name</td>
<td>Place</td>
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<tr>
<td>Amîr Mu`awiyah</td>
<td>Syria</td>
<td>Governor</td>
<td>Later to become caliph. Famous as a statesman and administrator.</td>
</tr>
<tr>
<td>`Amr ibn al-Åṣ</td>
<td>Egypt</td>
<td>Governor</td>
<td>Conqueror of Egypt</td>
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<tr>
<td>S'ad ibn Abi Waqqâs</td>
<td>Kufah</td>
<td>Governor</td>
<td>Uncle of the Holy Prophet.</td>
</tr>
<tr>
<td>`Utbah ibn Ghaswan</td>
<td>Basrah</td>
<td>Governor</td>
<td>A <em>muḥājir</em> and founder of Basrah</td>
</tr>
<tr>
<td>Abû Mûsâ al-Ash'ari</td>
<td>Basrah</td>
<td>Governor</td>
<td>Eminent and famous <em>ṣaḥābi</em>.</td>
</tr>
<tr>
<td>Nafi ibn `Abdul Harith</td>
<td>Makkah</td>
<td>Governor</td>
<td>An eminent <em>ṣaḥābi</em>.</td>
</tr>
<tr>
<td>`Uthmân ibn Abil-Åṣ</td>
<td>Ta'if</td>
<td>Governor</td>
<td>Maintained the people of Ta'if as Muslims whilst the other tribes reneged.</td>
</tr>
<tr>
<td>Ya'li ibn Umayyah</td>
<td>Yamân</td>
<td>Governor</td>
<td>A <em>ṣaḥābi</em> famous for his generosity.</td>
</tr>
<tr>
<td>`Alâ ibn al-Hadrami</td>
<td>Yamân</td>
<td>Governor</td>
<td>A very influential <em>ṣaḥābi</em> appointed to this post by the Holy Prophet.</td>
</tr>
<tr>
<td>Nu'mân</td>
<td>Madâîn</td>
<td>Revenue Collector</td>
<td></td>
</tr>
<tr>
<td>Name</td>
<td>Place</td>
<td>Post</td>
<td>Remark</td>
</tr>
<tr>
<td>--------------------</td>
<td>------------------</td>
<td>------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>‘Uthmān ibn Hanīf</td>
<td>Euphrates Valley</td>
<td>Settlement</td>
<td>An expert in surveying revenue assessment and accountancy.</td>
</tr>
<tr>
<td>‘Ayyad ibn Ghanam</td>
<td>Jazirah</td>
<td>Governor</td>
<td>Conqueror of Jazirah</td>
</tr>
<tr>
<td>‘Umar ibn S’ād</td>
<td>Hims</td>
<td>Governor</td>
<td>The caliph held him in high esteem.</td>
</tr>
<tr>
<td>Hudhaifah ibn al-Yamān</td>
<td>Madā’in</td>
<td>Governor</td>
<td>A famous saḥābi who the Holy Prophet took confidence in.</td>
</tr>
<tr>
<td>Samura ibn Jundub</td>
<td>Suq-ul</td>
<td>Treasury Officer</td>
<td>An eminent Companion</td>
</tr>
<tr>
<td>Nu’mān ibn ‘Adi</td>
<td>Misān</td>
<td>Treasury Officer</td>
<td>The first of the Companions to inherit.</td>
</tr>
<tr>
<td>Arfaja ibn Harthama</td>
<td>Musal</td>
<td>Revenue Commissioner</td>
<td>Founder of Musal containment</td>
</tr>
</tbody>
</table>

‘Umar refused to divide the conquered lands amongst the army. The land was left in the possession of its inhabitants and a land tax (kharāj) was levied. ‘Ushri lands were those owned by Muslims on which they paid one tenth of the produce or its equivalent in zakāt. The revenue department was entrusted with the task of collecting zakāt, kharāj, ‘ushr, jizyah, one fifth the spoils of war, and an import.
duty of ten percent. If Muslim traders went to foreign lands to trade they paid ten percent of the value of their merchandise to the coffers of that country. The same percentage was levied on foreigners who traded in Muslim lands. ‘Umar instituted a department of crime and police; a department of public works; the public treasury department for the promotion of agriculture, a department of Justice and the institution of Juris-consults.

5.6 Differentiation of fatwâ and aqâdiya into state departments by ‘Umar

The factor that bears the greatest testimony to the judicial and legal activity in the first century of Islam is the entire administration of the Islamic empire during the reign of ‘Umar. He separated the judiciary from the executive, he established courts of justice and he wrote a farman, his document of judicial procedure. His writing of the document outlining judicial procedure is a definite result of the seeking of fatwâ from him by the various governors he employed. The development of Shari‘ah into a comprehensive legal system was thus a result of iftâ - the seeking and consequent issuing of fatwâ. The procedure outlined in ‘Umar’s document is diametrically different to the Justinian principles that form the basis of Roman law and thus could not have been borrowed from them. The text of the farman as reported by Abû Ishâq Shirazi is thus;

"Praise to Allah, now justice is an important obligation. Treat the people equally in your presence and in your company and in your decisions, so that the weak despair not of justice and the high placed have no hope of your favour. The onus of proof lies
on the plaintiff, and he who denies must do so on oath. Compromise is permissible provided it does not turn the unlawful into lawful. Let nothing prevent you from changing your decision of yesterday after consideration (if the former decision was incorrect). When you are in doubt and find nothing about in the Qur'ân or in the Sunnah of the Prophet, think over the question and think again. Ponder over the precedent and analogous case, and then decide by analogy. A term should be fixed for the person who wants to produce witnesses. If he proves his case give him his due. Otherwise the suit should be dismissed. All Muslims are reliable, except those who had been punished by flogging, or who have borne false witness or are doubtful in inheritance and relationship.

The laws relating to the judicial procedure were as follows;

1. The qaḍî in view of his position as a judge, should treat all persons alike.
2. The burden of proof as a rule lies on the plaintiff.
3. If the defendant has no proof or witnesses, he should be made to take an oath.
4. The parties to a suit can compromise in all cases except when such a compromise is opposed to the law.
5. The qaḍî can revise his own judgement of his own will.
6. A date should be fixed for the hearing.
7. If the defendant does not present himself on the fixed date, the case may be decided ex parte.
8. Every Muslim is fit to give evidence, except one on whom the hadd (penal code) was applied or one about whom it has been proved that he has borne false testimony.
'Umar clearly outlined the manner in which a Shari'ah ruling should be derived. He wrote in a farman to qâdi Shuraih that he should first refer to the Qur'ân, then the Sunnah, then he should determine whether consensus (ijmâ') on the matter exists, and in the absence of a ruling in the three aforementioned sources he should exercise his ijtihâd. This clearly indicates to the formation of a legal theory.

'Umar often scrutinised the appointees personally. Some of the judges he appointed were 'Abdullah ibn Mas'ud, qâdi Shuraih, Jamil ibn Mâ'mar, Ibn Maryam al-Hanafi, Salmân ibn Rabi'â al-Bahâli, 'Abd al-Rahmân ibn Rabi'ah, Abû Qarat al-Kindi, and Imran ibn al-Hasin. The qâdi was subordinate to the governor and the district officer. No qâdi was permitted to engage in trade or commercial activities of any sort. Their sole income was from their fixed salaries which 'Umar set at such high levels that no further sources of income was necessary. He also instituted a rule that usually wealthy persons and those of high standing should be appointed as judges. The above steps were taken in order to remove the temptation of taking bribes. 'Umar also introduced the admissibility of expert testimony to the courts. Zabarcian ibn Bath lodged a complaint against Hâfiyya who using satire had maligned him. The point of satire was not ordinarily apparent. It involved certain technical and terminological usage of poetic language.

'Umar therefore invited Hassân ibn Thâbit, the most distinguished and eminent poet of his era to give his opinion and based his judgement on the expert evidence of Hassân. 67
5.7 Institution of the Juris-consults (muftiyûn)

The necessity of knowledge of Shari'ah is essential for the functioning of the Islamic Community. The Holy Prophet himself and the fuqahâ from amongst the Companions used to issue fatwâ. This practice continued after the demise of the Prophet and throughout the caliphate of Abû Bakr. ‘Umar saw the need of formalising this practice and appointed muftiyûn to every single town. Only these persons had the authority to pronounce opinions on Shari’ah. The names of the muftiyûn were announced in public assemblies. Some of the muftiyûn appointed by ‘Umar were ‘Ali ibn Abî Tâlib, ‘Uthmân ibn Affân, Mu’âdh ibn Jabal, ‘Abdullah ibn Mas‘ud, Abû Mûsâ al-Ash‘ari, ‘Abd al-Rahmân ibn ‘Auf, Ubay ibn K‘ab, Zaid ibn Thabit, and Abû Dardâr. ‘Umar himself trained the majority of the Companions who were later famous for their fatâwa. Although qu’dât and muftiyûn were appointed in every town, there were many issues on which the caliph himself was called upon to preside. Ibn Abi Shaiba has cited in his `Musannaf` approximately one thousand futâyû issued by ‘Umar. He also mentions the names of the persons who had referred the questions to him. Shah Wali-Ullah al-Dhelwi has reproduced this in his work Izalat-al-Khafi. The caliphate of ‘Umar was the nurturing phase for the Shari’ah. Through fatwâ the Islamic legal system was not only developed to the extent of the application of the primary and secondary sources only, but extensive evidence of ‘Umar’s usage of ijtihad and development of all the sources of the flexible spheres of the law exist. His reign is a physical encapsulation of all the essential components of the theory expounded by Al-Shafi‘î in his Risâlah. The laws that he developed for punishments other than the penal code (ta’zîr), his implementation of the kharâj land tax, the establishment of a department for the construction of roads, bridges, canals, the paying of restitution to a dhimmi for the damage caused to his property when the Muslim army marched pass, his general laws regarding the rights of a dhimmi etc.
all formed the basis of his *siyāsah Sharī'ah* which he developed through *fatwā*. These could easily be implemented if an *Islāmic* state were formed today.

6. The *fiṭrā* of ‘Uthmān ibn ‘Affān and ‘Ali ibn Abī Ṭālib

The process of *ijtihād* continued during the caliphate of ‘Uthmān, and he was responsible for further developing the *Islāmic* State that ‘Umar had so skilfully initiated. On his accession to the caliphate, he sent the following directive to the generals and the armed forces posted at the frontiers.

> "You are the protectors of *Islām* from the hands of its enemies. ‘Umar had prescribed certain regulations for you, which are not unknown to me. In fact they were drafted in consultation with me. Beware! That I do not receive reports that you have transgressed in any manner. If you do so better people will replace you. You should always be mindful of your conduct."

The above directive demonstrates how the caliphs ensured the continuity of the systems that they initiated. ‘Uthmān was fully cognisant of the major decisions of Umar and the directives he had issued. This was the case with every one of the six Companions from whom ‘Umar’s successor was to be chosen. ‘Uthmān also sent written policy statements to all the governors of the provinces. He outlined their code of behaviour and like ‘Umar before him emphasised their responsibility to the people and to their accountability to their Creator. He further warns them against any insincerity and lays special emphasis on the rights of the *dhimmis*.

He wrote, "Allah has bidden the rulers to become guardians of the community and not merely tax-collectors. Officers preceding..."
you had acted as guardians and servants of the people. I feel that senior officers may cease to discharge their responsibility as guardians and devote themselves to tax collection alone. If they will do so, modesty, righteousness and faithfulness will desert them. The best course is that you should take interest in the affairs of Muslims. Whatever is due to them give it to them and whatever is due to the state take it from them. Similarly whatever is due to the dhimmis give it to them and take from them whatever is due to you. Even with your enemies your conduct should be upright. Win them by your uprightness and fulfilment of convents.’

‘Uthmân compiled the Qur’ân into a standard text and sent copies of the same to different cities in the different provinces. ‘Umar forbade Mu‘awiya from establishing a navy. Mu‘awiya renewed his proposal to ‘Uthmân and he finally consented. The first naval fleet was built in the year 28A.H. under the admiralship of Abû Qais. Cyprus was the first place to be conquered by a Muslim naval expedition. ‘Uthmân ordered that tents should be pitched to shelter the pilgrims at Mina. This was never done before. ‘Uthmân completed the enlargement of the mosque at Makkâ which was initiated during the time of ‘Umar. In 29A.H. he renovated the Prophet’s mosque in Madîna and changed its mud walls to that of brick and motar.’
6.1 Some of the fatâwa issued by ‘Uthmân

- *Zakât* was not levied on horses at the time of the prophet, but ‘Uthmân included them as a ‘zakâtable’ item. The reason for the exemption earlier was that they constituted an essential mode of transport and were used in warfare. After the expansion of the Islamic Empire the position had materially changed and they were now considered as wealth or stock in trade.

- ‘Uthmân ruled in the case of pre-meditated murder, if the victim left no heirs then the ruler could act as the representative of the heir and claim retribution either by claiming the life of the perpetrator or the payment of the *diyyah* (blood money) as recompense. In the case of King Hurmuzan vs Ubaïd Allah ibn ‘Umar, ‘Uthmân acting as the guardian of Hurmuzan accepted *diyyah* and gave the money to the *Bait al-Mâl* (public treasury). ‘Uthmân also introduced the paying of *diyyah* by any article of equivalent value. Until then people used to confine the paying of *diyyah* to a specified number of camels.

- ‘Uthmân passed a ruling that invalidates the marriage contract of anyone who is in the state of *iḥrâm* while performing *hajj* or *‘umrah*. He quoted the *hadith* of the Prophet that a person in the state of *iḥrâm* should neither marry someone nor make a proposal of marriage.

- In certain cases ‘Uthmân maintained that the divorced woman should inherit. This was in the case of a person issuing divorce in a state of ill health or with the intention of causing the spouse not to inherit. It is reported from Abî Salmâ ibn ‘Abd al-Rahmân ibn ‘Auf that ‘Uthmân granted the wife of ‘Abd al-Rahmân ibn ‘Auf her inheritance after the end of her *‘iddah*. ‘Abd al-Rahmân ibn ‘Auf had divorced her when he was very ill.

- ‘Uthmân was renowned for his knowledge on inheritance. He along with Zaid ibn Thâbit solved complex problems in this regard.
When some people objected to the opinions of 'Uthmân, he replied thus, “By Allah! We had the opportunity to be in the company of the Prophet while he was on his journey. When we fell sick, he used to look after us, when some of us died we used walk together behind the bier, when he went for jihâd we were his companions; then we were destitute he shared whatever he had with us. Alas! Today the people who try to point out his Sunnah to us are those who have not even seen his face.”

The historical data relating to the issuing of fatwâ by Uthmân confirms the usage of many principles of derivation which form the bases of Shari‘ah today. The fatwâ illustrate the continual development of the Islâmic legal theory, its beginnings during the lifetime of the Prophet and the input of the khulafâ al-râshidin to its development by the fityâ they issued.

6.2 Fityâ of ‘Ali ibn Abî Ṭâlib

Many of the judgements of ‘Ali the fourth caliph of Islâm demonstrate his use of analogy and exercise of ijtihâd. ‘Ali was such an astute judge that the prophet described him as the most proficient judge amongst the Companions.

Some people had dug a deep ditch in order to trap a lion. The lion fell into it. People gathered near the ditch to see the lion. They started playing a practical joke on one of their friends and took him close to the ditch. By chance one of them slipped and while falling into the ditch he unintentionally caught the hand of another man in order to save himself. While the second man was falling into
the ditch he held onto the third, which in turn held onto a fourth person. Eventually all four fell into the ditch and were killed by the lion. Their families quarrelled with one another over this incident. 'Ali pacified them by saying that it was improper to enter into bloodshed in the lifetime of the Prophet. He volunteered to decide the matter between them and told them that if they were not satisfied with his verdict they were free to go to the Prophet. The people agreed. 'Ali decided on the case by saying that those who were instrumental in digging the ditch in order to capture the lion should pay diyyah in the following order. The heir of the first deceased should be given one fourth, the heirs of the second deceased should be given one third; those of the third deceased should be given half while the heirs of the fourth should be given the full amount of diyyah in settlement. The heir of the first deceased was given one-fourth because the incident ranged between culpable homicide and murder and the decision was given on the basis of the intention on the part of each deceased. The case in which the least intentional pulling of the person into the ditch was given the smallest share of diyyah. When the intention was greater the greater amount was awarded. A slightly greater degree of intention can be found in the case of the other three persons who dragged each other into the ditch. Then the case was decided on the basis of miráth, the law of inheritance. Although there were four persons involved in the incident the least amount that can go to any one of them was one-fourth. When one fourth was awarded to the first deceased the remaining two were allowed half each of the remaining amount. The next question was who was liable for the diyyah. Those who dug a ditch near a residential area in order to trap the lion committed the crime. Since the actual people who dug the ditch could not be specified from amongst the residents and the digging of the ditch was of a collective benefit to the neighbourhood, the diyyah was imposed collectively on all the residents. An
appeal against ‘Ali’s judgement was taken to the prophet during his farewell pilgrimage. After reviewing the case the Prophet upheld ‘Ali’s judgement.78

Ali ibn Abî Tâlib suggested that by analogy the penalty for false accusation should be applied to the wine drinker, “When a person gets drunk he raves and when he raves, he accuses falsely”. So the eighty lashes became the standard punishment for the consumption of wine.79

Mu‘awiyah once wrote to ‘Ali asking enquiring whether an ambiguous hermaphrodite inherits property as a man or woman. ‘Ali replied that he should judge according to the private part from which the hermaphrodite urinated. 80

The caliph ‘Ali was an eloquent orator and the first person to compile the laws of Arabic grammar into a written text. Abul Aswad al-Du‘ali narrates, “I entered upon the Amir al-Mu‘minin ‘Ali ibn Abî Tâlib and saw him with his eyes lowered, deep in thought. I said, “What are you thinking about Oh! Amir al-Mu‘minin?” He said, “I have heard in this city of yours mistakes in the use of the Arabic language and I want to make a book on the principles of Arabic (grammar).” I said, “If you do this, you will give life to us, and this language will remain amongst us.” I came to him three days later and he gave me a page on which was, “In the name of Allah, the Merciful, the Compassionate. The word is a noun, verb or participle. The noun is that which informs you of a named thing. The verb is that which informs you of the movement of the named thing. The participle is that which implies a meaning neither of a verb nor a noun.” He said, “Follow this up and add to it whatever occurs to you. Know! Abul-Aswad al-Du‘ali, that things are threefold: a substantive, a pronoun and a thing which is neither a substantive nor a pronoun. The men of knowledge have only differing degrees of excellence in the recognition of what is neither substantive nor pronoun.” ‘Abul-Aswad said: “I compiled some things on it and I showed them to him. The particles of nasb, which put the
noun governed by them in the accusative case or the verb in the subjunctive, were in it. Of them I mentioned inna, anna, laita, la'alla and ka'anna but I did not mention lâkinna.” He asked me, “Why did you leave it out?” I said, “I did not reckon it to be one of them.” He said, “It is one of them so add it in among them.”

• The Companions of the Prophet attained an absolute mastery over problems in which ratio and proportions have to be applied. This also includes solving problems of inheritance, since the Qur’ân verses allot the shares of heirs in proportions the following two episodes demonstrate how proficient ‘Ali ibn Abî Ṭâlib was at applying these mathematical formulations. Zîrîr ibn Hubaysh narrates, “Two men sat eating the morning meal, one of them had five small loaves and the other three small loaves. When they had placed the meal in front of them a man passed by them and greeted them. They said, ‘Sit down and eat.’ He sat down, ate with them and they ate equally of the eight loaves. The man stood up tossed down eight dirhams and said, ‘You two take them in place of what I have eaten.’ The two of them quarrelled. The man who had five loaves said, ‘I would not be content unless the dirhams are divided in half between us.’ They took their dispute to Amîr al-Mu’mînîn ‘Ali ibn Abî Ṭâlib and told their story. He said to the man who had three loaves ‘Your companion has offered you what he has offered you. His bread was more than yours so be content with three dirhams.’ He said, ‘By Allah! I will not be content except with the bitter truth.’ ‘Ali said, ‘There is nothing for you in bitter truth except for one dirham and he has seven dirhams.’ The man said, ‘Glory be to Allah! That’s it! Show me the reason in bitter truth so that I can accept it.’ ‘Ali said, ‘Do the eight loaves not have twenty-four third parts? You ate them and you were three persons, not knowing who ate more or less, so we will assume that all ate equally.’ He continued, ‘You ate eight thirds and had only nine thirds. Your companion ate eight thirds but had fifteen thirds, eight of which he ate
leaving seven, which the man who paid the dirhams ate, and he ate one of your nine. You have one dirham for your one share and he has seven.’ The man said, ‘I am now content.’

There is a case of inheritance that was brought to qāḍī Shuraih. A person left behind an estate of net value of six hundred dirhams. The heirs of the deceased were his wife, mother two daughters, twelve brothers and one sister. The proportionate shares are one eighth for the wife; one sixth for the mother; two thirds for the two daughters and the remainder to be shared amongst the brothers and sister of the deceased in the proportion that the share of each brother will be twice the share of the sister. The lowest common denominator is twenty four, so if the estate is divided into twenty four parts, this would translate to three parts for the wife, four parts for the mother; sixteen parts to be shared equally by the two daughters, and the remainder one part to be divided between the twelve brothers and one sister in the ratio two is to one, i.e. each brother will receive twice the share of the sister. To solve this problem the entire estate is divided by twenty-four to arrive at the value of each share. 600 dinârs / 24 = 25 dinârs. Therefore the value of the shares of each heir will be as follows.
The sister of the deceased who received one dinár approached 'Ali ibn Abī Ṭālib and complained to him that Shuraih had usurped her rights and allocated only one dinár to her. 'Ali was on the pulpit delivering a sermon at that time. He replied without any hesitation that "Perhaps your brother died leaving, his wife, mother, two daughters, twelve brothers and you as his heirs." She said, "yes." He then said to her "This (one dinár) is your absolute right, there is neither an increase or decrease in it." This famous case became known as the mas`alah al-mimbariyyah (the fatwā of the pulpit). 81

<table>
<thead>
<tr>
<th>Total net asset value of estate</th>
<th>600 dinârs</th>
<th>24 portions</th>
<th>Heir</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/8 proportionate share from Qur'ân S. 4 v. 11</td>
<td>75 dinârs</td>
<td>3 parts</td>
<td>wife=1/8</td>
</tr>
<tr>
<td>1/6 proportionate share from Qur'ân S. 4 v. 11</td>
<td>100 dinârs</td>
<td>4 parts</td>
<td>mother=1/6</td>
</tr>
<tr>
<td>2/3 is the proportionate share if the deceased leaves two or more daughters. Qur'ân S.4 v. 11</td>
<td>400 dinârs</td>
<td>16 parts</td>
<td>2daughters=2/3</td>
</tr>
<tr>
<td>The twelve brothers each receive two dinârs.</td>
<td>25 dinârs</td>
<td>1 part</td>
<td>Residuary</td>
</tr>
<tr>
<td>The sister receives one dinâr.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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It must be noted that Amir al-Mu’minîn ‘Ali ibn Abî Ṭâlib answered the question without the heirs being mentioned to him. He therefore had to compute the calculations in reverse and answer instantaneously. This clearly demonstrates a mastery of the subject and prolonged experience in solving problems of this nature. There are many companions like Mu‘âdh ibn Jabal who accepted Islâm at a very young age. He was schooled in Shari‘ah and fiqh by the Holy Prophet himself and spent the rest of his entire life as a qâfi‘ and muftî. He was sent to Yemen and later Damascus where he exercised his ijtihâd and fiqh in applying the Shari‘ah in varying social, cultural, economic and political communities. He died during the reign of ‘Umar in 18 A.H. in Palestine. The aqdiya (judgements) and the fatwâ (rulings) issued by the Prophet himself, the righteously guided caliphs and the Companions show;

(i) The complex legal role played by them in the early first century of Islâm.
(ii) The total development and application of the Islâmic legal theory to the extent of the harmonious functioning of the ideal Islâmic state.
(iii) The application of every aspect of the principles of derivation of Shari‘ah, later codified by Al-Shafi‘i in his Risâlah.
(iv) The high level of competency in the knowledge of Shari‘ah and the ability to readily apply its source methodology.
(v) The extensive exercise of ijtihâd and analogy in adducing the specific Shari‘ah rules.

7. Muftiyûn amongst the followers

Many people from the tabî‘in (followers) excelled both as qâfi‘ât and muftiyûn. Qâdi Shuraih is an example of a judge who did not enjoy the company of the Holy
Prophet. After the demise of the Prophet, the caliphs appointed some of the companions and some of the followers to positions of office. The following followers were appointed as muftiyûn of their respective areas.

2. Ėau’us to Yamen.
3. Yâhûyâ ibn Abî Kasîr to Yamâmah.
4. Ḥâs sûn al-Bashi to Bașrah.
5. Ma’khûl to Şâm.
6. ‘Aţaw al -Khurasânî to Khurasân.
7. Maslamâ ibn ‘Abd al-‘Azîz to Al Andalus.
8. Ibn al-Qâsim to Miṣr.
9. Abul Qâsim ibn Šalât to Baghdaď.

8. Famous collections of fatâwa

The practice of the Prophet was to have legal rulings written down on paper and presented to his companions when he dispatched them as governors or quṣâtîn of different localities. This practice continued amongst the companions and the followers. Later the scholars of fiqh listed their various futyâ. These were later arranged into chapters according to topics and collections of fatwâ emerged.
8.1 The futya of the early first century

Although many hadith books were extant in the early first century and many of them consist of reports of answers to questions on fiqh, they cannot strictly be qualified as collections of fatwā. Most of the very early works on fatwā are incorporated into later works or lost altogether. Some examples of work on fatwā in the first century of Islām are:

(i) The letters of the Holy Prophet to the various kings and emperors inviting them to Islām. The text of the treaty of Ḥudaybiyya and the treaties entered into between the Muslims and the Jewish tribes of Madīna. The Constitution of the city-state of Al-Madīna Al- Munawwarah.

(ii) The rulings of Mu‘ādh were read and transmitted by Ṭa‘ūūs in Yamen.

(iii) The kitāb al-ṣadaqah which contained the detailed rules governing zakāt and was in the possession of Sālim the grandson of ‘Umar, and ‘Umar ibn ‘Abd al-Aziz.

(iv) The various official written directives of the Holy Prophet, Abū Bakr, ‘Umar ‘Uthmān and ‘Ali. The legal works of ‘Umar include his farman and various letters addressed to Abū Mūsā al-‘Ashārī and others.

(v) The legal works of ‘Ali were in the possession of Ibn Abbās. The work of ibn Abbās was compiled in twenty volumes by Kuraib.

(vi) The works of Ibn Mas‘ūd are referred to by his son ʿĀmir.
8.2 Chronology of major works on fatwā from the early second century

This chronology only mentions the major collection of futyā of a particular era. The ḽāmi‘i al-Thirmidhi and Sunan of Abū Da‘ud, essentially collections of ḥadīth have been regarded as works of fiqh. Both Thirmidhi and Abū Da‘ud’s methodology is to discuss a fatwā quoting aḥadīth in substantiation of their rulings.

1. Ḥujjat alā Ahlu al-Madinā - Muḥammad ibn Ḥasan d. 189A.H.
2. Kitāb al- ‘Umm - Imām Muḥammad ibn Idrīs al-Shafi‘ī d. 204A.H.
3. Al-Risālah - Imām Muḥammad ibn Idrīs al-Shafi‘ī d. 204A.H.
4. Al-Muwāziya - Ibn Muwazi d. 269A.H.
5. Sunan Abī Da‘ud - Sulaimān ibn al-Ash‘at al-Sajistānī d. 275A.H.
6. ḽāmi‘i al-Thirmidhi - Abī ‘Īsā Muḥammad ibn ‘Īsā al-Thirmidhi d. 279A.H.
7. Mukhtāsār al-Kirkhī - Abul Qasim ‘Umar ibn Ḥussain d. 334A.H.
8. Al-Madhhab - Al-Shirāzī d. 476A.H.
10. Al-Basīt wa al-Wasit wa al-Wajiz - Al-Ghazālī d. 505A.H.
13. Al-Mughnī - Ibn Quddāmā d. 670A.H.
15. Majmu‘a Fatwa ibn Taymīyā - Ibn Taymīyā d. 787A.H.
The futiya of the Prophet, the companions, the khulafā‘ al-rāshidūn and the major works of futiya provide overwhelming evidence of

- The immense legal activity prior to the advent of the Umayyads.
- The continuity of the process of ifta unto the present century.
Notes for chapter two


5. *An Introduction to Islamic Law*, p.11.

6. Qur'an S.4 v. 65.

7. Ibid. S.33 v.36.

8. Qur'an S. 4 v.80.


10. See chapter four of this study. Many local branch offices of the Jami 'at al-'Ulamâ have records of all the cases in which a scholar was called upon to preside.


12. Qur'an S.16 v. 44.


16. Muslim. Kitâb al-Qa’dâ wa al-Shahâdât, hadith no.1051.

17. Ibid. hadith no. 1055.


Bukhari. Kitab al-I'tisam bi al-Kitab wa al-Sunnah, hadith no.6756; Muslim. Kitab al-Haj, hadith no.2433 Musnad Ahmad.

Bukhari. Kitab al-Zakat, Bab, Zakat al-Ganam, hadith no.737 (a) bint makhda: a she camel that has entered her second year of age. (b) bint labun: a she camel that has entered her third year and already given birth to a calf. (c) hiqqa: this camel has entered her fourth year. (d) dadah: a camel that has entered her fifth year and begins to lose teeth.

Thirmidhi, Al-Jami. Kitab al-Zakat, Bab Mal Ja'a Fi Zakat al-Ibil, hadith no.1463.


Mukhtasar Sahih al-Bukhari, p. 50.

Ibid p.67.


Suyuti lists over seventeen incidences wherein the ijihad of 'Umar was later confirmed by verses being related with the same injunction. Suyuti, Tarikh al-Khulaf.

36. Ibid p.20.

37. Ibid p.20.


40. This is according to Ibn Ishaq's version. See Guillaume, A. The Life of Muḥammad, A translation of Ibn Ishaq's Sirat Rasūl Allah, p.683.


44. This incident is quoted in the books of history and ḥadīth. See Ṣaḥīḥ al-Bukhārī. Kitāb al-Zakāt, ḥadīth no.1364; Ṣaḥīḥ al-Muslim. Kitāb al-Imān, ḥadīth no.29; Sunan Thirmidhi. Kitāb al-Imān, ḥadīth no.2532; Sunan Naṣā'ī. Kitāb al-Zakāt, ḥadīth no.2400; Sunan al-Nasā'ī. Kitāb al Jihād, ḥadīth no.3040; Sunan Naṣā'ī. Kitāb Tharīm al-dām, ḥadīth no.3902; Sunan Abī Dawūd. Kitāb al-Zakāt, ḥadīth no. 1331; Musnad Ahmād. Musnad 'Asharāh Muḥashsharah fi al-jannat, ḥadīth no. 64.


47. Al-Dārāmī. Al-Sunan. Kitāb al-Farā'iḍ, ḥadīth no. 2845. In another narration Al-Dārāmī, Al-Sunan, Kitāb al-Farā'iḍ, ḥadīth no.2847 the same definition of kašālah is given by Ibn ʿAbbās.

49. Şahîh al-Bukhâri. Kitâb al-Tafsîr al-Qur'ân, hadîth no.4311; Sunan Thîrîmîdhi. Kitâb al-Tafsîr al-
Qur'ân hadîth no.3028/9; Musnad Ahmad. Musnad al-Ansâr, hadîth no.20657.
Ha Publishers, p.90.
55. Sunan Thîrîmîdhi. Kitâb al-Manâqib, hadîth no. 3619; Musnad Ahmad. Musnad al-Shâmiîn, hadîth
no.16764.
56. Al-Nâwawî Abû Zakariyya Abû Yahyâ. Muñîyi al-Dîn ibn Shârîf. n.d. Thâzib al-Asmâ’ wa al-
57. Cfr. Tarîkh al-Khulafa’, p.120.
58. Qur’ân S. 8 v. 67.
59. Şahîh al-Bukhâri. Kitâb al-Tafsîr al-Qur’ân, hadîth no.4123; Şahîh al-Muslim. Kitâb Faḍâ’il al-
Shaḥâba, hadîth no.4412; Sunan Thîrîmîdhi. Kitâb al-Tafsîr al-Qur’ân, hadîth no.2774/5; Musnad
Ahmad. Musnad al-’Ashârah al-Mubashsharah fi al-jannat, hadîth no.152; Sunan Ibn Mâja. Kitâb
Iqâm al-Salât wa al-Sunnah fihâ’, hadîth no.999; Sunan Dârâmî. Kitâb al-Manâsik, hadîth no.1777.
60. Qur’ân S. 66 v. 5.
62. See definition of ‘Urf- a source of Shari’ah chapter three of this study.
Delhi: Idara Isla’at-e-Dinîyat. Ha’darat Nizâmuddîn, pp.210-211.
64. Ibid., pp.229-230.
’Arabiyyah, pp.146-149.
67. This incident can be compared to the judgement in the Cape Supreme Court in the issue of the Palm
Street Mosque wherein Abû Bakr Effendi’s expert testimony was called for. However the situation
whereby a judge in a Western court presides over a disputes between Muslim is untenable in Islâm but
occurs in the cases of minority Muslim community living in a non-Muslim state. It contradicts the essential precondition of a qādi. See chapter four, 4.1 of this study.


70. Khurshid Aḥmad, Fariq. Official letters of Uthmān, on the authority of Baladuri in Fatḥ al-Buldān.


72. Ibid, vol. 5 p 45.


74. This was the ruling of Uthmān, the opposite is stated in an aḥādīth narrated by ibn Abbās, namely that the Prophet married Maymūna whilst he was in ʿıhrām. Bukhārī. Kitāb al-ḥaj, hadith no.1706.

75. This ruling is a demonstration of the use of the principle of masālaḥah. A divorced woman does not usually inherit from her spouse since at the time of death the marital relationship did not exist. However considering the circumstances in this case Uthmān ruled that she should inherit. See chapter three in this study that correlates fatwā with the development of the source methodology of Shari’ah.


78. This is an example of the use of analogy for determining a punishment that is precluded from the penal code, ḥadd, since the offence is of a lesser nature than that in the prescribed code. It is of greater significance that this incident occurred during the lifetime of the prophet clearly demonstrating the role of ‘Ali as a muftī and the usage of qiyās a fundamental part of Islāmic legal theory, long before the advent of Shi’ī or the Ummayyad dynasty.

79. The qiyās analogy used for this ruling has become the bases for the prescription of punishment for the consumption of any intoxicant or narcotic drugs and is found in present day manuals of fiqh.

80. Mu‘āwiyā is the person seeking this ruling and acts as the mustaftī in this case. ‘Ali is the muftī that issues the ruling. The nature of the question is indicative of the legal activity of the early first century and the detail in which rulings were sought.

Chapter Three

Fatwâ: a manifestation of the principles of derivation of Shari‘ah

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8.1.1 Early modernists

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Chapter Three

Fatwā: a manifestation of the principles of derivation of Shari‘ah

1. Introduction
Chapter two dealt with the role that fatwā had played in the early first century of Islām. It led to the formation and later systemisation of the methodology of adducing a law. Evidence of this methodology during the time of the Prophet and the companions has already been cited. These were later crystallised into legal theory by scholars such as al-Shaybānī and al-Shafī‘ī. Thus the four major uṣūl or sources of Shari‘ah were established. Later other more complex sources were identified and the Shari‘ah thus developed into a comprehensive “legal system”. Fatwā has played a pivotal role in Shari‘ah in that it can be identified firstly as the catalyst that has led to its initiation. It then acts as a promulgator of Shari‘ah for it is the application of its source methodology. Finally if correctly applied or allowed to function unencumbered, it acts as the facilitator of the dynamism present within the Shari‘ah itself enabling it to be contemporarily relevant. This chapter establishes the role of fatwā by examining its interrelationship with the sources of Shari‘ah. A fatwā concerning the permissible dress code for prayer is used to demonstrate how fatwā exposes the inherent dynamism of textual Qur‘ānic law. The verse containing the relative injunction is analysed, then other textual evidences (nāṣṣ) are cited which delimit the dress code. Finally a rule is adduced based on the juristic principle al-‘aṣl fi kulli shay‘ al-‘ibāḥah depicting the proficiency with which the Divine injunction translates to applicable law. If we consider the Qur‘ān, Sunnah and ijmā‘ to constitute an immutable conceptual sphere of the law then the fatwā is a result of the interaction of the fixed sphere with those of ‘urf and the juristic principle of al-‘aṣl fi kulli shay‘ al-‘ibāḥah.
Laws that emanate from al-Qur‘ān, Sunnah and ijmā’ are those which are from the fixed or ‘immutable’ core of Shari‘ah. The role of fatwā in the fixed sphere investigated and the inner dynamism that it induces within these ‘immutable’ sources of the law is demonstrated. A fatwā concerning inheritance is used as an example of a ruling derived literally from the textual law. In this case the law is sacrosanct and expressed in clear detailed legal rules. It therefore forms part of creed and cannot be altered or adapted for any reason. The chapter then continues to establish the relationship between fatwā and the sources of ijmā‘, qiyās, ‘urf, istiḥsān, and maslaḥah al mursalah. The last part of this chapter discusses Fatwā as an affront to modernism; the assertion of the need for reinterpretation of the Qur‘ān in order that Shari‘ah copes with social exigencies.

1.1 The interrelationship between Fatwā and Qur‘ān and Sunnah

The Shari‘ah originated from the direct commands of Allah. These as they were revealed to the Prophet Muḥammad (peace be upon him) are contained in the Qur‘ān. They are extant and have remained unchanged for fourteen centuries. The preservation or custodianship of the Qur‘ān is guaranteed by the Divine Legislator

“ We have without doubt sent down the message and We will assuredly guard it (from corruption).”

The Qur‘ān, unlike other books of revelation, was not revealed in one instance but verses were revealed over a period of twenty-three years. In many instances these verses were revealed when a prevailing set of circumstances warranted a law of governance. In certain cases however revelation was a direct Divine response to
questions posed to the Prophet. Thus the people posing the question act as the mustafii and the verse or divine response is the fatwa whilst Allah, the supreme Legislator is the muji and the hakim. The words used in the Qur'an are yastaftunak and yas'alianak. Verse 127 of Chapter 4 reads:

“Wayastaftunaka fi al-nisâ: quâ Allâhû yusûkum fîhinna ......”

which literally can be translated as:

“And they seek a fatwa from you concerning women; Say Allah provides you with a fatwa concerning them....”

Another example of the literal use of the verbal form of fatwa is in regard to the injunction concerning the inheritance of a kalâlah- a person who dies without leaving any direct ascendants or descendants as heirs. The verse reads:

“Yastaftinaka: quâ Allâhû yusûkum fi al-kalâlah ......”

“They seek a fatwa from you Say Allah provides you with a fatwa concerning the kalâlah ............”

In the instance of the above examples we observe that the seeking of fatwa is followed by detailed rules of textual law governing specific matters. In other instances the literal word used in the Qur'an is yas'alianak which simply means to question. The laws concerning the prohibition of the consumption of wine and gambling are encased in the verse, which begins with the posing of a question seeking the ruling. The verse reads:

“wayas'alûnaku 'an al-khamri wa al-maisîr, quâ ......”

“And they ask you concerning wine and gambling: Say ..........”

Similarly with the laws concerning the property of orphans, the verse reads:

“Yas'alûnaka 'an al-yatâmâ, quâ ............”
Thus it is the seeking of a ruling which resulted directly in the revelation of Qur’anic injunctions. This forms the intrinsic link between fatwā and the primary source of Shari’ah, Al-Qur’an. Al-Suyūṭī has enumerated approximately five hundred verses of legal injunctions. They deal with marriage, polygamy, dower, maintenance, rights and obligations of the spouses, divorce and various modes of dissolution of marriage, the period of retreat after divorce (‘iddah), fosterage, contracts loans deposits, weights and measures, removal of injury, oaths and vows, punishments for crime, wills, inheritance, equity, fraternity, liberty, justice to all, principles of an ideal state, fundamental human rights, laws of war and peace, judicial administration etc. The seeking of fatwā can thus be regarded as the initiator of the Shari’ah for many injunctions were revealed in response to the fatwā sought.

The Prophet, as appointed by Allah is the expounder of the Qur’an and has legislative authority. We have aptly demonstrated in chapter two how the fatwā issued by the Prophet provided the impetus for detailed legal rules regarding the payment of zakāt on livestock. These rules are sourced directly from the Sunnah of the Prophet. The Qur’anic injunctions regarding zakāt establish the compulsion of their payment but do not specify the rules for calculating the exact amount payable. The existential life pattern of the Prophet which are a practical enactment of the Divine injunctions form the second primary source of Shari’ah. Thus if a mustafti seeks a detailed legal rule concerning any matter, and such a ruling cannot be found in the Qur’an then the Sunnah is resorted to. Thus it is the seeking, and the issuing of fatwā that has played a formative role in Shari’ah. The procedure outlined by Mu‘ādh when questioned by the Prophet at the time of being

“They ask you regarding the orphan, say.........” S. 2 v. 220.
dispatched to Yemen was first to rule by the Qur'an then the Sunnah of the Prophet and then to exercise his personal opinion. Later as further issues were raised and futuwwa sought more sources of Shari'ah began to develop.

1.2 Immutability and adaptability

Scholars have argued Islamic law as either "immutable" or "adaptable". The classical or traditional scholars maintain that since law is of divine origin (wahy) it is absolute and unchangeable. Westerners and "modernists" propagate adaptation of the law in order to maintain relevance in a rapidly changing society. The term "immutable" denotes an inability to mutate or change. With the promulgation of Darwin's theory of evolution, mutations have taken on a particular nuance in the Western mindset. It commonly refers to the biological changes that have occurred through cross breeding of species that is the basis of the evolution of man. This theory is widely accepted in the Western world. By implication therefore, a system of law that is "immutable" is one that has not evolved - is primitive and archaic. Through the use of terminology the Orientalists have prejudiced the classical scholar. If he argues, as Maududi does that the Shari'ah is of divine origin and the existence of an explicit command of Allah or His Prophet precludes the right of any ruler, scholar judge or ordinary Muslim from making the least alteration in it, his argument is mis-construed to apply inadaptibility and irrelevance. Coulson in comparing Shari'ah with Western legal systems writes:

"In contrast with legal systems based on human reason such a divine law possess two major distinctive characteristics. Firstly it is a rigid and immutable system, embodying norms of an absolute and eternal validity, which are not susceptible to modification by any legislative authority. Secondly, for the many different peoples who constitute the world of Islam, the divinely ordained Shari'ah
represents the standard of uniformity as against the variety of legal systems which would be the inevitable result if law were the product of human reason based upon the local circumstances and particular needs of a given community.”

Fatwā is the catalyst for ijtihād and is the vehicle which induces a dynamism in both the fixed core of Shari‘ah i.e. Qur‘ān, Sunnah and ijmā‘ and in the conceptually flexible spheres which are qiyās, istiḥṣān, ‘urf, and maṣlahah mursalah. It is a vehicle that straddles both the fixed core and the conceptually flexible sphere and provides for the interfacing of the sources in the flexible sphere with the fixed sphere. It is thus through fatwā that Shari‘ah has developed into a ‘legal system’ with these dual characteristics. However a great level of flexibility is generated within the primary source itself. We demonstrate through fatwā the multitudinous ramifications of a legal rule derived from Qur’ānic injunctions.

1.3 The broad scope of applicability of Qur’ānic injunctions

It could easily be demonstrated that Divine law, although “immutable” has greater diversity than uniformity of application. It has an inner dynamism that enables it to have relevance in all times and climes. The question still persists of how does transcendence of divinely ordained injunctions with fixed moral norms transform into the imminence of applicable law.

An examination of the injunctions of the Qur‘ān reveals that the injunctions can be divided into two basic categories.
[a] Those that contain moral precepts.

[b] Those that have specific legal prescriptions. These can further be divided into two categories:

1. Those that are based on interpretation (*mujtahid fihi*).
2. Those that are based on explicit text (*mansūs 'alayhi*).

2. Fatwā based on a verse that is *mujtahid fihi*, a fatwâ on the permissible male dress code for prayer

We now assume a *fatwâ* is required concerning the form of dress that is considered permissible for a Muslim male to pray in. The first step in the established methodology for adducing a ruling is to consider the Qur'anic verses regarding the issue.

Verse 31 of surah 7 reads

"O Children of Adam, wear your beautiful apparel (*zinatakum*) at every time and place of prayer; eat and drink but waste not by excess, For Allah loveth not the wasters." 12

1. The injunction is as general as possible. The verse addresses all humankind. The term *wear your beautiful apparel* (*khudhū zinatakum*) is open to various applications. A person who is an Eskimo might attend prayers dressed in skins, a Westerner in a pure wool designer suit, a North African in his richly coloured flowing garb with elaborate head-dress or an Indian in a lungi. 13 All these various forms of dress are considered legitimate with the proviso that none of
the other Shari'ah injunctions regulating the dress code are violated. The restrictions for men would be:

(a) They should not be of pure silk, this delimitation of the dress code is derived directly from the nass (text) of a hadith of the Prophet which prohibits men from wearing garments made of silk:

It is reported by ‘Ali ibn Abi Talib that the Prophet took silk in his right hand and gold in his left. He then said, “These two are unlawful for the males of my ummah.”

The prohibition expressed by the text of the hadith is of a general nature, but it is ascertained from other ahadith that Muslim men are prohibited from the wearing of garments made of pure silk or any jewellery of pure gold. Since men are prohibited from wearing these at all times, they are definitely prohibited from wearing them whilst praying.

(b) The minimum area of the body that has to remain covered is from the navel to the knee etc. This restrictions is also ascertained from the hadith of the Holy Prophet:

Ibn Jarhadin reports from his father that the Prophet passed by him whilst his thigh was exposed and said, “cover your thigh, For indeed the thigh is from your private parts.”

(c) The lower garment should not be of such a length that it drags on the ground. This restriction is from the text of another hadith:
It is reported by Abu Huraira that the Prophet said, "Whatever of the trousers is below the ankle is in the fire." 16

(a), (b) and (c) show that a vigorous application of Qur'an and Sunnah the primary source of Shari'ah enables us to determine a dress code for prayer. The nature of the Qur'anic injunction is such that there exists a narrow, clearly defined area of prohibition juxtaposed with a large and diverse scope of possible application. This enables Shari'ah to transcend both temporal and cultural constraints. It is as readily applicable to an Eskimo as it is to a Bedouin Arab; to a Muslim living in the seventh century at the advent of Islam and to one living in the twenty first century. The Shari'ah can thus be defined as a pathway which is a broad band, confining human behaviour according to its nature within an upper and lower limit in order to fulfil Divine Will. It is within this broad band of possible application of injunction that different cultures are assimilated into the Muslim 'ummah'. Therefore no change or re-interpretation of the injunctions is necessary in order to achieve this. The question then arises as to what criteria or source of Shari'ah was used to arrive at the permissibility of all the forms of dress except those that have been textually prohibited. If no direct ruling can be adduced from the fixed sources, Qur'an, Sunnah and ijma, then the mufti considers the flexible sources of qiyas (analogy), istihsans (utility), 'urf (custom), maslahah and maslahah mursal. These sources of the law require the application of juristic principles qaw'id al-fiqhiyyah which are derived directly from the Qur'an and Sunnah. The principle required for the adducing of the legal rule in our aforementioned masala is "the original rule of everything is permissibility" alasli fi kulli shay al-'ibah.
2.1 The doctrine, "the original rule of everything is permissibility": *Al-`Ashl fi kulli shay` Al-`Ibâhah* 17

In several cases the *Shari`ah* posits the position that everything is permissible except that which has explicitly been made unlawful. The basis of this supposition is found in surah 1 verse 29:

*It is he who hath created for you all things that are on earth.* 18

All things on earth whether they are from the vegetable or animal kingdoms, have been created for the use of man. Things in which there is benefit and not harm. Allah the supreme creator has created everything for the benefit of man and the prerogative of making things permissible or prohibited is His. This infuses an immense positivism in the law, enabling it to encompass cultural diversity and technological change. An example of the accommodation of cultural diversity is the many possible forms of permissible dress for men as cited previously. Let us assume that through the process of genetic engineering a fruit that is a cross between an apple and a peach is produced. It is found to thrive in the South-African climate. By the simple process of applying the aforementioned principle it would be considered permissible for consumption. If however it were proved that there are certain harmful effects of it, it would then be considered unlawful according to *Shari`ah*. If there were both harm and benefit in it, it would be considered doubtful, here abstention is preferred. This is vividly expressed by the following hadith:

"Indeed that which is lawful is plain and that which is unlawful is plain and between the two of them are doubtful matters about which many people know not. Whosoever avoids doubtful matters exonerates himself in regard to his religion and his honour, and whosoever indulges in doubtful matters falls into that which is 
unlawful, like the shepherd who grazes his flock all around a demarcated pasture, they would soon graze therein. Alas every king has a demarcated pasture, and the demarcated pasture of Allah is His prohibitions.

The imagery of the grazing of the flock aptly demonstrates that all grazing is lawful except that which comes close to or violates the demarcated area. Similarly all things are considered permissible except that which has been demarcated as unlawful by Shari'ah. Things that come close to the demarcated boundary are doubtful because they soon cause one to violate the limits.

Futuḥā based on verses that are mujtahid fihi allow us to conceptualise a sphere of flexibility within which the law develops enabling it to be effective. Shari'ah thus overcomes the powerful challenge of social change through this element of flexibility and adaptability. Other spheres of conceptual flexibility of Shari'ah exist. These will be discussed under 'urf and ta'zir. The derivation of the law is the responsibility of a mufti or mujtahid (expert jurist). The prerequisites and functions of this category of scholar have already been elucidated in chapter one. He cannot derive laws to suit his fancy but has to follow a clear methodology laid down by the jurists. This process or source methodology is termed usūl al-fiqh. The contrived effort employed in adducing the law is ijtihād. It has been practised from the time of the Prophet continues to do so presently and will continue to be practised in the future as long as the Islamic community exists. The vehicle or medium which induces this process of ijtihād is fatwā. The fact that a mufti and a mujtahid are synonymous and that fatwā were issued from the time of the Prophet to the present day and continue to be issued is an affront to the assertion that the doors of ijtihād were ever closed. To infer that the doors of ijtihād were closed even for a particular period is to infer that:
(i) No fatwā was sought or issued in that period,

(ii) Fatwā in this period were those which were based on verses that were *mansūṣ* 'alayhi.

(iii) If *futuḥ* were issued, persons who followed *taqlīd* and did not qualify as *mujtahidūn* issued them.

The *mujtahidūn* were present in every era of Islamic history and their collections of *futūḥ* are testimony to their *ijtihād*.

2.2 Fatwā based on a verse that is *mansūṣ* ‘alayhi, a fatwā on inheritance

In our preceding example we derived a fatwā which was based on a verse of the Qur’ān. The Qur’ān is the Divine and immutable word of Allah. Although the source of the law is from the conceptually fixed sphere the language of the textual injunction allows it to be considered as a verse which is *mujtahid fīhi*. Therefore the text together with others from the *ahādīth* allows for a broad spectrum of applicability which manifests the dynamism within the primary fixed source of Shari’ah.

In other cases however, fatwā is based on an injunction from a Qur’ānic verse which is *mansūṣ* ‘alayhi. The language of the text is an explicit legal rule. The law is derived directly and sometimes literally from the text (*nusūṣ*), i.e. from
either the verses that have specific legal prescriptions or narratives of the Prophet that do so. Here a broad band of varying applications is not possible. The behaviour, norms and conduct of society are Divinely regulated. Society is expected to adapt and change its norms to the Divine standard in order to enact Divine Will. This system will be successful if it:

(a) heralds great benefit to society
(b) places social responsibility above personal ones
(c) is in harmony with the nature of man and fulfils his basic needs.

Let us consider as an example a fatwā required on the distribution of the estate of a deceased person who leaves behind his mother, father, wife a son and two daughters as his heirs. Verse 11, Surah 4 reads:

"Allah (thus) directs you as regards the (inheritance of) your children. To the male a portion equal to that of two females. If only daughters, two or more, their share is two-thirds of the inheritance, if only one, her share is a half. For parents a sixth share of the inheritance to each, if the deceased left children. If the deceased left no children and the parents are the only heirs, the mother has a third. If the deceased left brothers (or sisters) the mother has a sixth. (The distribution) in all cases is after the payment of legacies and debts. You know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah: and Allah is All-knowing, All-wise."

Let us assume the total net value of the estate after the payment of legacies and debts was 960 dinārs. The shares of the heirs would be as follows:
<table>
<thead>
<tr>
<th>Heir</th>
<th>Proportion</th>
<th>Value in Dirhams</th>
<th>Total net value of estate = 960 dirhams</th>
</tr>
</thead>
<tbody>
<tr>
<td>Father = 1/6</td>
<td>16</td>
<td>160</td>
<td><em>Qur’anic</em> heir...for each parent is 1/6. Sūrah 4 v. 11</td>
</tr>
<tr>
<td>Mother = 1/6</td>
<td>16</td>
<td>160</td>
<td><em>Qur’anic</em> heir...for each parent is 1/6. Sūrah 4 v. 11</td>
</tr>
<tr>
<td>Wife = 1/8</td>
<td>12</td>
<td>120</td>
<td><em>Qur’anic</em> heir......and if you have children for them (wives) is 1/8. Sūrah 4 v. 12</td>
</tr>
<tr>
<td>Son</td>
<td>26</td>
<td>260</td>
<td>The son and the daughters are residuary and share the remainder of the estate in the proportion 2:1. Sūrah 4 v. 11</td>
</tr>
<tr>
<td>Daughter =</td>
<td>13</td>
<td>130</td>
<td>The son and the daughters are residuary and share the remainder of the estate in the proportion 2:1. Sūrah 4 v. 11</td>
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<tr>
<td>Residuary with son</td>
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<tr>
<td>Daughter =</td>
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<td>130</td>
<td>The son and the daughters are residuary and share the remainder of the estate in the proportion 2:1. Sūrah 4 v. 11</td>
</tr>
<tr>
<td>Residuary with son</td>
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</tbody>
</table>

The *fatwā* in this case is directly the textual law of the *Qur’ān*. The concept of the residuary is accessed from the direct text of the *hadith*. Later the *ijmā’* consensus of the companions raised the level of the proof by the narratives from one of speculation to absoluteness. The aforementioned verse demonstrates the
charismatic nature of divine authority. A believer is always perplexed with the
distribution of his wealth after his demise. How does one remain equitable
between one’s parents and children? Allah the supreme legislator addresses this
problem, presents the proportionate allocations and reassures the reader of the
divine emanation of the injunction. Further reassurance is achieved by the
mentioning of the divine attributes of “All-knowing and All-wise”.

The Shari’ah which is God given is also a universal law. An adherent of Shari’ah
is therefore in harmony with his own nature, in tune with the rest of the universe
and has the ideal balance between physical laws which are operative in his
biological life and moral laws which govern his voluntary actions. 27 The Islâmic
society is thus described in the Qur’an as wasâtâ 28 or justly balanced.

Human nature demands that one should be able to distribute the fruits of one’s
labour. The Shari’ah has a built in mechanism to accommodate this. It is the
wasîya or legacy which is restricted to a maximum of 1/3 and allocated to non
heirs and distributed before the distribution to the heirs takes place. Man has
volition with regard to the distribution of a certain part of his estate. The danger
exists whereby if total freedom were granted a person would have the liberty to
control the distribution of his entire wealth after his demise, sometimes to the
detriment of his next of kin. Let us assume that a very wealthy person becomes
involved in an animal anti-cruelty league prior to his demise and gains fulfilment
by serving its noble cause. He draws up his will and bequeaths all his wealth to a
home for stray cats in a very affluent suburb. This is unjust and usurps the rights
of his biological heirs and prevents the dissolution of wealth in society. Thus
Shari’ah is in harmony with human nature and “harnesses” it in order to fulfil
Divine Will. Humankind has a natural propensity to gravitate towards what is in
accordance with its needs and nature. These injunctions are readily adhered to
without coercion and Muslims voluntarily apply them in their lives in the absence of an Islamic state or any coercive authority and in environments hostile to their enhancement.

The Qur'an is essentially a book of universal guidance. Islamic law, is not purely legal, in the strict sense of the term, it embraces all the spheres of life - moral, ethical, political, devotional and economic. Since Islam demands total submission it must provide laws and guidance to cover all facets of human activity. The moderation induced to human behaviour by fixed moral and ideological standards is in keeping with both human nature and fulfils human needs. The immutable or fixed laws are as applicable today as they were 1400 years ago since human nature has remained the same. If we consider human behaviour to be a direct function of human needs we find that human needs have remained constant. Thus the Qur'an is replete with examples of the peoples of the past, presenting parables of Pharaoh the people of Sodom, and the children of Israel. What has changed in society through technological advancements is the expression of these needs. Maslov's theory of the hierarchy of needs remains as applicable today as it was when he first conceived it. Therefore an explicit law emanating from Allah, the Lawgiver, and creator of the universe tempers human behaviour to enact divine will also fulfils human needs. Since human nature and needs are constant the law does not change. Man made laws, unable to satisfy human needs are always subject to amendment and are modified from time to time, according to changes in man's social life. The modern systems of law, as framed by different societies, are for a particular social set up and being transitory in nature do not always completely satisfy human needs. In Shari'ah the determination of the natural needs of society is the prerogative of Allah the supreme Law-Giver whilst in a Western legal system the supreme court has a right to determine these needs and establish when they have been violated. In terms of the Bill of Rights and the
fourteenth Amendment of the United States the courts have the power to safeguard "natural" rights and to declare invalid any law that unreasonably interferes with life, liberty, property, freedom of speech or religion. 32

We have established:

(i) That Shari’ah laws derived from Qur’ān and Sunnah although immutable have an inherent flexibility and a wide scope of application. This was clearly demonstrated by the fatwā on a permissible dress code for Muslim males. The fatwā interfaces between the text of the Qur’ān and hadith, and the juristic principle al-’aṣl fi kulli shay’ al-‘ibāhah, the fixed and flexible conceptual spheres of the law. 33

(ii) Although flexibility is induced when a juristic principle is used to validate a particular fatwā, the flexibility is not unrestricted for the principle itself is derived from the Qur’ān or hadith.

(iii) Sometimes fatwā does not interface between the flexible and fixed spheres of the law but is only operates in the fixed immutable sphere and are based on textual laws which do not change with time, but compel society to change in order to enact the will of Allah. This is achieved by the laws being coherent with human nature and needs.

(iv) The adherence to the laws of Shari’ah is not only induced by reasonable and intellectual validity but also by the emotional attachment of a Muslim to his creator expressed as fear, hope awe and love.

This study now proceeds to examine the other sources of Shari’ah and how they are applied in fatwā. Shari’ah has a third source which is considered immutable since any law established by it is regarded as absolute. It is consensus or ijma‘.
3. *Ijmâ‘*- the collective concurrence of *fatwâ*

*Ijmâ‘* is the verbal noun of the Arabic verb *ajma‘* which means to agree (upon something.) Literally it has two meanings

(i) to decide on something and be resolute on the decision,
(ii) to have total consensus on an issue, i.e. unanimity in a decision.

The first meaning implies an individual decision whilst the second necessitates the participation of a group.

In the terminology of *Islamic Shari‘ah* law, it is defined as the unanimous agreement of the *mujtahidîn* or *muftiyîn* of the Muslim community of any period following the demise of the Prophet Muhammad (peace be upon him) on a particular *Shari‘ah* law. Certain scholars have extended this definition to include judicial, intellectual, and customary as well as linguistic matters. The reference to *mujtahidîn* precludes the agreement of laymen from the purview of *ijmâ‘*. Thus *ijmâ‘* is the acquiescence of the applied methodology of adducing the ruling, the converging of the *fatwâ* of different scholars. *Ijmâ‘* is of a few types and has preconditions expressed in absolute terms. It is a mechanism that elevates a decision to the status of infallibility and absolutism. It is unique to the *Islamic* “legal system”. All other legal systems are formulated or evolved by a particular society in a particular time frame. Since the source methodology of *Shari‘ah* is fixed and all its flexible sources interface with its normative base, i.e. *Qur‘ân* and *Sunnah* it is possible for all the participating *muftiyîn* to concur on an issue which becomes binding on the community and on the generations that follow. This is confined to an *ijmâ‘* founded on explicit texts of the *Qur‘ân* and the *Sunnah*. 
3.1 The effect of *ijmāʿ* on *fatwā*

*Ijmāʿ* plays an essential role in *Sharī'ah*. It ensures the correct interpretation of the *Qur'ān* 37, the establishment and application of the *Sunnah*, ratifies analogical reasoning in deducing a law and legitimises *ijtihād*. 38 The question of whether a *fatwā* is correct, i.e. the ruling has been correctly adduced from the sources of *Sharī'ah*, is always open to a degree of uncertainty. *Ijmāʿ* puts an end to this doubt for once it is established, it becomes an authority in its own right, decisive and absolute proof. It represents the natural acceptance of the *fatwā* by the Islāmic community. The consensus of the jurists is passed on to the general community and the Islāmic community is endowed with the divine trust of having the capacity and the competence of accepting only what is correct 39, i.e. the Divine Will. The Prophet (peace be upon him) has reported to have said in an *ḥadīth*

"My community shall never have consensus on that which leads (them) astray". 40

Therefore the *ijmāʿ* of the Islāmic Community becomes binding and the following of a path other than that of the believers a grievous error. The verse most frequently quoted as a proof for *ijmāʿ* is Sūrah al-Nisâ verse 115:

"And anyone who splits off from the Messenger after the guidance has become clear to him and follows a path other than that of the believers, *(ghaira sabīl al-mu'minīna)* we shall leave him in the path he has chosen, and land him in hell. What an evil refuge". 41

Preliminaries for arriving at an *ijmāʿ* are normally consultation (*Shūrā*) and juristic deduction (*ijtihād*). Instances can be cited where the Companions by their *ijmāʿ* upheld the ruling of a solitary *ḥadīth* elevating it from its speculative origin to a
The grandmother is entitled to a share in inheritance. This is a qāṭī‘ ruling of ijmā‘ which is based on a solitary hadīth narrated by al-Mughirah b. Shubah to the effect that the Prophet assigned to the grandmother the portion of one-sixth. No amount of ijmā‘ can abrogate an explicit text (naṣṣ) of Qur‘ān or Sunnah. Ijmā‘ therefore increases the scope of the normative base of Shari‘ah for rulings, which were originally speculative in nature through consensus, crystallise into laws of an absolute and immutable nature.

4. Fatwâ and the usage of analogy (qiyaṣs)

4.1 The role of qiyaṣs

Qiyaṣs or analogical deduction is the methodology by which a Shari‘ah ruling is transferred from its original application to a prevalent set of circumstances because of a common effective cause, illah (ratio legis), between the two. The commonality of the illah allows for the extension of the textual rule of the original case to be extended to comparable situations. As the Shari‘ah became exposed to novel situations, the need to bring out the implication of the Qur‘ān and Sunnah in these situations began to increase to such a degree that it was deemed necessary to devise a systematic methodology by which this is achieved. Thus a coherent body of rules govern every constitutive element of qiyaṣs evolved. Qiyaṣs can only be applied if the first three sources of Shari‘ah, i.e. the Qur‘ān, Sunnah and ijmā‘ have been exhausted as a means of adducing the law. It has to be based on them and therefore cannot contradict any of them. There are established preconditions regarding,
(i) The original case (‘asl).

(ii) The applied law of the original case (hukm).

(iii) The prevalent or parallel case (far'); its compatibility with the original.

(iv) The effective cause (illah), or ratio legis, rules governing its identification and transfer.

In the terminological usage of the fiqh, ‘qiyaṣ’ denotes a general principle. One therefore hears the expressions that such and such a ruling are contrary to ‘qiyaṣ’ without mentioning the analogy itself. An example of the application of qiyaṣ would be a fatwa, which prohibits the consumption, sale, and transportation of narcotic drugs. The text of the verse prohibiting the consumption of wine reads:

“Oh those who believe, indeed wine gambling idols and casting lots are all abominable works of satan, so desist from it, in order that you may be successful.”

The scholars have identified the illah (ratio legis) to be that of intoxication. The original or ‘asl as wine drinking. The far’, or parallel case is the usage of narcotic drugs and the ruling or hukm as prohibition. Since the effective cause is common to wine drinking as well as the use of narcotic drugs the verdict of prohibition is transferred from the original to the analogous case. Through qiyaṣ the Shari’ah has at its disposal an effective tool which enables it to extend its rules and cope with social exigencies. However, acute differences exist between Shari’ah and Western legal systems with regard to the application of the doctrine of analogy.
4.2 *Qiyâs*: analogy subservient to textual law

An essential difference exists between *qiyâs* and other forms of analogy. In western common law a judge uses an analogy freely and unrestricted in order to create a new law. He analyses the original case, looks for similarities and plays down the dissimilarities so that he decides on the case as if it were an extension of previous ones. It must be emphasised that the verdict in the original case is one of another judge and is a result of his interpretation of a statute. Moreover it could be a judgement dependent on extra-legal considerations. Judicial law making by its very nature leads to accretion of case law. *Qiyâs* is primarily concerned with the extension of the rationale of a particular text (*naṣṣ*), to cases which do not fall within the terms of its language. It precludes free interpretation.48 The juristic exertion is mainly in the identification of the common effective cause (*ratio legis*) which is not indicated in the language of the text. This is the sphere which involves human judgement.49 Once the identification is completed analogy necessitates that the given textual rule be applied without interference or change. *Qiyâs* is thus a rationalist doctrine in which personal opinion and speculation are subservient to the terms of divine revelation itself being supra rational. *Qiyâs* reveals the law that already exists but does not originate it. The law already exists in the text relating to the original case and *qiyâs* merely indicates that the divine command is so and so. Thus the law is originated by Allah and discovered by *qiyâs*.50 Many scholars have claimed that the strict, systematic methodology of *qiyâs* was evolved to counter the considerable currency gained by the usage of personal opinion (*râ'y*), in the formative period.51 However the controversy that raged between *qiyâs* and *râ'y* was one of misplaced terminology only. The following dialogue between Abû Ḥanifa and Imam Bâqîr illustrates how analogy is constricted by the overriding texts of either *Qur'ân* or *ḥadîth*.
Imám Abú Ḥanîfa was charged of innovation and once Imám Bâqir said to him that he (Abú Ḥanîfa) innovated and changed the religion and ḥâdîth with qiyâs. Abû Ḥanîfa replied that it is not the case and he respected him and his family (ahl al-bait) and requested Bâqir to sit down, Bâqir obeyed with respect. Abû Ḥanîfa asked Bâqir who was weaker, men or women? Bâqir replied that women were weaker. Abû Ḥanîfa questioned What is the proportionate share of a woman in inheritance? Bâqir replied, “A man gets two shares and a woman gets one”. Abû Ḥanîfa said, “Is this from the family of the Prophet or from the religion of Islâm?” He furthermore said: “If it is a matter of opinion, women being weak should be given two shares which I have not resorted to for the sake of religious principles.” He asked, “Is praying more superior or fasting?” Bâqir replied “praying”. Abû Ḥanîfa said that it was the saying of Bâqir’s family i.e. ḥâdîth of the Prophet and that if he (Abû Ḥanîfa) innovated by changing the law of the ḥâdîth, he would have viewed that a women in menses had to pay qûdâ or execution, and no execution for fasting.

Abû Ḥanîfa now requested a reply to a third question. He asked Imâm Bâqir “Is urine more dirty or semen?” Bâqir replied “urine.” Imâm Abû Ḥanîfa said that if he had innovated and changed the tradition from the Prophet by qiyâs, he would have given the legal opinion that after urinating it was necessary that a bath should be taken and ablution would have been ordered to have been sufficient after the discharge of semen. By Allah, he
said how could he (Abû Ḥanîfa) dare to innovate the religion of the Prophet through *qiyās*. On this ʿImâm Bâqîr embraced Abû Ḥanîfa and kissed his face. 52

In all three cases mentioned in the above conversation Abû Ḥanîfa demonstrates that he does not apply speculative reasoning in the presence of textual evidence of ḥadîth.

- According to Shari'ah law a female child will inherit half the share of a male child although it could be argued that the female being of the “weaker sex” should inherit more.
- A woman who is menstruating is not compelled to recompense for her *salât* (prayer) she has missed, but has to do so for the fast that she misses.
- It is not obligatory to take a bath after urinating, but it is necessary to do so if semen is discharged.

Schacht and Rahman opine that the term *qiyās* shows foreign influence, but provide no tangible evidence to prove that this systematised analogical methodology was influenced by Jewish, Roman or Greek rhetoric. 53 Its formal technical definition is not found in the extant early literature. Even Al-Shafî‘î does not give it a technical definition and refers to it as *ijîḥâd*. 54 However conformity with the methodology of *qiyās* can be shown by the actions of the Prophet and the companions when adducing certain laws.

- On the occasion when a woman called Khath Amiyyah approached the Prophet and asked him whether it would benefit her deceased father if she could perform pilgrimage on behalf of him, since he died without fulfilling this tenet of faith. The Prophet replied, “Supposing your father had a debt to pay and you paid it on his behalf, would this benefit him? To this she replied in the
affirmative, The Prophet said “The debt owed to God merits even greater consideration.”

- ‘Umar (r. a) used *qiyās* when he argued for the appointment of Abu Bakr as the first successor to the prophet. He asked the companions “Will you not be satisfied, as regards worldly affairs, with the man with whom the Prophet was satisfied as regards religious affairs?”

- When the companions held council to decide on the punishment for the consumption of wine, ‘Ali b. Abi Tālib suggested that by analogy the penalty for false accusation should be applied to the wine drinker, “When a person gets drunk he raves and when he raves, he accuses falsely”. The usage of *qiyās* by the prophet and the companions establishes that *qiyās* owes its origin to the Muslim legal thought.

In the post Shafi‘ī period however, when *qiyās* developed into a technical mechanism similarities between *qiyās* and certain principles of Roman Law can be cited. Roman-Dutch law has a considerable role in South African law. Cases can be cited wherein the judge by his pronouncements effectively becomes the source of new law or evolves a new law. This is so when no legal rule covers a particular situation. Chief Justice Straford aptly summed this position in the case of *Jajhbay v Cassim* in 1939:

> “Now the Roman-Dutch law, which we must apply, is a living system capable of growth and development to allow adaptation to the increasing complexities and activities of modern civilised life. The instruments of that development are our own courts of law. In saying that of course I do not mean that it is permissible for a court of law to alter the law; its function is to elucidate, expound and apply the law. But it would be idle to deny that in the process
of the exercise of those functions rules of law are slowly and beneficially evolved. That evolution to be proper must come from, and be in harmony with, sound first principles which are binding upon us.”  

The extension of the law by qiyās cannot in any way be tantamount to establishing a new law. Although qiyās offers a scope for creativity and enrichment, it ensures conformity with the letter and the spirit of the Qur'ān and Sunnah. Therefore it cannot strictly be regarded as an independent source of law. Some scholars regard is as a derivative or a secondary source.  

5. ‘Urf a source that broadens the scope of applicability of Shari'ah law

‘Urf literally means that which is known, familiar or customary. It is derived from the verb ‘arafa which means to know, recognise or take cognisance of. The majority of scholars use the terms ‘urf and ‘adah interchangeably. ‘Adah denotes a habit or a recurring practice. It could be used for either individuals or a community, whilst ‘urf cannot be used to describe the habits of an individual. ‘Urf is the collective practice of the majority of people of a particular community. It differs from ijmā' in that the latter necessitates total consensus whilst the former does not. In the Qur'ān it is used as ‘urf or ma'ruf which means that which has been generally or conventionally recognised as adherence to Allah’s injunctions. This therefore immediately excludes all customary practices which are contrary to any Shari'ah law and those in which there is no benefit to the community. In Shari'ah customs do not distil into law. ‘Urf or customs which do not contravene
the *Shari'ah* principles are valid, authoritative and upheld by the courts. They are only applicable in a conceptually flexible sphere of *Shari'ah*, e.g. 

(a) In laws derived directly from the *Qur'ān* wherein this flexibility is specified by the text. Here the words 'urf or *ma'rif* are used. Sūrah 2 verse 233 The responsibility of the maintenance of children is that of the father. The *Qur’ān* specifies it with *bi al-*ma*’ rif*, i.e. what is conventionally acceptable. The verse continues

"Allah shall burden no soul except with that which is within its capacity." 62

The exact amount of maintenance has to be determined by the norms of the particular community in the particular era in which it exists, with the proviso that it does not overburden the father. This criteria or extent has also to be determined by 'urf. Therefore a mujīf specifying a suitable amount for the maintenance of a child in South African society is prone to concur with a judge of the law court on this matter. This is an area of overlapping wherein the *Shari'ah* ruling and that of the court do concur.

(b) In verses which are mujahidīji. The case is stated earlier wherein various customary garb of divergent cultures is considered permissible for praying in, as long as it does not transgress *Shari'ah* principals. 63

(c) In cases which are pure ijtihādī, i.e. where the ruling cannot be sourced from the primary, secondary and subsidiary sources, e.g. *ta'zīr* - a judge will decide according to 'urf what would be the penalty for felonies which are not covered by *Shari'ah* laws. 64
Sharʿah therefore straddles the awesome cultural diversity of its adherents through the validity of 'urf in its flexible sphere. No conflict or contradiction can exist between 'urf and naṣṣ which is the definite principle of law. If a custom is in conflict with naṣṣ then the custom has to be altered to such a degree that it conforms with the text. This is possible because all Qurʾānic injunctions that are derived from explicit texts (manṣūs 'alayhi) are in harmony with the nature of man and do not oppose his inner nature. This facilitates the tempering of his cultural behaviour to the dictates of Sharʿah. Thus the Sharʿah either accommodates customs into itself through 'urf or changes them to concur with it. Fazlur Rahman asserts like the Orientalists that cultural borrowing was an essential trait of Islām and fails to differentiate between culture and that which is assimilated into Islāmic law, i.e. 'urf:

"There was actually nothing fundamentally disturbing about the modernist’s borrowing of Western cultural patterns and modes, for this is what every growing civilisation does and this is indeed, what Islam also did once it expanded beyond its original Arabian nursery." 65

Furthermore his regard of Islām as a growing civilisation betrays an Orientalists or outsiders view of it. 66 Islām is not a cultural artifice but a din, a tradition through which the truth of Allah may be seen and by which the Muslim may attempt to live up to his calling as the slave of Allah. Elements of material civilisation as well as political institutions and administrative techniques which were useful were welcomed but these did not enhance Islām for its power does not spring from technological accomplishments but rather in its persistently reforming human life in the light of God’s commands.
6. *Istiḥsān* and *istiṣlāḥ*

6.1 *Istiḥsān*

These sources of *Shari‘ah* namely *istiḥsān*, *istiṣlāḥ* or *maṣlaḥah mursalah* are applicable solely in the conceptually adaptable sphere of *Shari‘ah*. They are a further manifestation of the living nature of *Shari‘ah*, of how its laws continually evolve and adapt to any social and cultural exigencies. The word *istiḥsān* is derived from the verb *ḥasuna*, which means to be good. When presented in the tenth form the verb *istahsana* will mean to seek good. Its validity as a source of *Shari‘ah* is accepted by the Ḥanafī, Mālikī and Hanbalī jurists. The Ḥanafī jurist al-Karkhī has defined *istiḥsān* as a principle, which authorises departure from an established precedent in favour of a different ruling for a reason stronger than that, which is obtained in the precedent. According to Ibn Taymiyyah it is the abandonment of one legal norm for another which is considered better on the basis of *Qur‘ān*, *Sunnah* or *ijmā‘*. Here again the apparent flexibility of the law is counterbalanced by it being sanctioned by *Qur‘ān*, *Sunnah* and *ijmā‘*, which is a further manifestation of the interfacing between the conceptually immutable sphere of the law with the flexible ones. Examples of *istiḥsān* can cited from most sources of *Shari‘ah*. There are basically seven types:

(a) *Istiḥsān* based on the *Qur‘ān*, e.g. The proportionate shares of the heirs of the deceased are specified in the *Qur‘ān* Surah Nisā verse 11. Therefore a general principle of *Shari‘ah* invalidates a bequest. However, the *Qur‘ān* permits bequest as an exception to the general rule, i.e. through an exceptional *istiḥsān*. A case can occur wherein certain people are left destitute if they cannot fulfil certain preconditions of being an heir. They could be catered for
in the bequest of the deceased, for example if a man has many children and predeceases any one of them, his grandchildren from his deceased child are prevented from inheriting since they do not fall into any categories of heirs or residuary. The exception is favoured instead of the general ruling because of the greater good that can be achieved.

(b) **Istihšān based on Sunnah**, e.g. one eating or drinking inadvertently does not invalidate the fast of a person. According to the general principle of Shari‘ah eating or drinking invalidates the fast. However an exceptional istihšān has been established through the following hadith:

> “Whosoever eats or drinks unmindfully whilst fasting should complete his fast, for indeed it is Allah who feeds him and makes him drink.”

(c) **Istihšān** based on *ijmā‘*, e.g. a contract to manufacture goods at a price fixed at the time of placing the order. Istihšān validates this transaction although the merchandise does not exist at the time of the conclusion of the transaction.

(d) **Istihšān** based on *‘urf*, e.g. the entry into public baths is at a fixed price without a restriction on the amount of time spent at the baths or the amount of water consumed. According to strict Shari‘ah analogy the object of sale or hire has to be accurately defined. A contract in which these parameters are ill defined is invalidated but since this form of contract is an established custom and is not in conflict with the overriding Shari‘ah principle of both parties being mutually pleased with the conditions of a transaction, it is deemed acceptable.

(e) **Istihšān** based on necessity (*qarūrah*), e.g. the method used for the purification of water in wells which has become polluted because of an animal falling and dying in it. The water is considered pure and suitable for ablution by the
removal of a certain quantity of water from the well. The istihsan is validated by necessity and prevention of hardship to the people. 

(f) Istihsan based on alternative analogy qiyas khasfi (hidden analogy), e.g. it is an established Shari'ah principle that the object of any contract must be clearly identified in the detail. This is especially so for a contract of sale. Waqf is a charitable endowment, which like sale involves a transfer of property. If we draw a direct analogy (i.e. qiyas jali) between a sale and waqf then the attached rights can only be included in the waqf if they are explicitly identified: the waqf of agricultural land without its ancillary rights would negate the purpose of the waqf i.e. the use of the land for charitable purposes. Thus we change to a qiyas khasfi whereby we draw an analogy between waqf and a contract of lease (ijarah), rather than that of sale. Waqf can be validly concluded, since both of these involve a transfer of benefit (intifad) which is achieved through a presumption of all ancillary rights whether they are explicitly stated or not. Another example would be the fatwa of the prophet Solomon that we quoted in chapter one of this study wherein Solomon using a more subtle analogy differentiated between the loss of the corpus ('ain) of property and a loss of usage. He thus proposed a recompense based on the usage of the sheep and not on their outright confiscation.

(g) Istihsan based on maslapah, e.g. the validity of a bequest made by a person of limited capacity. If a person of limited capacity were to make a bequest, that is sound according to Shari'ah and would result in common good, it would be upheld. The general principle is that such a person of limited capacity cannot grant a gift. However the greater good that would be achieved if the bequest were upheld, validates the istihsan.
Istihšān is a source of Shari‘ah that demonstrates its dynamism. It is an important branch of ijtihād and plays a prominent role in the flexible sphere of Shari‘ah. It pervades through all the sources of Shari‘ah and induces relevance to the law. Jurists have discouraged an over-reliance on it because of its flexible nature, which might lead one to suspend or circumvent certain fundamental principles of Shari‘ah. Al-Shafi‘i has objected to istihšān on the grounds that it is personal opinion and inclination of an individual jurist, and consequently not in harmony with Shari‘ah. It is unlike qiyās in that it does not conform to a strict methodology. It neither consists of naṣṣ nor analogy thereof, is ultra vires and must be avoided. Other scholars reduce the controversy over istihšān to that of terminology only. Shaikh al-Khudari purports the view that one would find evidence of the usage of istihšān by jurists from all the schools of thought.

6.2 Istiṣlāḥ

The word ṣalāḥa literally means to be good, right and proper when the verb is used with the preposition li as ṣila it means to be appropriate or befitting. Its passive participle maṣlaḥa means affair, requirement, exigency or that which is beneficial, good promoting advantage etc. In the terminology of the fuqahā it means considerations of public interest. When it is qualified as maṣlaḥa mursalah it refers to unrestricted public interest insofar as that it cannot be authorised by text, i.e. by naṣṣ. Maṣlaḥah according to al-Ghazālī consists of considerations
which secure a benefit or prevent a harm and are simultaneously in harmony with the objectives (maqāsid) of Shari'ah, which consists of protecting the five essential values namely religion, life, intellect, lineage and property. He divides mašlāḥah into three broad categories:

(i) Mašlāḥah that is based on textual evidence.

(ii) Mašlāḥah denied by or which contradicts naṣṣ

(iii) A third type which is neither supported by, nor denied by naṣṣ.

The first category is acceptable, the second is rejected whilst the third which is the definition of mašlāḥah mursalah is further analysed. There is consensus amongst the scholars that devotional matters (‘ibādāt) and more importantly specific injunctions of the Shari'ah (muqaddarāt) do not fall within the ambit of the exercise of istisīlāḥ. This includes the muṣūs regarding the fixed penalties (ḥudūd) and penance (kaffārāt), the apportioned shares of heirs (farā’īd), the types of food considered permissible, the specified periods of ‘iddah which a widow or divorced person must observe etc. Mašāliḥ are generally divided into three types:

(i) Darūriyyāt: the essential type. This consists of the protection and promoting of the five essential values on which the existence of people depends. The mašlāḥah has to be validated by the availability of a textual authority in its favour. S. 2 v. 173:

Indeed he has but forbidden you carrion, blood, the flesh of swine and the animal on which the name of other than Allah is mentioned. Yet, whosoever is constrained, neither disobeying nor being excessive, then on him there is no sin. 82
The above mentioned things are forbidden for a Muslim, but if one is forced through dire necessity e.g. death from starvation one is allowed to eat only that amount that ensures one's survival. The original order of prohibition is suspended to uphold life.

(ii) Ḥājiyyat: to alleviate certain hardship so that the community is not unduly overburdened. In the area of ḍhādāt the concessions (rukhas) that the Shari'ah has granted to the sick and the traveller permitting them not to observe the fast, and to shorten the ṣalāt. Sūrah Al-baqara verse 185:

“And whosoever is ill or on a journey should complete the number from other days”

Unnecessary rigor in the enforcement of aḥkām is not recommended. Muslims should avail themselves of the flexibility and concessions that the Lawgiver has granted them. The prophet is quoted to have said,

“God loves to see that His concessions (rukhaṣ) are observed just as He loves to see that his strict laws (ʿazāʾīm) are obeyed.”

(iii) Taḥsīnīyyat is the maṣlaḥah that leads to improvement or attainment of that which is desirable. Personal cleanliness, moral virtues, ethics and avoiding extravagance fall under this category which enriches and promotes the law.
7. *Mašlaḥah Mursalah*

*Mašlaḥah Mursalah* (considerations of public interest) is neither supported by, nor denied by *nass* (text). This is one of the most flexible conceptual spheres of *Shari‘ah*. It differs from *qiṣṣa* (analogy) in that although both principles are applicable in the absence of *nuṣūs* and *ijmā‘*, *qiṣṣa* is an extension of a ruling that already exists whilst *mašlaḥah mursalah* has no specific basis in the established law. Preconditions for the validity of *mašlaḥah mursalah* are designed to ensure that the *mašlaḥah* does not become an instrument of arbitrary desire or individual bias in legislation:

- The *mašlaḥah* must not be in conflict with any *Shari‘ah* principle established through *nass* or *ijmā‘*. Its domain of applicability is clearly confined to the areas not covered by the primary and secondary sources. Thus *mašlaḥah* is operational through *ijtihād* and only functions in the absence of specific textual rulings. Hence the argument that *mašlaḥah* in modern times would require the equal distribution of shares between male and female children of a deceased Muslim, comes into conflict with the explicit *nass* of the *Qur‘ān*, and is invalidated. 85

- The *mašlaḥah* must be authentic and not one based on conjecture. There must be reasonable certainty that the benefits of enacting a *ḥukm* in pursuance of *mašlaḥah* far outweigh the harms that might ensue from it. 86

- The *mašlaḥah* must be general in that it must secure benefit or prevent harm to the Muslim *ummah* as a whole, it must contemplate a benefit yielded to the largest possible number of people and not secure the interest of individuals or a
particular sub-strata of society, regardless of their socio-economic or political status. 87

The first precondition of *maslahah mursalah* is that it must not be in conflict with any *Shari'ah* principal established through *nass* or *ijma*. The area of the law for which texts are found and the area where extension is possible through consensus and analogy are thoroughly developed by the jurists. This links the derived law directly to the literal content of the texts. The jurists firmly believe that nothing has been left out in the texts, and a rule can be discovered for every situation faced by humankind. The verse of the *Qur'än*

"We have neglected (farrafta) nothing (of our decrees) in the book" 88

is cited in support of this view. The only way that the laws of the text can be extended to through all areas of human activity is through the principles of *Islamic* law. These are abundant in the *Qur'än* and the *Sunnah* of the prophet. Al-Ghazâlî, 89 Al-Juwayni, the Imam al-Haramayn and the Hanafi jurist al-Dabusi are well known for having laid down the method of identification of the principles of law in the *Qur'än* and *Sunnah*. These principles point to the purpose of the law. They have further presented a detailed methodology to be used by the jurist for deriving the law from these general principles. This identification and implication of principles developed into the science of *qawâ'id*. This reasoning from principles is a wider form of analogy. These methods would be familiar to a judge in a Western legal system who refers to the propositions of his legal system, to principles of policy etc. This provides *Shari'ah* with a most powerful mechanism for evolution and growth of the law. The *Shari'ah* is only fixed at its central core and not in its extensions.
7.1 Fatwâ, a vehicle for the dynamism or a source of *Sharî‘ah* law.

When a *mufti* attempts to adduce a *Sharî‘ah* ruling on a particular issue he first refers to the *Qur‘ān*, the *Sunnah* and *ijmâ‘*. In the absence of any ruling in these sources, he must attempt *qiyyâs* by identifying a common cause (*illah*), between a ruling of the text and the issue for which a solution is wanting. However, if the solution arrived at through *qiyyâs* leads to hardship or unfair results, he may depart from it in favour of an alternate analogy in which the *illah*, although less obvious, is conducive to obtaining a preferable solution. The alternate analogy is a preferable *qiyyâs*, or *istiḥsân*. In the event, however, that no analogy can be applied, the jurist may resort to *maṣlaḥah mursalah* and formulate a ruling which, in his opinion serves a useful purpose or prevents a harm that may otherwise ensue. The *Sharî‘ah* is thus a "legal system" endowed with an immutable normative base and many mechanisms that induce flexibility as they interact with this base. The fixed laws cover a certain proportion of human activity whilst the flexible part changes and grows in order to remain a means of governance of the Islamic community. If we conceive the law to operate in conceptual spheres, then we would have at its centre a huge fixed sphere with many smaller flexible spheres interacting with it. The sources of the fixed sphere would be *Qur‘ān*, *Sunnah* and *ijmâ‘* of the Companions. Two basic types of mechanisms induce the flexibility:

(i) When a law is adduced from one of the sources of the fixed sphere and is a result of the interaction of either *qiyyâs*, *‘urf* or *istiḥsân* with the fixed sphere, it induces such an extension to the law that makes it culturally and temporally unconstrained. An example of a law as a result of the interaction between the fixed sphere, a *Qur‘ānic* injunction and the variable sphere *‘urf*, is the one in
which we derived a dress code for prayer. See (chapter three 1.3) The broad scope of applicability of Qur'anic injunctions, of this study.

(ii) The extensions or adaptations that are a result of the interaction between the fixed sphere and the sphere of maṣlaḥah mursalah, taʾzīr, siyāsiya shariʿah, and fatwā. This interaction is one between the flexible sphere and the juristic principles derived from the sources of the fixed sphere. This has a greater range of flexibility and adaptability of the law and is totally reliant on āijhād. Here fatwā acts as a source of the law.

Thus the Shariʿah as a “legal system” has a greater balance for it possess the supreme normative base at its central core. Then its laws are extended by the mechanism of qiyaṣ, (analogy), istiḥsān (utility), and ʿurf (custom). [The translations in parentheses are approximations of the true nature of these mechanisms as we have earlier extrapolated in this study.] Furthermore it has at its disposal a further set of mechanisms that adapts the law according to the juristic principles extracted from the normative base. These mechanisms are maṣlaḥah mursalah, taʾzīr, siyāsiya shariʿah, and fatwā. These characteristics differ from the adducement of a law in a contemporary Western legal system, primarily through the ability of the normative base of Qurʿān, Sunnah and āijmāʿ to diffuse into all the flexible spheres. Thus the transcendental authority of wahy is transmitted to every social contingency through fatwā, and all the adduced laws become the manifestation of the Divine Will.
Figure One

Figure One diagrammatically represents the conceptual spheres of the law. Fatwâ acts as a facilitator which ascertains the Shari'ah law through an interaction between the fixed sphere at the centre and the flexible spheres. Note: The transliteration font has been omitted in the diagram due to technical difficulties.

8. Fatwâ and the re-interpretationist lobby

The history of Islâm in modern times is the history of the tension between the resurgence of traditional Islâm and the impact of the West on Muslim society. From the thirteenth to the nineteenth centuries the formative influences of the West on Muslim society in the fields of education, culture and rapid
industrialisation was devastating. This gave rise to certain intellectuals who being overwhelmed by Western philosophy advocate a re-evaluation of the methodology and hermeneutics of classical Muslim scholars in order that Islam changes its “ancient world-view” and become a spiritual-moral force for the modern mind. The challenge is not only directed towards the social institutions of Islam such as marriage, divorce, the rights of women etc., but also calls for a change in the moral-ethical code of Islam which touches the foundational precepts of divine justice. Orientalists posited Shari'ah as a system of inert archaic laws. Through a proliferation of their works and their usage as standard texts on Islamic law at various universities and colleges a distortion of Islamic principles was successfully projected. Thus emerged an apologetic, overwhelmed, and submissive scholar termed by his Western mentors as ‘modernist’. Muslim “modernist” scholars have carried the cause of their Western masters further. The term “modernist” chosen by these scholars to describe their philosophy itself is an indictment on all other Islamic scholars. It implies a progressivity, dynamism and an ability to adapt. By implication those that are not “modernists” are orthodox, ancient “fundamentalists” and are bereft of a capacity for positivism and progress. Any work on fatwā is thus a refutation of this standpoint since fatāwa are physical evidence of the dynamism and continuous applicability of the law. The tyrannical usage of terminology is a ploy used both by Westerners and Muslim “modernists”. Further confusion has been sowed by the attempt of certain scholars to create a haze around the term. In many works the term is indiscriminately used to describe all resurgent Islamic movements. The movement of Abdul Wahab, Maududi’s Jami‘at al-Islāmi, and even the Muslim Brotherhood of Hasan al-Banna have all been branded as modernist movements from time to time. The terms pre-modernist, early modernist, modernist and post modernist abound in contemporary works. In this study we attempt to broadly categorise the modernists into the early and contemporary types. However of particular relevance to this study is the
modernist' scholar whom we shall define as a Muslim scholar who is a protagonist of reinterpretation of the Qur'an. Fatwā in its role as the facilitator of the application of the source methodology of Shari'ah, has rendered Shari'ah into a formidable dual "legal system" with both immutable and flexible parts all interacting with its supreme normative base. The fact that fatwā exists and plays a pivotal role in the Islamic community as the vehicle of accessibility and applicability of Shari'ah enables it to cope with all social contingencies and neutralises any suggestion of the need for reinterpretation of the textual law.

8.1 Early and contemporary modernists

8.1.1 Early modernists
The earlier modernists such as Muḥammad ‘Abduh, Jamāludīn Afghānī in Egypt and Sir Sayed Ahmed Khan in India were all similar to the Orientalist in that they were protagonists of a separation between religion, science and politics. They championed rational theology and wanted to reintroduce "reasoning" into "orthodox" Islām. Thus the terms "modern Islām" and "intellectual modernism" were born. Khan differed from Afghānī and ‘Abduh in that his attempted "reformist" agenda displayed a political orientation with a great affinity to the West. He concentrated his efforts in producing through education a generation of Muslims that would not present a political threat to the British. His decision to don Western attire, and to accept a knighthood from Queen Victoria earned him the wrath of the anticolonialists and the 'ulama who dismissed his loyalty and allegiance to the British as political and moral capitulation. "The Orientalists ascribed intellectual modernism only to those who had either challenged Islām, belittled its traditions, glorified Western thought and philosophy or its way of life.
and had condemned the 'ulama as orthodox fanatics or reactionaries”, writes Nadvi 97. He further analysis early Islāmic modernism and proves its connivance with Orientalism and colonialism.

The most dynamic pillar of Islāmic political configuration is ensconced in the concept of ummah (community of believers). The ummah transcends the national, tribal and ethnic boundaries between Muslims. The colonialist promoted concepts such as nationalism, culture and ethnicity and through coercion, appropriation, negotiation and persuasion initiated political economic and academic structures in colonised societies. Secularist doctrines were introduced to separate religion from politics. Orientalism became a valuable tool for the subversion of Islām. The purpose of the subversion was to disparage Islām so that it could not impede the march of colonial expansionism on Muslim lands. It gave a Westernised interpretation of Islām and distorted the real meaning of Islāmic concepts such as jihād, ummah, tawhīd, Shari'ah, fatwā, ijtihād etc. Many texts were produced and used for teaching Islām in Western universities. To be an Islāmic scholar was not to be committed to Islām but academically qualified in the theories of Orientalism and to accept them essentially as correct. 98

8.1.2 Contemporary modernist
The contemporary modernist has argued for the re-interpretation of the Qur’ān and that Islām adapts to the changing Weltanschauung 99 of man. Furthermore in order to facilitate this viewpoint of adaptation, the Orientalist notion of the aḥādīth being fabricated and the numbers of narratives increasing in order to authenticate the politically motivated changes to law, is upheld. Re-interpretation
is advocated both in the verses that are mansus 'alayhi and those that are mujtahid fihi, thereby eroding the solid rock bed base of Shari’ah and reducing it to a legal system similar to the western model depending on man-made value-systems and changing moral standpoints. Fazlur Rahman using the hermeneutical theory of the “objectivity school” contends that the Qur’an is

"God’s response through Mohammed’s mind (this latter factor has been radically underplayed by the Islamic orthodoxy) to a historic situation (a factor likewise drastically restricted by the Islamic orthodoxy in a real understanding of the Qur’an.) The Qur’an is the divine response, through the prophet’s mind to the moral-social situation of the prophet’s Arabia.”

He further denies the systematic legal activities of the Prophet, which consequently leads to the denial of the existence of the Sunnah of the Prophet, thereby rejecting the validity of whatever may have been described as the Sunnah of the Prophet.

Now, the overall picture of the prophet’s biography— if we look behind the colouring supplied by the medieval legal mass—has certainly no tendency to suggest the impression of the prophet as a pan-leggiest neatly regulating the fine details of human life from administration to those of ritual purity. The evidence, in fact, strongly suggests that the prophet was primarily a moral reformer of mankind and that apart from occasional decisions, which had the character of ad hoc cases, he seldom resorted to general legislation as a means of furthering the general Islamic cause.
Orientalists remain confounded with the Qur'ân. Stobard considered the Prophet as a possessor of some “poetic fire and fantasy.” Montgomery Watt considered the Prophet’s receiving of wâhy (divine revelation) as a fallacy: “what seems to a man to come from outside himself may actually come from his unconsciousness”, and as such the Qur’ân was “the product of creative imagination”. Some contend that borrowing from other scriptures had indeed taken place in the Qur’ân, that the hadîth are fabrications and that the authority of the Prophet was not “legal” but rather religious and moral. Schacht ignores the charismatic nature of divine revelation in that the Qur’ân itself defends the Prophet from the accusation of borrowing and establishes the legal authority of the Prophet. This is understandable since

(i) As a non-Muslim he might contest the validity of the Qur’ân being a divinely revealed script.

(ii) Being exposed mostly to Christianity as a religion they expect Islâm to display similar deficiencies and find it inconceivable that a religion could muster such governance on society.

(iii) Western scholars, even the most detached Western Islâmists, have not liberated themselves from the deep-seated prejudice they inherited from their experiences of the crusades.

However the Muslim modernist scholar cannot enjoy such laxity. In petitioning re-interpretation he denigrates and confines the revealed law to an historical and cultural time frame. He further asserts through his hermeneutical model that Divine intent can be guessed and the text adapted to a multitude of culturally diverse situations in a world of changing social communities. We have already demonstrated how the revealed law achieves this without the need to sacrifice its authenticity by changing. His fundamental methodological error is, as is the case with his Orientalist teachers, a total ignoring of the revealed Qur’ânic contentions.
of the matter. The Qurʾān explicitly vindicates the supposition that its message transcends cultural and temporal constraints.

"Blessed is He, Who sent down the criterion to his servant that it be an admonition to all creatures. ('ālāmin)"

The word 'ālāmin encompasses all creation, therefore all mankind. Thus the Qurʾān is the "sent down" or revealed criterion. It is the means by which mankind judges between right and wrong, what is lawful and what is prohibited. Whoever does not decree according to the revealed law is not considered a believer:

"Whosoever decrees not by what Allah has sent down, they are from the unbelievers."

The question would then arise as to whether the interpretation is in accordance with what is revealed or not. Here the modernist proposes a "guessing" of Divine intent. This is to subjugate the divine injunctions to human scrutiny and to change them in accordance with human perceptions of morality and justice. A fundamental tenet of Islamic belief is that the Qurʾān is the literal word of Allah. Allah is the supreme Truth, the all Wise the absolute Just. This elevates all the injunctions of the Qurʾān to a sublime status of knowledge and justice. Thus to imply a human analysis and adaptation to that which emanates from the Absolute Just and The Supreme Truth, is to deny these qualities of the supreme legislator which in itself is a vilification of a Muslim’s concept of Allah.

Fazlur Rahman proposes a process of interpretation consisting of a double movement, from the present situation to Qurʾānic times, then back to the present. The two steps are:

(i) The eliciting and systematising of the general principles, values, and long range objectives of the Qurʾān.
(ii) The analysis of the components of the present situation to assess the current situation and change the present to whatever extent necessary, to determine priorities afresh in order to implement the Qur'anic values afresh.

An exercise in systematising the values and objectives of the Qur'an will mostly yield the subjective values of the scholar. His background, experiences etc. would taint these and consensus on a globally acceptable set of general principles would never be achieved. Let us consider the prohibition of the flesh of swine, carrion and blood. Surah 5 verse 3

"Forbidden to you (for food) are: dead meat, blood, the flesh of swine, and that on which had been invoked the name of other than Allah; that which hath been killed by strangling, or by a violent blow or by a headlong fall, or by being gored to death; that which hath been partly eaten by a wild animal; ......." 116

If the Qur'an is considered as the divine response to an historical situation. The prohibition will only persist as long as the underlining objective of the prohibition is achieved. Using the aforementioned system of interpretation we consider objective of the prohibition to be the protection of mankind from the ensuing harms of consumption. The historical orientation would be that many dangerous diseases caused by the tapeworm in pork would spread and this would lead to the detriment of society. With modern day technology the problem of the worm is eradicated. 117 Many consumers of pork are fit and healthy. This would then mean that the objective of the Qur'anic injunction is achieved without the prohibition. The consumption of pork would then be deemed permissible. Similarly by extrapolation, the Shari'ah laws regarding every facet of human life would be restated according to changing ethico-moral norms of the society in which it operates. This would render it inert without the ability to temper human behaviour.
according to a Divine standard. The Shari'ah would then resemble the Western legal system. Fatwā is an affront to this disposition, since no fatwā can result in a ruling contrary to nass. The explicit textual laws of the Qur'ān and Sunnah because they emanate from revelation are part of creed. The reform of Islamic creed is totally out of the question because it is utterly unnecessary whatever an outsider, Orientalist, or insider, modernist may deem to be true.

The second step is not possible without achieving the first one. The methodology of step (b) is similar to that which is employed in qiyās the third source of Shari'ah. Here a principle or underlining reason for a particular injunction is assessed. Then through an analysis of both the Qur'ānic situation and the present one the verdict is transferred to the present if sufficient analogy exists.

The second contention of the contemporary modernist is to reduce the prophetic existential life pattern to that of a seventh century desert Arab. This is to deny the legislative authority of the prophet and to restrict relevance of his living example to the Arabian Peninsula. It is also an affront to the concept of the seal of prophethood that the Qur'ān ascribes to Muhammad (peace be upon him). This is an essential step for the protagonist of re-interpretation. No re-interpretation is possible without divorcing the Sunnah from the Qur'ān since the Prophet is the expounder of the Qur'ān. Surah 16 verse 44:

"We have revealed unto thee the remembrance [Qur'ān] (al-dhikr), that you may explain to mankind that which has been revealed for them and in order that they may give thought." 119

It is to this end that the modernist scholar denies the authenticity of the ahādith. The systematic legal activity of the Prophet, the rightly guided caliphs and the
companions of the Prophet is the subject of chapter two of this study. Intellectual modernism attempted an incorporation of Westernism into the values of Islam. It has failed because of the following factors;

(i) The "liberalism" of Westernism; lack of a clear moral and ethical code.

(ii) It originates from outside Islam and is foreign to it. The modernist relies on the Orientalist for his fundamentals.

(iii) Its protagonists are Muslims without traditional Islamic schooling. This has been candidly admitted by modernist's themselves. "This is why modernism, in so far as it existed at all, has been the work of lay Muslims with a liberal education. But the lay modernist, although his services have been undeniable in keeping a psychological and moral balance between traditionalism and Westernism (i.e. the influx of Western trends into Muslim society), could speak for himself only, and his credentials from the Islamic side being always somewhat questionable, he could not lay the foundations of a new Islamic theology." 121

The Shari'ah has thus been projected as both immutable and mutable. The scholars of immutability termed traditionalists argue that Islam transcends worldly ideology and the Shari'ah possesses sufficient dynamism to contend any social exigencies. The modernist, like his Orientalist tutors suggests a restructuring or reforming of Shari'ah in order to achieve this. Islam apart from being a civilisation and culture has a creed and laws. The creed cannot be reformed no matter how negatively any scholar, Muslim or otherwise depicts Islam or calls for its reformation. In the notion of Islam, as a Muslim understands it, there is nothing to reform. The ideal to submit to Allah can never be reformed, given the fundamental

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belief in the absolute nature of Allah and His commandments. Reform in the Muslim mindset is the ongoing attempt by the Muslim community to submit to Allah, which manifests itself as an attempt to access and implement the Shari'ah, through the process of iftā. The Shari'ah laws are thus in a constant state of "reform." "Thus to call for reform is to require of Muslims what they have always required of themselves. The demand is both gratuitous and insulting." Furthermore only the Islamic community may judge what is good for it in the light of its faith. It achieves this through the process of ijma', which is no innovative reform process but rather the method by which Islām conducted its self-examination from the beginning. Tibawi argues that this is the exclusive prerogative of the Muslim community, "The essential test of validity in our own time is still the old one: the consensus of the community and the approval of the 'ulamā in the region concerned"
Notes for chapter three

1. Qur’an, S.15 v. 9.
2. Ibid. S.4 v. 127.
3. Ibid. S.4 v. 176.
4. Ibid. S.2 v. 219.
7. For the full text of this narration see chapter one of this study.
10. ‘Ijtiḥād, can be defined as juristic effort or reasoning which is the primary vehicle of interpreting the divine law and relating it to the changing conditions of the Muslim community. A verse in which the language of the textual law allows the exercise of ‘ijtiḥād, harmonises revelation with reason. The verse is then termed mujtahid fīhī. See chapter one of this study for a full definition of ‘ijtiḥād.
11. Maṣūṣ ‘alāyhi are those verses in which the language of the text is explicit so that no scope of reasoning or juristic effort exists. The injunction has to be followed to the letter of the text.
13. “Jungi” (with the ‘g’ pronounced as in goat) a loin cloth or un-stitched garment tied at the waist, traditional to India, Malaysia, Thailand and even parts of Africa.
17. A principle of fiqh. The principles on which Islamic law is based are derived directly from the primary source and do not constantly change as in a Western legal system.


21. ‘Urf' has been loosely translated to mean customs. For a clear definition see chapter three subtitled ‘Urf as a source of Shari'ah.

22. Ta’zir - are those punishments which are prescribed by a Muslim judge or head of state for crimes which fall outside the hudud.

23 The qualifications of a person entrusted with the task of ijtihad are very clearly defined in works of fiqh. See the following topics under Chapter Bahs al-Iman (a) kayfa yasir al-‘alim mujtabidan, shurat al-mujtabid, pp105-107 Al-Badkhashani, Muhammad Anwar. 1990. Taysir usul al-Fiqh, Karachi. See also ‘Conditions of Ijtihad', Kamali, Mohammed Hashim. 1991. Principles of Islamic Jurisprudence. Cambridge: Islamic Texts Society, p.374.

24. The term usul al-fiqh translated is as either the “source methodology of Islamic Jurisprudence” or “the principles of Islamic Jurisprudence” etc. The term jurisprudence used to describe fiqh, particularises fiqh to a concept within Western legal systems. Fiqh belongs to an Islamic paradigm and, to be clearly understood has to be defined within it. Cf. Doi, A. Rahman I, Islamic Law: Western Tyranny by terms.


26. Qur’ân, S.4 v. 11.


30. Maslov’s basic assumptions concerning human nature is that the human being is fundamentally free and responsible for his or her own behaviour. The freedom manifests itself in the way one decides to fulfill one’s needs and achieve self-actualisation. For a Muslim this self-actualisation is reached by one's endeavour to implement the Divine Will in one’s life. Thus the Shari’ah law has to cover every facet of life and enable the adherent to fulfill all his needs. See Chapter entitled- Abraham Maslov: A Humanistic Theory of Personality, Hjelle L. and Ziegler D. 1976. Personality Theories Basic Assumptions, Research and Application. Tokyo: Mc Graw-Hill Inc.

31. The Western concept that law is nothing but a convenient agreement within a human collectivity and therefore relative and ever-changing implies that there can be no such ‘law’ which serves as the immutable norm of human behaviour.

32. See article entitled “The Law our safeguard” Reader’s Digest (October 1994). This is not the case in South Africa The position was well stated by Chief Justice Stratford in 1937: “Parliament’s will, as
expressed in an act of parliament cannot be questioned by a court of law, whose function is to enforce that will, not to question it.”

33. The interfacing elucidated in our example on page 167 is that of the flexible sphere of 'urf. The interplay between 'urf and nass allows this verse to produce and injunction that has relevance in any cultural or temporal manifestation.


35. Al-Shawkānī. Irshād al-Fuḥul ft Taḥqīq al-Ḥaqq min 'Ilm al-'Uṣūl, p.71, but Abu Zahrah restricts the consensus to Shari'ah matters only. See Abu Zahrah, 'Uṣūl al-Fiqh, p.197.


37. The 'modernists' being the protagonists of re-interpretation have disregarded the 'ijmā' of the community and consequently their influence remains severely restricted to certain sectors of the community. Mainly to modern Muslims themselves. Gibb observes “However, in striving towards a modernised formulation of Islamic principles and doctrine, the reformers...outstripped the great body of the learned, not to speak of the masses.” Their influence is thus limited to their own kind, among whom only a few Muslims may be numbered. The modernist Muslim further asserts that the Islām constructed by the earlier scholars is in some significant sense a departure from the pure Islām of the formative period, a pristine tradition that must be recovered. This task Gibb concludes is simply impossible and a delusion. Gibb, H. A. R. 1947. Modern trends in Islam. Chicago: The University of Chicago Press, pp.132-134.

38. Qiyās and ijtihād are both reliant on speculative proof (dalil ẓannī) and can be conceived as two flexible spheres of the law. However through consensus the speculative nature of their proof is transformed to an absolute nature.


41. Qur’ān S.4 v. 115.

42. A Qāfī ruling is one established through absolute proof.

43. Sunan Abī Dāwūd. Kitāb al- Farāḍīd, ḥadīth no. 2507; Sunan Dārāmī, Kitāb al Farāḍīd, ḥadīth no. 2710; Muwattā, Ḥānīm Mālik. Kitāb al Farāḍīd, ḥadīth no.953.


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47. Qur'ān S. 5 v. 90.


49. Ibid p. 143.


56. Ibn Hazm. *Iḥkām*, vol. 7 p. 100.


58. Law reports case Cassim vs. Jajbhai.


61. “Any form or procedures for the organisation of public life can ultimately be related to God and put to His service in the furtherance of the aims of Islāmic government can be adopted unless expressly excluded by the Shariʿah. Once so received, it is an integral part of Islām whatever its source may be. Through the process of islāmization, the Muslims are always very open to expansion and change. Thus Muslims can incorporate any experience whatever if not contrary to their ideals. Al-Turābī, Ḥasan. *The Islāmic State*, pp. 249-250.


63. See note 27 of page 7 of this study. By this example the interaction between the conceptually fixed sphere of the law is demonstrated, i.e. the Qur'ānic injunction and the flexible sphere of 'urf enabling one to adduce a dress code for prayer suitable for peoples from a broad spectrum of cultural diversity.

64. The fuqahā’ devoted their energies to identify the ḥudūd or fixed penalties established directly from the Qur’ān and sunnah. Ibn Rushd, in his book *Bidāyah al-Mujtahid*, mentions repeatedly that he is only dealing with the part of the law explicitly laid down in the texts. He separates the right of Allah from those of the community and state and refers to it as ḥaqq al-sulṭān. Al-Mawārid discusses these
laws in his work *al-aḥkām al-Sultāniyyah*. The area left for a ruler to develop was and still is wide open. The *fuqahā* have never closed the door of *ijtihād*.


67. The speciality of the verbs that appear in the tenth form is to have a meaning of seeking a particular act. The word *ghafara* means to forgive, but when it appears in the 10th form, viz. *istaghfara*, it means to seek forgiveness.


70. See the translation of this verse in chapter three of this study.

71. Bukhārī, chapter on fasting *ḥadīth* no.1898; Muslim. Ch. Fasting no.1952; Thirmjīhi. Ch. The person who eats forgetfully whilst fasting; Dārimi. Ch. Fasting no.1663; Ibn Maja, Ch. fasting no.1663. Abū Dāud quotes a differing narration. A person came to the prophet and said “I ate and drank inadvertently whilst fasting. He replied “It is Allah who caused you to eat and drink.”

72. This is an example of that illustrates the clear demarcation between *'urf* and custom. The usage of the amount of water is a customary norm, although unspecified its implications are usually understood by both participants of the transaction at the outset.


74. Imām Muḥammad ibn Ḥanīfa reports of Abū Ḥanīfa. Indeed his companions used to dispute with him on analogy. Whenever he said use *istīḥsān* no one concurred with him. So he used to draw analogy with those things that are analogous. whenever analogy failed he used *istīḥsān*. Abū Zahrah. 1957. *Usūl al-Fiqh*. Cairo: Dār al-Fikr al-'Arabi. pp. 262-263.


76. See the *fatwā* of Solomon chapter one, 3, of this study.


82. *Qur’ân* S.2 v. 173.

83. Ibid. S. 2 v. 185.


85. Wadûd-Mohsin argues that due consideration must be given to the circumstances of the bereft: ‘For example, if in a family of a son and two daughters, a widowed mother is cared for and supported by one of her daughters, why should the son receive the larger share?’ Since this is contrary to *naṣṣ* it is invalid. Wadûd-Mohsin, Amina. 1992. *Qur’ân and Women*. Kuala Lumpur: Penerbit Fajar, p.87.


88. *Qur’ân* S. 6 v. 38.


91. Naṣr in examining the dilemma of the present-day Muslim expounds the tensions that exist within the soul of modernised Muslims and attributes it to an induced inferiority towards the West. “It might, of course, be asked why this dilemma must exist at all? Why cannot Muslims simply evaluate modern civilisation according to the principles of their own tradition and simply reject what is opposed to these principles? The answer lies in the state of mind of most modernised Muslims, who, having been witness to the superior power of the modern West in the economic and military fields, fall under the spell of everything else that comes under the spell of the West, from philosophy to ethics, from social theories to canons of beauty.” See Naṣr, Seyyed Hossein. 1988. *İslâm and the Plight of Modern Man*. Lahore: Suhail Academy. Chapter 2 entitled ‘The Dilemma of the Present-day Muslim’, pp.21-22.

92. Al-Azmeh, Aziz. 1984. *Orientalism, Islam and Islamists*. Edited by Asaf Hussain, Robert Olson, and Jamil Qureshi. Vermont, U. S. A: Amana Books, p.86. “The professional Orientalist therefore has as his task the embedding within the Islâmic realm of that which Orientalism decrees as appertaining to it. Thus, if he engages in a study of say, Islâmic law, he would be performing two operations. He would describe its structure in terms of that which reverses the sense of the law, such as casuistry and abstract rigidity (and hence unreality, and consequently propensity to corruption).”

93. Naṣr ascribes the advent of the “modernist” Muslim to the dilemmas brought upon the Muslim because of the diametrically opposite conceptions of freedom or *hurriyah*. The Islâmic concept being that which enables man to enact the divine will. Thus the restrictions placed upon an individual by *Shari‘ah* are indispensable aids which make the attainment of true freedom possible. The Western concept is the post-Renaissance idea of individual freedom, which imprisons man within the confines of his individual whims and fancies. This basic confusion impacts on the morality of Muslim’s
affecting behaviour in matters as far apart as sex and literally style. He writes concerning modernised Muslims, "Moreover many of them display a sense of inferiority vis-a-vis the West which is truly amazing. They take much too seriously the various currents which issue forth from the West and usually last but a short time, and they make every possible effort to conform to them or to distort the teachings of Islam to appear in harmony with these currents. The source of the tension that exists within the soul of the modernised Muslim is precisely the strong pull of the modern world on a segment of the Islamic ummah (Islamic community) whose hold upon its tradition and whose roots within the tradition have been weakened during, and as a result of, that very historical process which has enabled modernism to spread throughout the Islamic world."


Weltanschauung literally means worldview.


Anderson. The World Religions, p. 57.
Most Orientalists base their studies on this supposition. "The Koran is the record of those formal utterances and discourses which Muhammad and his followers accepted as directly inspired" See Gibb, H.A.R 1962. Mohammedanism. New York: Oxford University Press, chapter 3. Certain later-day Orientalists however, concede to the Qur’an being the uncreated word of Allah.

Cf. Doi, Abdur Rahman I. Islamic law: Western Tyranny by Terms, p.66.


Qur’an S. 25 v. 1.

Qur’an S. 5 v. 44.


The belief in the attributes of Allah exactly as he has described himself is a fundamental of tawhid, the concept of the unity of Allah. These qualities are established from the narration of the Prophet regarding them.


Qur’an S. 5 v. 3.

The pork tapeworm Taenia Solium like its counterpart in beef inhabits the human jejunum. The eggs reaching the stomach of a host hatches into embryo, which penetrate the intestinal wall and are carried by the lymphohematogenous system to all tissues of the body. Cysticerci then develop in the subcutaneous tissues, muscles, heart, lungs, liver, brain, and eye. The death of larva, however, stimulates a marked inflammatory reaction, fever, muscle pains, and eosinophilia. Patients with lesions of the central nervous system may present with meningoencephalitis, epilepsy, and other neurologic or psychiatric manifestations. Sherris John C. 1984. Medical Microbiology An Introduction to Infectious Diseases. New York: Elsevier Science Publishing Co., p.345.

See qiyás - analogy subservient to textual law.

Qur’an S. 16 v. 44.


Chapter Four

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Chapter Four

FATWÂ IN CONTEMPORARY SOCIETY

1. Introduction

In Chapter one we defined fiqh, fatwâ, ijtihâd, and their practitioners the qâdî, hâkim, mufti and faqih, their respective prerequisites and functions. Chapter two dealt with the fatwâ and aqdiya or judicial activities of the Prophet, the rightly guided caliphs and Companions demonstrating the legal activity of the early first century of Islâm and the formative role of these activities in Shari'ah. Chapter three examines the ‘fulcrum’ of fatwâ in Shari'ah. Fatwâ is an exposition of the correct application of the source methodology of Shari'ah which enables the effusion of the Divine Will into diverse cultural and social applications. The question still remains of fatwâ in contemporary society. This chapter examines the role of fatwâ in
(i) an ideal Islâmic state
(ii) a Muslim country
(iii) in a non-Muslim country where the Muslims live as a minority.

The South African scenario would be case (iii). We would broadly categorise fatwâ in South Africa into two types.

1. Those that would be in conflict with South African law, since certain fundamental aspects of the law are in conflict with Shari'ah. Fatwâ is the application of the sources of Shari'ah to adduce a law and the nature of the conflict would thus be imbedded in the divergence of the sources of South African law with those of Shari'ah.

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2. The second type would be those issues wherein the fatwā or Shari‘ah ruling is not in conflict with the law and can easily be implemented in the lives of a minority Muslim community. The task at hand is thus to identify the fatwā issuing bodies in South Africa and to examine the fatwās in accordance with their application of the source methodology of Shari‘ah and the extent to which they present a form of governance over the community.

This chapter also briefly traces the issuing of the first fatwā in South Africa and then delimits itself to certain issues on which fatwās were issued. The fatwās chosen are further restricted in that only those that demonstrate a considerable exercise in ijtiḥād of the scholar have been assessed.

1.1 The role of fatwā in the Islāmic community

Islām is the religion for all mankind.

“ And we have not sent you except as a mercy to the whole of mankind.”

From the advent of the Prophet Muḥammad (may the peace and blessings of Allah be upon Him), the entire mankind is considered as his community or ummah. This is often referred to as the greater ummah or the ummah of da‘wah. However, the term ummah usually refers to the Muslim community or the Islāmic community. The extent to which a Muslim community adheres to the Shari‘ah is the extent to which it could be deemed Islāmic. In an ideal Islāmic state there would exist no difference between the laws of the country and the Shari‘ah. The natural instinctive striving of the Muslim community to fulfil its purpose and become Islāmic has been termed by Westerners as fundamentalism. Thus every
Muslim is essentially a fundamentalist. This “instinctive” struggle begins at the most elementary level. It is to seek the knowledge and understanding of the Shari'ah itself which is a compulsion established both by the Qur'an and the Sunnah. This is achieved in a Muslim community by many methods, the most fundamental of which is the imparting of the Shari'ah knowledge from mother to child and the establishment of an immediate home environment in which these laws and moral norms are adhered to. The role of the Islāmic State is to facilitate such a conducive environment and to ensure that it prevails not only in the immediate vicinity of the home but in the entire country and across demographic divides. The state achieves this by the amīr ensuring that the qūdūt who are appointed fulfil their essential prerequisites and apply the Shari'ah. In the areas were rulings have to be adduced to ensure practical governance ijtihād is essential. This is undertaken by the qūdūt in authority and a formalised law of the state emerges. This is the siyasiyā shari'ah or qānūn which covers matters in the flexible conceptual sphere of the law. The Islāmic state, like that at the time of the second caliph ‘Umar, also provides for the establishment of the institute of the juris-consults or muftiyūn who provide accessibility to the Shari'ah without the need for litigation.

Muslims not living in an Islāmic state find themselves locked in an environment where the Shari'ah is brought daily into conflict with the laws of the state. The principal areas of conflict are marriage, divorce, inheritance, education, parental authority over children, the role of women and the meaning of justice in a non-Islāmic legal system.
1.1.1 The role of fatwâ in an ideal Islâmic state

In our diagrammatic representation of the conceptual spheres of Shari‘ah law we considered fatwâ as a source in conceptually flexible sphere: Fatwâ is however operative in both the fixed and flexible spheres of the law. It straddles the entire Shari‘ah. In some cases a question is posed, and the answer, ruling, or fatwâ is derived directly from Qur‘ân, hadith or ijma‘ whilst in others the fatwâ relies on ijtihād, i.e. the scholar uses qiyās, (analogy), istihsān (utility), ‘urf (custom), maṣlaḥah, maṣlaḥah mursalah, or ta‘zīr. In the ideal Islâmic state the siyāsiya shari‘ah will be based on the principles derived from the Qur‘ân and Sunnah and therefore would be part of Shari‘ah. It would be termed ‘ādila. A parallel stream of accessibility to the law will be set up by the state. This is done by the appointment of muftis to the various cities and regions. The judgement passed by the qâdi will have to be executed. However in Islâm, Muslims may seek to apply the Shari‘ah voluntarily without the need of a plaintiff or recourse to a judge. Here the institute of the juris-consult, mufti plays the pivotal role. In the ideal Islâmic state there would exist insignificant differences with regard to the application of the Shari‘ah between the qâdi and the mufti. Therefore both these institutes are congruent and allow accessibility to the law and justice. Islâmic law is simple, clear and accessible to everyone. There are many instances in the history of Islâm that the Prophet was asked to judge between a Muslim and a Jew or in a dispute that arose between Jews living in Madina. These are cases which demonstrate the role of both aqîdiya and fatwâ outside the Islâmic community, i.e. the community which interacts with the Islâmic one.
1.2 Fatwâ and aqṣāya in a contemporary case study: The case of Deborah Parry and Lucille McLauchlan

Saudi Arabia cannot be termed an ideal Islamic state. Most aspects of its laws follow the dictates of Shari'ah. This is true for both the laws that are based directly on Qur'ân and Sunnah and those which require ijtihād in their derivation. At the time of writing judgement was about to have been passed on a case of particular relevance to this chapter. Deborah Parry a British nurse working in Saudi Arabia was implicated together with her accomplice, Lucille Mc-Lauchlan in the murder of an Australian nurse Yvonne Gilford. All the parties, the perpetrators of the crime and the victim were non-Muslims living in a Muslim state under a contractual obligation. Although their personal and religious freedom are guaranteed, the Islamic state will apply the dictates of Shari'ah to these non-Muslims. In this case it was a specification in their work contracts. The crime took place in December 1996. The case was settled in three phases:

(i) Deborah Parry was found guilty of the murder of Yvonne Gilford the Australian nurse.

(ii) Lucille Mc Lauchlan was found guilty of being an accomplice in the murder and faced an eight year sentence and five hundred lashes.

(iii) Frank Gilford the brother of the deceased and closest relative retained his right to claim the life of the perpetrator in retribution until the di̇iyyah (recompensation) was successfully negotiated between the parties. He then accepted the di̇iyyah and waived his right to qiṣās (equitable retribution).

Frank Gilford could have waived his right altogether as he was pressurised by a lobby of British nurses to do. Instead he awaited the verdict and exercised his right to the blood money.
• If he waived his right altogether, then he would have lost his right to the blood money *diyyah* in recompensation and the charges against the accomplice would be dropped.

• If he has exercised his right to *qisās*, then according to the *Shari'ah* both are equally guilty and both Mc Lauchlan and Parry would be publicly beheaded.

• Since he claimed the blood money from the perpetrator the accomplice is punished by *ta'zīr*.

This case is a visible application of the *Shari'ah* laws on non-Muslims although it took place in circumstances beyond their control. It is of great significance that Frank Gilford a Westerner and non-Muslim exercised his right to compensation and spent the money charitably, for it shows that he did not consider the *diyyah* as a means of monetary gain but rather as a sufficient punishment for the perpetrator of the crime. The *ta'zīr* or punishment applied to the case of the accomplice is in accordance with the *Shari'ah*, since the closest relative of the victim has waived the claim to the life of the perpetrator. Therefore the punishment of the accomplice has to be proportionately reduced. It transfers from *ḥadd* (the specified penal code) to *ta'zīr* (the punishment for crimes of a lesser nature that fall outside the ambit of those described by the penal code). This tangibly demonstrates my contention in chapter one that if the *Shari'ah* is applied correctly even its non adherents would consider its application equitable for it is designed in accordance with the nature of man.

2. *Fatwâ* as the vehicle of accessibility to *Shari'ah*

The simplicity and accessibility of *Shari'ah* has ensured that justice is available to the layman without any need for specialists of the law representing any litigant.
The law specialist is the appointed qacli. In the case of there being no litigation but the parties are mutually agreeable on applying the Shari'ah then the ruling (fatwá) of the mufti is sought. All this is available without any cost to the plaintiff or the mustafii and there are no lawyers. Law in a Western legal system is difficult, complicated, full of traps and pitfalls and inaccessible. The layman does not trust law nor the lawyer and believes that the law has been made complex by the lawyers in order to suit their own ulterior purposes. The French novelist Chevallier expresses the feeling of the ordinary people in the words of one of his characters,

"The law, as manipulated by clever and highly respectable rascals, still remains the best avenue for a career of honorable and leisurely plunder."

Many notable attempts were made by Westerners to try and remove the complexities of their legal system and to render the existence of a lawyer superfluous. Codification, which is the formal enunciation of the law by the legislature, has failed to achieve this. The ancient codes such as The Code of Hammurabi, the Twelve Tables and the Law of Manu were not true codes but statements of important rules of customary law. The Corpus Juris Justiniani is a collection of opinions and statements of eminent jurists and not a systematical statement of law. In Europe the great age of codification began with the Josephine Code of 1787, codifying Austrian Family law, and ended with the Swiss Civil code of 1907. Frederick the Great initiated the Prussian Code, which was put into force in 1794 after his death. He wanted a simple short statement of the law expounding the theory of natural law in order to produce universal principles by which justice could be rendered in all circumstances. Instead the jurists produced a document of over 19,000 sections and lawyers were required for the process of the interpretation of the Code by the courts. The major works on fatwá are...
collections of the rulings of scholars on various issues. When these rulings appear in the form of a book they usually contain the following chapters:

(i) Essential cleanliness
(ii) Prayer
(iii) Zakāt (poor due)
(iv) Fasting
(v) Pilgrimage
(vi) Trade
(vii) Marriage
(viii) Divorce
(ix) Burial rites.
(x) Penal Code
(xi) Holy War
(xii) Eatables

Each major work on fatwā is analogous to a codification of Shari‘ah. The works first cover the fundamental pillars of Islam and then other aspects of life concerning social political and economic interactions. However, unlike a codification they are not statements of the law but interpretations of it by the scholar. The collections of fatwā are demonstrations of how the Shari‘ah has coped with social exigencies throughout the centuries. Their content and emphasis would differ according to the era and the community, which presented its questions to the mufti. However an analysis of the works on fatwā reveals a trend towards greater emphasis on matters that require the exercise in ijtihād. As the Islamic education of the community develops, the necessity of posing questions on essential obligatory matters such as salah, zakāt, ḥajj and fasting diminishes. The general community has the ability to adduce these laws for themselves. So increasingly the mufti finds himself endeavouring to solve issues which never
occurred in the time of his predecessors and therefore are not covered in the manuals of fiqh.

2.1 Fatwâ, the effective counterbalance in the ideal Islâmic state

The Islâmic state has a parallel set of mechanisms to ensure the application of Shari'ah. One is the system of the Shari'ah courts, which are presided over by the qâdîs appointed by the governor or the amîr himself. The parallel mechanism is the institute of the juris-consults or muftiyûn. These persons were also appointed to different areas by the governor or the amîr. So the Shari'ah was either enforced through the judgements of the qâdî or was applied voluntarily through the consultation with the muftî. These two parallel streams for the application of Shari'ah act as essential counterweights or counterbalances to each other. If one stream is found to be deficient in a particular way the other readjusts to fulfil its role and thus ensures the application of the Shari'ah in the community. If for some reason a judge were to misinterpret the Shari'ah and the same were posed to the muftî, his ruling would differ with that of the qâdî considerably. The community would always be rendered with the correct application of Shari'ah and can correct the qâdî under such circumstances. The converse is also true, two parties might have resolved to settle their dispute according to the ruling of a particular muftî if he erroneously rules in favour of a particular party, the aggrieved party may seek recourse to the qâdî who, if he rules in favour of the plaintiff, has to correct the fatwâ of the muftî. Both the qâdî and the muftî function as interpreters of the Shari'ah and not of governmental policy dictated to by political expediency.
2.2 Two Parallel Streams of the Application of *Shari'ah* in an *Islâmic* state

**Figure Two**

Figure two represents the harmonious functioning of the institutes of both *fatwâ* and *aqdiya*. This demonstrates how the *Shari'ah* is applied either coercively through the courts or voluntarily through *fatwâ*. Both these mechanisms represent means of adducing *Shari'ah* and streams of accessibility to the law.

**The institute of the *aqdiya***

**Court - Qâdi**

- *Shari'ah*
  - violation of right
  - Plaintiff
  - *Qâdi*
  - verdict
  - Execution

**The institute of *Iftâ***

**Muftî**

- *Shari'ah*
  - *Shari'ah* ruling sought
  - *mustaftî*
  - *Muftî*
  - *fatwâ*
  - Application
2.2.1 The role of Fatwā in a Muslim country

Most countries in which the majority of the population is Muslim cannot be termed as Islamic States. These countries have taken on various systems of government. Many mimic the democracies of the West and are termed secular states. They have evolved legal systems, which are totally incompatible with Shari'ah. Some apply the Shari'ah to the extent of the fixed sphere. In their development of legal rules that fall into the flexible sphere they violate the principles of the Qur'an and Sunnah and have thus developed a siyāsiya shari'ah zālima - a set of legal rules that are repressive towards the establishment of Shari'ah. Other Muslim countries violate all the dictates of Shari'ah whether they are from direct explicit texts from Qur'ānic and Sunnah or those evolved from the principles derived from Qur'ān and Sunnah. The entire justice system would be based outside Shari'ah and their legal rules represent a Western legal system. There is no official role of the juris-consult (mufti) and none are appointed by the state. The entire environment is the antithesis of that provided by an Islamic state and it is seemingly impossible for the Shari'ah law to offer any form of governance over the populous. However, even in an hostile environment the Islamic community has a natural propensity to seek out the Shari'ah and abide by it. The community itself turns to the scholars endowed with fiqh and seeks rulings from them. These scholars, fiqahā and muftiyān being totally independent of the state issue their fatwā strictly in accordance with Shari'ah and most often in direct contradiction to the laws of the Muslim country. His futyā either rejects the legislation or restates it to conform to Shari'ah norms. When this situation persists then significant sectors of the community show scant regard for the laws of the country and adhere to the Shari'ah rulings issued by the mufti. The West interprets this as fundamentalism and the Shari'ah has been so maligned by Western propaganda that it seems inconceivable to the Western mindset that Muslims
would wilfully desire to adhere to it. In the case of Egypt for example, large areas of the country are governed by Shari'ah law and are no-go areas for the state. In the case of Algeria the majority of people voted in favour of the F.I S and the application of Shari'ah law in a democratic election monitored by Westerners: The results were overruled and a pro-West military junta installed. What has escaped Western analysts is that the installation of democracy, or secularism and an anti-Islamic government only removes one of the two parallel streams of accessibility to the Shari'ah. The formal institutions of the qâdi and the Shari'ah court are absent. The parallel stream of the scholar, the faqih and the mufti then strengthens and fills the void left by the deficiency of the formalised system. Thus the Shari'ah still remains accessible and readily applicable. The only means left to subvert Shari'ah is then to remove both the streams of accessibility. The history of Islam is thus perforated with examples of large-scale killing and imprisonment of the 'ulamâ, fuqahâ and muftiyûn and the wanton destruction of fiqh literature. This has occurred in history both by suppressive external forces and corrupt Muslim leaders. Many of the compilers of works on fiqh such as Ibn Taymiyyah, Ahmad ibn Hanbal and Imam Mâlik spent a significant portion of their lives imprisoned by unjust Muslim rulers. Hence the role of fatwâ in a Muslim country which is not Islamic, one in which the qâdi applies other than the Shari'ah, would be one of conflict and combativeness. The futyâ issued would act as a backdrop or sounding board reflecting the extent of divergence between the laws of the country and the Shari'ah. However since the mufti has no power of execution the only possible application of law would be those of the state. Thus even if the mufti is free to issue fatwâ, his futyâ cannot crystallise into applicable law. In this scenario, the parallel streams of the law exist; one contorts the Shari'ah, the other although correct cannot be official. The streams function in opposition to each other. If the Shari'ah is applied by any Muslim it would be in direct contradiction of the law.
2.2.2 The disfunctioning of the parallel streams in a Muslim country, non-Islamic state

**Figure Three**

In a Muslim country that is not Islamic, the laws of the country may be contrary to the Shari'ah. Therefore the ruling of the qâdi would be in conflict with that of the mufti and the parallel streams of applicability of Shari'ah would oppose each other.
2.2.3 Conflict of fatwā: the Gulf crisis

In the event of a corrupt Muslim regime being unable to muzzle the mufti it coerces him into issuing fatwā that are essentially incorrect but serve the political goals of the state. This leads to a state of instability, the issuing of contradictory fatwās and subsequent disunity in the entire world Muslim community. A striking example of this was the imprisonment of the imāms of the Holy mosques of Mecca and Madīna by the Saudi Arabian government during the gulf war. Beside the imāms of the mosques nearly every faqih of note was imprisoned. This was done so that no fatwā against the Saudi Arabian forces participation in the war alongside the American forces against a Muslim ‘enemy’ could be issued. The crisis precipitated immense division in the Muslim world. There was consensus in the condemnation of the Iraqi invasion of Kuwait. However the question arose as to the legitimacy of forming a coalition with non-Muslims against other Muslims and whether the presence of non-Muslim American troops in Saudi Arabia constituted defilement of the holy places. Both Saudi Arabia and Iraq sought international Islamic sanction for their actions through fatwā. Muftiyiin representing the respective political policies of their countries issued ‘palace fatwā’ as an attempt to provide Islamic tenor for the standpoints of their governments. An international convention of ‘ulamā convened by Iraq in December 1990 issued a declaration supporting the Iraqi position and urged Muslims to undertake jihād against the Americans and the Muslims leaders who joined the coalition of allied forces under American leadership. The Saudi’s convened another congress in the same month. The ruling mufti of Saudi Arabia ‘Abd al-‘Azîz ibn Bâz called for jihād against Saddām Hussein. Aḥmed Kaftāro, the grand mufti of Syria issued a fatwā which justified the Syrian position against Iraq, whilst the mufti of al-Azhar, ‘Ali Gâd al-Ḥaqq, and Muhammad Sayed Tantâwi of Egypt issued fatwās validating Husni Mubarak’s policies. Other independent futyā supporting Iraq were issued by certain countries and organisations: Sudan, Yemen, the Jordanian Fatwā Council,
the Council of ‘Ulama of Hijaz centred in Iran, the Islâmic Council in Britain, and the Jihâd Movement in Jerusalem. The opposing fatâwa presented opposing worldviews between the Islâmists and the government muftiyûn. Public opinion was also totally divided. The Muslim ummah was exposed as lacking decisive leadership and regionalism won the day. The government muftiyûn contended that Iraq’s aggression against a Muslim nation was illegal both in terms of the Shari‘ah and international law. This aggression necessitated the seeking of help from foreign forces who would leave once their mission was accomplished. This position was further supported by the famous scholar Yusuf al-Qaradawi who ruled that the presence of foreign forces was brought about by an absolute necessity (darûrâ). The Islâmists however contended that the real cause of the problem was the state of Israel which had driven Muslims out of their homeland and whose policy of expansion was supported by the Americans. Furthermore who will guarantee the departure of the Americans once they have got in? They argued that it is not permissible to seek help from non-Muslims in a battle against Muslims citing the following verse as proof:

“Oh you who believe, take not the Jews or the Christians as your friends and protectors; they are but the friends and protectors of each other. Whosoever amongst you turns to them is from amongst them.”  

The Egyptian mufti Huwaydî contended that the interpretation of the verse was incorrect. The seeking of aid from the non-Muslim is only precluded if there is accompanied muwâlâh, mutual affection with them. The seeking of aid was a necessity and that the question of the defilement of the holy places does not arise since the American soldiers were engaged about 1500kms from Mecca and Madîna. Al-Zayd 17 countered, “The question is not whether or not it is a crusading army; our concern that these forces are those of unbelief (kufr) - their enmity to us
and our enmity to them is established until the hour.” He argued that the issue is not whether necessity justifies seeking help from non-Muslims but an alliance with an eternal enemy of Islâm is a violation of the injunction contained in the text of the verse.

“Oh you who believe, take not my enemies and yours as friends offering them your love even though they have rejected the truth that has come to you and have driven out the Prophet and yourselves because you believe in Allah your lord.”

Other scholars saw a greater danger to the ummah in the alliance with the American and Western forces than the Iraqi aggression. Rida Idris argued that the American intervention would have far greater repercussions than any envisaged by the muftiyün issuing fatwa in its favour or their governments. The danger was three-fold:

(i) The American support for Israel was of an imperialist, colonial, Crusader-Zionist nature. It resulted in the expulsion and displacement of millions of Muslims from their homeland. In consequence thereof the Americans according to the Qur’an can never be chosen as allies.

(ii) The purpose of the American intervention was the destruction of Iraq in order to strengthen the Israeli position in the Middle East.

(iii) The use of weapons of mass destruction and untested lethal weaponry on other countries was typical of American warfare strategy as experienced by the Japanese and the Vietnamese. The odds were so overwhelmingly in the favour of the alliance forces that victory, the capitulation and subjugation of a Muslim nation was assured.
The government *muftiyûn* manipulated their positions as scholars, using *Qur’ânîc* texts and precedents of the Prophet in order to support the political views of their governments. The *fatwâs* and counter *fatwâs* deteriorated into a slinging match of the *muftiyûn* and *‘ulamâ*, dividing the *ummah* into camps each claiming to possess the correct *Shari‘ah* ruling, whilst the Muslim governments physically divided the *ummah* into opposing factions fighting one another with whatever destructive and sophisticated weaponry they could muster. Muhammad Khalifa summed up the situation aptly in his article entitled, “The War of Fatwas and the Fatwas of War.” He writes:

Thus, the Muslim world (not only) disintegrated into contending and warring factions, but *Islâm* itself degenerated into contending and contrary texts, jurisprudence, theories, concepts and *fatâwa*. The Muslim world was fighting itself by referring to Islamic texts that were meant to unite it. When the various governments and political entities differed and fought for their own narrow transient interests, the *ulamâ*, the religious leaders, the jurists, and the Islamic organisations appeared as mere instruments and tools for the respective authorities and leaders who used them to implant their designs and interests.

In Chapter One of this study under the heading the prerequisites of the *mufti* for issuing *fatwâ* was discussed. The statement of Ḥasan al-Baṣrî regarding the quality of a *muftî* being a person who “despised the world, was interested in the hereafter, was regular in prayers............etc.” 21 has particular significance, for it precludes the sycophants from issuing *fatwâ*. The *muftiyûn* who behaved as civil servants doing the bidding of their masters have induced feelings of misgiving in the general world Muslim community for the aftermath of the crisis proved the folly of their decisions. The Americans unleashed unprecedented military force on
Baghdâd, bombing the city with the most sophisticated and technologically superior weapons ever used. This resulted in thousands of civilian casualties. The bombing of food factories with stringently enforced trade sanctions and embargoes led to shortages of basic necessities which resulted in the deaths of a million infants and Iraq subsequently has the highest infant mortality rate in the world. The wanton disgrace and subjugation was not only rendered on Iraq, but Saudi Arabia, Kuwait and other Muslim countries who joined the allies had to bear the financial brunt of the entire operation desert storm including the ‘compensation’ paid to Israel for restraint shown in the face of attacks by Iraqi scud missiles. The Saudis debt repayment will be completed in the year 2015. This has led to economic pressures within the kingdom, a fall in the value of the riyâl and the rise in the internal fuel price. However of greater significance is the emergence of general anti-American sentiment amongst the Saudi youth. In April 1995 four young Saudi Arabians students confessed to the bombing of an American compound in Jeddah. The attack resulted in the deaths of six American military personnel. In 1997 a bomb was placed at a barracks of the American military base in which resulted in the deaths of approximately 150 American military personnel. Thus the issuing of fatwâ by the scholars supporting the American intervention led to a backlash from within the Islâmîc community of the countries themselves and condemnation from the international Muslim community. The ‘palace muftiyûn’ have lost the confidence of the greater community and even if they issue correct futaḥ on other issues it is regarded with circumspection. Therefore a further method of constricting the applicability of the Shari‘ah law in a Muslim country is to allow for both the streams of futaḥ and aqîqa to exist, but to ensure that incompetent, corrupt and syncophanic people oblivious to the overall situation of the ummah occupy the positions of muftî and qâdi. This is a ploy employed not only by Muslim regimes that do not want to be Islâmîc but can be used effectively by non-Muslim governments that seemingly allow Shari‘ah to be applied but
ensure that the people appointed as quđđat and musiyyūn will abuse their futyā and agdiya in order to serve the political whims of the government and not the Divine Will, i.e. the Shari‘ah. Thus fatwā correctly applied is the assurance of the applicability of Shari‘ah but abused is the disparaging of it.

3. The role of fatwā in a non-Muslim country

In a non-Muslim country both the streams of accessibility to the Shari‘ah are absent. The Muslim community devises its own method of establishing a stream of accessibility and ensures it adheres to Shari‘ah.

3.1 The Indian Sub-Continent

The case of the Indian Sub Continent is exceptional. Although the Muslims were in a minority the British decided to administer the Shari‘ah law through anglicised courts. The Shari‘ah was administered through civil courts for almost two centuries. English legal principles were introduced, a legal system was fused with Shari‘ah and the law applied by the Indian courts diverged from Shari‘ah to such an extent that the Shari‘ah transformed to Anglo-Muhammadan law. This process began with the formation of the third Law Commission in 1861. Six enactments which superseded the Shari‘ah in their respective fields were instituted by the Commission. They were: The Indian Succession Act, The Indian Contract Act, the Negotiable Instruments Act, the Indian Evidence Act, the Transfer of Property Act, and the Criminal Procedure Act. The development of Shari‘ah in Algeria under French rule and in Nigeria under the British does bear some resemblance to its development in British India. The main difference being that in Algeria and Nigeria the Shari‘ah was administered by the quđđāt even after
colonial domination. Shari'ah suffered major setbacks under the impact of Anglo-Muhammadanism.

- The judiciary did not possess the same fahm or understanding of the Shari'ah as the qâdî would and therefore formulated novel principles to supplement the Shari'ah.

- Precedence, the theory of stare decisis was widely implemented although it is foreign to Shari'ah. This restricted the exercise of ijtihâd and robbed the law of its dynamism.

- The Kazi Act of 1864 1281AH abolished the office of the Qâdî and non-Muslims judges presided over the cases. The British courts prevented Muslims from electing qudâcqat.

- Islâmic legal education at universities was inundated with literature on Anglo-Muhammadan law and it formed the greater part of the syllabi. The British allowed the implementation of Shari'ah in the civil courts in order to stigmatise it as archaic, barbaric and static and eventually replace it with their own hybridised legal system, the Anglo-Muhammadan law. However the Muslim population was still able to access the Shari'ah since the institutes of the court compromise the formalised stream of accessibility. When the demand of the Muslims for the restitution of the institution of the qâdî was rejected Muslims turned to the 'Ulamâ and consulted them in all their socio-legal problems for out of court adjudication. Many institutes of higher Islâmic learning, the Dâr al-'Ulûms set up specialist departments and appointed mufiyyûn to cope with the volume of queries that were presented seeking Shari'ah rulings. Trusted mufiyyûn from different parts of India were thus consulted. In 1869 a Dâr al-Iflâ (seat of juristic rulings) was established at Deoband. Fatwâ literature gained currency and the well-known collections were published. They were
Therefore it is the institute of the juris-consult muftī that ensures the establishment of Shari‘ah in the absence of the courts. The muftī in these circumstances is not appointed by the state but fatwâ are sought from the scholar in which the Muslim community has the most confidence. Just as ijma’ removes the doubt of the community the consensus of the community will ultimately decide as to which scholars would be regarded as muftiyûn.

3.2 The role of fatwâ in Western democracies

In many parts of the Western world Muslims coexist with people of other religious denominations as a small minority. The laws of the country are those established by a Western democracy through its legal system. Some of the laws of the country are compatible with Shari‘ah whilst many may be in direct contradiction to the essential tenets of Islamic belief. The Muslim community being a minority is usually afforded protection of their rights and freedom of religion. None of the structures of an Islamic state prevail under these circumstances. There is no amîr al-mu‘minîn, Shari‘ah court, qâdis or muftî appointed by the state. Moreover the environment is one which engenders liberalism the “zero-value” society with its
an overwhelmingly large percentage of the populous, places the Muslim minority in a cast. The value system, morals and behaviour of a Muslim ordinarily invokes criticism of being retrogressive, conservative and more recently fundamentalist and extremist. Muslims however in spite of the absence of an Islamic State, governmental institutions and any form of institutionalised authority attempt to study the Shari'ah and apply it in their daily lives. The scholar, faqih and mufti play an extremely important role in this situation. Through their rulings they are able to ensure the establishment of the Shari'ah in an environment hostile to it. The willingness of Muslims to apply the Shari'ah in these conditions reaffirms that the laws of Shari'ah are coherent with the nature of man for their application is desired in the absence of any authoritative or coercive pressure. 26 These communities consult with scholars, fuqahâ and muftiyûn in all their matters. Sometimes bodies of scholars undertake the task of issuing fatâwa and fiqh councils are formed. Since these are not officially appointed their rulings are of a persuasive nature only. Their rulings have a bearing on the Muslim community and on the larger community in the areas of interaction between them. In cases of a dispute the opposing parties agree that they would abide by the verdict issued by a particular mufti and approach him for arbitration. Thus this informally re-establishes the two parallel streams of applicability of the Shari'ah for the mufti fulfils both roles sometimes as a mufti and at others as a qâdi notwithstanding there is no institution for the execution of his verdict. Sometimes great variances can occur in the rulings of different muftiyûn or in the rulings of the various fiqh councils. In consequence confusion ensues in the community. The mustafii is then entitled to follow the ruling, which he has a preference for. The hadith of the Holy Prophet confirms that a faqih or mufti is blessed even though he may have erred. However if it is an error of such a nature that it can be proved incorrect by dalil qatî' (absolute proof) then it becomes incumbent on other scholars to correct the
muftī. The Islāmic community then becomes the judge and the most correct fatwā gains predominance in the community.

3.2.1 The establishment of both the parallel streams of accessibility by the community without any power of execution.

**Figure Four**

When Muslim reside as minorities in a non-Muslim country the muftī is called upon to act sometimes as a muftī and at others as a qāṭī. This represents a fusion of the parallel streams through which Shari‘ah is accessed.
3.2.2 *Fatwā*: the potential of conflict with South African law

In the earlier chapters we demonstrated how *fatwā* was an exposition of the correct application of the source methodology of *Shari'ah* and how the *Shari'ah* as a “legal system” through *fatwā* copes with social exigencies. The term “legal system” is only used as a point of reference. If we conceive the *Shari'ah* as a legal system then it has to be seen to exist alongside other legal systems of the modern world. This is not possible for beliefs and faith are not amenable to legal ordering. Modern law tries to reconstruct Islām, as it has successfully done with Christianity and Judaism as rights of worship and performance of rituals. The *Shari'ah* consists of not only laws enforceable by coercive political authority but also morals, manners, and obligations binding on the individual conscience. If South Africa is regarded as a Western democracy, many essential areas of conflict between *fatwā* issued and the laws of the country can be observed. As demonstrated in chapter three *fatwā*, correctly issued, are an attestation of the working of *Shari'ah* i.e. its source methodology. Therefore in essence the divergence lies in the application of the sources of *Shari'ah* with the sources of a law of a Western legal system. For relevance we delimit a Western legal system to the South African one, and draw a comparative analysis of the sources of *Shari'ah* with those of Western legal system to reveal the synergy's and the extent of the divergence between them. We then proceed to compare the application of the sources of *Shari'ah* with the application of the sources of South African law and analyse certain areas of conflict between them. The most essential area of conflict of the law would be in the rights established by the primary source, the *Qur'ān* and Sunnah, and the constitutional and statutory law. The Constitution of the Republic of South Africa and its Bill of Rights establishes the right to life in its entirety. In consequence thereof the Constitutional Court has ruled against the death penalty as a suitable punishment for murder. This is in direct contradiction to the right of *qiṣāṣ* (equal
retribution) established in the Qur'ân. Therefore a mufti issuing a fatwâ on the issue would be faced with the problem of the family of the victim asserting their right to qiṣāṣ, or diyyah (compensation). The fatwâ or the ruling of the mufti in a case of pre-meditated murder would thus be in total conflict with the Constitution of the country and the Constitutional Court's interpretation of the Bill of Rights. For the purpose of this study an analysis of the Constitutional Court's decision in the case State vs. T. Makwanyane and M. Mchunu is undertaken and then the Shari'ah ruling or a fatwâ on the issue is presented. Further cases are cited to highlight the differences between the Shari'ah usage of qiyyâs, and 'urf and the usage of analogy, precedence and customary law in the South African legal system.
3.2.3 Comparison of the sources of *Shari'ah* and South African law

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3.2.3.1 The Qur’ân and Sunnah, the normative base of Shari‘ah

The most fundamental difference between the systems is the primary source. The fountainhead of Shari‘ah which is the Qur’ân and Sunnah emanate from wahy, divine revelation whilst the primary source of the Western legal system is a heated debate between a group of people who ardently desire a particular piece of legislation and those who vehemently oppose it. The former establishes transcendental authority whilst the latter denies it. Outwardly it would appear that the latter possesses a greater degree of freedom and versatility. However the Shari‘ah has an inherent dynamism expressed in the primary source itself. An examination of the nature of the divine injunctions of the Qur’ân reveals an aspect of Shari‘ah hitherto ignored in definitions of it. The foremost objective of Islâm is the moral progress of man. In modern Western civilisation the position is exactly reversed. Considerations of material utility seemingly dominate all manifestations of human activity whilst morality and ethics are relegated to an obscure background of life. In consequence the legal system emanating from such a civilisation severs the bond between morality and legality, as such what is legal is not necessarily moral and visa versa. Fatwâ itself was the cause for the revelation of much of the Qur’ân. The verses that contain specific legal injunctions were revealed in many instances as a reply to certain questions posed directly to the Prophet himself. No fatwâ can be issued in contradiction to nasady (text) for all the sources of Shari‘ah, those that are immutable and those that are flexible, emanate from the nasady and are subservient to it. The methodology employed in interpreting the verses for the purpose of fatwâ is restricted to the confines of the forms of wahy. The first recourse is to other verses of the Qur’ân - ‘Al-Qur’ân yu’assuru ba‘dahu baqyan’. The second is to rely on the explanation of the verse rendered by the Prophet or his application of it by his practice (Sunnah). Thus the supreme normative base of Shari‘ah cannot be eroded by differing models of interpretation.
of the nāṣṣ. Every Muslim has access to the immutable source of Qur'ān and Sunnah, has studied them and applied them in his life. It is therefore impossible for a deviant opinion to gain currency in the ummah.

3.2.3.2 Statutes or acts of Parliament as a prime source

In a Western legal system such as the South-African one, parliament is responsible for statutory law making. A statute is thus the written instrument promulgated by parliament and tangible evidence of law emanating from this lawgiver. It is evidence of the legislative process and, as far as judges are concerned enacts the law. They (i.e. the judges) regard statute as law-constitutive, and parliament as the lawgiver. Statutes are the prime source of law and the deliberate law making of parliament is a sine qua non for the regulation of the state. They cover every conceivable field of social interaction and at a point in time constitute law, whether it is morally good or bad.

Judges accept the supreme law-giving function of parliament because of the judges' oath of office. The question then arises as to why does the average citizen accept the authority of the state. There exists no law declaring parliament as the absolute sovereign. Extra-legal considerations have to be cited for a judges and a citizens acceptance of the authority of parliament. 38

- They are politically obligated through the tacit consent to be governed and the moral objectives of the state.
- They do not accept the authority of the state but are prudently obliged to obey because of coercive power of the state.
• They regard the constitution and the bill of rights as having supreme sovereignty.

The Western legal system has a fundamental flaw in that the question of ultimate authority or a need for an ultimate reference point cannot be answered within a particular framework of legal rules. A legal system needs criteria of validity to determine which rules belong to it. Thus a legal system needs a basic or supreme norm which provides directly or indirectly the criteria of validity of all other norms but is itself unimpugnable. This does not exist in any Western legal system. The Shari‘ah possesses this supreme norm. It is the Qur‘an and the Sunnah. Islâm posits a submission to the will of Allah - expressed directly in the Qur‘an and the Sunnah. All the other sources by which laws are adduced are directly related to this supreme normative base and therefore all Shari‘ah laws enact the divine will. The absolute sovereignty of Allah the lawgiver is established through šahādah, the testimony that one bears when one embraces Islâm. This is voluntary for the Qur‘an says:

"There is no compulsion in din".  

Thus a commonality exists in that both the acceptance of divine authority in the case of Shari‘ah and the acceptance of the sovereignty of parliament in the case of a Western legal system are by consent. However a fundamental difference in the degree of the consent exists. Man is neither wholly rational nor is he obliged to submit to any law or authority. He is intrinsically multifarious and fallible. His nobility is enshrined in him being mind as well as heart, faith as well as intuition, and submission as well as love. The bond between man and his Creator is not only of a legal or logical character that may be limited to the payment of dues, the observance of laws and the enjoyment of rights. It is also a bond of love and other sublime emotions like those of devotion, tenderness and self-effacement which
permeates through human thought and deeds. Islâm takes full cognisance of human nature. The Qur'ân says:

"Those who believe are stancher in their love for Allah." 41

The consent to divine authority is total, unreserved, and based on the emotion of love whilst that to parliament is in the hope that ruling party will fulfil the hopes and aspirations of the electorate and uphold its basic rights. Parliament posses sovereignty but this does not necessitate that its statutes would uphold either the rights or the will of the people.42 Thus it fails the Western legal systems in that

(a) It cannot provide it with a supreme norm.

(b) It in itself has unbridled power to enact any kind of statute.

In Great Britain today no written constitution exists and the judiciary does not have the power to declare an act of parliament unconstitutional. 43 The nature of the law-making process entails that once a law has been passed by parliament it can only be repealed or amended by parliament. Parliament thus has prima facie the widest legal power and the judiciary is restricted to interpreting and enforcing the acts of parliament. 44

3.2.3.3 The written constitution and Bill of Rights

Unlike British law the American legal system sought to fetter the power of parliament. In order to achieve this a legal restriction on the supremacy of parliament had to be imposed. This took the form of a written constitution and a
bill of rights. Since 1994 the new Constitution of the Republic of South Africa was in the process of being drawn up. It is now complete and South Africa has a new constitution and a Bill of Rights.

*The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.*

Western legal systems in seeking an element of certainty opt for a written constitution and a bill of rights. These are meant to perform the function of a supreme norm, to enshrine the rights of every citizen, and to provide the criteria by which statutes can be validated or invalidated. Thus ultimate sovereignty is transferred from parliament to the constitutional court, which decides whether a statute adheres to or violates the constitution.

However, since both these written documents are drawn up by consensus arrived at by a constitutional committee, they represent a compromise between the major role players, and cannot present a moral normative by which human behaviour is to be regulated. The Bill of Rights has to be interpreted. The criteria for interpretation of the Bill of Rights is contained within the bill itself. This leads to a situation where the interpretation of the Bill of Rights by the judiciary transforms into law, although the law itself may be contrary to the will of the majority of the people of the country. Thus once a matter reaches the constitutional court the judiciary, through the process of its own interpretation prescribes to the people its notion of democratic values, disregarding public opinion on the issue. I quote from the judgement of the constitutional court *The State vs. T. Makwanyane and M. Mchunu.*
(87) The Attorney General argued that what is cruel, inhuman or degrading depends to a large extent upon contemporary attitudes within society, and that South African society does not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment. It was disputed whether public opinion, properly informed of the different considerations, would in fact favour the death penalty. I am, however, prepared to assume that it does and that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.

(88) Public opinion may have some relevance to the inquiry, but in itself it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour.

Therefore in a Western legal system once consent to govern is established via elections the electorate abdicates its will to that of parliament or to the interpretations of rights and the limitations thereof by the judiciary of the Constitutional court. Statutes enacted by parliament would to a large extent express the will of the electorate whilst the adjudication of the courts may not. When this occurs the public is left in a limbo, for what it perceived as just or a moral norm may be deemed inhuman by the judiciary. To redress the situation the electorate would have to resort to the mammoth task of amending the constitution. A similar scenario would occur with Shari'ah if the protagonists of re-interpretation were to make inroads into the mainstream Muslim society. The
interpretation of Qur’an injunctions by ethicists would then change the Shari’ah laws to concur with their perceived moral norms. Thus ‘modern Islam’ would be a reconstruction of Shari’ah into the mould of a Western legal system.

3.2.3.4 Shari’ah rights and the Bill of Rights

A contentious issue in contemporary South Africa is the repeal of the death penalty. The death penalty has been prescribed in Section 277 (1) (a) of the Criminal Procedure Act No. 51 of 1977 as a competent sentence for murder. In the matter of The State versus T Makwanyane and M Mchunu the death sentence was appealed against. The Appellate Division postponed the further hearings of the appeals against the death sentence until the constitutional court decided on the issue. The constitutional court passed its judgement on the 6th of June 1995 and the death penalty was repealed. We now consider the process by which this landmark judgement was arrived at, and what are its implications with respect to the Shari’ah. A rephrasing of the question would be, What is the fatwa or Shari’ah ruling on the issue?

3.2.3.5 The abolition of the death penalty

The constitutional negotiations of 1992 to 1994 did not resolve the issue of the death penalty. A “Solomonic solution” was adopted. The death sentence was neither sanctioned nor excluded, and it was left to the Constitutional Court to decide whether the provisions of the pre-constitutional law, making the death penalty a competent sentence for murder and other crimes are consistent with Chapter Three of the Constitution. In passing judgement on the matter the judge
president of the constitutional court Chaskalson P and the other jurors meticulously followed the criteria for the interpretation of the Bill of Rights as per section 39 of the constitution. It reads

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum-

(i) must promote the values that underline an open and democratic society based on human dignity, equality and freedom
(ii) must consider international law, and
(iii) may consider foreign law.

The Constitutional Court in its judgement ruled that the death penalty is a cruel, inhuman or degrading punishment. The judge president argued that

[26] Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased under Chapter Three of the Constitution. It leaves nothing except the memory in others of what has been and the property that passes to the deceased’s heirs.

The question then arises that if the death penalty is cruel degrading and inhuman was not the crime more heinous than it? Has not the right to life and all other rights ensuing thereof of the victim been put to an end. Does not the right of equality demand that society has the right to equal retribution, which serves as a deterrent to further crimes of this nature, thereby establishing a norm by which it can function harmoniously? The judgement reduces the need for retribution to one of vengeance and deems a very long prison sentence as a suitable way of
expressing outrage and visiting retribution upon the criminal. It also claims that although the death sentence ensures that a criminal will never again commit murder, a life imprisonment also serves the same purpose. The spirit of reconciliation and national unity which was the basis for the adoption of the Constitution was upheld in order to redress the gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear guilt and revenge. However the Constitutional Court has applied the unconditional right to life clause directly from the perspective of legality without any consideration to the realities of the prevalent situation. With the severe overcrowding of the prisons it is not possible to uphold life prison sentences. As a consequence an alarming number of serious crimes are committed by people who have had their sentences reduced through general amnesty. This has severely reduced the deterrent value of a life imprisonment sentence. Judges Mohammed and Madala argued that the deterrence by the death penalty is not greater than that of a life sentence. The violent conflict and legacies of the past were induced by the apartheid policies of the government were essentially of a political nature. The perpetrators of these crimes were indoctrinated by an inhuman ideology and both sides; those that supported the apartheid regime and the liberation movements acted as if a state of war prevailed. The intended spirit of reconciliation of the constitution was therefore to redress crimes of a political nature and not those of criminal ones. This judgement fails to recognise the difference. The council for the defence did not argue any political motive for the murders since none were existent. Criminals have herewith been assured that their right to life has been protected in its entirety and no crime is serious enough to warrant the taking of one’s life. This factor combined with the high rate of unemployment, the overcrowding of prisoners and periodic releases of prisoners convicted of major felonies has unleashed an unprecedented crime wave in South Africa. This gives credence to the argument of the Attorney General that if sentences imposed by the
courts on convicted criminals are too lenient, the law will be brought into disrepute. 59 The repealing of the death penalty has thus contributed to the prevailing state of lawlessness being experienced in the country. The response of Chaskalson the judge president to the Attorney General’s argument was

"Law is brought into disrepute if the justice system is ineffective and criminals are not punished. But if the justice system is effective and criminals are apprehended, brought to trial and in serious cases subjected to severe sentences, the law will not fall into disrepute."

In his judgement he has ignored the ineffectiveness of the justice system. He contends that for the justice system to be effective "serious cases have to be subjected to severe sentences". Then, is not murder a serious case and is not the death penalty a severe sentence? By implication therefore, serious cases subjected to lenient sentences would render the justice system ineffective as a consequence of which the law will fall into disrepute. This conforms with the argument of the Attorney General rather than presenting a rebuttal of it.

The judgement when considering point (b) and (c) of Section 39 (1) reveal a serious deficiency in the South African Constitution. The Bill of Rights expresses the right to life in an unqualified form and provides the criteria for both the enforcement and limitations of rights. International human rights agreements and the constitutions of other countries differ in that where the right to life is expressed in unqualified terms they deal specifically with the death sentence, or authorise exceptions to be made to the right to life by law. 61 When challenges to the death sentence in international or foreign courts and tribunals have failed; the constitution or the international instrument concerned has either directly sanctioned capital punishment or subjected the right to life clause to a certain
restriction. The Fifth Amendment of the constitution of the United States recognises the validity of capital punishment, whilst the Fourteenth obliges the state not to “deprive any person of life, liberty or property without the due process of law”, thus permitting the state to make laws for such purposes. The judge president however argued that assistance may be derived from international and foreign case law but these do not bind the judgement of the court. 61

3.3.2.6 The Shari‘ah verdict
An assessment of how the Shari‘ah verdict is derived - how the fatwā is issued - for the crime of premeditated murder accentuates the differences between the Qur‘ān and the written constitution as a document of supreme law. Verse 178 surah 2 reads:

“Oh you who believe, the law of equal retribution is prescribed for you in cases of murder, the 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 with handsome gratitude. This is a concession and mercy from your lord. After this whoever exceeds the limits shall be in grave chastisement.” 62

The right to equal retribution in the case of premeditated murder is recognised and entrenched by the Qur‘ān as a basic human right. The prerogative of exercising the right is left to the next of kin of the victim. They are the surviving heirs of the deceased and the ones who experience the loss. They have the right of either claiming the life of the perpetrator or a sum of money in recompense or forgiving
the murderer completely. The freedom of the individual to exercise or waive his right to retribution is established. He is not prescribed to or deprived of it by some legislation or judge’s interpretation of a constitution. The consideration of the humanity of the punishment is also the prerogative of the individual who suffers the most as a result of the crime. The individual in exercising his rights relieves society of its obligation of prescribing a standard on the individual. This also presents an avenue of recourse, which once applied removes the remorse caused by the perpetration of the crime. Thus society can return to functioning harmoniously without individuals who continuously harbour feelings of being unjustly robbed of a loved one and of revenge. The Qur’an shows total cognisance of this aspect of human nature. Therefore the next verse reads:

“In the law of equal retribution, there is (saving of) life for you, oh men of understanding, that you may be Allah fearing.”

The law of equitable retribution applies only to the case of premeditated murder. Other laws cover the cases of accidental killings and self-defence. The interpretation of the Qur’anic injunctions is contained in the Sunnah. The Sunnah effuses directly into law and this law is upheld up to the present times. The law of qisas or equitable retribution for the case of murder is found in the following tradition. The Prophet (peace be upon him) has reported to have said:

“Whosoever is afflicted or incensed by murder should choose from one of these three (options): Either he seeks retribution, he forgives (and waives his right to it), or he claims the blood money (recompensation). If he intends a fourth (option) then restrain his hand; whosoever transgresses after that for him is the fire of hell wherein he will dwell forever.”
When any one of the above three options has been exercised the right to any further claim on the perpetrator is forfeited. The punishment established by Shari‘ah advances many penological objectives

(i) If the death penalty is applied it establishes the equality of the value of life or the right to life of both the perpetrator of the crime and the victim. It is the supreme deterrent and induces safety and peace in society. It removes remorse and the seeking of revenge from the victims. Proportionality between the crime and the punishment is established in totality, the offence of wilfully taking an innocent life is balanced by the claim on the life of the perpetrator. If the death sentence is considered inhuman because it is irredeemable character, then the murder of an innocent person must be considered likewise. Therefore the claim on the life of the perpetrator is vested with victim.

(ii) If the "blood money" diyyah is claimed, it is paid directly to the next of kin of the victim and not to the state coffers. This thus becomes a vehicle by which recompensation is achieved and since it is directly between perpetrator and the deceased it constitutes a suitable retribution.

(iii) If the perpetrator is forgiven, it is done directly by the next of kin of the victim. Once again this right is not vested with the state, an institute, or a body of jurists but with the persons who bear the greatest loss as a result of the crime. Since this is a totally personal choice once it is exercised no animosity can remain amongst these persons and henceforth society can function harmoniously.

(iv) Once any of the above options have been exercised, the next of kin of the victim have no right to seek further retribution in any way whatsoever. This is considered as a heinous crime and is further evidence of how the Shari‘ah tempers human behaviour according to human needs. Equitable retribution is considered as a basic right, it is clearly defined and its limits are demarcated.
Any excesses to these limits themselves are considered as transgression and are forbidden.

The application of Shari'ah with regard to the punishment for pre-meditated murder thus easily provides a practical solution to the problem. If reconciliation is desired, the option of forgiving the perpetrator could be exercised. This is the prerogative of the heirs of the victim and cannot be legislated against. Unlike a Western legal system reliant on interpretations of the Constitution to establish the rights of individuals, the Shari'ah relies on the irrefutable textual rights established from Qur'an and Sunnah. These are readily accessible to any adherent of Shari'ah and no scholar, juris-consult or judge can rule otherwise.

3.3.2.7 Ijmâ‘ and other legal systems

As stated earlier all legal systems are restricted either geographically, culturally and are transitory. The Shari'ah however transcends these constraints. Furthermore it is the only legal system that can claim an absolute normative base viz. the Qur'an and Sunnah which is the solid rock-bed on which the entire Shari'ah is based. Western legal systems are bereft of an absolute norm, which forms a base for the evolution of law. Therefore their laws and morality are subject to continuous change and a consensus or total unanimity of jurists on an issue is extremely rare. Since Western law divorces itself from morality, it severs itself from any attachment to a divine standard and the community does not have the capacity of accepting a consensus based on fixed norms. This leads to instability in the legal system for it may legislate on an issue directly in conflict with the norms of a certain sector of society. A synergy may be drawn between ijmâ‘ and the
decision of the constitutional court in its landmark judgement which saw the repeal of the death penalty as a punishment for murder. Here the nine constitutional court jurors all issued judgements which concurred with that of the judge president. Each one arrived at his conclusion with similar reasoning and citing different examples and proofs. This could be considered as analogous to the individual *ijtihād* of the *mujtahidūn* participating in an *ijmā‘*. However, many essential differences exist. A unanimous decision is essential to *ijmā‘*, whilst the decision of the constitutional court would be upheld by a simple majority of jurors concurring on a verdict. *Ijmā‘* is binding on the entire Muslim community and the communities’ acceptance of it becomes an absolute ratification of the juristic efforts of the participants. This is only possible in an *Islāmic* society since theoretically the moral norms and ideology of the entire society is absolute. An *ijmā‘* based on the *Qur’ān* and the *Sunnah* cannot be refuted by any Muslim. Although the judges concurred unanimously in the case, the majority of the community is in disfavour with the decision. Thus in a western system although consensus of jurors may exist, certain sectors of society or as in the case even the majority community believe other than what the jurors have interpreted the constitution to mean. This constitutionalised oppression is an affront to the personal freedom and liberty of the individual.

3.3.2.8 Common law: the doctrine of precedence

Certain legal systems like our South African one have two major sources of law.

- (a) Statutory law, which is the law, made by parliament and by subordinate law making authorities, such as provincial and municipal councils.
• (b) Common law is the other major source of law. It is embodied in the decisions of the courts and is the interpretation and application of Roman-Dutch principles by South African courts. 67

It is a body of law that evolves out of the decisions made by individual judges. These collected verdicts are known as precedents. Judges are bound to apply the rules laid down in earlier cases. 68 The authority and binding force of these decided cases is the doctrine of precedence contained in the legal principle of stare decisis which literally means to "stand by the decisions". However it is not the entire pronouncement of the judge that is binding on the future cases but rather the legal principle ratio decidendi 69 used by the court while arriving at its decision. In English Law precedents are strictly adhered to. 70 In the United States of America they are departed from more freely, whilst the South-African courts tend to steer a middle course. 71 What is then the Shari'ah position with regard to the doctrine of precedence? As discussed under ijmā, if a law is established through ijmā it is binding on the community and on future generations. However if an analogy between Common Law and fatāwa is drawn, one can examine the extent to which the doctrine of precedence is upheld in Shari'ah. Fatāwa are the verdicts of jurists or scholars on particular issues. They have been issued from the time of the Prophet, the companions, throughout the history of Islām and continue to be issued as the time and occasions warrant. This forms a comprehensive body of written decisions and are invaluable to a scholar or judge with regard to the ijtihād (juristic effort) employed and the methodology of arriving at the verdict. However the fatāwa possess at most persuasive value and the decided cases have no authority or binding on other cases. A judge or scholar when confronted with a question has to arrive at his decision by his individual application of the source methodology of Shari'ah in every case, although his verdict may concur with some previously
issued fatwâ. 72 This is a precondition for him being considered as a mujtahid. 73 Consensus of the companions of the Prophet is considered as a binding proof in Shari'ah but the question arises as to whether the pronouncement or fatwâ of a single companion should also be binding and given precedence over qiyâs, or the fatâwa of other mujtahidûn. The leading jurists from the various schools concur that the ruling of a single companion is proof (hujjah) and is regarded as legal precedence. This is so because of the unique position that the companions have:

(i) with regard to their piety and character as established in the Qur'an
(ii) their knowledge of the circumstances of revelation (asbâb al-nuzûl) of many verses because of direct access to the Prophet
(iii) their upholding of the Sunnah of the Prophet. 74

This is the view of Al-Shâfî‘î, Mâlik, Aḥmad and some of the Hanafi jurists. 75 Al-Ghazâlî, Al-Shawâkânî and others do not consider the fatwâ of a single companion to be binding. 76 Thus the Shari'ah recognises the doctrine of precedence totally only in the case of ijmâ' of the Companions. This establishes its attachment to its supreme norm the Qur'an and Sunnah. The scope for precedence outside its primary source is extremely restricted. Therefore no other law is dependent on one which is derived from speculative evidences (zanni). The confining of precedence to the sources that rely on absolute proof (qat'î) - except in the case of ijmâ' of the companions - places it beyond the ambit of human reasoning and fallibility. Furthermore in all matters wherein ijtihâd is required, the juror, scholar or mujtahid is compelled to exercise his own energies and cannot rule according to the ijtihâd of another. In Western legal systems however, entire laws can change through consideration of an individual judgement as a legal precedent, sometimes with adverse moral aberrations. In the case GREEN v. FITZGERALD AND OTHERS (1913 Cape Provincial Division), the court ruled that the Dutch law that
made adultery a punishable criminal act, had become obsolete through disuse in South Africa. This then became the precedent by which adultery was not considered as criminal again in South Africa. I quote from the pronouncement of the presiding judge Lord de Villiers, CJ:

At the present day incest, though rare, is still treated as a criminal offence throughout South Africa, and whenever a case comes to light the authorities hasten to prosecute the offender. Adultery on the other hand is unhappily of the most frequent occurrence, and although the reports of divorce cases are daily published in the newspapers, the authorities take no notice of this offence. It has ceased to be regarded as a crime, however great the moral offence might be, and a criminal prosecution will certainly fail. I am of the opinion that the law of the indirect as well as for the direct punishment of offenders has been abrogated by disuse.....

In Shari'ah no law can be abrogated by disuse and a single judgement of a court cannot serve as precedence for other cases. The case of Green v. Fitzgerald and others vividly illustrates that it is the judge who authoritatively interprets a statute, or - in the event of the case not being covered by a statute - decides whether a previous case in point is binding, or whether or not a pronouncement of Roman-Dutch law is a law-constitutive medium for South African law. Thus in South Africa, a law having a direct bearing on the morality of the community it seeks to regulate is exhausted by the pronouncement of a judge. The details of the particular case indicate that the intention of the judge was to exculpate the adulterine child and grant him his share of inheritance as stated in his mothers will. To achieve this however he pronounced generally on the attitude of the court to the criminality of adultery. In Islāmic law principles which are binding are from
Qur’ân, Sunnah and ijmā‘ only. Therefore the normative morals of society are always consistent with divine revelation.

3.3.2.9 ‘Urf and customary law

3.3.2.9.1 Status of customary law in South African law

In Western legal systems, laws are specific to a single country or community in which they have jurisdiction. Customs of the particular community harden into law and gradually diminish in significance as the law evolves. Sometimes as is the case in South African law, the customs, which form the source base of the law, are foreign to the community itself. Many South African laws were derived from customs of European, Greeco-Roman-Dutch origin. Customs indigenous to South Africa, although disregarded by law have considerable relevance with regard to the governance, behavioural traits and morality of its peoples. These were termed tribal law and their domain of influence was confined to certain geographically demarcated areas. These areas known as tribal trust areas or Bantustans were a creation of the apartheid regime in the hope of dividing the black population into numerous ethnic tribes, each with their own authority, customs and law. With the demise of apartheid, the first democratically elected parliament and the inception of The Constitution of the Republic of South Africa (Act 108 of 1996) and the Bill of Rights an attempt at in-co-operating tribal and customary laws into the main body of law has been accomplished. Chapter 12 of the Bill of Rights recognises traditional leadership, the traditional authority that observes a system of customary law and its right to amend or repeal legislation and customs. However all these laws are subject to the constitution. Clause 3 of 211 reads:
The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. 80

Furthermore the application of customary laws is further constrained by chapter 2 of the Bill of Rights which specifies the criteria for its interpretation. Article 39 clause 2 and 3 read:

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of rights.

(3) The Bill of Rights does not deny the existence of any other right or freedom that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the bill. 81

Hence for any customary law to be effective within the South-African legal system it has to concur with the Bill of Rights. This leaves a considerable scope for discord within the system, e.g. when a young boy comes of age, circumcision according to tribal customs is compulsory. If the lad disagrees and contests this in court arguing his right to dignity as entrenched entirely under section 10 Non-Derogable Rights of the Bill of Rights will the court overrule the customary law or uphold it? Similarly polygamy is acceptable in customary law and practised even in urbanised Black communities. Will the court recognise the polygamous customary marriage or decree according to common law if one of the wives contests its validity citing her right to equality. Therefore depending on how the constitution is interpreted many occasions would arise wherein the customary law would be in conflict with the constitution. In a Western legal system that does not
use a constitution, like English Law, the problem is further exasperated for the law unlike our South African law, makes no provision for a customary marriage or one by tribal rites. Under s. 57 of the Offences against the Person Act, 1861, the crime of bigamy is defined thus:

“Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony.....”

However in the exceptional case of R. v Sarwan Singh the judge concurred with the powerful argument of the counsel for the defendant and ruled in the defendant’s favour. The argument runs thus “If, for the purpose of a prosecution for bigamy, a potentially polygamous marriage were recognised, then in view of the fact that the offence of bigamy can be committed wherever the second marriage takes place, whether in England or any part of the world, a man who married under a ceremony of polygamy a second wife might in some circumstances be liable for prosecution for bigamy; and I cannot believe that the criminal law and those who framed the statute under which the offence of bigamy was constituted ever contemplated that such a position could properly arise.”

This case clearly demonstrates how judicial preference affects the law. The law in itself is weak since it failed to recognise the Sikh’s customary right to a polygamous marriage. The judge however drew a distinction between a monogamous marriage and a polygamous one, and concluded that the marriage, which has to be the foundation for a prosecution for bigamy, has to be a monogamous one.
As opposed to Western legal systems the jurisdiction of *Shari‘ah* is not confined to a particular community or country. Rather the *Islāmic* community or *ummah* represents a diverse multiplicity of peoples language groups cultures and customs. The question then arises to what extent do customs serve as a source of *Shari‘ah*? How does *Shari‘ah* incorporate or assimilate the diverse customary practises of its adherents? The crystallisation of *‘urf* into *Shari‘ah* law is strictly the preserve of Muslims, the adherents of *Shari‘ah*. A non-Muslim living in an *Islāmic* State (*dhimmi*) would be allowed to practise his customs or religious rituals unreservedly if these were against *Shari‘ah* principles. Under a Western legal system as is the case with South African law all citizens are compelled by the dictates of the Constitution or the court’s interpretation of it. This is so even in the cases where the beliefs and customary practises of certain substantial segments of the population cannot be reconciled with the court’s interpretation of the Constitution. Thus the *Islāmic* system offers a greater degree of freedom to a non-adherent of *Shari‘ah* than a Western legal system would to a persons of diverse cultural orientations.

Western legal systems on the other hand have no normative base. Governments of the day assume increasing powers through statutes and there is nothing that they cannot legislate. They decide what is legal or illegal, what constitutes a crime or not. A Constitution or Bill of Rights represents the supreme law, and is a restriction on the supremacy of parliament. Two diametrical propositions have been advanced. Either parliament by its own internal procedure decides what constitutes a statute, or the courts decide as a matter of law what constitutes a statute. The next source is the common law, which operates in the absence of statutory legislation on an issue. These laws are case laws based on the applied juristic principles of earlier cases. They are arrived at through analogy or precedent. Finally customs may harden into law if they do not conflict with the
Constitution and Bill of Rights. Essential to the Western legal system is the hierarchy of its sources and courts. The system can thus be perceived as a pyramidal structure.

Figure Five

Our comparative analysis of the sources of the legal systems yielded the greater dynamism of *Shari'ah* and to some extent answers how the Divine law, usually portrayed as immutable, copes with social exigencies. This comparative analysis has been delimited to the sources of *Shari'ah* and those of South African law for the purposes of this study because *fatāwa* are the correct application of the *uṣūl al-fiqh*, the source methodology or principles of derivation of *Shari'ah*. Perhaps a study involving a detailed comparison of *Shari'ah* and South African law in all its details and ramifications should be attempted for synergism and divergence between the laws can be shown in all aspects such as Constitutional law, Statutory law, Common law, both Private and Criminal law. The comparison between *Shari'ah* and South African law on certain contentious issues was to demonstrate the versatility of *Shari'ah* and how *fatwā* would contend with the problems that
face the South African community today. I neither venture to suggest that Shari'ah should be implemented as an alternate, nor wish to prove the superiority of Shari'ah over the Western legal system but to discover the Shari'ah's exact nature. The evolutionary aspect of Shari'ah law escaped the attention of both Western and Muslim scholars. Westerners studied Islâmic law and its history from the specific perspective of demonstrating the borrowing from Jewish or Roman law. The Muslim scholar reeling from the effects of Orientalism and modernism became mentally and psychologically subjugated and has failed to study the evolutionary growth of the Islâmic "legal system," i.e. Shari'ah. The tendency has been to condemn taqlid and to complain of the closing of the doors of ijtihâd—an assertion itself borrowed from Orientalist scholars. Islâmic law has never stopped growing the interpretation of taqlid as blind following and the assertion that the doors of ijtihâd are closed betrays a superficial understanding of Shari'ah.

4. Fatâwa in South Africa: an historical perspective

The South African Muslim community can be considered a typical example of a minority Muslim community coexisting along a larger community in a Western democracy. The seeking of fatwâ is a process inbred into the fabric of a community since the Qur‘ân has made the enquiring on Shari‘ah matters a compulsion on every Muslim. Therefore it could be reasonably assumed that the first fatwâ issued in South Africa would be at the advent of the first Muslims into this country. The colonisation activity of Europeans perpetrated a slave trade and the involuntary migration of prisoners and political exiles. The Dutch East India Company introduced slaves into the Cape of Good Hope. In April 1694 the renowned Sheik Yusuf of Macassar (1626-1699) arrived abroad De Voetboeg with
forty-nine other followers. The Sultan of Java Sultan Agung and his followers including Sheik Yusuf opposed the Dutch. When Agung surrendered Sheik Yusuf and many of his followers were captured and exiled first to Batavia, then Ceylon and finally to the Cape of Good Hope. He was sent together with his retinue to live on the farm Zandvliet at the mouth of the Eerste River. Here the first Muslim community was established although they were forced to practise Islam secretly. This group of Muslims were known as the “Mardykers”. The following law was passed regarding them:

No one shall trouble the “Mardykers” about their religion so long as they do not practise in public or venture to propagate it amongst Christians. Offenders are to be punished by death.

The characteristic of the Islamic Community in that it will seek out the Shari‘ah and apply it as its din, was reaffirmed by this small group against overwhelming odds. Taun Guru arrived at the Cape on 6th April 1780 and was incarcerated on Robben Island. While in prison he wrote Ma‘rifah wa al-Imân. This is a book on aqâ‘id essential belief and was to serve as a standard for the community of Muslims of the Cape. In 1793 Taun Guru established the first Islamic educational institute in Dorp Street. This madressa was the nursery of Arabic-Afrikaans literature. The Muslims of the Cape produced a large amount of fiqh literature in Arabic-Afrikaans (the writing of Afrikaans in the Arabic script). By 1807 the Dorp Street madressa had a student population of 372. Taun Guru became the first qâdi of South Africa since the community used to present their disputes to him. He was not appointed by any ruler, sultan or amir. It was the mutual consent of the community that recognised his authority. In the absence of the Islâmic state, the South-African Muslim community was most resourceful in establishing structures by which the Shari‘ah law is accessed and applied. Two important and fascinating problems and the process of iftâ (seeking and issuing of
fatwā) were responsible for the arrival of the man who could be considered the first Hanafi mufti or qāḍī of South Africa - Abū Bakr Effendi.

4.1 The palm tree mosque and the khalifa issues

Abū Bakr Effendi was a Turkish scholar from the Hanafi school of thought who had completed his studies in Baghdad. He was well versed on the different aspects of the Shari'ah. His arrival in the Cape was through a treaty between Britain a mighty colonial power, and the Ottoman Empire formed by the Turks. There was mutual agreement as to the recognition of the rights of minorities living in each other’s domain. The Sultan was committed to establishing the total religious freedom of Christian minorities living under the rule of the Ottoman Empire. In reciprocation the British government afforded the same to Muslim minorities living under British rule. A Cape parliamentarian Mr. P. E. de Roubaix requested the British government in 1862 to arrange for a religious guide to be sent to the Cape Muslim Community. He had two reasons for doing so.

1. The Palm Tree Mosque dispute: There was a continuous battle that raged in the Cape Supreme Court between the descendants of Jan van Boughies over the position of imām of the Palm Tree Mosque. The property on which the mosque stands was first owned by Jan van Boughies in 1807. After his death in 1846 the ownership of the property transferred to Sameda van de Kaap and the position of imām to Mamat. Mamat in turn appointed his two assistants Hadjie Danie and Ismā‘il. Danie obtained the keys of the mosque and attempted to bar Mamat from performing his duties. This dispute ended in the Cape Supreme Court, which ruled in favour of Mamat. Mamat then tried to prevent Danie
from worshipping in the mosque. This lead to Danie seeking a court order against Mamat. Mamat at his death in 1864 appointed Ismâ‘îl as his successor. Danie then contested the legality of Mamat’s deed and the case was again presented to the Cape Supreme Court. It was at this juncture that the expert evidence of Abû Bakr Effendi was used by the court to arrive at a decision. The court then ruled on the 5th of April 1866 that Mamat had no power to appoint his successor by deed. It allowed Ismâ‘îl to retain his position as Imâm and ruled further that no one had the right of excluding any individual from worshipping in the mosque of Jan van Boughies (Palm Tree).

Muslim minority communities in many instances fail to recognise the authority of a muftî or qāḍî or the structures they set up by themselves in the absence of the authority of a caliph or Islamic State. Then individuals seek redress to the non-Muslim authority or government of the day. In many such cases the judges of the courts endeavour to understand the Shari‘ah and arrive at an equitable decision. In most cases however this is not possible. The Palm Street mosque dispute was one such case for the courts decision oscillated in favour of one litigant to the other as more Shari‘i considerations emerged. The matter was settled through the timely use of the court of Abû Bakr Effendi as a juris-consult. 87

It is noteworthy however that Abû Bakr Effendi played the role of providing expert testimony and was not afforded the status of qāḍî nor any juristic authority. Sultan ‘Abd al-Ḥamîd was the head of the Ottoman Empire which extended over almost the whole of the Muslim world. He considered himself the spokesperson for Muslims throughout the world and in effect held the position of amîr al-mu‘minîn. Since the Sultan dispatched Abû Bakr Effendi to the Cape and fixed a stipend of thirty five pounds a month for him, Effendi should officially
have been afforded the position of the chief qādi of the Cape. The court ruled relying heavily on his opinion that the Imâm could not appoint his successor by deed. However there is consensus amongst the scholars that it is permissible for the imâm to appoint his successor as Abû Bakr nominated ‘Umar as the caliph after him. Although the position of the Caliph and the imâm differs they are analogous since the imâms position is similar to the caliph albeit in a lesser degree. The system of nomination of the successor by the Caliph was open to abuse and in Islamic history this did lead to the institution of the caliphate changing to one of monarchy. Furthermore only Abû Bakr of the four righteous caliphs used the system of nomination. His character was impeccable and there was no possibility of him nominating anyone for personal considerations rather than the consideration of the Muslim community at large. Therefore Abû Bakr Effendi exercised his ījtihād in this matter and opined that it was not permissible for an imâm to nominate his successor, due to the possibility of abuse of this system.

This is the first documented evidence of the process of īftā in South Africa. The question was posed to the mufti, his ruling was in accordance with the established principles of the derivation of Shari'ah laws and the execution of his Shari'ah verdict was ensured through the Supreme Court of the Cape of Good Hope.

2. The khalifa Problem (1856)

Mr. P. E. de Roubaix the parliamentarian responsible for the arrival of Effendi to the Cape was in close contact with the Muslim community. He was involved in the 1856 Khalifa problem. It involved the question as to whether the practice of ratiep fell within the confines of Shari'ah or not. It is a practise of singing particular religious incantations to the beat of a drum until the participants are in a trance like state. Then the body is pierced with sharp instruments such as
knives and swords, and axes but no visible wounding occurs. Sometimes blood is caused to flow from a self-inflicted wound and then caused to stop with the wound healing instantly. This is allegedly a practice of the Sufis of the Rifā‘ī ṭariqa. The problem arose due to the noise that accompanied the practise. The imāms were indecisive on the issue and many conflicting positions arose. This problem was also one of the considerations in requesting the Turkish government to send a spiritual guide to the Cape.

4.2 The first written work of fiqh and fatwâ in South-Africa

Abū Bakr Effendi established the Ottoman Theological School on the corner of Bree and Wale Streets in Cape Town. This school became the forerunner of all the other Islāmic educational institutes as many prominent people of the Cape attended it. Abū Bakr Effendi wrote the Bayān al-Dīn, which was the standard handbook of fiqh for the students of his school. The book was published and distributed in Cape Town in 1877. The Bayān al-Dīn from a socio linguistic perspective is the oldest extant Arabic-Afrikaans publication. It is also the oldest extant major fiqh work of South Africa. The English translation of the Bayān al-Dīn entitled “The Religious Duties of Islām as taught and explained by Abū Bakr Effendi” was done by Mrs. Mia Brandel-Syrier, published by E. G. Brill of Holland (1964). There are many aspects of Bayān al-Dīn that bear testimony to its indigenous nature.

- The book is a translation of the greater work on fiqh, the Multaqā written by the fourteenth century Ḥanafī scholar Muhammad Ibrahim al-Ḥalabi. It was translated from Arabic to Arabic-Afrikaans, the writing of Afrikaans in the Arabic script, which was unique to the Cape Muslim community. It has always
been the peculiarity of many non Arabic-speaking Muslim communities that the Arabic language is read but not understood. This is so because the pronunciation of the alphabet and the recitation of the Qur'ān is taught to Muslim children all over the world since childhood. This was probably the case with the early Cape Muslim community. The community spoke and understood Afrikaans but could read Arabic. The scholars however could read write and understand Arabic as well as a variety of languages. A novel and ingenious way of solving the problem was to translate Arabic texts into Arabic-Afrikaans so that it could be read as well as understood by the people. This type of literature spread from the confines of the Islāmic educational institutions and was used by the people for writing letters and memorials.

- The Bayān al-Dīn is written in the same literally style of the fiqh works from the second century of Islām. It has the original text (maṭn) and then an elucidation of it (sharḥ). The sharḥ contains the explanations and the opinions of Effendi. Effendi’s sharḥ analyses many problems of relevance to the Muslim community of the Cape.

- Effendi followed the sequence of the fiqh manuals but has omitted the Book of Hajj and the Book of trade in the Bayān al-Dīn. Furthermore he asserted that the eating of crayfish is harām (prohibited). He also analyses Imām al-Shafi‘ī’s opinion on the compulsion of mentioning the name of Allah when slaughtering an animal. On page 288 a derogatory remark is made against Imām al-Shafi‘ī.

Effendi avoided the translation of the Book on Hajj because it would expose the validity of many customs of the Cape community concerning Hajj to Shari‘ah scrutiny. The custom of visiting the Karāmat (the graves of saints) and the calling of adhān in the house prior to setting off on pilgrimage are still prevalent in the
community and cannot be established from the Sunnah of the Prophet. However, his verdict concerning the eating of crayfish is incorrect even according to the Ḥanafi school of thought for it is considered makhř (abominable) and not ḥarām. The derogatory remarks against Imām al-Shafī‘i resulted in this extensive work of fiqh hardly being used by the community. 89

The Muslim community of the Cape continued to produce scholars who translated works from Arabic into Arabic-Afrikaans. The Tarjumā Al-Riyāḍ Al-Badī‘ah was done by ʿAbd al-Raqqīb ibn ʿAbd al-Qahhar also known as Imām ʿAbd al-Raqqīb Berdien. 90 This is an Arabic-Afrikaans translation of the work of ʿAllāmah Moulānā Ḥasab Allah. It is a work of Shafī‘i fiqh and contains all the books according to the fiqh manuals. As the years went by the number of students from the Cape to the major centres of Islamic learning increased and more scholars were produced. This reduced the reliance of the community on overseas scholars and eventually led to a united body of scholars to decide on matters of fiqh - The Muslim Judicial Council. (1945)

4.3 Arrival of Muslims from the Indo-Pak sub continent to Natal

The year 1860 heralded the arrival of the first people from India to serve as indentured labourers on the sugar cane plantations of the Natal coast. These labourers were either Hindus or Tamils. The Muslims arrived in Natal later and established themselves as businessmen. Some of them travelled to Northern Natal and moved further North until they eventually established themselves in the Transvaal. A sufi saint, known as sufi ẓāhib lived in Durban from the year 1895 to 1911. 91 He established many mosques, orphanages and madressas but no written
fiqh literature can be traced to him. Scholars who were graduates of Dār al-‘Ulūm Deoband or its satellite institutes arrived and many South-African students were sent to the Diyār al-‘Ulūm of the Indo-Pak sub-continent. On their return they formed ‘ulamā councils. The Jami‘at al-‘Ulamā of the Transvaal was formed in 1923 and the Jami‘at al-‘Ulamā of Natal in 1955. The jami‘ats performed several functions and set up specialist divisions of iftā. They served the community in providing both the essential avenues of accessibility to Shari‘ah sometimes functioning as quṭḍāt in disputes between Muslims and at others as muftiyūn or juris-consults. These organisations grew and set up regional and district branches so that their services could reach the Muslims of every major town of the country. The first Dār al-‘Ulūm in South Africa was started in 1972 in Newcastle and since many such institutions of higher Islāmic education have been established. All of them have a Dār al-İftā (seat of juristic rulings) where a specialist mufti with a team of scholars issue fatwā on all the questioned posed to them. The questions are varied and sometimes may require thorough research, inspections in loco, or consultations with specialists in different fields so that at times the fatwā may be issued many months after the question has been posed. They also serve as arbitrators in disputes between Muslims. The offices of the jami‘ats and the iftā departments of the Diyār al-‘Ulūm have voluminous collections of the fatwā that have been issued some dating back to the inception of the institutes or bodies themselves. However these have not been catalogued under the various chapters or books that a manual of fiqh comprises of and no collection has thus far been published. Some independent groups of ‘ulamā also issue fatwā. The Majlis al-‘Ulamā of the Eastern Cape has a section of its publication The Majlis dedicated to issues of fiqh. It enjoys considerable local and overseas response. In the early seventies the Muslim Youth Movement was formed. It initially aimed at being a mass movement and branches were opened in every town with a sizeable Muslim
population. A system of *halqa* (study groups) was developed where people gathered and engaged in the study of the *Qur’an* and discussed other religious issues. No significant contribution in *fiqh* emerged from the movement. It failed as a mass movement and then concentrated its efforts on Muslim students at the various Universities. In the wake of the movement the Muslim Students Association (M.S.A.), The Association of Muslim Lawyers and Accountants (A.M.A.L.) and the Islamic Medical Association (I.M.A.) emerged. It was the latter two organisations that were faced with many issues in which clear *Shari‘ah* rulings were desired and thus became the catalyst for some important *fiqh* work. The *Islâmic* Medical Association has published many booklets on medical issues; they are:

1. *Biomedical Issues - Islamic perspective* by Abul Faḍl Mohsin Ebrahim. It deals primarily with the issues of contraception, biotechnical parenting and abortion.
2. *Family Planning and Abortion - An Islâmic Viewpoint* by Qaḍî Mujahid al-Islâm translated from the Urdu by Moulâna Yunus Patel, then secretary of *Jami‘at al-‘Ulamâ* Natal.

The general trend is that as the Muslim Community becomes more knowledgeable about the *Shari‘ah*, the questions and issues shift from those that are found in the
immutable spheres of Qur’an, Sunnah, and ijmā’ to those that demand an exercise in ijtiḥād on the part of the muftī.

The nature of the problems usually requires the knowledge of an expert in that particular field blended with a thorough knowledge of fiqh and its source methodology. The muftī in attempting to solve issues of this nature has to spend considerable time acquiring the knowledge of that field or he has to rely on the opinions of scholars of the particular field. Therefore it is my humble contention that the bodies of scholars issuing fatwā in the future would consist of a muftī together with Muslim scholars of medicine, science, law, chemistry, engineering etc. This demand places a tremendous responsibility on both the muftī and the scholars of the other fields. The muftī has to ensure that he is aware of his time, that he has a working knowledge or understanding of all technological, social, and commercial advancements of his time. The Muslim scholars who have specialised in their particular professions should likewise ensure that they have a working knowledge of Shari‘ah and fiqh. It is the fusion of the intellectual resources of the Muslim scholars together with contrived effort and reliance on Allah for guidance that will provide the impetus for ongoing ijtiḥād which ensures the living nature of Shari‘ah law and enables the community to enact the din. This development is in its embryonic state in South Africa and will definitely grow and mature as the community is confronted with further complex issues. It must be emphasised however, that no Muslim organisation or group of secular scholars should attempt to issue fatwā on any issue, without the services of a competent muftī.
5. Fatâwa on gelatine

The contextual discussion of this particular issue for the purposes of this study centres around the extent to which the principles or source methodology of Shari'ah are applied and the exhaustive effort on the part of the various mujtahidûn in their attempt at adducing a Shari'ah ruling. The question of whether gelatine is permissible or not is one which has vexed the South-African Muslim community for a long period of time. The three major fatwá issuing bodies in South Africa, the Muslim Judicial Council, the Jamî‘at al-‘Ulamâ Transvaal and the Jamî‘at al-‘Ulamâ Natal have issued rulings on it and have ruled differently. In addition to these fatwâ other studies on the issue have been undertaken. There is considerable divergence of the rulings and no consensus on the matter exists. As shown in chapter two, a fatwâ is usually an answer given to a specific question. The muftî merely issues his verdict on the matter and does not usually elaborate on his proofs from the Qur’ân, Sunnah ijma‘ qiyâs or the other sources of Shari’ah. If he has arrived at his conclusion on the basis of analogy with an established juristic principle, he does not explain thus in his fatwâ. 94 This is quite unlike the practise of the judges of a Western Constitutional Court who elaborate their arguments in exacting detail and present ample justification of their positions. However in matters which entail the application of ijtihâd the modern day muftî tends to elaborate on the proofs of his ruling. The work Imdâd-al-Fatwâ 95 by the Indian scholar Ashruf Ali Thanvi is an example of one such work on fatâwa wherein the muftî elaborates extensively on his proofs. This has fortunately been the case in the gelatine fatwâ in South Africa. Moreover the author has had the opportunity of interviewing the principal scholars from all the major fatwâ issuing bodies which have issued fatâwa on this matter. 96
The initial research conducted by the Muslim Judicial Council was in May 1984 up to April 1985. Correspondence was entered into with Davies Gelatine Industries of Krugersdorp a subsidiary of Davis Consolidated Industries of Australia, which is the sole South African producer of gelatine. The company holds a market share of approximately 95% of the total South African market.

5.1 Articulation of the principle of *istiḥāla* or *tabdīl al-mahhiyyah*

5.1.1 The *fatwa* issued by the Muslim Judicial Council.

The principal scholar undertaking the research on which the Muslim Judicial Council’s *fatwa* was passed was mufti Alli Moosajee. He argues that in the process of the manufacture of gelatine a major transformation takes place from the hide to the finished product analogous to the transformation (*tabdīl al-mahhiyyah* or *istiḥāla*) which was first propounded by the great Ḥanafi jurist Imām Muhammad. Imām Muḥammad’s principle is based on the change that occurs when wine, an alcoholic solution through bacterial oxidation becomes vinegar an acid. The wine being ‘*khamar*’ an intoxicant is essentially *ḥarām* (unlawful), but becomes lawful when it is transformed to an acid. In substantiation he also quotes the example used by Mufti Kifayatullah, of a fat being saponified to form a soap. If the fat of a pig, lard which in the terminology of the *fuqahā* is *najis-al-‘ain* (impure in its essence), was used as a starting material for soap, after saponification it becomes a substance which is pure *tahhir* and *mutṭahir*, a substance capable of making other things clean or pure. The process of extraction of the collagen and its subsequent filtering, evaporation refiltering drying and grinding to form gelatine is considered as a transformation of the original
substance. The mufti argued further that the gelatine when used in formulations of jelly, ice cream and other products undergoes a secondary transformation, which he also considers as tabdīl al-mahhiyyah or istihāla. The third supposition was that in the event of one not accepting the transformation the types of hide which were used in the process at the Davis plant were categorised as either clean and ḥalāl, or clean but not ḥalāl the gelatine produced from these starting materials will be clean (tahhir). On the basis of this research the Muslim Judicial Council issued a fatwā declaring gelatine produced at the Davis Gelatine plant as permissible.

5.1.2 The fatwā issued by Jami‘at al-‘Ulamā‘ Natal

The Jami‘at al-‘Ulamā‘ Natal also issued a fatwā on gelatine declaring it as permissible. This was based on the research carried out by the late muftī ‘Abd al Wahāb Rahmānī, the muftī at Dār al-‘Ulim Newcastle. Although this research was carried out totally independently of the work done for the Muslim Judicial Council, the fatwā concur. The arguments presented by the late muftī are similar to those of muftī Moosajee. The Dār al-‘Ulim Newcastle fatwā firstly argues for tabdīl al-mahhiyyah because it considers the changes incurred in the process of producing gelatine from hides as a change in the essential characteristic of the hide. This combined with the principle of umūm al-balwā renders the gelatine ḥalāl. The fatwā enumerates many examples of tabdīl al-mahhiyyah quoted from books on fiqh and even states the fatwā of muftī Kifayatullah in substantiation. It is further argued that in the event of the process of the manufacture of gelatine is considered as one in which tabdīl al-mahhiyyah has not taken place, the end product gelatine is pure and permissible for consumption. This is based on the examination of the raw materials particular to the Davis plant in Krugersdorp. The raw material is the hides of animals that are permissible for consumption. The
hides were both of those animals slaughtered according to the *Shari'ah* way and those which were not. The argument then proposed is that the raw materials are pure since every hide that is tanned becomes pure except the hide of pig and dog. An analogy is drawn between the tanning process, which renders hides pure, and the process that the hides undergo in the formation of gelatine. The changes that are undergone in the formation of gelatine are considered more than that which is undergone during tanning and therefore the prepared raw material is *tahhir* (pure and clean). Thus the end product is also *tahhir* and permissible for consumption.

The above two fatwas, viz. that of the Muslim Judicial Council and that of Jami'at al-'Ulamâ Natal and Dâr al-'Ulûm Newcastle were both issued by gathering documentary information of the process of manufacture of gelatine, raw material content and finished product through correspondence with the Davis Gelatine factory. Up to this stage no in loco inspection of the plant was carried out.

5.1.3 The fatwa of Jami'at al-'Ulamâ Transvaal

The Jami'at al-'Ulamâ of the Transvaal arranged a visit to the Davis gelatine factory on Wednesday the 15 of August 1990. A group of thirteen prominent muftis and 'ulemâ inspected the operations of the plant and were given a thorough briefing by Mr. A. R. Tait the sales manager. Moulana Yousuf Abdulla Karaan the head of the fatwa committee and vice-president of the Muslim Judicial Council was also part of the 'ulamâ delegation. After this visit a report and a fatwa were prepared by mufti Basheer Ahmed Sanjalvi and mufti Ahmed Mia on behalf of the Jami'at al-'Ulamâ Transvaal. The document acknowledges the research contributions of mufti Ra Dü-ul-Ḥaq mufti Sulimân Cassim and mufti Muḥammad Saʻeed Motara. It is a comprehensive document and analyses every stage from the raw material, to the process of cleansing, the heating of the hide, the deterioration of the matrix, and the evaporation and drying. It then lists quotations from the
books of fiqh to substantiate its proposition that none of these processes render the material as tahrir (pure). The researchers have preferred here the opinion of Imam Yusuf to that of Imam Muhammad, which is the converse. It argues against istihâla or tabdil al-mahhiyyah because it does not consider the processes of hydrolysing, cleaning, melting, filtering curing by evaporation etc. of having induced sufficient transformation of the imbedded natural characteristic of the hides. It further states that a characteristic beefy smell is still present in the gelatine end product. With regard to tanning it maintains that it is permissible to sell or use the tanned hides of animals that are not najis al-'ain (impure in their essence) and are not slaughtered according to Shari'ah but not permissible to consume them. The fatwâ thus concludes that the consumption of gelatine is harâm (unlawful) according to Shari'ah.

In December 1990, the scholars from Dār al-'Ulûm Newcastle who were responsible for the research on which the Dār al-'Ulûm fatwâ and that of Jami'at al-`Ulamâ Natal is based arranged for a visit to the Davis gelatine factory together with representatives from Be-Tabs Pharmaceuticals. The delegation consisted of Moulâna Cassim Seema, the principal and founder of Dār al- 'Ulûm Newcastle, the late muftî ‘Abd-al-Wahhab Rahmâni, the head of Dâr al-Iftâ of Dâr al-'Ulûm Newcastle and muftî Burhânuddîn, the head of Dâr al-Iftâ of Dâr al-'Ulûm Nadwat al-‘Ulamâ Lucknow, India; Mr. Rashid Bhika (B.Sc. Pharm) the MD of Be-Tabs Pharmaceuticals Mr. Patel (B.Sc. Chem.) and Moulâna Ahmed Limbada. During this visit the plant was thoroughly examined and the processes explained to the scholars. This visit lasted for two hours. Subsequent discussions were held at Be-Tabs wherein the chemical reactions that the collagen undergoes when it becomes gelatine were expounded. This interaction between a group of Muslim scientists and fuqahâ resulted in the following three conclusions.
Hide and gelatine are not the same in essence, nature and in physical and chemical properties.

Collagen and gelatine are not one and the same thing.

The transformation that the collagen undergoes is completely irreversible in that it is impossible to reconvert the soluble gelatine protein back to the original collagen protein.

The physical and chemical properties of collagen and gelatine are not the same.

The 'ulamā then drew the conclusion that a definite transformation of the nature of the substance tabdīl al-mahhiyyah or istihda took place. There was complete consensus on the matter amongst the delegates and a unanimous decision was arrived at which ratified muftī 'Abd-al-Wahhab Rahmānī's earlier work. The muftī was to prepare another report on the issue after his return from the Cape Town Ijtīmā', that year. His sad demise occurred in a motor accident during the return journey from Cape Town in January 1991. Muftī Burhānuddīn, the head of Dārul Iftā of Dār al-‘Ulm Nadwat al-‘Ulāmā Lucknow, India who was part of the delegation also requested that a report on the issue be drawn up in the Urdu language to facilitate the issuing of the fatwā by his institute in India.

In August 1997 the issue of the halāl certification for Vital Foods was raised at a meeting of the fatwā committee of the Muslim Judicial Council. The members of the committee who were present at the discussions were Sheikh M. A. Fakier, Moulāna A. R. Hendricks and Moulāna T. Karaan. Vital Foods is supplied with gelatine by Croda Colloids, which uses hides and bones for the manufacture of gelatine. A discussion document reveals the many questions and angles of inquiry by the committee.

Is the process one of extraction something already present in the raw material or is it the creation of an entire new substance.
- If the process is one of transformation is the committee at liberty to base its fatwā on the principle of the Ḥanafī fuqahā of inqilāb al-mahhiyyah or istiḥāla.
- The committee felt that it is improper and unwarranted to proceed with issuing a fatwā without input from the experts in organic chemistry.
- The document admits that in the case of gelatine manufacture the scholars are not fully conversant with the extent of change that could be deemed istiḥāla or inqilāb al-mahhiyyah and suggests a thorough study before issuing a fatwā according to the muftī bihi opinion of another madhhab.
- A detailed study of istiḥāla has been embarked upon but since a speedy reply was required recourse to muftī Moosajee’s research was taken.

In December 1997 an inquiry regarding the gelatine produced by a Belgium-based company S.B.I. at their two plants in Ghent and Anglène was presented to the Muslim Judicial Council. These plants produce gelatine from bovine hides as well as bones. The fatwā committee ruled that the gelatine is ḥalāl since the universality with which the principle of istiḥāla operates allows for the inclusion of bovine bone.

The general methodology of all the scholars in adducing the law was initially to go to the primary sources of Shari‘ah. Since no direct nass (textual evidence) is found in either the Qur‘ān or ahadīth, recourse is taken to the works of fiqh in which a principle can be identified. The first step is to ascertain the nature of the raw materials, i.e. whether the raw material is ḥalāl or ḥarām (permissible or prohibited) or tahhir or najīs (clean or unclean). The second step would be to
identify a juristic principle, which could be used in the particular case. In the case of gelatine it is the principle of *isitiḍāla* or *tabdil al-mahāṣiyah* or *inqilāb al-mahāṣiyah*. The next step is to elucidate the principle and check its compatibility with the problem. This is done by a thorough examination and understanding of the process involved. Is it one of extraction or transformation? Then the utility of the product is examined. Is it one of operational essentially or is it readily replaceable by other agents? Finally the verdict is issued. The gelatine *fatwā* clearly demonstrates:

1. The extent to which the scholars exert themselves in that the research is ongoing. It is initiated by a *mustāfīṭī* seeking a *fatwā* on the issue and further rekindled by every subsequent enquiry into the matter.

2. The inspections in loco of groups of scholars and their interactions with experts in various fields in order to understand the chemical and biological reactions of the process of manufacture.

3. The continual re-examining of the juristic principles sourced from the manuals of *fiqh* in order to achieve analogical compatibility.

4. The re-emerging of the problem with different variations - as the case of using both hides and bones of bovines as starting materials.

5. How the *Shariʿah* copes with social exigencies by the application of its sources in the conceptually flexible sphere.

6. The *Shariʿah* ruling is sought by the *mustāfīṭī* without any coercion within the context of a small minority Muslim community co-existing with a large non-Muslim community in a non-Muslim state. This manifests how the Muslim community itself in South Africa continuously seeks to adhere to the *Shariʿah* and the role of *fatwā* as being the catalyst for the process of adducing a *Shariʿah* ruling.

7. In the case of the *mustāfīṭ* being non-Muslim, in many instances a company supplying ingredients to be used in end products which are consumed by
Muslims, the scholars were always afforded co-operation, allowed to inspect the premises unhindered and they received immediate responses to any queries.

8. The ikhtilâf or variances in the fatâwa of the different issuing bodies is regarded by the scholars as healthy and alludes to the different juristic principles that are being applied. The question of whether the hides of animals which are usually permissible but not slaughtered according to Shari'ah are tahir and as to whether a thing that is najis can be transformed into something tahir arise from the difference of opinion of Imâms Muḥammad and Yusuf on the issue.

In the event of a divergence of rulings the mustafî will adhere to the ruling of the scholar that he has the most confidence in, or to the ruling that his conscience allows him to have the least doubt in.

5.2 Fatwâ and taqwâ

A fatwâ is a ruling based purely on the legality of an issue. In many instances Muslims accept the validity of the ruling but in practise adhere to that which is stricter than the ruling itself. This is because of the quality of taqwâ present in the psyche of every Muslim, which is an ingrained consciousness of Allah and manifests itself in an ability to abstain from that which is forbidden and to adhere to that which one has been commanded to do. There is a dictum amongst the fuqahâ that the heart of the believer is the greatest mufti. Just as in the case of ijmâ', when the consensus of the jurists transforms to the consensus of the Islamic community, the collective conscience of the community bears the ultimate responsibility of enacting what it perceives as the Divine Will, so to it is the conscience of the individual mustafî which becomes the final judge as to the
extent to which the ruling of the mufti in his fatwa will be adhered to. This is corroborated by the following verse of the Qur'an:

Oh you who believe if you are conscious of Allah, then He will make a criterion for you, and will remove from you your sins and forgive you and Allah is the possessor of immense bounties. 104

The criterion is the ability to judge between right and wrong, to discern between what is in accordance with the Shari'ah and what contradicts it. Therefore the extent of adherence of the Islamic community is not only dependent on the accessibility to fatwa or the work of the mufti in adducing the ruling but also to the inner conscience, the Allah fearing ability of the individual Muslim who has sought the ruling. Thus the role of the mustafii has a dual element in that it not only initiates the process of adducing the law but also is the final authority.
Notes for chapter four


2. In chapter three, the diagram of the conceptual spheres of the law show fatwā as one of the sources operational in the conceptually flexible sphere. However fatwā is such a source that is sometimes operational in the fixed sphere only e.g. If a mustafī seeks a ruling which is found directly in the naṣṣ of the Qur’ān. In other applications it exposes the inherent dynamism of the naṣṣ e.g. the apparel that is permissible for one to pray in. It also facilitates the adducing of a law from the flexible conceptual spheres.

3. I have conceptualised the institutions of aqḍiya (judgements passed) and that of ʿiflā (seeking fatwā) as streams of accessibility to Shariʿah. However some overlapping of the functions can occur. There are many instances in South Africa wherein the mufti of a dār al-ʿiflā is called upon to act as a judge between disputing parties. These institutes have records of both fatwā and aqḍiya in their files.

4. The incident from the ḥadīth of ʿAbdullah ibn ʿUmar who reported that a group of Jews approached the Prophet (peace be upon him) and mentioned to him about a man and a women from amongst them who had committed adultery. The Prophet asked, ‘What do you find in the Torāḥ concerning stoning The punishment for adultery?’ They replied, ‘It is to flog them and disgrace them.’ Thereupon ʿAbdullah ibn ʿUmar remarked ‘they have lied. The injunction concerning stoning to death as a punishment for adultery is in it (Torāḥ). A copy of the Torāḥ was brought. One of the delegation put his hand on the verse concerning the punishment for adultery and read the verse before and the one after it. ʿAbdullah ibn ʿUmar remarked ‘Lift your hand’ and they read the verse prescribing stoning to death as the punishment for adultery. They (the Jews) then said, ‘You are correct Oh! Muhammad (peace be upon him). The verse is in the Torāḥ.’ The Prophet ruled accordingly and the adulterers were stoned to death.” Bukhārī and Muslim.

5. The reports on this case were carried extensively in the press. See the Gauteng daily, The Star issue Thursday October 16, 1997 on page 4 article entitled ‘Brother waives right to death penalty-deal will see family of murdered nurse paid millions in compensation’. Reuters, Adelaide, Australia.

6. See chapter three 2.2.

7. For elucidation see chapter one of this study. ‘Regulations concerning the mufti in passing fatwā’. It is permissible for a mufti to receive only an allowance from the public treasury but no remuneration for issuing fatwā is granted.


11. Books of *ahadîth* which contain the narrations according to the topics of the manuals of *fiqh* are called al-`jâmi’.

12. Refer to chapter two of this study p 5.5.2.3.2 the various administrative authorities of the state; 5.5.2.3.3 the department of justice and 5.5.2.3.4 the institution of the muftiyâns. These departments established during the caliphate of ʿUmar closely resemble an *Islâmic* state.

13. See chapter one of this study, ‘Fatwa its format and discipline’.


16. Qurʾān S.5 v. 51.


18. Qurʾān S.60 v. 1.


21. See chapter one of this study, the conversation between Ḥâsân al-Bâsri and Sufi Fârqudd regarding the prerequisites of a muftî.


23. This act abolished the office of a qâdi as the main functionary in the administration of justice under *Shariʿah*. Furthermore Muslims were prevented by the British Courts from electing quḍâtî. See Muhammad Abû Bakar v Mir Ghulam Husain, suit no. 453 of 1869 Ac decided by the Madras High Court in 1870.

24. This occurs primarily because in the absence of an *Islâmic* State, the community consults with the various scholars. After a period the most proficient muftî is given prominence by virtue of his *fiqh* and experience in issuing fatwâ that are based on ijîhâd.


32. Ibid. p 162.


34. *Introduction to South African Law*. See chapter on sources of South African Law, p.249, 5.4.2 The written Constitution.

35. Ibid. pp.262-263.

36. Ibid. pp 251.

37. Ibid. pp 26-32.

38. This is a principle of interpretation of the Qur'an "some parts of the Qur'an explains others." Application of the above principle is not possible without the knowledge of nasikh and mansikh, abrogating and abrogated verses, 'ámim and khás general and specific etc.


40. Qur'an S.2 v. 255.

41. Qur'an S. 2 v. 165.

42. See article 88 of the report of the judgement of the Constitutional Court of the Republic of South Africa in the matter of the State vs. T Makanyane and M Mchunu. Case No. CCT/3/94 (6 June 1995)

43. The English constitution exists but has never been formally enacted. Beside certain key statutes (e.g. Magna Carta, Bill of Rights, and the Act of Settlement) and precedent, much of the English constitution is to be found in a mass of custom and convention. *Introduction to South African law* Ch.4 Sources of S African law p.249.

44. "I would observe, as to these Acts of Parliament, that they are the law of the land; and we do not sit here as a court of appeal from parliament" per Willes J in *Lee and Another v Bude and Torrington Junction Rly Co.* (1871) LR 6 CP 576 582.


46. Ibid, Chapter 8: Courts and Administration of Justice article 5. "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.”
47. Ibid. Chapter 2; Bill of Rights, article 39 entitled Interpretation of Bill of Rights.


49. Ibid. article 87.

50. Ibid. article 88.


52. See article 88 of the report of the judgement of the Constitutional Court of the Republic of South Africa in the matter of the *State vs. T Makanyane and M Mchunu*. Case No. CCT/3/94 (6 June 1995). The ‘Solomonic’ clause is an example of how the workings of a Western legal system is manipulated by transferring a decision which clearly has majority support of the electorate to the Constitutional Court. Thus the verdict does not represent the will of the people but rather the judiciary’s contention on the matter. In *Shari‘ah* however, no issue concerning essential rights of an individual is reliant on interpretation of texts but is entrenched explicitly in the Qur‘ān and Sunnah.


55. The right to equality is not entirely protected in the Constitution whilst the right to life is. Therefore in the absence of the death penalty as a punishment for murder the victim, or his heir would not have an equal claim of retribution by contesting his right to equality. The Constitution of the Republic of South Africa, 1996 (act 108 of 1996) Chapter 2; Bill of Rights, Table of Non-Derogable Rights.


59. Ibid Article 124.

60. Ibid Article 124.


63. *Qur‘ān* S. 2 v. 179.

64. See Sunan Abu Dāwud. Chapter *diyyah*, ḥadith no.3898; Sunan Ibn Maja. Chapter *diyyah*, ḥadith no.2613; Musnad Ahmad, ḥadith no.15780; Sunan Darami, ḥadith no.2245 and finally: Al-


68. With the institution of the Supreme Court at the Cape in 1828 the English rule of stare decisis was adopted. This introduced the attitude that the rule of law embedded in a past judgement should be regarded as authoritative or imperative. Introduction to South African law, p.224.

69. In the leading case of Fellner v Minister of Interior 1954 (4) SA523(A) Centlivres CJ, after referring to an oft-quoted article by Kotze (1917SALJ280) setting out the place of precedent in Roman-Dutch law, said (529): “We have adopted the rule(sc. stare decisis) from English law”.


71. Introduction to South African law, p.225.


77. See law report on Fitzgerald vs. Green, Supreme Court of South Africa, Cape Provincial Division (1913 C. P. D. 403), p.103.

78. The court held on appeal that the Dutch law in so far as it made adultery a criminal offence punishable not only directly but indirectly by the guilty person being prohibited from leaving to an adulterine child by will more than what is required for it’s maintenance, had become obsolete through disuse in South Africa. However it upheld the right of the adulterine child to inherit from his mother citing the maxim “een wijf maakt geen bastaard” (a mother procreates no bastard) as applied in the South Holland law of intestacy.


81. Ibid Ch. 2 Bill of Rights 39. 2.3.


83. See the incident of Umar writing a letter to the Nile. And the maxim of Abu Hanifa for them it is meat and for us it is pork.

84. For a detailed historical account on Shaikh Yusuf see Dangor S. 1994. ‘In the footsteps of the Companions; Shaykh Yusuf of Macassar’ Chapter Two of Pages from Cape Muslim History. Pietermaritzburg: South Africa Shuter & Shooter.


86. The issue is the first documented evidence of the use of the mufti. (juris-consult). However having elucidated fatwa and the process of ‘iftā. It would be obvious that the first fatwa in South Africa would definitely have emerged from the very first Muslim scholar in South Africa-Sheikh Yusuf or from the work of Taun Guru. In researching his works that are extant I found evidence of his writings on taqawwuf-self reformation and not on issues of fiqh. It is noteworthy also that the documented evidence of Abu Bakr Effendi being used as a jurist consult is sourced from the records of the Cape Supreme Court and not a written account of the fatwa itself.

87. Effendi’s role is questionable. Did he act sincerely as a mufti or did he collude with the authorities and offer verdicts, which served the political ambitions of the Cape authority. His ruling in the khalīf issue seem to suggest political motivation, for the accompanying noise levels were not a serious factor to have it considered illegal. Rather the open display of faith with this practise would easily attract the common people to Islām. Thus it was in the interest of the Cape authorities to have it outlawed.

88. The practise of ratiep is one of the many influences of Sufi practises that have influenced the Muslim community of South Africa. These practises became part of the religious practises of the community although they cannot be corroborated from Qur’ān and hadith.

89. This first work on fiqh although in its main part a translation of an earlier fiqh work had the book on hajj omitted in order to avoid the sensitive issue of the custom of visiting the graves of the saints but failed to avoid the issue over the permissibility of eating crayfish. Its permissibility is established directly from the nasg of the hadith. Furthermore Effendi work failed because of the derogatory remarks against Imām al-Shafi‘i. The majority of the Muslims of the Cape were followers of the Shafi‘i madhab.


93. The attendance at their annual conventions fell from a figure of 5000 in 1971 to 400 in 1979. Muslim Youth Movement annual conference journal. 1979.
94. See Chapter One of this study 'Fatwā its format and discipline.'


96. The fatwā are usually a statement of legal permissibility or prohibition. Through the interviews with mufti Moosajee, Molvi Cassim Seema, Molvi Ṭahā Kiraan and Mr. Bika I was able to source the proofs of the arguments of the scholars.

97. The author was afforded copies of this correspondence.

98. This text is found in baṣīṭ one of the famous works on Ḥanafi fiqh.

99. The original fatwā issued by the mufti was found in the archives of Dār al- Ulām Newcastle. It is a three page document in the Urdu language with substantive quotations in Arabic.

100. After the demise of the late mufti, Molvi Cassim Seema and the team of scholars from the Dār al- ʿifā at Newcastle took up the task of completing this report.

101. A report on the Fatwā Committee's discussion regarding ḥalāl certification for Vital Foods was made available to me by a member of the committee.

102. This general methodology was accessed from the interviews with the scholars of the respective fatwā issuing bodies.

103. All the arguments in the fatwā on gelatine centre around whether istiḥāla/ tabdīl al-māhiyyah or inqīlāb al-māhiyyah takes place or not.

104. See the arguments discussed on page 25 of Dār al- Iftā' Report and Fatwā on Food Gelatine — Jamīʿat al-ʿUlamā Transvaal.

105. Qurʾān S.8 v. 69.
5. Conclusion:

In the dissertation an attempt has been made to highlight what a fatwā is, its origins in the Shari‘ah (the Islamic ‘legal system’), the research methodology which is employed in its issuing, the persons issuing it, and its role in Islām and in the contemporary South African Muslim community.

Islāmic law, the Shari‘ah, can be conceived as being adduced from two streams one established through aqdiya (verdict of a qādi or judge), and the other through fatwā (the opinionated ruling of a mufti). The manner of adducing a Shari‘ah law in both these streams is the same, for the qualifications and functions of a qādi and a mufti are not dissimilar. The principle difference lies in the power of execution. This is vested in the qādi via the Islāmic state and not the mufti whose rulings have only persuasive value. However since the Islāmic State in modern times remains as an idealised visionary concept, no Muslim country can be termed as one. The examples from history of Muslims living in what can be termed an Islāmic state after the period of the companions and the followers, are few and far between. Thus it has been fatwā that has played a greater role in the ummah in that it was the prime catalyst that enabled the Shari‘ah to transcend geographical, temporal and cultural divides and remain an effective means of governance over the broad multiplicity of peoples that constitute the ummah. The first thrust of the study was to define fatwā, to examine the prerequisites and the essential components of fatwā, the qualifications of the persons issuing them and to differentiate between fatwā and aqdiya.
and the companions, the rightly guided caliphs and the followers. Their roles as both judges and muftiyün was established to show the pivotal role that fatwa played during the lifetime of the Prophet, in the period antecedent to his demise and the following centuries up to the present time. The account of the Prophet himself training Mu'adh as both a judge and a mufti emphasises the importance of these functions in establishing the Shari'ah. Major works of fiqh, which are the manuals of the rulings of the muftiyün are cited for all the centuries up to the contemporary works. It is noteworthy that these manuals are of scholars from the different far-flung regions over which Islam held sway. So each work has a particular nuance depending on the era and its demography. These manuals of fiqh could be akin to the Western concept of common law or case law, which arise from the decisions of judges except that fatwa cannot be used as a binding precedent for the issuing of other fatwa.

The next thrust of the study was to identify the locus of fatwa within Shari'ah. To this end the concept of Shari'ah had to be defined and the sources of the law thoroughly examined. The Shari'ah, being a system of law dependant on revelation or the revealed law is often depicted as immutable with a resultant perception that it is static and cannot serve as a means of governance in contemporary society. The fatwa of the permissible dress code for men during prayer demonstrated the interacting of the conceptually fixed and flexible spheres of the law. Thus the Shari'ah could be depicted as having a fixed central core into which all its flexible sources interact. In effect it is a dual legal system. The locus of fatwa is that it is a source mechanism of Shari'ah that straddles both the conceptually immutable and flexible spheres of the law. This fact is the key to the role that this mechanism has played in the ummah, the Islamic community, from its inception to the present day. Fatwa clearly demonstrates the living nature of
*Shari'ah* law and as such is a rebuttal to the reinterpratationist lobby. The study then covered fatwâ in contemporary society.

- The role of fatwâ in an Islâmîc state would be one of accessibility to the *Shari'ah*. Its role also as the most effective counterbalance to the judgements of a qâdî has been identified. In an ideal Islâmîc state the verdict of a qâdî can be corrected by a mufti and visa versa. Thus the departments of aqdiya and fatwâ function harmoniously as parallel streams of adducing and accessing the *Shari'ah* law.

- In a Muslim country that is non Islâmîc, one which has implemented a system of law hostile to the *Shari'ah*, the role of fatwâ is further enhanced since it then becomes the only legitimate stream of accessing and adducing the *Shari'ah* law. This disfunctioning of the parallel streams leads the Muslim community into a position of showing scant respect for the laws of the state and placing total conviction on the ruling of the muftî. The fatwâ then becomes the Muslims’ only avenue of enacting the Divine Will. Fatwâ are sometimes issued to serve the political standpoint of certain countries. The issuing of futyâ and opposing futyâ by certain muftiyûn concerning the Gulf war aptly demonstrated how fatwâ could be manipulated if the muftî is obsequious to those in authority.

- The third critical role of fatwâ in contemporary society is the role it plays in a minority Muslim community living in a non-Islâmîc state. Muslim minorities face the daunting task of enacting the *Shari'ah* whilst interfacing with a large majority non-Muslim populous. Here in the absence of Islâmîc governance fatwâ plays a pivotal role for it once again becomes the only vehicle of accessibility to the *Shari'ah* law and in the case of social and technological exigencies the only means by which the law is adduced or extended to become applicable with the current situation. A comparative analysis of it with a
Western legal system reveals the operation and inter-relationship between the conceptual spheres of the law. To maintain relevancy the study delimited itself to the South African legal system and localised problems were analysed in terms of South African law and the Shari‘ah. In contemporary South Africa certain essential Shari‘ah rights are not established or accommodated for in the Constitution or the Bill of Rights. The right to equitable retribution as a case in point is denied with regard to the abolishing of the death penalty. This is clearly against nass, the textual establishment of the right from Qur‘an. If fatwā is sought on this matter, which falls under the fixed conceptual sphere of the law, the mufti would rule in a manner that establishes the Shari‘ah right even if it contradicts the Constitution of the country. Since the Shari‘ah always has predominance in the mindset of the Muslims, the Constitution then becomes a document only to be obeyed under coercion or as a matter of expediency but not one which the Muslim would feel a moral obligation towards. Once again the role played by the mufti is pivotal. Preceding the first democratic elections in South Africa, many muftiyin were requested to issue fatwā on the question of participation.

After having defined fatwā its etiquette and practice from the works of the classical scholars, and accessed fatwā from the local fatwā issuing bodies many observations emerge. The manner of issuing fatwā in contemporary South African society is in keeping with the classical discipline of the earlier scholars. In all instances the mufti issuing the fatwā can easily be placed into the categorisation of the types of mufti by the earlier scholars. Many fatwā today in the archives of the fatwā issuing bodies have the answer to a question on the same piece of paper used by the mustafī following even in this detail the practice of the classical jurisconsults. A developmental trend away from the classical theory is that in South Africa the muftiyin have expressed a preference for stating their arguments
Africa the *muftiyün* have expressed a preference for stating their arguments together with their sources at the time of issuing a *fatwâ*. This is especially so in matters which require *ijtihâd*. Therefore in the gelatine issue the *fatwâ* were supported by documents or reports which extensively elaborated the rationale by which the scholars arrived at their conclusions.

The gelatine issue also demonstrated the extent of research, the applied effort (*ijtihâd*) of the various *muftiyün*. In the case of the Muslim Judicial Council the scholars of the *fatwâ* committee who usually follow the *Shafi‘i madhhab* argued for *tabdîl al-mahhiyyah* which is a juristic principle established by the jurists of the *Hanafi* school. The *fatwâ* of Dâr al-‘Ulûm Newcastle and *Jami‘at al-‘Ulâmâ* draws the analogy between tanning and the processes involved in the manufacture of gelatine. The *muftî* then lists eight examples of *inqlâb al-mahhiyyah* or *istihâla* and using the principle of *Imâm* Muhammad arrives at his conclusion. It is of significance that the example of fat being saponified to form a soap are quoted in the early works of *fiqh*. The *fatwâ* of *Jami‘at al-‘Ulâmâ* Transvaal relies on the opinion of *Imâm* Yusuf in this regard in that a thing that is termed *najîs al-‘aîn* cannot be considered *tahhir* through transformation. The research into this particular issue is tangible evidence of the practice of *ijtihâd* amongst the South African *muftiyün* and their relentless effort into the issue every time they are presented with the problem. The doors of *ijtihâd* have never been closed for *fatwâ* induces *ijtihâd*, which has been the primary reason for the *Shari‘ah* crystallising into applicable law. A further suggested angle of research with regard to the gelatine issue would be to study in depth the chemical and molecular structural changes that take place in all the examples wherein the *fuqahâ* agree that *tabdîl al-mahhiyyah* or *istihâla* has taken place in order to establish a correlation between chemical structural change and the change in the characteristics of the end product.
changes that take place in any process with those in which there is consensus that tabdil al-mahhiyyah or istihâla has taken place. This line of research was suggested to senior scholars in interviews with them and there exists consensus on it being a necessary development, which could possibly give clarity to the issue.

Fatâwa play a central pivotal role in the South African Muslim community for rulings are sought on an almost daily bases from the various fatâwa issuing bodies. A wealth of fatâwa covering various issues can be found in the archives of the fatâwa issuing bodies or in those of the Dâr al-Iftâ departments which are a feature of almost all South African Diyâr al-‘ulûm. As yet no work on collecting these fatâwa and their subsequent categorisation into the chapters found in the manuals of fiqh has been undertaken. Although fatâwa feature so prominently in the South African Community there has been a lack of local study with regard to what the discipline of fatwâ is, its role in the Shari‘ah and its effect in society, which has in some quarters led to the erroneous notion that the Shari‘ah is a collection of archaic law. It is this void that my study has in some way tried to fill.

It is my sincere hope that this study would inspire the reader into further research, for fatwâ, the search for Allah’s Law is one of the greatest gifts accorded to the Muslim community, infusing in it an unprecedented and unrivalled dynamism and vitality. If I have achieved this to any degree then it is from the bounties and the grace of the All-Mighty. If through this work the converse has been achieved, then it is due to my weaknesses of belief, and ineptitude of presentation. I conclude with the usual concluding line of any fatwâ - and Allah the All-Mighty knows best.
6. Bibliography


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